Editorial

THE third session of the UN Conference on an International Code of Conduct on the Transfer of Technology held in May this year in Geneva adjourned without arriving at any conclusion, and a further session will now have to convened in order that final agreement may be reached.

This Code breaks new ground in the international field, and has been the subject of difficult negotiations involving 96 countries over the last five years. Its objective is to ensure that technology may be transferred on fair and equitable terms, and is to apply to all those international commercial transactions which include the transfer or licence of a patent right or other form of industrial property, as well as know-how, made between a party in a supplying country and a party in an acquiring country. Although global in application, its conception was particularly for the benefit of developing countries and for these countries it is an important element in the campaign for the new international economic order.

It was part of the strategy of the "77" that the Code was to be of a compulsory binding nature, and would thus serve to wrest advantageous terms from parties supplying technology. In this the 77 were backed by the socialist countries (Group D) and China, perhaps for political reasons. From the start however this was unacceptable to the West as a matter of principle, apart from the enormous difficulties of ratification and the amendment of national legislation. The 77 have now made it clear that a voluntary code would be acceptable, and thus the way has been opened to a general agreement.

That the negotiation was possible at all has been due to the broad alignment which exists between many of the practices which the developing countries wish to see eliminated and the anti-trust rules of the United States, which is the largest (and almost the only) net exporter of technology. Thus it was that progress could be made towards removing restrictions in connection with such matters as grant-back provisions, "no-challenge" clauses, exclusive dealing, price fixing, local adaptation, research, tying arrangements of all kinds, and patent pools.

But the 77 have also proposed a number of other provisions of particular concern to themselves, such as the use of local manpower, the suitability of the technology for the development purposes of the acquiring country, etc. Although Group B has been responsive to these proposals, there nevertheless remains an ideological difference of view as to whether the practices as a whole are to be regarded as anticompetitive or adverse to development. And although it would seem that the negotiators have been for the most part looking at different sides of the same coin, there is still a need for some comfortable semantic adjustment between them.

For the details of the practices themselves, some of the Group B countries found themselves in difficulties as they did not always subscribe to the United States position. The nearest to it was probably the proposed Regulation of the EEC on the subject of a group exemption for patent licensing, but this has not been received by the EEC member states with any notable enthusiasm. For just

as national legislation can facilitate negotiation, so it may be a restraining influence. Countries are not willing to go far beyond their own national laws, and they take into account their commitments to other bodies such as OECD, and to other agreements, in particular the newly-agreed UNCTAD Principles and Rules on Restrictive Business Practices. The Group B countries have therefore not found it easy to arrive at a common position.

An indispensable ingredient however seems to be the "rule of reason," which Group B insists on retaining in order to provide the rules with flexibility to meet all circumstances. Experience has shown that it is impossible to draft any code dealing with restrictive practices which does not contain power to dispense with the rules in the case of beneficial transactions which contain restrictions. The 77 suspect the introduction of "reasonableness" as an arbitrary element giving an advantage to the supplying party. Much will depend on how and by whom the Code is to interpreted, for while the Anglo–American experience is that interpretation of "reasonableness" by a tribunal is anything but arbitrary, this may not be the case if the Code is left for interpretation to the parties to the transaction themselves. Any more detailed drafting, however, to avoid this uncertainty seems to have led to great difficulty.

Another problem has been the treatment to be accorded to transnational corporations. The industrialized countries are ready to accept that a transfer of technology between parent and subsidiary could fall within the scope of the Code, but the issue arises as to what exception, if any, should be granted to them. Group B seem to support a certain latitude for them in connection with "arrangements necessary for the rationalization or allocation of functions . . . unless amounting to an abuse of a dominant position of market power." This seems to be a satisfactory enough solution for the transnationals, and as negotiations limited to the transfer of technology cannot by themselves settle any fundamental issues which are also under discussion elsewhere, it is something that the 77 will perhaps see fit to accept for the time being. As at least half of the transfer of technology goes through transnationals it is important that they should be brought within the Code.

Certain other issues of principle were raised by the 77, more within the framework of the new international economic order as a whole than peculiar to the transfer of technology, such as the reform of the patent system, the renegotiation of long-term contracts, the recognition of certain rules of international law, and that the law to be applicable shall in principle be that of the acquiring country. But it is clear that such issues are not negotiable in connection with the Code alone. The fact that the session actually broke up at the insistence of the African hardliners (the oil-producing states Algeria, Libya and Nigeria) on the issue of applicable law was felt to be an indication that further concessions were possibly to be hoped for on restrictive practices rather than that a fundamental stumbling block had been created.

The Code in addition contains a delicately balanced chapter on national legislation, as well as provisions for intergovernmental co-operation of considerable significance, with special treatment for developing countries. It is to be hoped that these global negotiations will ultimately succeed and that all countries will soon move forward to a period of co-operation in this important technical field.