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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 5 June 1985



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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 sixth session
of the Conference on 5 June 1985

Note by the UNCTAD secretariat

In accordance with paragraph 1 of the decision adopted by the Conference at its 21st plenary meeting, on 5 June 1985 (TD/CODE TOT/46), the UNCTAD secretariat has prepared the present document containing the draft international code of conduct as at the close of the sixth session of the Conference. A note by the secretariat containing other documents of the Conference will be issued separately as document TD/CODE TOT/48.

In order to facilitate consideration by governments, texts which are under consideration on the issues outstanding and on which several proposals exist are reproduced as appropriate in appendices. Appendix A deals specifically with documents considered at the sixth session of the Conference.

Note: In the present text, the following key is used to identify the sponsorship of a text, where the text is not an agreed one: Group of 77 text: *; Group B text: **; text of Group D and Mongolia: ***.

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Preamble

The United Nations Conference on an International Code of Conduct on the Transfer of Technology,

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 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;
11. 1/
12. 1/

1/ For texts under consideration, see appendices A and B.

Chapter 1

Definitions and scope of application

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. 2/

(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;

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

2/ 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.

(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. International transfer of technology transactions. 3/

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. Regional groupings of States. 4/

3/ For texts under consideration, see appendices A and C.

4/ Text under consideration. See proposal in appendix C.

Chapter 2

Objectives and principles

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.
- (ix) To specify restrictive [business] practices from which parties to technology transfer transactions [shall] [should] refrain. 5/

5/ Text under consideration. See also appendix A.

- (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.

2.2. Principles

- (i) The Code of Conduct is universally applicable in scope.
- (ii) States have the right to adopt all appropriate measures for facilitating and regulating the transfer of technology, in a manner consistent with their international obligations, taking into consideration the legitimate interests of all parties concerned, and encouraging transfers of technology under mutually agreed, fair and reasonable terms and conditions.
- (iii) 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.
- (iv) 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.
- (v) 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.
- (vi) Mutual benefits should accrue to technology supplying and recipient parties in order to maintain and increase the international flow of technology.
- (vii) 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.
- (viii) Recognition of the protection of industrial property rights granted under national law.

- (ix) 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

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 3.4 of this chapter and should act on the basis that these measures should:

- (i) Recognize that a close relationship exists between technology flows 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.

3.3. 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.

3.4. 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;
- (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 6/

[The regulation of practices and arrangements involving the transfer of technology] [Restrictive business practices] [Exclusion of political discrimination and restrictive business practices] 7/

Section A: (Chapeau) 8/

Section B: (List of practices) 9/

1. [Exclusive]** Grant-back provisions 10/

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.

2. Challenges to validity 10/

[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. 11/

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.

6/ 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.

7/ Title of Chapter 4 under consideration.

8/ For texts under consideration, see appendices A and D.

9/ With regard to practices 15 to 20, see appendix A.1 for text of agreed statement for inclusion in the report of the Conference, and for texts under consideration see appendix D.

10/ Text under consideration. See appendix A.

11/ The spokesman for the regional groups noted that their acceptance of agreed language which makes reference to the term "applicable law" is conditional upon acceptable resolution of differences in the group texts concerning applicable law and national regulation of this Code.

4. Restrictions on research 10/

[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 connection with new products, processes or equipment.

5. Restrictions on use of personnel 10/

[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 10/

[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 10/

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 10/

[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 when 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 8/

11. Patent pool or 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 10/

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. 11/

14. Restrictions after expiration of arrangement 8/

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 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 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 should take into account the other's request to include in the agreements, to the extent technically and commercially 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 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. Business negotiating 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 commercial 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 by comparing it to the price or consideration for other comparable technologies transferred under similar conditions, which may be known to him;

(ii) Relevant information

Should consider requests 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) The 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) The potential supplying party

Relevant information

- (i) 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) 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, in a direct manner, 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) 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 - Chapeau

5.4. The technology transfer agreement should, in accordance with 5.1., provide for mutually acceptable contractual obligations, including those relating to payments and, where appropriate, inter alia, 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 12/
- (iii) Dispute settlement and applicable law 12/
- (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;

12/ For text under consideration, see appendix A.

(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 to technical performance parameters which the supplying party has agreed to guarantee, including specification of requirements 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 5.5. (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.

Chapter 6

Special treatment for developing countries

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; 13/
- (iii) facilitate access by developing countries, to the extent practicable, to technologies whose transfer is subject to private decisions; 13/
- (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;

13/ 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) 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:

- (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

7.1. The States recognize 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; 14/
- (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.

14/ Text under consideration; see also appendix A.

Chapter 8

International institutional machinery

8.1. Institutional arrangements

(a) 15/

(b) 15/

(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 International Institutional Machinery

8.2.1. The International Institutional Machinery 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;

(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.

15/ For texts under consideration, see appendices A and E.

8.2.2. In the performance of its functions, the International Institutional Machinery may not act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual parties in connection with a specific transfer of technology transaction. The International Institutional Machinery should avoid becoming involved when parties in a specific transfer of technology transaction are in dispute.

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

8.3. Review procedure 15/

8.4. Secretariat

The secretariat for the International Institutional Machinery shall be the UNCTAD secretariat. At the request of the International Institutional Machinery the secretariat shall submit relevant studies, documentation and other information to the International Institutional Machinery. 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 15/

Chapter 9

Applicable law and settlement of disputes 16/

16/ For texts under consideration, see appendices A and F.

Appendices: Texts under consideration on
the issues outstanding

Appendix A

Texts considered at the sixth session of the Conference

1. Text submitted by the President of the
Conference during its sixth session

Preamble

(11)

Affirming the benefits to be derived from a universally applicable Code of Conduct and that all countries should encourage and assist their enterprises, whether private or public, to follow in all respects the provisions of this Code.

(12)

Hereby agrees on the following International Code of Conduct on the Transfer of Technology, consisting of universally acceptable recommendations.

Chapter 1

1.4

The Code of Conduct applies to international transfer of technology transactions.

Chapter 2

2.1 (ix)

To specify restrictive practices from which parties to technology transfer transactions should refrain.

Chapter 4 ^{17/}

Practices relating to transfer of technology transactions

4.1

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

^{17/} The chapeau of Chapter 4 (4.1 to 4.4) of the President's text was the subject of further informal negotiations among regional groups. The text under consideration, following these negotiations, as at the end of the sixth session of the Conference is reproduced below (see Appendix A,2).

4.2.

Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstances and the over-all purposes of the transaction including its effects on the economic and technological development of the acquiring country together with the situation in the relevant market.

4.3.

While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should be considered in the light of their special relationship.

4.4.

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

4.5.

The practices are the following: */

1. 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, 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.

2. Challenge 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.

*/ Text for inclusion in agreed statement

"The Conference agreed that the international machinery of the code would undertake to collect data and relevant material which would be available to the Review Conference to decide whether or not and in what form the following other practices should be included in the revised code: Practices on limitations on volume or capacity, use of quality controls, obligation to use trade marks, requirements to provide equity or participate in management, unlimited or unduly long duration of arrangement and limitations upon use of technology."

3. Exclusive dealing

Restrictions on the freedom of the acquiring party to enter into sales, representation or manufacturing agreements regulating 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

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 connection with new products, processes or equipment.

5. Restrictions on use of personnel

Requiring the acquiring party of 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

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 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

Imposing acceptance of additional technology, future inventions and improvements, goods or services not wanted by the acquiring party or 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 when 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

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 the protection of legitimate interests of the supplying party and of any acquiring party, such as to prevent export of such products to countries where any party's industrial property right would be infringed in the case of importation of these products into those countries or where an exclusive licence to use the relevant technology has been granted, or where a specific option has been firmly and explicitly secured.

11. Patent pool or 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 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 the expiration of the arrangement

Restrictions on the use by the acquiring party after expiration of the arrangement of the technology, including know-how, which has lost its secret character independently of the acquiring party, without prejudice to obligations relating to payment already agreed upon or to existing industrial property rights.

Chapter 5

5.4 (ii) Confidentiality

Maintenance of confidentiality including its scope and duration and the use of trade secrets, secret know-how and all other valuable confidential information received from the other party in connection with the transfer of technology;

5.4 (iii) delete

Chapter 7

7.2 (ii)

Exchange of available information on experience in seeking solutions to problems relating to the transfer of technology, particularly restrictive practices in the transfer of technology;

Chapter 8

8.1(a)

An intergovernmental group of experts on the International Code of Conduct on the Transfer of Technology operating within the framework of a Committee of UNCTAD will provide the institutional machinery.

8.1.(b)

The Intergovernmental Group of Experts on the International Code of Conduct on the Transfer of Technology open to all members of UNCTAD should meet as often as necessary, but at least once a year.

8.3.

Subject to the approval of the General Assembly five years after the adoption of the Code a United Nations Conference 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 including its legal nature. Towards this end, the intergovernmental group of experts shall make proposals to the Conference for the improvement and further development of the Code, taking into account relevant action in the field of the transfer of technology within the framework of the United Nations system.

8.5. delete

Chapter 9

9.1.

Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not limit the application of relevant rules of national legal systems which cannot be derogated from by contract.

9.2.

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

9.3.

Parties may, by common consent, have recourse to arbitration for the purpose of settling disputes arising out of transfer of technology transactions, in cases where the dispute is arbitrable under the relevant laws of the parties concerned.

9.4.

Parties should be encouraged to use internationally accepted rules of arbitration such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

9.5.

States should recognize and enforce arbitral awards in accordance with their national legislation and relevant international agreements to which they have acceded.

2. Chapeau of Chapter 4:

Text under consideration at the end of the sixth session
(31 May 1985) 18/

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

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

18/ See foot-note 17/ above.

4.3. While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should [not be considered inappropriate] [be considered appropriate] in the light of their special relationship [provided they comply with national laws and declared development policies]. 19/

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

3. Texts prepared by Chairmen of Working Group I (Chapter 4) and Working Group II (Chapter 9)

(i) Text submitted by the Chairman of Working Group I 20/

Chapter 4

4.1 In furtherance of the objectives, principles and other pertinent provisions of this code and taking into account all relevant circumstances in the supplying and acquiring countries, the following practices should be avoided in individual transactions, when they are unduly restrictive, adversely affecting the international transfer of technology.

Chapter 2 (Addition)

2.2 Principles

(x) The provisions of this code should not be construed as justifying practices or conduct by parties which are unlawful under applicable national or regional legislation.

Note: This text is practically the same as Section C, 5, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

(ii) Text submitted by the Chairman of Working Group II

Chapter 9

9.1. Parties to transfer of technology transactions may, by mutual consent, choose the law applicable to their contractual relations, it being understood

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

20/ This text was submitted by the Chairman as a package deal in the sense that it combines paragraphs 4.1 of Chapter 4 and 2.2 (x) of Chapter 2 as a solution to the issues raised in Chapter 4 of the draft code.

that such choice will not prevent the application by courts or authorities of other rules of law which must be applied whatever the law chosen by the parties. 21/

4. Informal working papers on Chapters 4, 5 and 9
submitted by regional groups and China

(i) Chapeau of Chapter 4 and related provisions

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

Chapter 2 - Objectives and Principles

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

Chapter 4

Title : Practices restrictive to transfer of technology.

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

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

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

Complementary element to Chapter 2:

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

Working paper submitted by Group B (17 May 1985)

In furtherance of the objectives and principles of this Code, parties to transfer of technology transactions should refrain from the practices described below when, in the individual case, they are unduly restrictive,

21/ Alternative texts to the second phrase:

"subject to the relevant binding rules [as applied by courts and other authorities] which [cannot be derogated from by contract] [must be applied whatever the law chosen by the parties]."

adversely affecting the international transfer of technology. Whether a practice is unduly restrictive, adversely affecting the international transfer of technology, should be determined according to the principles and rules for enterprises set out in sections D.3 and D.4 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

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

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

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

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

(ii) Chapter 5: confidentiality

Informal proposal by the Group of 77 (29 May 1985)

5.4 (ii) Maintenance of confidentiality including its scope and duration and the use of trade secrets, secret know-how and such other information deemed confidential by the parties in connection with the transfer of technology. This obligation shall not extend beyond a specified lapse of time after the transmission of each item of secret information pertaining to the contract sanctioned by the competent national authority.

(iii) Chapter 9: 9.1.

Informal text proposed by the Chinese delegation (20 May 1985)

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not prevent the application of the relevant rules of any of the national legal systems having a substantial connection with parties or the transactions which cannot be derogated from by contract.

Informal text on Chapter 9 proposed by Group D (24 May 1985)

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not prevent the application by the forum in the given matter of the relevant binding rules which cannot be derogated from by contract.

Informal text proposed by the Group of 77 (24 May 1985)

9.1. If the national law of the acquiring country permits, the parties to the transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, in a manner consistent with the objectives and principles of the Code, it being understood that the law chosen shall not prevent the application of Public Policy (Ordre Public) of the countries of the parties concerned, which cannot be derogated from by contract.

Appendix B

Preamble

Proposals by regional groups

(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.]***

Appendix C

Chapter 1

Paragraph 1.4.

(a) Proposals by regional groups

[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.]**

(b) Recommendation by the Secretary-General of UNCTAD and the President of the Conference 22/

1.4.

"The Code of Conduct applies to international transfer of technology transactions. For the purpose of this Code, transfer of technology transactions are international when relating to technology transferred across national boundaries, including transactions when at least one of the parties is an intermediary or otherwise acts on behalf of a party who does not reside or is not established within the same country. States may, in accordance with the provisions of chapter 3, extend the application of the Code to transactions which take place between parties within their national boundaries."

Paragraph 1.6. 23/

1.6. Any reference in the Code to "States" or "Governments" considered as such or as "members of UNCTAD" shall be construed as including any regional groupings of States to the extent that they have competence in the fields covered by this Code with respect to such competence.

22/ See TD/CODE TOT/38 of 11 August 1983.

23/ This new provision for Chapter 1 was proposed at the fifth session of the Conference by the United Kingdom of Great Britain and Northern Ireland on behalf of States members of Group B.

Appendix D

Chapter 4

(a) Regional groups' positions

Section A (Chapeau)

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 trade marks 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 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]**.

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]**/**.

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.]*

(b) Texts prepared during the sessions of the Interim Committee 24/

Chapeau

4.1 The restrictive practices described in this chapter should be avoided in international transfer of technology transactions where they would have an unjustifiable adverse effect on the international transfer of technology.

4.2 Evaluation of such a practice, for the purpose of paragraph 4.1. in an individual case, should take into account: consistency with the objectives and principles of this Code and all other relevant circumstances, including the over-all purposes and effects of the transaction on the economic and technological development of the acquiring country, and the interests of the parties in the light of, inter alia, the situation prevailing at the inception of the arrangement.

4.3. (a) While the provisions of this chapter apply to international transfer of technology transactions involving any party, their application to relationships between "affiliated" */ parties calls for special consideration. Practices not having an unduly restrictive effect outside the parties are, in principle, not considered objectionable.

4.3 (b) Practices between affiliated parties should be consistent with the laws and declared development policies of the acquiring country.

4.4 The provisions of this chapter should not be construed as justifying other practices or conduct by parties which are unlawful under applicable national or regional legislation. 25/

10. Export restrictions

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 the protection of legitimate interests of the supplying party and of any acquiring party, such as to prevent export of such products to countries where any party's industrial property right would be infringed in the case of importation of these products into those countries or where an exclusive licence has been retained or granted to use the relevant technology.

14. Registrations after the expiration of the arrangement

Restrictions on the use by the acquiring party after expiration of the arrangement of the technology, including know-how, which has lost its secret character independently of the acquiring party, without prejudice to obligations relating to payment already agreed upon or to existing industrial property rights.

*/ "Affiliated" parties should be considered those linked by relations of ownership (at least majority ownership) or legal control and include relationships between subsidiaries of the same parent enterprise.

25/ Certain regional groups felt that if it was necessary to include a specific provision on this topic it would be preferable to consider placing it elsewhere than in chapter 4.

Appendix E

Chapter 8

Regional groups positions

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.

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.

8.5. 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 connection 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.]

Appendix F

Chapter 9

Text prepared during the sessions of the
Interim Committee 26/

- 9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations; such choice of law does not, however, limit the application of the relevant national laws nor of the rules of public policy (ordre public), of the parties to the transaction, which cannot be derogated from.
- 9.2. Parties to transfer of technology transactions should try to settle in an amicable way the disputes or differences, which may arise between them in connection with the transaction, by direct negotiations or by resorting to a conciliation procedure.
- 9.3. Parties may, by common consent, have recourse to arbitration for the purpose of settling disputes arising out of the transactions in cases where the relevant laws of the parties concerned do not prohibit arbitration.
- 9.4. Parties should be encouraged to use internationally accepted rules of arbitration such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
- 9.5. States should recognize and enforce arbitral awards in accordance with their national legislation and relevant international agreements.

26/ See TD/CODE TOT/35, annex A.