

15 April 1987
Original: ENGLISH

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Consultations on the code of conduct on the transfer of technology

11-14 May 1987

Identification of appropriate solutions to the issues
issues outstanding in the code of conduct

Note by the UNCTAD secretariat

The present note has been prepared with the intention of assisting Governments in the identification of appropriate solutions to the issues outstanding in the code of conduct pursuant to General Assembly resolution 41/166 of 5 December 1986. The note describes the issues outstanding in chapter 4 of the code dealing with restrictive practices, particularly the so-called "chapeau" of the chapter. It then gives an account of the latest proposals by regional groups and China on the chapeau and summarizes the developments at the sixth session of the Conference.

A. Introduction

1. Chapter 4 of the Draft International Code of Conduct on the Transfer of Technology, dealing with restrictive practices, has proved to be the most complex area of the code negotiations. The chapter is supposed to set forth broad international standards concerning restrictive practices from which parties to technology transfer transactions should refrain. The Conference has succeeded, in this respect, in the formulation and conceptualization of 14 practices that include: challenges to validity of patents; exclusive dealing; restrictions on research and development; restrictions on use of personnel; price fixing; restrictions on adaptations; exclusive sales or representation agreements; tying arrangements; patent pool or cross-licensing agreements; restrictions on publicity; and, payments and other obligations after expiration of industrial property rights; grant-back provisions; export restrictions; and restrictions after expiration of arrangements. The precise scope of application of the last three practices still requires further clarification.

2. The difficulties encountered in the negotiations relate mainly to the formulation of the introductory paragraphs to chapter 4, the so-called "chapeau". The chapeau according to the various positions would comprise three major elements: (i) the characterization of the practices to be avoided and the circumstances under which they should be avoided; (ii) the criteria to be followed by parties or by competent authorities in the determination of whether a practice is restrictive or not for the purpose of the code; and (iii) the applicability of chapter 4 provisions to transfer of technology transactions between related parties (affiliated parties/parties under common control).

3. The sixth session of the United Nations Conference on an International Code of Conduct on the Transfer of Technology, hereinafter referred to as the Conference, held in May-June 1985, was a good occasion for Governments to clarify their precise views and positions on the conceptual problems surrounding the chapeau of chapter 4. During that session, all regional groups and China submitted papers describing their respective approaches to the chapeau. The sixth session was also the occasion for a major effort by Governments to come closer to an agreement. The important developments which took place at the Conference concerning chapter 4 of the draft code were summarized as follows by the Chairman of Working Group I when, submitting his report at the 21st meeting of the Plenary of the Conference he said "he would have liked to be able to report to the plenary meeting of the Conference that the consideration of chapter 4 of the draft code of conduct by Working Group I had been crowned with success, as everyone had hoped. The discussions had, however, been important as a means of assessing changes in the positions of the regional groups which might well at some future moment lead to a consensus on that important subject." 1/ These developments are summarized below.

B. Proposals by regional groups and China at the sixth session of the Conference on the chapeau of Chapter 4 2/

States members of Group D and Mongolia

4. The States members of Group D and Mongolia were of the view that the chapeau should reflect in a succinct manner the main purpose of chapter 4 by providing that parties to transfer of technology transactions should refrain

from the practices listed in the code when they are in conflict with the objectives and principles of the code. In order to clarify this notion further, the Group considered it appropriate to spell out among the objectives of the code - in chapter 2 - the specification of practices restrictive or detrimental to development and competition from which parties to transactions should refrain.

5. Under this proposal, the cross-reference to the objectives and principles of the code in the evaluation of whether a practice is restrictive or not would avoid the conceptual difficulties that the Conference has faced concerning the appropriate formulation of the chapeau of chapter 4. Also according to this approach, the broad notion of practices "restrictive to development and competition" would encompass the three major elements of the chapeau as described in paragraph 2 above.

China

6. The delegation of China in its proposal also considered it necessary in the characterization of the practices to be avoided, to have a reference to the objectives and principles of the code as well as all relevant circumstances in the supplying and acquiring countries. According to this approach, the practices listed in the code should be avoided, in individual cases, where they are unduly restrictive, having adverse effects on the international transfer of technology. China was also of the opinion that chapter 2 dealing with the objectives and principles of the code should be complemented by the addition of a reference to the encouragement and maintenance of "favourable conditions for competition so as to facilitate the international flow of technology".

7. Under this approach (as well as under the approach adopted by Group D), the chapeau of chapter 4 would not deal directly with the third major element described in paragraph 2 above, namely the treatment of transactions between related parties. It should be recalled, in this respect, that the definition of "party" in chapter 1 of the draft code includes, inter alia, entities such as branches, subsidiaries and affiliates.

Group B

8. With regard to the characterization of the practices to be avoided and the circumstances under which they should be avoided, Group B proposed at the Conference that the chapeau should provide that parties should refrain from the practices listed in the code when, in the individual case, "they are unduly restrictive, adversely affecting the international transfer of technology". As regards the criteria to be followed in the determination of whether a practice is "unduly restrictive", this should be determined, under this approach, according to the appropriate principles and rules for enterprises contained in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. It is implied, under this approach, that the Set would also govern the issue of the applicability of chapter 4 to transactions between related parties.

Group of 77

9. The Group of 77 was of the view that the chapeau of chapter 4 should be self-contained, comprising standards addressed to all the elements of the chapeau. With regard to the characterization of the practices, the Group proposed that the practices described in the chapter "should be avoided where they would have a restrictive or an adverse effect on the international transfer of technology."

10. On the criteria to be followed in the determination of whether a practice should be avoided in an individual case, the Group of 77 considered it appropriate to take into account "all relevant circumstances including overall purposes of the transaction, its effects on the economic and technological development of the acquiring country, the situation in the relevant market, the interests of the parties and the situation prevailing at the inception of the arrangement".

11. Relating to the treatment to be given to transactions between related parties (parties under common control), the Group was of the view that the criterion to be applied should be the consistency of the practices with the laws and development policies of the acquiring countries. The Group of 77 also proposed that the chapeau should contain a clause providing that chapter 4 of the code "should not be construed as justifying other practices or conduct by parties which are unlawful under applicable national or regional legislation".

C. Developments at the sixth session of the Conference

12. The sixth session of the Conference devoted most of its time to the discussions and negotiations on the chapeau of chapter 4. The proposals by regional groups and China, as described above, contributed to the emergence of some interesting developments that allowed a clearer identification of some common elements in the various proposals as well as a clearer identification of the existing divergences on approaches with respect to some of the other elements of the chapeau of chapter 4. On the basis of the discussions held during the Conference, the Chairman of Working Group I was able to prepare a compromise text that led to further developments in the discussions of the chapeau.

Chairman of Working Group I

13. The Chairman of Working Group I proposed an approach, inspired by the proposal made by the Chinese delegation, which included the notion that for a practice to be avoided, it should be "unduly" restrictive, adversely affecting the international transfer of technology. The objectives and principles of the code, as well as other pertinent provisions and all relevant circumstances in the supplying and acquiring countries should be the criteria to be taken into account in determining whether a practice is restrictive or not. The Chairman proposed to add to the principles of the code a provision referring to applicable national or regional legislation. He was also of the view that on the issue of "related parties" this element "could not be put impartially and should not be mentioned in the text, since any reference would necessarily mean tending towards one position or the other". 3/

President of the Conference

14. Following the submission by the Chairman of Working Group I, Mr. M. Pravda, (Czechoslovakia), President of the Conference, introduced a new text. His proposal referred to the three elements of the chapeau, i.e., the characterization of the practices, the criteria for the evaluation of whether a practice in an individual case is restrictive or not and the related parties test. It also contained a provision relating to applicable regional and national legislation. Based on the text submitted by the President, negotiations continued on the chapeau of chapter 4 until the very end of the Conference.

Text under consideration at the end of the sixth session

15. The text under consideration at the end of the sixth session of the Conference reflected the outcome of the final discussions on chapter 4. The text read as follows:

"4.1. In furtherance of the objectives and principles of this Code, the following practices should be avoided when under the circumstances of an individual case they are unduly restrictive, adversely affecting the international transfer of technology.

4.2. Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstances and the overall purposes of the transaction and should depend on whether the practice has adverse effects on the economic and technological development of the acquiring country and [on competition] [the competitive situation] in the relevant market.

4.3. While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should [not be considered inappropriate] [be considered appropriate] in the light of their special relationship [provided they comply with national laws and declared development policies]. 4/

4.4. Nothing in this chapter should be construed to supersede applicable national or regional law."

16. According to the reading of the secretariat, the text shows that a broad understanding was reached on the substantive contents of paragraph 4.1 which establishes the general characteristics of the practices to be avoided by parties to transfer of technology transactions. It is also apparent from the text that, for the first time in the negotiations on the code, the criteria to be used, under paragraph 4.2, for the evaluation of such practices have been clearly identified, although further drafting, of a clarificatory nature, still remains to be done, particularly with respect to the phrasing of the reference to the competition criterion.

17. However, as may be seen in paragraph 4.3 of the text, the difficulty at the Conference centred on the treatment to be given to practices between related enterprises. It was the view of some countries that, although the provisions of chapter 4 should apply to transactions involving any party, practices between related parties "should be considered appropriate in the light of their special relationship". Other countries held the view that such practices "should not be considered inappropriate in the light of the special relationship between related parties provided they comply with national laws and declared development policies".

18. The inclusion in the chapeau of chapter 4 of a reference to applicable national or regional law, as provided under paragraph 4.4 of the text, appeared to be broadly acceptable to all delegations, although differences still existed in the appreciation of its relationship to other provisions in the chapeau, and in particular to paragraph 4.3 dealing with the issue of related enterprises.

Notes

1/ See selected documents of the sixth session of the Conference, TD/CODE TOT/48.

2/ The text of the proposals is annexed.

3/ Selected documents of the sixth session of the Conference (TD/CODE TOT/48), summary record of the 21st meeting, para. 16.

4/ Suggested alternative text: [provided that such practices are not contrary to national laws and regulations].

Annex

INFORMAL WORKING PAPERS ON CHAPTER 4, SUBMITTED
BY REGIONAL GROUPS AND CHINA

Proposal submitted by the German Democratic Republic on behalf
of States members of Group D and Mongolia (17 May 1985)

Chapter 2 - Objectives and Principles

2.1 (ix): to specify practices, restrictive [detrimental] to development and competition in the field of the transfer of technology, from which parties to technology transfer transactions should refrain.

Chapter 4

Title: Practices restrictive to transfer of technology.

Chapeau: In transfer of technology transactions parties to these transactions should refrain from the following practices when these are contrary to the objectives and principles of the Code.

Informal text proposed by the Chinese delegation (17 May 1985)

4.1. In furtherance of the objectives and principles of this code and considering all other relevant circumstances in the supplying and acquiring countries, the following practices should be avoided in individual transactions where they are unduly restrictive, having adverse effects on the international transfer of technology.

Complementary element to Chapter 2:

To encourage and maintain favourable conditions for competition so as to facilitate the international flow of technology.

Working paper submitted by Group B (17 May 1985)

In furtherance of the objectives and principles of this code, parties to transfer of technology transactions should refrain from the practices described below when, in the individual case, they are unduly restrictive, adversely affecting the international transfer of technology. Whether a practice is unduly restrictive, adversely affecting the international transfer of technology, should be determined according to the principles and rules for enterprises set out in sections D.3 and D.4 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

Working paper submitted by the Group of 77 (24 May 1985)

4.1. In furtherance of the objectives and principles of the code, the practices described in this chapter should be avoided where they would have a restrictive or an adverse effect on the international transfer of technology, subject to the following provisions.

4.2. Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstances including overall purposes of the transaction, its effects on the economic and technological development of the acquiring country, the situation in the relevant market, the interests of the parties and the situation prevailing at the inception of the arrangement. Practices between "parties under common control" should be evaluated in the light of the consistency of the practices with the laws and development policies of the acquiring country.

4.3. The provisions of this chapter should not be construed as justifying other practices or conduct by parties which are unlawful under applicable national or regional legislation.