AMERICAN BAR ASSOCIATION
f AFRICAN LAW SUBCOMMITTEE
NEWSLETTER
MAY 1992

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EDITOR’S NOTE
This newsletter is intended to stimulate interest in and debate about Africa and the challenges that it faces. The articles in this issue address some of the political and legal implications of the changes presently underway in Africa. The Rojagopal and Carrol article highlights the challenge that Somaliland’s claim to independence from Somalia poses to the Organization of Aftican Unity’s fundamental principle of respecting the national.boundaries that the colonial powers imposed on Africa. The Byerly article, which looks at the post-Comprehensive Anti-Apartheid Act legal environment for U.S. businesses interested in doing business in South Africa, raises some of the challenges that the end of apartheid poses for U.S. policy towards South Africa. The Shockley article raises the issue of regional development and looks at changes in legal regime applicable to trade and investment in some of the PTA member countries.
In order to ensure that as broad a range of opinions as possible are included in the Newsletter, all subcommittee members are encouraged to submit articles or letters to the editor.
It is also our hope that the Newsletter can help forge links between African lawyers and American lawyers interested in Africa. To this end readers are requested to share the newsletter with friends in Africa.

We would like this newsletter to publish informative, thought provoking articles that represent as broad a range of views as possible. All articles, including those published in this issue, are selected on this basis and do not necessarliy represent the opinions of the editor or. the ABA African Law Subcommittee. Consequently, all subcomhittee members, African lawyers and other interested readers are encouraged to submit articles and letters to the editor for publication in the Newsletter. All articles and letters should be sent to ithe editor' : Prof. Daniel Bradlow, Washington College of Law, The American University, 4400 Massachusetts Avenue N.W., Washington D.C. 20016. Tel: (202) 885-2722; Fax: (202) 885-3601. The deadline for the next issue is October 30.

COMMITT E NEWS

The last six months have eeen numerous changes in the direction and focus of the African IAw Committee and its relationship within the Section of International Law and Practice. Never have I seen the legal community's interest in Africa higher. Perhaps the frush'ation of the rate of change occurring in the new order in Eastern and Central Europe is partly responsible but I think a large measure of credit shank! be given to those Committee members who have helped make our efforts so visible.

Among our accomplishments include: the staging of a successful internship project where five black South African Lawyers have been placed with US. arms for periods of six to nine month periods, the publication of our Newsletter (only three other Section committee publish newsletters) and our iint survey of African Law in the mm and our regular schedule of events. I wish to thank our core of Committee for their regular contributions to this success.

With the implementation of democratization and administration of justice programming by USIA and USAID, the Committee has been etked to consult on an array of related activities in Uganda, Mozambique, Angola, Ethiopia and Guinea Bissau. Moreover, in conjunction with the Academy for Educational Development, the Committee has submitted a proposal to provide assistance to the Nigerian Bar Association in the area of professional respontibiiity under the sponsorship of USIA. Those Committee members who axe interested in qualifying for future USAID projects . should contact Andy Bolton at Checchi and Associates at 202-452-9700.

As a final last note, many of you have been receiving information from the International Investment and Development's African Sub-Committee. This Committee was formed earlier this year and will be sponsoring monthly lunches and special programs. Those of you seeking additional information should contact fellow African Law Committee member, Tamara Shockley at 212-659-3310. .

Anthony J. Carroll
Committee Chairman
202-463-8400

OUTLINE OF ARGUMENTS FOR THE INDEPENDENT
EXISTENCE 0F SOMALILAND
by
BALAKRISHNAN ROJAGOPAL and ANTHONY J. CARROLL
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After a bloody civil war, in January 1991 Siad Barre's Twenty-one-year-old regime was overthrown in Somalia. The northern half of Somalia Declared its independence as the Republic of Somaliland in May 1991. This outline summarizes the main arguments for the propriety of such a declaration and its recognition as an independent state under international law. A thorough study is under preparation.

The state of Somalia which came into existence in 1960 resulted from a merger between two independent states, the northern Somaliland, a British Protectorate and southern Somalia, an Italian Trust Territory. General Mohammad siad Barre took over the administration in a coup in 1969 and led the country through a calamitous period of chaos and repression until he was deposed by the combined might of several liberation movements such as the Somali National Hovement(SNM) which had been waging its battle against his regime_since 1981. After his overthrow, the south has been a Hobbesian nightmare of interclan fighting whereas the independent north remains the most stable region in the Horn of Africa. '

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Somali society is comprised of various clans such as Digil, Rahanweyn, Dir, Hawaiye, Darod, and Isaq and the dynamics of interaction between then determines the distribution of political power in Somalia.

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The primary issue is the extent to which the assertion of independence is a valid manifestation of sovereignty over 1. territbry and thus forms a legal basis for the formation of a 'state under international law. A survey of the applicable law reveals that the issue can be broken down into the question of the nature of Somaliland's sovereign rights before and after the Act of Union of 1960 and the extent to which this will be dispositive of the viability of the Union.

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Britain signed formal treaties with the Somali clans in 1884. These treaties were specifically intended to ensure the maintenance of the independence of the Somali clans and did not cede any territory to Britain. Further, the treaties were also of a provisional character. The nature of the treaties leave no doubt at all that the Somali clans retained a large measure of escvereignty. The capacity to conclude treaties is itself an attribute of international personality. Old international law may have considered such treaties as not 'international', but the

contemporary standards exhibited by the World Court in the Eggtg;n_&ghgzg case in 1975 reject such views. As a result, the Somali clans existed as international persons.

The two territories were independent countries with no links between them. There was no unifying force from within. On the contrary, two external factors served to bring about this precipitate union. The first was the proposal by the British Foreign Secretary Mr. Bevin in 1946 to create a 'Greater Somalia'. The second was the cession o: the Baud and Ogaden to Ethiopia by Britain in 1954. Both served as stimulants of national identity. When the union was signed there were a number of legal loose ends. since both the north and south were independent countries, they could unite only by an international treaty as in the case of the Germanies. Such a treaty was never signed. The north passed a 'union law' which did not have any legal validity in south and the constitutional requirements regarding the election of the President were never completed. Conscious of such legal loopholes, the National Assembly attempted to remedy the situation by passing a retroactive 'union' law in January 1961. The absence of the legal basis for the union is clear and convincing. Furthermore, the draft constitution was decisively rejected by the north in a referendum evidencing a permanent rift between north and south.

It has always been an accepted rule that oppression, including the deprivation of basic rights such as right to life, justifies secession. Hugo Grotius mentions that a ruler who shows himself to be the enemy of the people can be deposed and Vattel emphasizes that the primary duty of the ruler is to - safeguard the welfare of the citizens and once he violates that cardinal rule, he can be deposed. In international law, human rights are embodied in various treaties such as the International Bill of Rights and are also acknowledged to be rules of jus cogens. Accordingly, there is a right to secede from a state, if the political establishment engages in such gross and grave human rights violations including-genocide. This finds support among many jurists. The test to determine the extent of deprivation of human rights and the legitimacy of secession is whether a group is being targeted due to its ethnic, cultural or other unique characteristic.

The regime of General Siad Barre practiced genocidal attacks on the northern clans, especially Isaaq. The bombing and shelling of two cities in the North, Hargeisa and Burao alone killed 50,000 and another 500,000 fled to Ethiopia. Africa Watch reports that inhuman practices were committed on women and

children. Most of the people killed or displaced were Isaaq. The government forces also looted everything and laid over a' million land mines in the North. Several U. 5. government documents including the State Department's Human Rights Reports attest to the massive violations of human rights such as rights to life and habeas corpus. Under these circumstances the sun and the people in the North had a legal right under international law to act in their self-preservation.

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Article 1 of the International Bill of Rights refers to the right to self determination as does the U.N.Charter in Article 1 and 55. The principal questions here are however, whether the right to self determination is applicable in Somalia and if it is, whether it will entitle Somaliland to claim independence. There are sound reasons why the right to self-determination should be conceded to Somaliland. Einst, one of the reasons behind Somaliland's assertion of independence is the incompatibility between northern and southern regions. The incompatibility arises.from distinct colonial experiences which contribute to a unique identity. Where the reason for self-determination claims lay in historical experiences that are grounded in colonialism, there is no reason to deny the right to the people who wish to exercise it. ggggng& when the assertion of self-determination does not result in changes in international boundaries and does not pose a threat to inter-state peace, it ought not to be denied to achieve the short term goal of doctrinal uniformity. Somaliland has expressly stated that it accepts the boundaries of the British protectorate in 1960. Third. when the assertion of self-determination is more conducive to inter-state peace, its validity is strengthened manifold. It is to be noted that Somaliland has the potential of solving longstanding regional disputes with Ethiopia, Kenya and Djibouti, due to its acceptance of colonial borders and close ties with Ethiopia. Eingllx, as Uhozurike has pointed out, legal right of self-determination arises upon the abuse of the political principle of self-determination.- In this connection two related issues have to be remembered. First,north had overwhelmingly rejected the unified constitution in a referendum. Second, the union was not preceded by any plebiscite, contrary to the general U. N. practice of conducting plebiscites prior to decolonisation, as in the case of British Togoland. Under these circumstances, right to self determination appears to be applicable to Somaliland. The exercise of such a right should also enable it to claim its independence.

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Indigenous rights found support in the jurisprudence of the 16th and 17th centuries including the works of Vitoria and Grotius. In early cases such as Worcester v. Georgia (31 U. S.

(6 Pet.) 515 (1832)) Chief Justice John Marshall made it clear that native tribes were to be considered as states of international stature. The contemporary interest in indigenous peoples' rights has resurrected those views and amplified them. A recent U. N. Report on indigenous populations defines them as non-dominant sectors of society, distinct from minorities, who emphasize their ties to their territories based on their original occupation and historical experience. It is immediately apparent that Somaliland fulfills these criteria. It is mainly populated by a single ethnic group, namely Isaq, who have been living there for more than 400 years. They have also had a unique colonial history and are truly nomadic compared to the south. Several countries such as Canada, Australia and Nicaragua have accepted the protection of indigenous rights. As a result, the Isaq who form a distinct indigenous group can exercise their right to self determination in reasserting their sovereignty.

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Old international law settled questions of title by the tool of recognition. Theories such as 'declaratory' and 'constitutive', were used to debate about the nature and function of recognition. However, in contemporary international law, recognition alone is not dispositive in determining the legal status of states. other norms of a humanizing character have entered the process of making states. To the extent however, that recognition enables a people to internationalize their claims, it is useful. .

A head count of all authorities shows that the declaratory view prevails, that recognition only confirms the fact of existence of a state. Lauterpacht has argued for a duty to recognize and Brownlie points out that it is not'in the interest of states to ignore the marks of statehood. It is not practical politics to refuse to recognize a state if it possesses attributes of statehood. The attributes of statehood as laid down in the Montevideo Convention are a government, territory, defined population and a capacity to enter into international relations. It is evident that Somaliland possesses all the attributes of statehood. Its distinct people occupy their traditional territory and the government has effective control over the population. Under these circumstances, the recognition of Somaliland is an international imperative.

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As indicated above, Somaliland has renounced territorial claims on other countries that the earlier Somalia had subsumed

under its banner of ’Greater Somalia’. It has accepted the colonial borders. As is well known, Somali irredentiSm was a major source of instability on the Horn of Africa and its removal paves the way for peace, stability and prosperity in the region. Furthermore, the acceptance of colonial borders is in accordance with the GAO policy. Fears of balkanization as a result of the recognition of Somaliland are unfounded since no new border is being created and in fact, for the first time colonial borders are being accepted in that region. It is to be noted that most troubled borders are those of Somaliland. Lastly, the international community is under an obligation to recognize because of the obligation to protect and promote human rights under Article 55 and 56 of the U. N. Charter. Only international attention can assist the fledgling state to stand on its own feet.

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The birth of Somaliland is an inevitable result of a distinct colonial experience. It is also the result of extreme economic exploitation and human suffering. The irredentist - policies of Somalia also contributed to the alienation of the northern population which never acceded to the union in the first place. While the past cannot be undone, the international community has a rare opportunity to bring peace and prosperity to the Horn. By a single act of recognition, it can end the sad saga of human suffering, enhance the prospects for peace in the region by putting an end to the Greater Somalia concept, and enable the people of Somaliland to reclaim their future.

American Bar Association
Section of International Law and Practice
1992 Spring Meeting
South Africa: From Pariah to Profit Center?
April 9. 1992

THE NEW LEGAL ENVIRONMENT FOR AMERICAN BUSINESS IN SOUTH AFRICA

by
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A remarkable process is underway in South Africa. If it continues on course -- and, after President de Klerk's resounding victory in the March 17 referendum, I firmly believe it will -- South Africa will be transformed from an apartheid outcast to a nonracial democracy. Moreover, with the right. decisions, hard work, and international support, this new South Africa can eventually ensure a decent life for all its citizens, black and white.

Today, I will discuss the role that "Americans and especiallyl American private enterprise can play in this process. I will examine, in particular, the U.S. legal environment for investment and trade, an environment radically different today from a year ago.

Let me begin, however, with a few words of caution. First, the de Klerk government, the African National Congress (ANC), Inkatha, and the other participants in the negotiations still face enormous challenges, ranging from

the continuation of violence in Natal Province and the black townships to the plethora of political, social, and practical issues that must be resolved in defining a new constitutional order. There will be ups and downs, advances and setbacks in the process. We should not expect instantaneous results and should pursue a policy based on our long-term interest in democracy, stability, and economic growth.

Second, South Africans, rather than outsiders, must conduct the negotiations. They must make the tough decisions and the difficult compromises that are essential to success. The United States can encourage this process of negotiation, but it is not our role to prescribe specific results -- to pronounce, for example, whether the future South African parliament should have one chamber_or two or how the school system ought to be structured in the future. In this first true exercise of self-determination by all the people of South Africa, they must be the ones to decide such questions.

Third, the economic challenges that South Africa faces now and will continue to face after negotiations are concluded are daunting indeed:

O a continuing demographic explosion that, in the 1980’s, witnessed the growth of the economically active population by three million while only 500,000 jobs were created in the formal sector;

0 huge deficiencies, primarily as a consequence of apartheid, in the education and training that black South Africans will need in order to participate fully in a modern economy;

’0 the economic burden of parastatal enterprises, protectionist measures, high corporate taxation, and bureaucratic red-tape;

0 the collapse in the price of gold in the 80’s with little prospect for change in the near future; and

0 the current drought -- the worst in this century -- that threatens both lives and livelihoods: it is estimated that the drought may reduce GDP by 0.5 percent this year, increase inflation by as much as one percent, and cut South Africa’s trade surplus by about $1 billion.

What can American businesses do? The first step is to have a fresh look at South Africa and examine opportunities for new investment and increased trade. This is not an exercise in corporate charity but rather a venture for profit: that, after all, is what private enterprise is all about. But in pursuing business opportunities in South Africa, American firms can create the jobs so desparately sought by the country's burgeoning population. They can introduce technology that the country needs in order to make the best use of its huge natural and human resources. And, as in the past, American firms can set an example in the workplace of fair labor practices, of a commitment to equal opportunity based on merit and hard work, not racial privilege. In sum, an expanded engagement of American business in South Africa can only enhance the long-term political stability and economic well-being of the new country that emerges from negotiations.

Let me turn now to legal developments of the past year. Less than twelve months ago, South Africa was subject to the full range of sanctions in title III of the Comprehensive Anti-Apartheid Act of 1986. 1/ These included a sweeping- prohibition on new investment 2/; a ban on air transportation 3/; a prohibition against the export to South Africa of crude oil and petroleum products A/; and wide-ranging import bans on iron, steel, coal, uranium, textiles, agricultural products, krugerrands, and items produced by South African parastatal organizations. 5/ In addition, there were three further sanctions of immediate relevance to U.S.-South African economic relations 5/:

(l) the 1987 Rangel Amendment, which denied foreign tax credits with respect to income from South Africa; 1/

(2) the 1978 Evans Amendment, which blocked Export-Import Bank support to all U.S. exports to South African purchasers other than businesses owned by South African blacks or other nonwhites; 8/ and

(3) the 1983 Gramm Amendment, which required the United States 'to oppose International Monetary Fund credits for South Africa. 2/

Today, the legal environment for U.S. firms interested in business opportunities in South Africa is radically different. On July 10, 1991, President Bush issued an executive order lQ/ in which he determined that the South African Government met all five of the conditions set forth in section 311 of the Comprehensive Anti-Apartheid Act for the termination of sanctions in title III of the Act. 11/ In brief, section 311 required the South African Government to:

(1) release from prison Nelson Mandela and all persons persecuted for their political beliefs or detained unduly without trial;

(2) repeal the state of emergency and release all detainess held under it;

(3) unban democratic political parties and permit South Africans of all races to form political parties, ’ express political opinions, and otherwise participate in the political process;

(4) repeal the Group Areas Act and the Population Registration Act and institute no other measures with the same purposes; and

(5) agree to enter, without preconditions, into good faith negotiations with truly representative members of the black majority. 12/

The President’s conclusion that the South African Government had met these conditions was consistent not only with the letter of the Comprehensive Anti-Apartheid Act but also with the clear intent of Congress that the Act should serve as a carrot, not simply a bully stick, in encouraging the South African Government to enter into good faith negotiations for a new, constitutional order. The progress made thus far in the negotiations under the aegis of the Congress for a Democratic South Africa -- CODESA -- underscores the de Klerk government’s commitment to good faith negotiations. On a political plane, the fact that the United States terminated sanctions immediately once South Africa had complied with the conditions set by Congress demonstrated to the white electorate the benefits of banishing apartheid, staying the course to a negotiated settlement, and rejoining the community of nations. In my view, America’s action wax one of several key factors that led to de Klerk’: overwhelming victory in the March 17 referendum.

Let me turn now to the practical effects of the termination of sanctions. On July 10, U.S. Government departments and agencies immediately took the steps necessary to implement the President's executive order. As a consequence, today -- contrary to a year ago -- U.S. citizens and businesses are free to invest in South Africa; South African Airways has resumed direct air service between Johannesburg and New York; and exports to and imports from South Africa are free of all sanctions other than special restrictions on trade in items on the U.S. munitions list and exports to the South African military and police. 13/

On July 10, Secretary Baker formally notified Treasury Secretary Brady that South Africa had met the conditions for lifting the Rangel Amendment, conditions that were identical to those in section 311. 11/ U.S. foreign tax credits are thus again available with respect to income from South Africa.

As the negotiations have advanced, the Administration has taken further steps to normalize economic relations. On February 18 of this year, President Bush determined pursuant to the Evans Amendment that "significant progress toward the elimination of apartheid has been made in South Africa." 15/ As a result of this formal determination, the Export-Import Bank may now support U.S. exports to the South African Government and its agencies: for example, exports of aircraft to state-owned South African Airways. In addition, the State Department announced on February 20 that it was encouraging U.S. exports to non-governmental South African importers who have endorsed and proceeded toward the implementation of fair labor standards. li/ The Department will receive applications from private importers who desire Ex-Im support for certification under the Evans Amendment. This process should soon be in full sw1ng. ’

The Department also announced on February 20 that the Administration would be prepared to consider a iSouth African proposal for an International Monetary Fund facility subject to the terms of the Gramm Amendment. 11/ As South Africa does not at this time have a balance of payments deficit, this will not result in immediate IMF support. The Administration’s announcement, however, was a strong and positive signal to international financial markets about the importance of opening their doors again to South Africa.

Finally, let me mention two other, very recent steps. First, the Acting Secretary of State has informed the U.S. Trade and Development Program (TDP) that South Africa is a "friendly country" eligible for TDP activities, such as funding for feasibility studies. pursuant to section 661 of the Foreign Assistance Act. 1&/ Second, the Overseas Private Investment Corporation (OPIC) has announced that it will send a delegation to South Africa in May to consult with the government and other parties ins the negotiating process to determine what role OPIC and American private investment can play in encouraging economic growth. 12/ As most of you know, OPIC is a U.S. government agency that provides project financing, investment insurance, and a ivariety of investor services in developing nations and emerging economies throughout the world. ZQ/

What special legal restrictions remain on economic relations with South Africa? At the federal level there are only a few:

(1) the ban on the export of arms and related materiel to South Africa as mandated by UN Security Council resolution 418 (1977); 21/

(2) the ban on the import of arms, ammunition, and military vehicles produced in South Africa pursuant to the voluntary embargo in UN Security Council resolution 558 (1984); 22/

(3) the prohibition on most exports to the South African military and police; 23/ and

(4) the requirement that, in order to receive U.S. export marketing assistance, American firms employing more than 25 persons in South Africa must comply with the statutorily mandated Code of Conduct containing fair labor standards. 21/

At the state and local level, however, nUmerous legal restrictions remain in force. By one fairly recent count. some 90 cities, 25 counties, and 27 states -- including the host for this year’s Spring Meeting, New York -- have enacted laws that restrict business with companies that do business in or with South Africa. 25/ For the most part, these laws are of two types. Some require that pension or other funds under the authority of state and local governments divest holdings in such businesses. The others bar state or local procurement from these firms. These state and local prohibitions are also replicated in

the investment and procurement policies of a number of private institutions, particularly colleges and universities.

It is hard to gauge precisely the economic effect of these state and local. measures, which vary widely in wording, scope, and actual enforcement. What American businesses tell the State Department, however, is that these measures are now the principal deterrent to their doing business with and in South Africa.

As many of you are aware, there has been a vigorous debate in the law journals about the constitutionality of such state and local sanctions. 25/ I do not wish to rehash those arguments. What I would like to say is that such measures, whatever their past justification, simply don’t make sense today. They deprive South Africa and the United States of economic opportunities that are good for both. That is the reason that President Bush, when he announced the termination of Comprehensive Anti-Apartheid Act sanctions last July, expressed the "hope that State and local governments and private institutions in the United States will -take note of our action and act accordingly to help build a new South Africa, to help build employment opportunity in South Africa." 21/ The time to take action is now, for two reasons. First, South Africa has an immediate and urgent need for investment, jobs, trade, and economic growth. Second, while state and local governments have shown the ability to enact sanctions with exceptional dispatch, their record in repealing antiquated measures is less impressive. Indeed, over two years after Namibia gained independence from South Africa in March 1990, eighteen cities and four states are reported still to have sanctions on the books that apply to Namibia, one of Africa’s few full-fledged democracies. ’ t’

In closing, let me emphasize that whether South Africa successfully completes the transition from pariah to profit center will turn first and foremost on choices that South Africans make. American private enterprise can play a role, however, in facilitating that transition by creating jobs, spurring development, and encouraging the right economic choices, including a strong market economy. free trade, and equal opportunity in the workplace. Again, the time to act is now.

NOTES

The views expressed are personal and do not necessarily reflect those of the United States Government.

Comprehensive Anti-Apartheid Act of 1986, 55 301-323, 22 U.S.C. SS 5051-5073 (1988).

m. s 310, 22 U.S.C. s 5060.

m. s 306, 22 U.S.C. s 5056.

m. 5 321, 22 U.S.C. s 5071.

1d. 5 301, 22 U.S.C. S 5051 (krugerrands); S 303, 22 U.S.C. $ 5053 (products from parastatal organiZations, with exceptions for strategic minerals and publications); S 309, 22 U.S.C. S 5059 (uranium ore, uranium oxide, coal, and textiles); S 319, 22 U.S.C. $ 5069 (agricultural products and food); 5 320, 22 U.S.C. 5 5070 (irgn, steel, and iron ore).

Less relevant to economic relations are those provisions of the Comprehensive Anti-Apartheid Act of 1986 and other legislation on South Africa that contain policy statements, restrict U.S. foreign assistance, or address government-to-government relations. See, e431, Intelligence Authorization Act for Fiscal Year 1987, $ 107, 22 U.S.C. 5 5072a (Supp. IV 1986) (restricting intelligence cooperation).

I.R.C. 5 901(j)(2)(C) (1987). In addition to denying foreign tax credits with respect to South African .income, the Rangel Amendment denied deferral of U,S. taxation of the South African income of U.S.-controlled foreign corporations. See id. S 952(a)(5).

Export-Import Bank Act of 1945, S 2(b)(9), 12 U.S.C. S 635(b)(9) (1982).

(9) (A) Except as provided in subparagraph (B), in no event shall the Bank guarantee, insure, or extend credit or participate in the extension of credit (3) in support of any export which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid; (b) in support of any export to the Government of the Republic of South Africa or its

agencies unless the President determines that significant progress toward the elimination of apartheid has been made and transmits to the Congress a statement describing and explaining that determination; or (c) in support of any export to other purchasers in the Republic of South Africa unless the United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the implementation of the following principles: nonsegregation of the races in all work facilities; equal and fair employment for all employees; equal pay for equal work for all employees; initiation and development of training programs to prepare nonwhite South aAfricans for supervisory, administrative, clerical, and technical jobs; increasing the number of nonwhites in management and supervisory positions; a willingness to engage in collective bargaining with labor unions; and improving the quality of life for employees in such areas as housing, transportation, schooling, recreation, and health facilities.

(B) The Bank shall take active steps to encourage the use of its facilities to guarantee, insure, extend credit, or participate in the extension of credit to business enterprises in South Africa that are majority owned by South African blacks or other nonwhite South Africans. The certification requirement contained in clause (c) of subparagraph (A) shall not apply to exports or purchases from business enterprises which are majority owned by South African blacks or other nonwhite South Africans.

Bretton Woods Agreement Act of 1945, S 43(b), 22 U.S.C. S 2863a (Supp. I 1983).

(b) The Congress hereby finds that the practice of apartheid results in severe constraints on labor and capital mobility and other highly inefficient labor and capital supply rigidities which contribute to balance of payments deficits in direct contradiction of the goals of the International ’Monetary Fund. Therefore, the President shall instruct the United States Executive Director of the Fund to actively oppose any facility involving use of fund credit by any country which practices apartheid unless rhn Secretary of the Treasury certifies and documents

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in writing, upon request, and so notifies and appears, if requested, before the Foreign Relations and Banking, Housing, and Urban Affairs Committees of the Senate and the Banking, Finance, and Urban Affairs Committee of the House of Representatives, at least twenty-one days in advance of any vote on such drawing, that such drawing: (1) would reduce the.severe constraints on labor and capital mobility, through such means as increasing access to education by workers and reducing artificial constraints in worker mobility and substantial reduction of racially-based restrictions on the geographical mobility of labor; (2) would reduce other highly inefficient labor and capital supply rigidities; (3) would benefit economically the majority of the people of any country which practices apartheid; (4) is suffering from a balance of payments imbalance that cannot be met by recourse to private capital markets.
Exec. Order No. 12,769, 56 Fed. Reg. 31,855 (1991).
Section 311 of the Comprehensive Anti-Apartheid Act also provides fOr the termination of two provisions not contained in title III: S 501(c), calling for the President to recommend additional measures against South Africa if significant progress has not been made in ending apartheid and establishing a nonracial democracy; and S 504(b), authorizing the President to develop a program to reduce U.S. dependence on strategic and critical materials from South Africa. Comprehensive Anti-Apartheid Act of 1986, sung: note 1, SS 501(c), 504(1)), 22 U.S.C. ss 5091(c), 50940:).
1d. 5 311, 22 U.S.C. S 5061.
These restrictions are treated at notes 21, 22; and 23. mm.
I.R.C. S 901(j)(2)(C)(i)(II), sung: note 7 (providing that the special rule for South Africa will end "on the date the Secretary of State certifies to the Secretary of the Treasury that South Africa meets the requirements oi section 311(a) of the Comprehensive Anti-Apartheid Act of 1986 (as in effect on the date of the enactment of this subparagraph").
Pres. Determination No. 92-15, 57 Fed. Reg. 7,315 (1992).

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22.
Statement by Margaret Tutwiler/Spokesman, Department of State (Feb. 20, 1992) ("We are also encouraging U.S. exports to non-governmental South African importers who have endorsed and proceeded toward the implementation of fair labor standards.. If the Secretary of State certifies that a South African firm meets these standards, U.S. exporters to such a firm would also be eligible for Exim support. Firms that are majority owned by non-white South Africans, are exempt from this requirement.").
Id. ("South Africa's considerable needs cannot be met by domestic resources alone. The legacy of apartheid is so great that South Africa will need a variety of resources to provide the necessary capital. A healthy economic situation in South Africa is of critical importance as a new non-racial constitution is being negotiated. In this regard, we want to be as helpful as possible. We would therefore be prepared to consider a proposal for an IMF facility for South Africa subject to the terms of the Gramm Amendment.").
Foreign Assistance Act of 1961, S 661, 22 U.S.C. S 2421 (1982).
Overseas Private Investment Corporation Press Release DO/92-11, "OPIC to Send Delegation to South Africa," issued Washington, D.C., March 26, 1992.
Exec. Order No. 11579, 36 Fed. Reg. 969 (1971) (as amended by Exec. Order No. 12163, 44 Fed. Reg. 56,673 (1979)); Foreign Assistance Act of 1961, tit. Iv, Pub. L. No. 87-195 (as amended by Foreign Assistance Act of 1969, Pub. L. No. 91-175, 5 105, 83 Stat 805; Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, 102 Stat. 2268 (1989)). .'
S.C. Res. 418, 32 U.N. SCOR Supp. (2046thj mtg.) at 5-6, U.N. Doc. 5/RES/418 (1977) (implemented by the Department of State, International Traffic in Arms Regulations (ITAR), 22 C.F.R. S 126.1 (1992); and the Department of Commerce, Export Administration Regulations, 15 C.F.R. S 785.4(a) (1991)).
S.C. Res. 558, 39 U.N. SCOR Supp. (2564th mtg.) at 5, U.N. Doc. S/RES/SSB (1984) (implemented by the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms, 27 C.F.R. g 47.52(c) (1991).

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27.
15 C.F.R. s 785.4(a) (1991). There are two exceptions to the prohibition: (1) medicines, medical supplies, medical equipment, related technical data, and parts and components; and (2) commodities and related data, and parts and components, to be used in efforts to prevent acts of unlawful interference with international civil aviation. The prohibition was originally imposed in 1978, modified in 1982 and 1983, and reimposed in its original form in 1985 as mandated (for at least one year) by the Export Administration Amendments Act of 1985, S 108(n), 50 U.S.C. app. s 2405(n) (Supp. III 1985).
Comprehensive Anti-Apartheid Act of 1986, snnLa note 1, S 207, 22 U.S.C. S 5034. see 1159 id. 55 208, 603(d)(3), 22 U.S.C. gs 5035, 5113(d)(3). The South Africa and Fair Labor Standards Program, 22 C.F.R. subch. G (1991), is administered by the Department of State.
Robinson, Anti-apaztheid maxemgntj_unlujj___iix;__n9, Midwesterner 5 (Oct. 1991) (newsletter of the Midwestern Office of the Council of State Governments). For a recent overview, 5g: Perez, A Read Razed with QQQd__1ntentians1__5tate_Jun1_19sjJ__eifnxts__t9__QQndust E . 1. i ll 1’ I’ E 5 II E: . gangtign5_tg_83mihia, 38 Fed. B. News & J. 405 (1991). President’s Remarks on the Termination of Economic Sanctions Against South Africa and a News Conference, July 10, 1991, 27 Weekly Comp. Pres. Doc. 923 (July 15, 1991).

TRADE AND INVESTMENT IN THE PREFERENTIAL TRADE AREA FOR. EASTERN AND SOUTHERN AFRICAN STATES

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The Preferential Trade Area for Eastern and Southern African States (hereinafter referred to as PTA countries) is a regional organization with the objective of improving commercial and economic co-operation, promoting regional trade, and creating institutional mechanisms, for facilitating trade. The Member States are Burundi, the Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. The Observer States to the PTA are Angola, Botswana, Madagascar, Namibia, Seychelles, and Zaire.

TRADE POLICI S

The trade policies of most PTA countries are undergoing restructuring as part of the Structural Adjustment Program(SAP) instituted under The World Bank and the International Monetary Fund. Under the SAP, items subject to export taxes have been reduced; quantitative import restrictions are to be gradually eliminated; and the import tariff regimes are in the process of revision.

The majority of PTA countries discourage the import of luxury products through the imposition of high tariff rates. _Minimal tariff.rates or tariff exceptions are placed on the import of essential products and equipment considered necessary for development by the Government. Import policy may also protect domestic industries through the imposition of high tariff rates on the import of goods manufactured by local industries. The custom tariffs reflect a protection of local manufacturers while allowing needed raw materials or capital goods to enter with a low duty rate.

In accordance with the provisions of the recent foreign investment codes in the PTA countries, exemptions from payment of customs duty are granted to plant, machinery and equipment for use in authorized direct foreign investment ventures. Raw materials may be exempt if used in the production of goods for export.

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Bureaucratic procedures for import licensing has been reduced in most African countries under the SAP programs. Most licenses can be obtained from the national Ministry of Commerce and Industry., Importers are responsible for licenses for restricted goods and industrial goods. _An import license is necessary to permit the importer to obtain the necessary foreign exchange accompanied with the proper shipping documents.

The foreign exporter must be aware of embargoes on items which will be prohibited from entering the country. Restrictions may include (a) additional requirements to assure that the product can be operated in the given country (b) consular certificates (c) import deposits (d) tariff quotas (e) goods of a politically sensitive nature, i.e. goods for military or telecommunications equipment, and (f) local content restrictions mandated for the inclusion of domestic raw materials.

In Zambia, applications for import licences and foreign exchange must be submitted to the Foreign Exchange Management Committee at the Bank of Zambia. Upon recommendations of the Secretariat, the Ministry of Commerce and Industry will grant import licences to applicants.

Botswana, a country with substantial foreign exchange resources, requires manufacturing or trading licenses and import permits. Licence and import permits may be obtained from the Ministry of Commerce and Industry, which requests the Director of Customs and Excise to register the applicant as importer of the specified goods. Botswana grants exclusive licences to protect infant industries and has a local Preference Scheme which provides a price advantage to Botswana manufacturers. In Namibia the majority of imports are subject to import permits issued by the Registrar of Companies and Patents and Trademarks within the Ministry of Trade and Industry. Permits for trade or manufacture must be registered with the Registrar of Companies.

In Mozambique import licences are required for all purchases from foreign countries. Enterprises that import on a regular basis must register as an importer with the Ministry of Trade and submit an annual plan of import requirements. Each application for an import licence must be addressed to the Ministry of Trade providing certain details of each operation, including the type of merchandise, quantity, price, purchaser dr supplier, destination payment terms and expected date of shipment.

Zimbabwe requires all goods to be subject to import control. The Control of Goods Commerce Regulations lists items that may be imported without an import license; other

imports require an individual ilicense permit obtained through the Ministry of Trade and Commerce. Import licences will only be issued against a certificate of foreign exchange allocation.

FOREIGN INVESTMENT

In general, the strategic goals for foreign investment in the PTA countries are to increase economic development through industrialization, better utilization of natural resources, improvement of the infrastructure, employment and training for nationals, and the development of particular sectors of the economy. The objectives are usually embodied in the Constitution, in the development plans, or in the investment codes. Most of the countries regard agriculture and natural resources as the foundation of their economy and the diversification in industry as the goal for future development. The strategy of the PTA countries is to improve regional self-sufficiency through the promotion of import-substitution and export-oriented industries, application of local raw materials for industry, and the increase in the technical skills of the labour force.

In order to regulate foreign investment and joint ventures, most PTA countries have enacted investment laws or investment codes whose purpose is to create a legal framework for the entry and operation of foreign capital. Legislation regulating foreign investment can range from a general investment law or joint venture law to special investment laws for particular economic sectors such as mining, oil exploration, tourism, or agriculture. The investment law is the primary, in some cases the only, statement of investment policy by the PTA country. In most cases, the Government will also promulgate regulations for foreign exchange controls, taxation, tariffs, price controls, technology transfer regulations, and investment incentives to regulate foreign investment. ’

Currently a large number of PTA countries have revised or are in the process of revising their investment legislation. Since 1990, Zambia, Namibia, Tanzania, Sudan, Uganda have implemented new investment legislation. Burundi, Comoros Islands, and. Malawi are presently revising their legislation. Other PTA countries have implemented fairly recent legislation since 1985.

Foreign investment ’or joint venture laws will ordinarily seek to define the kinds of investment projects which foreigners are permitted or encouraged to undertake. No country, including the United States, will allow foreigners to invest in any and all types of economic activity. At a minimum, certain areas will be prohibited to foreign capital for reasons of national security, defense,

or strategic consideration ’ such as armaments, telecommunications.

Most PTA countries encourage foreign investments with the following objectives:

a. increase foreign exchange through export earnings
b. increase employment opportunities_for nationals
c. transfer new technologies and skills to the host country
d. increase public revenues through taxation
e.develop local resources
9. strengthen local industries

The new Ugandan Investment Code has been one of several strategic policies which have focussed upon reducing budgetary and balance of payments deficits, improving incentives, promoting a strong economic recovery, gradually liberalizing the foreign exchange and trade system, and strengthening the public sector institutional framework. The Tanzania National Investment Promotion Policy lists as their specific national economic objectives for foreign investment the maximization of the nation’s natural and other resources; maximization of foreign resource inflows through export-oriented activities to complement domestic resources; and achievement of identifiable and substantial foreign exchange savings through efficient import substitution activities. The Tanzanian Code is one of the few PTA countries that specifically mentions as a goal the encouragement of investment within the PTA region.

The development of Botswana’s economy has been based on the two main sectors of mining and cattle. The objectives of the Government’s Industrial Development Policy are to create productive jobs for its citizens, train citizens into occupations with higher productivity, increase the value added in production, and disperse industrial activities in rural areas. The Sudan Investment Code encourages investment in projects which will diversify the national economy and attract the savings of Sudanese working abroad. This is one of the few Codes which specifically refers to the attraction of flight capital as a means for foreign capital investment.

Zambia, like other countries in the PTA region, is rich in mineral resources and has an economy based on the export of raw materials, such as copper, lead, zinc, and cobalt which have experienced falling prices on the international markets. Zambia as well as Zaire, Madagascar, and Angola are now’ making efforts to transform from an exporter of raw materials to an exporter of semi-manufactured and manufactured products. The main objectives of Zimbabwe’s economic policy are rapid growth, full employment, price stability, efficiency in resource allocation and the equitable distribution of benefits. As in most PTA

countries, Zimbabwe’s overall strategy is to develop the main sectors of the economy such as agriculture, industry, commerce and mining.

Due to Namibia’s political isolation prior to independence, regional economic links with PTA countries have been limited. Namibia has an unbalanced economy heavily dependent on the production and export of primary commodities of minerals, livestock and fish products. The potential for future development in Namibia depends upon diversifying the country’s productive base to industrial activities and expanding the manufacturing sector for import substitution and export to regional PTA countries.

Mauritius has successfully instituted an Export Processing Zone and has become a leading supplier of textile products. Sharing a problem common to a number of PTA countries, Mauritius has a small local market and places emphasis on attracting enterprises which produce export oriented manufactured goods with the main objective of diversification of the industrial base of the country.

Malawi, with a limited resource base, has made efforts to diversify the economy especially the limited number of agricultural products on which its foreign exchange earnings depend. Ethiopia, a predominantly agricultural economy with over 80 percent of its population living in rural areas, has as one of its objectives the increase in agricultural production from subsistence level to export potential.

A few of the PTA countries focus their investment legislation on defining the fiscal incentives and guarantees to the foreign investors. Rwanda focuses on the taxation and guarantees for the preferential treatment schemes as established in the Code. The investment legislation of Lesotho entitled the "Pioneer Industries Encouragement Act" focuses on tax incentives for approved 1manufacturers and related industries.

Swaziland’s government policies have encouraged the establishment of a free-market system and the removal of all unnecessary constraints on investment as a national priority. Seychelles has recognized the constraints for industrial development and. has implemented a program for economic self-reliance.

In an effort to attract foreign capital to their territories, many PTA countries offer special incentives and guarantees to foreign investors. The nature of the incentives varies from country to country and may include tax exemptions, direct subsidies, government loans, custom duties exemptions, and priority use of government facilities and land. One of the common incentives is the tax holiday which exempts the enterprise from local income and. other

taxation for a specified period of years. The PTA country may grant exemptions from taxes on dividends, royalty payments, interest payments, property taxes and other fees for which the investor may be liable.

The foreign investment legislation of PTA ’countries have enacted special guarantees for the encouragement of joint ventures or foreign investment. The protection of investment include protection from nationalization and expropriation, repatriation of capital and profits, and-the settlement of disputes.

The role of private investment has become significant in recent years as PTA countries restructure their economies through encouraging trade and foreign investment. PTA countries have promulgated policies aimed at strengthening the role of the private sector which has been reflected in the recent investment legislation and have created investment opportunities in the financial, industrial, and agricultural sectors.

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