

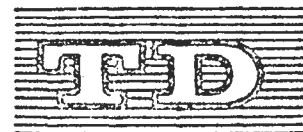
UNITED NATIONS CONFERENCE ON AN INTERNATIONAL CODE OF CONDUCT
ON THE TRANSFER OF TECHNOLOGY

**Draft international code of conduct
on the transfer of technology**

as of 6 May 1980



UNITED NATIONS
1980



Distr.
GENERAL

TD/CODE TOT/25
2 June 1980

Original: ENGLISH

United Nations Conference on Trade and Development

UNITED NATIONS CONFERENCE
ON AN INTERNATIONAL CODE OF CONDUCT
ON THE TRANSFER OF TECHNOLOGY

DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY

as at the close of the third session
of the Conference on 6 May 1980

In accordance with paragraph 3 of the resolution adopted by the Conference at its 14th plenary meeting, on 6 May 1980 (TD/CODE TOT/24), the UNCTAD secretariat has prepared the present document containing the draft international code of conduct as at the adjournment of the Conference. A note by the secretariat containing other documents of the Conference will be issued separately as document TD/CODE TOT/26.

DRAFT INTERNATIONAL CODE OF CONDUCT
ON THE TRANSFER OF TECHNOLOGY

as at the close of the third session
of the Conference on 6 May 1980

CONTENTS

<u>Chapter</u>		<u>Page</u>
	Preamble	1
1.	Definitions and scope of application	3
2.	Objectives and principles	6
3.	National regulation of transfer of technology transactions	9
4.	[The regulation of practices and arrangements involving the transfer of technology] [Restrictive business practices] [Exclusion of political discrimination and restrictive business practices]	11
5.	Guarantees/Responsibilities/Obligations	15
6.	Special treatment for developing countries	20
7.	International collaboration	23
8.	International institutional machinery	24
9.	Applicable law and settlement of disputes	26
10.	Other provisions	26

Appendices to the chapters

- A. Text relating to the Preamble of the draft Code
- B. Texts relating to chapter 4 of the draft Code
- C. Text relating to chapter 5 of the draft Code
- D. Texts relating to chapter 9 of the draft Code

NOTE: In the present text, the following key is used to identify the source of elements of the composite draft: Group of 77 text: */; Group B text: **/; text of Group D and Mongolia: ***/.

Preamble 1/

[The Contracting Parties]* [The Participating Countries]**

- (1) Recognizing the fundamental role of science and technology in the socio-economic development of all countries, and in particular, in the acceleration of the development of the developing countries,
- (2) Believing that technology is the key to the progress of mankind and that all peoples have the right to benefit from the advances and developments in science and technology in order to improve their standards of living,
- (3) Bearing in mind relevant decisions of the General Assembly and other bodies of the United Nations, in particular UNCTAD, on the transfer and development of technology,
- (4) Recognizing the need to facilitate an adequate transfer and development of technology so as to strengthen the scientific and technological capabilities of all countries, particularly the developing countries, and to co-operate with the developing countries in their own efforts in this field as a decisive step in the progress towards the establishment of a new international economic order,
- (5) Desirous of promoting international scientific and technological co-operation in the interest of peace, security and national independence and for the benefit of all nations,
- (6) Striving to promote an increase of the international transfer of technology with an equal opportunity for all countries to participate irrespective of their social and economic system and of their level of economic development,
- (7) Recognizing the need for developed countries to grant special treatment to the developing countries in the field of the transfer of technology,
- (8) Drawing attention to the need to improve the flow of technological information, and in particular to promote the widest and fullest flow of information on the availability of alternative technologies, and on the selection of appropriate technologies suited to the specific needs of developing countries,
- (9) Believing that a Code of Conduct will effectively assist the developing countries in their selection, acquisition and effective use of technologies appropriate to their needs in order to develop improved economic standards and living conditions,
- (10) Believing that a Code of Conduct will help to create conditions conducive to the promotion of the international transfer of technology, under mutually agreed and advantageous terms to all parties,

1/ Text transmitted by the President to the Conference at its 7th meeting.
See appendix A below.

(11) Affirming the benefits to be derived from a universally applicable Code of Conduct and that all countries should [ensure]*/*** [encourage]** that their enterprises, whether private or public, [shall conform]*/*** [follow]** in all respects to the provisions of this Code,

(12) [Convinced that an international legally binding instrument is the only form capable of effectively regulating the transfer of technology,]*

(13) [Agree on the adoption of this international legally binding Code of Conduct on the transfer of technology]*

[Hereby set forth the following code of conduct consisting of guidelines for the international transfer of technology:]***

[This universally applicable Code of Conduct on the international transfer of technology is established.]***

Chapter 1Definitions and scope of application 2/

1.1. For the purposes of the present Code of Conduct:

(a) "Party" means any person, either natural or juridical, of public or private law, either individual or collective, such as corporations, companies, firms, partnerships and other associations, or any combination thereof, whether created, owned or controlled by States, Government agencies, juridical persons, or individuals, wherever they operate, as well as States, Government agencies and international, regional and subregional organizations, when they engage in an international transfer of technology transaction which is usually considered to be of a commercial nature. The term "party" includes, among the entities enumerated above, incorporated branches, subsidiaries and affiliates, joint ventures or other legal entities regardless of the economic and other relationships between and among them. 3/

(b) "Acquiring party" means the party which obtains a licence to use or to exploit, purchases or otherwise acquires technology of a proprietary or non-proprietary nature and/or rights related thereto in a transfer of technology.

(c) "Supplying party" means the party which licenses, sells, assigns or otherwise provides technology of a proprietary or non-proprietary nature and/or rights related thereto in a transfer of technology.

1.2. Transfer of technology under this Code is the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods.

1.3. Transfer of technology transactions are arrangements between parties involving transfer of technology, as defined in paragraph 1.2 above, particularly in each of the following cases:

(a) The assignment, sale and licensing of all forms of industrial property, except for trade marks, service marks and trade names when they are not part of transfer of technology transactions;

(b) The provision of know-how and technical expertise in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, basic or detailed engineering designs, specifications and equipment for training, services involving technical advisory and managerial personnel, and personnel training;

2/ Text transmitted by the President to the Conference at its 12th meeting, as revised in the text submitted by the President to the Conference at its 14th meeting, by which provisions 1.1. (d) and (e), as well as foot-notes 4 and 5 of TD/CODE TOT/20, were deleted. It is understood that the term "technology acquiring country" should be used instead of "country of the acquiring party" in all the chapters of the Code.

3/ Group B accepts inclusion of this sentence subject to agreement to be reached on qualifications relating to the application of the Code to the relations of these entities in relevant parts of the Code.

(c) The provision of technological knowledge necessary for the installation, operation and functioning of plant and equipment, and turn-key projects;

(d) The provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods and/or raw materials which have been acquired by purchase, lease or other means;

(e) The provision of technological contents of industrial and technical co-operation arrangements.

[1.4 The Code of Conduct shall apply to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party or when a transfer of technology transaction is entered into between parties which do not reside or are not established in the same country. This Code does not prevent States from deciding to extend its application to all transactions which take place between parties which are resident of or established in the same country, including the case where either party is a branch, subsidiary or affiliate, or is otherwise directly or indirectly controlled by a foreign entity.] 4/

4/ This issue is still outstanding. The text of the draft provision in TD/CODE TOT/14 reads as follows:

[The Code of Conduct shall apply to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party or when a transfer of technology transaction is entered into between parties which do not reside or are not established in the same country, as well as between parties which are resident of or established in the same country, if at least one party is a branch, subsidiary or affiliate or is otherwise directly or indirectly controlled by a foreign entity and the technology transferred has not been developed in the technology acquiring country by the supplying party, or when it otherwise acts as an intermediary in the transfer of foreign owned technology.]*/**

[The Code of Conduct applies to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party. States may also apply, by means of national legislation, the principles of the Code of Conduct to transactions which take place between parties within their national boundaries.]**

The Chairman of Working Group 1 had prepared a compromise text, which was included in a foot-note to the draft provision in TD/CODE TOT/14. The Chairman's text states:

"The Code of Conduct shall apply to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party or when a

1.5 The Code of Conduct is universally applicable in scope and is addressed to all parties to transfer of technology transactions and to all countries and groups of countries, irrespective of their economic and political systems and their levels of development.

1.6 [Bilateral and multilateral agreements between States on the transfer of technology for meeting socio-economic needs of development in accordance with the chapters on objectives and principles and special treatment, should be consistent with the Code.] 5/

transfer of technology transaction is entered into between parties which do not reside or are not established in the same country. States may also decide to extend the application of the Code of Conduct to transactions which take place between parties which are resident of or established in the same country, if at least one party is a branch, subsidiary or affiliate or is otherwise directly or indirectly controlled by a foreign entity and the technology transferred has not been developed in the technology acquiring country by the supplying party, or when it otherwise acts as an intermediary in the transfer of foreign owned technology."

5/ The text in brackets has been proposed by the Group of 77. Groups B and D are in favour of deleting paragraph 1.6.

Chapter 2

Objectives and principles 6/

2. The Code of Conduct is based on the following objectives and principles:

2.1. Objectives

- (i) To establish general and equitable standards on which to base the relationships among parties to transfer of technology transactions and governments concerned, taking into consideration their legitimate interests, and giving due recognition to special needs of developing countries for the fulfilment of their economic and social development objectives.
- (ii) To promote mutual confidence between parties as well as their governments.
- (iii) To encourage transfer of technology transactions, particularly those involving developing countries, under conditions where bargaining positions of the parties to the transactions are balanced in such a way as to avoid abuses of a stronger position and thereby to achieve mutually satisfactory agreements.
- (iv) To facilitate and increase the international flow of technological information, particularly on the availability of alternative technologies, as a prerequisite for the assessment, selection, adaptation, development and use of technologies in all countries, particularly in developing countries.
- (v) To facilitate and increase the international flow of proprietary and non-proprietary technology for strengthening the growth of the scientific and technological capabilities of all countries, in particular developing countries, so as to increase their participation in world production and trade.
- (vi) To increase the contributions of technology to the identification and solution of social and economic problems of all countries, particularly the developing countries, including the development of basic sectors of their national economies.
- (vii) To facilitate the formulation, adoption and implementation of national policies, laws and regulations on the subject of transfer of technology by setting forth international norms.
- (viii) To promote adequate arrangements as regards unpackaging in terms of information concerning the various elements of the technology to be transferred, such as that required for technical, institutional and financial evaluation of the transaction, thus avoiding undue or unnecessary packaging.

6/ Text transmitted by the President to the Conference at its 12th meeting, as revised in the text submitted by the President to the Conference at its 14th meeting.

- (ix) To specify restrictive [business] practices from which parties to technology transfer transactions [shall] [should] refrain.
- (x) [To set forth an appropriate set of responsibilities and obligations of parties to transfer of technology transactions, taking into consideration their legitimate interests as well as differences in their bargaining positions.] 7/

2.2. Principles

- (i) The Code of Conduct is universally applicable in scope.
- (ii) [States may employ all appropriate means of facilitating and regulating the transfer of technology, in a manner consistent with their international obligations and taking into consideration the legitimate interests of all parties concerned.] 8/
- (ii) bis The principles of sovereignty and political independence of States (covering, inter alia, the requirements of foreign policy and national security), and sovereign equality of States, should be recognized in facilitating and regulating transfer of technology transactions.
- (iii) States should co-operate in the international transfer of technology in order to promote economic growth throughout the world, especially that of the developing countries. Co-operation in such transfer should be irrespective of any differences in political, economic and social systems; this is one of the important elements in maintaining international peace and security and promoting international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences. Nothing in this Code may be construed as impairing or derogating from the provisions of the Charter of the United Nations or actions taken in pursuance thereof. It is understood that special treatment in transfer of technology should be accorded to developing countries in accordance with the provisions in this Code on the subject.
- (iv) The separate responsibilities of parties to transfer of technology transactions, on the one hand, and those of governments when not acting as parties, on the other, should be clearly distinguished.
- (v) Mutual benefits should accrue to technology supplying and recipient parties in order to maintain and increase the international flow of technology.

7/ Text awaiting outcome of the negotiations on chapter 5.

8/ Subject to review at the next session of the Conference. The Group of 77 considers the language of this principle superseded by the agreement reached at the second session of the Conference on the chapter on national regulation of transfer of technology transactions (chapter 3).

- (vi) Facilitating and increasing the access to technology, particularly for developing countries, under mutually agreed fair and reasonable terms and conditions are fundamental elements in the process of technology transfer and development.
- (vii) Recognition of the protection of industrial property rights granted under national law.
- (viii) Technology supplying parties when operating in an acquiring country should respect the sovereignty and the laws of that country, act with proper regard for that country's declared development policies and priorities and endeavour to contribute substantially to the development of the acquiring country. The freedom of parties to negotiate, conclude and perform agreements for the transfer of technology on mutually acceptable terms and conditions should be based on respect for the foregoing and other principles set forth in this Code.

Chapter 3

National regulation of transfer of technology transactions 9/

3.1. In adopting, and in the light of evolving circumstances making necessary changes in laws, regulations and rules, and policies with respect to transfer of technology transactions, States have the right to adopt measures such as those listed in paragraph 3.3 of this chapter and should act on the basis that these measures should:

- (i) Recognize that a close relationship exists between technology flows and the conditions under which such flows are admitted and treated;
- (ii) Promote a favourable and beneficial climate for the international transfer of technology;
- (iii) Take into consideration in an equitable manner the legitimate interests of all parties;
- (iv) Encourage and facilitate transfers of technology to take place under mutually agreed, fair and reasonable terms and conditions having regard to the principles and objectives of the Code;
- (v) Take into account the differing factors characterizing the transactions such as local conditions, the nature of the technology and the scope of the undertaking;
- (vi) Be consistent with their international obligations.

3.2. Measures adopted by States including decisions of competent administrative bodies should be applied fairly, equitably, and on the same basis to all parties in accordance with established procedures of law and the principles and objectives of the Code. Laws and regulations should be clearly defined and publicly and readily available. To the extent appropriate, relevant information regarding decisions of competent administrative bodies should be disseminated.

3.2.1. Each country adopting legislation on the protection of industrial property should have regard to its national needs of economic and social development, and should ensure an effective protection of industrial property rights granted under its national law and other related rights recognized by its national law.

3.3. Measures on regulation of the flow and effects of transfer of technology, finance and technical aspects of technology transactions and on organizational forms and mechanisms may deal with:

Finance

- (a) Currency regulations of foreign exchange payments and remittances;
- (b) Conditions of domestic credit and financing facilities;

9/ Text transmitted by the President to the Conference at its 12th meeting.

- (c) Transferability of payments;
- (d) Tax treatment;
- (e) Pricing policies;

Renegotiation

(f) Terms, conditions and objective criteria for the renegotiation of transfer of technology transactions;

Technical aspects

(g) Technology specifications and standards for the various components of the transfer of technology transactions and their payments;

(h) Analysis and evaluation of transfer of technology transactions to assist parties in their negotiations;

(i) Use of local and imported components;

Organizational forms and mechanisms

(j) Evaluation, negotiation, and registration of transfer of technology transactions;

(k) Terms, conditions, duration, of transfer of technology transactions;

(l) Loss of ownership and/or control of domestic acquiring enterprises;

(m) Regulation of foreign collaboration arrangements and agreements that could displace national enterprises from the domestic market;

(n) The definition of fields of activity of foreign enterprises and the choice of channels, mechanisms, organizational forms for the transfer of technology and the prior or subsequent approval of transfer of technology transactions and their registration in these fields;

(o) The determination of the legal effect of transactions which are not in conformity with national laws, regulations and administrative decisions on the transfer of technology;

(p) The establishment or strengthening of national administrative mechanisms for the implementation and application of the Code of Conduct and of national laws, regulations and policies on the transfer of technology;

(q) Promotion of appropriate channels for the international exchange of information and experience in the field of the transfer of technology.

Chapter 4

[The regulation of practices and arrangements involving the
transfer of technology] [Restrictive business practices]
[Exclusion of political discrimination and restrictive
business practices] 10/

Section A 11/ (Chapeau) 12/

In furtherance of the objectives of this Code, particularly to avoid practices which [unreasonably]** restrain trade, [and]**/** [or]** adversely affect the international flow of technology, particularly as such practices hinder the economic and technological development of acquiring countries, parties to technology transfer transactions [shall]**/** [should]** refrain from the following practices [or practices having similar effects]** [in licensing patents or know-how or trademarks associated with patents or know-how]** [unless the practice is]**/** [subject to exceptions or justifications in the following provisions or reasonable]**** [in an individual case]** [.]**[,]** [Whether a restrictive practice ~~is~~ listed below is]** [consistent with the objectives of this Code in an individual case]**/** [which]**** [should be examined in terms of its purpose and effect in the actual situation,]**/** taking into account [its appropriateness in]**/** [all]** the relevant circumstances, including those prevailing at the inception of the arrangement [and its acceptability under pertinent national or regional laws or regulations for control of restrictive practices]**.

[Practices and restrictions between commonly owned enterprises should be examined in the light of the rules, exceptions and factors applicable to all transfer of technology transactions. Such practices may be considered as not contrary to the provisions of the Code when they are otherwise acceptable and which do not adversely affect the transfer of technology]**. [Recognizing that restrictions for the purpose of rationalization or reasonable allocation of functions between parent and subsidiary or among enterprises belonging to the same concern will normally be considered not contrary to this chapter unless amounting to an abuse of a dominant position of market power within the relevant market, for example unreasonable restraint of the trade of a competing enterprise]**.

Section B: (List of practices)

1. [Exclusive]** Grant-back provisions

Requiring the acquiring party to transfer or grant back to the supplying party, or to any other enterprise designated by the supplying party, improvements arising from the acquired technology, on an exclusive basis [or]** without offsetting consideration or reciprocal obligations from the supplying party, or when the practice will constitute an abuse of a dominant market position of the supplying party.

10/ Text submitted by the Chairman of the Second Committee to the Conference at its 12th meeting.

11/ In view of continuing negotiations on the chapter, no attempt has been made to number the provisions of this chapter consistently with the other chapters.

12/ See appendix B below.

2. Challenges to validity

[Unreasonably]** requiring the acquiring party to refrain from challenging the validity of patents and other types of protection for inventions involved in the transfer or the validity of other such grants claimed or obtained by the supplying party, recognizing that any issues concerning the mutual rights and obligations of the parties following such a challenge will be determined by the appropriate applicable law and the terms of the agreement to the extent consistent with that law. 12.12.25/

3. Exclusive dealing

Restrictions on the freedom of the acquiring party to enter into sales, representation or manufacturing agreements relating to similar or competing technologies or products or to obtain competing technology, when such restrictions are not needed for ensuring the achievement of legitimate interests, particularly including securing the confidentiality of the technology transferred or best effort distribution or promotional obligations.

4. Restrictions on research

[Unreasonably]**/*** restricting the acquiring party either in undertaking research and development directed to absorb and adapt the transferred technology to local conditions or in initiating research and development programmes in connexion with new products, processes or equipment.

5. Restrictions on use of personnel

[Unreasonably]** requiring the acquiring party to use personnel designated by the supplying party, except to the extent necessary to ensure the efficient transmission phase for the transfer of technology and putting it to use or thereafter continuing such requirement beyond the time when adequately trained local personnel are available or have been trained; or prejudicing the use of personnel of the technology acquiring country.

6. Price fixing

[Unjustifiably]** imposing regulation of prices to be charged by acquiring parties in the relevant market to which the technology was transferred for products manufactured or services produced using the technology supplied.

7. Restrictions on adaptations

Restrictions which [unreasonably]** prevent the acquiring party from adapting the imported technology to local conditions or introducing innovations in it, or which oblige the acquiring party to introduce unwanted or unnecessary design or specification changes, if the acquiring party makes adaptations on his own responsibility and without using the technology supplying party's name trade or service marks or trade names, and except to the extent that this adaptation unsuitably affects those products, or the process for their manufacture, to be supplied to the supplying party, his designates, or his other licensees, or to be used as a component or spare part in a product to be supplied to his customers.

8. Exclusive sales or representation agreements

Requiring the acquiring party to grant exclusive sales or representation rights to the supplying party or any person designated by the supplying party, except as to subcontracting or manufacturing arrangements wherein the parties have agreed that all or part of the production under the technology transfer arrangement will be distributed by the supplying party or any person designated by him.

9. Tying arrangements

[Unduly]** imposing acceptance of additional technology, future inventions and improvements, goods or services not wanted by the acquiring party or [unduly]** restricting sources of technology, goods or services, as a condition for obtaining the technology required when not required to maintain the quality of the product or service where the supplier's trade or service mark or other identifying item is used by the acquiring party, or to fulfil a specific performance obligation which has been guaranteed, provided further that adequate specification of the ingredients is not feasible or would involve the disclosure of additional technology not covered by the arrangement.

10. Export restrictions

[Unreasonable]** restrictions which prevent or [substantially]**/** hinder export by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rates of payments for exportable products resulting from the technology supplied[, unless justified]**/**[, for instance,]** [to prevent export of such products to countries where they are protected by the supplying party's industrial property rights]**/** [or where relevant know-how has retained its confidential character]** [, or where the supplying party has granted]**/** [an exclusive right]** [a licence]** [to use the relevant technology]**/**.

11. Patent pool on cross-licensing agreements and other arrangements

Restrictions on territories, quantities, prices, customers or markets arising out of patent pool or cross-licensing agreements or other international transfer of technology interchange arrangements among technology suppliers which unduly limit access to new technological developments or which would result in an abusive domination of an industry or market with adverse effects on the transfer of technology, except for those restrictions appropriate and ancillary to co-operative arrangements such as co-operative research arrangements.

12. Restrictions on publicity

Restrictions [unreasonably]** regulating the advertising or publicity by the acquiring party except where restrictions of such publicity may be required to prevent injury to the supplying party's goodwill or reputation where the advertising or publicity makes reference to the supplying party's name, trade or service marks, trade names or other identifying items, or for legitimate reasons of avoiding product liability when the supplying party may be subject to such liability, or where appropriate for safety purposes or to protect consumers, or when needed to secure the confidentiality of the technology transferred.

13. Payments and other obligations after expiration of industrial property rights

Requiring payments or imposing other obligations for continuing the use of industrial property rights which have been invalidated, cancelled or have expired, recognizing that any other issue, including other payment obligations for technology, shall be dealt with by the appropriate applicable law and the terms of the agreement to the extent consistent with that law.

14. Restrictions after expiration of arrangement

Restrictions on the use of the technology after the expiration or termination of the arrangement [, unless the technology is still legally protected, or has not entered the public domain]**/** [or after the know-how has lost its secret character]* independently of the acquiring party.

15. Limitations on volume, scope, etc.】**/**

[Unreasonable]**/** [Restrictions on the scope, volume and/or capacity of production]**/** [and/or field of activity]*.

16. Use of quality controls]**/**

[Use by the supplying party of quality control methods or standards not needed or not wanted by the acquiring party, except]**/** [to meet the requirement of a guarantee or]**/** [when the product bears a trade mark, service name or trade name of the supplying party]**/**.

17. Obligation to use trade marks]**/**

[Requirement to use a particular trade mark, service name or trade name when using the technology supplied]**/** [; the supplying party however, has the right to request that its name be mentioned on the product]**/**.

18. Requirement to provide equity or participate in management]**/**

[Obliging the acquiring party to provide equity capital or to allow the supplying party to participate in the management of the acquiring party as a condition to obtaining the technology]**/**.

19. Unlimited or unduly long duration of arrangements]**/**

[Unlimited or unduly long duration of transfer of technology arrangements]**/**.

20. Limitations upon use of technology already imported]*

[Limitations upon the diffusion and/or further use of technology already imported,]*

Section C: Exceptions]**/**

[Notwithstanding]**/** [the provisions]**/** [section 4.3]* [of this chapter transfer of technology transactions or practices and arrangements contained therein shall be deemed]**/** [non-objectionable]**/** [valid]* [if]**/** [, based upon exceptional circumstances,]* [the competent national authorities of the]**/** [acquiring party's]**/** [technology acquiring]* [country decide that it is in its public interest]**/** [and that on balance the effect on its national economy will not be adverse]* [and it has no substantial adverse effects in other countries]**/**.

Chapter 5

Guarantees/Responsibilities/Obligations 13/ 14/

Common provision on negotiating as well as contractual phase

5.1. When negotiating and concluding a technology transfer agreement, the parties [shall]*/*** [should]** in accordance with this chapter, be responsive to the economic and social development objectives of the respective countries of the parties and particularly of the technology acquiring country, and when negotiating, concluding and performing a technology transfer agreement, the parties should observe fair and honest business practices.

Negotiating phase

5.2. In being responsive to the economic and social development objectives mentioned in this chapter each party [shall]*/*** [should]** take into account the other's request to include in the agreement, to the extent practicable and for adequate consideration, when appropriate, such as the case in which the supplying party incurs additional costs or efforts, items clearly related to the official economic and social development objectives of the country of the requesting party as enunciated by its government. Such items include, inter alia, where applicable:

(a) Use of locally available resources

(i) specific provisions for the use for the tasks concerned of adequately trained or otherwise suitable local personnel to be designated and subsequently made available by the potential technology recipient including managerial personnel, as well as for the training of suitably skilled local personnel to be designated and subsequently made available by the potential technology recipient;

(ii) specific provisions for the use of locally available materials, technologies, technical skills, consultancy and engineering services and other resources to be indicated and subsequently made available by the potential technology recipient;

(b) Rendering of technical services

Specific provisions for the rendering of technical services in the introduction and operation of the technology to be transferred;

(c) Unpackaging

Upon request of the potential acquiring party, the potential supplying party [shall]*/*** [should]**, to the extent practicable, make adequate arrangements as regards unpackaging in terms of information concerning the various elements of the technology to be transferred, such as that required for technical, institutional, and financial evaluation of the potential supplying party's offer.

13/ Text submitted by the Chairman of the Second Committee to the Conference at its 12th meeting.

14/ See appendix C below.

5.3. Fair and honest business practices

When negotiating a technology transfer agreement, the parties should observe fair and honest business practices and therefore:

(a) Both potential parties

(i) Fair and reasonable terms and conditions

Should negotiate in good faith with the aim of reaching an agreement in a timely manner and upon fair [and reasonable commercial]** terms and conditions, including agreement on payments such as licence fees, royalties and other consideration; [the price or consideration to be charged should be non-discriminatory]*/*** [and no less favourable than the consideration usually required by the supplying party or other technology suppliers for similar technologies under similar circumstances;]*

(ii) Relevant information

Should consider request to inform each other, to the extent appropriate, about their prior arrangements which may affect the contemplated technology transfer;

(iii) Confidential information

Should keep secret, in accordance with any obligation, either legal or contractual, all confidential information received from the other party and make use of the confidential information received from a potential party only for the purpose of evaluating this party's offer or request or for other purposes agreed upon by the parties;

(iv) Termination of negotiations

May cease negotiations if, during the negotiations, either party determines that a satisfactory agreement cannot be reached;

(b) Potential acquiring party

Relevant information

Should provide the potential technology supplier in a timely manner with the available specific information concerning the technical conditions and official economic and social development objectives as well as legislation of the acquiring country relevant to the particular transfer and use of the technology under negotiation, as far as such information is needed for the supplying party's responsiveness under this chapter;

(c) Potential supplying party

Relevant information

(i) [shall]*/*** [should]** disclose, in a timely manner, to the potential technology acquiring party any reason actually known to him, on account of which the technology to be supplied, when used in accordance with the terms and conditions of the proposed agreement, would not meet particular health, safety and environmental

requirements in the technology acquiring country, already known to him as being relevant in the specific case or which have been specifically drawn to his attention, as well as any serious health, safety and environmental risks known by the supplier associated with the use of the technology and of products to be produced by it.

(ii) [shall]*/*** [should]** disclose to the potential technology acquiring party, to the actual extent known to him, any limitation, including any pending official procedure or litigation which adversely concerns the existence or validity of the rights to be transferred, on his entitlement to grant the rights or render the assistance and services specified in the proposed agreement.

(iii) Provision of accessories, spare parts and components

[shall]*/*** [should]**, to the extent feasible, take into account the request of the acquiring party to provide it for a period to be specified with accessories, spare parts and components produced by the supplying party and necessary for using the technology to be transferred, particularly where alternative sources are unavailable;

Contractual phase

5.4. The technology transfer agreement [should]** [shall]*/*** contain mutually acceptable contractual obligations, including those relating to payments, and [where in accordance with fair and reasonable commercial practice, should normally provide for]** [shall be subject to]*/*** the following provisions [taking into account the specific circumstances of the individual case]***. [The specific circumstances of the individual case should be taken into account in the inclusion of the provisions listed and recognition be given to certain circumstances, namely the stage of development of technology, the limitation of the supplying party's resources or the nature of the economic relationship of the parties such as any ongoing or continuous flow of technology between the parties]** 15/

(i) Access to improvements

access by the [parties]**/*** [acquiring party]* for a specified period or for the lifetime of the agreement to improvements to the technology transferred under the agreement;

(ii) Confidentiality

respect for the confidentiality [and proprietary nature, and the use only]**/*** [for the purposes and]** [on terms stipulated in the agreement]**/*** of any trade secrets, secret know-how and all other confidential information received from the other party in connexion with the transfer of technology [, provided that this obligation shall]**/*** [not extend beyond an adequate lapse of time after the transmission of each item of secret information]* [end after the trade secrets, secret know-how and other confidential information received have entered the public domain independently of the acquiring party]***

15/ Group B suggests that this paragraph should be added to section 5.1. (Common provision on negotiating as well as contractual phase.)

(iii) [Dispute settlement arrangements and applicable law]**

[appropriate dispute settlement arrangements, such as impartial fact-finding, and arbitration procedures or choice of judicial forum and choice of applicable law to be followed in connexion with the formation, validity, interpretation and the performance of the technology transfer agreement.]**

(iv) Description of the technology

The technology supplier's guarantee that the technology meets the description contained in the technology transfer agreement;

(v) Suitability for use

The technology supplier's guarantee that the technology, if used in accordance with the supplier's specific instructions given pursuant to the agreement, is suitable for manufacturing of goods or production of services as agreed upon by the parties and stipulated in the agreement;

(vi) Rights to the technology transferred

The technology supplier's representation that on the date of the signing of the agreement, it is, to the best of its knowledge, not aware of third parties valid patent rights or similar protection for inventions which would be infringed by the use of the technology when used as specified in the agreement;

(vii) Quality levels and goodwill

The technology recipient's commitment to observe quality levels agreed upon in cases where the agreement includes the use of the supplier's trade marks, trade names or similar identification of goodwill, and both parties' commitment to avoid taking actions primarily or deliberately intended to injure the other's goodwill or reputation.

(viii) [Achievement of predetermined results]*/***

[the supplying party's guarantee that the use of the technology will ensure the achievement of a predetermined result under the conditions specified in the agreement;]*/***

(ix) Transmission of documentation

The supplying party's commitment that relevant technical documentation and other data required from him for a particular purpose defined in terms directly specified in the agreement will be transferred in a timely manner and as correctly and completely for such purpose as agreed upon.

(x) [Training of personnel]*/***

[to provide adequate training to the personnel of the acquiring party or to the personnel designated by it, in the knowledge and operation of the technology transferred, on terms stipulated in the agreement;]*/***

(xi) [Provisions of spare parts, components, etc.]/***

[the supplying party shall]/*** [, to the extent possible,]/*** supply the acquiring party, as required, with accessories, spare parts, components and other requirements produced by the supplying party and necessary for using the technology transferred, at usual prices and for the period specified in the agreement;]/***

(xii) [Consideration for the technology transferred]/***

[(a) The price charged or other consideration made for all elements involved in the transfer of technology transactions, including goods and services in so far as they are part of the transaction, shall be distinctly specified for each item;]/***

[(b) The price charged or other consideration made for the technology transferred shall be explicitly determined or, where this is not possible, all the necessary elements for all determination shall be specified;]/***

[(c) The price or consideration to be charged shall be non-discriminatory]/*** [and no less favourable than the consideration usually required by the supplying party or other technology suppliers for similar technologies under similar circumstances;]*

(xiii) [Purchase of input]/***

[Where the acquiring party has no other alternative than to purchase goods and/or services from the supplying party, or from any enterprise designated by it, and prices for such inputs shall be fair and not higher than current world prices for goods or services of the same quality offered on comparable commercial terms and conditions.]/***

(xiv) [Sale of output]/***

[When the acquiring party sells its output to the supplying party, or to any enterprise designated by it, the price offered for such products shall be reasonable and fair and comparable with current world prices for the goods of the same quality sold on similar commercial terms and conditions.]/***

(xv) Liability

[The supplying party shall be liable]/*** [according to the appropriate applicable law]*** [for the loss of, damage or injury to property or persons, arising from the technology transferred or the goods produced by it, provided that the technology is used as specified in the agreement, or in absence of such specification, in a technically correct manner.]/*** [Disposition concerning liability for the non-fulfilment by either party of its responsibilities under the technology transfer agreement.]*

5.5. [Effects of non-fulfilment]*

[The effects of non-fulfilment of the provisions set forth in this chapter shall be governed by the appropriate applicable law.]*

Chapter 6

Special treatment for developing countries 16/

6.1. Taking into consideration the needs and problems of developing countries, particularly of the least developed countries, governments of developed countries, directly or through appropriate international organizations, in order to facilitate and encourage the initiation and strengthening of the scientific and technological capabilities of developing countries so as to assist and co-operate with them in their efforts to fulfil their economic and social objectives, should take adequate specific measures, inter alia, to:

- (i) facilitate access by developing countries to available information regarding the availabilities, description, location and, as far as possible, approximate cost of technologies which might help those countries to attain their economic and social development objectives;
- (ii) give developing countries the freest and fullest possible access to technologies whose transfer is not subject to private decisions; 17/
- (iii) facilitate access by developing countries, to the extent practicable, to technologies whose transfer is subject to private decisions; 17/
- (iv) assist and co-operate with developing countries in the assessment and adaptation of existing technologies and in the development of national technologies by facilitating access, as far as possible, to available scientific and industrial research data;
- (v) co-operate in the development of scientific and technological resources in developing countries, including the creation and growth of innovative capacities;
- (vi) assist developing countries in strengthening their technological capacity, especially in the basic sectors of their national economy, through creation of and support for laboratories, experimental facilities and institutes for training and research;
- (vii) co-operate in the establishment or strengthening of national, regional and/or international institutions, including technology transfer centres, to help developing countries to develop and obtain the technology and skills required for the establishment, development and enhancement of their technological capabilities including the design, construction and operation of plants;
- (viii) encourage the adaptation of research and development, engineering and design to conditions and factor endowments prevailing in developing countries;

16/ Agreed text prepared in the First Committee and transmitted to the Conference at its 7th meeting, as revised in the text submitted by the President to the Conference at its 14th meeting.

17/ The term "private decision" in the particular context of this chapter should be officially interpreted in the light of the legal order of the respective country.

- (ix) co-operate in measures leading to greater utilization of the managerial, engineering, design and technical experience of the personnel and the institutions of developing countries in specific economic and other development projects undertaken at the bilateral and multilateral levels;
- (x) encourage the training of personnel from developing countries.

6.2. Governments of developed countries, directly or through appropriate international organizations, in assisting in the promotion of transfer of technology to developing countries - particularly to the least developed countries - should, as a part of programmes for development assistance and co-operation, take into account requests from developing countries to:

- (i) contribute to the development of national technologies in developing countries by providing experts under development assistance and research exchange programmes;
- (ii) provide training for research, engineering, design and other personnel from developing countries engaged in the development of national technologies or in the adaptation and use of technologies transferred;
- (iii) provide assistance and co-operation in the development and administration of laws and regulations with a view to facilitating the transfer of technology;
- (iv) provide support for projects in developing countries for the development and adaptation of new and existing technologies suitable to the particular needs of developing countries;
- (v) grant credits on terms more favourable than the usual commercial terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transactions so as to reduce the cost of projects and improve the quality of technology received by the developing countries.
- [(vi) Omit] 18/
- (vii) provide assistance and co-operation in the development and administration of laws and regulations designed to avoid health, safety and environmental risks associated with technology or the products produced by it.

6.3. Governments of developed countries should take measures in accordance with national policies, laws and regulations, to encourage and to endeavour to give incentive to enterprises and institutions in their countries, either individually or in collaboration with enterprises and institutions in developing countries particularly those in the least developed countries to make special efforts, inter alia, to:

18/ The Group of 77 reserves its position on this provision (6.2.(vi)) of the chapter until it has had the opportunity to examine the references to the industrial property system in the final draft of all chapters of the Code. For the original proposal see TD/CODE TOT/1.

- (i) assist in the development of technological capabilities of the enterprises in developing countries, including special training as required by the recipients;
- (ii) undertake the development of technology appropriate to the needs of developing countries;
- (iii) undertake R and D activity in developing countries of interest to such countries, as well as to improve co-operation between enterprises and scientific and technological institutions of developed and developing countries;
- (iv) assist in projects by enterprises and institutions in developing countries for the development and adaptation of new and existing technologies suitable to the particular needs and conditions of developing countries.

6.4. The special treatment accorded to developing countries should be responsive to their economic and social objectives vis-à-vis their relative stage of economic and social development and with particular attention to the special problems and conditions of the least developed countries.

Chapter 7

International collaboration 19/

7.1. The States recognizes the need for appropriate international collaboration among governments, intergovernmental bodies, and organs and agencies of the United Nations system, including the international institutional machinery provided for in this Code, with a view to facilitating an expanded international flow of technology for strengthening the technological capabilities of all countries, taking into account the objectives and principles of this Code, and to promoting the effective implementation of its provisions.

7.2. Such international collaboration between governments at the bilateral or multilateral, subregional, regional or interregional levels may include, inter alia, the following measures:

- (i) Exchange of available information on the availability and description of technologies and technological alternatives;
- (ii) Exchange of available information on experience in seeking solutions to problems relating to the transfer of technology, particularly restrictive [business]** practices in the transfer of technology;
- (iii) Exchange of information on development of national legislation with respect to the transfer of technology;
- (iv) Promotion of the conclusion of international agreements which should provide equitable treatment for both technology supplying and recipient parties and governments;
- (v) Consultations which may lead to greater harmonization where appropriate of national legislation and policies with respect to the transfer of technology;
- (vi) Promotion, where appropriate, of common programmes for searching for, acquiring and disseminating technologies;
- (vii) Promotion of programmes for the adaptation and development of technology in the context of development objectives;
- (viii) Promotion of the development of scientific and technological resources and capabilities stimulating the development of indigenous technologies;
- (ix) Action through international agreements to avoid, as far as possible, imposition of double taxation on earnings and payments arising out of transfer of technology transactions.

19/ Text prepared by the Intergovernmental Group of Experts, as revised in the text submitted by the President to the Conference at its 14th meeting.

Chapter 8

International institutional machinery^{20/}

8.1. Institutional arrangements

(a) [A Special Committee on the Code established within UNCTAD] [The Committee on Transfer of Technology] will provide the institutional machinery;

(b) The [Special Committee] [Committee on Transfer of Technology meeting in special session with respect to the Code and matters related thereto] [as a special agenda item of its regular sessions or, if necessary, at special sessions of the Committee,] open to all members of UNCTAD, should meet as often as necessary, but at least once a year. The Committee may create appropriate subsidiary bodies to assist it in its work. Its rules of procedure [at least initially] shall be those of the main committees of the Trade and Development Board.

(c) States which have accepted the Code of Conduct on the Transfer of Technology should take appropriate steps at the national level to meet their commitment to the Code.

8.2. Functions of the Committee

8.2.1. The Committee shall have the following functions:

(a) To provide a forum and modalities for consultations, discussion, and exchange of views between States on matters related to the Code, in particular its application and its greater harmonization, and the experience gained in its operations;

(b) To undertake and disseminate periodically studies and research on transfer of technology related to the provisions of the Code, with a view to increasing exchange of experience and giving greater effect to the application and implementation of the Code;

(c) To invite and consider relevant studies, documentation and reports from within the United Nations system, particularly from UNIDO and WIPO;

(d) To study matters relating to the Code and which might be characterized by data covering transfer of technology transactions and other relevant information obtained upon request addressed to all States;

(e) To collect and disseminate information on matters relating to the Code, to the over-all attainment of its goals and to the appropriate steps States have taken at the national level to promote an effective Code, including its objective and principles;

(f) To make appropriate reports and recommendations to States on matters within its competence including the application and implementation of the Code;

^{20/} Text transmitted by the President to the Conference at its 12th meeting, as revised in the text submitted by the President to the Conference at its 14th meeting.

(g) To organize symposia, workshops and similar meetings concerning the application of the provisions of the Code, subject to the approval of the Trade and Development Board where financing from the regular budget is involved;

(h) To submit reports at least once a year on its work to the Trade and Development Board.

8.2.2. In the performance of its functions, neither the Committee nor its subsidiary organs may act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual parties in connexion with a specific transfer of technology transaction. The Committee or its subsidiary organs should avoid becoming involved when parties to a specific transfer of technology transaction are in dispute.

8.2.3. The Committee shall establish such procedures as may be necessary to deal with issues related to confidentiality.

8.3. Review procedure

Subject to the approval of the General Assembly [four] [six] years after the adoption of the Code, a United Nations Conference [of Plenipotentiaries] shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Code [with a view to bringing about its universal application as a legally binding instrument] [including its legal nature] [including the final decision on the legal character of the Code]. Towards this end, the Committee shall make proposals to the Conference for the improvement and further development of the Code, taking into account relevant activity in the field of transfer of technology within the framework of the United Nations system.

8.4. Secretariat

The secretariat for the Committee shall be the UNCTAD secretariat. At the request of the Committee the secretariat shall submit relevant studies, documentation and other information to the Committee. It shall consult with and render assistance, by the relevant services, to States, particularly the developing countries, at their request, in the application of the Code at the national level, to the extent that resources are available.

8.5. General provisions

[The establishment of the Special Committee by the Trade and Development Board shall be subject to the approval of the General Assembly.] The establishment by the Committee of such subsidiary bodies as it may deem necessary shall be subject to the approval of the Trade and Development Board. [Financial requirements in connexion with the servicing of the Committee which are to be borne by the United Nations budget shall be subject to approval by the General Assembly.]

Chapter 9

Applicable law and settlement of disputes

[under consideration]^{21/}

Chapter 10

Other provisions

[To be drafted]

^{21/} See appendix D below.

Appendix A

Text relating to the Preamble of the draft Code

Text proposed for the Preamble of the draft Code by the Co-Chairmen
of the Preparatory Meeting acting for the President 22/

...

(10) Believing that a Code of Conduct will help to create conditions conducive to the promotion of the international transfer of technology, under mutually agreed and advantageous terms to all parties;

(11) Affirming the benefits to be derived from a universally applicable Code of Conduct and that all countries should strive to ensure that their enterprises, whether private or public comply, with the provisions of this Code;

(12) Hereby adopt the following Code of Conduct on the International Transfer of Technology: 23/

22/ See TD/CODE TOT/L.5 of 17 October 1979. This text was used by the Conference at its second session as a basis for negotiation. The relevant parts of the chapters of this text on which substantial negotiations remain to be completed are reproduced in this appendix and appendices B and D below. In the preface to that document (TD/CODE TOT/L.5) the Co-Chairmen stated: "... The elements added to earlier texts are identified by underlining the new texts".

23/ This text combines paras. 12 and 13 of the draft Preamble.

Appendix B

Texts relating to Chapter 4 of the Draft Code

1. Text proposed by the President at the third session of the Conference

Chapter 4 - Chapeau

4.1. For the purposes of observing this Code, parties to transfer of technology transactions [shall] [should] refrain from practices described in this chapter.

4.2. The provisions of this chapter are not intended to preclude practices when acceptable */ under the particular circumstances of the individual case.

4.3. Subject to 4.2., parties to transfer of technology transactions [shall] [should] refrain from the following practices:

[list of practices]

4.4. The provisions of this Code should not be construed as justifying conduct by parties which is unlawful under applicable national or regional legislation.

*/ Whether in an individual case a practice is acceptable should be evaluated in terms of its over-all purpose and effects in an actual situation taking due account, in particular of the following factors:

(a) whether the over-all effect of the transaction is, on balance, in the national interest of the technology acquiring country;

(b) consistency with the objectives and principles of this Code;

(c) whether it is of a type which is usually treated as acceptable under pertinent national laws and regulations;

(d) whether it is a practice normally acceptable in the light of the legal, corporate and organizational relationship among the parties, recognizing that such will usually be the case when there is a parent-subsidiary relationship, and not having substantial adverse effects outside the related parties;

(e) the nature, scope and duration of the technology involved;

(f) circumstances existing at the inception of the arrangement.

2. Text proposed at the third session of the Conference by the Chairman
of the Ad Hoc Group on Chapter 4

Chapter 4 - Chapeau

Parties to transfer of technology transactions [shall] [should] refrain from [such] practices as [those] described below, except when [justifiable] [not objectionable] under the particular circumstances of the individual case:

[list of practices]

Whether in an individual case a practice is [justifiable or not] [not objectionable] should be evaluated in terms of its over-all purpose and effects in an actual situation taking due account, in particular, of the following factors:

- (a) consistency with the objectives and principles of this Code;
- (b) whether it is of a type which is usually treated as acceptable under pertinent national [or regional] laws and regulations;
- (c) whether it is a practice normally acceptable in the context of an economic entity, wherein they are under common control [including through ownership, or otherwise not able to act independently of each other] and not having a substantial adverse effect outside the related parties;
- (d) whether the over-all effect of the transaction is, on balance, not adverse to the acquiring country;
- (e) whether the practice is needed for a given transfer of technology transaction;
- (f) the nature, scope and duration of the [technology rights] [transaction] involved;
- (g) legitimate interests of both the supplying and acquiring parties;
- (h) circumstances existing at the inception of the arrangement.

3. Text considered at the second session of the Conference^{24/}

4.1. The provisions of this chapter are intended to further the objective of the Code of avoiding restrictive practices which unduly restrain international transfer of technology, adversely affecting international trade or economic and technological development particularly of acquiring countries.

^{24/} This text was considered in the Drafting Group of Working Group 3, but no final consensus was reached.

4.2. Practices listed are not contrary to this chapter if they are acceptable in accordance with exceptions stated herein or if, taking into account the relevant objective of this Code, they are otherwise justifiable or non-objectionable in an individual case in the light of all the relevant circumstances, including those prevailing at the inception of the agreement, in any case, if on balance the over-all effect of the transaction in the acquiring party's country would not be adverse.

4.3. While the provisions of this chapter are directed to transfer of technology transactions involving any Party, those arrangements, subject to 4.2. above, which are appropriate and ancillary to the nature of the economic interrelationship among affiliated enterprises, such as arrangements necessary for the rationalization or allocation of functions, are not intended to be precluded by the provisions of this chapter, unless amounting to an abuse of a dominant position of market power within the relevant market, for example undue restraint of the trade of a competing enterprise of the acquiring party's country.

4.4. Subject to paragraphs 4.1., 4.2. and 4.3., parties to transfer of technology transactions [shall] [should] refrain from the practices [such as those] listed below.

4. Text proposed by the Co-Chairmen of the Preparatory Meeting
acting for the President 25/

Restrictive practices in transfer of
technology transactions 26/

4.1. In furtherance of the objectives of this Code, parties to technology transfer transactions [shall] [should] refrain from the following practices: 27/

4.1.1. Grant-back provisions 28/

Requiring the acquiring party to grant back to the supplying party, or to any other enterprise designated by the supplying party, an exclusive licence for improvements arising from the acquired technology, or transfer sole title to such improvements, without offsetting consideration or reciprocal obligations from the supplying party, or when such practice will constitute an abuse of a dominant market position of the supplying party; or requiring a non-exclusive grant-back without offsetting consideration or reciprocal obligations from the supplying party when that practice will constitute an abuse of a dominant market position of that party.

25/ See TD/CODE TOT/L.5 of 17 October 1979, and foot-note 22 above.

26/ Title as suggested by the Chairman of Working Group 3. (See TD/CODE TOT/9, appendix C).

27/ Based on agreed portion of chapeau, as in TD/CODE TOT/14.

28/ Text proposed by the Chairman of Working Group 3. (See TD/CODE TOT/14, foot-note 24).

4.1.2. Challenges to validity

Requiring the acquiring party to refrain from challenging the validity of patents and other types of protection for inventions involved in the transfer or the validity of other such grants claimed or obtained by the supplying party, recognizing that any issues concerning the mutual rights and obligations of the parties following such a challenge will be determined by the appropriate applicable law and the terms of the agreement to the extent consistent with that law.

4.1.3. Exclusive dealing

Restrictions on the freedom of the acquiring party to enter into sales, representation or manufacturing agreements relating to similar or competing technologies or products or to obtain competing technology, when such restrictions are not needed for ensuring the achievement of legitimate interests, particularly including securing the confidentiality of the technology transferred or best effort distribution or promotional obligations.

4.1.4. Restrictions on research

Restricting the acquiring party either in undertaking research and development directed to absorb and adapt the transferred technology to local conditions or in initiating research and development programmes in connexion with new products, processes or equipment.

4.1.5. Restrictions on use of personnel

Requiring the acquiring party to use personnel designated by the supplying party, except to the extent necessary to ensure the efficient transmission phase for the transfer of technology and putting it to use or thereafter continuing such requirement beyond the time when adequately trained local personnel are available or have been trained; or prejudicing the use of personnel of the technology acquiring country.

4.1.6. Price fixing 29/

Restrictions regulating prices to be charged by acquiring party in the country to which the technology was transferred for products manufactured or services produced using the technology supplied, except when the acquiring party is not subject to competition in the relevant market.

4.1.7. Restrictions on adaptations

Restrictions which prevent the acquiring party from adapting the imported technology to local conditions or introducing innovations in it, or which oblige the acquiring party to introduce unwanted or unnecessary design or specification changes, if the acquiring party makes adaptations on his own responsibility and without using the technology supplying party's name, trade or service marks or trade

names, and except to the extent that this adaptation unsuitably affects those products, or the process for their manufacture, to be supplied to the supplying party, his designates, or his other licensees, or to be used as a component or spare part in a product to be supplied to his customers.

4.1.8. Exclusive sales or representation agreements

Requiring the acquiring party to grant exclusive sales or representation rights to the supplying party or any person designated by the supplying party, except as to sub-contracting or manufacturing arrangements wherein the parties have agreed that all or part of the production under the technology transfer arrangement will be distributed by the supplying party or any person designated by him.

4.1.9. Tying arrangements 30/

Requiring acceptance of additional technology, future inventions and improvements, goods or services not wanted by the acquiring party or designating or restricting sources of technology, goods or services as a condition for obtaining the technology required.

This shall not apply where required to avoid injury to the supplier's reputation when his trade or service mark or trade or corporate name is used by the acquiring party, or to meeting the requirements of a guarantee, where adequate specification of ingredients is not feasible.

4.1.10. Export restrictions 31/

Restrictions which prevent or substantially hinder export by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rates of payments for exportable products resulting from the technology supplied, except as to restrictions on exports of such products to countries where the importation could be legally prevented by the supplying party or where the relevant technology is licensed for production.

4.1.11. Patent pool or cross-licensing agreements and other arrangements 32/

Restrictions on territories, quantities, prices, customers or markets arising out of patent pool or cross-licensing agreements or other collusive arrangements among technology suppliers which limit access to new technological developments or attempt to dominate an industry or market with adverse effects on the transfer of technology, except for those restrictions necessary and ancillary to co-operative research arrangements or other co-operative arrangements.

30/ Ibid., foot-note 27.

31/ Ibid., foot-note 28.

32/ Based on present consolidated text in TD/CODE TOT/14.

4.1.12. Restrictions on publicity

Restrictions regulating the advertising or publicity by the acquiring party except where restrictions of such publicity may be required to prevent injury to the supplying party's goodwill or reputation where the advertising or publicity makes reference to the supplying party's name, trade or service marks, trade names or other identifying items, or for legitimate reasons of avoiding product liability when the supplying party may be subject to such liability, or where appropriate for safety purposes or to protect consumers, or when needed to secure the confidentiality of the technology transferred.

4.1.13. Payments and other obligations after expiration of industrial property rights

Requiring payments or imposing other obligations for continuing the use of industrial property rights which have been invalidated, cancelled or have expired, recognizing that any other issue, including other payment obligations for technology, shall be dealt with by the appropriate applicable law and the terms of the agreement to the extent consistent with that law.

4.1.14. Restrictions after expiration of arrangement 33/

Restrictions on the use of the technology in the country to which the technology was transferred after the expiration or termination of the arrangement, which extend beyond the legal protection of the relevant technology there.

4.2. In furtherance of the objectives of this Code, particularly the recognition of special needs of developing countries for the fulfilment of their economic and social development objectives and the encouragement of transactions under conditions where bargaining positions of the parties are balanced in such a way as to avoid abuses of a stronger position, parties to technology transfer transactions [shall] [should] refrain from the following practices: 34/

4.2.1. Limitations on volume, scope, etc. 35/

Restrictions on the volume of production, or on the use of the technology to certain fields of application.

4.2.2. Use of quality controls 35/

Restrictions requiring the acceptance of quality control methods and technical specifications not needed and not wanted by the acquiring party, where such restrictions would have the effect of being inconsistent with the provisions of this Chapter, and particularly with provisions 7 and 9, except for legitimate reasons of avoiding product liability when the supplying party may be subject to such liability.

33/ Text proposed by the Chairman of Working Group 3. (See TD/CODE TOT/14, foot-note 31).

34/ Based on provision 4.1 above and objectives 2.1 (i) and 2.1 (iii) in chapter 2.

35/ Text proposed by the Chairman of Working Group 3 (see TD/CODE TOT/14, foot-notes 32, 33 and 35).

4.2.3. Obligation to use trade marks 36/

Requiring acceptance of a particular trade mark, service name or trade name not wanted by the acquiring party when using the technology supplied.

4.2.4. Unlimited or unduly long duration of arrangements 35/

Requiring an unlimited duration of a transfer of technology arrangement or a duration that exceeds the lifetime of the substantial elements of the technology supplied.

4.3. Parties to technology transfer transactions [shall] [should] also refrain from other practices, having similar objects or effects as those listed above, which restrain trade and adversely affect the international flow of technology, particularly as such practices hinder the economic and technological development of acquiring countries. 37/

4.4. Subject to exceptions or justifications stated therein, the practices listed in this chapter may be justified in an individual case when consistent with the objectives of this Code, taking into account all the relevant circumstances, including their reasonableness, the nature of the economic relationship of the parties, and the circumstances prevailing at the inception of the arrangement. 38/

4.5. The provisions of this chapter are not intended to endorse conduct by parties to transfer of technology transactions which is not permitted under applicable national or regional law. 39/

5. Text proposed by the Group of 77 at the third session of the Conference

Chapter 4

1. Parties to transfer of technology transactions [shall][should] refrain from [such] practices as [those] described below:

2. While the provisions of this chapter are directed to transfer of technology involving any party, certain practices in an individual case are not precluded. */

35/ Ibid

36/ Based on Chairman's proposal (Ibid., foot-note 34).

37/ New text, which takes into account the Group of 77 position regarding "practices having similar effects" and basic principles stated by all groups in the chapeau.

38/ New text, which attempts to deal with "rule of reason" and parent-subsidiary relationships.

39/ Proposal by the Chairman of Working Group 3 (see TD/CODE TOT/14, foot-note 22).

*/ Whether a practice is precluded from a transfer of technology transaction will be determined by:

- (i) whether it is in the national interest of the technology acquiring country; or
- (ii) whether it is a practice the consequences of which has no adverse effects outside the related parties, by virtue of an existing parent-subsidiary relationship between them.

A parent-subsidiary relationship exists when one enterprise has control and at least majority ownership of another enterprise, and includes relationships between subsidiaries which are controlled by and are at least majority owned by the same parent enterprise.

Appendix C

Text relating to Chapter 5 of the draft Code

Text proposed at the third session of the Conference
by the Chairman of the Ad Hoc Group on Chapter 5 40/

Chapter 5 - Responsibilities and Obligations of Parties

Common provision on negotiating as well as contractual phase

5.1. When negotiating and concluding a technology transfer agreement, the parties [shall] [should] in accordance with this chapter, be responsive to the economic and social development objectives of the respective countries of the parties and particularly of the technology acquiring country, and when negotiating, concluding and performing a technology transfer agreement, the parties should observe fair and honest business practices and take into account the specific circumstances of the individual case and recognition [shall] [should] be given to certain circumstances, mainly the stage of development of technology, the economic and technical capabilities of the parties, the nature and type of the transaction such as any ongoing or continuous flow of technology between the parties.

Negotiating phase

5.2. In being responsive to the economic and social development objectives mentioned in this chapter each party [shall] [should] take into account the other's request to include in the agreement, to the extent practicable and for adequate consideration, when appropriate, such as the case in which the supplying party incurs additional costs or efforts, items clearly related to the official economic and social development objectives of the country of the requesting party as enunciated by its government. Such items include, inter alia, where applicable:

(a) Use of locally available resources

- (i) specific provisions for the use for the tasks concerned of adequately trained or otherwise suitable local personnel to be designated and subsequently made available by the potential technology recipient including managerial personnel, as well as for the training of suitably skilled local personnel to be designated and subsequently made available by the potential technology recipient;
- (ii) specific provisions for the use of locally available materials, technologies, technical skills, consultancy and engineering services and other resources to be indicated and subsequently made available by the potential technology recipient;

(b) Rendering of technical services

Specific provisions for the rendering of technical services in the introduction and operation of the technology to be transferred;

40/ In introducing this text to the Conference the Chairman of the Ad Hoc Group on Chapter 5 stated that it had been worked out after intensive consultations with the regional co-ordinators and that, in his view, it represented a possible compromise text for the whole chapter.

(c) Unpackaging

Upon request of the potential acquiring party, the potential supplying party [shall] [should], to the extent practicable, make adequate arrangements as regards unpackaging in terms of information concerning the various elements of the technology to be transferred, such as that required for technical, institutional and financial evaluation of the potential supplying party's offer.

5.3. Fair and honest business practices

When negotiating a technology transfer agreement, the parties should observe fair and honest business practices and therefore:

(a) Both potential parties

(i) Fair and Reasonable terms and conditions

(i) Should negotiate in good faith with the aim of reaching, in a timely manner, an agreement containing fair and reasonable terms and conditions, including agreement on payments such as licence fees, royalties and other considerations;

(ii) The price or consideration to be charged should be fair and reasonable it should be clearly indicated and, to the extent practicable, specified in such a manner that the acquiring party would be able to appreciate its reasonableness and fairness and to compare it to the price or consideration for other similar technologies transferred under similar conditions, which may be known to him;

(ii) Relevant information

Should consider request to inform each other, to the extent appropriate, about their prior arrangements which may affect the contemplated technology transfer;

(iii) Confidential information

Should keep secret, in accordance with any obligation, either legal or contractual, all confidential information received from the other party and make use of the confidential information received from a potential party only for the purpose of evaluating this party's offer or request or for other purposes agreed upon by the parties;

(iv) Termination of negotiations

May cease negotiations if, during the negotiations, either party determines that a satisfactory agreement cannot be reached;

(b) Potential acquiring party

Relevant information

Should provide the potential technology supplier in a timely manner with the available specific information concerning the technical conditions and official economic and social development objectives as well as legislation of the acquiring country relevant to the particular transfer and use of the technology under negotiation as far as such information is needed for the supplying party's responsiveness under this chapter;

(c) Potential supplying party

Relevant information

- (i) [shall] [should] disclose, in a timely manner, to the potential technology acquiring party any reason actually known to him, on account of which the technology to be supplied, when used in accordance with the terms and conditions of the proposed agreement, would not meet particular health, safety and environmental requirements in the technology acquiring country, already known to him as being relevant in the specific case or which have been specifically drawn to his attention, as well as any serious health, safety and environmental risks known by the supplier associated with the use of the technology and of products to be produced by it;
- (ii) [shall] [should] disclose to the potential technology acquiring party, to the actual extent known to him, any limitation, including any pending official procedures or litigation which adversely concerns the existence or validity of the rights to be transferred, on his entitlement to grant the rights or render the assistance and services specified in the proposed agreement;

Provision of accessories, spare parts and components

- (iii) [shall] [should], to the extent feasible, take into account the request of the acquiring party to provide it for a period to be specified with accessories, spare parts and components produced by the supplying party and necessary for using the technology to be transferred, particularly where alternative sources are unavailable.

5.4. Contractual phase - Chapeau

The technology transfer agreement [shall] [should], in accordance with 5.1., contain mutually acceptable contractual obligations, including those relating to payments and, where appropriate, provide, inter alia, for the following:

(i) Access to improvements

Access for a specified period or for the lifetime of the agreement to improvements to the technology transferred under the agreement;

(ii) Confidentiality

Respect for the confidentiality of any trade secrets, secret know-how and all other confidential information received from the other party in connexion with the transfer of technology, subject to the terms of the agreement to the extent consistent with appropriate applicable law;

(iii) Dispute settlement and applicable law

(Provision on this subject matter and text awaiting outcome of the negotiations on chapter 9)

(iv) Description of the technology

The technology supplier's guarantee that the technology meets the description contained in the technology transfer agreement;

(v) Suitability for use

The technology supplier's guarantee that the technology, if used in accordance with the supplier's specific instructions given pursuant to the agreement, is suitable for manufacturing of goods or production of services as agreed upon by the parties and stipulated in the agreement;

(vi) Rights to the technology transferred

The technology supplier's representation that on the date of the signing of the agreement, it is, to the best of its knowledge, not aware of third parties' valid patent rights or similar protection for inventions which would be infringed by the use of the technology when used as specified in the agreement;

(vii) Quality levels and goodwill

The technology recipient's commitment to observe quality levels agreed upon in cases where the agreement includes the use of the supplier's trade marks, trade names or similar identification of goodwill, and both parties' commitment to avoid taking actions primarily or deliberately intended to injure the other's goodwill or reputation;

(viii) Performance guarantees

Specification of technical performance parameters which the supplying party has agreed to guarantee, including specification of guarantees for the achievement of such parameters, details of the manner of determining whether the performance has been met and the consequences of failure to meet that performance;

(ix) Transmission of documentation

The supplying party's commitment that relevant technical documentation and other data required from him for a particular purpose defined in terms directly specified in the agreement will be transferred in a timely manner and as correctly and completely for such purpose as agreed upon;

(x) Training of personnel and provision of accessories, spare parts and components

Where negotiations under paragraphs 5.2. (a) (i) and 5.3. (c) (iii) have taken place, suitable provisions for training of personnel and supply of accessories, spare parts and components would be made, consistent with the results of the negotiations;

(xi) Liability

Disposition concerning liability for the non-fulfilment by either party of its responsibilities under the technology transfer agreement including questions of loss, damage or injury.

Appendix D

Texts relating to Chapter 9 of the draft Code

1. Texts presented by the Working Group of the President's
Contact Group on Applicable Law and Settlement of Disputes
for consideration by all regional groups at the second
session of the Conference

1. Text considered by the Working Group 41/

9.3. Parties to transfer of technology transactions should try to settle in an amicable way the disputes or differences, which may arise between them in connexion with the transactions, by direct negotiations or by resorting to a conciliation procedure.

Parties to transfer of technology transactions [may, by mutual consent,]*/*** [should be encouraged to]** have recourse to arbitration for the purpose of settling disputes arising out of the transactions in cases where the [national]*/*** laws of the parties allow for arbitration.

[Governments should promote the use of generally accepted rules of arbitration such as the UNCITRAL arbitration rules and should ensure the recognition and enforcement of arbitral awards by acceding to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards and other international agreements.]**

[States should recognize and enforce arbitral awards in accordance with their national legislation, and the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards and other international agreements in which they participate.]***

2. Text presented by Group D

Applicable law and settlement of disputes

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations if it is not prohibited by their national legislation.

9.2. In relation to issues concerning the sovereignty of the technology supplying and acquiring countries the law of these countries shall be applied.

2. Texts proposed by the regional groups

I. Proposal by the Group of 77 made at the first session of the Conference

A. Applicable law

1. The law applicable to matters relating to public policy (ordre public) and to sovereignty shall be the law of the acquiring country. Any clause to the contrary shall be void.

41/ The Group of 77 stated that the examination of texts on conciliation and arbitration was part of the general consideration of the chapter and the fact that arbitration had been considered first should not be taken as giving arbitration priority over the other elements of the chapter.

2. Any contractual clause which would be in violation of the public policy (ordre public) and sovereignty of the acquiring State, particularly in matters concerning its governmental prerogatives or its legislative, regulatory or administrative powers, shall be null and void.
3. The law applicable to matters of private interest is that which has a direct, effective and permanent relationship with the transaction.
4. The choice of the applicable law by the parties, the judge or the arbitrators shall be made in conformity with the above rule.
5. The law of the acquiring party shall apply to questions of characterization. In particular, it alone shall be applicable for the determination of matters that may not be submitted to arbitration or which concern public policy or sovereignty.
6. The principles and rules set forth in this Code shall be applicable. The law chosen by the parties, the judge or the arbitrator shall be interpreted and applied in conformity with the Code.

B. Settlement of disputes

1. The courts and other tribunals of the technology acquiring country shall have jurisdiction over disputes arising from the conditions or the effects of the contract which concern public policy (ordre public) or sovereignty. They shall also have jurisdiction over conflicts of characterization.
2. The contractual relationships between parties to a transfer of technology agreement may be the subject of a choice of forum or of arbitration, unless the acquiring country has express rules to the contrary.

The forum chosen must have a direct, effective, and permanent relationship with the contract. Any clause which explicitly or implicitly excludes the jurisdiction of the courts and other tribunals of the technology acquiring country shall be null and void.

3. In the case of arbitration each party shall designate its arbitrator(s) when the dispute has arisen. The parties and their authorized arbitrators shall proceed to the designation of a president of the arbitration tribunal. The latter shall be of a nationality which is different from that of the parties and of their arbitrators.

In the case of lack of agreement on the choice of president, or in the case of the refusal of one of the parties to designate its arbitrator, such designation shall be made from a list of arbitrators established within the framework of this Code and by the organ designated in it. The seat of arbitration shall be the technology acquiring country.

4. The arbitration process shall take place in conformity with the UNCITRAL rules for all matters not provided for in this Code.
5. The States parties to this Code agree to enforce, without proceeding to an examination of their merits, the arbitration awards and judicial decisions rendered within the framework of this Code, subject to the public policy (ordre public) of the forum and duly ratified international conventions on the recognition and enforcement of arbitral awards and judicial decisions.

6. The arbitral award shall, at the request of one of the parties, be the subject of an examination of its legality and, if necessary, shall be annulled. Such an examination will be made by a panel of three persons whose decisions shall be taken by a majority vote and who shall be selected from the list of arbitrators set up within the framework of this Code.

This examination shall under no circumstances be on the merits of the dispute.

7. Before proceeding to arbitration, the parties may have recourse to conciliation.

II. Proposal by Group D and Mongolia made at the sixth session of the Intergovernmental Group of Experts

8.1. The parties to a technology transfer agreement may by common consent, and within the limits permitted by their national legislation, freely choose the law applicable to the agreement. This law shall apply to the validity, performance and interpretation of the agreement.

In the absence of agreement between the parties concerning the choice of law, the arbitration commission or other organ settling disputes between the parties shall settle such disputes on the basis of the rules of substantive law determined in accordance with the conflict-of-laws rules which the arbitration commission or other organ considers applicable.

In all cases, the arbitration commission or other organ shall make its award in accordance with [the peremptory norms of this Code and] 42/ the terms of the agreement, and taking into account the trade usages applicable to the transaction.

8.2. If disputes or differences arise between the technology supplying party and the acquiring party concerning or in connexion with an agreement concluded between them, the parties shall make every effort to settle them in an amicable manner, by the direct negotiation method or by resorting to the conciliation procedure or any other procedure provided for in international agreements.

8.3. Since arbitration is one of the most suitable methods of settling possible disputes, the parties may include arbitration clauses in technology transfer agreements or may conclude arbitration arrangements providing for the settlements of disputes by arbitration, excluding the jurisdiction of the ordinary courts.

Disputes may be considered both in standing arbitration commissions and in commissions specially created for dealing with a specific dispute in the countries of the parties or in another country; and the awards of the arbitration commissions shall be final and binding on both parties.

8.4. Governments shall endeavour to take every possible step to promote the amicable settlement of disputes and differences and the consideration of disputes in arbitration commissions, in particular by recognizing the validity of arbitration clauses and arbitration agreements, and also to ensure the recognition and enforcement of arbitral awards, in particular by acceding to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards and other international agreements.

42/ If this Code becomes a legally binding instrument.

III. Proposal by Group B made at the sixth session of the Intergovernmental Group of Experts

- 7.1. The parties to a technology transfer agreement may freely choose the law governing the formation, validity, performance and interpretation of the agreement, provided that the law chosen either has a substantial relationship to the parties or to the transaction or there is other reasonable basis for the parties' choice.
- 7.2. (First alternative). In the absence of an effective choice of law by the parties the conflict of laws rules of the court trying the dispute should determine the proper law of the agreement. If the dispute is referred for decision to an arbitral tribunal this tribunal should apply the proper law under the conflict of laws rules which it considers applicable.
- 7.2. (Second alternative). In the absence of an effective choice of law by the parties the substantive law of the country to which the agreement has its closest and most real connexion should govern the agreement. In designating this law the court or the arbitral tribunal should, inter alia, take into account the following factors:
- (i) principal place of business of the parties,
 - (ii) location of the subject-matter of the agreement,
 - (iii) place of performance,
 - (iv) place of contracting,
 - (v) place of negotiation,
 - (vi) choice of the courts of a certain country.
- 7.3. In applying the law, a court or the arbitral tribunal should take into account the terms of the contract and the usages of the trade applicable to the transaction.
- 7.4. The parties to a technology transfer agreement should be freely permitted to choose the court before which disputes relating to the agreement shall be tried, and any such choice should be given effect unless there is no reasonable basis for the selection or the choice places an onerous burden on one of the parties. The parties should also be freely permitted to choose arbitration or other third-party procedures.
- 7.5. When disputes or differences arise between the technology supplying party and the acquiring party in connexion with an agreement concluded between them, the parties should make every effort to settle them in an amicable manner, by direct negotiation or by resorting to a conciliation procedure or any other procedure, notably those provided for in international agreements or by international non-governmental agencies.
- 7.6. Governments should endeavour to take every possible step to promote the amicable settlement of disputes and differences and the consideration of disputes in arbitration commissions, in particular by recognizing the validity of arbitration clauses and arbitration agreements and by encouraging the use of generally accepted rules of arbitration such as the UNCITRAL Arbitration Rules. Governments should also ensure the recognition and enforcement of arbitral awards by acceding to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other international agreements.

3. Text submitted by the Chairman of Working Group 2 ^{43/}

A. Applicable law

1. The provisions of this Code of Conduct relevant to transactions between parties [shall apply] [should be applied in accordance with the spirit of the Code] apply to all transfer of technology transactions.
2. The parties to transfer of technology transactions may, by common consent, subject to the limits placed by their national legislation, choose the law governing their contractual relationship, provided that the law chosen has a direct, effective and permanent relationship with the transaction but provided that such a choice will not be effective in matters relating to the public policy (ordre public) or sovereignty of either the technology supplying country or the technology acquiring country, particularly in matters concerning governmental prerogatives or legislative, regulatory or administrative powers.
3. In the absence of an effective choice of law by the parties [the national conflict of laws rules of the court seized of a dispute between the parties should determine the law to be applied] [the law applicable to decide disputes between the parties is that which has the most direct, effective and permanent relationship with the transaction] [the law of the technology acquiring State shall apply].
4. The law selected by the parties, the judge or the arbitrator [shall] [should] be applied and interpreted [in accordance with the spirit of] [in conformity with] the Code. The law [of the technology acquiring country] [of the country which has the most substantial relationship to the transaction] [of the court seized of the dispute] shall apply to questions of characterization, and in particular for the determination of matters that may not be arbitrated or which concern public policy or sovereignty.

B. Settlement of disputes between the parties

5. Parties to transfer of technology transactions [shall] [should] make every effort to settle, in an amicable manner, disputes or differences that may arise between them in connexion with the transaction, by direct negotiation or by recourse to conciliation or other such procedure provided for in international agreements to which their countries have subscribed or in agreements by the parties to use the rules and facilities of non-governmental organizations.
6. The parties to a transfer of technology transaction may, by common consent, subject to the limits placed by their national legislation, choose a judicial forum before which disputes relating to their contractual relationship may be brought, if the country where the forum chosen is located has a direct effective, permanent relationship with the transaction. However, the choice of a judicial forum by the parties shall not directly or indirectly exclude the concurrent jurisdiction of the courts and other tribunals of the technology acquiring country.

C. Arbitration between parties

7. If permitted by their national regulations of transfer of technology transactions, the parties may choose arbitration as the method for the settlement of disputes either by including an arbitration clause in the transfer of technology transaction or by specifically agreeing to arbitration in writing after the transfer of technology transaction has been entered into. The choice of arbitration shall

be effective, except in matters characterized as non-arbitrable by the court seized of the question under the law applicable to questions of characterization.

(a) With regard to the selection of arbitrators:

- (i) each party shall designate an arbitrator when the dispute has arisen. The arbitrators selected shall designate a president of the arbitration tribunal who shall be of a nationality other than that of the parties or the other members of the tribunal.
- (ii) If there is lack of agreement on the choice of a president or if one of the parties refuses to designate an arbitrator, such designation shall be made from a specific list of arbitrators. 44/

(b) The arbitrators shall apply the provisions on applicable law set forth in section A of this chapter.

(c) The seat of arbitration shall be [the technology acquiring country] [the country which has the most substantial relationship to the transaction] [the country chosen by the parties at the time of the dispute provided that the country chosen shall have a substantial relationship to the transaction, and the selection does not place an onerous burden on one of the parties. In the absence of agreement by the parties the arbitral tribunal shall make the selection on the basis of the criteria set forth above.]

(d) The arbitration process shall take place in conformity with the UNCITRAL Rules, which the parties shall not modify, for all matters not provided for in this Code.

D. Enforcement of awards and judgements

8. States which have adopted this Code agree [to enforce, without proceeding to an examination of the merits, the arbitration and judicial decisions rendered within the framework of this Code, subject to the public policy (ordre public) of the forum and duly ratified international conventions on the recognition and enforcement of arbitral awards and judicial decisions.] [that the recognition and enforcement of arbitral awards should be ensured by acceding to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other international agreements.] [that arbitration awards rendered pursuant to this Code should be recognized and enforced in accordance with the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.]

44/ The list of arbitrators could be established within the framework of the Code by an organ specifically designated in the Code. The organ could be the intergovernmental body designated for carrying out the international implementation of the Code or a registry created under the Code to be within the authority of the Secretary-General of the United Nations who would appoint a Registrar to prepare and maintain lists of arbitrators. The latter approach is followed in the Code of Conduct for Liner Conferences.

4. Text proposed by the Co-Chairmen of the Preparatory Meeting acting for the President 45/

Applicable law and settlement of disputes

9.1. Parties to transfer of technology transactions [shall] [should] refrain from making a choice of the applicable law or of the jurisdiction for the settlement of disputes that would be incompatible with the Code of Conduct and with the public policy (ordre public) of the technology supplying country or the technology acquiring country.

9.2. The public policy (ordre public) of the technology supplying and acquiring countries on matters covered in the Code of Conduct [shall] [should] be applied, notwithstanding any provision to the contrary in the transfer of technology transaction.

9.3. Parties to transfer of technology transactions may have recourse to arbitration for the purpose of settling disputes arising out of the transactions in cases where arbitration is permitted by the national laws of the parties.

^{45/} See TD/CODE TOT/L.5 of 17 October 1979, and footnote 22 above. This proposal recognizes the difficulties in achieving agreement at present on standards on applicable law and the settlement of disputes to be applied by States and addresses itself to the contractual arrangements of parties to transfer of technology transactions.