

# Transfer of Technology: UNCTAD's Draft International Code of Conduct

## I. Introduction

The sixth session of the United Nations Conference on an International Code of Conduct on the Transfer of Technology will be held in Geneva in May, 1985. It will be preceded by intensive preparations by Governments aimed at successfully concluding one of the longest United Nations conferences in recent years.<sup>1</sup>

The initiative towards the establishment of an international code was prompted by a number of studies produced in the late 1960s which emphasized the role of the transfer of technology in the development process of developing countries as well as the prevailing conditions in the flow of technology to these countries.<sup>2</sup> These studies suggested an acute dependence of developing countries on the acquisition of technology from a

---

\*The author is Chief of the Legal Policies Section, Technology Division, UNCTAD. This article is based on studies and reports prepared by the UNCTAD secretariat dealing with the Code of Conduct on Transfer of Technology. The comments contained in it are the sole responsibility of its author. The author acknowledges the valuable comments and suggestions made by his colleagues, A. Yusuf and R. Dhanjee.

1. For annotations on the history of the negotiations, see notes by the author in 11 J. WORLD TRADE L. 186 (1977), 12 J. WORLD TRADE L. 351 (1978), 14 J. WORLD TRADE L. 160 (1980) and 18 J. WORLD TRADE L. 176 (1984). See also the detailed analysis contained in A. Yusuf, *L'elaboration d'un code international de conduite pour le transfert de technologie: Bilan et perspective*, R.G.D.I.P., decembre, 781 (1984) á paratre.

2. See in particular early work by the UNCTAD secretariat, e.g., The Transfer of technology to developing countries, with special reference to licensing and know-how agreements (study prepared by G. Oldham, C. Freeman, E. Turkman), TD/28/Supp.1 (1967); Major issues arising from the transfer of technology to developing countries, TD/B/AC.11/10Rev.2 (1975); and An International Code of Conduct on the Transfer of Technology, TD/B/C.6/AC.1/2/Supp.1/Rev.1 (1975). See also A. F. Ewing, *UNCTAD and the Transfer of Technology*, 10 J. WORLD TRADE L. 197 (1976) and S. J. Patel, *The Technological Dependence of Developing Countries*, 12 J. OF MOD. AFRICAN STUDIES, 1 (1974).

limited number of technology suppliers. They also underscored the absence of or insufficient scientific and technological infrastructure in the recipient countries, factors that hindered the adequate absorption and adaptation of the foreign technology. Technology was being acquired under terms and conditions having important economic, social and financial consequences for the recipient countries. The legal environment for the acquisition, absorption and development of technology in developing countries was inadequate or at a very incipient stage. In brief, according to this perspective, developing countries were not sharing the vast opportunities offered by new discoveries and developments in modern science and technology.

Traditionally, in developed countries, science and technology has been seen as important economic and development factors. In developing countries, in general, until very recently, science and technology have been dealt with in a more *ad hoc* fashion with the absence of a coherent and coordinated approach to the number of interrelated aspects that define a national science and technology policy. Specific concern over the existing situation was manifested by developing countries in the late 1960s and early 1970s. One major area of attention has been the restructuring of the existing institutional and legal framework governing the transfer and acquisition of foreign technology. Specific policies, adopted by developing countries and less developed countries from Western Europe dealing with the purchase and licensing of technology in foreign collaboration agreements, have attempted to deal with these important channels for the acquisition and development of technology.<sup>3</sup> These policies had as their main objective the establishment of screening procedures for the acquisition of foreign technology based on its contribution to the acquiring country and the control of restrictive practices that might affect the further local development of the acquiring firm.<sup>4</sup> The introduction of new policies in this area was also accompanied by changes in the traditional well-established industrial property system.<sup>5</sup>

---

3. See UNCTAD, The channels and mechanisms for the transfer of technology from developed to developing countries (a study by Charles Cooper with the collaboration of F. Sercovitch), TD/B/AC.11/5 (1971).

4. In this area, Japan had a long history of successfully importing foreign techniques and adapting them to its particular needs. An UNCTAD report of 1967 gave the following summary of the Japanese experience: "The role played by the Government has been particularly important. In the first instance it played a major role in acquiring foreign technology and know-how in order to establish new industries. Secondly, it has provided important research and other service facilities for Japanese industry and has helped ensure that education was appropriate to the needs. Finally, in more recent years it has played the role of "watch-dog" and has tried to ensure that new licensing agreements were in the country's best long-term interests." (Oldham et al., *supra* note 2, at para. 61). See also UNCTAD, *Policies for transfer and development in pre-war Japan (1868-1937)*, TD/B/C.6/26 (1987); and T. Ozawa, *Imitation, innovation and trade: a study of foreign licensing operation in Japan* (Ph.D. thesis, Columbia University, 1966).

5. See The role of the patent system in the transfer of technology to developing countries (1975) (United Nations publication, Sales No. E.75.II.D.6).

Initiatives at the national level, and at the regional level with the adoption by the Andean Group countries of Latin America of Decision 24 on a common treatment for foreign capital, trade marks, patents, licensing agreements and royalties in 1971,<sup>6</sup> were emulated at the international level by important discussions and new initiatives taken by the international community in relation to transfer and development of technology to developing countries.<sup>7</sup>

The initiative towards the establishment of a code of conduct was promoted by the developing countries, and particularly by those countries that introduced new policies in this area. Those initiatives at the national and regional levels<sup>8</sup> were concentrated in the period 1969–1974, precisely when the debate on these issues culminated with the decision by the international community to work towards the establishment of an international code of conduct on the transfer of technology.

Policies of developing countries dealing with the acquisition of foreign technology emerged as a response to an area of economic law that neither general principles of law nor industrial property regulations nor antitrust rules could give a satisfactory solution to less advanced economies.<sup>9</sup> They correspond to a category of economic law that does not necessarily follow traditional legal concepts. In industrialized countries, in general, the transfer of technology is basically governed by industrial property and antitrust laws. Those two sets of legal instruments are based on some fundamental premises. Industrial property laws are designed to promote the protection of inventions and other related rights. Antitrust laws are designed to foster and protect the operation of competition in the relevant market. Transfer of technology regulations in developing countries, without contradicting those objectives, have been mainly designed to promote the flow of technology at the same time as strengthening the capacity of recipient firms for the acquisition of technology under the best terms and conditions with the ultimate goal of reinforcing the technological capabilities of the recipient country.<sup>10</sup> In promoting the formulation of a code of conduct, developing countries stressed the advantages to be gained for their economies as well as the opportunities that would be opened to small and medium-sized firms in

---

6. See UNCTAD, *Policies relating to technology of the countries of the Andean Pact: Their foundations* (a study by the Junta del Acuerdo de Cartagena, TD/107) (1971).

7. See P. Jeffries Counters, *Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT'L J.J. 309 (1977).

8. For a more detailed analysis of these initiatives, see UNCTAD, *Common Approaches to Laws and Regulations on the Transfer and Acquisition of Technology*, TD/B/C.6/91 (1982).

9. For a consideration of the issue of antitrust and transfer of technology regulations, see G. Cabanellas Jr., *Antitrust and Direct Regulation of International Transfer of Technology Transactions* (Max Planck Institute, ICC studies, vol. 7) (1984).

10. See Correa, *Transfer of Technology in Latin America: A Decade of Control*, 15 J. WORLD TRADE L., 388 (1981); J. Alvarez, *La Regulación de la Invencciones y Marcas y de la Transferencia Tecnológica* (Mexico, 1979).

the developed countries to participate in the market for technology. The code would thus amount to liberalizing trade in technology, with the consequent increase in trade flows.<sup>11</sup> As will be seen below, the negotiations on an international code of conduct have encountered a number of obstacles. Some of the difficulties find their origin in the different approaches and philosophies adopted by governments in dealing with the process of transfer of technology.<sup>12</sup>

Actual negotiations on an international code of conduct began in 1976 with the establishment within UNCTAD of an intergovernmental group of experts called upon to elaborate a draft of a code for submission for final decision to a United Nations Conference. Position papers on the code of conduct were prepared, in 1975, by both the developing and the developed market economy countries.<sup>13</sup>

Since 1978 the Conference has sorted out a number of problems and has produced a large degree of agreement on significant portions of the code dealing with broad aspects of the transfer and development of technology. The Draft Code of Conduct at the close of the fifth session of the Conference (November 1983)<sup>14</sup> represents, thus, a unique instrument in the area of international economic relations. The following sections describe the present Draft Code by drawing attention, firstly, to the main characteristics of the Code, and subsequently to the regulation of transfer of technology transactions, and to the application and implementation of the Code at the national and international levels. Consideration is also given to a description of the issues outstanding in the Draft Code.<sup>15</sup>

---

11. See Report of the Intergovernmental Group on Transfer of Technology, July 1974, TD/B/520, para. 103.

12. For detailed consideration of the negotiations and of some of its specific issues, see Correa, *El derecho latinoamericano y la propuesta de regulacion internacional de la transferencia de tecnologia, un analisis preliminar*, Integracion Latinoamericana (Mayo 1981); Miller and Davidow, *Antitrust at the United Nations: A Tale of Two Codes*, 18 STAN. J. INT'L L., 347 (1982); W. Fikentcher, *The Draft International Code of Conduct on the Transfer of Technology* (Max Planck Institute, Munich, 1980) and Thompson, *The UNCTAD Code on Transfer of Technology*, 16 J. WORLD TRADE L., 311 (1982).

13. See *supra* note 1.

14. See Draft International Code of Conduct on the Transfer of Technology as at the Close of the Fifth Session of the Conference on 4 November 1983, TD/CODE/TOT/41 (1983) [hereinafter referred to as Code or Draft Code].

15. This part of the article is based on the following reports prepared by the UNCTAD secretariat: "United Nations Conference on an International Code of Conduct on the Transfer of Technology" TD/CODE TOT/4 (1978); "The draft international code of conduct on the transfer of technology: major issues outstanding," TD/CODE TOT/27 (1980); "Present status of negotiations and issues outstanding," TD/CODE TOT/37 (1983) and "Status of the negotiations," TD/B/C.6/109 (1984).

## II. Major Characteristics of the Code<sup>16</sup>

### A. MAIN OBJECTIVES OF THE INTERNATIONAL CODE<sup>17</sup>

A major objective of the Code is the establishment of general and equitable standards on which to base the relationships among parties to transfer technology transactions and governments concerned, having regard to their legitimate interests and the special needs of developing countries.<sup>18</sup> Other objectives of the Code refer to the mutual confidence between parties and governments; the encouragement of transactions under conditions where bargaining position of the parties are balanced in such a way as to avoid abuses of a stronger position; the role of technological information, the growth of scientific and technological capabilities by means of the international transfer to technology; the contributions of technology to the identification and solution of social and economic problems; the formulation, adoption and implementation of national policies and laws in the field of transfer of technology, and the promotion of 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 transactions.<sup>19</sup>

### B. SPECIAL INTERESTS OF DEVELOPING COUNTRIES

The Code of Conduct is universally applicable in scope and is addressed to all parties to transfer of technology transactions (from developed as well as from developing countries) and to all countries and groups of countries, irrespective of their economic and political systems and their levels of development.<sup>20</sup> Notwithstanding its universal character, the Draft Code places particular emphasis on the special interests and concerns of developing countries.<sup>21</sup> Thus the Code, though an important expression of the North-South dialogue, is not an instrument to be applied only to relationships with developing countries.

16. The text of the draft code consists of a preamble and nine chapters dealing respectively with: 1. Definitions and scope of application; 2. Objectives and principles; 3. National regulation of transfer of technology transactions; 4. Restrictive practices; 5. Responsibilities and obligations of parties; 6. Special treatment for developing countries; 7. International collaboration; 8. International institutional machinery and 9. Applicable law and settlement of disputes.

17. These objectives are to be found mainly in Chapter 2 of the Draft Code dealing with objectives and principles.

18. See provision 2.1(i) of the Draft Code.

19. The objective of unpackaging is one of the items to be taken into account by the parties in the negotiating phase of a transfer of technology transaction, see para. 5.2(c) of the Draft Code.

20. See para. 1.5 of the Draft Code.

21. This emphasis on the special needs of developing countries is in the Preamble, Chapter 2 on objectives and principles (see paras. 2.1(i), (iii) and (iv); 2.2(iv) and Chapter 6 dealing with special treatment for developing countries.

## C. CONCEPT OF "TRANSFER OF TECHNOLOGY" IN THE CODE

For purposes of the Code, "transfer of technology" 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. Transactions involving the mere sale or mere lease of goods are specifically excluded.<sup>22</sup> The Draft Code provides further clarification of the concept by a specific listing of transactions that fall under the scope of the instrument, such as: transactions involving industrial property, except trade marks, service marks and trade names, unless these are part of a transfer of technology transaction; transactions involving the provision of know-how and technical expertise; and the provision of technological knowledge necessary for the installation, operation and financing of plants and equipment and turnkey projects.<sup>23</sup>

A major element in determining the scope of application of the code is the definition or description of what constitutes an "international transfer of technology transaction."<sup>24</sup> The Code will apply when technology is transferred across national boundaries. However, there is disagreement regarding the application of the Code to transactions when the technology is not transferred across national boundaries, but when the parties to the transaction are situated in different countries or one of the parties is controlled by a foreign entity.

The essential element in the approach taken by developed market economy countries (referred to as Group B countries in UNCTAD) is that for a transaction to be international, and thus within the scope of the Code, the technology must be "transferred across national boundaries." However, the Group B concept does provide that "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."<sup>25</sup>

The approach proposed by the developing countries (Group of 77) and by the centrally planned economy countries (referred to as Group D) also provides that transactions are international if technology is transferred across national boundaries. But in addition, the emphasis in this approach is on where the parties to the transaction are located and by whom they are controlled. The Code will apply if the parties are located in different countries. However, according to this view, even if both parties are located in the same country, the Code would also apply if one of the parties is "controlled by a foreign entity."<sup>26</sup> An important aspect of the problem involved in the notion of the "international" transfer of technology transac-

---

22. See para. 1.2 of the Draft Code.

23. Para. 1.3 of the Draft Code.

24. Para. 1.4 of the Draft Code.

25. See Appendix C to the Draft Code.

26. *Id.*

tion is the role of affiliated or related companies. This issue is treated with more specificity below in the part on restrictive practices.<sup>27</sup>

The Group of 77 and Group D consider, broadly, affiliated parties to be representatives of their parent companies, and a transaction between a foreign-owned subsidiary and an enterprise owned and controlled by nationals of the acquiring country is therefore deemed to be international. Group B regards, in general, the subsidiary as a principal in the transaction and considers that applying a different standard to companies related to foreign capital would constitute a serious departure from principles of national treatment and non-discrimination that should prevail among companies established in the same country. As will be seen below, these approaches are not consistently followed in Chapter 4 of the Draft Code.

At the fifth session of the Conference,<sup>28</sup> Governments considered two possible alternative solutions to the existing difficulty as regards the definition of an international transfer of technology transaction. According to one solution, the Code of Conduct would apply to international transfer of technology transactions and it is provided that, for the purposes of the 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,<sup>29</sup> extend the application of the Code to transactions which take place between parties within their national boundaries." The alternative to the first solution is a mere reference in the Code to the fact that it would apply to international transfer of technology transactions.

According to the first alternative, the field of application of the Code is restricted to transactions which are international either because the technology crosses boundaries, or because the parties to the transaction do not reside in the same country. The extension of the field of application to transactions with other types of international elements would be left to the individual States. In the case of the second alternative, the definition of "international," in general, is left to each individual State or addressee of the Code.<sup>30</sup>

---

27. See *infra*, Intra-Enterprise Transactions.

28. See Appendix A, Draft Code.

29. The reference made to Chapter 3, dealing with national regulation of transfer of technology transactions, is addressed to para. 3.2 which provides: "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."

30. This alternative was originally proposed by the Secretary-General of UNCTAD and the President of the Conference in August 1983. According to it, each addressee of the code would

## D. LEGAL CHARACTER

UNCTAD resolution 89 (IV), paragraph 2, provides expressly that the Intergovernmental Group of Experts (established to prepare a Draft Code for consideration at a negotiating conference) "shall be free to formulate the draft provisions ranging from mandatory to optional, without prejudice to the final decision on the legal character of the Code of Conduct." Accordingly, the United Nations Conference on an International Code of Conduct on the Transfer of Technology is called upon to take all decisions necessary for the adoption of the final document of the code, including the decision on its legal character. The Group of 77 held the position "that an international legally binding instrument is the only form capable of effectively regulating the transfer of technology."<sup>31</sup> Group B's position has been that the code of conduct should consist of guidelines which are voluntary and legally non-binding.<sup>32</sup> The original positions of the regional groups reflect the two broad alternatives for giving effect to the code; a convention which is formally binding on States parties under international law; or a legal instrument which is not formally binding, such as a resolution of the General Assembly or the Final Act of the negotiating Conference.<sup>33</sup>

At the second session of the Conference, the Group of 77 stated that it attached "the highest importance to the Code of Conduct on the Transfer of Technology being adopted as a legally binding Code by the negotiating parties." However, having taken into account the positions of the other groups, the Group of 77 proposed that the Code be adopted as a Final Act of the Conference for endorsement by a resolution of the General Assembly. A review conference would be convened five years after the adoption of the code, to review the code in all its aspects, "with a view to bringing about its universal applicability as a legally binding instrument."<sup>34</sup> The approach suggested by the Group of 77 has been accepted by the other countries with

---

determine for itself the definition of "international" in the context of the other provisions of the Code, particularly provisions 1.3 and 1.5. Provision 1.5 states that the Code "is universally applicable in scope and is addressed to all parties to transfer of technology transactions . . .," while provision 1.3 lists in some detail the type of transactions concerned by the Code. See UNCTAD document TD/CODE TOT/38, paras. 20 and 21.

31. Original proposal of the Group of 77 contained in Preamble, see Appendix B of Draft Code.

32. The original proposal of Group B countries made it explicit that "Guidelines for transfer of technology are of a general and voluntary nature and therefore do not derogate from the obligations of States under customary international law or as set forth in treaties or other international agreements. As a result of the diversity of the situations and the parties involved, every transfer of technology is an individual case." See UNCTAD, TD/B/C.6/14 (1976).

33. In the UNCTAD secretariat's study, "An international code of conduct on the transfer of technology," TD/B/C.6/AC.1/2/Supp.1/Rev.1 (1985), a number of alternatives are considered on the possible form of the code.

34. Statement by the spokesman for the Group of 77 at the second session of the Conference, see UNCTAD, TD/CODE TOT/21 (part two).



the understanding that the Conference could not prejudge the final outcome of the review conference and that the issue of the legal character is one among many other issues that the review conference would have on its agenda.<sup>35</sup>

The present approach indicates the possibility of a two-step procedure: the first step would consist of the adoption of the Code by the Conference, to be endorsed by a resolution of the General Assembly;<sup>36</sup> the second step would consist of a review Conference to be held within a fixed time-frame to examine, in the light of the experience gained, all the aspects of the Code, including its legal nature.

#### E. CATEGORIES OF SUBSTANTIVE PROVISIONS

The substantive provisions of the Code fall into two broad categories: those concerning the regulation of transfer of technology transactions and of the conduct of the parties to them, and those relating to steps to be taken by governments to meet their commitments to the Code. The first category of provisions, establishing certain generally agreed and universally applicable standards, covers three areas: (a) identification and clarification of responsibilities and obligations of parties (Chapter 5); (b) determination of practices and arrangements involving transfer of technology which are to be deemed undesirable, and under what conditions (Chapter 4); and (c) the law and forum to be selected for the settlement of disputes (Chapter 9). Provisions in the Draft Code under the second main category—steps to be taken by governments to meet their commitments to the code—can be classified into the following three main types: (a) provisions related to the regulation of transfer of technology transactions by States (Chapter 3); (b) provisions relating to international collaboration, on a bilateral, multilateral, regional or interregional basis, to facilitate the flow of technology and the growth of the technological capabilities of developing countries (Chapter 7) and special treatment to developing countries (Chapter 6); and (c) provisions concerning the establishment of an international institutional machinery responsible for the application and implementation of the Code (Chapter 8).

---

35. See Appendix E, Draft Code.

36. A similar form of adoption was followed by the United Nations Conference on Restrictive Business Practices. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was approved by the United Nations General Assembly resolution 35/63 of 5 December 1980.

### III. Conduct of Parties to Transfer of Technology Transactions

#### A. RESPONSIBILITIES AND OBLIGATIONS OF PARTIES

As regards the treatment in the code of transfer of technology transactions, the original proposals put forward by regional groups gave special emphasis to the avoidance of restrictive practices. The negotiations of the Code brought into light the significance of other, more positive, terms of transfer of technology transactions that parties should consider in negotiating and concluding an agreement. The fifth session of the Conference made it possible to finalize successfully this crucial aspect of the Code.

Chapter 5 of the Code, dealing with responsibilities and obligations of parties, sets forth a number of provisions on the manner in which parties to transfer of technology transactions should behave while negotiating and performing their agreements. There are two phases to which these provisions apply. The first is the pre-contractual phase, when the potential parties are negotiating the terms of the transactions; the second is the contractual phase, after the parties have entered into an agreement. For both the negotiating as well as the contractual phase, Chapter 5 contains a provision on responsiveness to the economic and social development objectives of the respective countries of the parties, and particularly of the technology-acquiring country, and on the observance of fair and honest business practices.<sup>37</sup> Provisions concerning the negotiating phase deal specifically with items relating to the use of locally available resources (personnel as well as materials, technologies, technical skills and other resources); the rendering of technical services; unpackaging; fair and reasonable terms and conditions; information; provision of accessories, spare parts and components; and termination of negotiations. The section on the contractual phase of transfer of technology transactions includes provisions on access to improvements, confidentiality,<sup>38</sup> description of the technology, suitability for use, rights to the technology transferred, quality levels and goodwill, performance guarantees, transmission of documentation, training of personnel and provisions of accessories, spare parts and components and liability.<sup>39</sup>

#### B. RESTRICTIVE PRACTICES

Chapter 4 of the Code deals with practices which parties should avoid in individual transfer of technology transactions. The text lists fourteen such

---

37. See para. 5.1, Draft Code.

38. The latest compromise text on confidentiality is still under consideration. It provides: "Maintenance of confidentiality including its scope and duration and the use of any assets like trade secrets, secret know-how and all other confidential information received from the other party in connection with the transfer of technology."

39. The inclusion of a provision on dispute settlement and applicable law is still under consideration awaiting the outcome of the negotiations on Chapter 9 of the Code.

restrictive practices: (1) certain grant-back provisions; (2) challenges to the validity of the supplying parties' patents and other types of protection for inventions involved in the transaction; (3) restrictions on sales or representation arrangements relating to competing technologies or products; (4) restrictions on research or development by the acquiring party; (5) restrictions on the use of adequately trained local personnel; (6) restrictions regulating prices to be charged by acquiring parties; (7) restrictions on adaptations or innovations by the acquiring party to meet local conditions; (8) obligation on the acquiring party to grant exclusive sales or representation rights to the supplying party; (9) tying arrangements, requiring the acquiring party to accept further technology, goods or services not wanted by him, or restricting sources of supply; (10) restrictions preventing or hindering exports by the acquiring party;<sup>40</sup> (11) patent pool or cross-licensing agreements among technology suppliers which limit access to new technological developments or which would result in abusive domination of an industry or market, with adverse effects on the transfer of technology; (12) restrictions on publicity by the acquiring party; (13) payments and other obligations arising after the expiration of the industrial property rights; (14) restrictions after expiration of the arrangements.<sup>41</sup> Chapter 4 has posed a number of difficult problems in the elaboration of the Code. In fact, several highly complex issues are still being negotiated, i.e., the basic purpose of the chapter (the conceptual problem) and the treatment of technology transactions between affiliated enterprises.

### 1. *Conceptual Problem*

The conceptual difficulties are reflected in the introductory section (chapeau) of the chapter. In this respect, the point of view of Group B is that, in furtherance of the objectives of the Code, "restrictive business practices" should be avoided "which unreasonably restrain trade and adversely affect the international flow of technology, particularly as such practices hinder the economic and technological development of acquiring countries." This follows from the fact that the practices listed in Chapter 4 are regarded in a number of Group B countries as restrictive business practices and, thus, to be prohibited or controlled on the grounds that they restrict competition.<sup>42</sup>

According to the developing countries, there should be an avoidance of practices that either restrain trade or adversely affect the international flow of technology, particularly as either type of practice might hinder the economic and technological development of acquiring countries. The Group of 77 has attached particular importance to the elimination of all

40. Provision still under consideration. For latest proposal, see Annex A, Draft Code.

41. *Id.*

42. See W. Fikentcher, *supra* note 12.

practices which, whether anti-competitive or not, are unfair, and thus prejudicial to the economic and social development of the technology recipient countries. The approach adopted by the developing countries has been identified as a development test approach, as opposed to the competition test approach proposed by the developed market economy countries.<sup>43</sup>

In considering the adverse effects of restrictive practices which are, in principle, to be avoided, one problem which arises concerns the method of formulation of the provisions. A number of countries claim that their experience shows that it is not possible, except in a very few cases, to lay down legislation containing an absolute prohibition. They consider that, although certain restrictions may adversely affect competition and are therefore to be prohibited, certain other restrictions falling within the same category, even when restrictive, may have additional effects which benefit the economy. This is particularly the case of recent legislative developments in the United States of America aimed at liberalizing antitrust rules for intellectual property licensing.<sup>44</sup>

According to this view, there should generally be an evaluation of the practice concerned to determine whether, on balance, its effect will be harmful or beneficial. The need to take into account a balancing of interests has led the United States to introduce the notion of the "rule of reason" into the apparently inflexible prohibition of anti-competitive practices under the Sherman Act.<sup>45</sup> Evaluation of the specific practices also takes place in the developing countries. In the screening of transfer of technology transactions, the competent national authorities in these countries have used broader concepts to achieve flexibility in applying their law. Developing countries that have implemented transfer of technology regulations have applied specific means of evaluation of restrictive practices. First of all, this evaluation takes place before the agreement enters into operation. Second, because of their lack of experience in handling antitrust regulations, the national authorities of developing countries have been guided by some general criteria suggested by the respective legislative enactments, e.g., local non-availability of the technology, appropriateness of the technology, unpackaging of technology, conformity of contract with the law of the

---

43. See articles by Thompson, Miller and Davidow, *supra*, and C. Correa, "La regulación de las cláusulas restrictivas en los contratos de transferencia de tecnología en el derecho Latinoamericano," REVISTA DEL DERECHO COMMERCIAL Y DE LAS OBLIGACIONES, 183 (1981).

44. See G. E. Weston, *New Trends in the U.S. Antitrust Law: the Patent-Antitrust Interface as an Example*, 15 IIC 269 (1984).

45. Under the Sherman Act of 1890 there is apparently a general prohibition against every contract or conspiracy in restraint of trade, and every attempt to monopolize. It has been held by the Supreme Court of the United States, however, that these words, if literally applied would go too far. In fact, they should be regarded as being broad principles of a constitutional character, which enacted the common law prohibitions in English law designed to prevent undue restraint of trade by combination or monopoly. See UNCTAD, TD/CODE TOT/27, *supra* note 15, at n. 37.

acquiring country, benefits for the country, or substantial benefit to the economy, such as promotion of export oriented ventures.<sup>46</sup>

## 2. *Intra-enterprise Transactions*

A subsidiary unresolved question to the broad conceptual problem of Chapter 4 is the extent to which its provisions would apply to affiliated parties or, as otherwise termed, intra-enterprise transactions. The chapter on scope of application and definitions considers the term "party" as including "... incorporated branches, subsidiaries and affiliates, joint ventures or other legal entities regardless of the economic and other relationships between and among them."<sup>47</sup> In agreeing to this formulation, Group B stated that the inclusion of this sentence was 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."<sup>48</sup> Chapter 4 of the code constitutes one of the relevant parts referred to in this statement.

The Group B position has been 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 acceptable unless amounting to an abuse of a dominant position of market power within the relevant market." This position is consistent with the antitrust approach adopted for the entire chapter.<sup>49</sup> In the Group of 77's view restrictions between commonly owned enterprises should be examined in the light of the rules, exceptions and factors applicable to all transfer of technology transactions. The latter approach is in line with the above-mentioned development test.

There seems to be general agreement that restrictive practices in the case of intra-enterprise transactions should neither be excluded from the application of Chapter 4 in all cases, nor be subject to the provisions of Chapter 4 in all cases. The conflict centers on the criterion to be introduced to govern intra-enterprise transactions. This criterion could be based on a specific test for this type of transaction or the general one to be applied to all types of transactions covered by Chapter 4. The analysis shows that Group B adopts a unitary or economic approach to the issue of affiliated parties in Chapter 4 and a very formal and legalistic approach in the definition of international

46. See table 15 and corresponding text in UNCTAD, *Common Approaches*, *supra* note 8.

47. Para. 1.1(a) Draft Code.

48. *Id.*

49. For purposes of competition law, most of the developed market economy countries recognize that affiliated parties constitute an economic unit. In a recent decision of the U.S. Supreme Court, it has been held that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of section 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984).

transfer of technology as provided for in provision 1.4. As far as the Group of 77 is concerned, in paragraph 1.4 it adopts the unity or economic approach to the concept of affiliated parties and in Chapter 4 a legalistic and formal approach similar to the one adopted by Group B as regards para. 1.4.<sup>50</sup> This apparent contradiction in approaches, based on the different legal treatment given to restrictive practices at the national level, continues to prevail and permeates the discussions and search for solutions on these important issues of the draft code.

### 3. *Latest Proposal on Chapter 4*

Various attempts have been made during the Conference to resolve the issues outstanding in Chapter 4. The evolution of the discussions on this chapter has proved that in order to succeed, the Code would need to introduce in Chapter 4 the notion of evaluation. Several proposals have been made in this direction.<sup>51</sup> The latest proposal submitted by the President of the Conference, at the fifth session, attempts a neutral approach to the conceptual difficulties encountered by regional groups in the search for an acceptable criterion for the evaluation of restrictive practices, including the affiliated parties issue. The proposal reads as follows:

4.1. In the context of the application of this Code, consideration should be given to whether the practices described below should be avoided in international transfer of technology transactions.

4.2. Evaluation of whether a practice should be avoided in an individual case should include the over-all purposes of the transaction, its effects on the economic and technological development of the acquiring country, the competitive situation in the relevant market, the interests of the parties, the situation prevailing at the inception of the arrangement, and all other relevant circumstances. While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should be evaluated in the light of their special relationship.<sup>52</sup>

This proposal suggests neither a development test nor a competition test, but lists factors that would cover these two tests in a non-exclusive manner. The proposal has not met fully the expectations of the respective regional groups that would like to see in the code a clearer recognition of their philosophies and specific approaches in dealing with restrictive practices.

## C. APPLICABLE LAW AND SETTLEMENT OF DISPUTES

The chapter on applicable law and settlement of disputes has also been the subject of extensive negotiations; however, there has been no agreement on

---

50. It should be noted that the Code adopts a formal approach in its definition of "party" when it refers to "... legal entities regardless of the economic and other relationships between and among them." See para. 1.1(a) of the Draft Code.

51. See Appendix D, Draft Code.

52. See Appendix A, *Id.*

the entire content of the chapter.<sup>53</sup> Group B's original position has been that the parties should have the freedom to choose the applicable national law and the national forum before which disputes will be brought. This freedom, however, is subject to the condition of the existence of a substantial relationship between applicable law and the forum and the parties and transaction, or another reasonable basis for the choices made. If the parties have not chosen either the law or the forum, Group B draft text sets forth criteria for decision-makers.<sup>54</sup> Group D, on the other hand, has been of the view that parties should have the right to choose the law applicable "within the limits permitted by their national legislation," and that the otherwise applicable conflict-of-laws rules should be used by the arbitral commissions or other organ deciding the dispute when the parties have not agreed on the choice of law.<sup>55</sup>

The Group of 77's original position has been that the law of the acquiring country is the law applicable to matters relating to public policy (*ordre public*) and sovereignty. Any clause to the contrary shall be void. 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. Questions with respect to transactional matters not involving the public policy (*ordre public*) of the acquiring country can be the subject of a choice of law by the parties. Choice of forum for such issues is permitted so long as it does not exclude the jurisdiction of the courts of the acquiring country. Both the choice of law and the choice of forum are subject to conditions set forth in the Code. Recourse to arbitration is permitted under the Group of 77 proposal unless the acquiring country has express rules to the contrary.<sup>56</sup> The developing countries' approach has been guided by some provisions in national laws that emphasize the public policy aspects of transfer of technology transactions. This is particularly the case of some of the Latin American statutes that have followed in this area, the Calvo doctrine to international economic transactions in general.<sup>57</sup>

The divergent approaches adopted by regional groups appear to be irreconcilable. However, various attempts have been made to resolve their substantial differences. All attempts have aimed at reducing the detailed treatment of the subject in the Code, as originally suggested by the regional

---

53. See on this issue Dessemontet, *Transfer of Technology under UNCTAD and EEC Draft Codifications: a European View on Choice of Law in Licensing*, 12 J. INT'L L. & ECON. 1 (1977) and Wilner, *Applicable Law and Dispute Settlement in the Transfer of Technology Code*, J. WORLD TRADE L. 389 (1983).

54. See UNCTAD, TC/CODE TOT/33, Appendix D.

55. *Id.*

56. *Id.*

57. See Correa, *supra* note 12, and Roffe, *Calvo y su vigencia en América Latina*, 6 REVISTA DEL DERECHO INDUSTRIAL (1984).

groups, to a more global approach enunciating general principles on choice of applicable law, encouragement of direct negotiations and conciliation procedures for the settlement of disputes, recourse to arbitration through accepted rules of arbitration and recognition and enforcement of arbitral awards in accordance with national legislation and relevant international agreements.<sup>58</sup> Under this approach, the only aspect that still constitutes a major problem is the one related to the choice of applicable law. According to the latest proposal made by the President of the Conference,<sup>59</sup> parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations. However, the provisions of the law chosen would not apply to the extent that their application in the given matter would be in derogation of relevant binding rules which cannot be derogated from by contract. This proposal still does not satisfy the basic aspirations of regional groups; for the Group of 77, the clear recognition of the prominent role of national laws and for the Group B, the principle of contractual freedom of the parties.

#### IV. Application and Implementation of the Code

The Draft Code envisages that the application and implementation of the Code are to be carried out at both the national and the international levels. The appropriate steps to be taken at the national level include national policies, laws and regulations on the subject of transfer of technology (Chapter 3). At the international level, the Code will be implemented by the establishment and operation of an institutional machinery within UNCTAD (Chapter 8). In accordance with Chapter 8, States which have accepted the Code should take appropriate steps at the national level to meet their commitment to it.<sup>60</sup> At the same time, the Code provides for specific measures geared at promoting international collaboration in favor of developing countries.

##### A. NATIONAL REGULATION OF TRANSFER OF TECHNOLOGY TRANSACTIONS

Chapter 3, on national regulation of transfer of technology transactions, gives recognition to the right of States to adopt laws, regulations and rules, and policies with respect to transfer of technology, and spells out the types of measures that may be taken in this field. These include measures dealing with finance, renegotiation, technical aspects and organizational forms and mechanisms for the transfer of technology.<sup>61</sup> The chapter sets forth general

---

58. See Appendix F, Draft Code.

59. *Id.*, at Appendix A.

60. *Id.*, at Para. 8.1(c).

61. *Id.*, at Para. 3.3



criteria to be followed by States when adopting and modifying measures in the field. These criteria include the promotion of a favorable and beneficial climate for the transfer of technology; the taking into consideration in an equitable manner of the legitimate interests of all parties; the encouragement and facilitation of the transfer of technology, to take place under mutually agreed fair and equitable terms and conditions, having regard to the principles and objectives of the code; the taking into account of different local conditions, nature of the technology and scope of the undertaking; and consistency with the international obligations of the State. The provisions of Chapter 3 also provide that the application of measures adopted by States, including decisions of competent administrative bodies, should be made fairly, equitably, and on the same basis to all parties in accordance with established legal procedures and the principles and objectives of the Code.

## B. INTERNATIONAL COLLABORATION

Chapter 7 lists a variety of ways in which activities relating to international collaboration can facilitate an expanded flow of technology for strengthening the technological capabilities of all countries. These activities can be undertaken at the national, multilateral, subregional, regional or interregional levels, as well as through the organs and agencies of the United Nations system, including the international institutional machinery provided for in the Code. A non-exhaustive list of international measures of collaboration is set forth. Among the different activities called for are several dealing with the exchange of information; promotion of international agreements providing for equitable treatment of supplying and recipient parties and governments; consultations on harmonization of national legislation and policies; common programs on searching for, acquiring and disseminating technologies; promotion of adaptation and development of technology in the context of development objectives and the stimulation of indigenous technology; and action through international agreements to avoid, as far as possible, the imposition of double taxation on earnings and payments arising out of transfer of technology transactions.

Chapter 6, on special treatment for developing countries, calls for specific international collaboration in the form of assistance and co-operation of governments of developed countries in order to facilitate and encourage the initiation and strengthening of the scientific and technological capabilities of developing countries. For the same purpose governments of developed countries should, as a part of their programme for development assistance and co-operation, take into account specific requests from developing countries with a view to assisting in the promotion of transfer of technology to developing countries. In addition, this chapter provides that governments of developed countries should give incentives to enterprises and institutions in

their countries to engage in activities which are favorable to the technological development of developing countries.

### C. THE INTERNATIONAL INSTITUTIONAL MACHINERY

According to the Code, an international institutional machinery is to be provided within UNCTAD to monitor the application of its provisions. The functions of the machinery are: to provide a forum and modalities for consultations between States on matters related to the Code and particularly its application; to undertake and disseminate studies related to the Code with a view to its more effective application; to invite and consider relevant studies from within the United Nations system as well as information obtained upon request addressed to all States; to make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Code; to organize symposia, workshops and similar meetings concerning the application of the code; and to submit reports at least once a year to UNCTAD's Trade and Development Board. The machinery and its subsidiary organs 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. It should also avoid involvement when parties to a specific transaction are in dispute.

### V. Conclusions

The establishment of an international code of conduct on the transfer of technology responds, primarily, to the aspirations formulated by developing countries for an improved access to the advances and developments in science and technology in order to improve their standards of living. The need to facilitate an adequate transfer is seen as a means of strengthening the scientific and technological capabilities of all countries. Although emphasis is laid on the special interests of developing countries, the Code of Conduct, that establishes general and equitable standards, is essentially of universal application and addressed to all parties and to all countries and groups of countries.

The article has outlined the background to the Code, its main features and the contents of its substantive provisions, as well as the nature of the unresolved issues. Agreement has been reached on most of the substantive chapters of the Code with the exception of those dealing with restrictive practices and applicable law and settlement of disputes. The existing differences in these two chapters reflect divergent national approaches on the manner of dealing with these issues as well as different experiences and

values attached to specific legal institutions. Efforts are being made to accommodate and circumvent, as far as possible, these differences.

The Code of Conduct on transfer of technology will serve as an important instrument of economic and technological co-operation among nations. Its form of adoption will give flexibility to its application, implementation and future revision. Its impact in modelling new forms of collaboration as well as in shaping national policies, particularly in developing countries, is already, slowly but steadily, taking place. The encouragement, through the establishment of international norms, of the adoption of appropriate policies at the national level and the pursuit of adequate measures of international collaboration geared at promoting the right environment for the transfer and development of technology in all countries will be facilitated by the early adoption of an international Code of Conduct on the transfer of technology that meets the general consensus of the international community. To achieve such a consensus, a display of realism will have to prevail at the negotiating conference based on concessions that should be inspired in the mutual recognition, by the North and the South, of the genuine aspirations of developing countries and of the legitimate interests of producers and consumers of technology.

