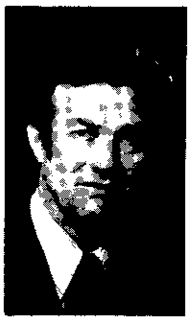
Background on Move for Code

Actions at UNCTAD's Nairobi conference was based on considerable body of opinions, study

BY ROLF I. ANDREASSON*

In May 1976 the Fourth UNCTAD Conference was held in Nairobi. UNCTAD stands for the United Nations Conference on Trade and Development. It is a worldwide forum with membership of 152 States. Its aim is to evolve policies, to be adopted by all governments and designed to accelerate the economic development of developing countries. Between these conferences which occur every 4th year, the work is carried forward by the UNCTAD Trade and Development Board and the Secretariat in Geneva.


R. Andreasson

One major issue that was taken up at the conference is: "Decisions on the legal character of the Code of Conduct for the Transfer of Technology and in light of those decisions, decisions on the modalities for its establishment."

The issue is based on a considerable body of opinions that has been building over the last decade among various international, intergovernmental, and other bodies concerning the need for the establishment of an international regulation or code of conduct governing the transfer of technology.

Among the contributions by nongovernmental organizations can be mentioned the work on a preliminary draft code initiated by the prestigious Pugwash Conference on Science and World Affairs in 1973.

It is interesting to note also that the International Chamber of Commerce in a statement not only accepts the feasibility of a code but declares that "the conditions for cooperation (in respect to the elaboration of the code) are propitious and the work now being undertaken should be capable of being brought to a successful fruition, provided all parties approach the issues with realism and understanding of the others' problems".

All these initiatives led ultimately in 1975 to the inclusion in the United Nations General Assembly resolution 3362 of the following:

> "All states should cooperate in evolving an international code of conduct for the transfer of technology, corresponding, in particular, to the special needs of the developing countries. Work on such a code should therefore be continued within the United Nations Conference on Trade and Development and concluded in time for decisions to be reached at the Fourth Session of the Conference including a decision on the legal character of such a code with the objective of the adoption of a code of conduct prior to the end of 1977...".

Issues

What are then the underlying issues that have caused this growing concern for a need to regulate the transfer of technology, specifically to developing countries.

Let us first look at the current setting for technology transactions. Unlike other commodities the market for technology is highly imperfect. The determination of production costs and selling prices is more difficult and more arbitrary than for other commodities.

In this market the small and financially and technically inadequately equipped enterprises of developing countries are in a particularly weak position when dealing with a technology supplying developed country enterprise. The latter is often in the position to dictate prices, terms, and conditions under which technology is acquired by the receiving enterprise.

There is a view that any international regulation of transfer of technology needs to take this special consideration into account.

Then there are the issues of abusive and restrictive practices which many are either deemed to be illegal or otherwise controlled in the countries of the suppliers of technology but which are found to be practiced in the transfer of technology to developing countries.

There is also the opinion that industrial property regulations and administrative policies hampers the effective utilization of the technology acquired by developing countries.

Adaptability

Another central issue is the question of adaptability of transferred technology. Having been generated under quite specific circumstances in a developed country the technology supplied is frequently ill-adapted to the requirements of a developing country.

An underlying issue is the feeling that transfers of technologies so far have done little to contribute to the development of the national, scientific, and technological infrastructure and capabilities and hereby have perpetuated the technological dependence of developing countries.

The desire of the developing world is that there should be a drastic change from the predominance of relying on private direct foreign investment to greater use of joint

**Senior Economic Affairs Officer, UNCTAD. Paper read at the LES Benelux Conference Concerning the Transfer of Technology Toward Developing Countries, University of Antwerp.*

ventures, independent licensing, and other collaborative agreements. In other words, there should be a greater emphasis on transfer of skills than of packaged investment.

In order for the developing countries to significantly increase their share of world industrial output as has been envisaged by the Lima Declaration and Plan of Action on Industrial Development in March 1975, the need for technological transfer should be vastly greater than has been the case in the past. The financial resources that would be required are enormous, \$2,000—\$3,000 billion during the next decade. The technology of course is available in developing countries. The high direct and indirect costs that are incurred and the limitations that are imposed adversely affect the realization of these necessary investments. There is therefore an urgent need for measures that will facilitate the Third World's access to technology and at reasonable prices.

It is against this background that the now ongoing intensive effort to formulate a code of conduct for the transfer of technology should be viewed.

Objectives and principles

What are the objectives and principles of such a code? A general principle can be found included in the Declaration on the Establishment of a New International Economic Order adopted by the United Nations General Assembly in March 1974, namely:

> "Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with the procedures which are suited to their economies."

I shall now discuss some of the more important objectives and principles which could be incorporated into a code of conduct in transfer of technology:

—The need for international regulatory action.

—The encouragement of unpackaged transfer.

—Improvement of access at fair and reasonable price and cost.

—Ensuring the development of technological capabilities of recipients.

First we have the need for international regulatory action.

Like many other commercial transactions, the transfer of technology cuts across national boundaries. Technology imports of one country constitute the technology export of some other country. Accordingly, any regulations imposed by one country upon either end of a transaction necessarily affects the interest of the other country as a partner in the trade in technology.

The aim of an international code of conduct in the field of transfer of technology would thus be to define certain internationally acceptable standards of technology transfer transactions among countries and to lay down the ground rules governing trade practices of technology transactions of individuals or enterprises of the various countries, with a view to achieving a certain order, fairness, and predictability in the field of technology trade operations.

The second important objective is the encouragement of unpackaged transfer.

While the supply of technology in complex package form may be quite often useful and necessary, particularly where national enterprises lack the necessary skills and resources, the degree of packaging is usually related to several characteristics or effects that are considered undesirable or detrimental from the recipient country's standpoint. Therefore, it would seem desirable to include in an international code the specific principle of the unpackaging of technology transfer operations so as to provide the technology recipient with a greater degree of flexibility in the choice of the various technological elements and forms of the transfer.

In the principle of unpackaging is also included the aspect of a complete detailed disclosure of the technological elements to be transferred and their respective prices, so as to give the recipient, and the governmental authorities of his country a clear view of the entire cost structure and financial implications of the operation.

Requirements to this effect have been introduced in the regulations of several countries and by regional cooperative organizations.

The third objective of a code of conduct is to improve the access of technology at fair and reasonable prices and costs.

The concept or principle of fair and reasonable pricing explicitly or implicitly underlies the laws of many developed countries aimed at regulating the conduct of business practices of enterprises.

The experience of a number of developing countries also confirms the need for such regulation. Recent legislation specifically addressed to the problems of transfer of technology establishes the governmental supervision over the pricing of technology transfer transactions. The Mexican act of December 28, 1972 provides that agreements shall be refused registration "when the price or consideration is disproportionate to the acquired technology and constitutes an injustified burden on the national economy." The Spanish regulation qualifies as "unfavorable" a number of possible license provisions concerning payments calculated on the bases of criteria deemed inappropriate because they lead to too high a cost. Recent changes in Argentine laws are characteristic of the evolution of the preoccupations of governments in this area. Its 1971 law provides that a supervisory authority in charge of the National Registry could refuse registration when the pecuniary or other consideration was disproportionate to the license granted or the technology transferred. Subsequently, the law was changed and now provides that the relevant governmental authority shall deny approval and registration if analysis of the expressed or implied costs show them to be greater than the benefits from the technology to be purchased. Furthermore, attempts to impose obligations of disclosure and clarification of the price of a particular element of technology have also been made in recent legislation as I have mentioned before.

Technological Development

The final but not least important of the objectives of a code of conduct is to ensure the development of the technological capabilities of a recipient developing country.

The transfer of technology is a commercial operation by means of which technological elements under various forms are exchanged. Having been generated under quite specific circumstances, the technology supplied is frequently ill-adapted to the recipient country's own requirements and cannot be said to have been fully and effectively transferred unless the recipient acquires an independent ability to use and develop it on his own according to the needs and conditions prevalent in the importing country. It therefore appears most important for international regulatory action to ensure that in the technology transfer process, the channels and procedures are such that they allow and if possible encourage, creative adaption and innovation with respect to the technology transferred, thus inducing or enhancing the development of the technological capabilities of recipient countries.

Recently-enacted laws on the transfer of technology contain various provisions designed to serve this basic aim. The Mexican Act of 1972 denies registration to agreements "where restrictions are imposed on research or technological development by the buyer."

The Spanish decree of 1973 provides for refusal of registration, or registration subject to a special note on the unfavorable circumstances being recorded in the Technology Transfer Register, whenever agreements "include restrictive clauses which prevent, jeopardize or hinder the technological development of the recipient".

The order implementing these decrees further qualifies as "unfavorable" and such qualification entails denial of registration: "provisions which prohibit, impose conditions on, or limit the use of the recipient's own technology, or which impose conditions on, limit or annul research, innovation and technological development by the recipient."

The more recent Argentinian law on the subject contains several provisions to that effect. Registration must be denied when a technology to be acquired "seems unlikely to promote technical, economic, and social progress" of the country, when the licensor is given rights which "directly or indirectly enable Argentine technological research or development to be controlled, prejudiced, interrupted or halted," and when no "appropriate training is provided for Argentine personnel to assimilate and operate the technology involved." Registration may be denied when the licensee is not allowed to use "designs, processes, production methods, equipment or other goods different from those involved in the proposed contract."

Scope of application of the code

Leaving the objectives and principles of a code of conduct, I will now touch on another central issue, namely the scope of application of the code.

This issue involves three important questions:

— Whether the code is universally applicable?

— The types of transactions to be covered by it.

— The parties to the transactions to be regulated.

On the question of applicability of the code, there seems to be general consensus that it shall be universal in the sense that the code would be applied to relations between recipients and suppliers of technology regardless of the type of countries involved.

On the question of what transactions should be covered by a code of conduct the previously mentioned Working Group of the Pugwash Conference listed in its proposed draft code the following items, that also appear to reflect provisions in recent national laws and regulations on transfer of technology by some countries:

(i) Licensing agreements covering patents, inventors' certificates, utility models and industrial designs as well as trademarks, service names, and trade names transferred together with proprietary or freely available technology.

(ii) Licensing agreements covering the provision of know-how and technical expertise in the form of plans, diagrams, models, instructions, guides, formulations, specifications, and involving personnel training.

(iii) Agreements covering provision of basic or detailed engineering designs for the installation and operation of plant and equipment and for the production of goods and services.

(iv) Purchases of machinery, equipment, intermediate goods and raw materials, insofar as they are part of transactions involving technology transfers.

(v) Industrial and technical cooperation agreements of any kind, including international subcontracting, as well as provision of management and marketing services.

(vi) Technology transactions associated with establishment and operation of wholly-owned subsidiaries or affiliates and of joint ventures with various degrees of participation.

Nature of the Parties

Finally, on the question of the nature of the parties to which the provisions of the code should be applied.

A first issue arises here in connection with the nationality of the parties. The implementation of the provisions of the code should not, it is felt, depend on the nationality of the parties involved.

A second problem concerns the geographical application of the code. The code could apply to all technological transactions or be limited exclusively to transactions involving foreign elements. The recent regulations on transfer of technology enacted by some developing countries have adopted different approaches on this issue. The Mexican law makes it obligatory to register all documents, contracts, or agreements to be implemented in the national territory, hence the Mexican law applies to all transactions to be performed in Mexico. Decision No. 24 of the Commission of the Cartagena Agreement is concerned with the "import of technology." The Argentinian law regulates acts concerning the transfer of foreign technology that may produce effects within the country. However, it also applies where the supplier is a local firm which is presumed to operate as an agent for an outside entity. The Spanish Decree regulating the transfer of technology covers only transactions "from abroad."

A further issue connected with the nature of the parties involved in the transaction relates to the application of the code provisions to private and public entities. One approach is to make the code applicable to all transactions covering transfer of technology regardless of the parties involved, whether private firms, state bodies or regional or international institutions. The laws on transfer of technology of Argentina, Mexico, and Decision No. 24 of the Commission of the Cartagena Agreement make no exception to the applicability of these regulations when the transactions involve transfer of technology falling under their scope. The Spanish decree, on the other hand, excludes transactions for the transfer of technology entered into by the Administration of the State.

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