

**Proposed Egyptian Law to Regulate  
Technology Transfers**

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A proposed Egyptian law to regulate technology transfers would give the Egyptian government centralized regulatory control over a wide range of agreements under which technology is transferred to Egyptian parties. If the draft legislation (Draft Code) is enacted, many of the licensing and technical assistance agreements under which foreign companies provide expertise and know-how to Egyptians would be subject to additional government regulation. Enactment of the Draft Code in essentially its existing form could also indicate a trend toward a "protected market economy" in Egypt.

The Draft Code is only a proposed law and has not yet been submitted to the Peoples Assembly for review and approval.<sup>1</sup> Nonetheless, it represents a significant departure from the current regulation of technology transfer in Egypt, and the breadth of the potential changes warrants a preliminary analysis. The Draft Code undoubtedly is not yet in its final form, however, and the discussion in this article is therefore not intended to be a comprehensive technical evaluation of the specific provisions and issues in the proposed law.

**Preparation of the Draft Code**

The Draft Code had been initiated at least as early as 1981 and is the end-product of an ad hoc committee consisting of representatives from the Investment Authority, the General Organization for Industrialization, the Academy of Scientific Research and Technology, and the Council of State. Last year, the United Nations published an English translation of the Draft Code in a relatively limited-circulation periodical.<sup>2</sup>

The Draft Code borrows heavily from the theories and terminology of the UNCTAD draft code on technology transfer,<sup>3</sup> and we understand that during its preparation, the drafters examined technology transfer laws of other countries, such as India, Mexico and the Philippines.

It is unclear whether any of the impetus for the Draft Code was created by the "economic rationalization" movement in Egypt and the backlash from the perceived abuses of Egypt's "Open Door"

policy. It appears clear, however, that the ad hoc committee concluded that greater scrutiny should be given to technology transfers. Apparently the committee also concluded that Egypt had previously received inadequate or inappropriate technology, at least in some instances. (In that regard, the Draft Code could receive support from many of the critics of the current Egyptian regulations on technology transfer, which generally allow parties significant latitude to negotiate the terms and conditions of their contracts.) The Draft Code also could reflect some of the tensions and resulting debate (both within the Egyptian government and the private sector) on the question of the future role of government in the Egyptian economy.

### **Technology Transfer: Background**

Over a decade ago, Egypt embarked on an "Open Door" economic policy to obtain the necessary capital, goods and technology for Egyptian national development. The keystone of this policy is Law No. 43 (1974), as amended (the Investment Law). This law was enacted to create a new legal framework in Egypt that would encourage foreign companies to transfer technology as an integral part of the economic development process.<sup>4</sup> A particular goal of the Investment Law was to increase investments of a trilateral nature: projects bringing together Arab capital, Western technology and Egyptian manpower and resources.<sup>5</sup>

### **Investment Authority and GOFI**

Neither the Investment Law nor its implementing regulations, however, specifically establishes procedures for the transfer of technology. Decisions setting the general policies on technology transfer in the context of Law No. 43 projects, as well as the specific terms and conditions of technology transfer contracts, have consequently been left to the broad discretion of the Investment Authority.

Many technology transfer agreements, however, do not involve "investment" in Egypt. They are consequently outside the scope of the Investment Law and therefore need not be approved by the Investment Authority. However, the General Organization for Industrialization (GOFI) at the Ministry of Industry is responsible for approving manufacturing operations in Egypt, whether performed by a public or private sector company. GOFI thus must approve a technology license if the agreement relates to a product not already manufactured in Egypt. GOFI has discretion to examine the substantive provisions of such licensing agreements and request changes it deems appropriate before issuing its approval.<sup>6</sup> (Depending on the particular circumstances, approval from other

Egyptian government authorities, of course, may also be required. For example, the Ministry of Health must approve licensing agreements for pharmaceutical production in Egypt.)

Although GOFI approval generally is necessary for technology licensing agreements, approval is not required for licensing agreements involving trademarks and certain types of technical know-how (for example, engineering expertise relating to plant layout) not involving "process secrets."<sup>7</sup> In GOFI's view, such "process secrets" are the core of any technology license agreement requiring its approval.

### **GOFI Approval**

No Egyptian legislation is applicable to the terms and conditions of licensing agreements (such as limits on the maximum rates of royalties) and, to date, GOFI has not issued standard or model licensing agreements. Nonetheless, GOFI applies a number of well-established principles in its review of technology licensing agreements. In general, a licensing agreement will be approved by GOFI only if the license is in the "national interest" and involves the transfer of "complete" know-how. With regard to royalty rates, GOFI will probably determine an "acceptable" rate by examining a number of factors, including the type of product(s) involved and the amount of local manufacturing that is contemplated by the licensing agreement.

One of the more important general considerations that guides GOFI is whether its approval will facilitate Egyptian exports or eliminate imports. Thus, if the licensing agreement is for a project expected to earn foreign currency for the Egyptian licensee, or diminish the amount of foreign currency spent by the Egyptian public on imports of similar products, GOFI approval usually will be granted.

### **Recent Criticism**

Review and approval by the Investment Authority and GOFI are designed to ensure that licensing agreements accord with the Egyptian public interest and not merely the interests of the contracting parties. Some observers have suggested, however, that the Egyptian government has failed to regulate technology transfer in a way that is truly in the national interest.

This criticism has been indirect in some cases. For example, in an article published in an Egyptian periodical,<sup>8</sup> Professor Elias Tuma reviewed technology development in the Middle East, including Egypt, and noted that one of the obstacles to technology transfer

is political in nature. Some political leaders, according to Professor Tuma, "vacillate between a market approach and planning, and between discipline through the plan or discipline through competition and self-interest."<sup>9</sup> Professor Tuma concluded that, among other things, "priorities have to be rearranged in favor of ... long term objectives."<sup>10</sup>

Other criticism of the Egyptian government's "track record" has been more direct, with critics charging that the Investment Law is merely an open door to consumption. At a recent conference of businessmen and lawyers in Cairo, one Egyptian attorney criticized the Investment Authority for approving projects (in this case, foreign fast-food franchises) that fall outside the intended objectives of the Investment Law: "Selling hamburgers or donuts is a perfectly legitimate activity, but one that can hardly be considered an objective of Egypt's economic and social development."<sup>11</sup>

Members of the ad hoc committee that prepared the Draft Code appear to have been sensitive to these concerns and the absence of any centrally developed policy on technology transfer in Egypt. Dr. Wahby Wahba, an official with the Cairo office of the Investment Authority<sup>12</sup> and a member of the committee, has said the Draft Code will serve to "better channel" the transfer of technology into Egypt in order to "safeguard" national "economic and technological autonomy." Dr. Wahba summarizes:

[O]ne should not forget that national development requires the infusion and integration of appropriate and selected technological innovations in productive enterprises all over the wide range of sectors producing goods and services. Appropriateness has to be decided upon not only at the level of the parties concerned (commercial feasibility) but also within a wider framework of national objective.<sup>13</sup>

The Draft Code establishes a framework in which a centralized government authority can decide whether a particular technology transfer agreement is "appropriate" for Egypt.

## **The Draft Code**

### **Scope**

The Draft Code, if enacted, would apply to a broad range of technology transfer agreements, including the sale or license of all forms of industrial property, know-how and expertise and technical assistance (such as managerial advice and training). In

theory, therefore, management assistance agreements (such as those common in the hotel and banking industries) would be included. Trademark and service mark licenses are not considered "technology transfers," except to the extent such licenses form a part of the types of technology transfer agreements described above. The pure sale or leasing of goods is not considered "technology transfer" for purposes of the Draft Code.<sup>14</sup>

Article 2 of the Draft Code broadly defines the parties subject to the Code, including public sector organizations as well as private sector entities, groups and individuals, "wherever their headquarters or centers of activity are located." Thus, the definition of the term "party" does not serve to significantly limit the scope of the Draft Code.

Nonetheless, the Draft Code was apparently prepared primarily to regulate "international" technology transfer transactions involving foreign parties supplying technology to Egyptian parties. Publicly circulated justifications for the Draft Code focus on the risks of such international transactions to Egypt (two problems cited are the strong bargaining power and sophistication of large multinational companies, and the loss of hard currency paid overseas for questionable technology).

As noted, however, the provisions of the Draft Code are not limited to "international" transactions. The officials preparing the Draft Code may not have been willing to expressly exclude "domestic" technology transfers from the proposed regulations because the "local" supplier of technology might in some cases be a branch, subsidiary or affiliate of (or otherwise directly or indirectly controlled by) a foreign company.<sup>15</sup>

### **Registration Requirement**

Under Article 13, the Egyptian Academy of Scientific Research and Technology (the Academy) is authorized to examine and evaluate contracts for the transfer of technology and to register the contracts after ascertaining that they comply with applicable law.<sup>16</sup> Article 5 provides that technology transfer contracts will only be effective after registration. Preexisting contracts for the transfer of technology must be presented to the Academy for registration within six months from the enactment of the Draft Code into law. (Although the Draft Code is silent on the matter, we understand that the committee's intention was not to subject such preexisting contracts to substantive review.<sup>17</sup>)

### **Centralized Regulatory Control**

Under Article 13 of the Draft Code, the Academy is assigned a number of wide-ranging and complex duties. For example, the Academy is authorized to develop model contracts for technology transfer. (The Draft Code does not indicate whether such model contracts will be mandatory, or whether the parties may supplement, or depart from the terms of, a model contract in a particular technology transfer agreement.)

Perhaps more significantly, the Academy is authorized to "cooperate" and "guide" public sector entities (and "extend advice" to private sector parties) in technology transfer negotiations in order to ensure the most favorable conditions for the Egyptian parties.<sup>18</sup> In particular, the Academy may assist by locating alternate sources for the technology and by locating "unpackaged" technology.<sup>19</sup> ("Unpackaging" is a process whereby technology is broken down into discrete components. In theory, the party acquiring that technology is then in a better position to evaluate the most appropriate foreign or local sources for each component of the technology.)

In connection with the Academy's role as the central regulatory body for technology transfer agreements, provisions in the Draft Code restrict or prohibit the parties from agreeing to certain contractual conditions. The Draft Code also makes other provisions mandatory in every technology transfer agreement reviewed under the Draft Code.

Certain Provisions Prohibited. Article 6 enumerates certain cases in which a technology transfer contract shall not be registered. Some of the most important of these are:

- (i) If the technology is publicly available;
- (ii) If the party acquiring the technology must assign, in favor of the licensor, without compensation, rights in inventions or improvements obtained by the acquiring party during the contractual period (so-called "grant backs"), or if other contractual provisions may lead to an unequal relationship between the parties;
- (iii) If the contract restricts the party acquiring technology from exporting products, if (presumably, in the Academy's view) such a restriction is incompatible with Egyptian public interest;
- (iv) If the contract imposes restrictions on the party acquiring the technology which relate to size of its

production or sales prices for local or foreign markets;  
and

- (v) If the period of the technology transfer contract exceeds ten years.<sup>20</sup>

Article 7 of the Draft Code enumerates certain cases in which a technology transfer contract will not be registered unless otherwise justified by countervailing considerations (for example, of the common good and the Egyptian national economy). Included are cases where the contract contains provisions that obligate the party acquiring technology to purchase raw materials and other products from the technology supplier, or require the appointment of the supplier as the sole representative or distributor for products produced by the party acquiring technology.<sup>21</sup>

Neither Article 6 nor Article 7 of the Draft Code expressly restricts or prohibits the amount or types of royalty payments that are legally permissible (for example, percentages of sales value or lump sum "up-front" payments). Significantly, however, the Draft Code does not address a licensor's right to transfer royalties out of Egypt, even if the license agreement is registered and the licensor complies fully with the Draft Code. In comparison, the Investment Law gives foreign investors certain express rights to repatriate profits from Egyptian projects.

Mandatory Provisions. Article 8 of the Draft Code sets out certain obligations of a supplier of technology. For example, the supplier must disclose any risks that may result from utilizing the technology, particularly relating to environmental and public health risks. (Middle East governments have, not surprisingly, shown increased sensitivity to these matters since the Bhopal and Chernobyl accidents.) The supplier must also agree to provide spare parts and other components necessary for the use of the technology, as well as all documents and other data required for the assimilation of the technology. The supplier must also guarantee to pay for damages resulting from defects in the technology when it is utilized in accordance with the conditions of the agreement.

The committee preparing the Draft Code apparently intended that Article 9 would help to "balance" Article 8 by establishing certain obligations on the party acquiring technology. (As currently drafted, however, Article 9 also contains additional obligations on the technology supplier.) For example, Article 9 states that the party acquiring technology must employ local labor, local materials and local services. Under Article 9, the technology transfer contract must also provide for the confidentiality of data and information supplied by both parties.

### **Disputes and Governing Law**

Jurisdiction for the settlement of disputes arising from technology transfer contracts is conferred on the Egyptian courts under Article 10 of the Draft Code. Presumably this provision grants exclusive jurisdiction to the Egyptian courts although, under Article 11, the parties may agree to settle disputes by arbitration. Article 11 of the Draft Code describes certain (presumably mandatory) rules governing the formation and operation of any arbitral panel established to resolve such disputes.<sup>22</sup> Although some of the language in Article 11 has been borrowed from Article 8 of the Investment Law, there are significant differences between them. For example, Article 11 of the Draft Code states that arbitration proceedings shall take place in the country of the defendant in the dispute.

Under Article 12, Egyptian law governs technology transfer contracts. Presumably the Academy would refuse to register a contract that contained a foreign (non-Egyptian) governing law clause.<sup>23</sup>

### **Sanctions**

As previously discussed, Article 5 of the Draft Code provides that technology transfer contracts will be effective only upon registration in accordance with the Draft Code. This provision obviously could be a significant deterrent to parties who might otherwise contemplate evading the registration requirement of the Draft Code. (For example, presumably secrecy clauses and royalty payment obligations would be "ineffective," at least in Egypt, if the underlying agreement were unregistered.) In addition, Article 14 contains penalties applicable to any party violating the provisions of the Draft Code, including the registration requirements. Those penalties include imprisonment for up to one year and a fine of not less than £E 5,000. Therefore, although the Draft Code does not state whether the registration obligation is imposed on the recipient of technology, the technology supplier, or both, the better view currently is that both parties to a technology transfer agreement should be responsible for ensuring registration.

Another related issue is whether supplemental agreements or "side letters" are subject to the registration requirements in the Draft Code. (Clearly such agreements would be unenforceable to the extent they attempted to deviate from applicable Egyptian law.) The answer to this question might depend on the registration practices adopted by the Academy. For example, the Academy might insist on registering short agreements (in the form of "model

contracts," as suggested under Article 13) but allow the parties to set out certain details of their technology transfer (such as highly technical matters) in a supplemental unregistered contract.

### **A Protected Market Economy?**

The Draft Code represents a significant possible departure from current regulations on transfers of technology in Egypt. Moreover, the scope of the Draft Code is extremely broad. For these reasons, the Draft Code raises significant questions, but many of its provisions are, at best, ambiguous. Of course, the Draft Code is only a proposed law and probably will be revised (for example, in the Peoples Assembly) before it is enacted.

In Egypt, as in other Middle Eastern countries, implementing regulations usually clarify many of the questions raised by broad general language contained in laws. Implementing regulations for the Draft Code must establish, for example, specific procedures for the submission of technology transfer agreements to the Academy.<sup>24</sup> In any given case, the Academy presumably will have to coordinate its review with the Investment Authority or GOFI.

For many years, the Egyptian government has sought to encourage foreign investment and technology transfer by streamlining or eliminating bureaucratic procedures and approvals. Only slightly more than a year ago, Dr. Ahmed El-Dersh, the Undersecretary of State for the Investment Authority, observed that "[T]he general trend in laws and regulations affecting the business climate [in Egypt] is towards less and less constraints and more and more privileges."<sup>25</sup> Aspects of the Egyptian government's current economic policy, however, reflect other, contrary elements - the policy is officially termed a "productions-oriented Open Door policy, with due regard to avoiding adverse social implications."<sup>26</sup> As noted, if the Draft Code is enacted in essentially its existing form, it will be strong evidence of a trend toward a "protected market economy" in Egypt.

**ENDNOTES**

1. As is often the procedure for proposed legislation, the Draft Code was initially referred to the Council of State for review prior to submission to the Peoples Assembly. We understand that the Council of State has opined that some of the provisions of the Draft Code (possibly those articles granting broad authority to the Academy of Scientific Research and Technology) may be in violation of the Egyptian Constitution. For this reason, the Draft Code has been returned to the ad hoc committee for reconsideration.
2. UNIDO (United Nations Industrial Development Organization) T.I.E.S. (Technological Information Exchange System) Newsletter (July 1985), at pp. 8-16.
3. United Nations Conference on Trade and Development, Draft Code of Conduct on the Transfer of Technology, reprinted in 19 International Legal Materials 773 (1980). See also Pedro Roffe, "Transfer of Technology: UNCTAD's Draft International Code of Conduct," 19 International Lawyer 689 (1985).
4. Stephens and Hayek, eds., Investment in Egypt: Law No. 43 and Its Implications for the Transfer of Technology (1974), p. ii. See also Samir Sadek, "Some Comments on the Regulation of Foreign Investments in Egypt," paper presented at Middle East Economic Digest Conference on Law and Business in Egypt (Cairo, March 17-18, 1986), p. 2.
5. Salacuse and Parnal, "Foreign Investment and Economic Openness in Egypt: Legal Problems and Legislative Adjustments of the First Three Years," The International Lawyer 759, at 759 (1978).
6. See Law No. 31, of 1958.
7. Licensing agreements involving trademarks and patents should be recorded (respectively) in the Trademark Office and the Patent Office in Egypt. See Law on Patents, Designs and Industrial Models (1949) and Trade Mark Act (1939).
8. Elias H. Tuma, "Science, Technology and Economic Development in the Middle East," L'Egypte Contemporaine (January-April 1983), at pp. 27-52.
9. Id., at p. 43.
10. Id., at p. 49. Similarly Dr. Elias Ghantus, assistant secretary-general of the Union of Arab Chambers of Commerce, has observed that Arab industrial development in the past

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decade has emphasized "the purchase of technical products, and the transfer of plants and their modes of operation, rather than a real transfer of technology." See Mushtak Parker, "Boosting Arab Industry," The Middle East (April 1986), at pp. 19-20.

11. Sadek, supra note 4, at p. 6.
12. Dr. Wahba is the Head of the Research, Information and Promotion Sector, General Authority for Investment and Free Zones (Cairo).
13. Dr. Wahby G. Wahba, "Technology Regulation in Egypt: The Draft Code," Egypt Investment Review (April 1986), at pp. 1 and 4. See also Wahba, "Technology Regulation in Egypt," Egypt Investment Review (Jan. 1981), at p. 6.
14. Articles 1 through 4 of the Draft Code are some of the more obvious examples of borrowing from the UNCTAD draft code on technology transfer.
15. The draftsmen of the UNCTAD code have similarly had difficulty in agreeing on the scope of that code. See Pedro Roffe, "UNCTAD: Transfer of Technology Code," 18 Journal of World Trade Law 176 (1984), at pp. 178-79.
16. We have been advised that United Nations' experts, who acted as consultants to the ad hoc committee developing the Draft Code, suggested that registration and supervision of technology transfer contracts be undertaken by a new center connected to the Prime Minister's office. The ad hoc committee was reluctant to expand upon a bureaucracy that is already subject to significant criticism. Therefore, reportedly in the last meeting of the committee before circulation of the Draft Code, the representatives designated the Academy as the responsible authority for supervising and implementing the Draft Code.
17. Under current interpretations, this might create a loophole in the registration requirement of the Draft Code. If a technology transfer agreement expires and then subsequently is "renewed," the agreement would be reviewed substantively by the Academy. An agreement would apparently avoid substantive review, however, if it contained an automatic extension clause.
18. The Academy is to coordinate its activities on these matters with the "specialized authorities" and technical agencies that have expertise in the technology involved, for example, the Ministry of Petroleum for oil-related technology transfer

agreements. Apparently the theory is that legal and economic aspects of a license will be reviewed by the Academy, while "technical" aspects of a license will go to the specialized authorities and technical agencies.

19. See also A. F. Ewing, "UNCTAD and the Transfer of Technology," 10 Journal of World Trade Law 197 (1976).
20. Although the Draft Code does not prohibit renewals of registrations, some interpret Article 6 to allow renewal (and continuing royalty or fee payments) only when the contract involves advanced technology needing continual updating.
21. The registrar at the Academy would have discretion to examine the surrounding circumstances to decide whether to allow such contract provisions. Such an examination would presumably scrutinize the effects of technology payments on the recipient/licensee, on the country's balance of payments and on the consumer. See Wahba, "Technology Regulation in Egypt," supra note 13, at p. 5.
22. Under current practice, GOFI will approve license agreements containing provisions for the settlement of disputes by foreign arbitration. GOFI is extremely unlikely to approve agreements containing provisions for dispute resolution in a foreign judicial forum. In regard to the treatment of such provisions in the UNCTAD code, see Gabriel Wilner, "Applicable Law and Dispute Settlement in the Transfer of Technology Code," 17 Journal of World Trade Law 389 (1983).
23. Under current practice, the choice of a foreign governing law provision in license agreements generally will be approved by GOFI, provided such foreign law has some reasonable connection to the parties and the licensee is not an Egyptian public sector company. Where the licensee is a public sector company, GOFI invariably will insist upon an Egyptian governing law provision.
24. We understand that implementing regulations are partially drafted, but in very preliminary form, and currently address only rules pertaining to Articles 6 and 7 of the Draft Code, concerning restrictive practices.
25. El-Dersh, "The Three Canons of Investment: Stability, Profitability, and Transferability," Egypt Investment Review (April 1985), at pp. 1 and 3. Earlier descriptions of Egypt's proposed technology transfer policy stated that scientific experts would serve as "advisors to, rather than regulators of, public or private sector purchasers" of technology. Dr. Wahby G. Wahba, "Egypt's Policy on

Technology Transfer," Les Nouvelles (Journal of the Licensing Executives Society) 215 (December 1982), at p. 217.

26. Dr. Nabil S. Mohareb, "A Modified Context for the 'Open Door'," Middle East Executive Reports (May 1986), p. 8.