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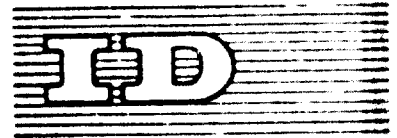
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**INDUSTRIAL PROPERTY OFFICES AS AN ELEMENT OF
THE INVESTMENT CLIMATE^{2/}**

by

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^{1/} Organized jointly by UNIDO and BIRPI (United International Bureaux for the Protection of Intellectual Property, Geneva).

^{2/} The views and opinions expressed in this paper are those of the author and do not necessarily reflect the views of the secretariat of UNIDO.

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1. TECHNOLOGY AND CAPITAL INVESTMENT IN RELATION TO DEVELOPMENT

Development, in the sense of an increase in the wealth of a nation as a whole and in the welfare of its individual inhabitants (which can be measured only on the basis of per capita income), is nowadays one of the main objectives of both national and supranational political organizations. Three fundamental elements are essential for development: qualified manpower, capital, and technology. Industrial property is one of the vehicles for the transfer of technology, since the protection of rights in connexion with the use of patents, distinguishing marks, working methods, manufacturing secrets and know-how helps to promote the activities to which they relate. A country's growth-rate can be positive only when it is based on technology. The role of technology is closely connected with the investment of capital, since, on account of the special structure of modern society, foreign capital implies not only financial collaboration, but also the application of new techniques. The developing areas of the world cannot simply import "the industrial revolution from abroad, unpaek it like a piece of machinery and start it up; they must also be in a position to apply the existing technology"^{1/} and the investment of capital can help to create some of the conditions necessary for their purpose. Hence, the promotion of capital investment is one of the ways of promoting development. In economic spheres, reference is sometimes made to "the vicious circle of poverty", by which is meant that a poor country is destined to remain poor for ever because, on account of its low income level, it cannot accumulate sufficient savings to finance its own development. Even if capital were available, the situation would be no different; there would be no incentive to invest it because the smallness of incomes would prevent consumption from reaching a level that would warrant the investment. We are thus confronted by a pessimistic picture: supply is limited by lack of capital, which reflects a low level of productivity, while demand is limited because of the lack of an incentive to invest, which in turn is the consequence of the limited purchasing power of the population. This entire situation - and herein lies the vicious circle in question - results from low level of real incomes and low productivity. These conditions are further complicated by the difficulty of increasing personal

^{1/} See E. S. Mason, "Planificación del Desarrollo en Tecnología y Desarrollo Económico", Madrid, 1965, p. 273.

saving, because the inhabitants of poor countries try to adopt the consumption habits of the rich countries. In general, the situation is aggravated by the continuous deterioration in the terms of trade, since the prices of agricultural products and raw materials, which constitute the main elements of export, remain stationary, whereas the prices of imported articles continue to rise.^{2/} This all adds up to show the importance of foreign investment in countries without adequate financial resources. Moreover, apart from its intrinsic influence on development, the investment of capital is so closely linked to the transfer of technology that it is impossible to separate them. Whatever the political and economic ideology adopted, one fact remains certain: the developing countries today must do all they can to encourage foreign investment. The Latin American countries have had a long experience in regard to foreign investment. Investments from abroad started around the beginning of the nineteenth century, when commercial banks and finance companies, most of which were British, became interested in the various countries of our continent as they acquired their independence. More than 40 joint-stock companies were thus formed to exploit the economic possibilities of Latin American countries in different spheres, such as pearl culture, the construction of a canal in the Central American isthmus, land settlement in the Rio de la Plata area and especially the working of gold and silver mines. This latter activity gave rise to the founding of the General South American Mining Association, which subsequently split up into 21 different companies. However, the enthusiasm aroused by the resources of Latin America was short-lived: European investors lost their confidence in Latin American companies as a result of various financial setbacks. Later on, about the middle of the century, there was renewed interest in productive investments in public utilities such as railways.

The golden age of foreign capital began in the late 1870's and lasted until 1914, in other words for approximately 40 years; it was due to the following factors: the threat of war in Europe, the fact that various European countries had become technically and financially more independent, the need to improve agriculture in the new countries in order to provide food for the growing urban population of Great Britain.

^{2/} See R. F. Crazut, "Consideraciones acerca de las Inversiones Privadas Extranjeras en Venezuela", Caracas, 1967, p.6.

During the golden age of foreign investment, the receiving countries benefited mainly from investments in infrastructure, such as road networks and utilities. Investment in railroad construction during this period was of particular importance, since the main purpose was to connect the ports with areas in which export industries had been established; however, these investments did not result in an expansion of the domestic market or in the growth of its related industries.

The First World War began to change the pattern of Latin America's external payments. The export trade was abruptly suspended at the beginning of hostilities, for non-payment but it recovered when shipments were started again. During this period there were two main types of foreign capital: European capital went mainly to the financing of railroad construction, while United States capital was mainly absorbed by public utility companies.

As a result of the serious crisis of 1929, the influx of foreign capital to Latin America was reduced to a minimum. The Second World War changed the financial situation: the value of Latin American exports began to rise rapidly while at the same time there was a marked rise in the prices of the exported products and increased buying on the part of Great Britain and the United States. During the period 1929-1945 Latin America began to control direct foreign investment, with the following two objectives in view: first, to limit the outflow of capital and profits to foreign countries in order to reduce the burden which such outflow constituted on the balance of payments and to ensure that the income produced by direct investments was more fairly distributed between the receiving country and the foreign investors and, secondly, to prompt foreign firms to establish new branches and subsidiaries in Latin America, whose production could be a substitute for imports. The following are some of the measures which were adopted: higher export taxes (Peru 1940) or a higher direct tax on joint-stock companies (Chile 1939), the introduction of new labour regulations intended to keep a larger share of the income of foreign companies within the country concerned, the establishment of State or semi-State undertakings to compete with foreign firms,^{3/} government control of foreign firms in the public utilities sector and, lastly, nationalization and expropriation.^{4/} Some of the measures taken during this period produced the opposite effect of promoting the

^{3/} Cold storage plants in Argentina; petrol distribution network in Argentina and Chile.

^{4/} Expropriation of foreign railroads by Mexico in 1932 and nationalization of oil deposits in 1938.

investment of foreign capital; this was the case, for instance, when new customs regulations imposed such high duties on imported manufactured products that the companies supplying them were led to build factories in the regions concerned.

The post-war period witnessed considerable changes in the structure of Latin America, changes that were due mainly to the three fundamental factors: changes in the level of income, the process of finding substitutes for imports and the development of foreign demand. These three factors have all remained effective until the present time.^{5/}

Historically, two distinct attitudes may be distinguished in Latin America as regards the desirability of foreign capital. The first of these attitudes, which we shall term ultra-nationalistic, is based on the view that foreign capital does not provide developing countries with an effective solution to the problem of economic growth, and the second attitude, which we could call realistic, considers foreign investment to be a fundamental factor in development.

The ultra-nationalistic attitude represents a reaction against the methods by which foreign capital was originally invested: foreign capital invested in Latin America by highly developed countries was exposed to risks in countries torn by constant revolutions and coups d'état and to the dangers of inflation and expropriation, and the methods employed to overcome the obstacles and difficulties that were thus encountered in the long run conflicted with local interests. These difficulties were of the same nature in our continent as in other developing areas and can therefore be included in the same general classification which is fundamental^{6/}: (1) obstacles of the traditional type due to differences of language, customs and political systems and to unfamiliarity with the conditions existing in the country where the capital is being invested; further, the risks associated with the fact that the investor's capital becomes subject to foreign laws and regulations, and the lack of attractive profit possibilities; (2) foreign exchange restrictions making it difficult or impossible to convert the yield on the investment or the amortized capital into the currency of the investor's own country; (3) economic and political instability

5/ Data obtained from the following sources: External Financing in Latin America, UN publication, New York, 1964; and The Economic Development of Latin America in the Post-War Period, UN publication, New York, 1963.

6/ Kramer, D'Arilin and Rooth in "Comercio Internacional. Teoría Política - Práctica", Mexico, 1964, pp. 378 ff.

(inflation, civil wars); (4) Intervention by foreign governments;^{7/} (5) the existence of adverse laws and regulations;^{8/} (6) the spirit of nationalism and resentment towards the foreign investor.

In view of these drawbacks, the investor confines his activity to areas which afford a greater security and a better chance of immediate gain. By way of example, the investor is classically interested in government-granted concessions, involving long-term operational rights - generally of a monopolistic nature - and therefore providing better possibilities for capital amortization and profit making, together with a large degree of freedom from control by the authority granting the concession. The main concessions which attracted foreign capital related to the operation of mines and public utilities. The abuse of concession rights and the wide support given to the principle that countries should exploit their own resources led to ultra-nationalism, of which the consequences were the nationalization of companies and the policy of granting no further concessions for utilities or for commodities that are public property.

Nowadays, however, the Latin American countries have come to adopt a more realistic attitude, realizing the fact that they do not possess adequate resources for financing their own development and that they need foreign capital in order to break the vicious circle of poverty. This has led to a receptive attitude towards foreign capital of which the inflow is promoted through laws and methods designed to compensate the risks involved. The establishment of customs unions and common markets by developing countries is now creating more attractive conditions for the investment of capital because of the greater opportunities afforded by the creation of regional markets. Countries importing capital and those exporting it realize that foreign investment provides both the capital and the managerial and technical know-how required to increase the productivity of underdeveloped economies. Specialists in this field consider that:^{2/} "Today, foreign investment helps to raise incomes and increase production and this in turn will lead to increased international trade in the future".

^{7/} Expropriation of property; harassing of foreign enterprises, establishment of government enterprises.

^{8/} For example, regulations intended to restrict both the ownership of property by foreigners and their share in management.

^{2/} Kramer, Roland, D'Arin Maurice and Root Franklin in "Comercio Internacional. Teoría Política - Práctica", Mexico, 1964, p. 362.

It has been pointed out that it is impossible to reduce the dependence of developing countries on foreign capital, since any attempt to do so would necessitate far-reaching changes in political and economic strategies, especially in regard to agricultural policies, integration, the patterns of external relations and industrial policies.^{10/}

2. INDUSTRIAL PROPERTY OFFICES AS AN ELEMENT OF THE INVESTMENT CLIMATE

Industrial property offices are administrative bodies which are responsible, in almost all countries that have established a system for the protection of industrial property, for granting exclusive rights for the use of inventions, discoveries and distinguishing marks. These administrative bodies, whatever their structure may be have to perform the delicate task of granting, on behalf of the State, a kind of temporary monopoly in respect of intangible property which is intended for use in industrial or commercial activities. An investor who proposes to work a new patent or to make use of a distinguishing mark must have protection against third parties who might interfere with his activities; he will therefore refrain from engaging in a new undertaking without having first obtained appropriate protection on account of the risks involved. The industrial property office thus constitutes, in a way, the primary condition for the launching of a new productive activity; this explains the importance of its function, which it should be able to perform under optimum conditions of efficiency in order to accomplish its purpose. Experience in dealing with applicants has shown us that the following conditions are considered to be of paramount importance for the functioning of an industrial property office:

1. Speed: The formalities to be accomplished in industrial property offices should be rapid, smooth and expeditious so as not to impede the exercise of the economic activity based on the intangible property for which protection has been requested.

^{10/} See Osval Sunkel "Política Nacional de Desarrollo y Dependencia Externa" in Revista Comercio Exterior, Mexico, April 1968, p. 341.

2. Code of practice: The procedures followed by industrial property offices should be perfectly formulated and given sufficient publicity; it would therefore be useful to compile all the rules relating to procedural matters. We are thinking not only of rules which govern the relations between the administration and the applicant but also of the rules governing the internal activities of the administrative organs of the office.

3. Uniformity of criteria: As far as possible, industrial property offices should employ uniform and consistent criteria on which to base their decisions. Although there is no doubt that administrative changes are the main cause of the constant variations in the criteria adopted with regard to the matters that have to be decided, efforts should nevertheless be made to lay down clear and exact principles on the basic questions and to formulate fixed rules for their interpretation.

4. Reasons for action taken: In order to safeguard the interests of applicants, industrial property offices must give proper justification for action taken by them when such action may affect these interests.

These are the fundamental conditions that an applicant expects an administrative body dealing with industrial property to fulfil. In addition, however, there are a number of ethical considerations which we feel obliged to mention in the light of years of experience in this field.

These considerations are based on the view that industrial property offices are essential elements of the foreign investment climate and that therefore they logically should confine themselves to the performance of mere routine work like simple registry offices without being concerned with the vital aspects of their responsibilities. It is generally recognized that a developing country must resort to scientific and technological planning. To reach a higher stage of development, countries must introduce scientific know-how into their way of life intelligently and not merely make indiscriminate use of the end results of a method practised elsewhere. The developing country must train its own scientific and technical personnel in order to assimilate technical developments and adapt them to its own requirements. It should be borne in mind also in the coming years the developing countries may also be able to find applications for branches of science and technology such as satellite communication and solid state physics, which at present may appear to be only remotely related to their requirements. Accordingly, the organization of industrial property offices should be changed along the following lines:

1. Industrial property should be so organized as to be able to keep track of a patent that has been granted, in order to determine whether it is of real technological value and deserves the protection the State has given it, or whether it merely conceals competitive or other interests that are of no benefit for the development plans of the country granting the patent.

2. Industrial property offices should constitute a link between a national inventor who needs capital and State credit institutions which can provide him with capital to enable him to work a patent or else put it into the hands of others who can.

3. Industrial property offices should give preferential treatment to inventions, discoveries and distinguishing marks relating to the processing of domestic raw materials and to those that are intended for use in connexion with substitutes for imports. This preferential treatment should be conceived as part of a general programme covering the entire system of incentives for foreign investment.

4. Industrial property offices should exercise control over licensing and know-how contracts in order to determine the true amount of royalties paid and to assess the economic advantages resulting from the industrial products manufactured under these contracts.

5. In view of the close relationship between industrial property and copyright, which are almost inseparable in the case of industrial models and designs, it would be useful to establish appropriate bodies to advise the applicant as to the best form of protection for each of the rights accruing from his intellectual creations.

6. Industrial property offices should avail themselves of the services of a body specialized in the evaluation, compilation and processing of the data of which the need has already been pointed out.

3. STATISTICAL RELATION BETWEEN THE NUMBER OF APPLICATIONS SUBMITTED IN RESPECT OF INDUSTRIAL PROPERTY AND THEIR REAL COST IN LATIN AMERICA

According to our agenda no statistical data are available on the relation between the fees payable for industrial property protection and the number of applications for patents and trademarks in the different countries. It is also pointed out that the cost of multinational protection has to be considered as an important factor in determining the protection strategy of an industrial enterprise.

We have no official data on the cost of registering patents and trademarks in the different countries of Latin America but we do have some information which might be much more useful and significant, in as much as it relates to the real cost, for an investor, of an application for a patent or trademark. In other words, we know what the agents obtain from the client for applications for registration submitted to industrial property offices in different Latin American countries. Although there are no internationally recognized fees, protected and controlled by an international body, the patent agents are, in fact, in a position to inform their clients regarding the cost of registering patents and distinguishing marks in the various countries on the basis of fee scales which they have established by agreement between themselves and which they regard as binding. We believe that this information is more important than a knowledge of the actual levies or taxes imposed for registration, since a person submitting an application in some particular State never does so directly but through a lawyer, patent agent, etc., who charges not only for the actual expenses but also for his professional services.^{11/} The figures are in US dollars and correspond to the cost of processing the application from the moment it is submitted until registration is obtained. The figures are approximate and general and do not include cost of novelty examination in countries in which this system is applied; in many cases, too, the figures do not include the cost arising from disputes relating to claims against the applications, when they involve work which is not of a routine nature, but requires a special study to be made of the problem or the collection of evidence necessitating additional costs and special action. We can assume that the figures given below refer to basic costs in systems without novelty examination in which the processing of the application presents no difficulties.

The following data have been supplied by Dr. Alain Coriat, of CODEMAR, which is one of the most important agents in Venezuela for the processing of applications with regard to industrial property.

The tables indicate the number of applications submitted in different Latin American countries and the approximate cost of processing the applications.^{12/}

PATENTS RELATION BETWEEN NUMBER OF
APPLICATIONS AND COST OF APPLICATION

	1964	1965	1966	1967	1968	Cost in US dollars until registration
Argentina	6,225	6,344	-	6,750		150
Brazil	10,075	14,367	-	8,178		140
Colombia	1,184	1,127	1,236	1,207		180
Costa Rica	-	-	-	180		70
Cuba	96	95	123	116		120
Chile	-	1,120	-	1,421		180
Guatemala	261	233	148	239		260
Haiti	28	-	-	-		130
Mexico	-	5,966	6,532	7,262		130
Dominican Rep.	-	20	93	-		170
Uruguay	-	-	517	-		90
Venezuela	1,398	1,839	1,960	1,883	2,192	185

For the following countries we know only the cost of processing the application:

Bolivia	160
Ecuador	270
El Salvador	200
Nicaragua	90
Panama	180
Paraguay	80
Peru	210

^{12/} Data relating to applications have been obtained from the review "La Propriété Industrielle", No. 3, March 1966; No. 12, December 1966; No. 12, December 1967; and No. 12, December 1968.

TRADEMARKS
RELATION BETWEEN NUMBER OF APPLICATIONS
AND COST OF APPLICATION

	1964	1965	1966	1967	1968	Cost in US dollars until registration
Argentina	27,206	28,225	-	31,279		50 to 60
Brazil	57,773	-	-	49,429		80
Colombia	2,413	2,109	2,132	2,517		120
Cuba	617	305	363	474		130
Chile	-	3,963	-	8,450		60
Guatemala	1,400	1,312	1,350	1,577		90
Haiti	35	-	-	-		80
Mexico	-	7,495	8,275	8,788		85
Dominican Rep.	-	626	810	-		110
Uruguay	-	-	5,773	-		60
Venezuela	4,838	4,997	5,341	5,157	5,505	115

For the following Latin American countries we know the cost of processing the application, but not the number of applications:

Bolivia	80
Costa Rica	70
Ecuador	80
El Salvador	90
Nicaragua	90
Panama	130
Paraguay	50
Peru	90

1. A careful analysis of the cost and number of applications leads to the conclusion that there is no fixed relation between the corresponding figures. It must be pointed out that the number of applications does not necessarily depend on their cost but is determined by innumerable different factors, ranging from those of a political character to those of a geographical and economic nature, as well as those related to the legal system of the State concerned, which may either hinder or facilitate applications for patents and trademarks. It must therefore be frankly admitted that:

- (a) We do not possess full data for each of the Latin American countries referred to in the tables, so that any conclusions drawn from them might be misleading.
- (b) We do not possess data for all the Latin American countries to enable us to make a complete comparative analysis.

In spite of what has just been said, however, we can still put forward certain conclusions on the basis of the figures available. These conclusions are summed up below.

2. The following are the countries in which the cost of trademarks is highest:

Cuba	US\$130
Colombia	120
Venezuela	115
Dominican Republic	110

As can be seen, Cuba is the country with the highest cost, but this figure is not suitable for analysis since it is determined by special political reasons.

After Cuba, the countries with the highest cost are Colombia, the Dominican Republic and Venezuela (110-120 dollars). Of these countries, Venezuela is the one with the maximum number of applications, amounting to more than 5,000 a year. It is significant that in Chile and Uruguay, countries where the level of development is more or less comparable to those mentioned above, the number of applications is higher, ranging from a minimum of 5,700 to over 8,000 a year. This disparity could be due to the fact that the cost of applications in these countries is only half that of applications in the first mentioned countries and does not exceed 60 dollars.

3. What is really surprising is the difference between the number of applications for trademarks in Mexico (with a maximum figure of 8,788) and in countries with a comparable level of development such as Brazil and Argentina, with much higher figures (Brazil had 57,773 in 1964 and Argentina had 31,279 in 1967). We do not believe, however, that the numerical difference is due to the cost because in Mexico and Brazil the cost of processing the application is the same.

4. With regard to patents, the highest figure is for Ecuador with \$270. We have no official data regarding the number of applications, but unofficially we have been informed that it is the lowest in the whole of America. Guatamala, which also shows a high figure (\$260), likewise has a very low number of applications (not exceeding 300 a year).

5. Venezuela, Colombia and Chile where costs are very high (\$180), are not very apart as regards the number of applications (which varies between 1,200 and 1,900).

From the above considerations we can conclude that:

- (a) The number of applications does not necessarily depend on the cost of processing the application;
- (b) There exists, however, to a certain extent an inverse proportion between the cost of processing applications and the number of applications submitted.





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