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INTRODUCTION

*Harold G. Maier**

On October 24, 1980, a symposium entitled "Transnational Technology Transfer: Current Problems and Solutions for the Corporate Practitioner" was held at Vanderbilt Law School. The symposium was a regional meeting of the American Society of International Law (ASIL) co-sponsored by the *Vanderbilt Journal of Transnational Law* and the Vanderbilt International Law Society under the auspices of the law school's Transnational Legal Studies Program. This writer served as organizer for the ASIL. Mr. Kevin Tyra, a third-year law student, was Symposium Chairman. Persons in attendance at the symposium were individuals active in private practice, government, and the academic field. During the one-day session, seven speakers discussed various legal, economic, and political issues related to transnational transfer of technology. Those presentations follow.

Mr. Robert Goldscheider, founder and Chairman of the International Licensing Network, Ltd., Technology Management Consultants, New York City, provides an overview of the importance of improving the technology transfer process to facilitate future world technological development. After reviewing various transfer methods and their utility to the licensor and licensee, Mr. Goldscheider highlights various important legal considerations unconnected with the actual transfer of technology in international licensing arrangements. Lastly, he reviews the impact of burgeoning interest in the acquisition of technology in the Third World, the scope of the technology explosion that will continue

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through the coming decades, and the importance of the international transfer of such technology as a major element in the improvement of the human condition.

University of Georgia School of Law's Professor Gabriel Wilner, a legal consultant to UNCTAD's Transfer of Technology Division, provides an overview of the role played by Latin American governments in the negotiation of private contracts for the transfer of technology. He points out that these governments are heavily involved in the technology transfer process and reviews the legal areas subject to closest governmental scrutiny. Professor Wilner also emphasizes the impact of Latin American government regulations on the technology transfer process. He concludes that the adoption of an international code governing technology transfer would be a step toward eliminating the abuses of the system, while maintaining the free flow of technology through international arrangements.

Mr. Brian G. Brunsvold is a partner with the Washington, D.C. law firm Finnegan, Henderson, Farabow, Barrett & Dunner and co-author of *Universal Technology Licensing — Antitrust and Misuse*. He makes specific recommendations concerning strategies for use in planning and carrying out negotiations of international licensing agreements. His discussion concentrates on three types of clauses not usually mentioned in the literature: defense and indemnification provisions against infringement actions by third parties; performance guarantees; and the licensor's obligation to enforce the licensed rights against infringers. Following the text of Mr. Brunsvold's talk is an appendix with models of selected clauses appropriate for inclusion in international licensing agreements of this type.

Mr. Homer Blair, Vice-President of Patents and Licensing at Itek Corporation and a former President of the Licensing Executives Society, was a participant in the UNCTAD negotiations in 1975 and 1977. He reviews most of the major international negotiations and multilateral agreements designed to regulate the transfer or use of technology. In addition to the proposed UNCTAD Code of Conduct on the Transfer of Technology, Mr. Blair discusses the Paris Union Convention for the Protection of Industrial Property, the law of the sea negotiations and their relationship to technology transfer, the United Nations Conference on Restrictive Business Practices, and the United Nations Conference on Science and Technology for Development. He suggests that in many instances the positions taken by developing coun-

tries in these negotiations or agreements are unrealistic because they fail to appropriately address actual technology transfer problems faced in the private sector. Mr. Blair argues that there is little incentive for entrepreneurs in developed countries to transfer technology to developing countries. He advocates a program to provide such incentives and suggests that international codes of conduct will be meaningless unless such incentives for technology transfer to developing countries are provided.

Mr. Robert J. Radway, engaged in international legal practice in New York City and a former Legal Advisor to the Council of the Americas, presents an overview of the relationship of various United States public policies as reflected in both government regulations and private attitudes to technology transfer issues. Mr. Radway reviews issues related to the organized labor movement in the United States, the uses of export controls for national security and general foreign policy purposes, the problems related to various United States taxation practices and policies, the role and effect of the antitrust laws in inhibiting or stimulating technology transfer, the presence of political considerations in influencing the role of financial and insurance schemes such as the Export-Import Bank and the Overseas Private Investment Corporation, and other miscellaneous laws and regulations that have an impact on technology transfer.

Mr. Gary Hufbauer, a lawyer and economist who was Deputy Assistant Secretary for International Trade and Investment Policy of the United States Department of the Treasury, identifies three organizing principles around which the United States technology transfer policy is constructed. Agreement types and their legal treatment are distinguished by reference to the geographic direction of the transfer, the amount of post-transfer control exercised by the transferor, and the degree to which the technology is embodied in a finished product rather than being exported in the form of know-how or technical expertise. The essay comments principally on the licensing, financing, and taxation of technology transfers. Mr. Hufbauer's presentation emphasizes technology transfer in the light of tax policy goals. He deals with transfer pricing, the foreign tax credit, expense allocation, and the effect of tax treaties and withholding requirements on the level and payment of royalties. He also surveys several regulatory statutes that control or direct the export of technology.

The last speaker Mr. Joel Davidow, Director of Policy Planning for the Antitrust Division of the United States Department of

Justice, discusses the antitrust issues raised by international know-how licensing. Much less has been written about know-how transfer and the antitrust laws than about the effect of these laws on patent or trademark transactions. Mr. Davidow discusses the legitimacy of restrictions contained in know-how licenses, considering the intent and purpose of the parties, the requirement that the scope and duration of post-expiration restrictions be reasonable, and the special relevance to the applicability of United States antitrust legislation raised by a license with an international character. He concludes with a general review of some foreign and international standards for judging know-how licenses. He identifies the dilemma of encouraging transfers by clear and predictable rules, while retaining necessary flexibility to deal with a variety of situations, and suggests that the Justice Department's Antitrust Guide represents progress in resolving this difficulty.

The article *UNCTAD's Draft Code of Conduct on the Transfer of Technology: A Critique* by James W. Skelton, Jr., was submitted to the *Journal* independently of the symposium. In this article Mr. Skelton, an attorney with Conoco Corporation in Houston, Texas, reviews the positions of the various negotiating blocs in the UNCTAD negotiations and identifies their impact on the substantive provisions of the Draft Code.

Although the expertise and background of each of the speakers are different and their subject-matter, in some instances, quite specialized, there are several common themes throughout the presentations. One such theme identifies the implicit tension that exists between the desires of the developing countries for a higher standard of living and the profit motive that is, of necessity, the energizing force behind the development of advanced technology. The perceived identity of technological capability and a high standard of living leads the lesser developed countries to insist upon access to foreign technology as a matter of right. Without such technology they feel that they are forever doomed to second class economic citizenship. In fact, some developing countries argue that technological innovation should be treated as part of the common heritage of mankind and, consequently, made available to all nations as a matter of right. On the other hand, private entrepreneurs point out that the technology that is available today developed as a result of the investment of time and expertise that came about only as a result of potential economic benefit for the entrepreneur. All systems to protect industrial property reflect this motive, and any international system that re-

jects it is, they argue, doomed to failure.

A second recurring theme is that developing countries lack the qualified personnel and the ability to train them to deal with technology transfer problems effectively. This results in difficulties of communication between the United States entrepreneurs and those foreign government officials who must evaluate and bargain for the desired technology. Related to both of the above themes are repeated references to the inadequacy, or even impropriety, of attempts at general international rule-making to place restrictions or limitations on the activities of technology owners in making transfers to developing countries.

A third theme that recurs in several of the presentations is that United States regulatory policies are not coherent as applied to technology transfer issues. There appears to be no coordinated government policy designed to either inhibit or encourage technology transfer and no identifiable government policy created to deal with the special problems involved in transferring technological expertise to developing countries.

It may be time for a fresh and multifaceted examination of these issues. Persons with practical interests in bringing about effective technology transfer should meet to discuss the functional problems and practical needs of grantors and grantees in both short and long-term contexts. Such discussions, to be successful, must avoid the have/have-not rhetoric that so often pervades international conferences concerning economic issues. It is unlikely that need alone will serve as a sufficient incentive to encourage the transfer of technology to Third World nations. Other important issues to be confronted by these nations and their technology suppliers are exactly what type of technology is needed, what level of development is sought, and what economic purpose should be accomplished. To install a plant capable of meeting the demands of a highly industrialized economy in a country where the issue is still how to supply basic human needs makes little sense. In fact, such an act may waste resources that could better be applied to nurturing and encouraging earlier and more useful stages of technological development. These questions cannot be addressed effectively in a context in which political posturing takes precedence over a pragmatic analysis aimed at effective problem-solving. The academic, commercial, and governmental communities have a real and important role to play in providing such a forum and stimulating such discussion. A practically oriented but academically sound training program in the intricacies

and techniques of technology transfer for foreign government officials, who deal with the functional problems involved in protecting, transferring, and using technology, would be extremely beneficial in preparing a common ground for the discussion of common problems, based on comparable understandings and notions of expertise. A university center designed to provide academic legitimacy to such a project, but funded by those private concerns that have the greatest stake in dealing with persons abroad who have a need for sophisticated understanding of the function and role of technology, could contribute to the long-term solution of international technology transfer problems. At the same time, such a university center, if properly structured, could operate without the excess political baggage that is always part of international approaches organized on a government-to-government format.