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THE TRANSFER OF TECHNOLOGY TO LATIN AMERICA

*Gabriel M. Wilner**

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I. INTRODUCTION

The transfer of technology to Latin America has taken place through both the licensing process and direct investments by foreign enterprises that are often transnational corporations. National law has concerned itself first with the creation of rights in technological knowledge and the protection of these rights by law. The regulation of these rights as set out in contractual relationships and the regulation of direct investment, particularly the technological component thereof, were dealt with thereafter. Other matters such as the repatriation of profits (exchange control), customs controls, and various taxes have also become a part of the national regulatory scene today.

Technological knowledge has traditionally been protected in Latin America. Because of the dearth of locally created technology, protection has, in fact, been largely extended to foreign owned or controlled industrial property and other technological knowledge. Therefore, it is the international transfer of technology rather than local technology transfer that has been crucial to the development of Latin American industry. Moreover, while

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protection of industrial property and other technology rights has had a long history in Latin America, the express regulation of the transfer of technology is a recent phenomenon. National regulation was born of the realization that technology is a key to industrialization and raising the standard of living. Over the past ten years the countries of Latin America have addressed themselves to the issues raised by the transfer of technology, and regulation has taken the place of what could be termed a thoroughly *laissez-faire* economic philosophy regarding the sale of the use of technology.

This paper focuses on the contractual acquisition of foreign technology through licenses and other contractual arrangements as contrasted with the technological components in the usual direct investment. Such investment is made either in the form of the wholly-owned subsidiary of the transnational corporation or as part of a joint venture. The use of technology as a major component of direct investment has been discouraged over the years, although this trend was reversed in Chile after 1977.

Modern legislation and practice in the regulation of technology transfer is characterized in the several Latin American countries possessing such a regime by administrative scrutiny and approval of the contractual relationship at its inception rather than the judicial determination of alleged violations of regulatory rules during the life of the contract.¹ The approach taken follows from the decision made by the Latin American states that they have an indispensable role to play in assuring that the direct and indirect costs of the importation of the technology be in the interest of national economic and social development, irrespective of the private benefit to the technology acquirer. This is in many ways analogous to the role of the state in serving the public interest by protecting the consumer.

The state's involvement in the technology transfer process has made it an active and sometimes dominant participant in the negotiation of the contract, the evaluation of the technology and the agreement transferring it, the approval of the agreement, and the monitoring of its performance. Over a period of decades such regulation has evolved from rules primarily related to the payment of royalties and to rules and regulations addressed to the entire process of the transfer of technology. Brazil and Colombia were

1. The countries employing such a regulatory system are principally Mexico, Colombia, Brazil, Venezuela, Peru, Bolivia, Ecuador, and Argentina.

among the first of the eight or nine Latin American countries with currently operational regimes to evolve from the pre-regulatory system to a modern system.

Regulation of technology transfer has been mainly national in character. At present, however, the Andean Pact has evolved a common set of rules,² implemented on the national level, through which a harmonization of the laws of the member states has been brought about. In addition to the five states currently members of the Andean Pact,³ Mexico,⁴ Brazil,⁵ and Argentina⁶ are presently implementing systems of technology transfer regulation.

II. OVERVIEW OF INSTITUTIONS AND LAWS

While all the rules relating to the technology transfer's regulation have a legislative basis in the various Latin American countries, a number of these countries delegate the authority to create specific rules and procedures to the institutional agency or agencies that are given the task of overseeing the evaluation and registration process. In Brazil the National Institute of Industrial Property (INPI) has established rules for the transfer of technology process and has also acted as the administrative body for carrying out the law.⁷ In Mexico the task of scrutinizing both the transfer of technology and direct investments has been placed within the Ministry of Patrimony and Industrial Development. Previously transfer of technology had been dealt with administratively by a separate unit in the Ministry of Industry and Commerce. While in some countries the entire process from assistance

2. Decision No. 24, Dec. 31, 1970, as amended by Decisions Nos. 37, June 24, 1971; 37-A, July 17, 1971; 70, Feb. 13, 1973; 103, Oct. 30, 1976; and 109, Nov. 30, 1976; of the Commission of the Cartagena Agreement, Andean Foreign Investment Code, text at 16 INT'L LEGAL MAT. 138 (1977).

3. See e.g. Colombia Decree No. 1234 of 1972; Venezuela Decrees Nos. 746, Feb. 11, 1975, and 2442, Nov. 8, 1977; Peru Decree Law 189000 July 1, 1971, Decree Law 21, 826, Apr. 12, 1977.

4. Bill Concerning Registration of the Transfer of Technology and the Use and Working of Patents, Trade-names, and Trade-marks, OF. GAZ., Dec. 28, 1972, Doc. TD/B/AC.11/13, reprinted in 12 INT'L LEGAL MAT. 421 (1973).

5. Normative Act 15, establishing basic principles and norms for the registration of contracts involving the transfer of technology and related agreements, Sept. 1975.

6. Law on Transfer of Technology, Law No. 21,617, Aug. 12, 1977, OF. GAZ. Aug. 16, 1977.

7. See note 5 *supra*.

in negotiation to post-registration monitoring is dealt with by one agency,⁸ in other countries there are several agencies that deal with the various stages in the process of the technology transfer regulation.⁹ These agencies may well include the central bank, which is concerned with the issue of pricing and repatriation of profits and, in some countries, registers the technology transfer agreements.¹⁰ In some countries the national agencies whose primary task is to plan for economic and industrial development are brought into the technology transfer regulation process.¹¹

The competent agency or agencies will conduct their scrutiny of the technology transfer on at least three levels.¹² The economic elements and consequences will be analyzed in order to determine the effect of the suggested transaction on the acquiring party and on the economy of the acquiring country. The general effect on balance of payments and the extent to which national industrial, natural, and human resources will be used are the basic factors utilized to determine the impact of the technology sought to be transferred. This economic analysis focuses specifically on the costs to both the acquiring party and the acquiring country, including royalty or other direct price to be charged and the more indirect costs involved in the control over the transaction exercised by the supplier of the technology. A second type of scrutiny involves an examination of the technology itself in order to determine whether it is current, whether it is unique and therefore not available in the country, whether the product or process can be used within the country without the help of the particular foreign owned or controlled technology, and whether it is technology which is sound in technical terms. In Latin America this investigation has generally been conducted by a very limited number of persons. In some of these countries the personnel have been swamped by the number of requests made. This small group of technical personnel is often confronted both with gaps in information and with lack of precision in their legislative and administrative mandates.

8. *E.g.*, Mexico, Venezuela, Bolivia.

9. *E.g.*, Argentina, Colombia, Ecuador, Peru, Brazil.

10. *E.g.*, Brazil and Ecuador.

11. *E.g.*, Argentina, Ecuador, Mexico.

12. See Correa, *Regimenes de Control de la Transferencia de tecnologia en America Latina*, INTAL Serie Monografias No. 5 (1979). See also Camp & Mann, *Regulating the Transfer of Technology: The Mexican Experience*, 10 COL. J. WORLD BUS. 110 (1975).

The administrative agency's legal role is to analyze the contractual arrangements to determine whether they are in conformity with national law and the administrative regulations and practices that have been developed. The agency's legal staff looks at the necessary contractual elements to determine whether they are present. It also examines the provisions of the contract in relation to the fundamental announced policies of the government to determine whether they are consistent. This will include an inquiry into the restrictive nature of certain contract terms and, in certain instances, the existence within the contract of certain guarantees required by national law. Review of the consequences of non-performance of the technology transfer agreement, including questions of the applicable law and disputes settlement, will also be part of the administrative agency's responsibility to make certain that they conform to national law.

The activity of the various teams of experts to whom the proposed agreements are submitted is based in each case on the information gleaned from the contract itself, from further information given by the parties to the administrative agency in charge, and from information provided by other concerned government departments. The entire professional staff available to engage in these complex and difficult tasks varies from six to thirty-two, including economists, engineers, lawyers, and policy experts.

The process of regulation then moves from the evaluation stage to the stage of government-party negotiations. At this stage the parties themselves have agreed to the conditions for the transfer of technology, and it now remains for them to adapt the contractual relationship to the requirements set forth by the government authorities. In playing its role in this phase of putting the agreement in final and acceptable form, the national regulatory agency can show considerable flexibility since the law and the regulations normally give a substantial amount of discretion to the agency. The extent of flexibility shown by the governmental power in approving or rejecting provisions of technology transfer agreements will depend on the general economic policies that are being followed nationally at a particular time.

Once the final negotiations have taken place and the agreement is deemed to be satisfactory to the government, it will be registered and considered valid under the legal system of the technology acquiring country. The agreement will be enforceable in the courts of the technology acquiring country, and the parties will be able to benefit from any incentives or facilities available to valid

transfer of technology agreements.

The national laws define the transfer to technology transactions that are to be governed by the regulatory regime through the listing of examples. Normally, the transactions covered by the regulatory regime are the licensing of agreements for industrial property rights, the sales of the use of know-how, including trade secrets, the supply of technical assistance, and, in some countries, the provision of technical services.¹³ Certain sectors of the economy are not within this regime of regulation but are covered by a set of special rules.¹⁴ In some countries, based on practice, the general regulatory regime will not cover contracts by public enterprises.¹⁵

Another aspect of the regulatory regime's scope of application is coverage with respect to the parties to the transfer of technology. Under the law and practice of some countries, all transfer of technology agreements must be submitted to the regulatory system.¹⁶ This includes purely domestic agreements and those of an international nature. In other countries the national system regulates only transfer of technology agreements made between local acquiring parties and foreign enterprises. Thus, it becomes important in these national systems to determine when an enterprise is considered to be foreign. This issue is particularly acute with respect to cases of transfers between foreign controlled affiliates and locally owned and controlled companies. A related problem arises in the context of the parent-affiliate enterprise situation.

The transfer of technology from parent companies located in industrialized countries to subsidiaries in Latin American countries is substantial. While some technology is transferred without the formality of an agreement, more often than not there will be an agreement between these legally separate entities for purposes of characterizing payments as royalties in order to avoid their being termed profits for purposes of exchange control and taxa-

13. For discussion of the transfer of know-how to Brazil, and the importance of its transfer in that country, see Rowland, *Foreign Investment in Brazil: A Reconciliation of Perspectives*, 14 J. INT'L L. & ECON. 39 (1979).

14. *E.g.*, in Argentina and Colombia transfer of technology in the mining and petroleum sectors are regulated separately; in Brazil the automobile and hotel sectors are covered separately; and in Venezuela the tourism, banking and petroleum sectors are specially regulated.

15. *E.g.*, Ecuador and Colombia.

16. *E.g.*, Mexico and Brazil.

tion.¹⁷ Latin American legislation and practice have often taken into account the fact that intra-enterprise transfers in the context of the transnational corporation have accounted for the bulk of technology transfer. Brazilian law prohibits royalty payments between parent and subsidiary corporations for patent and trademark licensing.¹⁸ This approach has also been adopted by the countries in the Andean group through Decision 24. Thus, on the one hand, favorable treatment of royalties encourages parent-affiliate relations on a contractual level. While on the other hand, legislation and practice will regulate the transaction when parents and subsidiaries enter into the easily detectable transfer of technology agreement. There is still a wide margin left open for parents and affiliates to enter into agreements regarding technical assistance, the sale of the use of know-how and trade secrets, and other licensing arrangements that do not necessarily involve patents or trademarks directly. With respect to these forms of technology transfer and agreements for technical services, national law has been interpreted to consider remittances to be royalties rather than profits.¹⁹ Intra-enterprise relationships remain complex, and when the law closes certain loopholes, others are likely to appear in the relationship between parent and affiliate.

III. THE TERMS OF TRANSFER OF TECHNOLOGY AGREEMENTS AND NATIONAL REGULATION

The most basic features of technology transfer agreements that national law seeks to regulate are the direct price for technology, the duration of the agreement, and the indirect costs as brought about by restrictive practices embodied in contract clauses. Other features in contracts for the transfer of technology, such as clauses on applicable law, the forum for the settlement of disputes, and currency and fiscal clauses, are often placed within the general rubric of restrictive practices.

Obviously, not all transfer of technology agreements contain abusive terms. In fact, a large proportion of the agreements submitted will not violate national law and will be registered. A significant minority of agreements will, however, be revised before

17. See REPORT OF OECD COMMITTEE ON FISCAL AFFAIRS, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES 45 (1979).

18. See Nattier, *Brazil*, in TECHNOLOGY TRANSFER: LAWS AND PRACTICE IN LATIN AMERICA 145, 158 (B. Carl ed. 1978).

19. See REPORT OF OECD COMMITTEE ON FISCAL AFFAIRS, *supra* note 17.

being registered, while others will be rejected altogether.

The determination of what is an acceptable royalty level is one of the most difficult tasks facing the national authorities. Most national agencies have put together certain internal policies on the range of royalty rates acceptable. These are usually based on the kind of technology that is being transferred and the acquiring party's type of activity. Argentine law specifically sets forth the maximum royalty rates for the different types of technology to be transferred. In Brazil and Argentina the top rate is five percent while a one percent royalty is the normal level for the use of trademarks. Each country has set policies based on what are considered to be the most relevant distinctions. In Colombia a five percent maximum for the internal market is permissible while seven percent royalties are acceptable for exports. Generally, royalty rates are applied on the net sales value.

The importance of Latin America as a market for technology from industrialized countries should not be underestimated. In 1978 direct payments from Latin America accounted for approximately forty-three percent of receipts to United States companies from developing countries for technology. A major proportion of this amount was in royalty payments from affiliates. The more industrialized countries such as Brazil and Argentina accounted for a substantial percentage of the flow of technology, leaving little to the less industrialized countries of the region. Nevertheless, the royalty payments to the United States from its trading partners in Western Europe and Japan accounted for an overwhelming portion of the payments. Latin America, like the rest of the developing countries, accounted for a small segment of the payment flow to the United States.²⁰

Like pricing, the length of the transfer of technology agreement is a fundamental element to be evaluated by the national regulatory agencies. In general, the length of transfer of technology agreements made since the regulatory systems were put into place has diminished. The period of validity of agreement was shortened so that there would be an opportunity for the regulatory agency to review the agreement after a reasonable number of years. An agreement of indefinite length or for a very long period may well outlast its value to the acquiring country and become a

20. For discussion and statistics on the volume of technology transfer and its distribution, see UNCTAD Secretariat Report, *The Implementation of Transfer of Technology Regulations*, U.N. Doc. TD/B/C (1980).

substantial economic burden, tempting the national authorities to terminate the agreement despite the announced duration. This type of action would be denounced as a violation of contract rights by the supplying party and by its home country and might precipitate a negative turn in economic and political relations between the countries involved.

A further basic element of technology transfer regulation concerns the indirect costs of the transfer that are embodied in the contract as a series of restrictive clauses. These clauses are normally imposed on the acquirer of technology, restricting its enjoyment of the technology rights acquired. The restrictions are perceived by the developing nations not only to affect the acquirer of a technology, but also to have an important impact on the acquiring party's country, particularly its economic development. As with the other costs of the transfer of technology, the acquiring country is deemed to have an interest in diminishing the indirect costs. Among the contract provisions most frequently found to impose restrictions are export constraints, tying clauses, restrictions on the amount and type of production permissible, grant-back clauses, clauses restricting the use of the technology after the expiration of the agreement, and clauses which impose the use of unnecessary industrial property rights upon the acquiring party. The inquiry into the validity of clauses sanctioning restrictive practices is not confined to contracts between independent entities. Parent-affiliate contractual arrangements are also subject to scrutiny for restrictive practices. In the latter cases, the agreement may not formally contain restrictive practices, although it can be assumed that the affiliate will conform to the policies of the parent company.

In certain national legislation the list of prohibited practices is exhaustive, while in others the listing is set forth by way of example. The proscription of practices which are identified in the national law, or in the regional legislation, as being restrictive is not absolute. Decision 24 of the Andean Pact and some national legislation appear to make the prohibition of certain practices absolute. Where the legislation does not, however, provide for exemptions from these per se rules, the administering authorities usually have the authority to act in a flexible manner. Sometimes the legislation itself provides for such flexibility. In Mexico the law provides that certain practices that are proscribed will be considered to be valid if the technology transferred is of special interest to the country.

Concern over the use of choice of law and choice of forum clauses to vitiate the effect of national legislation and general policies has led to the inclusion of provisions prohibiting the use of exclusive choice of law and choice of forum clauses. It is, therefore, expected that the national law of the acquiring country will be applied by the national courts of that country in all matters concerning the validity and performance of the transfer of technology agreement.

IV. SOME CONCLUDING REMARKS

The Latin American regulatory systems for the transfer of technology have generally adopted what may be called a preventive system for the control of abuses in the transfer of technology. It is no wonder that the single biggest reason for the rejection of transfer of technology agreement clauses is the existence of provisions in contracts reflecting unacceptable restrictive practices. It appears that the purpose of regulation in Latin America is not to impede the flow of technology, but to prevent the imposition of contract terms which are inimical to the economic development of the country of the acquiring party. Accordingly, there is a higher instance of initial rejection of contracts because of the invalidity of one or more clauses than final rejection once the offending clauses have been modified. Of course, if the parties were to continue to consider as valid a clause which has either been declared invalid or would be declared invalid if the authorities knew of it, such a clause would be severable from the rest of the agreement. This would be necessary in order to safeguard the interest of the acquiring state in the validity of agreements transferring technology to the country and its national enterprises.

There appears to be no distinct pattern in the volume of transfer of technology in the years since the creation of the various regulatory regimes. As the industrial base of a Latin American country becomes more powerful and extensive, the country may become more selective in the technology permitted to be transferred. Thus, for example, it is perceived that Brazil has become more severe in the application of its national policies. Significant changes in the economic orientation of a national regime may cause the system of regulation to be changed drastically. This has certainly been true of the regime in Chile and, to some extent, Argentina.

Latin American countries have shown great interest from the very beginning in the internationalization of the concept of a reg-

ulatory regime for the transfer of technology. This is undoubtedly why Latin America has been a strong supporter of the work on the international code of conduct on the transfer of technology.²¹ The code of conduct would create a model regulatory regime, albeit of a modest nature, which could be used by states in fashioning their own national regimes. Since such systems are already in place in many Latin American countries, the urgency of the adoption of the code is probably less pressing than it is for other regions. Nevertheless, its adoption would reinforce the international acceptability of the existing national and sub-regional systems. Like the national legislation and institutions to be found in the Latin American countries, the code of conduct as an international model would appear to be aimed at eliminating abuses in the system of the protection of technological knowledge, while maintaining the flow of technology through contractual arrangements.

21. The most recent version is *Draft International Code of Conduct on the Transfer of Technology* as of 6 May 1980, U.N. Doc. TD/CODE TOT/25 (1980).

