UNCTAD : As a Forum for South's Bargaining VIS-A-VIS the North - Case Study of Technology Transfer

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CERTIFICATE

This is to certify that this dissertation entitled " UNCTAD : AS A FORUM FOR SOUTH'S BARGAINING VIS-A-VIS THE NORTH - CASE STUDY OF TECHNOLOGY TRANSFER " is submitted by Ms. DISHA BANERJEE in fulfilment of six credits out of the total requirement of twenty four credits for the award of the degree of MASTER OF PHILOSOPHY of this university. This dissertation has not been submitted for any other degree of this University or any other University. This is her original work.

We recommend that this dissertation be placed before the examiners for evaluation.

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CONTENTS

PREFACE

North-South conflict revolves around the global politics of inequality. Though the terms North and South denote geographic configuration yet in the context of international politics, they manifest the economic divide between the rich and the poor. While the North represents the industrially advanced developed market countries, the South comprises the economically underdeveloped states, a large majority of them having been colonized by the major European imperial powers. So by North-South relations we mean the relationship between the haves and the have-nots, the centre and the periphery and the satellite and the metropolis.

While defining North we particularly use the adjective of developed market economies. This is so mainly because the market forces have dictated the quality of economic relations shared among the states. In such a set up the USSR and its allies in the Eastern bloc played no role, for they entered the global economic order much later. In fact, they designed their own policies and methods of interaction, far removed from the market-oriented relationships. Many a critic have insisted that what is refered to as North-South is basically West-South relations. South exports 20 times the volume of goods to the Western states than it does to the USSR and Eastern Europe and imports 10 times as much from the West. Also in terms of development aid West gives 20 times of what South gets from the 'East'. In effect West constitutes virtually the only source of credit, direct investment and technology for the South. Very often, the term West is used interchangeably with the North.

The dependence of the South on the North has resulted in the problem of distribution of international wealth and this constitutes the central issue in the North South debate.

After World War II it was expected that the late entrants to the international economic order would benefit from the development experience of the better off states from the North. But soon instead of transmitting development trends, these links of the 'South' with the 'North' reinforced the former's dependency status, and the resultant underdevelopment.

The commencement of the United Nations System four decades ago, however has done much to mitigate the adverse effects of the politics of inequality globally. It has provided a comprehensive institutional framework through which ideas of one-state-one-vote, just world order, essentially single global community have been pursued and promoted.

Three decades ago when international community came to accept that the system of colonialism was unacceptable and that all countries should have the right of self determination and independence, it brought with it far reaching transformation of international relations. North-South conflict emerged when after political freedom their aspirations for economic and social development did not materialize for the states of the South. Foreign aid, resource transfer and investment in any shape and size were seen as a natural extension of the imperialistic tendencies. Private investments following the flag in the colonial era, were now seen as the predecessors of the flag with brazen colonialism now replaced by neo-colonialism.

The issue of how to guide the thrust of economic relationships that weave the nations today into a closer fabric of

interdependence has become very important. The simplistic assumption that the world economy is a free economy unguided by any one has lost its force. Today's economy is strongly oriented by vast and powerful interests constituted by the major industrial, multinational enterprises and by the producers and exporters of vital commodities. Thus the main question is how the world economy is to be oriented and by whom. This is the cause of the North-South debate or more precisely global negotiations concerned with the establishment of a more equitable economic order. The main demands of the South are encapsulated in the UN General Assembly Resolution for the establishment of a New International Economic Order. The aforesaid Resolution sets the stage for concrete proposals for future negotiations.

South is locked in an economic structure faced with the problems that are endemic in the operation of that system. They can not hope to cope up with their international vulnerability except by challenging the existing rules of the game. Their international behaviour is characterized by their international dependence. As a group they have constantly endorsed the principles and norms that would legitimize a more authoritative allocation as opposed to a market oriented mode of allocation. Authoritative modes of allocation provides a level of resource transfer which the countries would not be able to get through the market. South is all geared up to support that international regime that would ameliorate their weakness.

To achieve both development and power through authoritative regimes South has pursued two specific strategies. One to alter the existing international organizations or to create a new one which will be more congruent with its preferred

principles and norms. Second, they have pressed for regimes which would legitimize their assertion of sovereign authority over a wide range of activities.

Under my topic (UNCTAD as a forum of South's Bargaining vis-a-vis the North - Case Study of Technology Transfer) of research the problems of the South's strategy have been the focus of analysis. In the first chapter titled, UNCTAD as a forum for South-North Bargaining, I have discussed the process of evolution of UNCTAD as a forum for the struggle of the South for a just order in spite of opposition from the North at every step. In the course of time UNCTAC became the platform of global negotiations covering a a wide range of issues and then the history of South-North bargaining at UNCTAD was made. But the negotiating strategies have not been entirely productive.

In the second chapter entitled "The Structure of Dependence of the South: The Problem of Technology Transfer", a modest attempt is made to analyse structure of dependence of the South and technology transfer. These two stages of dependence have been analyzed through the model of dualism. This chapter includes the role of UNCTAD in evaluation of the technological dependence. It has created a milieu to support the effort and the voice of the South against the practices of the North. It has published a wide range of studies on the subject to highlight the problems faced by the South and also created the inter-governmental Group of Experts in September 1970 which could monitor and contribute to the efforts of the South.

The Third chapter deals with the process of "Negotiating a Bargain" with the North on the International Code of

Conduct for the Transfer of Technology. In this chapter I have attempted to analyse the strategy of the South vis-a-vis the North at every stage of the process from the 1970s to 1985 when the last session of UN Conference on the Code of Conduct on the Transfer of Technology was concluded.

The last section is the Conclusions which have been drawn regarding the South's bargaining strategy over the entire period of the bargaining for a healthier technology order. Finally, I have added some opinions on the general strategy of the South in dealing with the challenge of the North.

The scope of research in this field is vast. The South no longer has the alternatives to economic management via the Socialist bloc of countries that used to be. In the global free market the South has to find its own ground to bargain effectively for its demands. Since, now, the flow of aid, technology and capital is going to be diverted to Eastern Europe, the entire dynamics of North-South relationship needs to be viewed from a more result oriented aspect of global politics. It becomes more difficult because of the North being united. With no Eastern Bloc to provide diplomatic liverage, North-South dialogue will become more central to the needs of the South.

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(Disha Banerjee)

CHAPTER - 1

CHAPTER-1

UNCTAD AS A FORUM FOR SOUTH NORTH BARGAINING

More than any other agency of the United Nations, United Nations Conference on Trade And Development (UNCTAD) promotes the view of the developing countries. It grew out of a special conclave summoned by the United Nations in 1964. The most significant outcome of the event was that it gave birth to a continuing machinary that has had a profound impact on international organizations and global negotiations.[1] The meeting was a major diplomatic event which marked the turning point in the evolution of international organizations. This ensured a redirection of organizational resources towards development. It was the first major conference in which lines were drawn sharply on a North-South rather than East-West basis. It became the only forum where the long postponed dialogue between the North and the South was initiated, raising the international political status of developmental issues and increasing the awareness of both the North and the South for the ultimate importance of furthering national welfare through multilateral diplomacy.[2]

UNCTAD is unprecedented in its structure and far reaching in its scope and membership. It soon became the focal point for discussions on economic problems of particular interest to the developing South.

EVOLUTION OF UNCTAD

I. ARTICULATION OF THE DEMAND OF THE SOUTH FOR A NEW INSTITUTION

The 1950s and 60s were the years of growing frustration for the developing countries of the South, when their dreams of rapid economic development were being rudely shattered. The

countries of the North, on the other hand were experiencing unprecedentedly rapid and wide spread economic growth. States with low per capita income were finding it difficult to translate these trends into equitable improvements in their living standards, and establishment of diversified productive structures.[3] Along with these trends there was also marked decline in the prices of primary products on which the developing countries of the South depended for their foreign exchange earnings. However, loans were not increasing, new aid was increasingly offset by the repayment of the principal and interest on account of the past loans.[4] Thus, among the countries of the South, there was growing a firm conviction that nothing short of a fundamental reshaping of the world trading system could deal with their desperate and urgent problems.

It has been the experience of the developing countries that the system established at Bretton Woods (in 1944) has failed to enhance their sense of national security; rather the operation of such a system has underlined the precarious nature of their position in the world economy. The developed countries of the North had a vested interest in the maintenance of this order.

After the Second World War the idea of an internationally managed economy gained ground. Concious efforts were made to establish an ordered framework for global economics. The dominant concept was that of multi-lateralism i.e., joint decisions for a jointly managed system on commonly accepted principles. The multilateralism that emerged showed itself to be narrowly based.[5] The multilateral organizations formed at Bretton Woods namely International Monetary Fund (IMF), General Agreement on Trade and Tarrif (GATT), and International Bank for

Recontruction and Development (IBRD) showed that only a handful of states took part in the decision making.

This System had made possible the unquestioned leadership of USA on the one hand and the spectacular economic recovery of Europe and Japan on the other. The developing countries of the South played a very little role in the management of this international economic order. Any move to redress this imbalance was likely to affect adversely positions of the developed countries of the North within the system.[6]

IMF, IBRD and GATT form the corner-stones of the present economic order. They are firmly committed to an organizational ideology of a liberal trading system. The South sees this ideology as inimical to its aspirations. The poor countries of the South were flattered by the promise of equal treatment with the older and established states of the North. This created a system disadvantageous to the poor because it treated in equal fashion states which were not equal.[7] The political and economic backwardness of the South demanded a different treatment in order to be equal and fair. The lack of this concern in the treatment of the poor countries led to the perpetuation of the inequalities built-in into the system. In all these forums of international economy, decision making procedure was based on the methods of "weighted voting". As a result the influence and strength was concentrated in favour of the rich and powerful countries. Weighted voting pattern exemplified the global political and economic inequality.[8]

Against this background it was only natural that the countries of the South should agree that there be one such organization where developmental issues could be discussed, where the participants were not tied to any commitments because of power

or wealth. They wanted to secure a truly global participation of all the UN members.

Historically, the weak have had very few effective strategies to influence the strong.[9] The UN structure has offered the states of the South an excellent platform to launch their struggle for change. Their numerical preponderence in the UN could ensure them a hearing. The forthright articulation of the needs and demands of the South shows the changing perception of the South of its own requirements and its relationship with the global economic order.[10]

II. AN INSTITUTIONAL GAP

A historic accident that had left a major institutional gap which the Southern states had taken upon themselves to fulfil. The Bretton Woods system had never been joined by the third international agency -- the International Trade Organization (ITO) or Organization for Trade Cooperation -- mainly because the US Congress failed to approve the plans, when presented to it in 1950. This provided the major impetus for the creation of UNCTAD -- an agency in many respects less congenial to the US point of view.

Though GATT was not an International Organization it had begun to behave like one. United States had agreed to expand the GATT membership enabling it to do virtually everything that a trade organization might have done. However, GATT did not have comprehensive provisions on commodity agreements, foreign investments and restrictive business practices that had been contained in the Charter of International Trade Organization. Also the preoccupation of GATT was with the reduction of tariff barriers and elimination of discrimination.[11] The way the

institution functioned, the Southern states were realizing pointedly that GATT had little time for development issues. The North had no time to redress discrimination that the South suffered in the present global order and that the gap between the two categories of states (the haves and Have-not) was becoming a radical issue which demanded immediate notice. So even if the North was seeing the concept of the institutional vaccuum as symbolic, the South was determined to take it seriously. The developing countries were convinced that they required to create a forum according to their own needs for the comprehensive review of trade and development.

III. FACTORS INSISTING CHANGE FROM WITHIN THE UN :

As compared to the 1940's the status of the South had undergone a significant change during the 1960's. First, during the 1960s the developing countries had come to believe firmly that the principle source of their problems lay in the design and conduct of the North dominated international economic institutions. Secondly, the birth of many a states in the international system increased the pressure for a more comprehensive institution pursuing a broad based multilateral approach to economic development. Thirdly, since the 1960s, the politics of inequality came to the centre stage of international politics. Soon sharp divergences between the objectives of the North and the South were revealed. The articulation of these rising North-South differences became the principle motivation for the evolution of the UNCTAD machinery.

In the 1960s, the central economic forums of the UN viz.(a) Economic and Social Council and (b) the Second Economic

and Financial Committee of the General Assembly took too much time in acrimonious and sterile cold war dabates, which seemed irrelavant to the problems of the developing countries. Added to this, there was a progressive deterioration in the representation of the South, level of debate and significance of the work of the Economic and Social Council (ECOSOC). Attempts to revive the overall situation through ministerial meetings in the 1960s proved to be a dismal failure.[12] In the ECOSOC the membership of the developed and the developing countries were balanced equally when actually the membership of the states from the South had more than doubled in the UN and they were almost in majority. Efforts to enlarge the ECOSOC membership was frustrated by the Soviet Union's insistence that China be seated first. It was only in December 1963 that the Soviet position changed. The headquarters of ECOSOC was mainly staffed by the members of developed countries, inadequately responsive to the needs of the poor. In effect it was more like the rich men's club. They had been able to bring out only a professional expression of the need for development.[13] But by then the developing countries were looking for a dynamic exponent of their needs. They were committed to the replacement of the Council by a machinery that would make full use of their majority.

IV THE SOVIET ELEMENT

Though the mounting pressure from the South played the key role, the Soviet Union and its allies played a significant supporting role to construct a Trade and Development machinary. After the death of Josef Stalin, Soviet Union began to play an active role in the economic forums of the United Nations in order to make a common cause with the developing countries and undermine

control of the developed capitalist countries on trade with the communist world.

Soviet Union had earlier boycotted the conferences called by the UN to establish ITO and had condemned the end products that emerged from them. But in summer 1955 the Soviet Union and its allies astonished the session of ECOSOC by urging a resolution to ratify the ITO charter.[15] Between 1955 and 1964, there were a series of resolutions proposing the establishment of a comprehensive world trade organization, either supported or initiated by the Soviet Union.As such in 1964, UNCTAD came into existence.

Soviet Union had a very negligible role to play when GATT, IMF and World Bank were being institutionalized and also in the various economic programmes of the UN. Launching of a new trade machinary in partnership with the states of the South seemed a way of breaking the traditional western hegemony in the global economic institutions.[16] This, the Soviet Union and its allies felt, would also expand their trade and political influence with the uncommitted countries to bring pressure to bear on the western economic policies (regarded as inimical to Soviet interests as well). European Economic Community (EEC) by then, had emerged as the prime target of Soviet attack.

V THE RESPONSE OF THE "NORTH"

Faced with the pressure from the Soviet bloc, Western developed countries were confused and divided. Inception of the European Community had not only created anxieties in Latin America, Asia and Africa, but had also developed differences among the developed countries. US and French policies in the economic

and political forums seemed increasingly to run at cross purposes. At the fluid state of international economy, none of the rich nations, least of all the US under the new J.F. Kennedy government was ready to accept the responsibility for frustrating the chances of a trade conference and a new trade machinery so ardently desired by the poor.

Part of the reason why the countries of the North went to UNCTAD I rested in the " fear " that Soviet Union would reap political gains.[17] The cold war between the East and the West had just begun to thaw in the early 1960s but the residue of suspicion still influenced the thinking on both sides.[18]

Fundamental changes in the world politics and the economies had their impact on the formation of national politics. They, in turn, laid the foundation for the creation of UNCTAD. Emerging super power 'detente' had begun to diminish the East-West cleavage. This trend was reflected in UNCTAD where the demand of the Eastern bloc countries pressing for the normalization of East-West trade was not much pursued.[19] As far as the Third World or the South were concerned they felt that the Eastern bloc states were enjoying a greater share of the value of world exports than they needed. Thus the North-South tug-of-war prevailed as the central character of the UNCTAD machinery.

VI PENULTIMATE CHANGES IN THE UN STRUCTURE AND MEMBERSHIP

The decisive factor which brought UNCTAD into existence was the complete erosion of the voting position of the developed Northern countries in the UN resulting from the admission of many Afro-Asian states.

An event of fall 1961 created a great impact. It was the amendment, namely Assembly Resolution 1707 (XVI) of

December 1961.[20] It highlighted international trade as the Primary Instrument of Economic Development. Once this was passed, the Secretary General was asked to consult the governments on the advisability of holding an international conference on International Trade problems.[21] The result was 45 votes in favour, 36 against and 10 absentions. This pro-South response paved the way for the Conference on Problems of Economic Development which was attended by 36 developing countries at Cairo in July 1962. This conference resolutely declared itself in favour of holding an International Economic Conference.[22] Force of this declaration was considerably enhanced by the enormous participation by the countries of the South, which then commanded majority in the UN.

This conference investigated the relevant issues and problems, in the course of which the interests of developing countries were distinctly outlined in complete divergence of the interests of the developed countries of the North. All these were later included in a final statement and presented to the General Assembly, as the "Joint Declaration" on behalf of 75 developing countries. This was the prelude to the establishment of the "Group of 77" (G-77).[23]

In the same year (1962), as a culmination of various reasons and events mentioned above, the ECOSOC meeting saw for the first time the US in opposition. Thus the way was cleared for the adoption of the ECOSOC resolution 77(XXXIV) of August 1962 calling for a UN Conference on Trade and Development and the establishment of a Preparatory Committee to consider the agenda and the documentation.[24] Once this stage was over, it was becoming almost obvious that the developing countries would like to create a permanent body. The question of what shape and structure it was to

have, would take the central position during the conference at Geneva.

In his report "Towards a new trade policy for development", Dr. Raul Prebisch, the General Secretary of the UN Economic Commission for Latin America (ECLA) endorsed the idea of a new "International Trade Organization", but he significantly put it into a lower case ; he outlined a continuing organization based on periodic conferences, a state committee and an intellectually independent Secretariat with the authority and ability to submit proposals to governments within the framework of the UN.[25]

VII INTELLECTUAL PREPARATION

Last but not the least there was the long period of intellectual preparation for the construction of motivation, spirit and the structure of the UNCTAD. The main thrust of this intellectual work came from the UN Economic Commission for Latin America (ECLA).

Dr. Raul Prebisch had developed a distinct analysis of underdevelopment.[26] He emphasized that a high degree of development was concentrated in certain economic centres, while countries on the periphery became dependent on raw materials, often of only one product. More often than not they suffered from the decline in their terms of trade, tending to recieve less for their products than they otherwise deserved. This dependency could be changed, Prebisch urged, by changing the terms of trade in favour of developing countries. For example Ghana (coco), Cuba (sugar), Brazil (coffee) had earlier experienced a decline in world market prices with catastrophic effects on their domestic economies. This centre-periphery concept later on became a significant arguement in favour of a Trade and Deveopment Conference.[27]

In July 1962, the Cairo conference mentioned earlier was notable for the active participation of Dr. Prebisch.[28] He had already begun to formulate a new doctrine for development and at Cairo he worked to forge some identity of purpose between Latin American and the Afro-Asian countries. He recognized that economic development of developing countries is meeting increasing difficulties, due partly to various international factors beyond their control and tendencies which might have the result of perpetuating the past structures of international inequality.

Thus the above mentioned causes and issues contributed in a big way towards the final approval for holding the United Nations Conference on Trade and Development in Geneva on the 23rd March, 1964.[29]

UNCTAD AND THE ASPIRATIONS OF THE STATES OF THE SOUTH

UNCTAD began to function as a strong inspiration for the improvement of global position of the Third World. Its motivating factor being the conviction that "it is imperative to build a new order with a view to solving the serious problems of trade and development that beset the world, specially affecting the developing countries."[30] Though Dr. Raul Prebisch played the key role in the designing and the conduct of the UNCTAD machinary in its formative years, yet some twenty years later he stated that "UNCTAD was concieved... to deal with those trade matters as well as other aspects of cooperation of the centres with the developing countries. A very streneous effort indeed. However very little has been gained".[31]

These two statements by and large sum up the effectiveness of the organization as the instrument to promote the

interests of the developing countries. But even though UNCTAD has not achieved much, this does not dismiss the importance of UNCTAD as a forum for South-North bargaining. For it cannot be said that UNCTAD has not achieved anything for the developing countries.[32] It functions through a standing committee of 55 members and the Trade and Development Board (TDB) meeting twice a year and reporting to the General Assembly through the ECOSOC. There is also an apparatus of committees on commodities, trade in manufacture, finance, transfer of technology. All these are serviced by a permanent Secratariat in Geneva.[33]

Many have recognized UNCTAD as 'the child of decolonization', born in 1964 when for the first time the South succeeded in receiving an institutional response in the economic sphere on the international scene.[34] Pursuing the objectives of fair negotiations, the South has always taken the initiative for structural changes in it. The North has never contemplated anything more than marginal trickle down concessions. So far in the last 20 years, though UNCTAD has been the central institution for South-North bargaining and has assumed an undeniable symbolic importance, yet it has long been conventional to deplore it in USA and Western Europe. Thanks to this attitude of the North, UNCTAD from the very begining has been a sort of handicaped institution, where articulation of South's aspiration is not difficult but to find functional remedies for their problems is almost impossible because of the way the North responds.

The northern oppostion became evident in the very first session of the UNCTAD meet. The motivated states of the South initiated long and probing discussions regarding the institutionalization of UNCTAD as a permanent organ of the General Assembly. Dr. Prebisch was the chief motivating force against all

resistance from the US and the other developed countries who had continuously insisted that matters proposed for discussions by the South could be easily dealt within the forums like GATT with clear and established decision making procedures, than in the massive UN conferences with numerous participants working on the principle of one man one vote.[35] The developed countries could not withhold the process which made UNCTAD into a continuing machinary for the majority of the developing nations to use to help them solve their problems in international economic relations. This new machinary was considered necessary to serve as an institutional focal point for the continuation of the work initiated by the conference.

UNCTAD played a valuable role in formulating and enunciating the principles which became the basis of the South's demand for New International Economic Order (NIEO). Its work had a systematic effect in the institutions of the U.N. and thereby was influential in gaining wider acceptance of certain principles of benefit to developing countries in the inernational economic relations. Further UNCTAD was influential in exerting pressure for concessions from developed countries to developing countries. What is more, its work placed legitimacy of aid from rich to poor countries firmly on the agenda of international discourse.[36]

Emergence of a comprehensive negotiating agenda has become a special achievement of UNCTAD specially in comparison with the earlier sporadic and isolated efforts by poor countries to articulate their grievances. Since concrete solutions of the fundamental problems of the developing countries regarding industrial growth and transfer of technology have been almost negligible, the fact remains that there are still many questions of logic and feasibility in the negotiating agenda.[37] The

principle elements of Southern sectoral demands in the UNCTAD have their most comprehensive restatement in the General Assembly Resolution 3202 (S-VI) - The Programme of Action on the establishment of NIEO. The major emphases of the agenda on structural reforms in the resolutions under discussions are:-

1. Stabilization of world prices at profitable and remunerative levels for primary products export, institutionalized through the Integrated Programme of Commodities (IPC).
2. Improved and preferential access to Northern markets for manufactured goods from the South without reciprocity.
3. Reform of the International Monetary System to ensure sharing of rights and obligations with SDR as the principal reserve asset and also including increased international reserves, rescheduling or cancellation of debts, less tied aids and more flexible aid modalities.
4. A greater share of world's industrial capacity and production in the South.
5. Codes to govern foreign investments and the operation of Multi-National Companies as well as the transfer of technology.
6. Restructuring of United Nations system to improve its capacity to assess developing countries in their development efforts and of the Bretton Woods and GATT to enable a greater share of control by the South.[38]

UNCTAD managed to evolve a forum for negotiations. In order to move beyond what was becoming a cumbersome, if not an unworkable system, debate in this forum of universal membership was simplified by aggregating a large number of opinions into a managable number of conflicting views.[39] The formation of the groups was the only way so that agreements of sorts, loosely

drafted and hedged about with demurres could be reached.[40] This was done by concerting positions on agenda items within groups prior to the negotitation. The formal function of the groups was the election of propotionate number of representatives for the Trade and Development Boards.

Group A - The African and Asian Countries

Group B - Developed countries

Group C - Latin American countries

Group D - USSR and Eastern European countries[41]

In the very first session the developing countries of Group A and Group C celebrated their cooperation and formed the Group of 77 (G-77). Thus the process of negotiation that developed in UNCTAD revolved around the groups exclusively and a few countries which decided not to form a part of any group could play no effective role. In sharp contrast to Bretton Woods, UNCTAD was dominated by a coalition of the least developed countries from the very beginning, with a prominent voting majority inspite of the fact that well over half of its budget was subscribed by the Group-B countries.[42] The group system simplified the process of negotiation because as Joseph Nye has noted, " Countries that had ranked higher in influence in UNCTAD than would have been expected from their power in the general environment i.e., the developing countries like Brazil, India, Chile, United Arab Republic etc., all with relatively extensive and matured administrative system. On the whole a new leadership was constructed for the Third World as the South was given a chance to emerge and the much highlighted influence of the South was directed towards a new development era."[43]

Through the creation of UNCTAD the position of the developing South was much strengthened, yet treaty like agreements have been slow to emerge from it. At one point it almost seemed as if self perpetutation and institution building may be worthy goals for bureaucrats but they cut little ice in the world at large when power rests within the powerful rich countries and whose influence in absolute limits is much wider than that of the developing countries. After two decades of existence UNCTAD still has to prove its credibility. Moreover all results of negotiations have been far from satisfactory in relation to the Southern objectives and needs.

An objective analysis is hard pressed to identify more than a few concrete operating agreements that have resulted from the multilateral developmental diplomacy at UNCTAD. Agreements with a legal character concern transport matters, Codes of Conduct for Linear Conferences and multi-model transport and a convention on the transit trade of land locked countries. Also some individual commodity agreements for tin, rubber, wheat, coco have been entered into, but for most part have not been negotiated under the Common Fund. The Common Fund was being negotiated between 1977 and 1979 in a climate of maximum demand and minimum concession in the context of Integrated Programme for Commodities. It had produced a compromise concept which could not satisfy the demands of the South. Ultimately the money required to construct the Commodity Fund could not be collected. Though in 1980, articles of agreement for the Fund were adopted, the required ratification by at least ninety countries could not be reached till 1988.[44] Till date the Comman Fund has not become operational. Codes of Conduct on restrictive business practices and on transfer

of technology have been agreed in part although their ultimate enforcibility is not clear.[45] On some occasions increased Southern resources have been made available by bilateral donors or multilateral lending agencies in response to call for debt relief.

In 1978, the writing off of the debts worth $ 3 billion as a relief measure for the poor countries indeed came to be counted as an achievement of UNCTAD. Also in the case of the Code of Conduct for Linear Conferences - another UNCTAD success, developing countries with shipping lines were able to claim 40% of the transport in their own trade.

A significant point to be noted here is that these successful agreements were negotiated outside the rigid group system within UNCTAD. Later negotiations on debt relief have achieved no success.

The single attempt at the institutional change in UNCTAD was the incorporation in Part-IV of GATT, the idea of special and preferential treatment to the states of the Third World or the South with regard to the Generalised System of Preferences (GSP). It was among the first preoccupations of the developing countries. Though it was put into effect after UNCTAD II in 1968, it clearily demostrated the limited role of UNCTAD as a negotiating forum. For, while the developing countries had pushed for the GSP, it was the developed countries which unilaterally determined it's 'design, implementation and execution.' The South had no power to overrule the North. As they saw it, the GSP would provide non-reciprocal preferences for the manufactured product exports of developing countries. But the Western countries had agreed to a non-permanent system with no provision for international consultation before the exemption of

any product from GSP. This left only about 8 percent of trade from developing countries qualifying for preferences under GSP. In other words only the expansion of the Compensatory Financing within the IMF was left. It is difficult to hail it as an achievement of UNCTAD, for what happened shows its ineffectiveness as a negotiating forum. As a means of compensating developing countries for shortfalls in earnings on commodity exports, the idea of a complementary financing facility was mooted at UNCTAD V. The Western nations opposed it on the ground that a compensatory financing facility was already functioning through the IMF. To counter the arguement of the developing countries that the IMF facility was inadequate and its terms 'unduly conditional on domestic policy changes', they merely expanded the IMF facility 'to some extent to meet the demands for greater support for the depressed earnings'. As a group of Commonwealth experts concluded, "the facility does not have a commodity focus; the support it provides is limited by IMF quotas; and its conditionality appears recently to have hardened".[46] Here I mention the developments in the case of GSP in much detail, as being one of the first issue brought up by the developing countries . It shows how in the final analysis the effect of the desired change is diluted and almost made inconsequential by the way the North responds and proceeds to handle it. The bargaining capacity of the South thus proves itself as a weak force in front of the interests and policies of the developed countries.

So the developing countries have got little practical benefits from the UNCTAD after twenty seven years of it's existance, even though it had been the single most important organization concerned with the economic issues in which the South has a strong voice and this indeed sustains their commitment to it.

Source - R.S. Walters : UNCTAD:Intervener Between the Rich and Poor, Journal of World Trade Law (London : 1973) vol 7, p530

TABLE

Main Accomplishments of UNCTAD

	Percentage of Respondents Citing Activity (Total N=40)	Number of Respondents Citing Activity as The Greatest Accomplishment
General preference scheme ..	78 (N=31)	10
Promoting less developed countries' demands	48 (N=19)	6
Shipping	38 (N=15)	6
Maximizing aid via aid targets ..	35 (N=14)	0
Affecting work in other international organisations	28 (N=11)	0

Multilateral Diplomacy in the UNCTAD and the Group of 77

In the months preceding the formation of UNCTAD and the three months after that a remarkable unity fashioned amongst the three regional groups of developing states, namely the countries of Latin America, Asia and Africa. They had enjoyed little previous contact with one another since each had been a colony or a dependent state to a metropolitan centre. Therefore these countries had two major things in common i) their position of underdevelopment and status of a dependent peripheral state vis-a-vis the developed centre, and ii) their determination to remove this economic imbalance inherited from colonization and imperialism.

In UNCTAD I, held from 23 March to 16 June 1964, during negotiations economic interests crystalized clearily along geo-political group lines and the developing countries emerged as a group defining its own identity. The " Joint Declaration of the Seventy-Seven" adopted on 15 June, 1964 presented in the same session, was hailed by the states of the South as an event of historic significance.

> ".... as the outstanding feature of the conference interest in the new policy enhancing international trade and development. They believe that it is their unity that has given clarity and coherence to their discussions in this conference."[47]

> ".... The developing countries have a strong conviction that there is a vital need to maintain and further strengthen this unity in years ahead. It is an indisputable instrument for securing the adoption of new attitudes and new approaches in the international economic field. This unity is also the instrument for enlarging the area of cooperative endeavour in the international field and for securing mutually beneficient relationships with the result of the world. .... they shall adopt all possible means to increase the contacts and consultations amongst themselves so as to determine common objectives and formulate joint programmes of action in international economic cooperation..."[48]

UNCTAD was the main forum of global development discussions, guided by the expectations voiced in 1964. It became the focal point for the activities of G-77 which by the fall of 1980 counted 122 members. During the phase when G-77 became an integral part of UNCTAD, it evolved as the most important agent for the socialization of the developing countries in matters relating to international political economy and established itself firmly in all major relevant parts of the United Nations systems, as the South's principle organ for the articulation of its collective economic interests and for its representation in the negotiations with the developed countries.[49]

The focal point of departure for the motivation of the South's new bargaining strategy was succinetly stressed by Mawalimu Julius K Nyrere in his address to the Fourth Ministerial Meeting of the G-77 held in Austria in summer 1979,

> "... What we have in common is that we are all, in relation to the developed world, dependent, not inter-dependent nations. Each of our economies has developed as a byproduct and a subsidiary of development in the industrialised North and it is externally oriented. We are not the prime movers of destiny. We are ashamed to admit but economically we are dependencies, semi colonies at best, not Soverign States".[50]

So from the common state of dependent relationships grew their stretegy for a unified action. The approach of collectively standing up against the economic order prescribed by the North for securing its own rights and interests, became the chief character of its behaviour in international forums, specially in UNCTAD.

In UNCTAD, the G-77 has become the prime device to prompt action favourable to less developed countries. Most of its officials and a number of western officials view the confrontation in UNCTAD between G-77 and the Group-B countries as a virtual

prerequisite for negotiations towards the types of systemic reforms in which the less developed countries are interested. It does not suit the developed countries to go hand in hand in partnership for development of the South. They have to be forced into extending considerations for development needs of the South. For bringing the western states to the point of willingness to address seriously to the possibility of action on some development issues at the systemic level, the group system is seen by UNCTAD as establishing clear negotiating patterns. Though it has been argued that group system leads to rigidification of negotiating positions, it has the value of providing a coherent structure of negotiations affecting so many states.[51] Generally the US has emerged as the most negative among the states of Group-B with regard to its attitudes towards the possible change. Thus, according to R S Walters the group system of UNCTAD is an important means to address the possibility of systemic reforms to which the developed countries otherwise manifest little interest. It also provides a clearer structuring of the negotiations.[52]

Though Joesph Nye maintains that the universal membership of UNCTAD broken into groups has led the countries of Group-B to strengthen their own coordination and prior consultations through group system resluting in the formation of the combined platform of the countries of the South, the G-77 has achieved a more respectable consideration from OECD countries as well as Council for Mutual Economic Assistence i.e., CMEA group of Eastern Bloc Countries.

Group of 77 constructs its joint position within UNCTAD through intra group coordination . There are separate regional groupings that meet in the Ministerial meetings - the Latin American Countries, Asian countries and the African States.

Because of the different development stage and interests of various countries, many a times we find them competing with the other group members for markets, This creats a situation in which the final proposal agreed to has a much diluted form and much reduced bargaining power. This position vis-a-vis the strong unified stand of Group-B countries often makes the solidarity of G-77 seems only a diplomatic cover for their weaknesses. We can not totally negate the opinion of Marc Williums that "their (G-77's) was not an organic solidarity".[54] This divergence of positions/interests between the main protagonists, the developed industrial states of Group-B and the developing dependent states of G-77, results in a situation in which rigid maximal demands confront rigid minimal concessions.[55] Under such conditions UNCTAD's negotiating forum could effect little compromise and even less agreement. Moreover, since it lacks any statutory authority to commit governments to legally binding agreements, all this leads to a very frustrating state of affairs at the forum of the South-North Bargaining, yet an effort continues.

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CHAPTER - 2

CHAPTER - 2

STRUCTURE OF DEPENDENCE OF THE SOUTH : THE PROBLEM OF TECHNOLOGY TRANSFER

Dependency is defined as a peripheral insertion of a nation state in the world system. Through this the former colonies and the underdeveloped countries are exploited economically and their backwardness is maintained over time. This economic exploitation not only requires and involves economic domination, but the whole question of power. Therefore the political diversion is intrinsically linked with the notion of dependency. While political dominance is required to create or maintain dependency, it is the degree of economic exploitation and the extent to which it can be maintained over time that determines the level of dependency[1] of a state or a group of states.

The main contribution of dependency idea is not so much the analysis of the exploitation of the backward countries and the mechanisms of that exploitation, but the way in which through the existing international trade patterns a set of dominance/dependence relationship could be developed and maintained, largely because of a set of politically influenced economic factors. Thus one can say that economic factors were and still are the result of political and military dominance. Foreign military domination, if not based on local popular support, has always invited counter actions as illustrated by so many guerilla wars around the world. Political domination if not based on military domination has even stricter limits, as illustrated by the 1974 and 1979 oil crisis. It is only economic domination, as observable in worsening terms of trade, which will give some indication of how effective and damaging the dominance/dependence relationship is[2].

It is a well known fact that the international dominance/dependence relationship developed as a major factor in international politics. Through the various economic models explaining economic inequalities one gets a meaningful insight into how these economic determinants were shaping the North-South relations, and the changing expectations and demands of the South vis-a-vis the North. Essentially international dependence models view the South as beset by institutional, political and economic rigidities, both domestic and international and caught up in a dependance/dominance relationship with the rich countries of the North.[3]

Neo Classical Dependence Model : It is an outgrowth of Marxist thinking. It attributes the existence and continuance of the Southern underdevelopment primarily to the historic evolution of a highly unequal international capitalist system of 'rich country-poor country' relationship. Whether because the rich countries are internationally exploitative or unintentionally neglectful, the co-existence of rich and poor nations in an international system dominated by such unequal power relationships, renders the attempts by the poor states to be self reliant and independent in their development effort difficult and sometimes almost impossible.[4] The neo-Marxist and neo colonial model : Its view of underdevelopment attributes a large part of the continuing and worsening poverty of the South to the existence and policies of the industrial capitalist countries in the Northern hemisphere and their extension in the form of small but powerful elite or comprador groups in the South. Thus underdevelopment is seen as an externally induced phenomenon as opposed to the linear stages and structural change theories that stressed on internal

constraints.[5] One of the most forceful statements on international dependence is that of Theotonio Dos Santos. According to him

> "... underdevelopment, far from constituting a state of backwardness prior to capitalism, is rather a consequence and a particular form of capitalist development known as dependent capitalism...".

Dependence is a conditioning situation in which the economies of one group of countries are conditioned by the development of others. A relationship of interdependence between two or more economies or between such countries and the world trading system, when some countries can expand through self impulsion, while others being in a dependent position can expand only as a reflection of the dominance of those countries. This may have a positive or a negative effect on their development. In either case the basic situation of dependence causes these countries to be both backward and exploited.[6]

Dominant countries are endowed with technological, commercial capital and socio-political predominance. Dependence structure is thus based upon an international division of labour which allows industrial development in certain countries to take place while restricting it in others (the South/periphery) whose growth is conditioned by and subjected to the power centres (the developed North) of the world.

Unlike the Marxist, the classical libral writers do not study the world economy as one particular historical formation with its own laws of motion, its inner contradiction and its generation of wealth and poverty as a necessary means for the maintenance of its historical progression. Rather to them, the world economy appears as a natural timeless phenomenon, where production is undertaken for profit instead of human needs and

competition in the market are natural, unquestioned attributes of the rational modern man. The progressive libral writers , worried about the world poverty and the unfair distribution do not see this as a historical development of the capitalist system of production. They regard this as a natural and indeed a historical accident, malfunctioning of the system which a spirit of global political will and cooperation can set right.[7]

Whatever be the ideological differences, these two trends of thought throw light on the structural disadvantage of the South in the sphere of global economic relations which are shaped by various degrees of inequality in the international community. One cannot omit to mention the dependency theorists at this juncture. They, to some extent like the Marxist thinkers, see the dynamics of underdevelopment being conditioned primarily by the position of the weaker states in the international economy and the resultant ties between the internal and external structures. Whatever may be the nature of social formation in various underdeveloped states of the periphery, their problems can be realistically analyzed in the context of the capitalist system. The theorists argue that this will be so not because of any ideological compulsions but because it is the capitalist system that has spread the farthest, more importantly it has evolved as the dominating mode of production. The theorist of dependency take the world system as a unit of analysis rather than the nation states, but they differ in their explanations of the roots of dependency and the perception of the strategy for development.

Scholars like Carol Furtado and Sunkel see underdevelopment as a creature of development and consequence of the impact of technical processes and the international division of labour commanded by a small number of societies that led to the

industrial revolution. However, they believe that the way out of this relationship is not through a sudden break with the international system or through the policy of autarchy, but through liberal reforms, rapid and independent industrialization and the assertion of the peripheral countries in the field of manufacturing, commerce and banking. At the other end of the spectrum are the views held by A.G. Rank and I. Wallenstein who believe that the development for the countries of the South in the present environment is impossible. Thus the only way out of this dominance/dependence relationship through the center periphery structure may emerge by a complete over throw of the existing system of economic relations and look for an answer through a socialist revolution.[8]

The various approaches to the understanding of the structure of global dependence have been discussed so far. While these do not directly deal with the resultant diplomatic momemtum between the dominant North and the dependent South, yet they provide various frame works within which this vast arena of international relations could be analyzed. Diplomacy can be defined as the management of international relations through negotiations.[9]

The exercise to analyze this process in the realistic parameter of political and economic situation, may lead us somewhere near to a better understanding of this chronic problem and may even lead to a solution.

So far we have noted that implicit in structural change theories and explicit in various international dependence theories is the notion of a world of dual societies of rich and poor nations.

This dualism is a widely discussed concept in development economics. It represents the existence of rich over poor nations and rich and poor peoples at various levels of their interaction.[10]

There are four key elements[11] which exemplify the concept of international dualism : (1) The co-existence of different sets of conditions of which some are superior and some are inferior in a given space at a given time. For example one can cite countries with greately raised per capita income in the international system. (2) This co-existence is chronic and not transitional, not rectifiable with time. Through both the theories of growth and structural change models implicitly make such assumptions the facts of the growing international inequality seem to refute it. (3) The fact that the disparities do not show signs of stabilizing bring out their fourth element that the disparities have an inherent dependency to increase the productivity gap between the workers of the developed countries and the developing countries widens. (4) The interactions between the superior and inferior elements are such that the existence of a superior element does little or nothing to pull up the inferior or the weaker element. In fact it may actually serve to push it further down - to develop its underdevelopment.

In the sphere of international relations, such interactions have developed the dominant/dependent relationships and perpetualed them over the decades. These tendencies are evident in colonialism and capitalism, the export of unsuitable science and technology, brain drain, private foreign investment, one sided harmful division of labour, harmful trade and aid policies etc.

So these elements of international dualism objectively trace the path of global politics and highlight the global policies of inequality. There are various problems that the weak and the underdeveloped countries face in such a situation of structural dependence disadvantage.

Among the various issues which represent this Southern disadvantage, I have chosen the issue of technological disadvantage faced by the South and how it is generating its momentum for an effective force in the South-North politics.

THE ISSUE OF TECHNOLOGY AMONG STATES

Before the Industrial Revolution Europe was the recipient of the benefits of Science and Technology advances in the rest of the world. The technology thus flowed from the east to the west. In the last two centuries this flow has been completely reversed. This background is important to note for it demonstrates the recent origin of the technological superiority of the developed countries over the developing ones, in particular in the application of science to production.[12] The explosive development of technology since 1850 has radically altered the ability of the people to produce more and varied goods and services. Productivity per person may be used as a measure of technological change incorporated in the production process. It may have barely doubled between the birth of Christ and 1850 AD but in the 141 years since then it has increased to 12 to 15 times in the industrially developed countries. The developing countries, because of their peripherality in the economic order did not match this pace of transformation. The vast transformation of the technological strength of the North has thus created in the process a treasure house of technologies which the

other nations can draw upon. The transmissibility of technology has immensely increased the element of interdependence among the states in the process of economic growth. Thus any country that undertakes modernization relies to a great extent on the heritage of others. Consequently this is the main source of advantage to the late comers.[13] The South had entered the area with the disadvantage of dependency which was represented in the massive backlog of crushing poverty, massive illitracy and little accumulated capital or industrial experience.[14] In addition to this, their heritage of colonial and semi colonial past combined with traditional instututions, production structures and organizations made their path incredibly difficult.[15] But their rising political consciousness expressed itself in demands for modernization.[16] The best way for accelerating this process was to tap the vast fund of production technologies that had already been developed in the North . Growth is dependent on technological progress and this is not merely a matter of indiginous evolution but also of significant transfers across geographical , political and cultural boundaries.[17]

The main problem began to crystalize when it was realized that technology was not free. Like the goods it helped to produce, it was traded and thus could be bought or leased mainly from the monopolistic Multi-National Corporations (MNCs) domiciled in the North. The two corner stones for national industrialization strategy were import of technology from the industralized North and the substitution of the domestic manufacturers for imports from outside.

In relation to the foregoing strategy, it is imperative to keep in mind the influence of the world wide market

for technology and of the respective positions of the MNCs and the developing countries of the South in that market.[18]

Behind these crisis is a central challenge to find an orderly way of accommodating the changing economic and strategic strength of the nations. The powerful and the established are preventing the weak and the new from finding a place for themselves in the coming of nations. It is an undisputed fact that the international community consists of unequal partners. The South (including China) accounts for 75% of the global population but only about 25% of its exports, 20% of its imports and GNP, 15-20 % of its industrial output and less than 5% of its capital goods output. Nowhere is this inequality expressed more sharply than in the technological field. The South has only a 20% share in world wide research and development, 10% in patent holdings and nearly no share in the development of "frontier technology".[19]

In some respects the developing countries have fantastic opportunities open which were not available to the now developed countries, like the vast and growing array of technical knowledge - to which all have potential access, the proper use of which may transform the status of South from preindustrial to high income, fast growing sophisticated economy. But unfortunately this opportunity is also a threat. A highly advanced knowledge possessed by few economies can lead to the domination over the underdeveloped.[20]

Theoretically one would of course expect the development task to be made simpler for the late comer, through the process of trickle down and diffusion of knowledge accumulated over such a long period of time. This theory had actually worked : the early developers France and Great Britain developed at a

slower rate than, say Germany and the United States of America in the second wave. The Scandinavian countries, Russia, Australia, New Zealand and Canada came in the fourth wave, the last.[21] In the last few decades one can easily see that this wave has not continued but the threat of technological domination has expanded and become more pronounced. Evidently because of the foregoing constraint, science and technology have not been able to play the role that was hoped for. The reason for this is closely related to international dualism as we have talked of earlier. The gap between the haves and the have notes has been increasing over quite some time now. Thus the developing South is left with no option but to salvage itself in the current epoch of inequitable development, through various means.

In the first instance, even if the South initiates a development process on bilateral basis it may, owing to its economic conditions require substantial parts of research and study (for progressive policies) on multilateral basis. Nature of bilateral action may vary from country to country. There will be many problems in common requiring multinational studies and through an international approach.[22] The problems of the costs of transfer, those of access to technological information and similar one are essentially multilateral problems.

Secondly, initiatives on the part of the South may be effective only when taken at multilateral level. For example, fixing the terms of transfer may be easier if several developed countries discussed the problem together rather than each discussing it in isolation. Then proposals like Technology Transfer Centres, Patent Banks for developing countries or a World Bank of Technology which are put forward by one or the other group

can only be discussed if taken up as an issue of multilateral developmental diplomacy.[23] Magnitude of the problem can be understood by the fact that almost all the technological innovations in the developed industrial states are geared to respond to their problems and aspirations. Multilateral initiative may lead to perfection of normal commercial transfer. A multilateral exchange is more benificial to a bilateral one in regard to the countries of the South.

Basicallly the problem, like that of technology gap is a problem with global character and answers thereto cannot be sought through a set of unilateral efforts. UNCTAD as an international organization always prepared to help developmental efforts of the South was the spearhead in articulating the Third World demand for a New International Economic Order (NIEO). Through the VI Special Session of the UN General Assembly in 1974, it gave a powerful stimulus to the restructuring of the existing technological relations among countries. Appropriately it was adopted on 1 May, 1974. It attached key importance to technology rather than science.[24] Among the 20 principles on which NIEO is to be founded, the declaration included :

1. Giving to the developing countries access to the achievements of modern Science and Technology
2. Promoting the transfer of technology and the creation of indigenous technology for the benefits of the developing countries in forms and in accordance with the procedures which are suited to their economies.

Through the demand for NIEO the South has put forward its desire to bridge the ever widening technological gap between the metropolitican centres and the backward periphery, in order to boost latter's industrial and agricultural productivity

and thereby to lessen dependence of the South on the North. But paradoxically the over all long run results of such efforts till now have been quite the opposite.[26] If the present trend of policies and the terms of transfer continue the global system of dominance not only will remain intact but will also be strengthened at a qualitatively higher level.

This technological imbalance is proving to be uniquely detrimental to all the efforts of development by the states of the South. In common with all the institutions concerned with the assistence of the developing countries, UNCTAD has ever since its first session in 1964, been engaged in the study of the question of transfer of technology. The trade and Development Board (TDB) finally in its tenth session, on the 19 September, 1970 adopted a resolution defining the role of UNCTAD in the field of transfer of technology, and established an intergovernmental group with 45 members on the issue. The group will be responsible on a continuing basis for preparing a programme of action for UNCTAD.[27]

UNCTAD began its study of the issue of transfer of technology in four stages. First was on how far technology is decisive factor in a nations growth and economic development. Second, once the importance of technology has been established, the need for its transfer bears automatic justification. But then, is the transfer of technology the most rational solution for the diffusion of growth and development to the underdeveloped South ? The actual fact is that the problem of technological inequality has not been solved to any extent. So the third stage of the UNCTAD study provides analysis of the market mechanism and the transference of technology. The market mechanism of transfer

delivered all the goods for the developed countries but the underdeveloped countries, owing to their primitive modes of production and distribution and their permanent inferior position remained isolated from the technological climate of the advanced indusries of the world. They cannot bargain with the monopolistic elements in the global market for the right prices or appropriateness of the technology. Thus through the market the process of transfer is having an over all harmful effect on the social and economic structure of the South.

Further details of the problems through this process are analysized in the very next section in relation to the model of international technological dualism.

Finally, UNCTAD study (TD/B/310) establishes the requirement for multilateral action and international decision making for solving the problems being faced by the states of the South vis-a-vis the North. This has already been discussed in the preceding section.

TECHNOLOGICAL DEPENDENCE :-

The unfair equation in the global technology order in itself shows how the concept of dependence/dominance emerges in relations among states.

Technology dependence is generally considered a crucial element in the overall structure of dependence. The disparity in the technological capacity of the rich and the poor countries is not merely a reflection of their inequality but an important cause of it.[28] In such a situation, while it is vital for the South to generate their own advance in technology, their technological capability may be enhanced only by a systematic assimilation of the inventions and processes already in use in the industrialized countries of the North. This makes the process of Transfer of Technology very important. Through this process one has open platform of interaction between the dominant and the dependent elements of the international community. Because of these two elements in the global technological order, one can study the extent of the technological dependence of the South objectively in terms of model of 'Dualism' discussed earlier in the chapter. The technological dualism that exists defines and initiates set patterns of relationships which can be studied under the four key elements of the dualism model.

International Technology Dualism :

As we have stated earlier, the process of scientific and technological advance in all its stages i.e. basic research, applied research, blue printing, has been heavily concentrated in the advanced and the rich countries of the North.[29] The key elements of this dualism are :-

1) The enormity of the technological gap that exists between the

North and the South can be scaled by some empirical data on the structure of global scientific and technological development. An OECD survey (1978) of world research and development indicates that Third World countries account for a miniscule 2.9% as against 97.1% taken up by the developed countries (OECD+COMECON combined). Within this gross division is a more pronounced concentration of world R&D funds in the six countries (USA, USSR, Japan, FRG, France and UK). They spend among themselves 85% of world R&D funds. The two superpowers USA and USSR already take up more than half of the global R&D expenditure and the biggest spender, USA spends more than 35% of the world money in this area. The most important thing to be noted in USA and other OECD countries is that there is a similar pattern of concentration in terms of monoploy firms. In the US for example two-third of its R&D expenditure is shouldered by the State and one third by the private firms. But 3/4th of the latter (viz. Industrial research financed by private enterprise) is accounted for by a couple of hundred of the largest MNCs which also receive the bulk of the State R&D funds through government contracts (military technology, aerospace and Aeronautics, Electronics, Communication, Energy, Health, Agriculture etc)[30] So ultimately fruits of technological development are the jurisdiction of MNCs and are brought to commercial use through product and process innovation and initiative and adoptive research.

Approximately 98 % of the global expenditure on R&D by the North is spent on solving their problems according to their priorities, in accordance with the factor endowment of the rich countries. Hence in both the selection of problems and the methods of solving them, the interests of the poor do not usually

bear any consideration.[31]

Hence the reality is that two-third of the mankind with their large bulk of problems account for only 2% of the entire expenditure.

This unequal expenditure would not have made much difference, had the priorities of advances in scientific and technological fields and the methods of solving the problem were independent of the place where the work is carried on. But this is not so. The basic differences between North and South are so wide that every aspect of their action and achievement reflects it.

2) The monoploy rent accruing from technological development is safeguarded worldwide by the international patent system, whose registry structures reflect the extreme concentration of R&D operations.[32] According to a 1975 UNCTAD study, 94% of the world patent rights are owned by juridical entities based in the developed countries. While 6% are accounted for by the South. Of the later 6%, 85% of the patents are actually owned by MNCs with their headquarers in the US, FRG, France, UK and Switzerland. Therefore only 1% of all the patents registered worldwide are owned by firms and individuals of the South.[33]

The fact that the rich countries have a virtual monopoly in technology is reflected in terms of institutions, equipments, number of trained scientists and technologists. Please refer Figure on the next page.

The statistics in the Figure show that there exists a perennial gap between dominant and dependent elements of the international community. Due to wide difference between them, one can easily make out that this reflects no transitional state of affairs. Another indication of this gross inequality can be the

The Technology gap between the Developed Countries and The Developing Countries (Source : Stewart,78; Open University 1976)

	Developed Countries	Developing Countries		
		Africa	Asia	Latin America
Ratio of Scientists and Engineers per 10,000	112	58	22.0	69
Scientists and Engineers engaged in Research & development per 10,000	10.4	.35	1.6	1.15
Expenditure on Research & Development as percentage of GNP	1.2	0.6	0.3	0.2
Total expenditure on Research & Development between Developed and Developing Countries as a percentage	98	2		

statistics of world productions of capital goods. In this too we find the same dense concentration. In 1970, world production of engineering and electrical industries was divided as follows :

3.1% of the production was produced by the South, 36.6% by the COMECON and 66.3% by the OECD group of countries. The 1976 data of distribution by countries of world exports and transport equipment showed an even greater concentration : 3.4% by the South, 9.7% by COMECON and 86.9% by the OECD countries. On the same scale there was the distribution of global imports of machinary and transport equipment from different country groups, which give an idea of the magnitude of the South technological dependence on the metropolitian countries. In 1976, 90.3% of the imports of the South came from the OECD group of countries and only 5.1% from the other countries of the South.

The statistics given above show amply that there exists an economic inequality between the dependent and the dominant elements of the international society. The dependents are so backward that even if the South grew very quickly and the North stagnated (which is very unlikely) only a handful of developing countries will significantly be able to close the technological gap within the next 100 years.

3) One of the main features of the model of international dualism is the tendency of the dependency to intensify. Earlier the statistics have shown how the national incomes in the North have been increasing at a much faster rate than the countries of the South. Similarly in the arena of growth of productivity per person the North is leaving the South far behind. If such trends continue in the international arena the Southern dependency will

obviously be intensified. In this over all trend of increasing interdependence the role played by technology dependency becomes very vital. The activities of the poor states represented by 2% of the global R&D expenditure, are also largely devoted to the problems and methods determined by the rich countries. The trend of research is set by the rich . Much of the present research work of the South represents a hopless attempt to compete with the North from a much inferior position. In fact the science and technological capabilities of South are insufficient to determine the nature of their own problems and to determine how far they are suceptible to solutions by applied science and technology with appropriate methods.[35] This tendency further pushes the countries of the South backwards while the North developsfurther, in the meantime with leaps and bounds. The existence of the rich countries with their superior facilities and the labour associated with the work on their defined frontiers of knowledge exert powerful attractions resulting in brain drain. External brain drain occurs often but in developing countries internal brain drain, the diversion of their own efforts, mentioned earlier, may combine to form a dangerously detrimental combination far from the South's development strategy.[36]

For the South technology poses a special problem since it is exogenous, having been developed in the North in a different environment physically, organizationally and economically. This exogeniety raises questions about the implications for the relative power of the North over the South. It also leads to many other forms of dependence like financial, managerial, social and cultural.[37]

4) The traditional remedy for this inequality in the distribution of Science and Technology in the international level comes in the shape of transfer and technology. This forms the frontier key element of the model and international dualism. For through this process is charted out the channel of interaction of the dominant and the dependent elements of the global technology community.

The most significant aspects of the present system of technology development and diffusion is that technology which is made available to the developing countries is not so much transfered as it is sold.[38] It is for this reason the nature of market and the impact of its forces play the key role in the interaction of the states because of their technological needs. As mentioned earlier, the market technology is a highly imperfect one in which information is limited and monopoly is rampant. The impact of the transfer of technology is strongly conditoned by the spread of the transnational corporations and their coordinated approach to the management of its activities so as to maximize global rather than national profits. Although it may have a clear logic in terms of the efficient operation of the corporations, the location of decision making centres being situated outside the border of the developing countries in which they operate tends to foster an international division of labour which accentuates the dominance/dependence relationship between the North and the South.[39]

First, Technology is not always available for right price. More often than not it is covered by secrecy, legal patents and restrictions, Second, the South can obtain technology only at an exhorbitant price which they cannot afford.[40]

Therefore, the debate about the international technology trade has, to a considerable extent moved forward as a

subcomponent of the general debate about the MNCs and the possibility of the international anti-trust action.[41] This inter-relationship between technology and the multi-national firm's problems stem from the fact that much of the recent technology transfer to the less deeveloped countries has been effected through the MNCs. Fortified by easy access to finance, technology, capital goods and management, the large MNCs are all set to establish a new international business order, where they would reorganise in the most efficient manner the inter-related systems of world production, trade, capital flow and technology.[42] In such a setting the countries of the south are particularly vulnerable. There arise three basic areas of problems from this way of transfer of technology:

Foreign exchange costs: As has been shown in some previous studies of UNCTAD, foreign exchange costs of transfer of technology represent a considerable burden on the balance of payments of the South.[43] The overall balance of payments impact on the individual investment projects has often been on the negative side. The value of transfered technology as indicated by fees, royalties and technical services has grown vastly. By the mid 80s the approximate value of developing country payments to the major industralized countries for technology was $6-7billion. This understates the true cost of transfer of technology. Service over invoicing of imports and/or underinvoicing of exports is known to add substantially to the cost, while the price of imported capital goods also includes some element of payment for Technology Transfer.

The precise way in which foreign exchange costs are being incurred in the transfer of technology depends both upon the

channels and the forms through which it takes place and upon the know-how elements involved. The forms of transfer may be broadly divided into a) transfer by agreement between independent-enterprises and b) transfer through direct foreign investment.

(a) In the case of transfer by agreement between independent enterprises, the foreign exchange costs of the technology are often determined by the terms of the agreement between the supplier of process technology and the recipient company.

The common form of payment for process technology is that of royalties. The payment for other elements of transferred know-how is often made in lumpsum. The payment may also take the form of equity participation (i.e. the supplier of technology receives a share holding in exchange for know-how. The dividend payments may properly be considered as payments for technology.)

In addition, the transfer agreements may sometimes contain hidden costs of technology transfer. One such condition in that the recipient company must buy its imported equipment and intermediate products from the technology supplier, who thereby may become the monopoly supplier. When this happens, he is able to raise the prices of equipment and intermediate goods. The price mark up is often hard to determine. But restrictions on alternate sources of supply clearly open the way to monopolistic rents on intermediate goods. Such a system of price work ups on equipments and inter- mediate products have often been the most important sources of profit to technology supplier.[44] In many cases the intermediate products are so specialized that the recipient has no real choice but to depend on the source of the supply. Also the agreement may contain clauses limiting exports by the recipient company. Such restrictions particularly in the enterprises of

small countries with limited market may effectively reduce the scale of production. As a result the costs of production in them go up and their products are not competitive in the world market.[45]

(b) It is equally difficult to determine the foreign exchange costs of the transfer of know how through direct investment. Even if the parent company changes its subsidiary, design fees, management fee or royalties. These may often serve as accounting devices to minimize tax burdens as a whole. The costs of the transferred technology may, in terms of the drain of foreign exchange be hidden. They will consist partly of nominal royalty, management payments, repatriated profits, profit on the supply of equipments and intermediate goods.

A major determinant of the costs of transferred technology may be the fact that the recipient enterprise does not possess adequate knowledge about the choices open to it or about the normal terms of transfer agreements. Ignorance of options available to a developing country is probably an important actor. But, particularly when price mark up on intermediate products is a source of revenue to the supplying company, other factors could also be important. For example, the costs of transfered technology may depend partly on whether there are alternative sources of supply of intermediates, partly on competitive conditions in the domestic market of the developing country (which will influence the possibility of price mark ups), and partly on government policy, which affect the outcome in three ways. First, protectionist policies may create imperfect domestic market conditions under which it is easier to absorb inflated intermediate prices. Second, government control of the sources,

volume and prices of imports may limit the scope for such price inflation. Lastly, there may be direct government control on payments in respect of royalities and consultants. In addition, since national policies may influence technology suppliers in choosing between transfer agreements or direct invsetments, they may command control over the form of payment. The way the payments for transfer of technology enter the balance of payment of a country depends on the choice of the channel and form of know-how components. The UNCTAD study on the elements on technology transfer emphasises that policies for the reduction in such exhorbitant foreign payments should be worked out on a wide perspective.[46] The tendency for trade to concentrate increasingly on technogically sophisticated goods itself poses a serious problem for the developing countries, for they will have to make sharp improvements in production techniques if they are to change their position in world markets. This will require very rapid and massive absorption in their economies of technologies developed in the advanced countries.

It is particularly disconcerning that the developing countries play a minor role in world exchange of technologies. And even when they have imported technology on some scale, there is little indication that their dependence on traditional primary exports has been lessened. The costs of technology transfer in these areas tend to be high.

There are other problems in the development of trade based on transferred technologies. A major difficulty is that where import substitution policies necessiatate heavy protection, unit costs of production may be high, reflecting the small scale of output. In these circumstances the costs of transferred technology per unit of output would also be high, thus

contributing towards making the product non-competitive in the world markets. A considerable revision of domestic policies may therefore be required in order that an export oriented strategy for the transfer of technology should be effective. Export development may suffer further in cases where technology agreements include clauses which limit export markets. The scope for a rational divison of labour among developing countries which are attempting to benefit from increased regional cooperation may be reduced as a result. It needs no emphasis that without a massive transfer of technology on reasonable terms, it will be clearly impossible to move towards changing the existing international divison of labour in accordance with the long term interests of the developing countries.

The MNCs are compelled by the changed conditions for capital accumulation, to relocate segments of their production to new industry sights wherever and whenever the profitability dictates. Many countries of the South emerged as excellent sites for these transnationally integrated but locally incomplete production processes. This process of relocaion is usually accompanied by transplantation of the requisite technologies there.[47] Here technology comes as a package i.e. along with capital technology and marketing facility management etc., as a part of the relocation set up. Even when the arrangements and agreements are dealing more or less exclusively with transfer of technology there are several restrictive practices. The market has the following pecularities. It is highly imperfect with great monopoly advantages for the sellers from North because of the secreacy and or the protection of the patents and trade marks. Possession of technology is jealously gaurded by its owners.

Property rights give its owners command over the terms, conditions and price for its exchange. The introduction of such property rights in technology is relatively a recent phenomenon. Although technology is so very unlike land, its exchange across nations is reminiscent of the practices in the feudal age.[48]

When technology is leased it forms a part of a much larger package. In the arrangements and agreements dealing more or less exclusively with the transfer of technology, there are several restrictive practices : for instance, exclusive grant back provisions, challenges to validity of patents, exclusive dealing; restrictions. On research, use of personnel, adaptatives goods or services, use of technology after expiry of agreements and use of technology already imported. The draft of the international Code of Conduct on transfer of technology now under negotiation in UNCTAD lists some 20 such restrictive practices.[49] The production technology whether in the form of pure knowledge or embodied in foreign investment or machinary is transferred under terms that are the outcome of negotiations between buyers and sellers in situations approximating monopoly or oligopoly. The final returns and their distribution depend on the reletive power of bargainers. The probability of an unfavourable outcome is highest in the case of developing countries because of the existing asymmetry in their technical knowledge.[50]

The restrictive practices, often illegal or inadmissible under national laws in the developed North have been widely imposed in transactions with the developing South. On the other hand, technology suppliers have accepted only the lowest possible degree of responsibility and obligation concerning the implementation of technology agreements to guarantee that the developing countries reap the full benefits of their transactions.

UNCTAD is actively engaged in drafting out the possibilities of creating national and international actions in helping the South to come out of such pressing parameters of dependence and exploitation.

Whatever be the mode of transfer of technology , now there is an increasing experimentation with the unpackaging of the technological packages themselves . As this 'unpackaging' has proceeded it has become evident that the principle contribution of the private MNCs to host countries and the main source of their market power is their technology, their"trump card".[51] All together these practices represent the inevitable exercise of the market power. But the ease with which these supplying fums have been able to extract excessive returns on their technology with the above mentioned or other practices is facilitated mostly by the nature of import substitution policies enacted by the governments of the developing countries.

Inappropriate technology :

Predominance of private transfer of technology has resulted in serious problems for developing countries. Uncontrolled technology imports are based solely on the requirements of the profit oriented decision making by international capital owners and local partners. The unsuitability of these technologies mainly originates due to the externality of technology to the infrastructure of the South.[52]

A major cause of disappointment with the progress in the second development decade has been the persistence of unemployment and underdevelopment and the failure of the growth rate of employment to keep up with the growth of population in much of the Third World. It has become evident that rapid

expansion of industrial output is not by itself sufficient to solve the problems. In the entire amount of lecture on the subject, the most frequently prescribed remedy is a greater relevance on efficient technology using a high ratio of labour to capital. Without doubt given the factor endowments in the South there exists a strong case for choosing new labour intensive techniques.[53]

The problem is that as the chief transferers of technology are again the MNCs. At a particular stage of the product cycle they may prefer to commercialize their technology through licencing arrangements and management contracts, joint ventures franchise etc. or even sell them outright (such as turn-key plants). These may offer at least some possibilities for the government of the host country to exercise some control over the choice of technology with respect to national development objectives and to provide some bargaining support to the local firm so as to ameliorate the terms and conditions of the transfer.[54] But these happen to be very united possibilities for one simple reason that within this frame work all considerations concerning technology transfer are subordinated to one over riding logic, the accumulation of capital. Other developmental and social requirements of the country are not permitted to interfere with this logic.[55] Industries of the developing countries have tended to employ techniques which have not been to adequate utilization of domestic resources, including environmental resources. So it can be concluded that through process of transfer of technology the various skills at the disposal of the developed countries has not contributed optimally to the solution of the uneployment problem rather it has aggravated it in those

instances where it had replaced traditional patterns of production.[56] Thus from the range of technology available to us, selecting them according to the specific needs has grown to be a very difficult task.

Associated with the debate about the choice of technique was the issue of appropriate technology. Many believed that because of the reasons discussed above the technology developed in North was not appropriate for the South. Technologies designed where labour is scarce are transferred unaltered to the poor countries with abundant labour. Thus the market prices paid for capital and labour in developing countries generally are giving the wrong incentive to the firms for choosing the techniques.[57] For example, we see the area of agricuture - the developed country techniques based on large scale, highly mechanized methods of cultivation in temparate climates are not adapted to the tropical conditions. Development to the tune abounds with examples of important technology for agricultural sector that falls into disuse the moment the experts have left . Thus though high yielding seeds succeeded in achieving spectacular increases in per acre yields in some cases, it mainly benefitted the rich landlords with access to credit who formed in areas where irrigation and fertilization were available.

In the final analysis it can be said that the South invests exhorbitantly in various ways for the transfer of much needed engine of development of technology. In many cases due to the introduction of inappropriate technology even the indigenous momentum of developing their technological capability suffers. In addition to this the imperfect market forces had to the transfe of backward technology as compared to the level of tecynical change in the west. Because of the excessively wide gap between the

North and the South, the South accepts whatever technology that it gets. When this old technology is transferred to the country of the South the buyer of the technology in his/her own interest will see to it that the technology concerned will retain its scarcity to which its monopoly rent is based. So the seepage and spill over effects are reduced to a minimum. A host of institutional instruments are available for this purpose - patent rights and restrictive stipulations in licencing contracts being most common. Because restrictive and the monopolistic clauses are associated with the process of technology transfer, it does not necessarily enhance the technological capability of the poor nation states. The terms and conditions of the transfer of technology are so severe that with the types of technology transferred they perpetuate dependency structures and dependent international division of labour, locking the relationship between the rich and the poor in permanent bonds of inequality.

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CHAPTER - 3

CHAPTER 3

NEGOTIATING A BARGAIN : THE SOUTH VS THE NORTH ON A CODE OF CONDUCT FOR TRANSFER OF TECHNOLOGY

It is obvious that the present system of international transfer of technology needs some kind of control and regulation . Clearly the world wide proliferation of technologies is characterized by some major structural deformations specially with regard to the conditions of transfer into and the nature of technology received by developing countries. Given the inherent weaknesses of most of the national and regional systems of legislation, an internationalized framework for regulation of technology transaction is required. Together with reform of the international patent system, a code would then serve to change the current arrangements concerning the transfer of technology i.e., legal and judicial environment.[1] Thus it would help to prepare the ground for the second component of this overall strategy, which would consist of policies aimed at "strengthening the technological capacity of developing countries and thereby reducing their technological dependence.[2]

International Initiatives

In its early phase the international concern for technical transactions was centered on patent legislations which were more easily identifiable than other aspects of transfer of technology. UN General Assembly, by a resolution (1713 XVI) passed in 1961, initiated a study on the effects of the patent legislation on the developing countries. It is also known as the First International initiative. The report of the UN Secretariat, prepared in response to this Resolution, pointed out that patents

formed only a part of the problem and a fuller consideration of the subject had to be undertaken in the broader context of facilitating the transfer of both patented and non-patented technology.[3]

Therefore, we see that the subject of an international Code of Conduct for the transfer of technology has been on the international agenda for nearly three decades. Specific proposals have been presented by various social scientists and technologists. The initiatives taken by international, regional and privately sponsored organisations have multiplied.[4] The international Chamber of Commerce in its "Guidlines for International Investment" (NOV, 1972), included a chapter specifically dealing with technology and related policies to be pursued by technology receiving and technology exporting countries. Through this measyre, the international business community demonstrated its interest in having a code included among the respectable political issues on the transfer of technology-bargain package.[5]

The demand for the revision of the Paris convention is mainly an attempt to improve a bad bargain entered into in the age of dependence. A much more far reaching initiative on the part of developing countries is their effort to establish a Code of Conduct on the transfer of technology. The negotiations on the code, in sharp contrast to the situation at the time of the signing of the Paris Convention in 1883, are being carrried on by 10 times as many governments, representing 25 times more people, producing 200 times as much income. Their combined Research and Development, technological and personnel staff is atleast 500 times larger and of the Research and Development expenditure, 2/3rd is absorbed by the Public Sector.[6] These factors may

illuminate the difference in the settings for the original Paris Convention and the UNCTAD code.

Among the independent groups, a special Working Group of the Pugwash Conferences on Science and World Affairs adopted in April 1974, a draft code which later served as the basis for UNCTAD's activities in this field.[7]

Subsequently, the UNCTAD got seized of this issue. UNCTAD-I held at Geneva in 1964, recommended that a competent international institute should explore the possibility of concluding appropriate international agreements to facilitate the transfer of industrial technology from developed nations to developing countries. The qualitative break through in this field was achieved in UNCTAD-III, held in Santiago in 1972. Two reports prepared by UNCTAD Secratariat highlighted seriousness of the problem and thereby served as background papers for the sesson.

The negotiation on an International Code of Conduct on the transfer of technology has been the objective of the developing countries for a long time. Access to the modern science and technology was included as one of the aims of the New International Legal Order, which was inaugurated by the General Assembly at its Sixth Special Session held in May 1974. In its accompanying Programme of Action there was a proposal for the formulation of the Code of Conduct on the transfer of technology, corresponding to the needs and conditons prevalent in the developing countries. It was resolved by consensus at the Seventh Special Session, held in September 1975, that all states should cooperate in evolving this code.[8]

In the first report, Transfer of technology, the Secratariat made an effort to estimate the cost of the transfer

illuminate the difference in the settings for the original Paris Convention and the UNCTAD code.

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In the first report, Transfer of technology, the Secratariat made an effort to estimate the cost of the transfer

of technology in some identifiable areas and it found that the direct cost of transfer i.e., across the counter payment made for the import of technology alone (excluding indirect costs resulting from transfer pricing etc.) amounts to about $ 1500 million for all the developing countries in 1968. The report further pointed out that this was equal to 5% of the exports of developing countries (excluding oil exports), 2/5th of their debt servicing costs and 56% of the flow of Direct Foreign Investment. Over the period these costs have increased by 2 1/2 times faster than the manufacturing output in the developing countries.

The second study, prepared by Junta del Acuerdo de Cartagena,[9] for the UNCTAD, analysed experience of the five Andean Pact countries, namely Bolivia, Chile, Columbia, Ecuador and Peru, in the field of transfer of technology. Out of the 409 contracts for transfer, 317 imposed total prohibition on exports falling within their respective purview and others remaining contained restrictive clauses of various types.[10] The study concluded that these restrictive clauses reflected the weaker bargaining positions of the parties from Andean Pact countries and it advocated active governmental intervention on behalf of the domestic enterprises, to strengthen their bargaining power. It appropriately cited the example of Coloumbia in this regard.[11]

The final resolution, i.e., Resolution 39 (III) on transfer of technology was agreed upon in the plenary conference of UNCTAD III (Santigo) unanimously. The major significance of this resolution was that while providing for firm foundations for UNCTAD's activities in this field, it clearly delineated the course of action to be pursued by UNCTAD as well as by member countries thereafter. On the other hand it directed the Secratariat to pursue the matter on a continuing basis and to

make necesary institutional arrangements for this purpose.[12] It also recommended an active policy with respect to transfer of technology for the developing countries. The developing countries were asked to establish institutions for the purpose of dealing with the whole range of question connected with technology, such as assisting the domestic enterprises in evaluation, negotiation and renegotiation of contracts involving transfer of technology and finding alternative sources of technology etc. In brief the resolution had decisively rejected the '<u>laissez fair</u>' approach to the problem and had advocated both at national and international levels to facilitate transfer of technology.

UNCTAD had responded to developing countries demand for a more adequate and equitable cooperation in enhancing technology flows to the developing countries as early as the 1960s by initiating a systematic scrutiny of the patent system. UNCTAD Group on transfer of technology and the Secratariat explored and clarified some of the complexities of technology trade and transfer in the early 1970s. These studies ultimately furnished significant inputs to the Pugwash meeting of April 1974, where the first concrete and comprehensive draft was born.

Meanwhile, the declaration of the establishment of the New International Economic Order adopted by the General Assembly at the end of its seventh Special session, imparted fresh momentum to the efforts of the UNCAD. Both the Declaration and the Programme of Action along with the resolutions on International Economic cooperation adopted in 1975, made specific and elaborate references to the problem. The thrust of these resolutions was that there should be a Code of Conduct.[*13]

After the Santiago meet the Trade and development

Board asked the Secratariat to consider the possibility and feasibility of an International Code of Conduct in the field of transfer of technology. Subsequently an inter-governmental group of experts was convened to prepare a draft outline to serve as a basis for the preparations of a universally applicable code.[14] The group met twice in 1975. These sessions gave the opportunity for the first exposure of ideas about what a future Code of Conduct would look like. During these meetings the developing countries (Group of 77) and the developed market economy Group-B countries presented their positions on the nature and contents of the future code.

The developing countries i.e.,the G-77 countries had already submitted in May 1975, their first draft outline of the future code. Please refer to Appendix-1. It contained a comprehensive treatment of transfer of technology issues and was based on current developments in national laws and particularly on the draft circulated in 1974[15] by the Pugwash Conference of Science and World Affairs. developed market economy countries had also submitted their preliminary concepts of a future code in 1975. On the basis of these two inputs, the Governmental experts which had met twice in 1975, agreed on the main chapter headings of the code[16] The two drafts submitted, covered in general the same subject matters :-

Preamble : Objectives and Principles ; definition and the scope of application; national regulations on it ; restrictive business practices; guarantees and responsibilities of enterprises; international collaboration and special treatment for developing countries, applicable law and settlement of disputes and other provision.

Broadly speaking of the position of the G-77, we note, that they perceived technology as a part of the universal human heritage and believe that all countries have a right of access to technology in order to improve standard of living of their people. An adequate mode of transfer of technology could become an effective instrument for elimination of economic in equality among countries and for the establishments of a new and more just economic order. The developing countries believe that an international legally binding instrument is the only mean capable of effectively regulating the transfer of technology.

According to the Group B countries, a Code of Conduct consisting of agreed guidelines of a voluntary and legally non-binding character would be the only way to facilitate and encourage the growth of scientific and technological capabilities of all countries. These guidelines should set out general and equitable principles applicable to the transfer of technology, including governments. One important consideration for the group-B countries is that modern industrial technology is being developed using primarily private resources.[17]

From the very begining of the Code of Conduct negotiations the position of the North and the South became crystalized. The above mentioned group positions had been reached during the two sessions of the governmental experts in 1975. During UNCTAD IV held in Nairobi in May 1976, Resolution 89 (IV) was adopted, which recommended that a draft on Code of Conduct should be expedited with a view to its completion so that the General Assembly at its 31st Session could convene a United Nations Conference (scheduled then for 1977) under the auspices of UNCTAD, to negotiate on the draft elaborated by the group of experts, as well as take all the decisions necessary for the

adoption of the final documents embodying the Code of Conduct.

UNCTAD IV was thus confronted with a double dilemma. a) the basic divergence of opinion on the legal character of the code, and b) and how to continue the work for a comprehensive draft initiated in 1975. By careful and measured diplomacy at this stage of the Code of Conduct negotiations, a deadlock between the North and South (i.e., the G-77 and the Group-B countries) was avoided. developing countries proposed that the code should be negotiated at a plenipotentiary conference leading to the adoption of a legally binding instrument, while the Group-B countries agreed to no such a proposal.

After prolonged discussions the above cited conference adopted a carefully drafted compromise whereby a new Group of Intergovernmental Experts was to be set up, open to participation of all states, and mandated to prepare a draft on an international Code of Conduct which would contain provisions ranging from mandatory to optional without prejudice to the nature of the code.[18] The basis of the text prepared could be negotiated at the UN conference to be convened after a draft had been finalized.[19]

Thus far the negotiations for the draft Code of Conduct had proceeded in a very peculiar fashion of avoiding the pronouncement of its legal character on the one hand and on the other of centering the exercise on the drafting of substantive provisions for the future instrument.

Before the actual negotiating conference the Inter-Governmental Group of Experts had held six sessions. The various working groups of the Inter-Governmental Group of Experts carried out their mandate for the preparation of tentative composite draft

texts of the chapter codes.

Working Group-I : It has been incharge of drafting provisions on the preamble, definition, the scope of application of the code, principles and objectives, special treatment to developing countries and international collaboration.

Working Group-II : It is responsible for the subjects such as restrictive practices and guarantees, responsibilities or obligations of parties, in technology transactions.

Working Group-III : It is entrusted with the work on the national regulations of applicable law and settlement of disputes and other provisions of the future Code of Conduct[20]

Negotiations took place on the basis of regional groups as we have noted earlier, according to the positions expressed in their respective draft outlines. At its second Session the Group-D countries submitted their comprehensive draft outlines. It matched the pattern of the proposal submitted by the G-77 and the Group-B countries, whose issues has been discussed above.

In general, Group-D countries stressed that the Code of Conduct should be able to ensure and promote the international transfer of technology on fair and equitable conditions, should assist in solving the social and economic problems of the receiving countries, in particular the developing countries, based on the development of the basic branches of their national economies and on the strength of the role of the states in their national economies. Further, the Code should establish commonly acceptable rules with due regard to the interests of the exporters and importers of technology. The Intergovernmental Group of Experts had held total six sessions, the last of which met in June-July 1978.[21] During this process the group of Socialist

countries of Eastern Europe, and USSR introduced for the first time, their set of proposals on the future Code of Conduct in line with the agreed chapter headings of the draft code. China also became an active negotiator and during the last session of the Inter-Governmental Group of Experts, it adhered in general to the substantive positions of the group of developing countries.[22]

The work of the Inter-Governmental Group of Experts carried on over six sessions and approximately ten working weeks proved to be insufficient for preparing the text containing the draft Code of Conduct for the final decision later in the UN conference. The negotiating draft prepared by the group had left open important questions that had been already outstanding at the beginning of the entire process. Complete chapters of the code such as those on the responsibilities and obligations of parties to technology transactions and on applicable law and settlements of disputes were sent to the conference in a form that merely reflected the original group positions on these subjects.

The job assigned to the Inter-Governmental Group to produce an agreed upon text was a very complicated task, since in this case the positions of the three groups were different. A gradual start had to be made from the periphery assimilating the points which were either agreed or which could possibly be negotiated into are agreed text.

The prime task of compiling a synoptic text, showing specific proposals of each of the three negotiating groups in juxtaposition with each other was done by the Chairman of the Inter-Governmental Group with the help of the UNCTAD Secretariat.

It divided the entire range of proposals into what ultimately became the nine chapters as follows :

(i) -- Definitions and scope of application

(ii) -- Objectives and principles

(iii) -- National regulation of transfer of technology transactions

(iv) -- Restrictive practices

(v) -- Guarantees

(vi) -- Special treatment of developing countries

(vii) -- International collaborations

(viii) -- International institutional machinery

(ix) -- Applicable law and settlement of disputes

(x) -- Other provisions [23]

The composit Draft Code of Conduct as prepared by the Intergovernmental Group Of Experts for submision to the proposed UN conference on transfer of technology is reprinted in Indian Journal of International Law Vol 18, 1978, p431

As the meeting of the Inter-Governmental Group were open to representatives from all countries, members of UNCTAD, the sessions were attended by some 100 countries who belonged to Group-B ,Group-D or the Group of 77, with the exception of China. Though China belonged to no group it followed the G-77.

As has been noted earlier, negotiations were by regional Groups, each group having a single spokesman in each of the working groups, namely Working Groups I, II and III. Therefore at a time only three negotiations proceeded since China rarely participated as the fourth participant. But the difficulty arose during the sessions between the negotiations mainly because of establishment of their respective group positions by the group to which they belonged.

Group-B was a fairly homogenous group with United States, Canada and the European community members and the other OECD countries. As a whole the group presented a common front, the only real difference being in the degree of liberalism they wished to show towards the developing countries. This varied from considerable generosity on the part of Netherlands, Denmark and the other Scandinavian countries through varying degrees of flexibility to the relatively hard position adopted by USA.[24] During the preparations for negotiations, the group had at its disposal great deal of expertise, its delegation being composed of government officials, lawyers, industrial property experts and engineers. All of these were being expertly serviced by the OECD Secretariat. Group-D was the smallest group with less technical expertise at its disposal but at the same time with an open mind on a number of controversial issues. On the whole they tended to back the G-77 but at times they were very conscious of their own interests either as the recipient or the suppliers of technology.

The Group-77 had to face grave difficulties. They were short not only of experts in the field of technology but also of trained negotiators. Very often the countries concerned could not send delegates from the capitals and had to rely on delagates from their missions in Geneva. Either their negotiator was a diplomat with little knowledge of the subject or the country's permanent representative to GATT, which practiced a very different method of negotiation. Not only were the G-77 the largest in number but they had three sub groups : the Latin Americian countries, Asian countries and African countries. Each took some pain to ensure that its specific views were given the due weightage. The task of harmonizing their positions was an arduous

and time consuming operation.

The UNCTAD Secretariat had the overall responsibility for servicing of the expert group as a whole. At the same time it felt obliged to render assistance to the developing countries. Particularly it helped them in the preparation of discussion papers giving background to the proposals put forward. This put the Secretariat in a somewhat delicate position. Yet it battled on for the success of the negotiations. If success came, it was due to its own integrity. The sessions of the IGE from its first one in 1975 to the last in 1978 made substantial progress towards a single draft. This enabled the convening of a diplomatic conference for the elaboration of a code. A United Nations conference on an international Code of Conduct on the transfer of technology was convened after a resolution in the General Assembly in October-November 1978 and its resumed session was held in February-March 1979.[25] But the outcome was nothing very encouraging and the work on the elaboration of the code was then at a standstill, as without alteration from the highest levels it did not seem possible to secure the political compromises which were required.

During the process of bargaining the position of the G-77 countries determined the entire pace and characteristics of the diplomatic conference. As always the developing countries put their entire effort in highlighting the crucial importence of technology to their economic and industrial growth and development. Thus they reaffirmed that the basic aims in negotiations on the Code of Conduct on the transfer of technology are to eliminate restrictive and unfair practices affecting their technological transactions and to strengthen their national technological capacities in order to accelerate the process of the

technological transformation and development, while increasing the international flow of all forms of technology under favourable terms.[26]

The Preamble agreed upon so far contains some important declarations and principles that have been subscribed by all the participating countries. First, it recognized the pivotal role played by science and technology in the social and economic development of all the states, in particular to the development of the South. Second it affirmed the belief that technology is the key to progress of mankind and that all people have the right to beefit from it. The Group B countries resisted this objective arguing that technology was a product of human inguinity and its inventors have a prior right over it. The recoginition by the Preamble to the fact that all people are entitled the fruits of technology gives a strong moral commitment to the South for negotiating the Code. The Preamble also acknowledges that the Code will assist developing countries in selection, acquisition and effective use of technology. The Code will also help to creat conditions conducive to the promotion of International transfer of technology under mutually advantageous terms for all.

The content of the Preamble is the most affirmative part of the entire draft. It indicates the degree of consensus reached among the various states and its future direction. But further progress was not forthcoming, There were grave hinderences which determined the future of negotiations on the final Code.

To begin with, the first major unresolved issue among the three groups participating in this multilateral sessions of negotiations is the legal character of the code. Since the very begining i.e., when G-77 countries submitted their first

draft on the code in May 1975, they maintained that an internationally legally binding instrument is the only form capable of effectively regulating the 'transfer of technology'. This position was reiterated in the G-77 draft resolution submitted again at UNCTAD V which requested the resumed session of the UN conference to adopt a universally applicable code in the form of a legally binding instrument. As explained in its Arusha programme , the G-77 reaffirmed the need to adopt a legally binding Code of Conduct as one of the key instruments which will contribute to the establishment of the NIEO.

Previously Group-D countries, i.e. Socialist countries and Mongolia did not have a specific stand on this issue but during UNCTAD V it cleared its opinion and recommended that the code should be legally binding.

However, this joint stand is opposed by the Group B countries which insist that the code should not be legally binding but should only be a Code of Conduct consisting of guidelines for international transfer of technology. They later expanded their stand, adding that the Code of Conduct could be made functional, without being legally binding through an effective international institutional machinery.[27]

A second unresolved issue is the concept of international transfer of technology which will govern the scope of application of the code.[28] Though all the groups agreed that the code applies to international transfer of technology transactions (which occur when technology is transferred across national boundaries between the supplying party and the acquiring party), the G-77 and Group-D stand was opposed by Group-B Countries. The Arusha programme explains that all international

transfer of technology transaction must be within the scope of application of the code and that such transactions occur either when the parties are from different countries or when they are located in the acquiring country and one of the parties is either owned or controlled by a foreign entity. In other words, if the technology transferred has not been developed in the technology acquiring country and is directly or indirectly under the control of a foreign power, in such a case even if the parties are not from across the national boundary, the technology transaction should be included in the scope of application of the international transfer of technology.

Group-B on this issue holds that the code would be applicable only to transactions across the national boundaries. Group-B considers that national law should apply as regards the transactions taking place between parties within national boundaries but states may also apply, by means of national legislations, the principles of the code to those transactions.[29] This mechanical construction of the expression 'international Code of Conduct by the Group-B can frustrate the entire purpose of the code', for the Multi-National Companies (MNCs) can easily circumvent its provisions by acting through their branches and subsidiaries.[30] The application of national laws has not proved of much consequence in this regard. This divergence of stand can be viewed in more totality when the differing perspectives of the developing and the developed are clearly revealed in the preamble of the draft codes.

The starting point of G-77 version is that technology is a part of the universal human heritage and that all countries have the right of access to technology, even otherwise they view implementation of the Code as an instrument to establish

the New international Economic order. But neither the Group-B nor the Group-D countries, which hold the key to the vast reservoir of modern technology were prepared to accept this proposition. Group-B believes that technology is the property of individual enterprises and therefore transfer of technology is primarily a commercial transaction. As Prof. Jayagovind points out,

".. for the developed countries the functions of the propsed code would be to facilitate such transactions by reducing the nationally erected boundaries i.e. an extension of the free trade philosophy from the commodity market to the technology market."

This idea is stated in categorical terms by the guidelines for international investments issued by the Internation Chamber of Commerce, " The host country and governments should in the formulations of its policies take into account the fact that technology is mainly developed by private enterprises in the principle industrial and scientific centre of the world and that its successful international transfer by such enterprises depends not only upon appropriate compensation being provided but also upon suitable conditions in the receiving world.[31]

Group D countries also do not recognize the access to technology as a matter of right of the states but it sets out development of basic branches of economy and strengthening of the role of state in their national economies as one of their objectives (Please refer to Appendix-III). This is favourable for the G-77 countries since it would contribute to technological self reliance envisaged in the context of planned economic development.

The approach of the Group-B countries to the establishment of the Code is at total cross purposes with the needs and aspirations of the developing countries to reset the

entire market mechanism of technology transactions and make it more easily available on more equitable and just terms giving considerations to the developing countries status of dependency.

The Draft Code contains a separate chapter on the 'objectives and the principles'. Apparently there is a large measure of agreement on most of the provisions. But the superficiality of this agreement becomes obvious when one looks at the reluctance of each party to subscribe to what the other party really considers as basic. For example, the principle of unpackaging of transactions involving transfer of technology. The G-77 considers it basic, but it does not find place in the proposals of Group-B countries. The principle of unpackaging implies that the recipient in a technology transfer should have the right to select that aspect of the technology from the package which it requires according to its economic and developmental needs. This principle is fundamental to the technological self reliance, towards which the developing countries want to direct their development efforts. Group-B on its part has insisted upon the unconditional respect for the industrial property rights (Appendix - III). This is not included in the G-77's proposals and principles, rather they have been raging a systematic battle against the system of patents through their various channels of struggle. In UNCTAD V the issue was taken up in a big way and the UNCTAD Secretariat had prepared extensive and indepth studies highlighting the features which are detrimental to the development efforts and dependency reversal trends of the developing countries.

A third outstanding unresolved issue is the <u>scope of practices to be restricted by the code</u>. The chapter on Restrictive Practices includes provisions regarded in the market

economy countries as restrictive business practices which are competitive in nature and are prohibited or controlled on the grounds that they restrict comptition.[32]

For the group-B and to a certain extent also for Group-D countries the emphasis is on the elimination of all practices which are regarded as being restrictive in the broadest sense, including those which are anti-competitive in nature but specifically that which above all hinder the economic and technological development of the acquiring parties. G-77 insists on a wide range coverage to avoid practices which restrain the trade or adversely affect the international flow of technology. Again as explained in the Arusha Programme, the G-77 affirms that the aim of the chapter of restrictive business practices must be to eliminate the practices having an adverse effect, particularly on the developing country. For this reason they feel the chapter should be titled as "the resolution of practices and arrangements involving the transfer of technology." This, however, is opposed by the developed countries.

This is the arena wherein the national interests of a recipient state, whether developed or developing directly collide against each other, where direct control through ownership (as in the case of subsidiaries) is not possible, i.e. if the major ownership is not permitted or technologies have to be sold through licences, TNCS resort to restrictive practices to ensure control over recipients. Such restrictions, obstruct absorption of modern technology for development of technological capability. The G-77 therefore opposes such proposals.[*33] The draft Code enumerates twenty restrictive practices, such as grant-back provisions, restriction on research and use of personnel, price

fixing, restriction on exports, etc. Disagreement among groups became evident when one goes through the scope of practices to be prohibited. On the one hand, G-77 countries want an unqualified ban on the restrictive practices, whereas Group B and to some extent group D countries insist upon the term `unreasonable' to qualify the activities that are to be banned. They stress on the following of the "rule of reason" in this regard, in the method of formulation of the provisions, the authority of national entities to grant exceptions in the public interest; as well as the question of the extent of application of the provision of the Code to transaction between related companies.*34 In these explanations they attempt to explain that elaboration is not-inherently bad, but only those which are unreasonable among them need to be banned. In this respect, apprehensions of G-77 are understandable for they feel any leeway so provided may be abused by the TNCs.

The Group B countries with complete backing of TNCs argue that the restrictive practices in the field of transfer of technology should be treated as qualitatively different. Given the technical and commercial risk involved in developing technology, its relatively longer gestation period and relatively shorter life span (resulting from parallel invention) make some kind of control over its use a justified claim.

Even the Group of Eminent Persons, in their report warned the countries, to be `careful not to reject the transfer of technology by rejecting a measure of control over its use which may be inseparably linked to it under advantages.*35

As can be seen from the developing countries point of view, the crux of their argument is not the "rule of the reason" per se, but reasonable according to whom. They point-out

that many a time the restrictive clauses on transfer of technology go beyond what is permitted by national legislations and there are no justifications for such practices. The South fears that very few restrictive practices then can be prohibited in absolute terms. They articulate this fear of theirs in their proposed draft for the Code and seek an answer to their insecurity.

Chapter 4 and 5 constitute the heart of the Code. Chapter - 4 deals with the 'prohibitions' and Chapter 5 deals with the positive obligations to be observed by parties.

The Chapter-5 on guarantees enumerates certain standards with respect to rights and obligations of parties to transfer of technology than sanctions which should be embodied as an absolute in the concerned contract. The idea underlying this provision is to prevent the exploitation of the weaker bargaining position of the enterprises from developing countries. The preliminary report by the UNCTAD Secretariat declares that they should be based on the recognition of the imperfection of the transfer of technology market and the consequent structural differences between the enterprises of developed and developing countries.*36 The idea of guarantees originated during the Pugwash Conference aimed at establishing international rules that would enable every country to participate in an equal footing in the international transfer of technology.*37 The developing countries demand elaborate guarantees both at negotiations and the contractual phases of transfer of technology transactions. Both Group B and Group D countries agree to this idea of guarantees though they differ as to the details. For example all groups agree to the need for guaranteeing fair and honest-business practices at the negotiating phase of the transactions. But

whereas G-77 and Group D countries want a categorical commitment, that potential parties shall agree to fair and reasonable terms and conditions. Group B is prepared to concede only that potential parties shall negotiate in good faith and reasonable commercial lines. Also for unpackaging where G-77 and Group D countries want a categorical commitment on the part of supplying parties to provide information about the various elements in a particular offer, Group B proposal is to leave it entirely to the discretion of the supplying party. So even if there are some agreements there is a dividing line where diplomacy has not yet been successful. The G-77 and Group D countries consider that some basic provisions should be formulated as implicit obligations which would then be applied to all transactions regardless of what the parties to the agreement decide. Group B on the other hand is ready to consider those provisions which provide for fair and reasonable commercial practices and taking into account specific circumstances of individual case.*38 The scenario is thus developing its own inertia which becomes more and more difficult to break with the passage of time. Neither side is ready to bridge as their individual interests are precariously balanced.

The fourth outstanding unresolved issue is the question of the applicable law and the settlement of disputes.

All the three groups considered that the Code should have a Chapter dealing with applicable law and settlement of disputes.

The three different groups presented their respective proposals but due to their wide divergence, no composite text could be produced for the draft Code. The G-77 proposed that the law of the technology acquiring country would apply to matters relating to public policy and to sovereignty.

During the Arusha programme it was further emphasized that the public policy issues which were to be considered would be as determined under the law of the technology acquiring state, should normally be decided by their national courts and tribunals. Arbitration is recognized aa a means of settlement of disputes if the manner of selection of arbitration and procedure is of a type which would be fair and equitable, and if the Code and the national law provided for under the provisions of the Code is the law applied by the arbitrator.*39

Group B countries advocated a more detailed elaboration of the chapter which broadly should sanction a freedom of choice on the law governing the validity, performance and interpretation of the agreement and on the forum before which disputes relating to the agreement are tried.

As may be expected the group B countries strongly registered their favour for the settlement of disputes by arbitration which is the chosen method of settlement among the socialist countries.

As compared to the positions maintained by the Group B, it seems reasonably clear that if the proposal of G-77 was to be substantially met this may have the effect of disrupting the edifice of international arbitration which has so far been built up. If the recipient country is able to invoke its own sovereignty in respect of disputes arising, the other party shall have no control of the resultant effects of such actions. This is hardly a situation that the developing countries are likely to accept nor will it be in the interest of the developing South in the long run. We have to remember that the South needs technology for their much needed development prospects, if the supplier has

no security through the transactions, it is very likely that the flow of technology to the South will be adversely affected.*40

The above mentioned four categories of the diplomatic hindrances have become the major obstacles to further the diplomatic momentum of UNCTAD. Two sessions of the UN Conference showed very little progress. By the end of the second session in November 1979, there were very few concrete changes in the Draft Code. The Third and Fourth sessions of the conference progressively ran into rhetoric abstractions and stalemate.

International Collaborations

All the participating governments recognize the need for appropriate international collaboration, whether between governments, inter-governmental bodies, members of the UN system on the Institutional machinery of the present Code, in order to strengthen the technological capability of all countries. As elaborated in Appendix-III the Chapter 7 provides for an in-depth range of exchanges which will slowly help the South in overcoming their infrastructural disadvantage.

International Institutional Machinery

This chapter provides for an institutional frame work for operation of the Code which will have a special committee operating either within the UNCTAD frame work or outside. But in either case it would be serviced by the UNCTAD secretariat and open to all the members. There are about eight items introduced as the function of the institutions where a systematic operation of the Code will be encouraged Provision is made for the convening of a United Nations Conference after four or six years to review the application of the Code and to arrange for its improvement. The G-77 suggested that on this review these should be a final decision as to the possibility of making the Code a legally

binding instrument. Also to be included are thr chapters on special treatment for the developing countries and the chapter on National Policies.

Thus the draft Code is a vast document which gives a framework to aspirations of the South, the demands of the North and also attempts to be the instrument of changing the global economic order to a more equitable and just order.

As Prof. E.E. Galal illustrates that the negotiations on the Code, from the point of view of sustained participation of the different groups can be said to have passed through different phases, which he categorizes as :

i) Exploration and manoeuvring for positions,

ii) Comprehensive exchanges dealing with general frame work and balance.

iii) Identification and clarification of basic positions and differences on pivotal issues.

iv) Bargaining and barter on pivotal differences.

v) Reassessment of interlinkages and balances.*41

These fine phases give a general essence of the negotiating procedure being followed from the very first meet of the inter-governmental group of Experts to the final and sixth session of the UN Conference on Transfer of Technology concluded in June 1985.

Untill before the convening of the UN Conference in October 1978, various groups in UNCTAD in accordance with the category I finalized their respective positions and proposed a draft on behalf of their groups.

Tallying to the second category the negotiations were conducted so that a general symbiotic text could be worked

out. But as this exercise was being carried out through various sessions of IGE till July 1978, the third category of the negotiations were taking shape. For as we know a Draft Code was indeed put forward to be elaborated upon but some issues like Restrictive Business Practices, Applicable Law and Settlement of disputes etc., emerged which could not be put into a composite draft since ten positions of the participants were so divergent. Then from October 1978 began a systematic bargaining and barter rounds on the issues of pivotal differences. This was the fourth stage of negotiations.

The progress of negotiation :-

The participation in the negotiations were open to all the member states, thus the quality and the intensity of the participants varied greatly. As negotiations gained momentum and became more and more intense, the G-77 faced maximum constraints. It could not always afford to send qualified experts supported by an entire machinery working to supplement its effect. The bulk of their team was formed by permanent UN representatives with widely varying experiences and interests, some of them had outstanding capabilities which more than covered for their lack of specialization at certain stages. Yet others were overwhelmed by multiple concurrent duties and the complexity of the subject matters and its protraction. Their lack of specialized persons to guide the negotiations became a major determinant of the quality of their bargaining strategy to overcome, at various stages, the lack of expertise the G-77 depended for its basic strength at bargaining on its political unity which at these higher levels of negotiation high degree of trust and readiness of consensus. So their political unity became their prime measure of bargaining power. This had its own very dangerous draw back, that it

restricted an analytical approach to the resolution of differences which cropped up in a big way all through the decade of negotiations on the Code. Thus mostly the negotiations from the South lay victim to the very nature of its bargaining strength by surrendering the element of flexibility at very critical moments of bargaining. Because of this handicap the South dispite its the voting majority, could not use its numerical power to translate the Draft Code into a functional Code.

The Group B countries on the other hand enjoyed more organic unity. Their negotiating positions were well supplied by specialists from all varying disciplins of science, technology, economics, politics and law. They were a formidable wall against which the South's bargaining became much harder. Moreover, during these sessions of negotiations on the Code, the bargaining strategy of South was made much harder by the overwhelming presence of the large business enterprise representatives. This element ensured a very commercially oriented diplomatic strategy for the Group B countries. Due to foregoing element in their Group position their political will to reciprocate the range of demands of the South was curtailed to a large extent.

The lack of South's flexibility along with their overly moralistic vague and grandiose notions which matched with the discrimination of the Group B countries to stick to their interests created a very difficult position. More often than not these two very hard strategies of the two groups have brought many a sessions to absolute standstill. At times though this kind of situation has been saved through compromises like in the case of negotiations over the binding character of the Code during the very first sessions of Intergovernmental Group Of Experts.

Group D countries have made their contribution to the sessions of negotiations. They have had a basically political approach which tended to avoid confrontation with the G-77 on the one hand and on the other they were also socialist reciever of technology from the increasingly restrictive suppliers from the Industrialized Market economy countries. This became a motivation for them to take a more active part in the progress of negotiations. Similar stand taken by them on most issues further strenthened the South's Bargaining position vis-a-vis the North.

Varying Group positons :- Varying bargaining positions of the groups during the negotiations characterized the progress of negotiations. Discussions and exchange of views in this fricton-locked atmosphere laid the foundations for mutual understanding if not agreement. In fact it was essential to lend an ear to the reasoned objections and criticism put forward by various sides on variety of issues to clarify their's positions and contemplate on future objectives and principles of bargaining for success. This can be well understood by a statement of an expert from Group B countries who admitted that discussions have helped them realize that the present system worked relatively well for developed countries but he believed that the situation for the developing countries was very different. In the same way the spokesman of G-77 experts noted that Group B draft proposal contains many substantive provisions which coincided in spirit and in form with G-77 views[42]. Group D introduced two parameters which reflected their concern through the rest of the negotiations. First, they wished the Code to prohibit trade discrimination in technology and secondly, they stated that inter-governmental contracts should be excluded from the scope of application of the Code. Group B's

stake in the negotiations arose from their desire for a smoother flow of technology in the global market with due weightage to the commercial interests. Though through the results obtained so far one can also see that they had also kept the scope of having to lose some of their purely profit-oriented privileges, for after all out of 20 restrictive practices to be prohibited they had agreed to 14. For the developing countries, (G-77) participation in the negotiations was significant from both economic development as well as political point of view. The fact that the negotiations continued for so long represents both a positive as well as negative aspect of this kind of a South-North Bargaining. Over a decade now, the sessions have been convened to overcome the critical differences brought the North to the negotiating table face to face to deal or find an answer to the technological inequality which is being nurtured in the economic system.

At the negotiating level, even though procedures vary among groups, experts and delegates in Group B and D, yet they seemed to have more detailed mandate from their respective national authorities. Many also had effective channels of consultation during negotiations which was hardly the case with the G-77. Over and above this, the Groups B and D had a more organized and systematized procedure of consensus building than that among the G-77 countries. In the latter group, while the political will for action was always strong, technical and contractual substance of negotiations was often not covered by a clear mandate, frequently reflecting a still developing national policy approach. More often than not consensus was organized around only those few issues on which complete agreement was achieved. Rest of the other grounds could not be treaded on. Confidence and trust seemed to compensate for these shortcomings

in the G-77's negotiating arrangements. Yet effective negotiations were not always possible for their almost 'traditional' approach served its purpose in situations where building a more frank consensus was more divisive than decisive or in cases where the other partners in the negotiations were not ready to reveal a clear cut stand or lacked a mandate to do so or in the exploratory phases where a negotiator is more interested in getting the answers than in receiving them.

Progress over the outstanding issues through the UN Conference in the 1980s

The Stretegies : Whatever strategies were there at every level of negotiations on the Code, they were not productively matched. This becomes evident from the fact that, though all the delegates met in 1978 with full powers to sign an agreement, pace of negotiations hardly accelerated; and after four sessions of the conference the South-North bargaining ran into an impasse.[43] As the South did not engineer its strategies in a more calculated manner the fifth stage of negotiations (mentioned above) for forming interlinkages and balance to overcome the obstacles and differences could never be reached. More than once at that stage one could also observe that those global negotiations which often last too long result in a loss of interest. During the first three sessions of the Conference most of the chapters were drafted and agreement was reached on basically all the provisions dealing with the objectives and principles, Chapter 2, and on measures relating to state and interstate action in the field of transfer and development of technology, chapters (3,6 and 7). This period of conference also assisted in identifying the problem areas of negotiations which have centered on the legal issues of the final

instrument and on those aspects of the Code dealing with contractual relationship between states i.e. Chapter 4,5 and 9). In the fourth session of the Conference no advance was made on the issues outstanding and existing gaps between groups seemed to have widened.

The latest text which is available had been arrived at on 10 April 1981. (Appendix III) Yet the hope for the Code was not given up in December 1981, the General Assembly agreed to hold a series of meetings of an Interim Committee of the UN Conference on Transfer of Technology, which would seek to resolve the impasse and open the way to further negotiations. The Interim Committee met in three sessions in 1982 and it recommended several proposals to the Conference dealing particularly with restrictive practices, applicable law and settlement of disputes, in the hope that they might serve as a basis for consensus on these controversial issues, but as was confirmed later the controversies on a number of element still remained, in light of the results of the fifth session of the Conference.[44]

Issues discussed in the Fifth session

The legal character of the Code had remained a problem all through the entire procedure of negotiations. However, it was decided that the Code would be adopted in the form of a General Assembly Resolution and later a review conference held after 5 years of adoption of the Code will reconsider the issue. This question has advanced to a stage of maturity due to a clearer understanding of other related issues.[45] In brief after a long debate, a stage has been reached where all governments, including the G-77 realize, that due to the specific character of the instrument, the Code could at least in its initial phase consist of recommendations to governments.

With regard to the **definition of international transfer of technology** the developing countries consider that in order to make the Code meaningful it should apply to all transactions having or likely to have an international character, regardless of the crossing of the national boundary criteria. Group B countries then feared that such an approach would alter the principle of national treatment by way of applying different rules to transactions according to the origin of the party itself. The fifth session did not bring a definite solution to the problem raised by the definition of an international transfer of technology.

There has been a substantial gap between the groups on the basic criteria that should guide the application of the provisions on the **restrictive business practices.** Discussion in the fifth session paved the way to resolution to some of these guiding elements. It was then clearly understood that the list of practices would be exhaustive and that it would contain the fourteen practices agreed upon (refer to Appendix III). Yet the areas of disagreement have not been overcome. These major areas which are being identified and most debated are as under (a) Is the code condemning outrightly the practices listed in Chapter 4 or is it just bringing to the attention of parties the possible harmful effects of some practices in transfer of technology transactions? (b) Under which criteria was the Code characterizing the practices that the parties should refrain from ? c) How are relationships between concerned parties e.g. between patents and subsidiary companies, going to be treated under the Code?

In the light of broad areas of disagreement, the conference has attempted a number of possible compromises but did

not succeed untill the end. The outstanding features in the agreement over the Chapter 5 (Responsibilities and Obligations) are related to the provisions on confidentiality and on dispute settlement and applicable law. The issue of confidentiality could not be finally resolved and the agreement on dispute settlement and applicable law would depend on the final outcome of negotiations on Chapter 9 on applicable law and settlement of disputes.

Discussion during the fifth session showed a persistant controversy over the issue of choice of law. Agreement in principle already exists in principle once the other components, but a final approval will be dependent upon the outcome of discussion on the choice of law. Developing countries stressed on the importance in any choice of law, role of the laws and regulation and in general the rules of public policy. The major problem of G-77 was to safeguard one of the few effective assets that ten developing countries have - the soveriegn legal jurisdiction, in an international instrument. Market economy countries on their part emphasize the element of freedom in choosing the law applicable to any contractual relationship that they enter[46]

The fifth session had been a tough diplomatic session which made noticeable progress in many of the controversial issues yet the final resolution of differences was not possible . Thus the fifth session recommended the convening of another session in order to complete successfully the negotiations on the Code of Conduct.

The Final Session of the UN conference

The sixth session held from 13th to 5th July ,in view of the progress made in the previous session centred all

efforts on the resolution of differences between the regional group position on mainly two issues i.e. restrictive practices and the settlement of disputes and applicable law. (Chapter 4 and 9 respectively)[47] The purpose of the Chapter 4 is made clear in the introductory section (refer to Appendix III). In this respect some countries put emphasis on the control of practices having restrictive effects on competition and others on practices that might hinder the economic and technological development of acquiring countries. Another, closely related unresolved issue , related to the broad conceptual problem of the extent to which its provisions would apply to affiliated parties or as otherwise termed, intra-enterprise transactions. On 17 May, the Chinese delegation made a proposal suggesting that under the circumstances, the supplying and acquiring countries should avoid individual transactions unduly restrictive practices having adverse effect on international transfer of technology. Though Chinese proposal was well taken and it bore positive influence yet the agreement on Chapter 4 was not to come about and it did not seem objective that the entire Chapter should be omitted from the Code for the sake of agreement.[48]

Similarly, the arguments faced on the controversies over chapter 9 were submitted to similar traditional disagreement among the parties. Finally, the session had come to a close without any agreement possible on these two major controversial areas.[49]

According to the President of the Conference agreement on the entire Code at the sixth session of the Conference 'had been within the hair breadth'. Had the two issues found a solution, agreement on other outstanding problems would not have been kept uncertain for long.

The lack of any final agreement was mainly due to the difficulty in an appropriate solution to this intra-enterprise issue. The resolutions of the other issues including the applicable law problem, were considered by all participants as dependent on the outcome of the discussion on Chapter 4.[50]

THE TURNING POINT IN SOUTH'S BARGAINING FOR THE CODE

The fifty session of the UN conference on Transfer of Technology was perceived as a rare opportunity by the South for securing an immediate and lasting agreement, which was lost. On the group B side there was a shift away from multilateralism and mounting conservatism in positions of some major countries. The acceptability of the Un Joint action was declining and so was their commitment to a responsibility for rectifying inequalities of the sta tus quo. A growing trend of disengagement and unilateralism was already immobilizing sever al endeavours of the G-77 towards a brave New World.

It was clear that no viable code could emerge without a resolved chapter 4 and the chapter 9, a lot of effort had been dedicated to these chapters, as has been explained above. A multitude of models had been devised by informal consultations led by the Chairman of the Conference, the Secretariat as well as the regional groups themselves.

In 1983 it was apparent that Group B's uncompromising stand on settlement of disputes preclude any immediate solutions. It thus became necessary for G-77 to dedicate its utmost efforts to balanced and parallel progress in all other outstanding issues so that the session could be ended with an available framework of a code that permits future

settlement of differences on applicable laws and on the intra enterprise issue. As the spokesman of the South, Dr.GALAL mentions that for the first and the last time we overstepped the limits of any mandate and offered to negotiate on the basis of some of the Group B's previous proposals which had been refused initially (as in case of the legal character of the code also regarding scope of international technology transfe). The group B position was jolted by a rare shock by this strategy of the South prompt acceptance of their proposals which led to requests for break for consultation. G-77 offered them a lot of scope for agreement by making compromises eventhough by structuring such group strategies he was trading on very sensitive grounds. Yet such an effort was not entirely successful.

After all, that was the maximum compromise that the G-77 could afford to make with Group B. Their compromise was merely a strategy to safeguard a valuable code. In some cases they thus withheld final settlement until they got assurances on intensions of the Group countries to show their inclinations for otherwise their compromise would have been a wasted strategy.

DIMINUITION OF SOUTH BARGAINING POWER

During the sixth session of the Conference, the strategy of the Group B countries further hardened and G-77's strategy fell into disarray. Their positions reflected neither appropriate sence of urgency nor awareness for the need for change in their bargaining tactics to pinpoint priority targets. Surprisingly the Group B were allowed to squander away precious time and pave the way for a negative and obstructive final stand. Thus in the final analysis G-77 not only failed to make the best of the opportunity of a clearly won chance of bringing a reluctant

partner to the negotiating table but more over gave the partner the excuse and justification of freezing the future. By the sixth session the G-77 had lost all hold the Group B countries dominant position by stressing the criteria of completion and insisting that restructive business practices should be entirely avoided which unreasonably restrained trade and adversely affected international flow of technology.

So, again the North South negotiation ran into the all too often occuring diplomatic statemate. The Secretary General of UNCTAD and the President of the Conference on the code were invited to hold consultations with the regional groups to chalk out if any appropriate action could be taken on future negotiations for resolving the outstanding issues in December 1985. The negotiations were renewed in December 1986 so that the General Assembly could take appropriate action on the future of the negotiation. These consultations only helped to highlight the widening gap and the deterioration of future prospects. The negotiating position of G-77 was further eroded. In their national policies and practices also there appeared significant shifts which sometimes in contradiction with their original basic demands in the early negotiating phase seem to have messed up the bargaining position of the South.

So as a last observation one can only say the South failed miserably to negotiate a bargain with the North on the issue of Technology.

Concluding Obsevations :

1. Though the negotiations were spread over a decade the strategy of the South could not evolve a flexible and collective posture to successful bargaining with the North.

2. The progress of the discussions during the fifth session was showing some promising stand by the G-77 but they could not clinch the deal from the North. It was the missed opportunity of the South.

3. Agreements had been reached over most of the aspects of the code, so diplomatic tactics could have somehow finalised revised code so that the formal approval was obtained for a functional code. The outstanding issues could have been left to the International Institutional Machinery.

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CONCLUSION

CONCLUSION

THE BARGAINING CAPACITY OF THE THIRD WORLD THROUGH THE UNCTAD MACHINERY : LAPSES AND DRAWBACKS :

The Group of 77 emerged particularly to deal with trade and development issues. Its existence is based upon the common approach to international economic problems shared by its members and their determination to change their collective peripheral status in the global economic structure.[1] It originated in the first session of UNCTAD and since then has been the main spokesman of the Southern challenges through the institutional framework of UNCTAD.

Among the undeniable accomplishments of Group 77 are effective communication system and a sense of togetherness in the South, in addition to a comprehensive articulation of the shortcomings in the post war international economic system through what might be called An Agenda for Action.[2] UNCTAD took it upon itself to help the South to eliminate most of egregious forms of misery and to improve the overall prospects of the Third World. In the last two decades UNCTAD emerged as the major and perhaps the most powerful seat of multilateral developmental diplomacy which would be geared to voice the demands on the challenges of the South in the international forum at any point of time.

As the Group System of negotiation rose to prominence in the procedings of UNCTAD, it continued to lay the ground work for the maturing of the G-77, the representation of the unity of the developing countries to overcome their bargaining weakness and

evolve into a group to be reckoned with in global decision making on various issues. Therefore it emerged as the first step to attempt to revise the shift in the bargaining power between the resource produces and the industrial manufacturers.[3]

Certain features of the G-77 grew to characterize its role in the international forum (UNCTAD). First, the power of sheer numbers in the membership of the group gives it a weightage in the forum where one state one vote pattern of decision making is encouraged. Through G-77 the poor states emphasize the most important political norm i.e. the right to participate effectively in global negotiation. Second, the group not only has three regional groupings but also embodies a cultural, political and economic diversity of the periphery. Together these elements have encouraged the articulation of extreme demands for changing the decision making procedures and the policies and interest coordination by the developed states of the South through the various international institutions. Third, since G-77 has not evolved any permanent institutional frame work for action it places emphasis on egalitarianism and pluralism so that a wide range of issues get the maximum coverage, thereby doing justice to a large membership and helping to sustain the group as a single bargaining unit through the global negotiations. Yet these vary characteristics of the Group of 77 become responsible in creating certain deficiency in the bargaining methods of the South as a whole. The emphasis on pluralism, egalitarianism, and rotation of leadership has tended to weaken its leadership structure. The organizational drawbacks of such a multifacated group alongwith its

lack of specialization deny it any scope for much required flexibility.[4]

In the last few decades the attitudes and postures of both sides have not been conducive to progress. The developed countries have tended to favour the status quo mainly because of their reluctance to move towards a non participatory international system. Thus they have adopted a passive approach leaving the South to propose subjects for negotiations. For example the negotiations for the Code of Conduct for transfer of technology.

Developing countries, on the other hand, have been more politically rather than technically oriented. It becomes clear from their group positions during the negotiations on the Code. From the outset they are concious of the inequitable nature of international economic relations and are convinced of the need for basic change. They tend to see the West directed economic forces as largely responsible for their economic problems and play down their own domestic factors. As a result they come out with bold and far reaching proposals for change many of which have been technically unrefined and politically unreaslistic. Mostly the content and assertivness of their demands are determined largely by the need to maintain solidarity and unity in the face of diversity. Therefore North South negotiations have a confrontational attitude which generates mistrust on both sides. Therefore, progress on real issues have always been difficult in such situations.[5]

EFFECTIVENESS OF UNCTAD

UNCTAD has a very significant role to play since in the current phase of world development. The complexity and the interdependence of every issue are placing unprecedented demands on the capacity of the developing countries. The indications are that the demands are going to be even greater as the negotiations move closer to the stage of adopting concrete agreements. The issues themselves have become more technically complicated requiring more specialised expertise. This are evident by some of the issues which have been taken up for negotiations. For example one can cite negotiations for the Common Fund, commodity, price stabilization, transfer of technology, regime to regulate the exploitation of the sea bed resources, etc. Now the international decision making is spreading to other areas on a more interdependent and higher level of specialization.[6]

The position of the developing countries is of a highly unequal status when dealing with such complex issues in comparison to the OECD countries as well as the CEMA group. The UNCTAD secretariat in this respect emerged as the god father of the developing countries. At every stage it helped by providing experts who could help in drafting out their background papers, prepare their stands on specific issues and also design the strategies. In such circumstances, as we have seen during the phase of preparation of negotiations for the Code of Conduct on the transfer of technology, UNCTAD had helped to build up an international opinion by bringing out extensive and analytical studies. But over a period of time UNCTAD's effort to help

the developing South to participate in complex global negotiates, has lacked a sense of priorities. As R.S Walter points out the look of the organisation seems to be pushing simultaneously on too many fronts which leads to a number of problems. It spreads the resources of the UNCTAD Secretariat too thin. A repulation for expertise and production of technical studies of consistently high quality are among the most effective instruments at the disposal of an international organisation Secretariat for achieving its aims. With action on so many fronts the UNCTAD Secretarial simply has not been able to produce, consistently,reports of high technical quality. This has hindered its attempts to change the policies of other international agencies.[7]

A great degree of inconsistency also arises because the developing countries have on numerous occasions voiced their strong support for a particular programme in UNCTAD, but failed to push for the same programme with the same intensity in other international organisations. Because of these inconsistancies, only the rich countries are shifting the true locus of decisions to a narrow arenas wholly within their control. In forums like IMF, World Bamk and GATT the exclusion of the poor occurs only due to their lack of wealth. Hence the South is compelled to force some concern to its problem with whatever power it can generate from within itself.

The failure of the existing institutions to cater adequately to the interests of particular groups of countries has lead to its proliferation and promiscuity. Another problem developes because of compartmentalization of institutions which

have prevented linked issues from receiving effective attention and coordinated treatment. A good example of this disadvantage is the rivalry between GATT and UNCTAD.[8]

Impact of Groups on Bargaining

After the formation of UNCTAD the South used the G-77 mainly as a vehicle for their bargaining power in the international arena. Over the years pitting of groups against each other i.e the developing countries of the South (G-77) and the developed countries of the free market (OECD) plus the planned economy (COMECON), has become a seemingly permanent feature of international relations. But this process of internationalism through the multilateral approaches is showing signs of disenchantment. There is a universl dissatisfaction with the North-South dialogue. It is evident that UNCTAD is becoming the target for closer scrutiny.

There are two principal views about the group system. On the one hand is the opinion of the North that the solidarity of the G-77 is nothing more than rheotoric, a temporary phenomena, not to be taken seriously. They consider G-77 as a mere diplomatic gloss covering up a variety of differences.[9] The bargaining strategy followed by G-77 is facing the challenge of the overtures of the North in attempting to 'divide and weaken' the position of the South. Their coalition has not come unstruck. The motivation of the North is largely to combat the South since it called into question the privileges in the present economic order.

On the other hand we have the enthusiastic supporters of the South. They see the coalition of the South as the path to salvation of the have nots. Over the time the speculation has been on how to establish more manageable ways to structure the basic North South debate.

More often than not the Group has been criticised for being nothing more than a rhetoric coalition. UNCTAD had been a very sure and secure platform for the South to initiate constructive global negotiations. But as Robert Ramsay points out " inspite of UNCTAD the Rich has continued to get Richer".[10] The birth of UNCTAD had been a major event in favour of the developing South, but it has not been used to its actual potential. From the point of view of the South, the need is to focus on development problems; to identify a common set of grievances and to help launch a dialogue between the North and the South. However, North has seen UNCTAD largely as a safety valve which has contained the process of radical calls for effective change. Thus undoubtedly the group system has failed to reflect the global economic realities and has not been able to build the required momentum for change. At this juncture, more than two decades later the liabilities of the process have become more and more prominent leading to a great loss in the bargaining profile of the group. Its role has been diminishing and its stance weakening, leading to an unavoidable stalemate in the North-South negotiations. All these factors are affecting UNCTAD, turning it into a forum for discussion without any impact on the real world.[11]

G-77's bargaining through UNCTAD goes through many stages of preparation. The Group's three regional groupings causes preparation from separate initial positions whose reconciliation at the group level introduces its own inflexibilities. This tends to introduce such delicate balance that failure to reach an agreement on any one issue delays and hence prevents consideration of others. Divergent national interests also encourage the tendency to maintain the bargaining at the broad level of principle. The balance thus struck in establishing the group's positions is therefore inherently fragile. It introduces a significant measure of rigidity into the negotiations. Reluctance to endanger internal compromises pre-empts effective bargaining and mitigate against optimal and creative solutions.

The group's practice of rotating its Chairman and sometimes its spokesman and negotiators among regional groups at regular intervals together with routine changes in the national delegations adds to the difficulties.[12]

The need of the hour is to reconstruct the group system of negotiation and rejuvinate it into the realities of the world economic relations. The lowest common denominator outcome to formulate the group position has proved to be a very rigid stand which has very limited bargaining scope and it does not satisfy anyone. UNCTAD is still the most important forum for the South. Thus bargaining strategy needs a systematic issue based overhauling to meet the challenges of the future of the economic relations among the community of increasingly by interdependent states.

SPECIFIC FEATURES OF DIPLOMACY OF THE SOUTH

As opined in most of the explanations of the structure of dependence of the South, the North is held responsible for the misery of the poor in international relations. The South when constructing their challenge to the North across a diplomatic front more often than not points accusing finger at the 'culprit North'. Their entire arrangement seems to revolve around the central belief that North owes them the reforms they desire and they are just demanding their dues. This altitude cause the South to enter into negotiations with a very radical stand in response to which the North gets into the armour of defensiveness. So at the very onset the Southern negotiations stand to lose the chance of finding out how far the North can move to negotiate their far reaching problems. Also the radial spokesman often make diplomatic sessions run into a rhetoric lecture which the North never takes seriously. Thus even though many of the South's development problems reach the center of international agenda, taking any action for future reforms on them becomes an impossible task.

One could observe that South-North bargaining is viewed more as a one sided initiation and demand tactics which never really succeeds in involving the North to a whole hearted participation. Over and above this trend, most of the issues raised in the forum of UNCTAD require vast areas of considerations like the Integrated Programme for commodities or the Code of Conduct on transfer of technology. They demand wide ranging agreements over varied forms of issues. Mostly it has been seen that after a lot of diplomatic effort the North did agree to some

of the demands of the South, but never on the complete agenda of demands. Failure of the South's diplomacy reflects in their inablity to capitalize on whatever little gains come their way . It happended during the Common Fund negotiations and also during the negotiations for the Code of Conduct on the Transfer of Technology. This further devalues the negotiating stand of the South during global negotiations. In addition, as a negotiating unit the South fails to make meaningful compromises, to bring the North down to realistic functional agreements which would be its first step toward a new world order.

Finally the position of the South in global negotiations is conditioned by the composition of the South itself. What constituted South two decades back has undergone a lot of changes. The differentation betwen the OPEC countries, the newly industrialized countries, the powerful members like India, Brazil, Argentina, and the nearest developed countries is widening further. They are all pursuing their places in the global order in their individual capacity. This can be catastrophic to the interests of the South in the global negotiations.

Before the South breaks into another rich and poor nation relationship, using the level of interdependence an attempt could be made to use the fragmented trends of modernization and development to change the entire profile of the South as a negotiating body. South South cooperation has been at the base of most of the strategies of the South during bargaining with the North. But when the real juncture of problem comes the South South strategy falls pray to these internal differences rather than

sticking up for each other. In such situation the North enjoys a diplomatic power over the South, since the very solidarity with which the South hopes to bargain with the North can break down to small fragments of power which they can be manipulated with considerable ease.

South -South cooperation is being promoted by the efforts of the South Commision headed by Julius Nyrere. This belongs to the lineage of global Blue Ribbon Commissions on international development issues which began with the Brandt commission in the late 1970s. Palme Commission was followed by Brandtland. This is a multilateral body which is funded by a variety of national and international sources. It runs many a groups, organization and institution. The recent report of the South Commission[13] is a detailed, lucid, well organized report of six chapters through which the concern for the divided world and the world in transition crystalizes. Subsequently it deals with the tasks of the South which form the main body of the work. It emphasizes the promotion of people oriented, democratic, poverty eradicating, basic need fulfilling, science and technology based, environmentally compatible, and mutually cooperative developments and to restructure the global relationships using South's unity and solidarity. But the work omits the mention of the various intra-South failures, also the growing hetrogenity of the South in diverse respects and diffent levels.

Thus the key question arises as S. Guhan pointed out whey so many countries have failed to follow these self evidently sound and sensible alternatives.[14]

With the changing priorities in the global economic relationships the south has to organise and reconstruct its solidarity. A structure of G-77 decisions making must evolve which should deal with the problem of the South, providing all types of consultations, thus creating a set of principles and norms which would represent the South as an organic whole.

In the final lines one could hope that before long the precarious insecurity of the south is won over by a rejuvinated attempt at South -South cooperation so that the global negotiations are taken as a challenge to the South in concrete and realistic terms. Through these stages of development our bargaining stand could evolve from its curent base of lowest common denomenator to a base of that "pereto-optimal solution where everybody is better off and nobody is worse off than they were before".[15]

Such a bargaining strategy would be seen with trust by all the Southern countries, overriding the small differences which can be tackled at the level of South-South negotiations.

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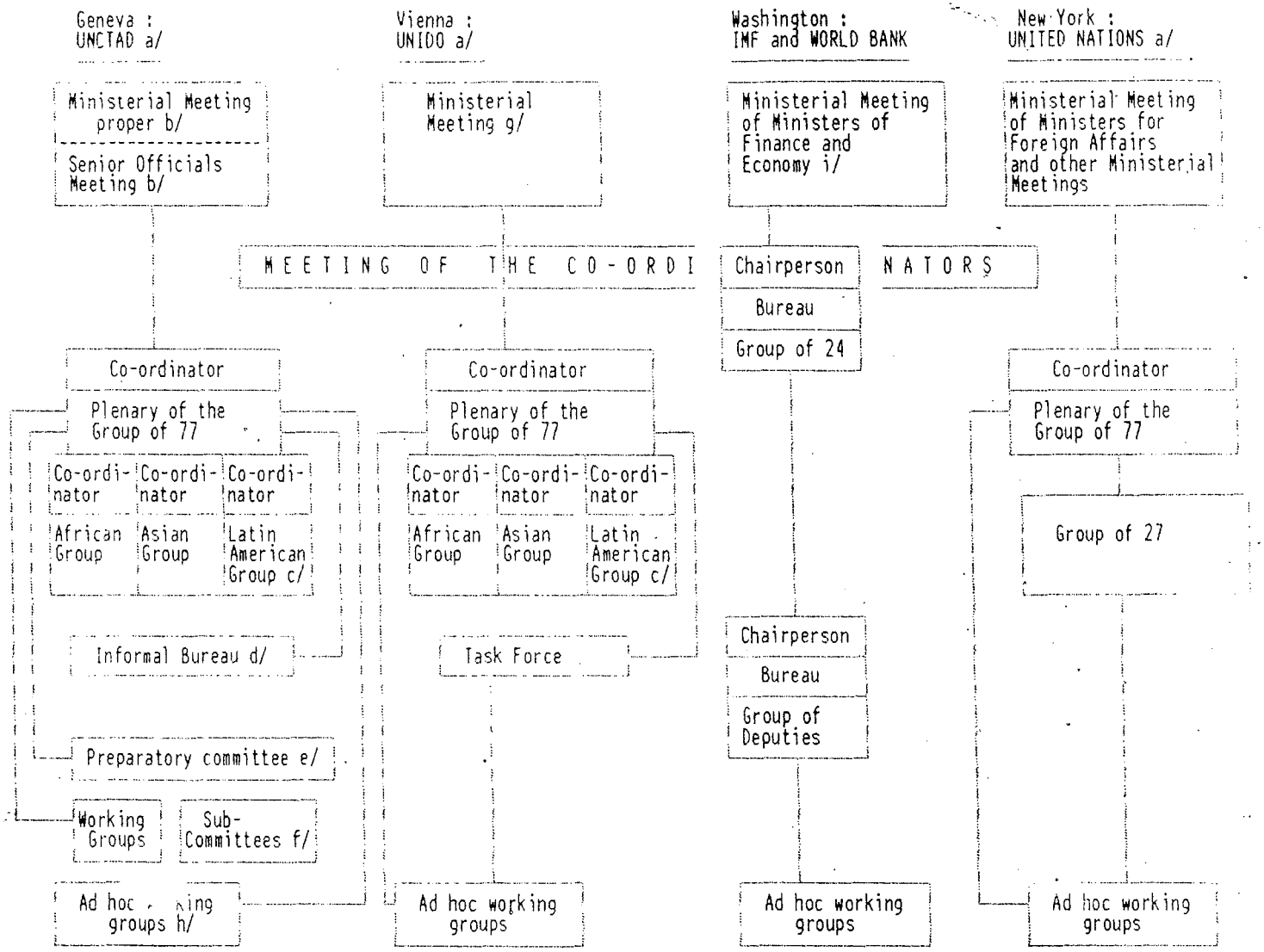
APPENDIX - I

FIGURE 1 : The Multi-central structure of the Group of 77



a/ And other international organisations of the United Nations system headquarterd in that city
b/ Only in preparation of UNCTAD sessions
c/ Romania is an associate member
d/ Consisting of the co-ordinator of the Group of 77 and the co-ordinators of the regional groups
e/ Only in preparation of the Ministerial Meetings
f/ Established in the Preparatory Committee
g/ Only in preparation of UNIDO General Conferences
h/ A working group in reference to the Committee on Assurance of Supply of the International Atomic Energy Agency has a somewhat more permanent ch

FIGURE 2
Sequence of preparations for a session of UNCTAD, exemplified for UNCTAD V

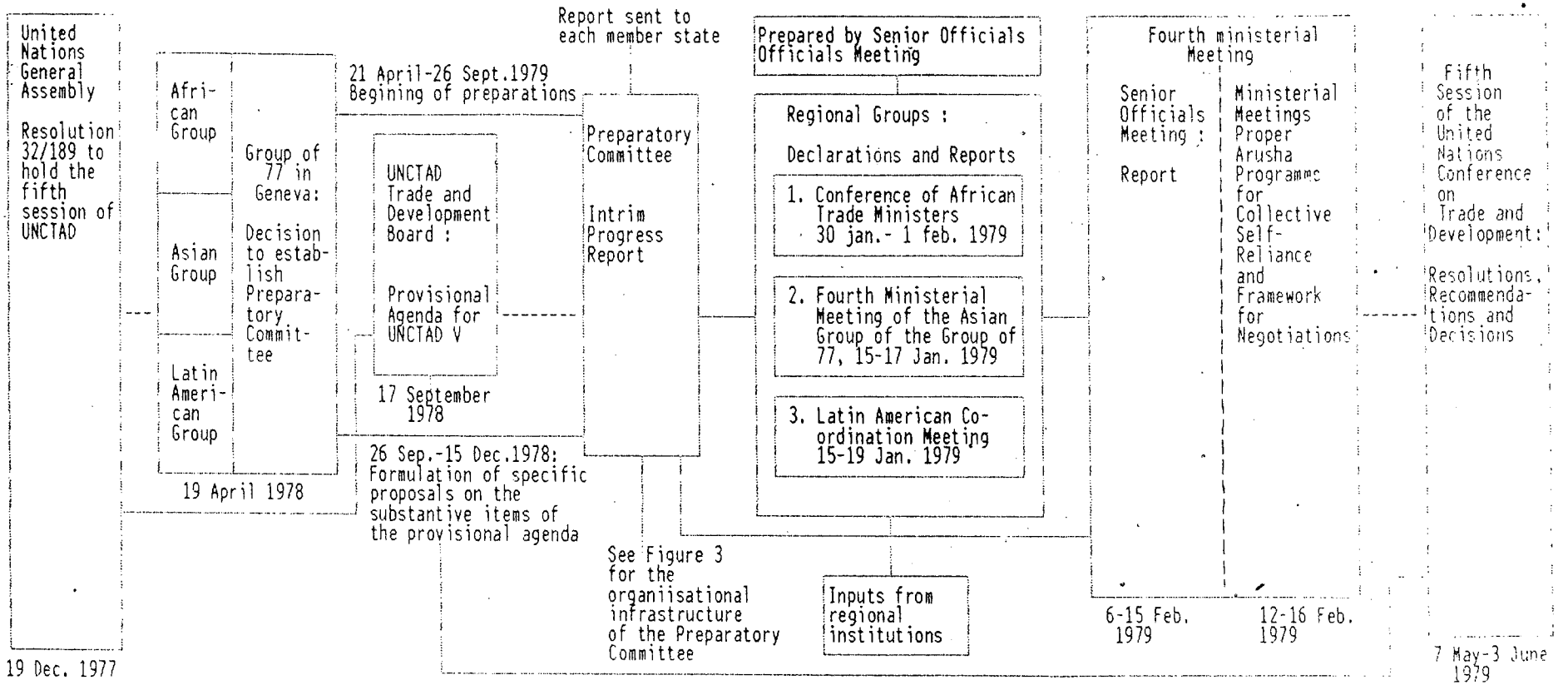
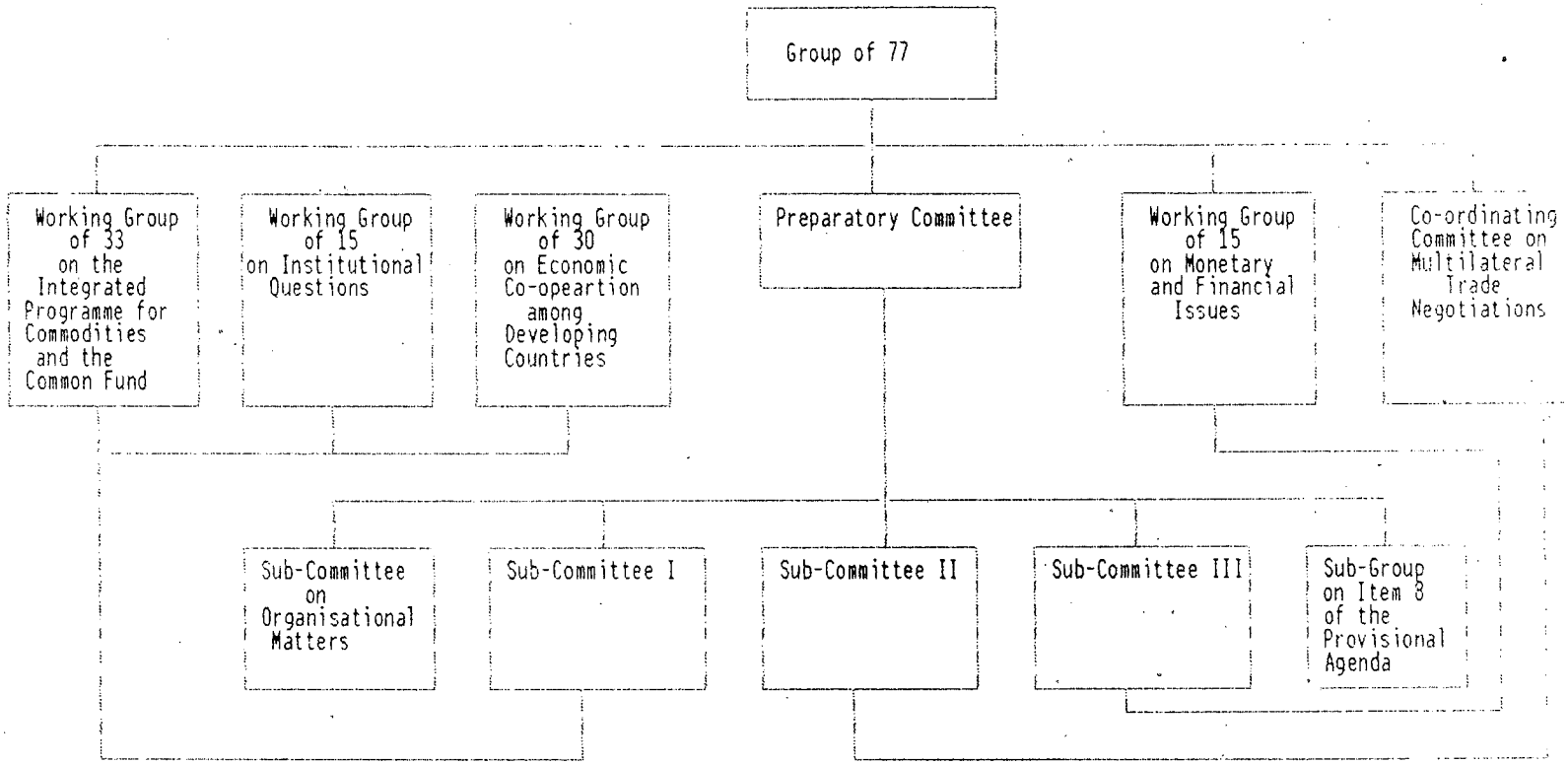
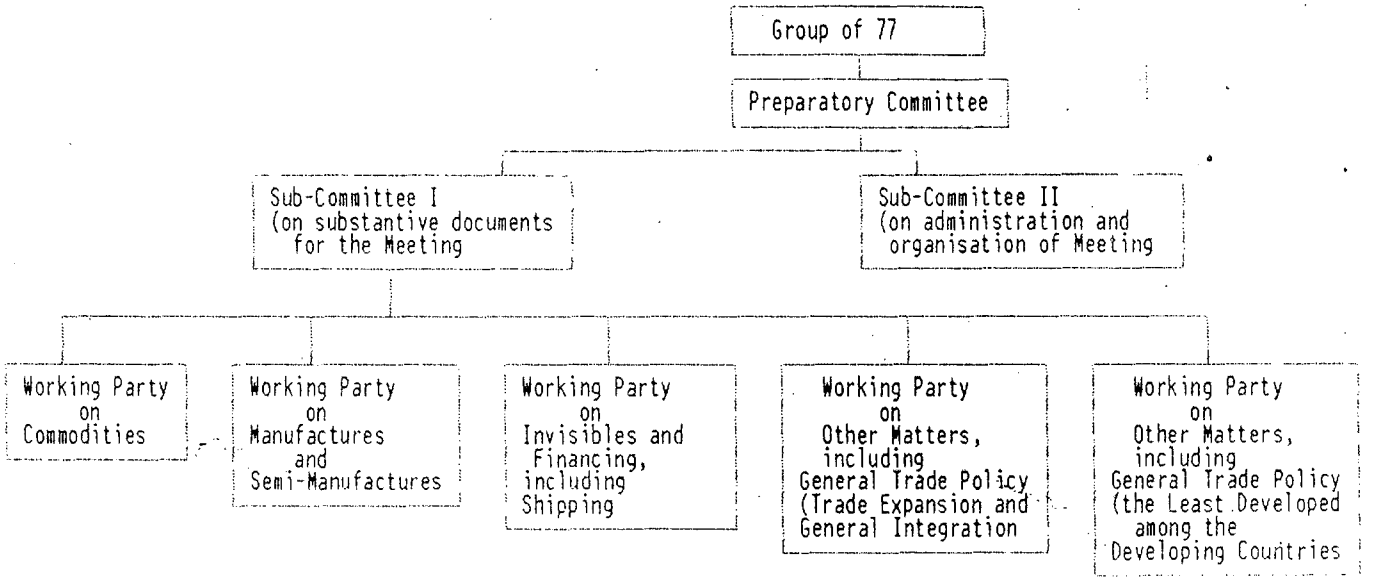


FIGURE 3
The organisational infrastructure of the Preparatory Committee for the 1979 Fourth Ministerial Meeting *



* The Working Groups are those in existence at the time of the Preparatory Committee.

FIGURE 4
The organisational infrastructure of the Co-ordinating Committee for the 1967 First Ministerial Meeting



APPENDIX - II

APPENDIX -II

THE CODE OF CONDUCT BY G-77, GROUP B AND GROUP D COUNTRIES
(Source : P. Roffe, International Code of Conduct on Transfer of Technology, Vol 11 1977, Vol 12 1978)

(A) Proposed code by the Group of 77

The main principles and objectives of the code, as set out by the Group of 77 are the following :-

(a) the strengthening of the national capabilities of all countries, in particular of the developing countries

(b) improving the access to technology at fair and reasonable prices and costs, both direct and indirect, and to regulate business practices, particularly those arising from transfer pricing and transfer accounting.

(c) the promotion of the unpackaging of transactions with regardto the coice of various elements of technology, evaluation of costs, organisation and forms and institutional channels for the transfer of technology.

The Group of 77's approach to the scope of application of the code is that it should cover all types of technology transactions, of proprietary and non proprietary technology irrespective of its legal form, including transactions associated with the establishment and operation of wholly owned subsidiaries or afiliates of transnational enterprises and other foreign enterprises and of joint ventures with varying degrees of foreign ownership.

In the view of the Group of 77 the code should recognize the right of all states to adopt legislation, policies and/or rules for the regulation of the transfer of technology operations, including measures such as evaluation, negotiation, registration and re-negotiation of agreements and arrangements involving technology transations.

On the regulation of practices and arrangements

involving the transfer of technology the Group of 77 has set forth a series of provisions that state that such transactions shall not include practices or arrangements which impose restrictions that directly or indirectly have adverse effects on the national economy of the receiving country and/or impose restrictions or limitations on the development of technological capabilities of the receiving country. The group of 77 lists forty practices and arrangements that parties to transactions shall not employ.

The practices and arrangements regulated by the proposed code fall under six different categories, as follow :-

(a) governing the use, adaptation and assimilation of technology and development of technological capabilities of the technology receiving country, e.g. prohibition or restrictions on the use of the technology after the normal expiration of the agreement

(b) concerning further acquisition of technology by the acquiring party, e.g. limitations upon the access of the recipient to new technological developments and improvements related to the technology supplied.

(c) concerning the commercial and technological freedom of the acquiring partye.g. trying the imports of inputs, equipment and spare parts, and technical and managerial personnel to a specific external source, and thus making it possible for enterprises to charge higher than normal prices for them.

(d) related to payments e.g. obliging the recipient to convert technology payments into capital stock.

(e) concerning the duration of the transaction e.g. requirements that the recipient make payments during the entire duration of manufacture of a product or the application of the process involved and, therefore, without any specification of time.

(f) other practices and arrangements, such as those exempting the

supplier from any liability consequent upon defects in the goods produced by the recipient with the help of the technology acquired.

The forty practices are considered incompatible with the principles and objectives of the code and shall be null and void. Exceptionally, some of these practices and arangements might be deemed valid if it is determined by the competent national authority of the technology receiving country that it is in its public interest and that on balance the effects on its national economy would not be adverse.

The group of 77 draft then provides for guarantees that enterprises supplying technology should grant in transfer of technology transactions. At the same time guarantees are to be given by enterprises receiving technology. Governments of technology receiving countries may require additional guarantees to be included in technology transactions e.g. that the technology is the most adequate to meet the particular requirements of the recipient, given the supplier's technological capabilities.

The code proposed by the Group of 77 lists a number of measures that governments of developed countries shall grant as a matter of special treatment to the enterprises of developing countries. Among these special measures, the text refers to preferential arrangements ensuring that the industrial property rights granted to a patent holder in technology supplying countries should not be used by him to restrict imports of products from developing countries. It also includes measures such as the untying of credits and granting of credits on terms more favourable than the usual commercial terms for financing the acquisition of capital and intermediate goods in connection with technology trnasactions.

On applicable law and settlement of disputes the Group

of 77 stresses that technology transacitons shall be governed by the laws of the technology, receiving country and that those countries shall exercise legal jurisdiction over the settlement of disputes pertaining to transfer of technology arrangements between the parties concerned.

(B) Proposed code by Group B

The Group B draft lists among others, the following principles :-

(a) the right of each government to legislate on the subject of transfer of technology, within the framework of international law and with due recognition of existing rights and obligations.

(b) that every transfer of technology is an individual case.

(c) that access to technology should be based upon mutually agreed terms and conditions.

On the scope of applicaiton of the code, the Group B lists the international transfer of technology transactions that should be covered by the provisions of the code. It emphasizes that the subject matter of an international technology transfer is technology of a proprietary or non-proprietary nature, and rights related thereto, transfered from a source enterprise to a recipient enterprise. The proposal excludes from the scope of application of the code the mere sale of goods.

Further the Group B text recognizes the right of source and recipient governments to adopt legislation, regulations and policies pertaining to the transfer of technology within the framework of applicable international law, treaties and agreements. National regulations should be publicly available and should be applied predictably and equitably. Changes in national regulation should be carried out with full regard for existing rights of source and recipient enterprises. It is also sugested that source as well

as recipient governments should setup appropriate systems for the legal protection of industrial property rights.

Another chapter of the Group B draft deals with responsibilities of source and recipient enterprises. It refers to what source enterprises and recipient enterprises should do to ensure the maximum mutual benefit of all parties to technology transfer agreements. Source enterprises should inter alia be responsive, to the extent practicable, to the economic and social development objectives of recipient countries in planning the employment of appropriate technology, as well as guarantee that the technology meets the description contained in the agreement and that the technology, properly used, is suitable for the use specifically setforth in the agreement.

Recipient enterprises should provide appropriate information regarding relevant economic and social development objectives and legislation of the recipient country, and such information as may be required so as to apprise potential source enterprises of all conditions and circumstances relevant to the transfer and use of technology, including the recipient enterprise's ability to effectively utilize the technology transferred.

Restrictive business practices arising out of transfer of technology should be avoided. Those restrictive business practices which especially have an adverse effect on the attainment of economic and social development objectives are defined in the Group B text. This provision lists eight practices that parties should refrain from utilizing. These include restrictions in patent or know how licences which unreasonably prevent the export of unpatented products or components, or which unreasonably restrict export to countries where the product made pursuant to the licensed technology is not patented and restrictions preventing the

exploitation of a licensed process or product after the date of expiry of a grant, or requiring royalties to be paid for the use of these patents as such after that date.

The section on cooperation and special measures for developing countries calls for internation action among all governments and international organizations in order to increase, encourage and facilitate an expanded international flow of technology.

On applicable law and settlement of disputes, the Group B draft points out that the parties to an agreement should have the freedom to choose the law governing the validity, performance and interpretation of the agreement, provided that the state whose law is chosen either has a substantial relationship to the parties or to the transaction or there is other reasonable basis for the parties choice. The parties to an agreement should be permitted freely to choose the forum before which disputes should be tried, and any such choice should be given effectunless there is no reasonable basis for the selection and the choice places an onerous burden on one of the parties. The draft indicates that parties should be permitted to provide that disputes could be settled by means of arbitration or other third party procedures.

(C) Proposed Code by Group D

The negotiations take place on the basis of the regional groups positions as expressed in their respective draft outlines. At its second session, the group of socialist countries of Eastern Europe (Group D) submitted for the first time a comprehensive outline of the draft code of conduct. This outline matches the pattern of the proposals made by the Group of 77 and by the Group B countries.

For Group D the objectives of the code of conduct

should be :- (a) to ensure and promote the international transfer of technology on fair and equitable conditions.

(b) to assist in solving the social and economic problems of receiving countries, in particular developing countries, based on the development of basic branches of their national economies and on the strength of the role of the state in their national economies to establish commonly acceptable rules with due regard to the interest of the exporters and importers of technology.

To achieve these objectives, according to Group D, the following basic principles should be observed : sovereignty ; equality; mutual benefits ; political and economic independence ; non-interference in the internal affairs of countries ; and elimination of any form of discrimination, particularly that based on differences in political economic and social systems or in the levels of economic development.

On the chapter of definitions and scope of application of the code the text contains, in general, similar proposals to the ones submitted by the Group of 77. It emphasizes that in bilateral or multilateral relations states may be guided by other provisions that are not in contradiction to those of the code of conduct.

Further Group D in recognizing the right of states to adopt legislation and carry out their national policy with respect to the regulation of technology transfer transactions, lists some of the measures that states may adopt. The draft outline indicates that legislative and other measures should be applied without discrimination.

On the regulation of restrictive business practices, the Group text emphasizes that parties should refrain from restrictive practices or conditions aiming at preserving technological dependence of receiving countries or imposing upon them

a technology which does not conform to their social and economic conditions and development objectives. The Group D lists 20 practices to be regulated by the code of conduct. Those practices relate, among others, to the following : restrictions after expiration of arrangement, exclusive grant-back provisions, restrictions on research, price fixing, tying arrangements, restrictions on publicity, etc.

It is also provided that notwithstanding the regulation of certain abusive practices, transfer of technology transactions could be deemed non-objectionable if the competent national authorities of the acquiring party's country decide that it is in its public interest and it has no substantial adverse effects on other countries.

The Group D draft further provides for obligations of the parties to technology transfer transactions. These obligations of the parties fall under two categories : the pre-contractual obligations of the parties and those of a contractual character. The pre-contractual obligations include such matters as the observance of fair and honest business practices in negotiating a transaction and in performing it; the provision by the acquiring party of relevant information concerning the technical, economic and social objectives and legislation of the acquiring party.

The contractual obligations correspond to supplying party guarantees, supplying party representations, acquiring party guarantees and guarantees by both parties. The supplying party should guarantee, inter alia, that during the validity of the agreement and upon terms and conditions stipulated therein, the acquiring party shall have access to all improvements related to the technology transferred; and, that where the acquiring party has no other alternative than to acquire goods or services from the

supplying party, the price should not be higher than current world prices for goods or services of the same quality offered on comparable commercial terms and conditions. At the same time, the supplying party undertakes that the technology will meet the safety and environmental requirements of the law in the receiving country and that the rights of the technology transferred belong to him. Among the guarantees that the acquiring party should give, the draft provides that the technology transferred should be used as specified in the agreement and that full payment should be made to the supplying party. Both parties should guarantee the confidentiality of all technical and business know-how received in the course of the transaction.

The Group D draft also contains achapter on special treatment in the transfer of technology to developing countries, and provisions on international cooperation. There is no present text in the Group D draft on the subjects of applicable law and settlement of disputes to match the corresponding proposals by the Group of 77 and Group B.

APPENDIX - III

APPENDIX - III

THE UNCTAD CODE ON TRANSFER OF TECHNOLOGY

{Source : Dennis Thompson, "UNCTAD : Code of Conduct on Transfer of Technology", in H.W. Singer, Neelamber Hatti and Rameshwar Tandon, ed., Technology Transfer by MNCs (New Delhi: Ashish,1988) vol II p710}

THE PREAMBLE : The preamble so far agreed contains some important declarations of principle that have been subscribed to by all the participating countries.

In the first place it is recognised that science and technology plays a fundamental role in the socio-economic development of all countries, and particularly in accelerating the development of developing countries.

In the second place it declares the belief that technology is "key to the progress of mankind and that all peoples have the right to benefit from its advances. Developing countries had originally proposed that technology should be described (like the fruits of the sea bed) as the common heritage of mankind". This, however, was successfully resisted by Group B on the ground that technology was in fact the product of human ingenuity and that inventors had certain prior rights. What is particularly significant is the recognition, however, that all peoples have the right to benefit from it. This gives moral force to the commitment of the developed countries for the negotiation of the code.

The preamble also asserts the belief that a code of conduct will assist the developing countries in their selection, acquisition and effective use of technologies which are appropriate to their needs, and that a code will help to create conditions conducive to the promotion of the international transfer of technology under mutually advantageous terms to all parties.

The preamble recognized the need to strengthen the scientific and technological capabilities of all countries and for

developed countries to cooperate with developing countries in order to assist them in their own efforts in this field as a decisive step in the progress towards the establishment of a new international economic order". It stressed the equal opportunity to be given to all countries to participate, irrespective of their social and economic system, and it emphasized the need for the special treatment to the developing countries. It also drew attention to the need to improve the flow of technological information so that countries could select the technology that was appropriate to their needs.

The wording of the preamble is important as it not only has an influence on the interpretation of the rest of the text, but it indicates the degree of consensus that has been reached by all parties on the reasons for the elaboration of the code and the principles to be applied.

CHAPTER-1. DEFINITIONS AND SCOPE OF APPLICATION

The transfer of technology is defined as the "transfer of systematic knowledge for the manufacture of a product, the the application of a process or for the rendering of a service and does not extend to the transactions involving a mere sale or mere lease of goods.

Transfer of technology transactions are arrangements (which may or may not take a binding contractual form) between parties involving transfer of technology as defined above. These arrangements specifically include the following :

a.) The assignment, sale and licencing of all forms of industrial property (except trade marks when not part of transfer of technology transactions) ;

b.) The provision of know-how and technical expertise in the form of plans, models, instructions, specifications, etc. involving

technical advisory and managerial personnel, and also personnel training ;

c). Technological knowledge necessary for the installation and functioning of plant, equipment and turnkey projects.

d). Technological knowledge necessary for the installation and use of machinery etc. obtained by purchase or other means ;

e). The technological contents of industrial and technical cooperation agreements.

Parties is given the widest possible meaning, including persons, whether corporate or incorporate, public or private, whether owned or controlled by States, and extending to States, governmental agencies, international or regional organisations when engaged in commercial transfer of technology transactions.

It is agreed that the code shall apply to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party.

This does not, however, deal with parties temporarily located in the technology acquiring country, nor with affiliates or subsidiary companies located in the recipient country, which are supplying technology provided form their patent company or another subsidiary located elsewhere. The Group of 77 and Group D have, therefore, proposed that the definition should apply to cases where the supplying party does not reside or is not established in the technology acquiring country, and to cases where the supplying party is a subsidiary controlled by a foreign parent and the technology has not been developed in the technology acquiring country. This problem is further dealt with later in the chapter on restrictive practices.

Group B is not disposed to accept this, but is prepared to accept that States may apply by means of their national legislation the principles of the code to technology transfers taking place between parties within their national boundaries, and it seems likely that a compromise along these lines will be acceptable.

The 77 also wish the code to apply to bilateral and multilateral agreements between States for the transfer of technology for development needs, but Groups B and D do not find this acceptable.

CHAPTER - 2 OBJECTIVES AND PRINCIPLES

This chapter sets out in some detail the general objectives and principles embodied in the code. As these are sufficiently evident from an examination of the rest of the text there is no need to make further reference to them here.

CHAPTER -3 NATIONAL REGULATION OF TRANSFER OF TECHNOLOGY TRANSACTIONS.

This chapter deals with a sensitive area, concerning the extent to which some limitation maybe put upon the unfeltered right of governments, particularly of the acquiring countries, to pass legislation within the scope of the matters dealt within the code of conduct.

The Group B countries wished to establish two principal points. The first was that the acquiring countries would undertake to observe the rules of applicable international law. This was directed specifically to the issue of compensation in the case of nationalisation of concessions or investments and to ensure that it was in general terms "prompt, adequate and effective". This raises an issue which has been hotly contested. The

developing countries have not accepted the traditional rules of international law as developed by western countries during the colonial period. They contend that these rules were elaborated without their consent and are inequitable. Furthermore since the establishment of the United Nations and the resulutions of the General Assembly international law has been "globalised" and has been revalued on an equitable basis.

The second matter of concern to Group B was the protection of industrial property rights, and the Group sought to ensure that developing countries should accede to the provisions of the Paris Convention for the protection of industrial property and abide by them.

With regard to the first point, it is now agreed that the measures taken by States should be "consistent with their international obligation", a phrase which displays a certain amount of ambiguity.

As to industrial property, it is now agreed that each country adopting legislation should have regard to its national needs, and should ensure the effective protection of industrial rights granted under its national law. This would seem to leave the protection of such rights to the countries concerned, without importing any specific obligations in respect of the Paris Convention.

The remaining provisions with regard to national legislation give a wide measure of latitude to the countries involved. A number of specific fields are named where States may take legislative action. In the financial sector they may deal with currency regulations, domestic credit and financing facilities, transferability of payments, tax treatment and pricing policies. They may also lay down the terms and conditions for the

renegot iation of transfer of technology transactions. They may prescribe specifications and standards for components and their payments, take measures for the ev aluation and the analysis of transactions for the benefit of the *arties to negotiations and prescribe for the use of lcoal and imported components.

Governments may also establish machinery for the evaluation, negotiation and registration of transfer of technology transactions, and legislate as to their terms, conditions and duration. They are specifically empowered to take measures to prevent the loss of ownership of control by domestic acquiring enterprises, and for the regulation of foreign collaboration agreements which could displace national enterprises from the doemstic market.

Appropriate channels may also be established for the international exchange of information and experience in the relevant field. It is also to be noted that States may strengthen their national administrative mechanisms for the implementation and application of the code, and of national laws, regulations and policies. This seems to indicate that countries will be free to introduce mandatory measures that could make the observance of the code compulsory within their own jurisdiction.

In taking all such measures countries should act on the basis that these measures will promote a favourable climate for the international transfer of technology, take into consideration the interests of all parties, and encourage transfer of technology to take place under mutual agreed fair and reasonable terms and conditions.

CHAPTER - 4 RESTRICTIVE PRACTICES

This chapter, together with chapter 5 dealing with guarantees, constitutes the heart of the code. Chapter 4 prohibits a number of practices which have been employed in the past in connection with the transfer of technology while its counterpart chapter 5 deals with the positive obligations to be observed by the parties.

Chapter 4 has lead to much argument and difficult negotiation, and even the title has not yet been agreed. The 77 describe it as "the regulation of practices and arrangements", Group B describes it as "restrictive business practices", while Group D considers it to be "the exclusion of political discrimination and restrictive business practices".

Basically the restirctions are those of an anticompetitive nature which are prohibited under anti trust laws in developing countries in connection with the abuse of a dominant position or restrictive agreement for the licensing of industrial property rights and know how. The prohibitions follow in the main the stricdt provisions that have been laid down in the United States and in the proposed Regulation regarding patent licensing agreements in the EEC. The Group B countries have tended to regard such restrictions as being undesirable because they are anti competitive and consider that transactions with developing countries are entitled to the same protection as is given to the nationals of Group B countries within their own territories. The 77 on the other hand tend to see the restrictions not so much in the light of anti trust, which has less meaning in developing countries, but as practices which are essentially reprehensive because they are unfair in themselves and represent the result of undue influence by a strong supplying party over a weaker acquiring

party.

The practices should be read subject to two reservations, The first concerns the application to the parent subsidiary relationship within companies, and the second is that although afewof the restrictions are to be avoided per se, most of them (unless otherwise indicated below) are subject to the "rule of reason". These two issues will be considered later.

There are 20 practices altogether on the list in the draft. Fourteen are the subject of substantial agreement, while the remaining six are proposed by the 77 and Group D only.

The first 14 are as follows :

1. Grant back provisions :

There is a per se prohibition against grant back provisions, the only outstanding issue being whether these should be restricted, as is the proposal of Group B, to cases where they are either exclusive without offsetting consideration from the supplying party, or when the practice will constitute the abuse of a dominant position. The 77 wish the prohibition to apply when the grant-back provision is either exclusive or without offsetting consideration.

2. Challenges to Validity :

There is a classical no challenge clause, and it is declared that the result of the challenge will be determined by the appropriate applicable law.

3. Exclusive Dealing :

A per se prohibition exists against exclusive dealing, so as to prevent the acquiring party from dealing in similar or competing technologies or products, unless such restrictions are legitimately necessary to secure confidentiality,

or distributional or promotional obligations.

4. Restrictions on Research :

The acquiring party should be permitted to undertake research and development towards adapting the technology to local conditions or in connection with new products or processes.

5. Restrictions on use of personnel :

The acquiring party should not be required to use personnel designated by the supplying party except where necessary for the establishment and use of the technology. Nor should such personnel be required where locally-trained personnel are available or after they have been trained.

6. Price Fixing :

Price fixing should not be required of the acquiring party in the relevant market to which the technology was transfered for products manufactured or services using the technology supplied.

7. Restrictions on Adaptations :

The acquiring party should be permitted to adapt the technology or introduce innovations in it, provided that it does not use the supplier's name or marks. It should not be required to introduce unwanted or unnecessary changes. Such adaptations as it makes should not render the technology unsuitable for the purpose for which it is supplied.

8. Exclusive Sales or Representation Agreements :

The acquiring party should not be obliged to grant any exclusive sales of representation rights to the supplier or its nominee, unless it is agreed, in respect of subcontracting or

manufacturing arrangements, that distribution will be wholly or partly carried out by the supplying party (per se).

9. Tying Arrangements :

Tying arrangements which are unwanted should not be imposed on the acquiring party, unless necessary to maintain the quality of the product when the supplier's mark is used, or to fulfil a guaranteed performance obligation.

10. Export Restriction :

The provision relating to export restrictions is still unresolved. They wish the removal of all restrictions that would prevent or hinder exports in any way. Group B considers that such restrictions would have to be unreasonable before they are condemned, and should be limited to those which prevent or substantially hinder exports, unless justified, for instance to prevent exports to countries covered by the supplier's industrial property rights, where the know how has retained its confidential character, or where the supplier has granted an exclusive right to use the technology. Group D substantially supports Group B.

11. Patent Pool or Cross licensing Agreement and other arrangements

There is a per se restriction on patent pools, cross licensing agreements and other international transfer of technology interchange arrangements among technology suppliers which "unduly limit access to new technological developments" or would result in the abuse of a dominant position. An exception is made for cooperative arrangements, e.g. joint research.

12. Restrictions on Publicity :

Restrictions should not be imposed on advertising or publicity by the acquiring party unless necessary to protect the

supplier's reputation or, marks, or for reasons of product liability, safety, consumer protection or to secure confidentiality.

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

There is a per se restriction against requiring payments or other obligations after the rights have been invalidated, cancelled or expired. Any other issue, including other payment obligations for technology, is to be dealt with under the appropriate applicable law.

14. Restrictions After Expiration of Arrangement :

This is an unsettled provision relating to know how. The 77 wish to prohibit all restrictions on the use of technology after the expiration or termination of arrangement or after the know how has lost its secret character independently of the acquiring party. Groups B and D consider that the restrictions should continue to be applicable where the technology is still legally protected, or has not entered the public domain.

Further propsals :

The remaining six restrictions have been proposed by the Group of 77. These deal with limitations on volume or scope of production; the use of quality controls; the obligation to use trade marks, the requirement to provide equity capital or participation in management; unduly long duration of arrangements ; and limitations on the use of technology already imported. The first five of these are supported generally by Group D. Group B has not supported any of them or made any counter proposals.

Exceptions :

The 77 and Group D have proposed a general exception clause to the chapter to the effect that restrictions could be accepted in exceptional circumstances where the competent national authority of the technology acquiring country decides that they are in the public interest and without adverse effects in other countries. Group B does not support this proposal.

The Rule of Reason :

Group B has attached the qualification "unreasonably" or "unjustifiably" to all those provisions dealing with restrictions above which have not been prohibited per se. This is essentially the Anglo American approach, which recognizes that it is impossible to elaborate any specific set of detailed anti trust prohibitions which could be effectively applied in all circumstances. Some prohibitions may well produce beneficial effects by giving corresponding advantages to the recipients. It is, therefore, necessary to aavaluate each case individually and make a value judgement as to the effect of the restriction. A similar approach has been adopted by the EEC, where the prohibitions of Article 85 of the Treaty of Rome have been tempered by the power of the Commission to grant exceptions to them in certain categories of cases under Article 85 (3).

The Group of 77 take objection to this attitude, partly because they are not accustomed to a rule of reason, and partly because they feel that the word "unreasonably" will open the door to the supplying party to enable it to impose restrictions in an arbitrary manner in the face of the code.

There is a good deal to be said for the attitude of the 77, as it will be appreciated that under Anglo American law the issue of reasonableness will in the last resort be determined by

the courts. Such courts are able to hold the balance between the interests of the opposing parties, and experience has shown that in many issues of varying kinds the courts have had little difficulty in establishing appropriate yardsticks for the evaluation of "reasonableness" in each case. The situation, however, is different where the code is not legally enforceable and depends on "self interpretation" by the parties. In these circumstances it may be more difficult for two parties to agree on what they both regard a "reasonable".

In the code an attempt is being made, so far without success, to put the rule of reason into a carefully designed form of words that will reduce the latitude that might be given to the meaning of "unreasonable". This had led to much argument, and the draftsmen have not got very much beyond saying that the restriction must be evaluated having regard to all the circumstances in the light of the objectives of the code.

It may be noted that in the formulation of the UNCTAD Set of Equitable Principles and Rules on restrictive business practices a similar situation existed, which was resolved by the use of a phrase prohibiting restrictions where they "limit access to markets or otherwise unduly restrain competition". This appears to have been accepted by the 77 in the negotiation of the Primciples and Rules without difficulty, although there would seem to be little to choose between "unreasonably and "unduly".

Commonly Owned Enterprises :

The second general issue outstanding concerns the transnational corporations in cases where the international transfer of technology takes place between the parent and its subsidiary, or between two comanies in common ownership. In such

circumstances the members of the group forming the transnational corporation may already be subject to internal restraints, which may be considerable. A balance must therefore be found between the legitimate interest of the group as a whole and the effective transfer of technology.

The Group of 77 propose that in such cases the restrictions existing between commonly-owned enterprises should be looked at in the light of the code restrictions, but that "such practices may be conssidered as not contrary to the provisions of the code when they are otherwise acceptable and which do not adversely affect the transfer of technology".

The attitude of Group B is a different one. They consider that "restrictions for the purpose of rationalization or reasonable allocation of functions" between parent and subsidiary will normally be considered not contrary to the code "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".

This issue, too, has also been dealt with in the Principles and Rules for restrictive business practices, where it has been provided in a footnote, that whether acts or behaviour constjtute an abuse of a dominant position is a matter to be examined in the light of the actual situation and in particular whether they are :

a) Appropriate in the light of the organisation,
managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises.

b) .....

c) Of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices."

Chapter 5 Guarantees

This chapter is the counterpart to Chapter 4 and deals with the positive duties, variously describred as "guarantees", "responsibilities" or "obligations", which the code imposes on the parties. Some of these are expressed in general terms, others are more precise.

These guarantees are divided into two parts, those which apply to the pre-contractual or negotiating phase, and those which relate to the contractual obligations to be included in the arrangement itself.

There is one general provision which applied to both these phases, which is that the parties should each be responsive to the economic and social development of their respective countries, and that they should observe fair and honest business practices.

1. The Pre-contractual Phase :

In the pre-contractual phase, the parties should take into account to the extent practicable specific provisions for the use of local personnel either trained, or to be trained in order to take over later, and for the use of locally available materials, technologies, skills, consultancy and other services which can be made available by the recipient.

An important provision relates to "unpackaging", in order that the acquiring party may be able to evaluate the various elements of the technology to be supplied. The degree of unpackaging does not involve a complete break down of all

components, but should provide sufficient details to satisfy the purposes of the recipient.

Both parties should aim to reach an agreement on fair terms and conditions, including licence fees, royalties, etc.

Group B wishes to add that such terms should be the reasonable commercial terms which are customary, while the 77 and Group D wish the price to be non-discriminatory. The 77 consider that the technology should be available on no less favourable terms as those given to other recipients.

There must be an apporpirate exchange of information, and any confidential information must be regarded as such by the other party. The supplier must in particular disclose to the recipient all details known to it that might have adverse effects on health, safety or the environment, together with any impediment in the transfer of the rights or services. The recipient must disclose any local requirements or legislation which might affect the position of the supplier.

Regard should also be had to the recipient's need for accessories, spare parts and components, particularly where non are available from other sources.

2. The Contractual Phase :

The 77 and Group D consider that the following obligations should be observed in the contractual phase. Group B considers that such obligations should only be in accordance with fair and reasonable commercial practice having regard to the circumstances of the individual case.

These should be access by the parties for a specified period or for the lifetime of the agreement to improvements to the technology transxferred. The 77 consider that this access need

only be given to the recipient.

Group B proposes that there should be "respect for the confidenntiality and proprietary nature, and the use only for the purpose and on terms stipulated in the agreement, of any trade secrets, secret know-how and other vonfidential information received from the other party." The 77 consider that this should not extend beyond an adequate lapse of time, and Group D considers that the obligation should end after the information has reached the public domain independently of the acquiring party.

The obligation in this phase also cover terms to be generally implied in such contracts, such as that the technology transferred should comply with the description and be suitable for the purpose, if properly used, as stipulated in the agreement. The supplier represents that it is not aware of any third party rights that might infringe the patent rights transferred. The recipient also undertakes to observe quality levels where the marks or goodwill of the supplying party are involved. The supplier undertakes to provide technical information and other data correctly and completely and in a timely manner.

There are in addition a number of obligations proposed by the Group of 77 and Group D but which have not received any support from Group B. These involve a guarantee that the technology will achieve a predetermined result under the conditions specified in the agreement; that adequate training should be provided for the personnel of the recipient; that spare parts, accessories and the components should be available at the usual prices ofor the period of the agreement; that the price charged should be broken down into each element supplied, and that it should be explicitly determined; that where input is purchased from the supplier or output sold to it this should be on fair and

reasonable terms.

The 77 and Group D also consider that the supplying party should be liable for loss of damage or injury to property or persons arising from the technology transferred or the goods produced by it. Group B considers that there should be an appropriate disposition concerning the non-fulfilment by either party of its responsibilities.

Chapter 6 Special Treatment for Developing Countries

Chapter 6 to 8 deal with cooperation between governments, which could turn out to be one of the most important parts of the code. Chapter 6 calls upon developed countries to encourage the scientific and technological capabilities of devedloping countries.

Developed countreis should assist with all possible types of information and provide the fullest access to technology practicable boty in the public and private sectors. They should assist in the development of national technologies by facilitating access to available research data; the growth of innovative capacities; support for laboratories; experimental facilities, as well as training and research, and cooperation in the establishment of national, regional or international institutions, particularly technology transfer centres. Developed countries are also urged to grants credits on specially favourable terms in respect of approved development projects.

The only provision not yet settled is one calling for preferential measures so that industrial property rights granted to a patent holder in supplying countries should not be used by it to restrict imports of products from developing countries. On this the 77 have reserved their position for the time being.

Chapter 7 International Collaboration :

The participating governments recognize the ned for appropriate international collaboration, whether between governments, inter governmental bodies, members of the UN system, or the institutional machinery of the present code, in order to strengthen the technological capacity of all countries.

Such collaboration should take the form of exchanges of information, the promotion of international agreements, consultations, the establishment of common programmes and the development of scientific and technological resources for stimulating indigenous technologies, together with action to eliminate the double taxation on earnings and other payments in respect of the transfer of technology.

Chapter 8 International Institutional Machinery :

The institutional machinery for the operation of the code will consist either of a special committee established within UNCTAD, or an independent committee. In either case it wil be serviced by the UNCTAD secretariat, and be open to all members of UNCTAD.

The functions of the committee will be as follows :

a. to provide a forum for consultation and discussion
b. to undertake appropriate studies and research.
c. to consider studies and reports from within the UN system, particularly UNIDO and WIPO.
d. to consider information obtained from all participants.
e. to disseminate appropriate information taken at national level.
f. to make reports and recommendations to the participants .
g. to organize symposia and workshops ; and

h. to report once a year to the UNCTAD Trade and Development Board.

It is specifically provided that neither the committee nor any subsidiary organ may pass judgment on any individual government or party in connection with any specific transaction. This follows the rule already laid down by the OECD in its guidelines to transnational corporation, and in the UNCTAD Principles and Rules on restrictive business practices. The committee must also establish a suitable procedure to ensure appropriate confidentiality.

If the committee is established within UNCTAD, its establishment shall be subject to the approval of the UN General Assembly. The financial requirements in connection with the servicing of the committee to be borne by the United Nations budget are also subject to approval by the General Assembly.

Provision is made for the convening of the United Nations Conference, after either four or six years, to review the application of the code and to arrange for its improvement. The 77 wish that on this review there should be a final decision as to the possibility of making the code a legally binding instrument.

The Provisions for cooperation between governments may not mean a great deal by themselves. They do, however, form the basis of the mandate given to the committee within which the participants will consult, and the spirit in which they are applied will depend on the climate induced by the governments collectively as well as the secretariat. It is not likely that governments will do much on their own, although some undoubtedly will. What is more to be expected is that, through collective consultation, governments will be able to identify issues and suggest suitable action that could be generally adopted.

Chapter 9 Appliable Law and the Settlement of Disputes :

There are two aspects which concern the law to be applied to the transfer of technology. The first relates to the substantive requirements either of the supplying country or the recipient country. This law will be applicable by virtue of the territorial jurisdiction of the country concerned over acts or omissions which are required by its general law, irrespective of the bargain existing between the parties.

On the one hand, this will consist of the legislation dealing with the supplying of technology, the physical condition of the products supplied, requirements as to credit, restrictions on strategic materials etc. On the other will be the legislation of the recipient country which will apply to the technology delivered. The latter will be the more likely incidence of national legislation and may refer to any of the matters permissible under Chapter 3.

The second, and more controversial aspect, of applicable law concerns the law to be applied to agreements between the supplying party and the acquiring party, especially when one party, generally the acquiring party, is the State itself, or an organism closely connected with the State.

The developing countries contend that there are often conditions imposed under pressure of a stronger supplying party, such as that disputes should be settled by arbitration in accordance with a law, or in a forum, where the law to be applied is not that of the recipient country. There are a number of reasons for this, some of which are perfectly legitmate, as where, for example, another system of law has a closer connection with the technology, or where the law of the developing country in a

particular respect is inadequate or incomplete. The objection on the part of the developing countries; is that such an arbitration clause, imposed virtually by duress, removes the matter from the jurisdiction of the national counts so as to "denationalize" the issue, and is therefore, an abrogation of the sovereignty of the recipient country.

This applies specifically where the recipient party is itself a State. Objection is taken to certain of the arbitral awards made in respect of petroleum concessions, such as the Aramco and Sapphire cases where the contract between the State and the oil company has been elevated to something having an existence in international law, and which is therefore governed by the principle 'pacta sunt servanda' to the exclusion of the right of the State concerned to legislate in the matter after the agreement has been signed.

These cases, coupled with the fact that developing countries have felt that the climate of international arbitration in the past has been tilted against them, has led them to take steps in many cases to secure that it is only their national law which is applied. Such is the case with Saudi Arabia, followed by other OPEC countries, as well as the Latin American countries under the Andean Pact. This, however, is not a very satisfactory solution for, as Professor Philippe Fouchard has said, "developing countries cannot reasonably hope, except by inverting the sense of domination, to secure that these international disputes should always be submited to their own jurisdiction".

The reality seems to be that there is a genuine need for a tribunal that will be more neutral than the courts of one of the parties to the dispute, and in fact developing countries are

making use more and more of such international arbitral institutions such as the International Chamber of Commerce, where arbitrations are often held in developing countries, presided over by a third arbitrator from a developing country, and sometimes even applying the national law of the recipient country. There is developing a better balance between the rights of each party, and increasing weight is being accorded to the arguments of developing countries. An example is the award of Professor R J Dupuy in the arbitration between the Government of Libya and the Californian Asiatic Oil Company and the Texaco Overseas Petroleum Company (although the arguments of the Libyan Government were not accepted). Current theory does not accept the great emphasis put on sovereignty by the developing countries, where it is even sometimes doubted whether stabilization agreements, whereby the State undertakes to make no change in its legislation without the consent of the other party, are legal. In these circumstances it is hardly surprising that so far there has emerged no agreed text dealing with this topic.

Position of the G-77.

The Group of 77 wish for some mandatory provisions, and they have proposed that the law applicable to matters relating to public policy (order public) and to sovereignty shall be the law of the recipient country, any clause to the contrary being void. Furthermore any contractual clause which would be in violation of the public policy or sovereignty of the recipient state, particularly in matters concerning its governmental prerogatives or its legislative, regulatory or administrative powers shall be null and void.

The law applicable to matters of private interest is

to be that which has a direct, effective and permanent relationship with the transaction, and the choice of law is to be in conformity with this rule. The law of the acquiring party is to apply to all questions of "characterization", and it alone shall be applicable to the determination of matters which may not be submitted to arbitration or which concern public policy or sovereignty.

With regard to the settlement of disputes, the proposal stresses the desirability of conciliation before arbitration, as do all the groups. The 77 desire, however, that the courts of the acquiring country should have jurisdiction over disputes arising out of the contract concerning public policy or sovereignty. The parties may choose the forum or arbitration, provided the forum has a direct, effective and permanent relationship with the contract, unless the acquiring country has express rules to the contrary, and any clause which excludes the jurisdiction of the counts of the acquiring country, shall be null and void.

The seat of arbiration is to be the acquiring country, and the procedure shall be in accordance with the UNCITRAL rules. There shall be no review of the award on its merits, but a tribunal of three arbitrators from the panel established by the code are to examine it for legality (recours en nullite, or misconduct of the arbitrators) and shall have power to annul it.

Proposal Group D :

As might be expected, Group D strongly favours the settlement of disputes by arbitration, which is the chosen method of settlement between the socialist countries. The parties may, subject to their national legislation, freely choose the law applicable the the agreement in respect of its validity,

performance and interpretation. In the absence of an agreement on choice of law, the arbitral tribunal is to apply those conflict of law rules which it considers applicable. The decisions of the arbitral commissions, whether standing or ad hoc are final and binding on the parties, and will be enforced through the New York Convention.

Proposal Group B :

Group B also favours the view that the parties may freely choose the law applicable to the agreement, provided that it has a substantial relationship to the parties or the transaction or there is other reasonable basis for the choice. The group proposes with regard to choice of law, in the absence of a choice by the parties, that either the court trying the dispute should apply its proper conflict of law rules, or, if an arbitral tribunal, the rules it considers applicable, alternatively that the substantive law of the country to which the agreement has the most real connection should govern the agreement. The parties should be freely permitted to choose the court, provided it has a reasonable basis and does not impose an onerous burden on one of the parties, or to choose arbitration. The use of the UNCITRAL rules is encouraged and enforcement should be by means of the New York Convention.

The Negotiations on this issue :

It will be seen that the difference between the proposal of the 77 and that of the other two groups is substantial, and it has not been possible to bridge the gap. It was indeed on this issue that the Conference finally broke down in 1981, at the insistence of some of the 77. If, however, the code is to consist only of guidelines, and is to contain no mandatory provisions, then

its effect on the law to be applied and the settlement of disputes will consist only of recommendations and will not directly affect existing national regulations on the subject.

At the Conference itself a compromise proposal was put forward by the President to the effect that parties "may, by common consent, choose the law applicable to their contractual relations, it being understood such parties should recognize that such choice of law may be limited in some or all of its effects by the relevant national law, including public policy", and they may also have recourse to arbitration where the relevant laws of the parties do not prohibit it. The UNCITRAL rules and the New York Convention should be applied.

It seems to be reasonably clear that if the proposal of the 77 was to be substantially met, this might have the effect of disrupting the edifice of international arbitration which has so far been built up. If the recipient country is to be able to invoke its own sovereignty in respect of disputes affecting its contracts, there will be no certainty on the part of the other party as to what the effect of the agreement is going to be. This is hardly a situation which technology suppliers are likely to accept, nor is it in the long run in the interest of the recipient countries themselves. There seems little reason for the unnecessary invocation of the doctrine of sovereignty, which is in any event archaic and pernicious when carried to excess, whereas it is eminently desirable that engagements should be met in accordance with the promises made at the time of the negotiations.

The developing countries cannot expect, therefore, that there will be agreement on any provisions in the code which will substantially change the existing system. Such changes as

they may desire will take longer and will have to be pursued within a wider framework. If they wish to see a successful and timely conclusion to the negotiation of the code the 77 may in all probability have to accept the proposal on the lines put forward above by the President.

Chapter 10 Other Provisions

No proposals have so far been made for this chapter.

The unsettled points are still being studied by the Interim Committee convened by the General Assembly, and it may be possible to make some progress. The difficulty is that many of the disputed points deal with issues that go considerably beyond the scope of the code and raise fundamental questions which can hardly be settled within the framework or within the time scale of the code. Some major adjustments would be required which are not likely in the present international climate to be forthcoming. The most that can be hoped for would seem to be some compromise that would contain the unsettled issues until they can be resolved on some future occasion.

The negotiations might be considerably expedited by an early statement, in which all groups might join, recognizing that the code would not be given legally binding force, at least initially.

An unknown factor at present is the attitude of the Reagan Administration to the negoations. As the United States is by far the largest net exporter of technology, any agreement on a code without the United States would have little meaning. IUf the present Administration is prepared to continue to accept the position which has higherto been consistently maintained by the US delegation, whereby in common with all the other participants, it fully endorses the right of all people to access to technology on

fair and reasonable terms, then it may be possible to achieve general agreement. If on the other hand the United States is determined to preserve its monopoly position without regard to the interests of the rest of the world, then it may be that the United States will not participate further. In any case it would be realistic not to expect much in the way of further concessions.

In these circumstances what ought the developing countries to do ? There is a school o f thought particularly among some African delegations, that it is better to have no code at all than a bad code. To make this choice, however, may mean that the possibility of a code will be lost for many years, and perhaps even for ever. On the other hand, if steps are taken now to accept as a first instalment what is being offered, there is always the possibility that it may in the future be improved. Such is often the experience in international afairs, where scarcely any country gets everything it wants. A great deal will depend for the effectiveness of the code on the multilateral consultations that take place after the negotiations are over, and if there is a good climate in this respect the prospects of improvement may be considerable.

A more difficult choice has to be faced should the United States refuse to take any further part in negotiations, or refuse to accept the code when it is finally agreed. If all other Group B countries were to accept it, then it would probably be of general advantage to proceed with it. Even if the United States were to vote against it at first, there is always the possibility of it being ac cepted by the United States at a later date. If, However, the rest of Group B or the majority of Group B do not participate the 77 will be faced with a further difficult decision.

Without the participation of the technology suppliers in Group B there would be no hope of any kind of cooperation arangements. As far as the chapters on national legislation, restrictive practices and guarantees are concerned there is a great deal of ground which is subject to general agreement, and it would be comforting to think that the area already covered by consensus would be generally accepted, as it may be sometimes at present, as guidelines by al the present participants. It may be that as the code is not complete such a suggestion might not be acceptable, and the guidelines would fall into disuse.

The alternative would be for the Group of 77 to take up the subject on their own, with or without other countries from Groups B and D. The 77 would then have the choice of negotiating a convention among themselves, as technology recipients, prescribing the terms on which they would be prepared to accept technology. Such terms could then be of their own choosing, remembering only that if they wish to attract technology, the developing countries must be willing to prescribe terms which are regarded as satisfactory by the suppliers as well as the recipients.

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1615