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Parity Codetermination in West German Companies and International Law

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I. THE PROPOSED ACT

A. *Elements of Parity Codetermination*

German Law on joint stock companies,[1] in conformity with that of nearly all other countries, has long provided that the organs of the joint stock company (*Aktiengesellschaft*) consist either exclusively of the shareholders themselves (*i.e.*, the general meeting of shareholders) or are elected by them (*i.e.*, the *Aufsichtsrat* or supervisory board), or that such an elected organ in turn appoint another organ (*i.e.*, the *Vorstand* or executive board). Ever since the "old" Labor Management Relations Act (*Betriebsverfassungsgesetz*) of October 11, 1952, however, only two-thirds of the membership of the supervisory boards[2] of the larger joint stock companies are elected by the general meeting of stockholders and one-third by the company's work force.[3] Special legal dispositions were enacted for enterprises in the coal, iron, and steel industry by the act of May 21, 1951.[4]

The essential element of so-called economic codetermination on the basis of parity (or simply "parity codetermination"), as found in the Codetermination Bill of 1974,[5] is to change the existing law as follows: in the future, half the membership of the supervisory board of any joint stock company with a work force of more than 2000 is to be elected by the shareholders, and half by the company

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1. The Federal Act on Joint Stock Companies has been in force in the Federal Republic since Jan. 1, 1966. Law of Sept. 6, 1965, [1965] BGBl. 1089 [hereinafter cited as AktG]. Until then, the relevant act of Jan. 30, 1937, [1937] RGBl. 107, was in force. The procedure for the election of the supervisory board by the general shareholders meeting is essentially the same in both acts.

2. The German joint stock company has not only an executive board (board of directors, *Vorstand*), but also has a second board called the supervisory board (*Aufsichtsrat*).

3. Law of Oct. 11, 1952, [1952] BGBl. 681. The provisions of this act are not applicable if all shares are in the hands of a family or of a single natural person and if there are no more than 500 workers and employees.

4. Law of May 21, 1952, [1953] BGBl. 347.

5. Parliamentary Paper of the Bundesrat (Federal Council) No. 200/1974. The English text of the statute, as translated by Dr. Martin Peltzer, is available together with Dr. Peltzer's English introduction from Verlag Dr. Otto Schmidt KG (Cologne, 1974).

work force. Those board members not elected by the shareholders may include persons who are not working for the company but who are trade union functionaries. In case of tie votes within the board thus constituted, various procedural solutions are envisioned according to the Bill.

Under the proposed law members of the supervisory board not elected by the shareholders would have equal voting rights on all matters for which the board is competent, and not only for matters pertaining to the working conditions of the company's work force. In questions of special concern to the work force, the organs of the company are already required by existing laws, especially the "new" Labor Management Relations Act of January 15, 1972, to consult the works council—the elected representatives of the company's work force—or to obtain its approval before taking certain measures. In addition under the old Labor Management Relations Act, as well as under the proposed Codetermination Bill of 1974, the board members not elected by shareholders participate in decisions dealing with investments or other dispositions of the property of the joint stock company, even if the interests of the work force are not affected.

The proposed Bill is to apply to all companies established under the laws of the Federal Republic.[6] Thus it would extend to West German companies whose stock is held exclusively, predominantly, or partly by foreigners and foreign companies, so long as the "controlled" German company has a work force of over 2000. Controlling foreign parent companies—which, after all, may have an organizational structure totally different from the German company in question—are themselves not affected by the draft law. If, however, a foreign company controls several German companies, the work force of all of the companies is to be aggregated so that, if the total is more than 2000, the company most closely related to the central management of the combine may be subjected to the act, even if the work force of that particular company remains below 2000.

B. *Impact on American Shareholders*

The result of applying parity codetermination to West German joint stock companies in which American nationals or companies are shareholders would be a serious reduction of their influence in the company, for the supervisory board of a German joint stock

6. Codetermination Bill of 1974 § 6.

company, though not apparent from its name, is actually the organ that makes the major decisions on company policy. In particular, it can decide that certain decisions may be taken by the executive board only with its approval. Further, the supervisory board selects the members of the executive board, which represents the company in its dealings with third parties and conducts the day-to-day business of the enterprise. Under the proposed Codetermination Bill of 1974, the supervisory board (composed of an equal number of representatives of the shareholders and of the work force) elects the executive board by a two-thirds majority; if this majority cannot be attained, involved procedures are provided to break the deadlock and insure that an executive board is constituted.

How radically the application of the Codetermination Bill would change the conditions on the basis of which American capital was originally invested in a German company is apparent, particularly in the case of companies in which 50 per cent of the capital is of American and 50 per cent of German origin,[7] and where the two groups of investors have concluded agreements concerning the persons to be elected as members of the supervisory board and executive board, and concerning the business policy to be followed by those organs. Agreements such as those customary among shareholders when all the capital is firmly in the hands of a small number of persons or companies would become inoperative were the supervisory board no longer composed of a majority of shareholder representatives. Among other consequences, this might enable the German shareholders in cooperation with the work force representatives to strengthen their own position in the management of the company at the expense of the American shareholders, and to circumvent contractual obligations toward the latter.

7. It can be submitted that most American investments in joint stock companies in the Federal Republic have not been effectuated by means of the acquisition of shares of existing German companies by individual American purchasers on the stock market, but by the incorporation of new German companies wholly-owned by the American parent company, or by the incorporation of German companies whose shares split equally between an American and a German company. Sometimes American capital is invested not in joint stock companies but in "limited liability companies" (*Gesellschaften mit beschranter Haftung* or GmbH). This legal form is particularly suitable for what is called a close corporation in the United States. GmbH's, too, would be subject to the planned codetermination law, if their work force exceeds 2000.

II. Parity Codetermination under the German-American Commercial Treaty

A. *Relevant Articles*

The following analysis deals with whether alteration by parity codetermination of the management structure of German joint stock companies in which American nationals have invested capital would be compatible with provisions of the Treaty of Friendship, Commerce and Navigation of 1954 between the Federal Republic and the United States, Oct. 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593 [German-American Commercial Treaty].

The relevant articles are set out below.

Artikel V	Article V
1. Das Eigentum der Staatsangehörigen und Gesellschaften des einen Vertragsteils genieBt in dem Gebiet des anderen Vertragsteils weitestgehenden Schutz und Sicherheit.	1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.
. . . .	. . . .
3. Keiner der beiden Vertragsteile darf unbillige oder diskriminierende MaBnahmen ergreifen, durch welche die in seinem Gebiet von den Staatsangehörigen und Gesellschaften des anderen Vertragsteils rechtmäBig erworbenen Ansprüche oder Interessen an den von ihnen errichteten Unternehmen oder an dem von ihnen durch Kapital oder durch ihr technisches Können, Wissen oder Geshick hierzu geleisteten Beitrag beeinträchtigt würden.	3. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have applied.
4. Eigentum von Staatsangehörigen oder Gesellschaften des einen Vertragsteils darf in dem Gebiet des anderen Vertragsteils nur zum allgemeinen Wohl unter Gewährung einer gerechten Entschädigung und der Möglichkeit, den Rechtsweg zu schreiten, enteignet werden. Die Entschädigung muB dem Wert des entzogenen Eigentums entsprechen; sie muB tatsächlich verwertbar sein und ohne unnötige Verzögerung geleistet werden. Spätestens im Zeitpunkt der Enteignung muB in angemessener Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein.	4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay. Adequate provision shall have been made at latest by the time of the taking for the determination and the giving of the compensation.
Artikel VII	Article VII
1. Den Staatsangehörigen und Gesellschaften jedes Vertragsteils wird in dem Gebiet des anderen Vertragsteils Inländerbehandlung hinsichtlich der Ausübung	1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in all types of

jeder Art von geschäftlicher, industrieller, finanzieller oder sonstiger gegen Entgelt vorgenommener Tätigkeit gewährt. Dabei ist es unerheblich, ob sie diese selbständig oder unselbständig und ob sie sie unmittelbar oder durch einen Vertreter oder durch juristische Personen jeder Art ausüben. Dementsprechend dürfen diese Staatsangehörigen und Gesellschaften innerhalf des genannten Gebiets

a) Zweigstellen, Vertretungen, Büros, Fabriken und andere zur Fuhrunc ihrer Geschafte geeignete Betriebe errichten und unterhalten,

b) nach dem Gesellschaftsrecht des anderen Vertragsteils Gessellschaften gründen und Mehrheitsbeteiligungen an Gesellschaften des anderen Vertragsteils erwerben,

c) von ihnen errichtete oder erworbene Unternehmen kontrollieren und leiten.

Auch wird den von ihnen kontrollierten Unternehmen, seien es solche von Einzelkaufleuten oder Gesellschaften oder sonstige Unternehmen, in allen mit ihrer Betätigung zusammenhängenden Angelegenheiten keine ungünstigere Behandlung gewährt als gleichartigen Unternehmen, die von Staatsangehörigen oder Gesellschaften des anderen Vertragsteils kontrolliert werden.

commercial, industrial, financial and other activity for gain, whether in a dependent or an independent capacity, and whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories:

a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business;

b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and

c) to control and manage enterprises which they have established or acquired.

Moreover, enterprises which they control, whether in the form of individual proprietorship, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals or companies of such other Party.

The provisions of article V are supplemented by the following provisions of article V(5).

5. Den Staatsangehörigen und Gesellschaften des einen Vertragsteils wird in dem Gebiet des anderen Vertragsteils hinsichtlich der in Absatz 2 und 4 dieses Artikels behandelten Angelegenheiten Inländerbehandlung und Meistbegünstigung gewährt. AuBerdem wird Unternehmen, an denen Staatsangehörige oder Gesellschaften des einen Vertragsteils in erheblichem MaBe beteiligt sind, in dem Gebiet des anderen Vertragsteils Inländerbehandlung und Meistbegünstigung in allen Angelegenheiten gewährt, die mit der Uberführung eines Privatunternehmens in öffentliches Eigentum oder seine Unterstellung unter öffentliche Aufsicht im Zusammenhang stehen.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which nationals or companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

The provisions of article VII are supplemented by the following provision of article VII(4).

4. Den Staatsangehörigen und Gesellchaften jedes Vertragsteils sowie den von ihnen kontrollierten Unternehmen wird für die in diesem Artikel behandelten Angelegenheiten mindestens Meistbegünstigung gewährt.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals or companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

B. *Comparative Treaty Provisions*

Similar provisions are to be found in other treaties between the United States and third countries. The interpretation and application of the articles of the German-American Commercial Treaty cited above in relation to the proposed Codetermination Bill might, therefore, have repercussions on the interpretation and application of other such treaties.

Conversely, recourse may be had to these other treaties in order to interpret the German-American Commercial Treaty. It is, for instance, relevant that the matter dealt within article V(3) of the Commercial Treaty between the United States and the Federal Republic is laid down in greater detail in the treaty between the United States and Italy of September 26, 1951.

> The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in:
> (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or
> (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise.[8]

Numerous treaties, which the Federal Republic has concluded with other states, contain further stipulations that by force of the most-favored-nation clause of the German-American Commercial Treaty[9] become especially relevant to the relationship between the Federal Republic and the United States. These treaties contain in particular a more exact definition of the prohibition against expro-

8. Treaty with Italy on Friendship, Commerce, and Navigation of Sept. 26, 1951, [1961] 1 U.S.T. 131, T.I.A.S. No. 4685.

9. German-American Commercial Treaty, arts. V(5), VIII(4).

priation and other forms of encroachment on investments. The treaty between the Federal Republic and Indonesia of November 8, 1968,[10] for instance, contains the following provisions.

Artikel 1	Article 1
Im Sinne dieses Vertrages	For the purpose of this Agreement:
(1) umfaBt der Ausdruck "Kapitalanlagen" Vermögenswerte ieder Art, insbesöndere, aber nicht ausschlieBlich,	(1) The term "investment" shall comprise every kind of asset and more particularly, though not exclusively:
(a) Eigentum an beweglichen und unheweolichen Sachen sowie sonstine dinglichte Rechte, wie Hypotheken, Pfandrechte, HieBhrauch und deroleichen;	a) movable and immovable property as well as any other rights in rem, such as mortgage, lien pledge, usufruct and similar rights;
b) Anteilrechte an Gesellschaften und andere Arten von Beteiligungen;	b) shares of companies or other kinds of interests;
. . . .	. . . .
(4) bezeichnet der Ausdruck "Gesellschaften"	(4) The term "companies" shall mean:
a) in bezug auf die Bundesrepublik Deutschland: jede juristische Person sowie jede Handelsgesellschaft oder sonstige Gesellschaft oder Vereinigung mit oder ohne Rechtspersönlichkeit, die ihren Sitz im Hoheitsgebiet der Bundesrepublik Deutschland hat und nach den Gesetzen zu Recht besteht, gleichviel ob die Haftung ihrer Gesellschafter, Teilhaber oder Mitglieder beschränkt oder unbeschrankt und ob ihre Tätigkeit auf Gewinn gerichtet ist oder nicht,	a) in respect of the Federal Republic of Germany, any juridical person as well as any commercial company or other company or association with or without legal personality, having its seat in the territory of the Federal Republic of Germany and lawfully existing consistent with legal provisions irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit, and
b) in bezug auf die Republik Indonesien: jede Gesellschaft mit beschränkter Haftung, die im Hoheitsgebiet der Republik Indonesien eingetragen ist, sowie jede in Übereinstimmung mit den Rechtsvorschriften der Republik Indonesien gegründete juristische Person.	b) in respect of the Republic of Indonesia, any company with a limited liability incorporated in the territory of the Republic of Indonesia, or any juridical persons lawfully constituted in accordance with its legislation.

10. Treaty between the Federal Republic of Germany and Indonesia of Nov. 8, 1968, [1970] BGBl. II 492.

Artikel 2

(1) Jede Vertragspartei wird in ihrem Hoheitsgebiet Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei nach Moglichkeit fördern und diese Kapitalanlagen in Uebereinstimmung mit ihren Rechtsvorschriften und Verwaltungsverfahren zulassen. Sie wird diese Kapitalanlagen in jedem Fall gerecht und billig behandeln.

(2) Kapitalanlagen, die in Uebereinstimmung mit den Rechtsvorschriften einer Vertragspartei im Anwendungsbereich ihrer Rechtsordnung von Staatsangehbrigen oder Gesellschaften der anderen Vertragspartei vorgenommen worden sind, genieBen den vollen Schutz dieses Vertrages. Soweit für die Vornahme der Kapitalanlage ein Zulassungsverfahren erforderlich ist, genieBt die betreffende Kapitalanlage diesen Schutz mit Wirkung vom Datum der Zulassung.

Artikel 3

(1) Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genieBen im Hoheitsgebiet der anderen Vertragspartei vollen Schutz und Sicherheit.

(2) Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragapartei nur zum allgemeinen Wohl und gegen Entschädigung enteignet werden. Die Entschädigung muB dem Wert der enteigneten Kapitalanlage entsprechen, tatsächlich verwerbtbar und frei transferierbar sein sowie unverzüglich geleistet werden. Spätestens im Zeitpunkt der Enteignung muB in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein. Die RechtmäBigkeit der Enteignung und die Höhe der Entschädigung müssen in einem ordentlichen Rechtsverfahren nachgeprüft werden können.

Artikel 9

. . . .

(2) Abgesehen von den Bestimmungen in Number 6 Buchstab b des beiliegenden

Article 2

(1) Each Contracting Party shall in its territory promote as far as possible the investment of capital by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation and administrative practice. It shall in any case accord such investment fair and equitable treatment.

(2) Investments made in accordance with the laws and regulations of either Contracting Party within the area of application of that Party's legal system by nationals or companies of the other Contracting Party, shall enjoy the full protection of the present Agreement. To the extent that an admission procedure is required for making an investment, such investment shall enjoy this protection as from the date of the granting of the admission.

Article 3

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually realizable, freely transferable, and shall be made without undue delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law.

Article 9

. . . .

(2) Except for the stipulations made in No. 6(b) of the Protocol annexed hereto

Protokolls behandelt jede Vertragspartei in ihrem Hoheitsgebiet Staatsangehörige oder Gesellschaften der anderen Vertragspartei hinschtlich ihrer Betätigung im Zusammenhang mit Kapitalanlagen nicht weniger günstig als ihre eigenen Staatsangehörigen und Gesellschaften dritter Staaten.

neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activity in connexion with investments, to treatment less favorable than it accords to its own nationals or companies or to nationals or companies of any third State.

Protocol:

(3) Zu Artikel 3:

Die Bestimmungen des Artikels 3 Absatz 2 gelten auch für die Überführung einer Kapitalanlage in öffentliches Eigentum, ihre Unterstellung unter öffentliche Aufsicht oder ähnliche Eingriffe der öffentlichen Hand. Unter Enteignung ist die Entziehung oder Beschränkung jedes Vermögensrechts zu verstehen, das allein oder susammen mit anderen Rechten eine Kapitalanlage bildet.

(3) Ad Article 3:

The provisions of paragraph (2) of Article 3 shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control, or to similar interventions by public authorities. Expropriation shall mean the taking away or restricting of any property right which in itself or in conjunction with other rights constitutes an investment.

(6) Zu Artikel 9:

a) Als Bestätigung im Sinne des Artikels 9 Absastz 2 gilt insbesondere, aber nicht susschlieBlich, die Verwaltung, die Verwendung, der Gebrauch und die Nutzung einer Kapitalanlage.

(6) Ad Article 9:

a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of paragraph 2 of Article 9: the management, maintenance, use and enjoyment of an investment.

Similar provisions are to be found in numerous treaties with other countries.[11]

It must be noted that all these treaties of the Federal Republic, which prevent an encroachment on rights based on investment, refer not only to German investments in third countries but expressly apply, on the basis of reciprocity, to investments of the nationals of these countries in the Federal Republic. For instance, paragraph 2 of the preamble of the Treaty with Indonesia provides:

In dem Bestreben, günstige Bedingungen für Kapitalanlagen von Staatsagenhörigen oder Gesellschaften des einen Staates im Hoheitsgebiet des anderen Staates zu schaffen . . . .

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State . . . .

By means of the most-favored-nation clause contained in the German-American Commercial Treaty, American investors in the

11. *See* Appendix 2.

Federal Republic can thus invoke all provisions referring to the protection of investments of third-country nationals in the Federal Republic.[12]

C. *Shareholder Property Rights*

If the treaty provisions set out above speak of property, companies, shares, control and management, they presuppose—irrespective of the fact that details of the legal rules may differ from country to country—that the contracting parties are in agreement on the notions of the legal institutions referred to and that the basic conceptions of these institutions are the same under the national laws of the contracting parties. As a matter of fact, the basic concepts of property and the rights of shareholders coincide in the legal systems of the Federal Republic and the United States as well as in those countries with which the Federal Republic has concluded treaties for the protection of investments.

If someone invests capital in the form of money or other property into a company endowed with legal personality, the investor himself loses the legal title to his original investment. On the other hand, the joint stock company as a juridical person enjoys the same rights over property and funds resulting from shareholders' investments (or otherwise acquired) as does a natural person with respect to his property. As a juridical person the company exercises its own property rights by means of the same organ that is empowered to make legal commitments on behalf of the company. The conclusion of all sorts of legal contracts, etc., on behalf of the company and the administration of the property of the company are together customarily designated as "management."

The shareholders have only an indirect legal interest in the property of the joint stock company. A shareholder, however, by means of contributing part of the initial capital of the company (or by purchase of a share) acquires the rights of an associate (a member) as defined by the law of the state in which the company is incorporated and the by-laws of the joint stock company in question. These shareholder rights are to be exercised in part individually, in part collectively. The right to receive declared dividends is the

12. British business, referring to the most-favored-nation clause in British-Japanese treaties, has required that the stipulations of the American-Japanese Commercial Treaty concerning equal treatment of American investments in Japan with Japanese investments be applied to British investors too. *See* D. HENDERSON, FOREIGN ENTERPRISES IN JAPAN 273 (1973).

most important right of the first category. Among those rights exercised collectively, the most important are the rights to participate personally in the shareholders meetings and to vote on questions for which the shareholders meeting is competent, especially the election of other organs of the joint stock company. German law in this respect has been defined by the Federal Constitutional Court as follows: "A share is both a property right and a membership right. It is property administered under the laws governing corporations . . . . Its character as a property right cannot be separated from that of a membership right."[13]

In the last analysis, the right to participate in the shareholders meeting and the right to draw dividends and a potential share of the liquidation proceeds in case of dissolution constitute a surrogate of the property that the shareholder has given to the company. Property rights of an individual comprise the right not only to the enjoyment of his property but also the right to determine how his property is to be used in order to be productive and the right freely to designate another person who, as administrator, has the authority and task to manage the property in the interests of the owner. Thus, the right of the shareholder comprises not only the right to collect dividends but also the right to designate, together with other shareholders, those persons who are to determine how the property of the joint stock company created by the investment of the shareholders is to be administered and utilized for the benefit of the company. The fact that small shareholders often do not exercise their right to take part in the shareholders meeting, and the fact that even when they participate in such elections their influence is minimal in comparison with the large shareholders does not alter the fact that under both German and American corporate law, an essential aspect of the rights of shareholders remains the privilege to participate in the collective designation of the organs of the company.

The voting right of the shareholder in the shareholders meeting is itself a property right, because it safeguards his property interests:

> [T]he right to vote is a right which is inherent in and incidental to the ownership of corporate stock, and as such is a property right, and it follows that the stockholder cannot be deprived of it, and that the right cannot be essentially impaired, either by the legislature or by the corporation, without his consent, through amending the

13. Judgment of May 7, 1969, 25 BVerfG 372, 407.

> charter, or by by-law. This is equally true though he is given what others might regard as a better right by way of a substitute. The legislature cannot indirectly impair such rights by authorizing the directors, with the consent of only a majority of the stockholders, to so amend the charter as to have that effect.[14]

Without prejudice to those special measures that protect minority shareholders, an ubiquitous aspect of a joint stock company is that the ownership of a majority of the shares enables the holder (or a group of allied shareholders) rightfully to exercise what is usually[15] called "control" of the joint stock company. Control of the company means control of the *management* functions exercised by the competent organs of the company; such control by shareholders is exercised principally through their right to elect the organs of the company or to recall their officers through new elections.[16] As an incident of the voting rights of the individual shareholder, the right to exercise such control constitutes a property right. Therefore, one refers to the higher price required for the purchase of a controlling plurality of shares as to the price for the "purchase of control."

As previously noted, under German law governing joint stock companies, the supervisory board is the most important managing organ of the company. Even under the old Labor Management Relations Act, which provides that one-third of the members of the supervisory board are to be elected by the company's work force, a "domination" of the supervisory board and thus *full control* of the management of the company under any and all circumstances is presently possible if one shareholder owns five-sixths of the outstanding shares or if five-sixths of the shareholders agree on the same policy. Independent of this control through voting power, especially with reference to the selection of the majority of the supervisory board, German law provides for the possibility that through the conclusion of a "domination contract" a joint stock

14. W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2025 (1931-1933).

15. *E.g.*, German-American Commercial Treaty, art. V.

16. "In the narrowest legal sense, control should mean possession of enough voting shares to elect a majority of the board of directors." A. CONARD, R. KNAUSS & S. SIEGEL, ENTERPRISE ORGANIZATION 1063 (1972). "The law has always recognized the right of majority stockholders of a corporation to control its business and affairs, and a court of equity will never interfere with such control except for the very best of reasons." Gaines v. Gaines Bros. Co., 176 Okla. 583, 588, 56 P.2d 863, 868 (1936).

company and its organs can be required to follow the instructions of the organs of another company that owns all or almost all the shares of the dominated company.[17]

To the extent that majority decisions of the shareholders at the shareholders meeting, or decisions by other organs of the company, can change the by-laws of a joint stock company, both American and German law severely restrict the possibilities of encroachment upon the voting rights that are by law attached to share ownership, notwithstanding the fact that by investing in the joint stock company the individual shareholders submitted to majority decisions of the company organs, which are competent to promulgate or to change the by-laws of the company.

Decades ago, American courts declared invalid amendments to a company's articles of incorporation providing that the legal voting rights of the shareholders should not generally be exercised by themselves but rather by others. The issue of "voting trusts" created by articles of incorporation was treated as follows by a decision of the Court of Appeals of Kentucky in 1913:

> Independent of any constitutional or statutory provision, in the absence of the consent of such stockholders such a provision cannot be upheld. The right to control one's own property is inherent; and while the courts have upheld voting trusts and pooling arrangements by stockholders where they are made with full knowledge of all the conditions, and are designed to effectuate some common purpose for the common good and have been voluntarily entered into, we are aware of no instance where individual rights have been so far abridged as to hold that a stockholder's shares may without his consent be placed in such a trust, either by a charter provision or otherwise, and be deprived completely of their control, even upon the ground that it was for his own as well as for the general good. It is well grounded in our fundamental law that there is no limitation upon one's right to control that which is his own, except such restrictions as might be imposed by the law of the land. Any other rules would be subversive of that individual responsibility which is the keynote of all civilization and progress. To say that appellants may without the consent of the poolers have inserted in the articles of incorporation a clause taking from the poolers the right to control that which is theirs, and place its control absolutely in their own hands, would be to recognize a most unwarranted assumption of authority. There is no more sacred duty confided to the courts than the upholding of individual rights in property, and no considerations

17. *See* AktG §§ 291, 308.

> of temporary advantage which it is thought might accrue to the growers generally will justify them in departing from the well beaten paths so clearly defined in all English and American jurisprudence.[18]

Unless special statutory provisions make it possible for the articles of incorporation of an American company to provide for the nomination of directors by creditors or employees,[19] such provisions are inadmissible under American corporate law.

> The holders of bonds of a corporation or other creditors cannot be given the right to vote at corporate meetings for the election of directors, or on the other questions, either by a by-law of the corporation or by contract, even with the consent of all the stockholders, where this is inconsistent with or contrary to express provisions of the charter or statutes.[20]

On the other hand, no provision of American law prevents the management of a corporation from freely contracting with creditors or employees, including trade unions, to inform or consult them before certain decisions may be taken.

According to the law of the Federal Republic of Germany, the articles of incorporation of a joint stock company adopted by a majority of the founding shareholders may provide an "upper limit" on the voting rights of an individual shareholder holding several shares.[21] However, neither the by-laws of the company nor the majority of shareholders at the shareholders meeting necessary to change the by-laws may grant to persons other than the shareholders the right to select members of the supervisory board and thus to weaken the shareholders voting rights at the general shareholders meeting.[22] Thus, under present law the shareholders meet-

18. Lebus v. Standifer, 154 Ky. 444, 157 S.W. 727 (1913). All the stockholders of the corporation in question were tobacco growers who earlier had set up a pool to handle the sale of their tobacco growers who earlier had set up a pool to handle the sale of their tobacco for all of them. The amended charter provided that the power to vote the corporate stock should not be vested in the stockholders but in officers of the sales pool corporation.

19. For some time company acts of some states permitted the by-laws of corporations to provide for creditors or company employees to nominate some members of the boards of directors. *See* Blumberg, *Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public" Directors*, 53 BOSTON U.L. REV. 547, 553 n.17 (1973).

20. W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2043 (1931-1933).

21. AktG § 134.

22. AktG § 101.

ing could not grant to the company's work force additional rights to name members of the supervisory board in addition to those they elect under the existing Labor Management Relations Act.[23] Again, the by-laws may grant to certain individual shareholders or a group of shareholders the prerogative to designate a fixed number of persons to the supervisory board distinct from those that are elected in the general shareholders meeting; these are included within the two-thirds of the members of the supervisory board elected by the shareholders.[24] But there is common agreement that no change in the by-laws may partially or totally remove this special right of delegation without the consent of those shareholders to whom it was originally granted; nor can this be done by changing the by-laws specifying the total number of members of the supervisory board.[25] Such a procedure would amount to expropriation of the special rights of certain shareholders duly granted in the by-laws. Under no circumstances can the by-laws deprive the shareholders of their normal voting right or stipulate that this voting right may only be exercised with the consent of others.

In American corporation law the right of the shareholder, together with other shareholders, to elect the top organs of management is considered to be an integral part of the property rights of the shareholder. Therefore, not even the legislature may transfer this right directly or indirectly to others or restrict it against the will of the owner.

> Shares of stock in a corporation constitute proprietary rights. They represent the proportion to which the respective shareholders are severally entitled in the distribution of the profits arising from the corporate business, and in the final distribution of the estate of the corporation, if it should cease to exist . . . . The right of voting stock at corporate meetings is an incident of ownership; it is a part of the stockholder's property inherent in him by virtue of his title . . . . The holders of the majority of the shares of a corporation have the right and the power, by the election of directors and by the vote of their stock, to determine the policy of their corporation and to manage and control its action . . . . The right to vote for directors is a right to protect property from loss, and to make its possession

23. *Meyer-Landrut*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR § 101 notes 9, 10 (C.H. Barz, *et al.* eds. 3d ed. 1972) [hereinafter cited as AKTIENGESETZ: GROSSKOMMETAR]; H. WUERDINGER, AKTIEN- UND KONZERNRECHT 122 (1973).

24. *See* note 3 *supra*.

25. *Meyer-Landrut*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 101, note 13.

beneficial. To deprive a stockholder of his right to vote is to deprive him of an essential attribute of his property.[26]

Under German company law, too, the voting rights and election rights of the shareholders at their general meeting are the most important means at the disposal of the shareholders to ensure that the other organs of the joint stock company fulfill their duties in the way the shareholders consider proper. In German law, shareholders have only very restricted claims for damages against the members of the executive board and supervisory board,[27] quite apart from the fact that particularly high claims for damages against individual members of either board could not *de facto* be collected. In contrast to American corporate law, under German law a suit by the shareholders' general meeting or by an individual shareholder to compel the executive board or supervisory board to take a certain measure required for the good of the company, or to abstain from a given action that would be detrimental, is possible only in truly exceptional cases. The real protection of the shareholders against the executive board and supervisory board exercising their powers in a way detrimental to the company, and, thus, indirectly detrimental to the shareholders, lies in their ability, through the shareholders meeting, to elect such persons to the supervisory board as may be expected to fulfill their trust vis-a-vis the company.

"The shareholders can safeguard their interests as members of the corporation only by means of such remedies as are provided for by the legal rules on joint stock companies."[28] This is done by exercising their voting rights and by claims for damages allowable within the applicable provisions of the act on joint stock companies.[29] Thus, under German law too, the right to elect the members of the supervisory board is the decisive means to prevent the organs of management from damaging the interests of the shareholders with respect to the application of income and to the preservation of the property of the joint stock company.

If a shareholder has a sufficient number of shares to insure "control," the controlling right resulting from his voting rights is an inseparable part of the rights evolving from his shares:

26. Fein v. Lanston Monotype Mach. Co., 196 Va. 753, 85 S.E.2d 353 (1955).

27. AktG §§ 93, 116, 117, ¶¶ 2, 47.

28. *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 93, note 41.

29. AktG §§ 117, 147.

> The power to control the management of a corporation, that is, to elect directors to manage its affairs, is an inseparable incident of the ownership of a majority of its stock, or sometimes . . . to the ownership of enough shares, less than a majority, to control an election.[30]

D. *Parity Codetermination under International Treaty Law*

As property in the wider sense, the voting rights of the individual shareholder and the position resulting from the ownership of sufficient shares to ensure control are protected both against total expropriation and against partial expropriation or encroachments under the international treaties protecting investments.

According to article 1 of the above mentioned Treaty between the Federal Republic and Indonesia, shares constitute an "investment" within the meaning of the Treaty.[31] The voting and election rights connected with shares are protected against expropriation and restriction by the additional protocol to article 3, because together with the other rights of a shareholder, the voting right is to be regarded itself as an investment.

Both the German-American Commercial Treaty and those conventions between the Federal Republic and third countries relating to the protection of investments, which may be invoked by United States citizens because of the most-favored-nation clause, presuppose that an investment protected by treaty has been made in conformity with the law of the host country. Once an investment has been legally made, the treaties do not prevent one of the contracting parties from changing its regulations governing future investments; however, a new law cannot retroactively invalidate investments which have taken place under laws hitherto valid. Under the German-American Commercial Treaty it would, therefore, be permissible to apply the proposed Codetermination Bill to *future* investments of Americans in the Federal Republic. No objections have ever been voiced by Americans when investments made after the Treaty came into force in 1954 were subjected to the regulations of the Labor Management Relations Act of October 11, 1952. Nor do the treaties prevent one of the contracting parties from modifying its trade and labor laws and applying them to past investments made by members of other contracting states. The treaties, however, do prohibit the transfer of property rights of American nationals acquired in the form of shares through legiti-

30. Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955).

31. *See* Part II(B) *supra*.

mate investments in the Federal Republic, when the transfer is against the investors' will, whether it is to the state or to another person and whether by legislation or by other sovereign acts. Similarly, the treaties expressly prohibit the retroactive restriction of the rights defined as investment through ex post facto laws passed by the host country.[32]

If the rights of the shareholder imply the possibility of indirectly exercising a decisive influence on the management of the company (especially on the use of the property of the company) by choosing the members of the organs of the company, and if under the law in force in the host country at the time of the investment a majority of foreign shareholders is guaranteed the opportunity to "control" the joint stock company, then a restriction of such control through later laws is irreconcilable with the treaties.[33]

The corporate law of the host country may, under the treaties, provide for the issue and acquisition of shares that do not carry voting rights, or a right to participate in the election of the members of the company organs. If, however, according to the corporate law in force at the time of the investment, such rights are tied to the share, it would be an expropriation within the meaning of the treaties cited were the voting or election right of the shareholder transferred by law to the state or to other shareholders or to third parties. It would also be expropriation within the meaning of the treaties were a law to specify that the shareholder must allow his voting and election rights to be exercised by someone whom he cannot freely designate, but who is imposed on him. It follows that within the meaning of the treaties it would be partial expropriation of the shareholders with hitherto exclusive voting rights were new voting and election rights created for persons other than those with whom the investor had to reckon at the time of his investment.

Since section 118 of the Act on Joint Stock Companies of the Federal Republic states expressly that the shareholders exercise "their rights in matters of the company" within the shareholders

32. *See, e.g.*, the Protocol to article III of the Treaty with Indonesia, quoted in Part II(B) *supra*.

33. German investments abroad can be insured in the Federal Republic against expropriation and "encroachment amounting to expropriation" with payment of indemnities by the federal budget. According to the general regulations of the Ministry of Economics, it is a condition for such insurance that the investment be endowed with voting and control rights; no insurance shall be given "if 50% or more of the capital or the *voting rights* are in foreign hands." IIa HANDBUCH DER ENTWICKLUNGSHILFE ¶ 62, INSTALLMENT 11.

meeting, it would constitute a restriction on the rights of each *individual* shareholder if a retroactive law changed the rights of the shareholders to elect the members of the supervisory board in favor of other persons, in particular the company's work force.

The explanatory preamble to the Codetermination Bill states that this sort of legislation is important "for the maintenance and extension of the democratic order of society of the Federal Republic." This goal is not alone sufficient to justify the claim that the partial expropriation of the voting right of the shareholders is a measure taken "in the public interest." At any rate, the draft law does not provide for any compensation for the loss in value of the investment resulting from the introduction of parity codetermination.

The following example illustrates how the diminution of the voting power of those shareholders who by virtue of ownership of a majority of the shares hold legal control of the company constitutes an *expropriation* within the meaning of the treaties. In some Algerian oil companies, Algerian and French shareholders each contributed 50 per cent of the capital. In 1971, an Algerian legislative enactment[34] transferred only two per cent of the French capital to the Algerian shareholder to establish Algerian control over the company. The legislative act expressly called this action "nationalization." The same effect could have been achieved had an Algerian law given to the state, or to the Algerian shareholder, or to a third party subject to the influence of this shareholder, simply one additional voting right in the organs of the company. Such a measure could also clearly have been an expropriation of the controlling voting power of the French shareholder.

III. PARITY CODETERMINATION UNDER GENERAL INTERNATIONAL LAW

The treaties' prohibition of restrictions of the voting power of foreign investors, especially restrictions that impair the influence of the shareholders over the use of the property of the joint stock company, conforms to the requirements of general international law (at least as it is interpreted in the United States) independent of the existence of the treaties themselves. The findings of the Foreign Claims Settlement Commission of the United States, as discussed below, show clearly that an expropriation in violation of

34. Ord. No. 71/11 of Feb. 24, 1971, art. 1, ¶ 3, *translated in* 10 INT'L LEGAL MATERIALS 851 (1971).

international law can occur not only when property rights of foreigners are openly transferred by action of the State from the owner to another person; expropriation can also consist of withdrawing or curtailing what is generally designated as the right of management, or control of the property and/or company.

In conformity with international law, the International Claims Settlement Act of 1949,[35] establishing the Commission, specified, on the basis of United States treaties with Yugoslavia and other East European countries, that American nationals should be compensated in full not only for the seizure of real estate and other movable and immovable property but also for the deprivation of "rights and interests in and with respect to property" in these countries.

According to the decisions of the Settlement Commission, "taking of property" includes restrictions imposed on the owner which result in his no longer having "control and management" of his property or other rights. As early as 1954, a decision under the Yugoslav Claims Agreement[36] stated that "taking of property" also takes place if the legal title formally remains with the claimant.[37] All acts depriving the owner of the right to administer or dispose of the property as well as depriving him of the enjoyment of the property or rendering this enjoyment *de facto* impossible constitute a "taking" of property. The Settlement Commission considered it decisive that "the property [had] been under the control and management of organs of the Yugoslav Government," although no formal act of state had taken place in the particular case.

In a later decision, the Commission stated:

> It is clear that the claimant is precluded from the free and unrestricted use of his property and that the fact that record title . . . has not been transferred to the State is of little moment . . . . Claimant's property has been "taken" . . . .[38]

When Czechoslovakian law imposed restrictions on the owners

35. International Claims Settlement Act of 1949, 22 U.S.C. § 162 *et seq.* (1970) [hereinafter cited as 1949 Settlement Act].

36. Agreement with Yugoslavia on United States Pecuniary Claims, July 19, 1948, 64 Stat. 13, T.I.A.S. No. 1803.

37. Claim of Michael and Nick Zuzich, Dec. No. 1196, Nov. 24, 1954, *cited in* SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMM'N AND ITS PREDECESSORS FROM SEPT. 14, 1949 TO MARCH 31, 1955 at 161.

38. Claim of Albert Bela Reet, 10 FCSC SEMIANN. REP. 61 (1959).

of apartment houses, the Commission ruled that certain American real estate owners

> were and are precluded from the free and unrestricted use of their realty and the fruits of such realty . . . . Owners of such property, despite the fact that they have remained the record owners, lost all control over the property and were little more than collecting agents for the Czechoslovakian Government . . . .[39]

As a result, the Commission considered the property of these American nationals as "constructively taken."

Dealing with measures against American nationals in Cuba, the report of the House of Representatives on Title V of the International Claims Settlement Act states:

> No special measures by the Castro government directed against the property of nationals of the United States are needed to show nationalization or confiscation when it is evident that a Cuban corporation owned by United States nationals is deprived of its management and assets by or with the concurrence of the Castro government.[40]

This line of reasoning was applied in a decision involving Cuba. Two companies created in Cuba under local law were wholly-owned by an American company. The Cuban companies were neither formally expropriated nor were they "otherwise taken by any . . . other single official or formal action of the Government of Cuba . . . ." Nonetheless, the Commission concluded that various laws, regulations, etc., of the Castro regime concerning control of shipping, transfer of foreign exchange, free disposal of bank accounts, hiring and firing of workers, and the like effectively precluded operation and control by the parent company and therefore constituted a "constructive taking":

> [a]s a direct result of these various measures claimant was completely deprived of dominion and control over its two Cuban subsidiaries. Moreover, the subsidiaries were compelled to continue operations despite these adverse conditions which resulted in progressively reduced profits and a steady depletion of the subsidiaries'

39. Claim of Alexander Feigler, 15 FCSC SEMIANN. REP. 16 (1961).
40. H.R. REP. No. 706, 89th Cong., 1st Sess. 3 (1966).
41. Claim of Garcia & Diaz, Inc., [1970] FCSC ANN. REP. 30.
42. 13 FCSC SEMIANN. REP. 16, 18 (1960).
43. Lord v. Equitable Life Assurance Soc'y, 194 N.Y. 212, 226, 87 N.E. 443, 448 (1909).

> assets . . . . The Commission holds that the actions of the Government of Cuba with respect to the two subsidiaries, which were engaged in the maritime industry, constituted a constructive taking of the two subsidiaries . . . .[41]

This decision is particularly relevant since codetermination by persons other than the shareholders, as planned in the Federal Republic, may also result in a situation in which the joint stock company is no longer administered with a view toward earning a profit for the shareholders, but with a view toward operating at a loss to preserve jobs or to induce the shareholders to sell their shares for a minimal price.

In Czechoslovakia, the agricultural cooperatives were assigned land which "in the view of the local peoples' committees had not been propertly cultivated;" in many cases this included land owned by United States nationals. Under laws passed in 1948-49, the organs of these cooperatives included persons who were not members of the cooperative, but in fact were predominantly government employees and members of the Communist Party. The Settlement Commission concluded that the inclusion of landed property owned by United States nationals in such cooperatives constituted a "constructive taking":

> It is obvious that the transfer of land by members to the cooperative virtually amounts to a deprivation of the right of the owner to dispose of the property and to employ the benefits thereof.[42]

The United States Foreign Claims Settlement Commission can act only when, as a result of foreign government measures, a complete loss of property rights of American nationals has taken place and when compensation has been demanded on those grounds. The Commission cannot hear appeals to prevent encroachment on the property rights of American nationals or to have such encroachment stopped. But the reasoning of the Commission shows clearly that restrictions on property rights *per se*—even when no actual damage has yet been caused and no certain amount is calculable for an indemnity—were considered as an interference with the rights of American nationals in violation of international law.

IV. Codetermination and the Duties of Directors

Decisions of United States courts have made clear that the vot-

44. *E.g.*, Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972). *See also* Blumberg, *Reflections on Proposals for Corporate Reform Through Change in the*

ing right which the individual shareholder has acquired together with his share cannot be encroached upon even by legislative or other action taken with the consent of the majority of shareholders, since this would constitute an expropriation of property without compensation. Even the express reservation by the legislature that general corporate law or a charter incorporating a particular company is subject to later change does not justify the violation of the voting right as an acquired property right. The decisions have clearly brought out that the voting right of the individual shareholder is a property right protected against encroachment by the legislature. As early as 1909 the Court of Appeals of New York ruled:

> The stockholders of a corporation, as such, have no direct power of management, and even by united action they can neither bind nor loose the company by making contracts or controlling investments. The capital stock owned by them is property. It represents an investment upon which they are entitled to dividends, provided they are earned, and whether they can be earned or not depends on the management. Indeed, the safety of the entire investment depends on the power to manage the corporate business, because, even in the case of the defendant, with its immense surplus, careless and improvident management might impair the value of the stock or utterly destroy it. The right to vote for directors therefore is the right to protect property from loss and make it effective in earning dividends. In other words, it is the right which gives the property value and is part of the property itself, for it cannot be separated therefrom. Unless the stockholder can protect his investment in this way he cannot protect it at all, and his property might be wasted by feeble administration, and he could not prevent it. He might see the value of all he possessed fading away, yet he would have no power, direct or indirect, to save himself or the company from financial downfall. With the right to vote, as we may assume, his property is safe and valuable. Without that right, as we may further assume, his property is not safe and may become of no value. To absolutely deprive him of the right to vote therefore is to deprive him of an essential attribute of his property. To so undermine that right as to essentially affect its power of protection would, under ordinary circumstances, undermine the right to property involved in the ownership of stock. . . . These are general rules, and under "ordinary circumstances" therefore the Legislature could not by direct action essentially impair the right of the plaintiff to vote as a stockholder, nor could it do so indirectly, by authorizing the directors, with the

consent of only a majority of the stockholders, to so amend the charter as to have that effect.[43]

Only if (as happens with life insurance companies) the charter creating a corporation already envisaged the possibility of a majority of shareholders deciding to transform the right of certain creditors into claims to the profits of the company together with a right to vote for directors, may subsequent legislation change—according to the decision just cited—the *modalities* for so curtailing the voting power of the original shareholders.

The question may be posed, therefore, whether under the law of the Federal Republic of Germany the introduction of parity codetermination in the supervisory board is not perhaps simply a new modality of restrictions such as German corporate law already imposes on the rights of shareholders. It is argued by some people that indeed under the laws of the Federal Republic the shareholders have no right to claim that the executive board and supervisory board should be guided primarily by the interests of the shareholders, whether expressed unanimously or by a majority. Thus, it is further argued, that the shareholders do not have an acquired right to exercise a decisive influence by voting on the composition of the supervisory board. This argument must be closely examined since in the United States, too, it has been said that the organs of management of a corporation need not be guided solely by the interests of the shareholders.[44]

The control of the management of a corporation by the majority of shareholders, as guaranteed by their voting power, is certainly not altogether without limits either under German or American law. Irrespective of whether a joint stock company is controlled by a certain group of shareholders, its management organs are neither completely free in the exercise of their powers nor are they unconditionally subject to the instructions of controlling shareholders.

Under American company law, directors are said to be in the position of trustees in relation to the shareholders.[45] While German company law does not know the juridical concept of the "trust" in

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Composition of the Board of Directors: "Special Interest" or "Public" Directors, 53 BOSTON U.L. REV. 547, 553 n.17 (1973).

45. *See* Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); H. BALLANTINE, BALLANTINE ON CORPORATIONS § 66 (Rev. ed. 1946); H. HENN, THE LAW OF CORPORATIONS § 235 (2d ed. 1970). For court decisions see Litwin v. Allen, 25 N.Y.S.2d 667, 677-78 (Sup. Ct. 1940); Meinhard v. Salmon, 249 N.Y. 458, 459, 164 N.E. 545, 546 (1928).

the sense that American law does, under German law the so-called duty of the executive board and supervisory board "to use proper care" (*Sorgfaltspflicht*) when fulfilling their functions[46] is also designated as a *Treupflicht*—a duty to loyally defend another person's interest.[47]

In German legal literature there is unanimous agreement that such loyalty is owed to the company and nobody else. Rather vague references imply that the duty of the executive board and the supervisory board to use proper care means not only safeguarding the interests of the company, but also includes safeguarding the interests of the individual shareholders, of the work force, and of the common weal.[48]

Such thoughts are not alien to American law either, where recently it has been suggested that the organs of a private corporation should carry out management functions with "social responsibility."[49] American legal literature, however, clearly distinguishes between social responsibilities that can be legally enforced and what are called "voluntary acts of corporate conscience." The social responsibilities enforceable under public law turn out to be nothing other than the obligation to abide by legislative requirements designed to protect the public interest when it differs from the interests of the shareholders:

> Corporate social duties are those that the state enforces directly by the criminal law, or indirectly by allowing private citizens to bring suits in its courts to force compliance or to punish noncompliance.[50]

Currently, however, the basic principle governing the actions of the organs of an American corporation remains the precept expressed in the famous case of *Dodge v. Ford Motor Co.*:[51]

> A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. This discretion of directors is to be exercised in

46. AktG §§ 93, 116.

47. *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 93, notes 9, 10; *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR § 84, notes 11, 12 (W. Gadow, *et al.* eds. 2d ed. 1961).

48. *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 93, note 10.

49. *E.g.*, Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).

50. Comment, *Herald Co. v. Seawell, A New Corporate Social Responsibility?*, 121 U. PA. L. REV. 1162 (1973).

51. 204 Mich. 459, 170 N.W. 668 (1919).

> the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[52]

This concept was elaborated in a famous article by Adolf A. Berle as follows:

> [A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears . . . . In consequence, the *use* of the power is subject to equitable limitation when the power has been exercised to the detriment of such interest, however absolute the grant of power may be in terms, and however correct the technical exercise of it may have been.[53]

The situation is no different with respect to German company law as it was and is in force until today. Even though it is said that company organs must be loyal *to the company*, it is still true that in the last analysis the company is nothing other than the union of the shareholders endowed with a separate legal personality. Under German law the duty of the executive board and supervisory board "to be loyal" means that these organs may under no circumstances exercise their powers to satisfy their own interests at the expense of the interests of the shareholders. The company organs have a duty also in the execution of their management functions to respect legally valid claims of third parties against the company, and neither the general shareholders meeting nor individual shareholders may prevent such action. The faithful execution of contracts concluded on behalf of the company with sellers and buyers, creditors, etc., is, again, their duty as conscientious managers. Similarly, the duty to respect the common weal, which is said to be subsumed in the general duty of the executive board and supervisory board to use proper care, consists of nothing other than obeying the laws that have been passed in the interests of the general public.[54]

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52. 204 Mich. at 507, 170 N.W. at 684.

53. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

54. This is underlined by the fact that the executive board of a joint stock company cannot be held liable for the violation of its duty of loyalty "with respect to the company" if in accordance with § 119, ¶ 2 of the Act on Joint Stock Companies, it has called a general meeting of the *shareholders* and then acted

Similarly, consideration of the interests of the work force essentially comprises, under present German law, adherence to all legal and contractual requirements relating to the company's work force. Furthermore, the organs of the company can and should confer "voluntary" benefits to the workers, *provided* that such legally voluntary concessions indirectly serve the good of the company, especially by maintaining or promoting goodwill and a peaceful working climate in the plant.[55] The welfare of the company, which in the last analysis alone is relevant, is always identical with the interests of the shareholders to the extent that it aims, under all circumstances, at the conservation of the capital, *viz.* the investment of the shareholders, and the realization of a profit commensurate to the size of the capital.

This proposition is confirmed if one examines the result under German law when the executive board or supervisory board violates their duty "to use proper care." Generally only the company by vote of the shareholders meeting (or possibly by a minority of the shareholders but only under very special circumstances by individual shareholders or creditors who have been injured) may raise claims for restitution of damage done to the company—claims, that is, against the members of those organs of the company that have violated their duty to use proper care.[56] If a

on the majority decision of this meeting. *See also* AktG § 93, ¶ 4; *Meyer-Landrut*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 93, ¶ 4.

In German as in American corporate law, court decisions focus on the proper conduct of the organs of a corporation as loyal servants of the company, if a majority of the shareholders—especially those who through their right to elect the organs of the company exercise "control" over it—have desires with respect to the activity of the company and the utilization of its capital differing from those of a minority. Detailed provisions of both German and American law guarantee minority shareholders certain minimum rights vis-a-vis the majority. These minimum rights cannot be taken from them by the organs of the company acting in accordance with the desires of the majority of shareholders. American corporate law offers the minority shareholders various possibilities of court action. In the Federal Republic, not only the company organs themselves but the majority shareholders who influence them can be held liable for damages if the legally protected interests of the minority are violated by the company organs acting on behalf of the controlling majority. An abuse by the majority of its voting rights in the general shareholders meeting provides the minority with the opportunity to challenge the decisions of the general shareholders meeting in court. AktG § 243.

55. *Meyer-Landrut*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 76, note 9.

56. *Id.* at note 12.

decision taken by the executive board has been expressly approved in the general shareholders meeting, the personal liability of directors lapses. It must be stressed here that the Law on Joint Stock Companies does *not* provide for suits by the government or third parties against the organs of the company for violation of their duty to use proper care when exercising their managerial functions.[57] The legal and contractual rights of these parties can be pursued in court by means of an action directed against the company only (and never against the directors).. The legal literature emphasizes further that the duty of the company organs to use proper care does not protect parties other than the company acting through the shareholders meeting. Other parties, therefore, may not invoke the legal rules regulating duties of directors as a basis for tort actions against the directors personally.[58]

The duty of company managers to be loyal vis-a-vis the company is not incampatible with the rule that the managers have a wide latitude in deciding which measures are most suitable to the interests of the company; acts performed pursuant to this discretionary power cannot be corrected by the courts, whether objection is made by the shareholders meeting or by individual shareholders. As previously noted, some situations require, in the best interest of the company, that concessions be made to third parties, especially to the company's work force for which these third parties do not have a legal claim. For the shareholders it is, therefore, crucial that in selecting the members of the company organs, they can select persons whom they may expect to exercise this economic discretion in the best interests of the company. It is for this reason that every shareholder has a legal claim vis-a-vis every other shareholder not to permit a non-shareholder to purchase his voting right and to exercise it in the interest of non-shareholders.[59]

The fact that persons other than shareholders have *legal* claims against the company, which the company can fulfill only through the action of its managerial organs, certainly does not justify a right of such creditors to nominate members of the organs of the corporation against the wishes of the shareholders. That an individual is under a legal obligation to do or to pay something to

57. AktG §§ 93, 116, 147.

58. *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTAR, *supra* note 23, § 93, note 67 and cases cited.

59. Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L.Q. 628, 631 (1965).

another person is certainly no reason to empower the creditor to require that a guardian be nominated for the debtor, so long as the debtor is not insane or bankrupt. If the debtor has entrusted the management of his property to an administrator, his creditors certainly cannot require the administrator to accept a coadministrator nominated by the creditors. Similarly, legal claims of third parties against a joint stock company can never justify allowing these third parties representation, with a greater or lesser degree of authority, in the organs of the company by board members holding the confidence of the creditors, unless the shareholders themselves agree. This applies to the credit-giving bankers and customers no more and no less than to those whose contractual relationship with the company is that of master and servant. Even if the organs of the company, under certain circumstances, have the right and the duty to promote company welfare by satisfying wishes of third parties even though these third parties have *no legal* claim to the satisfaction of such desires, this most certainly does not justify permitting them to acquire voting powers against the wishes of the shareholders.[60]

In the Federal Republic one-third of the members of the supervisory boards of most joint stock companies are indeed elected by the company work force under the Labour Management Relations Act of 1952.[61] German legal literature is unanimously of the opinion that these board members have the same duties as the members elected by the shareholders—namely to use proper care in promoting the welfare of the company. They must respect the legal rights and other interests of the workers, but no more and no less than must the other board members. They must yield to demands of the work force but only for the same reasons as the other members—namely for the good of the company. The general opinion is, therefore, that in case of a strike the supervisory board members elected by the work force may not themselves participate in such

60. It is conceivable that the government, in permitting a joint stock company to engage in an activity which is in the public interest and which is not allowed without a state permit, may condition grant of the permit upon representation of the government on the executive board of the company, even though the government may not be a shareholder. In such cases the legal requirements concerning the by-laws of such companies can be phrased to make this possible. For a discussion of public interest directors under American law see Friedmann, *The Public Interest Derivative Suit: A Proposal for Enforcing Corporate Responsibility*, 24 CASE W. RES. L. REV. 317 (1973).

61. *See* note 2 *supra*.

a strike, and certainly may not encourage or further such strikes.[62]

It seems that the projected parity codetermination act would no longer apply the welfare of the company as the only yardstick in the exercise of all supervisory board members' duty to use proper care when fulfilling their functions. The explanatory preamble to the bill lists as a task of the supervisory board that the board take into consideration "the interests of the shareholders as well as the work force" in all measures which it takes or refrains from taking. No longer is each member of the supervisory board to have his own individual conception of what is best for the company; rather, the bill is based on the assumption that the members elected by the work force will be guided primarily by the interests of the workers, while the board members elected by the shareholders may do the same with respect to the interests of the shareholders; it is then assumed that the "equally weighted" composition of the supervisory board will create a "constraint to agree."[63] Under this scheme the representatives of the work force could use their required approval of decisions which do not concern the work force at all as a lever to exert additional pressure on the representatives of the shareholders in questions that do involve the interests of the work force either directly or indirectly.

This also means that in questions of the administration of the *property* of the joint stock company the supervisory board would no longer be guided primarily by shareholder interests, including foremost the interest in safeguarding shareholder property against waste. Neither the board members elected by the work force nor those elected by the shareholders could be held liable by the share-

62. *Schilling*, in I(2) AKTIENGESETZ: GROSSKOMMENTER, *supra* note 23, § 116, note 7 and literature cited, notes 8, 9. "The unquestioned point of departure judging on the liability of the representatives of the work force on the supervisory board is the *equality of their rights and duties* in comparison with the other board members. In case of conflict of interest . . . the interests of the *company* take precedence over the special interests of the work force . . . ." (emphasis added) *Id.* at note 9. In case of strike, dominant legal opinion finds that, because of their loyalty requirement, the representatives of the work force on the supervisory board are precluded from actively participating in the strike. *Id.* Proponents of parity codetermination oppose this legal interpretation of the old Labor Management Relations Act claiming that in wide areas there is a basic "objective" clash of interests between the representatives of the shareholders and of the work force in the organs of a joint stock company. H. VETTER, EUROPAISCHE AKTIENGESELLSCHAFT 29 (1972).

63. Explanations to § 26 of the Codetermination Bill of 1974, *in* Parliamentary Publications of the Bundesrat No. 200/1974.

holders represented in the general shareholders meeting if, in order to reach agreement on a given question with the representatives of the work force, shareholder directors sacrificed the specific interests of the shareholders regarding the property of the company. The shareholders would be forced to accept the administration of their property by an organ whose members no longer consider themselves as trustees of the interests of the shareholders as investors.

V. CODETERMINATION UNDER THE GERMAN CONSTITUTION

A. *Constitutionality and International Obligations*

It has been shown above that the right of American shareholders to continue to designate the organs of management in conformity with German law existing at the time of the investment and, if they hold a majority of shares, to exercise control over the company, are *property* rights the deprivation or limitation of which would be a violation of international law. The violation of international law cannot be cured by arguing that discussion in the Federal Republic had already envisioned an extension of the "codetermination" of the work force when the Commercial Treaty with the United States was concluded.

Statements contained in articles 14 and 15 of the Basic Law (Constitution) of the Federal Republic, which lay down certain constitutional policies in economic matters, and which refer to "limits" on property rights and to duties of property owners vis-a-vis the community[64] have led some authors[65] to conclude that the

64. Grundgesetz arts. 14, 15 (1961) (W. Ger.). Article 14 provides:

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public weal.

(3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Article 15 provides:

Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.

65. *See, e.g.*, T. SCHWERDTFEGER, UNTERNEHMEISCHE MITBESTIMMUNG DER AR-

traditional "liberal" concept of property has been replaced in the constitution of the Federal Republic by a new "Social" definition of property, which would justify the introduction of restriction to the rights of those owning shares in large industrial enterprises. Even if true, such a definition of property cannot be invoked to interpret the rules on the protection of property as they are to be found in the German-American and other treaties.

Treaty provisions according to which property rights legally acquired on the basis of the law in existence at the time of acquisition are subject to expropriation or limitation only in the public interest and cannot be undermined by claiming that such rights are not protected against deprivation or limitation by the constitution of the host country, and that therefore he who acquires such rights has to acknowledge the possibility of deprivations imposed by new laws. It would be irreconcilable with the *reciprocity* of the protection of investments in international treaties,[66] if one of the contracting states, which in its own constitutional law does not envisage future limitation on the rights of shareholders, could be held in violation of the treaty if it actually engaged in such deprivation or limitation, while the other contracting state would be permitted to do just that. Thus, it is irrelevant for purposes of interpretation of the German-American Commercial Treaty whether codetermination, and in particular parity codetermination, is constitutional under the Basic Law of the Federal Republic.[67] This article does

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BEITNEHMER UND GRUNDGESETZ 219 (1972); Kindermann, *Verfassungswidrigkeit des Koalitionsentwurfs zur Paritaschen Mitbestimmung*, 27 DER BETREIB 1159 (1974).

66. *See* Virally, *Le Principe de Reciprocite dans le Droit International Contemporain*, 122 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1, 30 (1967).

67. During the negotiations for the former German-American Commercial Treaty of December 8, 1923, 44 Stat. 2132, the Government of the United States insisted that American property in Germany be protected against expropriation, in the event the German Constitution should permit expropriation without compensation.

Robert A. Wilson recounts the details of the negotiations as follows:

> A memorandum of the Solicitor of the Department of State concerning the paragraph of the German treaty, as quoted above, observed that:
> "This stipulation will operate to secure protection against arbitrary and unjust treatment in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized by international law." (Department of State file 711.622/60, National Archives). A letter from the Solicitor to the Under Secretary and the Secretary of State, Dec. 5, 1923, noted as "what was perhaps the major

not deal with this question; but it should be mentioned that most professors who testified before a commission of the Bundestag in 1975, did not believe that the 1974 Bill was compatible with the Grundgesezt.[68] The Federal Constitutional Court, in earlier decisions,[69] expressly stated that it was not called upon to determine the constitutionality of the far-reaching codetermination law for the coal, iron, and steel industries, and thus reserved opinion on this question.

The provisions of the Basic Law of the Federal Republic concerning expropriation, socialization, and the limits of property rights[70] did not prevent the Federal Republic from concluding international treaties on the protection of foreign investments—treaties which, as already explained, forbid the application of parity codetermination to investments by United States citizens made in the past, and which comport with general international law. If the legislature of the Federal Republic should believe

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German proposal" one that was amendatory of that provision of Art. I which contemplated that property should not be taken without due process of law and without the payment of just compensation. "The German Ambassador", the letter continued, "stated that the German Constitution permitted the taking of property without payment of just compensation and that the sentence quoted might be a violation of their fundamental law. While he intimated that it would be unlikely that the German legislature would avail itself of its constitutional right to take property of aliens without payment of just compensation, he stated there was a strong feeling in his country that the Constitution should not be interfered with. The reply in behalf of the Department was that the sentence in the American text did not contemplate a yielding of anything which the German Constitution forbade, and it was, therefore, in no sense a violation of that document; and that it merely marked an agreement by Germany *not to exercise a constitutional right*, and one which if exercised would cause immediate protest by this Government in so far as it applied to American citizens." U.S. Foreign Relations, 1923, Vol. II, p. 28.

Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83, 99 n.84 (1951).

68. As to the state of opinion in former years see T. SCHWERDTFEGER, UNTERNEHMERISCHE MITBESTIMMUNG DER ARBEITNEHMER UND GRUNDGESETZ (1972); T. SCHWERDTFEGER, MITBESTIMMUNG IN PRIVATEN UNTERNEHMUNGEN (1973). An interesting description in English of the ideologies and economics of workers' participation in the management of companies may be found in Frame, *Worker Participation in Company Management: With Particular Reference to Codetermination in the Federal Republic of Germany*, 5 VICTORIA U. OF WELLINGTON L. REV. 417 (1970).

69. Judgment of May 7, 1969, 25 BVerfG 372, 407.

70. GRUNDGESETZ arts. 14, 15 (1961) (W. Ger.), *supra* note 64.

that the present legislation on workers councils, collective agreements, etc., is not a sufficient realization of the constitutional program to enforce the "social responsibility" of property owners, it is up to the legislature to find other means which might be applied without violating existing international conventions.

B. *Parity Codetermination Prior to 1954*

We will now examine eventual consequences of the fact that in the Federal Republic parity codetermination, similar to that which is now planned for all large enterprises, was applied to the coal, iron, and steel industry by the Law of May 21, 1951,[71] and was in existence when the Commercial Treaty with the United States was concluded in 1954. Since no American capital was invested in those industries, the American Government had no reason to voice objections against this law when it was adopted, or during the negotiations for the Commercial Treaty.

Parity codetermination in the iron and steel industry had been introduced even before the Act of 1951 by the British occupation power when, during the early occupation period, these industries were subject to the immediate control of the military government. When new companies were formed as a result of deconcentration imposed by the occupation powers, an agreement was reached between the "North German Iron and Steel Control" and the trade union federation of the British zone of occupation that the supervisory board would be composed of five representatives of the work force and five representatives of the shareholders.[72] The American military government did not participate in these measures taken in the British zone of occupation. Indeed it observed with misgivings the policy of the British occupation power, a policy which even then allegedly had as its ultimate aim the socialization of German heavy industry. The American military government used its influence to ensure that participation of United States nationals remained exempt from this intervention in German heavy industry, that the measures taken by the British occupation power were limited in time, and that the final decisions concerning the property of coal, iron, and steel enterprises were reserved to future,

71. In 1970, a group of experts submitted a detailed report on the practical experience gained with the law in question. Their proposals for expanding codetermination were much more modest than those contained in the government draft.

72. G. BOLDT, MITBESTIMMUNGSGESETZ EISEN UND KOHLE 9 (1952).

freely-constituted German authorities.[73]

In the same vein, Law Number 27 of the Allied High Commission refers to the intention of the Allies "not to permit the return to positions of ownership and control of persons having furthered the aggressive designs of the Nazi party," but contains no provision for codetermination of workers. Thus, the Federal Republic could not confront the American Government with the argument that at an earlier stage the United States had already approved the introduction of parity codetermination in the Federal Republic.

VI. CODETERMINATION AND AMERICAN INVESTMENT IN OTHER COUNTRIES

We will now explore whether arrangements similar to the planned West German codetermination exist elsewhere, and, if so, how they affect American investment.

A. *The Netherlands*

According to the corporate law of The Netherlands, all members of the organs of a joint stock company have been appointed in the past solely by the shareholders, just as is true of all other western countries. A 1971 act[74] introduced a change for large enterprises whereby a new leading organ of joint stock companies (the Administrative Council) coopts its own members[75] after being formed initially in a general shareholders meeting.[76] Members are coopted subject to the following condition: co-opted members of the Administrative Council may include persons who are *not* shareholders but may not include employees of the enterprises in question nor trade union functionaries. Objections against the co-option of a given new member may be raised by the general shareholders meeting on the one hand and by the works council formed by the workers on the other; a final decision is rendered by a state organ at its own discretion.[77] Not only does the new Dutch corporate law reduce the influence of the shareholders to a much smaller extent than the planned Codetermination Bill in West Germany, and not only does it exclude a direct participation of the work force

73. U.S. Foreign Relations 1947 II, 946. The question of protecting foreign investments in Germany was already at that time the object of a special working party. *See* U.S. FOREIGN RELATIONS 1948 II, 698.

74. Law of May 6, 1971, [hereinafter cited as Dutch Act].

75. Dutch Act, art. 52(e).

76. Dutch Act, art. 52(i).

77. Dutch Act, art. 52(h), ¶ 10.

and trade unions in the said council, but Dutch companies controlled by non-Dutch companies are partially exempt from this requirement under a special regime. It is true that even such companies must form an Administrative Council, which co-opts its own members, but in these companies the most important powers are withheld from the Administrative Council and are exclusively exercised by the foreign shareholders. This exemption applies:

> in the case of those "large" companies which are beneficially owned to the extent of at least 50%:
> (a) by a legal entity, the majority of whose employees are employed outside the Netherlands; or
> (b) under a joint-venture agreement, by two or more legal entities as referred to under (a); or
> (c) under a joint-venture agreement, by one or more "large" companies.

"Large" companies are "those companies which have their 'centre of gravity' outside the Netherlands."[78]

Not only are companies with their "center of gravity" outside the Netherlands secure in the control of their shareholders over the Dutch company, but the Minister of Justice may also approve arrangements in other cases that depart from the general law mentioned above. All these exceptions were justified primarily in terms of a desire not to frighten off foreign capital. At the same time it was pointed out that any other regulation might have been incompatible with the existing treaties between the Netherlands and the United States. As Professor Sanders put it:

> As far as the U.S. is concerned, there is another argument in favor of the maintenance of the restrictive application: The Treaty of Friendship, Commerce, and Navigation which has been in force between the Netherlands and the U.S. since December 5, 1957. Article VII of this Treaty guarantees for U.S. companies the right "to control and manage enterprises which they have established or acquired." This provision might also work as a safeguard.[79]

78. I. VOGELAAR & M. CHESTER, DUTCH/ENGLISH COMPANY LAW: A COMPARATIVE REVIEW 10 (1973). For further details of the exceedingly complex provisions of Dutch Law see W. SLAGTER, COMPENSIUM VAN HET ONDERNEMINGSRECHT 236 (1973).

79. P. SANDERS, TIJDSCHRIFT VOOR VENNOTSCHAPPEN, VERENIGHINGEN EN STICHTINGEN 275 (1970).

B. *Yugoslavia*

In Yugoslavia, private property in economic enterprises was, it will be recalled, totally expropriated at the outset of the present regime. In non-state-owned enterprises operating today, the members of the work force have a *prima facie* position equivalent to the shareholders of a "capitalist" joint stock company. Recent Yugoslav laws permit foreign capital participation of up to 50 per cent in such enterprises. Through contracts between the foreign investors and the organs formed by the workers, it can be arranged that the former, in theory at least, have an equal influence on the management of the enterprise.[80] The Yugoslav Constitution was accordingly amended to provide:

> the rights of foreign nationals who invest in Yugoslav United Work Organizations [*i.e.* enterprises] cannot be diminished, once the contract is signed, be it by law or other acts.[81]

A recent law stipulates further that:

> If, after the investment contract has entered into force, the law regulating such investments is changed, the conditions of the investment contract remain subject to the stipulations of the original contract and to the laws which were in force the day the contract entered into force, provided that they were more favorable to the foreign contracting partner than the later laws and regulations, unless the contracting partners come to an amicable agreement to change certain points to bring them in line with the later laws and regulations.[82]

The laws of the United States do not forbid American nationals from assuming the risk of such participation in Yugoslav enterprises. No existing treaty arrangements between the United States and Yugoslavia correspond to those between the United States and the Federal Republic cited earlier. Nevertheless, insurance protection against expropriation of American investments in Yugoslavia is provided by the Overseas Private Investment Corporation.[83]

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80. For a discussion of the Yugoslav law see Glickman & Sukijasovic, *Yugoslav Worker Management and Its Effect on Foreign Investment*, 12 HARV. INT'L L. J. 260 (1971); 6 N.Y.U.J. INT'L LAW & POL. 271 (1973).

81. USTAV SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE (Constitution) amend. XII, ¶ 4 (1971) (Yugoslavia).

82. Law of April 13, 1973, art. 20, Official Cazette (1973).

83. Foreign Assistance Act of 1972, § 104, 22 U.S.C. § 2199(g) (Supp. II, 1972), *amending* 22 U.S.C. § 2199 (1970).

Moreover, a bilateral agreement does provide that the United States "reserves its rights to assert a claim in its sovereign capacity in the eventuality of a denial of justice or other question of state responsibility as defined in international law."[84] This enables the United States to insist on Yugoslav adherence to the statute cited above.

VII. CONCLUSIONS

The conclusions of the ongoing chapter may be summarized as follows:

1. The right of American shareholders[85] in companies of the Federal Republic to demand that members of the supervisory board continue to be elected under the regulations hitherto in force is a property right protected against expropriation and encroachment by the German-American Commercial Treaty of 1954, especially in light of its most-favored-nation clause and in light of other treaties for the protection of investments which the Federal Republic has concluded with third countries.

2. The introduction of parity codetermination would be an encroachment on the rights of American shareholders in violation of the Treaty.

3. Whether the introduction of parity codetermination is allowed or recommended by the Basic Law of the Federal Republic is irrelevant to the question of whether it is compatible with international law.

When the American Chamber of Commerce in Germany presented the foregoing arguments to the Bonn Government in 1974 as a confidential opinion on behalf of interested American inves-

84. Investment Agreement with Yugoslavia, Jan. 18, 1973, art. 20, T.I.A.S. No. 7630.

85. Although the German-American Commercial Treaty of 1954 expressly recognizes that control of a company enjoys legal protection against expropriation, etc., the question does not come up, as it does in the case of compensation claims for the total expropriation of the rights of foreign stockholders, whether the foreign majority stockholder who exercises control must be granted a higher compensation under international law than the other stockholders, since control constitutes a separate "right." Given the fact that a diminution of the voting rights of the individual stockholders through the creation of voting rights for nonstockholders in the election of the members of the supervisory board of a company certainly amounts to a direct restriction of the rights of foreign stockholders in a German joint stock company, it is not necessary to examine the question whether the introduction of codetermination is an act of expropriation against the company itself.

tors, the paper found its way into the hands of trade union leaders who sharply criticized the Chamber for an alleged interference in the internal affairs of the Federal Republic and for trying to obtain better treatment for "multinationals."[86] Even before the Bill had been introduced by the government, the West German electorate had been belabored with such slogans as "democracy in the economic area," "equality of capital and labour," etc. In 1975, even the oil crisis was turned to the advantage of advocates of parity codetermination. While oil prices were low, consumers had been kept in ignorance about the fact that low prices were imposed upon the producing countries by a cartel of concessionaires and distributors, sometimes even in violation of the dispositions contained in the concession agreements.[87] The public had been kept in ignorance of the fact that experts had warned in time of the upcoming oil crisis, and that inactive government officials had told them that surely the "giants of private industries would take care of things."[88] When oil prices rose drastically, consumers were told that this was due to the long ignored faults of the multinationals and that this should be corrected by introducing parity codetermination as a means to control them.

Opponents of parity codetermination also contributed to the general confusion. For too long West German managers failed to

86. Some critics of the American Chamber of Commerce pretended that foreign investors should absolutely refrain from influencing the politics of the host country. However, efforts (which, of course, cannot be carried out by ballot) to influence developments that affect the security of the investment, its profitability, etc., cannot be considered illegal unless expressly prohibited by law, particularly if domestic companies are allowed to bring influence to bear in the same manner. Nobody will scold foreign workers in West Germany for defending their interests in the host country by analogous means.

87. None other than Henry Ford, II has stated bluntly that in former times "the price for raw oil had been kept disproportionately low, the waste of a limited natural resource had been condoned, and the profits from oil extraction unequally distributed." Address by Henry Ford, II, before the Confederation of German Industry 25th Anniversary, 1974.

As a specialist in international law, the author of this article had warned against trying to justify the earlier situation in the oil market through the artificial argument that contracts between states and foreign private enterprises have the same legal quality as international treaties between states. Wengler, *Accords entre etats et entreprises etrangeres: Sont-ils des traites de droit international?*, 76 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 313 (1972).

88. For details on the lack of planning in the energy policy of the United States Government and in the management policies of the oil companies see S. KLEBANOFF, MIDDLE EAST OIL AND U.S. FOREIGN POLICY (1974).

develop other ways to stimulate the interest of the worker in "his" enterprise; instead, they agreed to parity codetermination "in principle," albeit with the hidden reservation that, despite numerical parity in the composition of the supervisory board, the shareholders would have the final word anyhow.[89]

Nevertheless, in 1975 a wave of criticism arose against the 1974 Bill in its original form, and by January, 1976, many modifications had been proposed by the two political parties in power. Currently the final version of the act to be adopted by parliament remains an open question.

Even if the result would be that by vesting the chairman of the supervisory council with a tie-breaking vote and some other means parity codetermination in its proper meaning would not be fully realized, the question will remain whether the act will be compatible with the German-American Treaty of 1954, the most-favored-nation clause and the investment protection conventions of the Federal Republic with third countries, and, last but not least, with general international law.

At first glance, the arguments elaborated in this article appear to refer only to American investments in the Federal Republic, but American and German investment in other countries is also involved. Should the United States and the Federal Republic of Germany agree between themselves that codetermination as proposed in West Germany can be reconciled with the treaties concerning the protection of investments that they have concluded with each other and with third parties, then the two countries

89. In 1967, Professor Pleyer deemed it a "wise policy" that the issue of the constitutionality of parity codetermination in the steel industry had not been raised before the Supreme Constitutional Court, though he was suggesting at the same time that even statutory changes in the distribution of power among shareholders might be confiscatory. Pleyer *Propriété et Contrat, Instruments de l'ordre économique dans la République Fédérale d'Allemagne*, 1967 REVUE INTERNATIONALE DE DROIT COMPARÉ 373, 378. For a discussion of the constitutionality of parity codetermination in the steel industry see text accompanying note 68 *supra*.

In the *Feldmuehle* case, decided by the Federal Constitutional Court, minority stockholders protested fusion with another company in which they lost their shares. In its judgment of Aug. 7, 1962, 14 BVerfG 263, the court ruled that they might be excluded, but only if there was more than a bare majority in the shareholders meeting for such a measure, and only on condition of *full compensation*. A deprivation of shareholder voting rights—especially one without compensation—in favor of the voting power of other shareholders or of people who are not shareholders at all is no more covered by the *Feldmuehle* decision than it is by American court decisions.

could hardly argue the contrary in their dialogue with third countries.

Besides the Netherlands,[90] several other countries in Western Europe have introduced codetermination in recent years, though mostly as minority codetermination of workers, as for instance in Norway[91] and Luxembourg.[92] In other countries plans for similar measures are on the table, as in Switzerland,[93] Great Britain,[94] and France.[95] The draft European Company Statute proposed by the Commission of the European Economic Community also provides

90. *See* text accompanying notes 74-77 *supra*.

91. Law of May 12, 1972, [1972] Lovtid. II Nr. 27, at 418.

92. Law of May 6, 1974, [1974] Memorial, Journal Officiel du Grand Duche de Luxembourg, A Nr. 35, at 620.

The Luxembourg law emphasizes that the Administrative Board members named by the employees are responsible and liable to the company and the shareholders in conformity with the normal provisions of corporate law, whereas discussion about codetermination in West German industry shows that the term "responsibility" has largely lost its meaning of a personal liability for faults committed in the exercise of a function. Using the word "responsibility" one has in mind often only the *power* to make decisions, and not the liability for damages caused by improper exercise of such power. The participants of a conference called by the International Labour Organisation in 1969 (*see* note 101 *infra*) were already allegedly in unanimous agreement "on the principle that participation, in order to be effective, required the acceptance of responsibility."

93. In Switzerland the constitutional basis for codetermination in a wider sense must first be created by popular referendum. The Federal Council (the Swiss Executive) has stated that

> codetermination authority of the work force on the level of the administrative councils of joint stock companies is irreconcilable with the system of corporate law based on the constitutional provisions now in force, which is characterized by the principle of private ownership and the resulting comprehensive shareholders' power of disposal. [1973] Bundesblatt II 414.

The proposals of the Federal Council tend to erect another barrier against impairment of property rights through codetermination by stipulating that codetermination "must be reasonable and safeguard the viability and profitability of the enterprise." In view of this, the question whether a codetermination scheme that interfered with property rights would be reconcilable with Swiss international treaties has not arisen.

94. In Great Britain, the trade unions published a "Green Book" at the end of May, 1974, demanding the introduction of codetermination modelled after the proposed Codetermination Bill of the Federal Republic. It is significant that the Green Book expressly rejects the idea that the work force representatives in the organs of management would hold the same responsibilities as those elected by the shareholders.

95. *See* Rapport du Comite d'Étude pour la Réforme de l' enterprise (Rapport Sudreau) 1974.

for representatives of the employees on the boards of these future companies.[96]

So it may be expected that other countries on other continents will follow with more or less radical laws of their own. Perhaps in those other countries codetermination, even if not parity codetermination, would have the most intensive consequences for foreign investors.[97] Joint ventures under which domestic and foreign capital enjoy equal participation,[98] and which are so important to the development of the economy of these countries, would be deprived of their very basis for existence,[99] namely the balance between the voting powers of domestic and foreign investors. It is most interesting to note that the need to uphold this balance has been clearly recognized in "socialist" countries that encourage foreign investments in the form of joint ventures. A Romanian decree of 1972,[100] for instance, provides that all worker representatives in joint venture enterprises composed of Romanian and foreign shareholders are to be counted among the Romanian half of the membership of the company board.[101]

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96. For discussion of the proposed European Company Statute see COMM'N OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMPANY STATUTE (Information Memo P-24, May, 1975). The draft Statute appears in [1975] BULLETIN OF THE COMMISSION OF THE EUROPEAN COMMUNITIES Supp. 4/75.

97. In a recent report, the State Department did not recognize encroachment on shareholder voting rights as disguised expropriation. *U.S. Department of State Report on Nationalization, Expropriation, and Other Takings of U.S. and Certain Foreign Property Since 1960, reprinted in* 11 INT'L LEGAL MATERIALS 84 (1972).

98. The formation of a company endowed in equal parts with domestic and foreign capital often results from the fact that the domestic investor contributes contacts with domestic customers and government offices which the foreign investor lacks, while the latter supplies technological and organizational knowledge as well as quite frequently a managerial drive, which are not available to the domestic investor.

99. Also, if the corporate law of a country provides for different voting rights for different categories of stockholders, such schemes are destroyed if codetermination by non-shareholders is introduced by legislation. *See* DANISH LAWYER'S ASS'N , COMMENT ON THE 1972 DANISH DRAFT LAW ON DEMOCRATIZATION OF PRIVATE BUSINESS (1973).

100. Decree of November 2, 1972, No. 424, art. 34, ¶ 3.

If, because of different nationalities among the shareholders, the Administrative Board must consist of fixed numbers of Luxembourg citizens and foreigners, the worker representatives are to be counted among the Luxembourg board members up to half of their total, according to the new Luxembourg law. *See* note 92 *supra*.

101. To the limited extent that East European countries allow codetermination by the workers, those states admit that codetermination, by authorizing

A legal opinion prepared by the Federal Ministry of Interior[102] claimed that codetermination as provided in the original government draft does not entail expropriation, or anything similar, within the meaning of the treaties concluded by the Federal Republic. Thus, an eventual impairment of the interest of West German investors in third countries by a possible introduction of parity codetermination there seems indeed to be regarded by that department as being in conformity with existing treaty obligations. This is all the more surprising as the Federal Ministry for Economic Assistance seems to be well aware that the Conventions for the Protection of Investments are the last important bulwark against the tendencies expressed in the Charter of the Economic Rights and Duties of States which was adopted on December 12, 1974, by the United Nations General Assembly against the votes of the United States, West Germany, and a few other countries.[103]

The opinion by the Federal Ministry of the Interior goes to the extreme of claiming that an inadmissible deprivation of property would occur only if "the *totality* of investors would be forced, against their will, to *submit* to decisions of *other* persons in fundamental questions of the conduct of the enterprise and of management policy."[104] This argument ignores that *controlling* voting

unqualified persons to participate in management, is not conducive to the well-being of either the enterprise or the common weal. *See* T. RABSKA, RAPPORTS: POLONAIS PRESENTES AU NEUVIÈME CONGRES INTERNATIONAL DE DROIT COMPARE 227 (1974). The export conference convoked by the International Labour Organisation in 1969 expressed the following opinion: "Another prerequisite for successful participation on which a number of experts placed great emphasis was the need for the workers' representatives concerned to have the knowledge and skill required to deal effectively with the great variety of sometimes highly complicated issues which came up for decision at the undertaking level." *Id.* at 160. The report concludes: "It is evidently very difficult, for these reasons, to give a cut-and-dried definition of workers' participation in decisions. It will also be clear that to put such participation into effect, no matter what formula be chosen, is an exceedingly delicate matter, since the economic mainspring of society itself is likely to be affected." The I.L.O. recognized that codetermination rights of workers' representatives "required, on the part of the trade union movement, a high degree of strength and stability . . . . It was also noted that, while some of these conditions were fulfilled in certain highly industrailized countries, *this was not yet the case in some of the developing countries* . . . ." INTERNATIONAL LABOUR OGRANIZATION, PARTICIPATION OF WORKERS IN DECISIONS WITHIN UNDERTAKINGS 159 (Labour-Management Relations Series No. 33, 1969).

102. The Ministry refused an invitation to publish this opinion.

103. *See* 14 INT'L LEGAL MATERIALS 250 (1975).

104. Professor Daeubler of the University of Bremen (which is noted as a home of left-wing professors) argues that constitutional guarantees of property would

power of German investors is a condition to giving insurance cover under the West German system of insurance for overseas investments,[105] and that on the other side treaties for the protection of investments expressly prohibit restrictions on each one of the rights that have been acquired in conjunction with the investment by every single investor.[106]

As shown in part II above, the common sense of American judges recognized a long time ago that the property of the *individual stockholder* is definitely affected if his voting rights are taken or restricted in favor of other stockholders in deviation from the previously existing legal situation. Whether a weakening of the voting rights of the individual stockholders in favor of non-stockholders and the ensuing modification of relative voting powers of different groups of shareholders amount to a taking of property or a restriction of property rights does not, therefore, depend upon whether this amounts at the same time to taking away the power of the totality of stockholders. Even Yugoslavia as a socialist country has constitutionally prohibited *any* later change of law of the status quo of foreign shareholders' rights as they are at the time of investment.[107]

The Federal Ministry of the Interior for West Germany went so far as to describe parity codetermination as a legitimate means of *defining* the legal nature and limits of shareholder property. It seems to have forgotten that expropriation of Jewish property under National Socialism was effectuated not solely by formally transferring title to other people, but often by restricting the own-

be impaired only if "the stockholders *together* can no longer exert decisive influence." Frankfurter Allgemeine Zeitung, March 1, 1975, at 13.

105. *See* note 33 *supra*. In comparison, the Yugoslav law concerning the establishment of subsidiaries of Yugoslav comapnies abroad permits them only if "control of the material and financial business activity" of the foreign subsidiary by the Yugoslav parent is assured. Law of July 21, 1972, art. 8, § 7, *as amended* Mar. 7, 1973.

106. *See, e.g.*, Treaty between Germany and Indonesia, Nov. 8, 1968, art. 3, § 3 of the Protocol, page 8 *supra*.

107. USTAV SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE (Constitution) amend. XII, ¶ 4 (1971) (Yugoslavia). See *supra* note 81. In Mexico and Japan, though these countries tend to limit control for foreign investors, codetermination in the organs of domestic companies is not yet a live issue. The 1973 Mexican law on Mexican and foreign investments simply states that the representation of foreigners in the organs of management may not be larger than their proportionate share of the capital investment. Law to Promote Mexican Investment and Regulate Foreign Investment, art. V (*Diario Oficial*, March 9, 1973). *See also* D. HENDERSON, FOREIGN ENTERPRISES IN JAPAN 265 (1973).

ers in the exclusive administration of their property rights through the imposition of State-appointed "administrators" or "trustees." Under the restitution laws enacted by the Western occupying powers and supplemented by the federal legislature,[108] there was a long controversy in postwar West Germany about what sort of powers an "administrator" imposed by the Nazis must have had before such action could be deemed a "deprivation" on behalf (or in favor) of the "Reich", even if the property later came into the hands not of the Reich but of a private person. The Third Chamber of the Supreme Restitution Court[109] finally concluded that the relevant acts "had deliberately been formulated in elastic terms to cover all relevant measures of the Reich and its organs that would justify a restitution claim. Therefore, the legislature did not try in a perfectionist spirit to list all the possible forms of 'taking' of property such as the imposition of a trustee, executor, administrator, or other State appointee."[110]

As early as 1962, the Supreme Restitution Court stated that the essence of property is that the owner "can exclude others from exerting any influence upon it" and that "it is with these very property rights that the Reich deliberately interfered."[111] Installing a "co-administrator" with veto power who finally forced the persecutee to divest himself of his enterprise would surely have been considered a "taking" to be retracted according to the restitution laws. For this reason, all limitations on voting rights and voting power had to be rescinded when shares were returned to their rightful owners.[112] On the other hand, if a controlling shareholder had been deprived of his shares, control had to be restored to him, even if in the meantime the joint stock company had been converted, *e.g.*, into a partnership.[113]

108. *See* Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 Nw. U.L. Rev. 479 (1972).

109. The Supreme Restitution Court is composed of German judges and judges from the former occupying powers and from "neutral" countries.

110. Judgment of Sept. 3, 1965, 12 ORGE 742 (Decisions of the Supreme Restitution Court).

111. Judgment of Feb. 5, 1966, [1966] RzW 323.

112. R. Godin, Rueckerstattungsgesetze 75, 78, 86 (2d ed. 1950).

113. Kubuschok and Weisstein, Rueckerstattungsrecht 150 (1950).

If the claimant owned a considerable number of shares which gave him an influence in the management of the joint stock company, his postwar participation in the transformed enterprise must take a form that restores the capital percentage of his contribution and his former legal position to the extent possible, even though the legal and economic status of the successor

The proposition that even smaller voting powers are to be regarded as assets protected against expropriative restrictions is intensively confirmed by the Australian Foreign Takeovers Act of 1975 which provides:

> Sec. 8: A reference in this Act to control of the voting power in a corporation is a reference to control that is direct or indirect, including control that is exercisable as a result or by means of arrangements, whether or not having legal or equitable force, and whether or not based on legal or equitable rights.
> Sec. 9: (1). For the purposes of this Act:
> (a). A person shall be taken to hold a substantial interest in a corporation if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares of the corporation; and
> (b). 2 or more persons shall be taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation.

It is interesting also to note that codetermination of workers as such is regarded as an encroachment on shareholder rights when the state (or government) is the holder of the shares. In Norway the question was raised whether codetermination of workers in those companies whose stock is entirely owned by the state was compatible with the principles of Norwegian constitutional law concerning control of public property. When a public enterprise owned by the City of Bremen and organized as a limited liability company (GmbH) recently sought to change its charter so that the city organs and the workers would have equal representation on the company's supervisory board, the company's request was denied in court under the rationale that the public interest prohibited depriving control from the organs of a company in public ownership, whether owned by a city or by a state.[114]

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enterprise may be totally different . . . . If, for instance, the majority ownership in the former joint stock company gave the possessor control of the enterprise—with his risk limited to the capital he put in— -his legal position in the present partnership can be adapted to his former position by giving him a participation in the form of a limited liability partnership vested with special rights to control the management of the enterprise.

114. *Cf.* Frankfurter Allgemeine Zeitung, Oct. 10, 1975. In comparison, the

In a more recent case involving American investments guaranteed by the Overseas Private Investment Corporation (OPIC),[115] arbitrators stated clearly that the point of improper interference with property rights is reached before formal expropriation takes place or decisions are forced on *all* the owners of the capital of the company in question. In that case the American company had an interest in a Chilean company in the form of a credit grant. As a result of measures of the Allende Government, such as wage raises imposed by statutes, additional social insurance requirements, other taxes, pressure tactics, threats of nationalization, and frozen bank accounts, the Chilean company could barely pay its current obligations and could not meet the requirements of the credit grant of the American company. Contrary to the OPIC point of view, the arbitration court decided that these developments were sufficient to trigger the guarantee; the Chilean enterprise in which American capital had been invested had been prevented "from exercising effective control over the use and disposition of a substantial portion of its property."[116] Furthermore, the court rejected the argument of OPIC that the measures were compatible with international law since they had been taken in harmony with the goals of the Chilean Constitution. When property rights guaranteed by treaties are subjected to expropriation-like interference or restric-

"control" exercised by the council representing the work force in Polish state enterprises is by no means identical with the "control and management" mentioned in the treaties of the United States with the Federal Republic and other countries. It is solely the right to engage in non-binding criticism of the management of the enterprise. "Les organismes de l'autogestion ne disposent pas du droit de sanction s'ils constatent des irregularites; ils ne peuvent s'ingerer directement dans l'activite qu'ils controlent. Ils ne peuvent presenter que des propositions au directeur de l'entreprise." T. RABSKA, RAPPORTS POLONAIS PRESENTES AU NEUVIEME CONGRES INTERNATIONAL DE DROIT COMPARE 216 (1974).

In state enterprises run by a single "director," the personnel council has the right to propose someone for this position but the nominating organ is never bound by such a proposal. For a description of the actual working of "self-administration" by the workers in Yugoslav enterprises—which has been unable to prevent even strikes—see BOONZAGER, FLAES & RAMONDT, AUTORITEIT EN DEMOCRATIE (1974).

115. *See* I.T.T. (United States v. Chile), 13 INT'L LEGAL MATERIALS 1307 (1974).

116. The World Bank also proposed to create an international institution giving insurance for "expropriation or equivalent governmental action or inaction which deprives the insured investor of effective control over . . . his investments." HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 1ST SESS., REPORT ON OVERSEAS PRIVATE INVESTMENT CORPORATION (Comm. Print 1973).

tion, such limitations, even if constitutionally permissible or encouraged,[117] violate international law.

VIII. APPENDICES

A. *Provisions Dealing with Protection of Property Rights in United States Bilateral Treaties with Third Countries*

1. BELGIUM—Treaty on Friendship, Establishment and Navigation, Feb. 21, 1961, arts. IV, VI, [1963] 14 U.S.T. 1284, T.I.A.S. No. 5432.

2. DENMARK—Treaty on Friendship, Commerce and Navigation, Oct. 1, 1951, arts. VI, VII, [1961] 1 U.S.T. 908, T.I.A.S. No. 4797.

3. ETHIOPIA—Treaty on Amity and Economic Relations, Sept. 7, 1951, art. VIII, [1953] 2 U.S.T. 2134, T.I.A.S. No. 2864.

4. FRANCE—Treaty on Establishment, Nov. 25, 1959, arts. IV, V, [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625.

5. GREECE—Treaty on Friendship, Commerce and Navigation, Aug. 3, 1951, arts. VII, XIII, [1954] 2 U.S.T. 550, T.I.A.S. No. 2948.

6. IRAN—Treaty on Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, art. IV, [1957] 1 U.S.T. 899, T.I.A.S. No. 3853.

7. IRELAND—Treaty on Friendship, Commerce and Navigation, Jan. 21, 1950, art. VI, VIII, [1950] 1 U.S.T. 785, T.I.A.S. No. 2155.

8. ISRAEL—Treaty on Friendship, Commerce and Navigation, Aug. 23, 1951, arts. VI, VII, [1954] 1 U.S.T. 550, T.I.A.S. No. 2948.

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117. Recognition that codetermination violates international law when its introduction encroaches upon the existing voting power of foreign investors would not preclude other reforms of existing corporate law in European and other countries. New laws could provide, for instance, that a body comprising workers, creditors, customers, or even government representatives in addition to the shareholders be consulted about certain proposed measures before the organs of the company take a decision. Workers might be encouraged and assisted through collective bargaining agreements or tax incentives to acquire shares in "their" company. Steps might be taken to insure that the interests of such worker-shareholders, as those of the general shareholding public, be assured proportionate representation in the organs of the company along with the representatives elected by the "big" shareholders. This might be done in West Germany by reforming the proxy voting right of banks, and perhaps the introduction of the United States and Argentine concept of cumulative voting.

9. ITALY—Treaty on Friendship, Commerce and Navigation, Feb. 2, 1948, arts. III, V, 63 Stat., pt. 2, 2255, T.I.A.S. No. 1965.

10. ITALY—Treaty on Friendship, Commerce and Navigation, Jan. 26, 1951, art. I., [1961] 1 U.S.T. 131, T.I.A.S. No. 4685.

11. JAPAN—Treaty on Friendship, Commerce and Navigation, April 2, 1953, arts. V, VI, VII, [1953] 2 U.S.T. 2063, T.I.A.S. No. 2863.

12. KOREA—Treaty on Friendship, Commerce and Navigation, March 27, 1956, arts. VI, VII, [1957] 2 U.S.T. 2217, T.I.A.S. No. 3947.

13. LUXEMBOURG—Treaty on Friendship, Establishment and Navigation, Feb. 23, 1962, arts. IV, VI, [1963] 1 U.S.T. 251, T.I.A.S. No. 5306.

14. MUSCAT AND OMAN AND DEPENDENCIES—Treaty on Amity, Economic Relations and Consular Rights, Dec. 20, 1958, arts. IV, V, [1960] 2 U.S.T. 1835, T.I.A.S. No. 4530.

15. NETHERLANDS—Treaty on Friendship, Commerce and Navigation, March 27, 1956, arts. VI, VII, [1957] 2 U.S.T. 2043, T.I.A.S. No. 3942.

16. NICARAGUA—Treaty on Friendship, Commerce and Navigation, Jan. 21, 1956, arts. VI, VII, [1958] 9 U.S.T. 449, T.I.A.S. No. 4024.

17. PAKISTAN—Treaty on Friendship and Commerce, Nov. 12, 1959, arts. VI, VII, [1961] 1 U.S.T. 110, T.I.A.S. No. 4683.

18. THAILAND—Treaty on Amity and Economic Relations, May 29, 1966, arts. III, IV [1968] 5 U.S.T. 5843, T.I.A.S. No. 6540.

19. TOGO—Treaty on Amity and Economic Relations, Feb. 8, 1966, arts. IV, V, [1967] 18 U.S.T. 1, T.I.A.S. No. 6193.

20. VIET NAM—Treaty on Amity and Economic Relations, April 3, 1961, arts. IV, V, [1961] 2 U.S.T. 1703, T.I.A.S. No. 4890.

B. *"Expropriation" as Defined in the Treaties for the Mutual Protection of Capital Investments Concluded by the Federal Republic of Germany**

1. PAKISTAN, Nov. 25, 1959, 457 U.N.T.S. 23 (1963).
Art. 3(1): Investments by nations or companies of either Party shall enjoy protection and security in the territory of the other Party. Art. 3(2): Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law.

Protocol: (3) The term "Expropriation" within the meaning of paragraph (2) of Article 3 shall also pertain to acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization.

2. MALAYSIA, Dec. 12, 1960.
Same as No. 1.

3. GREECE, March 27, 1961.
Art. 3(1) . . . .
Art. 3(2): Kapitalanlagen von Staatsangehörigen und Gesellschaften eines Vertragsstaates dürfen im Hoheitsgebiet des anderen Vertragsstaates nur zum allegemeinen Wohl und gegen Entschadigung enteignet werden. Die Entschadigung muss dem Wert der enteigneten Kapitalanlagen entsprechend tatsächlich verwertbar und frei transferierbar sein sowie nach den Rechtsvorschriften eines jeden Vertragsstaates entweder im voraus oder mindestens unverzuglich geleistet werden. Spätestens im Zeitpunkt der Enteignung muss in geeigneter Weise fur die Festsetzung und Leistung der Entschadigung Vorsorge getroffen sein. Uber die Rechtmassigkeit der Enteignung und die Hohe der Entschadigung muss in einem ordentlichen Gerichtsverfahren entschieden werden konnen.

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* As of the date of this writing, the treaties listed in this appendix have not been published in *United Nations Treaty Series*. They may be found in the West German *Bundesgesetzblatt*.

. . . .

Protokoll: 2(a) Die Bestimmungen des Artikels 3 Abs. 2 gelten auch fur die Überführung einer Kapitalanlage in öffentliches Eigentum, ihre Unterstellung unter öffentliche Aufsicht oder ähnliche Eingriffe der öffentlichen Hand. (b) MaBnahmen des Staates, die auf Antrag der Glaubiger eines Unternehmens im Falle des Konkurses oder zur Abwendung des Konkurses oder auf Antrag des Kapitalanlegers vorgenommen werden, gelten nicht als Eingriffee im Sinne des Artikels 3 Abs. 2. (c) Unter Enteignung ist die Entziehung oder Beschränkung jedes Vermögensrechts zu verstehen, das allein oder mit anderen Rechten zusammen eine Kapitalanlage bildet.

4. Togo, May 16, 1961.
Art. 3(2): Same as No. 1.
Ptotokoll: (4) Die Bestimmungen des Artikels 3 Abs. 2 gelten auch fur die Überführung einer Kapitalanlage in öffentliches Eigentum sowie fur alle sonstigen hoheitlichen MaBnahmen, durch die eine Kapitalanlage entzogen oder beschränkt wird und die einer Enteignung oder Verstaatlichung gleichkommen.

5. Morocco, August 31, 1961.
Art. 3(2): Same as No. 1.
Protokoll: (4) Die Bestimmungen des Artikels 3 Abs. 2 gelten auch fur die Überführung Kapitalanlage im öffentlichen Eigentum, ihre Unterstellung unter öffentliche Aufsicht oder ähnliche Eingriffe der öffentlichen Hand. Unter Enteignung ist die Entziehung oder Beschrankung jedes Vermögensrechts zu verstehen, das allein oder mit anderen Rechten zusammen eine Kapitalanlage bildet.

6. Liberia, Dec. 12, 1961.
Art. 3(1)(2): Same as No. 1.
Protocol Ad Article 3(a): (4) The provisions of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control, and to similar interventions by public authorities. Expropriation shall mean the taking away of any property or any property right, which in itself or in conjunction with other rights constitutes an investment, or curtailing the management, use or employment of such property right by such measures of sovereign power and to such an extent as are tantamount to expropriation.

7. Thailand, Dec. 13, 1961, 541 U.N.T.S. 181 (1965).
Same as No. 1.

8. GUINEA, March 19, 1962.
Art. 3(2): Same as No. 1.
Protokoll Zu Artikel 2: (4) Die Bestimmungen des Artikels 3 Abs. 2 gelten such fur die Überführung einer Kapitalanlage in öffentliches Eigentum, ihre Unterstellung unter öffentliches Eigentum, ihre Unterstellung unter offentliche Aufsicht oder ähnliche Eingriffe der offentlichen Hand. Unter "Enteignung" ist die Entziehung oder Beschrankung jeden Vermögenswertes oder Rechts, das allein oder mit anderen Vermögenswerten oder Rechten zusammen eine Kapitalanlage bildet, zu verstehen, durch hoheitliche MaBnahmen und in einem Ausmass, das einer Enteignung gleichkommt.

9. TURKEY, June 20, 1962.
Art. 3(2): Same as No. 1.
Protokoll Zu Artikel 3 Abs. 2: (a) Enteignung im Sinne des Artikels 3 Absatz 2 bedeutet die Entziehung oder Beschränkung jedes im Sinne dieses Vertrages als Kapitalanlage geltenden Vermögens oder Vermogensrechtes durch hoheitliche MaBnahmen und in einem AusmaB, das einer Enteignung gleichkommt. Artikel 3 Absatz 2 gilt auch fur die Verstaatlichung einer Kapitalanlage.

10. CAMEROUN, June 29, 1962.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3: (4) The provisions of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control, and to similar interventions by public authorities. Expropriation shall mean the taking away or restricting by sovereign measure and to an extent equivalent to expropriation, of any asset or right which in itself or in conjunction with other assets or rights constitutes an investment.

11. MADAGASCAR, Sept. 21, 1962.
Same as No. 8.

12. SUDAN, Feb. 7, 1963.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3 para. 2: (3) Expropriation shall be deemed to be any kind of deprivation by acts of sovereign power of any asset or right which constitutes an investment or is a part thereof, other acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization.

13. SRI LANKA, Nov. 8, 1963.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3: (3) The term "expropriation" within the meaning of paragraph 2 of Article 3 shall also pertain to acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization. Expropriation shall mean the taking away or restricting of any property right which in itself or in conjunction with other rights constitutes an investment.

14. TUNISIA, Dec. 20, 1963.
Same as No. 5.

15. SENEGAL, Jan. 24, 1964.
Same as No. 5.

16. KOREA, Feb. 4, 1964.
Same as No. 12.

17. PHILIPPINES, March 3, 1964.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3: (5) (a) Expropriation shall mean the taking in whole or in part of any investment as well as the restricting of any investment the effect of which is tantamount to such taking. (b) The provisions of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public ownership as well as to the subjection of an investment to public control or to similar interventions by public authorities the effect of which is tantamount to expropriation as defined in paragraph (a) above.

18. NIGER, Oct. 29, 1964.
Same as No. 5.

19. KENYA, Dec. 4, 1964.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3: (3) (a) The provisions of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control, or to similar interventions by public authorities. Expropriation shall mean the compulsory taking away or restricting of any property right which in itself or in conjunction with other rights constitutes an investment.

20. TANZANIA, Jan. 30, 1965.
Art. 3(2): Same as No. 1.
Protocol Ad Article 3: (3) (a) The provisions of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public

ownership, to the subjection of an investment to public control, or to similar interventions by public authorities. Expropriation shall mean the taking away of any property right which in itself or in conjunction with other rights constitutes an investment, as well as the restriction of any such property right, if the restriction is tantamount to expropriation.

21. SIERRA LEONE, March 8, 1965.
Same as No. 19.

22. COLOMBIA, June 11, 1965.
Same as No. 5.

23. ECUADOR, June 28, 1965.
Same as No. 5.

24. CENTRAL AFRICAN REPUBLIC, Aug. 23, 1965.
Same as No. 5.

25. CONGO (VR), Sept. 13, 1965.
Same as No. 5.

26. IRAN, Nov. 11, 1965.
Art. 3 Same as No. 1.
Protocol Ad Article 3: (4) (a) Expropriation shall mean the taking away or restricting of any property right which is considered an investment in this Treaty, by such measures of sovereign power and to such an extent as are tantamount to expropriation. The provisions of paragraph 2 of Article 3 shall also apply to the nationalization of an investment.

27. IVORY COAST, Oct. 27, 1966.
Same as No. 5.

28. UGANDA, Nov. 29, 1966.
Same as No. 19.

29. ZAMBIA, Dec. 10, 1966.
Same as No. 19.

30. TSCHAD, April 11, 1967.
Same as No. 5.

31. RUANDA, May 18, 1967.
Same as No. 5.

32. GHANA, May 19, 1967.
Same as No. 21.

33. INDONESIA, Nov. 8, 1968.
See text at 8.

34. ZAIRE, March 18, 1969.
Same as No. 5.

35. GABUN, May 16, 1969.
Same as No. 5.

36. MAURITIUS, May 25, 1971.
Same as No. 5.