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DOING BUSINESS IN FOREIGN COUNTRIES*

*Woodfin L. Butte***

The title of this address — “Doing Business in Foreign Countries” — is really king-size. To prepare anything even remotely describable as a scholarly paper fit for presentation at a conference sponsored by the American Society of International Law and by this great Law School, I would have had to bring it down to manageable proportions by selecting one small aspect of it for examination. I decided, however, that if our hosts had wanted me to do this they would have said so. It seemed to me that what was expected of me was to regard this talk not as an independent self-contained presentation but simply as the first part of this all-day program. I propose, therefore, to leave the title as it stands and give you a sort of general ride once around the field which will be filled in in more detail and with more brilliance by the distinguished panelists who are with us this morning and by the equally distinguished speakers whom you will hear during the remainder of the day. I propose, further, that we talk for a while about doing business in foreign countries as generally and as non-legalistically as a lawyer might do in advising a businessman client. Let’s imagine for a while that you are the lawyer to whom the businessman has come for advice and that you and I are discussing what sort of advice you might give him.

By hypothesis, the fact that he comes to you shows that he already has reasons that lead him in the direction of going into business in one or more foreign countries, but you and I may want to examine the validity of some of those reasons. Let’s adopt O. Henry’s mythical country of Anchuria as a convenient example. The advice your client will want from you will fall under three logical headings. First, how can we know whether Anchuria is a good country to go into? Second, having decided to go into business in Anchuria, how do we go about it? Third, having gotten into business in Anchuria, how do we conduct ourselves? The client won’t want all this advice all at once, of

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course, but these are the general areas within which you will guide him.

Let's go back for a minute to the businessman's own mental processes. What has led him to think about going into business in Anchuria in the first place? The obvious answer, and a very good one, is to make money. That is not likely to be a complete answer, however. Your client will probably admit that he has in no way nearly exhausted all the possibilities for profitable investment and business that are open to him right here at home in a familiar and relatively safe atmosphere. It must, therefore, be something more than just the hope of making money that takes him abroad.

Access to natural resources is, of course, an important motivation. If your client deals in manganese or bananas, he must go where the manganese or the bananas come from.

Perhaps the most frequent reason American businessmen find themselves investing money in a particular foreign country is to protect markets which they have already developed there. This is likely to be your client's story. Perhaps some years ago he began filling an occasional f.o.b. order from Anchuria. His product is a good one and his business grew until four or five years ago he named a commission agent as his representative in Anchuria and established a small warehouse there. The market is now so large that a competitor is thinking of starting to manufacture the same product in Anchuria, and the Anchurian Congress has enacted a new protective tariff. So your client decides that he must consider establishing a factory or at least an assembly plant for his product in Anchuria.

Another reason that leads businessmen to expand their businesses into foreign operations is quite simply that it's fun. Let no one underestimate the importance of this as a motivation. I don't mean to suggest that either the individual owner of a small business or the professional managers of a large corporation will squander money in a losing venture just to have a good time. But one of the things that is characteristic of American business and one of the secrets of its unique appeal around the world is that by and large the American businessman has more fun than his counterpart in other countries. And nobody would deny that given a reasonably sound business venture, it is more fun for

executives to make an occasional trip to Rio de Janeiro instead of just going to Chicago all the time.

Finally, your client probably does not stop to think that in deciding to invest money in Anchuria, he is serving the national interests of the United States. Nevertheless, he is. He is serving the interests of the United States because he is investing his capital in a productive enterprise that will help develop the economy of a friendly nation. If he is the kind of businessman we hope he is, he will be serving the national interest of the United States in another way, because he will make friends for himself and for this country and will spread by example the doctrine that the American way of doing business and getting along with neighbors is a good way.

Your client then is thinking of going into business in Anchuria for, let us say, a combination of all these reasons: to have access to raw materials or products he needs, to protect his existing market there, to make some money, and to have some fun doing it. On all of these grounds it is to our national interest to encourage him.

He will now want to know in some detail about conditions in and affecting Anchuria. What are the elements that go to make up that elusive thing called a favorable investment climate?

First of all, you will be able to tell him whether there is a treaty between the United States and Anchuria which will help protect his position. The United States now has treaties of friendship, commerce and navigation with thirty-six countries. A good many of these treaties, particularly the dozen or so which have been negotiated since World War II, contain detailed provisions regarding the right of the citizens and corporations of one country to own property and carry on business in the other. The treaty with Anchuria, if there is one, will probably assure American investors in that country of national treatment, *i.e.*, that they will enjoy the same rights, privileges, and obligations as citizens of Anchuria and will not be discriminated against by virtue of the fact that they are foreigners. The treaty is not likely to assure the foreign investor of anything better than national treatment. The day of treaty capitulations is gone. Very few American investors regret its passing. They realize that an investment that has to be built on a régime of special privilege is in a vulnerable position for the future.

If you find such a treaty between the United States and Anchuria, you can advise your client of the benefits which it contains. You will, however, want to avoid giving him the impression that having a treaty solves all his problems. You will find, for example, that some provisions of the treaty are not self-executing and depend on local legislation which may or may not have been passed. You will also find that other provisions contain necessary escape clauses which may make them less than air-tight in a pinch, as for example, a provision which obligates the host country to make "reasonable provision" for remittance of profits and repatriation of capital. You will also want to avoid giving your client the impression that if there is no treaty with Anchuria, he ought not to invest his money there. A "favorable investment climate" has a way of resisting efforts to pin it down on paper and often exists quite independently of any pieces of paper at all.

The next thing that is likely to catch your attention in the study of Anchuria is the existence of some sort of an incentive law. Many laws of this type have been passed in the last ten years and Anchuria may have one too. While specific provisions of these laws, of course, vary, they tend inevitably to fall into a pattern. When you study the Anchurian law you will probably find that it sets up a commission composed of representatives of the National Bank, the Ministry of Agriculture and the Minister of Industry. There will be machinery for foreign investments to be registered with this commission so that the identity and amount of the foreign investment can be preserved. There will then be provisions assuring the investor of the unrestricted right to remit current profits from his investment. There will also be provisions giving him the right to repatriate his capital, probably at some maximum annual rate. The law will probably contain something about exchange rates for remittances in both directions but the references will be to current rates at the time of the transfer; the law is quite unlikely to try to protect the investor from changes in the exchange rate while his investment is in the country. The law may or may not contain special tax provisions limiting tax liability for a period of years.

If you find that Anchuria has an investment incentive law, you and your client's counsel and accountants will want to study it carefully to see what it means to your client's investments. It

may be very valuable to him. However, as in the case of a treaty, you will not stop here. You will want to know particularly why Anchuria felt it necessary to pass a law like this in the first place. Is local taxation so high that it stifles investment? Does the local political situation create undue hazards which have been frightening investors away? Are the prospects such that the promises about remittances may be more than the country can carry when the time comes?

To get the answers you and your client are going to have to do more than just study the laws of Anchuria. You are going to have to study the country itself. Trying to make up your mind about the investment climate of a country from studying its laws alone is like trying to experience the physical climate from studying weather reports. In either case you need to breathe the air.

What is the country's record of past performance like? If it has a record of broken promises and flagrant squeezes perpetrated on foreign investors, you can fairly ask how much real reliance can be put on the promises it makes now. If, on the other hand, and I'm happy to say that this is the much more general experience, the country has a tradition of fair dealing and living up to its obligations, and is proud of that tradition, that pride gives you and your client a protection that goes beyond anything that could be put down on paper.

You will want also to ask how the citizens of the country itself are making out and how they regard their own country as a field for investment. There is no such thing as a climate which is favorable for foreign investors but unfavorable for nationals. Your study must therefore go beyond the international level of how foreign capital is treated and include a purely local study of such things as tax laws, labor laws, and the extent of government regulation in general.

It becomes plain, therefore, that you and your client are going to want to know a good deal about the country of Anchuria. You are going to want to know whether it has a treaty of friendship, navigation and commerce with the United States. You are going to want to know whether it has a special foreign investment incentive law and, if so, what its provisions are. More important than either of these, you're going to want to know the country's record of past performance as regards foreign capital and busi-

ness and you are going to want to make a local study of the laws which affect business in general, both national and foreign. Only when you've done all these things can you advise your client to go ahead.

"All right," your client then says, "we've decided to go into business in Anchuria. What do we do now?"

Well, the first thing you need is a good representative. The old proverb says that a man is known by the company he keeps. It is just as true that a company is known by the man it keeps. This doesn't mean that you need a super-slick expert in bowing from the waist any more than you want the old time rough and ready pioneer who was out drunk every night. The people with whom he will come in contact are keen observers of human nature and will not imagine that a second-class man has anything but a second-class company behind him. So, you will urge your client to send as his representative to Anchuria the best man he has or can get; the salary he pays him will be the best possible insurance for your client's investment.

The next thing your client will want is a good lawyer (I mean an additional good lawyer, since he already has you). In selecting a lawyer abroad, you can fall into awfully good hands or into awfully bad hands, so the selection is one you should not make without consulting as many references as you can. The United States Embassy or Consular Office will usually have a list of several reputable firms from which you can choose. Your banker will also be able to help and may feel more free to express an opinion as to the relative merits of various firms than American diplomatic representatives will be. Ask other businessmen on the ground, foreign and national, for this advice. You will find lawyers who specialize in politics, lawyers who specialize in learned interpretations of abstruse generalities, and lawyers who specialize in being seen at all the American cocktail parties. Finding the right lawyer to help and guide your client may be hard; but at least in the early stages you will lean so heavily on the advice of local counsel that the rewards are well worth the effort it takes to find the right man.

One word of caution, which gives me a chance to digress for a moment to a subject that is near to my heart. If the lawyer to whom you are talking begins to tell you that the only way to get

things done in his country is by passing out money to people, get another lawyer; you're in the wrong hands. It is unfortunately true that passing out money to people is still one way to get things done in his country is by passing out money to people, get will tell you that it is still the only way. With this I vigorously disagree. If your client is rigorously honest and law abiding himself and if he does business on the assumption that the public officials with whom he deals are equally honest, he will be right a very high percentage of the time. Doing business in a foreign country no longer means, if indeed it ever did mean, that you must leave your scruples at home.

Having chosen a good representative and a good lawyer and, I might add, a good banker, your client is ready to start any negotiations he may have to have with the Anchurian Government. Whether your client's business is one which is clearly touched by the public interest, such as mining or oil production, or whether it is a business which we usually think of as having few public aspects, you are sure to find that some sort of understanding with local governmental authorities is needed. Even if you don't need any sort of concession to operate and even if you are not qualifying your investment for registration under some incentive law, you will still want the government to know that you are about to make your appearance on the local business scene and you will want its blessing.

If your local lawyer is well chosen, he can probably give you all the entree you need. Here again, sponsorship by an outstanding member of the local legal fraternity will well repay the effort it took to find him. If your business has a financial aspect, your banker may be able to supply necessary introductions for you. If your business is of such importance, either because of its nature or because of the size of the proposed investment, that you want to start your discussions at the very top, United States diplomatic representatives can be extremely helpful. One of the first things your representative will want to do anyhow when he gets to Anchuria is to call on the United States Ambassador and tell him exactly and in detail what your business is and what you propose to do. The ambassador and his staff are there to help you. They will not ordinarily do your negotiating for you, but they will tell you whom you ought to see and telephone and make an appointment for you to see him.

At some stage of your planning you will have to advise your client as to the corporate vehicle he should use for doing business in Anchuria. You will have three choices: a branch of the parent company; a subsidiary of the parent company incorporated in Anchuria; or a subsidiary of the parent company incorporated somewhere else — Delaware or Panama or the Bahamas or wherever. The first of these choices — registering in Anchuria a branch of the parent company — is, I believe, the exception in practice. The principal objection to it is that by having the parent company present in the country and subject to its process, it incurs some risk of having its general assets answer for local claims; it may be subpoenaed to produce general books and records not pertaining to Anchurian business, etc. Most American businesses prefer to keep the parent company at home and to organize subsidiaries to hold their foreign investments.

If a subsidiary is to be used, the choice of place of incorporation of that subsidiary is one in which I have always deferred to tax counsel. There are one or two countries which require companies holding mining or petroleum rights to be organized in the country; these requirements must be met wherever they apply. There may also be some public relations and government relations advantage in being able to point to the company as organized under local law, although I have personally never thought this amounted to very much. On the other side of the fence, it has been suggested that a branch of an American company or a United States incorporated subsidiary may have better standing to claim United States diplomatic help and protection in case of trouble. I think most international lawyers will say this is not true. It is the American ownership interest which is entitled to help and protection in an appropriate case, not the particular vehicle through which the American interest is held.

In contrast to these rather nebulous advantages and disadvantages, the place of incorporation of your client's subsidiary may have some very real tax consequences. The taxes paid in Anchuria will probably be the same or nearly the same regardless of the place of incorporation; but the United States tax picture may be quite different under one method or the other. Your client's tax counsel will point out these differences with clarity and vigor. As I say, it has always seemed to me perfectly legitimate for your client to be guided by their views.

Your client has now sent his representative to Anchuria, has retained counsel, and established banking connections. He has called on the United States Ambassador and has conducted all necessary negotiations with the local government. Thanks to the good advice you have given him, these negotiations have been entirely successful. He has registered the appropriate corporate vehicle to do his business and has transferred to Anchuria the money and machinery that are to constitute the local capital of the business.

"This is fine," he says to you, "I am now in business in Anchuria. Do you have any advice to give me as to how I should conduct myself?"

An old maid music teacher of mine used to say that "the Key to success is B natural." That's pretty good advice for doing business abroad. You will say to your client something like this:

"Build yourself into the economy of the country as solidly as you can. Use local contractors and sources of supply and help develop new ones. Learn the language and observe local customs. However, don't be ashamed of nor try to conceal the fact that you are a United States enterprise; it is probably worth a good deal to you in prestige and immediate acceptance of your product.

"Stay strictly out of local politics. It is usually quite proper for you to express your opinion in appropriate fashion on pending issues which affect you, so long as this does not involve you in taking sides with one or another political group. You must never, under any circumstances, attempt to influence in any way the selection of any candidates for public office; you are formally on notice from the State Department that it will wash its hands of you if you do. Moreover, don't take your United States politics with you to Anchuria. You may think the man in the White House at a given moment is the worst disaster that ever happened to our country; but when you talk to your friends in Anchuria, he is the President of the United States — period.

"Obey the laws of the country scrupulously. This is one respect in which you will have to lean over backwards a little more than the citizens of the country and not take advantage of shortcuts which may be perfectly acceptable business risks to them.

"By the same token, stand up for all rights and protection which the laws of the country give you. If you get into an honest

disagreement with a private party or with the government which you cannot settle by negotiation and which is important enough to fight for, let the courts of the country pass on it through normal judicial procedure. One reason for this, of course, is that you cannot ordinarily claim protection from your own government without first exhausting remedies open to you under the laws of the country where you are. A better reason is that by demonstrating a genuine willingness to let your rights and obligations be determined by the courts of the country you are more likely to gain good will than you are to lose it. What's more, the court which has your case before it is put on its mettle to see to it that you get a fair decision; and the more important the case the truer this is.

"In this, as in every other respect, the more you can become a good citizen of Anchuria, the more likely it is that your experience there will be happy."

As I close this paper, I can imagine some of you are saying, "But I thought this was a meeting on international law. Here this man has talked for the better part of an hour and he hasn't even mentioned international law."

But, gentlemen, I do protest I've talked about nothing else. International law is not just wars and annexation of territory and cases before the World Court. International law is at bottom the very thing we have been examining — the whole body of rules and attitudes, written and unwritten, which enable men and nations and their enterprises to work together in harmony and for their mutual benefit. Your client is able to make an investment in Anchuria and do business there in peace and security precisely because of the reality and force of international law.

There can hardly be a better way to close my remarks than to quote and adopt as my own the words of the immortal Henry Wheaton who, in 1836, in the Preface to the first edition of his great work on International Law, said:

"The principal aim of the Author has been to glean . . . the general principles which may fairly be considered to have received the assent of most civilized and Christian nations, if not as invariable rules of conduct, at least as rules which they cannot disregard without general obloquy and the hazard of

provoking the hostility of other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish that perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that [his] attempt to illustrate it will be received with indulgence, if not with favour, by those who know the difficulties of the undertaking."