

ECONOMIC DEVELOPMENT  
AND INTERNATIONAL LAW

RECENT TRENDS IN THE CONFLICT BETWEEN  
THE DESIRE OF STATES TO ORGANIZE THEIR  
ECONOMIES AND THE DESIRE OF FOREIGN  
INVESTORS TO ACHIEVE FREEDOM FROM  
CONTROL AND SECURITY OF INVESTMENT

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Robert Delson

Summary of the Argument

International law, like other law, should serve as an instrument of social and economic development. When it becomes a barrier to social progress, it should be modified. However, the law can be changed for reactionary as well as progressive purposes and, thus, all proposed changes must be carefully scrutinized to determine their consequences.

I propose, therefore, to call to your attention a number of recent developments in international law which, in my opinion, are undesirable because they would have the effect of weakening the power to control foreign investments. I shall also note certain countervailing developments.

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I believe that the power of states to freely determine their economic destinies should be reinforced rather than weakened because recent history has demonstrated that increased state intervention is necessary to achieve economic democracy. In a time of great social and economic upheaval, the power of the state to deal with property and property rights, domestic or foreign, should be increased, not decreased.

"International practice, as established since the Cannes Conference (1922), is summed up in three words: non-intervention but indemnification. \*\*\* This position represents the present equation balancing the State's liberty to organize as it will and the security of international relations." (Judge de Visscher)

The less developed nations of the world recognize that they can achieve economic growth and a higher standard of living only through the industrialization and modernization of their economies as a whole. They recognize that to achieve the optimum rate of development, they must fully exploit their mineral, petroleum and agricultural resources. They are aware that these objectives can be achieved only by increasing the international flow of capital, both public and private.

However, they are opposed to the influx of capital on terms which might intensify the economic and social evils which they seek to eradicate. They wish to guard against intervention in their domestic political and economic affairs by foreign companies as well as against intervention by the home governments of such companies. Some of these

companies have, even in the recent past, helped to establish dictatorships and to maintain inequitable systems of land tenure resulting both in exploitation of the peasants and the retarding of social and economic development. This in turn establishes the conditions for another form of totalitarianism by creating a fertile breeding ground for communist activities.

The current desire for economic development has been intensified by two significant trends. The first of these is the increase in the number of politically independent nations. This has created a conscious demand for economic growth and industrialization because of their desire to utilize political independence for the welfare of the underlying population. The second of these trends is the acceleration in the pace of scientific innovation, as reflected in rapid technological and industrial advances which has, for the first time in history, made possible the realization of these economic objectives.

It must be realized, however, that the very nationalist strivings which created the demand for development have also created powerful opposition to the acceptance of foreign assistance when this is proffered on terms which might diminish the economic independence of the new nations. The less developed nations also seek to reduce the degree of diplomatic intervention by the home states of investors.

At the same time potential investors, who have been traditionally eager to obtain the maximum degree of security for their investments, have actively sought to devise new instruments and methods for the achievement of this objective. The desire for greater security on the part of investors is perhaps understandable in view of their unfortunate experience with defaulted bond issues and with confiscations, particularly in Communist countries. They have also been concerned with expropriations in a number of the less developed nations.

However, the experience of such nations with the institution of diplomatic protection and with political domination of their countries by certain foreign companies has certainly not been such as to induce either the newer or older members of this group of nations to accept any changes in international law which might occasion further manifestations of these abuses. I shall refer particularly to the abuses of diplomatic intervention which have been especially evident in Latin America where this institution developed most fully.

In Latin America, where independent governments existed in the regions marked out for economic exploitation, foreign investors could secure protection and relief only by the intervention of their home governments. The existence of abuses in the practice of diplomatic intervention is not denied by objective observers. But it is also true that, generally speaking, these abuses no longer exist in the aggravated form which we witnessed in the early decades of the twentieth century. While the adverse reaction of Latin American countries to these evils is understandable, in my opinion, they went too far when they demanded the complete elimination of the right of diplomatic protection through such concepts as the Calvo doctrine. This sweeping rejection of the right of protection has not found acceptance in international law generally.

The utilization of force as the culmination of diplomatic intervention created the fear that claims were presented as excuses for intervention rather than to redress genuine grievances.

The modern expression of the desire to minimize the extent of diplomatic intervention and to control the direction of foreign investments has taken the form of an insistence on permanent sovereignty over natural wealth and resources, conceived as an aspect of the right of

self-determination. Since 1952 this question has been before various organs of the United Nations.

Given the present state of political consciousness, it seems unrealistic to expect the underdeveloped nations to accept changes in international law which would be unfavorable to their present legal rights. In my opinion, international law recognizes the right of every country to order its own economy by nationalizing any property within its borders (which includes the right to terminate concessions), and holds that the exercise of these rights with respect to aliens is not in violation of international law unless such actions are taken in breach of treaty obligations, or are not for a public purpose, or discriminate without justification. While international law under the prevailing doctrine recognises the right of aliens to reasonable compensation, it does not, in my view, render illegal a taking which is not accompanied by such compensation. Here I take a middle path, departing from the views of Latin American jurists who would hold that an alien is not entitled to any more favorable treatment than a national, and of those jurists who assert that full and immediate compensation is a condition of the legality of the taking.

Perhaps the most striking attempt to limit the control of a state over its contractual relations with aliens may be found in the theory, recently advanced with special vigor, that a state violates international law when it fails to observe its contract with an alien, in the same manner as when it fails to observe its treaty engagements with another state. It is clear, however, that there is no basis for this position. It amounts to an attempt to extend the doctrine of pacta sunt servanda, as a principle of international law, to contracts between states and aliens, whereas this principle in international law is confined entirely to relations between states.

Certainly one must agree that it is desirable to find a means of reconciling the interests of both parties to agreements between states and aliens. The answer may well be sought not in terms of more extensive means of legal protection for aliens, but in a new relation of partnership in which mutuality of interests will be emphasized. It has been persuasively argued that the legal conditions of investment are not and should not be the primary determinants of whether an investment will be made in a given country.

Frequently the argument for greater legal security proceeds on the mistaken premise that an increase in the flow of private investment is desirable in itself, without regard to its effect on the balanced economic development of the recipient country. This reveals a complete indifference to the fundamental purpose of investment and development, which must be the achievement of social and economic progress and an increase in the standard of living. Of course, no private investor will participate unless he foresees the possibility of profit, but attainment of such profit must be viewed as a by-product and not as a goal of the economic process. If the pursuit of apparently increased legal security and of freedom from governmental control is not acceptable to the recipient nations, it may well have consequences opposite to those sought by the investor. Stability and security, which in the long run mean greater profitability, can only be achieved by the creation of an atmosphere of trust and confidence and by contributing to the establishment of a balanced and growing economy which is essential to political stability. Investment in processing and manufacturing industries which will result in the creation of a vast increase in the purchasing power of the people, will also mean a greater increase in the demands for the products of investors. In other words, the investor must see his role as that of one aspect of the very complicated process of creating sustained economic growth and development, and may

genuinely safeguard his future only by the extent of the contribution which he makes to this process.

On the part of the recipient country, this should be accompanied by a recognition that an investor is entitled to a legitimate profit, to the security of his investment, to the perquisites and attributes of management, to repatriation of his profits and capital, and to freedom from restrictions which are not essential to permit the recipient nation to order its own economy.

The need for economic development becomes ever more urgent as the gap between the richer and the poorer countries widens and as the people of the world recognize that we have reached an era in which it is possible to create, in the words of Toynbee, an "age of welfare for all." There is need for a global plan to marshal the natural resources and the capital resources of the world for a final assault on the problems of poverty, disease, and illiteracy. Within this overall framework it should be possible to find an accommodation between recipient nations and investors which will recognize the natural sensitivity of the latter to any encroachment upon their control over their economic destiny while giving assurances to the former that they may participate with adequate assurances of security in this worldwide endeavor.