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THE CHANGING LEGAL CLIMATE FOR MULTINATIONAL INVESTMENTS IN DEVELOPING COUNTRIES

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The current importance of the multinational corporation's role in global commerce is well-established. A recent study by the Organization of American States (OAS) has projected that by the end of the 1980's, seventy-five percent of the world's business will be conducted by as few as 300 multinationals, based predominately in the United States. The emergence of these corporate mammoths, whose planning and operations are conducted on a global scale, is having an increasing effect on the international business structure, changing the traditional patterns of global commerce.

Until the first half of this century, business negotiation in the international market was marked by the efforts of parties with conflicting interests to develop a mutually beneficial agreement on the terms of transfer of goods and capital. With the rapid growth of direct foreign investment after the Second World War, spearheaded by multinational corporations, concerned host-country governments sought to establish controls to develop a climate in which multinationals would collaborate with them in the pursuit of their developmental goals.

In transactions between multinationals and their subsidiaries abroad, the buyer-seller relationship tends to fade since the parties are elements of the same corporate entity. Negotiation between conflicting points of view does not take place; instead, we see a decision-making process, the purpose of which is to effectuate the entire entity's global strategy of production and

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1. OEA, El marco jurídico de las empresas multinacionales, OEA/Ser.K/XXI.1; CIDIP/2 (1973), reprinted in 14 Revista Derecho de la Integración 243, 251 (1974). These figures can also be found in Vagts, The Global Corporation and International Law and Economics, 6 J. Int'l L. Econ. 247, 249 (1972). For the different investment trends according to countries and regions see: UNCTAD, Prácticas Comerciales Restriccivas, TD/122/Supp.1, Jan. 7, 1972, at 16-53. As for the role of U.S. corporations in international trade, the author considers that they represent the most important sector of world investment. The following quotation is illustrative:

In the global process of expansion of foreign private investment, U.S. capital and its corporations with international activities have played a fundamental role; U.S. capital abroad has a sensible increase, being in 1968, 63 per cent of global private investment. While in 1959 American investment was considered to be 11,500 million dollars, in 1968 this amount was increased to 64,800 million dollars.


A new kind of operation in international trade has appeared which mandates regulation by either national or international law in a way which contributes to the developmental interests of the host-country and the well being of its people.  

The problem is that the present national and international legal systems have been unable to cope with this new method of corporate activity. Typical legislation in several countries seems to treat the multinational corporation as a type of business organization ruled by past commercial realities. Thus, this new method of doing business has been regulated according to the different areas it affects, rather than as a single phenomenon requiring a global and unified treatment. Eduardo White has said, "While corporations have become international in the course of a few decades, the legal system has remained in its substance the expression of each national policy." The need to change the norms and principles applicable to these new entities is evident and urgent, and host-countries are beginning to react in a remedial fashion toward regulation of the multinational corporation.

The need for the legal structure to adapt its provisions to the current circumstances of world trade is now under serious contemplation by the affected nations. This is a reaction which does not distinguish the poor countries from the rich; it is a trend in developed and developing countries alike to do something about the enormous power and wealth that multinationals can attain which enables them to threaten the sovereign rights and powers of States to guide their economies toward the achievement of a more favorable climate for their citizens.

The differences between the governments of developed and developing nations involves the choices of instruments and programs which are available to control and supervise the activities of multinationals.

Developed countries provide examples of national measures that can and have been adopted toward this end. In the United States, several attempts have been made by the courts to extend antitrust legislation to the foreign activities of U.S. corporations. This, however, has not been as successful as might have been expected, and recently there has been a proposal requesting the U.S. Congress to modify antitrust legislation in order to extend its scope of application to foreign activities of U.S. business enterprises.

At a regional and international level, developed nations have made attempts to formulate International Codes of Business Conduct. In 1976, the Organization for Economic Cooperation and Development (OECD)
adopted a "Declaration on International Investment and Multinational Enterprise," which included recommendations that multinationals not engage in restrictive practices; that they refrain from paying bribes and other illegal conduct; that they consider the host country's general policies, objectives, and priorities for economic and social progress in addition to industrial and regional development; and, among other recommendations, that they cooperate with host governments, providing them with relevant information concerning corporate operations. These guidelines, however, are strictly voluntary. Further, they apply only to foreign investments made within the territories of the OECD member countries, and are not for implementation in developing countries. OECD countries are therefore the ones to be benefited by such provisions, which leave beyond their scope the most difficult problems of private foreign investment, which are usually found in developing countries.

The already established legal framework of developing countries with respect to these matters has been characterized as passive, inefficient, and unable to cope with the new phenomenon. It is in more recent years that the need has arisen to implement stricter controls on multinationals.

In developing countries there is a very clear trend toward establishing controls over the activities of multinational corporations which promote their participation in the achievement of national objectives regarding the processes of development. These goals, among others, include rapid economic growth, industrialization in the direction of import substitution, and decentralization of industrial facilities with an eye toward less developed areas. This type of governmental action is exemplified by Mexico's recently established law on foreign investment.

From the point of view of developing countries, the traditional legal framework applicable to business transactions must be modified to include new provisions dealing directly with multinational operations. Until now these countries have been confronted with a dilemma. On the one hand is the urgent need for resources and capital to be transferred from abroad; and on the other hand, the fear that these powerful economic centers, which claim no national ties, may harass and impair legitimate national development and achievement of socio-economic objectives.

The new policy of developing countries towards multinational investment can be summarized as follows:

1. The transfer of resources is not only admissible, but welcomed, when its purpose is to accelerate and promote development adapted to the host's laws and national economic and social policies;

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(2) host countries do not ignore the right of a foreign investor to seek a legitimate profit, but believe that the benefit should be shared with the host country.11

The right of a country to regulate and control the transfer of resources into its economy is an expression of its sovereign power, and it is essential that a State exercise its perogative in that regard by directing foreign investment into those sectors of the economy where it is deemed most necessary, and by harmonizing such investment plans and multinational decision making with national developmental goals.

Developing countries are currently struggling to adopt two kinds of legal measures, with appropriate sanctions. One is a strengthened national legal structure involving stricter antitrust policies, and controls over the transfer of resources. The other is regulation of the conduct of multinationals through an international legal order.12

With respect to the former, several developing countries, among them Mexico, have recently issued legislation on foreign investments,13 technology transfer,14 and inventions and trademarks.15

All of these laws attempt to orient the transfer of resources toward the achievement of developmental objectives, and national economic and social goals.

At the international level, Third World countries are pushing hard in the Center for Transnational Corporations of the United Nations to obtain a legally binding "International Code of Conduct for Multinational Corporations,"16 which, together with the International Code of Conduct for the Transfer of Technology,17 the revision talks of the Paris Convention in the World Intellectual Property Organization (WIPO) and similar instruments now being negotiated in United Nations Conference on Trade and Development (UNCTAD)18 will provide a legal framework for controlling the operations of multinationals under more just and equitable rules.

Transfer of Technology to Developing Countries

The transfer of technology should be an arrangement whereby all parties receive reasonable, equitable and reciprocal benefits. It is not a question

of political ideology or of excessive nationalism, but rather, a complex and
delicate commercial transaction, subject to a difficult negotiation process,
and one in which developing countries have been actively involved and will
continue to be involved as they strive to obtain the technology needed for
development on the best available terms. It is not unreasonable that these
countries seek an independent and egalitarian development through regula-
tion and control of the participation of foreigners in the economic process.
The legal measures adopted by several developing countries with regard to
the regulation of the flow of foreign technology are expressions of a world-
wide trend. This new tendency is yet another expression of the desire of the
international community to build a more just and balanced "new interna-
tional economic order." Nothing in these measures is confiscatory or ex-
propriatory.\textsuperscript{19}

Annotation and discussion of specific provisions of the Mexican Law
on Transfer of Technology suggest the nature of the regulatory measures
currently being adopted by developing countries.

Article 7 lists cases in which the Registry should reject the registration
of multinationals wishing to do business in Mexico.\textsuperscript{20} Essentially, the list
refers to agreements which are either unfavorable to the national economy

\textsuperscript{19} See Report of the Task Force on Technology Transfer of the United States Chamber

\textsuperscript{20} D.O., supra note 13, at art. 7, which provides: The Ministry of Industry and Com-
merce shall not register the acts, agreements or contracts mentioned in Article 2 in the follow-
ing cases:

I. When their purpose is the transfer of technology freely available in the country,

II. When the price or consideration does not represent the technology acquired or con-
stitutes an unjustified or excessive burden on the national economy.

III. When provisions are included which permit the supplier to regulate or intervene,
directly or indirectly in the administration of the transferee of the technology.

IV. When there is an obligation to assign onerously or gratuitously to the supplier of the
technology, the patents, trademarks, innovations or improvements obtained by the transferee.

V. When limitations are imposed on technological research or development by the
transferee.

VI. When there is an obligation to acquire equipment, tools, parts or raw materials ex-
clusively from any given source.

VII. When the exportation of the transferee's products or services is prohibited, against
the best interests of the country.

VIII. When the use of complementary technologies is prohibited.

IX. When there is an obligation to sell the products manufactured by the transferee ex-
clusively to the supplier of the technology.

X. When the transferee is required to use permanently, personnel designated by the sup-
plier of the technology.

XI. When the volume of production is limited, or sale and resale prices are imposed, for
domestic consumption or for exportation.

XII. When an unreasonable term of duration is established. Such term shall in no case ex-
ceed 10 years, obligatory for the transferee.

XIV. When the parties submit to foreign Courts for decision in any controversy in the in-
terpretation or enforcement of the foregoing acts, agreements or contracts. The acts, agree-
ments or contracts referred to in Article 2, which are effective in Mexico shall be governed by
the laws of Mexico.
or to the contracting party receiving the technology concerned. Section II of Article 7 provides the Registry with the authority to judge the fairness of, and justification for, royalty payments which are to be made in return for the acquisition of technology, patent, or trademark license agreements. The provision grants the Registry administrative discretion, empowering it to make a technical and economic appraisal of the benefits contained in the license agreement, thus enabling it to determine the fairness of the payments.

Undoubtedly, the technical and economic evaluation of agreements involves great difficulties, in view of the diversity of existing technologies, and the lack of regulation setting the price of a given technology. As stated to Mexican authorities by some licensors who have been quite frank about the situation, the price of a technology is set pursuant to what the market is willing to pay for it. Further, it should be noted that the nature and scope of the technological efforts being made in the world differ substantially from one economic sector to another, from one company to another, and even from one product to another. For these reasons, it is not possible to establish general criteria for what constitutes adequate consideration, nor is it possible to set a maximum acceptable limit (such as the three percent limit applied by other governmental agencies in relation to the approval of new Industrial Projects) in order to grant fiscal incentives and exemptions, since the setting of a maximum acceptable limit implies that in many instances the supplier of technology, knowing that his contract will be accepted if priced within the limit, will ask that price for his technology. What was then a maximum limit or maximum percentage becomes a minimum, possibly well in excess of the value of that particular technology.

In my capacity as Director General of the Mexican National Registry on the Transfer of Technology, I would advise legal counselors of United States multinationals wishing to do business in Mexico to submit their cases to the Registry, giving it all the information that may be available, so that the Registry can undertake an adequate evaluation. It is particularly important that each supplier enumerate and elaborate on benefits which an agreement can bring to Mexico.

The approach followed in evaluating the price of technology to Mexico has been eminently pragmatic. The Registry is actively involved in the negotiation process between the supplying and acquiring parties assuring that the royalty agreed upon is acceptable to all. For this reason, it is strongly recommended that parties concerned contact the Registry and express their points of view.