University of Dayton Law Review

Volume 5 | Number 1 Article 7

1980

Multinational Corporations and Lesser Developed Countries — Foreign Investment, Transfer of Technology, and the Paris Convention: Caveat Investor

Warren Landau
University of Dayton

MULTINATIONAL CORPORATIONS AND LESSER DEVELOPED COUNTRIES — FOREIGN INVESTMENT, TRANSFER OF TECHNOLOGY, AND THE PARIS CONVENTION: CAVEAT INVESTOR

I. INTRODUCTION

In recent years, the growth of multinational corporations (MNC's)[1] has been a source of increasing concern in the international community.[2] In an effort to achieve economic independence from these major

1. Much of the literature dealing with foreign investment, transfer of technology, and codes of conduct distinguishes between MNC's, multinational enterprises (MNE's), transnational corporations (TNC's), and transnational enterprises (TNE's). The current mode of reference to business entities is TNE. United Nations use of this terminology is motivated by the desire to encompass more types of business entities within a single term. Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices,* 72 AM. J. INT'L L. 247 (1978). For some scholars, the word "transnational" is more exact than "multinational" since it better conveys the notion that these firms operate across national borders. Daniño, *Regulating the Multinational: A Note on the Divestment Myth,* 10 LAW. AMERICAS 385 (1978). *See also* United Nations Secretariat, The Impact of Multinational Corporations on Development and on International Relations 25 (1974) (U.N. Publication Sales No. 74.II.A.5). Others prefer different terminology in order to convey different ideas. *See, e.g.*, R. TINDALL, MULTINATIONAL ENTERPRISES 10 (1975); *see also* UNITED NATIONS DEPARTMENT OF SOCIAL AND ECONOMIC AFFAIRS, MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT 2-3 (1974); Weston, *"The Global Corporation: Agent of Change"—A Symposium,* 6 J. INT'L L. & ECON. 211, 211 (1971-1972); United Nations Conference on Trade and Development, Guidelines for the Study of the Transfer of Technology 1, U.N. Doc. TD/B/AC.11/9 (1972) (U.N. Publication Sales No. E. 72.II.D.19) [hereinafter cited as Guidelines]; Behrman, *The Multinational Enterprise: Its Initiatives and Governmental Reactions,* 6 J. INT'L L. & ECON. 215, 220 (1971-1972); C. KINDLEBERGER, AMERICAN BUSINESS ABROAD 179-85 (1969); Fatouros, *The Computer and the Mud Hut: Notes on Multinational Enterprise in Developing Countries,* 10 COLUM. J. TRANSNAT'L L. 325 (1971). Whatever terminology is used, it is generally understood that the terminology refers to the operations of the subject entity and not to its legal status. *Id.* at 331.

This comment will use only the term MNC and such term will be understood to refer to any business entity operating from its home base across national borders and whose transnational dealings are more than *de minimus* in relation to its total operations.

2. The MNC has caused much concern due to its operations and characteristics. MNC's, generally large and influential entities, have been perceived as posing a threat to the economic, political, and social sovereignty of LDC's. Daniño, *supra* note 1, at 385. LDC's perceive that MNC's, in making managerial decisions and in operating their enterprises, attempt to achieve least cost production; they do this by coordinating their affiliates and gaining control over local enterprise. This control, however, is exercised for the benefit of the MNC, not the host country. *Id.* at 391, 393.

suppliers of technology, many lesser developed countries (LDC's) have enacted stringent investment and transfer of technology codes.[3] The proliferation of such types of regulation has become a thorn in the relations between developed and underdeveloped nations. These codes and laws have been enacted, however, to rectify perceived inequities and abuses fostered by MNC's. The transfer of necessary knowledge and technology to LDC's has been accompanied by a multitude of restrictions on their use; oftentimes economic resources are depleted in return for inappropriate technologies.[4] Large scale transfers of technology from MNC's have had the effect of inhibiting the development of indigenous technology creating a danger of perpetual technological dependence upon developed countries.[5]

In addition, there is a prevailing opinion to the effect that MNC's have, in fact, achieved a monopoly over know-how and technology. For example, patents granted by LDC's and developed countries are granted mostly to corporations. In LDC's, 84% of the patents granted are granted to foreigners, in particular to MNC's. United Nations Conference on Trade and Development, The Role of the Patent System in the Transfer of Technology to Developing Countries 39, 41, 42, U.N. Doc. TD/B/AC.11/19/Rev. 1 (1975) (U.N. Publication Sales No. E.75.II.D.6) [hereinafter cited as The Role of the Patent System]. Technology, the mainspring of development, is difficult to acquire; when acquired, it is often acquired on unequal terms. *See generally* Ewing, *Transfer and Development of Technology: The Problem of Developing Countries in Perspective*, 11 J. WORLD TRADE L. 1 (1977). *See also* United Nations Conference on Trade and Development, Handbook on the Acquisition of Technology by Developing Countries 11, U.N. Doc. UNCTAD/TT/AS/5 (1978) (U.N. Publication Sales No. E.78.II.D.15) [hereinafter cited as UNCTAD Handbook]; United Nations Industrial Development Organization, National Approaches to the Acquisition of Technology, U.N. Doc. ID/187 (1978) (U.N. Publication Sales No. E.78.II.B.7) [hereinafter cited as National Approaches]. Pointed discussions of this problem may be found in Von Mehren & Gold, *Multinational Corporations: Conflicts and Controls*, 11 STAN. J. INT'L STUD. 1 (1976), and Perlmutter, *Perplexing Routes to MNE Legitimacy: Codes of Conduct for Technology Transfer*, 11 STAN. J. INT'L STUD. 169 (1976).

3. *E.g.*, Law for the Regulation of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks, [Dec. 31, 1972], D.O.; Law to Promote Mexican Investment and to Regulate Foreign Investment [March 9, 1973], 317 D.O. No. 7, at 5; Decision 24 of the Andean Commission, Standard Regime for Treatment of Foreign Capitals and for Treatment of Marks, Patents, Licenses, and Royalties, [Dec. 31, 1970], Registro Oficial No. 264, at 1 (Equador), *reprinted in* 10 *Int'l Legal Mat'ls* 910 (1969); Regulations on Foreign Investments in the Socialist Republic of Vietnam, Decree No. 115/CP (Apr. 18, 1977).

4. Certain technologies transferred to LDC's may be inappropriate either due to market conditions or due to the relative availability of various factors of production. A LDC may have a comparative advantage in technologies utilizing labor but not those utilizing capital. Guidelines, *supra* note 1, at 6.

For a list of typical clauses found in a technology licensing agreement (some of which are extremely restrictive), see Finnegan, *International Patent and Know-How Licensing: The Rules of the Game,* in CURRENT TRENDS IN DOMESTIC AND INTERNATIONAL LICENSING—PATENTS, TRADEMARKS, TRADE SECRETS, KNOW-HOW, AND INDUSTRIAL PROPERTY 113 (1975). *See also* Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273, 274-85 (1977).

5. *See* notes 35-46 and accompanying text *infra*.

Investment and technology codes, however, are double-edged swords. While alleviating technological dependence and controlling the depletion of economic resources, these laws have, in some instances, created a disincentive for potential investors to invest their capital in the enacting state.[6] MNC's acting as investors within LDC's have produced ample benefits. New technology is imported; employment and training are provided for the labor force; new and necessary products are imported. Some commentators have concluded that the disincentive thus created will greatly reduce benefits enjoyed by LDC's as well as by developed nations.[7]

The proliferation of these codes of conduct has had an impact on the development of international law. Old norms have been brought into question. Treaty obligations and relations have been affected.[8] Concepts of jurisdiction[9] and compensation for expropriated property[10] under international law have not been immune from attack. Many LDC's consider that there now exists a new international economic order justifying their sometimes harsh enactments.[11] In particular, national and international systems of protection for intellectual property have been subject to severe attack.[12]

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6. *See, e.g.*, Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEXAS INT'L L.J. 289, 304-05 (1978).

7. *Id.* at 305.

8. *See* notes 136-207 and accompanying text *infra*.

9. There is a growing feeling, prevalent especially among LDC's, that transfer of technology disputes are exclusively within the jurisdiction of the host country. *E.g.*, Report of the Intergovernmental Experts on an International Code of Conduct on Transfer of Technology on its Fourth Session, U.N. Doc. TD/AC.1/11, Annex II (Nov. 23, 1977), *reprinted in* 17 INT'L LEGAL MAT'LS 453, 472-73 (1978) [hereinafter cited as Report of the Intergovernmental Experts]. *Compare* Report of the Intergovernmental Experts *with* Report of the Intergovernmental Experts on an International Code of Conduct on Transfer of Technology on its Fourth Session, U.N. Doc. TD/AC.1/11, Annex III (Nov. 23, 1977), *reprinted in* 17 INT'L LEGAL MAT'LS 453, 480-81 (1978); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 8, 10, 18 (1965); Akehurst, *Jurisdiction in International Law*, [1972-1973] 46 BRIT. Y.B. INT'L L. 189.

10. *Compare* G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) ____, U.N. Doc. A/5217 (1962) *and* Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1975), *with* Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585, 604-10 (1961), Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553 (1961), *and* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-192 (1965).

11. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, ____ U.N. GAOR, Supp. (No. ____) ____, U.N. Doc. A/9559 (1974).

12. *Id.*; UNCTAD Handbook, *supra* note 2, at 47-51; The Role of the Patent System, *supra* note 2. *See also* Greer, *The Case Against Patent Systems in Less-Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973-1974).

American entrepreneurs, however, continue to invest abroad. Three different types of investment strategy are, in fact, employed. These types of investment may be classified as investment in an industry in an LDC, export of goods to LDC's, and the licensing of know-how to local industry.[13] In order to determine what, if any, type of investment is appropriate in a given LDC, the risks, costs, and benefits of each type of investment must be weighed. Thus, as well as assessing monetary costs and benefits (profits), it is necessary for investors to ascertain the degree of protection granted them under local and international law. Local and international law, however, are both reflective of existing attitudes in LDC's as well as social and economic conditions therein.[14] In order to avoid friction with local authorities, it is incumbent upon investors to understand these attitudes and conditions. Since local conditions may, in some instances, affect international law, a further justification for discussion of these conditions is presented. International obligations are greatly respected, though not universally agreed upon.[15] Thus, international law may be an effective limit on local legislation. As international law, local attitudes, and local conditions change, local law may be expected to reflect these changes.

An understanding of the problems and attitudes of underdeveloped countries thus forms the basis for harmonious relations, as well as an ability to predict developments in domestic and international law. In view of the materiality of local conditions and attitudes, as well as domestic and international law, in investment decisionmaking, an in depth exploration of these areas is indicated. Therefore, an analysis of the problems and attitudes of LDC's will be presented in order to provide a basis for understanding, as well as to provide a background for discussion of relevant international law. An example of local investment and technology law will be presented in the form of a discussion of Mexican law. Where helpful, comparisons to the law of other LDC's will be provided. Based upon these discussions, the relevant international law will be portrayed and explained. The effect and relationship of the aforementioned subjects on international law will be discussed. In particular, attention will be directed to the Paris Convention for the Protection of Industrial Property[16] and the Convention on

13. National Approaches, *supra* note 2, at 7.

14. *See* discussion of *rebus sic stantibus*, notes 157-87 and accompanying text *infra*.

15. The vitality of the doctrine *pacta sunt servanda* is evidence in this respect. *See* notes 157-58 and accompanying text *infra*.

16. *Revised* at Stockholm, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923 [hereinafter cited as Paris Convention].

the Recognition and Enforcement of Foreign Arbitral Awards.[17] The Paris Convention, which provides particularly important protections for investors, will be discussed in depth, as will be proposed revisions of that Convention.

II. THE PROBLEMS OF LESSER DEVELOPED COUNTRIES

The ability to control the mode of development is an important factor in the growth and economic development of a state. State economic planning has been a key factor in the development of many developed states and indeed in the high standards of living in some LDC's.[18] The great majority of LDC's have been unable to achieve high growth rates due, in part, to a form of economic imperialism or colonialism practiced by MNC's.[19] Control of key sectors of the economy by MNC's and restrictive business practices employed by these entities have stunted the growth rates of LDC's and have impeded the achievement of economic goals.[20]

The standard of living in many LDC's is very low. It has been estimated that in the year 1970 the per capita income of the richest country in the world was more than sixty times that of the poorest.[21] Measured by income level, it is evident that most countries in Asia, the Middle East, Africa, and Latin America fall into the category of LDC's.[22]

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17. *Done*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter cited as New York Convention].

18. The development of the Israeli economy, for example, has been due, in part, to the activity of the Israeli government. While not completely successful in achieving all the goals set by Israel, centralized planning did contriubte to its trade balance; a moderate rate of economic growth was also maintained in the period of 1963-1967. D. HOROWITZ, THE ECONOMICS OF ISRAEL 171-86 (1967). *But see* B. AKZIN & Y. DROR, ISRAEL 67-78 (1966).

19. Many MNC's, as well as other foreign investors, license their technology on what may be considered unjust terms. In so licensing, MNC's may engage in a number of restrictive business practices. Such practices include the use of tie-in clauses, grant-back clauses, territorial divisions, high royalties, licensee estoppel clauses and others. *See* Perlmutter, *supra* note 2, at 178-90.

20. *See* Joelson & Griffen, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT'L LAW. 5, 6 (1977).

21. D. SNIDER, INTRODUCTION TO INTERNATIONAL ECONOMICS 414-15 (1975). The per capita income for the year 1970 in the United States was approximately 4,294 dollars, while the per capita income of the poorest country, Malawi, was the equivalent of seventy United States dollars. *Id.* at 415.

22. *Id.* at 414. Many other factors besides income distinguish LDC's from developed countries. M. MERHAV, TECHNOLOGICAL DEPENDENCE, MONOPOLY, AND GROWTH 16 (1969). Leibenstein, a professor of economics at the Univesity of California at Berkeley, suggests the following as characteristic of underdeveloped countries:

I. Economic

A. General Characteristics

The problem of underdevelopment has political as well as economic content. Underdeveloped nations have been poor, sometimes poorer than they are now.[23] These countries have "not . . . just recently awakened from a state of blissful or miserable isolation from the rest of the world which 'took off' and passed them by."[24] Until recently, many of these states have been part of a world-wide economic system dominated by the advanced countries. Indeed, until thirty years ago many of these states had been under the political rule of the advanced states.[25]

The achievement of national sovereignty and independence has revealed the disparity between the wealth of the developed countries and the LDC's.[26] Discontent has formed the basis for political goals, as a direct result of the achievement of sovereignty.[27]

As former members of colonial empires, many of these countries had little opportunity to absorb the modern skills, know-how, techniques, and institutions which sometimes emerge as the by-product of

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1. A high proportion of the population in agriculture usually over seventy percent;
2. "Absolute over-population" in agriculture; it would be possible to reduce the number of agricultural workers and not decrease productivity. In other words, the marginal productivity of each worker, at that point, is *de minimus*;
3. Disguised unemployment;
4. Lack of employment opportunities outside agriculture;
5. A low capital to labor ratio;
6. Subsistence level existence;
7. Zero savings for the large mass of the population;
8. Existing savings are achieved by a landholding class whose values are not conducive to investment;
9. Low agricultural output of protein foods;
10. Consumption of income mainly on food and necessities;
11. Export of food and raw materials;
12. Low volume of trade per capita
13. Poor credit and market facilities and poor housing;

II. Technological and Miscellaneous
1. Low yields of foodstuffs per acre;
2. Insufficient training facilities for the development of skilled labor;
3. Inadequate transportation and communication; and
4. Crude technology.

H. LEIBENSTEIN, ECONOMIC BACKWARDNESS AND ECONOMIC GROWTH 40-41 (1963).

23. MERHAV, *supra* note 22, at 17.

24. *Id.*

25. *Id.* at 17-18. Until the end of World War II, several of the Mideast nations were subject to British domination. The United States also exerted control over the Philippines during that period.

26. *Id.*

27. *Id.*

colonialism.[28] MNC's, the products of capitalism,[29] may be viewed by LDC's with suspicion as capitalism may, in the underdeveloped world, be linked to colonialism.[30] Poverty and backwardness in these countries may further be equated with their former colonial status.[31]

Some of the obstacles to growth in LDC's may be formidable indeed. Many LDC's are handicapped by the limited amount and variety of natural resources available.[32] While not decisive in itself, such a handicap certainly disadvantages a state.[33] So too, the labor force in many states may be plagued by illness, illiteracy, indifference, lack of initiative, and lack of education and technical know-how.[34]

One of the most serious problems, however, is that of technological paucity and incomplete control over economic resources.[35] The ability to acquire and utilize resources for the national benefit and growth is, in large part, a function of both control over economic and natural resources and the state of technology. Output can be dramatically improved without any change in the factors of production, by applying more appropriate technology.[36] Many developed countries have benefited immensely by the advent of new and appropriate technology.[37] Technology and technological know-how, however, may be monopolized by large MNC's. Legal restrictions embodied in licensing agreements, contracts, or laws relating to industrial property may and do impede the diffusion of technology to LDC's.[38] So too, the monopolistic position of MNC's in the market, accompanied by the lack of necessity to develop or reveal innovations, is a cause of technological backwardness.[39] MNC participation in in-

28. *Id.* at 20. The attack upon MNC's may well be based, in part, upon suspicion and sensitivity; it may also be an attack upon the symbol of LDC inferiority—MNC's.

29. *Id.* at 21, 32; J. LEWIS, QUIET CRISIS IN INDIA 203 (1962).

30. LEWIS, *supra* note 29, at 203; MERHAV *supra* note 22, at 20-21.

31. MERHAV, *supra* note 22, at 21.

32. SNIDER, *supra* note 21, at 419.

33. A necessity to import some of these raw materials may further strain the balance of payments of LDC's; foreign reserves are also typically scarce. Guidelines, *supra* note 4, at 6.

34. SNIDER, *supra* note 21, at 420.

35. *Id.* at 419, 422. *See also* Guidelines, *supra* note 4, at 1; Ewing, *UNCTAD and the Transfer of Technology*, 10 J. WORLD TRADE L. 197 (1976).

36. SNIDER, *supra* note 21, at 422.

37. *Id.* For example, in the period 1909-1949, 87.5 percent of the growth of per capita income in the United States is attributable to technological progress. Ewing, *supra* note 35, at 197.

38. *See* Guidelines, *supra* note 4, at 23-27; Ewing, *supra* note 35, at 198. For example, if a local licensee is required to grant back ownership of improvements of licensed technology, the host nation will have difficulty in gaining access to the improvement.

39. *See, e.g.*, MERHAV, *supra* note 22, at 33, 36, 37, 60.

vestment might also provide the basis for interference in the internal politics of their host countries, a possibility to which LDC's display particular sensitivity.[40]

One of the reasons that technological dependence has become a nagging and self-perpetuating problem is that the process of industrialization in developed countries has led to specialization. Specialization, the province of the advanced countries, implies a dependence which militates against the independent growth of LDC's.[41] Catering to large markets requires large firms and economies of scale. The technology which is available (largely available in machinery and goods) is adapted to large markets and large scale production typical of advanced countries.[42] Foreign monopolies in the form of MNC's or subsidiaries develop.[43] Since the domestic market in LDC's is largely incapable of sustaining large scale competitive industry,[44] economic incentive for innovation is not present. Hence, the market of LDC's must rely more and more upon techniques and technology imported from advanced countries.[45] Israeli economist Meir Merhav, who worked with the United Nations in the late sixties on the problems of LDC's, stated:

> Whatever the ultimate causes may be, the underdeveloped countries depend for their growth on the techniques of the advanced countries and the consequences of the scales of capacity determined in the latter [advanced states] for the competitive structure in the former [LDC's] are immediately obvious: their narrow markets cannot sustain more than a few firms in each line of production.[46]

The market structure, industry concentration, and economies of scale are factors in technological dependence. Technological dependence and import dependence are problems which have been attacked by LDC's in a number of ways. Technology laws and investment codes have been the means chosen to achieve growth and technological independence.

The attitudes of LDC's, as well as their former colonial status, have led to a number of economic problems. New-found expectations

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40. *See generally* Perlmutter, *supra* note 2, at 169. *See also* Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) 50, art. 2(b), U.N. Doc. A/9631 [hereinafter cited as CERDS].

41. *See* MERHAV, *supra* note 22, at 6, 30-35, 36, 37, 39-60.

42. The technology originates from advanced countries which have large markets. *Id.* at 32-33.

43. *Id.* at 36, 37.

44. *Id.* at 37.

45. *Id.* at 30, 33-36.

46. *Id.* at 37.

and technological dependence have contributed to the intensity of these problems. LDC's are apprehensive of foreign involvement in their economy. These problems and apprehensions have found expression both in international and local law. In particular, the law of LDC's has responded in dramatic fashion to these problems.

III. TRANSFER OF TECHNOLOGY, INVESTMENT, AND INDUSTRIAL PROPERTY LAWS

Regulation of foreign investment is hardly the exclusive province of LDC's. Many developed countries have enacted laws and regulations dealing with the screening and regulation of foreign investment. Canada and Australia are two such countries.[47] Indeed, the United States Code contains many provisions relating to foreign investment.[48] While they are not the only members of the international society to promulgate restrictive laws, LDC's have, however, enacted regulations much more extensive in nature than have developed countries.

LDC legislation relating to investment and transfer of technology is

47. United Nations Centre on Transnational Corporations, National Legislation and Regulations Relating to Transnational Corporations 2, U.N. Doc. ST/CTC/6 (1978) (U.N. Publication Sales No. E.78.II.A.3) [hereinafter cited as National Legislation].

48. While the United States has not erected many barriers in the way of foreign investment, some sectors are screened very closely. For example, the United States has restricted alien investment in the communications sector. 47 U.S.C. § 310 (1976) effectively limits alien investment in radio stations. That section provides that the license required for the operation of a radio station shall not be granted to an alien. Neither may such a license be granted to the representative of an alien, nor to any foreign corporation wherein an alien is an officer or director; such license may not be granted to any corporation when an alien owns more than one-fifth of its stock. Finally, no license may be granted to any corporation which is effectively controlled by an alien influenced corporation. *Id.* § 310(b).

Congress has also begun a program of studying foreign investment in the United States. The timing of the program indicates that it was probably enacted in response to possible investment of petro-dollars by Arab states. *See* 15 U.S.C. §78b (1976).

In addition, national legislation has also denied to foreign corporations or foreign controlled United States corporations entry into certain other areas. Ownership of vessels engaged in coastal traffic, ownership of aircraft used in internal traffic, and ownership of interests in defense contractors is precluded. Vagts, *The United States of America and the Multinational Enterprise*, in NATIONALISM AND THE MULTINATIONAL ENTERPRISE 3, 15 (1973) [hereinafter cited as *The USA and the MNE*]. *See also* Vagts, *The Corporate Alien*, 74 HARV. L. REV. 1489 (1961).

Some states also maintain restrictions on alien ownership. Especially burdensome is the common law rule, prevalent in some states, against alien land ownership. A trend, however, seems to have been established invalidating such restrictions on constitutional grounds. Equal protection has been invoked as has been the constitutional principle of federal pre-eminence in international relations. *The USA and the MNE, supra*, at 16; Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

multi-faceted. The laws generally address such topics of concern as selection of foreign investment, reserved or restricted sectors of the economy, and incentive schemes.[49] Local laws may limit the types of enterprises which may be set up and may also limit the equity participation of foreign investors.[50] Local law frequently requires some degree of local representation in management[51] and may, in some instances, limit expatriate employment in order to provide jobs and training for local personnel.[52]

Some of the criteria in the screening of investment are contributions to the creation of employment, establishment of needed industries, contributions to the balance of payment problem, and the production of import substitutes.[53] If these criteria are substantially fulfilled, investment is generally permitted; a small but increasing number of LDC's, however, require eventual majority ownership by nationals of the host country.[54]

The pattern of investment regulation which predominates in South American countries involves many features not found in African or Asian regulation.[55] Some of the typically South American features are:[56]

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49. National Legislation, *supra* note 47, at 3-7. As used in this comment, a reserved sector is a sector of the economy wherein investment is limited to nationals. A restricted sector is one in which foreign investment is limited in scope, either in equity ownership or capital contribution.

50. *Id.*

51. This is done so that managerial decisions reflect the needs of the host state. *See, e.g.*, Decision 24 of the Andean Commission, Standard Regime for Treatment of Foreign Capitals and for Treatment of Marks, Patents, Licenses, and Royalties [Dec. 31, 1970], *as amended* by Decision 37 [June 24, 1971], Decision 37-A [July 17, 1971], Decision 70 [Feb. 13, 1973], Decision 103 [Oct. 30, 1976], and Decision 109 [Nov. 30, 1976], arts. 1, 36, 50 [hereinafter cited as Decision 24 amended], *reprinted in* 16 INT'L LEGAL MAT'LS 138 (1977). *But see* Note, *Decree No. 115/CP, Apr. 18, 1977, Socialist Republic of Vietnam*, 19 HARV. INT'L L.J. 681, 689 (1978).

52. National Legislation, *supra* note 47, at 3-7.

53. *Id. See generally* National Approaches, *supra* note 2, at 17-66.

54. *E.g*, Decision 24 amended, *supra* note 51, arts. 28, 30, 31, *reprinted in* 16 INT'L LEGAL MAT'LS 152, 161, 162-63 (1977). *See also* Decree 18900 [June 30, 1971], 18 L.R. 420, 550 (1971), [1971] Compendio 369 (Peru); Murphy, *The Andean Common Market and Mexico: A Foreign Investment Profile*, 13 TEXAS INT'L L.J. 307, 312 (1977-1978).

55. The general pattern of African and Asian regulation of foreign investment is characterized by few restrictions and a greater number of incentives. There is little discrimination on the basis of the nationality of the investor. There exists some screening of investment insofar as incentives are to be awarded. Sectors are not generally closed to foreigners and investment ceilings have not been established. Provisions for compensation in case of nationalization are provided. Some areas of the Middle East and North Africa have established local participation quotas and discriminate against foreign investors. National Legislation, *supra* note 47, at 3-7.

56. *Id.* at 1-10. *See also* National Approaches, *supra* note 2, at 31-63.

1. Screening of foreign investment on a case-by-case basis;
2. Few incentives;
3. Screening of technology transfer;
4. Limitations on foreign managerial control; and
5. Ceilings on fees, royalties, and profits, as well as limitations on the repatriation of profits.

South American legislation also pays homage to Calvo[57] in its requirement that investment disputes be adjudicated locally. Latin American countries typically have been unreceptive to international conventions which require third-party adjudication of disputes and also to any kind of intervention by states representing aggrieved investors.[58]

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57. The Calvo Doctrine, named after the 19th Century Argentine diplomat and lawyer, is comprised of two major themes. The first is that other nations must abstain from interference in what may be regarded as the sovereign and exclusive right of a host state to control conduct within its borders and to determine the compensation for its public takings. The second theme is that foreigners are subject to the laws and regulations in the states in which they are found or in which they invest. Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1, 2-3 (1978).

To the extent that a Calvo Clause requires exhaustion of local remedies before a claim may arise under international law, or before diplomatic intervention may take place, the clause is but a codification of existing principles of international law. W. FRIEDMANN, O. LISSITZYN, & R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 835-39 (1969). The clause may also validly prevent parties from utilizing a choice-of-forum clause. A legislative embodiment of the Calvo principle would nullify the effect of the forum clause since any judgment rendered pursuant thereto would not be recognized.

To the extent, however, that a Calvo Clause may be worded so as to deny the jurisdiction of another state over a specific area of law, the clause may itself violate international law. Under traditional bases of jurisdiction, a state may prescribe and enforce its own rules of law if the conduct involved has a significant effect upon the territory of that state. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 8, 10, 18 (1965). If two states are affected by actions, both may have jurisdiction. Hence, any attempt by one state to oust the jurisdiction of the other is a violation of international law, as an impingement upon sovereignty. Of course, no state is required to *enforce* the laws or judgments of another state. Hilton v. Guyot, 159 U.S. 113, 163-66 (1895). If the judgment of a state having jurisdiction over an area of law contravened the public policy of the second state, the second state need not enforce or recognize the judgment. *Id.* this does not justify the second state, however, in attempting to dictate the jurisdiction of the first state. *See* British Nylon Spinners v. Imperial Chem. Indus., Ltd., [1955] 1 Ch. 37 (extraterritorial assertion of jurisdiction in derogation of the sovereignty of a sister state is improper). *But see* CERDS, *supra* note 40.

Neither may a Calvo Clause operate to deprive a state of its right to vindicate violations of international law committed against its nationals. North American Dredging Co. Case (United States v. Mexico) 4 U.N. Rep. Int'l Arb. Awards 26 (1951). The right of a nation to vindicate violations of international law perpetrated against its nationals is a right appertaining to sovereignty. It is, therefore, not waivable by a private party.

58. *See* Szasz, *The Investments Disputes Convention and Latin America*, 11 VA.

Recent Mexican enactments, similar in nature to the codes urged by South America countries, have provoked widespread comment.[59] These controversial Mexican enactments will be examined as a prototype of LDC investment and technology legislation.

A. Mexican Investment Legislation

Aimed at a balanced and independent development, Mexico's Law to Promote Mexican Investment and to Regulate Foreign Investment[60] was enacted on May 9, 1973. Enacted to encourage investment in those areas where Mexican owned business did not extend, the law was designed to increase industrial growth and development of Mexican industry without cutting off the flow of much needed foreign capital and technology.[61] There is much discussion whether Mexico has, in fact, achieved her goals.[62]

The Mexican law provides that foreigners may generally not control more than forty-nine percent of the capital of Mexican enterprises not otherwise specifically regulated.[63] This prohibition, however, can be waived; the National Commission on Foreign Investment may grant exceptions when such an exception would, in its judgment, prove beneficial to the Mexican economy.[64] Participation of a foreign investor in the management of a local corporation may not exceed the investor's capital participation.[65]

Article 2 of Mexico's Foreign Investment Law defines foreign investors. Foreign investors include:

1. Foreign individuals or companies;
2. Mexican enterprises, the majority of whose capital is controlled by foreigners;[66] and

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59. *E.g.*, Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEXAS INT'L L.J. 289 (1977-1978); Camp & Magnon, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology*, 8 LAW. AMERICAS 1 (1976); Gordon, *The Contemporary Mexican Approach to Growth with Foreign Investment: Controlled but Participatory Independence*, 10 CAL. W.L. REV. 1 (1973-1974).

60. [March 9, 1973], D.O.

61. Vizcaino, *The Law on Foreign Investment*, 7 GA. J. INT'L & COMP. L. 33 (1977).

62. *E.g.*, Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEXAS INT'L L.J. 289 (1977-1978). *See also* Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247, 270 (1978).

63. Law to Promote Mexican Investment and to Regulate Foreign Investment [March 9, 1973] art. 5, D.O. [hereinafter cited as Investment Law].

64. *Id.* art. 5, 13; Vizcaino, *supra* note 61, at 34, 37.

65. Vizcaino, *supra* note 61, at 33-34.

66. *Id.* at 35; Investment Law, *supra* note 63, art. 2.

3. Foreign economic units not retaining legal status (for example, joint ventures).

Individuals who attain the status of permanent resident are not considered foreign investors unless connected with enterprises which have the capacity of making economic decisions abroad.[67]

Articles 4 and 5 of the Foreign Investment Law delineate the various sectors of the economy that are closed to foreign investors. These sectors are those which deal with the following areas:[68]

1. Petroleum and other hydrocarbons;
2. Basic petrochemicals;
3. Exploitation of radioactive minerals and the generation of nuclear energy;
4. Mining;
5. Electricity;
6. Railroads;
7. Telegraphs and wireless communications; and
8. Other areas established in specific law.

Other activities reserved exclusively for Mexicans or Mexican companies with an exclusion of foreigners clause in their corporate by-laws include:[69]

1. Radio and television;
2. Urban and interurban automotive transportation and federal highways transport;
3. Domestic air and maritime transportation;
4. Exploitation of forestry resources;
5. Gas distribution; and
6. Others established in specific laws or regulations issued by the federal executive.

Similarly, article 5 lists those activities wherein foreign investment is limited even below the general forty-nine percent capital control ceiling. These activities include the exploitation of certain national reserves of mineral substances (thirty-four percent), secondary products of the petrochemical industry (forty percent), and automotive part manufacture.[70] A permanent resident may not engage in those activities reserved exclusively for Mexicans.[71]

In view of the obvious importance of the national defense sector to any state, it is interesting to note that the Foreign Investment Law does

67. Vizcaino, *supra* note 61, at 35.
68. Investment Law, *supra* note 63, art. 4.
69. *Id.*
70. *Id.* art. 5.
71. *Id.* art. 6; Vizcaino, *supra* note 61, at 35-36.

not close the national defense, arms, and ammunitions sector to foreigners.[72] Commerical banking is also not closed to foreigners and certain aspects of the export business may even be available to foreigners on an unusually liberal basis.[73]

These limits and ceilings are not, however, absolutely rigid. The National Commission for Foreign Investment has the authority to make exceptions from the ceilings under certain circumstances. In making such exceptions the National Commission must, by law, consider a multitude of factors and goals, which include:

1. The extent to which the foreign investment will complement local investment;
2. The extent to which the foreign investment will or will not displace Mexican industries which are operating satisfactorily;
3. The extent to which the investment will exist in activities adequately covered by Mexican enterprises;
4. The positive effect of the investment on the balance of payment, and particularly, on the increase in exports;
5. The effect of the foreign investment on employment, taking into consideration the occupational level that it generates and the wages paid;
6. The resulting employment and training of technicians and administrative personnel of Mexican nationality;
7. The incorporation of national goods and components in the manufacture of the resulting products;
8. The extent to which the resulting operation finances its activities with resources from abroad;
9. The diversification of the investment sources and the necessity of promoting regional and sub-regional integration in the Latin American area;
10. Contribution of the foreign investment to the development of zones or areas of relatively lower economic development;
11. Guarantees of the investor not to take monopolistic positions in the national market;
12. The capital structure of the economic activity;
13. The technological contribution and assistance in research and development of the technology of the country by the resulting activity;
14. The resulting effect on price levels and the quality of production;

72. National Legislation, *supra* note 47, at 40. One might believe that LDC's would be especially hesitant to allow foreigners access to the national defense sector, considering investment laws from the perspective of nationalism.

73. *Id. See also* Investment Law, *supra* note 63, art. 13. To the extent that a foreign investor may be able to contribute to the Mexican export capacity, he will increase the state's receipts of foreign reserves.

15. Preservation of the social and cultural values of the country;

16. The importance of the activity within the national economy;

17. The extent to which the foreign investor identifies with the interests of the country and his connection with centers of economic decision abroad; and

18. In general, the extent to which the investment collaborates in the achievement of goals and policies of national development.[74]

Finally, in a bow to the Calvo Doctrine,[75] the law provides that foreign companies may acquire ownership of land and water, when authorized by the Ministry of Foreign Relations, only if the individual agrees to consider himself as a Mexican citizen with respect to the property;[76] he may not invoke the protection of his native government with respect to the investment.[77] Noncompliance risks the penalty of forfeiture of the properties so acquired.[78]

B. Mexican Transfer of Technology[79] Legislation

The Mexican Law on the Transfer of Technology[80] was designed to achieve technological independence. Recognizing that some transfer of technology from foreign licensors or investors is desirable,[81] Mexico

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74. Investment Law, *supra* note 63, art. 13.

75. *See* note 57 *supra*.

76. Investment Law, *supra* note 63, art. 7; Vizcaino, *supra* note 61, at 39-40. This is an expression of Mexican sovereignity and nationalism. The pressures of foreign exploitation have led to the inclusion of similar provisions in the Mexican Constitution. MEXICAN CONST. art. 27, *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Mexico) 10 (1978).

77. MEXICAN CONST. art. 27, *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Mexico) 10 (1978). *See also* Investment Law, *supra* note 63, art. 7, Vizcaino, *supra* note 61, at 39-40.

78. Vizcaino, *supra* note 61, at 39-40; Investment Law, *supra* note 63, art. 7.

79. Transfer of technology is characterized as the transfer of know-how, skills, methods, processes, and information. The transfer may be accomplished through working, learning, experience, licensing, or export of goods. *See* Guidelines, *supra* note 4, at 5.

80. Law for the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks [Dec. 30, 1972], D.O. [hereinafter cited as Technology Law].

81. Soberanis, *Legal Aspects Concerning the Technology Transfer Process in Mexico*, 7 GA. J. INT'L & COMP. L. 17, 18 (1977). As previously noted, United States economic growth during the first half of the 20th century was due mainly to technological innovation. *See* note 37 and accompanying text *supra*. The acquisition of technology, therefore, is crucial, but is helpful only when the technology is acquired on even terms. MNC's and other investors, however, have, in the past, often utilized superior bargaining position and experience to fetter the beneficial acquisition of technology. *See* 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, 233 (1976).

has attempted to strengthen the bargaining position of local purchasers and to acquire the best possible technology under the best of circumstances.[82] In so doing, Mexico has required that agreements contemplating a transfer of technology must be registered;[83] failure to do so will render the agreement unenforceable.[84] The types of agreements which must be registered are delineated in article 2 of the Law on the Transfer of Technology.[85] An agreement having effect in Mexico and which contemplates a transfer of technology of almost any type, must be registered.[86] Oral agreements are apparently covered under the regulation and must eventually be reduced to writing.[87]

While the law is widespread in coverage, the obligation to register an agreement falls upon residents and corporations or persons of Mexican nationality.[88] The foreigner who does not reside in Mexico is not obligated to register an agreement;[89] the failure to do so, however, will render the agreement unenforceable.[90] Agreements solely between Mexican nationals are not excluded from the scope of the technology law.[91] Mexico has attempted to tailor its law to the requirements of international law in excluding nonresident aliens from an obligation to register.[92]

Agreements must be registered within sixty days after they have been entered into; amendments and modifications must also be registered.[93]

In order to provide for the harmonious development of the Mexican economy and at the same time absorb only appropriate technology, article 7 of the Mexican technology law provides a number of circumstances which, when found to exist, will lead to the denial of

82. Soberanis, *supra* note 81, at 18.

83. Technology Law, *supra* note 80, art. 2; Brill, *Transfers of Technology in Mexico*, 4 DENV. J. INT'L L. & POL'Y 51, 53 (1974); Soberanis, *supra* note 81, at 19.

84. Technology Law, *supra* note 80, art. 6; Brill, *Transfers of Technology in Mexico*, 4 DENV. J. INT'L L. & POL'Y 51, 54 (1974).

85. Technology Law, *supra* note 80, art. 2.

86. *Id.*; Soberanis, *supra* note 81, at 19. *But see* Brill, *supra* note 83, at 53. Brill interprets the Mexican law as requiring registration only if the technology agreement will result in any act being carried out in Mexican territory.

87. Soberanis, *supra* note 81, at 20.

88. *Id.* at 28; Technology Law, *supra* note 80, arts. 3, 6; Brill, *supra* note 83, at 54.

89. Technology Law, *supra* note 80, arts. 3, 6.

90. *Id.* art. 6.

91. Soberanis, *supra* note 81, at 20.

92. *Id. See generally* Akehurst, *Jurisdiction in International Law*, in [1972-1973] 46 BRIT Y.B. INT'L L. 189. Such an obligation would have extraterritorial effect. Extraterritoriality is suspect, though not always forbidden, under international law. *Id.*

93. Soberanis, *supra* note 81, at 20; Brill, *supra* note 83, at 54; Technology Law, *supra* note 80, art. 4.

registration of a licensing agreement.[94] The obstacles to registration consist mainly of anticompetitive practices which are engaged in typically by MNC's.[95] Some of the impediments are waivable while others are not.[96] Provisions forbidding tie-in clauses,[97] for example, can be waived under certain circumstances as can be the provisions relating to foreign management and decisionmaking.[98] Provisions which can not be waived are those which forbid contracts for the transfer of that technology which is freely available in the country, and those which prohibit contracts containing grantback clauses.[99] It should be noted in passing, however, that this grantback restriction is mild in form.[100]

The Mexican Transfer of Technology Law provides that agreements which contain certain other types of clauses may also not be registered. Such clauses are those requiring that differences of interpretation or questions of compliance with the agreement be submitted

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94. Agreements providing for the following are not registerable:
1. Transfer of technology freely available in Mexico;
2. Excessive price or consideration which is unduly burdensome on the economy;
3. Permission for the supplier to regulate the administration of the transferee of the technology;
4. Grantbacks of patents, trademarks, innovations, or improvements;
5. Limitations upon research or development;
6. Tie-ins;
7. Prohibition of export of licensee's goods or services against the best interests of Mexico;
8. Prohibition of the use of complementary technology;
9. Obligation to sell the products manufactured by the licensee only to the licensor;
10. Permanent use of personnel designated by the licensor;
11. Limitation on production of the licensee or imposition of prices by the licensor; and
12. Unreasonable term of duration of the licensing agreement.

Technology Law, *supra* note 80, art. 4.

95. Jeffries, *Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT'L L.J. 309, 312, 314-15 (1977).

96. Technology Law, *supra* note 80, art. 8; Soberanis, *supra* note 81, at 22-28.

97. Technology Law, *supra* note 80, art. 8; Soberanis, *supra* note 81, at 24. A tie-in clause is a clause requiring the purchaser to purchase raw materials, spare parts, or imports, as well as the desired technology. Acquisition of the technology is conditional upon agreement to purchase the tied-in materials.

98. Technology Law, *supra* note 80, art. 8; Soberanis, *supra* note 81, at 24.

99. A grantback clause is a clause usually requiring the licensee to grant back to the licensor ownership and knowledge of improvements on the technology without payment.

100. There appears to be no prohibition against obligating the licensee to *license* back to the licensor any improvements developed by the licensee. Brill, *supra* note 83, at 56.

for resolution to foreign judicial tribunals.[101] Apparently, however, a provision providing for dispute settlement by a foreign arbitral tribunal is not forbidden.[102] Mexican law, however, must apply.[103]

As with many regulatory and administrative schemes found within the United States,[104] decisions regarding the rejection of a licensing agreement are subject to appeal. In the first instance, a disappointed entrepreneur has the right to a "reconsideration."[105] Once a request for reconsideration has been made, and the applicant has submitted his proof, the National Registry for the Transfer of Technology must decide the appeal within forty-five days. Failure to decide the appeal within that time will result in the appeal being deemed favorable to the applicant as a matter of law.[106] Should a foreign investor remain unsatisfied, further recourse is available in a federal district court and finally in the *Tribunal Colegiado Circuito en Materia Administrativa*.[107]

C. *Mexican Industrial Property Legislation*

The new Mexican Law on Inventions and Trademarks,[108] as well as the law concerning the transfer of technology, introduce a number of innovations and additions into Mexican law. Some of the more significant features involve duration and forfeiture of industrial property rights.

The duration of industrial property rights has been truncated by the Mexican legislation.[109] The Mexican law has also introduced the concept of compulsory licensing into the Mexican system of industrial property rights.[110] Such a concept is no stranger to the western world.[111] Industrial property rights must be worked; a failure to so

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101. Technology Law, *supra* note 80, art. 7; Brill, *supra* note 83, at 58; Soberanis, *supra* note 81, at 27.

102. Technology Law, *supra* note 80, art. 7; Soberanis, *supra* note 81, at 27.

103. Technology Law, *supra* note 80, art. 7; Brill, *supra* note 83, at 58.

104. *See, e.g.*, 5 U.S.C. §§ 701-706 (1976).

105. Technology Law, *supra* note 80, art. 14; Brill, *supra* note 83, at 60; Soberanis, *supra* note 81, at 29-30.

106. Technology Law, *supra* note 80, art. 14; Brill, *supra* note 83, at 60; Soberanis, *supra* note 81, at 29-30.

107. Soberanis, *supra* note 81, at 31.

108. Law on Inventions and Trademarks [Feb. 10, 1976], D.O. [hereinafter cited as Invention and Trademark Law].

109. Medina, *Significant Innovations of the New Mexican Law on Inventions and Trademarks*, 7 GA. J. INT'L & COMP. L. 5, 11 (1977).

110. *Id.* at 10; Invention and Trademark Law, *supra* note 108, art. 50.

111. *See* National Approaches, *supra* note 2, at 100-01. *See also* Henry, *Multi-National Practice in Determining Provisions in Compulsory Patent Licenses*, 11 J. INT'L L. & ECON. 325 (1976-1977); Mirabito, *Compulsory Patent Licensing for the*

work these rights may entail substantial penalties.[112]

Like some South American countries, notably the Andean group,[113] Mexican law provides that certain types of products and processes may not be patented. Inventions relating to health, nutrition, agricultural protection, nuclear energy, national security, and defense of the atmosphere fall within this category.[114] Inventions relating to these fields, however, may be protected by a certificate of invention. The term of registration of such an invention is limited to ten years;[115] the invention must be new, it must be the product of inventive activity, and most importantly to a country in Mexico's position, it must be susceptible of being applied industrially.[116] Rights and obligations accrue to the inventor upon registration.[117]

Pursuant to the new law and consistent with the recommendations

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United States: A Current Proposal, 57 J. PAT. OFF. SOC'Y 404 (1975). While the United States does not have a comprehensive statutory scheme of compulsory licensing, case law has established the propriety of compulsory licensing as a remedy for antitrust abuses. Hartford Empire Co. v. United States, 323 U.S. 386 (1945); United States v. General Elec. Co., 115 F. Supp. 835 (D.N.J. 1953). In some instances, the judiciary has, in effect, sanctioned compulsory licensing not as a remedy for antitrust violations, but merely in the public interest. *E.g.*, City of Milwaukee v. Activated Sludge, Inc., 69 F.2d 577 (7th Cir. 1934). Certain statutes also provide implicitly or explicitly for compulsory licensing in the public interest, under limited circumstances. *E.g.*, 28 U.S.C. § 1498 (1976). For further developments, see Note, *Is a Compulsory Patent Licensing Statute Necessary? A Study of the U.S. and Foreign Experience*, 7 L. & POL'Y INT'L BUS. 1207 (1975). *See also* Foster v. American Mach. & Foundry Co., 492 F.2d 1317 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974).

112. Failure to properly work industrial property rights will result in compulsory licensing of the property and, in the long run, may result in forfeiture. Invention and Trademark Law, *supra* note 108, arts. 50, 57; Medina, *supra* note 109, at 10, 11.

113. For example, pharmaceuticals are not patentable in many South American countries such as Colombia, Chile, Brazil, Argentina, and Venezuela. The Role of the Patent System, *supra* note 2, at 53.

114. Medina, *supra* note 109, at 6.

115. *Id.* Invention and Trademark Law, *supra* note 108, arts. 34, 66, 67.

116. Invention and Trademark Law, *supra* note 108, art. 65. It should be noted that the substantive requirements for obtaining a certificate of invention are the same as those required for obtaining a patent. Medina, *supra* note 109, at 6.

117. Rights accruing to the holder of the certificate are fourfold. First, the owner may exploit the subject invention himself. Second, the owner may receive a royalty for exploitation of the invention by a third party. Third, the owner may sue for damages upon infringement arising from the manufacture of subject products. Finally, the owners retains some control over the conditions of the exploitation license which may be granted third parties. Invention and Trademark Law, *supra* note 108, arts. 67, 68, 71, 77, 214; Medina, *supra* note 109, at 6-7.

Obligations incurred by the owner include the duty to register any agreement whereby he may authorize an interested party to exploit the subject invention. He must also furnish that information which may be necessary to exploit the invention. Invention and Trademark Law, *supra* note 108, arts. 67, 71, 77, 78, 211, 214; Medina, *supra* note 109, at 7.

of international organizations such as UNIDO,[118] Mexico's law provides that patents must be worked or exploited.[119] Measured from the date the patent is issued, the inventor must begin working the patent within three years. Failure to so work the patent or failure to work the patent sufficiently shall be grounds for the grant of a compulsory license.[120] An application for a compulsory license is to be evaluated by the Head Bureau of Inventions and Trademarks.[121] While the obligatory license is not exclusive, and may not be sub-licensed without the authorization and consent of the owner of the patent,[122] the license may be transferred with the authorization of the Department of Industry and Commerce.[123]

Protection for trademarks has also been reduced, consistent with Mexico's policy of national economic autonomy and increased competition in industry.[124] Trademarks may be registered only for five year periods and may be renewed for five year periods.[125] Previous Mexican law had provided for ten year periods of protection.[126] It should be observed that a trademark registration may be refused renewal where the owner thereof has not demonstrated that the trademark has been sufficiently used.[127] When there is no renewal, the trademark reverts to the public domain.[128]

One peculiar characteristic of the Mexican Law on Inventions and Trademarks is that dual trademarks may sometimes be required.[129]

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118. This is an acronym for the United Nations Industrial Development Organization.

Without exploitation of inventions, the host country does not obtain the benefit of the invention, nor the know-how necessary to eventually exploit it.

119. Invention and Trademark Law, *supra* note 108, art. 41; Medina, *supra* note 109, at 9-10. *See generally* The Role of the Patent System, *supra* note 2.

120. Invention and Trademark Law, *supra* note 108, art. 41; Medina, *supra* note 109, at 9. A compulsory license is a government mandated license of intellectual property rights from the owner to a licensee.

121. Invention and Trademark Law, *supra* note 108, art. 52; Medina, *supra* note 109, at 10.

122. Invention and Trademark Law, *supra* note 108, art. 55; Medina, *supra* note 109, at 10.

123. Invention and Trademark Law, *supra* note 108, art. 55; Medina, *supra* note 109, at 10.

124. As is discussed in note 134 *infra*, the international system of trademark protection has been attacked as conducive to foreign exploitation.

125. Invention and Trademark Law, *supra* note 108, art. 112; Medina, *supra* note 109, at 11.

126. Law on Industrial Property [Dec. 31, 1942], D.O.

127. Invention and Trademark Law, *supra* note 108, art. 140.

128. *Id.*

129. The use of dual trademarks, or linking, is apparently designed to remedy certain licensor abuses. For example, a Mexican distributor or licensee who has enhanced the reputation of a trademark, and has increased sales, often finds that the foreign

When a trademark has originally been registered abroad and is subsequently registered in Mexico, it must be used in conjunction with a trademark registered in Mexico that has not been previously registered in another country.[130] This provision of Mexican law is of dubious validity under international law in view of Mexico's membership in the Paris Union.[131]

As in the case of patents, compulsory licensing of trademarks may, in some circumstances, be required by the national authorities.[132] This action may be taken to avoid "the abuse or inconveniences for the economy of the country, which could derive from the exclusive use of the trademark."[133] A trademark may be cancelled when it is used to exploit the national economy, gain undue control thereof, or when improper use is made of the quality of the product or the service covered by the trademark.[134] The Andean Common Market has provided similar restrictions in its decisions.[135]

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licensor removes the trademark license. The use of a dual trademark would allow the licensee to profit from his efforts by enabling him to retain at least part of the symbol of quality.

The use of dual trademarks, however, is a clumsy means of protection. The dual trademark imposes tremendous expenditures upon the Mexican licensee. He would be required to change advertising, containers, and cartons to conform to the law. Exported products would confuse foreign consumers who may be used to seeing well-known trademarks. *See generally* Delgado, *Technology Transfer and Trademark Problems in Mexico*, 9 PAT. L. REV. 43 (1977).

130. Invention and Trademark Law, *supra* note 108, arts. 127, 128; Medina, *supra* note 109, at 13.

131. *See* notes 153-56 and accompanying text *infra*.

132. Invention and Trademark Law, *supra* note 108, art. 132; Medina, *supra* note 109, at 14. For United States practice, see Dobb, *Compulsory Trademark Licensure as a Remedy for Monopolization*, 10 INTELLECTUAL PROP. L. REV. 193 (1978).

133. Medina, *supra* note 109, at 14 (quoting from Invention and Trademark Law, *supra* note 108, preamble).

134. Invention and Trademark Law, *supra* note 108, art. 150, para. 2. It is arguable that trademarks aid in the perpetuation of monopoly abuses, deceptive advertising, and diluted product quality, if improperly used. The monopoly aspect of trademarks is especially important to Mexico and other LDC's. *See generally* Dobb, *supra* note 132, at 193; United Nations Conference on Trade and Development Secretariat, the Impact of Trademarks on the Development Process of Developing Countries, U.N. Doc. TD/B/C.6/AC.3/3 (____, 1977); United Nations Conference on Trade and Development, Report of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology, Annex IV, at 10-14, U.N. Doc. TD/B/C.6/AC.3/4/Add.1 (Nov. 2, 1977) [hereinafter cited as UNCTAD Report, Annex IV]. For contrary viewpoints on the role of trademarks in economic abuse, see McCarthy, *Compulsory Licensing of a Trademark: Remedy or Penalty?* 67 TRADEMARK REP. 197 (1977); United Nations Conference on Trade and Development, Report of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology 4-6, U.N. Doc. TD/B/C.6/AC.3/4 (Oct. 26, 1977) [hereinafter cited as UNCTAD Report].

135. For a comparison of the Mexican laws with the laws of other nations, see National Legislation, *supra* note 47.

The Mexican laws that have been examined, as well as similar laws of other LDC's, have been enacted to promote development, growth, and prestige. Certainly LDC's have accomplished the latter. Their collective voice is respected in international circles and in such organizations as the United Nations. In many instances, however, these laws cannot be completely reconciled with traditional concepts of international law.

IV. THE MEXICAN LEGISLATION AND TRADITIONAL AND EVOLVING CONCEPT OF INTERNATIONAL LAW

A. Possible Violations of International Law

Mexico is a signatory of two international conventions designed to protect the rights of foreign investors and commercial dealers. The first multilateral agreement is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[136] The second is the Paris Convention for the Protection of Industrial Property.[137] Some provisions of Mexican law relating to the transfer of technology potentially violate the New York Convention. The New York Convention provides that:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term 'agreement in writing' shall include an arbitral clause in a contract . . . .[138]

Licensing agreements which must be registered with the National Registry for the Transfer of Technology plainly fall within the contemplation of the New York Convention, if the agreements contain arbitral clauses. Such arbitral clauses are commonplace in commercial transactions.[139] While Mexican law recognizes the decisions that may be made by a foreign arbitral commission, Mexico will not recognize any arbitral agreement or award when the substantive law applied by the arbitral panel was, or shall be, a law other than that of Mexico. An agreement containing a requirement to utilize foreign law will be considered invalid and, hence, the arbitral clause will be considered invalid

136. New York Convention, *supra* note 17.
137. Paris Convention, *supra* note 16.
138. New York Convention, *supra* note 17.
139. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). *See also* McClelland, *International Arbitration: A Practical Guide to the System for Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729, 729 (1976-1977).

as will be any arbitral award stemming therefrom.[140] Article V of the New York Convention, however, recognizes that choice of law provisions embodied in an arbitral clause are protected by the Convention. Article V states, in pertinent part:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a). The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid *under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made . . . .*[141]

An agreement specifying as the governing law a law other than that of Mexico is invalid under the Mexican Transfer of Technology Law;[142] hence, specific performance of such an arbitral agreement will not be granted, and enforcement of any arbitral award stemming therefrom will not be granted by Mexican tribunals.[143] While there are embodied within the Convention a number of exceptions to the requirement to recognize and enforce foreign arbitral agreements and awards, these exceptions have generally been narrowly construed.[144] A blanket

140. Technology Law, *supra* note 80, art. 7, para. 14; Brill, *supra* note 83, at 58.

141. New York Convention, *supra* note 17, art. V (emphasis added).

142. Technology Law, *supra* note 80, arts. 6, 7; Brill, *supra* note 83, at 54, 58.

143. Since the agreement would be unenforceable, Mexico would undoubtedly regard clauses within the agreement as unenforceable.

144. Almost without exception, the cases dealing with the New York Convention have evinced a pro-enforcement bias. The cases narrowly interpret the exceptions to enforcement embodied within the Convention. *E.g.*, Parsons & Whittemore Overseas Co. v. Societé Generale de l'Industrie due Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976); Antco Shipping Co., Ltd. v. Sidermar S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Trooboff & Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts,* 17 VA. J. INT'L L. 469 (1976-1977).

Parsons & Whittemore must be regarded as the leading United States case on the New York Convention. In *Parsons & Whittemore*, an arbitral tribunal sitting under the rules of the International Chamber of Commerce awarded RAKTA $312,507.45 for breach of a construction contract. The matter had come before the arbitral tribunal pursuant to an arbitration agreement embodied within the contract. Parsons and Whittemore had ceased work on the contruction project and had failed to continue work on the project following the Egyptian-Israeli Six Day War. Parsons and Whittemore sought a declaratory judgment preventing collection of the arbitral award; it alleged five grounds on appeal in justification of nonrecognition, four of which were defenses derived from the express language of the New York Convention. The *Parsons & Whittemore* court rejected the public policy defense on the ground that the defense was to be narrowly construed; as such, it did not apply to the instant fact situation. The court

restriction preventing enforcement of an agreement or award which includes a bar even on the application of foreign law to a dispute involving only interpretation of the agreement would be overbroad, and would therefore, not be sanctioned by the exceptions to the New York Convention.[145]

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intepreted the public policy defense as precluding enforcement of an arbitral award "only when enforcement would violate the forum state's most basic notions of morality and justice." 508 F.2d at 974. The fact that there had been a severance of American-Egyptian relations was, therefore, insufficient to invoke the public policy defense successfully. The other defenses were also narrowly construed in conformance with the pro-enforcement thrust of the Convention. Article V, paragraph 2 of the Convention authorized nonrecognition of an award where the subject matter of the underlying dispute was incapable of settlement by arbitration under the law of the forum state. The Second Circuit held that this defense was confined to those situations where certain categories of claims would be nonarbitrable because of the special national interest vested in their resolution. *Id.* at 975. To uphold this defense merely because certain issues of national interest incidentally figure into the resolution of the dispute "would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement." *Id.* at 973.

It should be pointed out, however, that there is some authority, including the *travaux prepetoires*, or legislative history of the Convention, which suggests that a broad interpretation of the exceptions (particularly the public policy exception) is appropriate. *See* United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting 14, 15, U.N. Doc. E/CONF.26/SR.17 (Sept. 12, 1958); INTERNATIONAL COMMERCIAL ARBITRATION III.C.149 (G. Gaja ed. 1978); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1071 (1960-1961). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 530-31 n.10 (1974) (Douglas, J., dissenting).

The more persuasive argument, however, is that the exceptions to enforcement should be narrowly construed. Prior to the advent of the New York Convention, two multilateral conventions governed international enforcement of arbitration. These agreements were the Geneva Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 157 and the Geneva Convention on the Execution of Foreign Arbitral Awards, *done* Sept. 26, 1927, 92 L.N.T.S. 301. These conventions were ineffective because the exceptions to recognition and enforcement were too easily used by recalcitrant defendants. The exceptions were broadly interpreted and nonexclusive; the burden was placed upon the party seeking enforcement. Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 8 AM. J. COMP. L. 283, 289 (1959); Quigley, *supra,* at 1054-55. The New York Convention was designed to change the thrust of enforcement of arbitral agreements and awards. Since the New York Convention is designed, quite obviously, to provide a broad base of enforcement of international arbitral agreements, *id.* at 1060, and since arbitration is a cornerstone of international commercial transactions, *see* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the exceptions should be narrowly construed. Speculation concerning language that was not included should not be permitted to contravene the purpose of the Convention. Parochial interests should not be elevated above commercial stability and international comity.

145. It is difficult to perceive how a *blanket* restriction on enforceability of arbitral awards resulting from interpretation of agreements would violate Mexico's most basic notions of morality or public policy. It is also difficult to accept the notion that interpretation of a licensing agreement would be a matter incapable of settlement by arbitration.

Some of the provisions of Mexico's Law on Inventions and Trademarks also appear to violate a number of provisions of the Paris Convention for the Protection of Industrial Property.[146] Under Mexico's law, compulsory licensing may be granted if the patentee has not sufficiently worked the patent three years from the time the patent was issued.[147] The Paris Convention, however, states:

> An application for a compulsory license may not be made on the ground of failure to work or insufficient working before the expiration of a period of *four years from the date of filing of the patent application* or three years from the date of the grant of the patent, *whichever period last* expires . . . .[148]

Mexican law allows no justification for the failure to work a patent.[149] Article 5 of the Paris Convention, however, further provides that a compulsory license "shall be refused if the patentee justifies his inaction by legitimate reasons."[150] A further infringement of the Paris Convention is contained in those provisions of the invention and trademark law which allow the government to transfer a compulsory license.[151] On this point, article 5(A), paragraph 4 of the Paris Convention states that "a compulsory license . . . *shall not be transferable*, even in the form of a grant of a sub-license, except with that part of the enterprise or goodwill using such license."[152]

Provisions of article 6 of the Paris Convention are also potentially violated by certain aspects of the Mexican trademark law. Pertinent provisions of Mexican law require that foreign originated trademarks be registered and displayed together with local originated trademarks.[153] Article 6 *quinquies* of the Convention mandates,

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146. Mexico is not bound by the latest version of the Paris Convention, not having acceded to the Stockholm revision. Instead, Mexico is bound by the Lisbon version of the Paris Convention which is not significantly different from the present version in regard to the matters which will be discussed. *See* I S. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS 70 (1975). The Lisbon version is cited as the Paris Convention for the Protection of Industrial Property, *revised* at Lisbon, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931 [hereinafter cited as Paris Convention, Lisbon version]. The French text has been translated into English and use will be made of the English translation. The translation is found in III LADAS, *supra*, at 1911.

147. *See* note 120 and accompanying text *supra*.

148. Paris Convention, Lisbon version, *supra* note 146, art. 5(A), para. 4 (emphasis added).

149. Invention and Trademark Law, *supra* note 108, art. 50.

150. Paris Convention, Lisbon version, *supra* note 146, art. 5(A), para. 4.

151. Invention and Trademark Law, *supra* note 108, art. 55; Medina, *supra* note 109, at 10.

152. Paris Convention, Lisbon version, *supra* note 146, art. 5(A), para. 4 (emphasis added).

153. *See* note 130 and accompanying text *supra*.

however, that "[e]very trademark duly registered in the country of origin shall be accepted for filing and protected *in its original form* in the other countries of the Union, subject to the reservations indicated in the present Article."[154] Such reservations encompass situations wherein the trademark infringes upon the rights of others or where the trademark is devoid of distinctive character. Trademarks may also be denied registration where the trademark is deceptive, contrary to morality, or inimical to public order.[155] A trademark is not contrary to public order merely because the trademark is incompatible with a provision of local law on marks.[156]

B. Possible Justifications

It is standard treaty law that agreements to which nations are signatories must be honored. Expressed via the axiom of *pacta sunt servanda*,[157] this requirement is one of the most ancient and time-honored rules of international law.[158] There exist, however, certain countervailing norms, which, when present, render written agreements nonbinding. Two norms, in particular, are pertinent to Mexico and to developing states. These norms are known as *rebus sic stantibus*[159] and *jus cogens*.[160]

The doctrine of *rebus sic stantibus*, first implied in treaties and contracts, developed into an independent ground for termination of treaties.[161] *Rebus sic stantibus* is an embodiment of the principle that certain types of changes in circumstances will provide a ground for ter-

154. Paris Convention, Lisbon version, *supra* note 146, art. 6 *quinquies*(A) (emphasis added).

155. *Id.* art. 6 *quinquies*(B).

156. *Id.*

157. *Pacta sunt servanda* means that operative written agreements must be adhered to. *See* BLACK'S LAW DICTIONARY 999 (5th ed. 1979); Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180 (1945). Essentially, treaties entered into by following proper treaty procedure are valid and binding upon the parties unless norm abolishing facts, as laid down by international law, are proven. The superior normative nature of *pacta sunt servanda* requires that written agreements be honored unless there is a clear showing of the norm abolishing facts. *Id.* at 181, 190, 197.

158. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180 (1945). *See also* T. ELIAS, THE MODERN LAW OF TREATIES 40 (1974).

159. *Rebus sic stantibus* is otherwise known as the doctrine of changed circumstances.

160. A *jus cogens* is a hierarchically superior norm with which subsidiary norms must comply. It may be considered part of the superstructure of international law.

161. Depending upon one's view, it is possible to ascribe the general existence of *rebus sic stantibus* to either Roman law or Canon law. In any event, writers had seized upon the concept by the sixteenth century. Toth, *The Doctrine of Rebus Sic Stantibus in International Law*, 1974 JUR. REV. 56, 60, 61.

mination of a treaty obligation. The principle is not unlike the well-known domestic principle that a frustration of purpose will operate to excuse failures of contractual performance or terminate the contract.[162] Having its roots in Roman law,[163] *rebus sic stantibus* has progressed through various stages of development. First accepted as an implied clause by learned scholars,[164] then accepted as a general principle of law,[165] the principle has changed substantially and may now be considered to be a rule of customary international law.[166] The principle has been invoked numerous times in the twentieth century as a ground for termination or modification of a treaty[167] and has not been denounced as contrary to accepted norms of international law.[168] While the exact limits of the doctrine are not clearly defined, there is substantial guidance available from the Vienna Convention.[169]

The result of efforts extending over the period of twenty years, the Vienna Convention codifies, with substantial precision, the limits of

162. The Uniform Commercial Code embodies such a principle. U.C.C. § 2-615(a) reads:

> Except so far as a seller may have assumed a greter obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable *by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made* or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Id. (emphasis added). *See also* Toth, *supra* note 161, at 79.

163. The essence of the doctrine, however, was crystallized by commentators and canonists. Toth, *supra* note 161, at 59, 60.

164. *Id.* at 58.

165. *Id.* at 79.

166. There are several sources of international law. Customary law is comprised of the practice of nations. Such practice, in order to constitute customary international law, must be constant and uniform. It must also be accompanied by the conviction that the action is the exercise of a right or fulfillment of an obligation guaranteed or required by law. Finally, there must be a general acquiescence in, or recognition of, the practice by the international community. Toth, *supra* note 161, at 148.

Treaties are a second source of law. *See* I.C.J. STAT. art. 38(1)(a). A third source of law is general principles of law recognized by civilzed nations. *Id.* art. 38(1)(c). General principles may produce only subsidiary rules of law. *See generally* Kunz, *supra* note 157, at 180. Case law, opinions of scholars, and writings of jurists constitute the fourth source of international law. *See* I.C.J. STAT. art. 38(1)(d).

167. *See, e.g.*, The Diversion of the Water from the Meuse, [1937], P.C.I.J. Ser. A/B, No. 70; Fisheries Jurisdiction Cases (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland), [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MAT'LS 290 (1973); Case Concerning the Right of Passage Over Indian Territory (Merits) (Portugal v. India), [1960] I.C.J. 6, 25-29.

168. Toth, *supra* note 161, at 153.

169. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, U.N. Doc. A/CONF.39/27 [hereinafter cited as Vienna Convention].

the doctrine. As a result partly of the efforts of the drafters of the Vienna Convention, *rebus sic stantibus* is now an objective principle of customary international law.[170]

In order for *rebus sic stantibus* to apply five conditions must obtain:

1. The change in circumstances must relate to conditions existing at the time of the conclusion of the treaty;
2. The change must be fundamental;
3. The change must be one unforeseen by the parties;
4. The existence of the original circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and
5. The change in circumstances must have radically transformed the scope of obligations remaining to be performed under the treaty.[171]

The International Court of Justice[172] has further refined the definition of fundamental changes as referring to those changes which imperil the existence or vital development of one of the parties.[173] The World Court also emphasized that the two major features or requirements of *rebus sic stantibus* are the existence of a fundamental

170. Toth, *supra* note 161, at 170. *See also* Hooper v. United States, 22 Ct. Cl. 408 (1887); Fisheries Jurisdiction Cases (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland), [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MAT'LS 290 (1973).

171. Vienna Convention, *supra* note 169, art. 62.

172. The International Court of Justice, an arm of the United Nations, is the successor to the Permanent Court of International Justice. The Permanent Court of International Justice existed under the auspices of the League of Nations. The authority of the International Court of Justice derives from the U.N. Charter and the Statute of the International Court of Justice.

U.N. CHARTER art. 92 establishes the International Court of Justice. All members of the U.N. are parties to the Statute of the International Court of Justice and may avail themselves of the services of that Court. *Id.* art. 93. Pursuant to rules which may be promulgated by the Security Council, the Court may also hear cases of states not party to the United Nations Charter. *See* I.C.J. STAT. art. 35. Only states may appear as parties before the Court; organizations and individuals may not. *Id.* art. 34.

Unlike the United States federal judiciary, the International Court of Justice may render advisory opinions. *Id.* art. 65; U.N. CHARTER art. 96. Both the General Assembly and the Security Council may request advisory opinions; other organs may request advisory opinions when authorized by the General Assembly. U.N. CHARTER art. 96. The Court consists of fifteen judges of different nationalities. I.C.J. STAT. art. 3. In submitting their causes to the Court, parties undertake to abide by its judgment. Should one party fail to abide by the judgment, the other party may have recourse to the Security Council. U.N. CHARTER art. 94.

Jurisdiction of the Court is defined by I.C.J. STAT. art. 36. Parties may agree in advance to the jurisdiction of the Court or may, when a dispute arises, specially consent to its jurisdiction. The jurisdiction of the Court is purely voluntary. The Court may utilize in its decisions treaties, case law, customary law, teachings and writings, and general principles of law recognized by civilized nations. *Id.* arts. 36, 38.

The International Court of Justice is sometimes referred to as the World Court.

173. Vienna Convention, *supra* note 169, art. 62.

change of circumstances and a radical transformation of the scope of the reqirements imposed by the treaty.[174]

Mexico or other LDC's might put forth the following type of argument to justify any alleged violations of treaty obligations by virtue of its technology or investment laws. First, the sudden and rapid rise in foreign investment in LDC's and the rapid growth of MNC's provide a change of circumstances; the abuse control mechanisms of the Paris Convention might well be insufficient presently to deal with monopoly abuses.[175] The competitiveness of national economies is threatened by the improper use of patent rights to restrict imports.[176] Research and development activities occur mainly within developed countries; when patents expire, therefore, patented knowledge does not revert to the public domain of a LDC. An arguably essential basis of consent by LDC's was the ability to control abusive or damaging practices through the safety mechanisms of the Convention.[177] This arguably no longer exists.

Secondly, the change in circumstances was difficult to foresee as the parties to the Paris Convention could have had no idea of the tremendous growth in foreign investment and proliferation of MNC's that has occurred. It is to be noted that the proliferation of MNC's and the concomitant rapid rise in foreign investment in LDC's is

174. Fisheries Jurisdiction Cases, [1973] I.C.J., at ____, *reprinted in* 12 INT'L LEGAL MAT'LS 290, 298, 307.

The Vienna Convention expresses a preference that the mechanism of *rebus sic stantibus* not be unilaterally invoked. Article 65 of the Convention requires notice be provided affected parties and articles 65 and 66 provide that amicable negotiations must first be attempted. Failing agreement by negotiation, judicial or arbitral proceedings should be utilized. Vienna Convention, *supra* note 169, art. 66. Commentators also agree that certain procedures must be followed before *rebus sic stantibus* may take effect. Toth, *supra* note 161, at 169.

175. *See* notes 286-98 and accompanying text *infra*.

176. United Nations Conference on Trade and Development Secretariat, The International Patent System: The Revision of the Paris Convention for the Protection on Industrial Property 18, U.N. Doc. TD/B/C.6/AC.3/2 (June 28, 1977) [hereinafter cited as Report on the Revision of the Paris Convention]. *See also* notes 286-98 and accompanying text *infra*.

177. The inclusion of safety mechanisms in articles 4 and 5 of the Convention is, in itself, evidence of the necessity to control abusive practices since the thrust of the Convention is not to protect the patent granting state, but the patentee. *See also* I S. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS 59-94 (1975).

Alternatively, an undertaking of obligations to protect intellectual property may be said to be based upon the understanding that competition and development would be fostered, not that restrictive business practices would be protected. *See* U.S. CONST. art. I, § 8, cl. 8. This is indeed the justification for the industial property system. *See* United Nations Conference on Trade and Development, Report of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology, Annex V, 3, U.N. Doc. TD/B/C.6/AC.3/4/Add.1 (Nov. 2, 1977) [hereinafter cited as UNCTAD Report, Annex V].

basically, though not exclusively, a post-World War II phenomenon.[178] The Vienna Convention requires only an inquiry into that which was foreseen, not that which was foreseeable; as such the test of the Vienna Convention is much narrower than any foreseeability test.[179] It is difficult to believe that the rapid growth of foreign investment and MNC's was actually forseen by many of the parties.

The only remaining question is whether the change is fundamental, i.e., whether the change in global economic relations imperils vital development of LDC's and, in particular, Mexico. Such an inquiry is not easily undertaken and may persuasively be answered in either the affirmative or the negative. It may be argued that there is, in fact, no imperilment of vital development. The argument may well be made that what has occurred is not an imperilment of vital development, but a change in political perspective and outlook.[180] Indeed LDC's, including Mexico, have experienced high growth rates, particularly during the late sixties. The gross domestic product of Mexico and certain other LDC's[181] has achieved growth rates in excess of 5 percent per annum.[182] On the other hand, it may persuasively be argued that these growth rates are the rates of the highest achievers; even in these countries there is a steady and high rate of annual population growth, thus reducing the expected growth in per capita income considerably.[183] Furthermore, the argument might be advanced that these growth rates cannot be expected to continue;[184] the widening gap in per capita income between LDC's and developed countries, while not necessarily dangerous in itself, may well contribute to political and social unrest and resentment.[185] Much of this resentment may be engendered by the dominant economic position of MNC's, and their perceived excesses.[186] Whether through direct or indirect means, the

178. UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT 5-6 (1974); R. TINDALL, MULTINATIONAL ENTERPRISES 9-10 (1975).

179. Those familiar with tort law can appreciate the potentially pervasive nature of a test based upon foreseeability. Almost anything is foreseeable; very little is actual foreseen.

180. *See* C. KINDLEBERGER & B. HERRICK, ECONOMIC DEVELOPMENT 316 (1977); M. MERHAV, TECHNOLOGICAL DEPENDENCE, MONOPOLY, AND GROWTH 18 (1969).

181. H. MYINT, THE ECONOMICS OF DEVELOPING COUNTRIES 10 (4th ed. 1973). These countries include Brazil, Taiwan, Hong-Kong, Signapore, South Korea, Thailand, and Iraq. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 12.

185. *Id.* at 15, 16. Rising expectations and envy may cause political resentment.

186. As previously noted, MNC's are often accused of committing restrictive business practices and of overreaching. *See* note 19 *supra*.

growth of MNC's imperils vital development.[187] If one accepts the argument that there has been no vital change in circumstances, there is no justification for termination of the Paris Convention; hence those LDC's which are parties to the Paris Convention and which have enacted restrictive technology, investment, and industrial property laws may be in violation of international law.

A second and independent countervailing norm to *pacta sunt servanda* is the concept that a treaty which contravenes a *jus cogens* is void and without force.[188] There is much controversy concerning the origin, existence, and content of a *jus cogens*.[189] Indeed, there appears to be no case in which either an international court or arbitral tribunal has declared a treaty invalid because it is repugnant to a peremptory rule of international law. No international political organ has made any such type of decision; neither has any government agreed to such a proposition during the settlement of a dispute.[190]

The existence of the concept of a *jus cogens*, or peremptory rule of international law from which no derogation is permitted, indeed raises interesting questions. One such *jus cogens* was recognized during the conduct of the Nuremberg trials. A *jus cogens* was found to exist in the rule of international law prohibiting employment of prisoners of war in work having a direct relation to war operations (*e.g.*, manufacture, supply, or transport of arms or munitions).[191] It may also be contended that the prohibition against genocide has risen to the level of a *jus cogens*. Few crimes seem more heinous than the crime of genocide. It would be incredible to uphold the validity of a treaty which condoned or provided for the genocide of a people. Few agreements would be more shocking to the conscience, violative of international public policy, or *contra bonos mores*.[192]

The subject of a *jus cogens* was addressed in the Vienna Convention on the Law of Treaties. Article 53 of the Convention states a number of requirements regarding *jus cogens*. The article defines a *jus*

187. An additional requirement of the Vienna Convention concerning invocation of *rebus sic stantibus* is the fact that the fundamental change not be the result of a breach of an obligation under that treaty by the party invoking the doctrine. Vienna Convention, *supra* note 169, art. 62, para. 2(b).

188. *Id.* art. 64.

189. *See, e.g.*, Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977).

190. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949-50 (1967).

191. 9 TRIALS OF THE WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950).

192. Advisory Opinion on Reservations to the Genocide Convention [1951] I.C.J. 15, at 23, *cited in* Schwelb, *supra* note 190, at 955.

cogens, or peremptory norm of international law, as a norm general in nature, accepted and recognized by the international community as a whole; this norm must be one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[193]

It might be proposed that there has, in fact, arisen a new peremptory norm of general international law. The United Nations has been very active in paving the way for a "New International Economic Order." The "New International Economic Order" is embodied in U.N. Resolutions 3201 and 3202.[194] These resolutions, as well as a number of others, suggest that a number of principles be adhered to in the conduct of international economic relations. These principles include sovereign equality, territorial integrity, freedom from coercion, and sovereignty over natural resources.[195] These resolutions also include the principle of preferential treatment for developing countries and declare the right of LDC's to gain access to technology and to develop indigenous technology.[196] Similarly, the Charter of Economic Rights and Duties of States[197] calls for the establishment of these principles, as well as the principles of international cooperation and fulfillment, in good faith, of international obligations.[198] It should also be noted that article 13 of the Charter of Economic Rights and Duties of States provides that proper regard be given to the rights and duties of holders, suppliers, and recipients of technology.[199]

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193. Vienna Convention, *supra* note 169, art. 53.

194. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, ____ U.N. GAOR, Supp. (No. ____) ____, U.N. Doc. A/9559 (1974) [hereinafter cited as NIEO]; Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, ____ U.N. GAOR, Supp. (No. ____) ____, U.N. Doc. A/9559 (1974).

195. NIEO, *supra* note 194; Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, ____ U.N. GAOR, Supp. (No. ____) ____, U.N. Doc. A/9559 (1974); *See also* G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) ____, U.N. Doc. A/5217 (1962); G.A. Res. 3171, ____ U.N. GAOR, Supp. (No. ____) ____, U.N. Doc. ____.

196. *See* NIEO, *supra* note 194; CERDS, *supra* note 40.

197. *See* CERDS, *supra* note 40.

198. *Id.* ch. I.

199. *Id.* art. 13. The declarations of the United Nations do not, in and of themselves, establish international law. Some states, including Mexico, undoubtedly viewed the CERDS as constitutional in nature, and hence, obligatory upon the community of nations.

Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295, 297 (1975); Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591, 595 (1975). U.N. General Assembly Resolutions, however, do not have the force of law. No matter how solemnly pronounced, the resolutions are not law. *Id.* at 597. *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d ed. 1973). These resolutions may, however, be considered evidence of customary

The contours of this new international economic order are vague and undefined. While the right of LDC's to develop is stressed in these resolutions,[200] so too are the rights of property holders and the duty to fulfill international obligations. Those rights emphasized in the Charter which were not subject to dispute by member states in framing the Charter were the general rights of sovereignty and well-recognized concomitant rights (*e.g.*, the right to trade, the right of access to technology). The specifics of the Charter, however, where they involved preferential treatment,[201] the right to regulate MNC's, and the right to expropriate property without regard to international law, were subject to substantial dispute; these "rights" did not receive universal ratification.[202] It is, therefore, difficult to arrive at the conclusion that a *jus cogens* could have arisen within the meaning of article 53 of the Vienna Convention. While the language in the "New International Economic Order" and the Charter of Economic Rights and Duties of States may be normative in nature,[203] and generally applicable, the norms embodied therein are not recognized as peremptory by the international community as a whole. In fact, it is probably the case that these norms are not customary *jus dispositivum*, or pliable rules of law. The requirements for ordinary customary international law are not met.[204] Whatever the significance of U.N. resolutions, resolutions passed in the face of substantial opposition cannot create law or declare dispositively its existence.[205]

Therefore, the conclusion which must follow, is that neither the Paris Convention nor the New York Convention are invalidated by *jus cogens*. While the doctrine of *rebus sic stantibus* might operate to ter-

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international law. Collective acts, as well as individual acts of states, constitute state practice. Collective acts, consistently repeated, may be influential in the creation of international law, if acquiesced in by sufficient numbers of states. This is especially true if the declarations are normative or declaratory rather than exhortive. *See* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Brown, *Changing the Rules:* International Law and the Developing Countries: The ABA Workshops of 1977, 12 INT'L LAW. 265, 269 (1978). *See also* Toth, *supra* note 161, at 147-48.

200. *See generally* NIEO, *supra* note 194; CERDS, *supra* note 40.

201. Preferential treatment is simply the principle that nationals of LDC's receive treatment more favorable than that accorded nationals of developed states. Such treatment may be accorded with respect to patent duration, fees, ownership rights, or tariffs. *See generally* Comment, *Preferential Treatment: A New Standard for International Economic Relations*, 18 HARV. INT'L L.J. 109 (1977) [hereinafter cited as *Preferential Treatment*].

202. *See* CERDS, *supra* note 40, *reprinted in* INT'L LEGAL MAT'LS 263 (1975).

203. *Preferential Treatment, supra* note 201, at 111.

204. *See* Toth, *supra* note 161, at 148.

205. *Preferential Treatment, supra* note 201, at 111 n.9. *See also* HIGGINS, *supra* note 199, at 2.

minate the Paris Convention, or modify it, the New York Convention is not terminated. The exceptions to enforcement embodied within the New York Convention would be available at any time a *rebus sic stantibus* claim would otherwise terminate the obligation.[206] If the exceptions would be available, it cannot be claimed that the treaty would operate to imperil the vital development of a LDC.

Potential investors and licensors need not be concerned over the theoretical but impractical possibility that LDC's would be quick to invoke the aforementioned doctrines to escape their liabilities. Revision of existing treaties, however, is a substantial possibility.[207] Many LDC's have called for the alteration of the international system of industrial property protection. The Paris Convention, therefore, is a prime candidate for revision.

V. REVISION OF THE PARIS CONVENTION

The revision of the Paris Convention has been entrusted to the World Intellectual Property Organization (WIPO).[208] In connection with its role in studying the impact of transfers of technology on LDC's, the United Nations Conference on Trade and Development (UNCTAD) has also become involved in the study of the international patent system.[209] The UNCTAD Secretariat has participated in the ongoing revision process of the Paris Convention by preparing a report detailing the areas of the Paris Convention that require revision. The Secretariat has concluded that advantages accruing to LDC's under the patent regime embodied in the present version of the Paris Convention are outweighed by the disadvantages.[210] Indeed, the case for a patent system is not universally acknowledged even in developed states.[211]

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206. As previously noted, a restrictive interpretation of the public policy exception of the New York Convention would only permit nonenforcement when basic notions of morality or justice, or the most important aspects of national policy are threatened. Imperilment of vital development, a requirement of *rebus sic stantibus*, should certainly be sufficient to invoke the public policy exception. *See* notes 144-45 and accompanying text *supra*.

207. There are political constraints to the invocation of these doctrines. The most obvious restraint would be the possibility of international retaliation in the form of reduced foreign aid or trade advantages. Use by LDC's of a "legitimate" and "accepted" method to achieve their goals (for example, revision of treaties) would not be likely to engender retaliation.

208. *See* LADAS, *supra* note 177, at 175. *See also* UNCTAD Report, Annex IV, *supra* note 134, at 6.

209. Report on the Revision of the Paris Convention, *supra* note 176, at 1.

210. *Id.* at 2.

211. *Id.* at 2, 3. *See also* Greer, *The Case Against Patent Systems in Less Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973).

In contrast to earlier studies,[212] the present report has evaluated the utility of the industrial property system from the perspective of LDC's.[213] From their perspective, the protections against the abuse of patents, embodied in the Paris Convention, have been diluted; the patentee has been protected to the exclusion of the social and economic interests of LDC's.[214]

In conformance with the continuing awareness of the problems of LDC's,[215] changes have been suggested in five basic areas[216] of the Convention. These areas relate to:[217]

1. National treatment;[218]
2. Right of priority;[219]
3. Independence of patents;[220]
4. Compulsory licensing and forfeiture;[221] and
5. Importation of articles and products manufactured by a process patented in the importing country.[222]

In view of the recommendations of revision relating to these areas, a discussion of these principles, their significance, and the rationale for their revision will follow.

A. National Treatment

The principle of national treatment, embodied in articles 2 and 3 of the Paris Convention, is, in fact, a form of equal protection. The principle provides that nationals of countries adhering to the Convention, and others who are domiciled or have an effective industrial or commercial establishment therein, are guaranteed equality of treatment with nationals of the state granting the patent.[223]

National treatment, the antithesis of protectionism, is the product of a consistent pattern of practice among nations during the nineteenth century. In concluding treaties of friendship, commerce, and naviga-

212. *See* The Role of the Patent System, *supra* note 2, at 35; LADAS, *supra* note 177, at 171.
213. Report on the Revision of the Paris Convention, *supra* note 176, at 5.
214. *Id.* at 6.
215. *Id.*
216. *Id.* at 7. *See also* Greer, *supra* note 211, at 259. Greer advocates abolition of the patent system in LDC's.
217. Report on the Revision of the Paris Convention, *supra* note 176, at 7.
218. *See* Paris Convention, *supra* note 16, art. 2.
219. *Id.* art. 4.
220. *Id.* art. 4 *bis*.
221. *Id.* art. 5.
222. *Id.* art. 5 *quater*.
223. The Role of the Patent System, *supra* note 2, at 47; Report on the Revision of the Paris Convention, *supra* note 176, at 25.

tion, countries included such a provision as standard fare.[224] Artificial trade barriers are lifted as a result of such a clause; freer trade and capital flow may result. Comity is promoted; fractionalism and elevation of parochial interests above the interest in promoting friendly relations is prevented. National treatment provisions may promote a healthy respect for the rights of others and their status as equals.

The report of the Secretariat, however, addresses the national treatment guarantees of the Paris Convention in a different light. The Secretariat levels the criticism that the difference in levels of development and technological capacity between the LDC's and advanced countries renders the national treatment requirement an instrument of oppression.[225] The principle "can be characterized as a reverse system of preferences in the markets of developing countries for foreign patent holders."[226] The Secretariat opines that the principle, rigidly applied, prevents the adoption of appropriate patent policies.[227] Unequal or preferential treatment for local investors has been advocated by both the Secretariat[228] and the governmental experts from developing countries.[229] The principle of preferential treatment for nationals of developing states[230] finds support in contemporary state practice and may also appeal to one's sense of social justice. Preferential treatment is justified by the difference in economic situations between LDC's and developed countries. The problems faced by LDC's are different and more acute than those faced by developed states. It is argued that preferential treatment is necessary in order to cater to these problems and to prevent domination of industrial property by developed states.[231]

The conclusions drawn by the Secretariat and by the experts from the group of developing nations are sharply disputed in comments issued by the United States expert.[232] The attack on the principle of national treatment is countered by him on a number of bases.

Insofar as the differences in position and bargaining strength between local firms and foreign suppliers may affect the ability of local firms to conduct armslength bargaining, abolition of national treat-

224. LADAS, *supra* note 177, at 48; *See also* Convention of the Establishment, Nov. 25, 1959, United States - France, 11 U.S.T. 2398, T.I.A.S. No. 6923.

225. Report on the Revision of the Paris Convention, *supra* note 176, at 25.

226. *Id.*

227. *Id.* Such policies might include preferences in fees paid and duration of patents of nationals as compared to that of foreigners.

228. *Id.*

229. UNCTAD Report, Annex IV, *supra* note 134, at 8.

230. *Preferential Treatment, supra* note 201, at 122.

231. UNCTAD Report, Annex IV, *supra* note 134, at 6.

232. UNCTAD Report, Annex V, *supra* note 177.

ment is not the solution. Instead, the "weaker" organization should hire a technology transfer negotiator or expert to aid or represent it in negotiations.[233] Perhaps the most pointed criticism of the principle of preferential or discriminatory treatment in this context, however, is that the principle of preferential treatment is an irrational solution to the technology transfer problem. A state should encourage *local* inventiveness.[234] Differentiation in treatment between local inventions and foreign inventions can be accomplished consistently with the national treatment provisions of the Paris Convention;[235] distinctions in treatment based upon the origin of the invention could be utilized to encourage local research and development activities. This would have the positive effect of encouraging local invention, thus contributing to the national economy of the developing country. Access to the new technology would be fostered as well as local employment. The LDC would gain exposure to that subsidiary know-how necessary to successfully work the patented product after the patent has expired.

The comments of the United States expert stress that the national treatment principle is the cornerstone of the Paris Convention.[236] The comments further note that the United States and other developed member states are also obligated to grant the same treatment to foreigners that they grant to their own nationals.[237]

The report of the Secretariat, however, does not suggest that the principle of national treatment should be eliminated. Rather the contention is that the principle should not be "rigidly applied."[238] Exceptions to the principle should be acknowledged in the text of the Convention. The Secretariat suggests that such exceptions might include duration periods of patents,[239] standards for revocation or compulsory licensing,[240] and fee schedules.[241] The substantive requirement of novelty might also be applied differently to national investors than to foreigners.[242] The report states that "the revised Convention should provide for granting preferential treatment for developing countries *in some specific areas.*"[243]

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233. *Id.* at 7. UNIDO asserts, however, that LDC's may lack even the expertise to choose their advisers properly. National Approaches, *supra* note 2, at 13.
234. UNCTAD Report, Annex V, *supra* note 177, at 21.
235. Report on the Revision of the Paris Convention, *supra* note 176, at 26.
236. UNCTAD Report, Annex V, *supra* note 177, at 22.
237. *Id.*
238. Report on the Revision of the Paris Convention, *supra* note 176, at 25.
239. *Id.* at 26.
240. *Id.*
241. *Id.*
242. *Id.* at 25. For example, a national of the LDC might be required only to prove local novelty, while a foreigner might be held to a world-wide standard.
243. *Id.* at 26 (emphasis added).

Potential patentees should note, however, that the Secretariat concedes that elimination of the national treatment principle is not absolutely necessary in order to effect transfers and acquisitions of technology.[244] Accordingly, an LDC may provide for two types of patents; one for inventions made abroad and one for local inventions.[245] Such a distinction would accomplish the policy objectives of encouraging local invention and of providing greater protection.[246] Stricter rules of working and novelty for foreign inventions could be applied.[247] Under this approach, foreigners would also be eligible for patents pertaining to local inventions. The effect of this approach, however, would be that more of the research activity would take place in the LDC; thus inventions more appropriate to the conditions of the state would result.[248] This approach would not violate the national treatment provisions of the Paris Convention because there would be no discrimination based upon nationality of an investor or patentee.

B. Right of Priority

The right of priority under article 4[249] of the Convention is an important protection for the patentee. The priority period for a patent is twelve months, and for a trademark, six months. During the priority period the right of a foreign patentee or trademark owner cannot be cut off or invalidated by acts performed during the interval, such as publication or working of the invention, or another application.[250]

The right of priority relieves an inventor from the obligation of filing contemporaneous patent or trademark applications in all the countries in which he desires protection. The inventor will thereby be permitted to apply first in the state in which he resides or conducts business. During the priority period, the inventor will be in a position to ascertain the possibilities afforded by his invention or trademark and decide whether to register in another country. In the meantime, his right of priority will protect him from intervening events so long as he registers within the priority period; the inventor will be protected from invalidation.[251]

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244. *Id.* at 25. *See also* The Role of the Patent System, *supra* note 2, at 48; LADAS, *supra* note 177, at 266-68.
245. Report on the Revision of the Paris Convention, *supra* note 176, at 26.
246. *Id.*
247. *Id.*
248. *Id.*
249. Paris Convention, *supra* note 16, art. 4.
250. LADAS, *supra* note 177, at 272.
251. *Id.*

The report of the UNCTAD Secretariat advocates a reduction in the priority period for patents.[252] In justification of such a reduction, the Secretariat notes that the priority right originated in the 1883 version of the Paris Convention.[253] At that time the means of communication were more tedious than they are today. Even so, the priority period was originally limited to six months.[254] At present, the means of communication are much more effective, thus eliminating some of the need for an extended priority period.

The Secretariat also points out that the rights of third party national inventors are impaired by a priority period. For example, if an invention identical to the protected invention were independently made by a national inventor during the priority period, the national inventor would be unable to patent the invention. Thus, there emerges a risk that this situation may constitute a strong disincentive for the national inventor; investments of time and money may, according to this theory, become useless due to an application made in another country, but as yet unknown to nationals. The third party may unexpectedly be required to stop using his invention.[255] The report also suggests that this problem might be aggravated if foreign applicants choose to deliberately delay the filing of their application until the last month of the convention year; accordingly, the period of validity of the foreigner's patent would be extended.[256] The Secretariat, therefore, makes the following suggestions:

1. The priority period should be reduced;[257]
2. The priority period should not apply against third parties who have, in good faith, begun the exploitation of an invention upon which priority is claimed before its publication or disclosure;[258]
3. Preferential treatment could be granted to developing countries with regard to the rights of nationals who may, in good faith, apply for a patent during the priority period claimed by a foreign applicant;[259] and
4. "Preferential treatment could also be examined with respect to duration of the priority period, for inventions originating in developing countries."[260]

252. Report on the Revision of the Paris Convention, *supra* note 176, at 21.
253. *Id.* at 19.
254. *Id.*
255. *Id.* at 20.
256. *Id.*
257. *Id.* at 21.
258. *Id.*
259. *Id.*
260. *Id.*

The comments of the United States expert, however, cast doubt upon the efficacy and desirability of such revisions. The United States expert notes that the Secretariat has argued that the priority rights constitute a strong disincentive for local inventors to conduct research and development activities in developing countries. Carried to its logical extreme, the conclusion would be that the existence of patent rights of any kind "discourages research and development activity since somebody always has the possibility of being second."[261] This line of reasoning, however, is specious since it rarely occurs that two applications for the same invention are filed in a one year time span.[262] In the United States, for example, over 100,000 patent applications are filed annually; yet fewer than 400 cases arise in a year where there are conflicting applications for the same invention.[263]

As to the contention that foreign patentees deliberately wait until the end of the priority period before filing their applications, there are countervailing considerations that render this claim a misstatement. Delaying the application in this manner would not increase or lengthen the period of validity of the patent. The patent merely runs from the later date. Prior to the time a patent is applied for, protection for an invention does not begin; therefore, the invention may be practiced by anyone.[264]

Moreover, the priority period may be used to determine the market potential in various countries in order to decide where a patent application should be filed; the priority period may also be utilized to effect other preparations for patenting and marketing a product.[265] Additionally, a reduction in the priority period would probably have the effect of increasing the number of unworked patents in developing countries.[266]

C. *Independence of Patents*

The principle of independence of patents found in article 4 *bis* of the Convention essentially provides that the substantive requirements for patents in one country are independent of the requirements and conditions for patents of the same invention for other members of the Paris Union.[267]

The report of the UNCTAD Secretariat highlights some of the

261. UNCTAD Report, Annex V, *supra* note 177, at 17.
262. *Id.* at 18.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 19.
267. LADAS, *supra* note 177, at 272.

disadvantages of the principle of independence of patents.[268] Application of the principle leads to the result that forfeiture of a patent in one country (*e.g.*, for non-payment of taxes) does not cause the forfeiture of a patent obtained in another country of the Union. Similarly, expiration of a patent in one country does not mean that the patent obtained in another country has expired.[269] This is true of other causes of nullity or forfeiture and is also true with respect to conditions for the grant of a patent.[270]

The Secretariat notes that in some instances the principle will have an unfavorable impact on the patent grantor, especially when it is an LDC. For example, an application that has been rejected in one country of the Union for lack of novelty, for obviousness, or for lack of industrial applicability, may enter or remain in force in another country with similar substantive requirements.[271] This disadvantage is magnified in those LDC's which lack the technical staff required to engage in a searching examination of an application.[272] In order to remedy this deficiency, the Secretariat suggests that a system of compulsory exchange of information should be established; the country wherein the initial application was made should be required to inform other countries of the results of its examination.[273] This requirement would be especially valuable where the country in which the initial application was made is a country with a developed system of patent examinations.[274] The report also suggests that litigation results on the validity of patents should be forwarded.[275]

With respect to this problem, the expert from the United States does not differ greatly with the UNCTAD Secretariat. It is pointed out, however, that any requirement with respect to compulsory exchange of information should be drafted carefully, so as not to require exchange of information which would be irrelevant due to differences in the laws of the concerned states.[276] Thus, the United States suggests that only information upon which novelty and obviousness

268. Report on the Revision of the Paris Convention, *supra* note 176, at 22-24.
269. LADAS, *supra* note 177, at 272.
270. *Id.*
271. Report on the Revision of the Paris Convention, *supra* note 176, at 22.
272. Bolivia, for example, refers to the patent accreditation procedures of the country of origin when an investor from an advanced country applies for a patent. Exchange of information is particularly helpful in such instances; it provides the LDC with information material to the grant or denial of a patent which the LDC might not otherwise be able to acquire. *Id.* at 22 n.63 and accompanying text.
273. *Id.* at 23.
274. *Id.*
275. *Id. See also* UNCTAD Report, Annex IV, *supra* note 134, at 7.
276. UNCTAD Report, Annex V, *supra* note 177, at 20.

could be assessed should be exchanged.[277] It should be noted that the present text of the Paris Convention in no way prevents a country from requiring such information from the applicant.[278] The suggestions of the United States expert do not differ significantly from those of the UNCTAD Secretariat on this point.

D. Compulsory Licensing and Forfeiture

The essence of a right to patent inventions lies in the exclusivity of the right.[279] In a very real sense, patent rights confer a temporary monopoly upon the patentee.[280] The rationale behind the grant of patent rights has shifted over the years. In the fifteenth through the eighteenth centuries much of the justification for patent rights centered upon the right of an inventor to the fruits of his mind.[281] Justification for the grant of patent rights also stemmed from the interest of the state in promoting inventive activity and obtaining social benefits.[282] In the nineteenth and twentieth centuries the rationale switched from philosophical considerations to economic considerations. The grant of exclusive patent rights is not currently justified by any inalienable right accruing to the inventor.[283] Providing a fair reward to an inventor so as to encourage inventive activity is the current concern of patent laws. They are also designed to encourage inventors to disclose secrets and new technology to the public.[284] The efficacy of the patent in achieving these goals, however, is difficult to measure.[285]

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277. *Id.* The Patent Office of the United States is not equipped for massive exchange of information. Such a requirement would place a heavy burden on the Patent Office.

278. *Id.* In fact, the Canadian Patent Office may require an applicant to submit the following information:

1. The serial number and filing date of any application for the same invention that is being, or has been, prosecuted in any other country;
2. Particulars sufficient to identify the prior art cited against the application in the country involved;
3. The form of the claims allowed therein;
4. Particulars of any application or patent with which such application in the specified other country is, or has been, involved in conflict, interference, or similar proceedings.

Id.

279. LADAS, *supra* note 177, at 2.

280. *Id.* at 5-6; The Role of the Patent System, *supra* note 2, at 44, 45; Cohen, *Compulsory Licensing of Inventions — The Paris Convention Model*, 20 IDEA 153, 153 (1979).

281. The Role of the Patent System, *supra* note 2, at 44.

282. *Id.*; LADAS, *supra* note 177, at 6-7.

283. The Role of the Patent System, *supra* note 2, at 44-45.

284. *Id.* at 45; Cohen, *supra* note 280, at 153. *See also* U.S. CONST. art. I, § 8, cl. 8.

285. *See* The Role of the Patent System, *supra* note 2, at 45; Report on the Revision of the Paris Convention, *supra* note 176, at 2-3. Some commentators have, in

Since, however, a patent is an exclusive monopoly right, proper care must be taken to insure against its abuse. If a patent is obtained, but the patented product is not made available, nor the knowledge provided to the patentor state, much of the justification for a patent right fails. The benefits of local employment, acquisition of know-how, and availability of additional types of goods is not obtained. In fact, such a patent may well impede access to the sought after goods by creating both local and import monopolies.[286] Two of the essential protections against the abuse of patent rights are the compulsory license and the revocation of patents for nonuse or insufficient use.[287] The UNCTAD Secretariat, however, has concluded that the Paris Convention unduly restricts member states in the use of these protections as well as other remedies.[288]

The report of the Secretariat depicts two types of patent abuse prevalent in LDC's. The first problem is that of non-working or nonuse of the patent. If patents are to be an instrument for achievement of developmental objectives of LDC's, the patented inventions must be put to effective use.[289] The second problem involves the use of a patent monopoly to charge excessive prices or royalties or to force other restrictions upon a potential licensee of the patent.[290] The Secretariat has concluded that article 5(A), paragraph 4 of the Paris Convention[291] renders the compulsory licensing and revocation remedies unavailing against monopoly abuses.[292]

A number of difficulties confront the use of compulsory licensees or revocation as a remedy for patent abuse. The first problem is the time lag in obtaining a compulsory license. No compulsory license may be granted for insufficient working of the patent, prior to the expiration of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever is last.

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fact, concluded that the patent system is a detriment to LDC's. *See, e.g.*, Greer, *supra* note 211, at 259.

286. *See* Paris Convention, *supra* note 16, art. 5 *quater*.

287. Cohen, *supra* note 280, at 153; Report on the Revision of the Paris Convention, *supra* note 176, at 153; Report on the Revision of the Paris Convention, *supra* note 176, at 10; LADAS, *supra* note 177, at 25; UNCTAD Handbook, *supra* note 2, at 48-49; Mirabito, *Compulsory Patent Licensing for the United States: A Current Proposal*, 57 J. PAT. OFF. SOC'Y 404, 406 (1975); Note, *Is a Compulsory Patent Licensing Statute Necessary? A Study of the U.S. and Foreign Experience*, 7 L. & POL'Y INT'L BUS. 1207 (1975).

288. Report on the Revision of the Paris Convention, *supra* note 176, at 9-14. *See also* UNCTAD Report, Annex IV, *supra* note 134, at 6-7.

289. Report on the Revision of the Paris Convention, *supra* note 176, at 9-10.

290. *Id.* at 9.

291. Paris Convention, *supra* note 16, art. 5(A), para. 4.

292. Report on the Revision of the Paris Convention, *supra* note 176, at 10, 11.

If the patent officers are backlogged, or if compulsory licensing proceedings must be handled judicially rather than administratively, the value of a compulsory license is reduced.[293]

A second problem with respect to the provisions for compulsory licensing is the prohibition against the grant of a compulsory license "if the patentee justifies his inaction by legitimate reasons."[294] The Secretariat urges that this restriction is ill-defined; another more ascertainable standard should be utilized.

A further difficulty in the use of compulsory licenses as a remedial tool is the potential unavailability of necessary subsidiary know-how with which to operate the patent. A compulsory license is an involuntary grant by the patentee;[295] it is, thus, reasonable to assume that unless disclosure is mandated in some manner, the patentee will not transfer that subsidiary knowledge necessary to the successful working of the patent. The patentee's interest is adverse to that of the licensee.[296]

The Secretariat also criticizes the Paris Convention's limitations on revocation of patent rights. Under the Convention, no patent may be revoked except in cases where the grant of compulsory licenses would not have been sufficient to prevent patent abuses. In any event, forfeiture proceedings may not be instituted prior to the expiration of two years from the grant of the first compulsory license. This may lead, in many instances, to the result that patented technology may not inure to the benefit of the granting country until the technology has become outdated or of limited value.[297] The Secretariat further contends that the limitations imposed by article 5(A) "constitute an important constraint to the possibilities of promoting the actual working of the patent in the granting country."[298]

The position of the UNCTAD Secretariat, however, with respect to the compulsory licensing provisions of the Paris Convention is subject to substantial dispute. Admittedly, compulsory licensing provisions have proved to be of limited value in remedying patent abuses, such as the failure to work a patent.[299] The reason, however, lies not in the constraints imposed by the Paris Convention, nor because compulsory

293. *Id.* at 11. *See also* The Role of the Patent System, *supra* note 2, at 51.
294. Paris Convention, *supra* note 16, art. 5(A), para. 4.
295. Report on the Revision of the Paris Convention, *supra* note 176, at 12.
296. *Id. See also* The Role of the Patent System, *supra* note 2, at 51.
297. Report on the Revision of the Paris Convention, *supra* note 176, at 12. *See also* Note, *Is a Compulsory Patent Licensing Statute Necessary? A Study of the U.S. and Foreign Experience*, 7 L. & POL'Y INT'L BUS. 1207, 1213-14 (1975).
298. Report on the Revision of the Paris Convention, *supra* note 176, at 12.
299. *Id.* at 10. *See also* The Role of the Patent System, *supra* note 2, at 50.

licensing is in itself an insufficient remedy; its limited value derives from the fact that compulsory licensing provisions are rarely enforced. Compulsory licenses are seldom granted.[300]

The United States expert on the transfer of technology points out several other deficiencies of the criticisms levelled at article 5. The grace period for working a patent is important to patentees and also reflects reality and practical considerations. The United States expert points out the futility of a policy which demands prompt working at the penalty of a compulsory license or forfeiture. For example, the commercial success of penicillin was not accomplished until sixteen years after its invention.[301] Experience with the helicopter and even the ballpoint pen reveals similar results.[302]

It is also urged that article 5 and, indeed, the entire Paris Convention, is extremely flexible and will respond to the needs of LDC's. For example, each country is free to determine for itself:

1. The substantive criteria for granting patents;[303]
2. Whether to exclude certain subject matter from patentability;[304]
3. Whether to have compulsory licensing for nonworking;[305]
4. How to define a failure to work, for the purpose of granting a compulsory license or revoking a patent;[306] and
5. Whether to grant compulsory licenses in the public interest.[307]

The report of the UNCTAD Secretariat also calls for a redefinition of the concept of "legitimate reasons" found in article 5(A) of the Convention. The report considers the concept an obstacle to local working and acquisition of know-how.[308] To the extent, however, that the report calls for a close definition of the concept of "legitimate

300. UNCTAD Report, Annex V, *supra* note 177, at 12; Cohen, *supra* note 280, at 188; The Role of the Patent System, *supra* note 2, at 50. *But see* Note, *Is a Compulsory Patent Licensing Statute Necessary? A Study of the U.S. and Foreign Experience*, 7 L. & POL'Y INT'L BUS. 1207 (1975); Henry, *Multi-National Practice in Determining Provisions in Compulsory Patent Licenses*, 11 J. INT'L L. & ECON. 325 (1976-1977).

301. UNCTAD Report, Annex V, *supra* note 177, at 12.

302. *Id.*

303. *Id.* at 10.

304. *Id.*

305. *Id. See generally* Paris Convention, *supra* note 16, art. 5.

306. The Paris Convention does not itself define the term. *See* Paris Convention, *supra* note 16, art. 5. *See also* The Role of the Patent System, *supra* note 2, at 51 n.203; Cohen, *supra* note 280, at 162.

307. The Role of the Patent System, *supra* note 2, at 50; G. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 70 (1968).

308. Report on the Revision of the Paris Convention, *supra* note 176, at 11; Cohen, *supra* note 280, at 186-87.

reasons," it would accomplish the curtailment of the freedom of national authorities to lend their own interpretation to the concept.[309] The United States expert points out that this effect is inconsistent with the thrust of the UNCTAD report, which calls for more flexibility for LDC's. To the extent that a redefinition would narrow the defense, it "would impose a harsh and arbitrary standard on patentees who, for valid reasons, had not been able to work their patents."[310] The comments of the United States expert propose that such a redefinition would result in a disincentive to potential patentees to patent their inventions. The inevitable result would be a reduction in the transfer of technology to countries utilizing the redefined standard.[311]

The report of the United States expert evinces an agreement with the Secretariat that compulsory licensing is subject to certain difficulties. Notably, compulsory licenses may not accomplish local working of a patent because subsidiary technology and know-how is often required in order to work a patent.[312] The United States expert, however, contends, in effect, that the UNCTAD Secretariat has fundamentally misconceived the efficacy of compulsory licensing. Compulsory licensing draws its efficacy as a remedy, not only from the mandatory transfer of know-how which it accomplishes, but from the incentive it provides patentees to either work or voluntarily license their patents.[313] The fact that compulsory licenses are rarely issued may very well speak for the success of the incentive they provide to work inventions.[314]

E. Importation of Articles and Products Manufactured by a Process Patented in the Importing Country

Article 5(A), paragraph 1 of the Convention provides that no patent shall be forfeited by virtue of importation by the patentee into the country granting the patent of articles manufactured in any of the countries of the Paris Union.[315]

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309. UNCTAD Report, Annex V, *supra* note 177, at 12-13.

310. *Id.* at 13.

311. *Id. See also* Harris, *Technology Transfer and Industrial Property Protection: Problems Underlying Various European Patent and Other Conventions*, 19 IDEA 215, 226 (1977-1978).

312. UNCTAD Report, Annex V, *supra* note 177, at 13.

313. *Id.*

314. *Id.* at 12. *See also* Cohen, *supra* note 280, at 189.

A new proposal on article 5(A) of the Convention has already been argued upon at the Preparatory Intergovernmental Committee on the Revision of the Paris Convention. The proposed article would strengthen the hand of LDC's in dealing with patentees. UNCTAD Report, Annex IV, *supra* note 134, at 6-7.

315. Paris Convention, *supra* note 16, art. 5(A), para. 1. *See also* LADAS, *supra* note 177, at 273.

Article 5 *quater* provides that a patentee shall enjoy, with respect to imported products manufactured by the patented process, the same rights he would enjoy with respect to products manufactured in the host country;[316] in other words, where the domestic law would protect the patentee against domestically produced products, it must also protect him against imported products, even though it is the process and not the product, which has been patented.

This article does not mandate that any or all processes or products must be granted patent protection. It does provide, however, that any such protection which would be granted as against domestically produced products must also apply as against an imported product. The rights of a patentee may not be circumvented by importing, rather than producing domestically, a protected product.

The UNCTAD Secretariat, however, has criticized the aforementioned provisions. It is his view that these provisions contribute to the problem of nonworking of patents.[317] Importation does not constitute working of a patent.[318] The advantages of domestic production do not obtain when a product is imported. Employment is not created, workers do not gain experience and know-how, and there is a capital outflow. The combinative effects of articles 5 and 5 *quater* are the creation of an import monopoly as well as a domestic monopoly.[319] It is the Secretariat's view that these articles magnify the problems associated with nonworking of a patent and should, therefore, be modified or deleted.

The United States expert does not agree. In the first place, very few of the world's inventions are patented in LDC's. Most of the inventions patented in other countries are, therefore, available as are the products derived therefrom.[320] Additionally, without the article 5 *quater* protection against imports, a patentee may be unable to establish continued local working. Once local working has been established in a LDC, the ability to exclude infringing imports could determine the patentee's ability to continue local manufacture.[321]

It is also difficult to perceive what purpose would be achieved or benefits received by the deletion of article 5 *quater*. If a patented product is not worked, it should be licensed or forfeited irrespective of importation by the patentee. If a patent is sufficiently worked, impor-

316. Paris Convention, *supra* note 16, art. 5 *quater*. *See also* LADAS, *supra* note 177, at 273-74.
317. Report on the Revision of the Paris Convention, *supra* note 176, at 15-18.
318. *Id.* at 15.
319. *Id.* at 16.
320. UNCTAD Report, Annex V, *supra* note 177, at 8.
321. *Id.* at 16.

tation by the patentee should not result in forfeiture. While deletion of article 5 *quater* and article 5(A), paragraph 1 may encourage local working in lieu of importation, it may also discourage transfer of technology in the first instance, by forbidding importation when there may be a good reason for it. Forfeiture should follow lack of working, not importation.

F. Other Aspects of the Convention

The study by the Secretariat recommends certain other modifications be considered in a revision of the Paris Convention. The Secretariat recommends that reservations be permitted,[322] that patent arrangements among LDC's be permitted by modifying national treatment requirements,[323] that the requirements for amendment or revision of the Convention be modified, and that denunciation and withdrawal from the Convention be permitted; the only requirement should be a proper one year advance notification.[324] The Convention currently permits withdrawal only after a state has been a member for a certain period of time. These recommendations are among the more significant suggestions and have little chance of acceptance. The United States expert contests these recommendations as either undesirable or stale.[325]

The five areas in which the Secretariat has elaborated his criticisms to the Convention are extremely significant to the patentee. In particular the right of priority and the principle of national treatment provide a patentee with the incentives and the necessary flexibility to successfully work his patent. Adoption of the recommendations made by the Secretariat might well have the effect of creating disincentives for investors and patentees to transfer technology to LDC's. The Convention would also be transformed into an instrument of parochialism and disharmony.

VI. CONCLUSION

The problems of LDC's in the economic and technological arenas are substantial. Technological dependence has impeded growth and the poverty of many LDC's has not been alleviated. Part of the cause lies in the monopoly status of MNC's and their actions in monopolizing technology. In many instances inappropriate technologies have been transferred to LDC's at high cost.

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322. Report on the Revision of the Paris Convention, *supra* note 176, at 27.
323. *Id.* at 28.
324. *Id.* at 29-30.
325. UNCTAD Report, Annex V, *supra* note 177, at 24. These recommendations have little chance of acceptance because the Paris Convention requires unanimous approval for revisions. *See* UNCTAD, *supra* note 177, at 135-38.

LDC's have reacted by promulgating restrictive investment, technology, and industrial property laws to regain control over their economies and to promote balanced technology transfer and growth. Mexico's enactments are typical of LDC responses and are, by no means, the most radical response. These enactments may, however, create more problems than they solve; international obligations are implicated and the laws may also create investment disincentives. Chile's experience in the Andean Common Market is an example of reconsideration by a LDC of the wisdom of restrictive laws in view of the need for foreign investment.[326]

Many commentators and economists have focused upon the developmental problems of LDC's and have advocated that preferential economic treatment is a solution or an appropriate response.[327] Preferential treatment, however, has a weak foundation in economic theory, though it may appeal to one's sense of social justice.[328] Substantial criticism may be levelled at various agencies of the United Nations as well as academic economists. Impatient with impartial systematic inquiry, many have taken on the advocate's role of champion and spokesman for LDC's.[329] MNC's, investors, and patentees, while in many instances culprits in the stagnant economic development of LDC's, should be regulated in an equitable manner and in one which is both economically and theoretically sound. Radical unilateral changes in the investment scheme of a country and in its intellectual property system might well create undesired disincentives.

Investors should remain aware of the investment and intellectual property restrictions of LDC's. Mexico's laws, typical of those of LDC's,[330] require substantial working of patents and trademarks at the risk of forfeiture or compulsory license. Most important to the investor, however, are the protections provided by the Paris Convention. The guarantees of nondiscriminatory treatment, priority rights, independence of patents, and importation rights provide significant protections, especially in a field characterized by high research costs.

326. Chile has withdrawn from the Cartagena Agreement in consequence of both political changes and unfavorable experience with respect to economic development. The climate is much more favorable at the present time for foreign investment. *See* Comment, *Chile's Rejection of the Andean Common Market Regulation of Foreign Investment*, 16 COLUM. J. TRANSNAT'L L. 138 (1977).

327. *Preferential Treatment, supra* note 201, at 121.

328. *Id. Compare* United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (Brennan, J., concurring); State of Kerala v. Thomas, [1976] A.I.R.S.C. 490.

329. MYINT, *supra* note 181, at 16-17.

330. *See* National Approaches, *supra* note 2, at 32.

Changes in the five areas of the Convention discussed in this comment[331] could have a drastic effect on the protections afforded patents as well as other industrial property rights.[332]

It is questionable whether the present attack on the industrial property system by LDC's will serve any useful purpose. Industrial property is undoubtedly a symbol of MNC dominance over foreign investment and MNC economic power. In attacking a symbol of economic power rather than squarely confronting economic problems, one might feel better or make political hay; however, no real competitive advantage will be achieved.[333] LDC's should reconsider their strategies and work together with advanced countries in improving their lots.

Warren Landau

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331. *See* notes 208-320 and accompanying text *supra*.

332. The proposed revision of the Paris Convention also affects trademark protections. *See* UNCTAD Report, Annex IV, *supra* note 134, at 10-14; United Nations Conference on Trade and Development Secretariat, The Impact of Trademarks on the Development Process of Developing Countries, U.N. Doc. TD/B/C.6/AC.3/3 (____, 1977).

333. UNCTAD Report, Annex V, *supra* note 134, at 2-7.