THE DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY AND STANDARDS OF FAIRNESS IN CONTRACT RELATIONSHIPS

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1. INTRODUCTION

The liberalization of international trade and economic integration have been the keynotes of trade policy since the Second World War. An initiative taken by the leading Western Powers led to the signing of the General Agreement on Tariffs and Trade (GATT) in 1947.[1] This Agreement can be characterized as an effort to create on a global basis an arrangement founded on reciprocal most favoured nation treatment in order to avoid the consequences of the trade policies prevailing prior to the Second World War and now seen as misguided: namely high customs barriers and discriminatory treatment.[2] The trade policy objectives of the Signatories were stated in the Preamble to the Agreement as recognizing "that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods".[3]

The objectives so stated reflect the basic concepts of Adam Smith's free trade theory: economic welfare is defined as a measure of the means to satisfy the needs of citizens, the principle of the division of labour and the importance of exchange for economic growth are recognized. The idea that the liberalization of trade and free international competition will lead to the optimum utilization of world resources is equally evident in the text quoted.[4]

When the GATT-Agreement was being prepared, however, it was no longer assumed that the state should not intervene in economic development. Cogni-

[1] See e.g. Bela Balassa, *Trade Liberalization Among Industrial Countries,* New York 1967, pp. 1 ff.; Peter Behrens, "Integrationstheorie", *RabelsZ* 1981, pp. 8–14; Ulf Bernitz, *Marknadsrätt,* Stockholm 1969, pp. 178 ff.; Claus Gulmann, *Handelshindringer i EF-retten,* Copenhagen 1980, pp. 85 ff.; Kari Joutsamo, *The Role of Preliminary Rulings in the European Communities,* Helsinki 1979, pp. 1 ff.; Kari Joutsamo and Esko Antola, *Integroituva Länsi-Eurooppa: Organisaatiot ja politisoituminen* (Western Europe in Integration: Organisational Models and the Progress of Politicization), Turku 1979, and especially with regard to Finland, Lauri Haataja (ed.), *Suomen ulkomaankauppapolitiikka* (The International Trade Policy of Finland), Keuruu 1978.

[2] See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy,* New York 1975, pp. 4 ff., and Pierre Lortie, *Economic Integration and the Law of GATT,* New York 1975, pp. 1 ff.

[3] See *SopS* (Finnish Official Collection of Treatises) 15/1950.

[4] On free trade theory and its concepts, see Ilm. Kovero, *Vapaakauppateoria* (The Theory of Free Trade), Porvo 1929, pp. 22 ff.

zance of the goals of modern internal economic policies[5] is evidenced by the references to the safeguarding of full employment, as well as to the steady growth of income and demand. The problem of poor countries, however, seems to have been more or less ignored. The liberalization of trade offers very little if there is nothing to trade with. Sharing the benefits of economic integration equally among all participating peoples is possible only if all the trading partners stand more or less on an equal footing. This, in turn, would presuppose that the world's resources were divided relatively equally between different countries.[6]

One explanation for this anomaly between theory and reality is perhaps that in the 1940s the prospects for the economic development of developing countries were seen in a much more optimistic light. Once the initial obstacles to growth had been overcome in these countries, the rate of economic growth would surpass that of the industrialized countries, and the differences in economic performance would gradually disappear.[7] This theory proved to be false in the 1960s, when the gap between rich and poor nations seemed instead to be widening. At the same time the conviction grew stronger—buttressed by economic studies—that technological development was an indispensable precondition for economic development and expanding industrial production. During the past twenty years, the raising of the level of technology and the promotion of industrial production have indeed been the main goals of economic policy in developing countries, especially in Latin America.[8]

As developing countries after decolonization gained a majority of seats in the United Nations (UN) they began making concerted demands for economic action tailored to speed up their economic development. This was the start of the North–South dialogue. It was on the initiative of the developing countries that UNCTAD was founded and that the GATT-Agreement, too, was supplemented with provisions guaranteeing special treatment for developing countries.[9] The United Nations Declaration on a New International Economic

[5] See Bela Balassa, *The Theory of Economic Integration,* London 1961 (cited below as *Theory*), pp. 13–15, and later analysis of the book, Behrens, *op. cit.,* pp. 11–13, and, e.g., Henri J. Vartiainen, "Suomen rooli kansainvälisessä taloudellisessa järjestelmässä" (The Role of Finland in the International Economic System), in Haataja, *op. cit.,* pp. 159–61.

[6] See especially Behrens, *op. cit.,* pp. 11–13.

[7] See, e.g., Vartiainen, *op. cit.,* pp. 148 f.

[8] See Balassa, *Theory,* pp. 146 ff., and Debra Lynn Miller, "Panacea or Problem? The Proposed International Code of Conduct for Technology Transfer", *Journal of International Affairs* 1979, pp. 43 ff. On the importance of transfer and technology and the situation of the developing countries, see also Claes Sandgren, *Patentlicenser,* Stockholm 1974, pp. 9–33.

[9] See Ulf Bernitz, *Internationell marknadsrätt,* Uddevalla 1980, pp. 25–8 and 87; Wolfgang Fikentscher, *The Draft International Code of Conduct on the Transfer of Technology,* Weinheim 1980, pp. 3 f., and 24 f.; Frans A. M. Alting von Geusau (ed.), *Economic Relations After the Kennedy Round,* Leyden 1972, pp. 48–52, and James W. Skelton, Jr., "UNCTAD's Draft Code of Conduct on the Transfer of Technology: A Critique", *Vanderbilt Journal of Transnational Law* 1981, pp. 381–4.

Order (NIEO) adopted by the UN General Assembly in 1974 represents a turning point as regards international recognition of the interests and needs of the developing countries. One of the twenty general principles of this Declaration concerns itself with the developing countries' access to the results of modern science and technology. This, however, would be possible only through active promotion of the transfer of technology to developing countries.[10]

The first request to promote technology transfer from the industrialized countries was made in the UN as early as in 1961. It directed itself particularly to the international agreements dealing with patented technology.[11] The revising of the Paris Convention is still in process. The Declaration adopted by WIPO in 1975 emphasizes the endeavour to participate, by means of amendments to the Convention, in the implementation of objectives of the NIEO and the promotion of a transfer of technology to the third world.[12] The emphasis of the developing countries' demands, however, has shifted to a more direct regulation of transfers of technology transactions as such.

2. PREPARATION AND OBJECTIVES OF THE CODE ON THE TRANSFER OF TECHNOLOGY

In 1970 a group of experts in the field of technology transfer was convened to study the matter in depth. With the aid of the UNCTAD secretariat several studies dealing with various aspects of world markets in technology were published. The 3rd General Session of UNCTAD in 1972 decided to convene an intergovernmental Group of Experts with a mandate to draft a code of conduct on the international transfer of technology. The Group, however, did not succeed in preparing a draft code. It was not possible to reconcile the differing approaches of the negotiating groups, i.e. technology buyers or the developing countries (Group of 77), technology sellers or developed industrialized countries (Group B) and the Socialist countries (Group D).

The very first draft code was prepared in connection with the Pugwash Conference of 1973 by a group of experts on the transfer of technology, mainly from developing countries. The text was later revised before finally being

[10] The NIEO is treated in greater detail by Kari Joutsamo in *Kansat ja Oikeus* (Peoples and Justice), Helsinki 1980, p. 167. For a brief analysis, see e.g. *Kauppakamarilehti* 11/1975, pp. 34–36, Fikentscher, *op. cit.*, pp. 6–10, and Skelton, *op. cit.*, pp. 383 f.

[11] See Miller, *op. cit.* (footnote 8 *supra*), p. 54.

[12] On the WIPO Declaration, see Declaration on the Objectives of the Revision of the Paris Convention, *Industrial Property*, January 1976 p. 47. The position of industrial property rights in the context of UNCTAD are outlined in Homer O. Blair, "Technology Transfer as an Issue in North/South Negotiations", *Vanderbilt Journal of Transnational Law* 1981, pp. 308–16.

submitted to the other negotiating groups as a Group 77 proposal. Further preparation of the draft code was carried out by the intergovernmental group of experts.[13]

The proposal of the developing countries illustrated the intent of these countries to give the code the status of an international convention or treaty, which in an internationally binding manner would set out rules to be followed by states as well as private enterprises in transactions concerning the international transfer of technology. Adoption of the convention would ensure that states and private legal persons, after transformation into national law, would comply with the agreed set of rules, thus ensuring fair and reasonable terms of contract even where the buyer's bargaining position is not as strong as that of the seller.[14] For the developing countries, the code, despite its universal character, represented from the beginning a means of strengthening the position of developing countries as buyers.

National regulation of the transfer of technology served as a model for the code.[15] Legislation in this field had occurred in Japan during the 1950s and 1960s. Of the developing countries India had begun developing corresponding legislation as early as the 1950s. The impetus for legislation on the transfer of technology in Latin America is found in the Andean Common Market decision of 1970. The national legislation of Argentina, Brazil and Mexico is structured to a considerable degree along the lines of this decision. The terms of transfer of technology contracts are regulated, certain conditions or terms are considered unconscionable and prohibited, systems for the recording and approval of contracts by state authorities have been developed. The state has taken on the role of "protector" of the technology buyer and consequently offers a kind of guarantee that approved contracts are reasonable. One important state interest in this context is, of course, to ensure that the transfer serves the development interests of the country in question.[16] To a great extent Latin American legislation has served as a model for the code. At first the list of unconscionable

[13] On the initial stage of the code, see Blair, *op. cit.*, pp. 302–4, Fikentscher, *op. cit.*, pp. 11 f., and Miller, *op. cit.*, pp. 55 f. — For an analysis of world technology markets, see Maja Naur, "Transfer of Technology—A Structural Analysis", *Journal of Peace Research* 1980, pp. 247–59.

[14] See Fikentscher, *op. cit.*, pp. 41–5, Miller, *op. cit.*, p. 54, and Skelton, *op. cit.*, pp. 385–9.

[15] On the ideological background of the code, see especially Fikentscher, *op. cit.*, pp. 22–39.

[16] Concerning national legislation, see Miller, *op. cit.*, pp. 49–54. Page 50 contains a quotation of Eduardo White's analysis of state monitoring in Latin American countries: "... the principle of intervention is not aimed at eliminating negotiation, but rather, at strengthening it by making the government either a 'party' (in cases where there is no other way of representing the national interest) or a 'protector' of the local enterprise with a view to increasing their bargaining power having regard to its own interests and certain national objectives." On Latin American legislation, see also Gabriel M. Wilner, "The Transfer of Technology to Latin America", *Vanderbilt Journal of Transnational Law* 1981, pp. 269 ff., and the survey of world legislation in the Report by the UNCTAD Secretariat "Control of Restrictive Practices in Transfer of Technology Transactions", TD/AC.1/17, 16 June 1978.

contract terms which the code would prohibit encompassed forty items that originate in Latin American legislation on the transfer of technology.[17]

National legislation in the field has not resulted in only positive experiences. While Brazil and Mexico succeeded in promoting national interests by means of a stricter control of the conditions of technology transfer without any diminution in the flow of technology to their countries, the experience of Argentina was the reverse. The extremely protective legislation of Argentina led to an abrupt decrease in the country's access to technology. Only a major revision of the legislation in a more flexible direction and greater recognition also of the seller's interests led to an improvement in the situation.[18] On the other hand, efforts to develop national legislation have met with both political and practical difficulties, especially in the least developed countries. The international convention or treaty was thus expected in part to replace national legislation and in part to confirm its legitimacy under international law.[19]

The developing countries wished the international code of conduct to confirm certain basic principles of technology transfer, namely free and untied access to technology under fair and reasonable conditions and at fair and reasonable prices, effective enforcement of contractual obligations and that the transfer of technology would promote the technological capabilities of the acquirer.[20]

The objectives of the developing countries won the support of the UN General Assembly, both in the NIEO-Declaration and in the Program of Action on the Establishment of a NIEO. The latter set out the objectives of the code as follows: "the formulation of an international code of conduct for the transfer of technology corresponding to the needs and conditions that prevail in developing countries".[21]

On the whole, the industrialized countries did not support the idea of a code of conduct. They have argued in favour of respect for freedom of contract and traditional principles of international law. They contend that technology, especially saleable technology, is the property of private enterprises who have invested in its development. Enterprises have to view transfers of technology and the conditions for such transfers in the light of economic profitability. Technological development will cease if its results are sold at too low a price. The net profits of technological advances must be sufficient to finance future

[17] See, in particular, Miller, *op. cit.*, pp. 50–54.

[18] On later changes in Argentine law, see Fernando Noetinger, "Argentina Licensing Update", *LES Nouvelles* 1981, pp. 178–82. For an analysis of national experiences, see the Report by the UNCTAD Secretariat "Legislation and Regulation on Technology Transfer: Empirical Analysis of Their Effects in Selected Countries", TD/B/C.6/55, 28 August 1980.

[19] See Miller, *op. cit.*, p. 55.

[20] See Fikentscher, *op. cit.*, p. 141, Miller, *op. cit.*, p. 56, and Skelton, *op. cit.*, pp. 390 f.

[21] See Fikentscher, *op. cit.*, p. 8, and Skelton, *op. cit.*, pp. 383–5.

research and development. As long as property rights are protected in the constitutions of most states, the states cannot intervene in the right of private enterprises to decide whether and on what conditions technology developed by them will be sold. Hence it is impossible to foresee an internationally binding code of conduct regulating international transfer of technology transactions.[22]

The industrialized countries have, nevertheless, continuously participated in code negotiations. Group B submitted a counter-proposal containing a draft code in 1975. A basic approach of this draft was that the code to be drafted should have the status of a recommendation and set out only the major principles governing transfer of technology transactions. Established business practices should be respected and new ones adopted only to the extent that they proved necessary in order to safeguard the economic development interests of the poor countries. Free international trade was not to be encroached upon. On the other hand, free trade should be protected against abuses stemming from monopolies, cartels and restrictive business practices along the lines developed in national antitrust or competition laws.[23]

From the very beginning the industrialized countries have emphasized that even a nonbinding code would tend rather to suppress transfers of technology than promote them, if enterprises considered it unduly restrictive. There is a real danger that conflicts would ensue, instead of the cooperative and positive climate that is desired. Alternative methods to help the technological development of developing countries, such as training programs, consulting services etc., were offered in lieu of the code.[24]

Although the problem of the nature of the code has still not been solved, the developing countries have in fact dropped their demands for the immediate introduction of an internationally binding code. It seems as if the developing countries could, in the initial stage, accept a voluntary code or recommendation, in the hope, perhaps, that progressive developments may lead to a convention. Obviously, the unbending opposition of the industrialized countries at UNCTAD V in Manila in 1979 seems to have finally convinced the developing countries of the hopelessness of attaining their goal in the present circumstances.[25] If a code is adopted, it will consequently have the status of a UN General Assembly decision that is not internationally binding in charac-

[22] See Blair, *op. cit.* (footnote 12 *supra*), pp. 304–6, Fikentscher, *op. cit.*, pp. 28 f., Jaques Gaudin, "Outlook for Technology Transfer", *LES Nouvelles* 1981, pp. 122–5, and Skelton, *op. cit.*, pp. 391 f. The latter quotes one member of Group B: "Each technology transaction is an individual case and the transfer of technology is an on-going and sequential process. Flexibility in the technology transfer process is necessary and the freedom of parties to negotiate, conclude and perform agreements for the transfer of technology on mutually acceptable terms and conditions should not be unduly restricted." Cf. Skelton, *op. cit.*, p. 396.

[23] See Fikentscher, *op. cit.*, p. 28, and Miller, *op. cit.*, p. 57.

[24] See Blair, *op. cit.*, pp. 320–6, and Gaudin, *op. cit.*, pp. 124 f. — On the Swedish proposal to prepare a convention on patent licences, see Sandgren, *op. cit.* (footnote 8 *supra*), pp. 28–33.

[25] See Fikentscher, *op. cit.*, p. 142.

ter.[26] The unanimous adoption of the code would nevertheless allow the view that the code rules represent established international trade practice in the field. It would acquire the status of a source of international customary law and would probably serve as an instrument for the harmonization of national legislation as well. Despite their voluntary nature certain chapters of the code would have a direct influence on the contractual practices of enterprises and could act as a step towards a form of international contract law in the field.[27] Parts of the code have been unanimously characterized as contract law by the negotiating groups.[28]

After the intergovernmental group of experts concluded their work[29] a UN Conference was convened at four sessions in 1978, 1979, 1980 and 1981.[30] Secretarial services were provided by the UNCTAD Secretariat.

The last session of the Conference ended on 10 April 1981 in an atmosphere of failure. It did not seem possible to develop the code beyond the draft stage.[31] Although it had been possible to reach agreement in a great number

[26] See Fikentscher, *op. cit.*, pp. 8–10, where he states that according to present views also the UN NIEO-Declaration, the Programme for its implementation and the Charter of Economic Rights and Duties lack binding character under international law. He continues: "Yet, it must not be overlooked that resolutions of the General Assembly of the UN, supported by an overwhelming majority of states, may unfold at least a substantial political effect which, according to a new and growing theory in international law, may even amount to a 'quasi-legal' effect. Openly, there is talk of creation of 'soft law'."

[27] Fikentscher, *op. cit.*, pp. 5–7, divides post World War II international trade regulation into three stages: *the Havana phase*, which ended in the never implemented ECOSOC-proposal of 1953, during which one sought to create ITO and legally binding rules to safeguard freedom of trade, *the conference phase*, during which possibilities to regulate international trade were debated in a number of "private" antitrust conferences, and the third or *NIEO-phase*, which began at the adoption of the NIEO Declaration and which is characterized by initiatives from the developing countries and use of the UN system. He continues: "One need not to be a prophet to predict that this time some practical result having influence on international trade regulation will see the light of the day". — See also the foreword by Gabriel Wilner in Juha Kuusi's book *The Host State and the Transnational Corporation*, Kettering, Northamptonshire 1979. Kuusi studies the same type of question in analysing the possibilities for application of other than national rules on agreements between states and transnational corporations. — See also M. Sornajah, "The Myth of International Contract Law", *JWTL* 1981, pp. 187–217, where the author holds that the idea of "international contract law" born under the auspices of NIEO-thinking does not possess solid legal foundations and that "the inflexible standards of an international contract law" can only lead to conflicts. On the impact of international codes of conduct, see further Pieter Sanders, "The Implementation of International Codes of Conduct for Multinational Enterprises", *NILR Netherlands International Law Review* 1981, pp. 318–32. — See also Thomas W. Wälde, "North/South Economic Cooperation and International Economic Development Law: Legal Process and Institutional Consideration", *GYIL* 23 (1980), pp. 59 ff.

[28] See Fikentscher, *op. cit.*, pp. 64 and 144, Miller, *op. cit.*, pp. 56 f.

[29] See Fikentscher, *op. cit.*, p. 13.

[30] The author of the present paper has had the opportunity to take part in code preparations and conference negotiations since 1979.

[31] The status of the draft texts of the code can be studied in the UNCTAD Secretariat document Draft International Code of Conduct on the Transfer of Technology as of 10 April 1981, TD/CODE TOT/33. Unagreed texts are indicated by brackets. Some of the draft texts for the Preamble and Chapters IV, V and IX, which have been discussed in the conferences, are appended to the document. For a short summary of the code's aims and intentions and the difficulties of the negotiations, see Dev Muraka, "UNCTAD in työ polkee paikallaan. Kuilu syvenee lännen ja kehitysmaiden välillä" (The Work of UNCTAD Marks Time. The Cleft between West and Developing Countries Deepens), *Suomen Kuvalehti* 25–26 1981, pp. 36 f.

of questions, the relatively few differences that remained seemed impossible to bridge.

The "hardliners" of Group B led by the United States, Great Britain and Switzerland, considered that their willingness to compromise had extended far beyond what they had thought originally possible. The developing countries, for their part, found that acceptance of the Group B position fell short of the essential objectives of developing countries.

Within the UN, however, the case has not been considered lost. In December 1981, an interim committee was set up by the UN General Assembly in order to study the open questions with a view to solving them and to report their recommendations to the fifth session of the Conference. The Conference may be convened during the last quarter of 1982 or the first quarter of 1983.[32]

3. MAIN CONTENTS OF THE DRAFT CODE[33]

The preamble of the code begins with recognition of the fundamental role of science and technology in the development of all peoples. Paragraph (2) of the preamble expresses the belief 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". Here is expressed the argument put forward by the developing countries at the start of negotiations that technology as such belongs to all mankind, even though the argument itself has since been abandoned.[34]

The international transfer of technology is defined in the code as the transfer of systematic knowledge for the manufacture of a product, for the application of a process or the rendering of a service. The concept excludes only transactions involving the mere sale or lease of goods. The transaction is rendered international by fact of the information being transferred across national boundaries.[35]

What the code of conduct on the transfer of technology is expected to influence is expressed in paragraphs (9) and (10) of the preamble. Therein is stated the belief that the code will effectively assist the developing countries in their selection, acquisition and use of technologies appropriate to their needs. Secondly, the code is expected to help create conditions conducive to the promotion of the international transfer of technology under mutually agreed

[32] UNGA resolution 36/140.

[33] Fikentscher, *op. cit.*, gives a detailed analysis of the content of the code, pp. 39 ff.

[34] In greater detail, Fikentscher, *op. cit.*, pp. 25–8.

[35] See TD/CODE TOT/33, pp. 3 f., ch. I, para. 1.2, 1.3 and 1.4. Para. 1.3 also contains an illustrative list of transfer of technology transactions (contracts).

terms that are advantageous to all parties. Paragraph (11) states the precondition for this, namely that countries, as well as private parties to a transfer of technology transaction, should conform to the provisions of the code.

The interest in safeguarding the benefits of liberalization of trade, in this connection global technology markets as free as possible from trade barriers, is manifested in paragraph (6): the parties strive to promote an increase in the international transfer of technology with equal opportunities for all countries to participate irrespective of their social and economic system and of their level of economic development. At the same time it has been unanimously recognized that developing countries have a special need to acquire technology in order to strengthen their scientific and technological capabilities. The granting of special treatment to the developing countries is thus considered necessary (paragraphs (4) and (7) of the preamble).

In terms of structure, the code is divided into a preamble and ten chapters: I. Definitions and scope of application, II. Objectives and principles, III. National regulation of transfer of technology transactions, IV. [Regulation of practices and arrangements involving the transfer of technology] [Restrictive business practices], V. Guarantees/Responsibilities/Obligations, VI. Special treatment for developing countries, VII. International collaboration, VIII. International institutional machinery, IX. Applicable law and settlement of disputes and X. Other provisions.

Along with chapters I and II, chapters III, IV and VII may also be characterized as basic principles. Their impact on transfer of technology contracts is at most indirect as they refer to general market conditions. In addition to the general objectives stated in the preamble, chapter II defines the fundamental principles of the code.[36] A number of basic concepts of international law, such as the sovereignty of states, political independence and full equality, are referred to here. The responsibilities of states not parties to a transfer of technology transaction and those of the parties to a particular transaction are clearly seen as separate. A transfer of technology transaction furthermore must be advantageous to both parties so that the present flow of technology can continue and even increase. The protection of industrial property rights is recognized, as is also freedom of contract. The terms and conditions of individual technology transfer contracts are to be mutually agreed and are to meet the requirements of fairness and reasonableness.

Under chapter III the above-mentioned circumstances and other legitimate rights of parties must be borne in mind also in the preparation, revision or implementation of national legislation. Emphasis is, furthermore, given to the close connection between flows of technology and contractual usage and to the

[36] TD/CODE/TOT/33, pp. 7 f. See also Fikentscher, *op. cit.*, pp. 55–9.

desired effects of national legislation in creating a climate conducive to the international transfer of technology.[37]

Chapter VI deals with the various means whereby developed countries may assist developing countries, especially the least developed ones, in order to promote economic development. Assistance may be given primarily in the form of increasing the flow of information on technical development, in active cooperation as well as in assisting in the development of research and training. The need to develop international cooperation in the fields of science and technology on a global level is also emphasized.

Chapter VII enumerates the modes of collaboration which may come into question bilaterally, multilaterally, regionally or globally. Exchanges of information, common programs and negotiations are again mentioned.

It is proposed that the implementation of the provisions of the code as well as its effects be monitored internationally by means of a committee to be agreed upon later. The penetration of individual cases is not foreseen in chapter VIII. The chapter also provides for review of the code after a certain period of time. At such time the committee may make proposals for improvement and further development of the code.

The nucleus of the code therefore seems to comprise those chapters which deal directly with transfer of technology transactions, i.e. that are directed towards influencing actual practices in transfer of technology transactions. Provisions of this nature are found in chapters IV, V and IX. It is possible that the last of these, which deals with applicable law and settlement of disputes, will eventually remain on the level of a declaration of principles or be left out entirely.

In order to describe the contents of chapters IV and V in their proper context, it is necessary to return to chapter II, i.e. to the objectives sought in regulating contractual relationships. The first of these objectives is to establish general and equitable standards for the relationship between parties to transfer of technology transactions (2.1(i)). The second is the wish to promote mutual confidence between parties and their respective governments (2.1(ii)). Thirdly, transfer of technology transactions are to be encouraged to take place under conditions where the bargaining positions of the parties are balanced, so as to avoid abuses of a stronger position, and so that they arrive at mutually satisfactory agreements. This is of special importance where the buyer is a developing country (2.1(iii)). Finally, the chapter contains an enumeration of specific objectives intended (1) to enable the buyers to acquire the information

[37] See also Juha Kuusi, "Eräitä näkökohtia teknologiansiirtosäännöstöstä kansainvälisen oikeuden kannalta" (Some Aspects of the Code on the Transfer of Technology in the Light of International Law), *Oikeus* 1982:2, pp. 100–7, and Ole Lando, "Renegotiation and Revision of International Contracts. An Issue in the North/South Dialogue", *GYIL* 20 (1980), pp. 40–2.

necessary to evaluate the different elements of the transaction, (2) to specify restrictive business practices from which the parties should refrain and (3) to outline the appropriate responsibilities and obligations of the parties, taking into consideration their legitimate interests and the differences in their bargaining positions (2.1(viii–x)).

How enterprises are recommended to proceed in order to achieve the objectives formulated above is dealt with in two different chapters of the code. Chapter IV contains the negative obligations, i.e. a list of business practices enterprises are recommended to refrain from using. Chapter V in turn contains obligations of a positive character—the responsibilities of or "guarantees" supplied by the parties to the transaction.

The latter has proved easier to reach agreement on. All groups participating in the code negotiations have characterized this chapter as contractual law.[38] The recommendations of the chapter illustrate what might be called fair business standards on both sides as regards the negotiation of a contract as well as the content of the contract itself. Consequently, negotiations should be conducted on a bona fide basis to achieve fair and reasonable conditions including the price. The need to exchange information openly on both sides is emphasized. In the contract the seller should e.g. guarantee that the transferred technology corresponds to the earlier (written) specification, that the technology is suitable for the use stated in the contract and that all necessary documentation is delivered to the buyer. The negotiations on this part of the code have been successful and agreement on the few remaining open issues seems possible.

However, the formulation of the chapter concerning business practices which from the viewpoint of the buyer are unconscionable still seems to pose an insoluble problem. At the start of negotiations the developing countries proposed the insertion into chapter IV of forty different items or prohibited practices, taken more or less verbatim from the national legislation of Latin American countries. The developed countries, on the other hand, opposed what they saw as an unacceptable restriction of the freedom of contract. In their opinion abuses of restrictive business practices could be counteracted by means of competition law and they proposed a text drafted along antitrust law lines. This text included eight of the forty items proposed by the developing countries.[39] Concepts characteristic of antitrust law, such as the "rule of reason" and economic, in this case macroeconomic, grounds for evaluation, were also included.

Although it was later possible to agree on fourteen items, only details of

[38] See Fikentscher, *op. cit.*, pp. 64 and 144.
[39] See Fikentscher, *op. cit.*, pp. 28 f., and Miller, *op. cit.*, pp. 56 f.

which remain unsettled, there is still no agreement on the main principles and objectives of that chapter. This uncertainty is reflected already in the different titles proposed for the chapter by the three negotiating groups. The developing countries propose "the regulation of practices and arrangements involving the transfer of technology", the industrialized countries prefer "restrictive business practices" and the socialist countries speak of "the exclusion of political discrimination and restrictive business practices". The major differences of opinion, however, are those between developing and developed countries.

Another bone of contention is the content of the recommendations concerning the conduct of enterprises. The developed countries have not agreed to define the items so far included as restrictive or unconscionable *per se,* but contend that this is something to be determined according to the particular circumstances of each transaction. It is not difficult to agree with the developing countries that the "norm" in this case is in danger of losing its content.

A third major source of disagreement is the regulation of a transfer of technology which is international in the sense that the technology moves across national boundaries but takes place between different entities of a transnational enterprise. Should the chapter be applicable also to such transactions? "No", say the industrialized countries. "Yes", say the developing countries.

4. A BRIEF ANALYSIS OF PRACTICES REFERRED TO IN CHAPTER IV

In order to get a better grasp of the problem, it is necessary to look more closely into business practices that (sometimes) are unconscionable. Six of the items included in chapter IV may serve as an illustration.[40] In the situations concerned the seller:

- restricts the research activities of the buyer in a manner which unnecessarily prevents the buyer from pursuing research and development necessary for the effective application of the technology in the local circumstances,
- requires the buyer to use personnel appointed by the seller where this is not necessary for successful transfer of the technology,
- sets the prices for products manufactured through use of the acquired technology,
- prevents applications of the technology even if performed under the buyer's sole responsibility,

[40] TD/CODE TOT/33, pp. 12–14, ch. IV, paras. 4–9.

- requires that products manufactured through use of the technology be sold either by the seller or by an enterprise controlled by the seller,
- requires that the buyer, in order to acquire the technology he desires, also buys other products or technology.

We are concerned here with conditions that restrict the buyer's possibilities of putting the information he has bought to use in his business activities. Developing countries have striven to develop their economies by creating local industries independent of outside influence. However, if an enterprise in a developing country buys technology for its own use, acceptance of the requirements described above may result in a plant built in a developing country becoming in fact a subcontractor to the selling enterprise.

According to the view of the developed countries such requirements are precisely of the kind competition law concerns itself with. What is at issue is the protection of free trade and free competition against abuses by monopolies, cartels and enterprises having a dominant position, and other undue restraints. Competition law rules are applicable on an international level to ensure that developing countries have an opportunity to trade as equal partners in world technology markets. If the conditions in question do not lead to abuses, discrimination or restriction of competition in an individual case, there is no reason to prohibit the conditions as such. It is precisely for such cases that the presumptions and exceptions of the "rule of reason" have been developed in this particular field of law. The developing countries can, in turn, protect their market position with the aid of these rules when entering the world markets as sellers.[41] In the negotiations the developing countries seem to have accepted the antitrust/competition law approach to a considerable extent, in conjunction, however, with their own economic development policies.

The competition law approach of the industrialized countries has the consequence that application of the provisions of chapter IV to parent–subsidiary relationships proves to be logically impossible. Such enterprises do not compete among themselves as they form parts of an economic entity. Even national competition rules are not applied to intra-enterprise arrangements.[42]

These, then, are the makings of a conflict of views that seem irreconcilable. The fundamental differences of opinion between developed and developing countries are finally illustrated by juxtaposing the basic content of the groups' proposals for a "chapeau" or introduction to chapter IV of the code:

[41] Similarly Fikentscher, *op. cit.*, p. 23.

[42] See e.g. Ulf Bernitz, *Svensk och internationell marknadsrätt*, Stockholm 1973, p. 85, Valentine Korah, *Competition Law of Britain and the Common Market*, London 1975, pp. 57 and 199; A. D. Neale, *The Antitrust Laws of the USA*, Cambridge, Mass. 1977, pp. 138 ff., and Kirsti Rissanen, *Kilpailu ja tavaramerkit* (Competition and Trademarks), Vammala 1978, p. 192.

The parties to a transfer of technology transaction should/shall refrain from practices defined in this chapter, provided that they unduly/unreasonably restrain the international transfer of technology.	practices adversely affecting the international transfer of technology, particularly as such practices hinder the economic and technological development of acquiring countries. Restrictive practices are ... inter alia those listed in this Chapter.

That the developed countries chose antitrust concepts as their bid for chapter IV is perhaps explained by their ideological background. Especially in the United States belief in strong antitrust measures has often been closely connected with belief in the market economy.[43] Antitrust policy has also had strong links with efforts to liberalize world trade. Already in the context of the GATT negotiations, a proposal was prepared in Havana in 1948 containing the outline of an international code on restrictive business practices. The set of multilaterally agreed equitable principles and rules for the control of restrictive business practices[44] adopted by the UN General Assembly in December 1980 shows that free competition policy is seen as an integral part of liberal world trade policy.[45]

In the opinion of the present author, however, the antitrust or competition rules and concepts are ill suited for the present purpose. How is the concept of "market" defined? According to what criteria does one evaluate effects on competition and where is one to find the arbiter of what is reasonable against the background of the economic analysis foreseen by the code. Moreover, as regards licensing of know-how—knowledge and experience—case law especially in the United States accepts the premise that know-how belongs to its owner as one of his competitive assets. Transfer of know-how always entails the sharing of a competitive position and increased opportunities for competitors. For this reason restrictive business practices are tolerated to a considerable extent. Nevertheless, evaluation of where the line has to be drawn is so difficult that the present uncertainty has given cause for concern even among developed countries.[46]

[43] See especially Neale, *op. cit.*, pp. 20 and 427–32, and Rissanen, *op. cit.*, p. 13.

[44] The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. See Olavi Väyrynen, "Kansainvälinen kilpailunrajoitussäännöstö tulossa" (International Antitrust Law in Progress), *Lakimies* 1980, pp. 730–43.

[45] As regards this line of development, see in particular Joel Davidow, "Extra-territorial Antitrust and Concept of Comity", *JWTL* 1981, pp. 500 ff., *idem*, "International Antitrust Codes: the Postacceptance Phase", *The Antitrust Bulletin*/Fall 1981, pp. 567 ff., and Fikentscher, *op. cit.*, pp. 5–7.

[46] See especially Joel Davidow, "Antitrust and International Know-how Licensing", *Vanderbilt Journal of Transnational Law* 1981, pp. 363 ff. As regards application of competition law on licensing contracts, see also Rissanen, *op. cit.*, p. 222.

With the proposals of the negotiating groups in mind one may rightly ask whether any single transfer of technology transaction will ever have the effect of hindering the international flow of technology. Situations where restrictions would in fact be unconscionable seem even more remote. It is not possible to require anyone to put his knowledge and experience at the disposal of others. Furthermore, the transfer of technology on terms that are harsh and restrictive from the buyer's viewpoint, does not in itself restrict the flow of technology. The information, the technology, is nevertheless transferred.

In fact the restrictions on terms and practices concern only the use of technology. On the other hand, national legislation which strongly regulates and monitors the terms of individual contracts, may in fact restrict the flow of technology itself, as the example of Argentina has shown. If national authorities, for example, regulate prices at so low a level that the transaction is unprofitable to the seller, no transfer of technology will occur.

Competition policy forms a part of economic policy in general.[47] It is geared to promote interests of national economy. In the case of the code it would mean the promotion of the interests of the world economy. This fact probably accounts for the developing countries also basing their criteria on the effects of a given practice on the international transfer of technology and their economic development. The discussion is pursued on a macroeconomic level. It would be closer to the mark—ensuring equitable terms of contract—to direct attention to the question at hand, namely the transfer of technology contract or the activities of enterprises on the microeconomic level. Such an approach would allow for disregard of the complicated concepts and difficult economic analyses inherent in competition law. The terms of the contract could be evaluated only in terms of the actual transaction. A business practice or term of contract would be unconscionable, if, on no reasonable grounds, it were to restrain the buyer from making use of the acquired technology.

If situations were evaluated on the merits of the particular contract and the circumstances relevant to its content, it would be possible in a more direct way to arrive at the goal stated explicitly and unanimously in the principles and objectives of the code: to ensure that the terms of an individual contract are equitable and sensible even where the buyer's bargaining position is not as strong as that of the seller. The intention of the code provisions in this respect seem to be precisely to rule out situations where the seller, disregarding the buyer's legitimate interests, dictates conditions in a "take it or leave it" fashion.

The alternative outlined above would also entail a change of approach on

[47] See e.g. Rissanen, *op. cit.*, pp. 63–74.

the part of the developing countries. Terms of contract would be evaluated from a microeconomic point of view rather than a macroeconomic one. By concentrating efforts to ensure that an enterprise acquiring technology is in a position to use that technology effectively, the prospects for its growth and increased independence are enhanced. It follows that the prospects for growth of the national economy are similarly improved, which must also be the final objective for a national monitoring of transfer of technology transactions.

An argument that may be raised against this line of reasoning by the industrialized countries is that under the principles of freedom of contract independent entities have to fend for themselves. It seems, however, as though the tooth of time has gnawed away much of the foundations of this argument. To quote *Kovero* "a freedom of enterprise which permits the free sway of egotistical pursuits ... has been apt to undermine good faith and confidence".[48] Although the spirit of liberalism swept aside the old principles for a while, later developments have brought forth a multitude of legal "game" rules.[49] It has proved impossible to get along without them. Early market law concentrated on the behaviour of business competitors among themselves. During the last few decades, however, consumer protection legislation has established its position in the legal order. This branch of competition law strives to correct the imbalances inherent in the consumer's weaker bargaining position as party to a contract.

This development is obvious also in Finland. Under chapters 3 and 4 of the Finnish Consumer Protection Act, unconscionable conditions in standard contracts pertaining to consumer goods are prohibited and the terms of an individual contract deemed unequitable from the consumer's standpoint may be adjusted.[50] Consumer protection legislation is much the same in Finland as in other Scandinavian countries. It attempts to ensure equitable terms of contract in two ways in cases where the circumstances of entering into a contract do not offer both parties equal opportunities to defend their interest. For preventive purposes certain minimum standards of "fairness" are stipulated and these are complemented by corrective measures, i.e. adjustment of unfair terms of contract.[51]

[48] See Ilm. Kovero, *Kauppapolitiikka* (Trade Policy), Porvoo 1937, p. 175.

[49] As regards legislative development, see e.g. Bernitz, *Marknadsrätt*, Stockholm 1969, pp. 115 ff. and 430, and Mogens Koktvedgaard, *Konkurrenceprægede immaterialretspositioner*, Copenhagen 1965, pp. 57 ff.

[50] See Antti Kivivuori, C. G. af Schultén, Leif Sevon and Jyrki Tala, *Kulattajansuoja* (Consumer Protection), Helsinki 1978, pp. 91 ff.

[51] See Kivivuori *et al.*, *op. cit.*, pp. 102 ff., and as regards development trends in regulation of standard contracts, Ulf Bernitz, "Kontroll av standardavtal—utvecklingslinjer och metoder", *TfR* 1979, pp. 113–31.

5. STANDARDS OF FAIRNESS AS REGARDS BUSINESS CONTRACTS IN SCANDINAVIAN AND WEST GERMAN LAW

The monitoring and adjustment of business contract clauses according to a standard of fairness have been viewed with restraint both in legislation and court practice.[52] The trend of legal development nevertheless seems clear. Structural changes resulting from the progressive liberalization of world trade have led to increasing concentration and to the formation of large enterprises. As a result increasing pressures are brought to bear for the better protection of small businesses. The widening acceptance in Scandinavia of the idea of a general standard of fairness in contracts is the introduction of such a provision in national legislations. It was introduced into the Norwegian Sale of Goods Act in 1974. A similar provision was included into the Danish Contracts Act in 1975 and Sweden followed suit in 1976.[53] In Finland a bill to introduce such a provision into the Contracts Act was presented in December 1981, and enacted in 1982.[54]

Studies have been undertaken in all Nordic countries to examine the possibilities of improving the protection of small dependent enterprises against unfair terms of contract. Competition law affords effective relief in this regard in certain instances,[55] but leaves others beyond reach. It is also well known that an ordinary court action for adjustment of unfair contract clauses is usually not feasible between businessmen because of the repercussions on the long-term business relations.

In Finland proposals have been made to regulate the terms of contract especially with regard to petrol station keepers, who operate under franchise contracts, and food stores which are dependent on one of the few large wholesale dealers in the food business.[56] For the time being the matter has been left to be "self-regulated" by the business community.[57] Discussion on

[52] See Erkki Aurejärvi, "Oikeustointen kohtuullistamisen yleiset opit ja yrittäjien väliset sopimukset" (The General Principles of Adjustment of Unfair Conditions and Contracts between Enterprises), *Lakimies* 1979, pp. 727 ff., with references. See also Lando, "Initial Unfairness of Some of the Laws of the North", *GYIL* 23 (1980), pp. 42 ff.

[53] See "Yrittäjänsuojakomitean mietintö", *KM* (Report by the Commission for Protecting Small Enterprises, Series of Finnish Governmental Reports) 61/1979, p. 39.

[54] *HE* (Government Bill) 247/1981. See also Mikko Kämäräinen, "Ehdotus yleiseksi kohtuullistamissäännökseksi", *Oikeusministeriön lainvalmisteluosaston julkaisu* (Proposal for a General Rule on Adjustment of Unfair Contract Clauses. Publication of the Legislative Department of the Finnish Ministry of Justice) 4/1980.

[55] See Rissanen, *op. cit.*, pp. 276–80. For later practice in Sweden, see Decision no. 10/1981 (*Scan Väst ek för*) in the publication *Pris- och kartellfrågor* 1981: 8–9, pp. 82–98.

[56] See e.g. Bernitz, "Kontroll av standardavtal—utvecklingslinjer och metoder", *TfR* 1979, pp. 125 f., Aurejärvi, *op. cit.* (footnote 52 *supra*), pp. 744 f., and *KM* 61/1979 (see footnote 53 *supra*).

[57] In 1980 a Business Contracts Board was set up in connection with the Finnish Chamber of Commerce with a mandate to give opinions (on request) concerning the fairness of contracts between enterprises and adjustment of contract clauses. The enlargement of the functions of the Central Chamber of Commerce is reflected by an amendment of the Chamber's Statutes (Ordinance no. 41/16.1.1980).

this subject, however, is not closed. In 1981 Parliament unanimously requested the government to prepare legislation on the protection of small businesses along the lines of consumer protection principles. The government bill providing for a general clause permitting the adjustment of unconscionable terms of contract[58] and the setting up of a commission for business contracts under the aegis of the Finnish Chamber of Commerce were not found sufficient. According to Parliament's request, separate legislation should be enacted on the protection of businesses against unconscionable terms of contract taking into account the principles of freedom of enterprise and consumer interests. The program of the present government thus mentions the preparation of legislation on protection of entrepreneurs.[59]

In Sweden the committee for the revision of the Swedish Act on Consumer Sales (*Konsumentköpsutredningen*) was given additional terms of reference in 1978 to study the possibility of improving legislative protection of enterprises, in particular small enterprises, against unfair contract practices. The committee prepared a report on the question in 1981.[60] The report contains a draft Act on the prohibition of unconscionable conditions and terms in contracts between enterprises (*lag om förbud mot oskäliga villkor i avtal mellan näringsidkare*). The Act would empower the Swedish Market Court to enjoin an entrepreneur from future use of a term or condition found unconscionable or other conditions of essentially the same content (sec. 1). A claim for injunctions could be raised by an association of entrepreneurs or by an entrepreneur to whom the condition or term has been offered (sec. 4). The injunction would then aim at preventing similar usages in the future. The proposal does not restrict the application of injunctive relief only to standard contracts. The committee report has not yet led to legislation.[61]

In the field of consumer protection legislation, regulation of terms of contract has started with standard contracts.[62] These are often unilaterally drafted, preprinted forms where only the names of the parties and a few other details remain to be filled in. The risk is evident that only the interests of the party that is the stronger are taken into account. The pre-emptive evaluation of the terms of standard contracts is intended to assess their characteristic effects and consequences in individual situations.

[58] *HE* 247/1981 (see footnote 54 *supra*).

[59] See *Kauppapoliittisia tiedotuksia* 1–2/1982, p. 3 (Publication of the Trade Policy Department of the Finnish Ministry for Foreign Affairs. With an English summary).

[60] See *SOU* 1981:31 (Avtalsvillkor mellan näringsidkare).

[61] On the need for legislation on the subject as such, see *SOU* 1981:31, pp. 21–5, and the opinion prepared by an expert group representing the Swedish Federation of Industries and the Swedish Federation of Wholesale Traders, *ibid.*, pp. 137–40, which expresses serious doubts as to the necessity of legislative regulation.

[62] See e.g. Bernitz, *op. cit.* (footnote 56 *supra*), pp. 113–17.

Regulation of the terms of standard contracts in European law usually extends only to contractual relations between consumers and enterprises. In the Federal Republic of Germany a general Act of 1976 regulating terms of contract, *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, the so-called AGB-Gesetz, however, is applicable to the terms of all standard contracts, including those entered into between enterprises. It has been characterized as a milestone in the development of contract law.[63] Pursuant to sec. 9 of the Act, terms of contract are null and void "where they, against good faith, unreasonably disadvantage either of the parties".[64] In case of uncertainty, unconscionableness is assumed, e.g. provided that some term of the contract "restricts essential rights or obligations emanating from the nature of the contract so that the realization of the purpose of the contract is endangered" (sec. 9(2)(2)).[65] Succeeding sections of the Act contain lists of terms of contract that can be unconscionable (*mit Wertungsmöglichkeit*, sec. 10), as well as of terms of contract that are always considered as such (*ohne Wertungsmöglichkeit*, sec. 11).

6. CHAPTER IV OF THE CODE FROM THE VIEWPOINT OF STANDARDS OF FAIRNESS IN CONTRACT RELATIONSHIPS

From a purely logical viewpoint, it is not a long step from the AGB-Gesetz of the Federal Republic of Germany and the Swedish committee report to the pre-emptive regulation of contractual relations in international transfer of technology transactions when the bargaining positions of the parties are not balanced. Adjustment of the terms of an agreed contract seems impossible in this case. As regards transfer of technology contracts, there is enough practical experience available to make possible an evaluation of the typical effects of certain restrictive clauses used in such contracts. Where bargaining positions are not equal, there seems to be little difference between the need for general rules in the area of international trade in technology and the need for similar regulation as regards standard contracts in the Federal Republic of Germany. One may perhaps also assume that this mode of guiding international trade is

[63] See Bernitz, *op. cit.*, pp. 116–22. A more detailed analysis of the discussions preceding the enactment of the AGB-Gesetz as well as general legal development and the content of the Act is contained in Peter Ulmer, Hans Eric Brandner and Horst Dieter Hensen, *AGB-Gesetz. Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, Cologne 1977, pp. 17–33 and 151. See Jan Hellner, in *Konsumenträtt och ekonomi* 5/1980, p. 9, for an additional comment on the Act.

[64] "... wenn sie den Vertragspartner entgegen den Geboten von Treu und Glauben unangemessen benachteiligen".

[65] "... wesentliche Rechte oder Pflichten, die sich aus der Natur des Vertrages ergeben, so einschränkt, dass die Erreichung des Vertragszwecks gefährdet ist".

no less defensible under general trade rules than the method of regulating the standard contract terms is under the principle of freedom of contract in one country representing the hardliners of the group of developed countries. In the last resort it all amounts to whether the will to correct international shortcomings is as great as the will to correct national ones. In all fairness, it has to be admitted that a restructuring of chapter IV of the code along the lines described above would mean that an international recommendation would be adopted as a guideline for the legal development of the market-economy countries. In this sense we would be dealing with a great leap instead of a small step.

On the other hand, Western legal thought is by no means unfamiliar with the kind of regulation that the developing countries have sought. Proceeding from the ideas presented above, the introduction or *chapeau* to chapter IV might be phrased as follows: In situations where the bargaining position of the parties to a transfer of technology transaction is not equal, in particular where the technology is acquired by a developing country enterprise, parties should refrain from practices that without acceptable reason unduly restrict the recipient's rights and possibilities to utilize the technology acquired. Practices are unduly restrictive when they threaten to hinder the fulfilment of the purposes of the transaction. Practices enumerated in this chapter are normally considered unduly restrictive.

This model would also leave aside the problem of intra-enterprise relations. Contract law is not concerned with the problem of transnationals. The same rules have traditionally been applied to all arrangements between independent legal persons. The yardstick used in assessing the unreasonableness of a particular practice or term of contract naturally varies with the relevant circumstances. These include taking due account of a possible intra-enterprise relationship.

As regards the developing countries the long code negotiations have given rise to an additional difficulty. In the beginning the objective of the countries of Group 77 seems to have been quite clear.[66] The basic aim of national legislation as well of the UN code on the transfer of technology is to strengthen the bargaining position of the technology buyer and as a result ensure fair and reasonable contract terms with the aid of supervision by governmental authorities. The body set up to protect the buyer's interests would evaluate these on a general level taking into account also the interests of the acquiring country. If the code had been an internationally binding convention, its implementation would have been monitored by national, possibly even international, bodies.

[66] See footnote 16 *supra* and also Daniel Chudnovsky, "Regulating Technology Imports in Some Developing Countries. Trade and Development", *An UNCTAD Review* 3/1981, p. 133.

On the other hand, a voluntary code, i.e. a recommendation, would not be directly implemented. This may be the reason underlying the developing countries' insistence on having an indication in the code to the effect that a governmental authority could assess the fairness of terms of contract despite the fact that the code is voluntary. It is possible that this could be achieved by means of a macroeconomic yardstick in assessing the fairness of contracts, e.g. by using the general interest as a criterion. Within Group 77, the general interest in this context seems to be identical with the national interests of the country acquiring technology. This idea seems to be contained in an earlier proposal for a text submitted by the developing countries: "to avoid practices which restrain trade or adversely affect the international flow of technology, particularly as such practices hinder the economic and technological development of acquiring countries".[67] If this interpretation of the objectives of the developing countries is correct, it may be an insurmountable obstacle to the final acceptance of a code text founded on the fairness of the conditions of a transfer of technology contract seen from the viewpoint of the individual parties to the contract.

On the other hand, a text attempting to solve the problem of the missing monitoring authority by means of assessing possible negative effects on the international transfer of technology as such gives rise to new problems of interpretation. Transfer of technology[68] may be understood in any of the following ways:

a) pertaining to the flow of technology *per se,* i.e. whether technical information moves across national boundaries or not

b) pertaining to the particular transaction, including both transfer of information and its use or non-use in the acquiring country

c) the concept has no independent content; it only indicates that chapter IV deals with international transfer of technology.

Group B seems to follow interpretation a). This conceptual approach is in a sense open-ended. Technical information is always transferred if a contract is reached, regardless of how limited the possibilities of its use by the acquirer are. The practical importance of the chapter would thus not be of decisive significance for contract negotiations.

Group 77 on the other hand views the concept of transfer of technology in a wider sense and seems to feel that interpretation b) would include also the

[67] See TD/CODE TOT/33, p. 11.

[68] The definition of the concept of international transfer of technology is still open, which, however, does not eliminate the need for an interpretation. See footnote 35 *supra.*

interests of the acquiring country. The unduly restrictive character of conditions in contracts would, in their view, not be assessed by means of balancing the interests of only the contracting parties, but would include assessment also of general or national interests. For Group 77 such a wide interpretation would, moreover, indicate that the assessment is not left only to the parties to the contract, but would, or at least could, be undertaken by a national authority.

Acceptance of interpretation c) would exclude any necessity to define the effect on the international transfer of technology as such. For the reasons described above, Group 77 might oppose this solution.

It is obvious that the wording of international recommendations, and the degree of success in such projects, depends above all on the political will. Nonetheless, it is interesting to analyse whether legal constructs would be of help in the process of reaching a compromise text for the *chapeau* or introduction to chapter IV. At this stage of the negotiations it is reasonably safe to assume that the objectives of the two opposing groups are as follows. Group B does not want the practices listed in chapter IV characterized as unduly restrictive or unconscionable *per se*. Each contract has to be evaluated on its merits, using a test which does not contain any presumptions as regards the final outcome of the assessment. Group 77 now agrees that some test or criterion of assessment is necessary, but wants to retain the possibility that the code may be applied also by a national authority. In addition, the national interests of the country in which the acquiring enterprise is located have to be taken into account.

It could be possible to reconcile the opposing views by means of a formula which is neutral as to material content as well as to who, in the last resort, is to undertake the assessment. Such a formula could be phrased very simply, e.g. "when they would be unjustifiable" or "when they would have unjustifiable effects". All legal systems are familiar with the concept of assessing justice and fairness, so the grounds for such a test are clearly available. The neutral formula could then be given content by a mention of the circumstances which should be taken into account in the process of assessment. It may not be completely unrealistic to assume that Group B could accept that the development interest of the recipient country, along with the interests of both parties to a transfer of technology transaction, is among the circumstances to be taken into account.