National Regulation of International Transfer of technology & A Comparative Analysis

Over the years transfer of technology has figured as an important public policy issue at both national and international levels. There have been very many analyses of the socio-economic implication of transfer of technology. As we have seen in Chapter 3, transfer of technology has given rise to several complications for developing countries (LDCs) which have culminated in a new thinking over transfer of technology. The developing countries have largely advocated reforms in transfer of technology. One of the important reforms suggested by the developing countries has been to regulate the transfer of technology at the international level.

At the same time reforms through legal regulations have been underway at the national level since the seventies. The developing countries have enunciated direct governmental controls over technology transfer. Principally pioneered by Latin American countries who happened to be major recipients of foreign technology, the trend towards direct control of technology transfer has engulfed almost all developing countries. They have either through legislations or administrative guidelines sought to control technology transfer.

The object of this chapter is to give a comparative analysis of the national controls exercised by developing countries over technology transfer agreements. The developing countries over technology transfer agreements. The analysis is principally confined to the countries having legislative controls, as such reference to their legislations becomes necessary. However, reference is also given to the guidelines of some developing countries which are having a bearing upon regulation of technology transfer.
The developing countries after the seventies have sought to regulate the activities of the alien investors operating in their economies especially in foreign investment. The regulation of the activities of these aliens has been necessitated because of the costs associated with the penetration of MNCs in their domestic economies.¹

The preoccupying concern of developing countries has been to intervene in the operations of MNCs in such a way that the latter provide maximum advantages to host countries with minimum costs. The basic purpose to intervene is that the operations of MNCs result in a sustained and internally oriented development of developing countries. In other words, the regulations are aimed at furthering policies which would reduce the external dependence of the developing countries.²

Most of these regulatory techniques devised by developing countries are focussed upon regulating foreign investment and technology transfer. The laws pertaining to foreign investment have been considerably modified by the developing countries, as foreign investment has been the most significant area of activity by the alien investors in LDCs. The trend of the legislations of LDCs is to ensure that control of the foreign owned enterprises remain with local investors.³

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¹ UNCTAD. Major Issues Arising from the Transfer of Technology (UN TD/B/A.11/10. See also S. Lall and P. Streeton Foreign Investment. Transnationals and Developing Countries (1977) Chap.


³ However, after 70's following the restrictive regimes of the host developing countries, the MNCs responded by other ways of penetration notably joint ventures, collaborations, turnkey proposals etc. For new ways of penetration by MNCs. See Charles Oman. New Forms of International Investment in Developing Countries (1984).
This is provided by stipulating that majority of the equity ownership should as a rule be owned by local investors. Apart from this the entry of MNC is barred in several key sectors and is subject to other financial and operative controls. The impelling reason for such restrictive legislations has been that MNCs had achieved dominant control of the economy of developing countries, with the result decisions regarding these economies were taken by outside investors. Thus in order to safeguard their domestic economies from excessive domination by foreign investors, these steps have been considered necessary by LDCs.

North-South technology transfers have essentially been based on laissez-faire. However, since 1970's most of the developing countries have evolved out national regulatory regimes concerning technology imports with particular attention to transactions with MNCs. The Latin American nations were pioneers in passing legislations regulating the technology transfer process. Similarly African and Asian nations have also passed independent legislations concerning technology transfer. The object of these controls is to increase the governmental intervention in the formalization of technology transfer contracts.


The interventions by the host Governments seek to reduce the adverse aspects of technology transfer transactions. Moreover, the regulations of the developing countries have put many restrictions on the private rights of the parties to transfer of technology transactions. These restrictions as shown in the latter are often shaped by unilateral change of rules by developing countries, however, they are necessarily based on political and economic realities of the host country. Further these restrictions are carried out both at the time of entry and at the operational level of MNCs. Thus developing countries have sought to control the transfer of technology to their economies from abroad. From among various modes of controls, the basic ones, which have most prominently emerged are the legislative and administrative approaches.

1. **Legislative**

Countries like Argentina, Brazil, Mexico, Philippines and Republic of Korea have adopted a legislative approach in regulating transfer of technology. The governments have introduced

10. Argentina, Law on Technology Transfer (1981); See UNCTAD, Selected Legislations, Polices and Practices on Transfer of Technology. DDC.TD/6/C.048
11. Brazil, Normative Act (1975); Ibid.
12. Mexico, Law on Registration of Transfer of Technology (1973), Ibid.
special legislations on transfer of technology and created special governmental bodies for their implementation. The legislations establish 'screening and approval' as a precondition for allowing foreign technology. The implementation is left to an administrative body designated under the relevant legislations. However, some regulations assume the form of usual legislations concerning foreign investment as well as industrial property legislations. The special aspect of these industrial property legislations have been that private rights have been curbed in favour of public rights. Through these legislations the patent protection is shortened from 14 years to 5 years. Patents in food, drugs and agricultural chemicals are limited to 5 years from the date of sealing or 7 years from the date of granting whichever is less. Trade marks are valid for 7 years from the date of granting. Foreign brand names are prohibited except on export goods.

II. Administrative

Unlike legislative approach this system does not specifically provide legislations governing the import of technology from abroad. Rather an administrative authority is designated which controls the import of technology transfer agreements. It may be very often broad and sweeping conditions are laid down which guide the administering authority for approving the technology contracts in question.

The countries which do not have legislative regulations resort to a practice which is called as systematic screening. Screening case by case is a form of discretionary control whereby

15. Graham, supra note 6, p.69.
16. UNCTC, supra note 8, p.135.
17. A.J. Prasad, supra note 9, p.197.
every case of investment is taken as a special case. 18

The emphasis in such cases is the screening of the incoming contracts of technology in the light of national policies and priorities designated either by administrative guidelines or other discretionary legislations. These discretionary legislations are typical investment legislations or other domestic regulations of general applicability such as restrictions on financing, tax obligations, antitrust regulations and registration requirements. 19 Moreover, the administering authorities are given sweeping powers to validate or invalidate the contracts concerning foreign investment and technology transfer. 20 However, the problem with such an approach has been overlapping of functions by various authorities concerned with authorizing foreign investment or technology transfer. 21

The countries which have adopted an administrative approach to control technology transfer are Cuba, Egypt, Libya, Turkey, Yugoslavia, Iran, Pakistan, India, Malaysia, etc. The administrative authority systems is sought to be supplemented by administrative directions of the Governments from time to time. In these countries the criteria and conditions for approval of technology transfers and investments not only vary from year to year but they vary from Government to Government. 22

18. India Prefers Screening which is done by an authority called as Foreign Investment Board. See H.P. Aggarwal, Foreign Collaborations in Indian Industry (1986) 45-52.


There are both opponents and supporters of the regulation of foreign investment and technology transfer. The former are of the opinion that given the advantages which a host country gets through foreign investment, both the MNCs and the host country thrive in an atmosphere of free market. They argue that restrictions on MNCs will essentially mean cutting down the advantages for the host country and hence argue for a very liberal attitude towards foreign investment and technology transfer. On the other hand there are others who while upholding the desirability of foreign investment yet recommend official controls and regulations over foreign investment. They argue that the problems posed by MNCs can only be solved through national controls and clear cut guidelines. They maintain that the regulation of conditions and requirements of the foreign investment by the host country is central to both entry and performance of MNC in the host country. The matters of ownership and control of MNCs are important because they vitally affect the nature and costs of benefits provided by MNC.

The developing countries have more or less identified themselves with the latter school. They have enforced unilateral mandatory rules on both investment and technology transfer. These rules are specifically directed, inter-alia towards:

1) terms of technology transfer contracts;
2) the costs of technology transfer;
3) the removal of restrictive business practices in technology contracts;


iv) the regulation of technology in foreign investments; and
v) the consideration of local needs of the host country.²⁵

The main purpose of these technology regulations is to provide rules which are likely to foster economic and technological development of the developing countries. By enacting specific rules the developing countries want to heighten the contribution of the foreign technology towards their national development.²⁶

These rules have provided for various interventions by the Governments of developing countries. These Governments intervene in technology transfer process so as to equalize the weak bargaining position of the recipient firms. By such interventions the developing countries want to reduce or limit the adverse conditions of transfer of technology.²⁷

2. Subject Matter of Technology Transfer Regulations

Most of the developing countries have enacted comprehensive legislations concerning foreign investment and transfer of technology. The aim of both the legislations is to allow the entry of foreign MNCs subject to certain conditions and circumstances thought to be best suited to the host economy.²⁸

26. Rachel McCullock, Supra note 5, p.112.
28. See Graham, Supra note 15, p.17.
   See Friedmann & Pugh. Legal Aspects of Foreign Investment (1976)
specific aim of the legislations in the area of foreign investment is particularly to control the activities of the subsidiaries in the host countries. The regulations of a host country usually specify the limitations within which the foreign corporations are allowed to operate. The limitations relate to the raising of finances by the subsidiary, the allowable connection of the subsidiary with the parent company, the payments by the subsidiary to the parent company, and the extent to which the subsidiary can be controlled by the parent company. 29

The enunciation of regulatory codes whether on foreign investment or technology transfer has passed through various stages. In the earlier stages the investment codes of developing countries were quite liberal in the sense that they gave various incentives to the foreign investors so that they would invest liberally in the host country. 30 However, it was soon realized that even such inducements did not result in any significant contribution to the economic development of the host country. The MNCs kept on exploiting the resources of host countries with the result that the host countries were compelled to enunciate tighter investment and technology controls in the interests of the local economy. 31

Special legislations have been enacted to regulate the transfer of technology transactions/agreements. These legislations prescribe a legal framework for all acts and transactions concerned

with the transfer of technology as seen in latter sections. Moreover, the subject matter of transactions cover all types of technology transactions, whether patented or unpatented, whether it is a patent licence or a simple sale of goods. The scope of the technology transfer contracts is broadened for purposes of the application of technology transfer legislations. Technology transfer contracts now include licensing of property rights, sale of know-how, engineering contracts, specific technical assistance programmes etc.

3. Duration of Agreement

The firms supplying foreign technology which is often a large transnational corporation, usually determines terms of the agreements to its own advantages. This bargaining advantage has resulted in the incorporation of certain terms and practices in the technology transfer contracts which are unreasonable in the opinion of the developing countries.

One of such conditions which has recurrently been considered by the developing countries is the duration of the transfer agreement. The agreement may deal with licensing of either plain technology, or a patent or a trade mark or know-how and know-why. The nature of the substance of licensing


33. See UNCTAD. Implementation of Laws and Regulations on Transfer of Technology (UN 1986) DOC. UNCTAD TT/73, p. 1.

34. See UNCTAD. Major Issues Arising from Transfer of Technology, Supra note 1.

35. See Supra note 5.
agreement determines the duration of the agreement. The legislations of developing countries have circumscribed the duration clauses of the agreement. 36

The duration of the technology transfer contract is linked to the payments on one hand and to the absorption of the acquired technology on the other hand. Both of these elements are vitally considered by the developing countries while determining the duration of the licensing agreement. Consequently the regulations of developing countries have fixed a maximum duration for technology transfer contracts, and prohibit contracts of longer duration. 37

The technology transfer regulations of developing countries distinguish for purposes of duration control, between patent licenses, trade mark licences and other technology transfer transactions. This is important since the duration of the agreement and the payment thereunder cannot exceed the patent and trade mark protection. It may be noted that maximum period of patent protection in developing countries varies from 5 to 15 years. 38

Brazil has fixed a maximum duration of patent licenses to 10 to 15 years for supply of industrial technology. For specialized technical services the duration shall be the period necessary for assimilation of foreign technology and thus the length of the agreement may be more than the allowed duration. 39

36 See UNCTC, National Legislations-Supra note 16, p.8.
38 UNCTC, Supra note 16, p.18.
39 Brazil, Normative Act, 015 (1975), Arts, 2.4, 4.4, 5.4, See UNCTC, Supra note 8.
The Mexico transfer of technology law puts a ceiling of the duration of agreement to 10 years. The Government of India Guidelines for Foreign Collaborations has fixed a normal duration of collaboration agreements to 5 years and 8 years in case where production has been delayed. The extension though normally not favoured is granted only on merits. In Argentina the duration of collaboration agreement is 5 years.

It should be noted that the technology legislations of LIC provide large discretion to the screening authorities to reject approval applications for contracts whose duration appears excessive in view of the techno-economic goals of the host country. Similarly the host Government's regulations reject terms preventing the use of transferred technology at the termination of the contract. The rental concept of technology transfer is not accepted by the developing countries. Thus it is acknowledged that the licensee should freely use the acquired technology once the agreement has been terminated. However, this will not apply if the agreement terminates as a result of fault of licensee or restrictions are connected to the industrial property rights after the expiration of the agreement.

In relation to use of technology after the expiry of agreement, the restrictions may be deemed valid in case patent

41. H.P. Aggarwal, Supra note 18, p. 42.
44. Cesliak, Supra note 37, p. 421.
protection/know how has not expired. Once the patent protection has expired the developing country's regulations provide that the transferees shall be free to use technology after the expiry of the contract. Under Indian Guidelines the payment of royalty for the duration of the agreement would also constitute compensation for the use of patent rights till the expiry of life of the patent and the Indian party would be free to produce the item even after the expiry of the collaboration without any additional payments.

4. Screening and Approval

Most of the countries have adopted industrial licensing as a form of control over transfer of technology. The legislations have designated authorities and boards who are responsible for the screening and approval of all transfer of technology contracts. Called by various names such boards and authorities are also functioning in countries with non legislative frameworks.

In India e.g. screening and approval is conducted by Projects Approval Board which deals with composite proposals involving clearances relating to industrial licences, approval of foreign collaborations and import of capital goods.

The function of these boards/authorities is to: (a) promote direct foreign investment and the import of technology; (b) to authorize foreign investments; (c) to authorize transfer of technology contracts between the local and non local

45. Brazil. Normative Act. Supra note 49, art. 2.4.
46. Govt. of India. Guidelines for Industries (1976-77), as amended para 9(IX)
47. C.M. Corea. Supra note 32 p. 389.
undertakings; (d) to assist the potential investor or importer of technology; and (e) to provide him upto date knowledge of the economic policies and various procedures of the host country. 49

Screening is utilized as a form of control over foreign investment by the host country. The object of screening lies in the fact that the host Govt. seeks to examine the incoming investment in the light of national needs and priorities. Screening at the same time helps the host country to avoid the unnecessary import of the capital and technology and to protect domestic industries. 50 Moreover, the developing countries have utilized screening as a method to scrutinize the terms of the incoming capital and investment. In the belief that foreign capital and investment is always associated with unequal terms, the necessity of screening the technology contracts has arisen. Further, screening helps the developing countries to reduce the foreign exchange component of the transactions. 51 It may be pointed out that not only developing countries regulate the incoming foreign investment, but even the developed countries notably Canada, Australia and Japan. Japan had until recently a very restrictive regime of foreign investment. They allowed licensing rather than allowing the wholly owned foreign subsidiaries to operate in their economies. Japan has however, recently allowed the operation of foreign

49. UNCTAD. Implementation of Laws and Regulations on Transfer of Technology. Supra note 33, p.2.
51. E.M. Graham, Supra note 6, p.69.
owned subsidiaries. 52

The main concern of the screening and approval authorities is to authorize technology transfer contracts on better terms, at a lower cost and without or with less restrictive conditions. Furthermore, the screening authorities give more than due consideration to the likely technological contribution of the proposed transfer of technology agreement. 53

The composition of the screening boards or committees as the case may be, is fairly wide enough to include lawyers, economists, engineers and other technical personnel so that screening is thorough and meaningful. In this way a technological, legal and economic evaluation of contracts is being carried out by these authorities. 54

In the evaluation of these contracts special attention is paid to the unpackaging of technology, cost benefit analysis of the proposed technology transfer, the terms of the technology transfer, the sources and cost of technology and the degree of dependence of recipient on the supplier of technology. 55

The regulations either concerning investment in a broader sense or technology transfer in a stricter sense generally specify broad criteria to be used in the screening


53. UNCTAD, The Implementation of Laws and regulations, Supra note 33, p. 2.

54. Ibid

55. Graham, Supra note 6, p. 70.
and approval of foreign investment and technology transfer.
The criterion may be general e.g. projects furthering any
economic development, export production, the use of domestic
products, the effect on domestic employment, wage prices,
balance of payments, transfer of technology, the training of
technical and managerial cadres, regional development and the
diversification of investment. In cases where no legislation
exists, the criteria for approval is prescribed by administrative
and policy guidelines and accompanying discretionary legislations.
The overall purpose of screening is to undertake a thorough
evaluation of the terms of the technology transfer agreements.
The evaluation proceeds on a technical, legal and economic
analysis of the contract in the light of the following criteria:

a) The type of technology to be transferred
   with special attention to, inter-alia:
   i) age of technology,
   ii) the application of technology to a particular
       industrial sector;
   iii) the degree of complexity it involves;
   iv) the types of items to be produced;
   v) its contribution to the creation of new jobs;

b) The payments required i.e. the cost of the
technology with special reference to:
   i) total amount of payments during the term of
       agreement,
   ii) its impact on national balance of payments;
   iii) the rate of royalties with respect to other
       sources of technology available.

c) The Contribution to the national technology
   development;

57. India, Guidelines for Foreign Investors (1977) as amended,
d) The existing relationship among the parties involved including parent subsidiary relations;

e) Other advantages or disadvantages of the agreement in the right of overall national interest.

These regulations vest discretion in the authority administering the regulations or concerned with the approval. The discretion of these authorities is intended to enable them to extract maximum advantages from the alien investor. The negotiations at the entry level try to resolve the issues rather than leaving any scope for being involved in controversies at a later stage. The overall objective of the negotiators of the host government is to foster national economic advantages and procure up-to-date technology for the host country. Entry controls have moreover, the advantages of minimum uncertainty and maximum freedom to negotiate on terms which are advantageous to the host country. In case the terms and conditions are not accepted the negotiations are closed down. In case the terms are acceptable, the technology transfer agreement is accepted by the national authorities.

5. Registration

Another aspect of technology transfer regulations worth mentioning is that these regulations require compulsory registration for all the contracts falling under their jurisdiction. The host countries have created national

58. UNCTAD. The Implementation of Laws and Regulations on Transfer of Technology, Supra note 43, p.5; See Janizsuki, Supra note 22, p.313.

59. Cynthia, Wallace, Supra note 20, p.73-4.

registries with whom the technology transfer contracts have to be registered. The effect of non registration in some countries is that unregistered technology transfer agreements are void. 61

The screening authorities are empowered under the regulations to revise the legal, economic and technological aspects of the licensing operations. But this power to modify is confined only to the technology transfer regulation arena and does not involve other laws, e.g. contract law, or anti-trust laws. 62

The economic Planning Board of Korea which is responsible for the approval of foreign technology licensing contracts may not approve and register a licensing agreement under the Korean Foreign Capital Inducement Law (1983) if it contains any of the following characteristics namely;

1) the agreement is intended mainly to exploit a simple design, trade mark or exclusive franchise;

ii) the agreement is intended mainly to serve as a pretext for sale of raw materials, parts of accessories;

iii) the agreement contains significant terms which are unfair;

v) the agreement relates to technology similar to that which is used by a manufacturer using domestically produced technology as determined by the Ministry of Science and Technology;

61. Mexico, Brazil, Argentina and most of the Latin American Countries have created national registries for technology transfer contracts. See Supra note 8, p.16.

vi) the agreement relates to the inducement of technology which is unsuitable under the provisions of other laws or regulations.

The coverage of the technology transfer regulations is quite broad in the sense that the registration requirement is necessary where the contract of transfer covers;

1) a concession to use or authorization to exploit trademarks;
2) a concession to use or authorization to use technologies covered by patents;
3) the provision of "technical expertise in the form of plans, diagrams, models, instructions, guides, formulations, specifications, personnel training;"
4) the provision of basic or detailed engineering;
5) other technical assistance of any kind;
6) the provisions of company management and operation services.

As a matter of fact registration of foreign technology contracts is given a substantial importance by the developing countries. The States have given a comprehensive definition of technology contracts for purposes of registration with the national registry offices. All agreements of technology transfer are registrable if their purpose is to use the trade marks, the right to use patented inventions, the supply of technical expertise in the form of plans, diagrams etc., the supply of basic or complex engineering, the supply of machinery and plant, the provision of managerial assistance and training of personnel and the monitoring of any contract or agreement registered pursuant to the

64. Mexico, Law on Registration of Transfer of Technology (1973) as amended article (2); See UNCTC, National Regulations, Supra Note 16.
technology transfer regulation. The importance of registration is that no unregistered contract or agreement would be legally enforced in the host country. The transfer of an unregistered agreement shall not be entitled to any payment or other benefits under technology transfer regulations. In other words it shall be devoid of any substance. The unregistered contract is not entitled to any protection under technology transfer laws. In fact even penalties are provided for non-registration.

6. Prohibition of Ownership

A closely related aspect of entry controls is that of the prohibition of foreign ownership in certain sectors by foreign corporations supplying capital and technology. The developing countries have designated through their laws or guidelines the areas in which foreign investment, foreign collaboration and consequently foreign ownership is prohibited. The specific sectors in which foreign corporation is denied entry are sectors of vital national importance. The foreigners are excluded from national resources in Brazil and Philippines, ownership of land in Mexico and Brazil. The ownership of the media, communication and forestry and natural resources is confined to the nationals only.

66. Article 6, Mexican Law on Technology Transfer (1977)
68. E. Bladel, Supra note 29, p.337.
In other areas where foreign corporations could enter into business the regulations expressly provide and allow arrangements in which control by national enterprises or investors is ensured. To do so most of the developing countries provide for the majority ownership of share capital by local investors. As a rule developing countries allow only arrangements in which foreign corporations have a minority ownership in the venture. India as a rule allows only 40% foreign owned subsidiaries. However, this rule may be diluted in case of wholly export oriented enterprises. Argentine law requires that in automobile industry at least 51% of the capital of firms must be owned by nationals and a minimum of 80% of the directors and 90% of the professionals and technical staff must be nationals living in Argentina.

The main reason for the local equity participation appears to be the concern for distribution of benefits and profits to the local investors. The developing countries have shown a genuine concern that the local investor gets a fair share of the profits and that the control of the enterprise does not pass to the outside multinational corporation. The local capital ownership and local decision making implies that the enterprise makes appropriate decisions in the light of the needs and circumstances of the host country. Equally important is the concern of the

69. Wallace, Supra note 20, p. 70.
70. India, Foreign Exchange Regulations Act (1973) s. 29.
71. India; Industrial Licensing Guidelines 1977;
host country to develop local technological entrepreneurship. In such cases managerial control assumes a considerable importance since upon it depends largely the profitability and success of the enterprise. Most countries have fairly general laws requiring local representation on the boards of directors of the locally incorporated foreign enterprise. This provision is seen to be an important safeguard in the hands of the local investors. Similar provisions are made with respect to the import of inputs required for the venture, marketing and business matters, supply from local resources and export provisions. These provisions assure the independence of the local investor from interference by the foreign counterpart.

A specific provision with regard to technology transfer regulations relates to the control on licensing operations. Some of the developing countries have made special provisions for not allowing technology licensing in already available technology or which the transferee may reasonably develop. The statutes and guidelines also prohibit the importation of obsolete technology. Furthermore, these guidelines prohibit 'packaged licensing, as they imply some continuing costs for the transferees. However, the difficulty with such a provision is its actual implementation by the screening and approval authorities. Such an implementation is very difficult due to the lack of requisite information on the part of evaluating authorities.

75. See Corea, Supra note 32.
77. See Corea, Supra note 32.
With regard to the transfer of technology the host countries make specific provisions enlisting industries in which foreign collaboration for supply of foreign technology is allowed. The criteria fixed for such determination is the progress and stage of development of particular groups of industries. Generally speaking the industries which are fairly well developed and in which local expertise is available do not qualify for foreign collaborations. Sometimes, however, the criterion for such a choice is often arbitrary.

In India for example, foreign collaboration is allowed by the Government of India in selected fields of high priority industries and in areas where import of foreign capital is considered necessary. In other areas import of technology is considered by the Govt. on merits. Thus foreign collaboration in low priority non-essential industries is allowed only in special circumstances. The Govt. of India had in 1977 issued four illustrative list of industries where (a) foreign investment may be permitted with or without technical collaboration (b) only technical collaborations are permitted, (c) no foreign collaboration is considered necessary, (d) foreign collaboration is permitted only on merits. However, the Govt. has liberalized its policy and has only issued a schedule in which foreign collaboration is not permitted. This list serves as the main signpost for the Foreign Investment Board which approves collaboration agreements.

78. Mexico, Law on Transfer of Technology (1973) art. 7.
79. See Industries Development Regulation Act (1951) schedule (A); & H.P. Aggarwal, Supra note 18, AppendixAg.A.10.
involving foreign capital and technology. The foreign Investment Board screens all collaborations and foreign investment proposals including the terms of the project, the conditions of the project and the technological and economic viability of the project.

In addition the developing countries have passed laws by which foreign entities must reduce their share of ownership to some specified level by offering shares to nationals within a specified period of time. Through these devices several objectives are being pursued, but it is apparent that reducing the control of enterprises by foreigners is an overall objective of considerable importance.

7. Control on Prices

Some of the dynamic considerations in the price of the technology include the nature of technology, the nature of the firm holding the technology and the industrial base of the host country. Accordingly the prices of technology would be higher in case of recent technology and where technology is being owned by a comparatively larger firm.

80. India, Foreign Investment Board was constituted after the recommendations of the Mudliar Committee, to approve all foreign investments. It draws membership from all the concerned ministries and the R.B.I. However, now we have a Project Approval Board containing the membership of Foreign Investment Board, Licensing Committee, FERA Committee and the concerned ministries. The PAB functions as a separate authority in Ministry of Science and Technology. See Parliamentary Committee on Public Undertakings (1976) 89th Report; RBI, Foreign Collaboration in Indian Industry (1985); H.P. Aggarwal, Supra note 18, p. 141.

As already noted the developing countries have to pay excessive costs in terms of payment for patents, trade marks, licences, processes etc. The problem of developing countries has always been to determine the reasonable price of the imported technology. As it is, the foreign corporation holding the technology would always try to capitalize on the technology it possesses. The costs include royalties technical collaboration fees and dividends. In India for example, the imports by companies having foreign collaboration agreements have increased the outflow of foreign exchange. According to available estimates the total outflow of foreign exchange for payments of royalties, etc., for the group of 620 companies involving foreign collaboration agreements was Rs. 625 crores in 1980-81. In contrast export earnings by these companies increased to only 513 crores in 1980-81. The trade deficit of manufacturing companies was as high as Rs. 180 crore in this period. The payments included were payments for royalties, patents, trade marks and know-how. The Govt. of India has approved a large number of collaboration agreements. In 1974 the number of approvals was only 359 while as in 1984 it was 740. The large number of approvals may be because of the liberal collaboration policy of the Govt. If the above payments are of any indication it is reasonably expected that the amount of foreign exchange for these approvals

85. According to UNCTAD estimates the developing countries paid about 3 billion dollars as royalties and fees for importing technology from developed countries. This does not include the payments of 7 billion dollars of the book value of foreign investment in developing countries. See UNCTAD, Trade and Development Report (UN:1987) E.87.11.B.7. p.91.


87. This does not include the payments made by Govt. Companies having Foreign Collaboration Agreements, for which the Govt. has paid Rs. 3,659 million in 1980-81. See Amiya kumar Bagchi, Economic and Political Weekly (May 24, 1986) p. 917. See also Sumitra Chisti, Book Review XXI, Foreign Trade Review, no. 2 (1986).
must be quite heavy.\footnote{Bagchi, \textit{Economic \\& Political Weekly} (May 24, 1986) p. 917.}

The screening authorities of developing countries face the uphill task of evaluating the reasonableness of the consideration payable by the transferee and its direct and indirect impact on transferee's interests. Moreover, the payments have to be viewed in the light of overall costs and benefits to the host country.\footnote{Cabanellas, Supra note 43, p. 23.}

The regulations of the host countries have prescribed general and specific guidelines with regard to the cost of imported technology. The specific policies on controlling costs include policies limiting the remittance arising from foreign direct investments and payments for royalties and restricting payments over excessively long periods or prohibiting excessive prices in general.\footnote{Karl P. Sauvant and Hasenplug (ed) \textit{The New International Economic Order} (1979) p. 287.} The prices of imported technology are also controlled by fixing a limit on the outflow of percentage of profits and dividends or by prescribing a limit on royalties rates for the transferor.\footnote{Robert Radway, "Next Decade in Latin America," \textit{Case Western Reserve Journal of International Law} (1981) p. 20.}

The guidelines and regulations of the host countries provide that the price of the agreement should be commensurate to the technology acquired. This implies a thorough analysis of the royalty and other payments involved in the agreement. Though it is not easy to establish fixed rules concerning the adequate levels of payments for all kinds of contracts, each contract is evaluated on merits. The evaluation of agreements ensures that the formula to calculate the payment of royalty is specified in the contract. While evaluating the contract in terms of payment the following

\footnote{Bagchi, \textit{Economic \\& Political Weekly} (May 24, 1986) p. 917.}
\footnote{Cabanellas, Supra note 43, p. 23.}
\footnote{Karl P. Sauvant and Hasenplug (ed) \textit{The New International Economic Order} (1979) p. 287.}
points are considered necessary and relevant.

a) the form and time in which the payments are going to take place.
b) projected volume of sales or production during the term of the contract;
c) the duration of the agreement;
d) other specific payments involved;
e) the date of payment.\(^\text{92}\)

The Mexican guidelines provide that the technology agreements shall not be registered if the price or consideration is not commensurate to the purchased technology. What constitutes reasonable price is left to the discretion of the regulating authorities.\(^\text{93}\) Countries like India, Brazil and Argentina have put a ceiling on royalties. The permissible limit of royalty remittance varies from 5\% to 10\%. India for example, generally allows a royalty rate of 5\% in technical collaboration agreements.

The royalty to be paid is calculated on the basis of ex-factory selling price of the product, net of the excise duties, less the landed cost of the imported components. Wherever appropriate, the payment of a fixed amount of royalty per unit of production will be preferred. Stipulations of a minimum guaranteed royalty, regardless of the quantum and value of production, are not viewed favourably. Suitable lump sum payments in addition to recurring royalty are also considered in deserving cases. In deciding the reasonableness of such payments, account will be taken of the value of production so that the lump sum and recurring royalty, if any is an acceptable proportion of the value of production. However, such payments will be subject to Indian taxes.\(^\text{94}\)

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\(^\text{93}\) Mexico. Law on Transfer of Technology, article 7(1).

\(^\text{94}\) Aggarwal, Supra note 18, p.68.
The Korean Ministry of Trade and Industry does not approve agreements which provide for royalties in excess of 5% of net sales or terms in excess of 5 years. The maximum amount which may be charged in any given case depends upon the nature of technology involved. In the case of technology for low priority industries (e.g., food or pharmaceuticals), the permissible royalty rate is not more than 5%, but for high technology items which enjoy high priority in the overall economic development plans, royalty rates may be accepted even up to 10%. 95

The transfer of technology statues have made special provisions for taxes on royalties and payments for transfer of technology and technical know-how. This is distinct from taxes on income to foreigners resulting from foreign investment. The rates of taxes payable on such royalties and payments vary from country to country. 96

Generally, the rates of taxation on the profits and dividends from foreign investment are higher than the taxes on royalties, lump sum payments and other technical fees.

In India, the rate of income tax payable by foreign companies in respect of lump sum payments for know-how-technical information and supply of drawings and designs transferred to India is 30% of the Gross amount. In these cases, no expense of any kind, whether incurred in India or outside India, are allowed as deductions out of the lump sum consideration. In case the foreign participant is not a company, the rate of tax applicable will be normal rate as applicable to individuals. In such cases, expenses incurred by

95. T. Song, supra note 63, p. 61.
96. UNCTC, supra note 16, p. 138.
the foreigner in earning the lump sum consideration shall be allowed as deductions from the consideration. However, the Head Office expenses have been restricted to 5% of the income.

The rate of tax on royalties/technical fees for the transfer of any right, property or information to India in case of foreign companies is 30% on the gross amount of royalty, without the deduction of any expenses incurred by the foreign participant. However, before April 1, 1987 the rate of tax was 40%, where the recipient of the royalty is not a corporate body the tax chargeable shall be that which is applicable to individuals under the normal rates, subject to the deduction of expenses incurred. There is no restriction on expenses except that the Head Office expenses have been limited to 5% of the income. However, where the consideration received by the foreign company is not in the form of 'technical fees' it shall be subject to a normal tax rate of 65%. In case of payments of dividends/profits to the non-resident on account of his share holding in a partnership/joint venture the rate of tax payable is 25% on the gross amount of dividends. In case the foreign participant is an individual the rates shall be those which are applicable to individuals. However, where the non-resident shares profits by becoming a partner in Indian firm, the tax chargeable shall be 65%. In case of tax to be payable by a foreign company on the income

97. India. *Income Tax Act, 1961*, s.44(A) and 115(A).
99. Before Ist April, 1987 the rate was 68.25%. See Ibid,s.115 A.
100. H.P. Agarwal, Supra note 18,p.114.
by way of interest from money lent at interest and brought into India in cash or kind, the rate of tax shall be 25% of the gross amount of interest without any claim of expenses. Before June 1, 19n this rate was 73.5%. 101

In Columbia dividends paid to foreign corporations which do not distribute them or reinvest them in Columbia are taxed at 40%, provided a maximum of 25% of shares are held by non resident persons or companies. Royalty payments, technical assistance fees and interest are subject to a 20% tax. 102

Similarly dividend payments to non-residents in Argentia are taxed at 29.5% plus a 20% surcharge. Royalty payments are taxed at 43.2% with a 50% reduction for R and D, and technical assistance fees at 43.2% where materials are supplied by the recipients of the payments, and 25% where no materials are supplied. 103 However, in Korea, a flat rate of 20% tax is levied on dividends, royalty, technical assistance and interest payments abroad. 104

8. Control on Balance of Payments

The enactment of transfer of technology regimes also account for concern for acute balance of payment difficulties of the host countries. Consequently apart from the provisions on the royalty rates, any other transaction which has an adverse effect on balance of payment or a negative effect on recipient country's foreign trade is not approved. 105 A closely related aspect of foreign exchange savings is the imposition of other financial

101. Ibid p. 116
102. UNCTC, Supra note 16, p. 239.
104. Ibid, p. 141.
105. Cabnellas, Supra note 3, p. 33.
and exchange controls by the developing countries. An inherent policy of a developing country is to impose direct restrictions such as import quotas or import licensing or indirect restrictions such as high duties or specified import charges for non essential goods. Such restrictions are often adopted not only to alleviate an adverse balance of payments but also to encourage the development of local industry. 106

Many developing countries require external financing to regulate local borrowings. The regulation of local borrowings has been because of overcrowding of the local financial institutions by foreign corporations. 107 In Brazilian Law foreign controlled companies are refused domestic loans in periods of balance of payment difficulties. They are also ineligible for credit from official public credit organizations including mixed capital companies, except for the financing of projects of special national interest. Also foreign loans raised by the foreign corporations are subject to the control of Central Bank and are registered in the Registry of Foreign Investment. The interest rates payable to such loans shall not exceed those prevailing in the financial markets of the origin. 108 Similiar restrictions operate in Argentina, Columbia and Chile. 109 In India the express permission of Reserve Bank of India and Capital Controller of India is required for raising

106. See UNCTC, National Regulations, Supra note 16, p. 237.
107. W. Friedmann and R. C. Pugh, Supra note 50, p. 740.
108. UNCTC, National Regulations, Supra note 16 p. 224.
capital from the local market. Foreign loans and loans guaranteed by parent companies abroad require screening and approval by Reserve Bank of India. Interest on capital transferred abroad is taxed at 30% except on loans for the purchase of capital equipment and raw materials which is tax exempt. 110

The foreign investment laws specifically make provisions regarding the capitalization of technology. The question whether technology contribution by the foreign company amounts to capital contribution and thus can be registered as foreign capital has always arisen in foreign investment projects. The transfer of technology statutes also have provisions on this matter. Some countries expressly forbid capitalising intangible assets. Such technology contributions are only entitled to royalties and cannot be registered as capital contribution. Further such royalties are not tax exempted. 111 Argentina provides special procedures for valuating technology contribution as a capital contribution. 112 The valuation of intangible technology for purposes of registration as capital is determined with respect to the execution of the approved project and is carried out by the authority concerned with the approval of the foreign projects. 113 Columbia however, does not allow capitalization of technology. 114 In India the valuation of non cash contribution is made on a case by case basis and is quite liberal for high priority industries, lower foreign equity participation and export industries. 115 On the other hand in Korea the Ministry of

110. Ibid, p.132.
111. Andean Code art. 21; See Radway, Supra note 99, p.29.
113. Chile. Foreign Investment Law (1974) as amended (art.2 & 10), See UNCTC, Supra note 8, p.224.
114. UNCTC, Supra note 16, p.225.
115. Ibid, p.132.
Economic Planning Board authorizes the capitalization of necessary foreign exchange, capital goods, profits and industrial property rights. 116

9. Control over Local content, Employment and Production.

The developing countries have realized the possibility of imparting technical education to local persons as a means of transferring technology. Developing countries have consequently devised what is called as local content policies. Prospective investors are asked to commit themselves to a schedule of increasing the locally produced content of the final product over a stated period of time. Such local content policies are practised in various sectors. This follows the greater effort on the part of developing countries to integrate the activities of the foreign MNC into national development plans and investment programmes. 117

The practice of increasing benefits for the local population is through the promotion of local employment policies by the developing countries either through general labour legislations or through transfer of technology regulations. These legislations provide that the foreign company employ a certain proportion of local labour and other local technical personnel. Secondly, the employment of foreign personnel is controlled so as to restrict the number of expatriate personnel taking jobs in developing countries. 118

116. Ibid. p. 133.
117. Klaus Grehlich, Transnational Enterprises, p. 91.
118. In India e.g., the employment of aliens is subject to the authorization of the R.B.I. The remuneration of these foreign personnel is also limited which must not exceed 11% of the profits. See FERA (1973) S. 30; H.P. Aggarwal, Supra note 18, p. 25.
The Columbian legislation provides that foreign investors should employ at least 90% of ordinary workers and 80% of qualified personnel of Columbian citizens. However, exceptions can be made when foreign employment is deemed indispensable.\(^{119}\)

To boost exports, the developing host countries have imposed conditions of exports by the foreign investor. Export promotion is also sought to be achieved through incentive schemes. The host countries have sought to negate the contracts which impose restrictions on export by subsidiaries. They are either not registered as in the case of Mexico, Brazil or are unable to get the benefits.\(^{120}\) The incentives for export include tax credits, subsidies up to 15% of the fixed capital investment, local government subsidies, liberalized import quotas and priority access to equipment. The Government even allows 100% foreign owned enterprises to operate in highly export-oriented enterprises.\(^{121}\) Similar export incentive schemes are operating in almost all developing countries.\(^{122}\)

Similarly, divestment legislations operate as a measure of control on MNCs. Divestment legislations provide for the progressive transfer of the ownership of shares by foreign controlled enterprises to nationals of the country in which they are located.\(^{123}\) Most of the countries utilize divestment as a means of reducing the foreign control of their domestic

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119. See UNCTC, National Legislations. Supra note 16, p. 6
121. India, Industries (Development and Regulation) Act, 1951 (Schedule A & B); See H.P. Aggarwal, Supra note 18.
122. UNCTC, National Legislations & Regulations. Supra note 16, pp. 120-123.
123. Cynthia Wallace, Supra note 29, p. 244.
Divestment as a controlling technique is frequently utilized by Latin American countries whereby it is a progressive transfer of ownership to the host country nationals. It is all the more favoured to reduce the foreign concentration in the industries of developing countries. The developing countries at the entry point make the policy of divestment known to foreign MNC.\textsuperscript{125} Divestment may be voluntary in as much as the MNC agrees to the terms of divestment at the time of entry. Some countries have divestment legislations, others negotiate for the progressive divestment of the MNCs. In case the MNC does not accept the divestment, the host country resorts to nationalization through appropriate legislation as an ultimate of forced divestment. A special provision for divestment is made in treaties of Friendship, Commerce and Navigation between developed and developing countries.\textsuperscript{126}

In case the negotiations for divestment fail, the foreign corporation bundles out its operations and leaves the host country. In this connection, mention may be made of IBM and Coca Cola, who packed up their operations and left India as they did not yield to Govts. pressure for selling 60\% equity to local investors.\textsuperscript{127} In India under Foreign Exchange Regulations Act (1973) those companies operating before the operation of the Act had to progressively divest their majority

\textsuperscript{124} Ibid
\textsuperscript{125} India, Foreign Exchange Regulations Act, 1973, 3.29
\textsuperscript{126} A. Akinsanya, "International Protection of Foreign Direct Investment in Third World; 6 I.C.L.Q. (1987) 75.
\textsuperscript{127} Cynthia Wallace, Supra note 20, p. 76-77.
Divestment however, is not favourably viewed. Vagts points out that as the operations of MNCs are of a very long range, the host country may not fully realize the advantages through divestment, whether forced or voluntary. The MNC looks for quick returns in such a situation which may be quite exploitative for the host country. Furthermore, it may lead to retaliatory actions from the home countries especially when the divestment is a forced one. 129

Similarly takeover legislations and restrictions are another form of operative controls. The purpose of takeover controls is to limit foreign economic controls. Takeover restrictions are given a special emphasis in the laws of Australia, Canada and Japan. 130 In India for example, permission of R.S.I. has to be sought by resident aliens, non-resident individuals and corporations with more than 40% foreign ownership for acquiring any firm in India or purchasing shares in any Indian Company. 131 In Malaysia separate guidelines have been laid down for mergers and takeovers of existing firms. 132 However, in Korea there are no restrictions for investment in existing firms. 133

130. UNCTC, National Legislations, Supra note 16 p. 2.
132. UNCTC, National Legislations, Supra note 16, p. 129.
133. Ibid, p.131.
With regard to the operative controls it is enough to point out that their importance depends upon their efficiency. The direct controls may sometimes have the effects of resource allocation and thus turn into self defeating controls. 134

10. Control on Restrictive Business Practices

Restrictive clauses in licensing agreements belong to the broader category of restrictive business practices. In general terms, restrictive clauses might be defined as legal provisions which directly or indirectly limit the use of acquired technology in a broader sense i.e. in production, marketing, R and D, etc., thus enabling effective market control by the licensor. The relatively high share of such provisions in contracts covering technology transfer as compared to other business transactions result from the fact that unlike physical goods which are sold, technology transferred by the market transactions is 'rented' and the licensor retains the ownership of knowledge as well as the property rights. 135

These restrictive practices may be included either as part of a patent which is licenced or may otherwise be included in general technology transfer contracts. In the former cases their inclusion is justified by contending that they are necessary to safeguard the industrial property rights of transferors. In the latter they are justified as commercial

134. See Wallace, Supra note 29, p.250.
135. Jerzy Cieslik, Supra note 37, p.415.
decisions accompanying technology transfer. The effect of
these restrictive clauses is two-fold for developing countries.
Firstly, it affects their attempts of technological develop-
ment and secondly, it has an effect on threatening free and
fair competition in market.

It may be pointed out that these restrictions are
prevalent in licensing contracts in developed countries as
well. Nevertheless developed countries have controlled
these restrictions by devising suitable 'anti trust' legisla-
tions. The object of these legislations is to control all
those restrictive practices which hamper the free and fair
competition. The belief in maintaining a competitive economic
environment is that all business enterprises would freely and
fairly compete, thus resulting in an optimal allocation of
resources, lowest possible price and higher quality and material
progress. Following United States, all other developed
countries have passed antitrust legislations to control
practices that have an adverse effect on competition in
their domestic economies.

The laws and regulations of developing countries
have employed chiefly three safeguards against these practices
in licensing arrangements. These are patent laws, antitrust laws.

136. Sigmund Timberg, UNCTAD, International Code on the
Transfer of Technology in I.B.A. Law and Investment in

137. Michiko Ariga, "Restrictive Business Practices and Inter-
national controls on Transfer of Technology" in Parmuiler et al(ed) Controlling International Transfer of Technology,

138. Philipps Brusick, "UN Control of Restrictive Business
and more recently enacted transfer of technology laws. The developing countries as noted previously have modified their patent legislations whereby they have specifically prohibited restrictive practices in patent licensing. The approach followed by developing countries is by describing specific practices as null and void, if they are included in a licensing contract. These practices specifically relate to restrictive clauses with respect to transfer of both patented and non patented goods or products. Some legislations have taken a more general approach whereby any clause in a licensing contract shall be null and void in so far as it imposes on the licensee in industrial or commercial field, restrictions which do not derive from the rights conferred by the relevant industrial property rights.

The developing countries have tried to control the restrictive practices in technology transfer through technology transfer regulations. Specific provisions have been inserted in these regulations whose aim is to control the restrictive business practices in technology transfer contract apart from usual anti-trust legislations. However, certain general trends may be noted down in this regard.


141. See UNCTAD, Control of Restrictive Trade Practices in Transfer of Technology Transactions (UN.OEC.E.82.II.D.8, 1982)
Firstly, the aims of policies relating to restrictive practices vary among different countries. Where as the developed countries have controlled restrictive business practices in transfer of technology contracts by applying the principle of antitrust law, in developing countries the trend has been to make special provisions relating to the control of restrictive business practices in transfer of technology legislations.\textsuperscript{142} The objectives of these special legislations is to negotiate for foreign technology and to impress upon the supplier that there are no limitations for utilizing the technology transferred. In application of these rules more attention is given to technological development of the recipient country than to the possible anti-competitive effects of the restrictive business practice. Its implication is that the developing countries may allow technology contracts even with restrictive practices because of the special need and demand of particular technology.\textsuperscript{143} Furthermore, the rules devised by developing countries are addressed to the content of contractual provisions. They do not require any element of market power to be applicable. They are applicable so long as the technology is foreign and the contracts containing restrictive terms.

In India, for example, approval is refused on all agreements with secrecy clauses, minimum royalties and export restrictions, and continued access to new technology is usually required.\textsuperscript{144}

\textsuperscript{142} Cieslik, Supra note 47, p. 419.
\textsuperscript{143} Cabanellas, Supra note 53, p. 21.
\textsuperscript{144} See India Investment Centre. Investing in India (1987) p. 205.
Secondly, the formulation of provisions on restrictive practices also offer distinctive features. In some cases rules are formulated as outright prohibitions which declare particular provisions unlawful, and a ground for invalidating the agreement which contains such a provision.\textsuperscript{145} In case of developed countries the qualification of practice as a restrictive practice is subject to the principle of 'abuse' or 'rule of reason' test. This difference in approach is also reflected in the negotiations on the code of Conduct discussed in subsequent chapters.\textsuperscript{146}

Finally, the competent authorities are having a considerable discretion while applying these rules. This factor has an important effect on the determination of the content of restrictive business practice in technology contracts. This has led to an element of flexibility in allowing a technology transfer contract with a restrictive practice. In any case the determination by respective authority is of crucial importance for the final formation of the contract and its terms and conditions. Thus at the time of approval and registration it is possible to take into account additional aspects and priorities with regard to some industrial branches.\textsuperscript{146}

The transfer of technology regulations passed by developing countries contain a list of practices which are declared as per-se prohibitions. The contracts


\textsuperscript{146} See Inf r a, Chapter 6.

\textsuperscript{146} Cieslik, Supra note 37, p. 419.
containing these practices may not be approved by the screening authorities. The technology regulations include these restrictions as possible grounds of rejection of an approval of an application. However, the listing is not exhaustive so that the approving authorities may reject a contract on basis of other restrictive conditions as well, if the practice has a negative effect on the interest of transferee. In this case the technological analysis of the restrictive practices is conducted. If it is seen that the practice is likely to affect transferee's bargaining position or local technological development or increase overall burden of the transferee, the contract may not be approved. These prohibitions it may be noted, are not statutory but are derived from the practices of the authorities under the provisions which authorize the rejection of economically inequitable practices. We may discuss some of these practices and the approach of developing countries towards them.

1. Tie-in Clauses

Tie-in or Tying clauses are provisions incorporated in the technology transfer agreements which impose upon the acquiring party the obligation to acquire additional inputs such as raw materials, intermediate products, machinery or additional technology from the supplier or a source designated

147. Mexico, Law on Technology Transfer, (1973) Art. 7
148. Cabanellas, Supra note 43,p.22.
from him, apart from the technology wanted by the recipient. In such circumstances the acquisition of the additional goods is a condition for obtaining the technology itself. Moreover, the tying provision may also concern the obligation of the recipient to use specific personnel designated by the supplier. These clauses increase the cost burdens for the recipients as the supplier or the sources designated by him charge unduly high costs for such additional components.  

The transfer of technology regulations of LDCs prohibit the tying arrangement in the wider interests of the economy as a whole. This is because of the fact that tied clauses seek to establish a relation of dependency of transferee over transferor or other specified sources of inputs and leads to an unjustified control by the transferor, which the developing countries seek to avoid. This seems to be the pervading factor in the enunciation of technology regulations of developing countries in prohibition of tying clauses. Where there are no legislative prohibitions, the restrictive conditions are prohibited by the screening authorities which control the terms of the technology transfer transactions.  

In general national and regional regulations prohibit tying arrangements. It is unlawful to require a patent

149. UNCTAD, Control of Restrictive Business Practices in Transfer of Technology Transactions (UN: 1982)E.82.II.D.8, p.36.

150. Corea, Supra note 32, p.131.
licensee to purchase unpatented material from the licensor. It is also unlawful to prohibit or restrict the right of licensee to acquire or use unpatented material.\textsuperscript{151}

The logic behind such a provision is that the licensee must be free to find the best supplier so that the cost of articles is kept down in public interest. However, in certain circumstances, tied clauses may be permitted if they are necessary in order to perform necessary functioning and proper technical use of the licensed product or process of industrial property right, subject to the condition that the goods are available at international market prices.\textsuperscript{152}

II. Grant Back Clauses

Grant back clauses are prohibited either under direct technology transfer laws or under other regulations. They include contractual provisions whereby the transferee is obligated to disclose new inventions or developments made by him with the technology received from the transferor and clauses requiring the assignment or license of improved know-how by the transferee to transferor.\textsuperscript{153}

The grant back clauses considerably affect the attempts and motivation of the transferee to invest in research and the improvement of technology and technical processes. It also leads to reverse transfer of technology from the transferee to the transferor. Further, these clauses will limit the returns which the transferee will obtain from his


\textsuperscript{152} Anderen Code, art (20)

technical developments and investments. As a result, it tends to increase the technology gap between the transferor and the transferee.\textsuperscript{154}

Under the antitrust laws, non-exclusive and reciprocal grant-back provisions are held valid if they do not have an anticompetitive effect.\textsuperscript{155} Under some of the Latin American technology transfer regulations, grant-back provisions are valid if the assignment in favour of the transferee is not gratuitous but is subject to the payment of a consideration. Secondly, the transfer takes place on the same conditions as that of the original license.\textsuperscript{156} Under Mexican Law, the exchange of information on improvements and innovations, whether reciprocal or non-reciprocal, is not permitted. Any agreement containing such a clause is liable to be rejected. Since the main purpose of the prohibitions is to protect the rights of the transferee, the protection is afforded to all types of inventions made by licensee, even if they are obtained from the technology transferred under the principal licensing contract.\textsuperscript{157}

India, unlike its Latin American counterparts, does not have a technology transfer legislation. However, it seeks to achieve the control on technology transfer through

\begin{itemize}
\item \textsuperscript{154} See UNCTAD, \textit{Control of Restrictive Business Practices in Transfer of Technology Transactions} (UN: 1992) E.82. II. Q.8, p. 28.
\item \textsuperscript{155} UNCTAD, supra note 154, p. 28.
\item \textsuperscript{156} Brazil, \textit{Normative Act} (1987) art. 7.
\item \textsuperscript{157} Mexico, \textit{Law on Technology Transfer} (1977) art. IV.
\end{itemize}
the general guidelines for investors from time to time and general screening. These guidelines are enforced by the Project Approval Board while approving the contract.158

III. Export Restrictions

Most of the technology transfer regulations of developing countries prohibit contractual provisions which limit the right of transferees to export. They are also prohibited under the systems which do not follow the legislative approach. However, these export restrictions may be permitted in case of sales to countries where the transferor is operating himself or where he has granted exclusive licenses for the same technology, or where he has got an industrial property right.159

The transfer of technology regulations regarding the export restrictions lose their importance when the licensor has got an exclusive license in the country which the licensee wishes to export. In other words even if there is an express provision regarding export prohibition, yet the licensor can prohibit the sales of the licensee to those countries by reason of having an exclusive license. However, in such circumstances the licensor and licensee can mutually agree for countries to which the transferees can export and in which the licensor does not have an exclusive licence.160

158. - S. 140. Indian Patents Act (1970) makes it unlawful to insert certain restrictive conditions in patent licences including grant back, except where the condition is necessary for successful operation of the patent. See Narayanan on Patent Law (1975) para 702.
159. See UNCTAD, Supra note 154, p. 45.
160. Ibid, p. 45.
Further, restrictions must also be limited to a reasonable period and a negative list of countries must be disclosed in the collaboration agreement.¹⁶¹

IV. Territorial Field of Use Restrictions and Volume Restrictions.

Field of use restrictions are common in industrial property licenses. Such restrictions restrict the forms in which industrial property right may be used such as arrangements only for production or only for distribution. Conditions concerning the use of that technology acquired may consist of minimum production requirements and or limitations on the maximum output.¹⁶²

A distinction is made between restrictions which flow from industrial property right which are considered valid. Thus field of use restrictions concerning patents are regarded as part of the rights conferred by the industrial property right and are therefore held to be valid. However, in certain countries field of use restrictions are not considered part of the rights conferred by industrial property right and are thus prohibited.¹⁶³

The treatment of volume restrictions in national legislations differs considerably. The legislation of some countries consider volume restrictions as part of the rights conferred by industrial property right and thus valid. The technology transfer regulation may allow a supplier to control or

¹⁶¹ Anand, supra note 139, p. 436.
¹⁶² UNCTAD, supra note 154, p. 6.
to regulate the production or marketing of the recipient to the extent to which it is necessary for the protection of his rights under the act in question. 164

In secret know-how, the field of use, volume or territorial restrictions are prohibited. The reason for such prohibitions is that secret know-how does not confer proprietary rights to the owner of secret know-how. However, some countries prohibit volume restrictions irrespective of whether patents or know-how are involved. 155

V. Management Control.

Transfer of technology regulations include provisions limiting the interference of transferor with the transferee's management of the license either directly or indirectly. The purpose of the limitation is to maintain the transferee's independence, assuring that transfer of technology operations will not be used by transferor to acquire gradually a degree of control over local business contrary to the principles enunciated in the foreign investment legislations of the developing countries. This provision ensures that the foreign investor does not do indirectly what it cannot do directly. 166

The aim of these provisions is to prevent a licensor from imposing the restrictions prohibited generally by technology regulations. For, it is easy for the transferor to

166. Cabanellas, Supra note 43, p. 131. See Seidman, Supra note 41, p. 650.
impose other restrictions in the garb of management restrictions. Given the fact that the overriding objective of the transferor is to control technology, which is inimical to the interests of transferee’s, such provision has become necessary in transfer of technology regulations. 167

It seems that the major concern of the legislations has not been on the effect of the management restrictions on competition, rather is to protect the bargaining position of transferee and to limit foreign control of local business. However, sometimes special provision is made in order to respect the restrictions which flow from industrial right notably patent and trade mark and also the conditions agreed mutually at the time of contract. 168

However, a strict enforcement of such a provision creates many hindrances in case where the transferor transfers both patented and non patented technology and know-how. Further where there is a guarantee agreement between the supplier and the recipient about the working of the plant and the product. In these cases the transferor would like to exercise many management functions for the successful operation of the plant. In such cases it is prudent to allow the transferor to exercise management control till the completion of the project. 169

168. Cabanelias, Supra note 43, p. 131.
VI. Limitations on Licencee's Research and Development

Most of regulations on transfer of technology absolutely prohibit the restrictions on technical investigations or development by the licensee. The licensor would attempt to protect his control over the licensed technology through such a clause in the agreement. Through these clauses the licensor puts restrictions on further research, improvements and adaptations to the technology transferred or relate to research and development of competing technology. These restrictions would entail substantial costs to the receiving country in terms of suppression of technological development from the transferred technology.

In countries where registration is compulsory the inclusion of any term in the contract restricting the research activities by transferees may entail non registration and the consequent effects. In other cases specific provision is made for the training of the nationals in production and management. The guidelines make it incumbent upon the transferor and transferee to make adequate arrangements for research and developments, engineering design, training of technological personnel and other measures for the absorption, adaptation and development of the imported technology. Such measures are designed to be achieved through creation of inhouse facilities in collaboration with recognized


171. Brazil, Normative Act (1975), Art. 2.5; Mexico, Law on Transfer of Technology (1981), Art. 7
These provisions have been compared to the US antitrust provisions. Under the latter direct restrictions on research and development of the transferee shall be deemed unlawful per-se. However, under the antitrust provisions the restrictions may be justified where the industrial property of licensors notably trade mark is used. As to maintain the quality of the goods associated with the trade mark and even the patent, these restrictions may be necessary. Nevertheless since the main consideration of the developing countries is the development of their technology, therefore the tendencies of these countries has been to implement strictly these provisions irrespective of any impact on competition. At the same time to make the provision more meaningful the developing countries in general have not favoured the use of foreign trade marks.

The logic of prohibitions against restrictions on research and adaptation seems to be that these restrictions hinder the attempts of licencees to develop the goods made with the technology involved and the exchange of know-how and expertise. Moreover, these restrictions are contrary to the public policies of the receiving countries and are considered illegal under the general provisions governing contracts.

172 India, Guidelines for Industries (1977) as amended, Para 9(vii).
173 Corea, Supra note 32, p. 131.
174 See Dennis Thompson, "Trade Marks and Developing Countries", 14 J.W.I.L. (1980) p. 87
175 Cabanelles, Supra note 43, p. 124.
The supplier enterprises in order to maintain their competitive advantage usually incorporate in their transfer contracts terms which prohibit the use of competing or alternate technology. These clauses restrict the freedom of technology recipient to enter into arrangements relating to competing or other technologies or products not furnished by the supplier. Direct forms of prohibition on recipients are obligations of not to manufacture or sell competing products. Moreover, the licensor may obligate the recipient not to cooperate with competing enterprises or to pay higher royalties, if he sells or manufactures competing products. 176

Non competition clauses are deemed to be obnoxious by the developing country enterprises as this prevents the indigenous development of technology. 177 Furthermore, the freedom of choice of the enterprises of developing countries to use various alternative technologies is hindered. The acceptance of such a term in contract by the recipient enterprises is resisted, yet given the fact that they are in need of advanced technology, they usually submit to the pressure of the foreign enterprises. 178

These convents have been justified by the transferors on grounds namely; 1) to protect the confidentiality of the know-how; 2) to protect his royalty against the goods produced by using competitive technology and 3) to protect his exclusive

176. UNCTAD, Supra note 154, p.32.
177. Barrett, Supra note 170, p.275.
178. See UNCTAD, Supra note 154, p.32.
license if any. Of course these factors are of genuine concern to the transferor and the transferee. In order to keep best business transactions they strive to keep up the provisions of non disclosure and maintenance of royalty. But given the main concern of technology development of the recipient enterprises, the prominent feature of these restrictions are their gross anticompetitive effects. By restricting the free access to technology markets and other exclusive dealings and tying arrangements they strengthen the dominant position of the licensor in the home and host markets. Furthermore, they prevent the transferee from making a reasonable selection of the appropriate technology and productive technology. 180

The national laws of developing countries in general prohibit such anticompetitive terms in technology licensing contracts. 181 The argentine law would reject the registration of the agreement which contains a clause forbidding the use of competing technology without a just cause. 182 Any agreement which in any manner restricts the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person, is restrictive and is subject to registration under Indian laws on Monopoly. 183 Similarly, under the patent licenses to use the patent or manufacture the article, any covenant restricting the use of other non patented products or goods is illegal. 184

180. Ibid
181. UNCTAD, Supra note 154, p. 32.
183. India, S. 33, Monopolies and Restrictive Trade Practices Act (1969);
184. S. 140 Indian Patents Act (1970)
However, under Mexican Law non competitive clauses may be accepted if the contract involves the permission to use a trade mark that is owned by the licensor. The object of this provision seemingly is to protect the quality of the goods represented by the trade mark. Nevertheless, given the fact that trade marks have a very low rating in the transfer of technology, the propriety of this provision may be questioned. The transferor can maintain the relative quality of the products manufactured under the trade mark by other quality controls rather than by prohibiting competing technology.

VIII. Exclusive dealings

Technology contracts contain covenants requiring licensees to sell the licensed products exclusively. Similarly, the contract may include marketing restrictions, whereby the transferor directs the marketing of goods by the transferee to particular exclusive destinations. The licensor may also direct the licensee to use the former's trademark and prohibit the use of latter's trade mark.

These restrictions tell upon the freedom of licensee to individual decision making in the manufacturing and marketing operations of his products. Similarly, packaging, display and other restrictions contained in the contracts operate to interfere in the production decision and management of local firms.

185. Mexico, Law on Transfer of Technology 1981 (Sec. 8).
187. Ibid, 139.
188. Ibid.
Developing countries have as a matter of public policy made illegal these conditions in technology transfer contracts. These countries have made specific provisions prohibiting any interference by the supplying party into the distribution system of the acquiring party.\textsuperscript{189} The receiving countries have also prohibited provisions which give distribution rights exclusively to supplying party.\textsuperscript{190} Furthermore, the receiving countries have prohibited exclusive sales arrangements with the supplier, if they serve to allocate or monopolize markets.\textsuperscript{191}

There is a general prohibition which maintains that the technology agreement will not be registered if the licensee is required to sell to the licensor or an enterprise designated by licensor all the manufactured products at the price fixed by the licensor.\textsuperscript{192}

In this regard it may be pointed out that the problem with these type of restrictions is its actual operation and effective implementation. For, there is always a possibility that despite the fact that such restrictions are prohibited, in actual practice the receiving enterprise may entrust the publicity and distribution network to the supplier for earning more profits and rewards. This possibility is greater in countries which do not require compulsory registration of technology transfer contracts.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{189} Argentina, Normative Act of 1981, Art. 2.5.5.
\item \textsuperscript{190} Mexico, Law on Transfer of Technology (1977) Art. 7.
\item \textsuperscript{191} Argentina, Law, Supra note 173.
\item \textsuperscript{192} UNCTAD, Control of Restrictive Trade Practices, Supra note 154, p. 42.
\item \textsuperscript{193} Corea, Supra note 32, p. 131.
\end{itemize}
The developing countries have recently focussed their attention to the questions of guarantees/waranties and in particular the performance of the technology transfer contracts in their efforts to improve the terms and conditions of the international transfer of technology. From the point of view of recipients the success of transfer of technology depends upon the degree to which the execution of the contract satisfies the goals that the recipient had in mind at the time of making a contract.\textsuperscript{194}

The need of a warantee/guarantee arises from the fact that the enterprises of developing countries as recipients want to be assured about the nature and quality of the technology they receive. Furthermore, the importance of this provision lies in the fact that the transferred technology should fulfill the contemplated aims and objectives whether in the production of goods or otherwise. Further, the supplier supplies the technology which was agreed upon by him and the recipient. In order therefore that the supplied technology meets certain requirements the regulations of developing countries require a guarantee in the technology contracts from the supplier. The licensor must therefore guarantee that it is the lawful owner of the technology and technology provided is complete, faultless, effective and will be able to achieve the targets specified in the contract.\textsuperscript{195}


\textsuperscript{195} Charles J. Conroy, \textit{Supra note 169}, p. 552.
while such guarantee provisions are not unusual in international business transactions, foreign suppliers tend to define their guarantees/responsibilities according to the circumstances and terms of the contract. In some cases the supplier does not provide a guarantee on the ground that the operation of the transferred technology is not subject to the control of the transferor. Moreover, in case of licensing of patents, trade marks and know-how the supplier would also circumscribe his responsibilities, unlike turnkey projects.\textsuperscript{196}

The legislations and guidelines of developing countries provide for requirements of express guarantee/performance requirements by the transferor. These requirements relate to the quality and effects of imported technology or the liability to third parties for damages derived from its use. Moreover, the screening authorities would not register a technology transfer agreement in absence of a guarantee provision in the technology transfer contracts.\textsuperscript{197} However, these guarantees are only subject to the express provisions in the contract and do not relate to ordinary contract rules. The technology regulations relate to guarantees regarding the technological description of technology transfer contracts.\textsuperscript{198} With respect to these provisions it may be pointed out that even if these provisions are implemented in contracts the supplier binds these guarantees to other accompanying

\begin{itemize}
\item 196. Correa, Supra note 194, p.10-11.
\item 197. Cabanelias, Supra note 43,117, p.26.\textit{Brazilian Normative Act} (1975) Art.3.3; \textit{India Guidelines for Foreign Collaborations} (1977) para 9.
\item 198. Ibid.
\end{itemize}
conditions; namely the type of inputs used and the operating conditions specified by the supplier. Moreover, in case the product or the process turns out to be defective, the liability of the supplier is specified in terms of damages. The monetary damages do not represent in full the value of warranty provision and thus deprive these clauses of an actual effect on supplier's behaviour. Further when the supplier undertakes the technical assistance and training of personnel of purchasers and when the purchaser's personnel is able to operate the plant, the liability is shifted to the recipient coupled with the higher costs of maintenance of the plant according to specifications of the supplier.\textsuperscript{199}

In this regard it is suggested that the best option to bind the supplier would be to determine his responsibility under national law, since it would provide a broadest coverage as regards the amount and type of consequences for which the supplier may be held responsible.\textsuperscript{200}

11. Applicable Law and Settlement of Disputes

In the last decades there has been a dramatic rise in the volume, range and complexity of international business. There has been a sharp increase in trade, manufacturing, transfer of technology and services. Especially, after late 60's the volume of foreign trade of nations has grown at alarming speeds.\textsuperscript{201}

\textsuperscript{199} Ibid.

\textsuperscript{200} Corea, Supra Note 194, p.15.

\textsuperscript{201} Ibid.

The problem with these international commercial contracts is that disputes regarding either the construction of the contract or the rights and duties of the parties occasionally arise. The settlement of these disputes has posed serious problems. The settlement of these commercial disputes has been the subject of concern of many private organizations, especially concerning the disputes between private investors and States. The identification of the applicable law and forum of the settlement of disputes has been a difficult task.

Generally speaking, the licensing agreement or technology transfer agreement provides the framework within which the business relations between the parties to it are to be conducted. The license or the agreement gives the necessary guidance to bring about the fruition of the contractual relations. The contract may specify the machinery for the settlement of disputes, or it may stipulate a solution to be amicably reached on the basis of the terms of the contract or other practical business considerations. In the absence of an amicable solution, recourse may be necessary to external procedures or machinery such as a judicial settlement.

Arbitration is a flexible and an important machinery for the settlement of commercial disputes. As the disputing

202. An international 'Commercial Contract' is a contract where the parties have their place of business in different places, and goods, services or payments have to cross a frontier in order for the contract to be performed. See J. L. Kaul, "Illegal Contracts under Conflict of Laws" 5 Academy Law Review (1981) p. 181.
203. See Nuogogua, Legal Problems of Foreign Investment (1967) Chap. VIII.
parties usually appoint their arbitrators they choose persons who enjoy their confidence. Moreover, persons selected to act as arbitrators are experienced in commercial fields. Thus, they are able to contribute to a fair settlement of disputes requiring expertise. Furthermore, in many cases arbitrators are required to decide a case *a quo et bono* instead of a strict application of the letter of law. This has provided a greater flexibility for settlement of disputes in modern international business transactions. 206

The arbitral tribunal constituted by the parties may be national or international as per the constitution of its membership and its seat. Since most of the developing countries possess a well established national institutional machinery for arbitration, they more often than not have through law or guidelines impressed upon the parties to undertake national arbitration in case of a dispute in technology transfer contracts. Most of these nations have created arbitration boards to which the disputes arising in investment contracts shall be referred. 207 Moreover, arbitration facilities are also provided by various international organizations such as the World Bank and International Chamber of Commerce. Further, there are well known arbitration centres in London, New York, Paris and Malaysia. 208

207. See B.Sen, "Settlement of Disputes Arising out of Investment in Developing Countries" in IBA Law and Investment in Developing Countries (1984) 164.
No doubt many important commercial disputes are settled through arbitration. Yet the main problem with these arbitration tribunals is that the parties should mutually agree upon not only the constitution of the tribunal but also upon the law to be applied and the seat of the tribunals. In this case of course the party autonomy to elect the choice of law and the jurisdiction is still maintained. The parties may choose the municipal law of any State to be the applicable law. However, the choice should not be contrary to public policy or to the law of the State which would otherwise govern the contract. In absence of the choice of parties the ordinary principle of conflict of law is taken into consideration. Under that principle the dispute shall be resolved by the legal system having the closest and most real connection with the contract in question. It is therefore, in the interest of the parties to avoid this uncertainty by making a definite choice of law.

The arbitration clause in a technology licensing agreement may specifically refer to any existing arbitration tribunal and its rules expressly, or it can even be inferred from the terms of the agreements. Where the agreement does not provide an express reference to arbitration law of a country, and if the national law allows, the arbitration can even be conducted under the rules of international commercial convention (e.g. UNCITRAL rules); the rules of arbitration of a designated national or international chamber of commerce or other professional association. The award given by the arbitration tribunal maybe enforced either under the national

209. 16 American Juris. 2d, 260, p. 65.
211. WIPO, Supra note 204, p. 130.
law of the party concerned or it can be enforced under the
UN Convention on the Recognition and Enforcement of
Foreign Arbitral Awards (1958) to which most of the developing
countries are members. Under the convention each country
is required to recognize and enforce awards rendered in terri-
tory of another contracting State. Furthermore, bilateral
agreements between nations have been entered into recognize
foreign awards on par. with local awards. The United
Nations Commission on International Trade Law (UNCITRAL) has
enunciated a model draft law on international commercial
arbitration. This model law is a uniform set of rules for
international arbitration.

The recent data on international licensing contracts
shows that arbitration clauses in these contracts are
becoming quite prevalent. This is due to the fact that
arbitration is a relatively neutral solution. Further it
maintains the confidential nature of the agreement and the
technology, and moreover, sophisticated international
arbitration techniques already exist.

213. See Sat Pal Nalwa, "International Commercial Arbitra-
tion", in I.L.I. Law of International Trade transactions
(1973) p. 164.
214. Ibid 177.
216. See D.R. Christie, "Techniques for Settlement of
Transnational Disputes involving Transfer of Technology"
However, arbitration has some disadvantages for international business relations in some circumstances. For example, arbitration requires the agreement of the parties to arbitrate including the choice of law and choice of jurisdiction clauses. First there may be problems for arriving at unanimous choice of arbitrators. There may also be difficulties about the enforcement of an arbitration award and in particular recognition and enforcement of an award in a country other than the country of arbitration. Further there may be inadequate assets in the forum country available for execution under the award. Finally, the *aequo et bono* approach referred above may be carried too far by the arbitrators.\(^2\)

As an alternative to settlement of disputes by arbitration, proceedings may be instituted before judicial bodies of specified countries. The judicial forum of a country to which all disputes or specific disputes between the parties to technology transfer agreement are to be submitted may be indicated in the license or agreement.\(^2\) Similarly the license may also specify the law applicable in such disputes. However, where the parties have not made an express provisions with respect to either the jurisdiction or the applicable law, it may be determined by the application of the principles of conflict of laws. The most important

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\(^2\) See Ian Baxter, *Supra* note 208 p.543-44.
\(^2\) WIPO, *Supra* note 204, p.139.
principle in such cases being 'substantial and Real Connection.'
Under this principle the legal system with which the contract or license is directly and substantially connected will determine the law applicable. Such a determination is always a question of fact and circumstances and the principle is well established in conflict of law. 219

As a matter of fact the choice of jurisdiction and applicable law has been controversial in transfer of technology agreements. The suppliers of foreign technology have always maintained that jurisdiction and applicable law is a matter to be exclusively determined by the choice of parties to the contract in question. Consequently the parties may even choose forum and applicable law of countries other than the host country of the transferees. The suppliers have more often than not shown a marked preference for jurisdiction and law of a developed country. 220 This has been so because the suppliers feel that their rights and interests will be protected by the laws of the country they have chosen. Further the licensors believe that laws and courts of the developing country would mostly favour the licensees and the public interest of the host countries. 221

On the other hand the developing countries have maintained that public interest is involved in choice of jurisdiction and applicable law and therefore they do not favour jurisdiction and applicable law of foreign countries.

220. Christie, Supra note 216, p.272.
221. Wilner, Supra note 219, p.391.
The reason for such an approach is the scepticism on the part of receiving countries that foreign courts will be reluctant to apply laws and regulations of importing countries. It is a well-known fact that courts of the forum are reluctant to apply foreign law especially when they involve public policies, unfamiliar to them or which are contrary to interests of their countries. Secondly, the forum courts may consider foreign technology transfer regulations contrary to local public order and thus inapplicable by the forum courts. Thirdly, the foreign courts may declare some provisions of the contract void and may treat rest of the contract valid. This may come in conflict with the recipients countries which will treat the whole contract void.\(^{222}\)

The developing countries have made express provisions with regard to the jurisdiction and applicable law in transfer of technology regulations. As a matter of public policy and to protect the interests of local parties the developing countries have prescribed the applicability of the national jurisdiction and national laws of host country to the transfer of technology agreements. These provisions are seen to be an element of control by the developing countries over technology transfer.\(^{223}\)

The provision of some countries state that host country's jurisdiction shall be applicable in all cases relating to technology import agreements\(^{224}\) Other countries require that a clause providing for jurisdiction of the host country be expressly provided in the technology transfer contract. Failing

\(^{222}\) Cabanellas, Supra note 43, p.152.
\(^{223}\) UNCTAD, Supra note
\(^{224}\) Mexico. Law on Technology Transfer(1977) Art.7.
which the technology transfer agreement may not be registered. Some transfer of technology statutes prohibit the inclusion of choice of 'foreign jurisdiction clauses' in technology transfer contracts. In case the parties have made a provision for arbitration, it shall be conducted by local laws of arbitration and procedure of the developing countries. Similarly the technology transfer statutes prohibit clauses which provide for the applicability of foreign law to technology transfer contracts. In essence the approach of developing countries has been to provide for the applicability of national law to transfer contracts. The effect of these provisions is that the registering authorities will not register a contract which contains a clause providing for the choice of foreign law or forum.

Provisions invoking compulsory jurisdiction of the host countries have been criticized on many counts. Some authors maintain that these provisions are contrary to international law as they impair the freedom of parties to choose the law applicable to technology transfer agreements which is recognized by the order-public. Others maintain that the provisions of the developing countries on the applicable law and choice of law is contrary to free international flow of technology and the current and legitimate interests of the transferees. However, in this regard it maybe noted that

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227. Andean Code,Art.51
228. Christie, Supra note 216
there is no proof that such provisions have impeded the free flow of technology. The Latin American States who are the stalwarts in passing technology legislations are still receiving greater amounts of technology from advanced countries. Moreover, such a provision has been existing in several technology importing countries for more than two decades without causing any special difficulty for either the transferor or the transferee.  

It may be noted that the formulation of a composite text on 'applicable law and settlement of disputes' in the draft international Code of Conduct currently being negotiated in UNCTAD has been a formidable task. The developed countries argue that the parties should have the freedom to choose the applicable national law and national forum for disputes. Such a choice is however, subject to the existence of a relationship between the applicable law and the forum chosen, and the parties and their transaction. On the other hand the developing countries contend that matters relating to public policy (Ordre public) and sovereignty, shall only be determined by the courts of the acquiring party and under the national law. The parties may choose the applicable law relating to transactional matters of the technology transfer. However, in no case shall the jurisdiction of the acquiring country be excluded by such a choice.  

The proposed UNCTAD draft Code of Conduct on international transfer of technology reserves the right of the parties to choose the law governing their contractual relationship. However, the choice of law of the parties, it is submitted should not affect the public policy of the importing country. Further, the choice should have an effective and permanent relationship with the transaction. It is clear that such a position is already recognized in international commercial contracts and the conflict of laws. 234

12. **Comparative Evaluation**

It is clear that most of the developing countries have followed a unified approach to the regulation of transfer of technology. It may be seen that three factors have guided the enunciation of this unified approach. First, is that the actual introduction of foreign technology must be controlled. Secondly, the technology transfer agreements must be scrutinized in order to correspond to the actual needs of the host country. Thirdly, foreign equity participation must be limited in order to avoid control over indigenous economy by foreign investors.

However, these regulations must be seen in the light of the objectives in which developing countries have enunciated them. As already noted the aims and objectives of these regulations is to interfere in technology bargains so that the enterprises of LDCs get technology at lesser prices and more

equitable terms. At the same time the regulations should not decrease the inflow of foreign technology. 235

It is an accepted fact that in the initial years of the enunciation of controls, the regulations have affected the inflow of foreign technology. But that does not however, explain the reasons why inflow of capital and technology did not increase when developing countries were following literally open door liberal policies. As UNCTAD has shown that there is no evidence to suggest that foreign technology flows easily and in an increased manner to countries which do not have any laws regulating transfer of technology. 236 If Indian situation is of any guidance, then it cannot be accepted that regulating technology transfer has in any way decreased the amount of flow of the foreign capital and technology to the host country. The Government of India had approved 10,025 collaborations by the end of 1985. 237 Similarly, Brazil, Mexico and Argentina has the largest number of approved agreements despite tighter regulations. 238 Moreover, the substantial effect of these regulations has been that non equity forms of technology transfers have increased. These include technical collaborations, non equity joint ventures and other licensing arrangements. 239

In relation to the costs of technology transfer, the registering authorities have shown a greater flexibility to

235. See UNCTAD. Supra note 92.
analyse each agreement on its own merits. The regulations have established criteria for evaluating technology transfer agreements with a view to determine acceptable payment levels, while taking into consideration the needs of local enterprises. The guiding principle has been an equitable income sharing between the transferor and the transferee. Of course acceptable cost is a relative term and it depends on several factors, namely the nature of technology, the demand of technology, the acceptable profit levels of the supplier. At times it may seem quite difficult to reach a definite conclusion on the nature and character of particular cost. Nevertheless by providing ceilings on royalty rates as percentage of net sales and profit, the regulations have strived to arrive at a reasonable criterion to determine the cost. UNCTAD has adduced evidence to show that the implementation of the regulations have succeeded in reducing the price of technology contracts. For example, in Nigeria it has been estimated that an amount of $33,041,654 was saved in respect of registered agreements out of a total of 231 agreements which were submitted to the national registering office. Similarly, in Mexico an amount of about $60 million has been saved in foreign exchange through screening by Mexican officials. Moreover, more than 50% contracts have been renegotiated after the screening.

A trend in cost saving device for foreign technology has been

242. Grahms, Supra note 10, p. 73.
to discourage payments for patents and trade marks. Furthermore, the information collected on receipts by the US as well the data on transfer of technology payments indicate that growth rate of technology payments has been lower in 80's than 70's. Similarly, regulations regarding intrafirm payments for technology which directly prohibit such payments or subject them to a taxation similar to that in force for repatriated dividends have also affected the remittance of royalties and technical fees.

The legislations of developing countries have made provisions for elimination of restrictive practices in technology transfer contracts. These provisions tend to protect broad interests related to the economic and technological development of the recipient country. They are premised on the existence of a de facto inequality in the bargaining power of the contracting firms. These regulations seek to prevent any practice which even if it does not affect competition establishes a relationship of dependence or unjustified control over the productive technological or marketing activities of the recipient enterprises or otherwise adversely affect the importing country. Thus in this context the concept of restrictive practices includes those practices with possible anti-competitive results but are not limited to them.

243. See UNCTAD, Supra note 33, p.20.
244. Ibid
The regulations of developing countries in regard to restrictive practices are of preventive nature. The administering authorities analyse and condemn the practice before the agreement has entered into force. The evidence from selected developing countries collected by UNCTAD has shown that the administering offices have successfully fulfilled the task of avoiding unreasonable and restrictive terms in technology transfer agreements. It is calculated that these offices have not allowed agreements of longer duration. Nor have they allowed any restriction on the use of transferred technology or information after the expiry of the agreement. Furthermore, all industrial property rights granted to transferee by the licensor are registered in host countries. The licensor is required to give warrantee/performance guarantee for the transferred industrial property right. Where the terms are deemed unreasonable the parties are asked to modify or renegotiate the terms and incorporate the recommendations given by the registering office. 246

In the developing countries' regulations on restrictive business practices two main trends are discernible. In most of the countries some practices are illegal *per se* regardless of their effect on the acquiring party or the country. Other categories of practices are listed and evaluated by the competent agency. Where the practices are listed and are subject to evaluation, it has introduced an element of

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flexibility and discretion in the evaluation. Thus a contract may be allowed despite having a restrictive condition provided the technology is of special interest to the acquiring party. Moreover, lists of practices are in most cases non-exhaustive and are often drafted in wide terms. By doing so they allow the competent bodies to act within a flexible framework. Thus the competent authorities may include any practice which has even not been mentioned in the statute.247

Moreover, the countries following a regulated regime have succeeded in shortening the period of duration of the technology transfer agreements. The maximum duration of agreements which is allowed is 5 years. Renewals have not ordinarily been granted. At the time of renewal, a cost benefit analysis of the agreement in force is conducted in the overall framework of national priorities and the regulations in force.248

The legislations on technology transfer have provided a uniform criterion for screening regardless of the form of technology transfer. Furthermore, the regulations provide a coordinated approach with regard to both foreign investment and technology transfer. The entry control system devised by developing countries represent a national effort to create a climate that protects national interests and reduce risk. Moreover, this is an attempt towards a degree of stabilization of the relevant laws and regulations.249 It is submitted that the

247. See UNCTAD, Supra note 154.
moment there is an understanding between the registering authorities and the suppliers, a set of relatively stable system is likely to emerge.

However, certain points in relation to the application of these controls need to be taken into consideration. In some countries a proper technological and economic evaluation of the agreements is lacking. The screening only proceeds on the examination of the terms of the agreement. Therefore, what is needed is a proper definition and analysis of technologies locally available and those which are to be obtained from foreign sources. In other words the need is for a closer integration of the regulatory scheme into the indigenous system of technological development. 250

Secondly, in some countries a detailed monitoring and follow up is lacking. A detailed monitoring would help in actual evaluation of technological absorption at the time of renewal. It needs an examination of actual practices so that it is possible to detect the impact of legal policies followed in this area. Moreover, an examination of indirect and implicit practices involved in transfer of technology needs to be examined in detail. For example, the technological relations between parent subsidiaries has not been examined in full detail. 251

It may thus be said that a well designated control system can be very effective in achieving the goals of the

250. See UNCTAD. Technology and Development (1986) DOC. UNCTAD/TT/76.

251. Ibid.
national industrialization strategies. These measures which, we have discussed above if properly implemented can be effectively used to control the quality, quantity and timings of a range of foreign technology transmitted to various industries. However, if there is some loss of technology because of the application of these controls, the developing countries should be prepared to accept it as a trade off.252

With specific reference to India, it may be pointed out that

There is no specific and independent legislation or provision for regulating the transfer of technology from abroad. They are largely scattered in number of statutes.253 The regulation of technology transfer follows in the context of regulating foreign investment. Moreover, there are number of committees which are one way or other concerned with the approval of foreign collaborations.254 In the functioning of these committees it has been found that their functions overlap sometimes. Furthermore, it has also been seen that sometimes repetitive imports of technology have occurred because of the ill functioning of the committees.255


254. We have as many as four committees, licensing Committee, Licensing Cum MRTP Committee, Foreign Investment Board, Project Approval Board and Capital Goods Committee, See IIC. Investing in India (1987) p.108-13.

As we have seen that the countries regulating technology transfer through legislations have largely succeeded in keeping down the costs and avoiding other unreasonable conditions in importing technology from abroad. Moreover, providing for clear cut laws helps to avoid uncertainties in the transfer of technology regulations. As it is India shall be continuing the process of import of foreign technology for more time, therefore it is quiet advisable that India passes a comprehensive law which shall incorporate the provisions now scattered in various economic laws to control the transfer of technology. As we have seen that a number of developing countries have passed legislations on technology transfer, it shall be quiet fruitful if India also has a comprehensive legislation on technology transfer, and establish a centralized agency which shall regulate the import of technology from abroad.

In order that there is a specified and an integrated law covering transfer of technology therefore, it is suggested that a uniform legislation for regulating transfer of technology be introduced, which would provide uniform rules for the import of foreign technology. Such a legislation based on provisions which we have discussed above shall provide for compulsory registration of contracts importing foreign technology. It shall also provide for establishment of a Technology Transfer Development Corporation. For, India is at a crucial stage whereby it has to have a highly specialized approach to import of foreign technology. Although Government of India has recently announced a liberalized import policy, it is submitted
that a systematic regulation of technology inflows is still necessary in order to ensure that only extremely desired technology comes to India, and it is imported at reasonable terms and conditions. Furthermore, the regulation is necessary to avoid unnecessary imports or excessive costs. The regulation is necessary to arrive at a proper development of local technological capabilities, which will (a) increase the bargaining power of domestic firms vis-a-vis foreign suppliers and (b) make them more discerning about the import of different elements of a technology package. Thus we submit that even in liberalized atmosphere, regulation is necessary. For this we would like to have a legislation, which would codify the law on technology transfer and which would provide for the establishment of an independent technology Transfer Development Corporation.

Under the new scheme, the charge of approving all technology transfer agreements should rest with the proposed Technology Transfer Development Corporation. The function of the corporation shall be to authorize, approve and register all technology transfer agreements. It shall function as an independent organization with powers to register, monitor the approved agreements and even cancel the contracts already approved if they are not satisfying the national development needs. Moreover, the Corporation can start a technology transfer data bank, which would provide an information to the prospective Indian Buyer.
Furthermore, the corporation shall also have the powers to negotiate directly the transfer of technology agreements with foreign suppliers which can later on be sublicenced to Indian entrepreneurs. That would help in getting foreign technology at reasonable terms.

The Constitution of the Corporation shall be highly specialized unlike some of the present committees which are more bureaucratic rather than specialized. The Corporation shall have powers to formulate its own rules on the development and transfer of technology. It shall have a technological evaluation cell, whose function shall be to examine the technological composition of the proposed technology transfer. At the same time it shall have a research cell, whose job shall be to pick up the technology gaps and suggest measures for technology transfer. Moreover, it can be helpful in increasing the knowledge of the investors about technology available in different sources. Such Corporations are already present in countries who have shown a considerable rate of technical progress.

The existing committees shall be integrated with the corporation. Only those contracts would be entitled to foreign exchange which are registered with the corporation. The Reserve Bank shall only provide foreign exchange if a registration letter is obtained from the Corporation.

Moreover, the provisions of the proposed legislations shall apply to both foreign and local investors who want to transfer technology. As it has been found that at the present moment the drawing of a technology transfer agreement is left
to the parties themselves. The main advantage of the Corporation shall be that it shall be able to decide whether the proposed technology is available in India, and it shall direct the transferee to the relevant source. Or if the technology is available with the corporation the proposed transferee can obtain it from the corporation. In essence the Corporation shall be a centralized institution concerned with the development, transfer and adaptation of the imported technology (The detailed provisions of the proposed bill is appended in Appendix).