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## **NEGOTIATING WITH LATIN AMERICAN GOVERNMENTS: TECHNOLOGY TRANSFER & SERVICE AGREEMENTS\***

ROBERT J. RADWAY\*\*

This paper does not address the specifics of "How to Negotiate", since everyone has his own style of negotiating. Nor does it present a discussion of how to survive in business, since it is assumed that most readers are somehow able to manage this, or can pick up pointers elsewhere. It is not a summary of substantive laws governing technology transfer in Latin America, or of any other specific subjects (i.e., taxation, labor relations, or principles of contracting). What this paper does contain are some points which, according to my experience, are useful in negotiating service contracts or technology transfer agreements with governments in Latin America.

### **I. EVOLUTION OF THE PRESENCE OF TRANSNATIONAL COMPANIES IN LATIN AMERICA: HOST GOVERNMENT VS TRANSNATIONAL CORPORATIONS**

During the same period that transnational corporations (TNCs) experienced substantial growth, the host governments (HGs) became more active participants and regulators of their economies, thus bringing the HG into direct contact with the TNC. Negotiations became an important forum in which the HG could express its dissatisfaction with and hostility towards these huge enterprises, many of which had annual revenues

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\*This paper was first delivered to conferences attended primarily by business executives, lawyers, and bankers in August of 1976 in Boston, New York and Pittsburgh in a series of workshops sponsored by the Fund for Multinational Management Education and the Council of Americas. At that time the author was engaged in the private practice of law and the views expressed herein do not necessarily represent those of the Fund for Multinational Management Education or the Council of the Americas.

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several times the size of the host country GNP. Since the HG has been generally unable to negotiate as effectively as the TNG, conflicts between them increased.

HG antipathy toward the TNCs and increasing sophistication by government negotiators have encouraged a trend toward "unbundling" of technology.<sup>1</sup> This allegedly creates an opportunity for smaller and medium-sized companies, both foreign and nationally owned, to provide some constituent elements of technology at a lower cost. It also supposedly poses less of a threat to the Latin American countries than the acquisition of the same components from a large TNC. In addition, smaller firms sometimes appear potentially more responsive to host country needs. HG officials believe this unbundling trend encourages development of local technology and expertise at specialty levels, which initially require less capital and other resources. The administrative, logistical and re-integration costs and efforts often defeat this objective.

Finally, many HG officials are strongly resentful of past abuses and approach any new negotiations with a backlog of bad feelings. Regrettably, they tend to assume such abuses apply generally to all technology transfer. In addition, many conversations with government officials in and out of Latin America indicate that they rely on older, less up-to-date data to document these abuses. In particular, they cite certain research and publications by well-known economists and theoreticians of the "Third World,"<sup>2</sup> which along with some excellent scholarship include some unsubstantiated allegations.

## II. BUSINESS, CULTURAL AND GENERAL POLITICAL ENVIRONMENT

There are a number of caveats which should be kept in mind in planning for any negotiation in Latin America, but particularly when dealing

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<sup>1</sup>Also referred to as disaggregation or debundling.

<sup>2</sup>See generally, Wionczek, *La Transferencia de Tecnología en el Marco de la Industrialización Mexicana*, in Comercio de Tecnología y Sub-Desarrollo Económico, (M Wionczek ed. 1973); Sunkel, *Big Business and Dependencia, A Latin American View*, 50 Foreign Affairs 517 (1972); Sagasti, *A Framework for the Formulation and Implementation of Technology Policies: A Case Study of ITINEC in Peru*, in Science, Government, and Industry for Development 203 (Ingerson & Bragg ed. 1975); C. Vaitos, Employment Problems and Transnational Enterprises in Developing Countries: Distortions and Inequality (with particular reference to Andean Pact countries), (October, 1976) (working paper — World Employment research, I.L.O.).

with a government or quasi-governmental corporation. Although these may appear rudimentary, they are included precisely because they have so often contributed to widening the perceived cultural gap.

Know about legal traditions, like the Calvo doctrine, which affects willingness to accept governing law other than that of the host country, and precludes the possibility of the U.S. Government interceding on your company's behalf. Examine the possibility of substituting third country or neutral laws instead, and be familiar with differences between substantive, procedural (arbitration) and "conflict" laws.

You should also be familiar with the host country's historical and recent inflation rates and incorporate this into your planning and prices, or clearly identify a formula to negotiate the basis for periodic adjustment. There are many indices to which generally successful formulas have been tried, but there are limitations in any predictive formulas.

Familiarize yourself with the political background regarding a particular country's stability. Do not make statements or generalizations about Brazil, for example, that really apply to Peru, Argentina, or even Chile. Each country's situation is very different and you will lose respect and credibility by confusing one situation with another. While this may sound obvious, such ill-conceived remarks are often made, and they never help.

Be aware of and sensitive to nationalistic trends throughout Latin America, but particularly in the HG. Peru since 1968 has been a very different place to transact business for a U.S. company than Bolivia. Venezuela may have more money than Mexico, but it does not have the relatively stable traditions and track record which are important to TNCs. In each country, however, sudden changes in the government or its policy can sharply affect the environment for foreign commerce or investment.

### III. GENERAL TRENDS IMPEDING TNC ACTIVITY IN FOREIGN INVESTMENT AND TECHNOLOGY TRANSFER

When negotiating a technology agreement in any Latin American country, no one can afford to be ignorant of trends in new legislation restricting foreign investment and technology transfer throughout the world.<sup>3</sup>

<sup>3</sup>For Latin American examples, see: Ancom Decision 24; Transfer of Technology Law, Law 20, 794, XXXIV-D Arrales de Legislacion Argentina 3318 of Sept. 27, 1974; Mexican Law for the Registration of Transfer of Technology and Use and Exploitation of Patents and Trademarks of December, 1972; the more recent Law

Nor should a company be ignorant of attacks on the multinational corporations in the U.S. and abroad, e.g., Burke-Hartke, Jackson-Vanik, Trade Act of 1974 and other laws and legislative proposals affecting international trade, investment, technology transfer and finance.

One should also have at least a general awareness of (if not familiarity with) the Codes of Conduct designed to regulate TNCs and technology transfer proposed by: (a) United Nations Council on Trade and Development Group of 77, (b) Organization for Economic Cooperation and Development (and prior International Commerce Commission), (c) OAS (preliminary informal version).

#### IV. ORGANIZING FOR NEGOTIATIONS IN LATIN AMERICA

The TNC negotiation team varies with the nature of the project. In addition to the sales or marketing person, the team should always include a lawyer, someone who can present the detailed backup of the cost estimate, and someone who can explain and respond to questions on matters dealing with the technical approach or process. Other negotiators can be called in as needed in order to avoid making the permanent team too large and intimidating. The team should remain sensitive to the perception of intimidation by overwhelming numbers of foreign negotiators. Large numbers reinforce the colossus image, which is often associated with both U.S. corporations and the U.S. Government.

The team should spend some time together at the home office discussing strategies, fall-back positions, and roles. It is wise to spend time in advance briefing a legal or commercial specialist to handle questions on related subjects, rather than include another permanent member of the team. It may also be less expensive in the long run where negotiations drag on and on. But whatever the arrangement, have specialists on call to explain complicated or difficult aspects of the technical approach or process. It's costly in any case but after all this may be the unique aspect of your proposal which gives you competitive advantage over other bidders. Exploit that because it is your strength and it will be most reassuring to the HG, particularly your "friends," in the face of almost inevitable criticisms of the Government by opponents.

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on Inventions and Trademarks of Feb. 11, 1976; Decrees 62-63, G.O. No. 1.655 Extraordinario of April 29, 1974 (Venezuela); 13 I.L.M. 1220; Chilean Decree/Law 600 of July, 1974; and Brazil's INPI Normative Act No. 15 of September, 1975.

It is important that everyone on your company team be responsive to a single "Chief of Delegation," no matter what the home office reporting relationships may be. You must also know who is to play the "hatchet man" role and when that may be necessary. The Latin American government agencies nearly universally respect U.S. managerial sophistication above virtually everything else except technological superiority, and nothing destroys that image like a disorganized and inharmonious negotiating team.

The role of the U.S. attorney in these negotiations may vary considerably. Many companies prefer to keep their lawyer in the active negotiations, but not as chief negotiator or spokesman. They prefer the marketing or commercially-oriented person in that role. But most seem to rely on their inside counsel for active participation due to his ability to: (1) familiarize himself thoroughly with the laws and tax problems, (2) analyze the proposed structure of the transaction and advise the best approach to minimize tax and other liabilities and exposures, (3) perform quick analysis of new problems or considerations when raised (at least with respect to the above mentioned exposures), and (4) draft, revise, or modify language to facilitate the accomplishment of objectives of both parties while avoiding often encountered pitfalls.

Many companies use their attorney strictly to advise the senior management person and to control the participation by the local counsel. In other cases he may be one of the people who remains outside the negotiating room, constantly drafting revisions of clauses or language and checking local counsel on tax and other implications of new approaches being proposed, while simultaneously providing data back to the home office for its information or approval as appropriate.

On the other hand, the lawyer for the Latin American government usually serves as a draftsman and advisor on strict matters of law and legal procedure, and is generally more legalistic in approach and less commercially sophisticated than his U.S. counterpart.<sup>4</sup>

There should be a designated person keeping good minutes, including offers and counter-offers, fall-back discussions, snags, resolutions of stale-

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<sup>4</sup>For an interesting comparison of the role of respective lawyers in these negotiations, see Wells, *Negotiating with Third World Governments*, 55 Harv. Bus. Rev. 77 (1977). Industry for Development 83 (Ingerson & Bragg ed. 1975); Mayo, *Science and Technology as Development Factors*, P. Gabriel, *Importing Corporate Capabilities Without Exporting Ownership and Control: Alternative to Foreign Direct Investment* (1973) (paper for conference on Latin American-U.S. Economics Interactions at the University of Texas).

mates, and other pertinent comments. I cannot remember a single instance wherein several disputes which arose during the execution of the project were not resolved by referring to the negotiation notes. In one case a rather inexperienced agency recorded absolutely everything on tape right from the opening statements. This is unnecessary, but written summaries of key points initialed or signed by each side can be useful.

## V. PLANNING AND PREPARATION OF NEGOTIATIONS

Negotiation is not an isolated event. It takes place within a larger context of time and space, of past experiences and present policies of the host country pursuing its economic development goals. Therefore, it is important for the corporate representative to know something of the country's economic and political development (including previous business-government relationships in that country), and its legal system (i.e., Andean Sectorial Development Program—petrochemical industry assignments), in addition to the social and cultural background of the specific country. Finally, it is useful to identify the nature of current tensions in international business environments (such as confrontations between so-called Group of 77 countries and Organization for Economic Cooperation and Development countries in United Nations Council on Trade and Development meetings).

The above research may well reveal why the HG may be adopting seemingly irrational positions which compound existing frustrations.

It is frequently suggested that the essence of host country-TNC conflict is the issue of perceived corporate infringement of national sovereignty. A government of a Latin American country is dependent on the TNC for resources and technology inputs (including training) required for the pursuit of its national goals, both economic and social. Thus, the HG is not free to pursue its own course without help. Yet the TNC—with its worldwide presence, foreign control, and lack of allegiance to a single country—is perceived as transcending the limits and interests of the host nation.

As a result of their traditional business-government relationships, therefore, many Latin American government officials believe that American TNCs work closely with their (i.e., U.S.) Government. Mere denial of such a relationship does not change this Latin American perception, which is founded on strong political, psychological, and emotional considerations.

### A. *Conflicting Objectives*

(1) *Host Government Objectives* The country with which you are planning a project enters the negotiation situation with a defined set of objectives. These normally include:

- (a) Importation of technology to meet national development goals — new industries, plants, processes, or products.
- (b) Preservation of (often scarce) foreign exchange reserves.
- (c) Assurance that the benefits of imported technology are diffused throughout the economy (avoiding enclaves of foreign influence).
- (d) Massive training to improve technical skill base.<sup>5</sup>
- (e) Avoidance of overcharges for technology.
- (f) Avoidance of unsuitable or irrelevant technology (“Appropriate Technology” is a term now used in a specific U.S. Government program designed to facilitate or promote transfer of relevant technology to developing nations).
- (g) Avoidance of undue confidentiality and restrictions on use (the general objective is to buy or obtain outright the technology within a short time rather than continue to pay royalties for long periods, which places a severe burden on foreign exchange).
- (h) Generally to avoid “technological colonialism”.

(2) *Objectives of Technology Transfer.* Objectives of the foreign firms include some which are partially in conflict with those of the host country:

- (a) Fair return to amortize development costs — some corporate research and development is directed at developing

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<sup>5</sup>Note the reference to training in Art. 58, Decree 63 G.O. Na. 1.655 Extraordinario of April 29, 1974 (Venezuela) 13 I.L.M. 1221, 1231. The clearly indicated objective is for nations to obtain better use of acquired technology. Recent national programs in Venezuela (Plan Mariscal de Ayacucho), as well as decrees and proposed decrees elsewhere in Latin America reflect the need for more on-the-job training in addition to formal technical education. High government officials speak often of true technology transfer. See Radway, *Venezuela: Certain Legal Considerations in Doing Business*, 8 Case W. Res. J. Int'l L. 289 (1976).



technology for licensing. Most companies, however, receive a larger rate of return from use of this technology in international operations.<sup>6</sup>

- (b) Protection of property rights — the technology, whether or not protected under U.S. or foreign patent legislation, constitutes industrial property. Companies, therefore, insist upon confidentiality, non-disclosure of proprietary information, patent and trademark protection where available and appropriate<sup>7</sup> and whatever else may be necessary to prevent competitors from unfairly capitalizing on their technology without sharing in the tremendous development costs.<sup>8</sup>
- (c) Maintain reputation and competitive standing — obviously, a company's credibility is on the line with the technology it has developed and transferred. It therefore seeks exchanges of improvements and licensor's rights to inspect facilities after construction and during a plant's early operation,<sup>9</sup> and technical assistance and start-up assistance agreements in order to de-bug new plants or systems and assure satisfactory start-up and initial operation. The company has to be satisfied with the quality control and quality level of the product which bears its internationally known trademark.

#### B. *Technology Life Cycle and Shifting Relative Strength*

Analogous to an investment life cycle is a technology life cycle. Just as the value of foreign investment diminishes over time from its initially high level, so too does the value of transferred technology. As one author expresses it, "the contractual and ownership rights of the international corporation will be honored by the HC only as long as it feels that in

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<sup>6</sup>Evans, *Technology Transfer to the ANCOM Countries: The View of One U.S. Corporation*, The Andean Common Market: Management Implications of Application of Technology Legislation (1976); Dull, *Transfer of Technology to Latin America — a U.S. Corporate View*, Technology Transfer and Development: an Historical and Geographic Perspective (Driscoll & Wallender, eds. 1974).

<sup>7</sup>It is well known that many companies are disinclined to obtain patent coverage on certain types of processes and other know-how, electing rather to protect it by "secrecy agreements" and avoid the inherent limitations of the patent system.

<sup>8</sup>Evans, *supra* note 6.

<sup>9</sup>*Id.*

balance the country is gaining."<sup>10</sup> The foreign firm must therefore plan for the eventuality that after the technology is transferred, its control will necessarily diminish and ultimately disappear.

Initially, the transferor stands in a relatively stronger position than the host country because it has what the HG wants. Presumably, the particular technology has been evaluated according to an international competition or bid process and judged to be unique, or at least comparatively superior to anything locally available. Gradually, however, there is a shift in relative negotiating strengths, away from the TNC and in favor of the HG. In this process the political effects and social ramifications become more important than the economics of the transfer project.

One valuable technique used to maintain the foreign firm's strength is the periodic infusion of improved technology or other resources via a license agreement, joint-venture, or similar technology transfer agreement.<sup>11</sup> If the company takes great care to transfer only that technology that can be used at the outset, it should also facilitate periodic infusions of higher technology as the local economy develops the capability to absorb it.

In addition, the strategic use of informational publicity to counteract unfounded allegations or attacks, as well as to announce new developments, can help the TNC maintain its relative strength vis-a-vis the host government.

## VI. CONSTRAINTS ON GOVERNMENT NEGOTIATOR

### A. *Political*

(1) *Authority and Authorization.* A prerequisite for negotiating with a Latin American government is to find out in advance who the decision maker is and what limits exist to his authority. The next step is to find out whom to contact on a higher level to resolve sticky snags that stem from personality or inexperience, not from substance. This contact should be exercised only by the TNC's chief of delegation or agent, as appropriate, but it certainly should be utilized whenever necessary. These higher officials often appreciate outside views on the progress of the negotiations.

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<sup>10</sup>A. Kapoor, *International Business Negotiations: Characteristics and Planning Implications*, NYU Graduate School of Business Administration, at 31.

<sup>11</sup>*Id.* at 220.

(2) *Friends & Foes.* In cases where your company has been the successful bidder in a tight competition, ascertain who favored your firm and who favored your opposition. The loser never seems to have "lost" until the project is complete. Keep an eye on the "Friends and Foes", as well as on activities of your closest competition, even after the bid has supposedly been "awarded" by the appropriate Purchasing Committee, Ministry or other organization. They may be waiting in the wings and ready to move in if you falter, a fact which has been used for leverage by the HG spokesman in some situations. Worse yet, if the competition is better connected than your company, this may have an effect on the behavior of the HG Chief Negotiator during negotiations.

In addition, look for an antagonist on the HG side and ascertain whether he may be speaking for or representing the "Foes" (i.e., your competitors). Do not lose patience with him; be responsive to his sometimes trivial and irrelevant questions, and give him plenty of rope—he will probably hang himself! It is quite likely that he does not speak for the majority.

(3) *Societal.* Keep close surveillance on local and national tensions in respect of North Americans and U.S. investors in particular. Negotiations or progress on a project can be affected by these, since your company could become a convenient scapegoat for prior actions of others.

#### B. *Procedural*

In addition to the political constraints already mentioned, there is the consideration of the status or role of the HG's chief negotiator within his own ministry. This role sometimes changes during the negotiations or the project.

Everyone who has negotiated in Latin America is aware of the importance of knowing the HG negotiator as an individual. The personal relationship cannot be over-emphasized in these countries. Getting to know those with whom you are dealing is a long and often arduous process. Social and class distinctions often impede this process, yet they are not easily recognized by the inexperienced negotiator.

Preparation also involves knowing not only who your competition is but also what they offer. Do not hesitate to ask the HG negotiator about them. In service contracts developed through intense competition, many U.S. companies prepare engineering breakdowns of the competing processes (both technical and economic), and spend considerable time, effort

and expense carefully examining the percentage of local sourcing they can use and the nature, extent and location of the training which can be included.

Finally, you must know the content of the Supreme Decree or other legal authorization for the HG to enter into negotiations. This may disclose critical constraints, including deadlines, for the HG to conclude negotiations.

### C. *Substantive*

In addition to the contents of the Supreme Decree, where there are bidding documents involved the negotiators should re-read the legal and commercial terms prior to the negotiations to review legal constraints on the HG. These have probably been established by the appropriate planning or procurement committee and are very likely to be firm, at least at the outset. But they should be studied carefully to identify those areas the TNC cannot live with; these should be taken up in private at a high level meeting. The problem areas should be discussed as openly and candidly as possible with the decision maker.

Other critical constraints on the HG are the substantive laws governing the transaction or project. It goes without saying that the foreign firm should have spent time and effort with its local counsel in advance, familiarizing itself as much as possible with those laws.

## VII. CONDUCT OF NEGOTIATIONS

A time-honored rule of thumb is to avoid the necessity of the HG negotiator having to lose face. Flexibility is therefore required at all stages. The test for the foreign company is, "Can we live with it?" If the answer is even a hesitant "yes", and if risk does not outweigh payoff potential, then consider adaptation to the known constraints of the HG negotiator.

Closely akin to the "face" problem is the educational problem. Some government agencies in certain Latin American countries have a wealth of experience in dealing with TNCs and have confidence in their objectives and how to attain them. Other agencies, even in the same government, are totally inexperienced and require generous and frequent doses of patience, education, information, more patience, MAALOX, frequent informal contact at all levels, both socially and in private meetings, and still more patience.

### VIII. WHERE LEGAL PROBLEMS ARISE IN NEGOTIATIONS

Legal problems frequently arise from current business or economic factors such as shifts in supply and demand curves (not only oil boycott, but oil-based inflation affecting prices and availability of equipment and materials), revaluation or devaluation of the U.S. or HG currency or the currency of a major competitor, and the effect of weather on crop yields with resultant effect on prices and the economy generally. All these factors influence prices and costs, and therefore profit, to each party. At least one party will be insured and the possibility of a claim will arise.

Legal problems also arise from the competitive environment (price cuts in response to competition, or corresponding "add-ons" which increase cost). Negotiators should try to avoid giving unilateral concessions ("freebies"), since there are numerous examples of these items subsequently being eliminated when project costs exceed original estimates, and a responsible project manager or engineer (who was not in the original negotiations) applies a cost-benefit analysis.

### IX. ATTEMPT TO IDENTIFY POTENTIAL CONFLICT AREAS IN ADVANCE

This obviously requires preparation. Some TNCs which negotiate on an almost daily basis all over the world have fairly well defined systems and steps to complete before each negotiation, based on their unique needs and perspectives. Opinions vary on the advisability or usefulness of a negotiation procedure, but some companies report good results with it despite its inherent limitations.

Once most of the potential conflicts have been anticipated, informal negotiations can be initiated along with the more formal one. Either prior to or concurrent with formal negotiations, the lawyers from each side should talk to each other, the accountants to each other, the technical people likewise (further broken down within specific technical disciplines) and the marketing or commercial people. Each individual should know what his counterpart wants and try to reach an agreement with him on a one-to-one basis as much as possible. This builds and maximizes personal relationships, taking advantage of maximum intra-disciplinary credibility, and reducing risks of spoilage by "bad actors" who often create antipathy outside their field of competence. I am reminded of an example in a negotiation with a newly organized Bolivian agency wherein credibility with a bright young engineer evolved and was cultivated by an

older well-experienced engineer on our team. When this able young engineer became technical manager (within a few months) the conclusion of negotiations was accelerated.

#### A. *Tradition, Law, and Custom*

Local tax laws in the Latin American country affect the profitability of a project. Particularly when negotiating service contracts, it is important for the TNC to determine in advance who is subject to which taxes. This should be carefully examined with local counsel to learn of the precedents. Mexico, for example, has granted rulings (like Revenue Rulings) creating different tax treatment based on the character of the legal entity. If this would reduce costs which would otherwise be grossed-up, it should be to everyone's advantage to know about it. Several countries grant exemptions in the form of decrees governing specific projects or specific industries.

An example of this occurred in Chile. A decree was passed granting tax exemptions for copper-mining projects. When the government in power later changed, the Internal Taxation (revenue) Department revoked the exemption and the contractor was hit with a twelve million dollar tax liability. Through several years of litigation and another change of government, during which a written assumption by the HG agency of any potential tax liability to be imposed was obtained, this case was finally won on appeal at the Supreme Court level. These written assumptions of liability or indemnification agreements from the HG are particularly helpful, whether they are in the contract or in a side letter.

Another matter to be considered is whether a contractor may be reimbursed by the owner for corporate income taxes levied by the HG. Compare Mexico (yes) with Venezuela (no). But the trend is away from the Mexican position and towards the Venezuelan; in these cases it should be grossed-up in the proposal.

In this connection the complicated subject of U.S. Foreign Tax Credits (FTC) frequently arises. It has become quite clear that technicians in several Latin American Government agencies have some knowledge of the existence of the FTC, but do not understand its qualifications and limitations.<sup>12</sup>

<sup>12</sup>See, Camp and Rojas, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology* 8 Law. Am. 1, 24 (1976). The author was a member of the U.S. Task Force and recalls vividly the mistaken impressions held by the distinguished officials of "Impuestos Internos", concerning the application of the FTC mechanism. I have also been involved with very able counsel in several countries who held similarly mistaken views.

Each firm should examine possibilities of stamp tax exemptions and reductions. Several experiences are recalled (Bolivia, Venezuela, Mexico, and others) where the HG agency paid this tax. But there are other examples (even in those same countries) where the contractor will be specifically responsible for the tax and it must be identified in the estimate. When they won't pay or grant an exemption, one should consider asking for tax reductions due to the priority status of the project. Check with local counsel for precedent.

Taxation and other problems also arise where equipment importation is involved. In addition, delays arising from customs clearance have an impact on schedules. Other costs can accumulate from consular fees and a host of other miscellaneous bureaucratic burdens. It is best to provide for reimbursement of all these in the tax clause by express language. Equipment re-export problems invariably emerge when improper classification is assigned upon importation. Finally, problems exist in some countries where personnel assigned to a project or merely present for negotiations are subject to demands for unpaid personal income tax at the airport upon departure, payment for which should have been previously arranged. This highlights the importance of cultivating good personal relationships with the HG officials and selecting good local counsel to keep you aware of these potential exposures.

#### *B. Escalation of Costs and Financing*

Recent inflation rates in Brazil (40-45%), Argentina (300-400%), Chile (1000% in recent years, down to about 180% in 1976 and 90% predicted for 1977), and other Latin American countries necessitate inclusion of provisions to protect against escalation due to inflation. For example, when an Export-Import Bank loan is involved, inflation may cause cost increases subsequent to preparation of estimates. Yet at this time in the negotiations commitments from some suppliers are not yet firm. How do you protect against this? Many HGs have a policy against escalation clauses. They have been burned too often and a general feeling exists that contractors submit low bids and recover on extras and escalation formulas. A separate clause for this purpose is recommended; when separately identified, it is much easier to enforce. But, as it raises the red flag, it is much more difficult to negotiate.

The alternative is to add escalation language to a Force Majeure (Caso Fortuito) Clause. However, several Civil Code provisions in Latin America on this subject are severely limiting, and many HG agencies

insist on using their civil code provision for the contract clause. Thus, you might not be permitted to modify the language. In addition, there is a split in the legal community about whether escalation language in a Force Majeure clause is enforceable. Some argue that since it is outside the traditional objective of that clause (impossibility of performance), the addition of escalation language creates a hybrid clause and lessens the probability of such clause as modified being upheld upon the bringing of a proper challenge.

#### C. *Enforcing Agreements with HGs Generally*

Another problem exists with respect to enforceability upon succession of government. It is suggested that the contract bind the State, not the Government, even though a successor may choose not to honor it. One should always consult local counsel on the tradition and precedent to avoid or minimize conflicts as much as possible. It is likely that your degree of success may be a function of the importance of your project to the economy.

#### D. *Claims, Disputes, and Arbitration*

U.S. companies are frequently reluctant to sue a HG in its own courts due to Calvo traditions and the political environment, but this should be a very acceptable option in some cases. Local counsel should always be consulted for history of fairness in that country. In addition, some HG agencies will now accept some provisions for dispute settlement in neutral third countries. Some considerations with respect to arbitration that both parties will want to examine<sup>13</sup> include:

- (a) Choice of Agency or Institution (American Arbitration Association, International Chamber of Commerce, International Convention on the Settlement of Investment Disputes, Inter-America Commercial Arbitration Commission) and set of rules and procedures to be followed
- (b) Costs and associated delays
- (c) Choice of Law and
- (d) Enforceability of arbitral award in host country and in the U.S.A.

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<sup>13</sup>See generally, *The Future of Arbitration in Latin America; A Study of its Regional Development*, 8 Case W. Res. J. Int'l Law 480 (1976).



Much greater care should be taken in drafting the "agreement to submit Future Dispute to Arbitration" (arbitration clause), for many lawyers believe the trend is finally in that direction.<sup>14</sup>

## X. SOME GENERAL LEGAL CONSIDERATIONS

Although this is not a treatment of the substantive laws involved, some issues should be addressed in preparation for the negotiations since they are favorite subjects of most HGs herein discussed. They include:

- (a) Currency Choice—This is self-explanatory and should not pose a problem in hard currency countries.
- (b) Mandatory local partner—Venezuelan Decree 62 would preempt a 100% Foreign Owned Company in the engineering services sector from performing a feasibility study or project, but Dr. Rafael Soto Alvarez of Superintendency of Foreign Investments (SIEEX) has indicated that they will approve joint ventures for this purpose.<sup>15</sup> This subject is increasingly popular.
- (c) New foreign investment and technology transfer laws<sup>16</sup> raise serious difficulties with certain subjects including the following:
  - (1) The Mexican trademark law raises some interesting questions about protecting individual property rights.
  - (2) Know-how and trade secrets are "intellectual property"—the owner may keep information confidential or transmit it to another for a fee while obligating the recipient to keep it secret. Unless intellectual property rights are enforced companies have less incentive to perform research and development since competitors may obtain valuable property without paying for its development. In this context it is

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<sup>14</sup>The author is scheduled to present a paper on Arbitration in Latin America in the context of Foreign Investment and Technology Transfer in May, 1977 at the meeting of the Inter American Bar Association in Atlanta, Georgia. Many of these concepts are in a transitional state at this time.

<sup>15</sup>Radway, *supra* note 5, at 297.

<sup>16</sup>See generally: for Brazil, Pinheiro Neto, *Multinationals in Brazil* 8 Case W. Res. J. Int'l L. 311 (1972); for Mexico, Camp and Rojas, *supra* note 13; Hyde and Ramirez, *Mexico's New Transfer of Technology and Foreign Investment Laws — To What Extent Have the Rules Changed*, 10 Int'l Law 231 (1976); Perez Vargas, *Revised Mexican Law on Inventions and Marks — A Mexican Perspective*, 66 Trade-mark Rep. 188 (1976); for Venezuela, Radway, *supra* note 5.

appropriate to note the increased interest by HGs to locate TNC research facilities in their countries.

- (3) Relation between duration and confidentiality—there is a conflict between transferors and Latin American HGs on this issue. It is strongly suggested that U.S. companies stand firm on their longer term agreement requirements, as this question appears to have a bearing upon the reason for U.S. technological superiority (the top technology official in Venezuela claims they limit the term to five years in order to stimulate improvements, innovations, and developments). TNCs have thus far demanded greater protection.
- (4) The laws limiting profits and royalties provide no distinction for uniqueness of technology. This is left to the government officials who must apply them. It could conceivably result in a series of agreements for technical assistance, management assistance, systems design, operations analysis, inventory control systems, etc. In other words companies could structure the transaction by acquiescing to the “unbundling” demands, and then design each element in such a way that it can bring in total the fair return that can be justified on the project.
- (5) Fade-out and other similar provisions do not specifically apply unless the transaction involves licensing and affiliate, but they should be interpreted as representing a distinct trend. SIEX’s position is that the TNC may deduct license royalties paid to a foreign parent if the local affiliate fades down to 49%.
- (6) Training—the key element of know-how in technology transfer. The Venezuelan Ayacucho Plan is only a beginning. They need on-the-job training in Venezuela, but that is difficult.<sup>17</sup> They really need arrangements with TNCs to train in the United States and this can be a bargaining item for exchange in the negotiations.
- (7) The “Mexicanization Principles,” which call for preference for local suppliers, should be examined carefully, as they apparently carry a different meaning in different countries.

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<sup>17</sup>See note 5 *supra*.

The TNC should be prepared to justify imports against a local manufacturer who claims he can produce the item and then proceeds to block the import license approval in the appropriate HG agency.

## XI. USE OF THIRD PARTIES DURING NEGOTIATIONS

There is a considerable range of views on the use of third parties in or during the negotiations, despite their employment before (in the bidding or pre-sale stages) and after (during project execution). It should be noted that third parties include local counsel, local accountants or auditors, bankers, and consultants, in addition to an agent or representative. Many companies use local counsel as discussed earlier. The usefulness of an Agent (representative) will very likely be a function of his technical knowledge and/or his credibility with the HG. He can be helpful when an impasse arises, simply by trying to discuss the problem on a level which precludes introduction of nationalistic arguments or positions, which should obviously be avoided at all costs. The agent may be helpful also in accompanying your chief negotiator or the decision maker to the Ministry (for introductions, protocol), or simply as a national who should be sensitive to such otherwise obvious matters as whether the Minister (or Deputy) is being imposed upon if the meeting runs too long, or as a sometimes more objective sounding board.

It should be mentioned that one of the most effective uses of any third party I have ever witnessed involved contact by the U.S. transferor directly with key Registry officials during a negotiation with a local proposed transferee. Because of prior acquaintance with these officials (efforts for which are strongly urged), the U.S. company was able to go to the source to eliminate the bogey which the local unaffiliated company attempted to interject.<sup>18</sup>

Finally, the use of outside consultants with appropriate credentials has been very useful in highly technical negotiations. This provides additional credibility and can easily justify the additional expense if it accelerates negotiations by improving the psychological climate.

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<sup>18</sup>Task Forces to certain Latin American countries have been organized by the Council of the Americas at the request of those HGs, which has provided an excellent opportunity to become acquainted with these Registry Officials. See, Camp and Rojas, *supra* note 12, at 22.

## XII. CONCLUSION

Alleged inequality of bargaining power is often cited as a major reason for developments within the proposed "New International Economic Order," such as commodity agreements, which are further rationalized by some in Latin America as promotng solidarity among developing nations. In fact the ground rules are clearly changing and negotiations for technology and service agreements are far more complex than in the past. There is a need for more information to be presented, and a requirement to be aware of a broader range of considerations beyond the straight economics of the project. It is hoped that the results of the experiences discussed herein will prove useful in dealing with this changing environment.