INTERNATIONAL TECHNOLOGY TRANSFER: UNITED NATIONS CODE OF CONDUCT AND LAW OF THE SEA TREATY

BY

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I. UNCTAD INTERNATIONAL CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY

A. BACKGROUND

1. MANY IN UN AND DEVELOPING COUNTRIES BELIEVE THAT CODE WILL MARKEDLY INCREASE TRANSFER OF TECHNOLOGY FROM DEVELOPED COUNTRIES TO DEVELOPING COUNTRIES
2. SOME FEEL THAT TROUBLES OF DEVELOPING NATIONS ARE BECAUSE DEVELOPED COUNTRIES HAVE TRANSFERRED TECHNOLOGY ONLY UNDER "UNFAIR & ONEROUS" TERMS.
3. SINCE 1974 HAVE BEEN NUMBER OF DRAFT CODES AND MEETINGS.
4. MOST RECENT NEGOTIATIONS - APRIL 21 - MAY 6, 1980 - GENEVA
5. NEXT FULL NEGOTIATING MEETING - MARCH 23 - APRIL 10, 1981 - GENEVA
6. "INFORMAL CONSULTATION" - FEBRUARY 19-20, 1981 - GENEVA
7. LATEST DRAFT CODE, JUNE 2, 1980 (TD/CODE TOT/25/)
8. COLUMBIAN DELEGATE COMMENTS, MAY 6, 1980 (P. 3 OF PAPER)
9. PATEL COMMENTS (P. 4 OF PAPER)
10. PRESIDENT OF UNCTAD NEGOTIATING CONF.

AGREED:

CHAPTER 1 - DEFINITION (EXCEPT 1(4))

CHAPTER 2 - OBJECTIVES & PRINCIPLES

CHAPTER 3 - NATIONAL REGULATION OF TRANSFER OF TECHNOLOGY TRANSACTIONS

CHAPTER 6 - SPECIAL TREATMENT FOR DEVELOPING COUNTRIES

CHAPTER 7 - INTERNATIONAL COLLABORATION

CONSIDERABLE AGREEMENT:

CHAPTER 5 - GUARANTEES/RESPONSIBILITIES/OBLIGATIONS

CONSIDERABLE DIFFICULTIES:

CHAPTER 4 - RESTRICTIVE BUSINESS PRACTICES

CHAPTER 8 - INTERNATIONAL INSTITUTIONAL MACHINERY

CHAPTER 9 - APPLICABLE LAW IN THE SETTLEMENT OF DISPUTES

11. PREAMBLE - AGREED TO EXCEPT FOR "VOLUNTARY GUIDELINES" OR "BINDING"

DEVELOPING NATIONS - INITIAL 6-YEAR "VOLUNTARY" CODE, THEN MEETING TO DECIDE LEGAL NATURE OF CODE.

B. CHAPTER 1 - DEFINITIONS

1. SECTION 1.2 DEFINES TRANSFER OF TECHNOLOGY AS BEING "THE TRANSFER OF SYSTEMATIC KNOWLEDGE FOR THE MANUFACTURE OF A PRODUCT." DOES THIS REMOVE A NAKED PATENT LICENSE FROM THE CODE?

2. SECTION 1.3 INCLUDES "(A) THE ASSIGNMENT, SALE, AND LICENSING OF ALL FORMS OF INDUSTRIAL PROPERTY, EXCEPT FOR TRADEMARK . . . WHEN THEY ARE NOT PART OF TRANSFER OF TECHNOLOGY TRANSACTIONS" . . . NAKED ASSIGNMENT OR LICENSE IS INCLUDED.

3. SECTION 1.4 - CONTROVERSY ON WHETHER CODE INCLUDES TRANSACTION BETWEEN PARENT AND SUBSIDIARY, BRANCH OR AFFILIATE.

C. CHAPTER 4 - RESTRICTIVE BUSINESS PRACTICES

1. CHAPEAU -

   A. MANDATORY OR VOLUNTARY?

   B. PARENT - SUBSIDIARY INCLUDED?

2. 20 PRACTICES ARE LISTED WHICH SHALL/SHOULD NOT BE INCLUDED IN TECHNOLOGY TRANSFER AGREEMENTS

3. ALSO, PROVISIONS FOR EXCEPTIONS ARE INCLUDED IN ALL DRAFTS (SEE P. 8-9)

D. CHAPTER 5 - RESPONSIBILITIES AND OBLIGATION OF THE PARTIES

1. MUCH OF THE SUBSTANCE OF THIS CHAPTER HAS BEEN AGREED TO.

2. HOWEVER, THERE ARE A NUMBER OF VERSIONS OF THIS CHAPTER BEING DISCUSSED WITH MANY PROPOSED DETAILED LANGUAGE CHANGES.

3. HOMER BLAIR ATTENDED INFORMAL MEETING AT STATE DEPT. IN JANUARY, 1981, WHERE ENTIRE DAY WAS SPENT ON THIS CHAPTER. TEN PAGES OF SPEECH ARE DEVOTED TO THIS DETAILED DISCUSSION.

E. CHAPTER 8 - INTERNATIONAL INSTITUTIONAL MACHINERY

1. DRAFT PROVIDES THAT A COMMITTEE OF UNCTAD WOULD PROVIDE INSTITUTIONAL MACHINERY WITH A WIDE VARIETY OF FUNCTIONS. (SEE P. 26 OF SPEECH)

2. MANY ARE CONCERNED THAT THESE PROVISIONS WOULD PROVIDE FOR:

   A. AN ONGOING U.N. GROUP CONDUCTING UNNECESSARY DETAILED INVESTIGATIONS INTO TRANSFER OF TECHNOLOGY PRACTICES THROUGHOUT WORLD.

B. THIS GROUP WOULD BE A POLITICAL ORGANIZATION WHICH WOULD NOT HELP, BUT WOULD HINDER, TRANSFER OF TECHNOLOGY.

3. SECTION 8.1(2) "STATES WHICH HAVE ACCEPTED CODE . . . SHOULD TAKE APPROPRIATE STEPS AT THE NATIONAL LEVEL TO MEET THEIR COMMITMENT TO THE CODE."
4. 3 ABOVE WILL ENCOURAGE, IF NOT OBLIGATE, NATIONS TO ADOPT CODE AS THEIR NATIONAL LAW.
5. SECTION 8.3 PROVIDES FOR A MEETING IN FUTURE TO REVIEW ALL ASPECTS OF THE CODE. EXACT LANGUAGE IS STILL BEING NEGOTIATED.

F. APPLICABLE LAW AND SETTLEMENT OF DISPUTES

1. COMPLETE LACK OF AGREEMENT HERE
2. DEVELOPED COUNTRIES BELIEVE COURTS OF DEVELOPING COUNTRIES WOULD NOT INTERPRET AGREEMENT ON ITS MERIT. ALSO, LAW IS NOT DEVELOPED IN DEVELOPING COUNTRIES.
3. 77 FEEL THAT LAW OF DEVELOPED COUNTRY WOULD BE BIASED AGAINST THEM.
4. BEST SOLUTION WOULD BE TO USE LAW OF A DEVELOPED COUNTRY WHICH IS NOT INVOLVED IN THE TRANSACTION BUT WHICH HAS AN EXPERIENCED LEGAL SYSTEM.

G. CONCLUSION

1. PROBABLY WILL HAVE NEGOTIATIONS UNTIL SOME KIND OF CODE IS AGREED UPON.
2. PROBABLY WILL BE "VOLUNTARY" AT LEAST INITIALLY.
3. CONCERN IS THAT EVEN "VOLUNTARY" CODE WILL BE ESPOUSED BY GOVERNMENTAL ORGANIZATIONS AS A BASIS FOR LEGISLATION AND/OR AMICUS BRIEFS.

4. CREATIVE ATTORNEYS ATTEMPTING TO INVALIDATE PATENTS, OR MAKE LICENSE AGREEMENTS UNENFORCEABLE, WILL ATTEMPT TO CONVINCE JUDGE THAT CODE HAS A MORAL, IF NOT A LEGAL, EFFECT.

II. LAW OF THE SEA TREATY

A. BACKGROUND

1. U.N. CONFERENCE ON LAW OF THE SEA IN 1958 AND 1960
2. DECEMBER 17, 1970 - U.N. GENERAL ASSEMBLY DECLARED "THE AREA OF THE SEA-BED AND OCEAN FLOOR AND THE SUBSOIL THEREOF, BEYOND THE LIMITS OF NATIONAL JURISDICTION, AS WELL AS ITS RESOURCES, IS THE COMMON HERITAGE OF MANKIND, THE EXPLORATION AND EXPLOITATION OF WHICH SHALL BE CARRIED OUT FOR THE BENEFIT OF MANKIND AS A WHOLE, IRRESPECTIVE OF THE GEOGRAPHICAL LOCATION OF STATES."
3. NEGOTIATIONS BEGAN IN 1974, WITH FINAL NEGOTIATIONS BEING CONTEMPLATED IN THE SPRING OF 1981 IN NEW YORK, WITH THE FINAL DRAFT BEING PRESENTED IN CARACAS LATER IN 1981.
4. VERY BROAD - INCLUDES
   - NAVIGATION
   - WHALING
   - OIL AND GAS EXPLORATION
   - SEA-BED MINING
   - FISHING, ETC.

B. INTERNATIONAL SEA-BED AUTHORITY

1. COUNCIL
   - a. EXECUTIVE ORGAN OF THE AUTHORITY
   - b. 36 MEMBER COUNTRIES (SEE P. 33)
     - i. AT LEAST 3 EASTERN EUROPE (SOCIALIST) COUNTRIES

II. AT LEAST 8 DEVELOPING COUNTRIES

III. NO MENTION OF U.S. OR CANADA

2. THE ENTERPRISE

A. "ORGAN OF THE AUTHORITY WHICH SHALL CARRY OUT THE ACTIVITIES IN THE AREA DIRECTLY" INCLUDING "TRANSPORTATION, PROCESSING AND MARKETING OF MINERALS RECOVERED FROM THE AREA."

C. TRANSFER OF TECHNOLOGY

1. ANNEX III

A. SETS FORTH CONDITIONS OF PROSPECTING, EXPLORATION AND EXPLOITATION

B. ORGANIZATION MUST APPLY TO THE AUTHORITY FOR A CONTRACT, SIMILAR TO U.S. GOVERNMENT CONTRACTING PROCEDURES, EXCEPT THAT U.N. IS NOT GIVING YOU MONEY TO PERFORM.

2. ARTICLE 5 (ANNEX III) - TRANSFER OF TECHNOLOGY

A. READ 3, 3(A), 3(B), 3 (C), 3(D), 3(E) (P. 35-6)

B. ALSO 5, P. 37

C. ABOVE PROVISION APPARENTLY NEGOTIATED WITH NO CONSULTATION OR REFERENCE TO PRIVATE SECTOR TRANSFER OF TECHNOLOGY EXPERTS.

D. LES, APLA, ABA/PTC HAVE RECENTLY LEARNED OF THESE CLAUSES AND ARE EXPRESSING CONCERN.

3. ARTICLE 13 (ANNEX III) FINANCIAL TERMS OF CONTRACTS

A. ONE OBJECTIVE IS TO STIMULATE TRANSFER OF TECHNOLOGY TO THE ENTERPRISE.

B. ANOTHER OBJECTIVE IS TO ENABLE THE ENTERPRISE TO ENGAGE IN SEA-BED MINING EFFECTIVELY "AT THE SAME TIME" AS THE CONTRACTOR.

c. ADMINISTRATIVE COSTS IN PROCESSING AN APPLICATION FOR A CONTRACT IS $500,000. IF COST IS LESS, EXCESS IS REFUNDED.

d. ANNUAL FIXED FEE OF $1,000,000 TO AUTHORITY

e. ROYALTY OF 5% OF MARKET VALUE OF THE PROCESSED METALS EXTRACTED

i. FOR FIRST 10 YEARS

ii. AFTER THAT, ROYALTY IS 12%

f. ALTERNATIVELY, CONTRACTOR CAN GIVE A SHARE OF THE PROCEEDS TO THE AUTHORITY.

4. OTHER TECHNOLOGY TRANSFER PROVISIONS

a. ARTICLE 27 "STATES, DIRECTLY OR THROUGH COMPETENT INTERNATIONAL ORGANIZATIONS, SHALL PROMOTE THE ESTABLISHMENT OF GENERALLY ACCEPTABLE GUIDELINES, CRITERIA AND STANDARDS, FOR THE TRANSFER OF MARINE TECHNOLOGY . . . TAKING INTO ACCOUNT, IN PARTICULAR, THE INTERESTS AND NEEDS OF DEVELOPING STATES." (P. 43)

b. DOES THIS MEAN ESTABLISHMENT OF A CODE OF CONDUCT SIMILAR TO THE UNCTAD CODE OF CONDUCT?

c. ARTICLE 277 STATES THAT REGIONAL MARINE SCIENTIFIC AND TECHNOLOGICAL CENTERS SHALL, AMONG OTHER THINGS, COMPILE AND SYSTEMATIZE INFORMATION ON

i. MARKETING OF TECHNOLOGY AND

ii. CONTRACTS AND OTHER ARRANGEMENTS CONCERNING PATENTS

5. CONCLUSION

a. WILL THE COMPULSORY TECHNOLOGY TRANSFER OF THE LAW OF THE SEA TREATY BE ADOPTED FOR OTHER TREATIES TO BE NEGOTIATED?

i. TREATY ON THE SOUTHERN POLAR REGION

ii. WORLD CONFERENCE ON RADIO TRANSMISSION

B. LAW OF SEA TREATY AND UNCTAD CODE OF CONDUCT ARE DISINCENTIVES TO TRANSFER TECHNOLOGY (SEE P. 46-7)

C. DEVELOPING NATIONS WILL NOT BE ASSISTED BY THESE CODES

D. DEVELOPING NATIONS SHOULD INSTITUTE:

I. STRONG PATENT SYSTEM

II. STRICT LAWS PROTECTING PROPRIETARY INFORMATION

E. LES PROPOSAL.