

A Report

The Code of Conduct for Transfer of Technology: What Do the "77" Want?

Miguel S. Wionczek

The *Economist* of London published late last year a two-page article about the UNCTAD discussions on an international code of conduct for transfer of technology. This confirms that the importance of that issue for the future of North-South economic relations has been finally recognized in industrial countries of the North Atlantic area. The recognition comes after almost three years of unsuccessful pleas on the part of the less developed countries (LDCs) to consider, at intergovernmental level, the possible regulation of international technology trade, the only part of world commerce left out of the scope of multinational arrangements. LDCs pleaded for such action for two reasons: to establish some mutually acceptable guidelines for technology trade and to link it with their developmental needs.

Between 1970 and the summer of 1975 proposals for the regulation of international technology trade, made by a large group of the LDCs at UNCTAD and elsewhere, met strong opposition from major technology-exporting countries on a number of grounds. The LDCs were told on every occasion that technology, being a nondefined 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 international regulation; and, finally, that any attempt to regulate international technology trade would have negative effects on technology flows to the LDCs, because any regulation would scare technology sellers from entering into contracts with small, uncertain, and underdeveloped markets in countries eager to impose restrictions.

The almost theological discussions about the feasibility of regulating international technology trade gave place to a more practical and pragmatic debate only when the LDCs as a group presented to Western industrial countries and the socialist bloc in May, 1975, detailed

proposals of a code of conduct on international transfer of technology. The draft outline was elaborated by experts from the so-called Group of 77, part of the UNCTAD Intergovernmental Group of Experts who met in Geneva twice in the spring and fall of last year on a Code of Conduct on Transfer of Technology. The outline took the form of a draft of the international convention that covers the following fields: objective and principles, scope of application, national regulation on transfer of technology transactions, guarantees, special treatment for developing countries, international collaboration, and applicable law and settlement of disputes. The draft of the Group of 77 has not been invented by the experts from LDCs. It represents an improved and refined version of proposals elaborated in Geneva in May, 1974, by a private group of fifteen technology experts from Western, socialist, and the underdeveloped countries, meeting under the auspices of the Pugwash Movement on Science and World Affairs, an informal scientific organization, which counts among its members a score of Nobel Prize winners.

In answer to the draft of the Group of 77, whose main purpose was to prove that international regulation of technology trade is both possible and feasible, governmental experts from the Western industrial countries drafted last fall a counterproposal of similar length and coverage. Both proposals were submitted in early December, 1975, to the first session of the UNCTAD Commission on Transfer of Technology. They are to become the subject of international negotiations at UNCTAD IV, scheduled for May, 1976, at Nairobi, Kenya. The potential importance of the forthcoming negotiations can be understood only if one takes note that the Seventh Special Session of the U.N. General Assembly, in which Messrs. Kissinger and Genscher played such an important role, agreed by consensus that an international code of conduct on technology transfer should be negotiated at the Nairobi Conference and thereafter so that it could become reality before the end of 1977.

After the meeting of the UNCTAD Commission on Transfer of Technology it is only fair to state that the gap between the respective positions on the code of the LDCs and industrial countries is still very large, particularly in respect to the legal nature of

MIGUEL S. WIONCZEK is in charge of science and technology planning in Mexico. He acted as chairman of the Pugwash ad hoc Expert Group on Transfer of Technology (May, 1974), spokesman for the LDCs in the UNCTAD Intergovernmental Group of Experts on a Code of Conduct on Transfer of Technology (May, 1975), and as chairman of the first meeting of the UNCTAD Committee on Transfer of Technology (November, 1975).

the code. The fundamental disagreement is whether the code should be merely a set of voluntary guidelines or whether it should be made binding in an international agreement, and ultimately in national legislations, as the LDCs propose at this stage. This disagreement should not obscure, however, the degree of progress achieved between May and December, 1975, by the LDCs and industrial countries in respect to the general content of the code. Nor should the persistence of disagreement make anyone forget that socialist countries decided to participate in the exercise by defining their own detailed positions on the major issues covered by the two above-mentioned proposals. There is reason to believe that socialist countries, which import technology from the West and export it to LDCs, may bring their draft proposals to UNCTAD IV.

A number of preliminary comments on the draft code proposed by the Group of 77 have been made in recent months by such important bodies as the International Chamber of Commerce and Licensing Executive Society and by important economic journals published in industrial countries. While some parts of the proposal seem to be acceptable and fit for formal negotiations, others are being rejected. Such mixed reaction should not surprise anyone. It reflects the nature of informal prenegotiations on any internationally important subject. The progress of the code could, however, accelerate if the interested parties in technology-exporting countries had the opportunity to understand better what the LDCs really propose in that respect. Judging by the first Western commentaries, misconceptions continue to abound.

For the purpose of creating better conditions for a businesslike dialogue, the authors of the draft outline (who represent, among other countries, Argentina, Brazil, Mexico, Peru, Venezuela, Iraq, Egypt, India, the Philippines, Algeria, Nigeria, and Ghana) elaborated during the UNCTAD Commission on Transfer of Technology meeting the agreed statement on the code of conduct, which may be summarized in the following terms:

1. The important role of technology in the social and economic development of all countries, particularly the developing countries, has been universally recognized. Accelerating the rate of economic growth is not simply a matter of capital formation, but among other factors, of selecting the appropriate technology.

2. The relative ease with which the accumulated stock of technological knowledge can be transmitted across borders has rendered technology transfer from one country to another more immediately attractive than indigenous technological development. In addition, the technological dependence of developing countries has been increasing, since they do not possess adequate research, engineering, or the organizational capacity needed to assimilate and adapt the imported technology to their own purposes. Developing these capabilities in itself is an important aspect of the transfer process.

3. The need to accelerate the transfer of technology to developing countries has been constantly emphasized at

the U.N. and in other international organizations, including the World Intellectual Property Organization (WIPO). However, there is growing concern about the increasing number of obstacles to the effective and economical transfer of appropriate technology. This trend adversely affects the technological capabilities of developing countries and often tends to perpetuate technological dependence.

4. In several developing countries today, transfer of technology transactions, whether by public or private enterprises, are being regulated by government authorities. This regulation aims primarily at insuring that the terms are consistent with the objectives of national development, including the development of national technological capabilities, as well as strengthening the bargaining power of the recipient enterprises. The experience of developing countries that have such regulations provides evidence of the prevalence of restrictive business practices; abuses of industrial property rights; the weak bargaining position of enterprises in developing countries; the overwhelming burden of the direct and indirect costs of transfer of technology in the balance of payments of recipient countries; and the various techniques by which transfers of technology are institutionally tied together with other aspects of trade and investment, thus rendering it difficult to isolate or identify the technology components.

5. However, national regulations vary from country to country, both in their scope and application. In addition, such regulatory action represents a one-sided burden falling entirely on the countries importing technology. There is need, therefore, to restructure and improve existing relations between suppliers and recipients of technology so as to facilitate access to appropriate technology under equitable terms. It has become clear that present imperfections in the market for technology require the formulation and adoption of international regulations. A code of conduct agreed to both by technology-supplying and technology-receiving countries could set minimum binding standards based on an equitable balance of the various economic interests involved while taking into account the particular needs of the developing countries. It is within this broad framework that the formulation of an international Code of Conduct on Transfer of Technology should be viewed.

The Code of Conduct for Transfer of Technology as proposed by the Group of 77 is based on certain fundamental postulates. The most important is that all countries have the right of access to technology in order to improve the standard of living of their peoples. Transfer of technology can become an effective instrument for the elimination of poverty and economic inequality among countries and for the establishment of a more just international economic order. An unrestricted flow of information on the availability of alternative technologies and for the selection of appropriate technologies is necessary in order to build up the technological capabilities of developing countries.

A major feature of the Code of Conduct as envisaged by the developing countries is its *universality*. The Code

is intended to be applicable to all countries and to all enterprises, whether supplying or receiving technology. The universality of the Code will lead to a more equitable relationship between suppliers and recipients of technology transfer transactions, benefiting all countries, since almost every country is an importer of technology. One of the important purposes of the Code is to establish an appropriate set of guarantees to suppliers and recipients of technology alike, taking fully into account the weaker position of recipient parties in developing countries.

Another major feature of the Code is its *flexibility*. The Code explicitly recognizes the right of all countries to frame their own laws and regulations in accordance with their policies, plans, and priorities. The Code is intended to supplement and strengthen the national regulations, not to supplant them.

The Code of Conduct proposed by the Group of 77 also provides that technology transfer arrangements shall be governed, with regard to their validity, performance, effect, and interpretation, by the law of the countries utilizing the technology in their economies. These countries shall exercise legal jurisdiction over the settlement of disputes pertaining to technology transfer transactions, except where arbitration is permitted by national regulations and agreed to by the parties concerned.

Finally, another major feature of the Code is its legal character. The Code of Conduct is intended by the Group of 77 to be an international legally binding instrument, necessary to insure that its provisions are fully and universally implemented in all countries to regulate transfer of technology.

By now the need for a code of conduct has been accepted by all groups of countries represented at the U.N. This is clear from the following excerpt from the consensus declaration adopted by the Seventh Special Session of the U.N. General Assembly held in New York last September:

All countries should cooperate in the elaboration of an international code of conduct for technology transfer, corresponding in particular to special needs of developing countries. The work on this code should thus continue within UNCTAD and be concluded so that decisions, including the decision on the code's legal nature, can be taken at UNCTAD IV, with the objective of adopting a code of conduct before the end of 1977.

Moreover, private parties in industrial countries, commenting on the proposal submitted by the Group of 77, no longer question whether the code on transfer of technology is possible or feasible. A statement by the

“The most important [postulate of the proposed code] is that all countries have the right of access to technology in order to improve the standard of living of their peoples.”

International Chamber of Commerce not only accepts its feasibility 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.”

Those fully cognizant of the full text of the draft outline, prepared by the Group of 77 in UNCTAD, can hardly deny that while defending their interests the LDCs approach the issues with a considerable degree of realism. Their proposals do not ask technology owners for anything that might be considered as confiscatory, unfair, or retroactive. First, they do not want, nor do they expect, to receive any proprietary technology free of charge; second, their quest for some preferential treatment is secondary to their request to eliminate from technology trade those restrictive business practices that are illegal in most technology-exporting countries; third, they do not consider that their draft of a code involves the issue of retroactivity, although it opens the door for the possibility of renegotiating existing technology contracts. Moreover, the draft of the Group of 77 proposes guarantees for *both* sellers and buyers of technology.

The main unresolved issue is that of the legal character of the Code. Those who object to a legally binding instrument argue that most technology is produced and traded by private owners. The large majority of other goods and services are, however, also owned and traded privately. If the above-mentioned objection had general validity, then it would not be possible to have any international agreement on commodity trade or on regulation of service transactions. The existence of a large number of international regulatory agencies and international commodity agreements strongly suggests that a *legally binding* code of conduct for transfer of technology falls within the limits of the practices of international law as currently applied.