
Homer O. Blair
UNITED NATIONS INTERNATIONAL
CODE OF CONDUCT ON THE
TRANSFER OF TECHNOLOGY

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INTRODUCTION

Over the last few years, negotiations have taken place at the United Nations in Geneva in an attempt to formulate a code of conduct on the transfer of technology. The initial impetus for the Code was generated by people of some of the developing nations and has recently been encouraged and assisted by the Committee on Transfer of Technology of the United Nations Conference on Trade and Development. The Code is premised on the belief that the industrial nations possess technology which would materially assist the less developed countries in their development and rapidly raise their standards of living. Those who have been promoting the Code are generally persons with no experience in technology transfer. Yet they cite a number of examples of what they feel has happened to developing countries’ organizations when they have attempted to obtain technology from an industrialized nation.

The cornerstone rationale of the Code, and the unspoken assumption in its negotiations, is that desired technology is principally possessed by the large multinational enterprises located in the developed nations. These businesses must be forced to make technology available to less-developed countries’ organizations on terms which would be advantageous to both parties to the transfer agreement. The multinationals must be required to cease a number of their restrictive business practices. The developing enterprises need special assistance in order to in-

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1. The conference will be hereinafter referred to in the text as UNCTAD.
crease their bargaining power with the established entities. Another important assumption is that multinational organizations are eager to transfer their technology to developing nations and will do so regardless of the conditions imposed on them by either local regulations or an international code.

One of the comparatively novel proposed codes was the Pugwash Code of Conduct for Transfer of Technology. It was submitted in the report of the working group at the Pugwash Conference held in Geneva in April, 1974. This document was published and circulated by UNCTAD on July 15, 1974, at the request of the permanent representative of Algeria, who at that time was chairman of the developing nations' group at technology transfer sessions. Since that time, there have been a number of meetings of governmental groups of "experts" under the auspices of UNCTAD. While it was thought that an acceptable code could be prepared quickly, to this date, the goal has yet to be attained.

One problem that is common in international conferences is that the meetings are conducted by groups of "governmental experts" who, after promulgation of policy, will not have to actually implement it. This would be the responsibility of others in their countries. Thus, the discussants themselves will not be faced with whatever difficulties might arise under an international code. Unfortunately, technology transfer is a fairly complex subject, particularly regarding patents, trademarks, and know-how, which are fields which few, if any, non-specialists can readily master.

Hence, the major difficulty encountered in attempting to prepare a technology transfer code is that, as is generally the case with United Nations "expert" meetings, nearly all participants are not experts. Few have been significantly involved in either negotiating or administering technology transfer agreements. Thus, the meetings have often fostered political speeches which appease home governments but hamper negotiations. Even though those in attendance are usually quite intelligent and dedicated, by lacking practical experience, they often fail to evaluate proposals from either the developing or developed-nation viewpoint.

The most recent United Nations Conference was held in Geneva in the fall of 1978. Supplementary conferences are scheduled for 1979. While the developing nations hope to complete a code in 1979, various factors mitigate against attainment of this goal.
FUNDAMENTAL BASES OF THE LATEST DRAFT OF THE PROPOSED CODE

Substantial effort has been expended on this proposed Code. However, more time has probably been spent on the "restrictive business practices" and "guarantees" chapters. While much of the proposed Code has been agreed upon, there are still many significant areas where all parties have not concurred.

As is the case in other UNCTAD conferences, there are three primary groups of countries involved. One is known as the Group of 77. It now includes more than 120 developing states. Among the group, the Latin American nations are particularly active in code of conduct negotiations. The second subdivision is the Group B, market economy-developed, countries of Western Europe, the United States, Canada, Japan, Australia, New Zealand, and a few others. The third major category, Group D, includes the planned economy countries of Eastern Europe and the Soviet Union. With respect to development, Group D is regarded as developed. Thus, on many issues, they advance the same contentions as Group B vis-a-vis the Group of 77.

Certain aspects of the latest version of the proposed Code require explanation and critical comment. For simplicity, this will be done in the order in which this draft has been written. This is not necessarily the order of most importance. The more significant sections, such as the definitional chapter, will be scrutinized accordingly.

Preamble

The preamble of the proposed Code, as might be expected,
has been agreed upon in large part. The primary items remaining for negotiation are clauses eleven through thirteen. They relate to whether the Code should be an international legally binding instrument or a mere voluntary guideline. The developing nations want to make it legally binding, while the Group B countries prefer it to remain a voluntary model.

Objectives and Principles

Again, as might be expected, the objectives sub-chapter\(^6\)

- **Desirous** of promoting international scientific and technological co-operation in the interest of peace, security, and national independence, and for the benefit of all nations;

- **Striving** to promote an increase in the international transfer of technology with an equal opportunity for all countries to participate irrespective of their social and economic system and of their level of economic development;

- **Recognizing** the need for developed countries to grant special treatment to the developing countries in the field of the transfer of technology;

- **Drawing attention** to the need to improve the flow of technological information, and in particular to promote the widest and fullest flow of information on the availability of alternative technologies, and on the selection of appropriate technologies suited to the specific needs of developing countries;

- **Believing** that a Code of Conduct will effectively assist the developing countries in their selection, acquisition, and effective use of technologies appropriate to their needs in order to develop improved economic standards and living conditions;

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

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

- **Convinced** that an international legally binding instrument is the only form capable of effectively regulating the transfer of technology\(^1\);

- **Agree** on the adoption of this international legally binding Code of Conduct on transfer of technology\(^1\);

\(\text{Hereby set forth the following code of conduct consisting of guidelines for the international transfer of technology:}\)\(^**\)

\(\text{This universally applicable Code of Conduct on the international transfer of technology is established.}\)\(^***\)

6. The Code of Conduct is based on the following objectives:

- To establish general and equitable standards on which to base \(\text{the}\) relationship among parties to transfer of technology transactions and governments concerned, taking into consideration their legitimate interests, and giving due recognition to special needs of
has been generally agreed on. A few comments are needed, however. The first objective relates to relationships among parties to transfer of technology transactions and governments concerned. This, of course, assumes that governments will be interested in regulating technology transfer agreements. It adopts the philosophy advocated by most of the developing nations: government is the only body that should be involved in technology transfer. Fortunately, the United States government has not adopted this view. Members of the United States delegation realize that most American technology is owned by the private sector. While a number of countries regulate transfer agreements, the United States does so only where exports of technology are covered by export control legislation.7

Objective (iii) seeks to encourage transfer of technology transactions. Regardless of whether the Code will assist developing nations, it cannot really be categorized as encouraging developing countries for the fulfillment of their economic and social development objectives.

(ii) To promote mutual confidence between parties as well as their governments.

(iii) To encourage transfer of technology transactions, particularly those involving developing countries, under conditions where bargaining positions of the parties to the transactions are balanced in such a way as to avoid abuses of a stronger position and thereby to achieve mutually satisfactory agreements.

(iv) To facilitate and increase the international flow of technological information, particularly on the availability of alternative technologies, as a prerequisite for the assessment, selection, adaptation, development, and use of technologies in all countries, particularly in developing countries.

(v) To facilitate and increase the international flow of proprietary as well as non-proprietary technology for strengthening the growth of the scientific and technological capabilities of all countries, in particular developing countries, so as to increase their participation in world production and trade.

(vi) To increase the contributions of technology to the identification and solution of social and economic problems of all countries, particularly the developing countries, including the development of basic sectors of their national economies.

(vii) To facilitate the formulation, adoption, and implementation of national policies, laws, and regulations on the subject of transfer of technology by setting forth international norms.

(viii) To promote adequate arrangements as regards unpackaging in terms of information concerning the various elements of the technology to be transferred, such as that required for technical, institutional, and financial evaluation of the transaction, thus avoiding undue or unnecessary packaging.

(ix) Restrictive [business] practices (paragraph under consideration).

(x) Guarantees/Responsibilities (paragraph under consideration).


transfers of technology. It may impede and probably will discourage technology transfer involving companies unable to employ large staffs of lawyers and economists. Small organizations can ill afford to remain involved in lengthy negotiations in those nations which require governmental approval of technology transfer agreements.

Sections (ix) and (x) relate to restrictive business practices and guarantees and responsibilities. These paragraphs have not yet been completed. They will probably depend on finalization of the main portions of the Code relating to those subjects.  

While all three groups have concurred in many of the Code principles, some are still under negotiation. Paragraph (ii) sup-
ports the right of each state to employ resources needed to regulate technology transfers. Certainly this right is unchallengeable. If a state wishes to facilitate or regulate these transfers, they should and do have every right to do so. However, the manner in which this privilege is to be implemented has not been agreed upon. This particular paragraph is under consideration.

Clause (iv) includes a proposal of the Group of 77 and Group D countries. It states that the use of economic and other measures by the world community against certain states fully applies to technology transfers. In actual practice, transfers will become more effective and be more widely used if they can remain non-political. Political language, like that in this clause, should not be contained in an international document.

DIVERGENT VIEWS ON CODE DEFINITIONS

The definitional chapter may be the most important section of the proposed Code. It is also the one that can do the most damage to technology transfer. There are presently three versions of definitions being considered. One was prepared by the chairman as a suggested compromise draft text. Two Group B variations would modify the chairman's proposal. Most of my comments will be directed to the Group B second revision. One would expect it to be quite favorable to the Group B organizations.

Code negotiations have assumed that all technology transfer agreements involve a multinational corporation as the technology owner and licensor and a developing-nation organization as the technology recipient and licensee. However, when the definitional chapter is read, the Code seems much broader in scope. It would cover a large percentage of agreements that all multinational businesses enter into on a regular basis. Actually it is probably not the intention of the negotiating parties to in-
clude many types of agreements which appear to be covered by some of the definitions. The original version was much more susceptible to criticism. While the new definitions constitute improvements, they still pose potential problems.

One notable difficulty that the Code negotiators have failed to comprehend is that most corporations are licensees more often than licensors. They pay out much more in royalties than they receive. This is understandable when one considers all the organizations in the world which are engaged in any particular technological area. It seems logical that technical developments would usually be made by someone other than a particular company in any given field. It has become a tradition in many segments of industry to save considerable time and money by taking licenses under technology developed by others. No risks are involved and the production timeframe is substantially shortened.

Many present members of management feel that research and development is expensive and unnecessarily risky. Purchasing the right to use another's technology is less expensive, and a variety of risks is eliminated. This trend should continue in the future. Thus, many of the following remarks deal not only with the licensor's viewpoint, but also with the concerns of licensees. Contrary to the opinion of those who are working on it, the Code probably causes equivalent problems for licensors and licensees.

"Party"

The "party" definition includes individual persons and groups of individuals such as corporations, partnerships, small businesses, and universities. There is nothing in the definition that limits the scope of covered agreements to licenses from large, developed nations' organizations to those in less-developed countries. It should be so limited.

11. The Group B definition states that:
"Party" means any person, either natural or juridicial, of public or private law, either individual or collective, such as corporations, companies, firms, partnerships, and other associations, or any combination thereof, whether created, owned, or controlled by States, government agencies, juridicial persons, or individuals, [including so-called incorporated branches, subsidiaries and affiliates, joint ventures, or other entities directly or indirectly controlled by them,] as well as States/Governments, government agencies, and international organizations, when they engage in an international transfer of technology transaction of a commercial nature.

Tentative Paper By Group B on Definitions and Scope of Application, para. 1(a) (1978).
Transfer of technology transactions are defined as agreements between parties which have as their main purpose any of five different categorical transfers. The first group includes assignment, sale, and licensing of all forms of industrial property, insofar as they are an integral part of such transactions. This provision embraces the mere naked licensing of a patent or trademark as a transfer of technology transaction. Such trademark licenses might encounter difficulties in the United States under the Lanham Act. Yet there are perfectly valid trademark licenses where no actual technology is transferred except for the right to use the trademark subject to appropriate product quality control. This is particularly true of the trademark licensing business involving designer names, motion picture or television characters, and sporting figures.

If an American company is sued for infringement of a United States patent owned by a foreign corporation which had developed the technology in its own country, settlement of the suit could result in a mere naked patent license between the two companies. Though no trademarks or know-how would be conveyed, this agreement would be within the purview of the Code as it is clearly comprehended as a transfer of technology transaction. This definition is in need of modification. The Code should not apply to transactions which are naked assignments.

12. "Transfer of technology' means the transfer of production technologies and technical knowledge and integrally associated management or marketing techniques, as well as the supply of technical services related thereto, and does not extend to transactions involving only the sale or lease of goods." Id. para.2.
13. Id. para.3. The five listed purposes are:
(a) Assignment, sale, and licensing of all forms of industrial property, including patents, utility models, industrial designs, as well as trademarks, service marks, service names, and trade names insofar as they are an integral part of such transactions;
(b) Provision of know-how and technical information in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, specifications, and equipment for technical training;
(c) Provision of know-how and technical expertise, including marketing and management techniques, and technical services through technical, advisory, and managerial personnel and personnel training;
(d) Provision of the technological content of technical and operational services and co-operation for the installation, operation, and functioning of plant and equipment in connection with turn-key projects;
(e) Provision of the technological content of purchases, leases, and other forms of utilization or acquisition of machinery, equipment, intermediate goods, and/or raw materials in so far as they are an integral part of such transactions.
Id. paras. 3(a)-3(e).
sales, or licenses of patents, inventor's certificates, utility models, industrial designs, trademarks, service marks, and trade names.

Clause 4 of the definitional chapter deals with the scope of the Code.15 A transfer transaction between parties which do not reside or are not established in the same country is apparently encompassed by the Code, even if the transfer itself occurs in one nation. This anomaly must be remedied. Know-how and technical information should be provided by one party to another across national boundaries before a transfer is deemed to be within the realm of covered transactions.

"Acquiring" and "Supplying" Parties

An "acquiring party" is defined as the "party which obtains a license to use or exploit, purchases or otherwise acquires technology of a proprietary or non-proprietary nature and/or rights related thereto in a transfer of technology." Thus, it is apparent that anyone could be a technology acquiring party. The scope of the Code should be restricted. It should not apply to transactions in which the acquiring party is located in a developed nation. Such a limitation would comport with the Code's main theme of encouraging development of underdeveloped countries.17

A "supplying party" is one "which licenses, sells, assigns, or otherwise provides technology of a proprietary or non-proprietary nature and/or rights related thereto in a transfer of technology." Any technology transfer could be regulated by the Code regardless of the minimal contribution made by various suppliers. The Code of Conduct should not apply to transfer of technology transactions when the supplying party is a small business,19 a university, or one or a small number of individuals. Nor should it apply when the transaction is an employment or

15. The Code of Conduct would apply to "international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party or when a transfer of technology transaction is entered into between parties which do not reside or are not established in the same country." Tentative Paper By Group B on Definitions and Scope of Application, para. 4 (1978).

16. "The Code of Conduct is universally applicable in scope and is addressed to all countries and groups of countries, irrespective of their economic and political systems and their levels of development." Id. para. 5.

17. See note 20 and accompanying text infra.


19. A "small business" could be defined by the United States government.
consultant agreement or is an agreement which has research and development as one of its objectives.

**Rights Transferred in More Than One Country and Unsubstantial Transfer of Technology Transactions**

One common problem is that a large number of licensing agreements involve more than one country. For example, often one may acquire "worldwide rights" under a form of technology. At other times, one may acquire rights for the United States and Canada or Europe. Assume one American company obtains a license from another which grants the former worldwide rights to make, use, and sell under this technology. This would permit the licensee to manufacture the product in another country. The Code should not regulate this type of an agreement. One way to remedy this situation is to specifically exempt such arrangements from the Code. It should not apply to transfer of technology transactions which occur when the technology is initially transferred within national boundaries between the supplying and acquiring parties.

Only substantial agreements should be covered by the Code of Conduct. Fairly small and uncomplicated arrangements should not be burdened by the great number of possible clauses and approvals. Those under a certain size should be excluded from the Code. The exact terms could be negotiated, but a reasonable exemption guideline could be those transactions in which both parties agree that the contemplated payments involved for the first five years of the agreement would not exceed $1,000,000, based on the value of United States currency as of January 1, 1979.

**SPECIAL TREATMENT FOR DEVELOPING COUNTRIES AND NATIONAL REGULATION OF TRANSFER OF TECHNOLOGY TRANSACTIONS CHAPTERS**

One of the few sections which has been tentatively agreed upon is the one demanding that technology owners provide special treatment for developing nations and organizations.20 It includes a number of rather sweeping statements designed to

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20. The agreed chapter on special treatment for developing countries provides:

A. Taking into consideration the needs and problems of developing countries, particularly of the least developed countries, governments of developed countries, directly or through appropriate international organizations, in order to facilitate and encourage the initiation and strengthening of the scientific and technological capabilities of developing countries so as to assist and co-operate with them in their
definitively engrain the principle that these underdeveloped
efforts to fulfill their economic and social objectives, should take ade-
quate specific measures, \textit{inter alia}, to:

(i) facilitate access by developing countries to available
information regarding the availabilities, description, location and, as far
as possible, approximate cost of technologies which might help those
countries to attain their economic and social development objectives;

(ii) give developing countries the freest and fullest possible
access to technologies whose transfer is not subject to private deci-
sions;

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

(iv) assist and co-operate with developing countries in the
assessment and adaptation of existing technologies and in the develop-
ment of national technologies by facilitating access, as far as possible,
to available scientific and industrial research data;

(v) co-operate in the development of scientific and
 technological resources in developing countries, including the creation
and growth of innovative capacities;

(vi) assist developing countries in strengthening their
 technological capacity, especially in the basic sectors of their national
economy, through creation of and support for laboratories, experi-
 mental facilities, and institutes for training and research;

(vii) co-operate in the establishment or strengthening of
 national, regional, and/or international institutions, including technol-
ogy transfer centers, to help developing countries to develop and obtain
the technology and skills required for the establishment, development,
and enhancement of their technological capabilities including the de-
sign, construction, and operation of plants;

(viii) encourage the adaptation of research and development, en-
gineering and design to conditions and factor endowments prevailing in
developing countries;

(ix) co-operate in measures leading to greater utilization of the
managerial, engineering, design, and technical experience of the per-
sonnel and the institutions of the developing countries in specific eco-
 nomic and other development projects undertaken at the bilateral and
multilateral levels;

(x) encourage the training of personnel from developing
 countries.

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

(i) contribute to the development of national technologies in
developing countries by providing experts under development assist-
ance and research exchange programmes;

(ii) provide training for research, engineering, design, and other
 personnel from developing countries engaged in the development of na-
tional technologies or in the adaptation and use of technologies trans-
ferred;

(iii) provide assistance and co-operation in the development and
administration of laws and regulations with a view to facilitating the
transfer of technology;

(iv) provide support for projects in developing countries for the
countries must be assisted. It has encountered little objection in the negotiating process.

The chapter on national regulation of transfer of technology transactions\textsuperscript{21} is fairly straightforward. Section 3.3(g) provides that states should analyze and evaluate transactions in order to
development and adaptation of new and existing technologies suitable to the particular needs of developing countries;
(v) grant credit on terms more favorable than the usual commercial terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transactions so as to reduce the cost of projects and improve the quality of technology received by the developing countries.

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

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

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

Proposed Code of Conduct, Special Treatment For Developing Countries Chapter (1978).

21. The Proposed Code of Conduct National Regulation of Transfer of Technology Transactions Chapter:

3.1 In exercising their right to adopt laws, regulations and rules, and policies with respect to transfer of technology transactions, States may adopt such measures \texttt{[as]} \texttt{[relating to] \texttt{[evaluation, [negotiation]*]} \texttt{[renegotiation]*] and registration of agreements and arrangements involving transfer of technology transactions [taking into consideration their commitments arising in this field from international treaty obligations to which they have subscribed and the provisions of the Code of Conduct]* [in accordance with their international obligations under international law, treaties, and other agreements and taking into account the provisions of the Code of Conduct]** [on the basis of universally acknowledged principles and norms of international law and treaty obligations and with respect to the provisions of the Code of Conduct]**

3.2 In exercising this right States should act on the basis that:
A. These measures should:
   (i) Recognize that a close relationship exists between
assist parties in their negotiations. In practice this “assistance” should delay large technology transfer operations and signifi-

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technology flows and the conditions under which such flows are admitted and treated;

(ii) Promote a favorable and beneficial climate for the international transfer of technology;

(iii) Take into consideration in an equitable manner the legitimate interests of all parties;

(iv) Encourage and facilitate transfers of technology to take place under mutually agreed, fair, and reasonable terms and conditions having regard to the Principles and Objectives of the Code;

(v) [ensure effective protection of industrial property rights and other rights of parties involved in the transfer of technology.]* [ensure an equitable balance between the needs of economic and social development, particularly of the developing countries, and the rights granted by industrial property;]* [ensure effective protection of industrial property rights and other related rights]***

(vi) take into account the differing factors characterizing the transactions such as local conditions, the nature of the technology, and the scope of the undertaking.

B. Necessary changes in the light of evolving circumstances in the measures indicated in paragraph 3.1 should be made [with proper regard for the existing rights and obligations of the parties concerned]**/*** [and in an orderly manner] **

C. Measures indicated in paragraph 3.1 including decisions of competent administrative bodies should be applied equitably, in accordance with [fundamental fairness]** and established procedures of law [and without discrimination]** [and should be applied without any discrimination]***. Laws and regulations should be clearly defined and publicly and readily available. To the extent appropriate, relevant information regarding decisions of competent administrative bodies should be disseminated.

3.3 States should apply the provisions of paras. 3.1 and 3.2 when adopting and implementing measures on regulation of the flow and effects of transfer of technology, finance, and technical aspects of technology transactions and on organizational forms and mechanisms dealing with:

**Finance**

(a) Currency regulations on foreign exchange payments and remittances;

(b) Conditions of domestic credit and financing facilities;

(c) Transferability of payments;

(d) Tax treatment;

(e) Pricing policies;

**Technical aspects**

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

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

(h) Use of local and imported components;

**Organizational forms and mechanisms**

(i) Terms and conditions and the duration of transfer of technology transactions;

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

(k) Regulation of foreign collaboration arrangements and agree-
cantly impede less substantial ones. This is another reason why less complicated arrangements should be exempted from this Code and local regulations. Individuals and small companies do not have the staff, expertise, time, and funds that would be prerequisites to having their agreements approved by various governmental associations. It is more profitable for them to utilize their assets in other ways. The return on smaller transfer agreements would be negligible after awaiting approval for long periods of time.

RESTRICTIVE BUSINESS PRACTICES

The Chapeau

One of the major problems with the Code of Conduct emanates from the chapter on restrictive business practices. While the language employed prevents practices which nearly everyone condemns, it may be interpreted as forbidding activities universally accepted as legitimate in certain factual situations. It is inappropriate and impractical to have a form license agreement for this very reason. Each transfer of technology transaction is unique in its aspects and ramifications. No standard set of clauses covers them all. Each transfer is the result of separate negotiations involving varying tradeoffs which seek fairness to all parties. The distinct technologies and business facts make standard agreements impractical.

A number of restrictive business practices have been mentioned in past international trade discussions. From time to time, some have been added while others were deleted. At present there are twenty listed practices, though few can claim the

ments that could displace national enterprises from the domestic market,

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

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

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

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

The Group of 77 reserves its position on all provisions of this chapter until it has had the opportunity to examine the final proposed draft of the whole Code.
support of all of the groups of nations. In the Chapeau, the introduction to the restrictive business practices chapter, there are two main issues still under discussion. The first is whether arrangements between parent companies and subsidiaries should be regulated. The Group of 77 believes that they should be subject to regulation. The Group B nations generally disagree. Somewhat surprisingly, the United States delegation has received minimal support from the other developed countries. This Group B division has left this issue in doubt. The other problem is an outgrowth of the preamble controversy on whether the Code guidelines are to be mandatory or voluntary. Group B states have steadfastly desired the term “should” not to be strengthened to “shall” in the request that parties refrain from condemned practices.

22. Section A, the Chapeau, enunciates the basic restrictive business practices prohibition:

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

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

Listed Practices

Grantback

The first listed practice is labeled "grantback provisions."

One of the remaining subjects for discussion is whether this sub-section should apply to exclusive and non-exclusive grantback. Group B would restrict the ban to exclusive grantback. The other nations do not concur. Another trouble-spot is whether grantbacks should be prohibited unless there is offsetting consideration or reciprocal obligations from the supplying party. The Group of 77 supports this restriction for all grantbacks. The Group B nations want it to apply only to exclusive grantbacks. If the Group of 77 version was adopted, it might imply that a non-exclusive grantback is improper without offsetting consideration or reciprocal obligations from the supplying party. Unfairness might result in individual situations.

Many times in mere confidential disclosure arrangements, the disclosing party provides in a clause that if the receiving party improves upon the confidential information, the supplying party will receive a non-exclusive, royalty-free license back and will continue to practice the basic technology and the improvement. If this was not the case, suppliers would not divulge confidences or would make only incomplete disclosures. In appropriate circumstances, such agreements are the most equitable approach to the difficult task of handling confidential disclosures of technical information. Yet the Group of 77 suggestion would force abandonment of these arrangements since they fail to provide offsetting consideration or reciprocal obligations.

Challenges to Validity

The challenges to validity clause provides that it is a restrictive business practice to require "the acquiring party to refrain from challenging the validity of patents and other types of protection for inventions involved in the transfer." Group B wants to insert the modifier "unreasonably" at the beginning of this statement. This would mean that a rule of reason would be

23. The proposed language of this section describes prohibited grantback as:

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

Id. para. B1.

used to analyze a particular situation, rather than relying on an absolute, inflexible rule. This section also provides that the rights and obligations of the parties will be determined by the appropriate applicable law and consistent terms of the agreement.\textsuperscript{25} While this provision is in general accord with \textit{Lear, Inc. v. Adkins},\textsuperscript{26} it changes the law in many countries. Of course, \textit{Lear} itself causes some practical problems in our country which have not yet been judicially resolved.\textsuperscript{27}

If negotiations are undertaken between two parties and a patent license is involved, a royalty rate may be settled at a lower value in a straightforward business discussion than after extensive litigation in which the patent's validity was upheld. The cost of enforcing a patent may easily exceed one-half of one million dollars in today's market. If a patent owner may be forced to expend that amount to uphold its validity, he should be entitled to receive a somewhat higher royalty rate. Unfortunately, the particular language of this section makes it possible, and sometimes desirable, for the acquiring party to negotiate the lowest conceivable royalty. As soon as he establishes the royalty in the signed license agreement, he can then challenge the validity of the patent, and leave himself in an enviable position. If he fails to prevail on his invalidity contention, he will still have the license at the low royalty rate. A court would probably impose the low rate regardless of whether the license remained in existence. If the patent contest is successful, he pays nothing.

\begin{itemize}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} 395 U.S. 653, 162 U.S.P.Q. 1 (1969).
\item \textsuperscript{27} \textit{Lear} itself dealt with the problem of a conflict in the attempted accommodation of the common law of contracts and the federal patent law requirement that ideas in general circulation be dedicated to the public unless legally protected by a valid patent. The respondent inventor agreed to license his discovery to his company. Lear, Inc. reserved the option to terminate the license if a patent on the invention was refused or held invalid subsequently. A patent was issued, but the company later discovered that there was a patent that fully anticipated Adkins' discovery. Respondent brought suit when the company terminated royalty payments.

The trial court allowed the company to defend by questioning the validity of the patent. The California Supreme Court held that the license agreement originally entered into was binding, and that the doctrine of estoppel precluded challenging the patent's validity. 67 Cal. 2d 882, 435 P.2d 321, 156 U.S.P.Q. 258 (1967). The Supreme Court vacated and remanded. 395 U.S. at 676, 162 U.S.P.Q. at 10. The rules of contract law had to yield to federal patent law inconsistent thereto. After the patent had been issued in this case, the demands of the public interest, represented by patent doctrine, replaced contractual obligations as the core of the case. Patent policies allowed the company to terminate payments under the agreement pending its challenge of the patent's validity. \textit{Id.} at 674, 162 U.S.P.Q. at 9. See also Rose & Martin, \textit{Recent Developments in Patent Office Practice—1978}, 13 J. MAR. L. REV. 1 (1979).\end{itemize}
Nevertheless, the patent owner would have to have spent an exorbitant amount of money defending his patent. Even if the patent holder prevails, he is left with the nominal royalty. It would be more equitable to permit the patent owner to terminate the licensing agreement if validity was challenged. Thus, if the validity of the patent was upheld, there would be supplementary negotiations, and a new royalty would have to be set. This challenges to validity section, as proposed, encourages litigation because the party taking a license from the patent holder is in a "can't lose" situation. One principal objective of technology transfer agreements should be to reduce litigation. This provision should be altered toward attainment of this goal.28

**Exclusive Sales or Representation Agreements**

The restrictive business practice chapter prohibits "[r]equiring the acquiring party to grant exclusive sales or rep-

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28. Five other restrictive business practices are listed:

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

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

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

6. Restrictions [unjustifiably]** regulating prices to be charged by [competing]**/*** acquiring parties in the country to which the technology was transferred for products manufactured or services produced using the technology supplied;

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

presentation rights to the supplying party or any person designated by the supplying party. . . .”29 In a number of situations, it may be desirable for the acquiring party to manufacture and sell goods to the supplying party or another designated person. This would permit him to produce the item without having to confront marketing problems. It is not unusual in agreements between two developed-country organizations to have one with substantial technology enter into a joint venture with one with considerable marketing expertise in a particular nation. Such an undertaking may amount to a profitable arrangement for both parties, as it combines concentration on manufacturing with local marketing skills.

However, it appears that if such a provision was inserted in a transfer of technology agreement, it might run counter to the restriction against “requiring” the acquiring party to grant these rights. It would amount to a restrictive business practice even though the acquiring party acquiesces, and it is beneficial for him and his country. Even if a statement was inserted in the agreement acknowledging that such was the acquiring party’s desire, many governmental agencies would probably consider it a self-serving statement entitled to no weight. Hence, this strict language appears to forbid some advantageous arrangements. An absolute ban of a particular practice would in many situations frustrate the intention of all parties concerned.

**Tying Arrangements**

The tying arrangements clause30 presents similar constructional difficulties. It proscribes “requiring” acceptance of additional technology, future inventions, and improvements not desired by the acquiring party. What if the acquiring party requests future inventions and improvements and incorporates a

29. *Id.* para. B8. This provision makes an exception for “sub-contracting or manufacturing arrangements wherein the parties agreed that all or part of the production under the technology transfer arrangement will be distributed by the supplying party or any person designated by him.” *Id.*

30. Clause 9 states that a party commits a restrictive business practice by:

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

[This shall not apply where required to maintain quality to protect the supplier’s reputation when his trade or service mark or trade or corporate name is used by the acquiring party, or to meet the requirements of a guarantee, where adequate specification of ingredients is not feasible or would involve disclosure of a trade secret.]***/***

*Id.* para. B9.
demand in the agreement so stating? Is he barred by the language that requiring acceptance of this additional future technology is restricted? Would the government or United Nations body which would be approving the agreement claim that these items were merely self-serving such that the acquiring party was forced to acquiesce? This anomaly points out why the term "unreasonably," which the Group B states would insert, should modify this clause. The per se rule will inevitably occasion harsh results in individual factual situations. It should be altered to comport with the Group B viewpoint.

The second tying arrangements paragraph relates to maintaining quality to protect a supplier's reputation when his trade or service mark or trade or company name is used by the acquiring party. It is quite important and should be included. Both the Group B and Group D countries support it.

Export Restrictions

Various export restrictions constitute forbidden restrictive business practices. Because the groups of countries have promulgated divergent forms, this clause is extremely difficult to understand.

— Quantity Limitations

Section 10, in conjunction with the limitations on volume and scope, precludes utilization of quantitative limitations in technology transfer agreements. If one company granted a license to another for the construction of a plant with a one million pound production capacity and required a payment of $500,000, is it really unreasonable to demand an additional equivalent sum if the licensee wants to open another factory of identical output? The amount expended for the transferred technology should relate to the degree that it is utilized. Minimal usage should require a fairly nominal monetary outlay. Relatively more extensive use should be compensated for.

31. The prohibited export restrictions include:

[Unreasonable] Restrictions which prevent or [substantially] hinder export by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rates of payments for exportable products resulting from the technology supplied [, unless justified] [or where relevant has retained its confidential character] [or where the supplying party has granted] [exclusive right] [to use the relevant technology.]

Id. para. B10.

32. See note 37 and accompanying text infra.
accordingly. One approach would be a percentage royalty. Another method would charge lump-sum payments based on the capacity of the plant involved. These could possibly be payable periodically. However, clause 10 might mean governments could claim that a quantitative limitation on plant size would hinder the exportation of the item produced and, therefore, be an unreasonable business practice.

— Prevention of Exports Protected by Supplying Party's Patent Rights

The portion of this section justifying export restrictions when they prevent exportation of products to countries where they are protected by the supplying party's industrial property rights should be maintained. This important provision is supported by both the Group B and Group D nations.

— Prevention of Exports when Supplying Party Has Granted Licenses to Others

A proper conclusion is reached in accepting export restrictions where the supplying party has granted an exclusive right or license to use the relevant technology. However, the first country in which a right was granted, such as Mexico, would then acquire the right to export to all other countries. If the patent owner granted a license in Argentina under the Argentine patent, the Mexican company would have the right to export to Argentina under the earlier agreement because there would not have been a license granted there previously. The Argentine license would be limited by the prior grant, but would still be effective against subsequent licenses conferred in other countries. If the "exclusive right" language has to be included, the Code should state that countries in which a license is granted within five years of the preliminary grant could be excluded from export rights if the products are protected by the supplying party's industrial property rights.

These export restrictions should not be construed solely as developed-country organization attempts to impose their will on enterprises in less industrialized nations. For example, a Mexican company with an exclusive license for its own country under a patent owner's Mexican patent could be financially ruined if a large American licensee under a United States patent could import into Mexico. The technical expertise and financial power of the American firm would hamper Mexican business efforts. Nor would the Mexican company be pleased if a Hong Kong licensee began importing into Mexico and selling products at Mexican prices.
If legitimate industrial property rights exist in the countries involved, it would usually be to the advantage of the recipient developing-country organization if imports from other states were prohibited. For many years, developing-country organizations will encounter difficulties competing with entities from other nations. Without the protection of the supplying party's patents, acquiring parties face trouble competing in their own markets against enterprises with great expertise and those employing "cheap labor."

**Cartels/Patent-Pool or Cross-Licensing Agreements**

Patent-pool or cross-licensing agreements among technology suppliers which impose restrictions on territories, quantities, prices, customers, or markets, or limit access to new technological developments, are prohibited.\(^3\)

--- **Territories**

Two organizations would be prevented from cross-licensing under their respective technologies in a small number of countries which either prohibit exports to other countries where one party owned patents or limit the use of certain technology to distinct markets. A United States corporation may have cross-licensing agreements with many American and foreign companies wherein it acquires non-exclusive patent licenses in its field of interest. Other parties obtain rights in their areas of expertise. But an agreement with a Canadian company would apparently be improper under this section. There would be a restriction on the market involved because the American enterprise would be unable to utilize the Canadian entity's technology in markets other than in its speciality. The Canadian company would be restricted to using the American know-how in its own area of expertise. An impropriety would also apparently occur under a cross-licensing agreement which does not grant worldwide rights under all of one party's patents.


> [Cartel,]* patent-pool or cross-licensing agreements [and other collusive arrangements]*/**/*** among technology suppliers [], excluding necessary restrictions, ancillary to joint ventures or co-operative research arrangements,**/*** [including those between and among parent companies, their subsidiaries, and their affiliates,]* which [unreasonably]** impose restrictions [*, *inter alia,*]*** on territories, quantities, prices, customers, or markets, or limit access to new technological developments [in order to]**/*** [or]* attempt to dominate an industry,[]**/*** market [or]* [by controlling a]**/*** technological process, and that have adverse effects on the transfer of technology.
— The Scope of the Cross-Licensing Restrictions

The developing nations want this section to include cross-licensing arrangements between and among parent companies and their subsidiaries and affiliates. On the contrary, they should definitely be excluded. Another Group B proposal is well-founded. The modifier "unreasonably" should be included to prevent the possible harsh results of a per se prohibition of the aforementioned cross-licensing agreements. The term "technology supplier" appears to encompass any company involved in any type of cross-licensing. The practice contemplates a flow back and forth between the parties involved. A license agreement may join two companies, one technology supplier and one acquirer. However, if improvements are licensed by the original acquiring party to the original supplier, the former would become a "technology supplier." In such a case, both entities would be "technology suppliers" and their agreement would amount to a prohibited cross-license. This situation should be remedied.

— Quantity

Where improvements are supplied by one or both parties as part of a cross-license agreement, could the quantity manufactured by one or both be restricted because lump-sum royalties were sufficient to construct only one plant of a certain capacity? Such an arrangement would be prohibited because contained in a cross-licensing agreement. This section is extremely inclusive. Among many ramifications, it may have a substantial negative impact on legitimate transfers of technology.

Restrictions on Publicity

Section 12 prohibits restrictions regulating the advertising or publicity by the acquiring party, subject to delineated exceptions. The proposed Code would proscribe:


35. The proposed Code would proscribe:

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

of paramount importance. However, this clause would present a problem if the advertising or publicity did not actually make reference to the supplying party's trademark on the product. The supplying party would not be able to review this advertising. Thus, the reputation of the trademark could be severely damaged if the products were publicly misrepresented. The fact that the publicity makes no reference to the supplier is not particularly pertinent. The important inquiry point is as to whether the product bears the supplying party's trade name or trademark.

In various cases, it may be perfectly proper to regulate advertising or publicity. There are a number of listed exceptions to the preliminary clause. All are appropriate and necessary. A number of other exceptions are conceivably just as pertinent. Consider an advertising statement that a product is suitable for a particular use, when in actual manufacture, such use would pollute local air and water in violation of governmental regulations. The product supplier would be displeased by such publicity, as the item's function is misconstrued. The supplier might incur legal liability in addition to damage to his reputation and trademark. This and other situations point out the desirability of selective regulatory review of advertising or publicity.36

**Limitations on Volume, Scope, and Capacity of Production**

This limitations provision37 is supported by the Group of 77 and Group D nations. Group B has not yet agreed to include this wording. It will be the subject of further negotiation. The Group of 77 would include a supplementary field of activity restriction ban. Group D would only prohibit unreasonable limitations on volume, scope, and capacity of production.

It is perfectly legitimate to grant a license for only a certain volume or production capacity depending on how extensive a

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36. Clauses 13 and 14 enumerate practices that parties are encouraged to refrain from:

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

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


37. "[Unreasonable]*** [Restrictions on the scope, volume and/or capacity of production|*/*** [and/or field of activity]"* are prohibited. *Id.* para. B15.
monetary outlay is actually made. If a licensee’s expenditure entitles it to produce a determined output, it should be limited to that amount.

The additional limitation urged by the Group of 77 would prohibit all usage of field of activity restrictions. In actual practice, most license agreements provide that technology is to be utilized on a particular product. This is a “field license.” The definition of the field in a license agreement is often one of its most important clauses. One may have technology for catalyzing and manufacturing a number of polyolefin materials such as polyethylene and polypropylene. A polyethylene producer desiring a license under this technology may have no interest in manufacturing polypropylene. The fee he is prepared to pay may only be sufficient to let him use the technology for polyethylene. If he wanted to prepare polypropylene, he would have had to have paid an additional sum. His license is beneficially limited to use in conjunction with a single manufacturing process. Such a license would be prohibited by the proposed language, however.

Similarly, a licensee may wish to acquire physical development technology for use in metal printing plate production. A great number of inventions could emanate from this technology. Assume a licensee is granted the right to use the supplier's physical development technology to make metal printing plates. The supplier may want to retain the use of the same technology for its own main line of business. This would be prohibited by the Group of 77 proposal. The supplier would be forced to grant the licensee an exclusive license for all fields. This would prevent it from using the technology in its major line of business. Suppliers would then probably refuse to license their technology to anyone. The public would be detrimented by a failure to maximize technical resources.

Certainly there are instances in which restricting a license to a particular field would be improper. However, there are situations where such limitations are perfectly proper at least when the business operation in question is investigated by the people involved. At one time, the United States Department of Justice deplored all fields of use licenses. In more recent years, this policy has been altered. The government has come to realize that these licenses are appropriate, and even necessary, in certain situations. The Group of 77's per se rule on field of activity re-

38. Included among possible inventions would be: chemical baths; particular coatings to be used on the metal substrate; methods of reducing the coating upon exposure to light; and developments of the coating. The same physical development technology may also be used to make prints on paper, film, or on other substrates.
restrictions should be replaced by a prohibition that selectively determines which licenses are neither practical nor useful.

**Use of Quality Controls**

The Group of 77 and Group D countries would prohibit “use by the supplying party of quality control methods or standards which are not needed or not wanted by the acquiring party.”  

Group D would not ban those necessary to meet the requirements of a guarantee. Both groups would make an exception when the product bears a trademark, service name, or trade name of the supplying party.

There are times when quality control methods should be used whether or not needed or wanted by the acquiring party. For example, a pharmaceutical licensee may produce without complying with proper quality control safeguards. The product may be faulty and harm consumers. Should not the manufacturing licensees be subject to quality controls for the benefit of the public? The Group B approach takes cognizance of this duty and responds affirmatively.

Technology suppliers have both a moral and legal obligation to guarantee that products made by their licensees are of appropriate quality standards and safe for their intended use by consumers. Products derived from modern technology are often complex. There must be strict controls so that they are properly manufactured. These are not mere attempts by licensors to improperly bind licensees. Often quality controls are absolutely necessary. Hence, broad prohibitions on these requirements, under the guise of preventing oppressive action by suppliers, preclude both supplier and manufacturer from protecting the very purchasers that each attempts to serve. Certainly quality controls are not indispensable components of all licenses. However, in many they are mandatory. If not permitted, defective products may be extremely dangerous to consumers and impose legal liability on manufacturers and technology licensors.

**Other Restrictive Business Practices**

Another proposed prohibition supported by the Group of 77 and Group D nations provides that the “requirement to use a particular trademark, service name, or trade name when using the technology supplied” is a restrictive business practice.

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39. *Id.* para. B16.
40. *Id.*
41. *Id.*
42. *Id.* para. B17.
This section could cause a problem, particularly if an agreement provides that a trademark is to be used and the acquiring party is eager to use it to help him increase his sales volume. If utilization of the mark is provided for in the agreement, this provision would invalidate the transfer. Group B has recognized the benefits of certain trademark obligations and steadfastly opposed inclusion of this section.43

Formulating “unlimited or unduly long duration” arrangements are also barred.44 At what point is the “unduly long” line of demarcation reached? In some cases, three or four years might be unduly long. It should be noted that in Aronson v. Quick Point Pencil Co.,45 the United States government, in its brief, found nothing wrong with unlimited term transfer of technology agreements. Actually, courts need not be concerned that enforcing royalty obligations for indeterminate periods would undermine federal antitrust policies.46

Exceptions

The “exceptions” sub-chapter provides that any of the previously mentioned restrictive business practices may be exempted by a determination by “competent national authorities” of the acquiring party’s country that it is in the public interest.47 This saving procedure will probably hamper licensing efforts

43. Id. Group B also opposes clause 18 which prohibits “obliging the acquiring party to provide equity capital or to allow the supplying party to participate in the management of the acquiring party as a condition to obtaining the technology.” Id. para. B18.

44. Id. para. B19.

45. 99 S. Ct. 1096, 201 U.S.P.Q. 1 (1979). In Quick Point, petitioner contracted with the respondent company, granting it exclusive production and sales rights to a keyholder on which a patent application was pending. Petitioner was to receive a 5% royalty reducable to 2-1/2% if the patent was not allowed within five years. The patent application was rejected, and the royalty was accordingly reduced. After paying reduced royalties for fourteen years, the company sought a judgment declaring the agreement unenforceable. The district court entered summary judgment in the inventor’s favor. The Eighth Circuit reversed. 567 F.2d 757, 196 U.S.P.Q. 281 (8th Cir. 1977).

The Supreme Court granted certiorari “to consider whether federal patent law pre-empts state contract law so as to preclude enforcement of a contract to pay royalties to a patent applicant, on sales of articles embodying the putative invention, for so long as the contracting party sells them, if a patent is not granted.” 99 S. Ct. at 1097, 201 U.S.P.Q. at 3. Responding negatively, the Court held that federal patent law was not a barrier to the enforceability of the contract in question, and reversed, thereby reinstating the lower court’s judgment for the defendant. Id. at 1101, 201 U.S.P.Q. at 6. See also Altman, A Quick Point Regarding Perpetual Trade Secret Royalty Liability, 13 J. MAR. L. REV. 127 (1979).


47. Section C, in its entirety, provides:
with bureaucratic redtape. Less extensive arrangements will be especially restricted as smaller organizations have insufficient financial resources and employee expertise to argue their positions before national authorities.

GUARANTEES/RESPONSIBILITIES/OBLIGATIONS CHAPTER

Common Provision on the Negotiating and Contractual Phases

While it is certainly appropriate to demand that the parties observe fair and honest business practices in connection with transfer of technology agreements, it is also provided that they shall or should be responsive to the "economic and social development objectives" of the respective countries. Frankly, the specific goals of the United States and other countries defy ready determination. Certainly, minor technology owners have no information on these possible goals. This exemplifies the problems developed by the Code drafters' apparent assumption that all technology transfers are multimillion dollar operations between parties having the time and talent to determine the economic and social development objectives of the countries affected. The majority of transfers are not of this sort. Hence, literal compliance with this responsibility is improbable.

Negotiating Phase

One negotiating phase clause suggests that the parties consider requests to include in their agreements a number of provisions and thereafter enunciates examples: the use of locally

48. Id. Guarantees/Responsibilities/Obligations Chapter, para. Al. 49. Id.
50. The responsiveness to development objectives clause provides:

[Upon request of one of the potential parties to the technology transfer agreement, the other potential [The supplying] shall [should], to the extent practicable [and appropriate], be responsive to [such of the officially declared] countries of the parties as have been clearly and specifically indicated by the requesting party; therefore each party, and in particular the potential technology supplier, should consider requests to include in the agreement upon fair and reasonable commercial terms and conditions [This includes, inter alia,]:
available resources;\textsuperscript{51} the rendering of technical services;\textsuperscript{52} and unpackaging the various elements included in the particular offer.\textsuperscript{53} The following section demands that both potential parties adhere to fair and honest business practices.\textsuperscript{54}


51. Use of locally available resources:

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

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


52. Parties should consider requests to include “specific provisions for the rendering of technical services in the introduction and operation of the technology to be transferred.” \textit{Id.} para. B2(b).

53. Unpackaging:

Upon request of the potential acquiring party, the potential supplying party [* *** [should]***, to the extent [* practicable]** [possible]** [be responsive to inquiries about]** [make known]** the various elements included in a particular offer, [including the price to be charged or other consideration to be made for each item involved in the transaction]** [as far as such information (unpackaging) is necessary to evaluate the potential supplying party’s offer]**.

\textit{Id.} para B2(c).

54. The fair and honest business practices statement delineated in the third paragraph of the Guarantees chapter provides:

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

(a) Both potential parties

(i) \textit{Fair and reasonable terms and conditions}

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

(ii) \textit{Relevant information}

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

(iii) \textit{Confidential information}

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

(iv) \textit{Termination of negotiations}

May cease negotiations if, during the negotiations, either party determines that a satisfactory agreement can not be reached;
Section 3(a)(iii) provides that both parties “should keep secret, in accordance with any obligation, either legal or contractual, all confidential information received from the other party and make use of the confidential information received from a potential party only for the purpose of evaluating this party’s offer or request or for other purposes agreed upon by the parties.” Could this mean that absent a statute or a binding contractual arrangement between the parties, all confidential information received from the other party must remain secret except for the purpose of evaluating the other party’s offer? If so, this provision is objectionable as, absent statute or agreement, there should be no duty to keep material confidential. How long must such information be kept secret? Is it susceptible to valid use if it becomes available to the public, or is obtained legitimately from other sources? What happens if the receiving party already possesses it? These questions await response.

However, even if this section contemplates information only being kept secret pursuant to an appropriate statute or contractual provision, and then only to the extent provided therein, is the statement really necessary? The parties should abide by their legal and contractual duties in all aspects of an arrangement, not merely those relating to confidential information. If no such obligation exists, a negotiating party should not be bur-

(b) Potential acquiring party

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

(c) Potential supplying party

(i) Relevant information

[shall]*/*** [should]** disclose, in a timely manner to the potential technology acquiring party any reason actually known to him, on account of which the technology to be supplied when used in accordance with the terms and conditions of the proposed agreement, would not meet particular health, safety, and environmental requirements in the technology acquiring country already known to him as being relevant in the specific case, as well as any serious health, environmental, and safety risks known by the supplier associated with the use of the technology and of the products to be produced by it;

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

Id. para B3.

55. Id. para. B3(a)(iii).
dened by the duty not to disclose.56

**Contractual Phase**

A separate set of guarantees and responsibilities apply to the contractual phase.57 The proposed versions exemplify the Group B-Group of 77 split. The Group of 77 language imperatively provides that all agreements shall contain mutually acceptable contractual obligations and shall be subject to the listed demands. Group B would substitute “should” for “shall” and thereby transform the guarantees into mere guidelines.

56. See also notes 67-75 and accompanying text infra.

57. The contractual phase guarantees set forth are:

The technology transfer agreement [should]** [shall]*/**/*** contain mutually acceptable contractual obligations, including those relating to payments, and where in accordance with fair and reasonable commercial practice, [should normally provide for]** [shall be subject to]*/**/*** the following provisions taking into account the specific circumstances of the individual case:

(i) **Access to improvements**

access by the parties for a specified period or for the lifetime of the agreement to improvements to the technology transferred under the agreement;

(ii) **Confidentiality**

respect for the confidentiality and the use only for the purposes and on terms stipulated in the agreement of any trade secrets, secret know-how, and all other confidential information received from the other party in connection with the transfer of technology;

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

Provisions in this area might be provided elsewhere in the Code

(iv) **Description of the technology**

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

(v) **Suitability for use**

The technology supplier's guarantee that the technology, if properly used in accordance with the specified instructions contained in the agreement, is suitable for the use and operation requirements where such contemplated use and requirements are set forth;

(vi) **Rights to technology transferred**

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

(vii) **Quality standards**

The technology recipient's commitment to observe quality standards agreed upon in cases where the agreement includes the use of the supplier's trademarks, trade names, or similar identification of goodwill, and to avoid actions that may injure the supplying party's goodwill or reputation;

(viii) **Completeness of Information**

The supplying party's guarantee that the technical information to be disclosed will be complete and correct for the purposes directly specified in the agreement.

Id. para. 4.
Access to Improvements

The first suggestion on contract terms mandates considering access by the parties for a specified period or the lifetime of the agreement to improvements to the transferred technology.\textsuperscript{58} This would alter the generally existing practice. In the majority of agreements, there is no access by either party to the other's improvements. Where one has been sued for patent infringement, and the lawsuit results in a license agreement whereby the infringer takes a license under the patent holder's patent, there rarely is any need for provisions dealing with either party's improvements. Note also that if a small business licenses a large corporation some technology, it will probably not desire to grant the enterprise access to its improvements. Does this section compel access to improvements in such cases? While the naked language does, these anomalies identify the weaknesses inherent in an absolute requirement of an access to improvements provision.

Confidentiality

Confidentiality is a cornerstone of technology transfer, and there is extensive support for demands to respect confidentiality for purposes and on terms stipulated in the agreement of any trade secrets, secret know-how, and other protected information.\textsuperscript{59} However, this statement appears to be redundant as it only provides that a party must abide by a term in the agreement. There should be no obligation where there is no corresponding contractual provision.\textsuperscript{60}

Suitability For Use

The fifth responsibility would require that technology suppliers guarantee that the transferred technology is suitable for the use contemplated by the specified instructions contained in the agreement.\textsuperscript{61} In complex manufacturing, instructions, drawings, and operating manuals may fill thousands of pages. According to this section, they must be included in the document of the transfer, nonetheless.

There is no actual need for such a guarantee in most agreements. In some cases, a licensee may be more expert than the licensor and only seek rights under a portion of the technology. For example, a company may take a license under a paper-
feeder owned by another organization which would form one part of the recipient's office copier. There would be no need for a guarantee that the paper-feeder works in the licensee's copier. The licensor may not even know whether the feeder works in that particular use. He may not be that expert in the office copier technology which the licensee employs. It is also probable that the technology owner would not be willing to supply the information the licensor would need to make this type of guarantee. 62

Quality Standards and Completeness of Information

It would be difficult to object to a clause which provides that the technology recipient has a commitment to observe quality standards agreed upon in certain instances. 63 This contract term may not be necessary. This section only applies in cases "where the agreement includes the use of the supplier's trademarks, trade names, or similar identification of goodwill." 64 There may be other cases where quality standards should be imposed. There may be safety or health requirements that could prompt employment of quality standards. Undoubtedly there are other valid reasons for incorporating them into transfer agreements.

In some instances, it may be appropriate for the supplying party to "guarantee that the technical information to be disclosed will be complete and correct for the purposes directly specified in the agreement." 65 However, in many agreements, inclusion of such language may be improper. The aforementioned paper-feeder example is apposite. How would the owner of the paper-feeder technology know whether the particular technology would be fit to use with the licensee's copier technology? The simple answer is that he would not and should not know. This decision should be made by the licensee. This is another example of a proposed clause based on the assumption that all licensing involves large corporations transferring technical expertise to a licensee in a developing country who has no knowledge of the particular business area.

This section could probably be improved by language providing that the technology supplier need not supply any more technical information than he already has in his possession. Often a company takes a license under undeveloped technology realizing that it must be completed. How can the licensor in that

62. See also id. para. 4(vi).
63. See id. para. 4(vii).
64. Id.
65. See id. para. 4(viii).
situation guarantee that the technical information to be disclosed will be complete and correct when all parties realize that it can not be complete and correct if the licensee is still developing it? Many corporations have agreements of this nature. They neither expect nor pay for complete technical information, as the technology has not yet been brought to its full potential.\footnote{Joelson, United States Law and the Proposed Code of Conduct on the Transfer of Technology, 23 Antitrust Bull. 835 (1978).}

**Group of 77 Proposal for a Guarantees Chapter**

The Group of 77 has proposed a chapter on contractual-phase guarantees.\footnote{The proposed sub-chapter would state:}

4. The technology transfer agreement shall be subject to the following provisions, taking into account the specific circumstances of the individual case.

   (i) **Access to improvements**
   access by the acquiring party to improvements relevant to the technology transferred under the agreement during the lifetime of the agreement;

   (ii) **Confidentiality**
   respect for the confidentiality of any trade secrets, secret know-how, and all other confidential information received from the other party in connection with the transfer of technology as stipulated in the agreement, provided that this obligation shall not extend beyond an adequate lapse of time after the transmission of each item of secret information;

   (iii) **No provision**

   (iv) **Description of the technology**
   The technology supplier's guarantee that the technology meets the description contained in the technology transfer agreement;

   (v) **Suitability for use**
   The technology supplying party's guarantee that the technology, if used in accordance with the specifications contained in the agreement, is suitable for the purpose agreed upon by the parties;

   (vi) **Rights to the technology transferred**
   The technology supplying party's representation that on the date of the signing of the agreement, it is, to the best of its knowledge, not aware of third parties' valid patent rights or similar protection for inventions which would be infringed by the use of the technology as specified in the agreement;

   (vii) **Quality standards**
   The technology recipient's commitment to observe quality standards agreed upon in cases where the agreement includes the use of the supplier's trademarks, trade names, or similar identification of goodwill;

   (viii) **Achievement of predetermined results**
   the supplying party's guarantee that the use of the technology will ensure the achievement of a predetermined result under the conditions specified in the agreement;

   (ix) **Completeness of information**
   the supplying party's guarantee that the content of the technology transferred is complete and correct for the specific purposes of the agreement;

   (x) **Training of personnel**
The confidentiality clause appropriately demands respect for the confidentiality of information as stipulated in the agreements. However, the limitation that the obligation will not extend beyond an adequate lapse of time after the transmission of each item of secret information poses potential problems. How long is this period of time to be? In some cases, it might be six months, in others, possibly twenty years. More important, one wonders who is to determine what is an adequate lapse of time.

The Group of 77 would force technology suppliers to guarantee that the technology conforms to the transfer agreement’s description. Another redundancy is caused by inclusion of to provide adequate training to the personnel of the acquiring party or to the personnel designated by it, in the knowledge and operation of the technology transferred, where so required by the acquiring party;

(xi) Provisions of spare parts, components, etc.
the supplying party shall supply the acquiring party, as required, with accessories, spare parts, components, and other requirements produced by the supplying party and necessary for using the technology transferred, at usual prices and for the period specified in the agreement.

5. Consideration for the technology transferred
(a) Fair and reasonable terms and conditions
shall agree to fair and reasonable terms and conditions when technology is transferred, including licence fees, royalties, and other consideration; the price or consideration to be charged shall be non-discriminatory and no less favorable than the consideration usually required by the supplying party or other technology suppliers for similar technologies under similar circumstances;

(b) Consideration for the elements of the technology transferred
(i) The price charged or other consideration made for the technology transferred shall be explicitly determined or, where this is not possible, all the necessary elements for their determination shall be specified;
(ii) The price charged or other consideration made for all elements involved in the transfer of technology transactions, including goods and services insofar as they are part of the transaction, shall be distinctly specified for each item.

6. Purchase of input
Where the acquiring party purchases goods and/or services from the supplying party, or from any enterprise designated by it, the price shall be reasonable and fair and not higher than current world prices for goods or services of the same quality offered on comparable commercial terms and conditions.

7. Sale of output
When the acquiring party sells its output to the supplying party, or to any enterprise designated by it, the price offered for such products shall be reasonable and fair and not lower than the current world prices for the goods of the same quality sold on comparable commercial terms and conditions.

8. Effects of nonfulfillment of guarantees
The effects of nonfulfillment of the provisions set forth in this chapter should be governed by the appropriate applicable law.

Group of 77 Proposal For a Sub-Chapter on Guarantees (1978).
68. Id. para C4(ii).
69. Id. para C4(iv).
this clause. If the agreement provides for the description of the technology, the supplier would not need to guarantee it because he could already be sued under the agreement if what was transferred was defective. Similarly, the suitability for use clause appears to be redundant. Certainly, if the specifications and purpose are delineated by the parties in the agreement, the Code need not include a statement that the technology supplier must agree to do what he has already done.

The quality standards provision would compel transfer transactions to include the technology recipient’s commitment to observe the ideals concurred in where the contract envisions the use of a supplier’s trademarks, trade names, or similar identification of goodwill. This is another example of when a party must agree to live up to that which he has already agreed to. Does the technology recipient have to agree to be bound by the quality standards portion of the agreement only where it mentions the utilization of the supplier’s identification of goodwill? Should not the recipient have to commit itself to quality control for the benefit of the consumer regardless of such identification?

Technology suppliers must represent their unawareness of any valid patent or similar protective rights which would be infringed by use of the technology transferred. This clause is basically appropriate. However, it seems to eliminate situations where suppliers would specifically mention contractually some third-party patents of which the acquirers were fully aware. The achievement of a predetermined result section is at best mere surplusage. Such language would not really be pertinent in most transfer agreements. Similarly, the proposed spare and component parts provision is inappropriate. These clauses are not included in the vast majority of agreements. The consideration for technology transferred section is not really objectionable. A license negotiator would, however, have to provide some mechanism for determining how much would have to be paid under the agreement, before even employing the developed means in arriving at a consideration figure.

GROUP OF PROPOSED CHAPTER ON APPLICABLE LAW AND SETTLEMENT OF DISPUTES

The applicable law and settlement of disputes chapter

70. Id. para. C4(v).
71. Id. para. C4(vii).
72. Id. para. C4(vi).
73. Id. para. C4(viii).
74. Id. para. C4(xi).
75. Id. para. C5.
76. The proposal would add the following chapter:

A. Applicable Law

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

2. Any contractual clause which would be in violation of the public policy (ordre public) and sovereignty of the acquiring state, particularly in matters concerning its governmental prerogatives or legislative, regulatory, or administrative powers, shall be null and void.

3. The law applicable to matters of private interest is that which has a direct, effective, and permanent relationship with the transaction.

4. The choice of the applicable law by the parties, the judge, or the arbitrators shall be made in conformity with the above rule.

5. The law of the acquiring party shall apply to questions of characterization. In particular, it alone shall be applicable for the determination of matters that may not be submitted to arbitration or which concern public policy or sovereignty.

6. The principles and rules set forth in this Code shall be applicable. The law chosen by the parties, the judge, or the arbitrator shall be interpreted and applied in conformity with the Code.

B. Settlement of Disputes

1. The courts and other tribunals of the technology acquiring country shall have jurisdiction over disputes arising from the conditions or the effects of the contract which concern public policy (ordre public) or sovereignty. They shall also have jurisdiction over conflicts of characterization.

2. The contractual relationships between parties to a transfer of technology agreement may be the subject of a choice of forum or of arbitration, unless the acquiring country has express rules to the contrary.

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

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

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

4. The arbitration process shall take place in conformity with the UNCITRAL rules for all matters not provided for in this Code.

5. The States parties to this Code agree to enforce, without proceeding to an examination of their merits, the arbitration awards, and judicial decisions rendered within the framework of this Code, subject to the public policy (ordre public) of the forum and duly ratified international conventions on the recognition and enforcement of arbitral awards and judicial decisions.

6. The arbitral award shall, at the request of one of the parties, be the subject of an examination of its legality and, if necessary, shall be annulled. Such an examination will be made by a panel of three persons whose decisions shall be taken by a majority vote and who shall be
of views among the Group of 77 and Group B countries. Group B generally believes that the choice of law, forum, and arbitration provisions should be subject to individual negotiation by the parties involved. They have opposed the Group of 77's complex suggestions which are of minimal value to any but the developing-country party.

One proposal requires that the third party of a three-person arbitration tribunal be of a nationality different from the parties and the other two arbitrators. As a practical matter, nationalities should have no bearing unless the arbitration is to be a completely political operation. Those looking for an arbitrator to be a member of the Licensing Executives Society would have to check the various members' nationalities to determine whether any could be a suitable third member of an arbitration panel.

**INTERNATIONAL MACHINERY**

Both the Group of 77 and Group B international machin-
ery proposals contemplate the establishment of a permanent body, to be part of UNCTAD, which would review the Code. The United States should not support such an arrangement. Any benefits to be obtained are certain to be outweighed by prohibitive operating costs. Existence of such a committee will merely increase the amount of time and effort expended in continual negotiations and revisions and supplementary political speeches. If a Code is instituted, there should be no permanent body administering it. Even if there must be such a permanent

79. The Group B proposed chapter provides:

1. Subject to the approval of the Trade and Development Board, the Committee on the Transfer of Technology will provide institutional machinery.
2. This Committee may create appropriate subsidiary bodies to assist it in its work.
3. Tasks
   (a) Overview Procedure
      (i) To exchange views on matters related to the Code and on experience gained in its operation;
      (ii) To undertake studies for the purpose of furthering the aims of the Code;
      (iii) To consider relevant reports and studies from other UN bodies;
      (iv) To submit reports on its work to the TDB of the UNCTAD.
   In carrying out the above tasks, neither the Committee nor its subsidiary organs may act like a tribunal or reach conclusions on the conduct of individual governments or parties to a transfer of technology transaction.
   (b) Review Procedure
      To review the implementation of the Code with a view to its reappraisal not less than six years after its adoption and to make, if appropriate, proposals for its improvement and further development, taking into account relevant activity in the field of transfer of technology within the framework of the United Nations' agencies, organs, and other bodies.
4. Secretariat
   The Secretariat shall be the UNCTAD Secretariat. At the request of the Committee on Transfer of Technology, this Secretariat shall submit, and other UN bodies, particularly WIPO and UNIDO, shall be invited to submit relevant studies, documentation, and other information to the Committee.
body, it should certainly not be an arm of UNCTAD, as it is hardly capable of providing unbiased input or a competent administrative organization.

**Concluding Remarks**

What will be the final result of these negotiations? I expect that ultimately a Code will be agreed upon. However, some of the proposals under current consideration may be omitted or phrased in such vague language that they will be meaningless. Initially I believe the Code will be voluntary. At present, the Group B countries will not accept a mandatory Code. I also suspect that there will be a permanent UNCTAD body to review and alter the Code. It will probably continue to assert the Group of 77's position on various Code modifications and will attempt to make the "working paper" Code mandatory. The Code will exclude subsidiaries from its scope initially, but they will be included eventually, particularly if UNCTAD continues to advocate this position and the United States opposition receives dwindling support from other Group B nations.

While it appears unlikely that the Group B countries would agree to a legally binding code, some individual components will undoubtedly be enacted as federal legislation. Some aspects of the Code may be used in American litigation on transfer of technology agreements. Even if it is not statutorily adopted in the United States, certain courts may consider the Code a meritorious guideline to be abided by in transfer transactions. The United States Department of Justice may be at the forefront of efforts urging legislative and judicial adoption of the restrictive business practice standards. In any event, it would behoove those preparing future licensing agreements to avoid conflicts with the Code. Even though a finalized version of the Code may not have initial legal standing in the country involved, one cannot definitively predict what will happen during the term of the license agreement.