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RESTRICTIVE BUSINESS PRACTICES AND NATIONAL REGULATIONS ON TRANSFER OF TECHNOLOGY 1/

by

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1/ The views and opinions expressed in this paper are those of the author and do not necessarily reflect the views of the secretariat of UNIDO.

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RESTRICTIVE BUSINESS PRACTICES AND NATIONAL REGULATIONS ON TRANSFER OF TECHNOLOGY

Introduction

The industrial revolution, which started in England and later on spread to the rest of the European countries, the United States of America and then Japan, created a demand for foods and raw materials required as a result of industrialization and the formation of the new urban centres arising from it.

In this era of rapid industrial growth, our countries took advantage of the opportunities afforded by international trade, and in doing so were assisted to a considerable degree by the economic policy of the focus of power, namely Britain, whose interest in raw materials came to expression through loans, primarily from government to government, which made possible the establishment of infrastructure, promoting the economic development of Latin America and making it possible for our growth to take place at the same rate as that of the focus of power.

In this period, there was nothing surprising about government-to-government loans amounting to an everage of 4 per cent a year of Britain's gross domestic product and, at the beginning of this century, as much as 7 per cent of its annual gross product.

In contrast with these percentages, loans made by the industrialized countries to the developing countries today hardly amount to 1 per cent, and we can see what the limitations to development are.

Latin America's development in accordance with an "outward" growth model based exclusively on the export of raw materials was useful and feasible virtually until the end of the First World War. As a result of the shift of the focus of power from Britain, which had required large amounts of both raw materials and foodstuffs, to the new economic centre, namely the United States of America, which was itself a producer of raw materials, a very important change took place in the demand for our traditional exports. The fact that, beginning in 1914, the first emergency arose and we for the first time realized that this "outward" growth model had a fundamental weakness made Latin Americans feel, if only superficially, that this was not the most advisable path to follow. After the crisis of 1930, which lasted for nearly a decade, came a very important milestone, which made the policy of the most developed Latin American countries, and especially Argentina, Brazil and Chile, change, with the establishment of a particular industrial infrastructure

which Latin American economists referred to as being of the import-substitution type. While import-substitution was intended to avoid balance of payments and income problems, precisely the contrary turned out to be the case since, when in countries which did not yet have basic industries endeavoured to establish their own consumer industries, the import of capital goods, intermediate goods and services was unavoidable.

These imports, especially in respect of intermediate goods supplying factories established in the countries concerned, made it more and more difficult to put a stop to this. Containing imports of intermediate goods was tantamount to totally paralysing industry. For this reason, labour pressure and the social type of policy of Latin American governments prevented this approach from being taken, and we have therefore gone on suffering chronic balance of payments problems.

When new rigidity was introduced into balances of payments, new prohibitions took effect with new import-substitution policies, which reinforced the rigidity of the system and created a dead-end situation when market size was inadequate to achieve import-substitution with respect to durable consumer goods and capital goods, which require extremely large markets.

This situation quickly arose in the Latin American countries and the smaller the market, the more rapidly, making it necessary to seek different routes to economic development. This was the situation when Latin American economists, especially in the 1950s, undoubtedly influenced by the growing success of the European Economic Community, conceived of the establishment of a large common market in Latin America, with the preliminary stage of the Latin American Free Trade Area (LAFTA).

The idea of a Latin American Common Market is a constructive one dedicated to the economic and political viability of our countries.

We cannot turn ourselves into developed, industrialized countries by remaining divided in hermetic compartments in which there is no possibility for accelerated industrial and economic growth. It is expected that in the year 2000, Latin America will have 600 million inhabitants, with an estimated average per capita annual income of 1,000 dollars, so we can visualize a market as large as, or perhaps slightly larger than, the present European Common Market.

In 1960, the Treaty of Montevideo was signed by 11 countries meeting in Montevideo. Article 44 of the Treaty provided that the countries would have achieved integration by 1975 and article 45 specified that the countries would be grouped according to relative development. Instead of seeking integration, LAFTA only promoted trade among the 11 countries, i.e. Mexico, Brazil, Argentina, Uruguay, Chile, Colombia, Peru, Paraguay, Venezuela, Ecuador and Bolivia.

Thus, from the intermediate step taken through LAFTA, it was clearly seen that the theoretical model scheme was not suited to all the countries of the region. In LAFTA, there are three large countries - Argentina, Brazil and Mexico - whose industrial development and the size of their own markets made it possible to take advantage more easily of the benefits afforded by LAFTA.

For the less economically developed countries, on the other hand, gains were insignificant.

If the same procedures were continued with, the result would be exactly the opposite of that which the creators of the Latin American Common Market had wished to achieve. Therefore, other means, which might be much more useful, were sought and two new approaches by which countries could seek their own solutions in our region emerged. One of these was the Central American Common Market, which until recently was outstandingly successful, and the other project is the Andean Market.

In 1964, the plenipotentiaries of Peru, Ecuador, Colombia, Chile and Bolivia met at Punta del Este and agreed to accelerate the process of Latin American integration.

On the basis of the Treaty of Montevideo and the agreements concluded at the Punta del Este meeting, the representatives of the five countries at a similar level of development met in Colombia to establish the subregion with a view to accelerating the integration process by setting up the Andean Group with its headquarters in Peru. In 1971, after a number of preliminary meetings, the regime governing foreign capital, trademarks, patents, licences and royalties proposed by the Andean Group was adopted.

INDUSTRIAL PROPERTY AND TRANSFER OF TECHNOLOGY

The proposed statute provides the member countries with a machinery enabling them to evaluate true technological contributions, estimated profits, the price of products in which a technique is incorporated and other relevant factors.

MINIMUM REQUIREMENTS WHICH TRANSFER OF TECHNOLOGY CONTRACTS SHOULD FULFIL

Contracts for the import of technology should contain at least clauses on the following:

(a) Identification of the forms in which the technology will be transferred;

(b) The contractual value of each of the elements entering into the total value of the licence;

(c) Determination of the period of validity.

RESTRICTIONS WHICH TRANSFER OF TECHNOLOGY CONTRACTS SHOULD NOT CONTAIN

(1) Obligation for the grantee to acquire capital goods, intermediate products or raw materials from a specific source or to employ personnel of the supplier of technology;

(2) Clauses authorizing the grantor to fix sale or resale prices for the products for which the grantee has acquired technology;

(3) Clauses prohibiting the use of competitive technologies;

(4) Clauses compelling the grantee to hand over inventions or improvements achieved as a consequence of the licence;

(5) Clauses giving the grantor a purchase option;

(6) Clauses containing restrictions on the volume or structure of production;

(7) Clauses imposing royalties for patents or trademarks not used.

We must take into account the fact that intangible technological contributions bestow a right to the payment of royalties, but when these contributions are made to a foreign enterprise by its parent firm or by another subsidiary of the same parent firm, no payment of royalties will be authorized, nor will any deduction in this respect be permitted for tax purposes. In addition, clauses related to investment or the transfer of technology which remove possible conflicts or disputes from the national jurisdiction and competence of the recipient country or which permit the subrogation by States of the rights and actions of their national investors will not be accepted.

In Peru, clauses prohibiting or limiting export to other countries are also not accepted, and this is considered very important because it increases potential exports and consequently can mean an increase in foreign exchange for the country.

TECHNOLOGY LICENSING CONTRACTS AND NEGOTIATING POWER

The weak negotiating position of the poor countries is basically reflected in the price they pay in respect of royalties and technical assistance. Therefore, we must analyse quite closely the reputed situation of dependence which arises when a developing country is compelled to import a very high percentage of the technologies required to keep the production processes which constitute the source of its own wealth operating.

This scientific and technological dependence is a consequence of the poor countries' inability to develop their own technology, which makes it necessary for them to have recourse to foreign technologies in order to promote their own development.

This dependence manifests itself in two main ways: on the one hand, through the growing share of foreign payments for new technology and, on the other, through the weak negotiating position with respect to rich countries in matters of science and technology. This weak negotiating position of the developing countries is due primarily to the following:

(a) The divorce between the basic research institutes and institutes carrying out research oriented towards the needs of the production sector;

(b) The absence of capacity and machinery for both the generation and dissemination of information owing to unawareness at both the political and enterprise levels of the importance of science and technology in industrial development and the existence of cultural and social values which do not confer as much importance on scientific activities as on cultivation of the humanities, law, records, etc.;

(c) A productive system composed, on the one hand, by a traditional sector based on artisanal technologies of the pre-capitalist type, characterized by little or no division of labour and scant capital, tending to discourage technological innovation, and on the other one, by a modern sector largely in the hands of foreign investment, which entrusts to the efforts of the parent firm the technological developments for its production processes and the development of new products.

ACTION TAKEN BY THE GOVERNMENT

(a) In accordance with sectoral laws, research and technological development in the country must be oriented towards meeting industrial requirements, taking into account economic and social development plans, this research being controlled by the State. In some cases, the research may be carried out by the enterprise itself, with

advance approval by the competent authority, and in others the enterprises contribute directly to the State.

This refers to the 2 per cent of net income which the respective sectoral laws require to be paid when enterprises are authorized to carry out research and the relevant studies.

(b) Issuance of Decree Laws Nos. 18900 and 18999, under which the country will not allow transfer of technology contracts which contain restrictive clauses, and therefore does not authorize remittances abroad in respect of such contracts.

CRITERIA USED BY ONC TO EVALUATE RESTRICTIVE CLAUSES IN TRANSFER OF TECHNOLOGY CONTRACTS

In a developing country like Peru, it is necessary to import technology in order to ensure economic progress, and the more so the more the process is to be accelerated. Even when the country has achieved a certain level of development of its own technology, import of technology cannot be avoided, nor would this be advisable under any circumstances. In view of this situation, it is well to be informed of the factors involved in transfer of technology and the conditions under which the country can guide this process in the way which is most advantageous for its economy.

Transfers can be made either directly or indirectly. The former type of transfer consists of negotiations by a domestic enterprise with one or more sources of foreign technology, the seller or sellers of the individual components in the technological package being freely chosen.

An indirect transfer takes place when a foreign organization is interposed as an intermediary in the selection, contracting and administration of the various elements involved in the operation.

It should be pointed out that the study prepared on transfer of technology contracts registered with ONC shows that the elements composing negotiation packages are as follows:

(a) Technical and economic feasibility studies;
(b) Search for and selection of the most appropriate technology;
(c) Plant design and selection of equipment;
(d) Supply of process technology;
(e) Installation of the plant;
(f) Starting up of production;
(g) Organisation and administration of production;
(h) Organisation and administration of markets;
(i) Improvement in process efficiency.

This list could be expanded to include other less important services which enter into this type of agreement.

What should be stressed is that the country can reduce the purchase of all these elements through the development of a system of industrial research and technology, up to the point where only process technology itself remains. The necessity to include these other elements arises out of what is referred to as "the inability of the developing countries to use technological know-how" and also the distinction made by the developed countries between general technology and the specific technology of know-how.

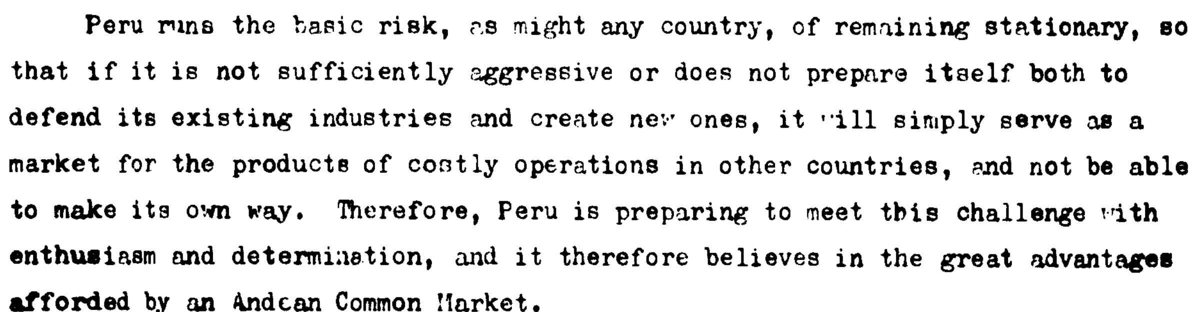
There are three basic criteria:

(1) The legal criterion, according to which clauses must be in keeping with the regulations obtaining in the country, in other words they must conform to Decree Law No. 18900;

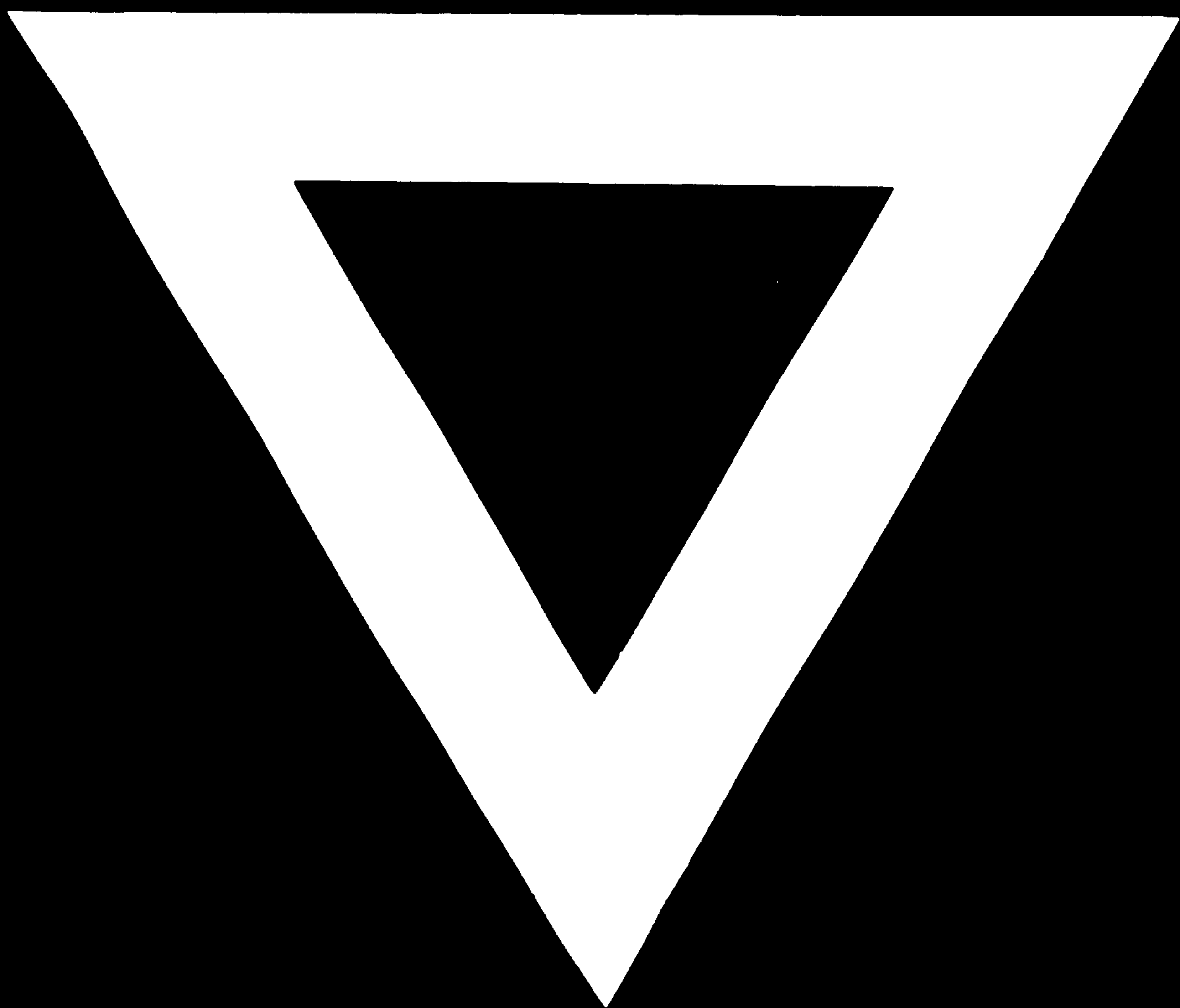
(2) The technical criterion. Under article 18 of Decree Law No. 18900, every transfer of technology contract, in order to receive the approval of ONC, must make an effective contribution to on-going and self-sustained industrial development. For this purpose, the clauses should be such that the actual transfer of technology is reflected in enterprise productivity, and consequently in a lowering of costs and upgrading of labour, and should, in accordance with our Government's principles, make possible the establishment of an indigenous technology in the country.

This does not mean that foreign technology will not be used, but rather that it will be used as a catalyst to bring about the making of innovations and establishment of indigenous technology in the country and in the Andean Group.

(3) The economic criterion. Evaluation of effects on the balance of payment, demand for new products, comparative costs, etc.



Peru runs the basic risk, as might any country, of remaining stationary, so that if it is not sufficiently aggressive or does not prepare itself both to defend its existing industries and create new ones, it will simply serve as a market for the products of costly operations in other countries, and not be able to make its own way. Therefore, Peru is preparing to meet this challenge with enthusiasm and determination, and it therefore believes in the great advantages afforded by an Andean Common Market.



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