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08084

Distr.
LIMITED

UNIDO/ICIS.61
3 April 1978

ENGLISH

UNITED NATIONS INDUSTRIAL
DEVELOPMENT ORGANIZATION

REPORT
ON A UNIDO EXPERT GROUP MEETING ON
INDUSTRIAL CO-OPERATION CONTRACTS AND PROCEDURES
FOR SOLVING DIFFERENCES *
VIENNA, 14-16 NOVEMBER 1977

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I. BACKGROUND

From 14 through 16 November 1977 a distinguished group of international lawyers from both developed and developing countries met in Vienna under the auspices of UNIDO to advise the UNIDO Secretariat concerning certain aspects of industrial co-operation contracts between enterprises in developed and developing countries. Attached to this report are:

(a) Annex 1 - List of Participants
(b) Annex 2 - Detailed Annotated Agenda
(c) Annex 3 - List of Background Papers.

The meeting was arranged as part of UNIDO's preparatory work related to the Joint Study on International Industrial Co-operation. Members of the Secretariat staff as well as special consultants participated actively in the discussions, which covered a broad range of topics dealing with different aspects of international industrial co-operation agreements, including various methods of financing, forms of contract for acquisition of plant and equipment, appropriate arrangements for transfer of technology, adequate forms of guarantees, and mechanisms for settling disputes. Particular attention was given to general conditions of contracts, liabilities of buyer and seller, insurance against consequential loss, and the effectiveness of present arbitration procedures. While no formal statement of conclusions and recommendations was adopted by the meeting, the discussions made important contributions to the drafting of a Secretariat paper on legal aspects of industrial co-operation agreements to be included as a component of the Joint Study.

In addition, the participants made a number of recommendations concerning ways in which UNIDO might assist developing countries in contract negotiation, implementation and follow-up. These included the provision of assistance in carrying out sound pre-feasibility and feasibility studies upon which contract negotiations should be based, the provision

of training for persons from developing countries in contract negotiation, contract administration, and in arbitration and other methods of dispute settlement; assistance in the elaboration of model contract clauses; assistance in strengthening the representation of developing countries in international arbitration panels; and assistance in developing a multilateral scheme for investment protection and performance guarantees, to meet the needs of both developing and developed countries.

II. SUMMARY AND CONCLUSIONS

The meeting was organised in the framework of the Joint Study on International Industrial Co-operation. The aim was to review prevailing contractual principles and procedures for industrial resource transfers to developing countries, to identify deficiencies and formulate proposals for improving the legal framework for such transactions, in order to meet the aspirations of developing countries to accelerate their industrial development. A number of major proposals for action emerged.

1. Capital Transfer

A. Joint Venture financing

Joint-venture financing as a form of co-operation is likely to have decreasing importance in the future. A tendency for separate contracts to be made for acquisition of technology, finance, management, etc. will probably prevail. This will call for greater consideration of the costs of these contracts, effectiveness of overall project management and of the crucial role of financial institutions.

B. Export Credits

Certain standard clauses of export credit agencies may need modification such as those relating to default, non-performance, and penalty payments. A detailed review of the rules was recommended. The question of setting up a multilateral export credit scheme, or a scheme for the more advanced of the developing countries may be looked into.

C. Investment Insurance

The question of investment protection schemes covering non-commercial risks was considered to be of crucial importance. It was suggested that attention be given to devising a multilateral investment protection scheme, packaged with reciprocal assurances to developing countries regarding plant performance, instead of merely guaranteeing investments to the industrialised countries.

This would be a new approach to the question of investment "protection", involving a complete package of guarantees and insurances available to the givers in the industrialised countries, as well as the receivers in the developing countries.

2. Transfer of Technology

Among the various topics discussed during the meeting concerning technology transfers, the following received particular attention:

- Duration of agreements
- Package unbundling
- Restrictive business practices
- Adaptation of technology
- Inverse transfer of adapted technology
- Export restrictions
- Exporting through the licensor; and
- The question of acquiring technology from medium and small industries.

Specific attention was called to solving the problem of performance guarantees and consequential losses incurred through non-performance. It was argued that some international form of insurance against consequential losses should be conceived. It was also suggested that performance of training may be capable of being guaranteed in addition to the "pure" technology. Furthermore, it was emphasized that governments of the developed countries supporting capital equipment exports should also assume part of the responsibility for losses.

3. Settlement of Disputes

The question of applicable law was discussed and it was suggested that further investigations would be required. It was also suggested that UNIDO might undertake the drawing up of rules of arbitration in the industrial field taking the social and economic development aspects into consideration. Strong support was voiced for efforts to use conciliation measures or reference to experts at an early stage. UNIDO may assist in setting up a group of

expert appraisers. It may also be able to provide training in arbitration. The meeting agreed that a detailed review of existing international organisations - in particular the ICSID - presently offering arbitration, should be undertaken.

4. Intergovernmental Agreements

Considerable attention was given to the role of intergovernmental framework agreements within which enterprises may undertake transfer of capital and technology. It was suggested that UNIDO may examine the possibility of promoting a concept of intergovernmental framework agreements between a group of developing countries and a group of industrialised countries. Such a scheme may widen the choices of resources and terms for the developing countries.

III. DISCUSSIONS ON MAJOR ISSUES

1. Introduction

The establishment of a New International Economic Order presupposes improved or new forms of international industrial co-operation. This implies a need for a review of legal rules, procedures and practices related to negotiations, contract formulation and contract fulfilment for financial and technology transfers, on the basis of equity of the parties concerned and with a view to ensuring accelerated industrial growth of the developing countries.

The meeting based its discussions on the recognition of the need to adjust significantly the prevailing system of contracts and rules for international industrial co-operation, to correspond to new realities rather than to continue a system based on sacrosanct principles of 19th century law. As was emphasised, the new international economic order challenges four basic assumptions:

(1) that all interests of all countries in the world can be pursued simultaneously through mutually agreed upon international policies without detriment to the interests of any;

(2) that all countries, because they are sovereign nation states, have equal rights and equal powers effectively to exercise and enforce these rights;

(3) that the existing order represents a set of natural laws of economic relations which cannot be upset with adverse effects upon the world economy; and

(4) that the social functions of distribution of wealth can best be performed by market mechanisms.

A revision of the international system is called for, on the basis of more appropriate and realistic assumptions. Certain developing countries have been evolving new forms to deal with the new realities. Developing countries have clearly stated their demands, their interests; what is needed is an equally clear and direct expression

of the interests of developed countries and a real commitment to co-operation on the part of all countries. UNIDO could play an important role in encouraging discussion of the idea of government responsibility and government to government contacts in the field of industrial co-operation.

The meeting reviewed the various pertinent legal aspects of international industrial co-operation and focussed its attention particularly on the follow major issues:

- financial issues;
- technology transfer;
- settlement of disputes; and
- intergo ernmental agreements.

2. Financial Co-operation

A. Joint Venture Financing

It was observed that the developing countries in general are tending to become less interested in joint venture agreements. Industrial companies in developed countries are also beginning to seek other forms of industrial collaboration. There is therefore a tendency to unpackage industrial co-operation arrangements and conclude separate contracts for technology, finance, management, etc. This facilitates the assessment of each deal but requires detailed and competent preparations by the developing countries.

In the discussions, it was mentioned that developing countries in general prefer loan to equity financing since the latter imposes an indefinite burden of dividend transfer and profit repatriation; however, difficulties in debt servicing have hitherto forced developing countries to accept joint venture arrangements as a means of foreign exchange financing. One way of solving the problems arising from the indefinite and continuing burden on the country's foreign exchange resources imposed by joint venture equity participation, is to establish from the outset the right of the developing countries progressively to buy back the foreign investment after a certain period of time, even if the foreign

investor might consider this to be against his interest. Several questions however arise:

What length of time is suitable for the joint venture?
Under what conditions can the country exercise its option to "buy back" the foreign investment?
How should the value of the participation of the foreign partner be established?

These questions were considered in the subsequent discussions, in which it was recognized that joint venture agreements may take many different forms, according to the purpose for which the joint ventures is to be established, and according to the conditions prevailing in the recipient country. While there was general agreement that it might be conceivable to establish joint ventures for a limited duration only, the length of time was seen to depend upon a number of specific considerations, particularly the purposes of the joint ventures, the capacity of the recipient country to derive full benefits from the collaboration, and the time taken by the domestic partner to absorb the technology and skills.

It was mentioned that in Algeria, joint venture agreements are entered into for the primary purpose of acquiring technology, rather than financial capital, from a foreign partner. Partnership with the foreign enterprise is therefore limited to a "holding" company with a very small capital base, leaving the operating company owning and running the plant, to be wholly domestically owned.

It was suggested that the Algerian approach might work well for joint ventures with service companies but might not equally well be suited for a manufacturing entity, where a fairly substantial investment by the foreign partner would be required, in equipment, know-how or cash. Also, in the case of a private company, it is difficult to speak of minimum capital investment - a debt/equity ratio of probably 1 to 1 but no higher than 2 to 1 would be needed in order to get financing.

While large foreign manufacturing companies do not usually insist on majority participation, they do want management control during a crucial initial period of the joint venture operations; this may be arranged through a provision in the collaboration agreement giving

the minority foreign partner a majority of board membership for a specified period of time. The collaboration agreement may also include a formula for establishing the value of share holdings at the time of the eventual phase out of the foreign partner, on the basis of net book value or a multiple of average earnings for a certain number of years before the transfer. Management contracts may be much more expensive than joint venture agreements which give a foreign partner a sufficiently substantial stake in the enterprise to ensure his active interest in its management. As regards joint ventures with equipment suppliers, it should be recognized that the supplier expects to make a profit from supplying the plant. One recommended approach would be for the developing country, on the basis of competitive bidding to form an idea of the likely profit, and then to persuade the supplier to invest this amount in the joint venture, in order to ensure his interest in the successful performance of the plant.

There was widespread recognition of the difficulties in generalising, in discussing joint venture agreements.

Since some countries have laws requiring proportionate representation on the board of directors, it might be difficult to give the foreign investor majority control on the board in the initial years of the venture. In such cases, it might be desirable to differentiate between policy and production management, leaving the latter in the hands of the foreign partner for a specified initial period, during which local technical managers have to be trained.

It was also pointed out, that India had had some bad experiences from the joint venture approach. For the past five years the Government's policy has prohibited joint ventures, except in selected high priority areas in which India lacks technology, and in ventures which produce entirely for export. In most cases, technical collaboration agreements are used for training, pilot plants and marketing; payment to the foreign collaborator is made on the basis of annual royalties as a specified percentage of production. Foreign equity participation has by law been limited to 40 per cent, which most foreign investors have apparently accepted.

While the advantages of the joint venture approach were aknowledged in providing incentives for the foreign partner to ensure effective transfer of technology to achieve a certain quality and quantity of production, the costs of this approach to the developing country were pointed out - particularly as a result of the unequal negotiating power of the foreign partner and the developing country. Excessive charges may have been made for the management and training services provided by the foreign partner in addition to the technology. The present system of joint ventures was considered to be tilted in favour of the foreign party, with contracts insulated from local conditions in developing countries, through provisions for the choice of applicable law, the settlement of investment disputes and other matters. The experience of certain Arab Countries was described, in seeking to separate financing from transfer of technology, so as to shop for technology on the most suitable terms. The role of development financing institutions in this area was also mentioned by several participants.

B. Export Credits

It was generally recognised that export credits are likely to remain a sizable means of foreign exchange financing for equipment purchases. The costs of such financing in terms of today's credit market, were below the Eurodollar rate and comparable to the rates of multilateral and bilateral financing institutions. Nevertheless, apart from the additional costs imposed by the premiums set by the export credit guarantee institutions, a number of possible disadvantages in foreign exchange financing in the form of equipment supplier credits were noted.

First of all, it was observed that since such credits are arranged by the suppliers, the whole attitude of the lending organisations tends to be to protect the supplier. Export credit institutions include in their financing contracts clauses to the effect that in the event of non-performance by the supplier, any liquidated damages are paid first to the lending institutions rather than to the borrower; the same is the case with insurance payments, which may be applied directly for repayment of the loan, rather than be paid to the borrower to compensate for the damage to his production process. It was also pointed out that the export credit organisations were established

primarily to promote exports rather than to promote self-reliant industrialisation in the developing countries. Credits are therefore frequently tied to a complete range of goods and services from the exporting industrial country regardless of the capacity of the recipient country to provide some of them locally. Another unsatisfactory aspect of the supplier credit financing arrangement is the use of categories of events of default designed for normal commercial banking transactions, quite unsuited to development financing. A new set of such categories is required for development project loans to governments or enterprises.

In seeking to arrange suitable credits, developing countries are frequently at a disadvantage because of the lack of information about the complicated requirements of the export financing institutions; they are therefore not in a position to negotiate effectively. In this context the need was emphasised for developing countries to benefit from the use of competitive bidding procedures, and to make systematic and detailed appraisals of the proposals received, preferably on the basis of cash costs.

The participants drew attention to the fact that acquiring export credits may constitute a problem for poorer or indebted developing countries, just as much as the financing of local costs. It was suggested that compensatory financing for such "less attractive" contracts may be considered. For those developing countries which are exporting manufactures, there is a problem of combating with the existing schemes of export credits as regulated by the Berne Union. It was therefore suggested that the multilateral export and credit guarantee schemes earlier proposed by the World Bank and UNCTAD should be re-examined. It was also suggested that in order to facilitate the assessment of bids, these should be based on cash prices; moreover it is important to consider the replacement of commercial "delivery" loans by "project" loans.

It was suggested that UNIDO might be able to provide assistance in the following ways to improve the access of developing countries to equipment financing:

(1) making direct approaches to the various export credit agencies in order to obtain reasonable modifications of certain standard clauses relating to the events of default, the applications of non-performance penalty payments or insurance payments, the duration of financing and other matters;

(2) providing information advisory services and training to developing countries to strengthen their capacity to negotiate financing on the basis of equality;

(3) studying the present categories of default events, attempting to draft new events more suitable for project loans, then trying to sell the recommendations to financing institutions.

C. Local Financing

The question of local financing was raised not only because the recipient country frequently requests assistance in local currency as well as foreign exchange financing, but also in view of the requirements in certain countries, particularly in Latin America, for the foreign partner to "phase out" over a specified period of timing, thus making it necessary to mobilise local funds. Although there are in the World Bank certain limits against financing local currency expenditures except in special cases based on the overall financial and economic conditions of the country, such financing is nevertheless sometimes provided as part of a Bank loan. The attention was also drawn to the importance of giving full consideration to the working capital requirements of the enterprise at the time of arranging financing.

D. Investment Protection Schemes

The question of insurance schemes covering non-commercial risks was considered of crucial importance for international industrial co-operation.

The creation of a multinational investment or credit guarantee scheme to cover non-commercial risks arising from sovereign acts of state as well as commercial risks for which other insurance is not available (such as consequential damages), would respond to the needs of both recipient and supplier countries, and offer useful prospects for encouraging investment and reducing costs; the existence of such a scheme itself might be conducive to better project proposals, to ensure that they qualify for the scheme. It was proposed that the scheme have different emphasis from present investment guarantee arrangements, which are designed primarily to protect rather than promote investment, and that it have a broader participation, with developing as well as developed countries. At present, the Inter-Arab Investment Guarantee Fund is the only scheme approaching the above proposal. There was a brief discussion of the Investment Guarantee proposal which had been prepared with the involvement of OECD and then considered over several years by IBRD. The most pertinent issues connected with setting up a multinational scheme, seemed to be the question of which countries would carry the risk-burden and in what proportion, the problem of subrogation, arrangements for settling disputes, and management of the agency, including the distribution of voting rights. Also, the question of who should bear the "cost" of nationlisation was considered essential. Eventually, the main exporters of capital who had developed their own national systems and did not seem to support a multilateral system which might, in effect, benefit their competitors, would have to be persuaded about the equity of a scheme which would protect both the giver and the receiver.

Another approach to the problem, was to have a multilateral framework agreement within which bilateral agreements on guarantees might be concluded, rather than have a multilateral organisation which itself would provide guarantees.

. Transfer of Technology

The discussion under this topic centered on ways in which developing countries might seek to ensure that the transfer of technology leads to the desired results in terms of quality and quantity of output, with specified consumption of raw materials over a specified period of time. It was recognised that transfer of technology is not limited to the transfer of patents or licenses but is a much broader activity involving both proprietary and non-proprietary know-how, management and training, as well as equipment. Attention was also drawn to the reverse transfer of technology from a developing country to an industrial country as the supplier of a particular technology learns to adapt it to the conditions of the developing country. Developing countries must ensure having continuing access to improvements in technology.

A. Standard Contracts

Reference was made to the possibility of simplifying contract procedures by using standard contract forms. Model forms of contracts or model clauses for contracts have been prepared, inter alia, by the Institution of Chemical Engineers (UK), by FIDIC International Federation of Consulting Engineers, by the United Nations Economic Commission for Europe, and by the Institution of Mechanical Engineers, the Institution of Electrical Engineers, and the Association of Consulting Engineers (UK). However, the model contracts as such have not been found to be entirely suited to the needs of buyers in developing countries. UNIDO has reviewed these standard contracts in its "Guidelines for Contracting for Industrial Projects in Developing Countries".

B. Unpackaging

If the supplier is expected to guarantee results, it is reasonable for him to be assured of all necessary inputs; in many cases this means that he will seek to decide on how the process is used, by ensuring management control in the initial stages of the project. Nevertheless, there are ways in which the technology transfer can be "un-packaged", while continuing to give the supplier of the technology itself a role in technical management, such as entrusting the design of the plant to the supplier of the technology, or at least giving him a voice in

the selection of equipment; providing the supplier a role in supervising or directing the construction of the plant, without entrusting the whole job to him. Although disputes are possible, the desire of both buyer and supplier to avoid a bad record with the financing agency may lead them to seek to avoid disputes. "Un-packaging" the technology may be expected to yield important price benefits, and it need not eliminate the possibilities for performance guarantees. It was recognised, however, that unless developing countries already have a fairly significant industrial capacity, particularly in terms of technical and managerial manpower, it may be very difficult to "un-package" the purchase of a technology; a developing country which must hire foreign consultants for the various stages of the project may also find that the consultants are informally or formally linked to the suppliers of a particular technology, so that separate contracts may not really lead to "un-packaging".

As an alternative to turn-key projects for plant sale, and particularly suited for countries which cannot follow the IBRD practice of first appointing a general engineering contractor then selecting the process technology, next procuring equipment and finally constructing the plant, all under separate contracts awarded through international competitive bidding, the consortium approach avoids some of the difficulties which may arise in ensuring that the contract package is complete, with no loopholes, and in resolving disputes concerning the limits of responsibility of the various contractors. In the case of complex industrial projects, it may in any event be difficult to find a single contractor with the capability and willingness to handle the whole project on his own responsibility. Consortium members have joint and several responsibility, and the developing country client may then proceed against any or all of the parties in the case of non-performance.

C. Performance guarantees

Several approaches to obtaining a guarantee of results in a transaction involving transfer of technology without a full turn-key contract for plant sale were described. The agency exporting the technology might be put into collaboration with the supplier of machinery and a package provided to the developing country under two related contracts which would permit the purchaser to link the sale of technology to the supply of equipment, thus having recourse to both suppliers together. Close relations might be established between the purchaser and the supplier of technology so that the latter would assist in the various steps of applying the technology. In Algeria a "product in hand" contract has been instituted calling for the established capability of the plant not only to produce a specified quantity and quality of products with certain standards of consumption of raw materials during the performance test run, but also to maintain such production over an extended period. This basically entails training of operators and technical management personnel, in addition to plant capability itself.

It was pointed out, however, that no matter how well drafted, contracts cannot cover every contingency - trust and confidence between the contracting parties must be developed from the negotiating stage onwards (despite the validity of the dictum that the basis of contracts is mistrust). Yet in the negotiation process, participants from developing countries may not adequately be prepared, and may insist unreasonably on the inclusion of clauses which, if eventually conceded, are easily offset by subsequent clauses in the contract.

D. Consequential Losses

This led to discussion of what should be the burden of liability of the supplier in the event of non-performance. The question of compensation for consequential damages was seen to be particularly difficult, although there was general agreement that the supplier should bear at least some liability for such damages - not so much to compensate the recipient country for loss incurred as to act as a deterrent to non-performance on the part of the supplier. It was agreed that under normal contractual principles there is no reason to limit the liability of the supplier with respect to

consequential damages, since the law itself has internal limitations. Since such unlimited or high liability might have the undesired effect of completely inhibiting international transactions, it was also agreed that some form of insurance was desirable. Such insurance coverage may presently be available, but at prohibitive prices, so the problem is one of reducing the costs of insurance through spreading the risks. It was suggested that there might be at least a moral basis for some sort of liability on the part of the government promoting its country's exports; this responsibility might be met eigher directly or through a multilateral reinsurance scheme to cover liability beyond what was commercially insurable. The insured party would be required to carry a certain proportion of the risk, thus retaining the deterrent effect of the liability.

It was pointed out that contractors presently accept certain liabilities - although contracts invariably specifically exclude liability for consequential damage. Contractors are willing to agree that if they fail to carry out their obligations for a period of 60 days, then the owner can bring in another party to complete the work at the cost of the contractor; that in the event of non-performance of equipment at start-up, replacement is at the cost of the contractor; that a warranty will be provided for a period of one year beginning with project completion; and that compensation, limited to 10 to 15 per cent of the price of the plant, will be provided in the case of non-performance in terms of performance guarantee tests. Moreover, notwithstanding payment of liquidated damages, the contractor continues to be obligated to make changes in equipment to correct defects (unless the process itself is deficient). There is a corresponding obligation on the part of the owner to make every effort to mitigate the damage caused by failure or non-performance.

There was felt to be a need for an intergovernmental organisation which could be entrusted with insurance against consequential damages. There was considerable feeling that the present instruments and procedures, designed for purely commercial transactions, do not take sufficiently into account the development objectives of developing countries. What finally interests such countries is self-development,

not a commercial profit, and what is important is finally establishing a factory with a level of performance which meets the needs of the country; commercial considerations of the damages of delay or non-performance are much less important.

It is particularly important for the developing country purchaser to define quite carefully the results sought from the project in technical and economic terms; the over-riding importance of sound feasibility studies as the basis for any project contract was widely recognized. However, a lack of information, difficulties of access to information, and the need to rely on outside consultants may create difficulties for developing countries. It was suggested that an international organisation might assist in establishing a system for exchange of information among developing countries with respect to their experience with contractors. It was also pointed out that developing countries themselves are likely in the next 10-20 years increasingly to be suppliers as well as purchasers. Care should therefore be taken to avoid establishing a system which creates incentives for using suppliers from industrialised countries because of the guarantees provided by governments.

4. Settlement of Disputes

Disputes may arise in the course of an industrial project because of disagreement as to the meaning or effect of terms of a contract, policy measures taken by the recipient country, failure of performance by either side, or vis majeure or force majeure. As to the question of applicable law one participant expressed a preference for international law, or for law of a third State, so that each party would have the same familiarity with the law; another participant said that in his experience contractors were generally ready to agree to the applicability of local law, at the time of signature of the contract. For financial agreements, bankers and lenders almost always insist on the laws of their own country. This question of applicable law may thus warrant further investigation.

The general view expressed at the meeting was that arbitration procedures had become expensive and time-consuming, with a tendency

to deal rigidly with legal principles instead of equity. Moreover, the present arbitration procedures were found to be poorly suited to industrial questions, which are considerably more complex than the commercial questions for which arbitration was originally designed. Particular mention was made of the problem of appropriate international arbitration for joint venture agreements. Possible solutions should be elaborated. It was suggested that UNIDO might undertake the drawing up of rules of arbitration in the industrial field, taking fully into consideration the social and economic development aspects.

Strong support was voiced for efforts to resolve disputes at an earlier stage through conciliation measures or references to experts. It was reported that in a number of instances there was provision in the contract for settling disagreement by reference to an expert, whose decision would be final unless one party expresses dissatisfaction in writing, in which case it would become an interim settlement of the dispute. In these cases work on the project continues and at the end the parties can go to arbitration. In this connection it was suggested that UNIDO might assist in setting up a group of experts who could assist in solving technical disputes or providing other conciliation meetings. Even if such meetings did not produce a solution to the dispute, they would at least have the effect of defining the issues clearly for subsequent arbitration.

Suggestions were made for measures to reduce delay, but it was also pointed out that an attempt to impose time limits might distort the process, giving undue advantage to the party calling for arbitration, who could take all the time needed to prepare his case and then require the defendant to reply within a very limited time; industrial projects are complicated, and it may take a long time to prepare a suitable case.

It was noted that there is a disappointing participation of arbitrators from developing countries in arbitration tribunals, attributed at least in part to the laxness of national committees in those countries in proposing candidates to the ICC, but also to

the reluctance of that organisation to select arbitrators directly without national committee endorsement. It was felt that in this area an international organisation might help to set up a list of arbitrators from developing countries - although it was made clear that what is of primary importance is experience in the problems of industrial projects in developing countries. It was also suggested that UNIDO might provide training in arbitration, supplementing the excellent but very limited and very expensive courses.

It might also arrange a seminar among the responsible officials of the various organisations to discuss the imbalances which exist in the different rules and regulations and possibly reduce the purely commercial aspects.

Contract administration was also mentioned as of considerable importance; effective systems of administration might handle many problems which might otherwise lead to disputes.

In connection with discussions on the institutional aspects of arbitration, it was advocated that an effective multinational organisation for arbitration may need to be set up. To this end, a detailed review of the various existing international organisations presently offering arbitration would have to be undertaken.

As one of these organisations, the International Centre for Settlement of Investment Disputes (ICSID) was mentioned. The Convention establishing the Centre and the rules which have been issued, introduce some innovations to arbitration. A fairly large number of agreements in fact contain ICSID arbitration provisions. However, the number of cases of arbitration settled by the Centre is very small. One difficulty is that the Convention of ICSID confines itself to investment agreements leaving the precise definition of investment to the parties concerned. It was suggested that the Convention be examined to assess its suitability as a framework for arbitration.

5. Intergovernmental Agreements

In the discussions, considerable attention was given to the role of intergovernmental frame agreements or bilateral agreements within which enterprises may undertake transfer of capital and technology. It may even be possible to define national quotas for the transfers from the developed countries. One participant however, cautioned against elevating disputes between enterprises to an intergovernmental level at an early stage since this might have adverse effects upon the enterprise of the developing country, which would be likely to provide a less effective briefing to its government. With respect to promotion of investment flows, it was suggested that rather than separate bilateral discussions with governments of industrial countries, which would necessarily be rather limited in number and which would provide additional opportunities for industrial countries to push projects without competition, governments of developing countries should have discussions with groups of industrialised countries, with the presence of an international organisation (along the lines of UNCTAD's proposal for debt re-scheduling discussions). The international organisation might even participate at an earlier stage to assist the developing country to screen proposals. International organisations should try to "open up the game", widening the choices for developing countries, which might otherwise be confined to relationships with only a few countries.

ANNEX 1

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Mr. G. Patterson, Senior Industrial Development Officer, Programme Development and Evaluation Section, Division of Policy Co-ordination

Mr. H. Janiszewski, Industrial Development Officer, Development and Transfer of Technology Section, ICIS

ANNEX 2

DETAILED ANNOTATED AGENDA

I. Opening Address on behalf of Dr. Khane by Mr. Könz.

II. Opening remarks and announcement of procedures by the Chairman.

III. Capital Transfer: Foreign Exchange Financing

(a) From equipment supplier:
- extended credit for equipment purchases
- discounted net additional cost

(b) From joint venture partner:

(i) Equity participation
- majority or minority holdings
- dividend repatriation
- re-investment of profits

(ii) Dilution of equity:
- offer for sale from current holding
- offer for sale from new bonus issues
- valuation of shares offered for sale

IV. Contracts for the Transfer of Technology

1. Normal contracts provide for completeness of information but do not guarantee that the same results would be obtained in the developing countries' installations.

- Can "results" in developing countries at all be guaranteed, if the technology transfer contract occurs in isolation?
- In these circumstances could any guarantees be defined to assure quality of the know-how?
- Is it reasonable for a developing country recipient to be bound by an obligation of secrecy?
- Does the recipient acquire rights to the patents and know-how?

- Should the recipient be obliged to disseminate innovations to the original technology donor, and thus be constrained from transferring technology to other developing countries?
- How does the recipient continue to have access to new technology developed by the donor (payment of technical fee vs. contribution to joint research)?
- Is the recipient free to export his products to third markets?

2. Merits in relocating technology supply contract in a broader package of contracts for industrial co-operation:

   - Contracts between specialised study bureaux of the industrialised countries and institutions in the developing countries.
   - Creating industrial organisations for training and technology in developing countries.

V. Turn-key Contracts for Plant Sales

(i) Principal construction contractor bears general responsibility for the quality and capacity of construction.

   - However, this raises the selling price of the plant.
   - The price premium can only be overcome if the client contractor himself indulges in international competitive bidding, assuming final responsibility himself.

(ii) Even turn-key contractors employ sub-contractors, thus splitting responsibility, unless the technology donor is forced to form a group with a prinoiple contract holder.

   - A degree of "local integration" would re-introduce some responsibility for the client contractor, but through some means prime responsibility must be left with the principle construction contractor.

(iii) A guarantee of mechanical performance flows for a turn-key contract, but leaves the outstanding question of a guaranteed output. Two responses on this problem are: industrial co-operation contracts, and performance/guaranteed contracts.

VI. Industrial Co-operation Contracts

(i) Operations covered by this type of contract are:
- Transfer of technology and technical experience
- Co-operation on research and development
- Production specialisation
- Broader co-operation in the field of production
- Co-operation for the exploitation of natural resources
- Joint marketing of products in each others countries or third markets.

(ii) Supplementary contracts for technical assistance, management and personnel training connected with the turn-key contracts simulate a pattern of industrial co-operation but any responsibility on the turn-key contractor is normally limited to damages with a ceiling of a percentage of his remuneration. This deficiency is sought to be overcome by four methods of contracting which set up a community of interest on the part of the contractor in the results of the undertaking:

(a) Paying the technology supplier with a share in net profits of the undertaking;

(b) Suppliers assuming the burden of financing costs in return for a share of profits;
- Both (a) and (b) require to provide the supplier with a role in the management of the undertaking which proves to be an obstacle.

(c) Joint marketing of output:
- As re-export to the technology supplier or in third markets;

(d) Performance guaranteed contract.

VII. Performance guaranteed contracts

(i) Final acceptance deferred until developing country is able to operate plant to full satisfaction. This builds into the original contract requirements for management and training of personnel.

(ii) Additional risks for the supplier lead to a higher price for the plant.

(iii) Extended period of trial and handing over requires trust and co-operation between the parties and supervision by a third party preferably an independent technical expert.

(iv) Suppliers liability for indemnities and damages may have to be limited to a percentage of total price.

(v) Excess risk above this ceiling on the supplier would have to be covered by an insurance scheme.

VIII. A diluted alternative could be progressive acceptance payments separately for the infrastructural works, the production equipment, and the capacity of the factory. Final performance guarantee acceptance would then be based on the training of local personnel.

IX. Training

(i) What obligations for training can be imposed on foreign firms?
- in the context of a specific contract
- by general legislation

(ii) How can the objectives of training be defined contractually and how can performance be controlled?

(iii) What are the possibilities to provide for training and the acquisition of experience by having national personnel - at all levels - associated to the performance of the contract (costs, secrecy, liability for defective performance)?

X. Leasing

(i) What are possible advantages or obstacles to applying the concept of leasing to industrialisation projects in developing countries?

(ii) If the concept can be applied to such projects, how can the respective rights of the parties be ensured in case of default?

XI. Relief

What are the conditions under which a party should be relieved, temporarily or completely, of its obligations under a contract:
- "force majeure"
- hardship clauses

XII. Applicable Law

The law applicable to the contract:

- local law
- law of the foreign party
- law of a third State
- international law
- a new body of international commercial law referred to e.g. as "lex mercatoria" .

XIII. Settlement of Disputes

(i) Potentiality of Negotiations

(ii) Arbitration

1. How frequently do parties to international contracts for industrial co-operation provide for settlement of disputes through arbitration?
2. What are the principal objections to arbitration?
3. Where such objections to arbitration prevail, are there any other non-judicial forms of dispute settlement available to the parties?
4. Where arbitration in principle is accepted, what aspects should be ameliorated?
5. What can be done to ensure greater participation of nationals from developing countries in arbitration proceedings?

(iii) Issues relating to International Arbitration

- Set up Special Sections under the ICC (Ref. Page 22/23 of Kopelmanas).
- Organised procedure for appointment of independant expert technical appraisal within ICC, or UNIDO.

XIV. Multilateral Investment Insurance/Guarantee Schemes

(i) Would insulate investors from non-commercial risks.

(ii) Would further encourage investment in developing countries and reduce the cost of the investment through a longer pay-back period.

(iii) Quid pro quo would be required by developing countries
- Consequential loss insurance scheme?

XV. Intergovernmental Agreements

(i) North-South:

- Framework arrangements on economic and industrial co-operation to lay down the broad principles and guidelines for industrial co-operation between enterprises of each country (particularly with regard to technology, finance, management, training, complex operations, settlement of disputes).

- Treaties on investment protection:
  the function and responsibility of Governments
  insurance schemes, international arbitration provisions

- The role of joint mixed commissions.

(ii) East-West:

- Economic and industrial co-operation agreements regarding the broad principles and guidelines for co-operation in the above-mentioned areas.

- The role of joint mixed commissions and of sectoral working groups.

- The settlement of disputes, including through international arbitration.

(iii) Multilateral:

- Lomé Convention, noting that international arbitration is an integral part of it.

- Club of Dakar: Proposed Charter on International Industrial Co-operation.

XVI. Possible UNIDO Activities

- Training in negotiating
- Model contracts
- Expert Technical Appraisal
- Co-operation with other UN agencies: UNCTAD, CTC, UNCITRAL, ECE, ILO, FAO.

ANNEX 3

LIST OF BACKGROUND PAPERS

1. The Adaptation of the Juridical Rules of International Trade to the particular relations between the Industrialised and the Developing Countries by Lazare Kopelmanas, Associate Professor at the Faculty of Law of the University of Geneva.

2. Checklist of Issues by Michael E. Schneider

3. Note for Participants in the Seminar on North-South Industrial Co-operation by A. Tiano

4. UNIDO in the context of the New Economic Order by UNIDO Secretariat

5. Joint Paper on International Industrial Co-operation - Scope, Arrangements and required Resources by UNIDO Secretariat

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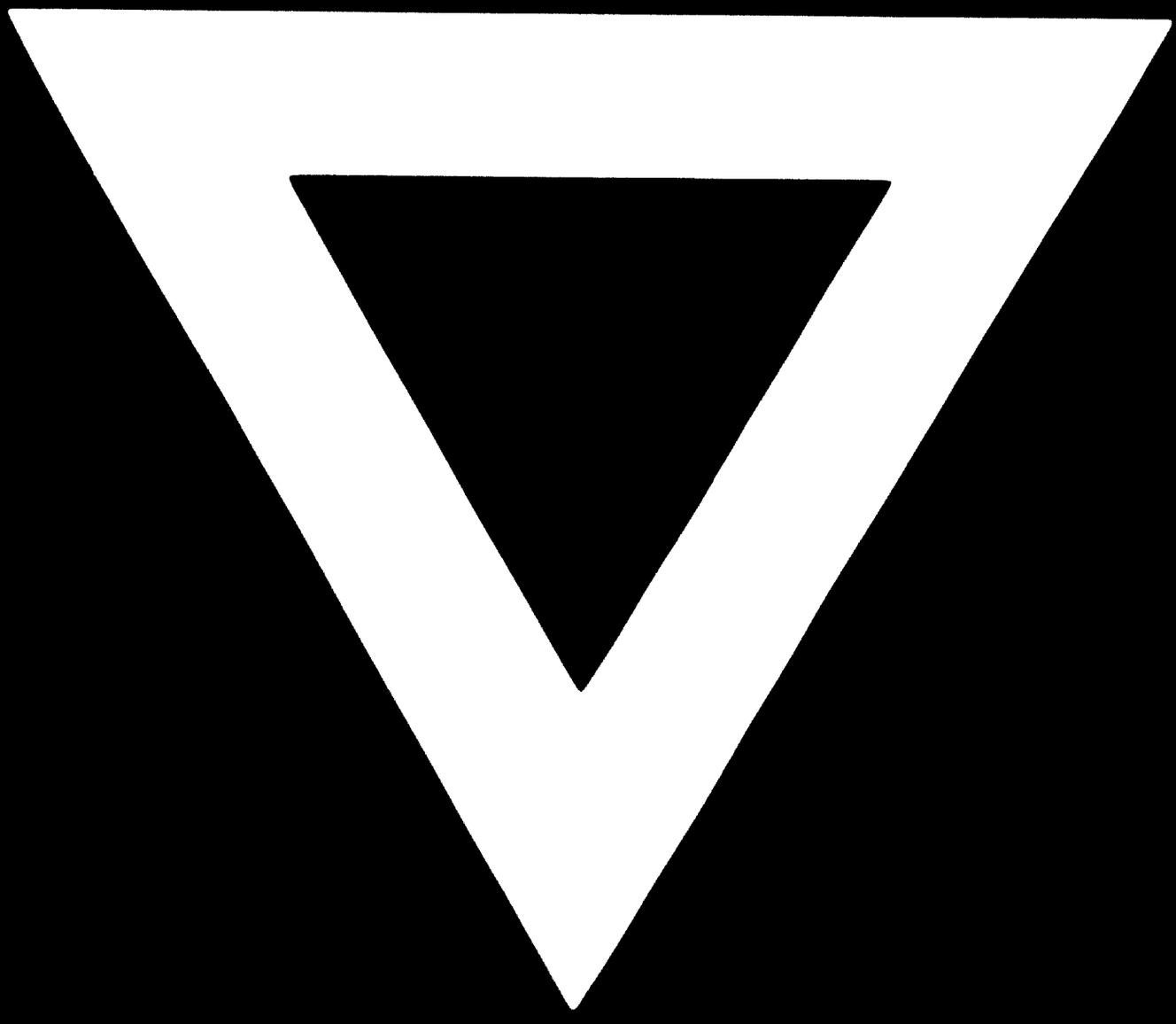

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