

KLUWER LAW INTERNATIONAL

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Legal and Economic Dilemmas on Multilateralism
versus Bilateralism

Yi Shin Tang



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*To Lii Hua & Kun Lieh,
Whose wisdom knows no frontiers*

*Para Lii Hua & Kun Lieh,
Cuja sabedoria não conhece fronteiras*

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List of Abbreviations

BIT	Bilateral Investment Treaty
EEC	European Economic Community
ECOSOC	United Nations Economic and Social Council
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
G-20	Group of 20
G-77	Group of 77
ICJ	International Court of Justice
ICCTT	International Code of Conduct on the Transfer of Technology
ICSID	International Centre for Settlement of Investment Disputes
IBRD	International Bank for Reconstruction and Development
ILO	International Labour Organization
ILC	International Law Commission
IMO	International Maritime Organization
IPR(s)	Intellectual Property Right(s)
LDC	Less Developed Country
MAI	Multilateral Agreement in Investment
MIGA	Multilateral Investment Guarantee Agency
MFN	Most Favored Nation (treatment)
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice

PTA	Preferential Trade Agreement
R&D	Research and Development
TNC	Transnational Corporation/Company
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
USTR	Office of the United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Chapter 1

Introduction

1.1 OBJECTIVES

The study of the legal rules governing the international transfer of technology from developed to developing countries, as devised in the present book, has three leading purposes. First, we attempt to understand the characteristics of the principal modes of technology transfer performed through market processes and the relations between these main alternatives, namely the case of foreign direct investments (FDIs) and licensing. Second, the book also investigates, through a view of legal efficiency, the importance of bilateral and multilateral agreements for promoting either forms of transfer. Third, the book will further analyze to which extent the current international legal framework regulating the transfer of technology between countries coincides with the institutional environment demanded by investors, licensors and other relevant players, not only in terms of efficient incentives, but also in terms of consistency with the principles of international law.

Although several factors determine a firm's choice for one or another mode of transfer, there are two variables that serve as our primary object of interest. One is the focus on technology flows that can be clearly identified in the market process, thus excluding a priori any other transfers taking place in non-market transactions. The other variable is the analysis of the legal framework. As one can note, this book is mainly interested in assessing whether certain types of international rules (namely, multilateral versus bilateral treaties) are more or less capable of efficiently encouraging technology flows from developed to developing countries.

In order to achieve that objective, the book will engage in a detailed examination of the effects of international transfer of technology on economic growth by introducing the main institutional channels of technology trade between countries and describing their evolution from domestic to international regulations. Some related concepts will then be extracted and refined in order to develop a more comprehensive analysis of the problem. For instance, one issue is to compare the

crucial definitions of 'developing' and 'developed' nations in the light of the traditional economic view of 'donors' and 'recipients' of technology, and to point out how they may interfere in the process of crafting effective agreements between two or more nation-states.

Furthermore, while many scholars agree that stronger levels of international intellectual property rights (IPRs) protection are fundamental for encouraging higher degrees of FDIs and licensing, it still remains controversial in the literature as to what the best strategy is to attain such levels of protection, and whether any particular strategy might conflict with another being simultaneously pursued in the arena of international relations. More specifically, several studies claim that bilateral trade agreements tend to undermine the benefits of the multilateral trade system, so that states should refrain from engaging in bilateral strategies if they wish to attract higher inflows of investment and technology. Because we are initially skeptical about these views, our aim is not only to contribute to the clarification of this matter, but also to evaluate under which circumstances the international legal framework, by dissecting its mechanisms and remedies, is actually able to maximize any given potential for disseminating technology among nations.

This objective implies that two distinguished areas of law will be primarily demanded: public international law and intellectual property under the international trade law framework. Moreover, the study of international law through a perspective of legal efficiency is an important facet of our proposal. International laws, as we generally know, may enjoy certain advantages but also bear other well-known costs. For example, experience suggests that treaties and international instruments are capable of promoting institutional changes on a global scale, through embracing full national commitments and faster means of legal harmonization. However, these international treaties hardly enjoy the same standards of enforcement like domestic contracts, and consequently cannot generate similar levels of confidence from private investors and companies. In addition, the formation of international laws is usually affected by negotiation costs in a particularly awkward manner: the resulting treaty can be an ambiguous, often contradictory text which in practice ends up as ineffective.

In sum, the objectives of this book are clear but challenging. Both licensing and FDIs are currently governed by international rules that may have not been properly organized to explore the latent benefits of global technological transfers. If we succeed in indicating those imperfections and understanding their causes, governments and scholars may have additional guidelines for understanding how the different international legal rules may enjoy greater potentials for improvement, according to the specific purposes for which they were originally designed.

1.2 BACKGROUND

The problem in overcoming the economic gap between developed and developing countries has reached a point where international transfer of technology has turned into one of the dominant issues in the economic and legal literature.

International transfers of technology have become acknowledged as one of the effective mechanisms that promote growth and development in developing countries.¹ The possibility of increasing local productivity by means of technological transfer therefore allows the creation of indigenous technical knowledge and leads to a substantial level of technological catch-up.² As a result, the importance of the regulatory standards for international technology transfers has gained enormous attention with the conclusion of the Uruguay Round of the World Trade Organization (WTO) negotiations in the 1990s (particularly through the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights – frequently known as the TRIPS Agreement – as part of the Marrakesh meetings of 1994), as well as with the substantial increase in the number of bilateral investment treaties (BITs) in the last decade.³

In theory, technological transfer is an activity in the interest of both companies and governments, since it fosters local development through the transmission of technical knowledge and equipment, while it also provides large opportunities for trade gains among companies and states. There is evidence of this convergence in the fact that international payments originating from contracts of technology transfer have suffered a sensitive increase in the last two decades through their two most frequent modes – FDIs and royalty payments originating from licensing agreements, as pictured in Figures 1.1 and 1.2. In fact, this sharp increase in the level of international technology transfers had its critical boost only a few years after the so-called Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations took place, which also led to an unprecedented level of institutionalization of the multilateral system of trade and investments embodied in the formal creation of the WTO.⁴

Such an expansion, which actually represented a continuation of the original objectives of the post-war Bretton Woods and GATT agreements,⁵ reflected the general trend of firms to produce goods in different markets, under the logic that certain locations can offer lower costs of production as well as further opportunities for market access. By following that rationale, the rise of the so-called transnational corporations (TNCs) demanded innovative methods for efficiently employing resources distributed among its various markets. Although several alternatives were attempted, continuous corporate practice generated the impression

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1. See Robert M. Solow, 'Technical Change and the Aggregate Production Function', *The Review of Economics and Statistics* 39 (1957): 312-320.
 2. See Richard D. Robinson, *The International Transfer of Technology: Theory, Issues and Practice* (Cambridge: Ballinger, 1988), 25 et seq.
 3. See Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?', *Northwestern Journal of International Law & Business* 26 (2005): 96.
 4. See The Marrakesh Agreement Establishing the World Trade Organization. Published on 15 Apr. 1994.
 5. For a detailed history of post-war economic agreements, see Ngaire Woods, *Explaining International Relations since 1945* (Oxford: Oxford University Press, 1996).