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UNITED STATES REGULATIONS AND ACQUISITIONS

*Robert J. Radway**

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I. INTRODUCTION

Licensing is an important form of technology transfer, but clearly not the only one because the overwhelming bulk of technology is transferred in connection with direct foreign investment. International technology flow bears a direct relationship to capital flows and trade patterns. In the North-South or global dialogue, the developing countries assert that access to markets of the industrialized countries is essential for their exports of manufactured goods. These exports pay for the importation of capital goods for industrialization. The protectionism that developing countries perceive to be on the rise in industrialized countries threatens to frustrate the export-oriented development models now adopted by most developing countries. Conversely, United States exporters of equipment and technology complain that import restrictions such as those in Latin America discourage the

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flow of technology essential to facilitate diversification of production from primarily agricultural commodities to manufactured and semi-manufactured goods. Thus, a stalemate has developed that must be resolved to encourage more transnational technology transfer.

Public policy issues in the developing countries revolve around social and economic development, whereas such issues and public opinion in the industrialized countries frequently revolve around inflation, jobs, and displacement of inefficient industries by goods produced in lower-wage-base, developing countries. Moreover, almost seventy-five percent of the world population, excluding the socialist states, live in the developing countries, and until recently, this majority produced only twenty percent of the world's gross product. The purchasing power of these countries, therefore, is low, and the markets that they create for manufactured goods produced by the United States labor force is much smaller than it could be. In the context of growing world interdependence, the United States labor movement and government must recognize that improvement of the standard of living of the United States worker will depend increasingly on the improvement of the standard of living of the developing nations' workers. This is the challenge that the proposed New International Economic Order presents to the United States labor force.

II. UNITED STATES REGULATIONS

A direct relationship exists between United States exports of technology, both equipment and services, and the ability of the developing countries to export in order to pay for their purchases. In this context, an examination of United States regulations on the export of industrial technology and their effect on international patterns of technology and trade is relevant. A brief overview of United States regulations applicable to technology transfer abroad includes public policy issues, export controls, taxation, antitrust law and policy, the export credit and insurance facilities for exporters, and other miscellaneous regulations affecting these transactions in specific industries.

A. *Public Policy Considerations*

One public policy aspect that appears to have had a particularly strong impact on United States regulations is the position of the organized labor movement. It is clear that organized labor

does not speak with one voice. Those unions representing workers in the industries hardest hit by import competition, such as textiles, clothing, and steel, have been outspoken in their opposition to transferring technology abroad. They contend that this exports jobs that would otherwise be held by United States workers. One view is that the United States worker, as taxpayer, makes a substantial contribution to his own unemployment.¹ Under this view, the taxpayer picks up most of the tab for research development, including that conducted by corporations and universities through government-sponsored programs. This investment results in development of the world's most sophisticated and advanced technology. This technology is turned over to private corporations to exploit, but these multinational corporations, it is said, are no longer satisfied with the profits that can be made from the labor of United States workers. Thus, these corporations take what is rightfully the property of all United States citizens and transfer it abroad, combining it with cheaper labor in developing countries that want to obtain technology from the industrialized countries under the most favorable conditions possible. The result under this theory is a net gain to the multinationals and a net loss to the United States workers.

Another allegation against the multinationals is that they can avoid collective bargaining by relocating abroad in countries where unions have not gained a solid base. Certain well-known United States companies, non-unionized in their domestic operations, have established facilities abroad and used their ability to absorb a significant number of unemployed nationals as leverage to avoid unionization in those countries. In developing countries where union elections are successful, such companies close down plants and relocate in other, more primitive countries where the host government agrees to protect the foreign investor against unionization.

Other union leaders do not condemn multinationals relocating abroad. One approach assumes that because multinationals will go where the profits are, moralizing is futile. These leaders are more concerned about the positions taken by the host governments in attempting to attract the capital and technology mobil-

1. *U.S. Preparation for the U.N. Conference on Science and Technology for Development: Before the Subcomm. on Science, Technology, and Space of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 124 (1977) (statement of Benjamin A. Sharman).*

ized by the multinationals. Others have pointed out that foreign investment by United States firms generates considerably larger exports of United States parts, components, and assemblies than would exist without such investments and actually results in fewer imports into the United States than would otherwise exist in the absence of such direct foreign investment. The debate continues, but it is clear that over the last fifteen years and until the nationwide deliberations over the preparation of the United States position for the Vienna Conference last year, the organized labor view had been effective in reducing the post-World War II incentives and benefits made available to encourage United States business to invest abroad.

B. Export Controls

Export controls were instituted in 1949 specifically to limit the flow of certain types of technology on political or national security grounds. There are two lines of control over the export and exploitation abroad of technology originating in the United States. The first consists of controls that operate directly on the export of technical data from the United States. These are generally imposed either to prevent strategically valuable technology from getting into the hands of our potential enemies or to pursue other, more general foreign policy objectives. The second line of control affects transactions that are carried out entirely overseas and involves either the sale of United States technology or products manufactured overseas with such technology. These controls are found in statutes and regulations administered by the Commerce Department or Treasury Department, among others. They restrict all business transactions with certain countries placed in various categories which have traditionally included communist countries and, from time to time, others that are subject to particular types of boycotts, such as Rhodesia. A coordinating mechanism was established to control strategic commodities and technology within the Atlantic Alliance called COCOM. By the 1950s and early 1960s the evolution of cold war patterns had produced a complicated web of controls which generally fell into the same two broad categories.

In 1976 the report of the Defense Science Task Force on International Technology, chaired by J. Fred Bucy, the President of Texas Instruments Corporation, urged substantial modifications of the export laws and regulations. The Bucy Report initiated a great debate and sharp division within the technology commu-

nity. The Bucy Report resulted in some policy changes from which one may conclude that the hardware itself is not as vital as the know-how or the software that is responsible for the hardware's creation and can therefore be utilized in its modification. One result was that know-how was transferred to the People's Republic of China, while the Russians, who wanted know-how, got only hardware. The Export Administration Act of 1979, however, contained some clarifications and imposed limitations on the President's ability to confuse foreign policy considerations with national security implications. It was believed that included among the unnecessary disincentives to exports of technology were excessive export controls. Since the President had done little to remedy these problems, the Congress took the lead through an intensive legislative hearing process resulting in, among other things, the President's being required to specify whether foreign policy or national security grounds formed the basis for denial of an export license. The celebrated case allegedly giving rise to this development was the denial of an export license to the Univac Division of Sperry for a computer that it wanted to sell to the Soviet news agency Tass. This computer was to be used by Tass wire services for text editing and story composition. At the time the export license was in the final stages of being approved, two famous dissidents were placed on trial in the Soviet Union. President Carter publicly denounced the trial and announced that the export license for the Univac computer had been denied. The industry knew that computers at least as powerful had previously been licensed for export to the Soviet Union. Seven months later the government encouraged Univac to reapply for an export license, which was ultimately granted. Unfortunately, Honeywell Bull of France sold Tass a larger computer before the issuance of the new license to Univac. The United States had no basis to prevent this sale from France since the computer apparently fell within the COCOM multilaterally agreed security limits.

The net effect of the United States export controls on technology transfer to developing countries, however, is minimal. The bulk of the problem in this area seems to be the prohibition on re-exports, which is a provision that must be imposed as a condition to the granting of an export license for certain strategic items that fall high on the list of prohibited items. This creates the embarrassing situation of United States businessmen having to defend themselves in negotiations with lesser developed countries against accusations that they are meddling in the internal affairs

of a sovereign nation. Here the culprit is not the multinational corporation, but United States Government policy.

C. *Taxation Issues*

United States taxation and fiscal policy can be viewed as a giant control panel in Washington. By the flipping of switches and levers, incentives which would substantially affect the ability of the United States private sector to transfer technology abroad can be created or removed. The incentives are directly affected by public policy and the dynamics of the political process, which have recently taken an anti-business and anti-foreign investment and technology transfer direction. Currently, the expressed policy of the United States Government is officially neutral with respect to direct foreign investment including technology transfer. The United States Government delegation to the Vienna Conference, however, expressed commitment and legitimate support for the desires of the developing countries, a position perhaps inconsistent with the neutral stance regarding foreign investment and technology transfer.

Numerous taxation problems constrain the transfer of United States technology abroad. The first issue is double taxation. United States companies doing business in foreign jurisdictions will create what is termed foreign-source income and, by their activities, be subject to the tax jurisdiction of the host country. Since this income is also subject to taxation by United States authorities, one of the questions generally posed is how to avoid the double taxation on income from international operations, including technology transfer in its many forms. The United States foreign tax credit system was created to address this problem, but Internal Revenue Service policies concerning which taxes may be creditable have created serious limitations. A second issue involves the taxation of United States personnel assigned abroad in the course of a project. An engineer, for example, can be sent to a developing country to work in the capacity of technical adviser. Frequently, this will involve assisting with the drafting of specifications for the purchase of equipment. The engineer is then in a position to specify the equipment with which he is most familiar, United States equipment made by United States manufacturers. A recent change in the tax law, however, has reduced the tax benefits and thus increased the economic disincentive for the assignment of such United States personnel abroad. Another problem is the allocation of various expenses incurred in international opera-

tions. United States tax regulations require the allocation of home office research and development expenses and other expenses to foreign income that may be produced by the company's subsidiary. In the accounting rules of many developing countries, however, expenses not incurred within their territorial limits are not deductible from income earned in that country. Thus, the foreign subsidiary finds itself unable to deduct for tax purposes an expense which the United States authorities will reallocate to the production of that income. One possible result would be the creation of research laboratories, which would contribute to the decline in the United States technological level. Another United States tax provision will impute income to the United States parent corporation that is providing technical assistance or other related services to its foreign subsidiary. An increasing number of developing countries, however, especially Brazil and the Andean Group, prohibit the subsidiary from paying licensing royalties or technical assistance fees to its controlling foreign parent. This is another example, this time on the side of the United States parent transferring the technology, of income deemed but not received, with the foreign subsidiary unable to deduct such imputed payments due to local regulations.

Treaties for the prevention of double taxation have been signed among industrialized countries to solve some of these problems. At this point, however, the United States has no tax treaties with any of the Latin American countries and virtually none with any developing countries that would be the object of the transfer of the more important technology.

D. *Antitrust Concepts*

The United States business community has for many years complained about the opportunity loss in their inability to engage in certain international transactions for fear of violating United States antitrust laws. This could involve significant direct foreign investment projects, including sizeable technology components. Studies prepared by the National Association of Manufacturers and the United States Chamber of Commerce attempted to establish this conclusion in congressional hearings in the early 1970s. With respect to know-how licensing in particular, the Antitrust Division of the Justice Department has attempted to clarify its policy by case examples in guidelines issued in 1977. Private sector critics of Justice Department policies and guidelines complain that use of concepts such as reverse engineering tend more to ob-

fuscate than facilitate.

E. *Financing and Insurance*

The United States Export-Import Bank (EXIMBANK) was created to provide incentives for United States exporters of equipment. In past years, this facility met certain needs by facilitating exports and foreign investment by the United States business community, including large turnkey projects with significant technology transfer. In more recent years, however, one complaint frequently heard is that political considerations have interfered with the business community's ability to rely on the export credit facilities of the United States. In addition to delays and congressional machinations, such political considerations as the human rights policy of the Carter Administration have thwarted exports of big ticket items to the point that sales were lost to competitive technology-exporting countries. Another complaint is that the terms offered by the EXIMBANK were simply not competitive with similar export credit institutions of competing industrialized nations. A final criticism is that the credit standards imposed require a finding of a reasonable assurance of repayment. Developing countries allegedly are not as strong credit risks as the industrialized countries. Technology and equipment financing for developing countries inevitably suffers.

The Overseas Private Investment Corporation (OPIC) has also been hampered by political considerations. Congressional policy directives require that OPIC direct its efforts toward the more needy of the developing countries. This has been implemented by the use of a \$1,000 per capita income test, providing a selective or restrictive basis and reducing the effectiveness of OPIC's programs for the transfer of United States technology to developing countries. This facility, which was originally part of the Private Investment Center of the Agency for International Development, is well known for its political risk program. This insures United States investors against currency inconvertibility due to expropriation, war, or insurrection. In recent years, however, in conjunction once again with various political policies, eligibility rules for United States participants have resulted in a diminution of the value of this government-sponsored program for transferring technology to developing countries. OPIC is currently doing nothing of significance in Latin America due to the Calvo tradition, which precludes the signing of the necessary bilateral facilitating agreements.

F. *Other Governmental Laws and Regulations*

A litany of other rules contributes to the frustration of United States businessmen interested in transferring technology abroad. For example, a couple of years ago, environmental groups successfully introduced a proposal that any entity seeking financing from the EXIMBANK for the transfer of technology or the sale of United States equipment must file an environmental impact statement to identify the environmental impact on the recipient country. The Food and Drug Administration (FDA) imposes severe requirements on United States companies in the food and pharmaceutical industries before certain types of products can be approved. The pharmaceutical industry, in particular, is well known for being technologically oriented. The FDA has far more stringent requirements for approval of pharmaceutical products than are found in other technology-exporting countries. Antibiotics manufactured by European companies may be purchased freely over the counter in any Latin American country, while the products of their United States competitors may not be available. The United States company is prevented from producing them abroad if the FDA has not approved the application. The time-consuming approval process is another contributor to the list of negative incentives. The Foreign Corrupt Practices Act is an additional frustration. Businessmen continue to complain that the imposition of United States morality on the conduct of business in foreign countries severely hampers technology transfer, direct foreign investment, and the export of United States products. Despite the noble objectives of this law, the absence of similar laws in other technology-exporting countries constrains the United States private sector.

III. ACQUISITIONS OF FOREIGN TECHNOLOGY

United States industry has suffered severe declines in productivity over the last fifteen years. Apparently, wage costs and productivity have caused industry in foreign countries to become more competitive. This, coupled with international economic conditions, including the relative value of the United States dollar to the currency of other technology-exporting nations, has resulted in substantial foreign investment in manufacturing operations in the United States in recent years. Simultaneously, some say there has been a reversal of United States technological superiority. Part of this is a result of aggressive technological development in

and competition from Japan and West Germany, among others. Others assert that this is also due, in part, to a general decline in patent protection and a reversal of the climate encouraging research and development that prevailed from World War II until the mid 1960s.

The result of this, along with predictable evolution, is that outstanding technology is now available from Western Europe, Japan, Eastern Europe, and even from some of the developing countries. In Mexico, a steel process developed by a private company has been licensed in twenty countries around the world. Also, deep-water oil drilling techniques developed by PEMEX are being used in other countries. In Brazil PETROBRAS has developed a process for extracting oil from shale that is the equal of almost any other process in the world. Brazil's alcohol program, which produces auto fuel from sugar cane, is now well known. Other outstanding technology is being exported by Korea, India, Colombia and other newly industrializing countries.

IV. CONCLUSION

Will protectionist sentiment in the United States result in the imposition of barriers ultimately impeding the flow of this foreign technology, or will the realities of reciprocity soften the restrictive legislation in some of the developing countries which are increasingly becoming technology exporters? It is clear that the international economic system becomes increasingly interdependent each year. What is ever more apparent is that trade flows, international capital movements, and the transnational transfer of technology are inextricably interrelated with other issues involved in the Global Dialogue, such as the role of energy in development, (including petroleum and alternate sources), the stabilization of commodity prices, and the access to developed countries' markets for lesser developed countries' exports.