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INTERNATIONAL LENDING: THE CASE FOR DEVELOPING NATIONS

*Harold G. Maier**

On November 29-30, 1973, a Regional Meeting of the American Society of International Law was held at the King of the Road Motor Inn, Nashville, Tennessee, on the topic: "International Lending: The Case for Developing Nations." The conference, which was co-sponsored by the ASIL, the Commerce Union Bank of Nashville, and the Vanderbilt Law School International Law Society, was attended by bankers, lawyers, businessmen, and students and faculty representing academic institutions. Principal organizers were Mr. Jerre Haskew, senior vice president of Commerce Union Bank and Manager of the Bank's International Division and this writer, representing Vanderbilt Law School, assisted by two student co-chairmen, Mr. Mark M. Greisberger, J.D. '74 of Rochester, New York and Mr. Richard T. Granfield, J.D. '74 of New Haven, Connecticut.

This issue of the *Vanderbilt Journal of Transnational Law* includes four articles that are based on papers presented at the Regional Meeting by Orville Freeman, Jack Baranson, Lajos Schmidt and Stacey Widdicombe Jr. In the keynote speech, entitled *The Role of International Lending in Developing Economies*, The Honorable Orville L. Freeman, former governor of Minnesota and United States Secretary of Agriculture and presently Presi-

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dent of Business International Corporation, discusses the forces that are shaping the background against which questions of lending and the effective use of credit in developing economies must be examined. Mr. Freeman identifies seven of these forces—the moral problem of human misery, the failure of development programs to “trickle-down” economic benefits to the masses, the need to reappraise assistance programs in the light of other models including those in Communist China and in smaller developing countries, the growth of political power in the Third World, the failure of leadership in the developed countries to provide support and resources for the developing countries, the need for additional activity in the private sector and the importance of multinational corporations in this effort, and the need to provide credit to small producers, especially in the agricultural area. Mr. Freeman concludes that these forces, taken together, make up a picture of great urgency, challenge and promise for the role of lending in developing countries.

In his article, *Changes in the Investment Climate in Developing Nations*, Dr. Jack Baranson suggests that substantial changes are already taking place in the climate for foreign investment in less developed countries (LDC's). Dr. Baranson identifies a shift, during the 1960's, away from an LDC interest in attracting direct foreign investment in favor of a greater interest in attracting investment in the form of technological and managerial know-how, not tied to the presence of a directly owned local branch of a foreign enterprise. Thus, instead of emphasis upon equity investment and earnings, Dr. Baranson sees the need for industrialized nations, such as the United States, to develop new organizational forms to permit the use of design and engineering capabilities as investment capital.

In *Legal Protection of Loans to Developing Country Borrowers*, Dr. Lajos Schmidt of the Chicago law firm, Baker & McKenzie, discusses some of the special legal problems faced by a lender doing business in developing economies. Dr. Schmidt indicates that many of the legal considerations in LDC loan agreements are much like those in purely domestic contracts but the fact that special governmental relationships usually exist in connection with the needs and activities of the borrower often dictates special care in drafting and negotiating such agreements. He discusses the need

for express provisions concerning capacity covenants and events of default as well as various loan guarantee arrangements and their particular problems. He emphasizes the usefulness of establishing agreement on means and form of dispute settlement including the utility of choice of law and choice of forum clauses and the utility of binding arbitration as a means of successful dispute settlement. Dr. Schmidt deals extensively with some of the problems raised by the varying national views on sovereign immunity and expresses particular support for the new sovereign immunity draft bill presently before Congress, which endeavors to set objective legal standards to determine when sovereign immunity will or will not be granted in United States courts. Finally, he considers the problems of fluctuations of currency and the relevance of domestic foreign politics, including the uses of currency options and "unit of account designations" as well as the effect of a change of sovereignty in the borrower's country upon outstanding legal obligations in loan agreements.

Dr. Stacey Widdicombe, Senior Economist of the Group of Controllers, Inter-American Development Bank in Washington, D.C., analyzes the standards to be applied in evaluating both private and public international lending programs in an article entitled *The Effect of International Lending Programs in the Developing Nations*. In an effort to answer the general question about the effects of international lending within the developing countries, Dr. Widdicombe identifies five different types of "effects" that must be evaluated in terms of separate but related factors in order to judge the effectiveness of international lending. In this context he discusses the operating effects, the technical effects, the financial effects, the economic effects and the socio-political effects of international loans. He concludes that while the overall effect of international lending in developing countries is positive, only by separating the effects to be judged and evaluating them independently can relevant questions be asked and relevant answers obtained by both public and private international lenders.

In addition to the papers published in this issue of the *Vanderbilt Journal of Transnational Law*, Mr. Theodore H. Moran, presently a research associate at The Brookings Institution, Washington, D.C. and formerly Assistant Professor of Polit-

ical Science at Vanderbilt University, discussed *Nationalism, Transnationalism and Changing Corporate Lending Strategies* in which he suggested that the changing needs and interests of developing countries would require a differing perspective on the part of corporate lenders and investors involving a shift in the nature of ownership from more or less total control as presently exercised to greater participation both in profits and in management by nationals of the host countries.

The Conference also featured a panel of professional bankers including Mr. George S. Moore, former Chairman of the Board of First National City Bank of New York, Mr. H. Ray Norton, Vice President of the Chemical Bank, International Division, of New York, and Mr. Robert B. Palmer, Senior Vice President and Manager of the International Department of the Philadelphia National Bank. The panel, moderated by Mr. Jerre Haskew, Senior Vice President and Manager of the International Division of Commerce Union of Nashville, discussed *The Practical Difficulties and Potential Rewards of Lending Activities in Developing Countries*.¹

As is peculiarly appropriate for any conference dealing with a rapidly developing and constantly changing area of international economic activity, both the speakers and the participants at this meeting raised more questions than were answered. A principal theme, illustrated by the papers reproduced here, was the need for careful consideration of the problem—legal and commercial—involved in international lending on the basis of specific information concerning its effect, its promise and the needs involved. Generalizations concerning activities in developing countries are increasingly ineffective as guides to government or business policy or academic inquiry. Recent events in the Middle East confirm the rise of some segments of the Third World to positions of unprecedented economic power with which the developed world must deal.²

Of particular importance was the evidence presented at the conference of the need for careful consideration of new organizational forms, both public and private, to permit the effective interchange of capital, raw materials, and goods and services in a manner in

1. Extensive quotation from Mr. Moore's address can be found in *International Perspective*, January, 1974, p. 5 (published by Commerce Union Bank).

2. For a Symposium devoted to legal and economic problems raised by the oil crisis, see 7 VAND. J. TRANSNAT'L L. 279 (1974).

which mutual benefit can be perceived by both developed and developing states. At a time when the developed world depends, to an ever greater degree, for supplies of basic raw materials, upon exports from the developing countries and when those countries give voice and action to a rapidly growing desire to enter the twentieth century *during* the twentieth century, consideration of these questions by the commercial, legal and academic communities must take a high priority. It is hoped that this symposium will contribute to that development.

