Significance of Code of Conduct

Arguments presented favoring need for code; technology transfer essential to developing nations, perhaps peace

BY SURINDRA PATEL*

It would, I hope, be pertinent to give you a flavor of the substantive background for negotiations on an international code of conduct on the transfer of technology now going on, a brief review of where they are at present, and an outline of the possible impact in years ahead.

THE SUBSTANTIVE SETTING FOR RESTRUCTURING THE LEGAL ENVIRONMENT FOR TECHNOLOGY TRANSFER

Let me recall memories from the book of history. If H. G. Wells' time-machine could be turned back to see the prologue rather than the epilogue, one could visualize the city of Paris in 1883, just three years short of a century ago. There a bare dozen governments got together to sign the Paris Convention on the protection of industrial property. They represented one-tenth of the world population. The instrument they forged gave monopolistic rights to inventors. And yet, they gave it a multilateral legally binding character.

There is in general no pressing need to shake the dusty lumber-rooms of history. But this particular memory recall has a special reason. It helps underline the significance of the Code Conference — less by comparison, much more by contrast. The code negotiations are attended by 10 times more governments. They represent 25 times more people. And they produce some 200 times more real income. Their combined Research, Development and Technological personnel is at least 500 times greater, and their R, D and T expenditures over a thousand times larger — with two-thirds of them by the public sector. Technology, as the wise Greeks defined it in antiquity is the art of producing and using tools. Never in the past had a more universal, a more powerful assembly been called together to herald its arrival on the world stage — the age of its exchange, development, adoption, adaptation, innovation, invention and diffusion.

The objective of the Code Conference brings out even more sharply its far-reaching significance. It is, as one of the agreed objectives of the Code boldly puts it, "to facilitate the contributions of technology to the indentification and solution of social and economic problems of all countries, particularly the developing countries." It is in reality to open to the peripheral and the marginal countries the promise of the accumulated treasure house of mankind to overcome their age-old afflictions. It is to unbind, step by step, thread by thread, Prometheus so that most of mankind need not for long remain ill-fed, ill-clad, ill-housed, illiterate.

At the dawn of human civilization, Aristotle had already concluded: "Enough has been said about the theory of wealth-getting; we will now proceed to the practical side". Over the two thousand years since then, many must have been amused, if not indeed distressed, about Aristotle's cheeky confidence. But for the dispossessed nations, the first faltering steps about proceeding to the practical part are just beginning to take shape toward the establishment of a New International Economic Order (NIEO). And the Code, without doubt, is the groundwork of the New International Technological Order (NITO).

LES International Conference, Geneva

Perhaps one order of magnitude may help. By the time this century gives way to the next, the developing countries will have undertaken over $10,000 billion of capital formation — a volume indeed larger than the sum total of all the goods exported across national frontiers from the time that tribes began to trade until the Second World War. The technology content of such capital formation is without doubt big and good business. For the developing countries, it is bigger than business itself. It is the very key to their transformation.

Mainstream

When you add to these figures the technological needs of all the other recipients in the developed countries, both in the market economies and the socialist countries, the picture is complete. Technological exchange undoubtedly would become the mainstream of world commerce.

This might be clearer if I were to outline very briefly the underlying uniqueness of technology. It is unlike any other commodity. It is the powerhouse of man's capacity to produce all the goods and services. Technology is the veritable genetic code, not of one man but of mankind itself. It is cumulative in growth over centuries. Most nations have contributed to build up its treasure house; but none fortunately have retained its mastery for long. It can be transferred, of course, to persons or across national frontiers with relative ease, impervious to climate, race, religion or sex. Once transferred, both its original owner and new acquirer have it, or as the economists would like to put it, for the supplying enterprise, the cost of its transfer

*Director, Technology Division, UNCTAD, Geneva.

is zero. Once obtained, it cannot be used up by its consumption. Once mastered, its life cycle is infinite. Once adapted, it appreciates.

If there is a place for poetry, one is reminded of Shakespeare's description of Cleopatra, through Antony's friend Enobarbus:

> *"That she did make defect perfection . . .*
> *Age cannot wither her, nor custom stale*
> *Her infinite variety . . .".*

And yet, technology is so different from science to which it mainly owes its origin now. Scientific achievements are universal, free and open to access by anybody. Possession of technology by contrast is jealously guarded as a secret by its owners. But even this is only partly true. The spectrum of technological achievements contains many shades — from those wholly decommercialized (e.g. many agricultural, social and publicly-owned technologies) at one extreme to those wholly controlled privately at the other, with, understandably, many shades in between.

No wonder the systems built up, whether as laws, or policies, or individual practices, to organize its transfer pose a wide variety of complex, and often conflicting questions. It is therefore not just idle academic eccentricity which poses these pertinent questions. Experienced negotiators for recipients of technology all over the world, both from the developed and developing ones alike, have faced the following questions.

Questions

How is this flow to be organized? Under what terms and conditions? At what cost? Who determines the costs? Which limiting conditions are to be permissible? What guarantees are to be given? What should be the scope of national regulation? Which laws are to be applicable? How are disputes to be settled? What special treatment needs to be given to developing countries? On which lines is international collaboration to be organized?

CONSTRAINTS ON TECHNOLOGY TRANSFER

Technology, to emphasize the banal, is very different from land, and yet the relationship governing the transfer of technology is in many respects not very different from that governing the leasing of land under the feudal order. Then, landlords owned the land which was cultivated by serfs, share-croppers or tenants at will. The cultivator did not have fixity of tenure, fixity of rent, autonomy in planning crops, freedom to plant hedges or, in general, invest labor and resources in the improvement of land. No wonder a complete restructuring of the legal fabric of land relations had to precede the modernization of both the techniques of agricultural production and the management of farms! Nor would the Industrial Revolution have found the fertile soil to sprout forth its seeds and blossom forth in Europe without a fundamental overhaul of feudal agrarian relationships.

Again in contrast to land, technology is the result of the cumulative search by restless minds, over the centuries, and spread over the continents, for doing things better or making different things. Technology is the child of the growth of the scientific spirit and has, thus, much more to commend it as a public good than land ever did. Yet technology is leased under conditions which in many respects are even harsher than those of a feudal regime. To give an example, current technological arrangements contain the following different types of restrictions on the receiver of technology, as listed in the tentatively agreed text of an international Code of Conduct on Transfer of Technology now under negotiation (UNCTAD document TD/CODE TOT/20):

1. Exclusive grant-back provisions
2. Challenge to validity
3. Exclusive dealing
4. Restrictions on research
5. Restrictions on use of personnel
6. Pricefixing
7. Restrictions on adaptations
8. Exclusive sales or representation agreements
9. Tying arrangements
10. Export restrictions
11. Patent pool on cross-licensing agreements and other arrangements
12. Restrictions on publicity
13. Payments and other obligations after expiration of industrial property rights
14. Restrictions after expiration of arrangement
15. Limitations on volume, scope, etc.
16. Use of quality controls
17. Obligation to use trademarks
18. Requirement to provide equity or participate in management
19. Unlimited or unduly long duration of arrangements
20. Limitations upon use of technology already imported.

Profiteering

In consequence, the technology transactions often show (to paraphrase R. H. Tawny) on the part of the supplier a virtuosity in unscrupulous profiteering, which — even when not interpreted as a personal sin — can result from the existing ways and means of technology transfer. It is difficult to see how the Third World's transformation could be accomplished without carrying out a fundamental technological reform: in many respects, this would parallel the accomplishment of the agrarian reforms in Nineteenth-Century Europe.

This is the type of concern that has found most urgent expression in UNCTAD's work on restructuring the current legal and juridical environment for the transfer of technology. Two initiatives have received widespread international attention: first, the revision of the industrial property system (affecting patents, trademarks, and the like) at the national and regional levels, and of the Paris Convention which legitimizes such practices; second, the establishment of an international Code of Conduct on Transfer of Technology.

REVIEW OF PROGRESS OF NEGOTIATIONS

The Code negotiations have been in progress since 1974. They have involved three negotiating sessions prior to the Nairobi Conference in 1976, which devoted nearly four weeks to the Code alone. Since 1976, the pace of negotiation has intensified. It has involved six sessions of an Intergovernmental Group of Experts on the Code, two sessions of the United Nations Conference on an International Code of Conduct on Transfer of Technology and a second resumed session of the conference. The third session is now underway.

The participants in the conference have set themselves the strategic objective of establishing the Code at this session. Many delicate and very difficult issues yet remain to be tackled. But the atmosphere is cordial, the tone of the discussions encouraging, the devotion of time and energy unstinting. But without the political will to compromise, these alone will not help. If these negotiations succeed, they will have paved the way for the most fundamental technological reform that its exchange has ever experienced. It will not have removed all the obstacles. It will not have yet freed Prometheus, ancient equivalent of modern technology, from the fetters that bound him. It will not have yet created the technological muscle with which the developing countries could accelerate their technological transformation.

Landmark

There is, however, little doubt that it will be a big landmark on the journey of technological exchange on a new road. It will have created the pre-conditions necessary for removing the most stringent restrictions on its exchange. In the process, it will offer the promise of a vastly greater flow of technology among nations. The groundwork will have been prepared for the countries in the Third World to alter their laws, regulations and policies, and to forge appropriate institutions for implementing them. From near obscurity, policies on technology would begin occupying the center of the stage in development planning. The heavy investments with which the countries of the Third World are building their scientific and technological manpower will then have concrete tasks in their hand to tackle.

The ensuing commercialization of technological exchanges and a better appreciation of the urgency of solving the pressing problems of mankind would have set the stage for the next step forward. The lessons of the new experience will be distilled thoughtfully at every stage. They will then begin the first steps toward specific action designed to decommercialize progressively the technologies transferred to developing countries. This idea was already put forward to the fifth session of the conference in Manila in the secretariat study, "Toward the technological transformation of the developing countries".

At present there are indeed so many technologies which are either publicly financed, owned or controlled, or are freely available and which are often required by developing countries. I should not be surprised if these meet nearly 90-95% of the technological requirements of most developing countries, including among them even the relatively more advanced. And yet the access of the Third World countries to this treasure house is severely constrained through a complex process of packaging with other elements, and of private control of know-how. There is a helpful departure in this area. The negotiations on the Code of Conduct on Transfer of Technology have already agreed to a provision giving developing countries "the freest and fullest possible access to technologies whose transfer is not subject to private decision." More determined action could surely be taken in this area. New institutional mechanisms and linkages will have to be established to implement it.

Human Need

Nowhere is the case for such progressive decommercialization of technology more pressing than in areas which cater to the satisfaction of critical human needs — for example, pharmaceuticals, food and food processing, housing and building materials, public transport and energy supplies. The World Health Organization strategy for the provision of "Health for all by 2000" can hardly succeed without firm initiatives toward freeing technologies needed for improving health, nutrition, housing, travel and communication and energy inputs. In this era of frustration, this could revitalize the profound conviction, cherished in the Nineteenth Century about the orderly progress of mankind.

I would like to conclude with the observation made by Gamani Corea, the Secretary-General of UNCTAD, at the United Nations Conference on Science and Technology for Development held in Vienna in August/September 1979. He said:

> "The world is on the threshold of the most far-reaching change in economic, political and technological balance among nations. A parallel could be found in the period from 1870 to 1940, when a major change in the balance among countries now considered developed took place. I need not recall how turbulent, how tortuous were those years. Small and large wars accompanied that process of change. The period ahead, when the developing countries will need to find their rightful place in the community of nations, poses a severe challenge to statesmanship. Will this be brought about in an orderly and wise fashion, or do we have to face an even more turbulent period than before? This conference and the processes it will initiate, will, I trust, serve the goal of an orderly transition."

The choices are severe. The test of statesmanship has always been to meet them in advance rather than have the historians debate the causes of turbulence, bordering on disaster.