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Keywords

Technology, Foreign Investment, Investment, Copyright, Industrial and Intellectual Property, Intellectual Property Law

confusing communications discussed at the trial court and court of appeals levels, and also simplified the Court's task. Both parties to the Treaty agreed to an interpretation consistent with American society's view concerning civil rights.

VII. CONCLUSION

In *Sumitomo Shoji America, Inc. v. Avigliano*, the Supreme Court held that a Japanese owned company that incorporated in the United States, must comply with U.S. civil rights laws. The company had argued that article VIII(1) of the Japanese Treaty permitted it to hire executive and managerial personnel "of their choice," without complying with U.S. discrimination laws. The Supreme Court however, went to a different section of the Treaty and found a seemingly simple answer to the dispute. Article XXII(3) provided that a company created in the United States is a company of the United States. Therefore, U.S. discrimination laws could be applied. The Supreme Court relied in part on the views of the Governments of Japan and the United States. Both Governments stated that where a company incorporates within the jurisdiction of the other country, the company becomes a citizen of the other country. Thus, the Court's decision did not upset the political community.

However, the Court did take an extremely narrow stance and avoided many difficult issues. This case did not resolve the issue of whether a purely Japanese corporation, operating in the United States, can blatantly discriminate in violation of U.S. laws. The Japanese Treaty was not written to license each country's companies to discriminate. Rather, the Treaty was written to assist foreign companies to establish themselves in the other country's business community. Reverse discrimination was not addressed by the Treaty, nor was it in the minds of the Treaty drafters when the Treaty was written. The Court could have taken a bolder stance against discrimination, and held that even article VIII(1) does not permit unfettered discrimination.

Robert M. Cooper

The New Mexican Transfer of Technology Law

The original Mexican transfer of technology law¹ (Old Technology

Ct. 2379.

1. Law on the Registration of the Transfer of Technology and the Use and Exploitation

Law) was replaced on February 10, 1982, by the New Law on the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks² (New Technology Law). The New Technology Law, as did the Old Technology Law, regulates the selection of foreign technology to be used in Mexico and the terms of its transfer to Mexican recipients.³ This regulation is accomplished under the New Technology Law, as it was under its predecessor, by requiring transfer of technology agreements to be registered with the National Register of Transfer of Technology⁴ (Register). An agreement must be registered to have any legal effect in Mexico,⁵ and before an agreement may be registered, it must meet certain standards set by the Mexican Government.⁶ The registrability of transfer of technology agreements under the Old Technology Law was determined in an almost totally ad hoc manner.⁷ A positive aspect of the New Technology Law is that it requires the promulgation of administrative procedures and guidelines for applying the law.⁸ Such procedures and guidelines, if adhered to, should result in more predictability in decisions as to the registrability of agreements and, thus, greater certainty for the contracting parties.

Overall, however, the New Technology Law is a more restrictive law than its predecessor. Under the New Technology Law more types of agreements must be registered than under the Old Technology Law;⁹ foreign parties to a transfer of technology, as well as the Mexican recipient, must now register their agreements;¹⁰ more conditions must be met before agreements may be registered;¹¹ sanctions for violation of the New Technology Law are substantially greater than under the Old Technology Law;¹² and sanctions will be imposed on foreign transferors of technology

of Patents and Trademarks, D.O., Dec. 30, 1972. For an English translation, see 12 I.L.M. 421 (1973) [hereinafter cited as Old Technology Law].

2. D.O., Jan. 11, 1982, First Transitory Art. For an English translation of the New Technology Law, see LES NOUVELLES: J. LICENSING EXECUTIVES SOC'Y, LES NEWS SECTION 8 (Mar. 1982) [hereinafter cited as New Technology Law].

3. The New Technology Law, as did the Old Technology Law, regulates transfers of technology from Mexican transferors to Mexican recipients. Brill, *Transfers of Technology in Mexico*, 4 DEN. J. INT'L L. & POL'Y 51, 54 (1974).

4. New Technology Law, *supra* note 2, at arts. 2-3; Old Technology Law, *supra* note 1, at arts. 2, 9.

5. New Technology Law, *supra* note 2, at arts. 6, 11; Old Technology Law, *supra* note 1, at arts. 5-6.

6. New Technology Law, *supra* note 2, at arts. 15-17; Old Technology Law, *supra* note 1, at arts. 7-8.

7. TECHNOLOGY TRANSFER: LAWS AND PRACTICE IN LATIN AMERICA 10-11 (B. Carl ed. rev. ed. 1980) [hereinafter cited as TECHNOLOGY TRANSFER].

8. New Technology Law, *supra* note 2, at arts. 8-9.

9. Compare New Technology Law, *supra* note 2, arts. 2-3 with Old Technology Law, *supra* note 1, arts. 2, 9.

10. New Technology Law, *supra* note 2, at art. 5.

11. Compare New Technology Law, *supra* note 2, arts. 15-17 with Old Technology Law, *supra* note 1, arts. 7-8.

12. Compare New Technology Law, *supra* note 2, arts. 11, 18-23 with Old Technology

as well as on the Mexican recipients.¹³ The more restrictive nature of the New Technology Law would seem to portend a reduction in the transfer of technology to Mexico.

I. BACKGROUND

The Old Technology Law was enacted in response to the feeling of the Mexican Government that foreign suppliers of technology were in many cases taking advantage of Mexican recipients by supplying inadequate and obsolete technology.¹⁴ The Mexican Government also felt that the foreign suppliers of technology frequently charged excessively high prices for the technology transferred and imposed improper restrictions on Mexican recipients.¹⁵ Thus, the two main objectives of the Old Technology Law were to strengthen the negotiating position of Mexican firms in acquiring technology and to prevent abusive licensing practices by foreign technology transferors.¹⁶ Other objectives were to contribute to the development of the Mexican economy and to encourage the development of indigenous technology.¹⁷

During the time the Old Technology Law was in effect, it was administered cautiously, flexibly, and pragmatically.¹⁸ As a consequence, substantial amounts of technology continued to be transferred to Mexico,¹⁹ Mexican firms were saved about \$640,000,000 in royalties,²⁰ and many restrictive clauses were eliminated from agreements.²¹ Thus, the Old Technology Law seemed to be working. Mexican recipients had been put in a

Law, *supra* note 1, art. 6.

13. New Technology Law, *supra* note 2, at arts. 18-23.

14. Old Technology Law, *supra* note 1, Preamble; Brill, *supra* note 3, at 51.

15. *Id.* The restrictions the Mexican Government sought to eliminate included limitations on research and development, export prohibitions or limitations, limitations on the recipient's production, distribution and marketing, and intervention by the technology supplier in the management of the recipient.

16. Old Technology Law, *supra* note 1, Preamble; Barrett, *The Role of Patents in the Sale of Technology in Mexico*, 22 AM. J. COMP. L. 230, 234 (1974).

17. Old Technology Law, *supra* note 1, Preamble.

18. TECHNOLOGY TRANSFER, *supra* note 7, at 9-11; Camp & Magnon, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology*, 8 LAW. AMERICAS 1, 8 (1976).

19. There are not enough statistics available to determine whether the rate of transfer of technology to Mexico decreased, increased or remained constant during the time the Old Technology Law was operative. A great amount of technology was still being transferred, however. TECHNOLOGY TRANSFER, *supra* note 7, at 30-36. In fact, Mexico had one of the highest volumes of applications and registrations of technology transfer agreements of any Latin American country in the mid-1970s. Correa, *Transfer of Technology in Latin America: A Decade of Control*, 15 J. WORLD TRADE L. 388, 405 (1981). Also, most multinational corporations continued to do business in Mexico after passage of the Old Technology Law. Kantor, *Restrictions on Technology Transfer in Latin America*, 68 TRADEMARK REP. 552, 566 (1978).

20. TECHNOLOGY TRANSFER, *supra* note 7, at 38.

21. *Id.* at 32-38.

better bargaining position²² and, as a result, were receiving more suitable technology at lower cost and on more equitable terms.

Why, then, has the Mexican Government enacted a new, more restrictive law with the potential to diminish the flow of much needed technology²³ to Mexico? The answer is probably threefold. First, since the Old Technology Law was successful, the Mexican Government was probably encouraged to try to drive an even harder bargain for the Mexican recipients of transferred technology through increased regulation of such transfers. Second, it was thought at the time that the Mexican economy was strong,²⁴ and the Government may have believed that foreigners would seek out its markets for technology even if greater restrictions were imposed on the transfer of such technology. Third, and probably most important, is the spirit of Mexican nationalism.²⁵ This new law seems to be one more step in the process of "Mexicanization."²⁶

II. EXAMINATION OF THE NEW TECHNOLOGY LAW AND COMPARISON WITH THE OLD TECHNOLOGY LAW

A. *Who Must Register?*

Under the Old Technology Law, the Mexican party²⁷ to a transfer of technology agreement was required to register the agreement.²⁸ Nonresident foreign suppliers of technology could, at their option, request regis-

22. Hyde & de la Corte, *Mexico's New Transfer of Technology and Foreign Investment Laws—To What Extent Have the Rules Changed?*, 10 INT'L LAW. 231, 251 (1976).

23. Mexico is a semi-industrialized country, but it has not reached the level of technological development of the United States or Europe. Thus, the transfer of technology to Mexico is necessary for its continuing development. Barrett, *supra* note 16, at 231; Brill, *supra* note 3, at 60-61; Gordon, *The Contemporary Mexican Approach to Growth with Foreign Investment: Controlled But Participatory Independence*, 10 CAL. W.L. REV. 1, 32 (1973).

24. Mexico's rapidly developing economy put it out of the class of other third-world nations, and made the country an attractive place for foreign investors. Barrett, *supra* note 16, at 231. The Mexican economy was still considered strong despite the 1976 devaluation of the peso. Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEX. INT'L L.J. 289, 305 (1978). Recent economic developments in Mexico, including further devaluations of the peso, the nationalization of Mexican banks and the growing balance of payments deficit indicate that the Mexican economy is much weaker than most experts had thought it to be. The Denver Post, Oct. 2, 1982, at 2B, col. 3.

25. Gordon, *supra* note 23, at 18-26.

26. Mexican ownership and control of the means of production and distribution have been progressively increased in Mexico in a series of steps since the Revolution in 1910. This process of increasing the limitations on foreign participation in the economy is referred to as Mexicanization. *Id.* at 18-19.

27. The Mexican parties required to register were natural persons or corporations of Mexican nationality, resident aliens, foreign corporations established in Mexico, and agencies or branches of foreign undertakings established in Mexico. Old Technology Law, *supra* note 1, at art. 3.

28. *Id.*

tration of agreements to which they were a party.²⁹ Under the New Technology Law, the same parties that were required to register under the Old Technology Law are still obligated to do so, but nonresident aliens and foreign corporations not established in Mexico must now register agreements as well.³⁰

This new requirement that nonresident aliens and foreign corporations must register agreements to which they are a party seems an unwarranted extraterritorial extension of Mexican law,³¹ especially since the law provides that sanctions may be imposed on these nonresident aliens and foreign corporations for failure to register and for certain other prohibited conduct.³² This extension is presumably predicated on effects jurisdiction³³ since foreigners are only required to register agreements which have effects in Mexico.³⁴ The extraterritorial application of a nation's laws is not without precedent.³⁵ However, it is still generally condemned in the international community,³⁶ and it seems that the goal of regulating the transfer of technology to Mexico could be achieved without obligating foreigners to register. Also, since fines can potentially be extremely large,³⁷ this requirement of the New Technology Law that nonresident aliens must register will undoubtedly make foreign technology suppliers hesitant to transfer technology to Mexico.

B. *What Agreements Must be Registered?*

Under the New Technology Law, as under the Old Technology Law, all agreements, contracts, or other documents having effects in Mexico

29. *Id.*

30. New Technology Law, *supra* note 2, at art. 5. In addition, the New Technology Law now requires enterprises with state participation to register their agreements. *Id.* Also, the registration of agreements will now be required of the previously exempt in-bond industries. *Id.*, art. 4. The in-bond industries were authorized by the In-Bond Assembly Program in 1965. In order to increase Mexican employment, certain U.S. companies were authorized to establish 100 percent U.S.-owned manufacturing plants in Mexico in areas where there is high unemployment. Raw materials are shipped in bond to Mexico and processed. The finished goods are returned to the United States for sale. No U.S. or Mexican duties are levied on the shipments of materials or finished goods. Radway, *Doing Business in Mexico: A Practical Legal Analysis*, 14 INT'L LAW. 361, 369-70 (1980).

31. Jaime Alvarez Soberanis, former Director of the Register, acknowledged that Mexican law cannot impose obligations on nonresident aliens. Soberanis, *Legal Aspects Concerning the Technology Transfer Process in Mexico*, 7 GA. J. INT'L & COMP. L. 17, 20 (1977).

32. New Technology Law, *supra* note 2, at arts. 18-23.

33. Under this principle, countries claim jurisdiction over persons who commit acts outside their national territory if those acts produce effects in their territory. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 105, 152-53 (1972-73).

34. New Technology Law, *supra* note 2, at art. 5.

35. Particularly in the area of antitrust law, the United States, the European Economic Community, Belgium, the Netherlands, Denmark, and other countries have asserted that their laws have extraterritorial reach. Akehurst, *supra* note 33, at 190-212.

36. *Id.* at 181-87.

37. The fines can be as great as the entire value of the deal. New Technology Law, *supra* note 2, at arts. 18-19.

and relating to the use or exploitation of trademarks, tradenames, patents, models and designs, or to the provision of technical know-how, engineering or technical assistance in any form must be registered.³⁸ The New Technology Law has added several other categories of agreements that must now be registered. These are: assignments of patents or trademarks; agreements relating to the operation or administration of enterprises; agreements relating to counseling, consulting or supervision; the licensing of copyrights which potentially may be used industrially; and agreements relating to computer programs.³⁹

Certain agreements need not be registered under the New Technology Law. These include four of the five categories which did not need to be registered under the Old Technology Law, which are: agreements allowing the admission of foreign technicians to install plants or machinery or to carry out repairs; agreements relating to the supply of designs, catalogues, and know-how which come with new equipment and which are necessary for its installation; agreements providing for assistance with emergency repairs; and agreements relating to technical training to be provided to employees.⁴⁰ The New Technology Law also exempts from registration international agreements for intergovernmental technical cooperation and agreements for the exploitation of copyrights for artistic purposes.⁴¹ Under the New Technology Law, the exemption provided by the Old Technology Law for joint venture agreements is no longer allowed.⁴²

C. *Administrative Procedure*

The Old Technology Law established the Register.⁴³ The Register subsists under the New Technology Law⁴⁴ and will continue to be headed by the Secretary of Patrimony and Industrial Development (the Secretary).⁴⁵ There are only minor changes in the procedure for registration of agreements under the New Technology Law as compared to the Old Technology Law.⁴⁶

38. New Technology Law, *supra* note 2, at art. 2; Old Technology Law, *supra* note 1, at art. 2.

39. New Technology Law, *supra* note 2, at art. 2.

40. *Id.* art. 3; Old Technology Law, *supra* note 1, at art. 9.

41. New Technology Law, *supra* note 2, at art. 3.

42. *Id.*; Old Technology Law, *supra* note 1, at art. 9, §5

43. Old Technology Law, *supra* note 1, at art. 1.

44. New Technology Law, *supra* note 2, at art. 8.

45. The Register was originally made subordinate to the Ministry of Industry and Trade [hereinafter Ministry]. Old Technology Law, *supra* note 1, at art. 1. However, in 1977, responsibility for administration of the Old Technology Law and for the Register were transferred to the Secretary. TECHNOLOGY TRANSFER, *supra* note 7, at 5.

46. Under the New Technology Law, technology agreements are to be submitted to the Secretary for registration within sixty business days after their execution. New Technology Law, *supra* note 2, at art. 10. If agreements are submitted within the sixty-day period, registration relates back to the date of execution. Otherwise, registration is effective only from the date of filing of the agreement. *Id.* Likewise, amendments to agreements must be sub-

Even though only minor alterations were made in the actual registration procedure, articles 8 and 9 of the New Technology Law could potentially result in major administrative changes. Article 8 provides that regulations are to be formulated to establish the organization of the Register and the procedures to be followed in administering the New Technology Law.⁴⁷ Article 9 specifies what the functions of the Secretary are to be, and these functions include formulating conditions under which agreements will or will not be registered and setting policies regulating the transfer of technology to Mexico.⁴⁸ The Secretary must set policies according to certain specified criteria such as the promotion and diversification of Mexican industry, acquiring technology at the lowest possible price, and the promotion of Mexican research and development.⁴⁹

Procedures under the Old Technology Law were extremely infor-

mitted for registration within sixty business days, and notice must be given to the Secretary within sixty business days of the early termination of agreements. *Id.* The only change in these requirements as compared to the Old Technology Law is that the periods for filing have been changed from sixty days to sixty *business* days. See Old Technology Law, *supra* note 1, at art. 4.

The Secretary must decide within ninety business days after its filing whether an agreement meets the requirements for registration. If no decision is issued by the Secretary within the ninety-day period, the agreement is deemed registered. New Technology Law, *supra* note 2, at art. 12. Again, the period for filing has been changed from ninety days to ninety *business* days. See Old Technology Law, *supra* note 1, at art. 10.

If the Secretary refuses to register an agreement, a petition for reconsideration accompanied by supporting evidence may be filed with the Secretary within fifteen business days following the effective date of the adverse decision. The Secretary is required to examine the evidence within thirty business days after it is submitted and to make a determination on the petition within sixty business days after all the evidence has been examined. If no determination is made within this sixty-day period, the petition for reconsideration is deemed to have been decided in petitioner's favor. New Technology Law, art. 13. The procedure for petitioning for reconsideration is essentially the same under the New Technology Law as under the Old Technology Law; however, the period for filing the petition for reconsideration has been extended from eight days to fifteen *business* days, and the Secretary now has a total of ninety business days to examine the evidence once it has been submitted and decide the case, whereas under the Old Technology Law he only had forty-five days in which to do so. See Old Technology Law, *supra* note 1, at art. 14.

47. New Technology Law, *supra* note 2, at art. 8.

48. *Id.* art. 9.

49. *Id.* Article 9 lists the criteria as follows:

- a) Adequately orient the technological selection;
- b) Determine the maximum limits of payments according to the lowest price of the available alternative at world levels in the interest of Mexico;
- c) Increment and diversify the production of priority [sic] goods and activities;
- d) Promote the process of assimilation and adaptation of the acquired technology;
- e) Compensate payments through export and/or import substitutions;
- f) Contractually orient, investigation and technological development;
- g) Foster the acquisition of innovative technology;
- h) Promote the progressive reorientation of the technological demand toward internal sources and foment the export of national technology.

mal.⁵⁰ Furthermore, decisions as to the registrability of agreements were almost entirely ad hoc,⁵¹ and there were only minimal guidelines as to how the Old Technology Law was to be interpreted.⁵² As a result, contracting parties could never be totally certain as to how to draft their agreements or what agreements would be approved.⁵³ Although the flexibility of this informal ad hoc approach had its positive points,⁵⁴ the formulation of specific standards and guidelines should provide increased and needed certainty for suppliers and recipients of technology in Mexico.⁵⁵

D. *Reasons Registration Will Be Denied*

The Old Technology Law provided fourteen different conditions under which agreements could be denied registration.⁵⁶ These conditions were divided into two groups: (1) if any one of six conditions was met, denial of registration was mandatory⁵⁷ and (2) if any one of the other eight conditions was met, denial of registration was not automatic, but, in either case, if the technology was of particular benefit to Mexico, an exception could be granted.⁵⁸ The New Technology Law likewise provides

50. TECHNOLOGY TRANSFER, *supra* note 7, at 9-10.

51. *Id.* at 10.

52. *Id.* at 11.

53. *Id.*

54. The staff of the Register has been noted for its accessibility and its willingness to spend considerable time with applicants and to extend deadlines. Furthermore, the staff has been willing to develop imaginative solutions where the facts seem to warrant them. *Id.* at 9-10.

55. It should be acknowledged that under the Old Technology Law, the Register acted, in essence, as the bargaining agent of Mexican technology recipients. TECHNOLOGY TRANSFER, *supra* note 7, at 9-10; Hyde & de la Corte, *supra* note 22, at 251. It is not anticipated that the role of the Register will change under the New Technology Law. The Register can, however, still act as a bargaining agent even though certain rules and guidelines are spelled out in advance of the negotiations, and it is hoped that this is the approach the Register will take.

56. Old Technology Law, *supra* note 1, at art. 7.

57. *Id.* arts. 7-8. The six conditions for which denial of registration was mandatory were: (1) where the technology was already available in Mexico; (2) where the licensee was required to assign to the technology supplier patents, trademarks, developments or improvements obtained by the recipient; (3) where the exportation of goods or services produced by the recipient was prohibited or limited; (4) where the term of the agreement was too long (the term could never exceed ten years); (5) where the agreement was to be governed by non-Mexican law; or (6) where limitations were imposed upon the recipient's research and development.

58. *Id.* art. 8. The eight conditions for which exceptions could be granted were: (1) where the price of the technology was excessive; (2) where the technology supplier was permitted to intervene in the management of the recipient; (3) where the recipient was obligated to acquire equipment, tools, parts or raw materials exclusively from a specified source; (4) where the agreement restricted the use of complementary technology; (5) where the recipient was obligated to sell goods exclusively through the technology supplier; (6) where the recipient was required to permanently use personnel designated by the technology supplier; (7) where production volumes were limited or sale or resale prices were imposed for national production or for the recipient's exports; or (8) where the recipient was required to enter

conditions under which agreements can be denied registration.⁵⁹ However, under the new law, denial of registration is never mandatory. An exception can always be granted if the technology is of particular benefit to Mexico.⁶⁰

This is one provision of the New Technology Law which is actually less restrictive than the corresponding provision in the Old Technology Law, and it should give technology suppliers a new bargaining tool.⁶¹ However, since the provision seems to be intended to allow the Mexican Government to determine on an ad hoc basis which technology transfers are of benefit to Mexico, some uncertainty for the contracting parties seems likely. This provision also seems intended to give the Mexican Government a way to adapt the law to Mexico's changing technological and economic needs.⁶² Although this ability to alter the administration of the law as circumstances change may be desirable in some respects, it will produce uncertainty for the contracting parties since the interpretation of "benefit" will constantly be changing.⁶³ Thus, despite the fact that this provision of the New Technology Law is actually less restrictive than the corresponding provision in the Old Technology Law and could act as an incentive to technology transfer, the overall effect seems neutral because of the disincentive resulting from the uncertainty as to what contracts will be granted exceptions.

The New Technology Law provides seventeen distinct conditions which can be grounds for refusing registration of a transfer of technology agreement.⁶⁴ Nine of these conditions are identical to ones which were the basis for denial of registration under the Old Technology Law.⁶⁵ In addi-

into exclusive sales or representational contracts in Mexico with the technology supplier.

59. New Technology Law, *supra* note 2, at arts. 15-16.

60. *Id.* art. 17.

61. Thus, it may be possible for those technology suppliers who can show that transfer of their technology will benefit Mexico to obtain higher royalties or to get relief from provisions of the New Technology Law they feel are particularly onerous.

62. Exceptions foreseeably will be granted to encourage the transfer of the types of technology Mexico desires and transfers which produce favorable economic results. Also, the provision could be used to encourage or discourage transfer of technology *per se*. Thus, if the flow of technology to Mexico should decrease as a result of the increased restrictiveness of the new law, more exceptions could be granted to promote technology transfer.

63. The uncertainty that may result from changing interpretations of "benefit" and from the ad hoc determination of which agreements will be granted exceptions may be prevented if the guidelines that are to be issued define the scope of "benefit" and if changes in interpretations of the term are made public in advance of the use of such a changed interpretation.

64. New Technology Law, *supra* note 2, at arts. 15-16.

65. Thus, under the New Technology Law as under the Old Technology Law, agreements can be refused registration if they: (1) provide for the transfer of technology readily obtainable in Mexico; (2) if the price is disproportionate to the technology acquired or constitutes an unjustified burden on the Mexican economy; (3) if the agreement enables the technology supplier directly or indirectly to control or intervene in the management of the buyer; (4) if restrictions are imposed on research and development by the buyer; (5) if the export of goods or services produced by the buyer is prohibited or restricted in a way con-

tion, five of the conditions are very similar to ones provided for in the Old Technology Law,⁶⁶ and the changes made are basically codifications of the Register's interpretation of the corresponding provisions in the Old Technology Law.⁶⁷ The New Technology Law further provides three new conditions which, if met, may result in refusal to register an agreement.⁶⁸

The first of these new conditions provides that agreements may be denied registration if the technology purchaser is obligated to maintain the technical information in secrecy beyond the duration of the technol-

trary to the interests of Mexico; (6) if the use of supplementary technology is prohibited; (7) if production volumes are limited or sale or resale prices are imposed on the buyer's Mexican production or exports; (8) if the period of validity of the contract is too long; or (9) when the technology recipient must permanently employ personnel designated by the technology supplier. *Id.*

66. The five conditions and the changes made are as follows:

1. The obligation of the buyer to transfer to the supplier patents, trademarks or innovations or improvements with or without compensation is still grounds for refusal to register an agreement, but an exception is made under the New Technology Law if the obligation is reciprocal or if it is of benefit to the buyer.

2. The obligation to acquire equipment, tools, parts, or raw materials exclusively from a specified source is a grounds for refusal to register under the New Technology Law only if there exist alternate sources of supply in national or international markets. The existence of other sources was not a limitation placed on this condition under the Old Technology Law.

3. The New Technology Law provides that agreements may not be registered if an obligation is imposed to sell products exclusively to specified clients. Under the Old Technology Law only agreements requiring exclusive sales to the technology supplier were nonregistrable.

4. Whereas under the Old Technology Law agreements could be denied registration if they required the buyer to conclude an exclusive sales or representation contract with the supplier in Mexico, under the New Technology Law such an obligation will be allowed if the technology supplier is in a better position to distribute or sell the products.

5. Under the Old Technology Law, agreements could not be registered if they required disputes arising under the agreement to be decided in foreign courts or according to foreign law. The New Technology Law provides that registration may be denied if lawsuits are submitted to foreign courts except where the agreement involves the export of Mexican technology or when the agreement is submitted to foreign arbitration and the arbiter applies Mexican law.

Compare New Technology Law, *supra* note 2, arts. 15-16 with Old Technology Law, *supra* note 1, arts. 7-8.

67. See TECHNOLOGY TRANSFER *supra* note 7, at 12-13, 20, 30; Kantor, *supra* note 19, at 561.

Many of these interpretations that were codified in the New Technology Law were those contained in the "Summary of the General Criteria of Application of the Technology Law" [hereinafter Summary] which was issued and widely circulated by the Ministry in December, 1974. The Summary did not have the force of an executive order or regulation, but the purpose of the Summary was to set forth the more relevant considerations which were to guide the Ministry in the application of article 7 of the Old Technology Law. Hyde & de la Corte, *supra* note 22, at 235.

68. New Technology Law, *supra* note 2, at art. 15.

ogy transfer agreement.⁶⁹ Under the Old Technology Law, the Register had construed transfers of technology as sales of technology.⁷⁰ As a consequence, the recipient acquired unrestricted use of the transferred technology, subject only to prior perfected industrial property rights,⁷¹ and was able to continue use of the transferred technology at the expiration of the technology transfer agreement.⁷² Also, the Register has in the past denied the registration of agreements which imposed any type of obligation on the recipient beyond the term of the technology transfer agreement.⁷³ Thus, this new provision seems only to be a codification of existing practice,⁷⁴ and, although technology suppliers will always be concerned about having their technology kept secret, should have little impact on the flow of technology to Mexico as compared with actual practice under the Old Technology Law.

The second new condition provides that registration may be denied if the agreement does not expressly make the supplier responsible for infringement of the industrial property rights of third parties.⁷⁵ This provision represents a tighter restriction on transfers of technology to Mexico than has previously been imposed. Under the Old Technology Law, the Register had, in some instances, compelled the inclusion of contract clauses, which required the supplier to indemnify the recipient for a portion of damages which the recipient might have to pay for infringement of third parties' rights if the infringement resulted from the use of the supplier's patents or know-how.⁷⁶ The language of the new provision is very broad. Whether "responsibility" includes both defending and paying damages or only paying damages is not clear. The responsibility of the technology supplier is not conditioned on the recipient's proper use of the transferred technology. Also, there are no geographical limitations, and the wording implies responsibility for infringement all over the world. Assuming such a potentially large responsibility could be a burden many technology suppliers might not want to assume.

The third new condition makes the lack of a guarantee by the supplier of the quality and results of the transferred technology a grounds for refusal to register an agreement.⁷⁷ The nature of the guarantee that will be necessary to satisfy this condition is not known. The Preamble to the

69. *Id.* The term of a technology transfer agreement can never exceed ten years. New Technology Law, *supra* note 2, at art. 16.

70. Camp & Magnon, *supra* note 18, at 15-16.

71. TECHNOLOGY TRANSFER, *supra* note 7, at 16.

72. *Id.* at 29.

73. *Id.* at 16.

74. Even if the duration of technology transfer agreements is less than ten years, the Register has in the past allowed the technology purchaser to agree to maintain the technology in secrecy for ten years from the date it is received. Camp & Magnon, *supra* note 18, at 20.

75. New Technology Law, *supra* note 2, at art. 15.

76. TECHNOLOGY TRANSFER, *supra* note 7, at 26.

77. New Technology Law, *supra* note 2, at art. 15.

Old Technology Law states that a goal of that law was to prevent the transfer of obsolete and inadequate technology to Mexico. Thus, the supplier will probably, at least, have to guarantee that the transferred technology is modern and complete enough so that an end result can be achieved.⁷⁸ Two other Latin American countries have provisions in their transfer of technology laws requiring that the technology be guaranteed.⁷⁹ Both laws provide that the supplier must guarantee that the technology will be complete and adequate enough to ensure the attainment of the purpose of the transfer. Also, both laws provide that the technology supplier must furnish technical assistance, if necessary, to help the technology recipient make the best use of the technology. Whether Mexico will require similar or greater assurances in the guarantee remains to be seen. However, whatever the nature of the guarantee, this is one further condition that must be met and will foreseeably deter at least some technology suppliers from transferring technology to Mexico.

E. Sanctions

Probably the most striking changes in the New Technology Law are in the sanctions that can be imposed for violations of the law. The penalty for violating the Old Technology Law was that an unregistered agreement had no legal effect in Mexico.⁸⁰ This penalty still exists under the

78. It would seem that a guarantee that the transferred technology is currently used by the supplier and that the use of that technology results in commercially acceptable products for the supplier should be adequate to conform to the law. Also, given the difficulty of adapting technology to local conditions and to the special needs of specific recipients, this is realistically all the technology supplier can promise.

79. Brazil's Normative Act Number 15 provides in part:

The agreement must:

. . . .

d) contain a clause to the effect that it is compulsory for the supplier, during the term of the agreement, to render technical assistance to the recipient, so as to ensure the best use of the transferred technology;

e) make suitable provision for the contents of the technology to be transferred to be total, complete and adequate to ensure the attainment of the established ends

Normative Act No. 15 of the Ministry of Industry and Commerce National Institute of Industrial Property (Sept. 11, 1975), art. 4.5.1. An English translation may be found in *TECHNOLOGY TRANSFER*, *supra* note 7, at 314 app.

Argentina's law provides that the technical aims which the recipient intends to achieve should be indicated in the technology transfer agreement. Law No. 21,617 of Aug. 12, 1977, art. 7(d). An English translation may be found in *TECHNOLOGY TRANSFER*, *supra* note 7, at 344 app. The law further provides that the technology supplier must guarantee that the technology transferred will enable the recipient to achieve his aims and that the technology supplier will, if necessary, supply adequate training to enable the recipient to use the technology. Law No. 21,617 of Aug. 12, 1977, art. 8. An English translation may be found in *TECHNOLOGY TRANSFER*, *supra* note 7, at 344-45 app.

80. Old Technology Law, *supra* note 1, at art. 6. An unregistered agreement produced no legal effect and was unenforceable before any authority or court. *Id.* In addition, it was necessary to present written evidence of registration to enjoy certain benefits of Mexican law such as tax concessions. *Id.* art. 5; *TECHNOLOGY TRANSFER*, *supra* note 7, at 6.

New Technology Law,⁸¹ but under the new law very substantial fines may be levied for furnishing false information in connection with an application for registration with the intent to deceive the Secretary, for not registering an agreement or an amendment that should be registered, and for refusing to furnish information requested by the Secretary. Of particular note is the fact that the fines for failure to register or for furnishing false information can be as large as the entire value of the bargain.⁸² Under the Old Technology Law, none of the above sanctions was a penalty for violation of that law. It should also be emphasized again that all these sanctions now may be imposed on a foreign technology supplier as well as on the Mexican recipient.⁸³

Finally, the New Technology Law imposes a fine on employees of the Register who breach the article 14 requirement that they maintain in secrecy technological information to which they become privy.⁸⁴ No such fine was imposed under the Old Technology Law. The new provision is significant since it is an additional safeguard to protect the confidentiality of transferred technology.

III. CONCLUSION

As a result of a fervent nationalism, Mexico seeks to achieve independence from foreign sources of capital and technology.⁸⁵ Two additional goals of the Mexican Government are to raise the economic standard of its people, mainly by industrialization, and to provide jobs for its rapidly increasing population.⁸⁶ But to achieve this economic development, the Government recognizes Mexico's continuing need for foreign technology and investment.⁸⁷ Thus, any new law enacted to regulate foreign involvement in the economy must not be so restrictive that it will reduce foreign investment and technology transfers to levels falling below a minimum level for the achievement of positive growth of the Mexican economy.

The New Technology Law is more restrictive than its predecessor, and it remains to be seen whether, as a consequence of its enactment, the flow of technology to Mexico will fall below the level needed to promote continued Mexican economic growth. Argentina has recently had to replace its very restrictive transfer of technology law because the flow of

81. New Technology Law, *supra* note 2, at arts. 6, 11.

82. *Id.* arts. 18-20. The exact amount of the fine is to be determined by the Secretary and will depend on his evaluation of the following factors: the seriousness of the infraction, the good faith and the degree of involvement of the transgressor in the illegal act, and whether fraud was involved. *Id.* art. 23. Provision is made for a hearing, and there is a right of appeal. *Id.* art. 24. If more than one violation of the act has occurred, only the sanction for the most serious violation will be imposed. *Id.* art. 23.

83. Articles 18-21 and 23-24 apply to any party or to any person.

84. New Technology Law, *supra* note 2, at art. 22.

85. Gordon, *supra* note 23, at 18-19, 26-27.

86. PRICE WATERHOUSE, *DOING BUSINESS IN MEXICO* 15 (1981).

87. Gordon, *supra* note 23, at 18, 32. *See* note 23 *supra*.

technology to the country had virtually stopped.⁸⁸ Transfer of technology to the Andean Pact countries is reduced,⁸⁹ and in Brazil it is anticipated that the combination of very restrictive laws, uncertainty as to how those laws will be interpreted, and administrative delays, will cause many suppliers to question the advisability of transferring their technology to that country.⁹⁰ Thus, a too restrictive law or a poorly administered law will result in a decrease in the transfer of technology to a country.

Mexico's Old Technology Law was very ably administered.⁹¹ The New Technology Law provides that procedures and guidelines for the administration and interpretation of the law are to be similarly promulgated.⁹² The promulgation of these procedures and guidelines will hopefully result in increased certainty for the contracting parties, and there is no reason to anticipate that the staff of the Register will not continue its history of competent and fair administration. Therefore, although some decrease in the flow of technology to Mexico seems quite likely as a result of the enactment of the new law, the decrease probably will not be sufficient to halt or severely retard Mexico's economic growth.

Wannell Baird

The Gulf of Maine Maritime Boundary Dispute

The ratification of the Maritime Boundary Settlement Treaty (Treaty) by the Governments of Canada and the United States concludes thirteen years of negotiation during which the two countries failed to settle the dispute over the delimitation of the maritime boundary in the Gulf of Maine area. The Treaty signifies both a departure from the usual course of dispute settlement between the United States and Canada and the emergence of a new forum for the settlement of international disagreements by binding third-party adjudication. Substantively, the Treaty will provide the International Court of Justice (I.C.J.) the opportunity to further clarify existing international law in the area of continen-

88. TECHNOLOGY TRANSFER, *supra* note 7, at 218-19; Kantor, *supra* note 19, at 573.

89. TECHNOLOGY TRANSFER, *supra* note 7, at 82-85. The Andean Pact was formed in 1969 and is intended to be similar to the European Common Market. The current Andean Pact members are Venezuela, Bolivia, Ecuador, Peru and Columbia. Kantor, *supra* note 19, at 553.

90. TECHNOLOGY TRANSFER, *supra* note 7, at 203-04.

91. *Id.* at 9-10.

92. New Technology Law, *supra* note 2, at arts 8-9.