

## Negotiating in the Caribbean Basin: Trade and Investment Contracts

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**NEGOTIATING IN THE CARIBBEAN BASIN:  
TRADE AND INVESTMENT CONTRACTS**

*Robert J. Radway\**

BACKGROUND OF NEGOTIATIONS AS A FORUM FOR  
CONFLICT RESOLUTIONS

*Business, Cultural and Political Climate*

In order to successfully negotiate a foreign investment or technology transfer agreement, it is vital for a foreign firm to become sensitive to the important variations which exist among Caribbean countries. For

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instance, some Caribbean countries are still strongly influenced by British, French, Dutch or Spanish traditions, laws and customs. Furthermore, Basin countries include market and nonmarket economies, with sharp cleavages within each of these categories. Mexico, which boasts a giant market economy and is clearly an emerging nation on the broadest international scale, can be contrasted with Barbados, which is heavily dependent on its sugarcane fields, and Trinidad, which thrives primarily on its oil and gas export earnings. Furthermore, political climates within each country vary. Nicaragua, with tensions increasing almost daily, contrasts sharply with the Dominican Republic, which now claims over eleven years of political stability. In general, then, successful agreements can be reached when a firm's long-term outlook is adopted and sprinkled with liberal dosages of sensitivity concerning a Caribbean country's business, cultural and political climate.

*Caribbean Country Regulation of Foreign Investment  
and Technology Transfer*

Because host governments have become more active participants and regulators of their economies, they have come into more direct contact with multinational corporations. Since a multinational can have annual revenues several times the size of a host country's GNP, host countries in the past have generally been unable to negotiate as effectively as the multinational. Consequently, negotiations have become an important forum in which host governments can express their dissatisfaction with, and hostility towards, these huge enterprises.

Host government antipathy towards multinationals and increasing sophistication by government negotiators have encouraged a trend towards "unbundling" of technology when it is transferred into a country. Allegedly, "unbundling" creates an opportunity for small and medium-size companies to provide some elements of technology at a lower cost. Also, smaller firms are said to be potentially more responsive to host country needs. Furthermore, host government officials often believe "unbundling" encourages development of local technology and expertise at specialty levels which initially require less capital and other resources. The administrative, logistical and reintegration costs and efforts, however, often defeat these objectives.

In the area of foreign investment, host governments have devised ways to control and account for investments as they are brought into a country. Requiring registration of the investment and subjecting it to specific accounting standards and criteria for valuation has provided a basis of repatriation of dividends and gives the host governments an idea of the expected flow of foreign exchange in the period under considera-

tion. These methods can also be used as a basis for valuation in the event of expropriation or nationalization.

The combined regulation of foreign investment and technology transfer has, according to some host government officials, resulted in a reduction of the foreign exchange drain and eliminated some alleged abuses of foreign multinationals. The increasing sophistication in identifying and segregating specific transactions under different categories has given the government regulators in host countries a feeling of confidence that they know exactly what money is being paid out, particularly by subsidiaries to their foreign parents.

#### ORGANIZING FOR NEGOTIATIONS IN THE CARIBBEAN BASIN

A multinational negotiation team should vary with the nature of the project and the particular host country. In addition to the sales or marketing person, the team should always include a lawyer and someone who can present the detailed backup of the cost estimate, along with someone who can explain or respond to questions on matters dealing with any technical or engineering approaches or processes involved. Other negotiators can be called in as needed in order to avoid making the permanent team too large and intimidating. In smaller transactions with less technical information involved, the negotiating team can be reduced to as little as one commercially-oriented individual. The multinational should remain sensitive to the perception of intimidation by overwhelming numbers of foreign negotiators. Large numbers reinforce the colossus image, which is often associated with both U.S. corporations and the U.S. government. Finally, there should be a designated person keeping good minutes of the negotiations, including offers and counteroffers, fallback discussions, snags, resolutions of stalemates and other pertinent comments.

#### PLANNING AND PREPARATION FOR NEGOTIATIONS

Advance identification of likely conflicts requires obvious preparation. Based on their unique needs, some multinationals which negotiate on an almost daily basis all over the world have fairly well-defined systems or procedures to complete before each negotiation. Opinions vary on the advisability of such procedures, but despite the obvious limitations, some companies report good results.

Once most of the potential conflicts have been anticipated, informal negotiations may be initiated along with the formal ones. Either prior to or concurrent with formal negotiations, the opposing lawyers should talk to each other, as should the accountants and the technical and commercial specialists from each side. Each individual should know what

the counterpart wants and try to reach an agreement with him on a one-to-one basis. Informal negotiations can thus build personal relationships and take maximum advantage of intradisciplinary credibility while also reducing the risk of spoilage by "bad actors" who often create antipathy outside their field of competence.

#### CONFLICTING OBJECTIVES IN NEGOTIATIONS

##### *Host Country Objectives*

A host country enters the negotiation situation with a defined set of objectives which normally include:

1. Importation of technology or resources to meet national development goals of new industries, plants, processes or products (import-substitution or export promotion);
2. Preservation of (often scarce) foreign exchange reserves;
3. Assurance that the benefits of imported technology and foreign investment are diffused throughout the economy;
4. Massive training to improve the technical skill base;
5. Avoidance of unsuitable or irrelevant technology;
6. Avoidance of undue confidentiality and restrictions on use of technology; and
7. Avoidance of "technological colonialism."

##### *Objectives of the Technological Transferor*

The objectives of the foreign firms include some which are partially in conflict with those of the host country:

1. *Fair return to amortize development costs.* Some corporate research and development is directed at developing technology for licensing. Host companies, however, receive a larger rate of return from use of this technology in its internal operations;
2. *Protection of property rights.* The technology, whether protected under U.S. or foreign patent laws, constitute industrial property. Companies, therefore, insist upon confidentiality, nondisclosure of proprietary information, patent and trademark protection and whatever else may be necessary to prevent competition from unfairly capitalizing on their technology without sharing in the tremendous development costs;

3. *Maintain reputation and competitive standing.* Obviously, a company's credibility is on the line with the technology it has developed and transferred. It therefore seeks certain rights and guarantees. The company has to be satisfied with the quality control and quality level which bears its internationally-known trademark.

4. *Transfer of technology.* Only those resources or technology which can be effectively utilized at one period of time should be transferred. Other resources or technology may be injected as the local economy develops the capability to absorb it. This maximizes the value of a transfer of technology, and prolongs the equal balancing of the relative bargaining strengths of the multinationals and the host country.

#### CONDUCT OF NEGOTIATIONS

A time-honored rule of thumb in the conduct of negotiations is to avoid the necessity of the host country having to "lose face." Flexibility is therefore required at all stages. If a foreign multinational can "live with" a host country and the risk does not outweigh the payoff potential, adaptation to the known constraints of the requirement should be considered. Often, a multinational will be able to receive a trade-off in return.

Closely connected to the "face" problem is the education problem. Some government agencies in certain host countries have a wealth of experience in dealing with multinationals and have confidence in the government objectives and full understanding of how to attain them. Other agencies, however, even within the same government, are quite inexperienced and require generous and frequent doses of patience, education, information and frequent informal contact at all levels (both in social and private meetings).

#### USE OF THIRD PARTIES DURING NEGOTIATIONS

There is a considerable range of views on the use of third parties in or during negotiations. It should be noted that third parties include local accountants or auditors, bankers, consultants, local counsel and an agent or representative. The usefulness of an agent or representative will be a function of his technical knowledge or credibility with the host country. An agent can be helpful when an impasse arises simply by trying to discuss the problem on a level precluding introduction of nationalistic arguments, which should be avoided at all costs. He may also be helpful in introducing the chief negotiator of a multinational to a host country official and acquaint the negotiating team with the proper protocol.

The use of outside consultants with the appropriate credentials has also been useful in highly technical negotiations. Since it provides additional credibility and can accelerate negotiations by improving the psychological climate, the expense of outside consultants can easily be justified.

#### CONCLUSION

Because the ground rules are clearly changing, negotiations for foreign investment and technology transfer agreements are far more complex than in the past. Consequently, there is a need for a greater exchange of information and an awareness of a broader range of considerations than straight economics.

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