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# **TRANSFER OF TECHNOLOGY, AND THE EMERGING INTERNATIONAL RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS: THE POSSIBLE IMPACT OF THE URUGUAY ROUND AT THE GATT**

**Kabir-Ur-Rahman Khan\***

This paper first examines the economic characteristics of the international market in technology and the legal regime traditionally applicable to such transactions, identifying the inadequacies of both. It then deals with the emerging concept of international responsibility of transnational corporations, placing it in the context of the Uruguay Round of the GATT. Possible impacts of current proposals, in particular on developing countries, are also discussed.

The advance made so far towards the implementation of international norms, it is concluded, can only be sustained by concerted national and increased regional measures.

## **Part I**

Technology now holds a significant place in international trade<sup>1</sup> and to its transfer to developing countries has certain economic characteristics, which on the one hand necessitate international regulation and on the other make that regulation manifoldly difficult. Unlike other products, say a motor vehicle, technology is not primarily produced for sale<sup>2</sup> and its transfer is usually seen in the

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1. United Nations Centre on Transnational Corporations [UNCTC], *Transnational Corporations in World Development, Trends and Prospects* (New York, United Nations, 1988), chap. XI.

2. OCED, *North/South Technology Transfer: The Adjustment Ahead* (Paris, OECD, 1981), p. 19.

context of trading objectives such as the sale of products or services.<sup>3</sup> In transfer of technology transactions, it is the strategy of the transnational corporation, not the market forces as such, which determine the terms and conditions of technology agreements. There is hence no genuine international market in technology as such, as the transactions are governed by the monopolistic domain of the technology-supplying TNCs.<sup>4</sup> The weak, often non-existent bargaining position of developing countries, manifested in a dearth of relevant information and skill, inadequate infrastructure and small domestic markets, compounds the situation.

The measures to palliate the imbalanced bargaining position advocated by the developing countries at international fora, it should be noted, are not designed to thwart or circumnavigate the market in technology, but indeed to establish a genuine one.

Another phenomenon adverse to developing countries in the transfer of technology is the inadequate legal machinery. Until recently, the international legal system did not provide any independent principles and rules applicable specifically to international transactions in technology, as these matters were subsumed in the rules and principles relating to foreign investment or those dealing with intellectual property, especially international patent law. The former is largely based on the rules of customary international law,<sup>5</sup> and the latter on the Paris Convention of 1883.<sup>6</sup> Both of these regimes, it may be noted, predate the emergence of developing states on the international scene and are primarily devoted to the protection of property rights of foreign nationals, rather than having any concern with the productive utilization of foreign capital and technology by host developing countries.

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3. Lowell W. Stele, *Proceedings of the UN/ECE Seminar on the Management of the Transfer of Technology within Industrial Co-operation*, Geneva 14-17 July 1975, cited in OECD, *North/South Technology*, *supra* note 2, pp. 20-21.

4. UNCTC, *Transnational Corporations and Technology Transfer, Effects and Policy Issues*, Doc. ST/CTC/86 (New York, 1987), chap. 2.

5. *See, for example*, G. Schwarzenberger, *Foreign Investment in International Law* (London, Stevens, 1969), chap. 1.

6. S. P. Ladas, *International Protection of Industrial Property* (1930), *passim*.

However, some progress towards improving the legal machinery has been made during the past few decades. Qualitatively, the new measures aim at securing fair and equitable terms for the acquisition of technology, removal or reduction of harmful restrictive practices entailed in such transactions, and curbing the illicit use of financial power that transnational corporations may exert.

On the substantive side, these measures aim at securing terms and conditions which would enable developing countries to make a productive use of foreign capital and technology as an instrument of development.<sup>7</sup> All this, in short, may be described as an attempt at establishing international responsibility of transnational corporations in their transactions with developing countries.<sup>8</sup>

Instruments to bring about this change are created or utilized at international, regional, sub-regional, and national levels, and are of multifarious forms and varied legal contents. The bewildering diversity of these instruments and measures can perhaps be explained by placing them within the international legal system. Public international law, emanating from express or implied consent of States, is essentially a law of coordination.<sup>9</sup> From its inception at the Treaty of Westphalia (1648), international law has relied on consent-treaty-arbitration<sup>10</sup> for the creation of international obligation. With the profusion of bilateral treaties and multilateral conventions, in the past three centuries the essential characteristics of the international legal system has altered little. What has happened, however, is that the areas of international obligations have expanded and, perhaps more significantly, the instruments of international accountability towards better supervision and implementation of those obligations have been added.

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7. See the provisions of the UN Code on Transfer of Technology, UN Doc. TD/CODE TOT/41 (1983); and for a discussion of the code, K. R. Khan, "The U.N. Code of Conduct on Transfer of Technology," *Science, Technology and Development*, Vol. 6, No. 1, pp. 5-12 (1988).

8. UNCTC, Doc. ST/CTC/86, *supra* note 4, chap. 1.

9. W. Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (London, Stevens, 1964), pp. 60-67.

10. R. A. Falk and C. E. Black (eds.) *The Future of International Legal Order* (1969), vol. I *passim*, and K. R. Khan, "The Law of International Economic Institutions and the Principle of Universality in the Contemporary International Legal Order," in W. E. Butler (ed.) *Perestroika and International Law* (Dordrecht, Martinus Nijhoff Publishers, 1990), pp. 227-243.

Another reason for the multiplicity of fora and instruments in dealing with the conduct of TNCs is the prevailing economic precept, in some cases almost an evangelical creed, of free markets which make most of the capital-exporting states — home countries of TNCs — ardent champions of, inter alia, unfettered movement of capital. While these states are happy to create, and in many cases would robustly insist on creating international rules and machinery for the protection of foreign investment, industrial property, and transfer of technology, they look askance at the very suggestion of creating corresponding rules and machinery for the eradication of major abuses that exist or may be entailed in the activities of the TNCs in these areas.<sup>11</sup> This patently asymmetrical approach is at the heart of the conflict.

The various instruments can now be briefly examined with a view to identifying their salient elements and the patterns of regulation they utilize for establishing international responsibility of TNCs. The concept of international responsibility in this connection, it should be noted, in itself is an evolving phenomenon. Two elements of it are identifiable however. On the minimal and strictly legal side, international responsibility of TNCs comprises what may be described as international accountability: for instance, obligations to comply with the warranties and guarantees they provide in the transfer of technology agreements,<sup>12</sup> and to pay compensation and be generally responsible for massive accidents such as in Bhopal, India,<sup>13</sup> and refrain from perverting the judicial and administrative systems of the host countries in which they operate. In these areas of international accountability of TNCs, there is perhaps a large degree of convergence among capital-exporting countries and technology-receiving developing countries.

The divergence, and indeed discord, revolves around the other aspects of international responsibility that is related to matters of

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11. See, for example, the protracted discussions on the two UN Codes.

12. UNIDO, *Guide to Guarantee and Warranty Provisions in Transfer of Technology Transactions* (Vienna, UNIDO, 1990) *passim*.

13. P. T. Muchlinski, *The Right to Development and the Industrialization of Less Developed Countries: The Case of Compensation for Major Industrial Accidents Involving Foreign-Owned Corporations* (London, Commonwealth Secretariat, 1989).

positive contribution towards internationally-recognized development objectives: for instance, the working of patents in developing countries or the fuller and productive use of technology and foreign investment generally towards generating real industrial growth of the host economy. Despite protracted negotiations and an obvious stalemate in them, significant movements towards the emergence of positive aspects of international responsibility of TNCs can easily be identified, but so far largely through national and regional measures.

## I. International Level

### A. *Multilateral Conventions*

The International Patent System is primarily concerned with securing international protection for the economic exploitation of inventions. The Paris regime, predating both developing countries and transnational corporations, contains little for the promotion and protection of public interests of the host countries. A major controversy centers upon the non-working of patents in developing countries. Article 5 of the Paris Convention has now been amended, allowing a bit more freedom to developing countries in issuing compulsory licenses in the event of the non-working of a patent during a specified period.<sup>14</sup>

Another controversy relating to patents has now emerged as a result of the proposals concerning the "trade-related intellectual property rights" at the Uruguay Round. Hitherto, it has been generally accepted that the Paris regime allows a member state to determine which sectors or specific items are to be patentable. Numerous states accordingly exclude, in the public interest, for example, pharmaceutical products.<sup>15</sup> The U.S. proposals at the GATT would, if substantiated in an agreement, deprive member states

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14. K. R. Khan, "The International Patent System: A Call for its Reform from Developing Countries," *Science, Technology and Development*, Vol. 5, No. 1, pp. 3-10 (1987).

15. UNCTC, *National Legislation and Regulations Relating to Transnational Corporations* (New York, 1978-89), *passim*.

of their sovereign right and would make any infraction subject to individual, if not international, retribution.<sup>16</sup>

### B. International Standards and Norms

Numerous instruments have emerged from the United Nations System which are collectively described as the New International Economic Order,<sup>17</sup> and codes have either been formulated<sup>18</sup> or are in the process of negotiation relating to Transnational Corporations and Transfer of Technology.<sup>19</sup> A detailed account of these instruments is unnecessary for the present discussion, but four points merit discussion.

First, international trade, foreign investment, and transfer of technology are recognized to have positive functions in international economic transactions; that is, in addition to conferring benefits on specific, related parties they are internationally recognized instruments of the development of nations. For example, the UN Code on Transfer of Technology “[r]ecognizes the fundamental role of science and technology in the socio-economic development of all countries and, in particular, in the acceleration of the development of the developing countries.”<sup>20</sup> This is the *raison d’être* for their holding such an important place in the arena of international economic relations and increasing attention in the international legal system.

This is not as heretical as the use of the term “development” might suggest to some people. In more traditional and prosaic terms, this function of international trade was recognized in the General

16. One of the elements of the proposed measures would include “Enforcement measures, including the imposition of civil and criminal penalties, to deter infringements of intellectual property rights.” See UNCTC, Doc. E/C.10/1990/23 (1990), para. 10(f).

17. For a comprehensive collection of these instruments, see A. P. Mutharika, *The International Law of Development, Basic Documents* (Dobbs Ferry, Oceana, 1978- ).

18. For example, UN, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, Doc. TD/RBP/CONF/10 (New York, UN, 1980).

19. For the latest progress relating to the UN Code on TNCs, see UNCTC, Doc. E/C.10/1990/5.

20. Preamble to the Code, note 7 above.

Agreement on Tariffs and Trade [GATT] as far back as in 1948. The preamble of that agreement states in part:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment on a large and steadily growing volume of real income and effective demand, developing the full use of the resources for the world and expanding the production and exchange of goods,<sup>21</sup>....

Reform in the General Agreement, allowing differential treatment for developing countries, inter alia, was based on the above provision. Article XXXVI, after reiterating the above provisions of the Preamble, affirms once again more specifically that "international trade [is] a means of achieving economic and social advancement."<sup>22</sup>

Second, these instruments of NIEO, either expressly or implicitly, question and call for dislodging of a major but false assumption, on which most of the traditional International Economic Law is based: all states, rich and poor alike — the United States and Swaziland — have equal economic bargaining power and, in the marketplace, they all come out with "mutually advantageous arrangements."<sup>23</sup> The rectification of this specious assumption is itself a part of the reform of the present system.

Third, following from the foregoing points, the instruments of the NIEO enunciate or affirm international responsibility for TNCs in both their regulatory and productive facets, basing this, inter alia, on the principle of good faith — a pillar of the international legal system.<sup>24</sup> For example, the UN Code on Transfer of Technology enjoins the parties to negotiations on the transfer of technology "to observe fair and honest business practices."<sup>25</sup>

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21. GATT, *Basic Instruments and Selected Documents, Vol. IV, Text* (Geneva, GATT, 1969) p. 1.

22. Art. XXXVI, para. (e), *ibid.* p. 53.

23. Preamble, General Agreement, *supra* note 21.

24. B. Chang, *General Principles of International Law As Applied By International Courts and Tribunals* (London, Stevens, 1953) Part II.

25. Para. 5.1, TD/CODE TOT/41, *supra*.



Fourth, the codes of conduct provide their own mode of implementation of specific provisions and principles. At the international level, this approach was first initiated by the International Labour Organization for the implementation of its Conventions and Recommendations.<sup>26</sup> The essential elements of this machinery are: acceptance of a Convention adopted by the ILO, the obligation on the part of the member countries to report on the acceptance of the Covenants and the measures taken; examination of those measures and reports by the ILO; consultation, enquiry; and conciliation in the event of controversy relating to the instruments concerned.<sup>27</sup> The operative concept underlying this system is “implementation” — not enforcement.

## II. Regional Level: OECD

The organization for Economic Co-operation and Development [OECD] has made a significant contribution towards promoting “good corporate behavior” on the part of TNCs [Multinational Enterprises in the terminology of the OECD], starting from the Guidelines on International Investment and Multinational Enterprises in 1976 and subsequent Decisions and Clarifications relating to those Guidelines.<sup>28</sup> From the OECD’s operation of these instruments, several points may be noted.

On the substantive side, the OECD Guidelines affirm what may be described as the co-operative and positive aspects of the international responsibility of TNCs.

The Guidelines thus state that

Enterprise should:

1. Take fully into account established general objectives of the Member Countries in which they operate.

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26. ILO Constitution, Chap. II, *UN Treaty Series*, vol. 15, p. 40- .

27. E. A. Landy, *The Effectiveness of International Supervision, Thirty Years of I.L.O. Experience* (London, Steven, 1966) *passim*.

28. OECD, *International Investment and Multinational Enterprises, The 1984 Review of the 1976 Declaration and Decisions* (Paris, OECD, 1986).

2. In particular, give due considerations to those countries' aims and priorities with regard to economic and social progress including industrial and regional development, the protection of environment and consumers' interest, the promotion of innovations and the transfer of technology.<sup>29</sup>

Relating to Science and Technology, the Guidelines specifically provide:

Enterprise should:

1. Endeavor to ensure that their activities fit satisfactorily into the scientific and technological policies and plans of the countries in which they operate, and contribute to the development of national scientific and technological capabilities including as far as appropriate the establishment and improvement in host countries of their capacity to innovate.<sup>30</sup>

On the strict application of the principle of *pacta sunt servanda*, the Guidelines would be applicable to the parties to the instruments, but the OECD extends these provisions beyond its member countries. The Guidelines declare the "common aim of Member Countries [is] to encourage the positive contribution which [TNCs] can make to economic and social progress and to minimize and resolve the difficulties to which various operations may give rise."<sup>31</sup> The Guidelines further recognize that the operation of TNCs "extends throughout the world, including countries that are not Members of the Organization." The Members of the OECD thus affirm that "international cooperation in this field extends to all States" and that they will give full support to efforts undertaken in cooperation with non-Member countries "and in *particular with developing countries*, with a view to improving the welfare and living standards of all people both by encouraging the positive contribution, which [TNCs] can make..."<sup>32</sup> In its report the Committee on Investment and Multinational Enterprises [CIME], inferring from the above

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29. *Ibid.*, p. 13.

30. *Ibid.*, p. 16.

31. Guidelines, para. 2, *ibid.*

32. *Ibid.*, para. 3.

statements, concluded that “the Guidelines have a *de facto* influence extending beyond the OECD area.”<sup>33</sup>

On the areas in which global organizations, such as the ILO and the United Nations, have adopted specific instruments, for example relating to industrial relations<sup>34</sup> and restrictive practices,<sup>35</sup> the OECD has treated those instruments as an elaboration of its own Guidelines.<sup>36</sup> A similar approach will be taken in relation to the UN codes relating to TNCs and Transfer of Technology.<sup>37</sup> A constructive use is thus made of interlinking of global and regional instruments of regulation.

The OECD experience relating to its Guidelines has successfully demonstrated that international regulation can be advanced by the implementation machinery of the code system, as an alternative to fully-fledged enforcement technique.

### III. Sub-Regional Level: Andean Pact

Decision 24 of the Andean Pact, *inter alia*, established a uniform policy for its member countries relating to foreign investment and acquisition of technology, laying down common criteria for the acceptance of foreign technology and requiring positive elements of international responsibility on the part of TNCs. While the generally deteriorating position of the debt-laden developing countries, and a marked reversal of international economic cooperation in the 1980s, have led in recent years to the slackening of the regional cohesion among the Andean Pact countries, Decision 220 of the Commission, adopted in 1987, now allows the member countries greater discretion in selecting foreign investment and technology.<sup>38</sup>

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33. *Ibid.*, p. 61.

34. ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977).

35. The UN Set of Principles, *supra* note 18.

36. OECD, *Guidelines*, note 28, pp. 61-62.

37. *Ibid.*, p. 62.

38. UNCTC, *TNCs in World Development*, *supra*, pp. 269-270 (discussing practices under the Andean Pact).

#### IV. National Level: National Legislation and Regulations

National laws and regulations are increasingly utilized for formulating and instituting measures for the implementation of national development objectives in consonance with internationally agreed norms. From a comprehensive and continuing study of these instruments<sup>39</sup> by the UN Commission on Transnational Corporations, the following points may be observed. First, these instruments institute a framework of terms and conditions and criteria for, among others, the acquisition of foreign technology linking these with the national development objectives. The requirements of registration and approval of such agreements, and the criteria for the approval of appropriate agreements, should provide a framework of structural accountability.<sup>40</sup> These criteria, with accompanying machinery, serve not only regulatory functions but, in an affirmative vein, they aim to link these measures with the positive elements of development policy relating to utilization of local materials and human resources and generally a better absorption of foreign technology in domestic economics.<sup>41</sup>

It has been recognized that the sustained use of national legislation by developing countries has improved the terms and forms of foreign investment considerably and promoted new forms of investments away from or in addition to foreign direct investments which, being largely intra-corporation transactions, are little susceptible to international accountability. The formation of joint ventures, licensing agreements, and the unpackaging of technology transactions are some of the recognized improvements contributed by the influence of national measures.<sup>42</sup>

Of all the measures and machinery available for the implementation of development objectives in the areas under

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39. UNCTC, *National Legislation and Regulation Relating to Transnational Corporations* (New York, UN, 1978).

40. For example, Ghana, Brazil and India, *ibid.*

41. These and several other developing countries have adopted such measures, *ibid.*, *passim*.

42. IECD, *Recent Trends in Foreign Investment* (Paris, OECD, 1984).

discussion, national legislation and regulation have perhaps been the most fruitful.

## Part II The Uruguay Round of the GATT

The current round of multilateral trade negotiations — the Uruguay Round — at the GATT is qualitatively different from all the preceding negotiations, in that it includes, for the first time, among others, proposals for international regulation of “trade related” foreign investment and industrial property rights under the GATT auspices.<sup>43</sup>

From the perspective of developed countries, the case for extending much strengthened rules and standards relating to these areas is logical and substantial. Having entered into agreements among themselves — through the OECD — to liberalize the movement of capital in their respective territories,<sup>44</sup> to secure a similar regime at the global level through the GATT is simply an extension of their earlier measures.

Developing countries, on their part, view these proposals with serious apprehensions for several reasons. Firstly, with the economies of developing countries in general, their sectors of capital and technology suffer even greater disadvantages which necessitate special nurturing and support of their “infant industries.”<sup>45</sup> Major developed countries, it may be recalled, have themselves, when going through similar stages, robustly advocated and used such protective measures. One of the more enduring examples is that of the “Manufacturing Clause” in the U.S. legislation which, until very recently, was a vehicle for extending protection to domestic workers and thus

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43. GATT, Ministerial Declaration on the Uruguay Round, 20 September 1986, in BISD, 33rd Suppl. (Geneva, 1989).

44. OECD, *Code on Liberalization of Capital Movement* (Paris, OECD, 1986).

45. One of the classical expositions and cases for such protection was made in the United States by Alexander Hamilton; see his “Report on Manufacture” reprinted in W. Letwin, *American Economic Policy, A Documentary History Since 1789* (Edinburgh, Edinburgh University Press, 1961), pp. 5-25.

curtailing intellectual property rights.<sup>46</sup> Since the general need for differential and more preferential treatment for developing countries is already recognized and written into Part IV of the GATT,<sup>47</sup> the developing countries argue for similar treatment, at the least, in the proposed areas of regulation.<sup>48</sup>

Secondly, the developing countries are very apprehensive of the fact that the existing legal machineries relating to foreign investment, settlement of investment disputes, e.g. Washington Convention 1966, and industrial property regime based on Paris Convention 1883 are being bypassed. And a new regulatory machinery for these areas, among others, is now being established within the GATT. The GATT, primarily based on the precept of resolution of conflict through consensus and negotiations,<sup>49</sup> is not known as an organization well-equipped with effective enforcement machinery. Even with the recent improvements in its machinery for settling disputes, the essential characteristic of that machinery as a framework of negotiated settlement has not altered.<sup>50</sup>

One reason for invoking the GATT machinery in these new areas, it is feared, is that, unlike the existing and appropriate machineries applicable to foreign investment and industrial property rights — both utilizing the traditional method of peaceful third-party adjudication, the GATT does allow, in respect of non-tariff barriers (dumping subsidies, etc.) a thinly disguised unilateral action by an aggrieved party.<sup>51</sup>

It is significant that the current proposals relating to foreign investment and industrial property at the GATT are not being negotiated under its normal machinery for reduction of tariffs, where the principle of “reciprocal and mutually advantageous benefits”<sup>52</sup> apply, but they are pursued under the machinery applicable to non-

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46. For a Panel's Report and the details of the related legislation, see GATT, *BISD*, Suppl. 30th (1984).

47. Article XXXXI. para. 3-8, GATT, *ext. supra*.

48. See GATT, *Uruguay Round Newsletters*, *passim*.

49. John H. Jackson, *World Trade and the Law of GATT*, (Indianapolis, The Bobbs-Merrill Co. 1969), chap. 8.

50. *Idem*, *Restructuring the GATT System*, (London, Frances Pinter, 1990), Chap. 6.

51. Jackson, *World Trade and the Law of GATT*, *supra*, chaps. 14-16.

52. Preamble to the General Agreement, *supra*.

tariff barriers which, as noted above, allows for individual punitive action.<sup>53</sup> One inevitable consequence of this approach is that these proposals already carry an assumption that the measures in question are “harmful” and detrimental to free flow of trade. Such an assumption is an integral part of future regimes emerging from the present proposals. One specific measure adopted by some larger developing countries, such as India and Brazil, is especially under attack. Investment laws of these, and indeed of many other countries,<sup>54</sup> contain provisions which lay down certain conditions of performance requirements — that is, for example, foreign investors should export a certain percentage of their products in order to utilize benefits granted in the investment agreements.<sup>55</sup>

During the discussions at the Uruguay Round, the aim behind these proposals has been evident, as it is reported that “the objectives of the agreement [on foreign investment and industrial property at the GATT] would be implemented through unilateral and trade-based enforcement measures *at national level*.”<sup>56</sup>

Developing countries, on their part, regard performance requirements, together with other investments measures, as a part of the constructive use of foreign investment and a necessary instrument for overcoming impediments both present in their domestic economies and generated by the international economy.<sup>57</sup>

A recent case between the United States and Canada before the GATT is good authority to refute the contention that an export performance requirement, *ipso facto*, is a non-tariff barrier and a violation of GATT rules. The Panel held that whatever the findings in this case, being between two developed countries, did not apply to a developing country for whom special treatment in the GATT is now well recognized. It further held that the “General Agreement does not prevent Canada from exercising its sovereign right to regulate foreign

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53. See note 51 above.

54. See UNCTC, *National Legislation, supra*.

55. *Ibid.*

56. GATT, *Uruguay Round Newsletter*, Nos. 34 and 36 (1989).

57. S. Gutsinger, “Investment Related to Trade,” in J. Michael Finger and Andrzej Olechowski (eds.) *The Uruguay Round, A Handbook on the Multilateral Trade Negotiations* (Washington, World Bank, 1987), pp. 217-225.

direct investment.” Dealing with the specific contention of the United States that the measures prescribed by the Foreign Investment Review Act of Canada, which included provisions relating to foreign export performance requirements, were contrary to the principles and provisions of the GATT, the Panel made a clear distinction between an obligation of contracting party to the GATT to accord non-discriminatory treatment to foreign products and nationals, and an obligation to allow a foreign national to operate by unfettered commercial considerations. The latter is not, as yet, part of a GATT obligation. The Panel, accordingly, held: “Article XVII: 1(b) [of the GATT] does not establish a separate obligation to allow enterprises to act in accordance with commercial considerations but merely defines the obligation ... to act in a manner consistent with the general principle of non-discriminatory treatment.”<sup>58</sup>

The Panel’s finding clearly rejects the contention that the unfettered commercial freedom of a foreign enterprise is an essential part of the international obligation to accord non-discriminatory treatment to such enterprises.

This somewhat open-ended and national interest-oriented interpretation of international obligations is also manifest in the United States’ Trade and Tariffs Act 1984, which assigns wide power to the administration to take punitive measures against a foreign state “who discriminated against United States’ interest.”<sup>59</sup>

Brazil and India, two countries among the Newly Industrialized Countries (NICS), have already been recipients of punitive measures or threatened with such measures. Heavy punitive duties were imposed against the Brazilian imports in the United States on the allegation that Brazil, by, *inter alia*, excluding its pharmaceutical products from patentable products under its laws, did not provide adequate protection to the U.S. products.<sup>60</sup> Similar action was threatened against India on the contention that it did not accord

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58. GATT, *Canada, Administration of Foreign Investment Review Act*, Report of a Panel, 7 Feb. 1984, BISD, 30th Suppl. (Doc. L/5504), pp. 140-165.

59. For an account and discussion of this and subsequent related legislations, see GATT, *Trade Policy Review, Report of the USA 1989* (1990), *passim*.

60. UNCTC, *TNCs in World Development*, *supra*.



favorable conditions for the U.S. investment. Interestingly enough, the U.S. transnational corporation concerned — Pepsi Cola — declared itself satisfied by the terms offered by India.<sup>61</sup>

### Conclusion

In order to minimize the adverse effects of the distorted market in technology and the related field of foreign investment, and to mitigate some of the major imbalances in their bargaining position, developing countries have adopted at national and sub-regional levels individual and joint measures in concurrence with internationally agreed norms. One of the primary objectives of these measures is to institute international responsibility of transnational corporations with a view toward securing structural accountability and responsibility towards facilitating genuine growth in host country economies. These measures are aimed at establishing, inter alia, a genuine market in technology, not thwarting it. The considerable progress made in this field is now threatened by the proposals at present being negotiated at the GATT.

The advance made so far by the developing countries need not however be nullified, as their measures to secure foreign technology on fair and equitable terms can still be sustained and implemented by continued national measures strengthened by increased regional cooperation and supported by international norms. The developing countries could perhaps also contest the legality of the contention that the performance requirements and the exclusion of certain sectors — for example, pharmaceutical products — from the scope of patent protection are illegal or constitute non-tariff barriers, as there is a strong case to the contrary.

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61. *Financial Times*, "PepsiCo urges US to let India off the hook," 25 May 1990. Subsequently it was reported that the US administration had put off its decision to initiate the proceedings relating to India.