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Study of Promotion of Private Foreign Investment in Developing Countries

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At the 43rd session of the Economic and Social Council in July and August, 1967, a Report [1] on private investments in developing countries was submitted by Karl Lachmann, Chief of the Fiscal and Financial Branch of the U.N. Department of Economic and Social Affairs. Designated "Summary and Conclusions" of a study which the Secretariat indicated would be published in full later this year, the document contains interesting observations on major problems involved in promoting private investment by "haves" in "have-not" countries.

There was little discussion of the document in Geneva last August. Further consideration was deferred for the resumed session in November 1967.[2] Quite likely there will also be some discussion of it at the 22nd session of the General Assembly in connection with provisional agenda item 42 dealing with the external financing of economic development of developing countries, including "Accelerated flow of capital and technical assistance to the developing countries." [3] The study has, however, been prepared for, and will presumably be mainly discussed at, the second U.N. Conference on Trade and Development (UNCTAD) scheduled for New Delhi in February and March, 1968.

The document provides a summary of the U.N. Secretariat's

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[1] "Financing of Economic Development," "Promotion of Private Foreign Investment in Developing Countries, Summary and Conclusions," U.N. ECOSOC *Off. Rec.*, 43rd Sess., E/4293, 6 March 1967 (Agenda item 5(b)).

[2] U.N. ECOSOC *Off. Rec.*, 43rd Sess., Prov. S.R., Econ. Comm., 430th meeting, 1 Aug. 1967, at 19.

[3] U.N. Gen. Ass. *Off. Rec.*, 22nd Sess., A/6680, 21 July 1967.

findings and recommendations based on many years of study and practical experience in the promotion of private foreign investment in developing countries. It is said that the principal problems and obstacles which may stand in the way of additional private investment are of two kinds. The first arises from the absence or ignorance of worthwhile projects which governments might wish foreign investors to undertake and which investors themselves find attractive. The second arises from the normal divergencies of interest which exist between foreign investors and governments of developing countries.[4]

As to the first group of problems, the Report emphasizes the great potential role of the more than 300 national development banks in the promotion of investment, and makes concrete proposals for both strengthening their internal operations and forging institutional links between them and interested business and financial circles in the developed countries, particularly through the intermediary of regional development banks.[5] There is also emphasis on the need for investment in medium and small plants, rather than in the large, basic industries, since the former are often more appropriate to the size of the market and more easily accepted by most developing countries.[6] Credit is given to the efforts of developed countries to deal with the problem, including the "highly interesting and novel approach" of the Atlantic Community Development Group for Latin America (ADELA), which is composed of prominent firms in Europe, North America, and Japan possessing a broad range of technical and financial resources.[7]

The second group of problems raises more issues for the lawyer, as it is in this area that clashes occur between governments and alien investors and arguments arise regarding rights and duties. It is also in this area that the Report is most provocative. This is not surprising in view of the fact that Professor A. A. Fatouros, of the University of Indiana, served as one of the consultants.[8] It is a gross perversion of the facts to refer to "a vanishing consensus" on the basic principles of international law governing the protection of foreign private invest-

[4] Lachmann, U.N. ECOSOC *Off. Rec.*, 43rd Sess., Prov. S.R., Econ. Comm., 427th meeting, 28 July 1967, at 9 and 10.

[5] *Id.*, at 9.

[6] U.N. ECOSOC *Off. Rec.*, 43rd Sess., E/4293 (Agenda item 5(b)) at 10.

[7] *Id.*, at 11.

[8] E/4293 at 5, footnote 5; Fatouros, *Government Guaranties to Private Investors* (1962).

ments.[9] Although recent efforts to promote a multilateral convention on this subject have not yet emerged into the arena of developing countries, the remarkable proliferation of bilateral treaties on the protection of private property evidences a widespread acceptance of these prinicples. The overwhelming vote in the General Assembly for U.N. Resolution 1803 (XVII) is clear evidence of a contemporary consensus.[10]

Apart from the post-war treaties between the United States and 11 developing countries (China, Ethiopia, Greece, Iran, Israel, Korea, Muscat and Oman, Nicaragua, Pakistan, Togo, and Vietnam), there are recent treaties between the Federal Republic of Germany and 19 developing countries (Cameroon, Ceylon, Dominican Republic, Ecuador, Greece, Guinea, India, Korea, Malagasy Republic, Malaysia, Niger, Pakistan, Senegal, Sierra Leone, Sudan, Thailand, Togo, Tunisia, and Turkey); between Switzerland and 14 developing countries (Cameroon, Congo Brazzaville, Costa Rica, Guinea, Ivory Coast, Liberia, Malagasy Republic, Malta, Niger, Rwanda, Senegal, Tanzania, Togo, and Tunisia); between Japan and 6 such countries (Cuba, El Salvador, Indonesia, Malaysia, Pakistan, and Peru); between the Netherlands and 2 (Cameroon and Tunisia); between Belgium and 2 (Morocco and Tunisia); between France and Tunisia; Sweden and the Ivory Coast; and the United Kingdom and Cameroon.[11]

To this list should be added a multilateral convention between France, Senegal, Malagasy Republic, Central Africa Republic, Congo Brazzaville, and Chad of June 22, 1960, and bilateral treaties between

[9] E/4293 at 31. The text reads: "International law, indeed, is in flux on some of the basic issues which are here involved. Attempts to restore a vanishing consensus, or to formulate new universal international law through multilateral investment charters . . . have so far not proved successful. The difficulties which seem to have prevented the adoption of such a charter must be traced precisely to the lack of agreement between various countries on the applicable substantive rules of international law." This is too simplistic. There appear to be many reasons why developing countries hesitate to accept multilateral conventions. The absence of such conventions, however, in no way evidences "a vanishing consensus" or non-acceptance of international law principles. The contrary is evident from what follows.

[10] Declaration on Permanent Sovereignty over Natural Resources, U.N. GEN. ASS. *Off. Rec.*, Seventeenth Session, Resolution 1803 (1962).

[11] For a convenient compilation of these treaties and other data relating to the international law requirement of compensation where foreign-owned private property is taken by a State, see "The Compensation Requirement in the Taking of Alien Property," Report of Committee on International Law, 22 *The Record* of the Association of the Bar of the City of New York 195, 217 (March 1967).

India and Afghanistan, India and Iran, Iraq and Kuwait, and bilateral treaties with 10 other developing countries (Chile, Colombia, Congo Kinshasa, Dahomey, Ghana, Honduras, Kenya, Philippines, Uganda, and Zambia).[12] Even though a treaty may not yet have entered into force, the signature of a developing country thereto evidences that country's acceptance of the principles contained in it. All of these treaties affirm international-law standards relating to the protection of property owned by nationals of other parties.

There are, in addition, the guaranties contained in the constitutions and fundamental laws of many of the developing countries which conform to the international standards of protection. The large number of investment encouragement laws adopted by new States also evidence acceptance of these principles.[13] When all of this material is combined with positions taken in the United Nations, it is difficult to understand why the recent U.N. Report should suggest that the international law consensus that has long existed should be vanishing. On the contrary, the growing bilateral treaty movement and the persistent demand for private investments point to a continuing affirmation of the principles which are so necessary for the protection of such investments and are essential if they are to be maintained and increased.

The Report contains some useful material on and suggestions relating to the transfer of modern technology to developing countries. Historically, the bulk of operative technology has been brought to developing countries by the local subsidiaries of foreign companies functioning largely with their own technical and managerial personnel under internal arrangements. The emergence in developing countries of indigenous enterprises seeking technology from a foreign concern has created an urgent need to work out satisfactory arrangements for its transfer. Many of the problems are the same as those involved in the investment of private capital. There are, however, in addition, the tasks of selecting and adapting technology and developing a local capability of innovation and the need of adjusting and developing the legal framework within which transfers of patents, know-how, and other technology are carried out.[14]

Quite rightly, the Report stresses the concern of foreign investors and technology-supplying enterprises with the availability of adequate

[12] *Ibid.*
[13] *Id.*, at 222, 223 (constitutions), 221 (investment laws).
[14] E/4293, at 37-41.

treaty and legislative protection for patent and know-how rights. In the case of patent laws, while many have been enacted, their effectiveness is greatly impaired by defective administration. Much is apparently being done to remedy these defects. In the case of unpatented know-how, there are many difficulties in establishing a sound legal foundation for protection. A study now under way by the Secretary General is designed to develop principles and criteria as well as new forms and improved practices, including model clauses for contractual arrangements.[15]

During last summer's ECOSOC discussion of the Report, it was pointed out that developed countries had not done all they could to encourage private investment in developing countries without discrimination, that more investment should go into manufacturing industries, that the continuous clarification of laws and administrative practices is essential, and that among the main obstacles to private investment are organizational and institutional inadequacies, fiscal policies, and balance of payments difficulties.[16] Although such measures as multilateral investment insurance could under certain conditions encourage the flow of private capital, no national or multilateral system could take the place of confidence. This is the decisive factor in all foreign private investment.[17]

[15] *Id.*, at 42-44.

[16] U.N. ECOSOC *Off. Rec.*, 43rd Sess., Prov. S. R., Econ. Comm., 427th meeting, 28 July 1967, at 15 (Libya), 17 (U.S.A.); 429th meeting, 1 August 1967, at 7 (Turkey).

[17] *Id.*, 429th meeting, 1 August 1967, at 13 (France).