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Franklyn P. Salimbene

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ESSAY

US BUSINESS AND TECHNOLOGY TRANSFER IN THE POST-UNCED ENVIRONMENT

FRANKLYN P. SALIMBENE*

If one image has captured the imagination of scientists, politicians, and business leaders over the last several years, it is the image of the world as a global village. It is "global" because people are more aware than ever of the reach and effect of their activities on the whole planet, and it is a "village" because directing those activities to life-sustaining ends requires the cooperation of every nation working and pulling together as members of the same community.

Nowhere did this image of the global village loom larger than at last summer's United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro. The clarion call for the conference came in a document entitled *Agenda 21*.¹ Characterizing humanity as standing "at a defining moment in history,"² the document noted that the continued, long-term prosperity and well-being of each country could only be achieved "in a global partnership for sustainable development" joined in by all countries. The means of achieving that sustainable development was for the nations of the global village to take "a balanced and integrated approach to environment and development questions."³

To encourage this global integration, the participants at Rio proposed a series of statements and conventions for adoption by the nations of the world. In addition to *Agenda 21*, these statements and conventions included the *Rio Declaration*, the *Statement of Principles on Forests*, the *Convention on Climate Change* and the *Convention on Biological Diversity*. The aim of each document is fundamentally the same, the achievement of "a more efficient and equitable world

* Adjunct Assistant Professor of Law and Research Fellow at the Center for Business Ethics at Bentley College, Waltham, Massachusetts.

1. U.N. CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, DRAFT AGENDA 21, ¶ 1.1, U.N. Doc. A/CONF. 151/4 (Part I), U.N. Sales No. E. 92.I.16 (1992).

2. *Id.*

3. *Id.* ¶ 1.2.

economy.”⁴

On a theoretical level, one would be hard-pressed to argue with the basic premise of UNCED. Yet, as the conference approached, there was considerable concern that the industrialized, developed countries would reject the offer of this partnership for sustainable development with the less developed countries (LDC). In fact, there was good reason for concern. Several weeks before the start of UNCED, the Bush administration stated that in its view, the *Convention on Biological Diversity* was “fundamentally flawed.”⁵ Citing unsatisfactory language on property rights, development funding, and biotechnology transfer, the Department of State announced that the United States would not sign the treaty. Following this decision, press reports indicated that Japan and many European nations would follow the lead of the United States in rejecting the treaty.⁶ While these reports ultimately proved to be incorrect, the United States remained firmly opposed.

This U.S. opposition was grounded in the fear that the biodiversity treaty simply did not provide adequate protection for the intellectual property rights of those who would invest in the technology needed to promote biodiversity. In fact, the Department of State noted that, in its view, the convention focused on intellectual property rights “as a constraint to the transfer of technology rather than as a prerequisite.”⁷ Without protection, the United States argued that owners of technology would be deprived of their rights to property and would refuse to share new biotechnology.⁸ Such an unfortunate development would endanger the very objectives which the treaty sought to accomplish.

In view of the unyielding position of the United States at the Rio conference, the U.S. business community might conclude that the overall results of UNCED are antithetical to its interests. In this author’s view, such a conclusion would be unfounded and unprofitable. There was, after all, much at the conference that was encouraging. The United States did sign the climate convention⁹ and it did join in UNCED’s acceptance of the idea that environmental protection is compati-

4. *Id.* ¶ 2.1.

5. *Convention on Biological Diversity*, 3 U.S. DEP’T ST. DISPATCH 423 (1992).

6. Keith Schneider, *U.S. Will Oppose Species Treaty That Would Promote Preservation*, N.Y. TIMES, May 30, 1992, at A1, A4.

7. *Convention on Biological Diversity*, *supra* note 5.

8. *Fact Sheet: US Environmental Accomplishments in Support of UNCED*, 3 U.S. DEP’T ST. DISPATCH. SUPP. 9, 11 (July 1992, Supp. 4).

9. *Id.* at 2.

ble with economic development.¹⁰ Further, the protection of property rights which so motivated the United States in its opposition to the biodiversity agreement may still be achieved despite the language of the treaty. There are several grounds to support this conclusion. First, however, it is important to understand the historical context of the debate regarding property which has been ongoing between the developed countries and the LDC.

Two Perspectives on Development

Amidst the poverty of the developing world, the LDC have generally viewed the accumulation of property, and thus economic growth, as being dependent upon preferential treatment. The LDC seek such preferential treatment from the developed countries, which have the capital and the technology to transform their poverty into wealth. They realize that the role of property in economic growth is crucial and that the industrialized nations as the owners of that property have to share it. Thus, the developing countries have sought preferences in the form of trade concessions in bilateral commercial treaties; in the formation of international codes of conduct governing not only nations, but also private sector transnational activities in the developing world; and in multilateral trade negotiations like those under the GATT.¹¹ In the early 1970s, the United Nations Declaration on the Establishment of a New International Economic Order energized this movement towards preferences.¹² In it, the General Assembly gave as one of the founding principles of the new order, "preferential and non-reciprocal treatment for developing countries."¹³ The declaration further affirmed the right of a nation to full, permanent sovereignty over all economic endeavors within its borders including the right to nationalize foreign activities

10. E.U. Curtis Bohlen, Report to Congress on Rio Conference, Statement before Subcommittee on Oceanography, Great Lakes, and Outer Continental Shelf of the House Committee on Foreign Affairs (July 21, 1992), in 3 U.S. DEP'T ST. DISPATCH SUPP. 31, 32 (July 1992, Supp. 4).

11. Regarding references to preferences for developing countries in international codes of conduct, see *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, Economic and Social Council, 2d Sess., Agenda Item 7(d), ¶ 26, 29, and 36, U.N. Doc. E/1990/94 (1990). For a discussion of the issue of preferential treatment for developing countries as it relates to GATT negotiations on trade in services, see *New Issues in the Uruguay Round of Multilateral Trade Negotiations*, Centre on Transnational Corporations, at 14, 38, U.N. Doc. ST/CTC/SER.A/19 (1990).

12. G.A. Res. 3201 (S-VI), U.N. GAOR *Ad Hoc* Comm., 6th Spec. Sess., Agenda Item 7, U.N. Doc. A/RES/3201 (S-VI) (1974), reprinted in 13 I.L.M. 715 (1974).

13. 13 I.L.M. 718(n) (1974).

and to transfer title of foreign-owned property to its nationals.¹⁴ Specifically addressing the activities of transnational businesses, the declaration asserted the right of a nation to regulate and supervise those businesses by taking measures based upon its own national economic policy objectives.¹⁵ These assertions of "host nation" sovereignty and preferences have been echoed in discussions at the United Nations over the last two decades in conferences relating to transnational corporate activities, technology transfer, and restrictive business practices.¹⁶

The developed countries, for their part, while gradually coming to accept the idea of preferences, have been careful to assure that foreign direct investment by their nationals in developing countries be protected by an international set of rules which would guarantee a minimum standard of treatment regardless of host state policy objectives.¹⁷ This minimum standard would measure "the legitimacy of the conduct of host States in their treatment of transnational corporations."¹⁸ In effect, it is the view of developed countries that international rules aimed at safeguarding the property interests of the industrialized nations will temper state sovereignty. Because of their insistence on a minimum, internationally-accepted standard for the protection of foreign-owned property, the United States, the United Kingdom, and several other industrialized nations in 1974 not only issued official reservations to the adoption of the UN declaration on the new economic order,¹⁹ but also voted against passage of a companion document, *The Charter of Economic Rights and Duties of States*.²⁰

From this position, the United States and other developed countries have argued that the protection of property in transnational business activities is essential if LDC development is to take place. The

14. *Id.* at 717(e).

15. *Id.* at 717(d).

16. *E.g.*, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Conference on Trade and Development, ¶¶ 83-90, U.N. DOC. TD/RBP/CONF. 3/9 (1991); CENTRE ON TRANSNATIONAL CORPORATIONS, THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS at 9-10, U.N. DOC. ST/CTC/SER.A/4, U.N. Sales No. E.86.II.A.15 (1986) [hereinafter CODE OF CONDUCT].

17. CODE OF CONDUCT, *supra* note 16.

18. PATRICK ROBINSON, THE QUESTION OF A REFERENCE TO INTERNATIONAL LAW IN THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS 2, U.N. DOC. ST/CTC/SER.A/1, U.N. Sales No. E.86.II.A.5 (1986).

19. *See* 13 I.L.M. at 744, 762 (1974).

20. *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), U.N. GAOR 2d Comm., 29th Sess., Agenda Item 48, U.N. Doc. A/RES/3281 (XXIX) (1974), *reprinted in* 14 I.L.M 251 (1975).

secretariat of the United Nations Conference on Trade and Development (UNCTAD) has even come to share this view. In a report issued on the status of negotiations relevant to the Draft International Code of Conduct on the Transfer of Technology,²¹ the secretariat noted that

given the importance attached by suppliers to the protection regimes of potential recipient countries, stronger protection could lead to greater willingness to transfer technology, particularly new technologies. There is growing evidence that the existence of a 'protection gap' among countries might lead to delays in technology transfer, with potential technology suppliers insisting upon adequate protection in the recipient countries before proceeding with the relevant investment or technology transfer.²²

Such protection would have the effect of encouraging foreign direct investment by transnational businesses. The result would be more investment opportunities for technology suppliers and more development opportunities for developing countries.

United Nations Conference on Environment and Development

Primarily because of this long-term position regarding property rights, the United States decided not to sign the *Convention on Biological Diversity*. While several offending clauses were referred to in the U.S. Declaration opposing the treaty, the U.S. representative reiterated the Bush administration position that "[a]s a matter of substance, we find particularly unsatisfactory the text's treatment of intellectual property rights . . . technology transfer and biotechnology."²³ The text of the biodiversity treaty relating to these issues is Article 16. In sum, Article 16 requires of each contracting party that it:

- (1) undertake to provide and/or facilitate access for and transfer to other countries of technologies that are relevant to conservation;

21. *The Relevance of Recent Developments in the Area of Technology to the Negotiations on the Draft International Code of Conduct on the Transfer of Technology*, U.N. Conference on Trade and Development, at 38, U.N. Doc. TD/CODE TOT/55 (1990) [Hereinafter *Recent Developments*].

22. *Id.*

23. *United States: Declaration Made at the United Nations Environment Programme for the Adoption of the Agreed Text of the Convention on Biological Diversity*, reprinted in 31 I.L.M. 848 (1992).

- (2) take legally binding steps to provide to developing countries which supply genetic resources access to and transfer of technology "including technology protected by patents and other intellectual property rights"; and
- (3) take legally bindings steps "with the aim that the private sector facilitates access to, joint development and transfer of technology . . . for the benefit of both governmental institutions and the private sector in developing countries."²⁴

While it was expected that other developed countries would oppose the treaty on similar grounds, they did not. Even the United Kingdom, a staunch proponent of property rights, ultimately agreed to sign the treaty. Fiona McConnell, head of the British delegation at Rio, characterized the possibilities for technology transfer under the biodiversity treaty as an "exciting breakthrough."²⁵ She added, "[i]t means that when developing countries contribute something they will get a share in the benefits."²⁶ The "something" given to investors in exchange for technology transfer was access to genetic materials. In the British view, the *quid pro quo* was worth it.

Unmoved by the British argument and the otherwise universal opposition to the U.S. position, Michael Young, the alternate head of the U.S. delegation at UNCED, provided a press briefing in which he argued that the adoption of the treaty would lead to a high level of international regulation of the biotechnology industry. The result would be a disincentive for companies to engage in the kind of work that would produce the very technologies that the world needed and that UNCED was trying to encourage.²⁷ At a subsequent press briefing, William Reilly, head of the delegation, put the point more bluntly. Asked if the United States government would require that American industry share its intellectual property, Reilly responded, "[w]e will not under any circumstances require that our industry share its patents or make available its technology on concessional terms. That is what we considered objectionable in the treaty"²⁸

24. *U.N. Conference on Environment and Development: The Convention on Biological Diversity*, May 22, 1992, reprinted in 31 I.L.M. 818 (1992).

25. Jane Perlez, *98 Nations Adopt Biological Treaty; U.S. May Not Sign*, N.Y. TIMES, May 23, 1992, at A1, A5.

26. *Id.*

27. U.S. Delegation Press Briefings (June 8, 1992), in 3 DEP'T ST. DISPATCH SUPP. 22, (July 1992, Supp. 4).

28. U.S. Delegation Press Briefings (June 12, 1992), in 3 DEP'T ST. DISPATCH SUPP. 22, 27 (July 1992, Supp. 4).

The Meaning for U.S. Business

How should U.S. business leaders view the discussion at the Rio conference? In particular, what effect should the U.S. position regarding the biodiversity treaty have on international business decisions made by U.S. businesses involved in technology transfer? The simple answer is that while raising a caution for business leaders, the results of UNCED should not discourage robust U.S. participation in the development and transfer of technology. There are four important considerations which provide support for this answer.

First, research in and development and transfer of sound technologies offer enormous business opportunities for those companies willing to make the investment. Transfer of that technology from the industrialized developer to the foreign user amounts to the exportation of knowledge.²⁹ As an intangible asset, once developed and utilized, knowledge in the form of technology can greatly increase the wealth of the owner.³⁰ In its study of recent developments in the area of technology, the UNCTAD secretariat has found evidence that royalties on new technology licenses have increased by over ten percent in the pharmaceutical and biotechnology fields since 1980.³¹ In 1992, one commentator indicated that royalties can be as high as twenty percent.³² Much of this wealth potential can be realized through the development and transfer of technologies, which both protect the diversity of the world's forests and exploit that diversity in the achievement of sustainable development. For example, the Brazilian copaiba tree, which produces liquid hydrocarbons, and a newly-discovered Mexican corn plant, which grows as a perennial, are just two biological discoveries that have the potential, with the proper technology, of promoting biodiversity, assisting in the LDC's development, and providing economic gain for those countries that develop and transfer the technology.³³ Other types

29. For a discussion of the opportunities in technology transfer in non-chlorofluorocarbon development, see David R. Chittick, *The Transfer of Non-Chlorofluorocarbon Technologies: A Case-Study in Industry Cooperation*, in ENVIRONMENTALLY SOUND TECHNOLOGY FOR SUSTAINABLE DEVELOPMENT 194, 195, U.N. Doc. ST/STD/ATAS/7, U.N. Sales No. E.92.II.A.6 (1992) [hereinafter SOUND TECHNOLOGY].

30. See generally Juan R. Zarco, *Legal and Financial Techniques for Technology Transfer to Developing Countries*, in SOUND TECHNOLOGY, *supra* note 29, at 181 (explaining that technology transfers can be financed creatively to minimize costs and liabilities).

31. *Recent Developments*, *supra* note 21, at 16.

32. Zarco, *supra* note 30, at 182.

33. Thomas J. Goreau, *Technological Options to Minimize the Loss of Biological*

of environmentally sound technologies need to be developed and utilized in many areas including transportation, refrigeration, and agriculture. In the field of energy, the requirements of the LDC will increase greatly as they struggle to establish their own industrial base and thereby their own development. In view of this, some responsible commentators believe that the United States should give a high priority to the transfer of environmental technologies that increase energy efficiency and minimize the net release of greenhouse gases.³⁴

Second, there is the moral dimension. Much of the emphasis in every United Nations effort regarding development over the last twenty years has been on the need to improve the quality of life for all citizens of the world, and especially for those in the developing countries. The Declaration on the Establishment of a New International Economic Order (1974) and the Charter of Economic Rights and Duties of States (1974) both take their cue from Article 25 of the Universal Declaration of Human Rights (1948) which affirms that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services"³⁵ This lesson is surely not lost on a country that sends its armed forces half-way around the world in order to feed the starving masses in Somalia. Technology has a transforming effect; it has improved the basic human condition in those nations that could afford it. The link between technology and economic development is clear.³⁶ In this linkage, business entities have a social responsibility. The moral dimension impels those businesses that own life-sustaining technology to share it for the betterment of the human condition. The responsibility of U.S. corporate entities, for example, is understood to encompass not only the obligation to return a profit to shareholders, but also the duties owed to consumers, employees, and the community within which the business operates.³⁷ As businesses expand their operations into the international community, it follows that

Diversity, in SOUND TECHNOLOGY, *supra* note 29, at 67-68.

34. *E.g.*, Mark S. Kasman, *Economic and Legal Barriers to the Transfer of Environmentally Sound Technologies to Developing Countries*, in SOUND TECHNOLOGY, *supra* note 29, at 162, 169.

35. Universal Declaration of Human Rights, Art. 25 (1948).

36. *See, e.g.*, Zarco, *supra* note 30; David P. Hanson, *The Ethics of Development and the Dilemmas of Global Environmentalism*, in BUSINESS ETHICS AND THE ENVIRONMENT: THE PUBLIC POLICY DEBATE 185-194 (Michael Hoffman et al. eds., 1990).

37. *See, e.g.*, A. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, BUSINESS HORIZONS, July/August 1991, at 39-48; P. Murphy, *Creating Ethical Corporate Structures*, 30 SLOAN MGMT. REV. 81 (1989).

they likewise expand the orbit of their social responsibility. Businesses that operate within the global village have a responsibility to it.

A third consideration which should encourage U.S. business enterprises to engage in technology development and transfer is an apparent softening in the attitude of developing countries. Their hardline stance of the 1970s encouraged by the declaration of the "new economic order" has given way to the realization that behavior which threatens foreign-owned investment is self-defeating. Foreign direct investment "has the potential to bring substantial benefits to host economies, in terms of capital inflows, transfer of technology and skills, employment, purchasing power and linkages to the world economy."³⁸ Despite this promise, the 1980s turned out to be a period of economic stagnation and decline for many LDC. Speaking as the representative of the developing countries at a United Nations development conference in 1990, India characterized the 1980s as a "lost decade of development."³⁹ The irony was that while the LDC experienced a lost decade, the annual flows of foreign direct investment by transnational corporations grew by more than 300 percent between 1984 and 1989 alone, to the level of \$200 billion.⁴⁰ Aware of the lost opportunity, LDC behavior has changed. One result has been a dramatic decrease in the number of expropriations of foreign-owned property by the LDC. At the height of activity in the 1970s, as many as eighty-three incidents of expropriation occurred in one year—1975. By the end of the 1980s, that number fell to an average of less than three per year.⁴¹ Another result has been the wholesale revision by many developing countries of their foreign direct investment laws. These revisions have liberalized those laws to attract transnational corporate activity. Specifically, many less developed countries today are allowing foreign investors tax concessions, free repatriation of profits to their home countries, exemptions from local fees, discounts on the cost of real estate leases, accelerated rates of depreciation, and more.⁴²

38. David Gold, *The Determinants for FDI and Their Implications for Host Developing Countries*, 31 CTC REP. 21, 21 (1991).

39. *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, *supra* note 16, ¶ 83.

40. Gold, *supra* note 38, at 21.

41. John Kline, *A New Environment for the Code*, 29 CTC REP. 2, 2 (1990).

42. *See generally* A.B.M.M. Islam and Neema Mujumdar, *Trends and Issues in FDI Laws in Least Developed Countries*, 30 CTC REP. 7 (1990) (demonstrating that there is a trend towards liberalization in the recent legislation of many LDC regarding foreign direct investment); *Draft International Code of Conduct on the Transfer of Technology*, U.N. Conference on Trade and Development, ¶ 6, U.N. Doc. TD/CODE

Fourth, there are several legal mechanisms available to U.S. businesses interested in engaging in international technology transfer that offer substantial protection for property rights. These legal mechanisms include licensing, outright sale, and joint venture agreements.⁴³ Licensing grants permission to use a technology in exchange for a fee or royalty payment. The level of risk to the owner in granting the license is reflected in the level of the payment. Outright sales of technology transfer ownership of that technology to the purchaser. The sale price would, at a minimum, reflect the cost of the investment made by the seller and the unique nature of the technology. Joint ventures between the developer of the technology and the foreign purchaser provide another opportunity for technology transfer and profit. This approach encourages the protection of the technology involved by granting a vested interest in it to the developing country.

These considerations ought to encourage U.S. businesses to engage in the kind of technology transfer envisaged in the biodiversity treaty. There are always risks when property is invested in business activities, let alone international business activities. The U.S. delegation at the Rio conference was correct to underline them. The language in Article 16 of the biodiversity treaty does allow governments the right to act to facilitate technology transfer in the interests of their own economic development, but it also recognizes the need for adequate and effective intellectual property protection. Perhaps that protection could have been more forcefully underscored in the treaty. Perhaps the Clinton Administration, at Vice President Gore's urging, will decide to sign the treaty regardless of the fears voiced by the Bush administration.⁴⁴ The ultimate test for U.S. business interests, however, is whether in the search for profits, those interests will respond to the call for sustainable development in a manner that is creative and responsible, as well as profitable. The reality of life in the global village requires nothing less.

TOT/52 (1988) (discussing the changing environment of international transfer of technology).

43. See generally Zarco, *supra* note 30, at 182-184; Kasman, *supra* note 34, at 168 (arguing that intellectual property rights protection is no stumbling block in transferring environmentally sound technologies).

44. On April 21, 1993, President Clinton announced that the United States would become a signatory of the Biodiversity Treaty. See N.Y. TIMES, April 22, 1993, at A1.