Treatment of Foreign Investment Under the Sudanese Investment Laws: Exchange Control Perspective

1. The Guarantee in Theory :

The most important guarantee to foreign investors is the assurance of freedom to remit their profits without control. The Sudanese practice in this respect may be considered as the most generous in the third World. Thus under sections 17,10(1) and 11 of the Industrial Investment Act, 1974, the *Investment in the Economic Services* Act, 1975 and the Agricultural Investment Act, 1976 all profits earned from investing any foreign capital in the investment enterprises are due to be transferred outside the Sudan, after paying all the prescribed taxes, duties and obligations to the Government. According to section 18(2) and 12 of the *Industrial Investment* and *the Agricultural Investment* Acts, in the case of liquidation of any investment, it is obligatory on the Government to approve the retransfer of the net capital originally imported, in the same currency in which it was imported or in any currency agreed upon. The transfer must be at the rate of exchange applicable at the time of transfer. However, , this may operate unfavourably to foreign investors, as the rate of exchange is subject to fluctuation. The recent devaluation of the Sudanese Pound gives a typical example of how this provision my be determinental to foreign investors in this respect. And as it is generally accepted that, in the absence of a treaty to the contrary, the devaluation of the State's currency is legal under customary international, law, provided that the devaluation is in the interest of economic monetary stabilization and solvency. Accordingly, the Sudan will not be held liable in international law for the loss to be incurred by foreign investors who intend to repatriate their Capital, which will fall for less than the original as a result of the devaluation of the Sudanese Pound. In order to protect foreign investors against any loss that might occur to their investments as a result of currency devaluation, it may be prudent to give them the right to transfer their original capital at the rate of exchange which is applicable at the time of the repatriation or at the rate applicable at the time when the capital was imported, whichever is favourable to them. This would no doubt result in loss of revenue to the State.

2. Practical Problems.

The enjoyment of these extensive concessions and guarantees by foreign investors in the Sudan may be encountered by several obstacles. According to the United Nations jargon the Sudan is counted among the poorest countries in the World which is, at *present,* suffering from serious deficits in hard currency, not even enough to buy the necessities. It is true to concede that the problem is not apparent to–day, as the majority of the investment projects have not yet yielded profits. Also, none of them has undergone any sort of liquidation.

To avoid pressing claims of foreign investors, which might be impossible to meet wholly at one time, the best solution is to adapt the investment laws to the realities of the economy. For instance, transfer of profits should be allowed only after a certain period from starting production, say two or three years. This will help in allocating sufficient hard currency to meet the claims of foreign investors as well as enhancing the country's balance of payments. It will also be easier and expedient if the transfer is made by instalments at different times. Another alternative is to allow only a specified portion of the profits and leave the rest to be re–invested. Admittedly, this is desirable from a nationalistic point of view, but it discourages rather than encourages foreign investment.

As regards transfer of Capital in cases of liquidation, it is noteworthy that the existing Sudanese investment laws leave loopholes in this respect. A foreign investor can enjoy all of the tax concessions and other incentives during the initial years, and then after the expiration of the grace period he may

decide to liquidate his business in the Sudan. He will then claim the right to repatriate his capital abroad without making any positive contribution to the economic growth of the country. To cater for this defect, it is wise to allow repatriation of capital in cases of liquidations only after two or three years from the expiration of the tax exemption period.

Another apparent defect in the Sudanese investment laws is that they do not contain any provision on the sale of the investment enterprise, which is quite distinct from liquidation.

3·Laws of other Developing Countries.

Though there is an increasing tendency among the developing countries to waive the exchange control restrictions in favour of foreign investors to transfer abroad their profits and capital; nevertheless, their practice is not uniform, some countries adopt a liberal view like the Sudan, in allowing foreign investors to transfer all their investee capital, profits, and the salaries of foreign employees to their home States. Example of these are Kenya, Liberia, Venzuela and many of the oil –producing countries.

Another approach is to leave the door open for negotiations between foreign investors and the capital importing country to agree on the amount of capital and profits to be transferred in each case. Mauritania is an example of this category.

Very few developing countries adopt a restrictive view. Though they agree in principle to allow foreign investors to repatriate the invested capital and remit profits earned therefrom, together with the salaries of foreign employees to the home State; nevertheless they impose restrictions on the amount to be transferred. In addition, the transfer will be permitted only after a certain period from starting operation. For instance, the Egyptian investment Law No. 43 (as amended in 1977) allows a foreign investor to repatriate his capital imported in foreign currency, only after five years from its importation, Furthermore, the Egyptian investment law permits foreign employees and technicians to transfer only 50 percent of their salaries. The same pattern has been adopted in Somalia and Indonesia. In the latter country, foreign investors can transfer abroad profits up to 60 percent. As regards dividends, only 30 percent is allowed to be transferred abroad. Foreign employees, under the Indonesian law, are permitted to remit only 20 percent of their salaries. This practice finds parallels in other countries like Syria and Brazil.

4. Recommendations for Reform.

1. The three Sudanese investment laws should be unified in one law to be administered by an independent board or commission. Bank of Sudan should be represented at all levels of the proposed investment commission.

2. The present system of registration of foreign capital should be strictly observed and improved, as the reluctance of foreign investors to register their incoming capital is quite obvious. Follow–up should be strengthened.

3· Exchange rates should be flexibly employed to attract foreign investments, taking into consideration the public interest and the international obligations imposed on the Sudan. Multiple exchange rates may be utilized within limits.

4. Foreign investors must initially be told of the critical situation of the balance–of–payments facing the Sudan· Misrepresentation should not be allowed in pursuit of attracting foreign capital. Foreign investors must be persuaded to contribute in the economic development of the country; not to "take out more than to put in".The present system may be considered by some investors discouraging rather than encouraging in fear of reversal by anew regine because of the exaggeration under the applicable law.

5. The Sale of the investment enterprise should be statutory equated with liquidation of the enterprise.

6. To encourage the re–investment of the profits generated from foreign investments special incentives should be introduced so as to keep foreign capital inside the country.

7. Joint Ventures should receive special Status as regards transfer of profits.

8. The existing provisions should be brought up–to–date with the recent temporary fiscal policy adopted by the Ministry of Finance and National Economy and the recent provisions dealing with exchange control. It is important to issue guidelines to the commercial bankd in this respect as the new policy has not yet hardened into a settled banking practice.

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NOTES FOR CONTRIBUTORS

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