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# The major unresolved issues in the negotiations on the UNCTAD code of conduct for the transfer of technology

*Miguel S. Wionczek\**

## I

Ten years after the appearance on the international agenda of the issue of technology transfer, a consensus seems to be emerging among the parties concerned—both technology suppliers and technology importers—that:

(a) technological know-how, including its development and transfer, is one of the key factors in the economic growth and social development of all countries;

(b) the technology transfer process involves a complex blend of capital, know-how, and trained personnel, and

(c) the successful selection, adaptation, utilization and innovation of technology requires a certain level of technological capability within a given country.

This sort of agreement in principle on the centre points of the issue of less developed country (LDC) participation in world technological advancement points to considerable progress towards understanding by the ad-

vanced countries of the reasons for the LDCs' long-standing insistence on the need to regulate international technology trade. Unfortunately, however, the deadlock reached at the United Nations Conference on a Code of Conduct for the Transfer of Technology, which adjourned in Geneva after three meetings last February without having been able to reach final agreement regarding such a Code, indicated once again that a consensus on broad principles is a necessary but *not* a sufficient condition for agreeing on international policy measures and their implementation. Moreover, the general economic stagnation and the growing competition for international markets among the major industrial powers has been reviving lately the opposition in some advanced countries against the liberalization of technology flows to the LDCs and the establishment of international "rules of the game" for technology transactions.<sup>1</sup>

## II

In view of the present adverse conditions it may be useful to restate once again the LDC case for a multinational code of conduct for the transfer of technology. Not only was the initiative in that respect taken by the LDCs, but over five years have now been spent in international meetings on clarifying misunderstandings around that issue, considered to be of great importance for a new international economic order.

Because they have been dependent his-

torically to a decisive degree on imports of technical know-how, the LDCs saw ahead of the rest of the world the need to establish a set of mutually acceptable rules for worldwide technology trade and to link international technological transactions with their own development needs. The LDCs were innovators in that field precisely because, as technology importers, they realize better than others the

<sup>1</sup>For more details see M. S. Wionczek, "Science and Technology for Development", *The Bulletin of the Atomic Scientists* (Chicago), Vol. 35, No. 4, April 1979, pp. 45-48.

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complexity of technology transfer, the economic disadvantages of traditional technology packages incorporated unilaterally into foreign private investment projects, and the crucial importance of domestic technological capability for the success of technology imports. They realize furthermore that this domestic capability neither comes automatically with commercial technology transfers nor can be imported lock, stock and barrel.

If one remembers that the LDCs acted as the initiators of the present worldwide debate on the subject of technology transfer and its regulation, then their arguments as regards the particular form of such regulation cannot be disposed of lightly as stemming either from ignorance or radical delusions.

All initial proposals for the regulation of international technology trade, made by a large group of the more advanced LDCs at UNCTAD and elsewhere in the 1970-1975 period, have met with strong opposition on a number of grounds from the major Western technology-exporting countries. The LDCs were told on innumerable occasions during that period that technology, being an undefined and very complicated object of international transactions, did not lend itself to international regulation; that technology, being mostly private property, could not be subject to such regulation; and,

finally, that any attempt to regulate international technology trade would have negative effects on technology flows.<sup>2</sup> The LDCs were warned that such regulation would scare technology sellers from entering into contracts with relatively small, uncertain, and underdeveloped markets in countries supposedly only too eager to impose technology restrictions for the restrictions' sake.

By now, we all know that these general objections against the regulation of technology transfer do not stand up to any serious criticism. If technology and technology transfer could not be defined and identified, we would scarcely have seen the emergence of an international patent system more than 100 years ago, a system aptly called a private system of technology trade control by an outstanding United States expert on international law, Prof. C. Fatouros of the University of Georgia.<sup>3</sup> If transactions involving private property could not be subject to international regulation, there would be no room for such multilateral arrangements as GATT. If the absence of regulation were a precondition for the international exchange of goods and services, there would have been no such thing as East-West trade, which apparently is advantageous to all the parties involved.

### III

The quasi-metaphysical discussions about the feasibility and possibility of regulating international technology trade gave place to a more practical and pragmatic debate only in May 1975 at UNCTAD in Geneva, when the LDCs presented the Western industrial countries and the European socialist bloc with a detailed draft of the possible contents of an international Code of Conduct on technology transfer. This first draft outline of international regulatory measures in the field of technology trade, prepared by experts from some 40 LDCs, injected real life into the intergovernmental political and technical discussions on technological advancement, technology transfer and industrial property systems.

The objective of the draft outline of a Code prepared by the LDCs in 1976 was not to impose its contents unconditionally upon technology producers and exporters, but only to prove that international regulation of technology trade was both possible and feasible and that

<sup>2</sup>This last argument, based upon partial and biased evidence, continues to be propagated under the guise of "scientific surveys" by commercial firms selling advice to large international business firms. For details see, for example, Business International, S.A., *Transfer of Technology — A Survey of Corporate Reactions to a Proposed Code*, Geneva, April 1978.

<sup>3</sup>See the background papers for the International Conference on Technology Transfer Control Systems (Phase II), Seattle, 6-7 April 1979.

it was urgent to start meaningful negotiations on the subject. This objective was achieved. In answer to the LDCs draft the Western industrial countries presented counter-proposals covering all major subject areas included in the LDC proposals. It is common knowledge that the outline Code offered by the Western countries borrowed heavily in many substantive points from the LDCs draft.

Moreover, in late 1976 the European socialist countries, which are heavy importers of technology, decided to join actively in the exercise by offering their own sketchy outline of a Code. The subsequent socialist drafts, submitted in 1977-1978, covered all major Code issues in technical language comparable to that used in the LDC and Western proposals. Finally, China joined the UNCTAD negotiations in February 1978, supporting in general terms the LDC position.

North-South technological co-operation, technology transfer and the Code of Conduct

were perhaps the only subject on which UNCTAD IV (Nairobi, May 1976) was able to reach a substantial degree of agreement by consensus. This Conference recommended that:

1. The drafting of a single set of proposals for an international Code of Conduct for technology transfer should be accelerated with a view to its completion by the end of 1977;

2. The experts drafting the tentative composite text of the proposed Code should be free to formulate draft provisions ranging from mandatory to optional, without prejudice to the final decision on the legal character of the Code of Conduct, and

3. After the drafting of the proposed Code was completed, the United Nations should convene in 1978 an international negotiating conference for the purpose of drafting the final document as well as "taking all other decisions necessary for its adoption".

## IV

Subsequently, six UNCTAD expert meetings at governmental level were held and an UNCTAD Conference on the Code of Conduct opened in the fall of 1978. By the time the third session of the Conference adjourned in February 1979, considerable progress had been made toward a single text of a possible convention on what the LDCs call a code of conduct and the Western industrial countries a "voluntary code", that would apply universally to all technology transactions, including those involving the different "national" segments of transnational corporations.

There are three major North-South disagreements still pending, however, related to (1) the legal form of the final international arrangement, (2) its implementation machinery, and (3) the scope of restrictive practices in international technology transactions to be considered undesirable—in the language of the North, or to be banned—in that of the LDC technology importers.

Let us take the first two points together, since they are closely linked. It is quite pos-

sible that the magnitude of the disagreement in respect of the legal form of the Code has been exaggerated by both the LDCs and the Western industrial countries, because from the beginning both sides have divorced the issue of the legal form from that of the substantive content of the Code. The decisions adopted by UNCTAD IV to leave the legal aspects of the Code in abeyance for the time being represents general albeit somewhat belated recognition of the intimate relationship between the legal form and the content of the future international arrangement. Such recognition may pave the way for some sort of mutually acceptable solution of the legal issue at a hopefully final resumed session of the United Nations Conference on the Code in the fall of 1979. A compromise clearly depends upon agreement on the machinery for implementing the Code of Conduct: a subject to which not enough attention has been given at the earlier stages of the UNCTAD negotiations by both the LDCs and the Western industrial countries.

According to the latest information from

UNCTAD, some sort of compromise solution is in the making on this second important point, independently—it would appear—of the final decision on the Code's legal form. An inter-governmental body is to be established within UNCTAD for the purpose of (1) providing a forum for discussion and exchange of views between States on matters related to the Code, in particular its application and the experience gained from its operation; (2) undertaking studies and research for the purpose of furthering the objectives of the Code; (3) inviting and considering relevant studies, documentation and reports from within the United Nations system; (4) studying, collecting and disseminating information on matters relating to the Code; (5) providing a forum for consultations between States, and (6) organizing meetings concerning the application of the provisions of the Code.

Even though the terms of reference of such an intergovernmental body might state explicitly—as the Western industrial countries insist—that it could not act as a tribunal or reach conclusions on the conduct of individual governments or parties, the fact that consideration is given also to periodical reviews of the application of the Code and its possible revision suggests strongly that, contrary to some interpretations, the potential role of the Code goes beyond that of just providing a favourable framework for the exercise by the States of their policy—and decision-making powers in the field of technology transfer. The future of the Code depends on its international implementation and not only on its legitimizing function in respect of national regulation.

At least to this writer, the question of implementation is much more important than the legal issue for several very simple reasons. If one accepts that (1) a law by itself does not govern social relations unless it is supported by the power of potential sanctions, and (2) in the present technology transfer set-up importers of technology (except in the case of the advanced countries of the West and of the East) have much less bargaining (and any other) power than technology producers and holders, then in the absence of sanctions not even a cast iron legally binding convention could help. Moreover, national legislation

cannot secure the desired objectives either in the absence of some sort of bargaining parity.

Thus, the issue of the legal form of the Code is subsidiary to that of its implementation machinery. The insistence by the LDCs on a legally binding code instead of mere guidelines is tantamount to an admission by the weaker parties that they are very weak indeed, so that they would like to see their weakness diminished by any means available, including the "sanctification" of the international regulating instrument.

It is the implementation of the Code which can make it into an international agreement worth more than paper on which it is going to be written. Technology owners and sellers are well aware of the importance of that issue, and they hoped for the best of two possible worlds: voluntary guidelines with the implementation mechanism reduced to an informal forum for "observation" of the technology transfer practices. As one of the participants in the UNCTAD negotiations, representing a major Western power, stated publicly at an international academic conference on technology transfer controls, held at the Wharton School of the University of Philadelphia last February, the industrially advanced countries continue to consider unacceptable any "quasi-judiciary" international evaluation of such practices.

The present writer expects a change in that position within the framework of a trade-off between the issue of implementation machinery and the legal form of the agreement on technology transfer regulation. Only through such a trade-off can the negotiations result in some degree of international equalization of technology transfer terms and conditions, rather than just a framework for national regulatory action. Of course, no automatic power can be built into the Code at the present stage. Moreover, the Code may fall apart through cut-throat competition for technology transfer among the recipient countries, through the drift away from the industrial property system into secrecy by technology holders, or through other even less expected developments. After more than five years of negotiations, however, the LDCs can at least feel that

an end will be put to exploitation without the participation of all the parties involved as far as most (albeit not all) international technology

transactions are concerned. Whether the stage of "participation without exploitation" will ever be reached depends largely on the LDCs.

## V

These considerations lead us to the third unresolved issue—that of the level of restrictive practices to be defined as undesirable and contrary to the interests of the LDC importers of technology.

The fact that restrictive business practices have increasingly become an important policy issue for governments and international agencies is the result of two clearly contradictory trends: firstly, government policies (especially in major industrial countries) have, by encouraging and permitting the concentration of economic power at the national and international levels, inevitably facilitated the growth of power over the market and provided ample opportunities for the increased and effective use of restrictive business practices by private enterprises, and secondly, concurrently with the expanded use of such practices, particularly by transnational enterprises, it has become widely recognized that they affect the interests not only of the home countries of large enterprises but of other countries as well.

While the subject of restrictive business practices is at present being dealt with in many places simultaneously, both inside and outside the United Nations, it is probable that the treatment it has received in the course of the UNCTAD negotiations on an international Code of Conduct on technology transfer offers better operative possibilities than in other forums, because nowhere outside the UNCTAD draft Code has an effort been made to specify and exemplify all the major restrictive practices currently in use in technology trade. At the same time, however, the progress achieved in that respect by the UNCTAD Code negotiators should not obscure by any means the size of the disagreement still existing between the developing world and the Western industrial countries.

At the United Nations Conference on a

Code of Conduct, agreement was reached by February 1979 on the provisions relating to exclusive dealing, exclusive sales or representation agreements, and payments and other obligations after the expiration of industrial property rights. Moreover, agreement has also been reached with respect to the criteria to be applied as regards including the notion of restraint of trade and adverse effects on the international flow of technology, particularly when restrictive practices hinder the economic and technological development of acquiring countries. Behind the unwillingness of the industrial countries to include in the list of restrictive practices six items that appear in the draft code elaborated by the Group of 77, however (limitations on volume and scope of production, use of quality controls, obligation to use trade marks, requirements to provide equity or participate in management, unlimited or unduly long duration of arrangements, and limitations upon use of technology already imported), lies a series of major disagreements between the two main negotiating groups.

According to an UNCTAD secretariat document, presented to UNCTAD V in Manila, which gives a review of major issues under negotiation in the field of the transfer of technology and the industrial property system, the following difficulties in respect of the chapter on restrictive practices in the draft Code still persist:

(a) While fourteen restrictive business practices are agreed by all parties, including all the industrial countries, to be anti-competitive in nature, the Group of 77 insists on the inclusion of the above six additional practices, independently of whether they are anti-competitive or not, because they are regarded as being, for one reason or another, unfair to the acquiring party or as adversely affecting economic and technological development in the

wider sense. Such is particularly the case as regards the obligation to use trade marks, which not only strengthens the monopoly patent but it directly responsible for creating outward-directed consumer preferences.

(b) The question of the coverage and scope of the practices is far from settled. The industrial countries would like to refer in the title of the chapter dealing with them just to "restrictive business practices", while the Group of 77 explicitly suggests their regulation by proposing the general title "The regulation of practices and arrangements involving the transfer of technology".

(c) The industrial countries continue to insist that it is necessary not only to enumerate restrictive practices but to determine whether their effect is actually harmful in practice. Consequently, they want to introduce in this, as in other fields covered by the Code, the notion of the "rule of reason" or "public interest". The Group of 77, however, objects to the inclusion of such a concept in the definition of the practices, on the grounds that the application of the "rule of reason" gives rise to a real danger of arbitrary interpretation of restrictive practices by the parties responsible for originating such practices, be they private parties or their governments.

(d) Finally, on the grounds of "unequal partnership", the Group of 77 defends the right of the competent authorities of the technology-acquiring country to disregard, in exceptional circumstances, the restrictive practices proscribed by the Code, provided that on balance and on development grounds there will be no adverse effect on its national economy. Industrial countries do not accept such an exception clause in the Code.

In brief, while the shape of the treatment which the issue of restrictive business practices will receive in the UNCTAD Code is slowly emerging, the process of international negotiation has been protracted and difficult. Indeed, perhaps it would never have reached such a detailed level in the absence of the expertise available within the Group of 77 as the consequence of the recent introduction in many LDCs of restrictive business practices legislation. Such new legislation has arisen

mostly from the double concern, first, about the structure of economic power in itself, resulting from historical developments and economic dependence on the advanced industrial economies, and, second, about the ability of mostly foreign enterprises with dominant power to use it to the detriment of the broadly defined national interest, through overpricing goods and technology and controlling the manufacture and distribution of products. It is no accident that these concerns found their reflection in the most detailed ever presentation of 40 restrictive practices in the early draft Code, elaborated by the Group of 77.

The reduction of this original list to 20 practices between 1975 and 1978 should not be understood as an admission by the Group of 77 of the irrelevance of half the actual practices detected by its experts. On the contrary, for the sake of arriving at a mutually agreeable consensus the "missing" twenty were incorporated in the shorter basic list or transferred in new legal language to other parts of the draft Code.

Just as in the case of national legislation on restrictive business practices, it would be unrealistic and naive to assume that any sort of international regulation of such practices, including that which may emerge from the UNCTAD Code on the transfer of technology once it is adopted, can by itself take care of the concentration of economic power and its encroachment on the development process in LDCs. It must be stressed that international regulation of restrictive business practices will fail unless the individual countries (1) set up their own development strategies, (2) design and implement policies aimed at increasing their domestic economic and technological capability and (3) introduce national legislation against restrictive business practices—defined more broadly than is the case in the similar legislation in force in the industrial countries or their groupings such as the European Economic Community.<sup>4</sup>

<sup>4</sup>UNCTAD, *Control of Restrictive Business Practices in the European Economic Community*, Report by the UNCTAD Secretariat, TD/B/608, Geneva, 1977.



## VI

These three major unresolved issues are closely related to the North-South divergence of views on the role of private interests in the international technology transfer process. The present official position of the Western industrial countries is based on the belief that private investment and investment-related activities, such as licensing and service and management contracts, among others, represent the most effective method for the international transfer of technology. This assumption gives rise to their advocacy of a liberal investment policy with a minimum of government intervention at both ends of the technology transfer process, i.e., in the selling and buying countries, accompanied by insistence on the maintenance of what has traditionally been called a sound and predictable investment climate.

These beliefs are not shared by most LDCs, even including those countries that follow quite liberal policies *vis-à-vis* foreign investment. The LDCs do not deny that a very large part of the presently available technology is privately owned, and they accept the right of its owners to reasonable retribution, but most of them take the view that excessive emphasis on the role of private investment as the bearer of technological progress either originates from the intention to defend particular interests of technology exporters or reflects confusion as regards the basic issue of technological development and technology transfer to the LDCs. According to the LDCs, technological progress and technology trade cannot be considered at the international level merely as a set of private transactions.

While most people in the industrial West equate technology transfer with the diffusion of privately-held know-how, the LDCs believe that real technology transfer takes place only when the know-how is incorporated into the stock of available knowledge in such a way that the receiving society can use it for varied purposes. One of these purposes—perhaps the most important for the LDCs—is that of building up their own more or less autonomous technological capacity so as to permit them to decide about the importation of the know-how,

its adaptation to local conditions and its uses for broad societal objectives.

If local technological capability is not understood only the very limited sense of the capability of the private industrial sector, and if technology transfer is understood not as the diffusion of private know-how within individual firms but as a social process, then it is difficult to defend the position that a single channel, such as foreign private investment—more and more equated these days with transnational corporations—represents the only, the best and the most expeditious transfer mechanism. There is ample evidence, both in the developed and the developing countries, that the spill-over of the know-how diffused within an enterprise, large or small, is very limited because of the proprietary character of such know-how and the owner's legitimate interest in keeping it to himself for competitive reasons. If this is so, such transfers are not sufficient for a developing country, even if regulated. Other transfers through other mechanisms are clearly needed to amplify the range of the scientific and technical knowledge available to society as a whole, including that available to the State and the educational system.

A variety of transfer mechanisms is also needed, in the context of underdevelopment, for another important purpose: in the LDCs the technological capability of the State and of the higher education system are needed to assure social uses of private knowledge. This problem does not arise in the advanced countries because they count upon the scientific and technological equilibrium among the major segments of society which has been established gradually over the last 100 years. The situation is very different in the underdeveloped world, however, which is backward because, among other reasons, it does not have at its disposal the necessary minimum overall scientific and technical capability. That capability must be build up by the domestic effort, with the support of imports of know-how (i.e., technology transfers)—support which is hardly automatic and should be subject to both international and national regulations.

## VII

There are two very important political factors that work in favour of the elaboration and international acceptance of some sort of Code of Conduct, hopefully by 1980. At the present moment, technology transfer regulation is the only concrete point on the large agenda of North-South economic issues on which both the LDCs and the West have been able to proceed from the stage of general debate and mutual recriminations to that of working together on technical and operational proposals. Since clearly nobody wants to go back to violent political confrontations, the common interest in pursuing negotiations on international technology transfer regulation —if only to prove that a dialogue between the developed and developing countries is possible— may prevail over those circles in the major industrial countries, and particularly in the United States, who —taking a narrower short-term view— would have nothing against making out of these UNCTAD negotiations another United Nations Conference on the Law of the Sea.

The second important factor militating in favour of a compromise solution on the subject of the Code is that in its prolonged absence there would be an increased risk of some LDCs starting to devise unilaterally restrictive national regulatory systems that might negatively affect international technology exports. Under such conditions many people in the industrial technology-exporting West feel that reasonable international technology trade

regulation might be better —much better as a matter of fact— than a maze of restrictive national schemes. If adopted without undue delay, such international regulation may offer basic standards in many LDCs for similar domestic schemes that would take into equitable consideration the interests of all the parties concerned.

A question that seems to linger still in many minds in the Western industrial countries is —what is the need for international action if the problems of international technology trade could be taken care of by national regulation? In the light of the evidence available the answer seems quite simple. The issues involved are too big, too important and too complicated to be treated exclusively at the national level at a time when the North is talking about interdependence and the South is stressing the need for a new international economic order. Technology, its development and its transfer are a worldwide problem and must be considered as such. Not only is a set of mutually acceptable rules urgently needed for the only remaining part of world trade not subject to any multilateral agreement, but the whole exercise also has a tremendous educational value for the developed, developing and socialist countries. It is helping all of them not only to design the general rules for technology transactions but also to define the preconditions for socially useful technology transfers and to clarify the crucial issue of the contribution of technology to development.