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## Problems of a code of conduct

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was trying to dodge all aid commitments by claiming that the "socialist" states were not the proper addressees for aid demands: the GDR portrayed it as a "success in the struggle against imperialism".<sup>29</sup>

But a look at the Charter shows that it recognises only two groups: the developing countries as recipients and the "developed countries" as donors. It does not — as the GDR press would have it — differentiate in the "developed countries" group between the B group (of western states) and the D group (of eastern states). The "Economic Charter" puts in words what the GDR is trying to repudiate, namely, that it is itself one of those to whom the developing countries address their demands, even if the involvement of the GDR is distinguishable from that of the western industrial states.

### No Alternative

To return to the question whether the GDR has an institutional alternative to the World Bank Group in view: The alternative position of the GDR has been circumscribed in the following terms: "Socialist states and progressive forces in the UN do not agree to the role and activities of the World Bank in view of its imperialistic character. They demand instead that full use be made of the democratic organs and programmes for assistance to the developing countries and fostering

international cooperation on the basis of the principles and objectives of the UN Charter."<sup>30</sup>

ECOSOC<sup>31</sup>, UNDP and UNCTAD are regarded as "democratic organs and programmes for assistance to the developing countries". The potentialities of UNCTAD for action in the interests of the developing countries do not however warrant the partiality for UNCTAD rather than the World Bank as an institution for development strategy. It may be that the GDR prefers UNCTAD because participation in it does not involve the GDR in any expenses. Cooperation with it would seem to have publicity value. UNCTAD — and UNIDO likewise — cannot serve as an "alternative" because it cannot provide credits, if for no other reason. In the UN set-up there is no alternative for the World Bank Group whatever censures western journals and Third World spokesmen may wreak on the World Bank. It may be that the developing countries would be ready to go along with the socialist states in completely disregarding the World Bank, but only if the "Community of Socialist States" had a similarly efficient organisation to hand in the sphere of development finance.

<sup>29</sup> Cf. Claus Dümde, Ein Erfolg im Kampf gegen den Imperialismus (A Success in the Struggle against Imperialism), in: Neues Deutschland, December 10, 1974, p. 6.

<sup>30</sup> Völkerrecht, *ibid.*, pp. 108 f.

<sup>31</sup> In the view of the GDR the Economic and Social Council (ECOSOC) should, together with UNCTAD, play the central role in UN development strategy.

## *Technology Transfer*

# Problems of a Code of Conduct

by Dr Karl Wolfgang Menck, Hamburg \*

**UNCTAD's Main Committee for Technology is to meet in November 1975 to discuss once again the subject of a Code of Conduct to be observed in transferring technical knowledge. What chances are there for such a Code to be adopted?**

**T**he transfer of technology is for many developing countries the only means whereby the technological gap between rich and poor countries may be closed.<sup>1</sup> Besides, the transfer of technological know-how may help developing countries to overcome their technological backwardness and their dependence on others by enabling them to set up national institutions of their own for technological development.<sup>2</sup> This has become the objective of many countries after they had been forced to realize that technical aid measures as such did not equip them with sufficient knowledge

in that a great deal of it was know-how protected by patents and licenses, and it is precisely this kind of knowledge of which poor countries stand in most need in their efforts to build up modern production plants and become internationally competitive. In addition, granting licenses and assign-

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<sup>1</sup> Cf. int. al. A. Wolf, G. Werth, Der internationale technisch-industrielle Lizenztausch (The International Exchange of Technical and Industrial Licenses), Düsseldorf 1972, *passim*; Institut für Weltwirtschaft an der Universität Kiel, Übertragung von Technologien in Entwicklungsländer (Transfer of Technologies into Developing Countries), Sept., 1974.

<sup>2</sup> Cf. int. al. G. S. Jones, The Role of Science and Technology in Developing Countries, London 1971, *passim*.

ing patents by firms in the industrial countries has not always been considered the best way of conveying technological know-how for

□ developing countries believe that the fees charged them for the use of these patents and licenses are higher than their market value so that at worst they may even constitute a form of exploitation;

□ there have been cases where licensors have been known to impose on the licensees additional restrictive conditions, forcing them to observe certain export limitations, to use certain materials – raw as well as auxiliary – and machines and to cede to the patent holder or licensors free of charge any technological inventions they may themselves be making.

### **Demands at UNCTAD**

Technology transfers are so important to the economic growth of developing countries that UNCTAD has for some time concerned itself with this problem; it has been prompted to do so also by growing complaints on the part of licensee countries about excessive charges and restrictive practices imposed upon them by industrial countries.<sup>3</sup>

Already at the First World Trade Conference voices were heard drawing attention to the importance of the transfer of technological know-how for the economic advancement of developing countries and demanding that measures be taken to hasten this process.<sup>4</sup> The Second World Trade Conference, mindful of the resolutions and recommendations of its predecessor, recommended that the World Trade Council be asked to consider the possibility of instituting an inter-state committee to deal with this complex of questions. As a result of this recommendation, the representatives of 42 countries, meeting in Geneva from June 14 to June 21, 1971, concerned themselves with "ways and mechanisms of transferring technology".

At the Lima Conference the 77 developing countries formulated their demands more precisely. They recommended among other things that

states with a developed market economy should make every effort to facilitate the transfer of technological know-how by fiscal means and financial incentives as well as by making it possible for research institutes in developed countries to communicate the results of their work to the appropriate bodies of the developing countries. International competition and marketing should be freed of all restrictions and the cost of transferring technology should be taken over by international organizations. At the Third World Trade Conference, the developing countries were asked to set up institutions capable of dealing with all problems involved in transferring technical know-how and empowered to grant permits for, and supervise, such transactions. These bodies were further to act in an advisory capacity and help to promote training schemes. The industrial countries for their part were called upon to facilitate transfers by increasing their aid, improving the form in which it is given and by easing the conditions under which patented or non-patented technological processes are transmitted.<sup>5</sup>

Since then an increasing number of voices have been heard in UNCTAD circles, urging that next year's Fourth World Trade Conference should adopt a Code of Conduct for the transfer of technology. Such a Code, it is said, would be a step in the direction of the desired new economic order. A draft Code has been worked out within the framework of the Pugwash Conference by 15 experts from various industrial and developing countries, among the former Switzerland, Federal Republic of Germany, Yugoslavia, Great Britain, Japan, Hungary, among the latter Mexico, Egypt, Cameroon, Argentina and India, and this document has been added to UNCTAD's official papers.

In the opinion of these experts such a Code of Conduct is essential in effectively safeguarding the interests not only of the developing countries but also those of patent holders and licensors in industrial countries; in particular the Code would ensure that the fees and conditions for such assignments are fair to both assignors and recipients. Moreover, a generally accepted and observed Code of Conduct would in the view of the experts strengthen technology transfers between rich and poor countries.

The draft Code is to contain among others the following recommendations:

<sup>3</sup> Cf. Report of the Intergovernmental Group on the Transfer of Technology, UNCTAD/TD/B/424, p. 7; Major Issues Arising from the Transfer of Technology. A case study of Ethiopia, UNCTAD/TD/B/AC. 11/21; Major Issues Arising from the Transfer of Technology to Developing Countries, UNCTAD/TD/B/AC. 11/10/Rev. 1; The Role of the Patent System in the Transfer of Technology to Developing Countries, UNCTAD/TD/B/AC. 11/19; Major Issues Arising from the Transfer of Technology, A Case Study/Chile, UNCTAD/TD/B/AC. 11/20; Major Issues Arising from the Transfer of Technology to Developing Countries, UNCTAD/TD/B/AC. 11/10; Major Issues in Transfer of Technology to Developing Countries, UNCTAD/TD/AC. 11/10/Add. 1; The Possibility and Feasibility of an International Code of Conduct on Transfer of Technology, UNCTAD/TD/B/AC. 11/22.

<sup>4</sup> A. Naini, Grundfragen der Dritten Welthandelskonferenz (Basic Problems of the Third World Trade Conference), Hamburg 1972, p. 134 et seq.

<sup>5</sup> Cf. int. al. A. Naini, A. Borrmann, H. L. Dornbusch, Analyse der Themen und Ergebnisse der Dritten Welthandelskonferenz (An Analysis of the Subjects and Results of the Third World Trade Conference), Hamburg 1972, pp. 161/162; M. Nitsch, Mehr UNCTAD-Aufgaben beim Technologie-Transfer (More Tasks for UNCTAD in connexion with Technology Transfers), in: Entwicklung und Zusammenarbeit (Development and Cooperation) 6/7/1972, p. 13.

- ☐ phasing out of down payments . . . , on a soft basis,
- ☐ scaling down the charges for technology in proportion to the size of the recipient's market,
- ☐ untying of credits for the purchase from the most competitive source,
- ☐ rebates on imports of raw materials, etc.,
- ☐ development of local technological capability,
- ☐ development of Research and Development . . . of the recipient firm,
- ☐ adapting the technology to be transferred to make it appropriate to conditions and factor endowment of the recipient countries,
- ☐ sublicensing rights under special concessional terms<sup>6</sup>.

### The Industrial Countries' Opposing Views

Ever since these demands were first voiced by developing countries in UNCTAD discussions the industrial countries have been countering them with views of their own. For example: As early as October 24, 1970, the General Assembly of the United Nations passed a resolution, laying down the international strategy to be adopted for the second development decade. In this document, the industrial countries undertake to re-examine the international patent law with a view to:

- ☐ discovering and removing any obstacles in the way of conveying technical knowledge to developing countries;
- ☐ making it easier for developing countries to gain access, on fair terms, to technical processes, whether protected by letter of patent or not;
- ☐ enabling them to make use of the technical knowledge conveyed in their endeavours to achieve their objectives in the spheres of trade and development;
- ☐ placing at their disposal a technology appropriate for the production structure of an emerging country and
- ☐ putting them in a position to develop more quickly a native technology of their own<sup>7</sup>.

Article 31 (c) of the Lomé-Agreement between the ACP countries and the EEC similarly states that "the acquisition of patents and other commercial property on favourable terms is to be facilitated, particularly by way of financing and/or other suitable agreements with the firms and bodies of the Community<sup>8</sup>. Individual industrial countries have formulated their own objectives in similar ways;

<sup>6</sup> The Possibility and Feasibility of an International Code of Conduct in the Field of Transfer of Technology, UNCTAD/TD/B/AC. 11/ L. 12, p. 12.

the German Federal Government for instance has expressed its own views on development policy in the following manner: "The Federal Government will support developing countries in their efforts to widen the scope of their scientific and technological knowledge by cooperating with them in the scientific field and giving them advice. It will actively participate in international discussions on measures to encourage growth as well as in negotiations aimed at removing obstacles in the way of transmitting technologies"<sup>9</sup>.

### No Approval for Conduct Guidelines

Whether the industrial countries, despite their understanding in principle for the problems of the developing countries, will agree to such regulations as a Code of Conduct is however far from clear. For against any Codes of Conduct as so far formulated it is pointed out that

- ☐ in the long run they are likely to diminish the readiness of firms to effect any technology transfers,
- ☐ they will not be able to do away with industrial countries' monopoly of technical knowledge and know-how in the form of patents and licenses, and
- ☐ the Codes of Conduct are not sufficiently flexible to allow for the problems of individual branches and/or countries.

Experts from various countries and branches of industry are agreed in forecasting that the willingness of firms to transfer technologies will diminish if such transfers and the fees charged for them are subjected to more rigid controls as is already the case in many developing countries<sup>10</sup>. In the long term, it is thought, conditions imposed upon the use of technological knowledge can only lead to firms being less prepared to innovate. True, this argument has as yet not been convincingly proved to be generally valid. On the other hand, however, it is beyond a doubt that the already limited trans-

<sup>7</sup> Die entwicklungspolitische Konzeption der Bundesrepublik Deutschland und die internationale Strategie für die zweite Entwicklungsdekade (The Federal Republic of Germany's Conception of Development Policy and the International Strategy for the Second Development Decade), Bonn 1971, p. 51.

<sup>8</sup> Cf. ACP-EWG-Abkommen von Lomé mit den Protokollen 2 und 3 (The Lomé Agreement between the African States and the EEC with the Protocols 2 and 3) in: Entwicklungspolitik, Materialien (Development Policy, Documents) No. 48, p. 18.

<sup>9</sup> Cf. Die entwicklungspolitische Konzeption . . . op. cit., p. 15.

<sup>10</sup> Cf. The Possibility and Feasibility of an International Code of Conduct on Transfer of Technology, op. cit., p. 11 et seqq.; W. Martin, R. Grützmaier, Der Lizenzverkehr mit dem Ausland (The License Trade with Foreign Countries); Genehmigungsvorschriften und steuerliche Behandlung von Lizenzverträgen (Regulations about the Permits Required for License Agreements and their Liability to Tax), 4th new and enlarged edition, Heidelberg 1972; R. Sutter, K. W. Menck, Investieren in Südostasien, Investitionsbedingungen in Indien, Indonesien, Korea, Malaysia, den Philippinen, Singapur, Sri Lanka, Taiwan, Thailand (Terms for Investments in Asian Countries), Hamburg 1973; the Regulations Governing Foreign Capital Investments in the Andes-Pact Countries (roneoed copy).

fer of patents and licenses would not be stimulated, if developing countries were to insist on stringent conditions for such transfers <sup>11</sup>.

Besides, the view is held in industrial countries that by not acceding to international patent agreements many developing countries have deliberately excluded themselves from a liberal, world-wide and non-discriminatory exchange of patents and licenses.

The rich countries reject the poor countries' plea they made when the matter was discussed in the World Intellectual Property Organisation <sup>12</sup> that the principle, upheld in that organisation, of complete equality of nationals and foreigners before the national patent law runs counter to the interests of the technologically backward countries. It is this very principle which most industrial countries consider to be essential to international agreements and therefore not negotiable because it is this clause and none other that promotes exchanges <sup>13</sup>. Only with great reluctance therefore did the industrial countries waive their copyright for translation in developing countries.

Besides, measures for the compulsory granting of licenses or the abolition of legal rights under the patent and license laws would not end the technological dependence of developing countries. On the contrary, such steps would in certain circumstances only strengthen the monopoly position of the industrial countries as sole suppliers. The threat of a compulsory license can be successful only, if the knowledge protected by a patent comprises the totality of foreign knowledge required for exploitation in a particular country or if the additional technical knowledge required can be supplied by a third party <sup>14</sup>.

<sup>11</sup> Cf. H. Mast, Schwierige Wege zur Lösung des Technologietransfers (Difficult Ways Towards a Solution of the Technology-Transfer-Problem), in: Blick durch die Wirtschaft, No. 270 of 20. 11. 1972; by the same author, Lizenzpolitik schädlich für Entwicklungsländer (License Policy Harmful to Developing Countries), in: Manager Magazin, 6/1975, p. 86; C. Freeman, The Economics of Industrial Innovation, Manchester 1974, p. 86, 207; L. Uhlmann, Innovation in der Industrie: Stand und Ergebnisse der Forschung im deutschsprachigen Raum (Innovation in Industry: Position Reached and Results Achieved by Research in the German-language Area), published by K. H. Oppenländer in: Technischer Fortschritt — Ursache und Auswirkung wirtschaftlichen Handelns (Technical Progress — Cause and Effect of Economic Action), Papers read and contributions made at the Second Innovation Conference, held from April 5 under the auspices of IFO — Institut für Wirtschaftsforschung in München, Munich 1974, p. 147.

<sup>12</sup> Cf. int. al., World Intellectual Property Organization, in: Board of Trade Journal, No. 3805 of 18. 2. 1970, and Schutz und Austausch von geistigem Eigentum (Protection and Exchange of Intellectual Property), in: Blick durch die Wirtschaft, No. 295 of 21. 12. 1970.

<sup>13</sup> Cf. Gewerblicher Rechtsschutz und Entwicklungspolitik (Industrial Property Rights and Development Policy), in: Neue Zürcher Zeitung, No. 67 of 21. 3. 1975; G. M. A. B. I. - Saad, Law and Development, in: C. Nader, A. B. Zaidan (eds.), Science and Technology in Developing Countries. Proceedings of a Conference, held at the American University of Beirut, Lebanon, Cambridge 1969, p. 510.

<sup>14</sup> Max Planck Institute for Foreign and International Patent and Copyright Law, Protection of Patents and Developing Countries, Munich 1966, p. 133.

By the way, it will as a rule be in the interest of the foreign patent holder to seek for his invention protection of patent in other more developed countries, i.e. in countries which as such are in a position to compete with him in the developing country by producing a product similar to his own. In these circumstances developing countries have plainly no means of influencing the situation. Applications for the granting of patents are most unlikely to reach them, and even if some did, refusal to grant the patent applied for would not break the monopoly the developed countries enjoy in the field of patents <sup>15</sup>.

### Uncertain Assumptions

Finally, there is no conclusive evidence to prove the correctness of the assumptions on which UNCTAD bases its views on the effects of technology transfers. As of now the only relevant material consists of a few studies from individual countries and analyses of answers to questionnaires sent back by members of individual branches of industry. In view of the smallness of the samples, it would be wrong to read too much into the number of cited cases of restrictive practices. None the less it would be equally wrong to ignore the fact that in some developing countries the drain on their foreign exchange holdings caused by patent and license fees has been, and still is, considerable. It should therefore be part of the technical and capital aid programme to look for means of lightening the burden these payments represent for the recipients <sup>16</sup>.

Because of these objections most industrial countries, including the Federal Republic of Germany, have expressed, directly or indirectly, their doubts about the advisability of introducing a binding Code of Conduct. They feel that as long as the developing countries fail to produce more convincing evidence to show that the industrial countries, in granting patents and licenses, have acted improperly, the industrial countries are likely to go on stressing the need for flexible arrangements <sup>17</sup>. They feel that at the present state of knowledge, rigid rules — of whatever kind — would presumably hinder rather than help the transfer of technology. This would be in the interests of neither industrial nor developing countries nor would it be in conformity with the aims of a new economic order.

<sup>15</sup> Ibid. p. 146.

<sup>16</sup> Cf. int. al. K. H. Sohn, Wettbewerb um Auslandsmärkte: Strukturpolitik durch Technologietransfer (Competition for Foreign Markets: Structural Policy through Technology Transfer), in: Marktwirtschaft 10/71.

<sup>17</sup> Cf. UNCTAD Working Party . . . , op. cit.; Bonn gegen internationalen Code für Technologietransfer (Bonn against an International Code for Technology Transfers), in: Nachrichten für Außenhandel, No. 145 of 31. 7. 1974.