

REGULATION OF TECHNOLOGY TRANSFER AGREEMENTS IN ETHIOPIA IN LIGHT OF THE WTO FRAMEWORK

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ABSTRACT

Accessing technology from developed countries requires accessing technological information, understanding it, adapting it to local realities and improving it. The existing WTO normative frameworks focus on diffusion of technical information from developed countries leaving host countries to take their own measures domestically to increase absorptive capacities. Art. 66.2 of the TRIPS Agreement is not particularly designed to increase absorptive capacities of least developed countries (LDCs). One major channel for technology transfer (TT) is through technology transfer agreements. Regulating TT agreements becomes imperative in view of restrictive and burdensome provisions dictated by technology suppliers. The prevailing international legal framework allows countries to adopt either ex post or ex ante approaches in regulating TT agreements. Ethiopia maintains a formality-based system of registration for investment related TT agreements and there is no system of registration for non-investment related TT agreements. The fact that non-investment related TT agreements are entirely unregistered goes contrary to various laws and policies including the national science, technology and innovation policy.

Key Words: Technology transfer, developing countries, regulation, restrictive agreements, new international economic order, globalization, North, South.

1. INTRODUCTION

It is said that one of the fundamental factors that determines a country's economic performance is its

technological prowess.¹ No country can industrialize and provide for its economic needs without technology.² Technology helps a country to complement or acquire industrial base. This makes access to technology a topic of paramount significance to developing countries in their attempt to extricate themselves from complicated economic and social problems. A given economy may access technology by innovating and diffusing it or by receiving technologies produced elsewhere, especially in developed economies.

Current literature on the subject shows that most technology is in the hands of developed economies that have the resources to invest in technology creation. Thus, the main focus of development literature for developing countries is towards ensuring diffusion of technologies created in such developed economies to developing economies. This requires defining international economic relationships in a manner that facilitates technology flow from North to South. Such transfer may take voluntary channels like trade, investment, licensing, franchising etc.; it may also take the form of involuntary channels like imitation. This research examines the suitability of the international and national regulatory framework in ensuring effective transfer of technology from developed countries to developing countries.

Understanding Technology Transfer

Technology transfer (TT) is perceived differently in different economies. In the North or developed economies, TT is about setting up market infrastructure to commercialize technologies to consumers who pay for access granted to them; whereas, in the South or developing economies, TT is about the diffusion of technology (as a matter of obligation) from North to South more on state-to-state terms.³ As a result,

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¹ Kevin E. Davis, 'Regulation of technology transfer to developing countries: the relevance of institutional capacity', 27 law and policy 6 (2005), p. 7

² Cezar T. F. Hilado, 'The Legal and administrative regulation of transfer of technology: the Philippine Setting', 51 Phil L. J, 69, 69 (1976)

³ Theodore Harper, 'Understanding technology transfer', 10 Whittier L. Review, 161, 161-162 (1988)

developed countries focus on strong intellectual property (IP) protection for technology owners and rules on technology export. For the developing world, TT is about affordable and easy acquisition of technologies from the North. Thus, the prevailing IP regime can be taken as retarding nonmarket based TT, especially through imitation and reverse engineering and encouraging market based transactions.

Technology is a result of huge personal and material investment by technology owners (in the North) and it is seen by corporate executives as the pride of their corporation and the biggest business asset; consequently private owners of such valuable asset will impart it only for profit.⁴ This also requires that the technology importing countries ensure certain and stable rate of return (eg. in terms of stable tax laws), stable exchange rates, absence of restriction on foreign exchange, transfer, and repatriation of funds. In addition, technology may be proprietary or non-proprietary and in the case of the former, it is important that the technology importing country maintains an appropriate property regime.

In addition to direct profit from the transaction, other benefits technology transferring corporations expect include assurance of market position in the technology recipient country/region; technical feedback/access to improvements to the transferred technology; sales support to penetrate market for the technology and to develop information and sell other products; and extension of manufacturing capacity by reducing cost of manufacturing.⁵

On the part of the technology recipient countries, the main areas of concern that warrant regulation of TT agreements include export restrictions on the products made using the technology, the price of technology,

packaging (i.e., linking TT to components, spare parts, and services) etc.

TT has various cognitive dimensions. Conceptually TT is understood as transfer of technological knowledge including acquisition of information concerning technology, transfer of capacity to assimilate, implement and develop technology.⁶ Thus, TT requires that the recipient should not only have access to technological information but also should (acquire capacity to) learn how to use the technology, adapt/assimilate it to local conditions and absorb (i.e., subsequent improvements/progression). This enables recipient to address local needs using local capabilities and opportunities.

Japan is a country well known in literature for its direct purchase of technology from abroad. But it is said that for each dollar it spent for technology purchase, it spent seven dollars for local research and development for local adaptation and improvement.⁷ In addition, the experience of Asian countries shows that local conditions like political will, high level of education and enlightenment, culture of work discipline and imaginativeness are important determinants of technology transfer. This shows TT cannot take place without deliberate regulatory and supervision policy.

TT can take the form of an economic operation itself or it may depend on operations that exceed it.⁸ When TT is dependent on other economic transactions like FDI, international trade, construction and supply of infrastructure, etc., it is a by-product or joint product and the importance and quality of TT depends on primary economic operations.⁹ The locus of decision making as to the modes of learning and the resources dedicated for TT is in foreign (technology exporting) country and scholars argue that there is risk of suboptimal decision making as the short term focus is drawing profit from the direct

⁴DanisM.Neill, Regulation of Technology Transfer, 1 Pub. L. Forum, 125, 126 (1981)

⁵Ibid, 126-127

⁶Dominique Foray, Technology transfer I the TRIPS age: the need for new types of partnerships between least developed and most

advanced economies, (ICTCID), (Issue paper No 3), (may 2009), p. 4

⁷Hilado, (n2) 75

⁸Foray, (n6)4

⁹Ibid

economic transactions.¹⁰In addition, the model of TT does not ensure long term technological independence of the recipient and effective technology transfer may not ultimately take place.

On the other hand, when TT is the main economic operation itself, it takes the form of market mechanisms like TT agreements, licensing, franchising, joint ventures and non-market mechanisms like imitation and movement of people. Here TT is the prime motivation and its success is not predicated upon other economic operations. Moreover, technology importers have the opportunity to participate in various decisions pertaining to TT but the incentives do not depend on other economic transactions. Importing countries shall make such transaction attractive on their own merit to the technology supplier.

We cannot commend one mode of transfer over another and LDCs like Ethiopia should acquire capacity and design regulatory frameworks to benefit from various levels of TT that affect local productivity in various ways. Many scholars argue that TT in both models is important for LDCs and they should make available sufficient incentives. However, the challenge is that LDCs' participation in international trade and flow of FDI is low (i.e., limited exposure to foreign technology) and the incentive for TT as independent economic transaction is poor as local absorptive capacity is low.¹¹ This requires additional incentives (other than market incentives, if any) especially to enhance local absorptive capacity and design policy framework to attract foreign investment and enhance international trade.

Models of TT Regulation

When technology transfer takes place from developed countries to developing countries, obviously there is a need to regulate TT agreements to deal with burdensome

terms and conditions due to unequal bargain power on the part of the recipient. Some of the undesirable terms and conditions that such regulations aim to prevent include inappropriateness of the technology to local conditions, disproportionately high (royalty) payment by the transferee, restrictive business practices imposed on transferees, requirements for extensive use of expatriate staff, . There are two competing approaches to regulate TT agreements as discussed below.

2. THE NEW INTERNATIONAL ECONOMIC ORDER AND REGULATION OF TT

Following the vocal assertion of the developing world for reform in international economic relationship in a manner supportive of their economic realities (especially to increase flow of technology to the developing world), the United Nations (UN) came up with various resolutions in support of the so called New International Economic Order (NIEO). These are the UN Declaration on the Establishment of New Economic Order (1974a) and the UN Program of Action on the Establishment of New International Economic Order (1974b).¹² This followed from domestic and collaborative measures by developed states and restrictive business practices by their multinational companies to restrict availability to and competitiveness of developing world.

Following these declarations certain reforms were taken in domestic laws and at international level. One notable international measure related to TT is the Draft International Code of Conduct on Transfer of Technology developed by United Nations Conference on Trade and Development (UNCTAD) in 1985. The genesis of the code is said to be Decision 24 of the Cartagena Agreement by Andean Group Countries ¹³that recommended establishment of a national agency to supervise technology transfer agreements.¹⁴

¹⁰Ibid, p. 5

¹¹ Foray, (n6) 7

¹² Davis, (n1) p.7

¹³Andean Group Countries are Bolivia, Colombia, Ecuador, Peru and Venezuela

¹⁴Paul Kuruk, Controls on technology transfer: An Analysis of the Southern response to Northern technology protectionism, 13 Md. J. Int's Law , 301, 312 (1989)

This instrument regulates both public and private aspects of TT agreements. In both cases the code tries to rectify unequal bargaining power between technology supplier and recipient. One notable provision affecting private aspect is Chapter 5.1 which encourages the parties to be responsive to the economic and social development objectives of respective countries of the parties and particularly of the technology acquiring country. In addition, Chapter 5.2 of the code again encourages parties to take in to account requests to include provisions requiring locally available resources and for unpackaging of information concerning various elements of technology to be transferred. Furthermore, Chapter 5.3 of the code requires parties to negotiate in good faith and requires the price or consideration charged for technology to be fair and reasonable and clearly indicated; the same provision requires the potential supplier party to disclose health, safety, and environmental risks associated with the use of technology and pending challenges to the validity of the rights to be transferred.

When we come to the public aspects of the code, it concedes huge discretion to state parties to regulate TT agreements in support of the weaker recipient party. Art.3.4 permits the establishment of national administrative agencies empowered to evaluate and aid in the negotiation of TT agreements with wide authority to review such agreements prior to their finalization. It also lists, under Chapter 4, the following restrictive business practices that may be prohibited in the TT agreement:

- Requiring the transferee to transfer improvements exclusively to the transferor (grant-back provisions) (4.1);
- Restricting the transferee's ability to challenge the validity of intellectual property claimed on the technology supplied (4.2);
- Unnecessarily restricting the freedom of acquiring party to enter in to sales, representation, manufacturing relating to similar or competing technologies or products (4.3)
- (Unreasonably) restricting the transferee's ability to engage in research and development to absorb and adapt to local conditions or to innovate new products, processes or equipment (4.4);
- (Unreasonably) requiring the transferee to use personnel, goods or services specified by the transferor(4.5);
- (unjustifiably) regulating the prices charged by the transferee for products produced using the technology supplied (4.6);
- (unreasonable) restrictions on adaptation or innovation of imported technology or restrictions that require transferee to introduce unwanted or unnecessary designs or specifications; (4.7)
- Exclusive sales or representation requirements in favor of the supplying party (4.8)
- Tying arrangements that impose duty to accept unwanted additional technologies, future inventions, goods, and services (4.9);
- Restricting exports (4.10); and
- Patent pool or cross licensing arrangements among technology suppliers (4.11);
- (unreasonable) restrictions on publicity or advertisement by acquiring party (4.12);
- Requiring transferee to pay after expiration of industrial property (4.13)
- Imposing obligation on the transferee after expiration of arrangement (4.14)

These are very important safeguards for developing countries in regulating TT agreements to prevent abuse and facilitate transfer of technology. However, the Code could not be adopted due to ambivalence of the developed world that is inclined to tolerate abusive arrangements to the extent that they do not entail anticompetitive effects.

The Globalization Model

The extensive regulation of terms of the TT agreements is said to be the reason why the NIEO model has not been adopted as a Treaty. The developed countries are said to have raised several objections to this model and opted for

a liberal model for the following reasons: the main developed country object to outright prohibition of restrictive business practices unless it entails unreasonable adverse effect on competition; application of same standard for TT agreements between commonly owned enterprises; and restriction on choice by parties of applicable law and court with jurisdiction as well as settlement by arbitration in the event of dispute.¹⁵The developed world seeks liberal treatment of TT agreements subject only on rules on competition as enshrined in various international agreements including the TRIPS Agreement. This globalization model embraced by developed countries is said to be particularly objected to non-competition related form of TT.

The NIEO model relies on scrutiny of TT agreements prior to conclusion (prior or at the time of contract) (ex ante) than the globalization model that uses competition law as instrument relying on later complaints (ex post) to enforce TT contract enforcement.¹⁶ When a system is predicated on predictability, ex ante regulation is preferable for it informs actors in advance.¹⁷ However, ex ante regulation is unattractive to countries with limited institutional capacity to administer such contracts.¹⁸ In addition, such compliance cost places smaller firms in developing countries at competitive disadvantage as such costs are fixed rather than variable.¹⁹ Thus, ex post regulation has two cost benefits especially to developing countries: savings in administrative expenses and compliance costs. Ex post approach deals with only a limited number of transactions suspected/reported to be non-compliant and is resource effective. But if the harm the transactions cause is not effectively dealt with for various reasons, ex post regulations entail irreparable loss to the economy. This is particularly the case in LDCs where the competition regime is ineffective. Secondly, the ex ante regulation does not give legislatures opportunity

for informed regulation to evaluate effects of a given practice.

As far as institutional aspect is concerned, the conventional developing country perspective is to authorize a specialized government agency 'to screen and regulate' terms of (international) Transfer of Technology agreements.²⁰

3. REGULATION OF TECHNOLOGY TRANSFER UNDER THE TRIPS AGREEMENT: PRIVATE AND PUBLIC ASPECTS:

Public Aspects

Paragraphs 5 and 6 of the preamble of TRIPS Agreement make mention of technology without any policy guidance on regulation of TT agreements. Similarly, the need for transfer and dissemination of technology is mentioned in Arts. 7 & 8 of the Agreement, again with no prescription of both public and private regulatory issues.

Art. 66.2 provides that 'developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDC Members in order to enable them to create a sound and viable technological base.' This provision focuses on measures by home countries of companies operating in LDCs and does not regulate measures by host LDCs. This provision is ill formulated in that it does not specifically impose obligation to enhance local absorptive capacity. A developed country may report to have sold or made available a technology or equipment to LDCs without being required to establish that measures have been taken to ensure that the recipient nation has actually understood how the technology works and has acquired capacity to adapt it to local reality. In such scenario, experts from the exporting country may be sent to operate the equipment for a certain period and the recipient may no longer be able to benefit from the technology once the experts have left or the equipment stops working. Thus, it is imperative that

¹⁵ Davis, (N.1) 12

¹⁶ Ibid, p. 23

¹⁷ Ibid

¹⁸ Ibid, p. 24

¹⁹ Ibid

²⁰ Ibid, p. 9

the obligation of the developed countries is defined in terms of the obligation both to impart the technological information and to improve local absorptive capacity.

The main impediments to this provision have been private ownership of technologies and host country measures or realities affecting TT. The TRIPS Council, following the Doha Declaration, came up with the 19 February, 2003 implementation decision. The decision requires annual reports and detailed reports every three year from developed countries on their implementation of this obligation.²¹

Home country measures taken to implement this obligation includes financing of TT, TT through FDI, matchmaking and provision of information on technologies, promoting public-private partnership, access to venture capital and TT, international alliances and transfer of technology, and measures to improve host country absorptive and technological capacity.²² Evaluation of the TRIPS implementation reports reveals that most of the private technology transfer initiatives follow business motive and LDCs, though target beneficiaries under the Art. 66.2, could not take advantage of the home country measures due to lack of absorptive capacities and resources.

Regulation of TT is also affected by legal regimes on investment. In this regard, Art. 2 of the Agreement of Trade Related Investment Measures (TRIMS) provides principle of national treatment. Thus, restrictions of investment that are inconsistent with the national treatment principle are not acceptable. For instance, imposing obligations on foreign firms to transfer technology will be inconsistent with the TRIMS. Such prohibited so-called local content requirements include the requirements on:²³

- purchase or use by enterprise of products of domestic origin from any domestic source;

- purchase or use of imported products be limited to an amount related to the volume or value of local products it exports;
- the importation by enterprise of products used in or related to its local production;
- importation by enterprise of products by restricting access to foreign exchange;
- the exportation or sale for exports by enterprise of products.

The TRIMS seems to be concerned more with prohibition of local content requirement than burdensome terms in TT agreements.

Bilateral investment agreements (BITs) (especially those negotiated by USA and Canada) exceed TRIMS and, in addition to prohibition on local content requirement, also prohibit requirements to transfer technology to local firms or to conduct a specified amount of research and development locally.²⁴ These prohibitions on requirements of local content easily spread to BITs that do not have such requirement on account of Most Favored Nation provisions. Such prohibition takes away the ability of state to use local content requirement to bring technology transfer or local innovation.

Private Aspects

Neither the Paris Convention nor the TRIPS Agreement regulates registration of technology transfer agreements. Art. 40 of the TRIPS Agreement allows members to regulate certain licensing conditions and practices which are very relevant to TT agreements. Moreover, Art. 31 (K) is interpreted as giving members the flexibility to regulate behavior of IP owners relating to TT agreements. In general the TRIPS allows member states to regulate TT agreements but only with a view to preserving competition. Furthermore, scholars who argue that the TRIPS follows a liberal model based on competition, as

²¹ WTO Council for TRIPS, Implementation of Art. 66.2 of the TRIPS Agreement, Decision of the Council for TRIPS of 19 February 2003, Art. 1

²² UNCTAD series on technology transfer and development: Facilitating transfer of technologies to developing countries –a survey of home country measures, (2004), PP. 5-11

²³ Agreement on Trade Related Investment Measures (Annex (1))

²⁴ Davis,(N.1) 15

opposed to the NIEO model, point to Art. 27.1. This provision is opposed to invalidation of patent on account of non-working and, even though it is controversial, there are scholars who further argue that same provision prohibits compulsory license for non-working locally.

In general, we can argue that the private and public aspects of the TRIPS regulation is not directly opposed to the NIEO model of regulation of TT agreements that relies on ex ante approval. However, it can also be argued that the prevailing multilateral framework is biased in favor of regulating TT agreements through the lenses of competition law than a system of ex ante evaluation, approval and registration.

4. REGULATORY FRAMEWORK FOR TECHNOLOGY TRANSFER IN ETHIOPIA

The Ethiopian economy is one of the fastest growing economies in Africa and the country aims at becoming a middle-income country by 2025.²⁵ There is a flurry of investment and TT activities. To mention just a few, the Ethiopian Airlines is acquiring state of the art aircrafts and undertaking a number of activities in partnership with foreign firms to benefit from new technologies; the country has embarked on building the largest hydro power generating dam in Africa; light municipal and cross country train services are under construction; multinational food chains like Pizza Hut and well known hotel managements have started entering the Ethiopian market; commercial agriculture is underway. Technology transfer is an important ingredient of such activities. In some cases TT agreements are entered for technologies like plant varieties not protected in Ethiopia even for longer period than duration of IP protection. It is also not difficult to anticipate restrictive or burdensome practices in many of those arrangements.

The current Science and Innovation Policy of the Country has, as its mission “creation of a technology transfer framework that enables the building of national capabilities in technological learning, adaptation, and utilization.”²⁶One important strategy embraced in the policy to realize the objective of TT is through importation of effective and appropriate technologies. However, there has been a lack of clear regulatory framework relating to TT agreements.

The Period from 1993-2003

During the period 1974-1991 Ethiopia had relatively not been open for foreign investment and the private sector commercial transactions were discouraged with the dominant socialist ideology. In 1991 the country arguably reversed the ideology and embraced market-based economy. Following the new market inclination, it issued Encouragement, Expansion and Coordination of Investment Proclamation No 15/1992 to encourage domestic and foreign investment. It also issued Council of Ministers Regulation No 121/1993 (pursuant to Art. 23 (4) of the proclamation) to regulate technology transfer agreements.²⁷The regulation was applicable to TT agreements between natural persons at least one of which is resident, domiciled in or is national of Ethiopia; a domestic private or public enterprise and a foreign enterprise; a foreign owned enterprise and a domestic private or public enterprise; and a parent company abroad and its branch or subsidiary in Ethiopia²⁸. The regulation introduced a system of advisory, evaluation, approval and registration of TT agreements by the Ethiopian investment Agency (EIA) and TT agreements not so registered are declared to have no legal effect.²⁹

The grounds for evaluation are: description of the technology transferred; ownership and validity of industrial property transferred and third party claims;

²⁵ Federal Democratic Republic of Ethiopia, The Second Growth and Transformation plan, (2015/16-2019/20)

²⁶ FDRE Science, Technology and Innovation Policy, (2012)

²⁷Transfer of Technology Council of Ministers Regulation No 121/1993

²⁸ Transitional Government of Ethiopia Transfer of Technology Council of Ministers Regulation No 121/1993, *Negarit Gazeta*, Art. 3

²⁹ibid, Arts.7-25

suitability of the technology for use; termination of confidentiality clause; performance guarantee; technical service; training of personnel; provision of accessories, components and spare parts when the technology supplier is the sole or major supplier of same; quality standards (in case of use by recipient of supplier's trademarks, trade names, and similar identification of good will); and use of local resources and local personnel; and evaluation of payment obligations.³⁰

Similarly, the regulation requires the EIA to refuse registration: when the agreement imposes restriction on research, development adaptation and modification by recipient; when the technology is obsolete and/or unsuitable or available in Ethiopia; when the supplier directly or indirectly controls or intervenes in the management of the recipient; when there is obligation to transfer or use industrial property rights or improvements obtained by technology recipient with or without compensation; if the agreement is fixed for an unduly long period; if there is undue restriction on use of complementary technologies; if there are tie-in clauses to obtain equipment, spare parts, tools, or raw materials exclusively, from supplier; when production volume is limited or sale or resale price is imposed on national production or exports; when there is undue restriction on personnel supply; when there is undue requirement on recipient to conclude exclusive sales or representation contracts; when there is undue and onerous obligation for quality control; when there is unreasonable restriction or prohibition on export of goods and services by the recipient; when there is obligation to sell goods to exclusive client; when the payment is unjustified for national economy or receiving party; and when the technology is contrary to national order or priority.³¹

The idea behind the regulation is protection of the weaker party, i.e., technology recipient, owing to information asymmetry and lower bargaining power. The effect of

non-registered TT agreement is that it is not enforceable by courts of law.³²

The regulation was expressly repealed by Art. 5 of Investment (Amendment) Proclamation No 373/2003. This means the system of detailed ex ante evaluation and registration of investment related TT agreements addressed above is set aside. However, there are other proclamations issued later like the Mining Proclamation No 678/2010 (Art. 43) that refers to the TOT Regulation No. 121/1993 or registration of TT Agreements. Therefore, we may say that the regulation is partly revived in case of such instruments.

On the other hand, Art. 15 of the current investment proclamation No. 1180/2020³³ reinstalls system of registration and tries to regulate formal aspects of TT. Sub-article (1) provides any investor concluding technology transfer agreement in relation to his investment shall have the agreement registered with the (investment) Commission. We can see that this provision is applicable only to TT agreements in investment context and is not applicable to other TT agreements.³⁴ TT agreements concluded by parties not related to any investment transactions do not qualify for registration.

The provision does not provide substantive requirements against which the Agency has to evaluate the agreement before registration. It also removed detailed formality requirements provided under the repealed proclamation. Art. 21 (2) of the repealed proclamation requires the following for application for registration of TT agreements to fulfill: application form signed by recipient of technology; photocopy of authenticated agreement between the technology recipient and provider; photocopy of valid business license or investment permit of the recipient; and certificate of registration or business license of the technology provider. In addition, Art. 21(3) of the repealed proclamation requires the Agency to issue a registration certificate to the applicant investor upon receipt of complete application as per sub-article (2). These are important details left out under the new proclamation probably for regulations that may be issued

³⁰ Ibid , Arts.10- 22

³¹ToT Regulation (n28), Art. 23

³²Ibid, Art.24

³³ The proclamation repealed and replaced Proc. No. 769/2012

³⁴ 'Investment' is defined under Art. 2(1) of the new proclamation as expenditure of capital in cash, in kind or in both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise.

pursuant to Art. 55. In any case both the new and repealed investment proclamations do not provide substantive criteria for the Commission to scrutinize terms of TT agreements in support of technology recipient and this is significant disregard of important policy considerations.

When we come to effect of registration of TT agreements, Art. 15 (2) of the new proclamation provides a technology transfer agreement that is not registered in accordance with sub-article (1) shall not have legal recognition with the Commission. This is important improvement from Art. 21 (4) of the repealed proclamation which states that TT agreements not registered with the Agency in accordance with the preceding formality requirements shall have no legal effect. Hence, under the new proclamation non-registration of investment related TT agreements does not render them effectless in the eyes of the law and they will be treated in equal footing with non-investment-related TT agreements. That is, unregistered TT agreements will be binding between parties but do not benefit from, among others, privilege of remittance of foreign currency available for registered agreements.

Sub-art. (3) of Art. 15 of the new proclamation requires the Commission to notify relevant federal executive organs and copy the National Bank of Ethiopia the registration of technology transfer agreement made in accordance with the same provision. This particularly because Art. 20 (c) of the new proclamation allows any foreign investor to remit (in convertible foreign currency) payments related to technology transfer agreements registered in accordance with Art. 15. One can question why the legislature guarantees remittance service to technology suppliers without ensuring that the technology and its terms of provision are in fact beneficial to the local economy. For instance, there is no point in

buying from abroad technologies available with local suppliers.

Failure to regulate terms of TT transfer agreements, investment related or otherwise, and absence of clear guidelines for remittance of royalty for non investment related TT agreements is serious gap a country like Ethiopia that desperately needs effective TT should rectify.

With the repeal of the TT regulation, Ethiopia seems to have been caught in between NIEO and globalization models to regulate TT agreements. It maintains a system of registration without substantive evaluation of the terms for investment related TT agreements. This (partial) move away from regulation to deregulation may partly be explained on account of maintaining consistency among different policies. That is, one may argue that the ex-ante model of regulation will only be successful if it is part of strict regulatory regime on FDI.³⁵ No doubt that the country maintains huge flexibility to attract foreign investment by providing lucrative incentives and tax and customs duties exemptions.³⁶ However, the regime has its own rigidities³⁷ and regulation of by-product transfer of technology does not necessarily contradict the policy behind the primary economic transactions.

The current approach does not have mechanism to implement policy direction embraced under the national Science, Technology and Innovation policy that requires transfer of only appropriate and effective technologies.

Examination of the experiences of many developing countries in Africa like Nigeria and Ghana shows that TT agreements are not registered when they contain provision which: transfers technologies freely available in the recipient country; permits technology exporter to unduly intervene in the administration of recipient; requires unnecessary quality controls; requires use of unnecessary package personnel and technologies;

³⁵See for example David Kremen, 'Anti-Trust and direct regulation of international transfer of technology transactions, A Comparison', 9 Md. J. Int'l Law and Trade 301, (1985)

³⁶ See Council of Ministers Regulation No. 270/2012, Arts. 5-15

³⁷See for example Ibid, Art. 3 (investment areas reserved for domestic investors), Investment Proc. 1180/2020 Arts. 6 (areas of investment reserved for the government or joint investment with the government)

imposes onerous obligation to transfer IP or improvements on the technology; requires royalty not commensurate to the technology; limits research and development; restricts sales, exportation, and use of complementary technology; unduly requires acquisition of inputs and personnel exclusively from supplier; imposes undue restrictions on volume of production and distributorship; prolongs duration of agreement beyond period of protection for the technology requires full payment for unexploited technology; requires submission to foreign jurisdiction and laws etc. In fact, countries like China have taken such deliberate measures dubbed at some quarters as ‘forced transfer of technology’ to ensure imparting and diffusion of foreign technology, for instance, by requiring foreign companies to operate in joint venture with local ones as condition to enter local market.³⁸

Most of the grounds of scrutiny above are also important socio-economic objectives in Ethiopia that TT agreements should not refute. Moreover, there are clear health, bio-safety, and environmental standards such agreements cannot disregard. The Commission cannot register anything parties agree. In addition, terms of non investment related TT agreements should not be entirely left to freedom of contract and provisions should be put in place to ensure that effective diffusion of appropriate technologies takes place and that such agreements are in tune with policy prescriptions and laws in diverse sectors.

Therefore, maintaining a system of prescreening through registration without clearly providing substantive grounds for evaluation is a paradox. Furthermore, if TT agreements in the mining sector are evaluated against detailed guidelines under Council of Ministers Regulation No. 121/1993, there is no reason why TT agreements in other sectors, investment-related or otherwise, should not be scrutinized ex ante against similar guidelines.

Ethiopia has a competition regime that prohibits anticompetitive trade practices that covers abuse of

market dominance; anticompetitive agreements, concerted agreements and decisions; and unfair competition.³⁹This can, among others, discipline such terms of TT agreements as tying arrangement (for basic inputs, spare parts and supplies after TT agreement), and export/import restrictions, and restrictions on competing local supplies. But this by no means justifies switching to ex post approaches. The inefficiencies of the competition regime means that there is a need for regulatory intervention at early stage than post facto analysis. The ex-ante registration and ex post competition regimes should complement each other.

5. TT AGREEMENTS UNDER ETHIOPIAN BILATERAL INVESTMENT AGREEMENTS

There were some (Latin American) countries in the past that required divestment of (existing foreign) investment and minority foreign shareholding in new investments with the aim to secure technologies thereby preventing decision making reflective of the corporate interest.⁴⁰This impedes the establishment of wholly-foreign owned subsidiaries in the developing world. The current Ethiopian law does not have such investment restriction; rather Ethiopia reserves a very long list of investment areas reserved for only domestic investors but this has nothing to do with regulation of TT. There are many wholly foreign owned subsidiaries in Ethiopia. The main focus at the moment is attracting more investment by reducing impediments and to strengthen the economy but in the future one may not rule out introduction of such requirement to facilitate TT.

Ethiopia has signed just over 30 bilateral investment agreements (BITs) with other countries to promote investment. The common provisions in the agreements related to TT regulation are national treatment and most favored nation treatment. Most of the agreements do not have provisions that directly regulate TT. However, certain BITS have provisions that can be seen as setting disciplines for domestic TT regulation. One such

³⁸ The legality of such measures is being examined within the WTO framework.

³⁹ See Trade competition and consumer protection Proclamation no. 813/2013, Arts. 5 -8

⁴⁰ Neill, (N4) 132

agreement is the Ethio-Finland bilateral agreement. Art. 3(3) of the agreement prohibits the contracting parties from mandating or enforcing measures on investments by investors of the other contracting party concerning purchase of materials, means of production, operation, transport, marketing of its products, or similar orders having discriminatory effects.

In the Ethio-France bilateral agreement, Protocol on Art. 3 (fair and equitable treatment) regards as impediment to fair and equitable treatment any restriction on purchase or transport of raw materials or auxiliary materials and hindrances of sale or transport of products. This can be construed as a guarantee against local content requirement in the host country.

The Ethio-Germany, Ethio-Iran, and Ethio-Kuwait agreements prohibit arbitrary or discriminatory measures that impair the management, maintenance, use, enjoyment, acquisition or disposal of investments. Moreover, the Ethio-Kuwait agreement prohibits imposition on foreign investors that require or restrict the purchase of materials, energy, fuel, or means of production, transportation, or operation of any kind that restrict the marketing of its product inside or outside its territory, or any other measure that has discriminatory effect. It also prohibits additional performance requirements (after establishment) by host countries that may hinder or restrict their use, enjoyment, management, maintenance, expansion and other activities of the investment.

Similarly, there are economic partnership agreements and treaties (with investment provisions) that may be considered as impacting TT regulation. One Such instrument is the Interim Agreement establishing a framework for an Economic Partnership Agreement between Eastern and Southern Africa States (ESA) and the European Community (EC) (2012). Under Art. 17 it requires elimination of all prohibitions or restrictions in trade on the importation, exportation or sale for export between the parties. This can be understood as

prohibiting import or export restrictions in TT agreements.

6. CONCLUSION

The prevailing international law does not impose firm obligation to ensure diffusion of technology from North to South. In particular, the prevailing international norms seem to focus only on limited aspect of TT, i.e., imparting of technical information. In terms of regulating private TT agreements between parties, the existing international instruments seem to be biased against ex ante regulation.

Ethiopia does not provide adequate measures for technological diffusion. The experience of successful Asian countries reveals that for effective technology transfer to take place, measures taken by recipient countries are important determinants. Especially building local absorptive capacity through promotion of scientific education and strengthening disciplined work culture is important. These are scarce commodities in LDCs like Ethiopia where advanced scientific education is at its early stage and capital is limited to public spending. Ethiopia concedes huge incentives for investment-related TT through investment incentives and tax exemptions. However, TT models as independent economic transactions are given no such incentives.

When we come to regulation of TT agreements the Ethiopian law entirely leaves aside non-investment-related TT agreements. Even with respect to investment-related TT agreements, the country has moved away from regulation to deregulation. As a result, there is no mechanism to check terms burdensome TT agreements on the recipient. And this undermines important public policy considerations.

The TRIPS system concedes flexibility to member countries to craft either NIEO or globalization/liberal model of TT regulation. In 1993 Ethiopia introduced a system of ex ante registration and evaluation of investment-related TT agreements. However, in 2003 it switched to a formality-based system of regulation, except for mining-based TT agreements. Registration of

an agreement without authority to correct restrictive and burdensome clauses does not serve much purpose. Similarly, it is imperative to exercise oversight over non-investment related TT agreements. It is important that Ethiopia maintains a system of prior evaluation and registration for all TT agreements, investment related or not. The existing system of regulation on TT agreement is extremely fragmented and chaotic and is not compatible with various national policies, especially science, technology and innovation policy. This, ultimately, needs to be rectified.

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