

University of Miami Law School Institutional Repository

University of Miami Inter-American Law Review

6-1-1976

Technology Transfer and Industrial Property Law in Developing Countries

Daniel R. McGlynn

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Daniel R. McGlynn, *Technology Transfer and Industrial Property Law in Developing Countries*, 8 U. Miami Inter-Am. L. Rev. 394 (1976)
Available at: <http://repository.law.miami.edu/umialr/vol8/iss2/6>

This Note is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

NOTE

TECHNOLOGY TRANSFER AND INDUSTRIAL PROPERTY LAW IN DEVELOPING COUNTRIES

The transfer of technology from industrial nations and multinational corporations to developing countries is one of the key issues in economic and social development of the Third World. In the last few years there has been increasing concern about the commercial terms of such technology transfer, and the effect of the resulting "technology dependence" on long term economic growth.

One consequence of this concern has been the substantial revision of the industrial property and technology transfer laws of several Latin American countries. Such laws regulate the registration, duration, and enforcement of patents, trademarks, copyrights, and know-how, and the license terms under which such industrial property rights may be transferred to a national enterprise from abroad.

A number of influential economists have been analyzing the financial statistics and terms associated with technology transfer agreements in developing countries. Although there is no question that such technology transfer has contributed significantly to industrial development and employment in such countries, the basic thrust of the criticism is concerned with the economic side effects of such agreements. These side effects include both direct costs in the form of a mounting balance of payments deficits, and indirect costs or "opportunity costs" in the form of being restrained from certain activities due to restrictive clauses in the technology transfer agreements.

Such economic studies reinforce the widespread general dissatisfaction with the activities of foreign corporations in developing countries, which has been reflected in the increasing demand for public accountability for the technology transfer agreements between foreign firms and domestic industrial organizations. This demand has resulted in the enactment of national legislation providing for registration and approval of such agreements by agencies in a number of important developing countries.

Such legislation includes Mexico's 1973 Law on the Transfer of Technology, Argentina's 1974 Law No. 20794, Brazil's 1975 decree of the National Institute of Industrial Property (INPI), as well as the guidelines established by Decision 85 of the Ancom Group.

The basic concern of such legislation is the fairness of the terms of technology transfer agreements, and whether the technology proposed to be imported is actually of benefit to the economic development of the recipient country. The mechanism of enforcement of such legislation is through the establishment of government agencies for the registration, analysis, and approval of technology transfer agreements. Such agencies are empowered to analyze the terms of the agreement, and the technical content of the technology proposed to be transferred, and to determine the suitability of the transfer under the proposed terms in view of the overall economic development objectives of the nation. Those agreements which are deemed to be not consistent with such objectives are refused registration, and returned to the parties for redrafting. An agreement which is not registered is denied legal enforceability in the country.

Some of the specific aspects of technology transfer agreements considered relate to the industry concerned, the price and payment terms for the technology, and the restrictive terms in the agreement itself. Agreements which foster technology transfer in high priority industries, such as energy or capital equipment, are highly favored. Those which are concerned with low priority industries, such as consumer products, are subject to stricter scrutiny, with generally lower royalty payment levels being acceptable.

The price and payment terms for the technology are subject of particular attention. There has generally been the feeling in the developing countries that imported technology has been "overpriced" as a means of avoiding rigorously enforced profit repatriation and exchange regulation. By inflating the cost of "technical assistance fees," and shrewd use of transfer prices, some transnational corporations have been able to report a better cash flow from their foreign investments.

The restrictive terms of the agreement, such as price-fixing provisions, tying provisions, and territorial limitations, are also subject to close examination. There is considerable concern over many unduly restrictive terms arising from a general feeling in developing countries of the inadequate negotiating position of relatively small national enterprises when dealing with large multinational corporations. In many instances,

national enterprises felt they had no alternative but to accept the terms offered by the multinational company, even though such terms may have appeared not to have met the standards set forth in U.S. antitrust laws. In this sense, one of the important practical advantages of the new technology transfer legislation is the reinforcement of the bargaining position of the national company by requiring approval of the agreement by the technology transfer agency.

Although the operation of many of the technology transfer agencies is but a year or two old, the international business community has, in general, actively protested against such legislation, predicting that strict enforcement of such technology transfer laws would virtually stop investment and technological transfer to such countries. Preliminary statistics concerning new direct foreign investment in the Ancom Group countries seem to demonstrate such a trend.

The basic intent of the technology transfer legislation is a strategy for long-term economic growth through an active discouragement of unfavorable business arrangements while promoting growth in certain high priority areas. More significantly, the legislation aims at developing an indigenous technological capability while reducing "technological dependency."

Technological dependency is really a consequence of the import substitution development policies of the 1950s. The fundamental premise of import substitution was to encourage manufacturing and assembly facilities in the developing countries, that is, to substitute imports with nationally produced goods. To that extent the development policy was a success; however, a new type of "import" was created—know-how and technology. At first, the cost of such imports was insubstantial compared with the imports of producer goods. By the late 1960s, as import substitution was more fully realized, the cost of technology imports became increasingly noticeable, and is now estimated to range between \$800 million and \$1 billion in Latin America alone. The rapid growth of the cost of technology imports is typified by the annual statistics from Brazil shown in Table I.

TABLE I
Brazil's External Payments for Royalties, Patents
and Technical Assistance 1968-1974*

Year	Amount (Millions of Dollars)
1968	\$ 70
1969	93
1970	107
1971	132
1972	154
1973	166
1974	212

*Source: Central Bank of Brazil

There are many aspects to the "technology dependency" issue. One point holds that new technology and new products are developed abroad and introduced into the domestic market with only a cursory consideration of the needs, resources, and priorities of that domestic market. Another, that research and development takes place primarily abroad, encouraging a "brain drain" of educated nationals to R and D facilities in developed countries. Finally, that the investment or distributorship agreements are structured so as to discourage competition. The end result of such a situation is a dependence on foreign technology, and lack of an indigenous technological capability.

One of the essential goals of almost all economic development plans in Latin America is the development of R and D facilities and programs. Just as high tariffs discouraged the importation of foreign goods, the new technology transfer laws are expected to discourage the importation of technology. And just as investment incentive programs encouraged the development of manufacturing facilities, it is hoped that similar research incentive programs will encourage the development of research laboratories. Only when faced with increasingly less desirable alternatives do the costs and risks involved with such ventures become more acceptable, as ITT recently concluded in establishing a new research and development facility in Chile.

Perhaps one of the most important outcomes of the new technology transfer legislation is the realization that trade in technology is not a mere commercial issue, but is an important political issue in the national framework for growth and development. Although the multinational corporations may possess the capital and technology necessary for economic

development, they often forget that the developing countries possess a priceless bargaining instrument—their national sovereignty. Although one may question the wisdom of the newly emerging “technology substitution” policies, they do express the national aspirations of the people of the developing countries.

DANIEL R. McGLYNN

LL.B.

*International Investment Analyst
and Trade Consultant*