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ECONOMIC COMMISSION FOR LATIN AMERICA
and the Caribbean

THE DRAFT MODEL
INVESTMENT PROTECTION AGREEMENT
FOR USE WITH ASSOCIATED STATES

Preliminary Observations

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Observations on draft "Model Investment
Protection Agreement for use with Associated States"

Purpose of the Agreement

In general, agreements guaranteeing private sector investments negotiated between two countries fall into two broad categories: (a) those negotiated between countries where both countries seek reciprocal assurances on the treatment of investments by their nationals; ^{1/} and (b) those agreements which set the framework of guarantees "underwriting" guaranty given by the lending country to its nationals for investments approved by both governments after consultation. ^{2/}

2. No examples have yet been found of agreements between Metropolitan countries and States related to them in a dependent or semi-dependent status; however, it must be noted that the search has not been completely exhaustive. Implicitly the guarantees which relate to such situations are normally extended by the Metropolitan country to its own nationals and to nationals of third countries.

3. The basic principle for the West Indies Associated States must be to encourage their nationals to invest in their own countries, and gradually by achieving a higher level of domestic ownership of capital to reduce the level of external control of their States. It therefore follows that the Associated States have no urgent reasons to seek guarantees for the protection of investments by their nationals in the United Kingdom. The establishment of such guarantees now, rather than inducing investments by nationals in the United Kingdom to be repatriated,

^{1/} Examples of this type of Investment Guarantee Agreement would be the Malta/Swiss Agreement of 1965, or the Belgo-Luxembourg/Tunisia Agreement of 1964, etc.

^{2/} Examples of this type would be the USA/Ceylon Agreement of 1966 or USA/Kenya Agreement of 1964 etc. The Investment Guarantee Agreements concluded between USA/Guyana 1965; USA/Jamaica 1962; USA/Trinidad & Tobago 1963, fall broadly in this second category.

might well have the reverse effect of creating a better climate for further outflow of funds from the Associated States. The basic situation is that nationals of the Associated States who have investments abroad and particularly in the United Kingdom, must have been satisfied with the risk, and therefore cannot be seen as needing additional protection.

4. On the other hand, United Kingdom nationals who already have investments in the Associated States may feel they need additional protection as these States move towards more comprehensive control of their economic affairs. On balance therefore, the advantages to be gained from a reciprocal agreement with the United Kingdom for protection of investments are almost entirely in favour of the United Kingdom and its nationals. ^{3/}

Terms of the Proposed Agreement

5. The general format of the first few articles of the draft agreement approximates somewhat to the first category of agreements mentioned in paragraph 1; but it is entirely different in its scope and emphasis. Generally, it covers any investment by nationals, without any prior consultation between the governments as to the desirability of the investments. Also it seeks to have all control left entirely to the individual as there is no indication of any kind of limitation or direction for the common good of the State.

At Article 8, however, it has a feature which is more common in the second type of agreement mentioned at paragraph 1.

6. It is evident from Article 2 that the United Kingdom seeks for its nationals the fullest possible protection and security for their investments, and complete freedom to use or not use and to dispose of as and when they wish. It is difficult to reconcile this wide latitude with any meaningful implementation of careful

^{3/} Diligent search has so far not revealed the existence of any previous agreement approximating to the draft, (i.e. specific to investment guarantees for UK nationals) concluded between the United Kingdom and any other country. There are numerous commercial credit agreements and avoidance of double taxation agreements, and some reinstatement of property agreements.

development planning; and it is hardly consistent with any kind of selective investment policy. The underlying issues of control of capital and participation in ownership of capital would remain unresolved if such terms as these were to be fully implemented.

In fact, no parallel to this Article is evident in the agreements guaranteeing reciprocal treatment of investments that have been examined. And it might be of some significance that those conditions are repeated in various forms in Articles 3, 4, and 5.

7. In most cases the Most Favoured Nation stipulation is stated in general terms as Article 1 of Investment Guarantee Agreements; but the article does not go into the type of detail which is evident in sections 2, 3 and 4 of Article 3 of this draft agreement. However, the Most Favoured Nation clause usually in its terms makes provision for the exceptions of advantages that may be granted by either country if it participates in a customs preference system or a free trade area. Admittedly, Article 6 of the draft seeks to do this at sub-sections (a) and (b); but the standard formula is much superior.

8. The provision at Article 6 section (c) is not a common feature of any of the agreements guaranteeing protection of investments that have been examined. Taxation is usually dealt with quite separately, and in many cases the Investment Protection Agreement is supplemented by an independent Avoidance of Double Taxation Agreement.

9. Articles 4 and 5 of the draft are obviously the core of this proposed agreement dealing with expropriation or nationalization of property, and the repatriation of investments. ^{4/} It is difficult to accept that expropriation or nationalization can take place for any other than a public purpose so that some clarification would seem to be needed to the first part of sub-section (1). Even more

^{4/} No reference to riots is seen in the various agreements examined.

difficult to understand is that such specific terms should be set for compensation; i.e. the compensation would be at market value of the investment, bearing interest at normal commercial rates until date of payment, which would be made promptly or with minimum delay, and in freely transferable currency.

While reciprocal agreements on guarantees of investments usually ask for payment without undue delay and in transferable currencies, room is normally left for negotiation of terms of compensation in the event such a situation should arise.

10. In the present context of the West Indies Associated States, it would seem that if any reference is to be made to convertible currency, then it should be specific - and say sterling. Even if in the future there is a higher autonomy of the EC\$, matters like the maintenance of currency reserves, and the intervention currency will influence the maintenance for some time of some close link to sterling. On the other hand the possibility should not be created of having an agreement that could "protect" the leakage of other scarce convertible currencies.

11. Moreover, investment guarantee agreements generally recognise that there must be adequate allowance for the exercise of exchange control; and in numerous cases they are negotiated with separate provisions for the transfer of net profits, interest and dividends on current account, as against provisions governing the transfer of blocs of capital and funds deriving from liquidation of investments. In some agreements capital transfers can be made only with the approval of the host Government, so that implicitly a programme for the movement of funds can be worked out.

It is suggested by Article 5 of the draft, that what is sought is fullest freedom for transferring investment funds. Given the present structure of capital ownership in the Associated States, this could mean capital flows of sufficient size as could be detrimental to the condition of the economy of any single State.

12. There are two places in the draft where the question must be asked whether the wording implies a limitation on the right of the Associated States to act in certain situations. For example, at Article 2 section (1), there is the evident implication of situations in which the right to refuse admission of capital might be deemed outside the powers of the State. Perhaps this relates to matters like the "right of establishment" which in respect of third countries fall clearly in the sphere of external relations, but which in respect of the United Kingdom has never come up for detailed clarification. Similarly, at Article 7 regarding disputes between the two governments, no provision is made for arbitration or intervention in any way by any third party if the matter cannot be settled by negotiation between the United Kingdom Government and the Associated State. ^{5/}

13. The terms of Article 9 are quite unique, and if it means what it says then the provisions of the agreement negotiated with one Associated State can be extended by the United Kingdom unilaterally, not only to any other West Indies Associate State but any other territory on whose behalf the United Kingdom administers external affairs. The only limitation seems to be in the definition that should be set on "territory" at sub-section (e) of Article 1. It is obvious that some confirmation by the Associated State should reciprocate the notification by the United Kingdom before such an extension should be effective. The purpose of this Article is not self-evident and should be examined with the greatest care as to its meaning and implications.

14. Finally, the provisions for duration and termination of the agreement are very generous, in that the agreement is stipulated to run for ten years and in the event of its termination the provisions would continue to have effect for a further twenty years. In fact, few agreements of this kind are concluded for such a long

^{5/} This lack of arbitration provision could derive from uneven constitutional status as between the UK and the Associated State.

period as ten years; and in those cases where they are negotiated to run 10 years the post-termination arrangements are for the same duration (ten years).

Some Wider Considerations

15. The draft Agreement is presented as a "model for use with the Associated States", which implies that as far as possible the UK would endeavour to have the same set of guarantees with each State. This conforms to the approach that ECCM participants should adopt a uniform posture in any dealings with non-ECCM countries. However the question arises whether the ECCM as a group would wish to confer guarantees of this nature in advance of the policy decisions for implementing Articles 13, 14 and 15 of the ECCM Agreement.

16. Most States already have under examination problems relating to monetary policy and currency control. In addition various aspects of Investment have been under debate in the CARIFTA forum, and all the States have adhered to the Agreement establishing the Caribbean Investment Corporation. A situation of giving such guarantees to UK nationals would certainly re-open the arguments for similar guarantees to investors of the region. Obviously an "investment code" for the ECCM region becomes necessary if there is to be a coherent approach to development.

17. Aside from seeing these guarantees as having implications for relations with Caribbean neighbours, there are the questions of implications for relations with other third countries. For example, could such guarantees be extended to UK nationals and not to the nationals of other EEC countries, in view of de facto Part IV status and the non-discriminatory provisions of the Rome Treaty? Similarly one must ask whether identical guarantees would not need to be given to Canadian nationals and USA nationals. While a suitable atmosphere must be created to encourage investment, obviously if such generous guarantees are given all round, there is no scope left for effecting structural economic transformation.

18. It is therefore of some relevance to consider the nature of the investment guarantees that other CARIFTA/CARICOM partners have extended to third countries. Those extended to the USA fall in the second group of agreements mentioned at paragraph 1, in that it is an underwriting of guaranty given by USA Government to USA nationals, for investments approved by the host Governments. ^{6/} Clearly uniformity of treatment of third countries by the whole ECCM-CARIFTA-CARICOM is an essential element for the regional integration movement.

19. If prior CARIFTA/CARICOM commitments for guarantees of investment is taken as a point of departure, then certain pre-conditions to new agreements exist. These are evident in the nature and content of the USA/Guyana, USA/Jamaica, USA/Trinidad and Tobago Agreements. The elements of consultation, determination of the fields of investment and the various industries, selectivity in the granting of guarantees, are all missing from the draft.

^{6/} The search has not so far shown up any similar agreements between CARIFTA/CARICOM countries and any country other than the USA. It would be worthwhile to make a further check of this.

