Appendix A

Texts considered at the sixth session of the Conference

1. **Text submitted by the President of the Conference during its sixth session**

**Preamble**

(11)

Affirming the benefits to be derived from a universally applicable Code of Conduct and that all countries should encourage and assist their enterprises, whether private or public, to follow in all respects the provisions of this Code.

(12)

Hereby agrees on the following International Code of Conduct on the Transfer of Technology, consisting of universally acceptable recommendations.

**Chapter 1**

1.4

The Code of Conduct applies to international transfer of technology transactions.

**Chapter 2**

2.1.(1x)

To specify restrictive practices from which parties to technology transfer transactions should refrain.

**Chapter 4**

Practices relating to transfer of technology transactions

17/ The chapeau of Chapter 4(4.1. to 4.4) of the President's text was the subject of further informal negotiations among regional groups. The text under consideration, following these negotiations, as at the end of the sixth session of the Conference is reproduced below (see Appendix A,2).
4.1

In furtherance of the objectives and principles of this Code, the following practices should be avoided when under the circumstances of an individual case they are unduly restrictive, adversely affecting the international transfer of technology.

4.2

Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstances and the over-all purposes of the transaction including its effects on the economic and technological development of the acquiring country together with the situation in the relevant market.

4.3

While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should be considered in the light of their special relationship.

4.4

The provisions of this chapter should not be construed as justifying other practices or conduct by parties which are unlawful under applicable regional or national legislation.

4.5

The practices are the following: */

1. Grant-back provisions

Requiring the acquiring party to transfer or grant back to the supplying party, or to any other enterprise designated by the supplying party, improvements arising from the acquired technology

*/ Text for inclusion in agreed statement

"The Conference agreed that the international machinery of the code would undertake to collect data and relevant material which would be available to the Review Conference to decide whether or not and in what form the following other practices should be included in the revised code: Practices on limitations on volume or capacity, use of quality controls, obligation to use trade marks, requirements to provide equity or participate in management, unlimited or unduly long duration of arrangement and limitations upon use of technology."
on an exclusive basis, without offsetting consideration or reciprocal obligations from the supplying party, or when the practice will constitute an abuse of a dominant market position of the supplying party.

2. **Challenge to validity**

Requiring the acquiring party to refrain from challenging the validity of patents and other types of protection for inventions involved in the transfer or the validity of other such grants claimed or obtained by the supplying party, recognizing that any issues concerning the mutual rights and obligations of the parties following such a challenge will be determined by the appropriate applicable law and the terms of the agreement to the extent consistent with that law.

3. **Exclusive dealing**

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

4. **Restrictions on research**

Restricting the acquiring party either in undertaking research and development directed to absorb and adapt the transferred technology to local conditions or in initiating research and development programmes in connection with new products, processes or equipment.

5. **Restrictions on use of personnel**

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

6. **Price fixing**

Imposing regulation of prices to be charged by acquiring parties in the relevant market to which the technology was transferred for products manufactured or services produced using the technology supplied.
7. Restrictions on adaptations

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

8. Exclusive sales or representation agreements

Requiring the acquiring party to grant exclusive sales or representation rights to the supplying party or any person designated by the supplying party, except as to subcontracting or manufacturing arrangements wherein the parties have agreed that all or part of the production under the technology transfer arrangement will be distributed by the supplying party or any person designated by him.

9. Typing arrangements

Imposing acceptance of additional technology, future inventions and improvements, goods or services not wanted by the acquiring party or restricting sources of technology, goods or services, as a condition for obtaining the technology required when not required to maintain the quality of the product or service when the supplier's trade or service mark or other identifying item is used by the acquiring party, or to fulfil a specific performance obligation which has been guaranteed, provided further that adequate specification of the ingredients is not feasible or would involve the disclosure of additional technology not covered by the arrangement.

10. Export restrictions

Restrictions which prevent or substantially hinder export, by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rate of payments for exportable products resulting from the technology supplied, unless justified for the protection of legitimate interests of the supplying party and of any acquiring party, such as to prevent export of such products to countries where any party's industrial property right would be infringed in the case of importation of these products into those countries or where an exclusive licence to use the relevant technology has been granted, or where a specific option has been firmly and explicitly secured.
11. Patent pool or cross-licensing agreements and other arrangements.

Restrictions on territories, quantities, prices, customers or markets arising out of patent pool or cross-licensing agreements or other international transfer of technology interchange arrangements among technology suppliers which unduly limit access to new technological developments or which would result in an abusive domination of an industry or market with adverse effects on the transfer of technology, except for those restrictions appropriate and ancillary to co-operative arrangements such as co-operative research arrangements.

12. Restrictions on publicity

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

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

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

14. Restrictions after the expiration of the arrangement

Restrictions on the use by the acquiring party after expiration of the arrangement of the technology, including know-how, which has lost its secret character independently of the acquiring party, without prejudice to obligations relating to payment already agreed upon or to existing industrial property rights.

Chapter 5

5.4.(ii) Confidentiality

Maintenance of confidentiality including its scope and duration and the use of trade secrets, secret know-how and all other valuable confidential information received from the other party in connection with the transfer of technology;
5.4.(iii) delete

Chapter 7

7.2.(ii)

Exchange of available information on experience in seeking solutions to problems relating to the transfer of technology, particularly restrictive practices in the transfer of technology;

Chapter 8

8.1.(a)

An intergovernmental group of experts on the International Code of Conduct on the Transfer of Technology operating within the framework of a Committee of UNCTAD will provide the institutional machinery.

8.1.(b)

The Intergovernmental Group of Experts on the International Code of Conduct on the Transfer of Technology open to all members of UNCTAD should meet as often as necessary, but at least once a year.

8.5.

Subject to the approval of the General Assembly five years after the adoption of the Code a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Code including its legal nature. Towards this end, the intergovernmental group of experts shall make proposals to the Conference for the improvement and further development of the Code, taking into account relevant action in the field of the transfer of technology within the framework of the United Nations system.

8.5. delete

Chapter 9

9.1.

Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not limit the application of relevant rules of national legal systems which cannot be derogated from by contact.
9.2.

Parties to transfer of technology transactions should try to settle in an amicable way the disputes or differences that may arise between them in connection with the transaction by direct negotiations or by resorting to a conciliation procedure.

9.3.

Parties may, by common consent, have recourse to arbitration for the purpose of settling disputes arising out of transfer of technology transactions, in cases where the dispute is arbitrable under the relevant laws of the parties concerned.

9.4.

Parties may, by common consent, have recourse to arbitration for the purpose of settling disputes arising out of transfer of technology transactions, in cases where the dispute is arbitrable under the relevant laws of the parties concerned.

9.5.

Parties should be encouraged to use internationally accepted rules of arbitration such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

States should recognize and enforce arbitral awards in accordance with their national legislation and relevant international agreements to which they have acceded.

2. Chapeau of Chapter 4:

Text under consideration at the end of the sixth session
(31 May 1985) 18/

4.1. In furtherance of the objectives and principles of this Code, the following practices should be avoided when under the circumstances of an individual case they are unduly restrictive, adversely affecting the international transfer of technology.

18/ See foot-note 17/ above.
4.2. Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstance and the over-all purposes of the transaction and should depend on whether the practice has adverse effects on the economic and technological development of the acquiring country and (on competition) (the competitive situation) in the relevant market.

4.3. While the provisions of this chapter apply to international transfer of technology transactions involving any party, practices between related parties should (not be considered inappropriate) (be considered appropriate) in the light of their special relationship (provided they comply with national laws and declared development policies.) 19/

4.4. Nothing in this chapter should be construed to supersede applicable national or regional law.

3. Texts prepared by Chairmen of Working Group I (Chapter 4) and Working Group II (Chapter 9)

(i) Text submitted by the Chairman of Working Group I 20/

Chapter 4

4.1. In furtherance of the objectives, principles and other pertinent provisions of this code and taking into account all relevant circumstances in the supplying and acquiring countries, the following practices should be avoided in individual transactions, when they are unduly restrictive, adversely affecting the international transfer of technology.

Chapter 2 (Addition)

2.2. Principles

(x) The provisions of this code should not be construed as justifying practices or conduct by parties which are unlawful under applicable national or regional legislation.

19/ Suggested alternative text: (provided that such practices are not contrary to national laws and regulations).

20/ This text was submitted by the Chairman as a package deal in the sense that it combines paragraphs 4.1 of Chapter 4 and 2.2 (x) of Chapter 2 as a solution to the issues raised in chapter 4 of the draft code.
Note: This text is practically the same as Section C, 5, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

(ii) Text submitted by the Chairman of Working Group I

Chapter 9

9.1. Parties to transfer of technology transaction may, by mutual consent, choose the law applicable to their contractual relations, it being understood that such choice will not prevent the application by courts or authorities of other rules of law which must be applied whatever the law chosen by the parties. 21/

4. Informal working papers on Chapters 4, 5 and 9 submitted by regional groups and China.

(i) Chapelo of Chapter 4 and related provisions

Proposal submitted by the German Democratic Republic on behalf of States members of Group D and Mongolia (17 May 1985)

Chapter 2 - Objectives and Principles

2.1.(ix) to specify practices, restrictive (determinetal) to development and competition in the field of the transfer of technology, from which parties to technology transfer transactions should refrain.

Chapter 4

Title : Practices restrictive to transfer of technology.

Chapeau : In transfer of technology transactions parties to these transactions should refrain from the following practices when these are contrary to the objectives and principles of the Code.

21/ Alternative texts to the second phrase:

"Subject to the relevant binding rules (as applied by courts and other authorities) which (cannot be derogated from by contract) (must be applied whatever the law chosen by the parties)."
Informal text proposed by the Chinese delegation
(17 May 1985)

4.1. In furtherance of the objectives and principles of this code and considering all other relevant circumstances in the supplying and acquiring countries, the following practices should be avoided in individual transactions where they are unduly restrictive, having adverse effects on the international transfer of technology.

Complementary element to Chapter 2:

To encourage and maintain favourable conditions for competition so as to facilitate the international flow of technology.

Working paper submitted by Group B (17 May 1985)

In furtherance of the objectives and principles of this Code, parties to transfer of technology transactions should refrain from the practices described below when, in the individual case, they are unduly restrictive, adversely affecting the international transfer of technology. Whether a practice is unduly restrictive adversely affecting the international transfer of technology, should be determined according to the principles and rules for enterprises set out in sections D.3 and D.4 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

Working paper submitted by the Group of 77 (24 May 1985)

4.1. In furtherance of the objectives and principles of the code, the practices described in this chapter should be avoided where they would have a restrictive or an adverse effect on the international transfer of technology, subject to the following provisions.

4.2. Evaluation of whether a practice should be avoided in an individual case should take into account all relevant circumstances including overall purposes of the transaction, its effects on the economic and technological development of the acquiring country, the situation in the relevant market, the interests of the parties and the situation prevailing at the inception of the arrangement. Practices between "parties under common control" should be evaluated in the light of the consistency of the practices with the laws and development policies of the acquiring country.
4.3. The provisions of this chapter should not be construed as justifying other practices or conduct by parties which are unlawful under applicable national or regional legislation.

(ii) Chapter 5: Confidentiality

Informal proposal by the Group of 77 (29 May 1985)

5.4.(ii) Maintenance of confidentiality including its scope and duration and the use of trade secrets, secret know-how and such other information deemed confidential by the parties in connection with the transfer of technology. This obligation shall not extend beyond a specified lapse of time after the transmission of each item of secret information pertaining to the contract sanctioned by the competent national authority.

(iii) Chapter 9: 9.1.

Informal text proposed by the Chinese delegation (20 May 1985)

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not prevent the application of the relevant rules of any of the national legal systems having a substantial connection with parties or the transactions which cannot be derogated from by contract.

Informal text on Chapter 9 proposed by Group D (24 May 1985)

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, it being understood that such choice of law will not prevent the application by the forum in the given matter of the relevant binding rules which cannot be derogated from by contract.

Informal text proposed by the Group of 77 (24 May 1985)

9.1. If the national law of the acquiring country permits, the parties to the transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations, in a manner consistent with the objectives and principles of the Code, it being understood that the law chosen shall not prevent the application of Public Policy (Ordre Public) of the countries of the parties concerned, which cannot be derogated from by contract.
Appendix B

Preamble

Proposals by regional groups

(11) **Affirming** the benefits to be derived from a universally applicable Code of Conduct and that all countries should (ensure)/***(encourage)*** that their enterprises, whether private or public, (Shall conform)*/***(follow)** in all respects to the provisions of this Code,

(12) **(Convinced that an international legally binding instrument is the only form capable of effectively regulating the transfer of technology,)**

(13) **(Agree on the adoption of this international legally binding Code of Conduct on the transfer of technology)*

**(Hence set forth the following Code of Conduct consisting of guidelines for the international transfer of technology:)**

**(This universally applicable Code of Conduct on the international transfer of technology is established.)***

Appendix C

Chapter I

Paragraph 1.5.

(a) **Proposals by regional groups**

(The Code of Conduct shall apply to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the acquiring party or when a transfer of technology transaction is entered into between parties which do not reside or are not established in the same country, as well as between parties which are resident of or established in the same country, if at least one party is a branch, subsidiary or affiliate or is otherwise directly or indirectly controlled by a foreign entity and the technology transferred has not been developed in the technology acquiring country by the supplying party, or when it otherwise acts as an intermediary in the transfer of foreign-owned technology.)

(The Code of Conduct applies to international transfer of technology transactions which occur when technology is transferred across national boundaries between the supplying party and the
acquiring party. States may also apply, by means of national legislation, the principles of the Code of Conduct to transactions which take place between parties within their national boundaries.

(b) Recommendation by the Secretary-General of UNCTAD and the President of the Conference 22/

1.4.

"The Code of Conduct applies to international transfer of technology transactions. For the purpose of this Code, transfer of technology transactions are international when relating to technology transferred across national boundaries, including transactions when at least one of the parties is an intermediary or otherwise acts on behalf of a party who does not reside or is not established within the same country. States may, in accordance with the provisions of chapter 3, extend the application of the Code to transactions which take place between parties within their national boundaries."

Paragraph 1.6 23/

1.6. Any reference in the Code to "States" or "Governments" considered as such or as "members of UNCTAD" shall be construed as including any regional groupings of States to the extent that they have competence in the fields covered by this Code with respect to such competence.

Appendix D
Chapter 4

(a) Regional groups' positions

Section A (Chaperau)

In furtherance of the objectives of this Code, particularly to avoid practices which (unreasonably)** restrain trade (and)**/* *** (or)** adversely affect the international flow of technology.

22/ See TD/ CODE TOT/38 of 11 August 1983.

23/ This new provision for Chapter 1 was proposed at the fifth session of the Conference by the United Kingdom of Great Britain and Northern Ireland on behalf of States members of Group B.
particularly as such practices hinder the economic and technological development of acquiring countries, parties to technology transfer transactions (shall)*/***/(Should)** refrain from the following practices( or practices having similar effects, (in licensing patents or know-how or trade marks associated with patents or knowhow)**/(unless the practice is)*/***/(subject to exceptions or justifications in the following provisions or reasonable)**/* (in an individual case)** (-)*,)(**/(whether a restrictive practice listed below is)*/***/(consistent with the objectives of this Code in an individual case)**/* (which)*/***/(should be examined in terms of its purpose and effect in the actual situation,)*/*/**(taking into account (its appropriateness in))*/*/**(all)** the relevant circumstances, including those prevailing at the inception of the arrangement (and its acceptability under pertinent national or regional laws or regulations for control of restrictive practices)**.

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

10. Export restrictions

(Unreasonable)** restrictions which prevent or(substantially; **/*/**(hinder export by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rates of payments for exportable products resulting from the technology supplied (, unless justified)**/*/***(, for instance)*/,**(to prevent export of such products to countries where they are protected by the supplying party's industrial property rights)**/*/**(or where relevant know-how has retained its confidential character)**/*,( or where the supplying party has granted)**/*/**(an exclusive right)**/* (a licence)**/* (to use the relevant technology)**/*.

14. Restrictions after expiration of arrangement

Restrictions on the use of the technology after the expiration or termination of the arrangement(, unless the technology is still legally protected, or thus not entered the
The restrictive practices described in this chapter should be avoided in international transfer of technology transactions where they would have an unjustifiable adverse effect on the international transfer of technology.
4.2. Evaluation of such a practice, for the purpose of paragraph 4.1, in an individual case, should take into account: consistency with the objectives and principles of this Code and all other relevant circumstances, including the over-all purposes and effects of the transaction on the economic and technological development of the acquiring country, and the interests of the parties in the light of, inter alia, the situation prevailing at the inception of the arrangement.

4.3. (a) While the provisions of this chapter apply to international transfer of technology transactions involving any party, their application to relationships between "affiliated" parties calls for special consideration. Practices not having an unduly restrictive effect outside the parties are, in principle, not considered objectionable.

4.3. (b) Practices between affiliated parties should be consistent with the laws and declared development policies of the acquiring country.

4.4. The provisions of this chapter should not be construed as justifying other practices or conduct by parties which are unlawful under applicable national or regional legislation. 25/ 10. Export restrictions

Restrictions which prevent or substantially hinder export, by means of territorial or quantitative limitations or prior approval for export or export prices of products or increased rates of payments for exportable products resulting from the technology supplied, unless justified for the protection of legitimate interests of the supplying party and of any acquiring party, such as to prevent export of such products to countries where any party's industrial property right would be infringed in the case of importation of these products into those countries or where an exclusive licence has been retained or granted to use the relevant technology.

*/ "Affiliated" parties should be considered those linked by relations of ownership (at least majority ownership) or legal control and include relationships between subsidiaries of the same parent enterprise.

25/ Certain regional groups felt that if it was necessary to include a specific provision on this topic it would be preferable to consider placing it elsewhere than in chapter 4.
14. Registrations after the expiration of the arrangement

Restrictions on the use by the acquiring party after expiration of the arrangement of the technology, including know-how, which has lost its secret character independently of the acquiring party, without prejudice to obligations relating to payment already agreed upon or to existing industrial property rights.

Appendix E

Chapter 8

Regional groups positions

8.1. Institutional arrangements

(a) (A Special Committee on the Code established within UNCTAD) (The Committee on Transfer of Technology) will provide the institutional machinery;

(b) The (Special Committee) (Committee on Transfer of Technology meeting in special session with respect to the Code and matters related thereto) (as a special agenda item of its regular sessions or, if necessary, at special sessions of the Committee,) open to all members of UNCTAD, should meet as often as necessary, but at least once a year. The committee may create appropriate subsidiary bodies to assist it in its work. Its rules of procedure (at least initially) shall be those of the main committees of the Trade and Development Board.

8.3. Review procedure

Subject to the approval of the General Assembly (four)(six) years after the adoption of the Code a United Nations Conference (of Plenipotentiaries) shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Code (with a view to bringing about its universal application as a legally binding instrument) (including its legal nature) (including the final decision on the legal character Conference for the improvement and further development of the Code, taking into account relevant activity in the field of transfer of technology within the framework of the United Nations system.

8.5. General provisions

(The establishment of the Special Committee by the Trade and Development Board shall be subject to the approval of the General
Assembly.) The establishment by the Committee of such subsidiary bodies as it may deem necessary shall be subject to the approval of the Trade and Development Board. (Financial requirements in connection with the servicing of the committee which are to be borne by the United Nations budget shall be subject to approval by the General Assembly.)

Appendix F

Chapter 9

Text prepared during the sessions of the Interim Committee 26/

9.1. Parties to transfer of technology transactions may, by common consent, choose the law applicable to their contractual relations; such choice of law does not, however, limit the application of the relevant national laws nor of the rules of public policy (ordre public), of the parties to the transaction, which cannot be derogated from.

9.2. Parties to transfer of technology transactions should try to settle in an amicable way the disputes or differences, which may arise between them in connection with the transaction, by direct negotiations or by resorting to a conciliation procedure.

9.3. Parties may, by common consent, have recourse to arbitration for the purpose of settling disputes arising out of the transactions in cases where the relevant laws of the parties concerned do not prohibit arbitration.

9.4. Parties should be encouraged to use internationally accepted rules of arbitration such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

9.5. States should recognize and enforce arbitral awards in accordance with their national legislation and relevant international agreements.

26/ See TD/CODE TOT/35, annex A.