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The Legal Status of Foreign Investments in the East African Common Market

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BOOK REVIEW

THE LEGAL STATUS OF FOREIGN INVESTMENTS IN THE EAST AFRICAN COMMON MARKET. By O.C. Eze. Leiden: A.W. Sijthoff, 1975. Pp. xv, 353.

One noticeable development in the field of International Economic Law during the last decade since the United Nations ushered in the new era of an economic world order has been the growing literature on the law of investments, especially in respect to developing economies. International Economic Law itself is a recent specialist off-shoot of general public international law, having been nurtured and popularized as a subject of separate university discipline in its own right within the last 30 years or so by Schwarzenberger among others. Notable, generally, among the specialized studies on international investments law are Worthley's *Expropriation in Public International Law* and Schwarzenberger's *Foreign Investments and International Law*, in which topics such as the expropriation and nationalization of foreign property as well as the appropriate treatment of such property in the place of its investment under customary international law are examined in detail.

The process of decolonization and the consequent emergence of the right of self-determination have focused the attention of students of international law on this new area, and studies like *The Legal Problem of Foreign Investment in Developing Countries* (1965) by Nwogugu began to appear. More specialized studies devoted to individual developing countries, such as Proehl's *Foreign Enterprise in Nigeria* (1965) and Suckow's *Nigerian Law and Foreign Investments* (1966) have since followed. If one were to regard the Market as an economic unit, Dr. Eze's book, *The Legal Status of Foreign Investments in the East African Common Market*, would seem to belong to this genre.

The book, which originated as a doctoral thesis in the Graduate Institute of International Studies, Geneva, was apparently completed while the author was a Senior Lecturer in the Faculty of Law at the University of Dar-es-Salaam, Tanzania. Therefore, he had the opportunity to study and write about his subject with unusual insight and appreciation. The study is divided into eleven chapter headings. The first is a general introductory background to East African economic co-operation as reorganized under the constitutive Treaty of 1967. Chapter III deals with the national as well as the regional and sub-regional institutions—the African

Development Bank and the East African Development Bank. Chapter IV studies banking companies, insurance businesses, building societies, partnerships, and other companies. Land tenure and land holdings, including mining and mineral rights, in each of the three constituent territories are discussed in Chapter V. Chapter VIII describes the law and procedure of registration of patents, trade marks, trade names, and designs. Chapter IX treats Labor Law, explaining factory regulations, social security, and minimum wages as well as the legal obligation to train nationals in specified types of jobs. Under Chapter X are discussed local trade union laws and the settlement of labor disputes in each territory. While these seven chapters give much needed information to some types of new foreign investors coming to East Africa, they deal only with relatively marginal issues.

The really fundamental questions of foreign investments are to be found in Chapter II which deals somewhat too briefly with the policies of the East African Governments toward foreign investment in both public and private sectors under which industries are wholly controlled, made partnership ventures, or left "open." The investment climate together with problems of establishment are all disposed of in about a dozen pages, but taxation, customs, and excise are given a fairly full treatment in Chapter VI. The exchange control legislation and foreign exchange in the three territories are discussed in Chapter VII, and the Foreign Investments Protection Act is too summarily dismissed under three pages in the same chapter. Curiously, the fourth most relevant chapter, Chapter XI, is headed "Legal Protection" and covers such miscellaneous topics as constitutional and investment law, the theory and practice of Tanzanian and Ugandan nationalizations, recognition and enforcement of foreign judgments, commercial arbitration, the I.B.R.D. Convention on the Settlement of Investment Disputes, and bilateral agreements—six major aspects of the law of foreign investments that should have received far more extended treatment in a book of the present title than the sixteen pages allowed to them. The first two topics might well have been discussed together in a separate chapter, possibly along with the part of Chapter VII dealing with the Foreign Investments Protection Act. The third topic, recognition and enforcement of foreign judgments, should be in a chapter by itself if included at all; and the remaining three topics also deserve a chapter to themselves. The I.B.R.D. Convention is far more important than the author's less-than-two-page treatment suggests. It should have been discussed on a comparative basis with the earlier section on the theory and practice of Tanzanian and Ugandan nationalization.

Interestingly, the author makes a useful contribution in his analysis of the theory and practice of nationalizations in Tanzania and Uganda. He points out that, while the predominant aim in the former is to achieve the goal of state ownership and control of all major industries, the Ugandan measures such as the expulsion of Asians and "the taking over of their property as well as investments belonging to the nationals of some 'unfriendly' countries would seem to create the atmosphere which is hardly conducive to foreign investments" (p. 322). The author has also permitted himself this shrewd observation: "It has been said that that country would combine the best of capitalism, communism and socialism." Kenya is considered "the most liberal as far as the advantages to and protection for foreign investments are concerned" (p. 322). In view of these divergent approaches of the three Partner States in the Common Market, one shares the author's cautious doubt about the future, which he expresses in his concluding remarks: "Because these countries are in a period of transition and are always seeking new ways of improving the social and economic well-being of their inhabitants, despite the obstacles imposed by both internal and external forces, it is difficult to predict the future with any degree of certainty" (p. 324). The problems facing the Community are accentuated as much by internal economic and political rivalries and competition as by external factors. For example, the incentives offered to foreign investors are generous even by the standards of other developing countries (*see* pages 178-185), and the Foreign Investment Protection Act seems to have few parallels elsewhere in English-speaking Africa. The normal provision one expects in favor of nationals, such as the stipulation that certain specified posts should be reserved for indigenes (as, for example, in Nigeria, Egypt, or Ghana), is not to be found even by implication in the Act. There has not yet been any development in East Africa at all like the pervading atmosphere in Nigeria and Ghana, where indigenization laws are the order of the day and compulsory shareholding in the proportion of up to 60-40 per cent as between local and foreign investors are the rule rather than the exception. Zaire is an example of what might happen if certain economic measures were taken without a realistic assessment of the situation in terms of the available resources, both human and material. Although the author makes almost no comparative cross-references to other countries in Africa, he often deplors the fact that the legislation and the government policies have not been geared to the real present needs of the countries.

A matter of some importance discussed by Dr. Eze is the perennial problem in customary international law concerning the

issue of whether there is any distinction between expropriation and nationalization. He does not accept Schwarzenberger's identification of the two legal phenomena and insists that they are distinct not only in their juridical status, but also in their legal consequences. Schwarzenberger sees any distinction that might be deemed to exist as only one of the degree and not of kind. Likewise, Eze disagrees with Foighel, who in his book, *Nationalization—A Study in the Protection of Alien Property in International Law*, distinguishes between expropriation and nationalization on the basis of the kind of economic motive that inspired the particular process. Foighel says that it is expropriation if the utilization of the property after the take-over is different from its previous utilization, whereas nationalization is mainly a problem of distribution. It is Eze's view, however, that "any taking which fundamentally alters the economic structure would distinguish nationalization properly so-called from expropriation" (p. 297). He argues that restrictions on the state's use of the nationalized property may lead to the same result that expropriation in the traditional sense implies (pp. 296-297). Eze accepts the legality of nationalization as a fact of modern international law, but does not admit that it must be full, effective, and prompt to be valid. He feels that the taking of the property must be treated as a separate matter from the issue of compensation for it. Even on the question of vested rights, he believes that "the legislator is not bound and a law is not illegal solely because it may intend to violate vested rights" (p. 299). It is important to note, however, that Eze is aware that "many distinguished international jurists uphold with vigor the maxim of vested rights" (p. 299). After appreciating some of the difficulties to which some of his ideas would lead, he concludes that "perhaps the best way of avoiding these controversies is to include in a bilateral agreement specific provisions relating to nationalization or expropriation and compensation" (p. 299).

All the suggestions made above are for the possible improvement of a second edition of this book, which might still be published if the current fissiparous tendencies within the East African community could be overcome. The book has been reasonably well researched, but the arrangement of the subject-matter could be better organized and the treatment of certain topics more fully analyzed. Also, the book would be better if some of the chapters dealing with pure company law, commercial law, labor law, and industrial relations were shortened and summarized into one or

two chapters so that the more relevant matters, which the book no doubt contains, could be given a more balanced treatment.

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