

## Third World Legal Studies

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Volume 6 *The Application of Law and Development  
Theory: Some Case Studies*

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Article 9

1-9-1987

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### Recommended Citation

Kamuwanga, Mwangala B. (1987) "The Teaching of International Trade and Investment Law in a "Law and Development" Context: A View from Zambia," *Third World Legal Studies*: Vol. 6, Article 9.  
Available at: <http://scholar.valpo.edu/twls/vol6/iss1/9>

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# **THE TEACHING OF INTERNATIONAL TRADE AND INVESTMENT LAW IN A “LAW AND DEVELOPMENT” CONTEXT: A VIEW FROM ZAMBIA**

Mwangala B. Kamuwanga\*

## *Introduction*

A symposium on teaching “Law” in the context of development is appropriate at this time for many reasons. There are, however, two major reasons in this writer’s view. The first is that it is an appropriate time to reflect on the thinking of the 1960s and 70s on the subject and see what can be learned from that for future planning. Secondly, it comes at a time when developmental issues have been made more urgent by the stagnation resulting from the stress of external debt in developing countries.

The reality of underdevelopment in an international capitalist system is deeply affecting populations in many developing countries, in Africa and elsewhere, probably more forcefully than ever before. The international debt crisis has increased the International Monetary Fund’s control over capital flows to developing countries. Having lost their creditworthiness, most of these countries are squirming under the conditions set by the International Monetary Fund. Despite assurances that the Fund and its conditions are the appropriate medication for the economic ills currently being experienced, it is without doubt a bitter medicine. Signs of healing are hard to find, in spite of the fact that the medicine has been administered for a long time in most cases. The reality of perpetual poverty and squalor has never been so real for most developing countries of Africa.

What is involved in teaching law under these circumstances? It is to teach law in a manner relevant to the situation of underdevelopment. For

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those who have made the choice, it is to employ one's legal skills to the finding of solutions to the gigantic problem of underdevelopment.

Addressing the Law Society of Zambia on "the functions of a lawyer in Zambia today" (in 1970), President David Kenneth Kaunda stated that "the law of any society must inevitably reflect the character and needs of that society."<sup>1</sup> It is amazing how this statement, made in the municipal law context, summarizes the law and development perspective in international law terms. International law (including international trade and investment law) has been correctly referred to as "European law"<sup>2</sup> because it has evolved from the interaction of the modern European states from the fifteenth century onwards. Modern African societies participated (if it can be called participation at all) in the formation of international law as appendices of their metropolitan colonial ruling states of Europe. It is undebatable, therefore, that conventional international law and jurisprudence are unrepresentative of modern African states. This is true of other developing countries generally.

The emancipation of many colonial territories in this century, including most of Africa, prompted the emergence of many new states. Most of them were ill equipped to take over the responsibility of managing their political and economic affairs. Colonialism robbed them, not only of their mineral wealth, but also of their confidence as dignified, capable peoples. To mention their unpreparedness to take over the political and economic responsibilities of their territories is not to chide them, but to visualize the brutality of colonialism.

The world today is not Europe and the United States only, but also these many poor countries. The character of the world and the needs of the international community have changed. This "European law" must change as well. International law is bound to be archaic and obsolete in so far as it fails to adapt itself to the changed character of the new community it is supposed to serve. To so adapt it has to address itself to the issue of development. The word "development" summarizes the need of the developing world. In a sense it also reflects the needs of the "developed" world.

Law and development is a perspective that looks at law in the context of the development process. It emphasizes the social engineering role of

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1. Kaunda, *The Functions of the Lawyer in Zambia Today*, 3-4 ZAMBIA L. J. 1-4 (1971 & 1972).

2. H. J. STEINER & D. F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 329 (2d ed. 1976).

law,<sup>3</sup> albeit not at the expense of its other roles, notably that of control. At the international level, we may not necessarily talk of "social engineering," but there exists an equivalent role for international law to hasten change to a system and rules reflecting the new composition and needs of the international community of states. The need for law to play this role at the international level may be even more acute, due to the predominance of power politics. This is evident from what follows.

This paper assumes that international law is Law, and does not, therefore, attempt to establish this. Development in the context of this paper refers to the process of economic, social, political and cultural advancement that countries traditionally referred to as "developing" are striving to achieve. To go into the technical ramification of the term "development" is not within the competence of this writer.

### *International Trade Law and Development*

To understand the international legal framework and substantive international trade law, students have to appreciate the philosophical dimension. Law implements philosophy. This is true of the current international trade law based on the laissez faire philosophy. Students have to understand the theory of free trade and its compatriot, the doctrine of comparative advantage, and their intended objectives. The division of labour or specialization as advocated by these theories, is examined, in this paper, in the light of the intended objectives. The analysis of these theories is accompanied by an appraisal of the reasons or rationale for their adoption. The rationale of maximization of trade and efficiency in achieving the general objective of increasing the wealth of nations are important among these. This objective has, however, become an illusion for developing countries in spite of the trade and development connection. The teaching of international trade and investment law in the context of development, therefore, has to question the adequacy of the theory of free trade to cater for developmental requirements of developing countries. Consequently, there is great motivation not to be preoccupied with theory, but instead to analyze the actual working of these theories in the real world.

Competition is the cornerstone of laissez faire. A theory that advocates allocation of resources on the basis of competition assumes that there

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3. Ocran, *Law, African Economic Development & Social Engineering: A Theoretical Nexus*, 3-4 ZAMBIA L. J. 14-42 (1971 & 1972).

exists “out there” among the participants an equality of economic power to compete. The most favoured nation clause in the General Agreement on Tariffs and Trade (hereinafter GATT or the Agreement) assumes this equality,<sup>4</sup> but the international community does not consist of states with equal economic power. The “survival of the fittest” philosophy enshrined in GATT is bound to be biased against the poor and weak. History tends to confirm the view that the weak are disadvantaged under the system.

The United Kingdom was the champion of the *laissez faire* philosophy in the 19th century. It could afford to be, having an empire of colonies that supported its economy as markets for its goods and as suppliers of cheap raw materials. The United States of America within the same period preferred a protectionist approach, as it was still building its infant industries following its independence and the Civil War. In the 20th century, especially the latter part, tables have turned.<sup>5</sup> Especially under Reagan, the United States is the protagonist of the market philosophy, while Britain and Europe, having lost their colonies, are constantly being accused by their ally of being protective, particularly in the agricultural sector.

This makes sense because Europe and Japan were ravaged by the Second World War. It was the Marshall Plan that helped Europe and Japan gain their economic strength. Through the Marshall Plan the United States of America poured about 95% of its aid into Europe. European currencies were not convertible until late in the 1950s.<sup>6</sup> This substantial aid was, *inter alia*, in recognition of the fact that the operation of the international economic system on the basis of the market philosophy required strong participants in Europe and Japan.

Between Europe, the United States of America (USA) and Japan, the GATT framework makes sense. Contracting parties with equivalent economic bargaining strength regularly meet at conferences to negotiate for the reduction of tariffs and other barriers to trade among themselves. These are generalized through the most favoured nation-clause. There is some kind of equity achieved in this kind of atmosphere.

When the scene changes and developing contracting parties enter, the framework ceases to make sense. The young nations do not have the necessary concessions to offer in order to assist them to extract concessions

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4. The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I, para. 1, 61 Stat. A12, T.I.A.S. No. 1700.

5. Steiner & Vagts, *supra* note 2.

6. R. H. MASON, R. R. MILLER & D. R. WEIGEL, *INTERNATIONAL BUSINESS* (3d ed. 1981).

from developed countries; further, their interests are different and are diametrically opposed to those of the dominant parties. They find themselves having to negotiate with their previous metropolitan rulers on the same level, and of course they do not have the same economic power or expertise. The lack of concessions to offer on the bilateral basis means developing countries cannot obtain meaningful tariff reductions on products of relevance and importance to their economies.

The fact that a customs union (instead of its constituent members<sup>7</sup>) is regarded as the contracting party to the GATT also limits the benefits of the Agreement to developing countries. Article XXIV of the GATT organizes the developed-country parties to the Agreement into the European Economic Community (EEC), the USA and Japan. This block membership further concentrates their negotiating strength, while it reduces the significance of developing countries in GATT. Once the EEC, the USA and Japan have satisfied their interests, there is no incentive for them to deal with the unique problems of developing countries.

Exceptions, under which developing countries may apply for exemptions from some GATT obligations, are also of limited benefit to these countries. For example, a member may apply for an exemption from the rule prohibiting application of quantitative restrictions, for balance of payments reasons. However, if any contracting party establishes *prima facie* that the restrictions are inconsistent with article XII, and that their application adversely affects its trade and if previous negotiations between the applying and affected party have not been successful, the contracting parties are required to invite the applying party to consult with them. If the contracting parties find such restrictions inconsistent with the article and no agreement is arrived at, they shall recommend withdrawal of such restrictions, at the pain of retaliation. The same applies to restrictions that may be applied under the article relating to government assistance to economic development.<sup>8</sup> In the latter case, the ultimate remedy for the country applying the restrictions may be withdrawal from GATT.

Consultation and retaliation are the normal modes of settling disputes under GATT, but retaliation by a developing country against any of the developed-block members of GATT is ineffective. Developing countries are not, therefore, in a position to enforce their interests under GATT.

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7. The General Agreement on Tariffs and Trade, art. XXIV, para. 1, 61 Stat. A66, T.I.A.S. No. 1700.

8. *Id.*, art. XVIII, para. 12(d).

Furthermore, free trade and comparative advantage force developing countries to continue in their role of supplying raw materials, whose prices in the international market are extremely unstable and low. Export earnings from commodity trade fall far short of those required to carry out the development needs of the poor countries. The trade and development connection under GATT is weak.

Part IV of GATT was meant to remedy these problems by introducing the "commitments without reciprocity" principle for developing countries. However, the commitments under this section are dubious and uncertain, having been abrogated by an exception of "compelling reasons, which may include legal reasons,"<sup>9</sup> and the fact that adoption of these measures "shall be a matter of conscious and purposeful effort on the part of contracting parties."<sup>10</sup>

To free themselves from the philosophical straitjacket of GATT, developing countries strongly advocated the creation of the United Nations Conference on Trade and Development (UNCTAD) in the General Assembly. UNCTAD was formed in 1964. Although UNCTAD's success is sometimes said to be the result of its function as a forum for developing countries as commodity traders, its underlying spirit is development through industrialization.<sup>11</sup> This spirit gave rise to the Generalized System of Preferences (GSP) whose aim is to open up developed countries' markets to manufactured products from developing countries.

Although the GSP is UNCTAD's most tangible success story, the scheme has had its own share of problems. Naturally, it received mixed reactions among developed countries because it was introducing a non-reciprocal exception to the most favoured nation clause under GATT. Due to lack of agreement on its provisions, the various blocks of developed countries formulated and applied their own schemes along the lines of the proposed one. Some, like the USA and Canada, did not implement their own miniature schemes. The scheme's general effect has further been reduced by the distinction made by the developed countries between developed developing countries and the least developed. The overall effect has also been limited by the application of quantitative restrictions in conjunction with ceiling rates, and other restrictions placed by donor countries to protect their markets.<sup>12</sup>

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9. *Id.*, art. XXXVI, para. 9.

10. *Id.*, art. XXXVII.

11. J. PINCUS, *TRADE, AID AND DEVELOPMENT: THE RICH AND THE POOR NATIONS* (1967).

12. Murray, *UNCTAD's Generalized Preferences: An Appraisal*, 7 J. WORLD TRADE L. 461 (1973). See also Walters, *UNCTAD: Intervener Between Poor and Rich States*, 7 J. WORLD TRADE L. 527 (1973).

The GSP applies to manufactured goods. It excludes the processed agricultural and fishery products in which developing countries have a comparative advantage. Other semi-manufactured goods, in which these countries would perform better, are excluded for the protection of donor countries' markets. Consequently, its effect is severely limited.<sup>13</sup>

The effort to diversify under UNCTAD has been at the expense of developing countries' traditional exports. The main objective of international commodity agreements is to stabilize commodity prices through avoidance of excess production and through price margins agreed between exporters and importers. The importing power of developed countries is also felt here. Under the International Wheat Agreement, for example, importers have no obligation towards exporting countries if the price falls below the agreed-upon minimum, and importing countries are free to purchase wheat elsewhere when prices exceed the agreed upon maximum price.

### *International Investment Law*

The philosophical underpinnings of GATT's relationship with developing contracting parties have dogged these countries in the field of investment law too. The confrontation here has been intense, due to the fact that investment has a more immediate impact on the host state's political economy. The confrontation has been epitomized through the issues of nationalization and compensation for nationalization. The USA has been at the forefront in resisting change in this field, but its views are generally shared in the developed world.

Whereas the USA accepts that the act of nationalization (expropriation) is within the competence of a sovereign state, it insists that it has to be accompanied by prompt, adequate and effective compensation to be lawful under international law. It maintains that there is an international minimum standard, to which the treatment of aliens should conform regardless of the treatment accorded nationals.

A survey<sup>14</sup> of the USA's voting pattern in the General Assembly on the issue of permanent sovereignty over natural resources reveals that country's stand on this matter: there is no sovereign right in the host state to secure and increase its share in the administration of foreign investment. Neither does the USA believe that a host state has a sovereign

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13. *Id.*

14. This summary of the U.S.A.'s views is compiled from excerpts of explanations of objections in Steiner & Vagts, *supra* note 2.



right to secure and increase its share in the profits and advantages derived from the exploitation of the permanent natural resources when it is exploited by foreign capital. The developed world also opposes the view expressed in the 1973 General Assembly resolution to the effect that "the expression of their sovereignty. . . implies that each state is entitled to determine the amount of possible compensation, and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of each state carrying out such measure."<sup>15</sup> Objection was also expressed against the General Assembly Resolution on the establishment of a New International Economic Order referring to the principle of

[f]ull permanent sovereignty of every state over its natural resources and full economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right. . . .<sup>16</sup>

The USA objected to the lack of a provision requiring compensation.

These views should be contrasted with those acceptable to the USA in the 1962 Resolution on Permanent Sovereignty over Natural Resources, which acknowledged: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned."<sup>17</sup> It also stated that the exploration and disposition of the resources and the importation of foreign capital for this purpose "should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities."<sup>18</sup>

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15. *Resolution on Permanent Sovereignty over Natural Resources*, United Nations, General Assembly, Res. 3171, adopted 17 December 1973. U.N. Doc. A/RES/3171 (XXVIII) (1974). See 13 INT'L LEGAL MATERIALS 238 (1974).

16. *Declaration on the Establishment of a New International Economic Order*, U. N. G. A. Res. 3201, art. 4(c), adopted 1 May 1974. U.N. Doc. A/RES/3201 (S)VI (1974). See 13 INT'L LEGAL MATERIALS 715 (1974).

17. *Resolution on Permanent Sovereignty over Natural Resources*, U. N. G. A. Res. 1803, adopted 4 December 1962. U.N. Doc. A/RES/1803 (XVIII) (1962). See 2 INT'L LEGAL MATERIALS 223 (1963).

18. *Id.*

It further provided that when such authorization for the importation of foreign capital is granted, the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law,<sup>19</sup> and Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."<sup>20</sup>

The views of the developing world can be summarized from the exchange between the USA and some Latin American states on nationalizations in the latter. These views are the so-called national treatment principle, generally referred to as the Calvo doctrine.<sup>21</sup> This principle states that foreign investors voluntarily accept treatment similar to that accorded nationals on entering a host state. Consequently, foreign investors are not entitled to compensation when nationalization is general and of impersonal (i.e. non-discriminatory) nature. They are so entitled only if nationals are also given compensation under the same circumstances. Other developing countries, while accepting the general principle of compensation, have included other variables considered relevant in the calculation of profits of the investment. Chile under Allende, for example, insisted on deduction of previous excess profits earned by the companies in comparison with normal profitability earned in their international operations. This variable aims at recouping profits that might have been earned through concentrating on high grade ore, for example. Chile also wanted to deduct from profits revaluations in anticipation of the nationalizations.

The practice in Africa generally has been that nationalization is done under investment agreements between host states and individual investors which spell out the terms of the nationalization. This is as opposed to decrees abolishing private ownership as such. The former approach was employed in Zambia where the government, through a wholly owned enterprise, negotiated and entered into various forms of agreements with foreign investors. These nationalizations were carried out under the Independence Constitution. This constitution<sup>22</sup> prohibited compulsory taking

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19. *Id.* at I(3).

20. *Id.* at I(4).

21. See Steiner & Vagts, *supra* note 2.

22. Zambia, Parliament, The Independence Constitution of Zambia, S. 18.

of property except for defense, public utility and development, and the law authorizing the taking was required to provide for prompt payment of adequate compensation. The constitution further required provision for access by the investor to a court of law or other authority for determination of the legality of the taking, the investor's interest so nationalized and the determination of the amount of compensation where there was disagreement.

The current Zambian constitution permits expropriation under an Act of Parliament which Act must provide for compensation for such expropriation, or taking of interest in, or right over, property. Such an Act of Parliament shall state principles on which compensation is to be determined. The Act shall also provide that in default of agreement, compensation is to be determined by the National Assembly.<sup>23</sup> Compensation so determined by the National Assembly is not questionable in a court of law on the grounds of inadequacy. Zambia also has an Arbitration Act which has been incorporated in a number of nationalization agreements.<sup>24</sup>

Issues relating to expropriation are extremely important to developing countries because they affect their economic self-determination. It is indisputable that every sovereign state has, under international law, the right to control its economy and economic destiny. A notable writer on international law has stated, regarding territorial sovereignty, that

[o]ne of the essential elements of statehood is the occupation of a territorial area within which state law operates. Over this area, supreme authority is vested in the state. . . . hence there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states.<sup>25</sup>

Of course there are qualifications to this rule, but it is the primary principle of international law on this matter.

Examining the 1962 resolution acceptable to the USA, one can justifiably argue that subsequent General Assembly resolutions, which the USA found repugnant, are mere amplifications of that resolution, except for the reference to international law and compensation. That resolution acknowledged permanent sovereignty over natural resources as a principle

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23. The National Assembly is composed of elected members of Parliament (125), and 10 members nominated by the President. The National Assembly and the President (for purposes of signing bills) constitute Parliament.

24. Zambia, Parliament, The Arbitration Act of Zambia, Chap. 180, LAWS OF ZAMBIA.

25. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 152 (9th ed. 1984).

of international law and that these resources should be administered in the interests of the peoples (i.e. States) who own them. How can this be achieved, if host states do not have the right to participate in the administration and profits from the exploitation of such resources, and if they do not have the right to exercise effective control over them?

The amplifications made by subsequent General Assembly resolutions in effect add flesh to the 1962 resolution by stating that host states have the sovereign right to control foreign investment effectively so that their economies, and therefore their peoples, may benefit from it. This control in practice is effected through rules, restrictions and conditions placed on foreign investors on entering host states. Generally, these rules and restrictions take the form of requirements of indigenous share participation in foreign enterprises, restrictions on repatriation of profits, restrictions on areas of participation in host states' economics and requirements regarding filing of certain information with a monitoring government agency. The totality of these rules and regulations gives host states control over foreign investment in their territories. It is accepted by resolutions subsequent to that of 1962 that for any meaningful benefits from foreign investment to accrue to a developing host state such restrictions and regulations are necessary, and the history of foreign investment in these countries tends to confirm this. The USA's acceptance and affirmation of the indisputable principle of international law that foreign capital enters host states subject to rules, restrictions and conditions that may be placed upon it on entry, therefore, is an acceptance of developing countries' sovereign right to control foreign investment in the above sense. It is this writer's understanding of these resolutions that any such rules and restrictions which result in a more equitable sharing of the benefits of foreign investment between foreign investors and host states is within the purview of all these resolutions, including the 1962 one, and therefore, in accordance with international law.

The USA's objection to these resolutions is not so much with the verity of their substance as with their ideological implications, because control is diametrically opposed to the theory of free trade or *laissez faire*.

Looking at the USA's objections stated above, one is prompted earnestly to ask: What remains of developing countries' state sovereignty if the U.S. position is international law? The answer is nothing. The effect of the USA's position is to place, superficially private investment, but effectively all foreign investment above the interests of nationals of developing countries. Consequently, this allows for developed countries' continued exploitation of these countries. There is no international law

principle that subjects the rights of nationals to those of aliens.

The USA's position is that the "international law" in relation to the earnings of foreign capital and compensation in the 1962 resolution refers to the principle of prompt, adequate and effective position, i.e. that this is a binding principle of international law. This position *prima facie* supports the principle of an international minimum standard in the treatment of foreign investors by a host state. This might have been the principle then, but it is questionable whether this is still the prevailing international law principle.

The issue boils down to the extent to which the above discussed United Nations resolutions can be said to have either influenced or effected change of customary international law in this area. Before dealing with this highly debatable issue, it is important to point out that the principle of prompt, adequate and effective compensation primarily evolved from developed countries' expropriation of their nationals' property for public utility reasons. This is because compensation for expropriation has never been an issue among developed countries *inter se* considering the relative parity in the flow of capital between them. The appropriateness of applying a principle formulated purely on municipal law considerations to an international situation involving other sovereign states with their own ideological variant is highly questionable. Consequently, UN resolutions on this matter constitute and illustrate the failure of this primarily Western principle to gain acceptance as a principle of international law in the new international community. Alternatively, the new nations of the current international community have not accepted this old international law principle. Either way, the rejection of this principle has been effective. The current issue is whether the above resolutions constitute the new consensus as advocated by the new element or another consensus has yet to come.

It is this writer's view that the resolutions above discussed constitute the new international principle on this matter because they are consistent with the principle of state sovereignty, which is the cornerstone of international law.

The fact that the USA has perpetrated its views, in international agreements like treaties of Friendship, Commerce and Navigation and through conditional aid under its own legislation such as the Hickenlooper Amendment<sup>26</sup> to the Foreign Assistance Act of 1962, does not prove its

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26. See Steiner & Vagts, *supra* note 2.

case. This fact merely proves might as an economic and military power.

It is obvious from the objections of the developed countries against effective control of foreign investment that they believe that mere foreign participation in a developing political economy bestows sufficient benefits to warrant its admission. This has been a persistent line that has been used to intimidate developing countries to open their economies to foreign investment and to subsidize it heavily through incentives. This view, however, ignores the idiosyncracies of the political economy of developing countries that give rise to different results from foreign investment participation in a developed country.

### *The Internal Effort*

International trade and investment law, issues the writer has come to term "issues of sharing," is fertile ground for a law and development perspective. Capital inflow and technology are only two of the ingredients required for development. They are very essential ingredients, however. They are also in short supply in developing countries. The challenge for developing countries in international transactions was aptly stated by UNCTAD in the following words:

In the long run, the success of a developing country in servicing its indebtedness depends primarily on the contribution that capital inflows make to the country's growing income stream, and on the country's ability to capture from that income stream a volume of savings adequate to service debt and to support its development programme.<sup>27</sup>

As regards technology, this writer came to the following conclusion:

Through the course of this study, it has become clear that if ranking has to be done, transfer of foreign technology supercedes capital inflow in essentiality, although these two are intertwined. By legally transferring the control of the economy to Zambians in the Mulungushi policy statement, the government made indigenous capability to manage the economy a priority goal above any other.<sup>28</sup>

Both capital and technology are transmitted through international transactions, particularly foreign investment contracts. Investment law in the context of development, therefore, is to strive at increasing a developing

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27. U.N. CONFERENCE ON TRADE & DEVELOPMENT, DEBT PROBLEMS OF DEVELOPING COUNTRIES: REPORT 5, U.N. Doc. TD/118/supp. 6/rev. 1, U.N. Sales No. E.72.II.D.12 (1972).

28. M. B. Kamuwanga, Legal Issues Involved in Negotiating Investment Contracts Between Developing Countries and Foreign Investors: An example from Zambia 330 (S.J.D. Dissertation, University of Wisconsin - Madison, 1985).

country's quid pro quo, to effect genuine transfer of technology, to localize the settlement of disputes arising therefrom and to provide for a positive impact of foreign investment on the local economy generally in a way that enhances the economic self-determination of the country. To achieve this objective, there is need to bring about an awareness that the allocating process is not inflexible and that internal effort can be made to achieve this objective. This awareness is necessary not only among the students of Investment Law, but also among the bureaucrats who are responsible for the local decision-making process relating to foreign investment entry into the country.

This educational effort is necessary because developing countries have for a long time preoccupied themselves with attracting foreign investment through incentives. That foreign investment is a necessary evil in the development process is not debatable. The mindset of many of these countries is, however, that foreign investment per se is beneficial to a developing country. The question that needs to be analysed is whether the instance of foreign capital investment by itself is *prima facie* beneficial to a developing country. Developed countries have advocated this view over the years.

A behavioural study of multinational corporations, however, strongly suggests otherwise. Apart from their undesirable impact on the social fabric of developing countries' societies, their impact on the host state's balance of payments position is debatable.<sup>29</sup> Their notorious practices of transfer pricing, tax evasion and tax avoidance, etc., may result in decapitalization of a developing country which does not have sufficient sophistication or staffing to detect and stop these practices. Genuine transfer of technology is hindered by multinationals' insistence on complete management control of their investments, sometimes at the pain of withdrawal. Even when joint ventures are accepted, their "satellization"<sup>30</sup> through contract provisions neutralizes their effectiveness in effecting transfer of technology.

To deal with the problem of possible decapitalization and an inadequate quid pro quo, there is need for a developing country to screen

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29. See for example, R. J. BARNET & R. E. MILLER, *THE GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974).

30. M. WIONCZEK, *MEASURES STRENGTHENING THE NEGOTIATING CAPACITY OF GOVERNMENTS IN THEIR RELATIONS WITH TRANSNATIONAL CORPORATIONS: TECHNOLOGY TRANSFER THROUGH TRANSNATIONAL CORPORATIONS - A TECHNICAL PAPER* U.N. Doc. ST/CTC/11, U.N. Sales No. E.79.II.A.6 (1979).

foreign investment admitted in its territory and thereafter to monitor its operations effectively.

The screening period starts with the bureaucrats who are in a position to place conditions and terms of entry on foreign investment. In Zambia this is done by the Investment Coordinating Committee.<sup>31</sup> The negotiation done at this stage gives officials involved opportunity to incorporate the country's economic policy and priorities in the entry agreement. The continued operation of the investment in the country is made conditional on the observance of the conditions and terms so agreed upon by the Investment Act.<sup>32</sup>

The second stage of screening is at the micro level if the investment is a joint venture. The screening process spreads over the negotiations on the terms of the joint venture contract. It is this contract which generally allocates benefits and liabilities relating to the investment among partners. Negotiators are well placed to weigh offers from a foreign investor and to assess their beneficence to them as partners and to the country generally. An inadequate bargain should be rejected at this stage.

Developing countries have, however, for a long time, treated the negotiating process as a matter of formality. They have left to the foreign investor the responsibility of drafting the legal instruments, leaving to their own lawyers only the responsibility of turning pages for the appropriate government official to affix his signature. This attitude is suicidal and should be discontinued.

There are three main explanations for this attitude. The first is that lawyers trained or specialized in international transactions are few. When they are available, they may not be fully utilized because of the attitude still predominant in many developing countries that a lawyer's function is the traditional role as a defender of rights in litigation. This old-fashioned view prevents the effective utilization of lawyers generally in the development process and in matters of international transactions in particular. The third explanation is that political leaders usually prefer foreign experts as being more competent than indigenous ones. This is a crisis in self-confidence that is proving to be one of the greatest success stories of colonialism. So even when legal opinion is sought, it is sought from overseas. Yet, the foreign lawyers often trusted with the responsibility

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31. This Committee is constituted by the Investment Act of 1986. It has the primary responsibility of processing and approving applications from investors to invest in the country.

32. Zambia, Parliament, Investment Act (No. 5) of 1986, S. 20.



of advising in these transactions are usually handicapped by their lack of understanding of their client's political economy.

A trade and investment curriculum to train development lawyers, therefore, has to be more than a law course because it has to be taught in the context of the country's political economy. The political dimension is important because it constitutes the environmental context. Political risk analysis has become an important factor in foreign investment decision-making. Economic policy usually demarcates the area of participation of foreign investment in the local economy. It also provides the rationale for restrictions placed on foreign investment participation and why these are necessary for the achievement of stated national goals.

Being in tune with the country's political and economic aspirations, a foreign investment lawyer is better placed to negotiate them into the investment contract. Having been involved in the negotiations, she is able to capture the spirit of the negotiating process and incorporate it into legal language to express adequately the needs and aspirations of the country. After having participated in the drafting and execution of the investment contract, a lawyer is better placed to participate, when necessary, in the carrying out of the project in the form of provision of legal opinion or interpretation. This further gives a lawyer the opportunity to gain relevant experience and better incorporate the country's aspirations in future investment contracts.

#### *Empirical Evidence of the Injustice of the International System*

The philosophical hurdles for developing countries are equally pronounced in the international financial system. A smooth capital flow to the developing countries is important to facilitate productive investment. The terms of lending have a bearing on the net resource transfer to developing countries. This has been amply demonstrated by developing countries' experiences in the 1975-85 decade.

After the 1973 oil crisis that was introduced by oil price hikes among other things, developing countries have been experiencing problems of acute shortage of capital for their development plans and lately for debt servicing purposes. Their first reaction was to turn to the commercial lenders to fill the gap. Commercial borrowing by these countries was intensified in the late 1970s as official flows declined, reflecting adjustments made by developed countries as they, too, wrestled with the successive recessions.<sup>33</sup> This created the opportunity for market forces

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33. WORLD BANK, *WORLD'S DEBT TABLES: EXTERNAL DEBT OF DEVELOPING COUNTRIES* (1983/84 ed. 1984).

predominantly to influence the distribution of resources among nations. The result has been that developing countries, being acutely affected by shortages of capital, were obliged to sign loan agreements with variable interest rate clauses. The variable interest rate clause imported high interest rates into these loans as developed countries contracted their money supplies to curb inflation. Interest rate payments have become a large component of developing country debt. The working of market forces should have prevented over-lending either by lowering the demand for borrowed capital because it was becoming too expensive, or by refusal by lenders to over-expose themselves for fear of default by borrowers. As it was, neither happened. Borrowers continued to borrow because they needed capital, and lenders continued to lend because of the excess liquidity they had. It would have been unprofitable for lenders to keep their capital without earning interest on it. Consequently, the automatic working of market forces failed to prevent over-lending as theory suggested they would.

The international debt crisis has resulted in a reverse transfer of resources. This will continue as charges on rescheduled debt multiply. Objective analysis of the situation would seem to support the view that "non-intervention in the market cannot apply when there is no more market. There has to be some outside compulsory action to stop the drain of resources, when that drain cannot be affected by any conceivable internal adjustment by the debtor countries."<sup>34</sup>

Apart from opening a few extra facilities of borrowing, which provided opportunity for developing countries to place themselves in the noose of conditionality, the International Monetary Fund has done nothing to cater to the unique problems of underdevelopment of developing countries. It expects developing countries to conform to Western economic theory that has been tailored to suit Western developed countries. The over-emphasis of the Fund on the external currency policy at the expense of other relevant factors, is assisting in the decapitalization of developing countries through unrealistic depreciation of their currencies. The IMF, through its conditionality and its insensitivity to the political repercussions thereof, is also destroying any rudiments of democratic institutions and values that may have been germinating. The IMF's failure to comprehend the problems of developing countries is a classic example of the archaic nature of

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34. Langoni, *The Way Out of the Country Debt crisis*, IMF ESSAY EUROMONEY, Oct. 1983, at 20.

the Bretton Woods system to cater for the changed international community of states.

### *Conclusion*

The law and development perspective on international trade and investment law is a critique of the international system's impact on the development efforts of developing countries.

This paper has addressed a few issues which the writer considers important to the teaching of law in development. There is sufficient evidence to the effect that developing countries are swimming against the philosophical and, consequently, the legal current in the international system. UNCTAD has succeeded in breaking the myth of economic equality of States in the international market, but it has failed to establish non-reciprocity as a legal principle. The establishment of such a rule is problematic in a system that requires reciprocity for the establishment of a legal obligation. However, the international legal system has overlooked the fact that many developing countries have given, albeit involuntarily, through colonial exploitation. It is a valid point that there has been transfer of resources from colonies to the metropolitan states. Aid given to developing countries, so-called non-reciprocal measures under GATT or elsewhere is legitimately restitution that developed countries owe poor countries for the material and other forms of exploitation during many years of colonialism.

The basic problem is, therefore, dealing with a system that legitimizes exploitation without creating an obligation for redress. The General Assembly Resolution on the Establishment of the New International Economic Order appropriately declares: "The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples. . . ."<sup>35</sup>

The wrangle over nationalization and foreign investment participation in developing countries can better be appreciated as part of the East/West ideological competition only. The Western developed nations feel that direct control (in this case of trade and investment) removes the allocation of resources through market forces and ushers in the control-

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35. *Declaration on the Establishment of a New International Economic Order*, U. N. G. A. Res. 3201, art. 4(f), adopted 1 May 1974. U.N. Doc. A/RES/3201 (S-VI) (1974). See 13 INT'L LEGAL MATERIALS 715 (1974).

oriented socialist approach. Yet the poor developing countries cannot afford not to institute some control measures to compensate for their ineffective participation in a system that buttresses the interests of the rich and economically powerful. The international debt crisis that has subsisted since the beginning of this decade is proving that the very survival of these countries is at stake, unless the sucking dry of these countries legitimized by the international capitalist legal and economic systems is deliberately stopped or abated.

As far as developing countries are concerned, their ideological labelling based on whether or not their economies are based on control or on the basis of the market ideology leaves them no room for the important distinction between indigenous private investment and foreign private investment in dealing with their developmental problems. This distinction would give opportunity to developing countries to develop their private enterprise without fear of external economic domination while at the same time to remain clearly non-aligned in terms of the East/West confrontation. Also, *indigenous* private investors would not feel afraid to excel when measures are taken against *foreign* private investment.

In the quest for solutions to their developmental problems, developing countries cannot abdicate the responsibility they have to themselves. Internal efforts to seek solutions that have a positive overall impact at both international and national levels cannot, therefore, be overemphasized. The writer is of the opinion that effective negotiating with foreign investment is one such effort that many developing countries have yet to exploit to the fullest. The vices of corruption, wastage and misuse of resources (including human ones) and maladministration have to be genuinely and consistently tackled. One of the greatest problems undermining the development process, especially in Africa, is the lack of stable political governments. History, in Africa, is proving that there cannot be economic development without a genuine democratic political system whose goal is to seek sincerely to improve the well-being of the people.

That the character of the international community has changed is not debatable. The ultimate question for the international system to settle is whether it will continue to ignore the new element in its community. There is sufficient empirical evidence that supports a need for change, for accommodation of the latecomers and the poor.

If this issue will be left to be settled in the fashion of the market philosophy, the market philosophy will vindicate itself. But if so, at what cost? What a mockery of the rule of law that is supposed to be synonymous with civilization! What a travesty of justice!

