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Secretariat
P. O. Box 3243

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REPORT OF THE SECRETARY GENERAL ON THE NEGOTIATIONS OF AN INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY

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INTRODUCTION

Since the 1960s, developing countries have been calling for improved conditions for the transfer of technology, by expressing their concern about the inequitable features of the international technology market and the consequent disadvantages and constraints experienced by them in the importation of technology. Africa, while identifying itself with the Group of 77 in these negotiations, gave the issue due attention in a number of OAU fora, such as technology symposia, Councils of Ministers and more emphatically by the OAU Heads of State and Government who in the Lagos Plan of Action directed that "action should be taken to ensure that technology is transferred under general conditions acceptable to the recipient country and supportive of a self-reliant and self-sustaining strategy in the development of local and scientific capabilities".

DEVELOPMENT OF THE CODE

2. The first practical step by the international community, aimed at responding to the call by developing countries, for improved conditions for the transfer of technology, could be traced as far back as 1961 when the UN General Assembly adopted resolution 1713(XVI), calling for a study of the effects of patents on the economy of developing countries. It was, however, eleven years later that the idea of a possible international code regulating the transfer of patented and non-patented technology from developed to developing countries emerged.

3. This led to the establishment of an Intergovernmental Group of Experts on the Code of Conduct for the Transfer of Technology charged with the preparation of a draft basis of a universal code of conduct. The Group of Experts was to base

their work on documents submitted by the Group of 77 and Group B.

4. It was quite clear from the beginning that these two groups which constitute the major recipients and suppliers of technology respectively, had a very marked difference of approach. While the developed countries would have prefered a maintenance of the status quo in technology transactions, the developing countries were seeking basic changes which would make the transactions more equitable.

5. There was need at this stage to establish some regulatory procedure within which these divergences could be negotiated. Bearing in mind Resolutions 3201(S-Vi) and 3202(S-VI) adopted by the Sixth Special Session of the General Assembly in 1974, endorsing the Declaration and Programme of Action for the Establishment of a New International Economic Order, it was agreed to hold a United Nations Conference to negotiate the draft text of the international code of conduct on transfer of technology prepared by the Intergovernmental Group of Experts.

6. Since that decision taken in 1978, four negotiating sessions have been held as follows:

a) First session - from 16th Oxtober to 11th November 1978.

b) Second session - from 29th October to 16th November 1979.

c) Third session - from 21st April to 6th May 1980.

d) Fourth session - from 23rd March to 10th April 1981.

PRESENT STRUCTURE AND POSITIONS ON THE DRAFT CODE

7. The draft code as it stands today consists of a Preamble and 10 Chapters that could be looked at in two broad categories, namely:

a) Those Provisions contained in the Preamble and the Chapters on Objectives & priciples, National regulations and Special treatment for developing countries, International collaboration and International institutional machinery. These are provisions of a general nature.

b) Those Provisions dealing with the Legal character and scope of application of the code, Restrictive Practices, Guarantees, and Applicable law and settlement of disputes.

8. Since the First Session of the Conference, some progress has been made especially on those provisions in the first category above. But considerable differences still exist on the provisions outlined in the second category.

9. This report, will not go into details of what was agreed in the previous first three sessions, but will limit itself to the outstanding issues as at the time of convening and conclusion of the fourth session.

10. Prior to the meeting of the fourth session of the Conference, the OAU Secretariat in collaboration with the African Regional Centre for Technology organized a meeting of African Experts in Addis Ababa from 26th to 30th January 1981, with a view to adopting an African position on the outstanding issues to be negotiated at the fourth session.

11. The central issues on which consensus had still to be obtained were: the legal character of the code and the mandate of the review Conference: restrictive practices; international institutional machinery; and applicable law and settlement of disputes.

a) <u>The legal character of the code and the mandate of the Review Conference</u>

12. The African Group maintains the position of the Group of 77 that an international legally binding instrument is the only form capable of effectively regulating the transfer of

technology, while Group B countries want the code of conduct to consist of guidelines which are voluntary and legally non-binding. Group D and China would prefer a legally binding code.

13. Though the issue of the legal character peameates almost all the provisions of the draft instrument, the present proposals of regional groups indicate the possibility of a two-step procedure: the first step would consist of the adoption of the code by the Conference to be endorsed by a resolution of the General Assembly; the second step would consist of a review Conference to be held within a fixed time-frame to decide on the legal nature. It should be pointed out that the idea of a review Conference has now been accepted by all regional groups. By the end of the fourth session, th s issue still remained unsettled.

b) Restrictive practices

14. The African position hinges on avoidance of practices that either restrain trade or adversely affect the international flow of technology, particularly as either type of practice hinders the economic and technological development of developing countries. The Chapter on restrictive practices has proved to be one of the most difficult to negotiate so far. In the 14 practices on which there is some measure of understanding, there are six that are not considered by Group B countries to involve anti-competitive practices, while the Group of 77 and Group D are of the view that these provisions prescribe practices that adversely affect the economic and technological development of acquiring countries.

15. Apart from this conceptual problem, when it comes to considering the specific practices which are to be prohibited or regulated by the code, the method of formulation causes difficulties. The developed market economy countries argue that it is not possible to lay down legis ation containing an absolute prohibition and feel that certain restrictions, even when restrictive, may have additional effects which benefit the economy.

16. The developing countries, on the other hand, consider that the competent authorities of the technology-acquiring country, in exceptional circumstances, must have the authority to decide that it is in its public interest to disregard the restrictive practice proscribed by the code, provided that on balance there will be no adverse effect on its national economy.

17. Although most of the time of the fourth session was spent in an attempt to arrive at a text acceptable to all groups on this chapter, the compromise proposals submitted by the President of the Conference could not satisfy the positions of any group.

International institutional machinery

18. There is already an agreement on the functions, timing of sessions, creation of subsidiary bodies, and terms of reference of the international institutional machinery to be established. What is still to be negotiated is the precise status and title of the institutional machinery.

Applicable law and settlement of disputes

19. This is a chapter that has been the subject of extensive negotiations and regional groups have had to refine their positions. But there still exist very fundamental differences, particularly between the Group of 77 and Group B.

20. The Group of 77 position is that the law of the acquiring country is the law applicable to matters relating to public policy (ordre publique) and sovereignty. The Group of 77 also wants a framework for a system of arbitration for the code.

21. Group B's position on the other hand, is that the parties should have the freedom to choose the applicable

national law and the national forum before which disputes will be brought. If the parties have not chosen either the law or the forum, Group B proposes a criteria for decision-makers.

22. Group D is of the view that the parties should have the right to choose the law applicable "within the limits permitted by their national legislation" and that the otherwise applicable conflict-of-laws rules should be used by the arbitral commissions or other organ deciding the dispute when the parties have not agreed on the choice of law.

23. The text presented by the President of the Conference as the negotiating text at the fourth session could not satisfy the demands of any group. This chapter which is very much linked to the one on restrictive practices therefore remains one on which there are still fundamental differences to be resolved. The one time floating suggestion that discussions on this chapter should be postponed until the rview Conference, met with strong opposition from the Group of 77 who attach great importance to the provisions in their chapter.

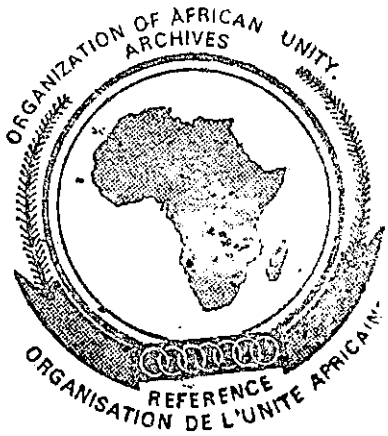
CONCLUSION

24. The fourth session of the Co nference had been scheduled to be the last session. However, having failed to reach agreement on those crucial areas outlined above, the Conference agreed to refer the matter back to the next session of the UN General Assembly, with a view to seeking a fresh mandate to continue the negotiations. It was particularly the feeling of the developing countries that most of the issues still to be resolved are more of a political nature than technical and a forum such as the UN General Assembly would be more appropriate. It is at this meeting that member States of the OAU are urged to effectively defend the positions of the developing countries.

25. It was quite clear, as experienced in earlier international negotiations, that the attitude of the developed countries bends more on maintenance of the status quo than promotion of international Economic Co-operation for the Development of Developing countries.

26. Any international code of conduct on transfer of technology would be ineffective if there is no necessary national legislations for regulating technology transactions. There is therefore urgent need for member States to enact or update national regulations, as well as establishing institutions to evaluate, register, monitor and appraise technology transactions.

27. In an attempt to assist member States in the above, the OAU General Secretariat is embarking on a special programme as directed in the Lagos Plan of Action. It is envisaged for instance, that during the period 1982 - 1983, studies will be undertaken on the harmonization of the technology policies, plans and programmes of its member states, as well as identification and preparation of multinational technology projects at the sub-regional, regional and continental levels. With global negotiations going on, it is also invisaged to institute, on a regular basis, African fora to serve as a basis for common positions.



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