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REGULATIONS AND JURISPRUDENCE ON
TECHNOLOGY TRANSFER

by

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I. HISTORICAL BACKGROUND

Technology transfer in the Philippines dates to its colonial past. Prior to the said period, it had trade relations with its neighboring countries such as China and said trade inevitably included technology. Under the Spanish colonial rule which lasted for more than three hundred years, Spanish investors and neighboring traders brought technology into the country. Thereafter, under American rule, technology came in as part of foreign investment. Foreign investment in the Philippines was estimated to amount to \$100 million in 1914, \$300 million in 1930, \$315 million in 1935 and \$420 million before the outbreak of World War II. American investments accounted for 61% and the rest shared by Chinese, Spanish (10% each), British (9%) and Japanese (8%) and other nationalities.^{1/} The colonial rule brought in technologies which are relevant to plantations and extractive industries. Although there were laws limiting equity holdings of foreigners in the exploitation of natural resources, said limitation did not apply to Americans who were treated as Philippine nationals up until the termination of the Laurel-Langley Agreement in 1974.

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^{1/}Today, American investment is estimated at approximately \$3 billion and is approximately 57% of total foreign investments. In 1970, it was 87% of total foreign investments.

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During the colonial period, limited technology was brought in the manufacturing sector. The country was predominantly a raw material supplier. During the Second World War, in the absence of a number of imported products, indigenous technology was given more importance. This quest for indigenous technology was aborted when the war ended and imports freely entered the country. Shortly, after the Second World War, when the Philippines was given independence by the U.S. in 1946, the need for economic self-sufficiency prompted its policy makers to give incentives to those venturing in new industries. In the New and Necessary Industries Act ^{2/}, exemption from internal revenue taxes was granted to those industries which were new. The question of necessity was vaguely defined. Packaging and assembly type operations being the easiest to set up, a number of industries along this line was encouraged by the incentives under the aforesaid law. In effect, foreign investors brought in minimum technology in setting up new industries.

In keeping with mandate of the 1935 Constitution to promote scientific research and invention, Republic Act 165 and Republic Act 166 were enacted on June 20, 1947 for the establishment of an independent patent system.

The lack of direction in industrialization policies after the New and Necessary Industries Act ^{3/} and the Basic Industries Act ^{4/} prompted the policy makers to create the Board of Investments in 1967. ^{5/} While the government in the past has left the investor by

^{2/} Republic Act No. 35 (September 30, 1946).

^{3/} ibid.

^{4/} Republic Act No. 3127 (June 11, 1961).

^{5/} Republic Act No. 5186 (September 16, 1967), as amended by Executive Order No. 226 (July 17, 1987).

itself to decide what activity to undertake, the government has now acted as a catalyst to channel investments in desirable areas taking into consideration national priorities. With the passage of the Investment Incentives Act in 1967, the Board of Investments (BOI) was vested with planning and implementing powers in relation to the identification of industries that should be encouraged with incentives. These investment areas are listed in what are called priorities plans which the BOI prepares on an annual basis. Incentives are granted to investors who venture in these areas. One of the criteria for listing as a pioneer industry deserving of incentives is the usage of new technology to produce a new product in the Philippines or the adoption of a process which is new and untried in the Philippines provided that the final product will involve substantial use and processing of domestic raw materials, whenever available. A major part of evaluation procedure in determining viability of projects for BOI registration for incentive availment is therefore the technology aspect. Hence, BOI has denied projects for use of technology which is not proven or has conditioned approval of projects on the submission of a foreign technology tie-up where local technology is not available. Also, projects registered with the BOI can freely bring in the needed foreign technicians. The BOI incentives also accrue to importation of capital equipment, in most cases, bringing in with such import the technology for the project. Foreign equity in lieu of foreign exchange remittances may partake of knowhow in which event the BOI and the Central Bank assign the value to such knowhow after due appraisal.

In the past, a foreign company which invests in the Philippines was supposed to bring in the necessary technology for the project. The foreign

investor did not value the technology if after all it were a branch or wholly-owned subsidiary since the company profits were all remittable to the foreign investor. Industrial property laws, joint venture arrangements, tax and foreign exchange regulations, however, prompted most companies to put up a value to technology they bring in apart from their equity investment. Thus, licensing agreements covering patents, trademarks and knowhow became a common arrangement not only between two (2) parties which have no relation to one another but also between subsidiaries and mother companies. There are also other modes of transfer of technology, such as equipment supply contracts and technical service contracts or use of foreign technicians, however, the most common mode of technology transfer which has attracted government regulations is the subject of licensing agreements of patents, knowhow and trademarks.

In 1970, a study was conducted by a team of researchers under the supervision of then Secretary of Finance Cesar Virata, on foreign technical collaboration agreements in the Philippine industry. The study consisted of a survey of corporations such as branch offices and subsidiaries, Philippine owned corporations and joint ventures which have entered into foreign technical collaboration agreements. Essentially, this research study on the nature and extent of foreign technology acquisition by Philippine industry put to light the lack of a regulatory body that would screen foreign technical collaboration agreements as to the reasonableness of the costs, whether direct or indirect, attendant with the technology transfer as well as with regard the restrictive implications of certain business provisions. It was suggested that the powers of the Central Bank over foreign exchange remittances be used as a temporary regulatory

mechanism, and that licensing agreements be registered with the Central Bank using as sanction its monetary control powers.

On December 1, 1973, the Monetary Board promulgated Circular 393 entitled "Regulations Governing Royalties/Rentals". This Circular permits full remittance of foreign exchange payments, net of taxes for royalties, rentals and fees due to foreign licensors for transfer of technology or for the use of patents, trademarks and copyrights through licensing and technical service agreements, provided the agreement does not go beyond five years, the royalties do not go beyond 5% of net sales and that there are no restrictive business practice clauses in the contract. These guidelines were, however, given flexibility by an escape clause which allowed for exemption from these requirements depending on the merits of a particular project. There must be sufficient justifications, based on an overall assessment of the project, to warrant exemptions. Further, Circular 393 provided for consultation with the Board of Investments. This Circular consequently expanded BOI's role in the screening of licensing agreements. While before, BOI had jurisdiction only over projects registered with it, the Circular allowed it to cover even projects not registered with it, upon referral from the Central Bank.

The development of foreign technology regulation in the Philippines was therefore initially monetary in approach, the direction being essentially geared towards the control of excessive foreign exchange remittances. This approach was subsequently found to be too narrow and limited in scope and as such unresponsive to what should be the more important objective of importation of appropriate technology towards greater technological dependence. Since Central Bank's concern was the

solution of the country's foreign exchange problems, measures adopted were therefore basically geared towards this problem. Clearcut problems in respect of the very basic issue of need and appropriateness of technology in the light of national objectives of industrialization and development as well as for the control of restrictive business practices were lacking.

This new awareness made evident the need for adopting a more comprehensive set of policies as well as a well-defined institutional machinery that will formulate and execute technology policies in the light of national development objectives and programs. After a prolonged discussion on the appropriate machinery to undertake the screening of imported technology, the creation of a Technology Transfer Board, an inter-agency body composed of representatives from the Ministry of Industry, Board of Investments, Central Bank of the Philippines, Philippine Patent Office, National Economic and Development Authority, National Science Development Board and the Technology Resource Center was finally decided with the passage of Presidential Decree No. 1520 in 1978.^{6/} It is a policy-formulating and policy-implementing body that has been tasked with the important responsibility of efficiently and effectively regulating the acquisition of foreign technology. The inter-agency composition strengthens the coordinative function of the Board as a focal point of all governmental activities related to technology transfer. Indeed, the creation of this body was a positive step towards the achievement of a comprehensive and integrated perspective over the various issues attendant to the import of foreign technology. In 1987, this Office became part of the Bureau of Patents, Trademarks and Technology Transfer without the inter-agency Board.

^{6/} Presidential Decree No. 1520 is an amendment of the Charter of the Ministry of Industry. It repealed Section 34 of the Patent Law, as amended by Presidential Decree No. 1263 relative to voluntary licensing agreements.

II. THE NEW CONSTITUTION AND THE CHARTER OF THE DEPARTMENT OF TRADE AND INDUSTRY

New rules on both foreign investments and technology transfer have been adopted by the two-year old new Government. Upon the assumption of the new Government, there was a need to come up with new structures and reinforce existing ones.

A. New Constitution

In February 1987, the Philippines adopted a new Constitution which for the first time made reference to technology and investments. The present Constitution recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.^{7/} It also provides that the State shall regulate investments in accordance with national goals and objectives.^{8/}

In the exploitation of natural resources, the new Constitution provides that the exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other

^{7/} Article I, Section 20 of the 1987 Constitution.

^{8/} Article XII, Section 10 of the 1987 Constitution.

than the development of water power, beneficial use may be the measure and limit of the grant.^{9/}

The Constitution further provides that the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone shall be reserved exclusively to Filipino citizens.^{10/}

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays and lagoons.^{11/}

The President is authorized to enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use local scientific and technical resources.^{12/}

Under the new Constitution, the Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or

^{9/} Article XII, Section 2 of the 1987 Constitution.

^{10/} Ibid.

^{11/} Ibid.

^{12/} Ibid.

such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos. In the grant of rights, privileges, and concessions covering the national economy and patrimony, preference to qualified Filipinos shall be given.^{13/}

With respect to technology, the Constitution provides that:

1. The State shall encourage appropriate technology and regulate its transfer for the national benefit.^{14/}
2. The State shall regulate the transfer and promote the adaptation of technology from all sources for the national benefit. It shall encourage the widest participation of private groups, local governments, and community-based organizations in the generation and utilization of science and technology.^{15/}
3. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.^{16/}

^{13/} Article XII, Section 10 of the 1987 Constitution.

^{14/} Article XII, Section 14 of the 1987 Constitution.

^{15/} Article XIV, Section 12 of the 1987 Constitution.

^{16/} Article XIV, Section 13 of the 1987 Constitution.

B. New DTI Charter

Under the new Department of Trade and Industry (DTI) Charter ^{17/}, it is provided that the Department shall:

"Formulate and administer policies and guidelines for the investment priorities plan and the delivery of investment incentives;

Assist the investment one-stop action center in pursuing the latter's objective of providing under one roof all investment assistance services of the government, in accordance with established policies and guidelines;

Formulate the appropriate mechanics to guide and manage the transfer of appropriate industrial technology in the country;

Formulate and implement regulations for the protection of industrial property rights and in particular, patents and trademarks."

The above functions are implemented by two agencies: the Board of Investments and the Bureau of Patents, Trademarks and Technology Transfer.

III. FOREIGN INVESTMENTS

A. Investment without Incentives

Foreign investment regulations in the Philippines may be categorized into two groups. The first group consists of limitations on foreign investments. In the Philippines this group consists of a series of laws and constitutional provisions at the early part of century which limited investments in various business activities such as exploitation of natural resources, operation of public utilities, banking, retail trade, mass media and rural banking to Filipinos or 60% Filipino-owned companies with respect to the first 3 examples and 100% Filipino-owned companies in retail trade,

^{17/} Executive Order No. 133 (February 27, 1987), as amended by Executive Order Nos. 242 and 242-A (July, 1987).

mass media and rural banking. (See Annex "A" - Table on Nationalization Laws). Included also in this category is the 1968 Foreign Investment Law which is now Book Two of the Omnibus Investment Code of 1987 (E.O. 226) which requires registration of foreign investments and approval and registration by the Board of Investments of foreign investments, except in the banking sector.

Specifically the Omnibus Investment Code (Book Two) provides that no alien or "business organization formed, organized, chartered or existing under any laws other than those of the Philippines or which is not a Philippine national, or more than forty per cent of the outstanding capital of which is owned or controlled by aliens shall do business or engage in any economic activity in the Philippines, or be registered, licensed or permitted by the Securities & Exchange Commission or by any other bureau, office, agency, political subdivision or instrumentality of the government, to do business, or engage in any economic activity in the Philippines, without first securing a written certificate from the BOI."

Three types of corporations/enterprises are, therefore, covered by the above provision: 1) associations/corporations organized abroad; 2) domestic corporations, more than 40% of outstanding capital of which is owned by aliens; and 3) non-Philippine national, i.e. more than 40% voting equity is owned by aliens.

The third category should be related to the definition of a Philippine national under Book One of the Omnibus Investment Code which provides that:

"Philippine national shall mean a citizen of the Philippines; or a partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty per cent of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee Philippine national and at least sixty per cent of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stock in a registered enterprise, at least sixty per cent of the capital stock outstanding and entitled to vote of both corporations must be owned and held by the citizens of the Philippines and at least sixty per cent of the members of the Board of Directors of both corporations must be citizens of the Philippines in order that the corporation shall be considered a Philippine national."

There are five criteria set forth in Book Two of the Omnibus Investment Code which determine whether a certificate of authority to do business may be issued to an applicant.

1. Operation or activity is not inconsistent with the Investment Priorities Plan (IPP)^{18/}

As a general rule, when an area is already listed in the IPP as non-pioneer, the area is no longer open for alien entry. However, in pioneer areas or export activities, the citizenship requirement is temporarily lifted to allow alien entry.

^{18/} The Investment Priorities Plan lists the specific activities and generic categories of economic activities wherein investments are to be encouraged. The Plan is prepared by the Board and approved by the President.

2. The business or economic activity will contribute to the sound and balanced development of the national economy on a self-sustaining basis

This criterion is the most subjective of the criteria for the grant of license and gives the Board a wide discretion in its exercise. Surprisingly, it is one of the least used reasons for denying an application. It has been used as basis in denying applications for repacking businesses, junk shops, motel business, distillery business, Chinese pharmaceuticals, chemicals and cosmetics.

3. Activity will not conflict with Constitution and Laws of the Philippines

Applications for licensing under Book Two of the Omnibus Investment Code have been denied in the retail trade area, financing, and exploitation of natural resources.

4. The business or economic activity is not one adequately exploited by Philippine nationals

This criterion has been most often used as basis for denial of an application. Since quantitative studies are the basis for rulings in this area, the Board has less flexibility in the application of this condition. As a general rule, however, investments in the food industry and the actual manufacture of pharmaceuticals would be allowed.

Areas declared adequately exploited, particularly in the Manila area and suburbs were: wholesale of general merchandise; assembly of transistors, television sets, radio-phonos; appliance business; repair of electrical appliances; general bonded warehouse; floor wax manufacture; travel agency; insurance agencies; dressmaking; phono records; manufacture of T-shirts; ladies jeans, ladies blouses, sweaters, stockings; and undergarments; restaurant business; hardware; printing of labels on cotton bags;

wholesale of hemp and copra; ship brokers; importing various products; etc. all for the domestic market.

5. Entry of the applicant will not pose a clear and present danger of promoting monopolies or combination in restraint of trade

This last criterion has not been used to deny any application with the BOI for licensing. On the other hand, due to the fear of monopoly in a particular area by an alien firm, the Board has authorized the entry of another alien firm which will provide a healthy competition as well as export its products abroad.

Additional Guidelines -

The BOI has adopted additional guidelines for branches and subsidiaries, to wit:

- "1. No further approvals shall be made of applications filed by foreign nationals for authority to establish liaison offices; instead, such applications may, if properly amended and if the applicants are qualified, be considered either for setting up branch offices or representative offices both of which once granted a certificate of authority by the Board of Investments would be registrable with the Securities and Exchange Commission.

A representative office may be established by foreign manufacturing firms, but not by foreign trading firms except as provided for in Guideline No. 2(a). For this purpose, an office with not more than ten (10) personnel of which not more than two (2) may be expatriate (including management trainees from the foreign firms) would qualify as a representative office. An office with more than the above personnel would be considered a branch or subsidiary, as the case may be.

2. In the evaluation of applications for authority to undertake trading business activities, the following guidelines in addition to the criteria set forth in Section 4 of the aforesaid law, as well as the regulations promulgated thereunder, would be considered:

a) For the business of exporting from the Philippines, a branch office, a representative office or a domestic corporation (as subsidiary) may be allowed subject to the five criteria prescribed and the specific need therefor. Adequacy of exploitation of this business activity by Philippine nationals with respect to both the production and foreign sale of specific Philippine export products would be the principal criterion in processing the application filed for this activity.

b) Where the business activity applied for is principally the importation of consumer goods, no further approvals of either (1) new firms or (2) of additional lines by existing firms may be allowed, except in cases where the activity involves specific products considered desirable by the Board of Investments after consultation with other government agencies and which are not yet being imported in commercial quantities or produced locally. In the event that such exceptions are authorized, importation of said products shall be allowed only upon specific recommendation of the BOI and in accordance with existing Central Bank policies.

c) No importation of raw materials (commodities, industrial inputs and intermediates) may, as a rule, be allowed directly or indirectly. Although a representative office may be established, it cannot engage in the importation of raw materials, supplies and other producer inputs, except through Filipino firms.

d) Representative offices, branch offices or subsidiaries of manufacturing firms may be allowed to import essential capital equipment, manufactured by their principals including the necessary spare parts thereof provided there is no existing Filipino distributor, and provided, further, that such importation are in accordance with existing Central Bank policies.

3. The application of any foreign national for authority to establish a representative office, branch office or subsidiary office for technical, financial and other non-export-import services may be approved only if there is a specific need for the particular service offered, taking into account similar, allied and/or substitutable services already being offered by existing Filipino-owned or financial firms in the country; and in cases where the financial services offered are in the nature of financial intermediation, approvals shall additionally be subject to existing Central Bank policies.

4. For a new business of manufacturing within the Philippines, a branch office or a domestic corporation (as subsidiary if not eligible to register under Book One) may be allowed subject to the five (5) criteria prescribed and specific need therefor. Adequacy of exploitation of this business activity by the Philippine nationals with respect to both the production sale of specific Philippine products would be the principal criterion in considering the application filed for this activity."

Conditions for the Grant of License

The BOI in certain cases provides for specific conditions for the issuance of a license. Thus, an export oriented venture, will be subject to the specific condition to export. In addition to these specific conditions, and to the requirements of the Corporation Law, Book Two requires a number of conditions such as: the appointment of an agent in the Philippines who is a citizen of the Philippines and of good moral character; the bringing in of assets; the setting of an office; the keeping of books of account; proof of reciprocity; and priority of resident creditors in the disposition of the assets of the firm in the Philippines.

Expansion of Business Activity

The implementing rules of Book Two provide that a business expansion may be in the same line of business, in which such enterprise has actually been engaged; in which case, if the expansion will not entail additional equity investments, there would be no need for securing BOI approval. However, if the extension will be financed by additional alien investment, the rules on permitted (Art. 67 of Book Two) and permissible (Art. 68 of Book Two) investments should apply.

On the other hand, if the enterprise expands to an allied line or sets up a new venture not covered by his municipal license, prior Board authorization will be secured and the five criteria on licensing previously discussed should be applied, even if such activity is within the corporate purposes appearing in the articles of incorporation of the enterprise.

Advance Authority

One of the criticisms against the requirement of BOI approval is the administrative difficulty of keeping abreast with stock transfers of those shares listed in the stock exchanges. Under the Rules, the BOI, on case to case basis, may issue an advance authority to allow investments in certain areas up to the maximum permitted by the Constitution and existing nationalization laws, if any, for alien investments in excess of 40%. Thus, mining shares traded in the stock exchanges have advance authority to trade their shares up to the maximum of 40% allowable by the Constitution.

Publication

Publication of notice of BOI action on any application is required.

Some BOI Rulings

1. Forced Heir Rule

For aliens who are presently engaged in a business which may be already adequately exploited by Philippine nationals, the BOI, for humanitarian reasons, allows a forced heir to continue the business of a deceased alien if the Board finds that such heir has no other means of livelihood. In such cases, other forced heirs should waive their rights in favor of only one heir. Once transferred to a successor-in-interest, the business can no longer be transferred to another heir since sufficient time has already been given to such alien to liquidate and engage in a more desirable venture.

2. Transfer of Location

As a rule, the transfer of location with a change in business activity from an overcrowded business to another overcrowded activity, would involve a determination of whether the business activity desired is not overcrowded in the particular area to which transfer is sought. In addition to the aforesaid objective test, BOI considers humanitarian reasons to allow an applicant to transfer to another locality with a change in business activity.

3. Opening of Branches

To prevent the proliferation of branch offices as a circumvention of the law barring alien entry in a particularly overcrowded area, the Board has ruled that opening of branches in another municipality would be considered new business subject to BOI approval.

4. Backward Integration

To encourage backward integration of certain business activities, the Board has ruled that BOI licensing will not be necessary if the intended production will only be limited to supplying the raw material needs of an already existing business venture, although there may be existing facilities to supply such raw materials. In fact, this would be merely an expansion in the same line and if no additional alien equity will be involved, BOI's permission will not be necessary.

5. Merging of Activities

Where activities of two separate corporations are placed under one corporate roof without dissolving the other corporation, the license is issued subject to the condition that the other corporation engaged in an overcrowded business activity will not be reactivated.

B. Investment with Incentives

The second group are better known as investment incentive laws.

On July 16, 1987, a significant milestone in business history occurred with the signing of the Omnibus Investments Code of 1987. The Code is an expression of the desire of Government to encourage investments in desirable business activities which would help accelerate the economic development of the country. It specifically recognizes the private sector as the prime mover for economic growth. It stresses that the private initiative is to be encouraged, with deregulation and self-regulation of business activities to be generally adopted where dictated by urgent social concerns. It affirms the position of Government that the State shall principally play a supportive role rather than a competitive one, providing the framework, the climate and the incentives within which business activity is to take place.

The Code essentially puts into one document the following: (1) investments with incentives; (2) foreign investments without incentives; (3) incentives to multinational companies establishing regional or area headquarters in the Philippines; (4) incentives to multinational companies establishing regional warehouses; (5) special investor's resident visa; and (6) incentives to export processing zone enterprises. All of these used to be found in various legislations and an investor would have to look into the scattered laws to find out where such investor should fall. The first objective therefore of the Code is the ease of looking into these various laws into one document.

The second objective is the increase in the flow in desirable business activities through simplified procedures of registration and incentive availment. In line with this objective, the Code provides that complete

application filed shall be considered automatically approved by the BOI if not acted upon within 20 working days from official acceptance thereof. If it is an application without incentives, it is automatically approved within 10 working days from official acceptance. The incentives also have been simplified such that they are easily understandable by the investor. The previous incentive scheme of net local content and net value earned which is quite complicated for some investors to understand and to compute, has been replaced by a simple income tax holiday.

It is also the intention of the Code to align the fiscal incentives provided by the Philippines with that around the region, i.e. in income tax holiday feature. It is also the objective of the Code to remove the countervailability of the incentives provided in the previous laws in the light of our experience with countervailing duties imposed by developed countries on exports on the ground that export incentives are export subsidies. There is therefore a general availability feature in the new Code. All preferred areas are identified to be those that will contribute to the economic development of the country and promote general economic activities without necessarily limiting incentives to exports only. Experience also showed that while export is encouraged, sometimes there is not enough domestic production for domestic as well as export requirements, hence the need to promote a number of industries.

Not to be forgotten is the intention of the Code to develop small and medium scale industries particularly in the region and to make the services of the BOI available in the countryside through the regional and provincial

offices of the Department of Trade and Industry. The new Code does not specifically clarify whether a registered enterprise is an export producer, agricultural producer, domestic producer, export trader or service exporter. What seems to be controlling is the listing in the Investment Priorities Plan (IPP) which therefore gives the BOI a lot of flexibility in including subcontracting arrangements or indirect exports. Moreover, the Plan can be amended after publication by the BOI by including additional areas in the Plan, alter any of the terms in the declaration of an investment area or the designation of measured capacities or withdraw the status of preference provided that there are no legally vested rights which are abrogated from such amendments. These changes used to go to the President prior to the new Code. If the activity is no longer in the Plan, then it is no longer entitled to incentives.

The specific features of the Code are the following:

1. Income tax holiday for enterprises engaged in preferred areas of investments. An investor is exempted from paying income tax for six years if his new firm is classified under the pioneer industry, or for four years, if it is under a non-pioneer one.

This is, however, extendible to another year if he meets the following criteria:

- a) the project meets the prescribed ratio of capital equipment to number of workers set by BOI;
- b) it utilizes indigenous raw materials at rates set by BOI;
- c) its net foreign exchange savings or earnings amount to at least US\$50,000 annually during the first three years of operation.

But this privilege is granted for a period not to exceed eight years. And if the firm is expanding, it will be entitled to income tax exemption for three years proportionate to the approved expansion.

2. Double tax deduction incentive if the enterprise is to locate in a less developed area. Normally, for five years, a project will be allowed to deduct from its taxable income 50% of the incremental direct labor wage for skilled and unskilled workers hired for the project. But this incentive is doubled, meaning a 100% deduction, for the incremental direct labor wage from its taxable income if located outside the Metro Manila area.

3. Tax and duty exemption on imported capital equipment. If you are an investor and you are planning to bring in new machinery and equipment and even spare parts, your enterprise shall be exempt from paying revenue tax so long as you comply with the following:
 - a) you seek approval of BOI first to import equipment and machinery;
 - b) make sure they are reasonably needed and will be used by you in the manufacture of your products;
 - c) the equipment you will be bringing in are not available locally and the quantity is reasonable. You must also make sure that they are of comparable quality and reasonably priced.

4. Tax credit on domestic capital equipment. In addition, a new and expanding registered enterprise which purchases the equipment and spare parts from local manufacturer can avail of a tax credit equivalent to 100% of taxes and customs duties that would have been waived on the equipment and spare parts had these items been imported, provided:
 - a) the said equipment and spare parts will be used exclusively by the enterprise in the manufacture of its products;
 - b) the equipment would have qualified for tax and duty-free importation;
 - c) the purchase is made within 5 years from the effectivity of the Code.

5. Exemption from contractor's tax. The registered enterprise shall be exempt from payment of contractor's tax, whether national or local. The national contractor is now equated for value-added tax for exporters.

6. Unrestricted use of consigned equipment. Equipment and spare parts consigned to any registered enterprise shall not be subject to restrictions as to period of use, provided that the appropriate re-export bond is posted and that such consigned equipment shall be for the exclusive use of the registered enterprise.
7. Employment of foreign nationals. A registered enterprise may employ foreign nationals in supervisory, technical or advisory positions for a period not exceeding 5 years from its registration, extendible for limited periods at the discretion of BOI.
8. Exemption on breeding stocks and genetic materials. Within 10 years from date of registration or commercial operation, the registered enterprise is exempt from all taxes and duties on imported breeding stocks and genetic materials, provided:
 - a) such breeding stocks and genetic materials are not locally available and/or obtainable locally in comparable quality and at reasonable prices;
 - b. reasonably needed in the registered activity; and
 - c. approved by the BOI.
9. Tax credit on domestic breeding stocks and genetic materials. A registered enterprise which purchases the breeding stocks and genetic materials from a domestic producer can avail of tax credit equivalent to 100% of the taxes and customs duties that would have been waived on the breeding stocks and genetic materials had these items been imported, provided:
 - a) such breeding stocks and genetic materials would have qualified for tax and duty-free importation;
 - b) they are reasonably needed in the registered activity;
 - c) BOI approval was obtained; and
 - d) the purchase is made within 10 years from the date of registration or commercial operation of the registered enterprise.

10. Tax credit for taxes and duties on raw materials of export products. A registered enterprise can enjoy a tax credit equivalent to the taxes and duties paid on the supplies, raw materials and semi-processed products used in the manufacture, processing or production of its export products. The BOI can, however, set a fixed percentage of export sales as the approximate tax credit for taxes and duties on raw materials based on an average or standard usage for such materials in the industry.
11. Access to bonded manufacturing/trading warehouse system. A registered export oriented enterprise (70% for export), can have access to the utilization of the bonded warehousing system in all areas required by the project.
12. Exemption from taxes and duties on imported spare parts for export products. A registered enterprise with a bonded manufacturing warehouse is exempt from taxes and duties on imported supplies and spare parts for consigned equipment or those imported tax and duty free.
13. Exemption from wharfage dues and any export tax, duty, impost and fee. A registered enterprise exporting non-traditional export products is exempt from wharfage dues and any export tax, duty, impost and fee.

Additionally, if the project is located in less developed areas, it is treated as pioneer and entitled to a tax credit equivalent to its expenditure for infrastructure.

The government has also eased granting of visa to prospective investor under the following terms:

- a) he is willing and able to invest the amount of at least \$75,000 (\$50,000 for tourism projects) in the Philippines although he must prove that he has remitted such amount in acceptable foreign currency to the country;
- b) he had not been convicted of a crime involving moral turpitude which must be proven by a certificate from the appropriate authority in his country of origin;
- c) he is not afflicted with any loathsome, dangerous or contagious disease and this to be accordingly certified by a medical practitioner;

- d) he has not been institutionalized for any mental disorder or disability.

The investor may also bring his family and thereby be granted the same visa privilege.

The visa, however, is only good until the investment subsists. Once the alien withdraws his investment, his special investor resident visa automatically expires.

- 14. Incentives granted to regional headquarters and regional warehouses locating in the Philippines. A multinational which establishes a regional headquarters in the Philippines are given the following incentives:

- a) exemption from income tax;
- b) exemption from contractor's tax;
- c) exemption from paying local fees and dues, imposts or local burdens;
- d) it can bring in its training materials tax-free.

Such company can also set up a regional warehouse in the country for 70% exports to the region, and be entitled to the following privileges:

- a) exemption from customs duty, internal revenue tax, export tax or any local tax on goods destined for re-exportation to the Asia-Pacific and other foreign markets.
- b) exemption from the maximum storage provision under the Tariff and Customs Code, which means qualified goods or articles entered for a period of 2 years without restrictions normally applied under the customs laws.

- 15. Incentives to firms locating in the Export Processing Zones. In the Philippines at present, there are areas in the country where multinational factories are located and they are appropriately called export processing zones. These were primarily established to encourage multinationals or even big-time joint ventures to produce goods for exports under a blanket of incentives. Such firms will be allowed the following:

- a) employment of foreign nationals in supervisory, technical or advisory positions for a period of 5 years. They will be entitled to a multiple entry visa valid for 3 years and subject to further extension.
- b) exemption from customs and internal revenue laws, regulations of all foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts, and wares that will be used by the firm.
- c) enjoyment of benefit from the purchase of merchandise of the custom territory that is brought into the zone.
- d) such additional incentives under the new Code which the BOI may grant.

IV. INDUSTRIAL PROPERTY LAWS

The Bureau of Patents, Trademarks and Technology Transfer (BPTTT) is an office created by Executive Order No. 133 (1987), otherwise known as the new Charter of the Department of Trade and Industry (DTI). It is an Office within the DTI which administers the Patent Law ^{19/} and the Trademark Law ^{20/}. The Office processes applications for grant of letters patent for inventions, industrial designs and utility models as well as applications for registration of trademarks, tradenames, service marks and other marks of ownership. It performs quasijudicial function by conducting adjudication proceedings related contested rights and its decisions are appealable to the Court of Appeals. In 1987, the functions of the Technology Transfer Board were likewise transferred to the Bureau.

^{19/} Republic Act 165 (June 20, 1947), as amended by Republic Acts 637 and 865, Presidential Decree 1263, and Executive Order 133.

^{20/} Republic Act 166 (June 20, 1947), as amended by Republic Acts 172, 623, 638, 681 and 685 and Executive Order No. 133.

A. Patents

Under the Philippine Patent Law, grant to inventors or their heirs, representatives or assigns of letters patent shall be for any new and useful invention of a machine, a manufactured product or substance, a process or any improvement thereof. It is said to be new if: (1) the invention is not known or has not been used by others in the Philippines; (2) it was not patented nor described in any printed publication in the Philippines or in any foreign country more than one year before the application for a Philippine patent; (3) such invention was not in public use or on sale in the Philippines for more than one year before the application for a Philippine patent is filed; or (4) it has not been previously patented in the Philippines.

The usefulness criteria is based on operability and if the invention is not contrary to the public order or moral, or to public health or welfare. A mere idea or principle or abstract theorem is not considered useful.

The law also allows the grant to designers of letters patent for any new, original and ornamental creation relating to the features of shape, patterns, configuration, ornamentation or artistic appearance of an article of commerce. Letters patent (utility model patent) may also be given to makers of any new model of implement or tool, or of any industrial product, or of part of the same, which does not possess the quality of invention but which is of practical utility by reason of its form, configuration, construction or composition. The design is adjudged to be new under the same criteria above-mentioned which are applicable to invention, except that the one-year period therein provided is changed to six months. A

design is considered original if its creation involves the use of the creative faculty and is not a mere imitation of any known or previously made design. For utility models, they are considered new if they have not been previously used in the country or are not substantially similar to any other utility models used or described in the country.

A patent holder has an exclusive right for its invention for a period of 17 years unless it is subsequently voided by the BPTTT in cancellation proceedings or by courts in a suit for infringement.

A patent holder for a design or a utility model, on the other hand, has an exclusive right to make, use or sell articles embodying such design or utility model for a period of five years (renewable twice for a period of five years each time).

B. Trademarks

Under the Trademark Law, registration of trademarks, tradenames, service marks and other marks of ownership shall be granted to its owners provided that these are actually used in the Philippines and that these do not fall within the following:

1. immoral, deceptive or scandalous matter, or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute;
2. the flag or coat of arms or other insignia of the Philippines or any of its political subdivisions, or of any foreign nation, or any simulation thereof;
3. a name, portrait or signature identifying a particular living individual except by his written consent, or the name, signature or portrait of a deceased President of the Philippines, during the life of his widow, if any, except by a written consent of the widow;

4. a mark or tradename which, when applied to or used in connection with the goods, business or services of the applicant is merely descriptive or deceptively misdescriptive of them, or when applied to or used in connection with the goods, business or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, or is primarily merely a surname.

Since under existing Trademark Law, the acquisition of original ownership of a trademark is not required, BPTTT follows the principle of adoption and use as basis for the determination of trademark ownership.

A holder of a certificate of registration has an exclusive right to a trademark, tradename, service mark or collective mark or name for a period of 20 years, unless the certificate of registration lapses for failure to file an affidavit of use/non-use or the certificate of registration is voided by BPTTT in a cancellation proceeding or by the courts in an infringement suit.

In this connection, it is important to note the national policy on infringement of internationally known marks. In the Philippines, as early as 1980 the then Minister of Trade directed the Patents Office to act in accordance with Paris Convention to which the Philippines is a signatory and directed the Director of Patents to review all pending applications for Philippine registration of signature and other world famous trademarks by applicants other than its original owners or users and deny them. Such an order was subsequently reiterated in another memorandum to the Director of Patents that: "Pursuant to Executive Order No. 913 dated 7 October 1983 which strengthens the rule-making and adjudicatory powers of the Minister of Trade and Industry and provides, inter alia, that 'such rule-making and adjudicatory powers should be revitalized in order that the Minister of Trade and Industry can x x x apply more swift and effective

solutions and remedies to old and new problems x x x such as the infringement of internationally-known tradenames and trademarks x x x' ", guidelines were set on how to determine whether a trademark is well-known in the Philippines or is a mark already belonging to a person entitled to the benefits of the Paris Convention. These memoranda to the Director of Patents for the protection of internationally known marks have been upheld by the various decisions of the Supreme Court such as the celebrated Lacoste and Puma cases. In the said Lacoste case, noteworthy is the following excerpt from the decision which summarizes the national policy:

"It is essential that we stress our concern at the seeming inability of law enforcement officials to stem the tide of fake and counterfeit consumer items flooding the Philippine market or exported abroad from our country. The greater victim is not so much the manufacturer whose product is being faked but the Filipino consuming public and in the case of exportations, our image abroad. x x x We buy a kitchen appliance, a household tool, x x x etc. -- the list is quite lengthy -- and pay good money relying on the brand name as guarantee of its quality and genuine nature only to explode in bitter frustration and helpless anger because the purchased item turns out to be a shoddy imitation albeit a clever looking counterfeit, of the quality product. Judges all over the country are well advised to remember that court processes should not be used as instruments to, unwittingly or otherwise, aid counterfeiters and intellectual pirates, tie the hands of the law as it seeks to protect the Filipino consuming public and frustrate executive and administrative implementation of solemn commitments pursuant to international conventions and treaties."

The above policy notwithstanding, the former Philippine Patent Office has in 2 cases, which are currently on appeal to a higher court, ruled that:

1. Under Philippine law, ownership of a trademark, service mark or tradename is acquired through use in commerce in the Philippines. Since only the respondent-registrant was able to establish such use, then it is deemed the owner of the mark.

2. In order for petitioner to claim protection under the Paris Convention particularly Art. 6 bis thereof, it must present evidence to establish:
 - a. that it has an established reputation in the Philippines - in other words, it must be well-known both internationally and in the Philippines as well; and
 - b. that the local infringer has usurped the trademark or tradename in bad faith.

C. Copyright

Presidential Decree No. 49 which took effect on December 15, 1972 is the principal law on copyrights. It is supplemented by Republic Act No. 248, which was approved and took effect on June 12, 1954, certain provisions of the Civil Code (Republic Act No. 386), which became effective on August 31, 1950, Presidential Decree No. 285 (September 3, 1973), as amended by Presidential Decree No. 400 (March 1, 1974) and Presidential Decree No. 1203 (September 27, 1977), and Presidential Decree No. 812 (October 18, 1975).

A copyright is an exclusive right:

1. to print, publish, copy, distribute, multiply, sell and make photographs, photo-engavings and pictorial illustrations of the work;
2. to translate or make other version or extracts or arrangements or adaptations thereof; to dramatize it if it is a non-dramatic work; to convert it into a non-dramatic work if it is a drama; to complete or execute it if it is a model or design;
3. to exhibit, perform, represent, produce or reproduce the work in any manner by whatever method for profit or otherwise;
4. to make any other use or disposition of the work not contrary to the laws of the Philippines.

The grant of copyright, however, has limitations in that it should not restrict the public right to general information, the advancement, dissemination and conservation of knowledge and culture and the promotion of educational, charitable and religious purposes.

Under Section 10 of the Decree, the creator can not prevent the recitation or performance of the work if done privately and free of charge, or if made strictly for charitable or educational purposes or at religious services by any educational, charitable or religious institution or society nor the reproduction, translation and adaptation thereof for personal and private use.

Making quotations or excerpts is permissible but only to the extent compatible with fair practice and justified by the scientific, critical, informatory or educational purpose.

News items, editorials and articles in periodicals on current political, social, economic, scientific or religious topics may be republished or reproduced only by the press or broadcasters.

Where a literary, scientific or artistic work forms part of the background or setting or is an integral part of a current event, the work may be reproduced and communicated to the public to the extent necessary for the purpose.

Likewise, public archives and museums have the right to produce, in pursuit of their activities and subject to certain limitations, copies of a literary or artistic work by photographic means without the consent of the creator or proprietor.

If after 5 years from the date of first publication of the written work a prospective licensee has failed to obtain from the copyright owner the license to translate and publish the translation of the same in the national or other local language, the Director of the National Library is empowered to grant a non-exclusive compulsory translation license subject to the terms and conditions to be determined by him.

In addition, under Presidential Decree No. 285 dated September 3, 1973, as amended by Presidential Decree No. 400 dated March 1, 1974 and Presidential Decree No. 1203 dated September 27, 1977, compulsory license may be granted to reprint any prescribed textbook or reference book by the registrar of the school, university or college (whether of domestic or foreign origin), the price of which has been determined to be exorbitant, provided that no book or material reprinted under license may be exported from the Philippines and that royalty of 7% of the domestic list price for locally published materials and 2% of the foreign list price for materials published abroad shall be paid to the owner.

Ownership of the copyright is vested in the creator or his heirs or assigns. If the work is a creation of two or more persons, the copyright is granted jointly, subject to the rules governing co-ownership under the Civil Code.

When a work is made during the course of the creator's employment, the copyright belongs to the employee if the creation of the object of copyright is not part of his regular duties even if the employee uses the time, facilities and materials of the employer; otherwise, to the employer.

Work that is commissioned by a person belongs to such person but the copyright is jointly owned by him and the creator.

Unless subject to contrary stipulations among creators, the producer exercises the copyright to cinematographic or similar work to the extent required for the exhibition of the work except for the right to collect performing fees for musical compositions that are incorporated in the work.

Under the Decree, the copyright shall endure during the lifetime of the creator and for a period of 50 years after his death.

Moreover, the Decree provides that the creator can participate in the proceeds of every disposition of his work after it has left his possession to the extent of 5% of the gross proceeds of such disposition.

Aside from pecuniary interests, the creator has moral rights to his work. These rights include the creator's right:

1. to make alterations of his work prior to, or to withhold it from, publication;
2. to require that the authorship of the work be attributed to him;
3. to object to any alteration of his work which is prejudicial to his reputation;
4. to restrain the use of his name with respect to any work not of his own creation or in a distorted version of his work.

The Philippine law on copyright is one of the more advanced legislation in this field but there is still a need to enrich the same with jurisprudence with more effective implementation.

V. TECHNOLOGY TRANSFER

The 1987 reorganization abolished the Technology Transfer Board and transferred its functions to the Technology Transfer Registry of the Bureau of Patents, Trademarks and Technology Transfer. The inter-agency character of the Board ceased but in practice consultation is made with pertinent government offices concerned with technology transfer. For indeed, technology transfer is not the function of only one office. Most often than not, various offices such as the Board of Investments and the Central Bank are concerned with major technology transfer arrangements. In case of a highly complex technology, a foreign consultant may even be in the picture. Most of the agreements processed by the Registry refer to licensing agreements.

The Bureau of Patents, Trademarks and Technology Transfer has recently adopted the Rules of Procedure of the Technology Transfer Registry, which takes effect on July 11, 1988.

Registration

Technology transfer arrangements refer to contracts or agreements entered into by and between domestic companies and foreign companies and/or foreign-owned companies involving transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service, including the transfer, assignment or licensing of all forms of industrial property rights. All technology transfer arrangements are required to be filed with the Registry as follows:

- 1) New Agreements - within thirty (30) working days from the date of execution or effectivity, whichever is earlier.
- 2) Renewal Agreements - within thirty (30) working days before the expiration of the term of the existing technology transfer arrangement.
- 3) Amendatory Agreements other than those mentioned under Section 7 of Rule IV - within thirty (30) working days from such amendment or modification.

The Registry shall act on these applications within 2 working days if the agreements are patterned after the model form of the Office and the rate does not exceed 2% of net sales; pure trademark arrangements; franchising agreements with a fee not exceeding 1% of net sales; agreements which are royalty-free; and amendatory agreements involving minor changes such as addition of new products involving the same technology under the same terms or change of technology supplier/technology recipient or change in corporate name of technology supplier/technology recipient.

Criteria for Evaluation

In evaluating technology transfer arrangements, the Registry shall take due consideration for agreements where:

- 1) The use of the technology/industrial property right(s) will lead to substantial contribution to the national development objectives and goals such as employment generation and export promotion, use of indigenous raw materials, conservation of energy, etc.
- 2) The use of the technology/industrial property right(s) answers an immediate need taking into account the gap between the requirement of the industry and the national technological capability.
- 3) The use of the technology/industrial property right(s) does not result in environmental pollution, and/or health hazard to employees of the technology recipient and to the community at large.

In looking at the cost of the technology, the following criteria shall be applied: scope, complexity and pioneering nature of the technology; importance of the technology in relation to the technology recipient's overall activity; degree of mastery of the technology by the technology supplier; stage of the licensed product in the product life cycle; use of indigenous raw materials and services; energy savings; level of priority of the licensed activity; employment generation; export earnings and its

Previous study on registered technology transfer arrangements shows values of technology supplier's share of the technology recipient's profit ranging from a low of 0.3% to a high of 45.4% and an average value of 20.4%.

Restrictive business clauses shall not be allowed; specifically the following clauses shall be prohibited:

- 1) those which restrict directly or indirectly the export of the products manufactured by the technology recipient under the technology transfer arrangement, unless justified for the protection of legitimate interest of the technology supplier and the technology recipient such as exports to countries where any of the party's industrial property rights will be infringed or where exclusive licenses to use the technology in these countries have already been granted;
- 2) those which restrict the use of the technology supplied after expiry of the technology transfer arrangement, except in cases of early termination of the technology transfer arrangement due to reason(s) attributable to the technology recipient;
- 3) those which restrict the manufacture of similar or competing product(s) after the expiry of the technology transfer arrangement;
- 4) those which require payments for patents and other industrial property rights after their expiration, termination or invalidation;
- 5) those which provide free of charge that improvements made by the technology recipient shall be patented in the name of the technology supplier, or shall be required to be exclusively assigned to the technology supplier, or shall be required to be communicated to the technology supplier for its use;
- 6) those which require that the technology recipient shall not contest the validity of any of the patents of the technology supplier;
- 7) those which restrict the technology recipient in a non-exclusive technology transfer arrangement from obtaining patented or unpatented technology from other technology supplier(s) with regard to the sale or manufacture of competing products;

- 8) those which require the technology recipient to purchase its raw materials, components and equipment exclusively, or a fixed percentage of the requirement, from the technology supplier or a person designated by him, unless it could be proven that:
 - i) the selling price is based on international market price or the same price is charged by the technology supplier to third parties and that there are no cheaper sources of supply; and
 - ii) such requirement is necessary to maintain the quality standards prescribed by the technology supplier.
- 9) those which limit the scope of production and pricing of products manufactured by the technology recipient and set a minimum volume of production, unless such minimum volume can be proven to be reasonable based on historical sales and/or sales projection of the licensed products;
- 10) those which restrict the research and development activities of the technology recipient designed to absorb and adapt the transferred technology to local conditions or to initiate R & D programs in connection with new products, processes or equipment;
- 11) those which prevent the technology recipient from adapting the imported technology to local conditions, or introducing innovations to it, as long as it does not impair the quality standards prescribed by the technology supplier;
- 12) those which require the technology recipient to employ personnel designated by the technology supplier, except to the extent necessary to ensure the efficient transfer of technology, or those which require the continued employment of such personnel when adequately trained personnel are available or have been trained;
- 13) those which require the technology recipient to grant exclusive sales or representation rights to the technology supplier or any person designated by the technology supplier, unless the technology recipient does so on his own volition;
- 14) those which require the technology recipient to keep part or all of the information received under the technology transfer arrangement confidential beyond a reasonable period, e.g. five (5) years after termination/expiration of the technology transfer arrangement; and

- 15) those which exempt the technology supplier from liability for non-fulfillment of his responsibilities or that which provide for maximum amount beyond which the technology supplier shall not be liable, with regard to third party suits arising from the use of the licensed products or licensed technology.

The issue allowing export restriction to countries where exclusive licensing agreements have already been granted is predicated on the premise that the act of exporting to these countries may itself constitute a tort thus putting the local technology recipient in a position where they may be brought to court together with the technology supplier. This has further relaxed the previous position of the Technology Transfer Board allowing export restriction only to countries where legal impediments exist. That is, for as long as there is no law in the country of export prohibiting the importation of the licensed product, the existence of an exclusive licensing agreement between the same technology supplier and another technology recipient for the manufacture of the said product in that country does not constitute a legal impediment but merely a contractual obligation binding the parties to their respective rights and obligations under the agreement.

Also considered as a restrictive business practice is the prohibition on the manufacture of similar or competing product(s) after the expiry of the technology transfer arrangement which appeared in a number of technology transfer arrangements submitted for registration with the Technology Transfer Board and lately with the Registry. A prohibition on the freedom to obtain competing technology is not warranted particularly so when such restriction is not necessary for ensuring the attainment of legitimate interests of the parties to the technology transfer arrangements.

Requiring technology recipient to transfer or grant back to the technology supplier or any other enterprise designated by the technology supplier the improvements made by technology recipient arising from the technology transfer, whether patented or not, without the offsetting consideration or reciprocal obligation from the technology supplier constitutes an "abuse" of the dominant market position of the technology supplier.

Additional requirements for technology transfer arrangements are as follows:

- 1) That the laws of the Philippines shall govern the interpretation of the same and in the event of litigation, the venue shall be the proper courts in the place where the technology recipient has its principal office.
- 2) A fixed term not exceeding five (5) years with no automatic renewal; however, a term longer than five (5) years may be allowed under the following conditions:
 - i) licensed activity has a long gestation period, provided the royalty payment shall apply only to sales of the licensed product(s) generated for a five-year period; and
 - ii) royalty-free agreements.
- 3) That the technology, if used in accordance with the specific instructions of the technology supplier, is suitable for the manufacture of the licensed product(s) or for the extension of services pursuant to the technology transfer arrangement;
- 4) That on the date of the signing of the technology transfer arrangement, the technology supplier shall warrant, to the best of its knowledge, that it is not aware of third parties' valid patent rights or similar protection for inventions which would be infringed upon by the use of the technology by the technology recipient when applied in accordance with the technology transfer arrangement;
- 5) Continued access to improvements in techniques and processes related to technology shall be made available during the period of the technology transfer arrangement;

- 6) In the event the technology transfer arrangement shall provide for arbitration, the Procedure of Arbitration of the Arbitration Law of the Philippines or the internationally accepted rules of arbitration such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) shall apply and the venue of arbitration shall be the Philippines;
- 7) That Philippine withholding taxes on all payments relating to the technology transfer arrangement shall be borne by the technology supplier; and
- 8) That all payments relating to the technology transfer arrangement shall be remitted to the technology supplier at the prevailing exchange rate at the time of remittance.

To date, there are still a number of issues in technology transfer that make implementation effective. The last decade, however, has been an education for practitioners in drafting licensing agreements to accept the new rules on technology which hopefully will be the measure of its effectiveness.

Annex A

NATIONALIZATION LAWS AND THEIR REQUIREMENTS

Subject Matter	Minimum Filipino Ownership Requirement (%)	Legal Provisions
Banking		
¹ Banking institutions (including private development banks)	70 % of voting stock (60% with President's approval)	Republic Act 337, as amended by Presidential Decree 71, Batas Pambansa 51, Batas Pambansa 63, and Presidential Decree 119
² Rural Banks	100%	Republic Act 720 as amen- ded by Presidential Decree 122, Presidential Decree 1794, and Batas Pambansa 65
³ Savings and loan associations, pawn- shops	70% of voting stock	Republic Act 3779 as amen- ded by Republic Act 4378, Presidential Decree 113, Presidential Decree 114, Presidential Decree 1796, and Batas Pambansa 62
⁴ Relending of foreign loans by government financial institutions	70%	Republic Act 4860 as amended by Republic Act 6142, Presidential Decree 81
Public Utilities		
¹ Authorization for the operation of a public utility	60%	Constitution (Section 5, Article XIV)
² Permit to engage in domestic air commerce and/or air transportation	60%	Republic Act 776

Subject Matters	Minimum Filipino Ownership Requirement (%)	Legal Provisions
Finance Institutions		
¹ Financing companies	60%	Republic Act 5980
² Insurance business	60%	Republic Act 2427
³ Investment companies	All directors must be Filipinos	Republic Act 2629
⁴ Investment houses	51% of voting stock	Presidential Decree 129 as amended by Presidential Decree 690
Government Contracts		
¹ Public works construc- tion	75%	Commonwealth Act 541
² Supplier to government corporations	60%	Republic Act 5183
³ Supplier to government agencies	75%	Commonwealth Act 138 as amended by Republic Act 76
⁴ Reparation benefits	100%	Republic Act 1789 as amended by Presidential Decree 332.
⁵ Public works and construction for national defense	100%	Commonwealth Act 541
⁶ Mass media	100%	Constitution (Section 7, Article XIV)

Subject Matter	Minimum Filipino Ownership Requirement (%)	Legal Provisions
Private Lands		
¹ Disposition, exploitation, development or use of any of the natural resources of the Philippines	60%	Constitution (Section 9, Article XIV)
² Transfer or assignment of private agricultural land	60%	Constitution (Section 14, Article XIV) Commonwealth Act 310
³ Mortgage of private real property	60%	Republic Act 133 as amended by Republic Act 4381.
Public Lands		
¹ Disposition, exploitation, development or use of agricultural, timber, and mineral lands and other lands of public domain; mineral, petroleum and other natural resources	60%	Constitution (Section 9, Article XIV), Republic Act 387, Commonwealth Act 137 as amended by Presidential Decree 463, Presidential Decree 87, Presidential Decree 972
² Lease of coal-bearing lands	60%	Public Act 2719
³ Lands within military reservation	60%	Republic Act 274
⁴ Lands bordering shores or banks of navigable rivers or lakes	60%	Republic Act 293

Subject Matter	Minimum Filipino Ownership Requirement (%)	Legal Provisions
Fishing And Other Aquatic Rights		
¹ Fishing operations	60%	Presidential Decree 704, Presidential Decree 43
² Gathering and farming of seaweeds	60%	Fisheries Administrative Order 108
³ Construction (establish- ment of fishpens or fish enclosures in all inland waters)	60%	Fisheries Administrative Order 109
⁴ Fishpen operations in Laguna Lake	60%	Fisheries Administrative Order 114, Republic Act 3512, Presidential Decree 43
Shipping		
¹ Register of vessels of domestic ownership for coastwise trade	60%	Tariff and Customs Code (Section 806) as amended by Presidential Decree 761
² Issuance of bay and river license	75%	Tariff and Customs Code (Section 911), Republic Act 1937
³ Exemption from pay- ment of taxes on income derived from overseas shipping business and construction of boats for overseas services	75%	Republic Act 1407 as amended by Republic Acts 4146, 5963, 6106 and Presidential Decree 214

Subject Matter	Minimum Filipino Ownership Requirement (%)	Legal Provisions
Construction		
¹ Domestic construction	75%	Letter of Instructions 630
² Overseas construction (Filipino contractor)	60%	Presidential Decree 1167
³ Recruitment and place ment of workers, locally or overseas	75% of voting stock	Presidential Decree 1412
Retail Trade		
Retail trade business	100%	Republic Act 1180 as amended by Presidential Decree 714
Cooperatives		
Cooperative associations	61%	Republic Act 2023, Commonwealth Act 565
Geothermal Energy		
Lease for exploitation, tapping and utilization of geothermal energy, natural gas and methane gas	60%	Republic Act 5092
Coconut Industry		
Coconut mills	Majority	Republic Act 1369