CHAPTER - 7

Summary and Conclusions

Technology and technology transfer has in recent years emerged as a separate field of enquiry. This is because of the accelerating awareness of the central role of technology for economic development. The economic historians have confirmed technology to be sine-qua-non of development. Technology in the realm of development would include ideas, knowledge and know how for creating goods and services and products that are marketable in strict commercial sense. Moreover, technology has various representative elements in patents, know how, techniques, trade secrets etc. that may or may not be contained in a finished product, and may be either embodied or disembodied.

The modern technology has its effects felt on the interdependence of nations. Because of the increases in means of transportation and communications between nations the processes and products originating in one country get diffused to other countries which in turn would adapt and assimilate the process or the know-how. This interdependence has resulted in what we mean by transfer of technology, a process whereby a country other than the one which originated the process, product or know-how would like to utilize the said process, product, etc. The transfer refers to the ways and means of acquiring the technology and know-how by individuals, enterprises and governments.  

1. See Supra Chapter 2.
Over the years the transfer of technology from advanced industrialized countries to the less industrialized developing countries (LOCs) has been recognized as an important input for their economic development. Economists have decreed that through transfer of technology the LOCs can overcome their economic, technological and developmental problems. The transfer of technology is also visualized as a substitute for generation of indigenous technology by LOCs. Thus transfer of technology has thus come in vogue in recent years.

The LOCs do not show any substantial progress in their industrial growth and economic development despite the fact that science and technology have made enormous advances during the past several decades. The reasons for this are not far to seek. There are strategic impediments attached to the transfer of resources, capital and technology to LOCs. The LOCs are in the most vulnerable position in the international economic order, which has been built up by the advanced countries. The functioning of international economic order has not been conducive to the economic and industrial growth of LOCs. The present international order has been characterized as unequal, exploitative and against the interests of LOCs. The post-war Bretton Woods economic arrangement has perpetuated and even widened economic inequality between the industrially developed

advanced countries and economically backward LDCs. At the present state of international economy the LDCs face huge problems, viz the debt crises, balance of payment shortages, industrial recession, etc. Major problems have arisen with respect to transfer of resources, foreign investment, transfer of technology, Multinational Corporations (MNCs), and Intellectual Property.

The functioning of international economy has thrown open new challenges to the international legal system. The challenge has been to evolve out new norms and rules for regulating international economy in general with particular emphasis on the needs of LDCs. It has more or less boiled down to the process of reorganization of international economic relations between states and non-state legal subjects on the international level.

It needs hardly be emphasized that the subject of reforms in international economic relations is complex and as such is not susceptible of conjunctures. However, we have only taken international transfer of technology. The broad objective of the present study has not been to depict the overall picture of technology generation and diffusion, but the limited objective has been

4. See S. Lall Developing Countries in International Economy (1985)
undertake an analysis of the problems and issues relating to transfer of technology in legal perspective. While undoubtedly technology transformation of LDCs should belong to its relevant discipline, the scope of the present study has been to discern the major legal responses to the overall functioning of the present system of technology transfer. The aim has been to undertake a legal analysis of major trends towards regulation of international transfer of technology at national and international levels. However, this has impelled us to highlight various other ramifications involved in transfer and assimilation of technologies by LDCs. Thus we have discussed various modes of transfer of technology in Chapter 2.

As has been seen the major mechanisms of transfer of technology have been either foreign investment or licensing. The relative importance of individual forms of technology transfer would, by and large, depend on the economic and legal policies of particular LDC and the nature of technology involved. Moreover, it would also depend upon the strategies of the suppliers notably MNCs. However, as we have seen the LDCs have predominantly favoured transfer of technology through licensing and other non-equity investments particularly joint ventures. These non-equity ventures have become popular in LDCs because of the association of local investors with the ventures unlike those requiring direct foreign investment. Further direct foreign investment has not been viewed as an ideal form of transfer of technology by LDCs.

Different mechanisms of transfer involve different agents of transfer and constitute different legal rights and duties for the parties to transfer. These mechanisms it may be noted are not 'value free' or 'neutral' but involve externalities for both the donor and the recipient countries in terms of costs and benefits to the parties. Technology transfer does not follow the laws of fluids as such it does not automatically get diffused to other countries. Thus we have discussed various costs for LDCs in transfer of technology in Chapter 3.

These shortcomings have achieved considerable proportions for LDCs both in terms of costs for their economies and the suitability of technology. It has been seen that the national and international legal systems have been supportive of the impediments of the LDCs to advanced technology. The proprietary rights in technology have been responsible for various abuses in the transfer of technology. The direct and indirect limitations by the transferors have also incurred costs for LDCs.

The problems of technology transfer are inextricably intertwined with the MNCs, as they are the major monopolizers of scientific and technological know how. It can well be argued that to a large extent international technology transfer and MNCs are complementary. As we have seen the international technology

7. See Supra Chapter 3 notes 17-48 and the accompanying
transfer flows tend to be commercially motivated, with MNCs occupying the commanding heights. The MNC which is a private sector entity freed from many national constraints is often the critical carrier of capital, technology and ideas. The commercial motivation of MNCs in technology transfer has also been the major cause of present disorder in technology transfer. The operations of MNCs which are strictly not amenable to one particular national system has incurred extremely high costs for LDCs, which have further been increased because of manipulative practices of MNCs. The transfer whether through direct investment, or any other licensing arrangement leads to other economic fall outs. The LDCs have been facing acute balance of payment problems because of the high costs of technology transfer which has forced them in an external debt crisis. The matters which have caused concern to LDCs are the transfer of inappropriate technology, overpricing, and restrictive business practices in licensing clauses.  

As we have seen in chapter 3 the MNCs have been incorporating restrictive business practices in the technology transfer agreements with LDCs. These practices are manifestations of controlling measures by the MNCs even after the transfer. They have given the MNCs immense power not only to control the costs but even to direct the flow of accompanying inputs and technology. The introduction of these restrictive practices have assumed unethical proportions in the absence of a strict international anti-trust legislation. Although transfer of

8. See Supra Chapter 3, notes 49-70 and the accompany text
technology across the frontiers does not take place on compassionate grounds, however, the fact remains that restrictive practices in technology Transfer agreements have been overwhelming. Thus practices like Grant Back, Price fixing Tied in clauses, Territorial restrictions, etc. are frequently used by MNCs while transferring technology to LDCs. Although these practices are ultravires the anti monopoly laws and anti trust laws of advanced countries yet they are used with impunity by the MNCs in international transfer of technology. The purpose of the present study has not been to deal with them in an extensive way but we have touched upon them at appropriate places.9

The operation of MNCs in LDCs have reinforced a number of conflicts not only in transfer of technology but even in other areas. The phenomenal growth of MNCs has been treated with ambivalent attitudes. On the one hand it is stressed that MNCs provide the requisite resources capital, technology and know-how and act as the most effective instrument of development particularly in LDCs. On the other hand, the pervasive role of MNCs in the world and their oft quoted acts and misdeeds have generated a serious debate about the impact of MNCs on the political and

9. See Supra chapter 3, Notes 71-92 and the accompanying text
economic development of LDCs. In transfer of technology because of the above noted problems MNCs have come to a frontal attack at national and international levels. Consequently, as seen in chapter 3, transfer of technology has been on the agenda of important international organizations like UNCTAD, UNIDO etc. These discussions have highlighted the need for reforms in the legal framework of international transfer of Technology.

The discussions about the reforms in present system of technology generation and diffusion have been underway since 1970's at national regional and international levels. The concern has been on the development of institutions and instruments for a policy which would enable governments to neutralize the adverse effects of technology imports. Aided by some of the important contributions by UNCTAD and other international organizations the international community has shown greater concerns to increase local innovative capacities of the LDCs. The debate has ultimately fructified into efforts to enunciate an international legal regime notably an international Code of Conduct on transfer of technology. The enunciation of these codes, constitute an important strategy of the reorganization of the international order. The UN declaration of New International Economic Order has legitimized the demands of the LDCs to formulate Codes of Conduct on MNCs and

10. See Supra Chapter 3, notes. 93-143 and the accompanying text.
11. Ibid Notes 144-168.
on transfer of technology. Thus major efforts for legal developments in pursuit of economic progress of LDCs has been pursued at the United Nations.

The reform activities in transfer of technology have encompassed three specific areas; (i) Modernization of the international patent system; (ii) enunciation of a legal framework for transfer of technology at the national level and (iii) formulation of an international code of conduct on transfer of technology which shall regulate diverse aspects of transfer of technology at the international level. These are the three areas which we have discussed and which we now recapitulate.

(1) Patents and the Reform of International Patent System:

Industrial property has played a crucial role in the innovative activities. It is for the reason that innovation has to be supported that industrial property rights in the form of patents, trade marks and know-how are protected nationally and internationally. These rights have had an important impact on the technological development of the advanced industrialized countries. The LDCs are equally catching up with supporting innovative activities in areas of patents, trademarks and know-how. Many LDCs have either already enunciated industrial property legislations or are in the process of devising suitable legislations.13

As we have discussed, patents are historically associated with technology innovation and development. It is generally recognized that patents constitute a strong incentive for the development and commercial utilization of inventions. It also encourages the disclosure of information. A patent system provides a technical framework within which manufacturing activities can be established either by the patentee himself or by the grant of a patent license. It is generally believed that the existence of a patent system provides a legal basis for the transfer of technology and leads to an improvement in investment climate necessary for industrialization.\(^{14}\) In the advanced industrialized countries, a sound patent system is deemed to be necessary for the growth of innovation and industry. The value of the patent system in these countries is buttressed by the fact that patents are granted in new areas of technology. The importance of the patent system is fairly well accepted by the international community. Consequently there is hardly a country which do not possess a patent system even including socialist countries like U.S.S.R. and China.

Paris Convention for the Protection of Industrial property (1883) has recognized the international dimensions of

\(^{14}\) See Supra Chapter 4, notes 16-42 and the accompanying text.
patent protection. The adoption of the convention was necessary to obviate the difficulties posed by conflicting systems of different countries. Moreover, through a comprehensive international patent system, there would be no necessity of securing patent protection in other countries through bilateral arrangements. Thus the Paris Convention has adopted uniform rules in some areas of patent protection to facilitate international patenting.15

The object of the Paris Convention is to ensure that the protection of industrial property extends beyond national frontiers and is as far as possible universal. To encourage patenting across national borders, the Convention creates a Union to which most of the countries at present are members. The Union represents an agreement for mutual cooperation between nations in matters of industrial property protection. However, the national countries are principally the one which grant patents, as the Convention does not displace the national patenting. The nation states are free to legislate on diverse areas of patent protection. The Convention lays down certain minimum standards of patent protection which the member countries have agreed to incorporate in their national patent legislations. However, the convention does not create an international

15. See Supra Chapter 4, notes 51-61 and the accompanying text.
patent. As we have discussed in Chapter 4, these international standards are National Treatment (Art. 2), Right of Priority (Art. 4), Right of Importation Art. 5 (quarter) and Safeguards against compulsory licensing and Revocation (Art. 5A). 16

The direct object of the Paris Convention is not transfer of technology, rather it provides uniform rules for patent protection which the member countries incorporate in their national patent systems. However, over the years it has been argued that the provisions of Paris Convention have a direct bearing on the transfer of technology especially for LQCs. It is generally recognized that Paris Convention helps in international diffusion of technology and know-how. By providing for patenting in various countries, the patent provides an avenue for information of technology. It also introduces new technology by the application of the patented process usually linked with direct foreign investment. It can also be licensed to others for manufacture of the patented product or patentees may himself import the patented goods. The LQCS have presumably acceded to the Convention in the belief that its membership will help them in getting information about latest advances in technology. 17 In order to understand the exact correlation between the transfer of technology and the patent system a broad analysis of the provisions of Paris Convention has been undertaken in Chapter 4.

16. See Supra - Chapter 4, notes 62-123 and the accompanying text.
17. Ibid, notes 28-61 and the accompanying text.
It may be noted that with advanced industrialized countries the convention has worked well. This is for the reason that these countries possess a comparative technological advantage. Moreover, for them the patent is essentially a manifestation of private property and to that extent the convention augments the preservation of private property. For this reason the essential features of the Convention have remained intact despite six successive revisions.18

However, with LDCs, the functioning of international patent system has not been without difficulties. Serious problems have cropped up by the operation of international patent system. As we have discussed in Chapter 4, the international patent system has created somewhat anomalous situations.19 The patent statistics reveals that out of patents granted by LDCs, an overwhelming majority of them is owned by foreigners notably MNCs. Some 90% of them are unutilized in production. The non use of the patents by foreign patentees is one of the most important difficulties faced by LDCs. The foreign patentees try to satisfy the market of an LDC by importing the patented product from abroad. The right of importation granted to patentees under Art.(5) and Art 5 (quarter) of the Convention has increased.

18. The Convention has been revised at Brussels (1900), Washington(1911), Hague (1929), London(1934), Libson(1958) and Stockhom(1967).
19. See Supra Chapter 4, notes 124-162 and the accompanying Text.
the chances of non working by foreign patentees. Moreover, it prohibits others from doing so and thereby helps to convert a developing country into a captive market. The 'non discriminatory' treatment as incorporated in Art. (2) of the Convention have precluded the LDCs from taking actions against foreign patentees. These provisions have helped foreign patentees to create import barriers. The patents even if used in collaboration agreements and foreign investments have acted as vehicles for monopoly controls.20

Patents in LDCs do not significantly influence domestic innovative activities or R & D. The majority of patents being held by MNCs are more or less based on overall business strategies of these firms and are aimed at achieving market controls rather than fulfilling the needs of the LDCs. The patents filed in the LDCs are more of commercial products rather than innovative processes. The motives of foreign firms in obtaining patents in LDCs are; to import their products into these countries and to nullify all efforts of imitating their patented products; They also ensure in a clandestine manner the perpetual dependence of LDCs on the technology of MNCs.21

Patentees in LDCs have acted as monopolists. The monopoly privileges associated with patents help the patentee to incorporate restrictions in patent licenses. Through these

restrictions, the patentees actually enlarge the period of their protection. These restrictions considerably hamper the economic and technological advancement of the LDCs. The Paris Convention has nothing to prohibit such restrictions.  22

In the matter of reducing patent abuses, the measures of compulsory licensing and revocation have not proved to be successful. The time lag, inconvenience and high costs for obtaining compulsory license is such that by the time compulsory licenses are obtained, the patent protection is almost over. Moreover, a large MNC has many avenues to forestall compulsory licensing either through court action or through proof or circumstances of non-working, or a MNC may seemingly exploit the patent only to stifle the action of compulsory licensing. Further revocation is possible after 2 years from the grant of compulsory license, only when a compulsory license could not prevent the abuse of non-working. Revocation thus is only a subsidiary means only after a compulsory license has been insufficient to prevent the abuse of non-working. This has obviously diminished the effectiveness of compulsory licensing as a means of encouraging use in production of patented inventions in the country granting the patent.  23

22. See Supra Chapter 4, notes 147-162 and the accompanying Text.

23. Ibid, notes 184-193 and the accompanying text.
In the modern context most of the patenting by individuals is replaced by large industrial corporations. These MNCs indulge in patenting only when it is useful financially or is to block competition. More often than not, the patents taken by them is that of a commercial product rather than of an innovative device. The patents taken out by MNCs are more or less tailored to the commercial needs of the advanced countries. Moreover, if they find that it will be profitable to capitalize on secret know-how, they do not take patents, because this would give them monopoly advantages. Where individuals take patents, they are of a basic character and the successful commercialization of such patents need resources and capital which only a large MNC can provide. Once the MNC takes on the commercialization, it enters into its monopoly domain.24

Nowadays the patents do not disclose adequate information for successful commercialization. Their successful commercialization in turn depends either upon know-how or other patented technology. Where the commercialization depends upon such know-how or patents, it reduces the commercial viability of the original patent.

24. Supra, Chapter 4 notes 128-130,
moreover some of the patents taken are commercially unproductive, which reduces the potency of patents as a successful channel of transfer of technology. 25

A significant amount of technology transfer in the recent years has taken place through non patented technology and know-how, thus giving rise to increase in technical and industrial collaboration agreements. The major vehicle for transfer of technology has been foreign investment and foreign collaboration agreements which invariably use know-how rather than patents. Thus technical knowledge and know-how have increasingly become an important source of new technology. An analysis of transfer of technology in recent years indicate that not more than ten percent of technical collaborations involve patents. 26

Compulsory licensing can help to remove the patent abuses but it is insufficient to be able to commercially exploit the invention. The information disclosed by the patents is very small and thus necessarily depends upon the secret know-how of the original patentee. Where the accompanying information is either secret or the original patentee does not possess the required know-how the licensee will have to spend a lot of money in scaling up the information to produce the technology. Same logic applies to those foreign


26. Ibid.
patents which are readily available in the domestic country. However, it is nobody's case that provisions for compulsory licensing should not exist in patent legislations.

Thus the expectation that patent protection will lead to the introduction of new technology and knowledge in LDC has fallen short. Patent protection has not led to the exploitation of new techniques but served as a legal innovation to the maintenance of individual interests. The fact that know-how and technical collaboration have increased as a means of technology transfer has eroded the value of patents as a means of transfer. Therefore, it can be argued that role of patents in transfer of technology is steadily decreasing. This may be because of the fact that development is becoming costly and is a lengthy process. In such a complex situation the significance of patent protection to the technological and economic development of LDCs cannot be overstated. Among the legal instruments that can contribute to the transfer of technology, patent protection has albeit a limited role.

Even though the role of patents is steadily decreasing in international transfer of technology, yet it can not be argued that the patent system in LDCs should be disbanded. The protection of inventions by patents is apt to promote technical progress if not technology transfer. Indeed a
a sound patent system should be a pre-requisite for the international relations in patenting, a system that is balanced in terms of the rights of the patentees and the public interests. The international system should not subvert the general interests by a system of private controls through agreements. The general distribution of knowledge cannot be subject to restrictive policies of the private interests. 27 For the successful operation of the patent system in international transfer of technology institutional changes are necessary in the international patent system. However, these changes should be undertaken keeping in view the legitimate interests of the patentees. Thus we turn to the question of revision of international patent system. 28

The revision of the international patent system has become necessary because of the fact that as noted earlier, the patent protection is always liable to be abused. The patent system inherently has a number of weaknesses, which are necessarily associated with the monopoly privileges. A patent is especially capable of being misused when it is held by a wealthy company. As noted earlier, the chances of misuse have been enhanced by the provisions of the Paris Convention. The justification for the present revision is that a legal system which does not dovetail its rules to

27. See Wipo. Doc PR/DC/3/ (1964)

28. Supra Chapter 4, notes, 194-213 and the accompanying text.
varying circumstances is bound to suffer from a number of disadvantages. The object of the reforms should be to minimize the apparent disadvantages and at the same time preserve the main rationale. The central justification for patents is their incentive effect. This must remain and the side effects must be kept under review so that they do not overwhelm the major purpose. This has absolutely become necessary especially for LDCs where technology generation is a continuing phenomenon. In such a process a patent takes on a special educative purpose, that of providing knowledge about the improvement of a process or product. The purpose of the international patent system should then be to buttress the flow of information. 29

In order that the international patent system represents a balance between the individual interests and public good, the LDCs have initiated revision of the international patent system. The United Nations Declaration of New International Economic Order is a forerunner to the LDC's arguments for having just and equitable principles of law in international economy. The revision of the international patent system thus constitutes one of the important strategies to overhaul the present system and is a recognition of the changing position and requirements of LDCs.

Non working of patent is an area which is costly for LDCs. Initially, when the provisions for compulsory licensing and revocation in the Paris Convention was introduced, it was thought that it would provide a balancing factor between the rights of the patentee and that of the public interest. However, as we have earlier pointed out that compulsory licensing and revocation are necessarily time consuming. Ordinarily a compulsory license takes an average of seven years to be granted. This includes the time involved in the grant of patent and that of the procedure in obtaining the necessary license. The provisions of Paris Convention have diluted the rigors of these measures.

Furthermore, under the existing Art. 5 of the Convention, revocation of a patent is not possible unless there has been a compulsory license which has not been sufficient to prevent the abuse of non-use. It is therefore, imperative to reduce the time lag in compulsory licensing and revocation. There is a justified concern for the LDCs to argue for less dilatory compulsory licensing. The time period of compulsory licensing should therefore be reduced. It should be possible for developing countries to obtain a compulsory license after two years from the date of grant of patent. Moreover, a compulsory license should not be a precondition for revocation in case of non-working or insufficient working. Thus an action for revocation may be taken after a period of time say 4 years.
from the date of grant, if the patent is not worked or insuffici-
ently worked. Furthermore, member states should be free to
adopt any legislative measures deemed necessary to prevent the
non-working of patents including forfeiture and compulsory
licenses. Under Art. 5(A) of the Convention
licenses. Under the member countries are free to introduce
compulsory licensing for reducing the abuses of patent.
Recourse to these measures should not be circumsenbed by the
provisions of the Convention. No doubt compulsory licenses are
infrequent and incur practical difficulties as we have seen
earlier nevertheless the existence of such legislations is a
substantial encouragement to the giving of voluntary licenses
which are necessary for increasing Transfer of technology.

The LDCs have advocated in favour of grant of
exclusive non-voluntary licenses. An exclusive non-voluntary
license would confer proprietary rights on the licensee
(unlike non exclusive licenses) in as much as the licensee
assert a claim not only from the license but also from the
industrial property right. 30 A non-voluntary license is
a license to work an invention without the authorization of
the owner. It also means a license to work an invention given
by the owner of the patent where the national law obliges
him to give such a license. The necessity of such exclusive
licenses is because a potential licensee would always be

30. Supra Chapter 4, notes 43-48 and the accompanying text.
of a large MNC in case the license is non-exclusive.
In case of a non-exclusive license a patentee does not
forgo his legal rights. Given the massive resources of MNCs
a potential licensee does not want to text risks. The
introduction of exclusive licenses thus would give some
kind of a protective umbrella to the licensees against the
MNC.\textsuperscript{31}

The principle of national treatment as incorporated
in Art (2) of the Convention as discussed previously should
not be extended to such an extent that it helps a patentee
to exercise his monopoly privilege at the expense of the countr
granting patent protection. When the provision of national trea-
ment\textsuperscript{1} was introduced, it was presumably on the logic that
the member countries are of equal rating. However, 'national
treatment' in the face of glaring inequality between developed
and developing countries has become a mechanism for
protection of foreigners in LDCs. The LDCs have nothing to
gain from such a provision in developed countries, as there
is hardly any patenting by LDC patentees in developed
countries. Especially in the modern context where most
of the patenting is done by MNCs rather than individuals.
The former indulge in all sorts of harmful activities in
the guise of national treatment. Moreover, the provision has
enabled the patentees to satisfy the markets through
importation rather than actual working. This right has in
effect increased the chances of non use of the patent.\textsuperscript{32}

\textsuperscript{31} See supra Chapter 4, notes 177-183 and the accompanying
text.
Therefore, the Convention should expressly recognize that importation does not constitute actual working of the patent. The LDCs should be given express powers to link right of importation to actual working of the invention within the territorial jurisdiction of LDC. The right of importation of products manufactured abroad by a process patented in the importing country should be stopped because this right consolidates import monopolies in favour of patentees. According to Art. 5 (quarter.) of the convention a patentee shall have all the rights with regard to the imported product which are accorded to him in respect of the products manufactured in the country. According to this article when a country grants certain privileges with respect to use and sale of a product manufactured locally by a patented process similar privileges will have to be granted to imported products manufactured by the patented process. As a result importation by another party without a license from the patentee will constitute an infringement of the patent right. This article also encourages the non-working of process patents and increases the monopoly of the patentee and the price of the imported articles without there being a transfer of technology. Therefore, there is a need to omit this article. The Convention should not bind the states to grant patentees right of importation of the products manufactured by a process patented in the importing country.33

33. See Supra Chapter 4, notes 91-94.
Patent licensing restrictions are a part of the illegal terms accompanied with the transfer of technology. This is one of the areas which has caused much concern to LDCs, as we have seen in Chapter 3. There is an emergent need to formulate rules with regard to these practices, what ought to be done is to enunciate a set of rules on restrictive practices in patent licensing, and to incorporate them as an Annexe to the Paris Convention, which shall be implemented as part of the national law by states who are parties to the Convention. This will obviate some of the difficulties encountered in Chapter 4 of the proposed draft Code of Conduct dealing with restrictive business practices as we shall see later. 34

Another provision which causes concern to LDCs is Art. 19 of the Convention. According to this, enter into any special agreement between themselves which controvene the provisions of the convention. Given the fact that regional measures between developing countries have increased in recent years Art 19 restricts the developing countries who are members of the convention to enter into special arrangements with other countries whether members or not. Art. 19 would therefore operate as a rider to cooperation between developing countries. Therefore this article should also be omitted from the Convention.

34. Ibid Chapter 4, Art. 25 of the Convention obligates the States parties to the Convention to adopt in accordance with their constitution measures necessary to ensure the application of the Convention. See also Fikentscher, "The United Nations Code of Conduct" 30 J.C.L. (1982) pp. 598-602.
At the national level the LDCs should incorporate strict disclosure requirements for patentees at the time of patenting. The requirement for disclosure should be that patents disclose the most relevant information and in such a way that it represents the best mode of working the invention in trade and industry. This requirement will obviate the difficulties posed by less disclosure of information by patentees at the time of patenting. Moreover, there is a need for technical assistance to LDCs for expanding access to and utilization of patent documentation by developing countries. For increasing such an access the WIPO need to establish regional centres of patent information. This would facilitate the transfer, adaptation and absorption of suitable technology.

The proposals for revision of the international patent system are pending in the World Intellectual Property Organization. An interesting feature of these proposals for amendment is that some of the advanced countries like Canada, Australia, New Zealand and Spain have supported the proposals of developing countries especially with regard to the grant of exclusive voluntary licenses and revocation of patents which are not worked or insufficiently worked.35

It is difficult to predict whether ultimately there will be a meeting ground between developed and developing countries, given the ideological differences between developed and developing countries. However, there is an emergent need of successful curtailment of the monopolistic prerogatives of patentees by elimination of the right to stop importation, compulsory licensing, exclusive licenses and control over patentees pricing practices. These measures would also make the international patent system less amenable to abuses. Further these amendments would have a legitimizing effect on the restrictive patent legislations of some countries like India, Mexico, etc.

The developed countries must recognize that apart from the monopolistic aspect of patent protection, it has a public function to perform which is essential for LDCs. Many of these objectives as sought by LDCs are similar to those already implemented by anti-trust and patent laws of the developed countries. The developed countries need not be under any kind of fear that the revision of the convention and the limitations on patentees would entail undesirable consequences. As long as a patentee retains the right to obtain a fair compensation on basis of freely negotiated contracts the rationale of patents continues to subsist.

The above revision should remove some rigidities of the international patent system and should prove to be a step towards regulating international distribution of knowledge and technology.
In case the proposed revisions do not come through, the developing countries may well be advised to leave the convention and opt for other regional conventions according to their needs. The working of the convention has shown that it has acted well to defend the economic interests of developed countries.

While the revision along the above lines should be successfully advocated by developing countries, however, a caveat must be added here. It is true that above measures would increase the acceptability of the convention, and would give the national countries extended powers to take action against patentees. However, the importance of these measures in facilitating international transfer of technology cannot be overstated. They would not by themselves provide complete remedies to technology transfer. As noted earlier nowadays the role of patents in technology transfer has been steadily decreasing. Compulsory licenses are rather infrequent and wherever taken do not provide a ready answer. An implication of this is that LDCs are perforce compelled to undertake a broader analysis of the alternative strategies in both patented and non patented areas of technology transfer. These strategies assume quite an important role given the fact that technology transfer is essentially an ongoing process which involves more than mere import of foreign technology.
In these circumstances the question of what system of regulation an LDC should adopt in the realm of patents is as much a matter of political choice as that of economic necessity. Thus applies equally to even a general legislation on transfer of technology. Thus apart from the above noted changes in international patent system, it may become necessary for an LDC to even reconsider the extent to which their national patent systems have contributed to technological developments and to examine various possibilities of enhancing local technological capabilities. It may even be desirable to throw open incentives which would facilitate licensing of patents or may grant patents in areas where patent protection is not available in developed countries. Or developing countries could also reward domestic working of the invention by granting additional or special rights to the patentees working their inventions at the national level. It should be remembered that the object of a legislation should be both to regulate and facilitate technology development and its transfer.

It is also necessary to encourage the local research and development activities so that the domestic innovative activities cater to the production of new technologies. Moreover, there is an emergent necessity on the part of LDCs to create comprehensive information systems on foreign patents.
so that the local firms have easy access to literature of patented inventions. This would help and encourage the domestic firms to develop the know-how to exploit the patent.

At the regional level the developing countries may draw up parallel Conventions to formulate a common set of principles and regulations and agree to incorporate them at the national level. Because there is nothing in Paris Convention which prevents them from doing so. The advantage of this approach is that it would be a common strategy for common problems. We have a support for this in the form of African Intellectual Property Organization and Patent Convention of the European communities. The later, though not yet in force even goes to the extent of creating an European Patent rather than a national patent. An accompanying advantage is that the regional Conventions could agree to common rules in licensing of technology and patents, and also may distinguish between practices that are to be permitted and those that are likely to be misused. Such regulations should apply to all transfer of technology agreements involving national patents of member states. 36

II. National Legislations.

The recipient host countries have many justified concerns in the present North-South technology trade. For many years to come the recipient states especially the LDCs will continue to have a key role in their technology relations with advanced countries. Because in the

While voluntary licensing of patented and non-patented technology is common in North-South technology trade, the recipient LDCs have because of the adverse effects noted previously subjected technology transfer to governmental regulation and control. As we have seen in Chapter 5, the LDCs have enacted various protective legislations on transfer of technology. This has been because of the implications of transfer of technology as a major form of foreign investment. The immediate object of these legislations as noted in Chapter 5 have been to enhance the national jurisdiction over MNCs and have been aimed at harnessing R & D and its technological outputs to specific national, economic and social objectives. Thus as we have seen the LDCs have institutionalized controls over the incoming technology either statutorily or through other policy guidelines and declarations. These controls had first been tried by Latin America and India, however, over the years most of the countries of Asia, Africa, and Latin America have enunciated such controls.

The adoption of specific laws and policies on technology transfer as discussed in chapter 5 have been more or less inspired by the concern of LDCs over the increasing
burden of costs and royalties of such transfers and the inclusion of wide ranging restrictive conditions in technology transfer agreements. Apart from prescribing a maximum royalty limit, these legislations have made specific provisions prohibiting restrictive business practices. This is despite the fact that some countries have legislations on restrictive business practices. A second notable feature of these legislations/guidelines is that they have made the governments a dominant partner in the negotiation of the technology transfer contracts. Thirdly, the governments have not favoured long duration of technology transfer agreements.

The chief methodology enunciated by these legislations is that of screening and registration of foreign investment and/or technology transfer contracts. Screening involves a legal, economic and technological analysis of the technology to be transferred. The registration of technology transfer contracts of any description including (transfer of know-how, patents, etc.) has been made mandatory in these legislations. The unregistered contracts are declared to be null and avoid. Any agreement, instrument or contract which has not been registered with the appropriate authorities has no legal effect in the sense that it shall not be ascertainable before any authority and no action to enforce them shall be receivable by the national courts or tribunals. Another effect of non-registration is that payments cannot be released whether within the country or abroad. Moreover, the unregistered contracts shall not be entitled to
any fiscal or financial benefits.\footnote{37}

The economic evaluation includes the evaluation of the likely effects of the proposed transfer on the host economy viz. the balance of payments, costs, effect on local employment, use of local resources. In the legal realm the analysis proceeds on the examination of the conformity of the contract with basic principles of the law of the country, the existence of the essential elements of the contract, the identification of restrictive practices, the stipulation of adequate guarantees and the applicable law and jurisdiction. The criteria by which technology transfer contracts are evaluated as we have seen vary from country to country depending upon the economic resources and development priorities of each state. It may be noted that even if the law prescribes certain conditions, but in reality the administering authorities are given enough discretion. The discretionary element has introduced a flexibility in the operation of these controls, rightly so because the aim is not to completely stop the introduction of foreign technology.\footnote{38}

In so far as technological evaluation of the technology transfer agreements is concerned, it has to be mentioned that this is one of the most difficult areas.

\footnote{37. See Supra Chapter 5, notes 47-66 and the accompanying text.}

\footnote{38. Ibid.}
Because the agreements in itself do not contain any information about the technology to be transferred but is rather a description of contractual terms. Secondly, the registering bodies may not possess an appropriate system of technological information of the technologies present in the country. This problem may be acute in those countries which do not have an established technological base. To overcome this problem the evaluating authorities have to create a linkage with the industry. This becomes important because it is only after this linkage that the evaluating and registering authorities can have a first hand information of what technology is present in the country and what technology is needed.

The method used by LDCs to control the costs of transfer of technology has been by imposing limitations on payments to foreigners by domestic enterprises. The LDCs have through law put a limit on the repatriation of profits arising out of investment by MNCs. Ceiling has been put on royalty rates payable to foreign MNC. As we have seen a majority of the LDCs have ordinarily allowed royalty rate of 5%. Royalty rates are linked to the value of actual production. Further these countries have also regulated these payments through provisions of income tax law. Generally as we have seen these countries have put upon enhanced rate of tax on profits accruing to the foreign corporations. 39

39. See Supra Chapter 4 notes 82-104
The statistics provided by UNCTAD has shown that large sums of money has been saved through registration and evaluation of technology transfer contracts.\(^{40}\)

Another method of controlling the transfer of technology has been by limiting foreign ownership and control of domestic enterprises. The mandatory fade out requirements have had a strong impact on the activities of the MNCs. Initially prescribed by Andean Code, the fade out policies have been introduced by the majority of the LOCs. The fade out provisions are applicable to all foreign investments and require that majority ownership and control of domestic enterprises be turned over to national investors within a period of time. Along with this the LOCs have strictly enforced ownership requirements by limiting foreign ownership in domestic enterprises to 49% of equity and limiting foreign participation in sensitive areas or areas which are of national importance.\(^{41}\)

The concern of LOCs with restrictive business practices in technology transfer agreements has been overwhelming. The technology transfer legislations have made specific provisions for restrictive business practices. The

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\(^{40}\) See UNCTAD. Implementation of Laws and Regulations on Transfer of Technology. Doc. UNCTAD/TT/44(1985)

\(^{41}\) See Supra Chapter 5, notes 57-83 and the accompanying text.
LDCs have adopted a per se approach unlike Western count-
ries who apply 'rule of reason', in the elimination of
restrictive business practices. The LDCs legislations
tend to prohibit all restrictive practices, whether
anticompetitive or not. A technology transfer contract
containing restrictive practice which is likely to affect
the domestic technological development of the host country
is either not approved/registered or is sent back for
modifications. By this approach the LDCs have been able to
prohibit many restrictive business practices in technology
transfer agreements as we have seen in Chapter 5.

The approach of LDCs in prohibiting the restrictive
practices has been that of a preventive nature. The
administering authorities condemn a practice before the
agreement is entered into force, notwithstanding whether
the practice is anticompetitive or not. The main stress
here is on the effect of the restrictive practices on
technological developments of the host country. The
evidence from selected developing countries as collected by
UNCTAD has shown that the administering offices have
successfully reduced the number of restrictive business
practices in technology transfer agreements. However
as we have noted there are some shortcomings also

42. See Joseph Griffin, United States Antitrust Laws
and Transnational Business Transactions' 21 Int.
43. Supra chapter 5, notes 135-48
44. See UNCTAD, Implementation of Laws and Regulations on
Transfer of Technology. UN DOC TD/73/1936/7(1986)
A shortcoming of these regulations is the absence of a proper monitoring system. Despite all good features of these regulations, no serious attempt is made to monitor the agreements once they are concluded. Monitoring in this sense means the examination of all relevant aspects of technology transfer contracts and its actual contribution to the host economy. A detailed monitoring and periodic check ups of the technology transfer agreements would help in the evaluation of technological absorption of the transferred technology. Thus what is suggested is that monitoring should be effectuated at more sectoral levels. Monitoring must be done during the continuance of the agreement and also at the time of renewal.

A substantial problem to deal with has been the intra-firm trading between MNCs and its subsidiaries. Rough estimates indicate that about 52% of the receipts by parent companies account for intra-firm trade. While the LDC legislations have prohibited such payments or have fixed enhanced rates of taxation over such payments, as they are deemed as profits. Nevertheless it cannot be said that it constitutes a comprehensive treatment of intra-firm transactions. There is a need for statistical analysis of the effects of the legislations of LDCs on such intra-firm transactions/payments, which we may take up somewhere at a later stage.
The developed countries have often argued that tighter controls on transfer of technology would lead to a decline in the flow of technology to developing countries. In other words, they would like the LDCs to have a comparatively liberal policies to attract foreign investment and technology.  

In this case it may be pointed out that there is no evidence to substantiate the assertion that countries following liberal policies received increased flow of foreign investment and technology transfer. Moreover, if Indian and Latin American situation is of any indication then it cannot be said that controls on technology transfer have led to a decline in the flow of foreign technology. As UNCTAD has shown that India, Mexico, Argentina and Brazil have the largest number of approved agreements despite tighter regulations.

To safeguard the inflow of foreign technology the developing countries have made specific provisions which guarantee the remittance of profits and royalties of the foreign investors of course subject to the payment of taxes and duties. These countries have safeguarded the


property protection to the foreign technology owners. This has been done by entering into bilateral investment protection agreements with the developed countries and secondly by providing special provisions in local legislations for compensation in case of nationalization. \(^{46(a)}\) The developing countries have specifically ensured payment of compensation in case of nationalization of foreign property. These provisions have been necessitated to allay the fears of the foreign property holders with regard to their property protection.

The purpose behind these legislations as reviewed in Chapter 5 have been to internalize the benefits of foreign collaboration by reducing the possible detrimental effects of technological dependence. The purpose of regulations is not to impede the flow of technology but to prevent the imposition of terms that are inimical to the economic development of the acquiring country.

In general national legislations on technology transfer as discussed earlier have proved to be an effective way of changing the terms of technology transfer to the benefit of importing countries.

However, while a developing country shows some significant technological development, there is always a possibility that these countries would affect changes in their technology transfer policies. With the accumulation of experience in evaluating and screening contracts, the governmental authorities would appear to move towards increased selectivity in the application of controls. This easing of control with respect to transfer of technology arrangements is particularly evident in countries like Mexico, Korea and India. Nevertheless as has been argued that despite these tendencies the existing control systems of developing countries should continue for better appreciation of technology transfer. Thus we have suggested that India may also adopt a unified approach towards regulating transfer of technology. The draft of the proposed bill in this connection is given at the Appendix.

Interestingly enough the developing countries while having national legislations have consistently been arguing for an international code of conduct. Perhaps this is because the operations of MNCs are international, and as such the international code should provide an internationalized framework for the regulation of technology transactions. Moreover, the code may have the effect of legitimizing the already existing legislations of developing countries. Together with the reform of international patent system they argue that code would change the current arrangements concerning the transfer
of technology. In effect the developing countries argue that transfer of technology being international necessitates international rules. Thus we turn to code of conduct.

III Code of Conduct on Transfer of Technology

As already noted the debate over transfer of technology has fructified in the efforts to formulate an international code of conduct on transfer of technology. The enunciation of international Code of Conduct on transfer of technology is but one aspect of the New International Economic Order (NIEO). The bridging of 'technology gap' between the industrialized and the developing countries has been rightly posited as an important strategy of the NIEO. The NIEO has demonstrated that suitable mechanisms must be enunciated which would enable the developing countries to participate in 'sharing of modern technology.'

The initiative towards the establishment of an International Code of conduct was prompted by a number of UNCTAD studies which highlighted the chronic technological gap, between the developed and developing countries. These studies also confirmed that the transfer of advanced technology is crucial for the developmental processes of developing countries.

47. See Supra Chapter 3.
48. Ibid.
UNCTAD has been deliberating upon the enunciation of the Code of Conduct since 1973. Initially when the intergovernmental group of experts was elaborating upon the draft Code of Conduct, the regional groups i.e. the developed countries (Group B), developing countries (Group 77) and socialist countries (Group 8) had participated by submitting their separate drafts. Over the years the United Nations Conference has been successful in arriving at a consolidated text of the proposed Code, with the disputed provisions in brackets and reproduced in Appendices. However, as we have seen in chapter 6, there are some shortcomings rather inconsistencies in various provisions of the draft Code which may have an adverse impact upon its adoption.

The draft Code of Conduct has very little to do with technology per-se. It is rather an attempt to establish a set of general and equitable set of rules governing the conduct of suppliers and recipients of technology and that of governments in transfer of technology. The rules seek to increase the international exchange of technology, particularly to the developing countries. The draft Code in its preamble has succinctly outlined the crucial role of technology for economic development of all countries.

48. Ibid.
especially for developing countries, and maintain that all peoples have the right to benefit from the advances in science and technology. The Code recognizes the importance of transfer of technology for developing countries and their economic development. It stresses the need for cooperation in the field of promoting transfer of technology. Further it seeks to promote international transfer of technology by suggesting appropriate measures and to give special treatment to developing countries. The Code thus tends to create conditions conducive to the promotion of international transfer of technology.

Of course, preambles are always hyperbolic, and in the body of the Code as we have seen earlier in Chapter 6, less stringent language is used. This marks a departure from the earlier stand of developing countries who had wanted pronounced restrictions on the technology suppliers from advanced industrialized countries. They had argued so, believing that the transfer of technology in the present form has not resulted in real transfer to them. 50

An important aspect of the Code is that it is universal in scope and is addressed to all parties to the transfer of technology, and thus should cover many enterprises which are involved in transfer of technology. Secondly, the Code

is applicable to all countries and groups of countries, irrespective of their levels of developments. This is important in the sense that the proposed Code may regulate transfer of technology even between developed countries, iter-se despite the fact that only developing countries had primarily argued for a Code of Conduct. An implication of this is that some advanced countries should have supported some apparently reasonable proposals of developing countries, which has not however been the case.

It is significant to note that major agreement has been reached on the objectives of the Code. The main objectives of the Code include inter-alia

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

2. To establish general and equitable standards which would provide a basis for the relationship among parties to transfer of technology transactions and governments concerned, having regard to their legitimate interests and special needs of developing countries;

III. to encourage transfer of technology, particularly these involving developing countries, under conditions where bargaining position of parties are balanced in such a way as to avoid abuse of a stronger position and to achieve mutually satisfactory agreements; and

IV. the supplying parties should respect the sovereignty and the laws of the host country where they are operating and should have proper regard for the declared development policies of that country and endeavour to contribute substantially to the development of that country.  

The scope of the Code is quite broad and covers both patented and non patented technology. For the purposes of the Code transfer of technology is the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for rendering of a service. The definition of the parties for the purposes of the Code is quite broad and takes within its fold every conceivable legal and judicial entity including governments when transferring technology. Thus as we have noted, the governments in the capacity of a party to transfer of technology would not be entitled have some privileges under international law. The Code applies to all

52. See Supra Chapter 6, notes 57-81 and the accompanying text.
54. See Supra Chapter 6, notes 32-35 and the accompanying text.
types of international transfer of technology. However, as we have seen there is a disagreement between the developed and the developing countries over the definition of international transfer of technology. The Code primarily applies to transfer of technology crossing borders. However, the developing countries want that code should even apply to transfer between two enterprises in a country, where one of the enterprises is controlled by a foreign enterprise. The reluctance of the developed countries to treat such transactions as international transfer of technology is because they view the subsidiary in such transfers as 'principal'. This is a fundamental disagreement because subsidiaries have a large role to play in transfer of technology and thus should come under the purview of the Code. It is not understandable why developed countries do not want to include such transfers, given the fact that it is agreed that a party includes even 'subsidiaries' or 'intermediaries' in Chapter 1.1 of the draft Code.\[55\]

The draft code in both preamble and objectives have emphasized the need of encouraging access of technology to developing countries. They have underlined the cause of international cooperation for promotion of economic and technological growth of all countries and especially that of developing countries. At the same time the Code has protected the rights

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55. Ibid, Notes 45-55.
and interests of technology owners also. It is duly recognized that transfer of technology should be on mutually acceptable terms and has recognized the principles of 'market' in transfer of technology. This is presumably on the logic that transfer of technology thrives in a suitable economic and legal investment climate whereby both the suppliers and recipients would be mutually benefited.\(^56\) However, this is essentially the recognition of the Western philosophy that free play of economic forces will make the economic welfare of the whole world greater in the long run. In that context the Code has recognized its function to protect the beneficial free flow of private capital.\(^57\) Whether it actually does cannot be prejudged.

The negotiations on the Code of Conduct have come a long way. It is heartening to note that consensus has been reached between the negotiating groups on a number of provisions. The draft Code in its Chapter 3, recognizes the power of individual countries to regulate transfer of technology. The nations may adopt laws, regulations, rules and policies with respect to transfer of technology transactions. Among the measures that could be adopted by states are evaluation, negotiation, registration and renegotiation of agreements involving transfer of technology. Other measures which states

\(^{56}\) See Supra Chapter 6, Notes 71-79, and the accompanying text.

may take pertain to the regulation of terms and conditions of the agreement, modes of payment, foreign exchange regulations, pricing policies etc. 58

However, as we have seen the provisions on national legislations have been subjected to certain limitations. The legislations which the states, apparently the receiving states, adopt on transfer of technology, should be in consonance with principles of international law and should ensure effective protection of rights and interests of suppliers and the industrial property rights. As we have seen, herein lies the contradictory approach of LDCs. At some forums they accept international law and at others they reject it. 59 This has essentially been to yield to US stand because at one stage US had threatened to withdraw from the negotiations if these principles were not taken into consideration. 60 Secondly, as we have seen the doctrine of 'national treatment' has been introduced, though in a disguised form in the provisions in chapter 3. This provision would mean that host states should accord to foreign enterprises 'treatment under their laws, regulations and administrative practices, consistent with international law.
and no less favourable than that accorded in like situations to domestic enterprises.\footnote{Draft Code, Supra note 49, chapter 3.2, See also OECD, Declaration on International Investment and Multinational Enterprises (1976) Sec.II} There shall always be a gap between theory and practice. The implied equality as enunciated in above provision does not correspond to the real feelings of peoples and governments. Certainly there are areas in which distinctions between domestic and foreign capital have to be made. Equality of treatment is neither feasible nor practicable, because aliens in all probabilities will receive less favourable treatment than nationals. Moreover, it would divest the developing countries of the rights that constitute preconditions for the exercise of self-reliance policies with the further effects of diminishing the bargaining power of developing countries vis-a-vis the MNCs. Further this would jeopardise the discriminatory unilateral policies of developing countries towards MNCs.\footnote{See Supra Chapter 6, notes 90-99 and accompanying text.} Indeed the above provision can be viewed as a substantial concession by developing countries towards developed countries. It was advisable that text should provide that all aliens should be treated alike.\footnote{See Elsa Kelly, "National Treatment and the Formulation of a Code of Conduct for transnational Corporations" in K. Hossain(ed) Legal Aspects of New International Economic Order (1980) 153}

Thirdly, it has been mentioned in chapter 3 that the national measures should be conducive to the promotion of economic and legal investment climate including the protection of...
interests of the parties. This has in essence been a
deferece to the wishes of advanced countries that the
function of legislations should be to protect the rights of
foreign private investment including industrial property.63(a)

The above provisions have contradicted major tenets
of the New International Economic Order and the Charter of
Economic Rights and Duties of the States especially in the
area of application of international law to national
legislations.64 Moreover, it has also tended to minimize
the effects of the existing national legislations, which are
rather restrictive in nature. An implication of this is that
existing legislations may need substantial changes in case
the Code is adopted as a legally binding one.66 Realizing
this possibility certain developing countries have given up
their forceful arguments for a legally binding Code of Conduct,
especially those which are relatively advanced.

However, it should be pointed out that the Code
should not be construed to have any effect on national foreign
investment and technology transfer laws which are often very
stringent. Although nations are free to incorporate the
principles of the above chapter in their national legislations,
however, nothing in the Code requires them to do so.67

63(a) K. Hussain(a) Legal Aspects of New International

64 See Supra Chapter 6, note 91 and the accompanying text.

65 Betz. Supra note 63; See B.S. Murthy,"Transfer of
Technology in the New International Economic Order"XIX
Indian Year Book of International Affairs(1986) pp. 443-
450.

66 See D. Ernst,"International Transfer of Technology"Law &

67 See Baage,"Legal Effects of Codes of Conduct for Multina-
tional Enterprises" in Horn(a) Legal Problems of Code
of conduct for Multinational Enterprises(1983) 11.
The chapter 5 of the draft code on Guarantees and Obligations sets out some common provisions which the parties should follow when negotiating and concluding technology transfer agreements. Among the obligations referred to in this chapter are that parties should clearly relate the acquisition and delivery of technology to the social and economic developmental objectives of the governments particularly of the acquiring countries. Among other obligations, which we have discussed earlier, are that parties while performing and concluding agreements should observe honest and fair business practices including fair and reasonable price and unpackaged transfer. 68

There is likely to be a gap in theory and practice. Because it is doubtful if any legal consequences follow from this Chapter. It is not sufficiently clear as to what are the consequences if a technology transfer agreement does not take into consideration the official developmental policy of the recipient country. In the absence of a suitable and appropriate sanction for non-fulfilment, perhaps not much may follow from these obligations. 69

Secondly, the reasonableness of terms, prices and unpackaging is an issue that requires a great deal of clarification and work. To determine these reasonable terms

68. See Supra Chapter 6, notes 205-231 and the accompanying text.

69. Ibid Notes 232-36.
it requires enough information about the technology and technology transfer agreements which may not be forthcoming because of the secretive nature of technology transfer agreements. It may be pointed out that UNCTAD can obviate this difficulty by eliciting information on technology transfer contracts for the benefit of developing countries. Such an inventory shall help the developing countries to undertake a comparative analysis of technology transfer agreements.

The Code has recognised the weak position of developing countries in international economy. In that context it has been agreed that special treatment should be given to developing countries. Therefore, the draft Code in its Chapter six and seven has made provisions for special treatment of developing countries. The provisions are mainly programmatic and therefore did not pose any major problems in drafting. As we have seen the chapters make a list of various programmes to be undertaken by developed countries to help the developing countries in increasing their technological capabilities. It has also thrown open a framework of intergovernmental cooperation in matters of technological developments of developing countries. These programmes are more or less replication of technical aid programmes of the developed countries and other international organizations.

70. Ibid notes 237-55 and the accompanying text.
active in the field of transfer of technology to developing countries. It may be noted here that though the object of these chapters is salutary, however, they have to be supplemented with national self reliant measures.

The Chapter on the international institutional machinery for implementation of the Code has been agreed upon. As we have pointed out that the implementation and the follow up machinery has been somewhat controversial. The developing countries wanted some specific functions to be given to the international institutional machinery, which has not been accepted by the developed countries. Secondly, there has been a dispute about the constitution and functioning of the international institutional machinery. In all probabilities the institutional machinery will be an intergovernmental group of experts within the framework of a committee of UNCTAD.

Among the agreed functions of the international institutional machinery are; to provide a forum for exchange of views among states on matters related to the code; inviting and considering relevant studies from within the United Nations system; studying information obtained from states and collecting and disseminating information

71. See e.g. UNCTAD, A Strategy for Technological Transformation of Developing Countries (1985) UN.DOC.E.84.II.8.19.
72. See Supra Chapter 6 notes 256-276.
on such matters. The new body may organize workshops, symposia, and similar meetings concerning the application of the provisions of the Code. However, the international institutional machinery shall not act like a tribunal or reach conclusions on the conduct of individual governments or parties to a transfer of technology transactions. The implementing machinery shall also not get involved when parties are in dispute. 73

It has also been agreed that after 5 years of the adoption of the Code, a review conference shall be held under the auspices of UNCTAD for purposes of reviewing all the aspects of the Code including its legal nature. However, the character and mandate of the review conference is still in dispute. 74

Thus it may be seen that an authoritative determination and application of the Code is lacking. The international machinery would be acting like a 'discussion club'. The monitoring as suggested by the code falls short of any kind of adjudicatory or enforcement authority. At the national level the implementation of the Code is left to the national countries; Apart from enacting national legislations, we have suggested certain measures to be undertaken at the national

73. Draft Code, Supra note 31, Chapter 8. See Supra Chapter 6, notes 270-91 and the accompanying text.
74. Ibid.
level in case the Code is to be effectively implemented at the national level. 75

A significant drawback in the implementation mechanism is that the Code is silent on powers to impose appropriate sanctions against the party violating the provisions of the Code. The major problems of detection of violations of the Code provisions remain to be settled. This is more pressing in case of violation of the provisions in Chapter 4 of the Code, dealing with restrictive business practices and Chapter 5 of the Code dealing with Guarantees. In case the compliance with the Code is desirable then the Code should prescribe the sanctions. The absence of sanctions in the Code is the admission of the failure of negotiations to create internationalized rules. Presumably the question of sanctions is left to the national legal systems. This would imply that the code is supposed to be ultimately adopted as a non-binding one, consisting of guidelines and principles only. 76

It must be pointed out that the international institutional machinery must be empowered to take effective steps for implementation of the Code. One of the steps in this direction can be to authorize the proposed international group to make binding reports on the nature of implementation of the Code. Such measures would considerably enhance the

75. Ibid notes 271-274.
76. Ibid, Notes 286-91.
normative impact of the Code, even if it is adopted as a non
binding one. The international authority must also be given
rights to adjudicate any dispute between the parties and
recommend appropriate measures as sanctions to be applied
against the defaulter. Such a system would perhaps
be more effective to establish a specialized framework for
interpretation of the Code of Conduct.

The Code negotiations have also been marked by acute
disagreements on other chapters. The disagreements are so
much so that they have blocked the adoption of the Code of
Conduct.

Restrictive Business Practices have been a perpetual
problem in transfer of technology transactions. These practi-
ces are detrimental not only to competition but to
liberalization of world trade. Within the context of transfer
of technology restrictive practices have adverse effects
on the flow of technology. They seriously impede the
access of developing countries to technology. As seen in
Chapter 3, the suppliers have through the exercise of
restrictive practices fixed prices and imposed conditions in
technology transfer agreements which augment the
bargaining power of the owners of technology.

In the Code negotiations on restrictive business
practices chapter 4 of the draft code seeks to prohibit
restrictive business practices in transfer of technology

77. We have a support for this in the form of GATT Panel
Report on the basis of which the GATT contracting
parties recommend measures like retaliation or
withdrawal of concessions. See Massimo-Coccia,
"Settlement of Disputes in GATT under subsidies Code"
transactions. Since the goal of developing countries is technological independence the elimination of many restrictive practices should encourage utilization and absorption of technology by the recipient enterprises. However, as we have seen in chapter 6, there has been a major split between the developed and developing countries. The difference of opinion has been on (1) scope and nature of transactions to be included in chapter 4, (ii) the test which should govern the formation of Chapeau of the chapter, (iii) the application of chapter 4 to intra-enterprise agreements.

According to developed countries the restrictive practices which unreasonably restrain trade and adversely affect the international flow of technology, should be avoided. On the other hand the developing countries have argued that those restrictive business practices should be avoided that either restrain trade or adversely affect the international flow of technology. The developing countries have attached particular importance to the elimination of all practices which whether anti-competitive or not are unfair, and thus prejudicial to the economic and social development of technology recipient countries. This point is deadlocked.

However, as we have noted, the compromise put forward by the President at Sixth Session should have a chance of acceptance by the parties. The compromise text for the first time mentions both 'competition and development' as the test to

78. See Supra Chapter 6, notes 122-137 and the accompanying text.
applicable in drawing the chapeau of chapter 4. However
the developing countries should argue for the exclusion
of restrictive business practices which are anticompetitive
or adversely restrain the flow of transfer of technology.
This test should be able to prohibit many restrictive
business practices in transfer of technology. 79

On the issue of application of chapter 4 to intra-
Enterprise transactions the developed countries have impliedly
agreed that in particular cases, depending upon the facts and
circumstances of each case, the provisions of chapter 4 may
be applicable to 'intra-enterprise' transactions, if the
restrictive practices have an adverse effect on competition
or constitute an abuse. This compromise should be
acceptable to the developing countries. It should be
remembered that the Code should not be such as would dispel the
suppliers from supplying technology. By restricting the freedom
of the commonly owned enterprises, the Code may work in
opposite direction. Moreover, it is always good to have
flexible rules rather than rigid or indefinite prescriptions.

79. According to the proposal the practices which are unduly
restrictive, adversely affecting the international transfer
of technology should be avoided. The evaluation of the
practice should proceed on whether the practice has adverse
effects on the economic and technological developments
of the acquiring country and competition in the
relevant market. See Draft Code, Supra note 49, Appendix D.
It may be argued that an 'intra-enterprise' transaction may be considered in individual circumstances, provided they do not come in conflict with the objectives of the Code and are not restrictive or otherwise restrict the international transfer of technology. 80

Initially the developing countries had proposed a list of as many as 40 practices to be included in the chapter. However at the end of Sixth session the list has been reduced to 14 practices which we have discussed in chapter 6. (80a)

Assuming that chapter 4 is agreed a problem would always arise here whether the advanced countries would be able to control restrictive practices of their enterprises abroad which do not have adverse effects either on their domestic commerce or exports. As we know the US takes action against enterprises whose conduct abroad has a prejudicial effect on its domestic commerce or exports. In case the developed countries want to take actions against their enterprises for their conduct abroad, it may require a domestic legislation in these countries. Secondly the exercise of jurisdiction by the home countries will necessarily lead to more extra-territorial effects, which may not be liked by the developing countries. Thirdly the home countries may need some information from the host countries pertaining to

80. See UN.DOC/TD/CODE TOT/47, Appendix A. p. 8; See Chapter 6A notes 138-149 and the accompanying text.

80(a) See Supra chapter 6, notes 156-200 and the accompanying text.
the actions against MNCs. The said information may not be forthcoming from the host developing countries. Thus it would necessarily require bilateral and multilateral collaboration between governments to facilitate the control of restrictive business practices. This would also require the creation of an international machinery to facilitate the exchange and dissemination of information among governments concerning restrictive business practices. Moreover the states both developed and developing will have to take measures to prevent and control restrictive business practices which adversely affect international transfer of technology. To facilitate such an action regional and subregional mechanisms have to be established to obtain information from enterprises necessary to prevent restrictive business practices. Therefore it is necessary for the Code to make a provision for strengthening the above mentioned measures, if it wishes to create internationalized anti-trust rules pertaining to the control of restrictive business practices in transfer of technology.

Applicable law and settlement of disputes constitute another stumbling block of the negotiations. Despite various efforts by the President of the UN Conference it has not been possible to draft a composite text on this chapter on the draft Code.

81. See D. Thompson, "UNCTAD Code on Transfer of Technology" in Singer et al. (eds) Technology Transfer by Multinationals 1988 Ph.2 pp. 710-45, 719.
The rules on the applicable law are designed to give clear indications as to which law is to govern the validity, interpretation and discharge of the obligations contained in a transfer of technology agreement. According to developed countries, the parties shall have freedom to choose law and the forum even other than that of the recipient country. According to developing countries the national law should exclusively govern the validity, interpretation and discharge of the transfer of technology agreement.

The argument of the developing countries has essentially been that law of the acquiring country is the law applicable to matters relating to public policy (Irre public) and sovereignty. Any clause to the contrary shall be void. Parties may, however, choose arbitration provided it is allowed by the national law. The developed countries have on the other hand favoured settlement of disputes through arbitration and the recognition and enforcement of arbitral awards under the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958). As yet there is no agreement between the developed and the developing countries. 82

There are two alternatives in view of continuing deadlock. One is to allow freedom to the parties subject to the exception that the freedom shall not be absolute. As in international commercial transactions, the right

82. See Supra, chapter 6, notes 292-322 and the accompanying text.
of the parties to choose the law to govern such transactions is generally recognised. However, the choice can never be unfettered and unlimited. The legal systems throughout the world and judicial practice has confirmed that certain limitations must be placed upon the right of the parties. A choice of law may be struck down on the ground of not being bona fide or being meaningless or if it is made intentionally to exclude the applicability of a legal system which would otherwise be applicable. Further there may be statutes which expressly restrict the rights of the parties to choose the applicable law. 83

Similarly in the Code rules on applicable law, it must be noted that certain degree of restriction on the free choice of parties is necessary, if ordre public rules are to maintain their effectiveness. Because significant differences between the national legislations will continue to exist even if the code rules become obligatory. A free choice of law provision in such cases would act as a licence to avoid acquiring country regulations by a foreign choice of law. This situation will have the result of negating the scope and object of national regulations which in any case is not desirable. It should be emphasized that parties cannot contract out the mandatory provisions of the law of a

particular country, if all the other elements at the time of choice are connected with that country only. This approach would be flexible and would also satisfy the basic demands of the developing countries. The second approach is not to draft any provisions on applicable law and settlement of disputes. This is because of the fact that states would be left with freedom to devise appropriate legislations on the choice of law, provisions taking into account their needs and circumstances. The importance of this approach lies in the fact that divergences between the national legislations and the code will continue, even if the code succeeds to prescribe comprehensive rules on applicable law and settlement of disputes. Secondly even if provisions were not drafted on applicable law it will have a little effect on the substantive standards of the code. Finally the code may not be directly applicable as part of national law if the code has been accepted as a G.A. Resolution. Meanwhile the UNCDTRAL may be requested to draft a model law on settlement of disputes for transfer of technology.

84. Reference may be made to Art. 86 EEC Convention on the Law applicable to Contractual Obligations (1985). This Convention puts express restrictions on the right of parties to choose applicable law. See Schmitt of Law of Int. Trade Law (1986) pp. 185-86

85. See Supra Chapter 6, notes 318-22 and the accompanying text.
On other points it has been tentatively agreed that parties may report to arbitration. The developing countries should not get frightened on this because arbitration has been established as an important mechanism of settlement of disputes in international commercial transactions. This is because there are very many well established arbitration centres not only in developed countries but even in developing countries. Arbitration has moreover certain definite advantages over other methods of dispute settlement including even litigation. To make arbitration more effective in transfer of technology it may be suggested that the international institutional machinery may prepare a list of arbitrators, out of which the parties will choose their arbitrators and umpires.

The conceptual differences between the developed and developing countries towards the Code has made it impossible to have an agreement on the legal nature of the Code apart from those mentioned earlier.

The developing countries have argued for a binding Code of Conduct through a multilateral Convention. This would involve the adoption of the Code as a multilateral treaty, with a binding supranational enforcement machinery and a comprehensive dispute settlement mechanism. Of course this would have been quite advisable since there is no universal instrument whose principal subject matter is transfer of technology. The Convention could either be self executory or could provide
general and specific rules, which the parties would enact in national legal systems. However, as we have seen this option involves problems of its own. The adoption of specific conventions, is conditioned by various complex factors, notably the objectives of the convention, the content of the convention and the degree of consensus arrived at by the States in relation to the subject matter involved. The Convention may be binding only on the parties who adopt it, thus becoming only guidelines for states who do not adopt it. Finally it may happen that most of the developed countries may not adopt the convention, which would frustrate the whole codification exercise. On the other hand developed countries have taken the argument that in international arena binding Codes are a rare possibility given the fact that MNCs are not 'natural' or 'artificial' subjects of international law nor do they fully participate in international norm creation. Secondly, it is argued that overregulation of the suppliers of technology may result in loss of technology to developing countries. Thirdly, non binding codes if effectively implemented may be as good as binding ones. In effect the developed countries have been arguing for a soft-law approach.

This difference of opinion is a continuing phenomenon of international law making. We would not go into details of

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86. See Supra Chapter 6, notes 257-69 and the accompanying text.
this problem, as it has elsewhere been thoroughly analysed. However, it is of interest to point out that the cultural, economic and political differences between the business and government interests usually combine to argue against the adoption of legally binding codes in international relations.\textsuperscript{88}

On top of this the enforcement of such codes would always present formidable problems. Because of these problems as we have seen earlier the code may eventually be accepted by the diplomatic conference and send it to the G.A. for adoption as a resolution\textsuperscript{89}

The importance of such a code would depend upon how one takes a G.A. resolution. It is recognized that the G.A. resolutions back formal binding character. Nevertheless it is also recognized that these Resolutions represent customary international law apart from the fact that they act as a mechanism of codification of rules recognized by the community of nations. A consensus Resolution of G.A. creates an international custom, which may ultimately find its way in the national legal systems, and have considerable moral and practical force on the conduct of both states and enterprises.\textsuperscript{90} The sanction in case of departure

\textsuperscript{87} See N.Horn(ed) The Legal Effects of Codes of Conduct (1980); See also Davidow and chiles, "The US and the Issue of Non binding Voluntary Codes" 72 A.J.C.L. (1978) pp. 247-69

\textsuperscript{88} See Wallace, Supra note 57, p. 720, 295-319.

\textsuperscript{89} Thompson, Supra Note 81, p. 720

\textsuperscript{90} See in particular Beade, "The Legal Effects of Codes of Conduct on Multinational Enterprises" in Horn (Ed.) \textit{The Legal Effects of Codes of Conduct (1980)} pp. 4-38
would be either persuasion or pressure from affected parties. It may also put some limitations on home countries and legitimize policies of host countries. The most important effect in our opinion is that a voluntary Code may reinforce the negotiating capacities of the host countries vis-a-vis the MNCs. 91

These arguments have been there for a considerable period of time and shall continue even with much greater force because of the pressures for norm building in international law. As Asante has shown the Code movement represents an ongoing exercise in the enunciation of norms on MNCs. 92 What is important in the present context is that consensus is achieved on the disputed provisions, which should pave the way for adoption of the Code of Conduct. Whether a voluntary Code would affect the transnational business relations in technology, cannot be put in black and white at the present moment, however, it could have a considerable weight in the development of international law concerning transfer of technology. Apart from the fact that there is nothing which can compel an unwilling states to agree to binding codes, they may however, view these non binding codes as meaningful and may ultimately pass into general realm of customary international law. These Codes should then be able to recommend standards on which national legislations could be based and should be a general framework for international cooperation.


It may be pointed out that given the special characteristics of technology transfer, any attempt of international regulation is bound to have inconsistencies and disagreements as we have noted earlier. There is a good reason to believe that they are the most vulnerable situations in the proposed Code of Conduct, nor can they be thrashed out in the immediate future. This is because of the fact that basic principles of economic organization and political economy of the developed and developing countries are essentially different. Moreover, some of these inconsistencies have their roots in differences in legal traditions of the developed and developing countries. For example, as we have seen earlier developed countries greatly value ideals like competition, industrial property and principles of market. The developing countries on the other hand have strongly espoused a regulated development which includes putting restrictions on laissez-faire system of production and distribution.

The Code negotiations must also be viewed in the light of changes in international economy in eighties. These changes would have an important role in determining the outcome of the Code of Conduct and the scope of further negotiations on the disputed issues. The developing countries are facing acute debt problems, a sluggish economic growth and low rate of investment. According to available indications the flow of private investment to developing countries has fallen from $16.6 billion in 1981 to $7.8 billion in 1985.93 The

reason for this may be that most of the private investment is currently directed at the advanced countries. An implication of this is that it would result in a shift in emphasis from control oriented to encouragement oriented foreign investment policies in developing countries. These countries would have to explore ways and means to encourage private capital flows to their economies. Foreign direct investment would have to be encouraged by promoting investment policies in accordance with national policies, legislations and development priorities. A side effect of this trend is that a number of countries have considerably modified the existing regulations on foreign investment and technology transfer. They have relaxed limits on profit remittance, opened up their economies to foreign capital and have taken measures aimed at liberalizing their regulations.

Furthermore new developments are taking place in the field of technology which have hard pressed the existing legal techniques. With the result intellectual protection is granted to new processes and products thus increasing the scope of property protection. At the international level also demands are made to extend the scope of property protection. This is clear from the fact the inclusion of services related investment and intellectual property protection in GATT negotiations. The implication of this is that technology trade is becoming a hotly debated issue and would continue to be so in the near future.

94. UNCTAD VII has highlighted the need for encouraging such measures. Ibid. See also, Review International Affairs, Oct. 20 (1987) p. 4.

95. See UNCTAD, Outstanding Issues on International Code of Conduct UN DOC. UNCTAD/TT/Misc. 74 (1987)

In the light of these developments it is clear that solutions to the outstanding issues in the Code would be rather difficult. The agreement on these issues would require compromises on both the substance and the wording of individual proposals. This will be conditioned by the nature and character of international investment climate and the policies of developing countries towards foreign corporations. These factors may also compel the developing countries to take a moderate stance on the outstanding issues. In fact there is already an indication of such a moderate approach on the part of developing countries. Thus developing countries have conceded some demands of developed countries e.g. freedom of contract, protection of industrial property, operation of market and obligations in international law etc. Secondly the developing countries have accepted the UN Restrictive Practices Code as a General Assembly Resolution. While the adoption of the Code is uncertain at the present moment therefore it is difficult to predict the probable effects of the Code on international transfer of technology. It would depend upon how well the Code shall be received by the international community despite the shortcomings noted above. It would also depend on the adequate solutions to unresolved questions. Nevertheless the necessity of the Code need to be emphasized for the reasons that it should facilitate international data collection on MNCs and transfer of technology and it should be a step further towards a GATT for MNCs. It should also provide

a general framework in the realm of technology transfer. In the context of an interdependent world economy, such a framework shall enhance the stability and predictability needed for the free flow of technology.

The promotion of technical change and environment conducive to the increase of international transfer of technology must be of considerable interest to the world community. Developing countries need active assistance to catch up with their developmental efforts. The promotion of adequate access to the international technologies at affordable cost should therefore form an integral component of a balanced and equitable international system of distribution of scientific and technical know how. The control of restrictive business practices and the promotion of international measures to facilitate transfer of technology to the developing countries should form the core of the proposed Code of Conduct. There is a need for developing countries to argue for the adoption of the Code to bring a semblance of order in the international transfer of technology. However, a word of caution need to be added here. International regulation can never be a substitute for domestic self-reliance because of the shortcomings in the code as noted previously in the commentary. The international measures can only supplement the national measures for self-reliance. Indeed the development of the domestic technological capabilities of developing countries through national structural reforms is
equally important for their technological transformation. It is important to note that domestic policies of the developing countries shall have a greater impact upon the use and development of appropriate technologies than even policies of developed countries or even an international convention.

Secondly, a special mention may be made of regional cooperative measures among developing countries. These measures can prove equal to the task. Through these regional measures, the developing countries can adopt a common approach towards the suppliers of technology. These measures can dwell upon common strategies towards regulation of foreign corporations. This approach may take the form of international standards which may subsequently be adopted in national legislations. The advantage of this is that consensus with developed countries is not required here. In fact some of these regional measures are already successfully tried e.g. ANDEAN Pact, EEC, COMECON. 98

The foregoing has more or less reflected the limitations on the enunciation of substantive rules in a complex subject like transfer of technology. It also indicates that the development of rules on transfer of technology would be continuously influenced and shaped by the changing needs and realities of international community. Perhaps that is the reason that a study of this type raises more questions than it

98. Wilner, Supra note 36.
answers. Nevertheless it does reflect that development of norms for transnational business in technology needs a constant dialogue and cooperation between the developed and developing countries. Further it indicates that the enunciation of rules in transfer of technology is essentially in an evolutionary process and the code is only a step.

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Proposed Technology Transfer Bill.

A bill to propose the establishment of a Technology Transfer Development Corporation and to provide rules for the transfer and development of technology in India.

Preamble - Whereas it is expedient in the interest of technological development of India and to promote the transfer and adaptation of imported technology, this bill seeks to provide rules for the transfer of technology to India.

Section 1. Title, Extent and Commencement.

(i) The Act may be called Technology Transfer Act, 1988.

(ii) It extends to whole of India and is applicable to both Indians and Foreigners who want to import technology in India.

(iii) The provisions of this Act shall apply to all agreements for the transfer of technology whether or not they involve industrial property rights, whether technical collaborations, or other technology transfer agreements of any description, between the parties, whether public or private, whether individuals or companies or branches or any other form of representation of foreign companies.

(iv) It shall come into force from the date of its publication in official gazette.

Section-2. Definition.

Unless the context otherwise requires, Agreements for the transfer of technology are deemed to cover all acts or contracts in connection with;

(i) the granting or licensing of rights for the use of patents, trade names or marks, drawings
or inventions as well as the transfer of other non patented know-how;

(ii) the rendering of technical assistance for company management and for the production or marketing of any Goods or Services, or the services of Experts or other technical Personnel.

(iii) Any other form of technical assistance or technical collaboration.

Note-1. The definition is not exhaustive and the definition of terms, patent, Trade Mark shall carry the meaning as used in Acts concerning them.

Section 3. Technology Transfer Development Corporation.

(i) The Central Govt. shall by notification establish a Central Technology Transfer Development Corporation of India.

(ii) The Corporation shall be an autonomous Corporation with, subject to provisions of this Act, powers to acquire hold and dispose of property and may by its name sue or be sued. The corporation shall have powers to make rules regulations necessary for carrying out the objects of this Act. The functions of the Corporation shall be to approve, authorize and register all agreements for transfer of the foreign technology, as defined in S.2.
(iii) Agreements for the transfer of foreign technology as well as all or any alteration thereto shall be deemed legal, especially for payment purposes, only when duly appraised, authorized and registered by the Corporations.

(iv) The registration of agreements for transfer of technology shall be compulsory for all the parties, whether nationals or non-residents, whether companies or associates of companies, national or foreign. A letter or registration shall be granted by the Corporation, a copy of which shall be presented to the Reserve Bank of India to release foreign exchange.

(v) The Corporation shall be entitled on its own to negotiate for transfer of technology with foreign suppliers and may import technology, technical information or other technical data, relevent to India's technical development, which may be sublicenced to Indian parties desirous of such know-how.

(vi) The corporation may be behalf of the Indian party negotiate with foreign supplier, keeping in view the needs of Indian transferee and the national development of India. The agreement reached by the Corporation shall, as far as practicable be binding on the local transferee.

(vii) The Corporation shall be empowered to modify the terms of the contract, agreed between the transfer and transferee in case it deems it necessary in the national interests to do so. However, the
corporation shall not register the contract if the costs are high, or terms are unfavourable, or is otherwise not in the interests of national development.

Section 4. Appraisal.

(i) The Corporation shall undertake a legal, technical, economic and technological appraisal of the proposed technology transfer, by means and methods laid down by the Corporation.

(ii) The Corporation shall lay down specific guidelines or criteria for appraisal and authorization for sectors, branches or activity or products. These guidelines shall be laid down in consultation with the Ministry concerned of the specific sector or department.

Section-5. Refusal.

(i) The Corporation shall not register the contracts which include the following;

a) Disproportionate costs of technology transfer;

b) contract contains restrictive business practices,

c) contains restrictions either on technology transferred or on technology adaptation,

d) if the technology is already available in country or available with the Corporation.

Note: These shall not be exhaustive. Registration may be refused on the ground of other unreasonable restrictions. However, the Corporation may register a contract containing a restrictive term if the Technology is of exceptional character and it is extremely necessary to import.
Section-6.

(i) Applications for the transfer of payments following the implementation of the agreement for transfer of technology which has been duly authorized and registered by the corporation shall be submitted to Reserve Bank for necessary authorization of foreign exchange.

(ii) The Corporation shall provide the Reserve Bank with all information having a bearing on payment arising from agreements for transfer of technology including alterations, renewals or terminations thereof.

(iii) The Bank shall submit to the corporation all information and data or any other information about payments that are made as a result of authorizations by the Corporation.

Section-7. Evaluation.

(i) The Corporation shall conduct a follow up of the transferred technology every six months. It shall specifically monitor these agreements in the light of the objects and clauses of the original technology agreement.

(ii) In the monitoring of technology transfer agreements, the transferee shall be obliged to make available any record, technical data, personnel, necessary to carry out techno-economic monitoring of the agreement.

(iii) The Corporation may take the help of any other organization, committee, personnel, ministry to evaluate and appraise the performance of the agreement.
Section-8 Compositions

(i) The Corporation shall have a Chairman and as many as eight members to be appointed by the Central Government, known as Board of Directors.

(ii) The members and the Chairman shall be highly specialized professionalised personnel in the field of economics, law, science and technology and public administration.

(iii) The Board of Directors may constitute as many Committees, as necessary to carry out the purposes of the Act. There must be at least four committees, Research Committee, Technological Committee, transfer Committee and Monitoring Committee.

(iv) The Corporation may take the help of existing Research and Development Organizations in the fulfilment of objectives and purposes of this Act, or they may be taken as Associated members.

Section-9 Finance of the Corporation;

(i) The Corporation shall be financed by the Central Government, after due appropriation made by Parliament by Law for the purpose, and the terms and conditions relating to the provisions of such capital shall be determined by the Central Government.

Section-10 Offices.

(i) The Central office of the Corporation shall be at such Central place as is provided by the Central Govt. in the official Gazette.

(ii) However, the Corporation may have four regional offices as determined by the Central Govt.
Section-11. - Reports.

(i) The Corporation shall submit an annual report of its activities to the Central Government.

(ii) The Central Govt. shall cause the report to be laid before the Houses of Parliament as soon as possible after the report is received by the Central Government.

Section-12. - Settlement of Disputes.

(i) Any dispute arising from a technology Transfer agreement between a foreign supplier and Indian recipient shall be amicably settled.

(ii) Failing this settlement the dispute may be referred to arbitration Council or the Corporation or it may be referred to Indian Council of Arbitration.

(iii) Failing Arbitration, the dispute shall be settled by Indian Courts and under Indian Law.

(iv) All disputes arising under technology transfer shall be subject to Indian Law.
DRAFT INTERNATIONAL CODE OF CONDUCT
ON THE TRANSFER OF TECHNOLOGY

as at the close of the sixth session

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