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UNCTAD'S Draft Code of Conduct on the Transfer of Technology: A Critique

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I. INTRODUCTION

In the mid-1960s the developing nations of the Third World realized that they regularly held the majority position when votes were taken within the various bodies of the United Nations. As a result, General Assembly resolutions and studies and decisions made by various United Nations conferences, committees, and councils, including the United Nations Conference on Trade and Development (UNCTAD), brought issues such as the transfer of technology squarely to the forefront of the world body's attention. Sixteen years have passed since UNCTAD's first session recommended a study to explore the possibility of legislation concerning the transfer of technology to developing countries.[1] What began as an *ex parte* attempt to confront the developed nations has grown into a full-blown tripartite struggle to negotiate a compromise for a code of conduct to regulate the transfer of technology. The three groups involved in this struggle are the Group of 77, representing the developing nations, Group B, representing the developed countries of the Western industrialized world, and Group D, consisting of and representing the interests of the so-

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1. Final Act Adopted by the United Nations Conference on Trade and Development, E/Conf.46/L.28, Annex A at 2 (1964).

cialist countries of Europe, the USSR, and Mongolia.

UNCTAD's fourteenth plenary meeting on May 6, 1980, produced the latest of several attempts to draft such a code. The document is entitled "Draft International Code of Conduct on the Transfer of Technology"[2] (Draft Code), and this draft will be the primary subject of analysis in this article. The drafters of the code face a number of problems, the least of which is the ultimate determination of the code's legal character and, consequently, its legal effect. This determination and other problem areas confronting the drafters, including the code's special preferences for developing countries, the core chapter on restrictive practices, and the objectives and principles of the code, will be discussed and analyzed in this article. By necessity, reference will continually be made to the various approaches of the three contending groups.

The writer will, whenever possible, point out the different positions among these three groups regarding the standards of international law that the code should embody. An example of one point of contention is that, whereas new normative standards are being devised by the developing countries (the Group of 77), the existing standards of international law are being protected by the Western (Group B) and socialist (Group D) groups.

This critique will carefully avoid any technical evaluation of specific provisions of the Draft Code because the code of conduct is far from reaching its final form and such an analysis might well defeat the purpose of an overall critique of the Draft Code. More appropriately, the subject matter of this article will be examined from the standpoint of general comparisons and criticisms, while including occasional references to particular provisions of the Draft Code for the purpose of illustration.

II. SPECIAL PREFERENCES FOR DEVELOPING COUNTRIES

The developing countries have asserted from the very beginning that they were dealing from a disadvantageous position in discussions concerning the transfer of technology. The 1975 Report by the UNCTAD Secretariat stated:

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2. UNCTAD, DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY, Report by the UNCTAD Secretariat, U.N. Doc. TD/CODE TOT/25 (1980), *reprinted in* 19 INT'L LEGAL MAT. at 773-81 (1980) [hereinafter cited as UNCTAD Draft Code] (subsequent cites will refer to page numbers in 19 INT'L LEGAL MAT.).

> The technological and economic capabilities of the enterprises of developed countries are much stronger than those of the developing countries. In the supplier/recipient relationship, therefore, the weak position of developing countries is more exposed to the strong quasi-monopolistic power of the transnational corporations of the developed countries. Any international regulation of transfer of technology, needs to take this special consideration into account.[3]

The UNCTAD report found that the purpose of such a code would be "to restructure existing relationships between suppliers and recipients of technology so as to facilitate the third world's access to the accumulated promise of mankind's scientific and technological achievements."[4]

The Declaration of the Establishment of a New International Economic Order[5] (Declaration) and the Programme of Action for the Establishment of a New International Economic Order[6] (Programme) are both concerned with "the formulation of an international code of conduct for the transfer of technology corresponding to the needs and conditions that prevail in developing countries."[7] By means of the Declaration "the General Assembly established as one of the main principles for restructuring existing international relations a principle in the following terms: 'Preferential and non-reciprocal treatment for developing countries whenever feasible, in all fields of international economic cooperation whenever possible.' "[8] Several Western nations opposed this effort, but the idea of preferential treatment for the developing countries through transfers of technology received further impetus in 1975 with the passage of the Charter of Economic Rights and Duties of States[9] (Charter). Article 13 of the Charter recom-

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3. AN INTERNATIONAL CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY, Report by the UNCTAD Secretariat, U.N. Doc. TD/B/C6/AC.1/2/Supp. 1 at 2 (Mar. 25, 1975) [hereinafter cited as Report of the UNCTAD Secretariat].

4. *Id.* at 3.

5. G.A. Res. 3201 (S-VI)(1974), *reprinted in* 13 INT'L LEGAL MAT. 715, 718 (1974).

6. G.A. Res. 3202 (S-VI)(1974), *reprinted in* 13 INT'L LEGAL MAT. 720, 727-28 (1974).

7. Zaphirion, *An International Code of Conduct on Transfers of Technology*, 26 INT'L & COMP. L.Q. 210, 211 (1977).

8. Report of the UNCTAD Secretariat, *supra* note 3, at 41.

9. U.N. GAOR, Supp. (No. 31), U.N. Doc. A/9631 (1975), *reprinted in* 14 INT'L LEGAL MAT. 251, 257 (1975).

mended that "all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs."[10]

Accordingly, special treatment for the developing countries had become a cornerstone in the efforts to develop a code by the time UNCTAD met for its fourth session in Nairobi in May 1976. This meeting mandated the drafting of a code in Resolution 89 (IV).[11] During a 1976 meeting of a group of experts, the developing nations advanced three main propositions to be considered in drafting a code. They proposed to proscribe certain practices to curb the dominant position of the seller and protect the economy of the buyer country, to institute programs to assist buyers of technology to adapt and assimilate technology, and to strive for the enhancement of national technology development through international cooperation.[12] The aims of the Group of 77 zeroed in on the transfer itself, emphasizing a desire to protect the national economies of the developing nations.

The fourth session of the Intergovernmental Group of Experts convened in 1977 and produced a Report[13] demonstrating a divergence of views on this special preference for developing countries. Although Group B and Group D followed the pattern of emphasis upon special treatment for developing countries, they did so in ways varying from the approach taken by the Group of 77. Whereas the Group of 77 wrote detailed proposals and couched the language in mandatory terms, Group B utilized vague proposals of an aspirational nature and adopted a voluntary approach to compliance.[14] In contrast, Group D employed vague and general proposals phrased in terms of encouraging and promoting various activities, while making use of mandatory language regarding special treatment.[15] All three groups agreed that "particular consid-

10. *Id.*
11. UNCTAD Res. 89(IV) (May 30, 1976).
12. *Id.*
13. UNCTAD, Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Fourth Session, U.N. Doc. TD/AC.1/11, Annexes I-IV (1977) [hereinafter UNCTAD Report 11]; *reprinted in* 17 INT'L LEGAL MAT. 453-90 (1978).
14. *Id.* at 27-28.
15. *Id.* at 37-38.

eration" or "special attention" be granted to the "least developed of the developing countries."[16] Predictably, however, the Group of 77 used the word "shall"; Group B used "should"; and Group D inserted "will" in this provision.[17]

Since UNCTAD is one of the most politicized of the United Nations organizations, it is surprising to note that the text to the current Draft Code contains a compromise based on the more moderate, optional language of the earlier Group B proposals. The current Draft Code uses the word "should" throughout the text on "Special Treatment for Developing Countries."[18] The Western industrialized nations would have resisted a mandatory, one-sided code similar to the one proposed by the Group of 77 in the 1977 drafts, regardless of the Code's legal character.

This compromise is not a breakthrough of great magnitude. As far as the developing countries are concerned, such Third World shibboleths as permanent sovereignty over natural resources still appear to be non-negotiable.[19] Although the developing nations have declared that the achievements of modern science and technology must be shared and do, in fact, belong to mankind in general, the natural resources of the developing world are not viewed in the same manner. By agreeing to use optional terminology to set forth the special treatment for developing countries, the Group of 77 has given away very little.

III. Legal Character and Effect of the Code

The Group of 77 has been consistent in its demand that "an internationally legally binding instrument is the only form capable of effectively regulating the transfer of technology."[20] In contrast, the representatives of both Group B and Group D have fa-

16. *Id.* at 18-19, 27-28 & 37-38.

17. *Id.*

18. A new subsection of the Draft Code provides that developed countries should consider requests from developing countries to "provide assistance and co-operation in the development and administration of laws and regulations designed to avoid health, safety and environmental risks associated with technology or the products produced by it." *Id.* at 791. This may be an indication that the parties are beginning to appreciate and respect each other's respective bargaining positions and experiences. UNCTAD Draft Code, 19 Int'l Legal Mat. 773, 789-91 (1980).

19. *See* notes 5 and 6, *supra.*

20. Roffe, *International Code of Conduct on Transfer of Technology*; 11 J. World Trade L. 186, 187 (1977).

vored a non-binding instrument or some form of guidelines. One commentator has offered the following opinion: "[I]f the prospects for a legally binding code at this stage may not appear very strong, there is every reason to believe that the gap between the developed market economies and the '77' is closing steadily."[21] Such optimism may be premature when dealing with a topic that is riddled with policy considerations, politics, and widely varying ideological viewpoints.

The 1975 Report by the UNCTAD Secretariat urged the adoption of a legally binding multilateral convention that would implement the objectives of developing nations.[22] According to Resolution 89 (IV), the group of experts currently working on the code are "free to formulate the draft provisions ranging from mandatory to optional, without prejudice to the final decision on the legal character of the code of conduct."[23] This effectively places the codifiers in a legal vacuum in which they prepare substantive provisions of a code of conduct whose legal character will be determined after its formulation. Holding the legal nature of the code in abeyance may have seemed like a good idea to some, but it is truly unrealistic because the Report by the UNCTAD Secretariat states that neither the organization nor its members can per se adopt a code that would be legally binding upon states without each state's prior consent.[24] Nevertheless, the Secretariat's report wishfully considers the prospects of having a multilateral convention:

> [I]f the code were to take the form of a multilateral convention (thus legally binding under international law on the parties to it) it would remain a set of guidelines for those states which did not become parties to it. These states could treat the code as they wished and might, as happened in the case of other multilateral coventions, enact the code rules into their own law without acceding to the code (multilateral convention).[25]

This begs the question because it reveals a refusal on the part of the developing nations to deal with the basic facts that would arise in such a situation. If all the developing nations insist upon

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21. Ewing, *UNCTAD and the Transfer of Technology*, 10 J. WORLD TRADE L. 197, 201 (1976).
22. Report by the UNCTAD Secretariat, *supra* note 3, at 46.
23. UNCTAD Res. 89(IV), *supra* note 11.
24. Report by the UNCTAD Secretariat, *supra* note 3, at 102.
25. *Id.*

having a multilateral convention which is unacceptable to the Western industrialized nations, what have they accomplished? No amount of pressure will make the Western states become parties to a one-sided treaty. For this reason, "[t]here is perhaps a slightly better chance that universally acceptable voluntary guidelines will be agreed upon by a reluctant West."[26] A fact of fundamental importance is that "[n]o UNCTAD resolution or other action nor any treaty, agreement or code formulated by UNCTAD has purported to have binding force in the absence of the traditional requirement of international law, the consent of the parties."[27]

Prior versions of the code of conduct submitted by the Group of 77 do not mention or refer to international law.[28] Presumably, this is due to the Group of 77's view that the code represents only one part of the overall attempt to introduce new normative standards into international law that will favor its own positions. Included in prior drafts of the chapter on objectives and principles was a footnote stating that the term "standards" remained to be defined. This reference has been deleted from the current Draft Code,[29] revealing a willingness to compromise that was not evident in prior drafts.

This leads the discussion to a consideration of whether the code of conduct could become customary international law. The International Court of Justice in the *North Sea Continental Shelf Cases*[30] found that the Continental Shelf Convention expressed concepts of the continental shelf that were unclear legal principles until the treaty codified them. The court held that the provisions in a treaty may have "a fundamentally norm-creating character such as could be regarded as forming the basis for a general rule of law."[31] One writer has observed that if an UNCTAD "code or guideline were so universally accepted as to rise to the level of international custom having the force of international law, that could result in the code becoming enforceable in the United

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26. Primoff, *International Regulation of Multinational Corporations and Business — the United Nations Takes Aim*, 11 J. INT'L L. & ECON. 287, 294 (1976).

27. Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?* 11 INT'L L. 529, 531 (1977).

28. *See* UNCTAD Report 11, *supra* note 13.

29. UNCTAD Draft Code, *supra* note 2, at 777.

30. Judgment of Feb. 20, 1969, (1969) I.C.J. 3.

31. *Id.* at 43.

States as a part of international law."[32] This would be possible only if a consensus is eventually reflected in the final document, thereby combining the various approaches of the three groups. Ultimately, "if a number of nations do not accept a code, national practices subsequent to 'adoption' will not demonstrate that the code is viewed as a part of international law."[33]

It appears that a code of conduct in the form of a multilateral convention will bind only those nations that consent to it, thereby effectively eliminating from its scope those nations to which the code is directed. On the other hand, if the final document assumes the character of a set of guidelines for the transfer of technology in the context of a three way compromise, it may well lead to an international standard of customary international law that could eventually be incorporated into national legal systems by way of adopting legislation.

All parties to the negotiations agree that the code should cover only international transfers of technology.[34] In addition, the three groups agree that the code "is universally applicable" regardless of the type of economic and political systems involved or the level of development of the countries concerned.[35] Even though the Draft Code includes a provision concerning proprietary and non-proprietary technology,[36] the applicability of the code's provisions "should be left to the proper law of the contract or the law governing the transfer as defined by the applicable private international law rule."[37]

The Draft Code does not contain a negotiated compromise on either choice of law or a method for dispute settlement.[38] This demonstrates how very far apart the groups are when these issues are discussed. There are, however, several proposed drafts of choice of law and dispute settlement provisions in Appendix D of the Draft Code.[39] The Group of 77 has proposed mandatory terminology favoring the "acquiring country," while Group D would allow parties to "freely choose the law applicable to the agree-

32. Schwartz, *supra* note 27, at 536.
33. *Id.*
34. UNCTAD Draft Code, *supra* note 2, at 777.
35. *Id.* at 778.
36. *Id.* at 777.
37. Zaphiriou, *supra* note 7, at 218.
38. *See* UNCTAD Draft Code, *supra* note 2, at 794.
39. *Id.* at 806.

ment."[40] Group B has chosen the optional approach also, but with much more specificity and evenhandedness apparent in the steps required to determine the applicable law and to settle disputes.[41]

These differences provide additional support for the argument that a set of voluntary guidelines is the only possible type of agreement that all three groups could accept. Such a document would, however, have no legal effect. If an UNCTAD resolution passed a mandatory set of guidelines without a compromise agreement among the groups, it would be equally impotent because the guidelines would be ignored by those in disagreement. Although the only enforceable method available to implement a workable code of conduct seems to be the multilateral convention, such an instrument would have to be replete with exceptions, optional terminology, and provisions for derogation before the developed nations would consent to be bound thereby. This is the legal quandary in which the three groups find themselves.

The Draft Code contains a subsection on "review procedure" under chapter 8 (international institutional machinery). The subsection provides that:

> 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 of the Code]. Towards this end, the Committee shall make proposals to the 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.[42]

UNCTAD may, therefore, take four to six years to determine the legal character of a code of conduct following its adoption. Perhaps such a long-term review will provide a cooling-off period for the Group of 77. This could assist the groups in ultimately reaching a reasonable compromise. There is also the possibility, however, that such an extended period of time between adoption and legal determination could serve to produce the opposite result.

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40. *Id.* at 807-808.
41. *Id.* at 809-10.
42. *Id.* at 794.

IV. Objectives and Principles

As mentioned above, ideology plays a tremendous role in the development of a code of conduct. Much of the assault on transnational corporations "comes from Marxist sources or from statist and planned-economy philosophies which today characterize so much of the developing world."[43] The free enterprise system is under attack, and, although some modifications of the system appear to be necessary, any attempt at international regulation by means of prohibitions must be resisted. This is why the developed countries maintain that it is easier to modify the behavior of the transnational corporations through tax concessions and incentive programs than through a code. The transnational corporation is a commercial supplier of technology seeking an economic return on its holdings of proprietary knowledge.[44] Since the socialist, developed countries cannot perceive the notion of such economic freedom and many of the developing countries are leaning in the direction of socialist philosophies, it is to be expected that all of these groups would develop different sets of objectives and principles for the code.

The 1975 Report by the UNCTAD Secretariat listed five basic objectives and principles that could be incorporated into a code of conduct for the transfer of technology:

a) The need for international regulatory action;
b) The encouragement of unpackaged transfer;
c) Improvement of access at fair and reasonable prices and cost;
d) Effective performance of transfer arrangements;
e) Ensuring the development of technological capabilities of recipients.[45]

Most of these objectives and principles are included in chapter 2 on Objectives and Principles in the Draft Code.[46] Unpackaging, for instance, has been approached in chapter 2[47] and in chapter 5 on Guarantees/Responsibilities/Obligations.[48] This issue is

43. Primoff, *supra* note 26, at 320.

44. Jeffries, *Regulation of Transfer of Technology, An Evaluation of the UNCTAD Code of Conduct*, 18 Harv. Int'l L.J. 309, 315 (1977). *See also* W. Chudson, Unitar Research Report No. 13: The International Transfer of Commercial Technology to Developing Countries 41 (1971).

45. Report by the UNCTAD Secretariat, *supra* note 3, at 5.

46. UNCTAD Draft Code, *supra* note 2, at 777-79.

47. *Id.* at 778.

48. *Id.* at 785.

fiercely promoted by the developing countries. One recent evaluation of the code noted that "the requirement that transfer of technology agreements be unpackaged is the most feasible rule for immediate implementation. Under such a rule, approval of a contract would only depend upon presentation of details of components and prices of an agreement to an appropriate agency."[49] Although this may be true, the Group of 77 and Group D are insisting that unpackaging become a mandatory provision of the Draft Code rather than an optional provision.[50]

Many specific provisions for the conduct of the parties are found within chapter 5.[51] As with many other parts of the Draft Code, the Group of 77 puts forth mandatory terminology in hopes of creating a self-executing document. Group D, on the other hand, flip-flops from one side to another, sometimes agreeing with the Group of 77 and sometimes protecting its vested interests.[52] Group B maintains a consistent approach in favor of optional terms and reasonable restrictions.[53] The source of the problem is the difference in the structures and philosophies of the political and economic systems involved. When a developing nation's government speaks, it directly represents the buyer in a transfer of technology. When a Western industrialized nation's government speaks, however, it does not directly represent the seller in such a transaction. One of the fundamental challenges for the drafters of the code is to find a way for the free economy governments to agree on international measures for corporate regulation that have generally not been instituted on the domestic level. If viewed in this manner, what is referred to as a challenge might more accurately be described as a nearly insurmountable obstacle.

In an earlier draft of the code entitled "Consolidated Composite Draft on Objectives and Principles,"[54] the Group B negotiators suggested the following paragraph:

> [E]ach technology transaction is an individual case and the transfer of technology is an on-going and sequential process. Flexibility in the technology transfer process is necessary and the freedom of

49. Jeffries, *supra* note 44, at 334.
50. UNCTAD Draft Code, *supra* note 2, at 785.
51. *Id.* at 785-89.
52. *Id.*
53. *Id.*
54. Consolidated Composite Draft on Objectives and Principles, Chairman of Working Group I (Feb. 24, 1978).

> parties to negotiate, conclude and perform agreements for the transfer of technology on mutually acceptable terms and conditions should not be unduly restricted.[55]

Such a principle lies at the very heart of the free enterprise system, but this same principle has also been the alleged foundation for the abuse of a dominant position by some technology sellers. The developing countries could not agree to such a principle. It does not appear in the current Draft Code.

The entire objective of regulation was placed in a more realistic light by a 1976 United Nations report that recognized the dangers of overregulation. The report feared that regulation would cause the seller to "withhold, withdraw or transfer the investment."[56] Since the developing countries are still in a comparatively weak bargaining position, the Group of 77 should concentrate on more moderate approaches to regulation by the code. The present climate of uncertainty and hostility has led one commentator to state that "[t]here is increasing evidence that investments in developing countries are being diverted to developed ones where 'results are more predictable.' "[57] If this is the case, radical regulatory provisions of any kind would make the code a self-defeating instrument from the developing countries' viewpoint because many of their most rudimentary objectives could not be realized.

V. Core Chapter on Restrictive Practices

Chapter 4 of the Draft Code contains a mass of provisions regarding restrictive practices.[58] The effort is an improvement over earlier drafts prepared by the various working groups simply because it reduces from seven to three the number of symbols required to identify one group's proposals from another's. Although there is a surprising amount of agreed upon text within the twenty paragraphs of chapter 4, the brackets and asterisks in most of the important paragraphs subject them to tremendous ambiguities and complexities. In addition to the partially agreed upon text on restrictive practices, Appendix B, as attached to the current Draft Code, contains further suggestions and variations

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55. *Id.*

56. National Legislation and Regulations Relating to Transnational Corporations, Report to the Secretariat, U.N. Doc. E/C.10/8, (Jan. 12, 1976), at 17.

57. Primoff, *supra* note 26, at 322.

58. UNCTAD Draft Code, *supra* note 2, at 781.

on the theme.[59] It is beyond the scope of this paper to become involved in the intricacies of the language being inserted by each of the groups in this section, and, therefore, the writer will restrict his attention to the substance of the practices that are being prohibited by chapter 4.

Since the goal of developing countries is technological independence, the elimination of many so-called restrictive practices should "encourage utilization and absorption of technology by the recipient enterprise."[60] Nevertheless, the list of prohibitions is viewed by many as "unduly harsh and unnecessary for achievement of the goals of the Code."[61] Prohibitory clauses on publicity[62] and use of trademarks[63] do not seem to remedy any specific problems, but are nonetheless included. On the other hand, prohibitions concerning grantback provisions, use of personnel, price fixing, adaptations, tying arrangements, and export restrictions[64] appear to be acceptable to all groups.

All of these prohibitions against restrictive business practices have direct reference to the protection of the developing countries' economies. While these are legitimate goals for the developing countries, one wonders if there is not an over-emphasis on technology transfers for the sake of development. One writer has noted that "[d]evelopment means more than the structural transformation of an economy but without it, development will not get very far."[65] The point is that a distinction must be made "between capital goods which produce more capital goods and those which produce consumer goods,"[66] because significant development is not possible without growth. Growth through industrialization can occur only if the developing countries are discriminating in their choices of technology. These choices will dictate the type of industrialization that occurs. The developing nations must attain an understanding in terms of the process of the transfer of technology because development will be frustrated "unless there

59. *Id.* at 795.
60. Jeffries, *supra* note 44, at 335.
61. *Id.*
62. UNCTAD Draft Code, *supra* note 2, at 783.
63. *Id.* at 784.
64. *Id.* at 782-83.
65. Ewing, *Transfer and Development of Technology: The Problems of Developing Countries in Perspective*, 11 J. WORLD TRADE L. 1, 7 (1977).
66. *Id.*

is progressive introduction of intermediate and capital goods."[67] The concentration on restrictive practices in the transfer of technology is understandable, but it is not the only answer to the development goals of the Group of 77. A set of ground rules for the transfer of technology should be part of a long-term goal for the developing countries in order that they may achieve an equal bargaining position with the multinational corporations. This goal will require an organizational strategy that emphasizes the training of skilled technical personnel and administrative experts, the supply of which is at a premium in the developing countries today. Added sophistication on the part of the buyers of technology would naturally lead to further restrictions on the sellers, and the relative bargaining positions of the two would approach a more nearly equal level.

Even on a short term basis, as the developing countries "gain in strength and ability to regulate, more stringent laws and enforcement mechanisms can be implemented."[68] In the meantime, incentives and other devices for controlling the transfer process should be implemented in order to augment more moderate regulatory provisions of a code of conduct.

VI. CONCLUSION

Some simplistic arguments have been advanced by a variety of sources in order to convince transnational corporations that they should comply with a code of conduct. One such argument was made by the Secretary General of UNCTAD, who is credited with saying that "[i]f complied with, this [code of conduct] might make it easier for transnational companies to operate in developing countries — replacing confrontation with co-operation."[69] As a general statement, this is obviously true, but what is the real price of compliance? The answer to that question will ultimately depend upon the final form of the code of conduct. It is certain that the interests of the developing countries will be given special preference and treatment. If the majority Group of 77 continues to push for extremely strict regulations, the chances are minimal that the members of either Group B or Group D will be willing to pay an exorbitant price for compliance.

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67. *Id.*

68. Jeffries, *supra* note 44, at 342.

69. Wasserman, *Key Issues in Development, Interview with UNCTAD's Secretary-General,* 10 J. WORLD TRADE L. 17, 18 (1976).

The legal character of the code is still in limbo. A recent commentary has suggested that "the UNCTAD Code of Conduct on Transfer of Technology should be more than an umbrella for unilateral rules and regulations. It should provide a framework for unification and standardization of rules on transfer of technology."[70] This writer would add two specific requirements. First, the final document should take the form of a set of guidelines acceptable to both buyers and sellers of technology. Although the result of such an effort might be an agreement based on the lowest common denominator, it would necessarily involve a commitment from all three negotiating groups, not just the developed countries. Second, this set of guidelines should clearly stipulate that all parties are to observe international law and that an international minimum standard should be observed.[71] Some provision for the acceptance or development of new normative standards should be included within the guidelines in order to give the developing countries a share in the development of international law in this area. Minimum standards must be emphasized to avoid the majority tendency to attempt to abolish the old rules of the game. At this stage in the negotiations, hopes for such a final result are slim. The most likely scenario would culminate in a majority vote for the Group of 77 mandatory and binding version, which would be rendered meaningless by the refusal of the Western industrial states to comply with it.

The advantages that accompany a more moderate approach to restrictions on the transfer of technology have been set forth in this paper. The author submits, however, that the developing countries need more than just the UNCTAD code of conduct for the attainment of its developmental objectives. While the Western industrialized nations have the OECD and the socialist bloc has COMECON, "[t]he Third World needs its own corresponding instrument, able to service its countries in economic and technical matters, not only in negotiations with the developed countries, but just as important, in promoting co-operation among its members."[72] This economic union could play a great role in the long-term strategy of equalization and technological independence. Thus a code of conduct should be viewed as a key step forward for the developing countries, but more importantly, as a means to

70. Jeffries, *supra* note 44, at 342.
71. Zaphiriou, *supra* note 7, at 218.
72. Ewing, *supra* note 65, at 14.

an eventual balancing of bargaining power in technology transactions.