

Impact of Mexico's Technology Laws

An evaluation of the impact of Mexico's technology legislation on nation's economy, and on local and foreign firms

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It is increasingly evident that there is a critical need to generate and disseminate new information about the process of technology transfer, sources of technology, and mechanisms for controlling the importation of technology into a developing country. I shall attempt to evaluate the impact of Mexico's technology legislation on the economy of the country, on the foreign firm, and on the local firm.

My original task was to discuss doing business in Mexico. Many of you have been personally involved or are with companies involved in the Mexican scene. To talk in a very general way would not be the most beneficial use of time. For those of you who have not been involved in the business scene in Mexico, it would be equally difficult to convey, in anything more than a very general way within the time allotted, the conditions under which one does business in Mexico and some of the questions that a company must address.

Peso Uncertainty

Another factor complicating the design of this presentation is the current state of uncertainty induced by the floating of the peso. Confidence is an important key to successful business, and it is most difficult to feel confident in periods of uncertainty.

Notwithstanding these problems, and because Mexico is so important as a world leader in such areas as the control of technology transfer, some remarks are in order.

The United Nations Industrial Development Organization held its second general conference in Lima, Peru, in March of 1975, in response to the United Nations General Assembly direction of 1973 that UNIDO support establishment of a new international economic order. At the Peru meeting, the so-called Lima Declaration and plan of action on Industrial Development and Cooperation was adopted.

A section of the declaration was devoted to ar-

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ticulating an implementation action plan. Several portions of the action plan refer rather specifically to matters related to the transfer of technology and to licensing; and, further, these portions suggested actions for developing countries and for developed countries. For instance:

A. Within developing countries, national industrialization policy should lay emphasis, among other things, on the *establishment and strengthening of machinery in institutions to regulate and supervise foreign investment and promote the transfer of technology.*

B. Furthermore, it says that cooperation between developing countries should include the creation of the necessary institutional machinery to *enable consultation and coordination in order to obtain better terms for the acquisition of technology, expertise, equities, licensing, equipment, etc. for the developing countries.*

C. The developing countries should share their experience in industrialization and technology as well as their experience in the application of legislative machinery in the economic field in order to disseminate the information among them. The experience shared should include *experience in dealing with foreign investments and transnational corporations with a view toward coordinating policies in this respect.* UNIDO should, therefore, implement and expand its programs of activity in this area.

D. Further, the action plan suggests that cooperation between developing and developed countries take the form, among other means, of *granting the developing countries access to technological know-how and advanced technology, whether patented or not, under fair, equitable, and mutually acceptable conditions.*

Mexico Laws First

In 1973, well before the Lima Declaration, Mexico enacted two laws involving foreign-source technology which were intended to influence the course of industrialization and would affect the way business can be carried on. Both the "Law on the Transfer of Technology and the Use and Exploitation of Patents and Trademarks" and the "Law to Promote Mexican Investment and to Regulate Foreign Investment" have influenced other developing nations of the world and, indeed, the thinking that resulted in the Lima Declaration.

These laws, which affect some \$3 billion of U.S. investment in Mexico, have among their principal purposes:

1. To improve the ability of Mexican enterprises to negotiate for better terms in acquiring technology.
2. To increase the participation of Mexicans in business.
3. To conserve national resources through a more selective process of importation of technology.
4. To prevent abuses by licensors to the detriment of domestic entrepreneurs and the economy of Mexico.
5. To strengthen the technical capabilities of Mexico.

Some questions were raised as to whether or not the legislation will have the desired effects, or whether it will result in a decrease in the quantity or quality of technology available to Mexico.

For the foreign corporation, many uncertainties arise concerning the application of these two laws and even more so from the newer 1976 legislation covering Inventions and Trademarks. Some of these uncertainties include the following:

1. The apparent retroactive application of the law regulating foreign investment. While the law specifically states that it cannot be applied to companies in Mexico prior to enactment, Mexican officials defined any expansion of operations as a new investment. This, in effect, makes it appear applicable to any company which seeks to keep up with the growing market in Mexico.

2. The Law on Technology created uncertainties in the area of long-term protection of valuable proprietary know-how. The Mexican Government has in general placed a 10-year maximum limitation on licensing agreements, but will allow for renewal upon re-registration of the contract. However, should renewal be denied, the Mexican position appears to be that the technology belongs to the licensee, having been bought and paid for over the term of the license.

Operating Problems

The 1976 Patents and Trademarks law itself created some operating problems for U.S. companies:

1. Many U.S. companies, especially companies in the food and food processing industries, worry about the dilution of their trademarks resulting from the requirement for dual marks — the foreign mark and a new Mexican mark which must always appear jointly with the foreign trademark.

2. Another voiced concern revolves around the possibility of a loss of patent value in third countries through compliance with the Mexican code.

3. Finally, some doubt was expressed concerning the validity of certain sections of the law. Mexico ratified the Stockholm Amendments to the Paris Convention on Patents. Some of the Mexican provisions seem to contradict these amendments. However, no clear decision has been made as to which will have the force of law in the country.

Now I will focus on the Law on Transfer of Technology and the Use and Exploitation of Patents and Trademarks. This law is extremely important because it is a basis for other national legislation affecting foreign corporations seeking to sell or license technology.

The first article of the Law on Transfer of Technology created the National Registry of the Transfer of Technology within the Ministry of Industry and Commerce. Jaime Alvarez Soberanis is the current director of the Registry, and the first director was Enrique Aguilar. Since it was established, the Registry has had some 6,500 applications for registration.

The Law on Transfer of Technology gives the state the power to determine the registration, evaluation, and acceptance or denial of contractual transactions taking place in Mexico. The law goes to considerable length to detail the reasons for denial of registration. There are 14 reasons for denial. Contracts which contain any of the following clauses may not be registered. Six of these allow for no exceptions, as noted. Denials will be based on clauses which:

1. Transfer technology that is freely available in Mexico (no exceptions).
2. Set a price out of proportion to the technology acquired or impose an excessive burden on Mexico's economy.
3. Permit the licensor to regulate or interfere with the management of the licensee.
4. Oblige the licensee to grant back to the licensor the patents, trademarks, innovations, or improvements it makes (no exceptions).
5. Limit the licensee's research and development efforts (no exceptions).
6. Oblige the purchase of equipment, tools, parts of raw materials from a certain supplier only.
7. Prohibit the use of complementary technology.
8. Prohibit or restrict the export of goods or services by the licensee in a way contrary to Mexico's interest (no exceptions).
9. Require that goods produced by the licensee be sold to the licensor only.
10. Oblige upon licensee to permanently employ personnel appointed by the licensor.
11. Limit production volumes or impose sale prices on goods produced by the licensee.
12. Oblige the licensee to sign exclusive sales or representation contracts within Mexico.
13. Establish excessively long terms of enforcement. In no case may these terms exceed a 10-year obligation on the licensee.
14. Clauses which call for disputes to be submitted to the jurisdiction of courts in a foreign country (no exceptions).

Reasons for Denial

An earlier analysis indicated that among the major reasons for denial were:

- Price and unjustified burden
- Unreasonable terms
- Output and price restriction
- Limitations on R&D
- Export restrictions

The initial denial rate overall has run at about 25%-30%, and many of these have been reconciled on reconsideration by one or more of the parties involved.

Early uncertainties as to how the law would be implemented and how the Registry would function gave

way to a broad-based feeling that throughout its short history the directors and staff of the Registry have been highly dedicated, hard working, and of a high professional caliber. They have been reasonable and accessible, even while under the pressure of a substantial backlog of work.

This accessibility has encouraged a free and open dialogue between representatives of U.S. corporations and registry personnel. However, many questions remain concerning the effects of this law on the economy of Mexico, on the foreign source firm, and on the Mexican recipient firm. It is in the interests of all parties concerned to encourage the collection of information on the impact of the technology law. Mexican officials, despite the apparent success of the Registry to date, are seeking answers to these central impact questions.

Mr. Schorr has been intimately involved in one effort at improving the state of information — a study to determine the feasibility of evaluating the *impact* of Mexico's transfer of technology legislation.

As mentioned, over 6,5000 applications for the transfer of technology had been processed by the end of 1975. In June 1975, in discussing the progress of the implementation of the law with Guillermo Becker, Under-Secretary of Industry and Commerce, and Enrique Aguilar, then Director General of the National Registry Office, it was suggested that one might try to evaluate the impact of Mexico's law on the various entities which may have been impacted by it. This led, in the latter part of 1975 to establishment of the feasibility study, which was funded and supported by UNIDO.

The Mexican government is interested in an improved understanding and insight into the effects of the law on the economy of Mexico, on the attitudes and behavior of foreign corporations which have transferred or are seeking to transfer technology to Mexico, on the companies in Mexico which received the technology, and on those companies within Mexico which have not received technology from abroad but are in competition with companies in Mexico which have received technology from abroad.

It appeared then — and nothing has developed during the course of the study to alter this impression — that the government is sincerely interested in a greater understanding in terms of whether the intent of the law is being realized, and what if anything should be done to improve the results of the application of the law so as to realize more fully some of the aspirations of the Government of Mexico.

From UNIDO's viewpoint, in addition to the mandate from the Lima Declaration and its plan of action, the proposed study would aid in responding to the increasing interest of other countries of the world in promulgating and implementing their own transfer legislation.

It was deemed necessary to conduct a feasibility study before proceeding with a full research effort in order to determine:

1. What are the areas of concern?
2. Are data available to help provide insights into these areas?
3. Would those who have the data be willing to part

with it?

4. Given that the answers to the previous three questions are positive, what would be the most cost-effective way to approach the acquisition of the information, and what might be the cost of doing so?

Accomplishments

Now briefly, what was done. Several passes were made at formulating questions of interest to the Government of Mexico; these were finally agreed upon. Discussions were held with a rather broad spectrum of government officials within the Mexican economy who might have an input to the study. Other discussions were held with some members of industry associations as well as with industrialists within Mexico including those who had received technology from abroad and those who had not received technology from abroad. In addition, there were interviews with a small sample of multinational companies which had transferred their technology to Mexico.

A questionnaire was used as a basis for discussion. It was not the intent of the feasibility study to obtain answers to the questions at this time; but rather to address the issues of *whether* or not data was available, *could* it be made available, *would* it be made available, *what would* be the best way of going about doing the study, and most importantly to determine *whether* a full-fledged study would be considered of importance.

The answers to these issues were essentially positive. That is, there were areas of concern deemed to be of importance, such as:

1. Understanding better whether and in what way the application of the Laws on Transfer of Technology had affected the attitudes of transnational corporations toward doing business in Mexico.

2. Whether there had been a diminution, increase, or no change in interest in doing business in Mexico.

3. Whether the cost of doing business in Mexico had changed.

4. Whether the implementation of the legislation contributed to making the rules of the game of doing business in Mexico clearer and thereby reducing uncertainty.

Insofar as the availability of data, there is a certain amount which is quantitative in character and relates to such matters as the changing cost of doing business in Mexico as a result of the legislation. In many other areas, however, the data, if derived from impressions, is subjective.

By and large, the small sample of industrialists with whom we spoke indicated a willingness to supply such data under the correct auspices. In fact, several of them took the time to fill out the questionnaire rather than just use it, as suggested, as a basis for discussion during interviews with them. In all cases the executives involved were extremely generous with their time and in sharing their thoughts.

As for the desirability of doing the full study, it was fairly universally expressed that an objective study could prove of substantial value.

Among the 45 people interviewed, it is particularly interesting to note, no one expressed a desire to avoid

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provision that (the licensee) shall not sell products involving the know-how, and not involving any patents, in the United States." Defense counsel replied that he thought that such a provision would be illegal, and that his client had not done that.

It is thus seen that in practical terms the real legal problems in international licensing transactions do not revolve about the applicable law so much as about the facts. The real questions are how the facts will be viewed in terms of the probable intent underlying, and effects flowing from, the arrangement, and in terms of whether the perceived view of the facts will lead to any antitrust enforcement actions. In that context and for that purpose, the Guide may be invaluable, when it is utilized with sophistication and discernment.

NOTES

1. *Guide*, preface page.
2. See 15 U.S.C. §§ 45 (a) (b), 46 (g), 57a(a)(1)(B); Petroleum Ref. Assn. v. FTC, 482 F. 2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).
3. 5 U.S.C. §§ 553, 556, 557.
4. See *Guide*, p. 1.
5. 28 C.F.R. § 50.6.
6. See 16 C.F.R. § 1.1-1.4.
7. See *Guide*, p. 1.
8. *Guide*, preface page.
9. See *Guide*, preface page.
10. See *Guide*, p. 1.
11. Cf. McLaren, *The Licensing of Technology Under the United States Antitrust Laws*, 40 *Antitrust L.J.* 931, 935 (1971).
12. *Ibid.*
13. 15 U.S.C. §§ 1-2.
14. See *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-12 (1972); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 5 (1958).
15. See *Guide*, p. 3.
16. See *Guide*, pp. 4-5.
17. See *Guide*, p. 5.
18. See *ibid.*
19. *Ibid.*
20. *Id.* at 5-6.
21. *Id.* at 9.
22. See *id.* at 28.
23. See *Guide*, pp. 28-29.
24. See *Guide*, p. 29.
25. *ibid.*
26. *Id.* at 30.
27. *Id.* at 3.
28. *Id.* at 30.
29. See *Guide*, pp. 30-31.
30. *Ibid.*
31. *Id.* at 33-34.

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development of better information about the law and its impact.

As the feasibility study progressed, one area of concern appeared when it became evident there was difficulty in discriminating between the impact of the Law on Transfer of Technology and that of the more recent Law on Inventions and Trademarks which was established coincident with the timing of the study.

The report with its recommendations was submitted to the Mexican Government through UNIDO and recognition was expressed by the parties concerned on

the usefulness and validity of the feasibility study. Consequently, UNIDO is considering the possibility of extending this type of study to other countries.

In order to reduce the burden that might be placed by the information gathering chores on the companies affected, should such studies be initiated, a statistical sampling approach will be taken.

It is our hope, if the plans as we understand them are carried out over the next year or 18 months, that we will be able to give you the information resulting from these in-depth studies at a Licensing Executives Society meeting.

Challenges of Technology Exchange

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interested in western culture and so vigorously imported foreign technology. Japanese industries may be called a showcase of world technology. I believe it has been one of the primary factors which drove us up to today's industrial level. And yet, we have not completely westernized. We still preserve a strong cultural identity and we intend to do so as far as it does not retard our effort toward affluence — the affluence both in material and spiritual sense.

Japan today is facing mounting problems both politically and economically. Politically we are a divided country. It is not a monolithic nation as it is so often misconceived by foreign people. The government has lost its leadership and it is failing in its attempt to create a national consensus. We are in a stage of political instability. The Liberal Democrats, who have been in power for the past 30 years, may lose its majority in the Diet for the first time. Nobody knows what will happen after the opposition parties assume the majority, because the policies of the opposition are totally unknown.

Economically, it is forecast that the world consumption of oil will exceed production by the late 1980's and oil may be rationed. Japan swallows 250 million tons of crude oil every year. If our oil consumption grows at the current pace, by 1990 we will see hundred-ton tankers lined up three miles apart from the Arabian Gulf to Tokyo Bay. What can we produce to pay for that oil? Automobiles, yes. Color TVs, yes. But just as we are losing competition to Hong Kong, Taiwan and Korea in textile trade someday we will lose our competitiveness in TVs, automobiles and ships, just like England and the U.S.A. lost to Japan in these fields.

Yet there is no master plan to steer the country in these difficult times because of the lack of consensus.

I may sound like a pessimist. But many other business executives in Japan feel the same way. We really need a realistic foundation on which we can establish a consensus of the people. Perhaps the most valuable know-how Japan needs keenly today is how to find a breakthrough in the current turbulent age, and how we can sustain a highly industrialized yet highly fragile economy in the era of uncertainties.