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# TRANSFERS OF FOREIGN TECHNOLOGY IN LATIN AMERICA: THE BIRTH OF ANTITRUST LAW?

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DURING the past four years, the Andean Common Market organization, through its adoption of so-called Decision No. 24 (the "Andean Code")[1] in December 1970, and the participating countries of the Andean Common Market together with the other major Latin American countries (Brazil, Mexico and Argentina), through their adoption of national legislation or decrees, have put into effect comprehensive and far-reaching regulations governing transfer of foreign technology by license agreements in virtually every part of Latin America. While the Brazilian,[2] Mexican[3] and Argentine[4] decrees were adopted unilaterally, their affinity to the Andean Code is strikingly apparent. The scope of these national and regional market regulations is so comprehensive that it may be somewhat misleading to focus only on that portion of them that embodies a specific set of prohibitions against restrictive trade practices in the licensing field. Accordingly, I will comment briefly on a few of the important provisions of these decrees that concern limitations on the amount of royalty payments, and then concentrate on the new antitrust restrictions.

One preliminary comment concerning the royalty limitation provisions is that, while these are undoubtedly important, they have existed in one form or another within some of these Latin American countries for some time preceding the Andean Common Market (especially in Brazil, Chile and Colombia), primarily by virtue of foreign exchange controls exercised by central bank authorities.

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1. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties, translated in 11 Int'l Legal Materials 126 (1972). For an excellent historical analysis and background of the provisions of Decision No. 24 see Vaitsos, Considerations on Technological Requirements in Developing Countries with Observations on Technology Licensing Agreements, J. Licensing Executives' Soc'y 43 (June 1972); Vaitsos, Strategic Choices in the Commercialization of Technology: The Point of View of Developing Countries, 25 Int'l Social Sciences J. 370 (1973).

2. Law of Dec. 31, 1971, Code of Indus. Prop., Law No. 5772 (Colecão (legis.)).

3. Law of Dec. 28, 1972, Law on the Registration of Contracts and Agreements Regarding the Transfer of Technology, translated in 12 Int'l Legal Materials 421 (1973).

4. Law of Sept. 13, 1971, Establishing a National Register of License and Know-how Agreements, [1971] Anuario (Argen.).

The new laws and decrees mainly codify these pre-existing informal restrictions on royalty payments, although in the course of so doing they have added a few limitations that are new to some countries (prohibiting minimum annual payments or limiting the maximum duration of the agreement).

I hasten to add that the very fact of formalization of these pre-existing controls over royalty payments and the duration permitted to trademark and technical assistance license agreements may well have exacerbated the previous controls in this field, from the viewpoint of the multinational licensor. At least one organization, the American Apparel Manufacturers' Association, espouses this view so strongly that on October 16, 1974 it issued a condemnation of these specific portions of the new Latin American laws and regulations.[5] It directed its condemnation particularly against Mexico, Colombia, Peru and Brazil together with some countries outside of Latin America. Its attack is reportedly scheduled to be followed by protests filed by the Association with the Departments of State and Commerce seeking their assistance to end what the Association calls policies of "semi-nationalization" in arbitrarily revising licensing and trademark agreements already in effect.

That is a subject worthy of concentrated study and comment, and has a variety of legal ramifications in addition to raising questions of political and economic prudence. To take only one example, Latin American countries are setting limits on the maximum duration of technical assistance and trademark license agreements even though some existing agreements by their terms have no time limit.[6] In what sense and in what circumstances might the imposition of a limit be properly characterized as "semi-nationalization?"

Perhaps the American Apparel Manufacturers' Association, by its "semi-nationalization" terminology, means to imply that Latin American countries are coupling their time-limits on existing trademark license agreements with a requirement that, upon termination, the local licensee shall be deemed irrebutably to hold a permanent paid-up license to use the trademark. If so, traditional international protection

5. Ad Hoc Licensing Sub-comm. of the Foreign Trade Comm. for the American Apparel Mfrs. Ass'n, The Growing Threat to International Licensing Agreements in the Apparel Industry, Oct. 16, 1974.

6. Correspondence with local counsel in Latin America indicates that at least some of those countries set time limits only with respect to the right to convert the payments into foreign exchange and remit them abroad. Under that arrangement, the technical assistance or trademark license agreement would remain effective for most purposes, provided the licensor could find some legitimate method for use of payments made in the local currency. Letter from James W. F. Raisbeck to the author, Nov. 30, 1974, on file at Fordham L. Rev. (concerning the Colombian legal views to this effect).

accorded (under the Paris Convention for the Protection of Industrial Property[7] and under the General Inter-American Convention for Trademark and Commercial Protection[8]) to trademark holders whose rights originated in one country and were bolstered by re-registration in another country would indeed be seriously impaired, especially if the foreign licensor was getting less-favored treatment than that accorded to a national of the host country. To my knowledge no such charge has yet been made with respect to Mexico, Colombia, Peru and Brazil. However, a new Argentine decree concerning the transfer of foreign trademark and technology rights, recently issued,[9] suggests that the foreign trademark licensor in that country may face semi-nationalization in the near future. He must permit his local licensee to develop a local trademark substitute, or agree to assign the foreign-originated trademark without charge to the licensee by December 31, 1979, or he must consent to the continued exploitation of that mark by the licensee thereafter, without further compensation.[10]

In sum, the recent license agreement regulatory measures of the Latin American countries give rise to many legal problems for the multinational licensor quite apart from their prohibition of restrictive licensing practices. But it is really the latter set of provisions, which in effect constitute a mini-body of antitrust law, that concerns us most in the context of this Symposium. One reason for our interest in the Andean Code is that its adoption, together with the various ancillary or parallel national regulations outlawing specific restrictive trade practices employed by foreign licensors as against domestic licensees, marks the first enactment by the Latin American countries of a body of antitrust law, albeit circumscribed in scope, that is intended to be applied immediately and with full force and effect. This is the new factor injected into the Latin American scene. To be sure, some Latin American countries, notably Brazil, Mexico and Argentina, had previously adopted broad, comprehensive antitrust codes, and at least in the case of Brazil had set up substantial administrative machinery to

7. Mar. 20, 1883, 10 Martens Nouveau Recueil (ser. 2) 133, as revised: Dec. 14, 1900, 30 Martens Nouveau Recueil (ser. 2) 449; June 2, 1911, 38 Stat. 1645 (1913), T.S. No. 579; Nov. 6, 1925, 47 Stat. 1789 (1931), T.S. No. 834; June 2, 1934, [1938] 53 Stat. 1784, T.S. No. 941; Oct. 31, 1958, [1962] 13 U.S.T. 1, T.I.A.S. No. 4931; July 14, 1967, [1970] 21 U.S.T. 1583, T.I.A.S. No. 6923 (to which Argentina, Brazil and Mexico adhere). See generally G.H.C. Bodenhausen, Guide to the Application of the Paris Convention for the Protection of Industrial Property (1968).

8. Feb. 20, 1929, 46 Stat. 2907, T.S. No. 833 (effective Feb. 17, 1931) (among the members are Brazil, Colombia, Ecuador, Peru and the United States).

9. Law of Oct. 28, 1974, Concerning Transfer of Foreign Trademark and Technology Rights, [1974] Anuario (Argen.).

10. This is reminiscent of an early but discarded draft of the Andean Code providing that after 1977 member countries should no longer authorize the licensing of any trademarks that originated in foreign countries.

enforce such comprehensive legislation. But their sheer breadth of scope and occasional vagueness, taken together with a background of social, economic and political factors that has not hitherto made their implementation highly popular, seem to have doomed them to be relatively ineffectual, at least for the time being. By contrast, the sheer narrowness in scope and the specificity of the mini-body of antitrust laws contained in the regulations governing transfer of foreign technology have helped create an atmosphere of earnest endeavor to implement and effectuate that body of law. Equally or more important than the significance of legal format, the general cultural factor underlying this mini-body of antitrust law—namely, that it is directed expressly and specifically against the foreign licensors (the multinational companies) and is aimed at protecting local business enterprises as well as the domestic consumer—seems to have stimulated a strong desire on the part of the administrative officials to make sure that these provisions represent the living law in the immediate present.

Nevertheless, from the viewpoint of broad public policy for the long run, it should be recognized that the economic interests of these countries will be served far better by greater emphasis on the objective of curbing restrictive practices whatever their geographic source, and eliminating the present aspect of nationalistic discrimination against *foreign* licensors as such. The principle of National Treatment, which is well-engrained in international practice in most of the developed countries, is based on sound principles of reciprocal international fair-dealing and tends to liberalize and promote international trade and objectives. That is an objective far more calculated than nationalistic exclusion or regulation to protect consumers in these Latin American countries.

Another reason for the effectiveness of these regulations is that each of the countries involved requires the foreign licensor to submit old as well as new license agreements to national registration authorities. Their express approval must be obtained to allow these agreements to continue or to come into effect, and is needed, moreover, in order to obtain central bank approval of remittance of royalties to the foreign licensor. Thus the very existence of administrative machinery for enforcing these new provisions can readily be remarkably effective, within its present narrow scope. And it is conceivable that if these new antitrust provisions were in fact effectively implemented, there might well be a spillover effect in the broader field of antitrust outside the licensing field.

It is perhaps not at all coincidental or fortuitous that the first concrete step taken by the developing countries of Latin America towards the fashioning of an antitrust code of behavior appropriate for their stage of development is reminiscent of the preoccupation displayed by the Executive Commission of the European Economic Community during the first ten years of its existence with respect to distribution and license agreements, in contrast with problems of merger and concentration of industry.[11]

And it is perhaps inevitable that current attempts by the Junta of Andcom to achieve uniformity of interpretation of these licensing-control provisions by holding periodic meetings of the appropriate government lawyers from the various member countries may eventually lead to the establishment of an Andcom Court of Justice, paralleling the role of the European Court of Justice, resulting in uniformity of interpretation in a more authoritative, systematic and public fashion than is possible under the present system.

I suggest that the Latin American countries may be embarking upon an approach to antitrust that may lead them from a narrow band of restrictive practices to a more comprehensive and still enforceable body of antitrust law that they may adopt and enforce as they gain greater experience in implementing the mini-body of antitrust law they have now, and as the further industrialization of their economies creates a felt need for the expansion of their antitrust law. The fact that the motivations leading the Latin Americans to establish these narrow-gauge antitrust provisions differ sharply from those that led to the adoption of the Treaty of Rome and the establishment of the European Economic Community should not obscure the fact that they have, willy-nilly, made a beginning in the antitrust field. And, while their immediate concern has been to curb what they view as excessive, unnecessary outflows of foreign exchange in the form of royalties and overpriced tied component parts, they have perceived the broadly disadvantageous impact of restrictive trade practices imposed by foreign licensors. In its document, *Policies of Technology of the Andean Pact: Their Foundations,* the Junta of the Cartagena Accord expressly cites the need for these provisions to fill temporarily the gap left by the "absence of overall and comprehensive antitrust legislation which, among other things, results from the lack of adequate analysis of the effects of monopoly and economic concentrations in developing countries."

Let us turn now to a brief examination of the specific restrictive

11. See, e.g., EEC Comm'n Reg. No. 67/67, 10 E.E.C. J.O. 849, 1 CCH Comm. Mkt. Rep. ¶ 2727 (1967); EEC Comm'n Reg. No. 153/62, 5 E.E.C. J.O. 2918, 1 CCH Comm. Mkt. Rep. ¶ 2694 (1962) (rescinded by Reg. No. 67/67 supra); EEC Comm'n Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents, 5 E.E.C. J.O. 2921, 1 CCH Comm. Mkt. Rep. ¶ 2697 (1962); EEC Comm'n Official Notice on Patent Licensing Agreements, 5 E.E.C. J.O. 2922, 1 CCH Comm. Mkt. Rep. ¶ 2698 (1962). See also E. Stein & P. Hay, Documents for Law and Institutions in the Atlantic Area 146-64 (1967).

practices that have been banned from technical assistance, patent licensing and trademark licensing agreements between foreign licensors and domestic licensees within Latin America. Article 20 of Andean Common Market Decision No. 24 bans from patent and technical assistance license agreements virtually any and all types of tying provisions—namely, any requirement that the licensee buy capital goods, independent products, raw materials and other technology from any specified source (*e.g.*, the foreign licensor)—although the Code allows a host country to accept such a clause in exceptional cases providing that the prices of such goods are internationally competitive.

Clauses restricting the volume of production, prohibiting the use of competing technology, requiring grantbacks (at least in some circumstances) of inventions or improvements with respect to the licensed technology, and clauses compelling payment of royalties to patent holders for patents not used are all prohibited. The American experience in prohibiting many of these restrictive practices under our own antitrust laws is sufficiently well-known so that these prohibitions need not be analyzed in this brief survey. Whatever uncertainties Roger Milgrim perceives as to the "extraterritorial" applicability of the U.S. antitrust laws on licensing, there are none with respect to the applicability of Latin American licensing regulations to American licenses extended for use in a Latin American country.

One particular set of restrictive trade practices barred by Article 20 and by similar provisions in the laws of Argentina, Brazil and Mexico relates to restraints upon the marketing of the licensed products imposed by the foreign licensor. This helps to answer the question as to whether an American company can properly, under American law, forbid its foreign licensee to export to the United States or some third country. Latin American regulations forbid the foreign licensor to reserve a right to fix the sale or resale prices of the products made, or to provide for himself a total or partial option to purchase the licensed products, and, "except in exceptional cases," forbid any clause which "prohibits or limits in any way the export" of the licensed product. It is not surprising to find such strictures against mandatory control over exports by the foreign licensor, particularly given the general shortage of foreign exchange resources in developing economies and the local interest in helping to lower domestic price levels by maximizing local production to the extent feasible, including *inter alia* stimulation of exports of the products. Article 7 of the 1972 Mexican Law[12] similarly bans clauses that prohibit or restrict the export of goods or services by the technology importer in a way contrary to the country's interest, the

12. Law of Dec. 28, 1972, Law on the Registration of Contracts and Agreements Regarding the Transfer of Technology, transl. in 12 Int'l Legal Materials 421 (1973).

last clause introducing an interesting element of flexibility for the administrator.

Another element of discretion is embodied in an Argentine regulation implementing its 1971 Technology Transfer decree. The licensor and licensee are required by the terms of a certificate that must be filed to state that they have cancelled all export ban provisions in their license except bans on exports to those countries where the licensor itself manufactures the products or in which it has granted an exclusive license to another party. (Brazil is said to have adopted a similar rule in practice).

These and other variants regulating the licensors' control over the export marketing of the licensed products of the Latin American country are of great interest to American-based multinational companies in one particular context—namely, where the American licensor is the parent company that owns the Latin American licensee-subsidiary. One reason for this interest is that American antitrust law, as spelled out in numerous consent decrees issued by the American courts, has recognized that restrictive marketing arrangements that apply only as between a parent and its wholly-owned or virtually wholly-owned subsidiaries should not be treated as conspiracies restraining commerce, and particularly not when it is a question of integrating the ordinary operations of an American parent and its wholly-owned foreign subsidiary. The Attorney General's National Committee to Study the Antitrust Laws concluded that nothing in the Supreme Court decisions "should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1 [of the Sherman Act]."[13] Wilbur Fugate, former Chief of the Foreign Commerce Section of the Antitrust Division, adds that he "believes that this continues to be the policy of the Department of Justice—certainly in the foreign commerce area."[14]

Given this strong American belief in the validity of noncoercive marketing arrangements by a parent and subsidiary as part of a single enterprise, one immediate and very important question arises for the multinational corporate licensor in Latin America: Are these Latin American codes and decrees regulating transfers of foreign technology intended to prevent an American parent from acting as an exclusive marketing agent for the exports of its Latin American licensee-subsidiary, and, if so, under what circumstances?

13. Report of the Attorney General's National Committee to Study the Antitrust Laws 34 (1955).

14. W. Fugate, Foreign Commerce and the Antitrust Laws 325 (2d ed. 1973).

This is a problem which is gradually filtering into the consciousness of those who administer and those who study the operations of regulatory provisions of this type. A large portion of the 1973 United Nations Commission on Trade and Development [UNCTAD] *Report by the Ad Hoc Group of Experts on Restrictive Business Practices in Relation to the Trade and Development of Developing Countries*[15] deals with this problem. The report seems to condemn without qualification territorial market allocations of exports as between parent and subsidiary in the less developed countries.[16]

More recently, a further review of this problem undertaken in the 1974 United Nations *Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations*[17] seems to have recognized the possible desirability of allowing the multinational corporate systems to operate with respect to exports of the less developed country licensee-subsidiary as a single enterprise with an integrated marketing system. The Report recommends that "host and home Governments, preferably through an international agreement, should prohibit the market allocation of exports by multinational corporations, unless it can be shown that such allocations are necessary to secure other benefits to the countries concerned."[18] It further comments that "the drawbacks of market allocation from the viewpoint of particular countries may be more difficult [in the case of single enterprise systems as contrasted with independent licensor-licensee relationships] to disentangle from the advantage of large organizations, technology and marketing that are associated with multinational corporations."[19] Without analyzing or debating the implications and merits of this or similar suggestions, I call the single enterprise marketing question to your attention as one of the major potential frictional problems that may directly affect the multinational corporation as at least one part of this new mini-body of antitrust law of the Latin American countries is implemented.

One final question may be worth raising in light of this morning's discussion of the patent licensee's rights and lack of rights with respect to intra-European Economic Community marketing of products man-

15. U.N. Doc. TD/B/C.2 119 (1973), reprinted in full in 18 Antitrust Bull. 509 (1973).

16. 18 Antitrust Bull. at 527-28. "However, one of the experts stated that these views were too broad and too sweeping. In his opinion it would not be in the interest of the developing countries themselves if the multinational corporations were totally denied the possibility to implement a consistent corporate strategy of their own." Id. at 528.

17. U.N. Doc. E/5500/Add. 1 (pts. I & II) (1974); see 57 U.N. ECOSOC, Supp. 1, at 13, U.N. Doc. E/5570 (1974).

18. U.N. Doc. E/5500/Add. 1, at 85.

19. Id. at 84. This is a comment particularly pertinent to the Andean Common Market situation.

ufactured under a patent of one of the member countries. What view will the Andcom take as to the corresponding question within the Andcom region? I wonder whether the clouded crystal ball suggests the possibility that the Junta may ultimately follow the same course taken by the European Court of Justice in the *Sterling Drug* case?[20]

## APPENDIX

*Panel Discussion**

PROFESSOR BLAKE: My observations are not in any sense intended to be a synopsis of what Dr. Constantine Vaitsos might have said if he were present, but rather my own impression of the prevailing Latin American point of view in this matter, based on the limited literature and on conversations with many Latin American economists, public officials and businessmen in recent years.

We all recognize that economists in Latin America play a very important role in public policy making in areas of this kind. They are often more influential than lawyers; Dr. Vaitsos' papers have been particularly important in this field. I would think that my brief comments will at least not be inconsistent with his position.

Latin American economists now talk not about the licensing of patents, technology and know-how—as we commonly do—but are

20. The crystal ball seems to be clearing rapidly. Section V, Art. 28 of Andcom Decision 85, promulgated in June 1974 and appearing in translation in 13 Int'l Legal Materials 1489, 1492 (1974), provides that: "The patent [issued by an Andcom member country] shall not confer an exclusive right to import the patented product or one manufactured under his patented process." This appears to be an even more sweeping result than that announced by the European Court of Justice in Centrafarm v. Sterling Drug Inc., 2 CCH Comm. Mkt. Rep. ¶ 8246 (EEC C.J. Oct. 31, 1974). In Sterling Drug, the court ruled that, as a result of the trade liberalization principles of the Treaty of Rome, the holder of a patent in one Common Market country can no longer block parallel imports of the "genuine" product by others from other countries within the Common Market. The 1973 UNCTAD Ad Hoc Report on Restrictive Business Practices, which deals with developing countries, urged in analogous though more limited fashion that "the ownership of a trademark by a multinational corporation should not be used to prevent imports from another related company of that multinational corporation." 18 Antitrust Bull. 509, 529 (1973) (italics omitted). The erosion of national import-ban privileges on the part of trademark and patent holders seems to be a worldwide phenomenon, and thus readily transferable as a concept from the developed area of the European Economic Community to the less developed area of the Andean Common Market.

* The Panel Discussion was moderated by Professor Harlan M. Blake, Professor of Law, Columbia Univ. School of Law. Panelists included: Lawrence F. Ebb; Leonard B. Mackey, General Patent Counsel, International Telephone & Telegraph Co.; and Roger Thomas, member, Cleary, Gottlieb, Steen & Hamilton.

more apt to talk in terms of "technology purchasers" or "acquisitions in the market for technology." This is a different and sophisticated perspective, viewing technology as an economic product has interesting implications. One of these stems from the view that technology is one of the few products which has a zero marginal cost. This means that once you have developed and worked out the problems of certain technology and know-how (presumably in the first instance to better serve domestic markets), making it available to somebody else (a firm in a developing country) adds very little in the way of expense—not necessarily zero, because transfer or adaptation of the technology may involve costs, but costs that are low relative to the original research and development. On the other hand, for a developing economy to *create* the technology would involve very high costs, frequently costs impossible for the economic system to support.

Thus there is an enormous bargaining range, if you like, between a marginal cost of zero—the price anyone would like to pay—and the very high cost that would be entailed if one had to replicate the technology independently or devise a new one. Therefore, bargaining inevitably is involved in determining the price to be paid for technology—that is, the terms and conditions of licensing agreements.

What are the main elements of bargaining power, from the Latin American view? In essence what they have to offer to American and other multinational corporations—the licensors—is "access," which their sovereignty enables them fully to control, through tariff barriers, exchange restrictions and the like. One kind of access is entry into their markets; these are usually small, by comparison to our own, but are obviously of substantial and growing significance in some product areas. Certainly Brazil, with well over one hundred million potential consumers—more than half of whom are now effectively "in" the market, and other millions rapidly coming into the market-place—is not an insignificant market.

The host country usually also controls access to low cost labor, which may be attractive to some multinational parents. Although highly skilled labor is often not available, highly motivated labor can be trained. And, finally, the traditional attraction has been access to basic primary raw materials, the subject matter of the early "concession" agreements.

On the other hand, the licensor's bargaining power derives from the developing country's need for technology, know-how, patents, management skills, capital goods, and intermediate products. The developing countries must acquire these things, subject to the constraints of limited foreign exchange, if their industrialization is to continue.

Historically, the initial bargain between licensor and licensee, Latin American economists say, is almost always a bad one for the licensee.

Early concession agreements and licensing arrangements were almost by their nature likely to be bad deals for the developing countries. Why? Because the market for information is an especially tricky one to deal in, especially as a newcomer. One usually does not have enough information about the technology he is trying to acquire until he has acquired it. Furthermore, the new buyer typically does not have full information as to alternative sources. It is difficult to go comparison shopping as between German, Japanese, American, and other possible sources of technology.

Since the initial bargain is likely to be a bad one, it is not surprising that as the technology arrives and is put into practice, the terms of bargaining change. Once the technology is there and being used it frequently cannot be picked up and taken back home again. So the terms of the original bargain are likely to change as industrialization takes place, as more technology comes in, and as the dimension of one's markets increases. Within this wide range of prices (from nearly infinite to zero) in which the bargaining process takes place, one would expect continual attempts at renegotiation of the terms of the bargain on the part of the developing countries. One of the tactics in this continuing bargaining strategy, it seems to me, is the kind of increasing surveillance of technology licensing arrangements which has been described by Mr. Ebb. Perhaps these new controls will eventually evolve into broader antitrust regimes generally applicable to the structure of the host country's domestic economy, but so far antitrust in Latin America has been primarily a tool used to strengthen bargaining positions vis-à-vis the foreign investor.

Where does this carry us? It may end up with some foreign investors saying, "All right, the terms are now too tough for us, we are not interested in assuming such risks on this basis." But that's not a very easy thing to have to say. Latin American officials are likely to respond with hostility to what may be perceived as a threat. And increasingly they have available alternatives: there are likely to be others eager to replace the established foreign affiliate—Japanese, German, or other firms throughout the world—others who have a suitable technology and are prepared to move in quickly after an established position has been abandoned.

So I suppose that the United States firm should stay in the market as long as it can, hopefully until levels of industrial modernization have reached a sufficiently high level that a mutually beneficial equilibrium is reached.

By suggesting this kind of model I certainly do not want to suggest that I fully endorse it. I prefer a less nationalistic and more supranational approach to development, based on comparative advantage and economic efficiency. In the long run, I think those forces will prevail. But I think that in the short-run and intermediate run, this model is a realistic one. The Latin American drive for industrialization and national economic integrity is perfectly understandable, and national goals inevitably produce tensions with some whose objectives entail a different perspective.

MR. MACKEY: There are several points on which I would like to comment; however, the time remaining permits me to make only one or two observations that may be of some interest.

I think the basic political and economic issue is: will the regulations and laws of Latin American countries, as they will be implemented over the next several years, facilitate or not facilitate development in these countries. The regulations have come about, as described by Mr. Ebb, as a result of some excesses and, I think also, as a result of some economists for Latin American countries emphasizing fears and excesses while playing down some of the benefits that have been realized from past license arrangements. There is great fear that they have been taken advantage of, and a fear that markets have been foreclosed. There is a degree of truth to these fears.

What seems to be evolving, however, is that those countries which are most interested in obtaining new technology are prepared to find devices for avoiding or working around the proscriptions in the laws and regulations that have been described in Mr. Ebb's talk. These various proscriptions, while stated as per se proscriptions, can be worked with if good economic sense requires. If you read these laws and regulations too strictly, and do not discuss them with legal authorities you are left with little choice, from a business point of view, but to walk away from the deal. So if you have a deal that's good for you, as a license, and it makes good economic sense to the host country, I am firmly convinced that a mutually satisfactory deal can be put together.

For example, you have read in some business papers within the last several weeks that in Chile the Chileans are indeed making an effort to depart from some of the provisions of Decision 24.

I leave you with the observation that if you have got a good deal for your client, and for the host country, something can be put together.

MR. THOMAS: As the last participant in the panel, perhaps I could take this opportunity to sum up some of the principal points made here today and add what I believe to be a proper focus.

I think it is clear that we are not dealing here with the area of intra-community regulation, but rather with regulations imposed by various Latin American countries on their local entrepreneurs' relations, not among themselves, but with the rest of the world. In this regard, I believe Professor Blake's comments on the import of these new regulations are very pertinent.

We are talking here more of an enforcement technique, a negotiating technique, than we are of a method of arranging the internal markets of the various countries concerned. It seems to me that, as a result of the new Latin American technology laws, we have moved from a two-party negotiating arrangement to what is essentially a three-party negotiating arrangement, whereby the state has announced that it intends to sit down at the bargaining table and participate in, if not dominate, the negotiation of the principal terms and conditions under which technology will be purchased by local entrepreneurs from suppliers in technology-exporting countries.

I think this point is of particular importance in understanding the thrust of the new legislation. In effect, the regulations are designed to enhance the negotiating abilities of the local companies. Both the Andean Common Market Decision 24 and the Foreword to the Mexican regulations on technology stress the fact that one of the principal objectives is to improve the negotiating ability of local entrepreneurs—that is, improve the terms upon which local entrepreneurs can purchase technology abroad.

If one reads the texts of the various technology laws that have been enacted, one comes to the clear conclusion that there is a great deal of flexibility, and that this flexibility is intended as a tool in the hands of the regulatory agencies charged with determining whether or not a particular contract shall be registered, *i.e.*, approved, and therefore be enforceable under the laws of the country concerned. The only two areas in which there is clearly very little room for negotiation are export restrictions and price, at least once the government has decided what it considers to be a fair price.

The essence of the regulations is perhaps reflected in what I understand to be the present Mexican attitude toward the negotiation of new technology transfers with Mexican licensees, that is, that the Mexican Registry of Technology is perfectly willing to sit down with the parties and discuss what it considers to be the reasonable and unreasonable aspects of a draft contract. The Registry is, in fact, admitting thereby that it intends to be a very active party to the negotiations of any future technology agreements. And, at least in our experience, it appears that the Registry intends to be very active not only in negotiating new agreements, but also in re-negotiating those agreements that already existed prior to the enactment of the technology law.

PROFESSOR BLAKE: Isn't it possible, given the weaknesses of local firms or licensees in Latin America, that they might be better off with territorial protection than without it, and thus that their new policy may be counterproductive? Let me make one comment, and then I would like to pass it on to Larry Ebb.

They have the territorial protection of their domestic market through tariff walls. There is not much more that is likely to arise out of different kinds of licensing arrangements. They see the export limitation as disadvantageous in at least two ways: one, in terms of foreign exchange; secondly, they need the foreign market to permit their local licensees to achieve economies of scale sufficient to bring the cost of production down so that they can fully tap the domestic market, or both markets combined.

MR. EBB: Well, Harlan, I don't know that you have left me very much to say after that, except to comment that in addition to the fact that obviously these licensees, from their viewpoint, will be better off if they are freed of contractual restraints within license agreements upon their ability to export in the usual case, and that they can count on the tariff and other trade protective devices that their own national governments can erect. Where that is not the case, as is true, perhaps, within the Andean Common Market itself, that is a result that follows not at all from knocking out this export ban privilege that foreign licensors have exercised, but because of the very theory of the Andean Common Market itself.

PROFESSOR BLAKE: That exhausts our supply of written questions, Mr. Chairman.