The European Journal of International Law Vol. 34 no. 2

Foreign Investors of the World, Unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958–1968

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Abstract

This article studies lobbying efforts by the actors that investment treaties protect – namely, foreign investors. It uses a legal-historical approach to analyse the activities of the International Association for the Promotion and Protection of Private Foreign Investments (Association internationale pour la promotion et la protection des investissements privés en territoires étrangers or APPI), a transnational business interest association that lobbied for better protection of private foreign investment under international law. The article considers the role of this group in lobbying for three multilateral investment treaties (an investment code, investor-state arbitration and investment insurance) during the 1950s and 1960s, using unexplored archival sources. The article makes three substantive contributions to the literature. First, it shows that the key actors involved in APPI were a transnational advocacy network of businessmen and lawyers at multinational companies, mainly in the oil and banking sector. Second, it shows how these two types of actors (businessmen and lawyers) acted symbiotically. The businessmen provided access to policy-makers and introduced company lawyers into the policy-making cycle. The company lawyers provided expertise and specific legal texts with which civil servants could work. Third, it argues that, despite the group members' common goal to improve foreign investment security, competing individual initiatives and institutional competition, next to state preferences, often impeded more effective lobbying.

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1 Introduction

On 8 December 1958, nine businessmen met in Geneva, where they were brought together by Pierre Piffault, a legal counsel at the Compagnie française de pétrole (CFP), the predecessor of TotalEnergies. On that day, they signed the articles of association for an International Association for the Promotion and Protection of Private Foreign Investments (Association internationale pour la promotion et la protection des investissements privés en territoires étrangers or APPI), whose goal it was, as stated in Article 2, to 'study [...] all conditions of any nature whatsoever, both national and international, which promote or impede the free flow of private investments, as well as the study of all recommendations or obligations of such nature as to encourage such investments by ensuring their security'.[1]

The organization's first two resolutions in 1959 were entitled 'on the principles of international law relating to private foreign investments' (Resolution no. 1) and 'on international arbitration and on an international guarantee fund' (Resolution no. 2).[2] These two resolutions proposed three pathways to improve, multilaterally, the legal protection given to foreign investment. First, in Resolution no. 1, there was the idea of a multilateral charter with substantive investment provisions, which ended with the failure to sign a Convention on the Protection of Foreign Property at the Organisation for Economic Co-operation and Development (OECD) during the period 1957–1967. Second, in Resolution no. 2, there were attempts to conclude a multilateral investment insurance agency, which failed but which were eventually picked up again in the 1980s and led to the creation of the Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group, in 1988. Third, also in Resolution no. 2 but more successfully, there was another proposal doing the rounds in the 1960s with the idea to create new institutional machinery that would allow individual investors to stand against states in case of investment disputes, which led to the 1965 ICSID Convention.[3]

While recent literature in international investment law (IIL) has already started analysing the activities of APPI,[4] the group has not been studied yet from the perspective of its internal archival records. This article aims to fill that gap. I answer the following questions: why was this group created and how did it function; what was its role in the three multilateral IIL initiatives (a code, investor-state arbitration and a multilateral guarantee fund) of the 1950s–1960s; and which factors helped it be or impeded it from being an influential lobbyist? I thereby seek to broaden our perspective of IIL by looking at how the actors that receive privileged rights from IIL – namely, the foreign investors – have contributed to shaping the regime. The period of the 1950s–1960s, on which this article focuses, has been described as a critical juncture for IIL, when 'a broader than normal range of feasible options' was possible, and the choices made 'had a significant impact on the path-dependent development

1 The original, signed, copy of these articles can be found in 50ZZ546/15, Archives TotalEnergies.
2 The stenographic record can be found in 50ZZ546/12, Archives TotalEnergies.
3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159.
4 N.M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (2021); T. St. John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018).

of an institution'.[5] Empirical evidence from various archives helps to understand why the rules are what they are and why the investment treaty regime operates in a certain way. This examination offers a new perspective that may contribute to a critical evaluation of the law. For example, it can show how and why a certain provision or idea became ingrained in IIL and the interests or politics that stood behind it, which might or might not align with what one considers important nowadays.

And the choices made in IIL treaty instruments during the 1950s–1960s certainly do matter for present-day discussions. Previous research has suggested that historical sociology does better than a rational design model does at explaining why certain language gets reproduced in investment treaties. Due to efficiency considerations, socialization processes and cognitive constraints, investment treaty language tends to be reproduced over time.[6] The investment treaties we negotiate today are grounded in the language of the past. To a certain extent, the same holds for both investor-state dispute settlement (ISDS) and international investment insurance. For example, during the current ISDS reform negotiations at UNCITRAL, most states are clearly 'incremental' (pleading for modest reforms) or 'systemic' reformers (replacing arbitrators by judges and a two-tiered system) instead of 'paradigm shifters' that want to do away with the system of ISDS itself,[7] and, clearly, the fact that ISDS 'has always been there' (or at least since 1965) constrains how many negotiators imagine change.

To answer the research questions, I have used archival records at several public and private archives. The most important source are the files from Büro Hermann J. Abs at the Archiv der Deutschen Bank. Abs, who held various leading positions at the bank from 1937 to 1976 (and remained honorary president after), was known for keeping a meticulous record of his correspondence and, as a leading member of APPI, left an astonishing amount of material from the association's creation in 1958 up until his death in 1994. Another critical sector of APPI – namely, the oil companies – can be primarily traced using two archives. The Archives Historiques of TotalEnergies in Paris hold very detailed material on APPI from 1958 to 1962, as APPI's secretary-general until 1962 (Pierre Piffault) was also working at the CFP. The interests of Shell are more difficult to trace as the company does not allow external researchers to access its archives. The second-best alternative for this information was the personal archive of the Dutch liberal politician Dirk U. Stikker, who was a member of APPI's Directing Committee from 1964 to 1970 and, during that time, also a director at Shell. I traced Swiss business interests at the Institut für Zeitgeschichte, which keeps the archive of Vorort (nowadays EconomieSuisse), the most important Swiss business interest association (BIA). These sources have allowed me to expand our knowledge of APPI significantly. At the same time, one must acknowledge the limits of the archive. Abs' records, for example, are a reflection of what he considered important to keep (for

[5] St. John, *supra* note 4, at 28–29.

[6] Alschner, 'Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design', in M. Hirsch and A. Lang (eds), *Research Handbook on the Sociology of International Law* (2018) 347.

[7] On this characterization of reform camps, see Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', 112 *American Journal of International Law* (*AJIL*) (2018) 410.

example, focusing on the multilateral investment convention) and what not to keep (for example, keeping more outgoing rather than incoming correspondence).[8] Hence, the absence of evidence cannot always be taken as evidence of absence.[9]

The article proceeds as follows. In section 2, I briefly review the existing literature on business lobbying in IIL and on APPI. I then propose the concept of a transnational advocacy network as the best way to understand the group. In section 3, I reconstruct the founding of APPI in 1958, showing how a combination of Anglo-Dutch and French oil companies teamed up with European banking interests and other multinationals in creating an association to coordinate lobbying for the three multilateral investment law initiatives. I also briefly describe how the organization worked, focusing mainly on the key businessmen and lawyers involved. In section 4, I assess the involvement of APPI and its members in three important multilateral investment law initiatives. Here, I deal in turn with a multilateral investment charter, an investor-state arbitration centre and a multilateral investment insurance agreement. In the final subsection, I summarize what the three case studies teach us about APPI and business lobbying and outline possibilities to assess other, more indirect, ways in which APPI could have been influential. I then briefly conclude in section 5.

2 APPI as a Transnational Advocacy Network

Only a few scholars so far have zoomed in on the question of the private interests behind investment treaties. Most of this work has shown that business in both the USA and the European Union (EU) has tended to have only a marginal interest in bilateral investment treaties (BITs) or does not necessarily know much about the content of BITs.[10] Some evidence suggests that business actors were more actively involved in multilateral IIL negotiations[11] and the early years of the investment treaty regime.[12] There is some existing literature on APPI itself. Recently, Hervé L'Huillier (then TotalEnergies' archivist) referred to the organization as one of the several means by which TotalEnergies addressed political risks during the 1950s–1960s,[13] Taylor St.

[8] Hermann J. Abs' archive also gives the impression of a man who was well aware of his historical significance and the possibility that researchers might one day enquire into his life. It is difficult to assess if Abs might have (consciously) removed records on the APPI, although it must be remembered that investor protection was (certainly back then) generally not a politically salient issue in Germany, reducing the chances that this happened.

[9] On the promises and pitfalls of business archives more broadly, see Decker, 'The Silence of the Archives: Business History, Post-Colonialism and Archival Ethnography', 8 *Management and Organizational History* (2013) 155.

[10] Basedow, 'Business Lobbying in International Investment Policy-Making in Europe', in D. Dialer and M. Richter (eds), *Lobbying in the European Union: Strategies, Dynamics and Trends* (2019) 389; Chilton, 'The Political Motivations of the United States' Bilateral Investment Treaty Program', 23 *Review of International Political Economy* (2016) 614; J.W. Yackee, *How Much Do U.S. Corporations Know (and Care) about Bilateral Investment Treaties?* (2010), at 31, available at https://ccsi.columbia.edu/content/no-31-how-much-do-us-corporations-know-and-care-about-bilateral-investment-treaties-some.

[11] Walter, 'Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment', in D. Josselin and W. Wallace (eds), *Non-State Actors in World Politics* (2001) 150.

[12] J. Bonnitcha, L. Poulsen and M. Waibel, *The Political Economy of the Investment Treaty Regime* (2017), at 192.

[13] L'Huillier, 'Réponses de la Compagnie française des pétroles à la montée des risques politiques dans le monde pendant les Trente Glorieuses. Avancées et limites', 6 *Les cahiers Irice* (2010) 79.

John noted the organization's role as a hub for transnational investor coordination,[14] and the APPI plays an important role in a recent monograph by Nicolás Perrone.[15] Quinn Slobodian, whilst not discussing APPI itself, links a few of APPI's key members (Hermann J. Abs and Lord Hartley Shawcross) to neo-liberal intellectuals and their proposals for a universal investment code developed within the International Chamber of Commerce (ICC).[16]

I engage with, and expand on, these authors' findings by using the APPI members' archives. The main focus of St. John's work was the role of World Bank officials in using agenda-setting techniques and brokering to facilitate the creation of the ICSID Convention.[17] Once the World Bank took over work on the ICSID Convention the APPI indeed mostly kept its hands off ISDS, as I show in section 4.B. However, St. John also states that her approach 'may have understated private sector interests',[18] and this article complements St. John's work by showing how and why private business was involved in the precursors to the ICSID Convention. Perrone centres APPI (which he dubs the 'Geneva Association'), claiming that the businessmen involved with this group helped create a certain investor-friendly 'legal imagination' about foreign investor relations in the 1950s, which still thrives today.[19] He defines this concept as 'the space in which our ideas about the limits and purposes of property take shape', a way of thinking rather than tracing concrete causal relationships.[20] As I show in section 3, I agree with Perrone that APPI represented a much broader business coalition than just being about Abs and Shawcross, the two individual members of the group who have received the most attention so far.[21] His most recent work has also started centring the role of company lawyers, rather than just the businessmen themselves, an approach that this article shares.[22] At the same time, Perrone largely sees the businessmen in his story as a collective. This article looks at the internal discussions of APPI members, showing many disagreements amongst the businessmen. Some businessmen believed an investor code had to be prioritized, others thought investor-state arbitration was key and still others prioritized work on an international investment insurance agency. I will show how businessmen sometimes hindered each other's lobbying efforts by jousting for control of APPI's agenda. The concept of legal imagination covers both direct and indirect and more diffuse forms of influence. This article focuses on three concrete legal projects, not the many other ways in which APPI members might have influenced the discourse surrounding IIL. Because I do not deal much with indirect influence, I remain agnostic on Perrone's claim that APPI

[14] St. John, *supra* note 4, at 84–87.
[15] Perrone, *supra* note 4.
[16] Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), at 121–145.
[17] St. John, *supra* note 4, at 14.
[18] St. John, 'Review of Nicolás Perrone, Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules', 33 *European Journal of International Law* (*EJIL*) (2022) 304, at 307.
[19] Perrone, *supra* note 4, at 3.
[20] *Ibid.*, at 4.
[21] *Ibid.*, at 8.
[22] Perrone, 'Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment', 7 *Business and Human Rights Journal* (2022) 375.

businessmen succeeded in promoting an investor-friendly legal imagination and that, by implication, IIL would have looked very different without them.

Slobodian's work is different. He centres on another group of actors to understand the early course of IIL. For him, it was some neo-liberal intellectuals who '[wrote] first drafts for postwar international investment law'.[23] He claims that the ideas of the neo-liberal thinker Michael Heilperin, the main drafter of the ICC's 1949 Code of Fair Treatment for Foreign Investments, lived on via the intermediary of Hermann Abs and the ordo-liberal German economy minister Ludwig Erhard in later multilateral and bilateral investment treaties.[24] This article argues in favour of a stronger separation between neo-liberal thinkers and the businessmen behind APPI, who were, above all, people looking for practical solutions to business problems. Even though neo-liberal political thinkers might have been in sympathy with some of these businessmen's ideas, in other cases, such as in international investment insurance, which created an extra layer of state bureaucracy, some neo-liberal thinkers opposed such plans.[25] I also show in section 4.A the differences between the 'APPI proposal' for a multilateral investment code and the ICC's work. Finally, while recognizing again that absence of evidence does not constitute conclusive evidence of absence, in none of the archival materials consulted did APPI businessmen refer to, or were directly in contact with, neo-liberal intellectuals such as Röpke or Heilperin.

This contribution argues that APPI can best be understood as a transnational advocacy network (TAN) that was formed to coordinate the lobbying activities of those firms most interested in IIL during the 1950s – namely, (i) oil companies; (ii) large banks; and (iii) multinational companies with a strong presence outside their home market. The power of APPI lay in the fact that it brought together businessmen who had access to policy-makers and company lawyers with legal expertise. The literature on TANs has greatly expanded ever since Margaret Keck and Kathryn Sikkink launched the term to define 'those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services'.[26] In launching the concept, Keck and Sikkink heavily focused on values and principles, excluding business groups. Yet, as Susan Sell and Aseem Prakash have shown, this separation between non-governmental

[23] Slobodian, *supra* note 16, at 125. Tzouvala has argued in favour of a similar link between the first German and Swiss BITs and the ordoliberal thinker Wilhelm Röpke (1899–1966), in Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale', in J.D. Haskell and A. Rasulov (eds), *New Voices and New Perspectives in International Economic Law* (2020) 37.

[24] Slobodian, *supra* note 16, at 136–143. The code is published in ICC, *Brochure 129 – Fair Treatment for Foreign Investments: International Code* (1949). It is reprinted in UNCTAD, *International Investment Instruments: A Compendium. Volume III: Regional Integration, Bilateral and Non-Governmental Instruments* (1996), at 273–278.

[25] For example, Afred Müller-Armack, a German neo-liberal thinker at the Bundesministerium für Wirtschaft, was opposed to a German investment insurance system in the 1950s on exactly the grounds that this would be an example of state interference with the German market economy. See 'Ergebnisprotokoll: Sicherheitsleistungen und Gewährleistungen des Bundes für Kapitalbeteiligungen im Ausland; Besprechung am 26. Oktober 1956', 8 November 1956, B 102-27058, Bundesarchiv(BArch).

[26] M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998), at 2.

organizations (NGOs) and business does not hold: both groups usually combine principled and more instrumental beliefs, using similar strategies. TANs can also be business groups, as Sell herself has convincingly shown for the intellectual property rights regime.[27] Such groups are particularly likely to arise where domestic lobbying is ineffective to resolve a certain conflict, when 'political entrepreneurs' believe that networking will further their mission and where international contacts allow for forming and strengthening such networks.[28]

APPI fits the bill on each of these counts. The problem of protecting foreign property had become global after communist takeovers in Eastern Europe and the start of decolonization. There was an interest for global business to be active in this area, and the creation of a host of new international economic institutions (for example, the Bretton Woods institutions globally and the Organisation for European Economic Co-operation (OEEC) / OECD regionally) obviated the need for a transnational approach. TANs existed at various times and in multiple sub-regimes of international economic law. To some extent, one 21st-century equivalent in IIL would be the European Federation for Investment Law and Arbitration, which has brought together many of the law firms that are the primary providers of ISDS litigation services and has taken a rather critical approach towards paradigmatic ISDS reform.[29] TANs also have various advantages for their participants as they are voluntary organizations (making an exit easy), serve as hubs for information sharing, can be used to build trust among participants and are a flexible and adaptable organizational form.[30] Furthermore, whereas individual businesses often do not enjoy direct access to international organizations, choosing another organizational form can help to provide access whilst obscuring the identity of the profit-seeking entity behind the NGO, a phenomenon known as 'astroturf activism'.[31]

APPI can best be understood as a two-layered TAN. The first layer consisted of businessmen, often chief executive officers (CEOs) from large companies. Through these individuals, APPI enjoyed access to policy-makers, most strongly in the case of Germany and Hermann Abs. But access in itself does not suffice. The fact that TANs have a particular interest in international law is not surprising given their global agendas, and, through agenda setting, information provision and the drafting of legal rules, to name a few, they can contribute to building international legal rules.[32] What

[27] S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003); Sell and Prakash, 'Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights', 48 *International Studies Quarterly* (2004) 143.

[28] Keck and Sikkink, *supra* note 26, at 1–38.

[29] See European Federation for Investment Law and Arbitration, 'About EFILA', available at https://efila.org/about-efia/.

[30] Sikkink, 'The Power of Networks in International Politics', in M. Kahler (ed.), *Networked Politics: Agency, Power, and Governance* (2009) 228.

[31] Durkee, 'Astroturf Activism', 69 *Stanford Law Review* (2016) 201.

[32] Sikkink, 'Transnational Advocacy Networks and the Social Construction of Legal Rules', in Yves Dezalay and Bryant Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (2010) 37.

is needed is the expertise to change general ideas (*in concreto*, better investor protection) into specific legal rules that can be discussed with civil servants and diplomats at ministries and international organizations. Often, these people are versed in this type of legal language (for example, in the case of Germany, a 1957 sample concluded that more than 50 per cent of civil servants at the Ministry of Economics had some form of legal background).[33] In short, what one needs are good lawyers. These are the company lawyers at large firms such as Shell, Deutsche Bank or Standard Oil, people whose personal ideological inclinations are not known, who remain in the limelight and who translate the wishes of their CEOs and directors – often, practical men less versed in the subtleties of international law – into legal text.

Several reasons made it easier than it would be nowadays for the network to exploit its access and expertise. In marked contrast to the 21st century, IIL was not a very politically salient issue in capital-exporting countries. True, very specific demands, such as the return of German property confiscated during the war, were politically salient.[34] But more abstract proposals such as the three multilateral investment law initiatives were much less so, and the press reports in Abs' archive show that mostly business press (for example, *Handelsblatt*, *Börsenzeitung*, the *Financial Times* and so on) wrote about these proposals.[35] Likewise, discussions on the code, arbitration and insurance were held mainly at the OECD and the World Bank, either Western or Western-dominated institutions, while Abs strenuously lobbied against code discussions at the United Nations (UN).[36] As a result, and unlike the UN Code of Conduct negotiations in the 1970s (let alone the 1990s negotiations on a Multilateral Agreement on Investment),[37] there was no solid non-state counter-movement against the ideas proposed by APPI and no 'competing imaginery', as Perrone calls it.[38] As has been shown in international relations literature, when the public cares less about a matter, managerial organizations will find it easier to exercise disproportionate influence.[39]

There are two important limitations to this article. First, there is the measuring of lobbying[40] success. To define influence in this article, I focus on causal claims – namely, 'an actor's ability to shape a decision in line with her preferences, or, in other words, a causal relationship between the preferences of an actor regarding an outcome and the outcome itself'.[41] APPI promoted the negotiation and conclusion of three multilateral

[33] B. Löffler, *Soziale Marktwirtschaft und administrative Praxis: das Bundeswirtschaftsministerium unter Ludwig Erhard* (2002), at 164.

[34] Kobrak and Wüstenhagen, 'The Politics of Globalization: Deutsche Bank, German Property and Political Risk in the United States after World War II', 49 *Entreprises et Histoire* (2007) 53.

[35] Abs' archival folders often contain a separate listing on '*Presse*' (Press).

[36] See Letter from Hermann Abs to Heinrich von Brentano (then German Minister of Foreign Affairs), 12 July 1958, B56, REF.404_IIIB3_62, Politisches Archiv des Auswärtiges Amts (PA AA).

[37] Walter, *supra* note 11.

[38] Perrone, *supra* note 4, at 81–95.

[39] P.D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (2010).

[40] Lobbying is defined here broadly – namely, as 'all actions of interest groups that are aimed at influencing public policy'. See Leech, 'Lobbying and Influence', in L. Sandy Maisel, J.M. Berry and G.C. Edwards III (eds), *The Oxford Handbook of American Political Parties and Interest Groups* (2010) 534, at 535.

[41] Dür, 'Measuring Interest Group Influence in the EU: A Note on Methodology', 9 *European Union Politics* (2008) 559, at 561.

instruments. I assess its success at doing so, looking at the various direct roles that business can play in international treaty negotiations – namely, as *demandeur*, drafter, negotiator, promoter or funder of these instruments.[42] But this is not the only way an organization can be said to be influential as 'power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A'.[43] Concretely, even though neither a multilateral investment insurance agency (until the 1985 MIGA Convention) or a multilateral investment convention came into being during APPI's intensive period of lobbying, national investment insurance mechanisms and bilateral investment treaties did arise.[44] Even though, as I will show, APPI was not much involved in these bilateral mechanisms itself, its multilateral proposals might still have influenced the content of these bilateral treaties and mechanisms, and the 'discursive power' of APPI in shaping debates might have cast a long shadow.[45] I focus on three specific legal projects, not APPI's role in influencing the discourse of IIL as a whole. The second limitation is that APPI was not the only business interest association interested in investment law. At the level of global organizations, there also exists the far-better-known ICC, which was created in 1919. Whereas I deal with the interaction, cooperation and competition between the ICC and APPI, there is certainly a need for further research on the role of the ICC and, in particular, its Committee on Foreign Investments and Economic Development. Equally, national and sectoral organizations sometimes had an interest in investment law too. APPI was an umbrella organization with constituent 'pillars' that sometimes acted inside, and sometimes independently from, APPI. The focus of this article is squarely on the umbrella organization itself and less so the 'oil pillar' and the 'banking pillar', which require separate research.[46]

3 Creating and Governing an Investors' Club

A *A Meeting of Minds in Geneva*

APPI's founding meeting took place in Geneva in December 1958. Although nine personalities from the European and American business world were present, the creation of APPI can be brought back to a meeting of minds of three key players: Hermann Abs, Lord Shawcross and the Compagnie Française de Pétrole, represented by René Massigli and Pierre Piffault. Abs' interest in protecting foreign property must be seen in the context of the confiscation of German property abroad during World War II.

[42] Durkee, 'The Business of Treaties', 63 *University of California Los Angeles Law Review* (2016) 264, at 294.

[43] Lowery, 'Lobbying Influence: Meaning, Measurement and Missing', 2 *Interest Groups and Advocacy* (2013) 1, at 7.

[44] Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention) 1985, 1508 UNTS 99.

[45] N. Perrone, 'How Corporations Shape International Economic Law: A Reply to Taylor St John', *EJIL: Talk!* (22 September 2022), available at www.ejiltalk.org/how-corporations-shape-international-economic-law-a-reply-to-taylor-st-john/.

[46] For one such study, see S. Pitteloud, *Les Multinationales Suisses dans l'arène Politique (1942–1993)* (2022).

Abs, a leading German banker whose star quickly re-established itself after denazification proceedings had ended in acquittal in 1948, was close with Chancellor Konrad Adenauer. Abs, who, like Adenauer, was a Rhinelander, conservative and catholic, became a very close economic adviser of the chancellor during the 1950s–1960s.[47]

In 1955, Adenauer tasked Abs with the issue of German property confiscated during the war in the USA and its possible return to German investors' hands. These negotiations, during which Abs continuously stressed the principle of the inviolability of private property and adequate compensation for already liquidated property, seem to have harnessed his interest in the legal protection of foreign property.[48] Rather than the context of decolonization (although the Suez crisis gave Abs even more incentive),[49] this was the primary reason for Abs to create the Cologne-based Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e.V in March 1956.[50] The organization focused on the elaboration of a 'Magna Carta', a draft for a multilateral investment treaty, of which the first version was officially published in November 1957, and the return of German property in the USA.[51] The Gesellschaft concealed its interest in the recovery of German property in the USA, and this very salient political issue only ended when President John F. Kennedy ruled out the return in 1962 (although Deutsche Bank vowed it would still take up the issue later on).[52] Ostensibly, the Gesellschaft focused on the investment treaty, but, for Abs, this included a satisfactory solution to the 'American problem'. To write the convention itself, Abs retained the services of Hans Dölle, then the director of the Max Planck Institute for Comparative and International Private Law in Hamburg.[53]

Other than Abs, it was the oil sector that was most concerned about the state of the protection of foreign property under international law, and decolonization took centre stage in this discussion.[54] The situation that all Western oil companies were facing was quite similar. Lord Shawcross, a former chief prosecutor for the United Kingdom (UK) at the Nuremberg trials, had become involved as a lawyer (and later director)[55] for Shell in some of the early post-war oil arbitration cases of the 1950s.[56] Oil companies were especially shocked when, in 1956, the Suez crisis erupted and oil supplies were disrupted. A consortium of American oil companies, supplemented by British Petroleum (BP), Shell and the CFP, quickly came together to consider their

47 L. Gall, *Der Bankier: Hermann Josef Abs; eine Biographie* (2006), at 121–206.

48 H.J. Abs, *Zeitfragen der Geld-Und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (1959), at 43–55.

49 H.J. Abs, *Der Schutz Wohlerworbener Rechte Im Internationalen Verkehr Als Europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (1956).

50 On the founding of the Kölner Gesellschaft, see, in particular, V01/2252, Historisches Archiv der Deutschen Bank (HADB).

51 Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V, *Heft 1 – Gründung und Ziele* (1957).

52 On this long-standing diplomatic conflict and Abs' involvement, see Kobrak and Wüstenhagen, *supra* note 34.

53 Letter from the Kölner Gesellschaft to members, 15 May 1956, V01/2252, HADB.

54 L'Huillier, *supra* note 13, at 85; Perrone, *supra* note 22, at 3.

55 H. Shawcross, *Life Sentence: The Memoirs of Lord Shawcross* (1995), at 257.

56 Leiter, 'Protecting Concessionary Rights: General Principles and the Making of International Investment Law', 35 *Leiden Journal of International Law* (2022) 55.

options, one of which was a proposed pipeline going through Syria and Turkey to the Mediterranean. However, oil companies demanded additional guarantees. The British international lawyer Sir Elihu Lauterpacht, a friend of Shawcross, proposed that the oil companies, next to their contracts with the transit states, could also convince the states in which they were incorporated to conclude a treaty with the relevant Middle Eastern states, including an umbrella clause (so that a breach of a pipeline contract would also constitute a breach of the interstate treaty) and reference to dispute settlement under the International Court of Justice (ICJ). The Turkish authorities refused, and the plan was shelved.[57]

This triggered different responses among oil companies and their lawyers. In the case of Shell, Shawcross developed a 'Convention on Foreign Investments' in 1957–1958, which was a very lean draft for a multilateral investment treaty in which the use of the umbrella clause (an affirmation of the principle of *pacta sunt servanda* for Shawcross)[58] was especially a novelty.[59] The CFP, meanwhile, created a business interest group of oil and mining companies in France called the Association de droit minier et pétrolier (ADMP) in 1956, which Piffault headed.[60] The ADMP organized a colloquium in Aix-en-Provence in May 1958 on the legal security of mining and oil investments internationally. The ADMP also decided to invite several foreign lawyers, including Shawcross. At this colloquium, the ADMP launched the idea to create 'a select committee, made up of Frenchmen and foreigners, which will look for the best solutions among the various international plans proposed'.[61] The seeds for APPI were sown. The French quickly started enrolling members for this new organization, and Abs was an eager candidate. He was already acquainted with Shawcross as the two of them had been working to combine their plans for a multilateral investment convention, eventually leading to the so-called Abs-Shawcross draft convention in 1959.[62] The French opted for an organization based in Geneva, with Eberhard Reinhardt, a Swiss national and banker at Crédit Suisse, as its first president. This allowed the

[57] On Lauterpacht's involvement, see Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', 20 *Arbitration International* (2004) 411, at 412, 418. On the proposal for a pipeline through Syria and Turkey, see Kasapsaraçoğlu, 'Oil Pipeline Projects through Turkey during the Suez Canal Crisis in 1956', 7 *History Studies International Journal of History* (2015) 99. The umbrella clause (also, *inter alia*, known as 'observance of obligations' clause), which can be found in many bilateral investment treaties (BITs), aims at securing the compliance of host states with the obligations they have towards investors from other contracting parties by elevating breaches of contract (for example, an agreement between the investor and the host state) to breaches of the BIT. For a general overview, see A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (2020), at 855–969.

[58] Shawcross, 'The Promotion and Protection of Private Investment in Foreign Countries', 266 *Comptes Rendus des Travaux de la Société Royale d'économie Politique de Belgique* (1959) 3, at 18.

[59] To my knowledge, the convention was never published. The draft of March 1958 can be found in the data accompanying St. John, *supra* note 4.

[60] 50ZZ572/15, Archives TotalEnergies.

[61] Association de droit minier et pétrolier, *Colloque d'Aix-En-Provence, 2–3 Mai 1958: Compte-Rendue Sténographique* (1958), at 262 (translation from French by the author).

[62] The text of this convention can be found in 'The Proposed Convention to Protect Private Foreign Investment: A Round Table: Introduction', 9 *Journal of Public Law* (1960) 115.

oil companies 'to avoid that the Commission should have any "smell of oil"',[63] and Switzerland also had benefits as a neutral state not tainted by colonialism. APPI was formally created in 1958, and the two resolutions mentioned earlier were adopted one year later.

B *APPI's Institutional Machinery*

As mentioned before, APPI is best understood as a two-tiered TAN consisting of businessmen with access and lawyers with expertise or, in APPI parlance, the Directing Committee and the Consultative Committee/Secretariat. The political organ of APPI was the Directing Committee. This organ was responsible for the general administration and management of the association (Article 11 of the articles of association) and designated a president and a secretary, whilst also having the right to appoint a steering committee and other ad hoc committees. During the first 10 years of APPI's existence, it usually met semi-annually. Following APPI's creation, Directing Committee members made efforts to enlarge APPI's reservoir of businessmen, and several key directors joined. Table 1 contains a list of the directors most closely involved in APPI's functioning during the period 1958 to 1968.

Given the character of the Directing Committee as a 'high-level' meeting place for businessmen, two other organs – the Secretariat and the Consultative Committee – did most of the substantive work. The Secretariat initially had a permanent presence in Geneva, Paris and New York. The central Secretariat was in Geneva, where Michael Brandon, a UK lawyer who had previously worked at the UN, dealt with much of the day-to-day work of the organization.[64] In New York, the key persons involved were Irene Winkelman and George W. Haight. Haight was closely involved in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[65] and head of the legal department of Shell in London during part of the 1950s. Finally, and as a direct result of the French origins of APPI, Piffault was appointed secretary-general of APPI in Paris, but the post was abolished in 1962 to drive down costs.

The Consultative Committee, created in 1962,[66] had one legal expert for each country with an APPI director. The group quickly became the forum where the directors' key confidants met before directing committee meetings, hashed out internal differences and provided flesh to the bones of the businessmen's meetings. Besides the general committee, ad hoc committees on various topics (for example, international arbitration, international guarantee funds and so on) were also created. Table 2 provides an overview of the key Secretariat and Consultative Committee

[63] Letters from Hermann Abs to A. Avon, 27 October 1958, and to Hartley Shawcross, 27 October 1958, V1/4403, HADB.

[64] An example of a monthly report by Brandon (for May 1960) can be found in V01/4404, HADB.

[65] Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, 330 UNTS 38; Grisel, 'Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', 28 *EJIL* (2017) 73, at 85.

[66] V01/4405, HADB. Before 1962, some key directors and their legal experts occasionally met in a 'steering committee'.

Table 1: 'The businessmen': Key members of APPI's directing committee

Name	Nationality	Information
Hermann Abs (1901–1994)	German	German banker (Deutsche Bank), Sprecher des Vorstands 1957–1967, Aufsichtsrat 1967–1976; APPI member 1958–1994; president 1974–1982; honorary president 1982–1994.
Victor de Metz (1902–1982)	French	French industrialist (CFP, including CEO 1945–1971); APPI member 1964–1974.
Arthur Dean (1898–1987)	US	American diplomat and lawyer (chairman Sullivan & Cromwell); APPI member 1958–1976.
Michael Haider (1904–1986)	US	American businessman (CEO Standard Oil 1965–1969); APPI member 1963–1969.
René Massigli (1888–1988)	French	French high-ranking diplomat (until 1956), adviser for CFP afterwards; APPI member 1958–1972.
Eberhard Reinhardt (1908–1977)	Swiss	Swiss banker (Crédit Suisse, including CEO 1963–1973); APPI president 1958–1974.
Jean Reyre (1899–1989)	French	French banker (Banque de Paris et des Pays-Bas, including CEO 1948–1966); APPI member 1959–1970.
Lord Hartley Shawcross (1902–2003)	British	Former Member of Parliament (UK) for St Helens 1945–1958 (thereafter Life peer, House of Lords); director at Shell 1961–1972; APPI member 1958–1990 (thereafter honorary member).
Dirk Stikker (1897–1979)	Dutch	Former Dutch minister of foreign affairs 1948–1952; NATO secretary-general 1961–1964; APPI member 1964–1970
Marcus Wallenberg Jr. (1899–1982)	Swedish	Swedish banker and business manager (including CEO Stockholms Enskilda Bank 1946–1958); APPI member 1960–1971.

members. To zoom in on one of them, John Blair worked as a lawyer at Shell and was close to the English and Shell-affiliated directors. In the biography of former ICJ President Robert Y. Jennings, Blair, a close friend of Jennings, is described as a 'lawyer whose skill was to operate effectively behind the scenes without attracting any fame for himself'.[67]

This institutional structure notwithstanding, it is best to view APPI as a weakly centralized business association. The Secretariat's small size stands in stark contrast to the ICC, whose headquarters in Paris employed no fewer than fifty-five people even before World War II.[68] As a result, APPI was 'an association behind which there [was] less of a large organization than individual personalities'.[69] This means that it is not always easy to distinguish between lobbying activities undertaken on behalf

[67] C. Jennings, *Robbie: The Life of Sir Robert Jennings* (2019), at 128.
[68] G.L. Ridgeway, *Merchants of Peace: The History of the International Chamber of Commerce* (1959), at 145.
[69] Letter from Eberhard Reinhardt to Pierre Piffault, 15 July 1959, 50ZZ546/32, Archives TotalEnergies (translation by the author).

Table 2: 'The lawyers': Key members of APPI's consultative committee and secretariat

Name	Nationality	Information
John R. Blair (1912–1989)	British	Lawyer at Shell 1958–1984; consultant to the ICC and the Confederation of British Industry, linked to the UK directors; APPI Consultative Committee member 1962–1974, afterwards an APPI member.
Michael Brandon (1923–2012)	British	British lawyer; UN official 1959–1957; International Bar Association (IBA)/International Law Association (ILA) representative post 1957; APPI secretary 1959–1970.
George W. Haight (1905–1983)	US	Expert in international arbitration, active at Shell's legal department during (at least) the 1950s; affiliated with APPI from 1959 to 1964; linked to the US APPI directors.
Hans Jakob Halbheer (1925–2022)	Swiss	Swiss lawyer; member of APPI's Consultative Committee 1965–1975, APPI member afterwards; APPI secretary-general 1982–1992; linked to Swiss directors.
Paul Krebs (?–1981)	German	German lawyer; head of the Corporate and Foreign Secretariat at Deutsche Bank post 1952 (end date unknown); Consultative Committee member 1962–1974; linked to German directors.
Hugo Lindgren (1924/1925–1999)	Swedish	Swedish banker; director at Stockholms Enskilda Bank; member of Consultative Committee (1964–1974); APPI member thereafter until 1985; also affiliated with the ICC and its Working Group on a UN Code of Conduct until (at least) end 1980s; linked to Swedish directors.
R.E. McCoy (?)	US	American lawyer, Standard Oil Europe manager in 1970s, possibly earlier; member of Consultative Committee 1967–1974; linked to American directors.
Pierre Piffault (?)	French	French lawyer, legal adviser at the CFP (1950s–1960s); secretary-general of the Association de droit minier et pétrolier 1957–1968; secretary-general of APPI (1958–1961); head of Consultative Committee 1962–1969.
Louis H. Sandberg (1902–1984)	Dutch	Dutch lawyer; worked at Bataafse Petroleum Maatschappij, an Indonesian subsidiary of Shell from at least the 1950s; APPI Directing Committee 1961–1964; APPI Consultative Committee 1964–1973 (head of committee 1969–1973).
Ulf Siebel (?–2008 or later)	German	German lawyer; worked at Deutsche Bank post 1958 (director of the Central Department of the bank's foreign branch); president of the Kölner Gesellschaft 1983 to end of the 1990s; APPI Consultative Committee 1964–1974 (initially as Krebs' alternate); APPI member afterwards.
Irene Winkelman (1924–2015)	US	Spokesperson and writer for the US oil industry (dates unknown); responsible for APPI office in New York 1959–1974.

of APPI and the individual initiatives of the APPI directors and the companies they headed. APPI existed until 2005 when it was dissolved.[70] It went through its first major reorganization in 1969 when some of the French members left. Although they ostensibly referred to the fact that APPI had completed most of its original mandate by 1969 in pleading for its dissolution, they were also resentful of how the French influence in APPI had declined.[71] A second reorganization happened in 1974. The 1974 reorganization qualitatively changed APPI. Some lawyers had remained in APPI from 1968 to 1974 in one (instead of several, as before) working group, but this group was disbanded in 1974. With only a yearly meeting of businessmen and a small secretariat remaining in operation after 1974, APPI now served as a forum where businessmen could 'quite informally, exchange views and information on current problems'.[72] For the lawyers involved, the demise of APPI as a lobbying group also meant that their preferred forum had changed. During the 1970s, the ICC's Committee on International Investment and Economic Development seems to have come to the fore again, and figures such as John Blair and Hugo Lindgren were actively involved in this committee.[73]

4 APPI's Work Programme: Convention, Arbitration and Guarantees

A *Case Study 1: The OECD Draft Convention*

First, there was the work on the OECD's draft Convention on the Protection of Foreign Property. The story here is fairly well known: Abs convinced the German government to submit on his behalf two drafts – one of his own in 1957 and the later 1959 draft cowritten with Shawcross – to the OEEC. These drafts formed the basis of intergovernmental negotiations, which continued to drag on and eventually ended with the OECD Council adopting a non-binding resolution, rather than a binding treaty, in 1967 in which general support for the ideas behind the convention was expressed.[74] Even though the OECD draft failed, APPI and its members were at the peak of their influence in these negotiations. Given that the convention was a 'legacy project' that preceded APPI but with most of the same transnational advocacy network involved, I first briefly turn to what happened outside and before APPI, highlighting the crucial symbiotic role between the businessmen and the lawyers.

[70] This information was kindly provided by A. Bischoßberger, last APPI secretary-general (1992–2005), by email, 9 February 2021 (on file with author).

[71] For the 1969 reorganization, see, in particular, V01/4413, HADB; V01/4414, HADB.

[72] 'Meeting of the Directing Committee held in London on Tuesday, 30 April 1974', APPI Doc. 5/74, 30 April 1974, V01/4417, HADB.

[73] For example, even in 1988, John Blair was still leading the International Chamber of Commerce's (ICC) Working Party on the UN Code of Conduct on Transnational Corporations negotiations. Hugo Lindgren was a member too. See ICC Doc. 191-24/41, 25 February 1988, 480.1.4.15.1.1.3, Archiv für Zeitgeschichte (AfZ): IB Vorort-Archiv.

[74] St. John, *supra* note 4, at 73–99.

As already mentioned, Abs' chief drafter Hans Dölle wrote the first draft convention, published in 1957.[75] A more extensive treatment of its content (as well as the Abs-Shawcross and OECD draft) can be found elsewhere,[76] but suffice it to say that this draft went significantly beyond established international law. Most significantly, it included a moratorium, with exceptions, on expropriating new foreign property for 30 years (the main part of the provision, Article 6, stating that 'property, rights and interests belonging to a national of one of the High Contracting Parties which have been invested within the territories of one of the other High Contracting Parties must not be expropriated by the latter Party during a term of 30 years after investment'). The convention also gave private standing to investors before an arbitration committee (Article 10). It also included a sanctions regime (Article 11) with a non-exhaustive list of measures that state parties could take in case of breaches of the convention (*inter alia*, revocation of most-favoured-nation (MFN) status, refusal to grant state loans and so on), which Abs himself called the economic equivalent of NATO.[77]

Shawcross clearly recognized the more explosive elements in Abs' draft, such as the economic sanctions, and his proposed 'Convention on Foreign Investments' was a much shorter, eight-article draft that purported to be a restatement of fundamental principles of international law.[78] Substantively, this draft very generally recognized the 'general principles' (Article 1) of the protection of foreign property (fair and equitable treatment, full protection and security, prohibition of unreasonable or discriminatory measures), and contained an umbrella clause (Article 2) as well as a full-compensation-for-expropriation clause (Article 3), backed up by state-to-state dispute settlement provisions (Article 6). It took Abs and Shawcross almost a year to hash out their internal differences, and the two finally arrived at the 10-article-long Abs-Shawcross draft Convention on Investments Abroad in early 1959. Many well-known investment law standards were present in this draft, such as fair and equitable treatment, full protection and security, a prohibition on unreasonable or discriminatory measures (Article 1); an umbrella clause (Article 2); and expropriation under strict conditions and upon payment of just and effective compensation (Article 3). It also included state-to-state dispute settlement via arbitration or the ICJ (Article 7(1)) as well as optional (if the host state agreed) investor-state dispute settlement (Article 7(2)).

Substantively, the umbrella clause took primacy. As mentioned by Sinclair (who enjoyed unique access to Lauterpacht's archive), this clause had been championed by Lauterpacht as far back as 1953, when he (unsuccessfully) attempted to include it in the settlement between the Anglo-Iranian Oil Company (later BP) and Iran. Lauterpacht had two goals: ensuring that breaches of investor contracts could become a matter of international, not solely domestic, law and adding the possibility of interstate dispute settlement.[79] The clause appeared in the Abs-Shawcross draft

[75] The text can be found in Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V., *supra* note 51, at 42–70.

[76] Perrone, *supra* note 4, at 68–80.

[77] Letter from Hermann Abs to George Ray, 16 January 1958, V01/4403, HADB.

[78] See note 59 above.

[79] Sinclair, *supra* note 57.

after Abs' team was convinced that it was a better alternative to its proposed 30-year moratorium on expropriations as the umbrella clause could offer more robust protection (and would also apply if an investor contract contained a moratorium clause).[80] Lauterpacht saw the clause as potentially having a broad scope, as he later clarified at an OEEC meeting, stating that the observance of 'any undertaking' could apply equally to general undertakings (legislation, license or otherwise) as to a specific undertaking (contractual or concession contracts) and that this was really about protecting the 'legitimate expectation of the continuance of a particular state of affairs'.[81] The ICC's Secretariat recognized that this clause was specifically 'fit for purpose' for large, capital-intensive natural resources investors (*in concreto*, oil companies) that had the power to negotiate investor contracts, as for most investors 'contractual engagements between governments and the private investor are non-existent'.[82]

The umbrella clause, which made its way into BITs, seems to have retained this primacy for oil companies over time, as Blair stated in 1982 that he regarded 'this provision as the most important commitment contained in the promotion of fair treatment clauses'.[83] The businessmen's part of the job – namely, putting the draft convention on the agenda – was mainly done by Hermann Abs. Abs' key contact in this regard was not, as Slobodian suggests, Ludwig Erhard, the minister of economics,[84] but, rather, Chancellor Konrad Adenauer himself. Abs corresponded with Adenauer on the merits of a multilateral investment convention, and Adenauer's office gave him some personal follow-up: in August 1958, when the Bundesministerium für Wirtschaft was working on the development of a German investment guarantee system, the German Chancellery asked to be kept up to date as the proposal 'had the particular interest of the Bundeskanzler, given [*inter alia*] the international convention for the mutual protection of private property rights in foreign countries, circulated on the initiative of Mr. Abs'.[85] Internally, the German Economics and Foreign Ministries had their doubts concerning the viability of Abs' ideas, with Abs' first draft being described as representing '*Neuland*' (new legal ground) in some respects.[86] They eventually found a

[80] 'Protokoll über die Dritte Ordentliche Mitgliederversammlung der Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e.V., 12 March 1959, V01/4509, HADB.

[81] Lauterpacht was invited to present the Abs-Shawcross draft at the meeting of the Organisation for European Economic Co-operation's (OEEC) Committee for Invisible Transactions on 23 June 1959. His memo can be found in file 463.1.3, AfZ: IB Vorort-Archiv.

[82] Statement adopted by the Council of the ICC, ICC Doc. 111/100, 20 May 1960, DNB – EXIM, 2.25.74.04, inventory no. 36769, Nationaal Archief, Den Haag (NL-HaNA).

[83] Letter from John Blair to Peter Gent (UK Department of Industry), 13 October 1982, E7113A#1991245#70, Az. 756.2.7, Investissements (Comité de l'investissement international et des entreprises multinationales), CIME II, Schweizerisches Bundesarchiv (Blair had passed on the letter to Swiss negotiators).

[84] Slobodian, *supra* note 16, at 138–143. That is not to say that Abs and Ludwig Erhard did not correspond on this subject (they did) but, rather, that one cannot draw a direct link from neo-liberal, philosophical thinkers to Abs' ideas. Abs and Erhard shared similar ideas on the role of state and market. But, whereas the nature of Erhard's convictions was influenced by 'die Ideenwelt des Ordoliberalismus', Abs was much more a man of 'praktische Überlegungen'. See Gall, *supra* note 47, at 239–240.

[85] Letter from Dr. Kroog (BMW, Abt. VI B2) to Herrn Abteilungsleiter VI, 11 August 1958, B 102/27059, BArch.

[86] See the 'Ressortbesprechung', 11 June 1958, REF. 404_IIIB3_61, PA AA.

middle ground by submitting both drafts and giving a general declaration of support, simultaneously stressing that the drafts were private initiatives and not officially endorsed by the Bundesrepublik. This served as the basis for the OECD Council to give the Committee for Invisible Transactions (CIT) a mandate to develop a draft convention in 1960.[87] The CIT developed five drafts in total from 1960 to 1962, the earliest drafts closely resembling the text of the Abs-Shawcross draft.[88]

The lawyers' part of the job was mostly done by Shell and Deutsche Bank's company lawyers, the convention's content moving closer to Shawcross's conception of a lean draft rather than Abs' more expansive proposals. These meetings were held by a group that became known as the 'Haager Freundenkreis' (Hague Circle of Friends), bringing together the lawyers involved in the Abs-Shawcross draft. Several reports of these meetings have been kept thanks to one participant's notes (Rudolf Emil Gsell-Busse, a Swiss lawyer).[89] Participation varied over time but, at the time of the Abs-Shawcross draft, included Deutsche Bank's Paul Krebs and Ulf Siebel as well as Abs' original draftsman Dölle, Shell's Blair, Lauterpacht, the Dutch Shell lawyer Lout Sandberg and Rudolf-Emil Gsell.[90] This first set of meetings led in 1959 to the Abs-Shawcross draft. States acknowledged that the Abs-Shawcross draft was a fundamentally different instrument from Abs' first plans; the German Foreign Ministry observing that the more precise English-language version seemed to indicate that 'the original of the new draft originates from an English law firm', the Swiss Foreign Ministry likewise being surprised with the 'completely changed content of the new draft convention' and both of them agreeing that this shorter, but vaguer, focus on recognized principles of international law made the instrument much more realistic to negotiate.[91]

The group of lawyers kept meeting in the early 1960s and was enlarged to take account of the more diverse set of APPI interests lobbying for the convention. In at least one meeting, Haight was present and so was Lindgren.[92] These meetings were the transnational setting for company lawyers to be updated by one another on what they heard about the OECD draft via their governments, to discuss specific legal problems and to propose ways to achieve progress. For example, when the OECD's discussions threatened only to provide protection for new investments, the group's German

87 OECD Doc. TFD/INV/65, 19 April 1960.

88 OECD Doc. TIC (60) 21, 8 June 1960 (which had a first, second, third and fourth revision).

89 Some of his correspondence with Swiss business and the Ministry of Foreign Affairs can be found in 463.1.3, AfZ: IB Vorort-Archiv; E2001E#197233#936, Az. C.41.124.1, Kapitalexport, Schweizerisches Bundesarchiv.

90 For a more extensive analysis of Lauterpacht's role, see Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention', in S.W. Schill, C.J. Tams and R. Hofmann (eds), *International Investment Law and History* (2018) 241.

91 On the German side, see 'Aufzeichnung: Schreiben von Herrn H.J. Abs vom 17.3.1959 an den Herrn Staatssekretär', 10 April 1959, B 56, REF. 404_IIIB3_149, PA AA; on the Swiss side, see a memo from the Swiss MFA to the Swiss Delegation in Paris, 13 March 1959, E2001E#197233#937, Az. C.41.124.1, Schweizerischer Kapitalexport, Schweizerisches Bundesarchiv (translations from German by the author).

92 See a memo from Werner Veith (then Secretary of the Kölner Gesellschaft) entitled 'Besprechung im Haager Freundeskreis in London am 3.12.1962', 5 December 1962, E2001E#1976/17#869*, Az. C.41.124.1, Schweizerischer Kapitalexport (Vorarbeiten betr. Internationale Konvention zum Schutz der Auslandinvestitionen), Schweizerisches Bundesarchiv.

members agreed to lobby their government specifically not to exclude investments previously made.[93] The lawyers had good access to policy-making: Lauterpacht (on the UK side) was part of the group of legal experts that helped the OECD Secretariat to draft the convention, Krebs (on the German side) was closely involved too. Records indicate they kept meeting until at least 1964.[94] This group probably explains why APPI did not create a working group on the Abs-Shawcross draft: most of the APPI lawyers involved were already part of the Hague Circle of Friends.

Most of the key personalities behind APPI lobbied actively with their governments for the draft convention. The only scepticism came from French members who were initially opposed, believing that the chances of success were minimal.[95] The most extensive lobbying took place by Abs' men in Germany, whose access went so far that they routinely received the internal OECD material from the German authorities.[96] In the UK, interventions were made at various points by Shawcross at the political level and by Blair at the technical level.[97] In the USA, Haight made multiple interventions with the US State Department, and Standard Oil actively lobbied as well. This pressure possibly helped to change the US position from staunch opposition to one of qualified support around 1963–1964.[98] Other members, such as Marcus Wallenberg in Scandinavia and Reinhardt in Switzerland, took similar initiatives.[99] APPI members also went beyond their national boundaries to lobby for the convention. For example, the organization sent representatives to Turkey to try and convince the Turkish prime minister to take a more positive attitude (Turkey abstained in the end).[100]

At the same time, APPI became the central institutional hub promoting the OECD draft. The relationship with the ICC had to be delicately handled. The ICC had proposed its own draft convention in 1949, in a process outlined by Slobodian.[101] My view

[93] Besprechung Cambridge (Old Guest Room, Trinity am 22. und 23. Juni 1961), 463.1.4, AfZ IB Vorort-Archiv.

[94] See an untitled memo, probably drafted by Elihu Lauterpacht, with comments on proposed US amendments to the convention, 17 August 1964, B 56, REF. 404_IIIB3_156, PA AA.

[95] For example, René Massigli unsuccessfully lobbied APPI colleagues in 1959 to adopt another line in favour of a leaner, non-binding resolution on substantive principles to be adopted by an international organization. 50ZZ546/24, Archives TotalEnergies.

[96] See the report made by the then responsible diplomat Von Rhamm (AA) about a conversation between him and Ulf Siebel, 25 May 1966, B 56, Referat IIIB3, 3, Abgabe 1200, PA AA.

[97] In a 1962 Dutch Ministry of Foreign Affairs (MFA) memo entitled 'Derestriktie van de conventie inzake bescherming van buitenlandse eigendommen' (8 October 1962), it was stated that 'in England, Shell is the motor of the car that tries to keep the convention running'. Buitenlandse Zaken_Code-Archief 55-64, 2.05.118, inventory no. 10821, NL-HaNa (translation by author).

[98] On the UK and US position regarding the OECD draft convention, see St. John, *supra* note 4 at 88–90, 94–95. See also a letter from Helmut Wohlthat to Paul Krebs reporting that Standard Oil was asking the US national ICC Committee to take a stronger stand in favour of the convention to sway the State Department, 22 March 1963, B56, Ref. 404_IIIB3_154, PA AA.

[99] Letter from Marcus Wallenberg to Hermann Abs, 30 April 1965, V01/4410, HADB; 'Swiss MFA – Notiz an Herrn Generalsekretär Kohli: Besprechung mit Herrn General-Direktor Reinhardt vom 2.9.1959', 4 September 1959, E2001E#197233#937, Az. C.41.124.1, Kapitalexport, Schweizerisches Bundesarchiv.

[100] 'Mission to Turkey concerning the OECD Draft Convention on the Protection of Foreign Property', APPI Doc. 254/66, 4 April 1966, Stikker, 2.21.156, inventory no. 107, NL-HaNA; 'OECD Draft Convention on the Protection of Foreign Property', APPI Doc. 140/66, 1 March 1966, V01/4411, HADB.

[101] Slobodian, *supra* note 16, at 136–138.

of this draft differs from Slobodian's in two ways: in my reading, the ICC draft was a failure for the organization, and its content is quite different to the Abs-Shawcross draft convention. That the ICC draft was a failure was admitted by the organization itself. It had no success in propagating it in 1949, acknowledging that 'the time was clearly not ripe'.[102] The ICC picked up the document again in 1956–1957, calling for a conference of the UN Economic and Social Council (ECOSOC), the International Bank for Reconstruction and Development and the International Finance Corporation to elaborate a model multilateral convention. The conference was never held.

Substantively, the ICC's Code of Fair Treatment was quite different too.[103] Both Dölle and Shawcross were clearly inspired by the substantive standards of protection in post-war US Friendship, Commerce and Navigation (FCN) treaties. This instrument included most investment protection standards except for the umbrella clause (and ISDS). The USA negotiated these treaties with developing and developed economies, including Germany, in 1954.[104] Neither of the drafts referred to the ICC's Code of Fair Treatment. Although the gist of all these documents is towards better legal protection for foreign investments, the legal language is different. Certainly, there are some similarities (for example, the expropriation clause in Article 11 of the ICC's Code of Fair Treatment is similar to the corresponding clause in the Abs-Shawcross draft convention). But the ICC's Code of Fair Treatment had a much wider scope than Abs-Shawcross draft as it, for example, also included granting national treatment for the acquisition of property (Article 5), national treatment in taxation matters (Article 7) and transparency obligations for states (Article 12), to name but a few differences. At the same time, whereas the Abs-Shawcross draft had elaborate dispute settlement provisions, the ICC's Code of Fair Treatment left the details of dispute settlement to be 'worked out by the negotiating governments' (Articles 13–14). The different approach was also noted by the ICC Secretariat itself. It said that Abs' first draft 'differs profoundly in spirit and content from the ICC's Code' (even the ICC believed it focused too much on investor security) and described Shawcross' draft as 'reduced simply to the statement of one or two fundamental principles of law … and with all the weight thrown on arbitral procedures to settle disputes'.[105]

The ICC's misgivings that its draft had been eclipsed by the Abs-Shawcross draft lessened after 1960, and APPI was able to rally several business organizations in favour of the convention. In 1961, the Conseil des Fédérations industrielles d'Europe (the predecessor of BusinessEurope), then led by APPI member Wallenberg, asked

[102] 'The Promotion of International Private Investments – A Review of Recent Initiatives Governmental and Private, and of the ICC's Role', ICC Doc. 111/INT.63, 24 September 1959, 50ZZ546/32, Archives TotalEnergies.

[103] The text of this code can be found in ICC, *supra* note 24.

[104] See, for example, the various references to the US Friendship, Commerce and Navigation (FCN) treaties in Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V., *supra* note 51; letter from Lord Shawcross to Douglas Dillon (US Under Secretary of State for Economic Affairs), 8 October 1958, 50ZZ546/24, Archives TotalEnergies, where Shawcross states that 'to some extent the actual language … based on the Treaties and other official documents of the Government of the United States'.

[105] 'The Promotion of International Private Investments', *supra* note 102.

for a speedy conclusion of the OECD draft.[106] In July 1962, as discussions were still deadlocked, the OECD Council agreed that its members could disclose the OECD draft to other states and interested organizations for comments, which led to another outpouring of business pressure.[107] Several organizations, including the ICC and the OECD's Business and Industry Advisory Committee (BIAC), took a position in favour of the convention (Wallenberg was president of BIAC between 1962 and 1964). BIAC first endorsed the draft in 1962, passed on a generally favourable opinion to the OECD Secretariat in 1963 and again stressed its importance in 1967.[108] The ICC's American national committee had also become more active, calling for the draft to be signed and ratified as soon as possible.[109] By 1966, even the OECD Secretariat was annoyed with the intense pressure that private interests were exercising.[110]

Why then, despite all this private lobbying, did the draft convention end not with a bang but, rather, with a whimper? Three critical blows blew the wind out of its sails, diluted it and eventually led to a 'weak' declaration instead of a treaty. First, the USA was primarily responsible for delays to the convention. It had been opposed to the convention from the start, showing profound scepticism on investment multilateralism after the failure of the Havana Charter and its own experiences trying to negotiate bilateral treaties in Latin America.[111] The US delegation, after a close comparison of the Abs-Shawcross draft with its own FCN treaties, critiqued the draft when it deviated from customary US treaty language (for example, using 'measures to deprive' instead of 'taking' for expropriations). It singled out the umbrella clause as drafted by Shawcross as specifically problematic, given that US law also foresaw that contracts could be cancelled (upon compensation) when the USA wanted to exercise its police power to protect the public welfare.[112] The spectre of an American veto hung over the talks until 1963, after which the American attitude changed, and a set of US amendments were adopted.[113] Likewise, France and the UK, keenly aware of their own balance of payment issues, always remained lukewarm supporters.[114] Second, from the viewpoint of investors, the convention was weakened in successive drafts, mostly due

[106] 'Résolution adoptee par le Conseil des Fédérations industrielles d'Europe à sa session du 8 septembre 1961 concernant le Projet de Convention de l'OECE sur la protection des investissements', 50ZZ546/34, Archives TotalEnergies.

[107] OECD Doc. C/M (62) 23, 11 December 1962.

[108] These first two initiatives can be found in V01/4406 APPI, HADB, and the last endorsement in V01/4411 APPI, HADB.

[109] See a paper entitled 'Promotion of International Investment' submitted by the US Council of the International Chamber of Commerce for the ICC's 1963 Congress, where it also endorsed the OECD draft. 463.1.1, AfZ: IB Vorort-Archiv.

[110] In an internal Auswärtiges Amt (AA) memo, the chief of staff of OECD Secretary-General Kristensen was reported to have said that the 'private organizations or other interested groups (e.g. banks) were continuously exercising pressure, and that the General-secretariat considered this to be an annoyance', B 56, 1200, PA AA (translation by author).

[111] Letter from Douglas Dillon to Lord Shawcross, 10 July 1958, 50ZZ546/24, Archives TotalEnergies.

[112] *Ibid.*

[113] Documents related to the proposed US amendments can be found in B 56, REF. 404_IIIB3_156, PA AA.

[114] On the lukewarm UK attitude, see, for example, the report of talks between the AA and the UK's Foreign Office, 27 September 1962, B56, REF. 404_IIIB3_153, PA AA.

to Greece and Turkey, two developing OECD countries. By 1962, for example, both the MFN clause and national treatment were taken out of the convention, and only a weak recommendation on transfers remained rather than a free transfer obligation.[115] As a result, investors started seeing the OECD draft as a minimum of what they wanted.[116] Third, even the two most important proponents of a multilateral convention – Switzerland and Germany – lost interest over time. In the case of Switzerland, archival material indicates that, by mid-1961, it had decided to start negotiating BITs, every successful bilateral negotiation lessening its interest in the multilateral convention.[117] Though Germany had been the first to negotiate bilaterally in 1959, Abs' influence remained longer. For the Germans too, however, BITs were eventually seen as giving better protection to foreign investors,[118] and Abs' influence declined when Adenauer left office in 1963.[119] As a result, even the Germans eventually shelved the convention. APPI and its members had strongly influenced the work, but, ultimately, they could not stop its demise.

One might also ask how APPI related to the ever-growing BIT network, especially when their multilateral attempt had failed. Whereas APPI took note of the growing BIT network in the mid-1960s and compiled lists of BITs,[120] a plan for an APPI-developed Model BIT was cancelled. The main reason, as Blair noted, was that there simply was no need for this model treaty given that '[t]he Swiss treaties are by far the best, and their protective clauses are anyway copied by other industrialised countries'.[121]

B *Case Study 2: ISDS*

A second part of APPI's work related to investor-state disputes. By the end of the 1950s, the existing system was seen as deficient. The World Bank had started taking an interest in solving these disputes through good offices, conciliation or mediation, and ICC arbitration already had a long historical pedigree.[122] But investor sentiment held that new legal machinery was needed. Initially, the French APPI interests pushed this agenda. French interests saw sovereign immunity, which could make the enforcement of awards against states difficult, as the main irritant. But Shawcross quickly noted that states would be unwilling to restrict their sovereign immunity and that this

[115] These changes are discussed in German reports of Committee for Invisible Transactions (CIT) meetings of February 1962 and July 1962 in B56, REF. 404_IIIB3_152, PA AA; B56, REF. 404_IIIB3_153, PA AA.

[116] In a meeting of the biggest Swiss business interest group Vorort on 25 March 1963, the OECD draft was called a 'minimum'. 463.1.9, AfZ: IB Vorort-Archiv.

[117] A meeting between the Swiss MFA, the Handelsabteilung and various Swiss business interest associations (but not Reinhardt) on 17 August 1961 solidified this choice. See E2001E#1976/17#872*, Az. C.41.124.3, Investitionsgarantie – Schweizerischer Kapitalexport, Schweizerisches Bundesarchiv.

[118] See the instructions given by the AA to the German OECD Delegation, 25 January 1967, B 56, Referat IIIB3, 3, Abgabe 1200, PA AA.

[119] Letter from John Blair to Dirk Stikker, 27 July 1966, Stikker, 2.21.156, inventory no. 254, NL-HaNA.

[120] 'Bilateral Agreements and Treaties Containing Provisions Directly Relevant to the Security of Foreign Investments', APPI Doc. 10/67, E2001E#1978/84#1267*, C.41.124.5.3, APPI, Dokumentation, Schweizerisches Bundesarchiv.

[121] Letter from John Blair to Dirk Stikker/UK APPI Directors, 6 May 1968, Stikker, 2.21.156, inventory no. 109, NL-HaNA.

[122] A.R. Parra, *The History of ICSID* (2nd edn, 2017), at 20–23.; Böckstiegel, 'Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce', 59 *AJIL* (1965) 579.

was not the main problem anyway: states generally complied with awards rendered against them.[123] Shawcross immediately saw the benefit of a new arbitration mechanism. Shell had met 'uncompromising resistance to the neutral adjudication of disputes by governments granting oil concessions', and states were extremely reluctant to sign up for ICC arbitration in oil contracts.[124] German APPI interests did not play a major role. Abs was in favour of investor-state arbitration, as his original Magna Carta included it, and the Abs-Shawcross draft had retained an optional ISDS mechanism. But his focus was solely and squarely on the OECD draft convention, and it took considerable efforts from others to convince Abs that APPI's ISDS work was complementary to the multilateral investment convention.[125]

APPI was not the only business organization interested in ISDS, as the ICC's Committee on International Arbitration had created an expert group on investor-state arbitration in 1958, which had advised creating a special arbitration centre, next to the ICC's existing facilities, to settle disputes concerning commercial transactions and private investments between individuals and states. The ICC wanted to develop a proposal in tandem with the UN, which the UN's Legal Department refused, informing the ICC that 'a proposal of this kind made on the initiative of the I.C.C. would not meet with general acceptance'.[126] The ICC subsequently kept its hands off the file, and APPI's working committee on arbitration could start its work without institutional competition.[127] Five meetings with in-depth discussions between legal experts followed (besides Piffault, Blair, Siebel and Haight, two other important figures in this group were the Italian legal scholar Giuseppe Guarino and the French Banque de Paris et des Pays-Bas (modern-day BNP Paribas) lawyer Jean Maisonobe), which ended with a hefty report at the end of May 1960.[128] The report consisted of an explanatory memorandum and a 'text and commentary on the draft regulations for an international institute for the arbitration of investment disputes'. To establish an arbitration institute, the working committee considered two options: creation through governmental negotiations, leading to an investor-state arbitration convention, or a private initiative (via APPI itself). The committee tended towards the first solution, although some members preferred an immediate private initiative until a convention was established.[129]

The draft's authors proposed an institute with a seat in Geneva (Article 2) and with a mandate for 'the rapid and final settlement of disputes relating to or resulting from private investments' (the term 'investment' not being defined in order to avoid limiting

[123] The verbatim discussion on these issues between Piffault, Shawcross and Haight can be found in 50ZZ546/12, Archives TotalEnergies. One oddity is that the New York Convention, *supra* note 65, which entered into force in June 1959, hardly ever gets discussed in the archival material. The most logical explanation is that many states only became party to it in the 1980s–1990s.

[124] Letter from Lord Shawcross to Pierre Piffault, 5 December 1959, 50ZZ546/27, Archives TotalEnergies.

[125] Letter from Pierre Piffault to Ulf Siebel, 12 February 1960, 50ZZ546/27, Archives TotalEnergies.

[126] 'Réunion du 29 février 1960, Arbitrage entre états et particuliers – Note du Secrétariat International', ICC Doc. 420/99, 14 January 1960, 50ZZ546/32 Archives TotalEnergies.

[127] Letter from Sir Edwin Herbert to Pierre Piffault, 29 December 1959, 50ZZ546/32 Archives TotalEnergies.

[128] 50ZZ546/17 Archives TotalEnergies; 50ZZ546/18, Archives TotalEnergies.

[129] APPI Doc. 11/60, 50ZZ546/18, Archives TotalEnergies.

the scope) (Article 1(1)). The authors foresaw that the institute's jurisdiction (Article 3) could be found not only in contractual arbitration clauses or ad hoc agreement but also in interstate treaties (Abs-Shawcross draft, FCN treaties or BITs explicitly being mentioned). They proposed two options to appoint arbitrators: either full autonomy for the disputing parties (as proposed by Guarino) or via a permanent panel of arbitrators designated by state parties (as Blair, Haight and Siebel preferred). Concerning applicable law, party autonomy reigned supreme, municipal law being applicable if the parties had made no stipulation. However, conscious that the state could unilaterally change domestic law, APPI also foresaw that, if this would lead to an 'unjust decision because such law has been materially changed after the making of the contract' or if that law was 'inadequate for the determination of the dispute' – a nod to the *Aramco* case of 1958[130] – then general principles of law recognized by civilized nations, international custom or (subsidiary) judicial decisions and teachings could be used (Article 6). Awards were to be binding and final, and only a very limited possibility of revision (within 30 days if part of the claim was not adjudicated or new decisive facts were discovered) would exist (Article 10). Finally, the institute would also have a permanent administrative Secretariat, including a registrar (Article 12).[131]

The next step for APPI was to consult with an expert in international law. Shawcross used his contacts within Shell and arranged for Lauterpacht to write an expert opinion. The gist of Lauterpacht's comments consisted of suggested improvements to the definitions (for example, to define investment), jurisdictional clause (for example, by including the possibility of unilateral declarations by states to establish jurisdiction), applicable law (proposing for the tribunal to apply rules of public international law when the case touched upon issues of international, rather than purely contract, law) and several comments on the procedural provisions.[132]

Early in 1961, Blair took the lead in the Working Group and started looking for a consensus on Lauterpacht's proposed changes. APPI's directing committee also decided in April 1961 that APPI itself could not viably create an arbitration centre and that its work should at some point be taken over by negotiations between states.[133] At this point, APPI's work slackened for unclear reasons, and the file only regained traction when Shawcross put it on the agenda again in November 1961. The reason was twofold: Eugene Black, the World Bank's president, had announced the World Bank's intention to study ISDS and the legal adviser of the World Bank, Aron Broches, had contacted Haight to receive a copy of APPI's study.[134] This led to further changes being made, and Blair presented a final draft in May 1962. Again, APPI reiterated its wish for an arbitration institute 'to provide an internationally constituted jurisdiction to hear and determine disputes between sovereign States or State-controlled entities on the one hand and foreign private parties on the other arising in connection with private investments' (Article 1). In comparison with the previous version, most

[130] *Saudi Arabia v. Aramco*, 27 ILR 117 (1963).
[131] The proposed convention (APPI Doc. 12/60) can be found in 50ZZ546/18, Archives TotalEnergies.
[132] The memo (dated 30 November 1960) can be found in 50ZZ546/18, Archives TotalEnergies.
[133] Letter from John Blair to Pierre Piffault, 7 November 1961, 50ZZ546/17, Archives TotalEnergies.
[134] *Ibid.*

of Lauterpacht's proposals were added: a list of definitions was included in Article 15 (including a broad definition of private investment, which included foreign direct investment, portfolio investment and loans), states could also give the arbitration institute jurisdiction by unilateral declaration (Article 3(2)) and, in case the proceedings involved an alleged breach of public international law, the arbitral tribunal would apply rules of public international law, 'including the principles of sanctity of contracts and of respect for acquired rights' – an oblique reference to the Abs-Shawcross draft (Article 6(1)(c)). Blair got his way on the panel approach and the applicable law clause proposed by Lauterpacht, but, in both cases, he added that some committee members disagreed.[135] Reinhardt then finally contacted Black and sent APPI's finished paper.[136]

Did APPI's work influence the ICSID Convention? With respect to the APPI draft specifically, there is reason to believe that its influence was modest. As St. John has shown, Broches had already prepared an internal memo four months before Black officially launched the idea at the Board of Governors' annual meeting in September 1961.[137] The first evidence we find of Broches' interest in the APPI paper dates from November 1961. Likewise, Broches' working paper in the form of a draft convention was dated 5 June 1962, which makes it doubtful that APPI's final draft, which was only sent at the end of May 1962 – unless he informally received copies earlier – served as a major influence.[138] What is more, APPI was not the only institution interested in ISDS. For example, the IBA (since 1958) and the ILA (which created a Committee on the Juridical Aspects on Nationalization and Foreign Property in 1956) were also interested in the subject. The IBA adopted a resolution in favour of ISDS in September 1960, and an ILA committee had equally prepared statutes for a foreign investment tribunal and a foreign investment court, the chief drafter of which was the Austrian international lawyer Ignaz Seidl-Hohenveldern.[139]

At the same time, some evidence suggests that the Shell lawyers played a more important role and that there was a separate draft in which only these lawyers were closely involved. St. John has pointed out how a 1961 'Draft Convention on the Conciliation and Arbitration of International Investment Disputes' prepared under the auspices of the American Bar Association (ABA) does seem to have strongly influenced Broches' thinking on the ICSID Convention.[140] Of the seven committee members (Lauterpacht,

[135] A final version dated 30 April 1962 can be found in 50ZZ546/17, Archives TotalEnergies.

[136] The letter was sent on 28 May 1962. See *ibid.*

[137] St. John, *supra* note 4, at 129–130.

[138] Parra, *supra* note 122, at 27.

[139] I have not consulted the International Bar Association or the International Law Association archives for this article, but a wealth of material concerning these initiatives, which APPI was well aware of, can be found in 50ZZ546/31, Archives TotalEnergies. Undated copies of the 'Statutes of Arbitral Tribunal for Foreign Investment' and the 'Statutes of Foreign Investment Court' can be found in this folder. According to APPI Doc. 15/62 (3 September 1962), these two drafts were subsequently discussed during the ILA's 1962 conference in Brussels, where a resolution was adopted 'approv[ing] the principle of arbitration in disputes between States and foreign private parties concerning the protection of property and the enforcement of contracts between States and foreign private parties'.

[140] St. John, *supra* note 4, at 132. I kindly thank Dr. Taylor St. John for having shared her archival records on this American Bar Association (ABA) draft with me.

Haight, Sandberg, Blair, Broches, Georges Delaume, another World Bank lawyer, and Clifford Hynning, the chair of the ABA's International and Comparative Law Section), no fewer than four had a direct Shell connection (Lauterpacht via Shawcross, Haight and Blair were in Shell's legal department and Sandberg was in Shell's Indonesian subsidiary, the Bataafse Petroleum Maatschappij). Blair and Broches seem to have known each other well, and Blair also had some inside knowledge of progress on the ICSID negotiations.[141]

A textual comparison of APPI's draft with the ABA draft suggests there are some similarities.[142] For example, both documents foresaw permanent panels of arbitrators, a choice that was eventually also endorsed by the ICSID Convention. Most prominently, Article 5(8) (on the applicability of international law) of the ABA draft closely resembles the corresponding APPI draft clause; the ABA provision stating that when an investor alleges a 'breach of public international law, the Arbitral Tribunal shall apply such law in the same manner as if the claim were made by such Contracting State'.[143] But the two drafts are, on the whole, quite different. Where the ABA draft also contained provisions on conciliation (Article 4), the APPI draft did not. Where the APPI draft defined private investment, the ABA draft did not, simply mentioning that the centre had jurisdiction over investment disputes (Article 3(1)) (the approach also followed in Article 25 of the ICSID Convention). Importantly, whereas the APPI draft was not linked to any institution, the ABA draft foresaw a close link with the World Bank, as it would only enter force when states representing 65 per cent of the capital stock of the World Bank had signed up (Article 6(1)). One secretary-general and two deputy secretaries general of the proposed 'International Conciliation and Arbitral Center' were to be appointed by the World Bank's Board of Governors (Article 2(9)). The ABA draft is much more detailed too, containing provisions where the APPI draft remained silent (for example, on immunities, entry into force and so on). Curiously, the ABA draft was never mentioned during the APPI meetings. The most likely explanation seems to be that the Shell lawyers 'went it alone' on investor-state arbitration, probably consciously cutting out their APPI colleagues. This at least accords with how the British negotiators saw Shawcross, as an internal treasury memo stated that 'Shawcross … wishes to push a number of different approaches'.[144] From 1961 to 1962, these Treasury files also show an active push by Blair to nudge the UK towards a positive view of the World Bank's then nascent proposals. The unique role of Shell

[141] For example, Blair already knew in November 1961 that the World Bank favoured a panel approach for the selection of arbitrators. Letter from John Blair to Pierre Piffault, 19 February 1962, 50ZZ546/17, Archives TotalEnergies.

[142] The ABA draft has not been published. However, the text can be found in T 312-251, The National Archives.

[143] One can make an educated guess that this provision was inserted at the request of the Shell lawyers. Whereas the notes to the draft refer to the existence of a previous 'Delaume draft', the provision on the applicability of international law was 'New' *vis-à-vis* the Delaume draft.

[144] Internal Treasury memo entitled 'Proposed Centre for Arbitration and Conciliation of Investment Disputes', 8 December 1961, T 312-251, The National Archives.

stands out in this material, and the contribution of its lawyers in the ABA draft and, eventually, in the ICSID Convention deserves further study.

As the World Bank took over the file, APPI took a backseat in the discussions leading to the ICSID Convention and its later propagation by World Bank's staff. Certainly, the initiative was encouraged by APPI, and Broches presented the convention at an APPI meeting in February 1964.[145] When the ICSID Convention came into existence in 1966, Reinhardt also congratulated the World Bank's new President George Woods and recalled how 'APPI has contributed to and encouraged the development of the initiative which led to the opening for signature of the Convention'.[146] When it came to propagating the ICSID Convention, a task that Broches gladly took upon himself, APPI equally retained a static posture. According to Blair, the World Bank might even 'find open support by us (unless done extremely discreetly and selectively) more of a liability than an asset'.[147] Clearly, the fact that the ICSID Convention had the stamps of the World Bank all over it was seen as advantageous to its success.

C *Case Study 3: Multilateral Investment Insurance*

A third prong of APPI's work involved multilateral investment insurance. This was a quickly evolving area of law, as the USA in 1948 and Japan and Germany in the 1950s had established national investment insurance mechanisms. In short, these mechanisms allowed investors to 'transfer to a third party … the financial consequences of a loss suffered by the investor as a result of the materialization of a political risk [*in concreto*, usually expropriation, transfer restrictions and political violence], in return for a fee'.[148] Soon enough, proposals were made to create a multilateral investment insurance treaty, several of which were brought forward by private individuals. The Dutch banker E.H. Van Eeghen made a proposal and also the French APPI director Jean Reyre, then managing director of the Banque de Paris et des Pays-Bas.[149] The topic was debated during the 1960s, but the MIGA Convention would only be concluded in 1985.[150] The archival records show that APPI was a minor player in these discussions due to personal disagreements on the necessity of investment insurance, institutional competition with the ICC and the fact that the key states that APPI could have lobbied were negatively disposed to the idea.

First, there was the personal factor. As with arbitration, the idea of an insurance fund was initially proposed by the French APPI interests. However, the French members

[145] More concretely, the Consultative Committee meeting in February 1964, see V01/4407 APPI, HADB.

[146] Letter from Eberhard Reinhardt to George Woods, 23 September 1966, 'Liaison – APPI', volume 2, 30023906, WB IBRD/IDA EXT-08, World Bank Group Archives.

[147] Letter from John Blair to Michael Brandon, 14 February 1969, Stikker, 2.21.156, inventory no. 110, NL-HaNA.

[148] Protopsaltis, 'Investment Guarantees and Political Risk Insurance', in M. Krajewski and R. Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (2019) 299.

[149] There were many more plans and proposals. In a 1962 World Bank report, no fewer than 12 proposals are discussed. See International Bank for Reconstruction and Development (IBRD), *Multilateral Investment Insurance: A Staff Report* (1962).

[150] On the MIGA Convention, *supra* note 44, see I.F.I. Shihata, *Miga and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (1988).

had a very limited mandate for an international investment insurance mechanism in mind. Their proposal was for the insurance fund to be some annex to an ISDS mechanism as they only foresaw the fund to be activated in cases where an arbitral award was not paid out by states (linked to the French fear of sovereign immunity).[151] English and Swiss interests in APPI were not opposed to discussing investment insurance (albeit along the more familial lines of political risk insurance) but were generally less active. Major opposition came from the offices of Deutsche Bank in Frankfurt-am-Main in the person of Abs. Already in 1958, Abs had told Chancellor Adenauer that pursuing a multilateral investment convention would be much more useful to protect foreign investment than developing a national investment insurance mechanism.[152] The nature of Abs' grudge against insurance was his fear that an insurance mechanism could incentivize developing countries to expropriate investments and end with Western taxpayers footing the bill. In Abs' conception, protection thus clearly preceded insurance, and the latter could only come about if strongly linked to substantive protection.[153] It needs to be stressed that, even in Germany, Abs' views were somewhat out of sync with other investors. For example, one early academic survey showed that German investors tended to care more about the German investment insurance programme than the existence of a BIT when making foreign investment decisions.[154]

Second, the ICC was incensed when it learned that APPI also considered studying the topic. The ICC became interested in investment insurance when, during a businessmen's conference that it had organized in Karachi in 1960, Van Eeghen also came to promote his scheme.[155] The ICC was quite adamant in wanting to retain its primary role on investment insurance. Shawcross defused the situation by proposing that APPI would only play a subsidiary role, limiting its contribution to a study, after which APPI would pass the topic over to the ICC.[156] While APPI did create a Working Group on an International Guarantee Fund in 1961, it was a lame duck from the start, especially as it was headed by an ally of Abs (Krebs). Other members included Siebel, Blair, Van Eeghen himself, Lindgren, Théodor Faist (the secretary of the Swiss BIA SwissHoldings) and Maisonobe.

Another contradiction inherent in the committee's work was that its mandate entailed 'particular attention' to Reyre's plan, which strongly diverged from other conceptions of investment insurance. As noted, Reyre primarily saw guarantees as useful when an arbitration award was ignored. In contrast, investment insurance systems as we know them today pay out the investor shortly after the event occurs (for example, expropriation), then get subrogated into the rights of the investor and will only move

[151] Letter from Pierre Piffault to Eberhard Reinhardt, 23 April 1959, 50ZZ546/22, Archives TotalEnergies.
[152] Letter from Hermann Abs to Konrad Adenauer, 15 March 1958, V01/4403, HADB.
[153] See, in particular, letter from Paul Krebs to Hans Henckel (Abteilungsleiter Bundesministerium für Wirtschaft (BMWi) Abt. VI, Geld und Kredit), 9 February 1961, B 102/47640, BArch.
[154] Jüttner, 'Rechtsschutz von Investitionen in Entwicklungsländern und Investitionsentscheidung', 9 *Verfassung und Recht in Übersee/ Law and Politics in Africa, Asia and Latin America* (1976) 201, at 219.
[155] For a report of the conference, see 'Bericht über die 9. CAFEA-ICC-Konferenz (International Businessmen's Conference) in Karachi vom 5. Bis 9. Dezember 1960', 13 December 1960, V01/4509, HADB.
[156] Letter from Lord Shawcross to Jeremy Raisman, 7 February 1961, 50ZZ546/27, Archives TotalEnergies.

to recoup the amount paid from the host state. But Reyre would not budge, and he had the Paribas bank lawyers prepare their own 15-article draft convention on a 'Fonds international de garantie'. Reyre had in mind the creation of an institute separate from the World Bank. Both the investor and the host state would pay a premium (initially, 2 per cent of the investment contract's value) (Article 5) to have 80 per cent of that value insured paid out when an arbitral award was not abided by (Article 7). The incentive, so Reyre believed, was that, as long as the party that lost the case did not pay out, it would not be eligible to register any new contracts with the insurance fund (Article 9).[157] Reyre's lawyers could not convince their APPI colleagues, and the eventual German imprint on the document is quite clear, as, in contrast to the code and arbitration efforts, the APPI lawyers merely produced a report and not a draft convention. The creation of a multilateral guarantee fund was, in principle, endorsed, but only if the necessary prerequisites were met – namely, 'acceptance by the member countries of a minimum of rules of good conduct' and 'the institution of a judicial system which ensures the claimants uniform jurisdiction in the settlement of disputes arising out of the manifold legal relationships which the establishment of the fund will create'.[158] Finally, everything had to be done to avoid the risk that guaranteed investments would be more conducive to expropriation. For example, risk-sharing provisions that host countries also had to contribute to the fund were essential for APPI, as this would lower the expropriation risk.[159] For Krebs, sending the report to the ICC's Pieter Kuin exhausted the groups' mandate.[160]

But the file would not go away. Even after the OECD's Development Assistance Committee asked for a study from the World Bank in 1961 and received a somewhat pessimistic report on multilateral investment insurance in 1962,[161] efforts at the OECD to study the topic continued to gather pace. Likewise, a 1963 ICC study showed that business generally favoured a multilateral insurance convention.[162] Whereas the OECD did prepare its own draft, which was passed on to the World Bank in 1965, there was also a third reason why APPI lobbying in this area was unlikely to lead to success. The four largest OECD countries (the USA, the UK, France and West Germany) were not vetoing the idea. Still, these four countries would probably remain on the sidelines of a multilateral insurance agency. For Germany and, to a lesser extent, the USA, reluctance came from the fact that both had national systems in place and did not need a multilateral scheme. France was meanwhile opposing pressure from its domestic industry groups to create a national system (which France would eventually establish in the 1970s), and the UK still had the awkward issue of its balance-of-payment problems, meaning that it did not want to promote the flow of outward foreign investment.

[157] Jean Reyre's draft can be found in Investissements privés étrangers, 3AH372, Archives BNP Paribas.

[158] 'Report of the Working Committee of the A.P.P.I. on the Establishment of an International Guarantee Fund', 13 September 1961, 50ZZ546/13, Archives TotalEnergies.

[159] *Ibid.*

[160] 50ZZ546/22, Archives TotalEnergies.

[161] IBRD, *supra* note 149; St. John, *supra* note 4, at 106–108.

[162] 'Résume des réponses des Comités Nationaux au Doc. 111/116 préparé par le Secrétariat International de la CCI', ICC Doc. 111/119, 10 November 1963, 463.1.1, AfZ: IB Vorort-Archiv.

Pressure to create a system would have to come from smaller and mid-sized OECD countries, some of which were also developing national insurance mechanisms.[163]

APPI reactivated its work on insurance when the World Bank took over the file and published the draft articles of agreement of the International Investment Insurance Agency in 1966, which were amended in 1968. APPI had access to World Bank staff as members discussed the subject with the World Bank's deputy director of the Development Services Department.[164] When the World Bank published its first draft in 1966, APPI submitted detailed comments. These focused first on the importance of substantive law; APPI wanted more favourable insurance conditions for countries signing an undertaking with the World Bank to treat investments along the lines of the OECD draft convention or that had signed BITs. APPI also asked for a broad definition of insurable investments, allowing old investments to be fully insured in case the original investment was expanded or modernized; loss-sharing arrangements that would require developing countries to also bear the burden of potential liabilities of the scheme and for potential disputes between investors and the agency to be dealt with by ICC arbitration.[165] Neither of these remarks is very surprising as the focus on substantive law, arbitration and the inclusion of (modernized) old investments are another reflection that APPI's work was mostly about investment protection and less about promotion. The loss-sharing arrangements soothed Abs' old fear that the system could give an alleged incentive to developing countries to expropriate private property. Most of these remarks, which were not incorporated by the World Bank in its second draft of 1968, were reiterated in APPI's second submission.[166]

The World Bank eventually admitted defeat in 1968. The meeting of the bank's Committee of the Whole in June 1968 concluded that 19 meetings had shown that too few countries were willing to sign up to the scheme unconditionally, and the World Bank put the file on ice. It would only be picked up again when Ibrahim Shihata, World Bank general counsel from 1983 to 1998, managed to push through the MIGA Convention in the mid-1980s.

D *Evaluating APPI's Effectiveness*

The three case studies show some interesting similarities. TANs can become active when the domestic players (in this case, APPI businessmen) cannot achieve their objectives by (solely) lobbying in their domestic arena and decide that they need to bypass their own state in search of international allies (this has sometimes been called the 'boomerang pattern' of TANs).[167] This process fits with the rationale for creating APPI. Shawcross could not sell his ideas domestically because of the state of the UK

[163] Memo from Swiss Delegation OECD to Handelsabteilung, Multilaterale Investitionsgarantie, 1 February 1965, E2001E#1978/84#1260*, Az. C.41.124.3.2, Multilaterale Investitionsrisikogarantie in (1963–1965), Schweizerisches Bundesarchiv.

[164] Memo from David Gordon to George Woods, Meeting with APPI Representatives on Investment Guarantees, 10 April 1965, Liaison – APPI, volume 1, 30023905, WB IBRD/IDA EXT-08, World Bank Group Archives.

[165] APPI Doc. 295/67, 21 March 1967, V01/4411 APPI, HADB.

[166] APPI Doc. 804/68, 2 December 1968, V01/4413 APPI, HADB.

[167] Keck and Sikkink, *supra* note 26, at 13.

economy, but some of his international colleagues – like the well-connected Abs – might; the French APPI members knew that they needed support abroad to push their ideas on arbitration and investment insurance, and they created APPI for that reason. APPI members also engaged in tactical forum shopping. Some international organizations (such as the UN) were avoided when discussing specific legal issues, and others that seemed more promising (the OECD and the World Bank) were preferred.

APPI was particularly well suited to influence the terms of the debate because of the combination of access and expertise. APPI lawyers produced specific legal proposals that could be discussed with civil servants. APPI only played a secondary role in areas where its lawyers did not prepare specifical proposals (such as insurance). It was also able to conduct many of its activities in the limelight, with lawyers being inserted into expert groups (for example, at the OECD), by structuring its involvement via other groups not directly linked to business (for example, the Shell lawyers using the ABA) or by establishing direct contacts with mid-level civil servants. Another interesting factor is that the businessmen and lawyers often remained involved for the full 10 years discussed here and dealt with all three issues of a code, arbitration and insurance in tandem.[168] At the same time, the evidence strongly suggests that business lobbying was often impeded by factors that only come to light when adopting a granular approach. Personal disagreements (for example, Abs' aversion to investment insurance) and institutional competition (for example, the disgruntled attitude of the ICC Secretariat, which believed APPI was encroaching on its area of expertise) did impede more effective lobbying at times, and business was often not unified in what it wanted to prioritize.

Was APPI a success story? APPI was mostly not successful in that it clearly identified three multilateral proposals that it wanted to see become a reality (a code, investor-state arbitration and a multilateral guarantee agency), and only one materialized during the 1960s. APPI members devoted most resources to a multilateral investment convention, but the OECD draft was never opened for signature. The fact that APPI members perceived this outcome as 'little successful', was confirmed by a member of APPI's consultative committee who was already involved during this period.[169] With respect to investment insurance, the Reyre plan never materialized, and the idea of an insurance agency was only picked up again by the World Bank during the 1980s. APPI members were happy with the outcome on investor-state arbitration. Still, if APPI was influential in that area at all, it seems to have happened mainly via the intermediary of the Shell-connected members of APPI.

I believe the jury is still out on APPI's success in other ways. A multilateral investment code did not materialize, but an ever-growing network of BITs did. Hermann

[168] To give a telling example of the opposite situation: when civil servants rotated positions in Germany's Foreign Ministry, the new civil servants sometimes did not know about initiatives their predecessors had taken in favour of the OECD draft, and they had to contact their predecessors or look through the archives to get up to date. See AA to BMWi, Stellungnahmen der Entwicklungsländer zum Konventionsentwurf, 28 January 1966, B 56, Referat IIIB3, Abgabe 1199, PA AA.

[169] Letter from H. Halbheer to author, 12 October 2021 (on file with author).

Abs certainly believed APPI's work on the OECD draft influenced later treaty practice, noting in his 1977 letters to attract new APPI members that 'it influenced governments to embark in the first place on negotiating and concluding bilateral treaties'.[170] Then again, Abs needed to attract new APPI members and exaggerated his influence at times.[171] In truth, the early spread and diffusion of BITs, and the possible afterlife of the OECD draft in later BITs, remain a blind spot in our knowledge. The same goes for investment insurance: the MIGA Convention was only created in the 1980s, and most Western countries had developed national insurance programmes by that time.

Looking at other initiatives in which the organization, or individual members, were involved might bring to light other, more indirect ways in which APPI was able to influence the discourse on foreign investment relations. For example, APPI was an association with legal personality under Swiss law (Articles 60 and following of the Swiss Civil Code). Its organizational form meant that it could gain access to international lawmakers. After the UN Conference on Trade and Development was created in 1964, APPI believed that foreign direct investment questions would receive more attention at the UN. As NGOs can, but individual businesses cannot, receive consultative status with ECOSOC, APPI promptly applied for – and received in 1966 – consultative status at ECOSOC, believing that this could help it influence UN discussions.[172] These and other international organization contacts existed until 1974 when international organizations were informed of APPI's second restructuring and asked to no longer send documents.[173]

There is also more to be said about things APPI preferred to keep off the agenda. For example, whilst APPI was in favour of investor rights, it was opposed to discussing investor obligations.[174] During the OECD draft discussions, some developing countries noted the one-sidedness of the document, as it only contained state obligations. Even though APPI lawyers drafted a 'Draft protocol on counter-assurances', which would have contained non-binding investor obligations, this discussion was quickly closed when several businessmen voiced their opposition in the directing committee.[175] It would be interesting to assess whether business groups were more successful (from their perspective) when on the defensive, opposing calls for investor obligations to be enshrined in international law, a subject at the heart of the negotiations of the UN Code of Conduct during the 1970s.

[170] Draft letters from Hermann Abs to prospective APPI members, 8 July 1977, V01/4424, HADB.

[171] For example, Abs claimed in a 1968 speech in Karlsruhe that, as concerns the 1964 Germany-India Investment Guaranty Agreement, he 'negotiated this agreement [him]self on the spot in India'. See H. J. Abs, *Die rechtliche Problematik privater Auslandsinvestitionen: Vortrag gehalten vor der juristischen Studiengesellschaft in Karlsruhe am 16. Dezember 1968* (1969), at 13. The actual archival record shows this to be an exaggeration at best, see B 56, REF. 404_IIIB3, 235 to 238, PA AA.

[172] Article 71 of the UN Charter. See 'Special Report on UNCTAD', APPI Doc. 360/64, 17 June 1964, V01/4407, HADB; 'Consultative Status with the United Nations', APPI Doc. 128/65, 22 February 1965, V01/4410, HADB.

[173] Letter from Ulf Siebel to Hermann Abs, Umgestaltung der A.P.P.I., V01/4417, HADB.

[174] On this divide, also see Perrone, *supra* note 22.

[175] APPI Doc. 21/63, 1 December 1963, V01/4406, HADB.

5 Conclusion

This article has shown how business actors were closely involved in early multilateral discussions of an investment code, investor-state arbitration and investment insurance. I have posited that APPI was the key actor involved and that it can best be understood as a TAN. APPI was an umbrella organization for the companies that, because of the practical concerns with which members' businesses were faced, had a particular interest in IIL. I have shown that the group operated by combining the access to policy-makers that businessmen enjoyed with the specific legal expertise that company lawyers brought, two elements necessary to exert influence. I have also shown that disagreements existed within the business sector on which initiative to prioritize and how individual and institutional competition made business lobbying less effective at times. Even though APPI could mobilize extensive company resources in support of its lobbying efforts, only one of the three multilateral IIL projects that APPI members supported materialized during the 1950s–1960s.

This article also suggests many further avenues for research on business lobbying in the international investment regime. My definition of lobbying focuses on direct causal influence, discussing three specific legal projects. We also need to investigate further discursive power as well as other more nebulous forms of influence. The influence of TANs for other sub-areas of international law should also be further researched. Equally, the focus in this article has been on APPI only. As I have shown, APPI was an amalgamation of different business actors, and the next step would be to look at the constituent parts of this group. Especially regarding the role and importance of Shell-affiliated lawyers, I believe this contribution has only been able to show the tip of the iceberg. In a regime mired with path dependencies and critical junctures originating in the immediate post-World War II period, the past still influences how we perceive, think and reason about investment law today. Lifting the veil on those who influenced the regime in its early days is one of the best ways to understand why we are where we are today and whether we want to change tomorrow's law.