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PERSPECTIVES ON FOREIGN INVESTMENT IN THE SOUTHEASTERN UNITED STATES: AN INTRODUCTION

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It has only been within the past fifteen years that the South could claim to have an international bar. Prior to that time, international activity in the Southeast was confined primarily to agricultural exporting. A few southern industrial companies, such as Alladin Industries of Nashville, had become multinational, but the southern economy was still largely based upon agriculture, real estate, and manufacturing, assembly, and distribution plants owned by northern companies.

The minimal international business activity in the Southeast demanded little support from southern lawyers. Consequently, prior to 1970, international legal practice in the Southeast was confined to a few lawyers who represented agricultural exporters, customshouse lawyers in the major ports and a small tax haven practice based in Miami.

International business activity in the Southeast increased dramatically in the 1970s. During much of this period, the weak dollar attracted investment capital to the United States from around the world. Certain political events—the separatist movement in Quebec Province, the Soviet invasion of Czechoslovakia, social unrest in South Africa, Juan Peron's return to Argentina, the election of Francois Mitterand's socialist coalition in France, and

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concern over the future status of Hong Kong, among others—encouraged investors from many countries to move capital into the United States.

Political concerns gave rise to the "last plane" syndrome. "I want to have some investments in the United States and carry a Green Card so that when the Russians cross the border I can take the last plane from Frankfurt." Or, "When the Cubans cross the border, I can take the last plane from Johannesburg." Or, "when the economy is nationalized, I can take the last plane from (fill in the blank)."

More recently the sense of impending doom seems to have diminished, or become overwhelmed by a general fear of global disaster. Thus, politically motivated investments actually may have decreased. The last plane syndrome and the belief that the United States would stand alone as the last bastion of capitalism, however, were, and perhaps remain, very real.

While world economic and localized political conditions encouraged flight of investment capital to the United States, the Southeast became increasingly visible to potential foreign investors. Southeastern states established aggressive industrial recruiting programs and promoted their underdeveloped resources, abundant energy, non-union labor, local tax incentives, and quality of life to foreign manufacturers.

Spartanburg, South Carolina, became the South's first "international city" (notwithstanding claims to the contrary by Atlanta and Miami) by attracting several European textile machinery manufacturers and the Michelin Tire plant.

The candidacy and election of Jimmy Carter generated intense publicity for Atlanta, Georgia, and the Southeast, which helped to dispel the impression of the world business community that the United States consists of New York, Chicago, and California, plus the Grand Canyon and various wastelands created by Generals Sherman, Grant, and Sheridan.

In 1977, in virtually his first act as President, Jimmy Carter approved the recommendation of the Civil Aeronautics Board (CAB) establishing direct flights between Atlanta and Europe. (Gerald Ford, in virtually his last act as President, had overruled the CAB recommendations.)

The international bar in the Southeast developed to serve the great influx of investment from Europe, Canada, Japan, and other countries. Consequently, the majority of southern practitioners who refer to themselves as "international lawyers" are involved in

representation of foreign clients doing business in the United States.

International practice in the Southeast is primarily divided between representation of industrial and business investors and representation of real estate investors. In both cases, the legal skills required are those necessary to represent domestic clients engaged in the same activities, with an overlay of specialized expertise. For example, closing a real estate purchase on behalf of a foreign purchaser involves the same elements of real estate practice as any domestic purchase and sale. If the purchaser is foreign, however, the lawyer must consider the applicability of tax treaties, Internal Revenue Code provisions governing repatriation of real estate income, various state laws restricting foreign ownership of real estate, and registration requirements imposed by the United States Departments of Commerce and Agriculture and by the Foreign Investment in Real Property Tax Act, among other issues.

Representation of foreign business clients also requires application of general business law skills together with specialized expertise. Basically, formation of a United States business entity owned or controlled by foreign interests involves movement of resources—money, technology, industrial property rights, products, services, and managers—across national boundaries. Bringing these resources into the United States requires special attention to various laws and regulations governing each.

Perhaps the biggest difference between representation of foreign clients and routine domestic practice is the relationship which must be established between lawyers and clients. Foreign investors tend to view their lawyers differently than do domestic clients. Most foreign clients are accustomed to receiving all legal advice in their home countries from a single attorney rather than from various specialists within a firm and expect to do so in the United States.

A typical initial interview with a foreign business investor might range from considerations of tax haven or treaty haven planning to individual income tax and estate planning considerations for the managers planning to come to the United States to supervise the investment. Between are such topics as corporate law, products liability, licensing, trademarks, customs, and of course, immigration. To cope adequately with the breadth of issues involved, United States international practitioners must be broad generalists, funneling the accumulated specialty areas of

practice available in their firms to the investors and supervising application of appropriate legal skills.

United States lawyers counseling foreign investors must also assume much greater responsibility for "issue spotting" than is the case with domestic clients. Typically, the representative of a foreign company who is transferred to the United States to establish an operation is skilled in appropriate business areas, such as marketing or distribution, but has only the most general notions of the legal aspects of the project. Furthermore, many of the legal issues involved in doing business in the United States do not even arise in foreign countries. Issues such as products liability and the Foreign Investment in Real Property Tax Act are almost uniquely American. Therefore, even a foreign investor sophisticated in legal matters may not be aware of the questions that must be addressed.

Foreign clients, especially those investing offshore for the first time, also may not be aware of various legal issues that must be addressed in their home countries. For example, Canadian immigration clients should be alerted to the Canadian departure tax, German clients should consider the Aussensteuergesezt, and Japanese corporate clients should be cautioned that the Japanese tax code does not provide an indirect foreign tax credit. Obviously, United States attorneys are not competent to advise on matters of foreign law, but should counsel their clients to obtain the advice of home-country advisors before adopting business plans.

In addition to assuring that all appropriate questions have been identified in a particular investment situation, a United States lawyer often must also train his client to be a sophisticated consumer of legal services and to know when to call upon his attorney. In many, if not most, foreign countries, members of the legal profession are much less ubiquitous and operate within a more well defined "turf" than do United States lawyers. Consequently, foreign investors in the United States may simply not be in the habit of turning to a lawyer in many situations when they should do so.

Many foreigners are at first surprised with the depth of involvement that United States lawyers tend to have with their business clients. The organized bars in many countries have not been as effective as their American counterpart in electing lawyers to local equivalents of the United States Congress where they can enact complicated codified legislation in the form of lawyers' and accountants' relief acts, requiring sophisticated legal advice on a

continuing basis. In these backward countries, such as West Germany, law firms are relatively small and the individual attorneys are generalists.

It is actually possible in some foreign countries to conduct business virtually without legal counsel. This astonishing phenomenon is best exemplified by Japan, a country roughly the same geographic size as Georgia. The population of Georgia is about six million and the Georgia Bar Association has about 14,000 members. Japan has a population of about 120 million with about 12,000 lawyers. Obviously, our Japanese colleagues have done a very poor job in promoting legal services and leave it to American lawyers to indoctrinate their clients into the joys of legal representation and monthly fee statements.

Another challenging aspect of international practice is that foreign investors, especially those who are less than fluent in business English, may not thoroughly understand what their lawyers are trying to accomplish. This is particularly true in the case of real estate investors who may place their investments through treaty haven and tax haven countries. Such clients may leave all decisions regarding the structure of their investments to their United States lawyers. Furthermore, clients who do not entirely understand (or, over the course of time, may forget) why their investments were placed through Curacao, the Cayman Islands, or Liechtenstein, cannot be counted on to attend to corporate formalities on a regular and continuing basis. The American lawyer, therefore, must monitor the day to day activities associated with the investment much more closely than would be the case with a domestic client.

Ethical issues can be particularly troublesome in international practice. Many foreign investors come from societies where laws are not enacted so much to further public purposes as to create the opportunity for bureaucrats to obtain "fees" for issuing licenses or otherwise performing the functions assigned to them. Investors from such countries often bring with them the attitude that legal requirements can be satisfied with cash rather than compliance.

A particular area of ethical concern is immigration law. Applying for and obtaining visas for foreign individuals to reside temporarily or permanently in the United States is a very personalized area of practice and one which may be the first and foremost goal of a foreign client. In other words, the question in the initial client interview may not be "I intend to form a United States

business enterprise, how do I obtain a visa to come here to manage it?" but, "I wish to obtain a visa so that I can live in the United States, must I first form a United States enterprise?" Unlike areas such as tax practice or customshouse law in which varying degrees of success can be achieved, immigration law is strictly black or white; either the foreign applicant is awarded a visa or not. Without a visa, a foreign person cannot reside legally in the United States, and that's it. Consequently, visa clients are, at times, tempted to give the "right" answers to their immigration lawyers so that they may qualify for various categories of visas. Lawyers must constantly keep in mind that they must endorse under oath the applications that they prepare and submit to the Immigration and Naturalization Service on behalf of their clients.

Ethical considerations can also be problematic in the case of foreign investors who wish to remain anonymous. The requirements to register foreign investments, particularly in real estate, may be anathema to investors who might be placed in financial or personal jeopardy in their home countries were their United States activities made public there. To maintain representation of such clients, United States lawyers might be requested to be less than forthright in completing and filing registration forms. This problem is particularly acute in instances when foreigners fund their United States investments with "black money," which is unreported in their home countries.

The failure of jurisprudence to translate from foreign countries to the United States has many corollaries in representation of United States clients doing business abroad. The most publicized examples are the Foreign Corrupt Practices Act, which makes it illegal for United States companies to bribe officials in countries in which such bribes may not only be legal but customary, and the anti-boycott regulations of the International Trade Administration.

The challenges of international practice are also its appeal. International practitioners probably face a broader range of questions and issues in day to day practice than any other members of the bar. The complexity and scope of the practice creates a very lively and thought-provoking legal environment.

Undoubtedly, one of the most satisfying aspects of international practice is the clientele. The opportunity to deal on a regular basis with business people from foreign countries is stimulating and rewarding. Foreign businesses investing in the Southeast tend to be those companies that are most successful and well-

managed in their home countries and are aggressively reaching out for new markets for their products and services. Managers of these companies are skilled and sophisticated and provide continuing sources of diverse attitudes and business practices.

Finally, international practitioners in the Southeast have the satisfaction of serving their states and region by acting as industrial recruiters and cooperating with state and local authorities in bringing investment and jobs to their areas, while at the same time building rewarding practices.