The Foreign Loan Guarantee and Mutual Assistance Fund of the Conseil de l’Entente

Jean-Pierre Andre Vignaud

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.cornell.edu/cilj/vol4/iss2/2
The Foreign Loan Guarantee and Mutual Assistance Fund of the Conseil de l'Entente

JEAN-PIERRE ANDRE VIGNAUD*

I. INTRODUCTION

Dahomey, Ivory Coast, Niger, Togo, and Upper Volta, five French-speaking West African countries, are the members of the Entente Group, a political and technical regional organization which was formed in 1959. In June 1966, they created the Foreign Loan Guarantee and Mutual Assistance Fund. The major purpose of this Fund is to provide a multinational guarantee to foreign loans, designed to finance new enterprises conducted by local investors and deemed to contribute to the economic growth of one or several countries of the Group. Furthermore, since 1967, the first year of actual operation, the Fund has encouraged and sponsored different kinds of initiatives serving the long-term goal of economic integration in the area.

The regional approach which underlies the creation of the Fund, the fact that for the first time capital-importing countries grant some sort of financial guarantee to foreign capital, and the fast and simple reimbursement which is offered through the Fund to foreign lenders bring interesting innovations to the field of legal protection of foreign investments in developing countries.

The last twenty years have seen substantial changes in the problem of protection of capital invested in developing countries. For a long period of time, the international community suffered from a relative lack of effective financial and legal remedies. The effectiveness of diplomatic protection first depended upon whether or not a given country had sufficient power to intimidate those responsible for the takings and, second, upon whether or not it was willing to use this power in a particular instance. Unwillingness to press a claim was illustrated by the attitude of the French government of the late 1920's and the early 1930's when the bolshevik authorities refused to reimburse the holders of bonds which had been issued by the czarist regime. Likewise, the French government did not really react to the takings that immediately followed the independence of Tunisia and Algeria.¹

Since the late 1950's, however, capital-importing and capital-exporting countries as well as international organizations have shown deep concern towards the problem of legal protection of foreign investments. The reasons for this trend are simple: the needs of developing countries in capital and technology are so huge that they cannot be satisfied by local resources alone or by the relatively limited amount of aid which is granted by wealthier nations or by international organizations. Consequently, almost all developing countries seek to attract an inflow of foreign capital in the form of either direct or portfolio investments. This is true even in those countries where the economic program of development is not a capitalistic one. Ghana and Tanzania, for instance, nationalized the key sectors of their economy but are calling for foreign investments in other branches of their industry.

However, the legitimate fear of any kind of political domination from abroad and of any type of venture that could lead to a resurging colonization has caused some countries to deter the flow of foreign capital either by expropriation without adequate compensation or by some kind of discriminatory treatment.

Where this conflict between economic needs and political concerns exists, the commercial atmosphere looks unattractive, and foreign investors often avoid undertaking ventures in spite of potentially profitable business opportunities.

In order to make the commercial climate more attractive to foreign investors, significant efforts have recently been made at all levels by the international community. At the national level, some of the most important capital-exporting countries such as the United States, Japan, and Germany have set up a system of financial insurance for domestic

---

¹ M. Gonidec, Cours d'Institutions Publiques Africaines et Malgaches 89 (1967).
capital invested abroad.\(^2\) The insurance policy usually covers different kinds of noncommercial risks and may be purchased for the major types of investments. It is restricted to investments that are made in a country which has previously signed a bilateral agreement with the exporting country.

In order to improve the investment climate, most of the host countries have enacted domestic legislation rather favorable to foreign capital. Among the provisions to which foreign investors pay most attention are those dealing with the financial incentives — including tax exemptions, domestic ownership requirements, and the law of expropriation.\(^3\)

The practice of bilateral treaties dealing with this problem has long been used by the Anglo-American States. Since the end of World War II, the United States, for instance, has entered into more than twenty treaties of Friendship, Commerce and Navigation under which national treatment is granted to individuals and companies of both parties and adequate compensation expressly provided for in case of nationalization or expropriation.\(^4\)

The problem of the protection of private investments abroad has also been treated by several worldwide international organizations. Three main directions have been followed:

First, certain private or public organizations have tried to set forth or to codify the international customary law regarding the treatment of private property.\(^5\) The Organization for Economic Co-operation and Development, for instance, has been working on the problem for more than twenty years and has published two draft conventions on the protection of foreign property.\(^6\)


\(^3\) E.g., The Philippine Incentive Acts set forth an elaborate system under which, in order to take advantage of the “registered enterprises” incentives, an enterprise must have at least 60% of its stock held by Philippine citizens. See C. Fulda and W. Schwartz, *Regulation of International Trade and Investment* 585 (1970).


Second, a Centre for the Settlement of International Investment Disputes was created in 1965 under the auspices of the International Bank for Reconstruction and Development (I.B.R.D.). The Centre provides an international forum for the settlement of disputes directly related to an investment in which a State is a party to a suit by a national of another State. Thus far, the Convention has been ratified by 62 countries.\(^7\)

Third, the I.B.R.D. has been working for three years on a project to create an International Investment Insurance Agency which would offer, at the international level, the same kind of financial guarantee that is granted by certain capital-exporting countries. This project is still in the draft stage.\(^8\)

The regional framework has also been used to deal with the problem. An illustration of this approach in French-speaking Africa is the West Africa Entente Group (Conseil de l’Entente), organized in 1959 to promote political and economic cooperation in the area. The 1959 Agreement mainly deals with technical matters such as customs problems and the avoidance of double taxation. The Agreement also contained two important provisions dealing with economic problems.\(^9\) One, which envisaged the harmonization of the development plans, has never been put into effect. The second, providing for the establishment of a Solidarity Fund, reflected an acknowledgement by Ivory Coast that it was in its interest to share its relative prosperity with its partners of the Group. The Fund was to receive 10% of the revenues of each state, but its operation ceased in 1963.\(^10\)

An attempt at integration took place when Mr. Houphouet Boigny launched the idea of double nationality; this proposal found its origin in the fact that many workers were traveling to the Ivory Coast to find

---

other party states is allowed only where (i) the measures are taken in the public interest and under due process of law, (ii) the measures are not discriminatory or contrary to any undertaking which the former party may have agreed to, (iii) the measures are accompanied by provision for the payment of just, speedy, and effective compensation. See also E. NWOGUOGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 152 (1965).


8. The Agency would be authorized to issue insurance upon payment of premiums against noncommercial risks for new investments which (i) are proposed for insurance by a Member State, (ii) are to be made in a host country and approved by it, (iii) are developmental in character. See Stikker, The Role of Private Enterprise in Investment and Promotion of Exports in Developing Countries, UNCTAD TD/35/Rev. 1, at 37 (1968).

9. Ratified by Dahomey on April 11, 1968 (ordinance); by Ivory Coast on Nov. 20, 1967 (decree); by Niger on Dec. 3, 1966 (decree); by Togo on Sept. 25, 1968 (ordinance); and by Upper Volta on Aug. 29, 1967 (decree).

10. Arts. 5 and 6 of the 1969 Convention.
jobs and were applying for Ivorian citizenship. The proposal was not adopted mainly because of the vigorous opposition from Ivorian workers who feared the loss of their employment.

The first important accomplishment in the economic sphere was the establishment in June 1966 of the Loan Guarantee and Mutual Assistance Fund. In connection with the Fund, the major questions to be considered are: What considerations induced the Members of the Group to create the Fund? What is its nature and its structure? How does it work? What actual results have been obtained thus far? What is the place of the Fund in the domestic legal systems of the Member States and the international legal order? Does the guarantee created therein duplicate any other financial protection granted elsewhere? Could the guarantee be extended to other forms of investments or to a larger geographical area? How can the Fund contribute to the economic integration of the five economies?

II. THE DETERMINATION OF ECONOMIC INTERESTS

A. THE NEED FOR FOREIGN CAPITAL

The need to attract foreign capital in the area of the Group is a direct consequence of two basic economic facts. First, financing by domestic resources is still inadequate. Second, official international aid is insufficient and irregular from year to year.

The inadequacy of domestic sources of financing can be described briefly. It has been calculated that on the assumption of a total formation of capital equivalent to 20% of the gross national products, the average growth rate of the African countries (South Africa excluded) would reach the level of 5.9% in 1980. This implies, of course, considerable structural change — especially in West Africa where the current rates of domestic savings are still very low. This particular problem has appeared as a very serious one when these countries have faced the problem of financing their plans of development. Public and private savings are expected to finance 70% of the total planned investment program in Ghana whereas the percentage goes down to 55% in Ivory Coast, 24% in Upper Volta, and 19% in Niger. It should be added that, in the Entente Group area as in the whole of French-speaking Africa, the problem of the scarcity of domestic savings is aggravated by the existence of

a substantial outflow of private capital to France. Although it is difficult
to gauge it accurately because of the freedom of transfers within the
Franc Zone, some experts estimate this outflow at around 2% to 3% of
the gross national product.  

Some valuable attempts have been made among the Members of the
Group to increase domestic savings and to finance public and private
investments through domestic financial channels. Two examples of such
efforts can be found in Niger and in the Ivory Coast.

Niger has used a very simple technique — the voluntary bond issue. A
statute passed in December 1961 created a Development Bank which
is authorized to issue public bonds during a 15-year period and up to a
limit of two billion francs CFA. The bonds are guaranteed by the gov-
ernment of Niger. The Bank has been moderately successful thus far:
350 million francs CFA were subscribed from 1964 to 1966.

A more sophisticated technique has been used by Ivory Coast. In fact,
the borrowing policy of this country mixes choice with compulsion. The
National Fund of Investment is provided with capital from a certain per-
centage of the earnings of individuals and corporations involved in cer-
tain industrial or real estate ventures. The National Society of Financing
tries to mobilize domestic funds by issuing voluntary bonds. From 1963
to 1966 there was one issue per year, and the average product has been
130 million francs CFA.

The goal of this mechanism is twofold. It is designed, first, to mobilize
funds by making it compulsory for the individuals and the corporations
to reinvest in the Ivorian economy part of their earnings. Second, the
Fund invests its resources in those sectors of the economy deserving a top
priority. However, each individual retains title to his contribution to the
Fund and can even purchase it back if he can prove that he has invested
in one of those designated sectors or is in the process of earning income
from an investment in one of them.

Because of the insufficiency of domestic savings, the countries of the
Entente Group, like all less developed countries, have to rely on inter-
national capital. In this respect, it is necessary to distinguish the major
techniques of international financial transfers to developing countries;
besides the traditional channel of private investments, there is a substan-
tial flow of official capital — bilateral and multilateral — granted or
loaned at low rates by industrialized countries or international organiza-
tions. We may first ask whether these five countries can rely on sufficient

14. Id. at 52.
15. Vinay, les Etats Africains et Malgache et la mobilisation de l'épargne par l'em-
prunt, 76 RECUEIL PENANT 30 (1966).
16. 1 franc CFA = 0.02 franc Metrapole. 1 American dollar = 275 francs CFA.
17. Vinay, supra note 15, at 43.
bilateral or multilateral financial aid to meet their development needs.

The evolution of bilateral aid has not been favorable to French-speaking African countries. The net development assistance rose substantially each year from 1959 to 1962, but over the last seven years one finds "an annual average increase of DAC (Development Assistance Committee) official assistance of 1.4%, a very modest rate of increase in real terms, if any." This mediocre trend is dominated by the stagnation of the flow of financial assistance from the major donor countries. The stagnation of the French official assistance is particularly significant, and the countries of the Franc Zone have suffered from it.

The second form of official assistance is provided through multinational agencies such as the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation. But, here again, the West African countries cannot expect much help. As a matter of fact, it appears from the 1969 annual report of the World Bank Group that Upper Volta, Togo, and Dahomey are the three countries that have received the least assistance since the World Bank Group was created.

It is thus clear that the five countries of the Entente Group need to draw a substantial inflow of nonofficial capital. Aware of this economic necessity, they have long sought to create a favorable climate for foreign private capital.

Nothing can be found in any of the countries' constitutions dealing specifically with the treatment of foreign property; these constitutions are derived from the 1958 French constitution which does not contain any such provisions. Each of the Member Countries, however, has enacted an investment code. These codes carry a wide variety of economic incentives, ranging from tax and import duty exemptions to guarantee of minimum sales. Besides the availability of such incentives, however, foreign investors are highly interested in the legal protection of their capital; this involves not only the right to fair compensation in case of expropriation but also guarantees against any kind of creeping expropriation.

The first express right granted to foreigners is the "right to freely transfer all profits and invested capital in case of closure or cessation of operations." This provision, contained in Art. 2 of the code of Dahomey, exists in three other codes with some variations.

As a general rule, the codes ban any kind of discriminatory treatment against foreigners. But it is noteworthy that these provisions usually remain very vague. In practice, close attention is paid to this matter in the "contracts of establishment" (convention d'établissement), which are signed between the government of the host country and those foreign investors who are willing to take advantage of the incentives program; specific rights such as assurance to foreign manufacturers that they will be treated on an equal footing with national enterprises by the administrative agencies are spelled out at this stage. Dahomey and Niger have introduced the so-called "stabilization rule" under which a foreign investor may be granted the right not to be subject to later modification of the domestic law.21

With regard to the law of expropriation, the codes themselves do not say much; the Dahomey statute is the only one which specifically provides for "equitable compensation in case of expropriation." Apparently, this question was purposely kept outside the scope of the codes, for a distinction was made between the law of incentives and basic guarantees offered to desirable foreign investments and the general policy of each country regarding the problem of expropriation. In other words, the only purpose of the codes was to lay down technical incentives and obligations for foreign enterprises.

The five members of the Group have entered into a series of bilateral treaties or agreements with developed countries regarding the treatment of foreign capital. A good example of this type of agreement is to be found in the United States investment guarantee program by which the American government, through the Agency for International Development, offers United States investors financial guarantees against political risks.

These agreements help to create a favorable climate for investments of foreign capital even though their scope is rather limited. None of the five countries has entered a treaty of Friendship, Commerce, and Navigation with the United States. But Togo does have a treaty of amity and economic relations which was signed in 1966 and entered into force on 1967.22

None of the five countries except Ivory Coast has made a public statement regarding the treatment of foreign capital according to

21. Art. 29 of the Dahomean code and Art. 16 of the code of Niger. These provisions, however, do not have much legal value since the legislatures could easily overrule them. See Deaume, Des Stipulations de Droit Applicable les Accords de Prêt et de Développement Economique et le leur Rôle, Revue Belge de Droit International 336 (1968).

customary international law on expropriation. We can observe, however, the position they have taken in international organizations. First, and as a matter of course, they all voted in favor of both the 1962 and the 1966 Resolutions of the United Nations Assembly on the permanent sovereignty of a country over its natural resources. These votes, though, are not very significant since, from them, one cannot draw any other conclusion than the existence of apparent cohesion among the countries of the developing world. More significant is the rapidity with which they signed the Convention setting up the International Centre for Settlement of Investment Disputes. It should be noted that they were among the very first States to sign it, whereas many less developed countries (especially all Latin American countries) have not done so thus far. The adhesion to the arbitration procedure set forth by the Convention constitutes a substantial step forward in the process undertaken by the Entente Group members to create a more attractive climate for foreign capital. This is true even though the actual jurisdiction of the Centre is based purely on consent and results from the agreement of the parties to invoke it by means of a "compromise (agreement to submit to arbitration), an arbitration clause, or a unilateral declaration by a State followed by acceptance by the investor."

B. THE ATTEMPT TO CONCiliate FOREIGN INVESTMENTS AND NATIONAL INDEPENDENCE

All these endeavors to create a climate of confidence show a desire for an inflow of foreign capital into the area. The Members of the Entente Group, however, like many other less developed countries, feel that the presence of an excessive amount of direct investments may threaten their political and economic independence. Thus, the relevant questions are: What forms of investment best suit the needs of these economies? What financial and legal techniques can be used to achieve this goal? The study of the reasoning which led the Members of the Group to set up the Guarantee Fund and the study of the techniques used in the operation of the Fund will help to answer those questions.

Sharp criticism can be lodged against foreign private investments in infant economies. Over 80% of the flow of private capital to West
Africa has, in recent years, been in the form of direct investment, as opposed to portfolio investments.\(^{26}\) Regarding this phenomenon, modern economic analysis shows that, from the host country's viewpoint, the value of foreign direct investments could be maximized only if the three following principles are recognized and applied.\(^{27}\)

The first principle would be the willingness of investors to Africanize their enterprises by training skilled workers and local managers.

Second, investors must acknowledge the need for local industrialization. Foreign capital has long been invested almost exclusively in trading activities, extractive industries, and primary commodities plantations. These activities usually require little processing and hence have little beneficial impact on the local economy, for as a general rule, the more local processing and manufacturing an investment involves, the more profitable it is for the overall economy.

The third principle calls for at least some minimum participation by local interests. This is a very delicate issue because foreign ventures may be discouraged by too strict regulations in this matter. No precise answer can be given "in abstracto" as to the minimum participation that should be offered to local investors. The requirements, if any, are usually spelled out in investment codes. The Philippine Incentives Act, for instance, sets forth an elaborated system under which to take advantage of the "registered enterprises" incentives, 60% of a corporation's stock must be held by Philippine citizens and 60% of the corporation's board of directors must be Filipinos.\(^{28}\)

The observer of West African economic problems may feel that foreign capital is very necessary but, in many instances, is not employed in a way that maximizes its usefulness. It was recently said that "while there is a continuing need for infrastructure investments in the area, such projects do not easily attract foreign capital."\(^{29}\) On the other hand, there is little difficulty in attracting foreign concerns to the service sector, where business could more readily be run by local enterprises.

Several courses of action have been suggested to solve the problem of maximizing the usefulness of foreign capital.

The most daring suggestion was enunciated by an African economist, Antoine Lawrence, who proposed the creation of a special fund designed

---

28. Philippine Investment Incentives Act, § 3 (B), as reported in C. Fulda and W. Schwartz, *supra* note 3.
to promote African participation in new foreign investments.\textsuperscript{30} This fund would be financed initially by contributions from both African and developed countries and would be used to provide for equity capital to selected foreign investments. The shares thus acquired by the fund would be placed at the disposal of Africans.\textsuperscript{31}

On a narrower scale, some West African countries, such as Liberia and Nigeria, have created Investment or Industrial Banks, the purpose of which are to assist in the establishment of new industrial enterprises.\textsuperscript{32}

The reasoning that led the Entente Group countries to create the Foreign Loan Guarantee Fund is simple: foreign private capital inflows are extremely desirable. Often times they are not oriented to sectors or branches where they are most needed. Therefore, a substantial part of the inflow should be diverted from direct ventures into loans. Hence, the purpose of the Fund is to guarantee foreign capital loaned to local investors.

One might wonder why these countries do not try to borrow capital from wealthier countries or from international organizations rather than from private parties at what are probably higher rates. The answer is to be found in the fact that loans from "public sources" do not always suit the actual needs of the borrowing party; they are sometimes restricted to certain categories of operations or to certain categories of borrowers (States or public subsidiaries, for example). In other instances, they provide only for part of the planned investment. Consequently, it is necessary to look for financial participation of private parties (especially banks) whose funds can be better adapted to the demand and to the nature of the borrowers.

III. HOW THE FUND PROTECTS FOREIGN INVESTMENTS IN MEMBER COUNTRIES

A. STRUCTURE AND OPERATION

The goals of the Fund are enunciated in the Preamble of the Convention portant création du Fonds d’Entraide et de Garantie des Emprunts. The Fund is designed, first, to promote the economic development of

\textsuperscript{30} G. Benveniste and W. Moran, \textit{supra} note 27, at 101.

\textsuperscript{31} This fund would not duplicate the existing African Bank of Development which is financed by public funds and designed to assist public investments exclusively.

\textsuperscript{32} E.g., the Liberian Bank for Industrial Development and Investment created in Apr. 1960 and the Nigerian Industrial Development Bank created in Jan. 1964, 77 \textit{Recueil Penant} 172 (1967). The purpose of the Development Bank of Nigeria, for instance, is "to stimulate indigenous entrepreneurship by assisting financially" (Art. 1 of its charter). Where the size and the nature of the project warrants foreign participation, the Bank works out financial aspects of collaboration. See also 12 \textit{Nigerian Trade J.} 91 (July-Sept. 1964).
the Entente Group by appealing, as much as possible, to international cooperation and by providing the greatest possible security to external capital which will be invested in the area;\textsuperscript{33} second, to accelerate and coordinate the economic growth of the five member countries by setting up a common organization which will contribute to the preparation and the financing of common projects, to the enlargement of the market, and also to avoidance of duplicate national projects.\textsuperscript{34}

The administrative structure of the Fund is relatively simple. Three organs were created.

The Fund is administrated by the Council of the Chiefs of State of the five countries.\textsuperscript{35} The Council meets at least once a year and is presided over by the President of the Entente Group.\textsuperscript{36} It directs the activities of the Fund, and its decisions are made by unanimous vote.\textsuperscript{37} During inter-sessions, the Council delegates its authority to the Management Committee which is responsible to it.

The Management Committee is composed of two representatives of each member state and is presided over by a representative from the country whose head of state is at that time President of the Group.\textsuperscript{38} In fact, the representatives are usually Ministers of Finance and Ministers of Economic Planning.\textsuperscript{39} As in the Council, decisions are made by unanimous vote. Art. 6, para. 1 of the Convention grants the Committee the power to administer the Fund; it approves the applications for guarantee, the semiannual financial statements, the annual budget, and the annual report prepared by the Administrative Secretary.

The Administrative Secretary of the Fund is appointed by the Council for an unspecified period of time.\textsuperscript{40} This is very unusual and probably unique among international organizations. From the Secretary's standpoint, this may be an advantage as he can undertake long-run action. But it may as well be a disadvantage since he may be removed at any time "ad nutum" by the Council. His powers are defined in very broad terms both in the Convention and in the bylaws. He receives, examines, and presents applications for guarantee to the Committee. Once a guarantee is granted, he follows the service of the debt. He prepares all the documents necessary to the meetings of the Council and the

\textsuperscript{33} Preamble, paras. 1, 2, 3 and 5.
\textsuperscript{34} Preamble, paras. 1 and 4.
\textsuperscript{35} Convention, Art. 6, para. 1.
\textsuperscript{36} Convention, Art. 6, para. 2. Since 1968, the President has been Mr. M. H. Diori, President of the Republic of Niger.
\textsuperscript{37} Convention, Art. 6, para. 5.
\textsuperscript{38} Convention, Art. 6, para. 3.
\textsuperscript{39} See \textit{Le Fonds d'Entraide et de Garantie des Emprunts du Conseil de l'Entente: Un Outil de Promotion Economique} 2 (1968).
\textsuperscript{40} Bylaws, Art. 10.
Committee,\textsuperscript{41} appoints and discharges the personnel of the Fund, and determines wages.\textsuperscript{42} He also represents the Fund as regards third parties.\textsuperscript{43}

From the nature and the respective powers of the three organs, it can be inferred that they fulfill very distinct functions in the operation of the Fund. The Secretary is in charge of the general management of the Fund and of the preparation of the decisions, while the Committee acts upon the decisions. It is the Council, however, which gives the Fund the basic political and financial means for action.

It should be remembered that the proper operation of the organization is dependent upon a unanimous agreement among the member states; thus if one of the members were to withdraw or if a serious disagreement were to arise among the States, the Fund would not be able to grant future guarantees. The identical composition of the Conference of the Chiefs of State of the Entente Group and of the Council of the Fund indicates that the theoretical autonomy of the latter actually depends upon the common willingness of the five governments to preserve it. Two consequences follow this interdependence so far as the scope of action of the Fund is concerned. It could be blocked or confined to routine tasks, or it could also be enlarged. However, due to the willingness of member states to make the Fund the cornerstone of economic cooperation in the area, the latter possibility has prevailed thus far. It should be further noted that the Council controls the financial power of the organization since it determines the amount of annual contribution of the members of the Fund.\textsuperscript{44}

The Foreign Loan and Mutual Assistance Fund is financed through four different channels which are listed in Art. 5 of the Convention. The first channel is “an endowment constituted by annual contributions from the Member States. The amount of the contributions is determined by the Council every five years.”\textsuperscript{45} In the future, the amount of the endowments will probably vary according to the needs of the organization. However, in order to provide the Fund with substantial financial capability rapidly, the Member States agreed to pay an exceptional annual contribution of 650 million francs CFA (\$2.5 million) during the first two years.\textsuperscript{46} The quotas were fixed as follows: Ivory Coast, 500 million; Dahomey, Niger, and Upper Volta, 42 million each; Togo, 24 million.\textsuperscript{47} In fact, at the end of the first two financial years,

\begin{itemize}
\item \textsuperscript{41} Bylaws, Art. 14.
\item \textsuperscript{42} Bylaws, Art. 15.
\item \textsuperscript{43} Bylaws, Art. 16, para. 2.
\item \textsuperscript{44} Convention, Art. 5, para. 1.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Convention, Art. 5, para. 6.
\item \textsuperscript{47} Mallet Buisson, Garante aux investissements, celle qu’offrent maintenant les Etats du Conseil de l’Entente, 1026 L’ÉCONOMIE 17 (1966).
\end{itemize}
the Council decided to extend this “super contribution” for five additional years. The quotas remain the same as were fixed in 1966. The amount of the contribution may seem insignificant, but it represents in all cases a substantial share of the national budget (up to 1/10th in the case of Dahomey). This is an additional indication of the confidence and the expectations these countries have put in the Fund.

The second source of revenue is “miscellaneous endowments”. Up to now, the only endowment in cash made to the Fund came from France, through the Aid and Cooperation Fund (ACF). This “unique and nonrenewable” 100 million francs CFA ($400,000) contribution was made in May, 1967. In addition to endowments in cash, the Fund tries to obtain technical assistance with regard to the realization of multinational projects. In 1968, for instance, the American government financed research conducted by Ford Machine Co. International to develop new agricultural products.

The third source of revenue for the Fund is “the proceeds of its investments”. Actually the only proceeds received thus far by the Fund under this chapter have been the interest from the bank which holds the Fund’s assets.

The proceeds of the guarantee granted to local investors constitutes the last category of resource for the Fund. Art. 10 of the bylaws fixed an upper limit of 0.50% on the premium which may be levied by the Fund on the guaranteed loan.

Two characteristics of the financial organization of the Fund are particularly noteworthy. First, the guarantee provided to foreign lenders is pledged in cash, in French francs, deposited at “a financial institution of international reputation”. This offers security to the beneficiaries of the guarantee. Second, it appears that the origin of the most significant part of the resources of the Fund is African. This stresses the sense of responsibility that has developed among the five Member Countries.

The Fund is a multinational organization created in the form of an

49. 1969 PERSPECTIVES NIGERIENNES 17.
50. Convention, Art. 5, para. 2.
51. HEAD COMMITTEE OF THE AID AND THE CO-OPERATION FUND, REPORT ON MEETINGS (May 30, 1967). “The Head Committee of the Aid and Co-operation Fund authorizes the grant of a unique and non-renewable sum of 2 million Francs ($400,000) to the Foreign Loan Guaranty and Mutual Assistance Fund of the Entente Group . . . [and] stipulates that this grant allows no further commitment and no liability of the ACF towards creditors or beneficiaries of the guarantees.”
52. ANNUAL REPORT ON THE ACTIVITIES OF THE FUND 18 (1968). These studies are designed to discover new possibilities for foreign investors to grow and transform new agricultural products such as rice, tomatoes and different oil plants.
53. Convention, Art. 5, para. 3.
54. Convention, Art. 5, para. 5.
“établissement public international à caractère financier, doté de la personnalité civile et de l’autonomie financière”. An “établissement public international” can be defined as an organization having an international status and autonomous powers and designed either to perform services on behalf of private parties or to regulate the use of a state or interstate property.55

The Fund meets all the characteristics of an “établissement public international”. It was created by subjects of international law. It is designed for a specific purpose which is spelled out in Art. 2 of the Convention: “To guarantee the loans made by capital holders outside the area to either States, public or semipublic organizations, or those private enterprises having their principal office and their principal place of business in one or several Member Countries... to finance profitable or infrastructure industrial, agricultural and commercial projects”.56 It is a legal entity.57 It has headquarters which are located in Abidjan.58 It has its own organs and assets. Its agents enjoy the status of international civil servants within the area of the Entente Group.59 The Fund itself enjoys privileges and immunities in the territory of each Member State.60

The Fund, however, is not only subjected to international law. It seems that nothing prevents a subsidiary application of the lex situs, here the Ivorian law, when the principles of international law or the rules laid down in the Convention are insufficient. This is the case, for instance, with regard to the relationships of the Fund to its employees.

The benefits of the total guarantee granted by the Fund is unequally portioned out among the Member Countries. Dahomey has received more than half of the total amount whereas the Ivory Coast has not applied for any guarantee. In fact, in 1966, the Ivory Coast officially declared it would not apply for any guarantees during a 5-year period starting on January, 1967. This decision constitutes a real effort to facilitate economic cooperation within the Group. Ivorian leaders are aware of the fact that it is in the interest of their country to assist in the economic growth of the four partners. One might be disappointed by the fact that all guaranteed loans were heretofore designed to finance purely national investments. The reason for this is the great difficulty encountered in drawing up multinational projects. The economic studies financed or managed by the Fund are designed to overcome this obstacle.

56. The Fund has broadened the scope of its action.
57. Convention, Art. 1, para. 1.
58. Convention, Art. 1, para. 2.
59. Convention, Privileges and Immunities, Art. 8.
60. Convention, Privileges and Immunities, Art. 4, 5, 6, 9, and 10. These articles deal with the inviolability of the assets of the Fund and the exemption of all taxes whatsoever within the territory of the member states.
B. THE MECHANISM OF THE GUARANTEE

Unlike most existing national, bilateral, or multinational systems, the Fund does not guarantee direct investments but only foreign loans designed to finance direct investments. Also, unlike these other systems, the guarantee covers not only the so-called political risks but also any kind of failure to reimburse, whatever the reason.

In order to be eligible for the guarantee, a loan must be "productive", "designed to finance industrial, agricultural or commercial projects."61 The investment projects must meet certain conditions which are enunciated in the bylaws.

First, they must be real investments. The definition of eligible investments, as stated in Art. 21 of the bylaws, is unusually broad: "No loan will be guaranteed by the Fund except these intermediate and long-term loans designed to finance investments in either the agricultural, industrial, touristic or commercial section. Investment means any necessary expense, other than overhead expenses and cash in hand, necessary to realize movable or immovable property." This broad concept is somewhat similar to the one which has been spelled out in international congresses on the problems of the economic growth of developing countries: "Any enterprise, the result of which is to increase the economic ability of the recipient country."62

Second, Art. 24 of the bylaws prevents the Fund from extending its guarantee to investments that have already been realized or the realization of which has begun. This provision is naturally designed to encourage new investments.

Third, the proposed investment must meet minimum standards so far as financing and foreseeable profitability are concerned. These standards are spelled out in Arts. 22 and 28 of the bylaws and can be outlined as follows.

The promoters of the investment must provide for a "reasonable" amount of the necessary capital. In other words, the realization of a project should not be entirely dependent upon foreign capital. No further amount is specified as to the minimum that must be brought into the business by the African investor. This is to be determined by the Committee on a case by case basis.

Also, the income generated by the investment must be sufficient to

61. Convention, Art. 2, paras. 1 and 2; and bylaws, Art. 21, para. 1.
provide for the financial balance of the business and for a reasonable profit. Regarding public investments (infrastructure works, for instance), the criteria of profitability are replaced by the concept of “financial viability”. Thus, it appears that a loan can be guaranteed only where the related investment is deemed to be economically desirable and financially sound. The Management Committee has great discretionary power in this matter although its decisions may be influenced by political considerations.

Finally, the bylaws provide that projects dealing with two or more Member Countries shall have priority over purely national projects. However, this principle has not yet been implemented.

The Fund grants its guarantee to transnational loans exclusively. Since the five countries have retained the French commercial law which was applicable at the day of their independence, the legal definition of “transnational loans” that prevails is the one given by the French tribunals. According to a 12-year old decision of the Cour de Cassation, transnational loans require a “double movement of capital across the borders” regardless of the domicile or the nationality of the parties.

So far as the lenders are concerned, the Convention simply says that “the Fund shall guarantee only those loans made by persons outside the area of the Entente Group.” Art. 20 of the bylaws reiterates this requirement by stating that “in no case shall the guarantee be granted to either citizens or residents of any of the Member Countries.” However, nothing is said with regard to the legal nature of the lenders; they may be public or private corporations or financial institutions. So far, the lenders have been two French corporations, three French banks (two public banks and one private bank), two groupings of Italian banks, and one German bank.

The borrowers are “the States, the public corporations and the private enterprises having their main office and their principal place of business in one or several Member States.” It seems that the drafters of the Convention were primarily concerned with the economic location of the borrower rather than his nationality. At a consequence of this, there seems to be no reason why the African subsidiary of a foreign group could not obtain a guarantee on the merits of the proposed venture.

63. Bylaws, Art. 27.
64. Dahomey, Art. 76; Ivory Coast, Art. 76; Niger, Art. 76; Togo, Art. 88, para. 3; Upper Volta, Art. 76. P. GONINDE, DROITS AFRICAINS EVOLUTION ET SOURCES 35 (1968).
65. C. CASS. civ. com. Nov. 4, 1958, Ph. Malanries note, REC. DALLOZ 361 (1959). This rather strict definition was given by the French Cour de Cassation in a case where the question of the validity of a gold clause was involved. This definition might, however, be interpreted by African Courts in a way that would not make the repatriation of the loan an obligation.
67. Id.
Nothing specific can be found either in the Convention or the bylaws as to the form the loan should take. The only information which can be found in this respect is the reference in Art. 2 of the Convention to “issued or contracted loans”. We can conclude from the vagueness of this provision that the loans eligible for the guarantee of the Fund may take the form either of a usual loan agreement, commercial papers (billet à ordre), or bonds. One might raise the question as to whether convertible bonds could be guaranteed; theoretically, nothing prevents this. However, this is unlikely to happen at least in the near future since a convertible bond constitutes for the bondholder a virtual participation in the capital of the business. This would mean considerable enlargement of the scope of the Fund’s action.

All applications ought to be made through the government(s) of the country(ies) where the investment is to be realized.68 The purpose of this requirement is twofold. First, the governments are supposed to make a preliminary selection among the applications. Second, when a government recommends a project for the approval of the Management Committee, it thereby acknowledges its responsibility to reimburse the Fund in case the borrower fails to pay his creditor.

The second step is taken by the Secretary of the Fund who examines the project from an economic, financial, and technical standpoint. The purpose of this second examination is to make sure that the venture will be profitable and sound enough to bear the burden of the proposed borrowing.69

Finally, the Management Committee approves the application and issues the guarantee of the Fund. Art. 3, para. 2 of the Convention requires the maintenance of a ratio of 10% between the nominal resources of the Fund and the total amount of guarantees granted. In case this percentage appears to be about to drop, the Committee should hold an emergency meeting in order to take “appropriate measures” to cope with this situation.70 In relation to the problem of the procedural requirements, one might question whether the Fund, through the Management Committee, could subordinate the grant of a guarantee to the modification of a Member Country of its investment laws. The answer to this question is negative. Nothing in the Convention authorizes any of the organs of the Fund to take into consideration factors other than the economic soundness and the financial profitability (or viability in the case of a public investment) of the proposed project.

The key element of the system is the “financial institution of inter-

68. Bylaws, Art. 19.
69. Note 39 supra, at 5.
70. The phrase “appropriate measures” probably means additional contribution.
national reputation” which holds the nominal resources of the Fund and to which the Committee, immediately after having issued a guarantee, gives a previous and irrevocable order to pay the creditor’s claims within thirty days should the debtor fail to pay.

Since the guarantee deals with loans, it covers the risk of nonpayment as a matter of course. Art. 4 para. 2 of the Convention, together with Art. 23 of the bylaws, explicitly states that, in case of the debtor’s failure to pay, the Fund shall pay the lender the sum due and unpaid at the installment date stated in the table of amortization. The annuities of the table of amortization deal not only with the principal of the loan but also with the interest which is covered by the guarantee. Unlike the system of protection of direct investments, the determination of the foreign owner’s rights are here very easy to make: thirty days at the most after the unpaid installment is due, the Fund will act through its depository.

All contracts with foreign lenders stipulate that all risks of nonpayment are covered by the guarantee.71

First, there are the so-called political risks. These include nationalization of the borrowing enterprise without acknowledgement of its debts, war or civil disturbance, or any kind of creeping expropriation which makes it impossible for the borrower to pay its debts. The risk of non-transferability of foreign currencies is also included in the category of noncommercial risks. The guarantee against this risk, as is provided for by the Fund, is especially important from a lender’s standpoint. In fact, protection against these political risks is offered to investors in all national systems of guarantee for direct investments.

The major innovation brought about by the guarantee of the Fund is its coverage of commercial risks as well as noncommercial risks. The effect of the system is to guarantee that the creditor will recover his investments and the interest on it, regardless of the cause for the debtor’s failure to pay. Nor is it material when the nonpayment occurs — indemnification by the Fund is automatic.

C. THE LEGAL REGIME OF THE GUARANTEE

The Convention and the bylaws of the Fund contain few specific provisions dealing with the problem of the legal relationships created by the granting of a guarantee. These relationships are in fact rather sophisticated insofar as five different parties are involved in each case: the lender, the borrower, the government of the country in which the investment is made, the Fund, and the bank that holds the resources of

71. Letter from P. Kaya, the Administrative Secretary of the Fund, to the author, Jan. 12, 1970.
the Fund. The nature of the contractual links which exist among them is stated in much detail in each case handled by the Fund. All cases, however, are handled according to the same five-step pattern which can be described as follows.

First, there is the basic agreement between the Fund and a financial institution of international reputation where a deposit account is opened. Thus far, the bank chosen by the Fund has been the French Banque Internationale pour l'Afrique Occidentale located in Paris. But nothing prevents the Fund from depositing its resources in another bank which would offer a better rate of interest.

Second, there is the loan contract itself, which is the object of the guarantee of the Fund.

Third, we find a counter-security agreement entered into by the government of the country in which the investment is to be made, in favor of the Fund.

Fourth, there is the grant of the guarantee provided for by the Fund to the lender.

Finally, the Fund and the borrower must sign an agreement in which the rights and obligations of the parties are spelled out. The Fund will honor the borrower's debts whenever this is necessary. The obligations of the borrower in consideration for this are threefold. He will pay the Fund an annual fee which in no case shall exceed 0.50% of the guaranteed amount. He will provide the Fund with an annual report on the financial situation of the enterprise and on the progress of the investment financed through the guaranteed loan. He will also make every effort to pay the interest and reimburse the principal as stipulated in the loan contract.

These five contracts or agreements create a rather complicated network of relationships between the Fund and the other parties. The central issue in this matter is to determine the nature of the relationship existing between the Fund and the lender on the one hand and between the Fund and the borrower on the other hand.

Vis-à-vis the lender, the system is well organized to make the guarantee operate automatically as soon as the debtor's failure to pay occurs.

The obligation of the Fund is secured in cash at an international bank as required by Art. 3, para. 2 of the Convention. Moreover, Arts. 11 and 12 specify that as long as the obligation of the Fund is not satisfied, the deposits in cash may not be withdrawn or shared even in the case of the

---

72. Id.
73. Bylaws, Art. 28, para. 2.
75. Bylaws, Art. 29, para. 2. The legal value of this particular provision seems to be rather weak.
withdrawal of a Member State or of the dissolution of the Fund. These provisions are very significant; they mean that the creditor is offered a real (as opposed to personal) pledge, held by a third party external to the Entente Group countries. Furthermore, since the pledge is made in French francs, there should be no difficulty as to its actual execution. This type of relationship can be compared to the trustor/trustee relationship in Anglo-American law. The Fund stands in the position of a settlor, the international bank being the trustee and the lender the beneficiary. The Civil Code countries in general and France in particular do not have the concept of trusteeship. The above described relationship, however, can be compared to a "stipulation pour autrui," which is analogous to a trust in this particular case. Art. 29 of the bylaws of the Fund sets forth the basic condition for automatic payment by the bank. This condition is to be found in the thirty-day rule, which provides that once the lender has proved that the installment has not been paid within this period of time, the bank has the duty to pay him directly. In case of the bank's failure to do so, the lender could bring an action against it on the theory that a beneficiary has the right to seek to enforce a stipulation made on his behalf. Finally, it is noteworthy that because of the "previous and irrevocable order to pay" made to the holder of the pledge, the Fund is in a worse position than an ordinary guarantor. It seems, for instance, that he cannot present the defense of the nullity of the loan contract, which is generally allowed.

As a guarantor, the Fund has recourse of action against the defaulting debtor. In this respect, Art. 29, para. 3 of the bylaws stipulates that the Administrative Secretary has to ask the bank for a "quitance subrogative"—a certificate of payment—so that the Fund can be subrogated to the lender's right to be reimbursed. But in fact, it seems that such a subrogation claim is very weak compared to the automatic guarantee which operates on behalf of the lender.

Theoretically, the Fund can first proceed against the borrower himself. This is the usual rule in the law of guarantees, and the Fund could invoke it even though it is not specifically provided for in the Convention and even if it were not mentioned in the agreement made between the Fund and the borrower. It seems unlikely, however, that the Fund would go itself against the debtor because the debtor's failure to pay might indicate his insolvency; and the Fund might prefer to use the course of action it has against the State which gave a counter-guarantee and let it deal directly with its resident.

76. See C. Civ., Arts. 1120-21. This statement is made, of course, on the assumption that a French bank holds the Fund's assets.
78. PLANIOL, RIPERT ET SAVATIER, DROIT CIVIL FRANCAIS 991 (1954).
The counter-guarantee given by the government of the country in which the investment is made is an essential cog in the machinery. It should be noted, first, that the Member States have no direct obligation vis-à-vis the lenders even if the fund has been depleted by prior payouts. In this situation, appropriate measures are to be taken by the Management Committee, as mentioned earlier.\(^\text{79}\) However, the obligations of the State vis-à-vis the Fund are very precise and stringent. In addition to the basic counter-guarantee required in Art. 4, para. 1 of the Convention, the State must budget every year for the interest and the principal outstanding on the loan.\(^\text{80}\) Furthermore, the counter-guarantee agreement must set forth the maximum period within which the government will reimburse the Fund; in no case may this period exceed three months.\(^\text{81}\)

In spite of these rather strict regulations, the power of the Fund to compel State indemnification seems rather theoretical. The only efficient course of action it can take is provided for in Art. 4, para. 3 of the Convention: the denial of examination of new applications sponsored by the State which has not satisfied its debt to the Fund. It is too soon to say whether or not this will provide the Fund with adequate influence.

Likewise, it is still difficult to appraise accurately the value and efficiency of the overall network of contractual relationships between the Fund and the other parties. The prime concern of the creators of the Fund was to offer foreign capital holders the maximum security through an unequivocal guarantee. They achieved this through a rather complex system of contractual relationships. Moreover, further difficulties may arise as to the interpretation or the execution of the contracts. Therefore we must face the problem of determining what jurisdiction will be competent and what law will be applicable.

It is not difficult to establish that the guarantee granted by the Fund as well as the legal relationships thereunder are international by nature. First, the guarantee is international in its sources: the Convention and the bylaws which regulate its mechanism were set up through the cooperation of five States. Second, the guarantee is operated by an "établissement public international."\(^\text{82}\) Above all, the guarantee is international "ratione materiae" insofar as it is integrated in a series of contractual relationships which involve parties of different nationalities: a loan contract between a borrower resident in the Entente Group area and an outside lender; a guarantee granted to the latter by the Fund and a counter-guarantee given to the Fund by a State; the deposit by the Fund of its resources, in French francs, at an outside bank.

---

79. See note 70 supra.
80. Bylaws, Art. 25, paras. 1 and 2.
81. Bylaws, Art. 25, para. 2.
82. H. Adam, supra note 55.
It is true that specific documents, such as the constitutive Convention, the bylaws, and the contracts themselves, are designed to regulate the operation of the Fund and its relationships with other parties. Nevertheless, we cannot assert that no possibility of litigation remains; and therefore we must consider the problem of finding competent judges and applicable laws. This question ought to be approached from the viewpoint of the different relationships existing among the parties, e.g., the Member States-Fund relationship, the Fund-lender relationship, the Fund-borrower relationship, or the bank-lender relationship.

Art. 3 of the Annex on Privileges and Immunities which is attached to the Convention sets forth the requirements to be met by a court in order to obtain jurisdiction over the Fund. It says that "actions may be brought against the Fund only in a court of competent jurisdiction in the territories of a member in which the Fund has an office, has appointed an agent for the purpose of accepting service or notice of process or has issued or guarantee securities." In the present situation, there are no courts but those of Abidjan — the city where the headquarters of the organization are located — that fulfill the requirements enunciated in this provision. In practice, however, this provision may have different effect depending on the parties dealing with the Fund.

The State which counter-guarantees the loan cannot bring an action against the Fund since para. 3 of Art. 3 of the Annex expressly states that "no judicial action shall be brought against the Fund by the Member States or by persons allegedly subrogated in the rights of the Member States."

The borrower is strictly bound by the rule of jurisdiction of Art. 3 of the Annex. There is no doubt that a Dahomean court, for instance, would not have jurisdiction on a suit brought before it by a Dahomean borrower against the Fund. This lack of jurisdiction is based on the theory of the superiority of a treaty over national laws.

The actual effect of this role of jurisdiction might be different from the foreign lender's viewpoint. In the absence of any clause of jurisdiction in the guarantee contract, an Italian bank, for example, could very well sue the Fund before an Italian court since Italian courts are not bound by the Convention creating the Fund. The major problem would then be for the plaintiff to enforce the judgment — in France, for instance, against the assets of the Fund which are held by a French bank. Al-

83. By a resolution of July 1969, the Council decided on the building of new offices at Lome (Togo). When this is done the Togolese tribunals will have competent jurisdiction over the Fund.

84. This principle is expressed in Art. 56 of the constitutions of Dahomey, Ivory Coast, Niger, and Upper Volta, and in Art. 57 of the constitution of Togo.
though no precedent dealing with this particular type of situation can be found in French law, there is no reason why a court would not recognize the judgment of the Italian court. From the lender's standpoint, another solution to bring a valid action in Italy would be to stipulate in the contract of guarantee that the Fund shall deposit the total amount or part of the amount of the capital guaranteed in an Italian bank "of international reputation" in the sense of Art. 3 of the Convention. In this case, the problem of the enforcement of an Italian judgment against the assets of the Fund would be solved.

The rules of jurisdiction mentioned above do not prevent the parties from stipulating in the contract that a dispute would be submitted to international arbitration. An interesting question in this respect is to determine whether they could refer to the International Centre for the Settlement of Investments Disputes. Art. 25 of the Convention on the Settlement of Investments Disputes reads:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre . . . .

In this particular case, the "ratione materiae" test seems to raise little difficulty. The dispute would not involve an investment, strictly speaking, but would arise directly out of an investment in the sense of Art. 25. It is generally acknowledged that portfolio investments fall within the scope of the general concept of "investment." The "ratione personae" test might be more controversial. In fact, the dispute would not directly involve one State and the national of another State since the Fund constitutes a screen between them. We can think of eliminating this obstacle. We can consider the Fund as "an agency of a Contracting State". It would suffice, then, for the five governments of the Entente Group to designate the Fund as such to the authorities of the Centre to comply with the requirement. Another possibility would be to specify in the arbitration clause of the contract that, in case of litigation, the parties would be the private lender on the one hand and the State assisted or represented by the Fund on the other.

The choice of law problem in the Fund-lender relationship is a difficult one to resolve when a disagreement arises. First, it must be said that fear of the unknown or of the uncertain usually leads international lenders to give special interest to including a choice of law clause in the loan contract. In the particular case with which we are dealing, it ap-

85. The five countries of the Entente Group signed and ratified the Convention.
pears that the lenders usually expressly refer to French law.88 We must assume, however, that such stipulation may not be stated in the contract; and we thus face the problem of determining what law would be applied by both the Entente and foreign courts.

The application of the law of the country where the investment is made has sometimes been suggested by international and national tribunals. In the Serbian and Brazilian Loans cases, the Permanent Court of International Justice assumed that a special rule of conflict of laws should be applied in respect to private loans to public parties and presumed that, in the absence of an express provision to the contrary, public parties intended to contract under their own law.89 The same solution was reached by the French Tribunal de Grande Instance de la Seine in an analogous situation.90 Also, Art. 42 of the Convention on the Settlement of Investments Disputes between States and nationals of other States provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) . . . .

This solution, however, can be easily challenged. First, precedents exist denying the right of a State to have its law applied when it enters into a contract with a private party.91 This is particularly relevant where the State is not directly involved in the contract, as is the case here. Furthermore, the advantage of the simplicity that this solution would present will no longer exist when several States are associated in the same venture, as is likely to happen in the future.

In response to this last argument, one might suggest the application of the common legal principles of the area. As already mentioned, the five countries of the Group have adopted a similar constitutional provision whereby the French legal system is maintained. This theory was in fact put into practice when twelve French speaking countries created the international corporation Air Afrique in 1961.92 Art. 2 of the certificate of incorporation stipulates “the corporation is subject to the treaty, to the certificate of incorporation and to the common legal principles applicable in the Member States”. This solution has the disadvantage of uncertainty insofar as the domestic laws of the Members of the Group might very well diverge in the future.

88. Letter from P. Kaya, the Administrative Secretary of the Fund, to the author, Jan. 12, 1970.
90. Tribunal de Grande Instance de la Seine, June 1, 1966, 56 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 715 (1967)
It is likely, therefore, that the judge will try to find the most adequate national law and, in order to do so, will research the most significant connecting factor in the guarantee contract. The place of negotiation and the place of signature of the contract must be considered. However, insofar as they may vary from one instance to another, no precise conclusion can be drawn therefrom. Actually, as is often the case in absence of specific provision stipulated by the parties, the place of performance would probably be considered as the center of gravity of the contract. Since the guarantee is to be performed by the bank which holds the assets of the Fund, it seems reasonable to apply the law of the country where the bank is located.

We can assume that insofar as most tribunals have refused to follow the theory enunciated in the Serbian and Brazilian Loans cases, the application of the law of the State(s) where the investment is made would be rejected. In this respect, the discovery of the intent of the parties or of the most significant factor would probably lead most of the tribunals to apply the law of the place of performance of the guarantee, that is to say, the place where the bank is located.

Determination of the applicable law raises little difficulty. The common legal principles of the area could easily be referred to at least so long as the five national contract legislations do not diverge substantially. If they do, the judge would have to apply national law. It seems reasonable to designate Ivorian law since the negotiation, the signature, and the most significant obligations of the parties such as the payment of the premiums and the reports to be made by the borrower take place at the headquarters of the Fund in Abidjan. Furthermore, insofar as the Ivorian courts are the courts of competent jurisdiction, the application of the lex fori would offer a great practical advantage.

D. THE CONTRIBUTION OF THE FUND TO PROTECTION OF FOREIGN CAPITAL IN DEVELOPING COUNTRIES

West African countries have used different techniques to determine the scope of incentive programs. But in almost all cases, commercial activities are excluded from the benefits of the program. Niger is the only West African country which classifies commercial activities among “priority enterprises”. This trend is generally justified by the over-
development of the commercial sector compared to the industrial sector.

Art. 2 of the Convention includes commercial investments among eligible investments for a loan guarantee. The reason for this new policy is that the Member Countries of the Fund realize that some types of commercial investments can contribute a great deal to the overall development of the economy.

Likewise, by guaranteeing loans the Fund helps to eliminate the artificial distinction which is often made in the West African codes between direct investments and portfolio investments. The Senegalese code is the only one that provides foreign loans with protection when these loans finance projects which are deemed to be economically desirable. The framers of all other codes seem to have believed that there is no direct relation between a financial credit and an investment. Therefore, by encouraging the inflow of foreign loans in the Entente Group area, the Fund has made a positive contribution to the question of determining which forms of foreign capital participation can contribute to the growth of a less developed economy.

The foreign capital holder's prime concern is a profitable business investment. For him, the relevant question is to determine whether the advantages offered by the Fund are the greatest he can find. In this respect, we can say that, in the limited area of foreign loans protection, the Fund provides investors greater advantages than guarantee programs of capital exporting countries.

Most other programs do not cover commercial risks. The United States Investment Guarantee Act authorizes the President to issue guarantees to eligible investors to assure protection against "inability to convert into United States dollars other currencies or credits in such currencies, . . . loss of investment due to expropriation or confiscation by action of a foreign government, . . . loss due to war, revolution or insurrection." In fact, an Extended Risk Guarantee Program exists, under which the commercial risks of an investment are protected. But in the case of long-term loans, only 75% of the principal and interest may be covered. Furthermore, it seems that the application of this extended program has remained rather limited and is not available to all countries that subscribed to the political risk program.

No other guarantee program in the world covers investments whether direct or portfolio against nonpolitical risks. Even West Germany's pro-

97. The Foreign Assistance Act of 1961, 22 U.S.C. § 2181 (b) (1) (B) (1964.)
100. Id. Niger, for example, is absent from the list of countries where the Extended Risk Guarantee Program is available.
gram, which is the most advanced outside the United States, restricts the scope of the coverage to noncommercial risks.\textsuperscript{101} Therefore, the absolute and automatic guarantee which is granted by the Fund must constitute a substantial advantage from the lender's standpoint.

Also, under the programs of capital exporting countries, the investor has to pay an annual fee which, in some instances, may go up to 2\% of the value of the protected investment.\textsuperscript{102} In this respect, it is noteworthy that the guarantee granted by the Fund is free of cost for the foreign lender; Art. 5, para. 4 of the Convention specifies that the guarantee fee is to be paid by the borrower.

The question can be raised whether it would be possible to extend the Fund's guarantee to direct investments. It is not possible to give a precise answer at the moment, but this extension seems unlikely in the near future. In fact, the Fund was conceived to complement the investment codes of the five Member Countries. The guarantee it provides to foreign capital lenders is designed to encourage local entrepreneurs in the area. Therefore, by extending the guarantee to foreign direct investments, the Fund would deviate somewhat from its major mission. Moreover, insofar as such an evolution would, to a certain extent, substitute the Fund for the domestic codes of the five countries, this would necessitate a strong political willingness on the part of the Member States to achieve economic integration. It is probably too soon to speculate on this matter.

A possible enlargement of the system to other African countries can be envisioned through two different mechanisms. It could be either the enlargement of the Fund itself to the eighteen African countries which are associated with the European Economic Community or the creation of regional funds between States which are already linked by regional cooperation agreements such as the Economic Union of Central Africa or the Common African and Malgasy Organization.\textsuperscript{103} The former solution would offer the advantage of fitting the Fund into the overall association agreement made with the Countries of the Common Market. But the system probably would be looser than that of the Entente Group Fund, where only five countries are involved. The latter solution would be

\textsuperscript{101} Stikker, \textit{The Role of Private Enterprise in Investment and Promotion of Exports in Developing Countries}, UNCTAD TD/35/Supp. 1, at 63 (Nov. 1967).

\textsuperscript{102} Id. Premiums vary; and rates offered include 0.47\% in Japan, 0.80\% in West Germany, 0.25\% to 1.75\% in the United States, and 0.30\% to 2\% in Netherland, depending on the kind and the scope of insurance given.

\textsuperscript{103} Members of the E.U.C.A. are Cameroon, Chad, Central African Republic, Congo (Brazzaville), and Gabon. The organization, created in 1966, is designed to achieve a free trade area and possibly a customs union. Members of the C.A.M.O. are Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Malgasy Republic, Niger, Senegal, Togo, Upper Volta, and Mauritania. Founded in 1965, the organization is designed to reinforce solidarity and economic cooperation among the member states.
easier to set up but would have less political and economic impact vis-à-vis the European Economic Community as well as foreign investors.

IV. THE FUND'S CONTRIBUTION TO ECONOMIC COOPERATION

As we have seen earlier, the Foreign Loan Guarantee and Mutual Assistance Fund is an “établissement public international”. One of the legal features of this type of international organization is to be found in the “special purpose” that each of them must be assigned to achieve. The Fund's specific purpose, as stated in Art. 2 of the Convention, is to guarantee foreign loans designed to finance agricultural, industrial, or commercial investments. By 1968, however, the Fund had broadened the scope of its activities. Beside granting guarantees, it has undertaken to stimulate and eventually sponsor a variety of endeavors by the Member States to improve economic research and coordination of national projects.

One might raise the question whether this enlargement of activities is consistent with the specific purpose for which the Fund was created. In fact, the Preamble of the Convention spells out the goals of the Fund in such broad terms as “to coordinate the efforts of the Member States in order to promote rapid economic growth.”104 The concept of “établissement public international” is flexible enough to make possible an extension of the activities of the Fund as long as this does not conflict with the objectives it has to pursue. An example of this flexibility can be found in the evolution of the European Investment Bank, an établissement public international, created under Art. 129 of the Economic European Community Treaty. The initial task of this Bank was to grant loans to projects for converting enterprises or for creating new activities which are called for by the gradual establishment of the Common Market. Since 1963, however, the Bank has been involved in the assistance program offered by the EEC to the less developed associated countries.105

In the preface to the 1968 annual report on the activities of the Fund, Mr. H. Diori, President of the Republic of Niger, stressed that “while the financial guarantees constitute the major aspect of the action of the Fund, 1968 is characterized by the role the Fund played in the field of economic cooperation among the Member Countries.”

Since each of the five countries of the Entente Group has a small population and a narrow domestic market, it is important that each of them take into account in its investment policy the major investments

104. Preamble, para. 4.
realized in the area. Up to 1966, however, no organization or committee whatsoever existed within the Group to facilitate any sort of coordination of national projects. This is a reason why the Fund undertook this kind of action. It stands in a good position to conduct or supervise economic studies. This part of its activities is actually closely related to its basic financial mission. Insofar as it is designed to facilitate the financing of profitable economic projects, it can help research the best possibilities and try to maximize their usefulness by preventing duplication in the area of the Group. This new role of the Fund was officially acknowledged by the five Chiefs of State at a meeting of the Council held in Ouagadougou in November, 1968. While it is true that the Fund cannot afford to finance expensive economic studies, it stands in a better position than the individual governments to obtain technical and financial assistance from foreign countries or international organizations. The United States, through the Agency for International Development, and France, through the Aid and Cooperation Fund, have already provided the Fund with assistance to conduct economic studies. The annual report for 1968 stresses that contacts were recently established with the World Bank Group.

In 1968, the Fund undertook to conduct an economic study on livestock, one of the most important products of the area. Two outside countries, Mali and Ghana, have been associated with the Group for the purpose of this market study. Niger, Upper Volta, and Mali are traditional producer countries whereas Dahomey, Ivory Coast, Togo, and Ghana import their needs in livestock from the former countries. The purpose of the study is twofold. The first is to determine, from a general standpoint, the situation and the prospects of the livestock market in the area; this part of the study was financed by the French ACF and conducted by a French corporation. The second part of the study is designed to research the possibilities of creating meat processing plants; it was financed by the United States AID and assigned to an American company. The major idea underlying this operation is to determine the best locations for the plants so far as profitability and usefulness for the whole area are concerned. The final report was completed by the end of 1970 and was submitted to the Council in 1971. After studying the report’s recommendations, the Council will have to decide on its course of action.

This same type of endeavor to coordinate national investment policies was made by the Fund with regard to the cement production. Important

107. Thomas Miner Co. from Chicago.
deposits of limestone were recently discovered both in Dahomey and in Togo. The problem is that the market is too narrow to support several big plants even though the Ivory Coast can absorb substantial quantities of cement. In 1968, the Fund caused the creation of a joint venture in which the government of Dahomey, the government of Togo, and two private companies are associated to determine the best possible location of the plant(s) as well as the capacity.

The third sector in which encouraging results have been obtained is tourism. On the proposal of the Administrative Secretary of the Fund, the Council passed in January 1968 a resolution whereby an Interstate Technical Council for Tourism in the Entente Group was created. This Council is designed to determine and promote a common policy for the development of tourism in the area. The 1968 resolution states that the Management Committee of the Fund shall pay the closest possible attention to the applications for guarantee which will be related to a project recommended by the Council for the development of tourism.

These three examples illustrate the avenues of action chosen by the Fund to extend economic coordination among the Member States. It has already been suggested that it should undertake to coordinate the development plans of the five countries. In this respect, it seems reasonable to suggest that the proper operation of the Fund will inevitably lead to some sort of coordination of the economic policies of the member countries, for one of the purposes of the Fund is to promote complementary projects in the area of the Group. It is likely, however, that this effort will be made through a functional approach rather than a formal or active process since the Fund has no power to influence directly the preparation or the implementation of the national development plans.

On January 12, 1967, the Management Committee of the Fund created an “Intervention Budget”, the purpose of which is to assist the States in financing the preparation of projects that will eventually be submitted to the Fund for the granting of a guarantee or to an international organization such as the International Bank for Reconstruction and Development. This Budget is financed by the interest of the Fund’s capital after deduction of the operation costs of the Administrative Secretary. The sum thus collected is still small (19 million francs CFA in 1969) but is going to grow in proportion of the increase of the overall capital.

The distinction existing between the “economic coordination” activities of the Fund and its “technical assistance” activities ought to be emphasized. In the former case, the Fund conducts or supervises economic studies of common interest for the Group but does not itself finance the

110. ADMINISTRATIVE SECRETARY, supra note 108, at 5.
operation whereas in the latter case it directly sponsors the preparation of a particular project.

In 1967, the government of Niger entered into a contract with the British corporation Balkhany Ltd. to establish a water detection program. The cost of the operation, $320,000, was to be spread over a 3-year period. The first annuity was paid by Niger in 1968; but, in order to spread the debt of this country over a longer period, the Fund agreed to pay the two next installments. Niger is to reimburse the Fund in 1971 and 1972.

In 1968, the Fund financed the technical study related to the second agro-industrial complex for which a loan guarantee was granted in 1969. This is the type of action that the Fund should emphasize in the future. Since the resources available for this Intervention Budget will remain rather limited, it cannot really diversify the range of its assistance program. Consequently, it seems that the most useful action it could undertake in this respect is to help in financing the preliminary studies of projects which are eligible for a loan guarantee.

V. CONCLUSION

Several observations can be drawn from the study of the Foreign Loan Guarantee and Mutual Assistance Fund of the Entente Group.

The contribution of the Fund to the problem of the protection of foreign capital in developing countries is significant but restricted to a limited area. The stringent obligations taken towards foreign capital holders by the Member Countries through the Fund are acceptable to them because of the actual community of interest that exists among them at the level of the regional grouping. Developing countries have to face the problem of striking a balance between the need for foreign capital and the willingness to preserve national independence, between the incentives designed to attract an inflow of capital and the regulations designed to control foreign ownership. The creation of the Fund is an attempt by five countries to use the regional approach to help strike this balance; the granting of a multinational loan guarantee on the one hand and the local ownership requirement on the other hand are the two major techniques used by the Fund in this respect.

It is noteworthy that whereas all other plans for protection of foreign capital are sponsored by capital-exporting countries, the resources of the Fund are mostly of African origin. This indicates the concern existing among the countries of the Conseil de l'Entente to contribute to the solution the problem of the protection of foreign investments.

The Fund's scope of action is rather limited, however, since it deals only with foreign loans designed to finance enterprises run by domestic investors. This is the reason why the guarantee can be "simple, reliable
1971/Guarantee Fund

and administratively fast moving”. A system of protection of direct investments cannot be based upon those principles for the problems are more complicated than in the case of loans; the difficulties raised by the evaluation of a loss or by the evaluation of the time within which an expropriated enterprise ought to be indemnified, for instance, cannot be treated according to the automatic system which characterizes the operation of the Fund.

With respect to the Fund’s contribution to economic cooperation among the Entente Group countries, the most interesting aspect of the Fund has been the informal and functional approach it has adopted to handle the problem of economic coordination. Since its initial purpose was a financial one, the Fund does not have specific powers to accelerate cooperation among the five economies. However, a functional approach seems to suit well the present needs of West African countries. The steady increase of the Fund’s resources will strengthen its role in the progress of the Group toward economic integration. But since this role is informal and since it is not supported by a solid legal basis, it will be subject to the willingness of the States to let it operate properly. In this respect, the Fund is an experimental organization. The genuine economic integration of the Entente Group economies will be made through a more elaborate and adequate organization, but the Fund will have contributed substantially to this achievement.