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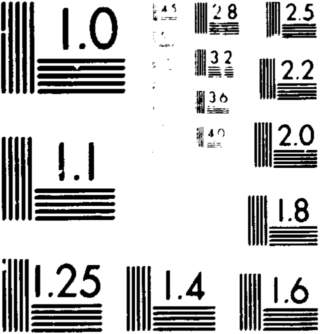

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Meeting of Government Experts on
Regulatory Functions in Transfer of Technology

Vienna, Austria, 29 May - 2 June 1978

Agenda Item No. I

RECENT DEVELOPMENTS IN THE REGULATION OF FOREIGN TECHNOLOGY IN SELECTED DEVELOPING COUNTRIES*/

prepared by

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I. INTRODUCTION

1. This document has been prepared in response to the requests of developing countries and, more particularly, to the recommendations of the Meeting of Heads of National Registries and Similar Institutions in Selected Developing Countries held in Vienna from 6 - 10 March 1978, that data on recent development in national legislation and approved administrative pertaining to the regulation of the inflow of foreign technology should be compiled in one document. A number of documents recently published by UNIDO[1/] and other United Nations agencies describe in detail the systems applied by different countries.

2. Over the past decade a steadily growing number of governments of developing countries have taken steps to introduce - explicitly or implicitly - national technological policies with a view to increasing inputs into priority sectors of the economy, and into industry in particular. Such policies usually include legislative and administrative measures regulating the inflow of foreign technologies.

3. The expanding role of governments in respect of the transfer and use of imported technology is particularly marked in such Latin American countries as Mexico; a similar trend is to be observed in India and the Republic of Korea, and still more recently in Algeria, Egypt, Ghana, Nigeria, Libya, Malaysia, Pakistan, Philippines, Portugal, Spain and Turkey. It is expected that this trend will continue as the benefits accruing from such policy measures become increasingly apparent.

The measures applied vary greatly: some take on the form of consistent, complex technological policies, others that of limited administrative measures and decisions. It should also be emphasized that the policies applied have evolved over the years, undergoing refinement and improvement, as evidenced in the policies adopted by Argentina, India and the Republic of Korea.

4. The regulation of technology inflow to developing countries has to be viewed from a dual perspective. On the one hand, institutional control should ensure that restrictive provisions in agreements contrary to the interests of licensees and the economy should be avoided or minimized as

1/ See, for example, National Approaches to the Acquisition of Technology (UNIDO, "Development and Transfer of Technology Series" No. 1); and Review of Legislative and Administrative Systems for the Regulation of Technology Transfer Agreements (UNIDO, document no. ID/WG.206/2) far as possible. On the other hand, positive institutional and legislative assistance is necessary to promote the inflow of appropriate industrial technology in order to bridge major technological and production gaps. It is only when a judicious balance has been reached between these two aspects that the licensing of foreign technology can serve as a real effective instrument for technological growth in developing countries.

5. UNIDO would welcome comments and suggestions for the inclusion in the present document of further information relevant to developments in developing countries in order to improve current knowledge of events in this important field.

II. DEVELOPMENTS IN LEGISLATIVE ACTIONS FOR SETTING-UP REGULATORY FRAME FOR INFLOW OF TECHNOLOGY

M E X I C O

The Mexican legislation introduced as from January 1, 1973, provides for the creation of a national registry of technology transfer. The law was prepared after very extensive discussions and assessment of the experiences of Argentina, Japan and other countries in this field. The basic orientation of the Mexican technology transfer policy derives from fundamental principles in economics and international relations. The Mexican legislation in this field is oriented towards the development of an efficient and rationalized process for technology importation. Although there is recognition of the country's dependence on foreign technology, an important objective of this legislation is to gain a degree of control over this major import, both in terms of cost and technological impact. Emphasis is placed on evaluating the effect that a technology contract can have on: (a) the balance payments; (b) the creation of jobs; and (c) the improvement of national technological capabilities. The law requires that all agreements must be examined by the National Registry of Technology Transfer, and it goes into considerable detail in enumerating the kind of restrictive practices that must be eliminated from the contract.

The following are basic extracts from the Law for the Registration of the Transfer of Technology and the use and exploitation of patents and trade marks adopted on December 28, 1972 :

Article 1 : The National Register for the Transfer of Technology, in charge of the Ministry of Industry and Commerce, is hereby created.

The National Council of Science and Technology shall be a Consulting Body, as provided in the Law creating the Council.

Article 2 : The registration in the Register mentioned in the preceding article, is obligatory for all documents containing acts, contracts or agreements of every nature which are effective in the National Territory and which have been entered into for the following purposes :

(a) The licensing of the use or exploitation of trade marks;
(b) The licensing of the use or exploitation of patents for inventions, improvements, industrial models and drawings;
(c) The furnishing of technical information by plans, diagrams, models, instruction sheets, instructions, formulas, specifications, formation and training of personnel or otherwise;
(d) The supplying of basic or detailed engineering plans for the building of facilities or manufacture of products;
(e) Technical assistance in whatever form it may be furnishes;
(f) Services for the administration and operation of business enterprises

REPULIC OF KOREA

The Republic of Korea adopted over a period of years a host of various laws pertaining to the regulation of flow of foreign technology and development of indigenous technological capabilities.

The basic regulations of this country are hereby described, discussed and commented.

The "foreign Capital Inducement Law and Act" (no. 1802) was established in August 1966 and revised in March 1973.

The purpose of the Foreign Capital Inducement Law is to promote and administer technology inducement for which the period of royalty payment exceeds one year, together with foreign investments and loans, by allowing tax privileges for royalty payments. The Law stipulates the criteria for judging technology to be induced and sets priorities and procedures for inducing technology. The Economic Planning Board assumes the primary role in approving the foreign technology inducement contracts, in co-operation with the Ministry of Commerce and Industry, the Ministry of Science and Technology and other concerened agencies. The following matters are reviewed when an application for technology inducement is considered; need for the technology inducement, content of the technology, supply method, payment amount and method, terms and conditions of contract and economic and technological feasibility in general.

The last revision (3rd) occurred in December 1976.

The "Technology Development Promotion Law"*) was introduced in December 1967 and revised in December 1972*) (no. 1721)

The purpose of the Technology Development Promotion Law is to build up the nation's indigenous technology development capabilities and also to expedite the modification and adaptation of induced technology through various incentives including tax exceptions, financial support and the like. These benefits can be secured by those who induce foreign advanced technology and incur R&D expenditures to assimilate and improve that technology. In addition to previous acts in 1973 the "Engineering Service Promotion Law" was introduced.

The "Engineering Service Promotion Law" deals with technology inducement contracts for which royalties must be paid for less than one year. The Ministry of Science and Technology holds the primary responsibility for administering the Law in co-operation with the Ministry of Finance and other concerned agencies.

As a result of the above-mentioned acts, the Government decided to centralise its control over 'technology inflow' and in October 1976 established the "Technology Transfer Centre", whose main functions are :

(1) Reviewing and checking adequacy of technology and eliminating unfavourable terms and conditions of licensing agreements (this service already has been carried out at KIST since 1972).

(2) Collection, accumulation and distribution of overseas technical information for industry.

(3) Consultation and guidance service for technology inducement, i.e. assisting industry in identifying and evaluating relevant technologies, unpackaging technologies, and negotiating for the best terms.

(4) Study and review of the proposed technology inducement project's techno-economic feasibility.

(5) Arrangements for research and development of induced technologies to accelerate their digestion, modification and adaptation.

The essential activities of the Korean Centre are further refined in order to cut red tape to facilitate the introduction of required foreign technologies. So far, technology has been induced using the same procedures as for capital goods, with the former regarded as identical with capital goods trade. As a result many ministries and agencies take part in the deliberating of technology inducement proposals and the procedures for government approval are too complicated and time-consuming, making it difficult to cope effectively with the rapidly changing technology market. To remedy this situation and meet mounting needs for technology, technology inducement procedures are to be simplified ant the criteria for government reviewing less stringent. In this connection, the revised Presidential Decree for the Foreign Capital Inducement Law will be soon effective (expected in 1978), according to which projects involving comparatively small charges and short periods - with advance payment of up to US$ 30,000 and royalty payment of up to 3% of net sales for up to three years - will be automatically approved without the present screening procedures. Project with higher royalties and those concerned with the defence, atomic power and computer will remain under the government screening as before yet with new criteria.

ARGENTINA

Two laws were enacted in Argentina in 1971, law no. 19135, prohibiting the imposition of certain restrictive conditions on the automobile industry, and law no. 19231, which prescribes the regulation of agreements for foreign technology and patents and creates a National Registry for licence contracts and transfer of technology. These laws stipulate that contract contracts will not be approved if they contain clauses which, among others, force the purchase of equipment, raw materials or components from certain aspects, restrict export, include unreasonable grant-back provisions, provide trade-mark licensing without know-how, impose jurisdiction of foreign courts or require unreasonably high payments.

A new law, no. 20794, was enacted in late 1974 in Argentina replacing the earlier ones, the main provisions of which are contained in article no. 5 (stipulating which contract approvals will be rejected), and article no. 6 (enumerating restricted clauses, which cannot appear in contracts).

An interesting novelty in this law is the article no. 33, which opens the possibility of getting advice from the National Registry on agreement conditions prior to official submission for approval and registration. This way, the legislation gives the opportunity for extra negotiations with foreign partners and local entrepreneurs.

In August 1977, the Government of Argentina has gain revised its transfer of technology policy, liberalizing in particular screening and approval procedures by enacting the Law no. 21.617, exerpts of which are reproduced below :

Contrary to what was provided in Law 19.231 and in conformity with Law 20.794, contracts of a gratuitous nature are included within the scope of this law. The object of their inclusion is to obtain for the national government a full knowledge of all transactions of a technological nature and at the same time to give greater security to the local recipient with regard to his rights under the licensing instrument in the event of possible violations thereof by third parties.

Law no 21.617 Transfer of Technology Law will include :

Article 1: Any voluntary act of legal consequences having as its principal or accessory object the transfer, assignment or licensing of technology or trade marks by persons domiciled abroad, for a price of free of charge, to physical price or free of charge, to physical or corporate persons, whether public or private, domiciled in this country, must be registered in the National Register of Licence Contracts and Transfers of Technology established by Law no. 19.231 and confirmed by Law no. 20.794 and always provided such acts produce effects in this country.

Article 2: The following voluntary acts of legal consequences are included in the preceding article, their enumeration being merely illustrative :

(a) The acquisition of rights or the grant of licenses for the use of patents, industrial designs and models, trade marks or any other industrial property right that may be established in the future.

(b) The supply of technical knowledge by means of the description of processes, formulae, specifications, or other means, for the manufacture of products or the rendering of services;

(c) Technical consultancy, assistance and services.

(d) The supply of basic and detail engineering.

Article 3: The voluntary acts of legal consequences included in the preceding articles whereby technology or trade marks originating from abroad are transferred to another person also domiciled in this country, must be registered even though the supplier is domiciled in this country. The local supplier of such technology or trade marks shall be liable for the damages that may be suffered by the recipient because of failure to register an act included in this article, when he does not notify such recipient of the existence of the conditions stated therein.

I N D I A

In India, for several years both import of technology and foreign capital investment have been subject to considerable regulation. The process of approval of a foreign collaboration agreement is part of the process of industrial approvals. For industry covered by the Industries (Development and Regulations) Act of 1951,)the entrepreneur is first given a letter of intent which stipulates whether or not foreign collaboration will be considered for the project. Thereafter, he goes ahead with other negotiations including those for foreign collaboration, if permitted. An industrial licence is issued only after such negotiations receive the approval of the Government.

Although foreign-exchange regulations do not refer specifically to technology licence agreements, the power under these regulations to refuse remittances of foreign exchange makes the regulation of technology licensing possible. The policy is to permit sophisticated foreign technology having high priority to be imported that the country could not otherwise acquire. Permission to import will be denied in those fields where indigenous technology is sufficiently developed.

The Foreign Investment Board is authorized to evaluate and approve agreements pertaining to foreign collaboration and which include, inter alia, transfer of foreign technology.

According to the Statement on Industrial Policy laid before Parliament on 23rd December , 1977, foreign collaboration is permitted in fields of high priority and in areas where the import of foreign technology is considered necessary. In such areas preference would be for outright purchase of the best available technology and then adapting such technology to the country's needs. The Indian firms which are permitted to import foreign technology are required in appropriate cases to set up adequate Research and Development facilities so that imported technology is properly adapted and assimilated.

Government have in the Industrial Policy Statement announced on 23rd December 1977, proposed the setting up of a "National Registry of foreign collaboration" in the Secretariat for Industrial Approvals to monitor the progress of the various proposals of foreign collaboration approvals by the Government and to watch how for the Indian firms which are permitted to import foreign technology have been able to set up adequate Research and Development facilities so that the imported technology is properly adapted and assimilated.

B R A Z I L

The flow of technology into Brazil is at present regulated by the Normative Act No. 015 (Registration of Contracts Providing for the Transfer of Technology and Related Agreements) (September 11, 1975) which gives an authority to the National Industrial Property Institute (INPI) to evaluate and approve a host of technology agreements. INPI has been created in 1970 and at present its authority over transfer of technology includes all types of agreements as described below.

- Concept and Basic Conditions of a Licence Contract for the Working of a a Patent : Objective. A "licence" contract shall be deemed to be a contract specifically designed to authorize the actual working by third parties of the subject of a patent regularly filed or granted in Brazil, where an industrial property right has been duly established in terms of Law no. 5.772/71 (Industrial Property Code).

- Concept and Basic Conditions of a Licence Contr t for the Use of a Trademark or Publicity Slogan : Purpose. A "licence" contract shall be deemed to be a contract specifically designed to authorize the effective use, by third parties, of a mark or publicity slogan that has been properly filed or registered in the country, where an industrial property right has been duly established in terms of Law no. 5.772/71 (Industrial Property Code).

- Concept and Basic Conditions of a Contract for Technical-Industrial Co-operation: A contract for "technical-industrial co-operation" shall be deemed to be a contract for the specific purpose of acquiring knowledge, techniques and services required for the manufacture of industrial units and submits, machinery, equipment, components thereof and other capital goods, upon order.

- Concept and Basic Conditions of a Specialized Technical Services Contract : Subject. A "technical services" contract shall be deemed to be a contract for the specific purpose of planning, programming and formulating studies and projects, and likewise for the performance or furnishing of services of a specialized kind that are needed by the country's production system.

Note: In cases where urgent technical services are furnished individually by foreign technicians and the total amount of remuneration does not exceed US$ 20,000 , or the equivalent amount in some other currency, the contract formality may be waived and registration may be made directly on the basis of the invoice, in which the services must be duly specified.

THE PHILIPPINES

The Philippine Investment Incentives Act of 1967 provides for regulation and screening of technology licensing in major fields of industry. There are two tiers of control. For project covered by the Investment Incentives Act, the entrepreneur first submits an agreement to the Board of Investments, which may advise him to modify it before the Board will approve the project. The agreement then has to go to the Central Bank, which may modify it further. The Act, however, does not spell out any policy for technology licensing.

The Central Bank has more comprehensive powers than the Board of Investments to control licence agreements whether they are covered by the Investment Incentives Act or not. Circular no 281 of the Central Bank, dated 26 November 1969 and issued under the Central Bank Act, provides for prior authorization by the Central Bank of all contracts involving remittance of foreign exchange. Pursuant to Section 5 of this Circular, licence agreements covering royalties or payment of rentals or fees for the use of patents, trade marks and copyrights and for the transfer of technology to local licensees by foreign licensors must be submitted to the Central Bank for approval before royalties may be remitted to the foreign licensors.

Section 6 of the Central Bank's Circular no. 289 of 21 February 1970 states that the sale of foreign exchange for current invisible payments by authorized agent banks shall be allowed provided that remittances for royalties, among other things, shall be subject to regulations to be promulgated by the Monetary Board.

Pursuant to Circular no 289, the Monetary Board promulgated certain implementing rules and regulations. In particular, a memorandum to authorized agent banks (MAAB) of 21 February 1970, amended on 5 January 1971, states that remittances of royalties/rentals on patents, trade marks and copyrights, net of the withholding tax, of up to 50 per cent of the royalties for rentals incurred during the year for which the remittance is being paid may be allowed, provided that no royalty remittance shall exceed 5 per cent of the wholesale price of the commodity being manufactured locally under a royalty contract. The tax rate on royalties in the Philippines is 35 per cent.

On 7 December 1973, the Monetary Board promulgated Central Bank Circular no. 393 (see annex III), entitled "Regulations Governing Royalties/Rentals". This Circular permits 100 per cent remittance, net of taxes, of royalty/rentals/fees owed to foreign licensors provided that certain conditions are met.

In 1973 the Board of Investment, which acts as a body responsible for approval of transfer of technology agreements, adopted internal guidelines for the evaluation of licensing and other agreements related to such transfers.

SPAIN

Dramatic changes in the treatment of the flow of technology into Spain have been introduced by Decree 2343 of 21 September 1973 followed by the Ministry of Industry Order of 5 December the same year. Excerpts of both acts are quoted below :

MINISTRY OF INDUSTRY ORDER OF 5 DECEMBER 1973 REGULATING THE ENTRY OF CONTRACTS FOR THE TRANSFER OF TECHNOLOGY IN THE REGISTER ESTABLISHED BY DECREE No 2343 OF 21 SEPTEMBER 1973

Section 1

1.1 The duty to apply for entry of documented contracts, covenants and agreements in the Register established by Decree no. 2343 of 21 September 1973 shall relate to all contracts, covenants and agreements under which foreign technology is acquired directly or indirectly through the agency of a Spanish national, regardless of the nature of the consideration given by the recipient of the technology; that is to say, in a tangible form, monetary or otherwise, or in an intangible form.

1.2 Such application shall be made by any individual or corporation domiciled, resident or legally established in Spain who is a recipient of technology.

DECREE 2343 of 21 SEPTEMBER 1973 REGULATING THE TRANSFER OF TECHNOLOGY

Article 1: The transfer from abroad of technology set out in documented contracts, covenants and agreements, the regulation of which is the purpose of this Decree, may take one or more of the following forms :

(a) Transfer of patent rights and of other types of industrial property

(b) Transmission of non-patented knowledge, of plans, magnetic tapes carrying digital information, diagrams, specifications and instructions and, in general, the transfer of confidential information applicable to productive activities that has been accumulated by and is the property of the enterprises controlling it.

(c) Project study and development, preparation of preliminary or feasibility studies and technical plans for the execution of projects; services connected with the assembly, construction and operation of plants and their maintenance and repair.

(d) Any aspect of research, analysis, programming, consultative and advisory services for management and administration

(e) Staff training and re-training, whether or not connected with those services.

(f) Technical or economic documentation and information services

(g) Other forms of technical assistance

T U R K E Y

In Turkey, the inflow of technology - within the scope of treatment of foreign investments - has been regulated as early as from 1954 by the Foreign Investment Encouragement Law excerpts of which concerning its scope are reproduced :

Subject of the Law

Article 1: This law shall apply to the foreign capital imported into Turkey and to loans made from abroad by the decision of the Foreign Investment Encouragement Committee and the approval of the Council of

Ministers provided that the enterprise in which the investment shall be made :

(a) will tend to promote the economic development of the country

(b) will operate in a field of activity open to Turkish private enterprises

(c) will entail no monopoly or a special privilege

The Foreign Investment Encouragement Committee referred to in this Article and established according to Article 8, will hereinafter be referred to as "The Committee".

Foreign capital base

Article 2: For the purpose of the application of this Law, the term "Foreign Capital Base" shall mean the sum of the values assessed and fixed in the manner described hereunder :

(a) The following items imported from abroad for the efficient establishment, expansion or reactivation of an enterprise as envisaged by this Law :

1 - Capital in the form of foreign exchange

2 - Machinery, equipment, instruments and the like, machinery components, spare parts and materials and other necessary goods approved by the Committee

3 - Intangible rights such as licences, patent rights and trade marks and services.

(b) The experts selected by the Committee will assess the value of the imported capital in the form of goods, services and intangible rights and will determine whether these are goods and values imported for the purpose of the enterprise approved by the Committee.

The assessment made by the experts may be reviewed and modified by the Committee.

ANDEAN PACT
(VENEZUELA, COLOMBIA, ECUADOR, PERU)

One of the earliest and most important decisions ever taken in the area of regulating the inflow of technology and the treatment of foreign investment by developing countries was effected by the Andean Group and which has affected a number of similar legislations both in and outside Latin America. The historic Decision 24 by the Junta Cartagena followed by Decision 84 and 85 has established new dimensions in the treatment of the flow of technology and set a basis for direct Government role and responsibility in this vital field.

Parts of above-mentioned Decision 24 and other acts are hereby reproduced:

Article 6: Control of fulfilment of the obligations contracted by foreign investors shall be the duty of the organization which registers the investment, in co-ordination with the proper government divisions and agencies in each case.

In addition to the functions indicated in other provisions of the present regime and of those established in the respective regulations, the competent national body shall :

(a) Control fulfilment of the commitments of national participation in the technical, administrative, financial and commercial management, and in the capital, of the company;

(b) Authorize in an exceptional way the purchase of shares, participations or rights of national or mixed companies by foreign investors, in accordance with the provisions contained in Articles 3 and 4 of the present regime;

(c) Establish a system of information and control of the prices of the intermediate products which may be furnished by suppliers of foreign technology or capital;

(d) Authorize the remittance abroad, in freely-convertible currency, of every amount which the companies or investors may be entitled to remit in accordance with the present regime and with the national laws of the respective country;

(e) Centralize the statistical, accounting, information and control, registrations connected with direct foreign investments, and

(f) Authorize licensing contracts for the use of imported technology and for the exploitation of trade marks and patents.

Article 18: Every contract on importation of technology and on patents and trade marks must be examined and submitted for the approval of the competent body of the respective Member Country, which much appraise the effective contribution of the imported technology, by means of an estimate of probable profits, the price of goods containing technology, or other specific forms of measuring the effects of the imported technology.

TEMPORARY PROVISIONS

Article A: The present regime will become valid when all the Member Countries have deposited in the Office of the Secretary of the Board the Instruments by which it is put into practice in their respective territories in accordance with the provisions of the second paragraph of Article 27 of the Cartagena Agreement.

Article B: Foreign investment, which exist in the territory of the Member Countries at the time in which the present regime becomes valid, must be registered before the respective competent national body within the following six months.
These investments will continue to enjoy the benefits granted by current provisions in every respect which is not contrary to the present regime.

Article C: While the regulations established in Temporary Article G of the present regime have not become valid, the Member Countries will abstain from signing unilateral agreements on industrial property (trade marks and patents) with third countries.

Article D: Within the three months following the date on which the present regime becomes valid, each Member Country will designate the organization or organizations which are competent for the authorization, registration and control of foreign investments and for the transfer of technology, and will inform the other Member Countries and the Board regarding that designation.

Article E: All contracts on the importation of technology and on licenses for the exploitation of trademarks and patents of foreign origin, signed prior to the date on which the present regime becomes valid, must be registered before the competent national body within the six months following that date.

Article F: Within the six months following the date on which the present regime becomes valid, the Committee, upon request of the Board, will approve the regulations of the Subregional Office of Industrial Property (Trade marks and Patents).

Article G: Within the six months following the date on which the present regime becomes valid, the Committee , upon request of the Board, will adopt regulations for applying, the provisions on industrial property (trade marks and patents) which will comprise, among others, the subjects which appear in Annex no 2.

Article H: Member Countries commit themselves not to establish incentives for foreign investment other than those contemplated in their industrial development legislations at the time that the present regime becomes valid, while the obligation referred to in Article 28, second paragraph, of the Cartagena Agreement, on harmonizing industrial development legislations, has not been fulfilled.

Likewise, before November 30, 1972, the Committee, upon request of the Board, will adopt the necessary measures to harmonize the regime of incentives applicable to the other sectors.

Article I: Within the three months following the date on which the present regime becomes valid, the Committee, upon request of the Board, will determine the treatment applicable to capital belonging to national investors of any Member Country other than the recipient country.

Within the same period of time, the Committee, upon request of the Board, will determine the rules which are applicable to the investments that the (Corporacion Andina de Fomento) Andean Corporation of Development may make in any of the Member Countries.

PORTUGAL

Decree Law no. 239/76 of 6 April 1976 defined a code for direct foreign investment in Portugal, and laid down general conditions for this kind of investment and fixed the rights and guarantees inherent in the acceptance of it.

Among the principles underlying this code was the recognition of the value of foreign investment for national economic development provided it was subordinated to the requirements of that same development and to the general strategy of the State in matters of economic policy. An attempt was thus made in that Decree-Law to establish a point of balance between safeguarding the interests of the country and encouraging the foreign investor.

In the period of somewhat more than a year following the publication of Decree Law no. 238/76, a number of important events have occurred which have led to a better definition of the overall politico-economic situation; in particular, the new Constitution has been promulgated, the Assembly of the Republic has been elected, the Programme of the Constitutional Government has been approved, and the limits of the private sector in the economic sphere have been defined.

Criticisms and suggestions have meanwhile been received about the said Decree-Law and many of them have shown a proper understanding of the problem of foreign investment in countries such as Portugal, while at the same time the country's economic situation has developed to the point of being now substantially different from what it was at the beginning of 1976.

In these circumstances, it has become necessary to revise the provisions of Decree Law no. 239/76 and to publish a new code of foreign investment which will take into account the system of selectivity and control which is necessary in the national interest, and at the same time contribute towards the promotion of investment.

As regards transfers of technology, the system off case by case authorization has also been maintained in view of the importance which such transfers may assume in the development of a national technological capacity within the scope of the Plan and their possible contribution towards this objective within the framework of an overall policy; furthermore, existing agreements for the transfer of technology which have not already been appraised by the Bank of Portugal shall be submitted to the Institute for registration purposes, since this will better safeguard not only the national interest but also of the bodies supplying and receiving the technology.

The Institute of Foreign Investment will continue to be responsible for the evaluation of investment projects and for the granting of the respective authorizations as well as for the presentation for approval to a higher authority of applications for investment under the contractual regime.

The said Institute will work closely with the Bank of Portugal and with all State organizations which are required to give an opinion on such projects and will, for all purposes, be the only body with which the investor has to deal.

The Bank of Portugal as the central bank and under the guidance of the Government will continue to be responsible for monetary and exchange matters and especially for the control of exchange operations.

Transfer of Technology

Article 25 :

1. Joint agreements for the transfer of technology between residents in Portugal and residents abroad shall in all cases depend on special and prior authorization being granted by the competent authority.

2. Appeals against decisions taken by the competent authority may be made to the Minister of Planning and Economic Co-ordination.

Article 26 :

1. Agreements for the transfer of technology are deemed to cover all acts and transactions in connexion with :

(a) the sale of or the granting of rights for the use of patents, trade names, models, drawings or inventions as well as the transfer of other non-patented know-how;

(b) the rendering of technical assistance in the field of company management, the production or marketing of any goods or services which entail expenditure arising from consultations with or the movement of experts, the drawing up of plans, the supervision of production, market studies or personnel training;

(c) agreements with specialized companies for the construction or maintenance of industrial units, roads, bridges and ports;

(d) any other form of technical assistance.

2. Even when connected with direct foreign investment or with investment in branches of foreign companies, transfer of technology are deemed to be covered by the provisions of this chapter.

Decree no. 53/77 of 24 August 1977

Regulations governing Transfer of Technology

Having regard to the provisions governing agreements for the transfer of technology as contained in Articles 25 to 28 of Decree-Law no. 348/77 of 24 August.

The Government decrees, under the terms of sub-paragraph (c) of Article 202 of the Constitution, the following :

Article 1: The drawing up of agreements for the transfer of technology between residents in Portugal and residents abroad, as well as the alterations or renewal thereof, shall in all cases depend on special prior authorization being granted by the Institute of Foreign Investment, hereinafter referred to as the Institute.

Article 2 :

1. The provisions of this Decree shall apply to all agreements for the transfer of technology whether or not they involve industrial property rights, whether or not private or public bodies or international organizations are parties thereto and whether or not they are drawn up individually or in conjunction with direct foreign investments.

2. Also covered by the provisions of this Decree are transfers of technology in which the recipients are associate companies, branches or any other form of representation of foreign companies.

Article 3 :

Agreements for the transfer of technology are deemed to cover all acts or contracts in connection with ;

(a) The granting or licensing of rights for the use of patents, trade names or marks, models, drawings or inventions as well as the transfer of other non-patented know-how;

(b) the rendering of technical assistance for company management and for the production or marketing of any goods or services entailing expenditure arising from consultation with or the movement of experts, the drawing up of plans supervision of production, market studies or personnel training;

(c) agreements with companies specialized in the construction and maintenance particularly of industrial units, roads, bridges and ports;

(d) any other form of technical assistance.

Article 4 :

1. Agreements for the transfer of technology as well as all or any alteration thereto shall be deemed legal, especially for payment purposes, only when duly appraised, authorized and registered by the Institute.

2. The full text of draft agreements for the transfer of technology is to be submitted in triplicate to the Institute which may request any clarification necessary for the appraisal thereof and which will give its decision thereon within a period of ninety days renewable for one further period of ninety days by order of the Minister of Planning and Economic Coordination.

VENEZUELA

The legal framework in this country for the treatment and regulation of the flow of technology has been based on decisions 24, 37, 84 and 85 of the Junta Cartagena.

The competent regulatory agency to deal with the flow of technology is the Superintendency of Foreign Investments (SIEX) subordinated to the Ministry of Development

The decree no. 63 of 29 April 1974 describes the following duties of SIEX :

Chapter VII : Importation of Technology and Use and Exploitation of Patents and Trademarks

54. Any contract concluded by foreign, national or joint enterprises relating to the importation of technology and the use and exploitation of patents and trade marks shall be approved and registered by the Superintendency of Foreign Investments within 30 working days from the date of its conclusion.

55. The following documents shall likewise be subject to registration under the foregoing article: deeds, contracts and agreements of any kind liable to have effects on national territory, irrespective of whether or not such documents involve payment or any consideration, and which have been concluded for the following purposes :

1. licence to use or authorization to exploit trade marks;
2. licence to use or authorization to exploit patents for inventions, improvements and industrial designs;
3. the supply of technical know-how in the form of plans, diagrams, models, instructions, formulae, specifications, the training or preparation of personnel and other forms;
4. the supply of basic or specific engineering in connexion with the installation of plant or the manufacture of goods;
5. technical assistance in whatever form it is provided;
6. administrative and management services.

56. The contracts referred to in the preceding articles shall, as a minimum, contain relevant and detailed information on the following matters:

(a) the identity of the contracting parties together with express indication of their nationality and domicile, as well as of any intermediaires;

(b) a description of the technological contribution and identification of the patents or trade marks which are the subject of the contract;

(c) details of terms and conditions for the transfer of technology;

(d) the contractual value of all the elements involved in the transfer of technology expressed in a form similar to that provided for registration of direct foreign investment in Decision no. 24 of the Cartagena Agreement and in these Rules;

(e) the duration of validity which, in the case of technological contracts concluded after the entry into force of these Rules, shall not exceed five years;

(f) the mode of payment and the recipient country.

57. In accordance with its duties as laid down in Articles 20 and 25 of Decision no. 24 of the Cartagena Agreement the Superintendency of Foreign Investments shall be empowered to define, after consultation with the Minister of Development, those restrictive trade and other clauses which, if contained in the contracts referred to in Articles 54 and 55 of these Rules, would preclude their registration.

58. Technological contracts signed after the entry into force of these Rules shall contain a clause requiring the supplier to train national personnel with a view to making the best possible use fo the technology provided under the contract and to promote development and technological research activities in the country.

59. Technological contributions made under the deeds, contracts and agreements referred to in Articles 56 and 58 above shall entitle the supplier to the payment of royalties, subject to the approval of the Superintendency of Foreign Investments, but shall not, however, be deemed a contribution by the owner or supplier of the technology to the capital of the recipient undertaking, whether national or joint.

When the technology is supplied to a foreign enterprise by its parent company or by another branch or subsidiary of the same parent company, the payment of royalties shall not be authorized and no deduction for the purposes of tax shall be admissable under this heading.

First paragraph: The following shall be deemed to be technological contributions: any supply, sale lease or assignment relating to trade marks, patents or industrial designs; assistance with technical processes and administrative procedures through the provision of qualified personnel: instruments, models, documents or instructions concerning manufacturing processes and techniques; and any other article or service of a similar nature which the Superintendency of Foreign Investments deems should be classed as such.

Second paragraph: This provision shall not apply to personal services which are occasional or which represent an amount below the relevant ceiling fixed by the Superintendency of Foreign Investments. The duty to inform the Superintendency of Foreign Investments in advance shall be applicable in all cases.

60. The Superintendency of Foreign Investments may at any time verify that contracts are carried out in accordance with the approved terms and, in this connexion, the contracting parties shall, if so requested, report on the activities performed under the contracts and, in particular, on whether the process, patent or trade mark is being effectively exploited in satisfactory economic conditions.

In the event of a breach of the terms of an approved contract, the Superintendency may, according to the gravity of the breach, suspend or revoke the registration of the contract, stating its reasons for so doing.

61. Contracts relating to the importation of technology and to patents and trade marks, which were concluded before January 1, 1974, and are still in force, shall be submitted to the Superintendency of Foreign Investments for registration within six (6) months from the date of entry into force of these Rules.

62. Payments of royalties and other fees for the use of trade marks, patents or industrial designs shall not be permitted beyond the period of validity of the industrial property titles granted under the Industrial Property Law.

63. The deeds, agreements or contracts, as well as amendments thereto, referred to in Articles 56 and 58, which have not been registered with the Superintendency of Foreign Investments, shall have no legal effect and accordingly shall have no effect either as between the parties or as against third persons.

P E R U

The Peruvian legislation regulating the transfer of technology from abroad, as well as the regulation of foreign capital, are represented by Decree-Laws 18.900 and 18.999 which give effect to decisions 24 and 37 of the Junta Cartagena.

Under Decree Law 18.999 the Industrial Property Office of the Ministry of Industry and Tourism is the competent agency responsible for evaluating contracts on the transfer of technology (patents, know-how) as well as consultancy services and others.

The currency control is exercised by the Ministry of Economic Affairs and Finance and the Central Bank of the Nation, which are the competent agencies named by Decree Law 18.275.

III. BRIEF DESCRIPTION OF STRUCTURES OF REGULATORY AGENCIES IN SELECTED DEVELOPING COUNTRIES

The present chapter contains a unique collection of organizational set-ups and charts applied by various developing countries and concerns itself with administration structures regulating the flow of technology in those countries. Furthermore an attempt has been made to support presented structures by excerpts of corresponding legislation in those countries in order to describe fully applied legislative and administrative systems.

It is intended by the Secretariat of UNIDO to update collected data incorporating new information, changes etc. which may occur in the future.

MEXICO

Table 1: Organisational set-up regulating the inflow of technology

	Commission on Foreign Investment
	Ministry of Industry and Commerce
	National Register for Transfer of Technology
consulting body	National Council of Science and Technology

Organization, functions and place of national registry for technology transfer

ARTICLE 4: The documents containing the acts, agreements or contracts referred to in Article 2, shall be filed with the Ministry of Industry and Commerce for registration in the National Register for the Transfer of Technology, within 60 days from the date of their execution. If filed within this period, the registration shall be effective from the date of their execution. Upon expiration of said period, the registration shall be effective only from the date of filing.

Further, any amendment of acts, agreements or contracts referred in Article 2, must be filed for registration with the Ministry of Industry and Commerce, as provided in Article 2. When the parties terminate the contracts or agreements prior to the termination date stipulated therein, notice shall be given to the Ministry of Industry and Commerce within 60 days from the date of termination.

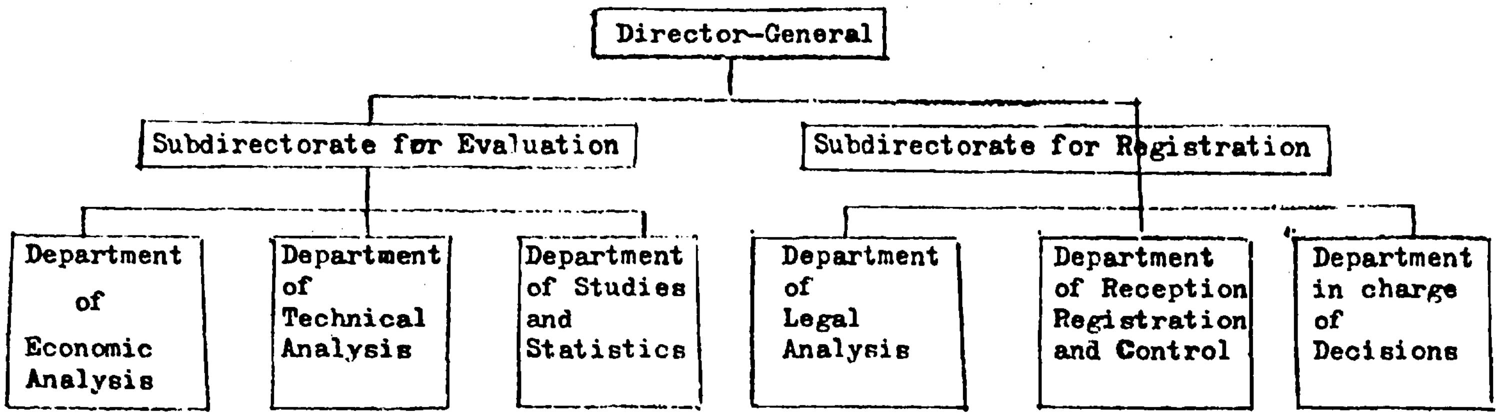
ARTICLE 10: The Ministry of Industry and Commerce shall pass on the registration and non-registration in the National Register for the Transfer of Technology within a period of 90 days following the filing with it of the documents containing the acts, agreements or contracts referred to in Article 2. Upon the termination of this period without the Ministry having rendered its decision, the respective act, agreement or contract shall be registered in the National Register for the Transfer of Technology.

ARTICLE 11: The Ministry of Industry and Commerce may cancel the registration in the National Register for the Transfer of Technology, of the acts, agreements or contracts when the terms under which they were registered are amended or modified contrary to the provisions of this Law.

ARTICLE 12: The Ministry of Industry and Commerce is authorized to verify at any time the compliance of the provisions of this Law

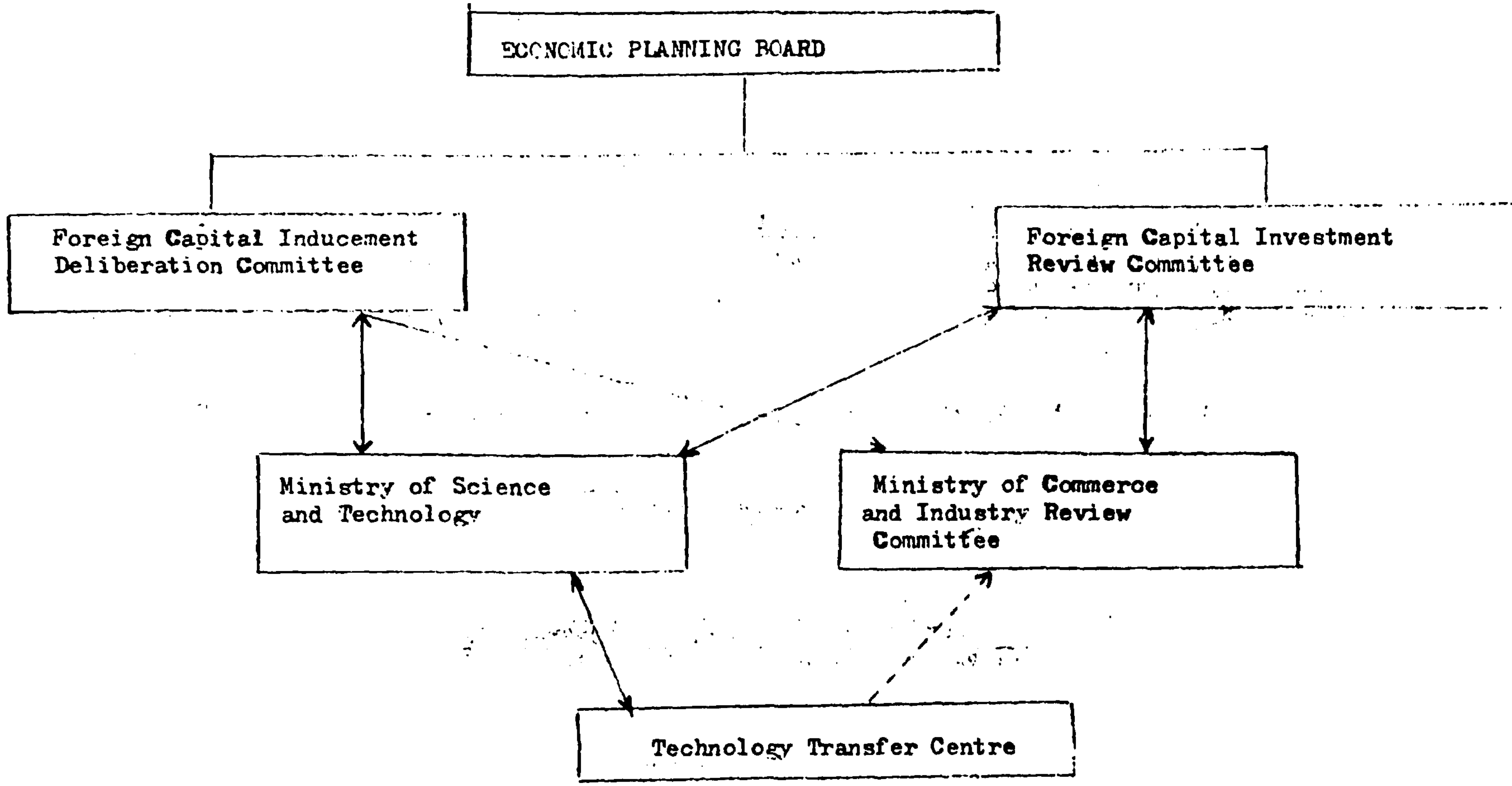
MEXICO

Table 2: Organization chart of the National Registry for Transfer of Technology in Mexico



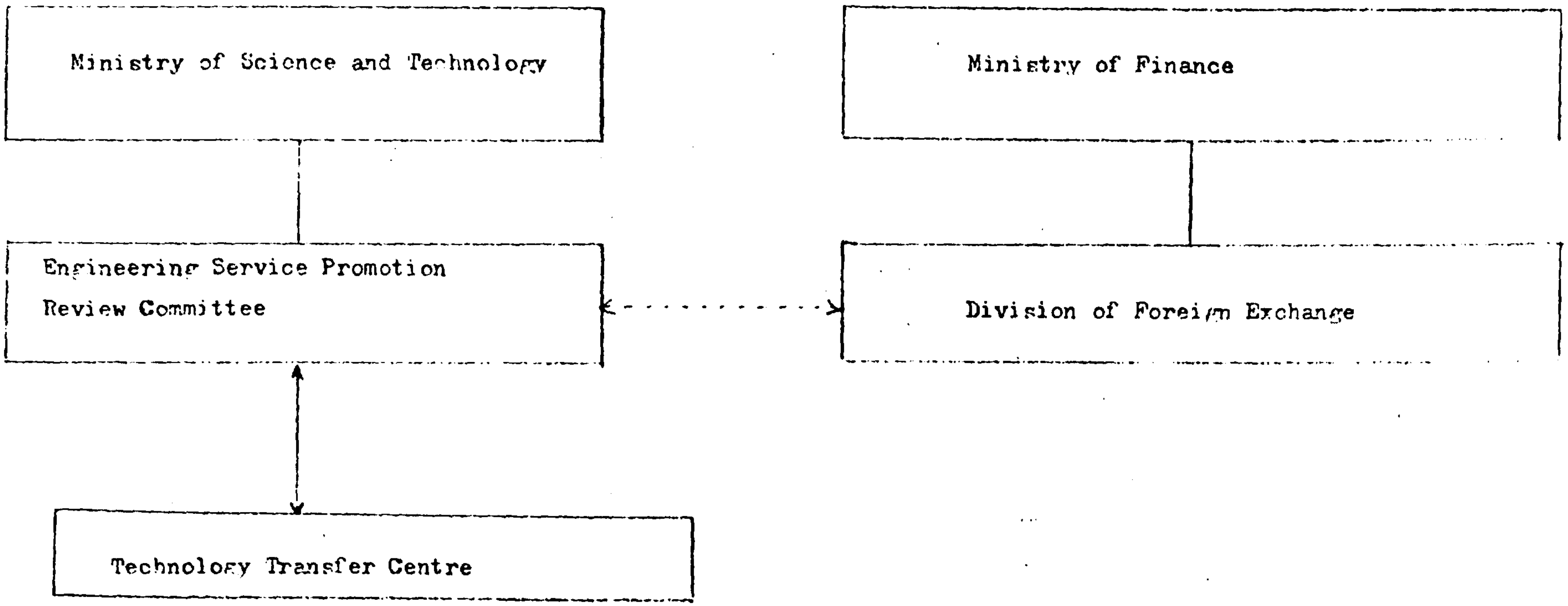
KOREA, Republic of

Table 3: Organizational set-up regulating the inflow of technology



KOREA

Table 4: Organizational set-up regulating the inflow of certain technical services



KOREA

In Korea a special body called Final Decision Committee has been established to issue decisions in respect to transfer of technology agreements. It deals with two categories of agreements as outlined:

(A) Contracts of conditions exceeding:

Duration : 3 years

Initial Royalty : $30,000

Running Royalty : 3 per cent of net sale

"Foreign Capital Inducement Deliberation Committee"

Chairman: Minister of Economic Planning Board

Members: Ministers of Finance,
Agriculture and Forest
Commerce and Industry
Construction
Science and Technology

Governors of Bank of Korea
of Foreign Exchange Bank

Outstanding economists, lawyers, scholars nominated by the President

(B) Contracts up to:

Duration : 3 years

Initial Royalty : $30,000

Running Royalty : 3 per cent of net sale

"Foreign Capital Investment Review Committee"

Chairman: Assist Minister of Economic Co-operation of Economic Planning Board

Members (20): Directors of each ministry and banks and institutes

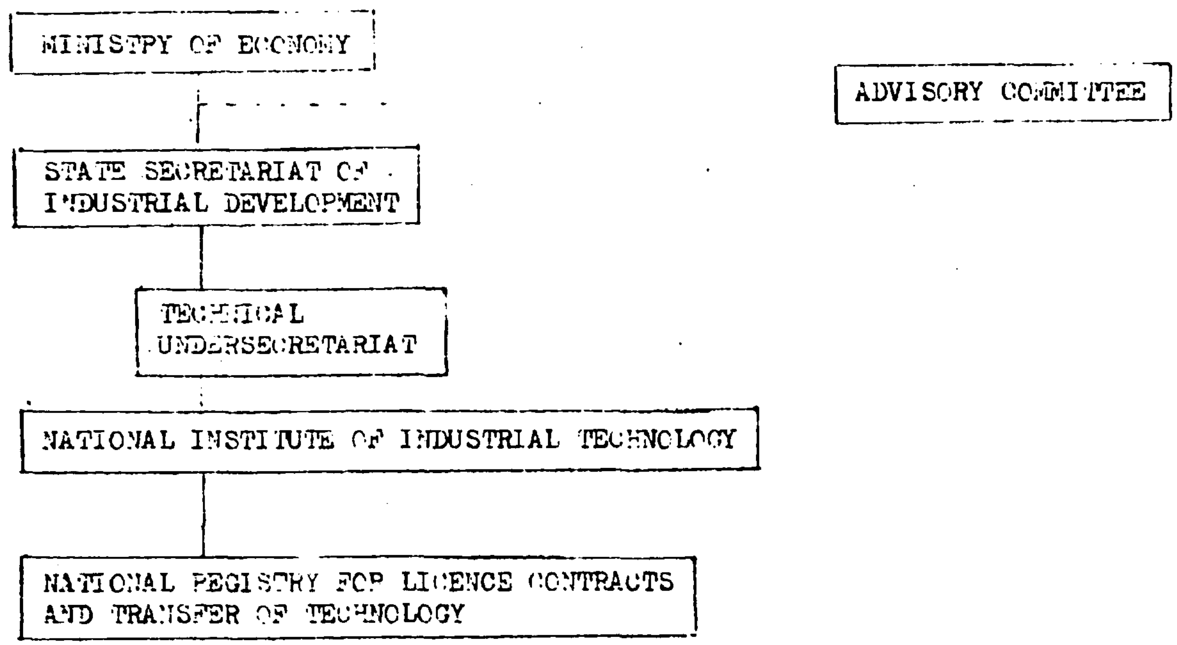
Contracts related to purely engineering services of a duration of 1 year and less are dealt with by the "Engineering Service Promotion Review Committee":

Chairman: Vice Minister of Science and Technology
Members : Directors of each ministry

Contracts other than of purely engineering services nature of a duration of less than one year are dealt with by the "Foreign Exchange Division" of the Ministry of Finance.

ARGENTINA

Table 5: Organizational set-up regulating the flow of technology



ARGENTINA

The decisions of the National Registry are reviewed by an advisory committee composed of officials of the Secretariat of Industrial Development The Secretariat of Science and Technology, and the National Development Bank before they are submitted through the Technical Secretariat to the Secretary of State for Industrial Development for final approval or rejection.

Prior examination and binding clauses

Article 7: Voluntary acts of legal consequences which, in accordance with the preceding articles, are subject to nonautomatic registration according to the provisions of this Law, shall be subject to prior examination by the Enforcement Authority. For the act to be approved, it must at least include the following clauses:

(a) Identification of the services which will be rendered by the supplier of the technology or trade marks;

(b) Identification of the services which will be rendered by the recipient of the technology or trade marks. The consideration for each one of the services rendered by the supplier shall be specified with the greatest accuracy possible;

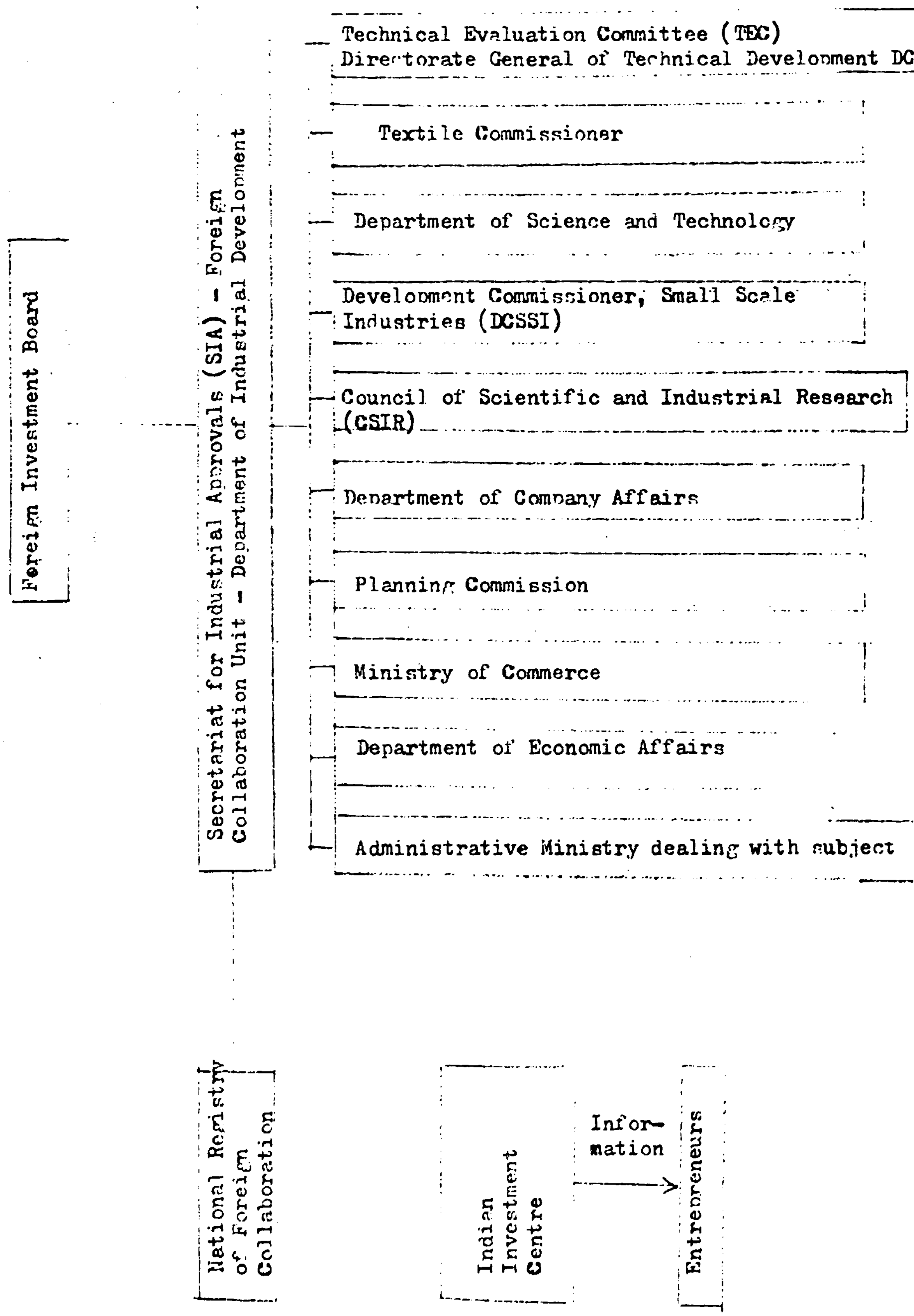
(c) Determination of the effective term of the contract;

(d) In acts that involve the transfer of technology, the technical aims which the recipient intends to achieve by said transfer must be indicated;

(e) A declaration by the suppliers of the technology that his is familiar with this Law.

INDIA

Table 6: Organizational set-up regulating the flow of technology



INDIA

The Technical Evaluation Committee considers the proposal from the technical angle and furnishes comments to the SIA and to the Administrative Ministry dealing with the subject. The comments of the TEC, CSIR, DCSSI, the Administrative Ministry etc. are placed before the FIB for consideration. The various aspects of the proposals such as need for foreign collaboration, the inter se priority of the industry, the reasonableness of the terms offered by the foreign collaborator etc. are discussed in detail before a view is taken by the Foreign Investment Board to recommend or reject the proposal. The minutes of the meeting of the FIB are submitted to the Secretary of the Department of Economic Affairs for approval in his capacity as the Chairman of the FIB and thereafter submitted to the Minister (Industry) for final approval. After approval of the minutes by the Minister of Industry final orders are issued by the SIA to the individual applicants. As per present procedure, final orders are required to be communicated to the applicant within 90 days from the date of receipt of the application by the SIA .

The following is the structure of the FIB and the TEC:

"THE Foreign Investment Board" (FIB) is responsible for all matters relating to the approval of such collaboration proposals.

The constitution of the Foreign Investment Board is as follows:

1.	Secretary, Ministry of Finance (Department of Economic Affairs)	Chairman
2.	Secretary, Ministry of Industry (Department of Industrial Development)	Member
3.	Secretary, Ministry of Petroleum	Member
4.	Secretary, Ministry of Commerce	Member
5.	Secretary, Department of Company Affairs	Member
6.	Secretary, Planning Commission	Member
7.	Secretary, Department of Science and Technology	Member
8.	Secretary of the Administrative Ministry concerned	Member
9.	Director General, Council of Scientific and Industrial Research	Member
10.	Director General, Technical Development	Member
11.	Joint Secretary in charge of sia, Department of Industrial Development	Member-Secretary

"The Technical Evaluation Committee" (TEC):

Director General of Technical Development	Chairman
Representatives of CSIR, Department of Science and Technology	Member

Special procedure for the import of design and drawings

The Government has introduced a simplified procedure for the import of designs and drawings or the manufacture of certain items of industrial machinery, machine tools and electrical equipment.

BRAZIL

In this country the techno-economic evaluation of technology agreements is being carried out by the National Industrial Property Institute (INPI) subordinated to the Ministry of Industry and Trade within the scope of the so-called concept and basic conditions of a contract for the furnishing of industrial technology as outlined below.

Purpose:

A contract "for the furnishing of industrial technology" shall be deemed to be a contract specifically designed to allow the acquisition of knowledge and techniques not covered by industrial property rights filed or granted in the country and which are to be applied in the production of consumer goods or inputs in general.

The contract must cover in particular:

(a) The supply of all the technical engineering data for the process or the product, including the methodology of technological development used to obtain it, such data being represented by the body of formulae and technical information, documents, industrial designs, instructions for operations and other like elements allowing manufacutre of the product;

(b) The furnishing of data and information to update the process or product;

(c) The furnishing of technical assistance by the furnisher's technicians, and the training of specialized technical personnel of the acquiror.

PHILIPPINES

Table 7: Organizational set-up for regulating the flow of technology

- Government
  - Board of Investment
  - Monetary Board
    - Central Bank of the Philippines
      - Foreign Exchange Division

Necessity of approval and registration of the contracts with the Central Bank

The contracts regarding technology transfer as well as renewals thereof shall be submitted to the Central Bank for approval and registration. In approving/registering such contracts and/or renewals thereof, the Central Bank shall consult the Board of Investments except in case of rental/distribution/royalty contracts covering movie and television films.

SPAIN

Table 8: Organizational set-up for regulating the flow of technology

Ministry of Industry

Director General
Industrial Development of Technology

Office of Director General

Register of consultant of industrial project development enterprises

Below is outlined the evaluation and approval procedure based on the Ministry of Industry ORDER of 5 December 1973:

1.3 The application shall be submitted in triplicate in the form of a request to the Director General of Industrial Development and Technology and shall be accompanied by three copies of the contract, which for the purposes of this Order shall be drawn up in Spanish, of the memorandum and of the documentary evidence specified in sub-paragraphs 1.5 and 1.6 below.

1.4 The memorandum shall include information and data on the contracting parties, the technological content of the transfer, the scope and terms of the agreement, and any other data supporting the content.

The appropriate forms for the application and the memorandum shall be provided by the office of the Ministry of Industry.

1.5 The documentary evidence shall comprise:

(a) A public document declaring the applicant's representative status;

(b) Where the applicant is an industrial enterprise, a copy of the entry relating thereto in the Industrial Register or, where appropriate, the most recent addition thereto;

(c) A copy of the Government's decision, if any, authorizing foreign participation in the capital;

(d) Where advisory or project development services are concerned complete texts of the agreed technical offers and specifications;

(e) Any other documents that the Ministry of Industry may consider necessary.

(b) Any decision of the Committee may be appealed by the parties concerned within 30 days as from the date of the notification thereof. The competent authority to deal with such appeals in constituted by the Ministers of Finance, Economy and Commerce and State Enterprises. The decisions of this authority are final.

Article 9

(a) The Ministry of Economy and Commerce is the competnet authority in the application of the provisions of this Law.

(b) The Ministry of Economy and Commerce shall have the authority to order release from the custody of the customs of foreign capital imported in kind according to the decisions of the Committee.

For the simple licencer agreement licencee applies for approval to the Ministry of Finance where financial evaluation takes place while the techno-economic approval is being carried out by the Ministry of Industry and Technology. Such procedure is carried out in compliance with Decree No 17 related to the Invisible Transactions Notifications.

ANDEAN PACT

Below reproduced extracts of decision 84 provide details as to the contents of technology agreements:

Contracts for the importation of technology shall contain the following data:

Concessionary (name and profession)

Grantor (name and nationality)

Affiliation between concessionary and grantor, if any

Particulars of the technology being transmitted and its intended use

Description of the subject of the agreement: process technology, product technology, trade marks, patents, technical assistance, operative skills, training

Mode of payment of royalties (fixed and variable, parts and basis for the variable payment) : amount of the fixed sums or periodical payment, and percentages where payments are variable.

For information purposes general guidelines of the Andean Pact are reproduced as adopted by member countries.

GUIDELINES FOR THE AUTHORIZATION, REGISTRATION AND CONTROL OF FOREIGN INVESTMENT

Every application for foreign investment must contain:

I. Individualization of the investor

(a) Name and commercial style;
(b) Nationality;
(c) Constitution of the directory;
(d) Composition of personnel and management;
(e) Economic activity;
(f) Copy of the public deed of organization.

II. Details of the investment

(a) Financial resources in currency or credit:

- Currency in which the investment is made
- Capital of national origin
- Capital of foreign origin
- Credit from main office (or parent company)
- Credit from other sources
- Effective interest to be paid for credits.

(b) Physical or tangible resources such as:

- Industrial plants
- New and reconditioned machinery
- New and reconditioned equipment
- Spare parts
- Loose parts and pieces
- Raw materials
- Intermediate products.

(c) Resources derived from technology or intangibles such as:

- Trade marks
- Industrial designs
- Management capacity
- Technical knowledge (know-how) patented or not patented
- Possible alternative technologies.

Technical knowledte (know-how) may be presented in the following forms:

(i) Objects:

Samples
Non-registered models
Machinery, devices, pieces, tools
Manufacturing apparatus

(ii) Technical documents:

Formulas, estimates
Plans, drawings
Unpatented inventions

(iii) Instructions:

Elaboration (or working up) notes, manufacturing, functioning (operation) of the product or of the process;

Explanations or practical advice for performance;

Technical booklets;

Complementary explanations of patents;

Manufacturing circuits;

Control methods;

Amounts to be paid for royalties;

Individualization of the receiver of royalties.

Article 19:

Contracts on importation of technology must contain, at least, several clauses on the following subjects:

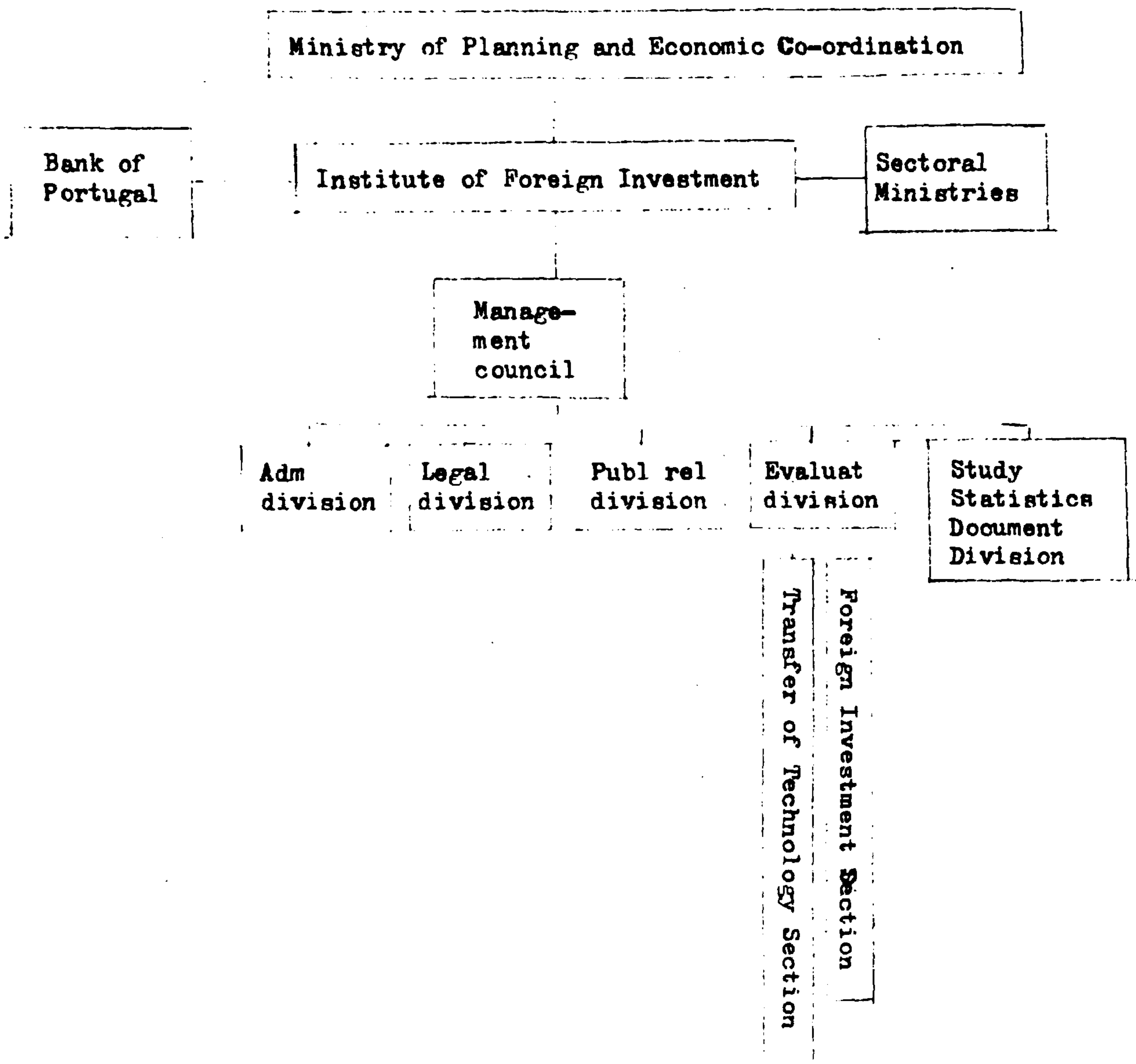
(a) Identification of the forms by which the imported technology is transferred;

(b) Contractual value of each of the elements involved in the transfer of technology, expressed in a form similar to the one used in the registration of direct foreign investment; and

(c) Determination of the period of validity.

PORTUGAL

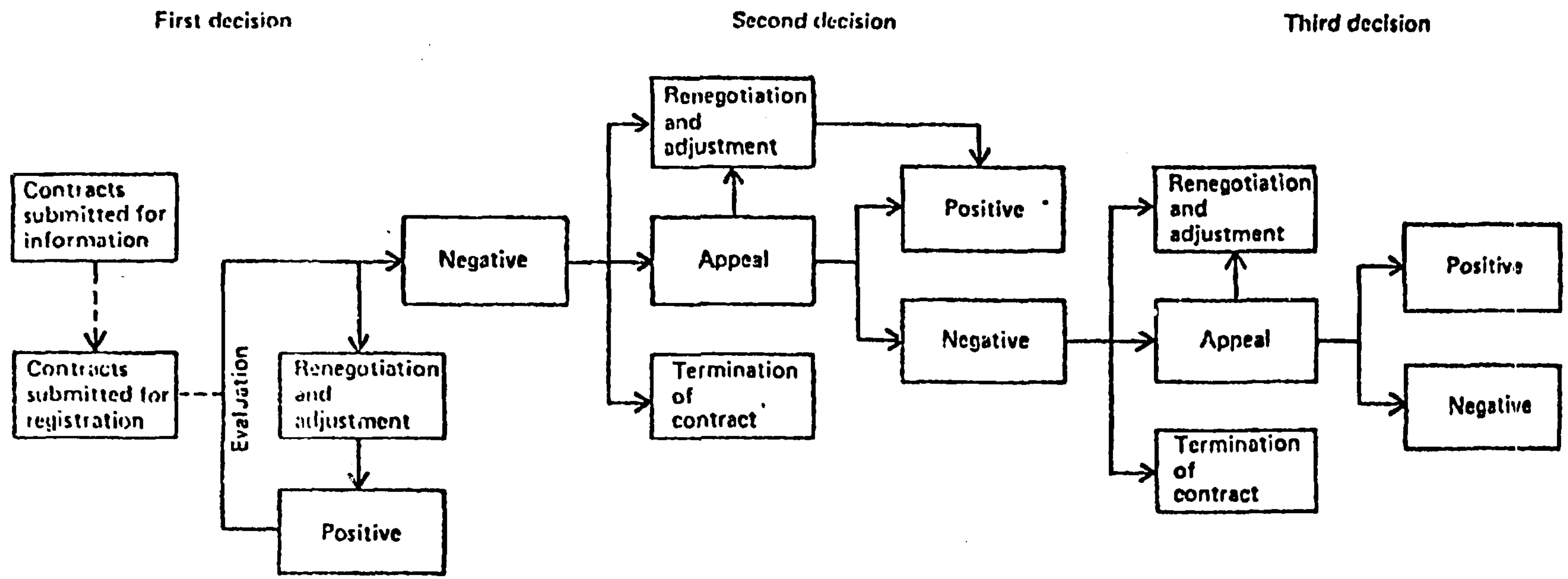
Table 10: Organizational set-up regulating the flow of technology



IV. GENERAL ANALYSIS AS TO PRESENT FUNCTIONS AND EFFECTIVENESS OF SELECTED REGULATORY AGENCIES IN DEVELOPING COUNTRIES

The present chapter attempts to briefly analyze the functions and effectiveness of selected regulatory agencies on the basis of available figures and material to which UNIDO has been given access. The evaluation as contained does not claim to be neither complex nor exhaustive and it is hoped that the present meeting,which will decide on detailed surveys in some of the countries, will make it possible to collect more complete and detailed materia.

Table 11: Flowsheet of the process for approving or rejecting agreements presented to the Mexican National Registry of Technology Transfer



Above table 11 gives the flow sheet for processing contracts submitted to the National Registry for registration (i.e. approval). It shows that agreements that are rejected after evaluation may be renegotiated. At this stage the Government may take a direct part in the negotiations to ensure that the agreements shall conform with its policies.

The following basic criteria have been adopted in Mexico for approval of technology agreements as per law:

Article 7: The Ministry of Industry and Commerce shall not register the acts, agreements or contracts mentioned in Article 2 in the following cases:

I. When their purpose is the transfer of technology freely available in the country, provided this is the same technology.

II. When the price or consideration does not represent the technology acquired or constitutes an unjustified or excessive burden on national economy.

III. When provisions are included which permit the supplier to regulate or intervene, directly or indirectly, in the administration of the transferee of the technology.

IV. When there is an obligation to assign onerously or gratuitously to the supplier of the technology, the patents, trade marks, innovations or improvements obtained by the transferee.

V. When limitations are imposed on technological research or development by the transferee.

VI. When there is an obligation to acquire equipment, tools, parts or raw materials exclusively from any given source.

VII. When the exportation of the transferee's products or services is prohibited, against the best interests of the country.

VIII. When the use of complementary technologies is prohibited.

IX. When there is an obligation to sell the products manufactured by the transferee exclusively to the supplier of the technology.

X. When the transferee is required to use permanently personnel designated by the supplier of the technology.

XI. When the volume of production is limited or sale and resale prices are imposed for domestic consumption or for exportation.

XII. When the transferee is required to appoint the supplier of technology as th exclusive sales agent or representative in Mexico.

XIII. When an unreasonable term of duration is established. Such term shall in no case exceed 10 years, obligatory for the transferee.

XIV. When the parties submit to foreign Courts for decision in any controversy in the interpretation or enforcement of the foregoing acts, agreements or contracts.

Effectiveness and results of the Technology Law

The Registry has allowed policy-makers to know, for the first time in a precise manner, the general characteristics of foreign investment present in Mexico and its effects upon the economy. Such information and the studies have allowed policy-makers to formulate better and more realistic policies.

Since May 1973, when the law came into effect, there has been quite a change in the conditions under which foreign investment is flowing into Mexico.

Firstly, foreign investment has been adjusting to the minority joint venture participation that the law establishes as a general rule. Out of 392 new enterprises that have been created with foreign participation since the law came into effect, only 10 have been established in exceptional conditions and usually on a temporary basis. Furthermore, this has been possible in the framework of a process of increasing participation of the European countries and Japan, even if the United States still represent three fourths of our foreign investment.

Secondly, the law has allowed to channel new foreign capital, towards high priority sectors of economic activity such as the chemical and the capital goods industry.

Thirdly, the law has been able to stop altogether the takeover trend of the fifties and sixties.

Fourthly, the law has been able to produce some very important contributions to development goals through day to day negotiations, such as numerous export programmes, import substitution projects, the creation of jobs, training programmes for Mexican workers and technicians and location and relocation of investments in less developed areas of the country.

Finally, it is important to mention, that all these results have been obtained without slowing up the required inflow of foreign investment.

Briefly, the most important benefits to Mexico have been the following:

a) Substantial foreign exchange savings as a result of lower payments.

b) Reduction of the costs of some manufactured goods.

c) A higher tax collection due to the elimination of considerable fiscal evasion which excessive royalty rates allowed to subsidiaries of international corporations.

d) Opening of export markets to Mexican manufactures.

e) Lower prices for capital goods and components which previously had to be imported from the licensor, in spite of the existence of lower priced alternative suppliers.

f) Growing consciousness among Mexican entrepreneurs, who have understood better the importance for productivity and profits, of obtaining full information on technological alternatives, conducting a careful evaluation and selection of products, processes, and licensors, and negotiating terms of contracts from the strongest possible positon.

g) Promotion of local efforts leading towards the assimilation, adaptation and improvement of imported technologies, as well as towards local performance of R+D activities.

From 29 January 1973 to 31 Ma·· 1975, 6,528 contracts were presented to the Registry either for information or for registration. Of the 4,244 contracts submitted for registration. 2.200 were examined from the legal, economic and technical points of view. Of these, 1,600 were approved for registration and 600 were rejected. This figure does not include the many contracts that were modified after discussions with officials of the Registry. In 307 cases where registration was denied, the affected parties requested the Registry to reconsider its decision. In 80 per cent of the cases decided negatively, the rejection was based on clause II of Article 7.

In the remaining cases, the negative decision was not challenged for two reasons:

(a) In many cases the parties expressed their willingness to adjust their contracts to the law;

(b) In a few cases the recipient company decided not to continue with the agreement.

Most frequent violations of Article 7

Table I shows the frequency with which the various clauses of Article 7 were violated in 600 contracts for which registration was denied. It does not include the many contracts that were modified after discussions with officials of the Registry.

TABLE 1. BREAKDOWN OF VIOLATIONS OF ARTICLE 7 OF LAW ON TECHNOLOGY IN 2.200 CONTRACTS EXAMINED, 29 JANUARY TO 31 MAY 1975

Clause		*Number of contracts*	*Share of total (percentage)*
I.	Involving technologies freely available in the country	5	0.23
II.	Payments not in relation to the value of technology acquired or constituting an excessive burden on the country's economy	494	22.5
III.	Interference with the management of licensee	68	3.1
IV.	Obliging licensee to grant back to licensor patents, trade marks, improvements etc.	129	5.8
V.	Limiting licensee's research and development	103	4.7
VI.	Obligation to acquire from licensor equipment, parts, raw materials etc.	67	3.1
VII.	Restricting exports, contrary to Mexico's interest:		
	(a) Total prohibition	105	4.8
	(b) Restrictions on geographical areas or countries	31	1.4
VIII.	Prohibiting the use of complementary technologies	20	0.9
IX.	Obligation to sell licensed products to the supplier company only	6	0.3
X.	Calling for permanent employment of personnel appointed by licensor	4	0.2
XI.	Limiting production volume or imposing sales price on licensed products	210	9.6[a]
XII.	Obligating licensee to sign exclusive-sales contracts with licensor	7	0.3
XIII.	Establishing excessively long terms of duration of contracts	261	11.9
	(a) Obligatory period exceeding 10 years	105	4.8
	(b) Excessive period under 10 years	33	1.5
	(c) Obligations to licensee exceeding 10 years	123	5.6
XIV.	Calling for contract disputes to be submitted to the jurisdiction of foreign tribunals	124	5.7

Since the law on transfer of technology came into effect, the Registry of Technology Transfer had examined about 4,600 agreements, out of which 35% had been rejected due to the high payments involved and the restrictive clauses present.

However, the percentage of contracts rejected because of restrictive clauses goes up to about 60%, if agreements that involve majority foreign owned subsidiaries are excluded, since in the latter restrictive clauses don't have any practical singificance.

Most frequent reasons for negative resolutions have been the following:

		As % of rejected agreements
1.	Excessive or unjustified payments.	68.5
2.	Excessive duration of agreements.	31.6
3.	Prohibition to use non patented technology or to manufacture goods, at the end of the agreement	30.7
4.	Submission of agreements to foreign laws or courts	18.5
5.	Grant-back clauses on innovations produced by licensee	16.8
6.	Export restrictions contrary to the interest of the country	14.5

As a consequence of the renegotiation process promoted by the Registry, payments and restrictive clauses have been substantially reduced and eliminated.

Similarly, many independent Mexican enterprises have received considerable support in the approval of new licensing agreements, that is not reflected in statistics, since their contracts have been "clean" by the time they have been submitted to the Registry.

REPUBLIC OF KOREA

Criteria for Technology Importation

1. Technologies to open new export markets.
2. Technologies for component manufacturing for industry and for process development for the capital goods industry.
3. Technologies, the local development of which may waste more time and cost than their inducement from a foreign country.
4. Technology whose spill-over has the potential for cost reduction and increased productivity.
5. Technology to further the public good.

Payment for induced technology, as a general rule, should not exceed 3% of the net amount of product sales but technologies destined for other than the manufacturing sector may be excepted.

Payment period for the induced technology should not in principle exceed three years except in cases where payment has nothing to do with sales, such as fixed amount or advance payments or guarantee monies.

Technology aiming at the import of raw materials or intermediate products or the import of a trademark under the cloak of a technological inducement contract will not be approved.

If a technological inducement contract includes the following restrictive provisions they must, as a general rule, be deleted or amended:

1. Restrictive provisions preventing the recipient enterprise from exporting or selling the products to third markets except when the technology supplier has obtained a patent on the product or has supplied the same technology to the third market.

2. Restrictive provisions preventing the recipient enterprise from using competitive goods or technology.

3. Restrictive provisions stipulating guarantee of a minimum payment to the supplier for the technology.

If a technology inducement contract lacks the following provisions it should, as a general rule, be augmented.

1. Provision for the guarantee of the quality of the product by the technology supplier.
2. Provision for supplying newly developed technology by the technology supplier during the contract period.
3. Provision for preventing a third party from being brought to court on a matter concerning the induced technology.

In spite of the nature of these guidelines, the significance of technology to be induced in the course of economic development may allow them to be applied flexibly project by project.

TABLE 12: Technology Import 1/ by Field (1962 through 1977)

Field	Approved	Items cancelled	Terminated	Royalty (Unit : US$ 1,000)
Primary Industry	9		5	2,446.8
Agriculture + Livestock	9		3	2,446.8
Secondary Industry	842	45	299	155,436.4
Foods	12		8	2,690.6
Pulp + Paper	10	1	3	810.9
Textiles	19		5	965.5
Chemical Fibres	20	2	7	12,824.5
Ceramics + Cement	18	3	6	1,659.2
Petroleum + Chemical Production	166	3	59	54,437.9
Pharmaceuticals	27	2	18	1,454.4
Iron + Non-ferrous Metal	81	7	27	30,344.7
Electronic + Elec.Equip.	175	10	73	19,829.8
Shipbuilding	16	1	3	6,093.1
Machinery	255	14	73	22,709.3
Others	43	2	17	1,625.5
Tertiary Industry	56	1	27	13,715.3
Electricity	17		5	6,173.4
Communication	30		19	5,551.8
Construction	9	1	3	1,990.1
Total	907	46	331	171,598.5

Source: Economic Planning Board

1/ That for which royalties must be paid for more than one year under the Foreign Capital Inducement Law.

TABLE 13: Technology Import by Country (1962 through 1977)

Unit: Item

Year / Country	62–66	67	68	69	70	71	72	73	74	75	76	77	Total	%
U. S. A.	12	11	14	10	17	6	10	17	12	22	27	51	209	23.0
Japan	10	23	32	45	62	35	34	47	62	58	79	77	564	62.1
West Germany	4	1	1	1	1	1	3	3	2	1	5	16	39	4.3
France	1	–	–	–	–	–	1	1	2	2	–	5	12	1.4
Others	3	–	3	4	4	3	2	1	8	15	19	21	83	9.2
Total	30	35	50	60	60	84	45	50	69	86	98	130	907	100.0

Source: Economic Planning Board 1978

TABLE 14 Organization and Activities of TTC

Technology Transfer Center

Counsel Committee by each specialized field

Consultant Section	Research and Investigation Team	Analysis Team	Contract Section
To provide consultations and guidance about technology transfer.	To collect information about advanced technology	To analyze accumulate and evaluate technical information about technology to transfer	To prepare business plan
To introduce proper supplier of technology	To conduct fact-finding surveys on domestic and foreign industrial technical levels.	Post-management of transferred technology	To prepare contracts for transfer of technology
To review appropriateness of technology to transfer		Localization of equipment and material	To negotiate contract terms

TABLE 15: Scope of Activities of TTC

A)	Consultation, guidance and introduction of technology	- To consult and select source of technology - To check adequacy of technology and settle the cost - To prepare contracts
B)	Review of appropriateness of technology to transfer	- To review appropriateness of technology to transfer - To eliminate unfavourable terms of contract
C)	Acting as an agen for technology transfer	- To prepare programmes for technology transfer - To prepare technology transfer contracts
D)	Promotion of joint technology transfer for minor industries	- To introduce identical technology for the interests
E)	Accumulation, analysis evaluation and dissemination of technical information for transfer of proper technology	- To collect, analyze and circulate various technical and economic information and data on technology transfer - To establish information flow system with international organizations
F)	Promotion of research for assimilation and improvement of imported technology	- To introduce proper institute to perform research for assimilation and improvement of imported technology - To furnish technical information necessary for such research - To help engineers and technicians to acquire necessary training in transfer technology
G)	Post-management of imported technology and presentation of technology transfer policy approaches	- To make a periodical survey of imported technology - To recommend effective technology transfer policy approaches

TABLE 16: Flow-sheet of Evaluation of Technology Agreements

Licensee

Provisional Contract

Economic Planning Board

Opinion exchange

(to be processed within 30 days)

Ministry of Science + Technology

Problems in post-investigation system

- A long period of time needed for technology transfer
- Heavy reliance on one country for technology donors
- Frequent conditional licenses by the government of technology
- Duplicated technology transfer by the interests

Licensee

Economic Planning Board

Ministry of Science + Technology

(to be processed within 7 days)*

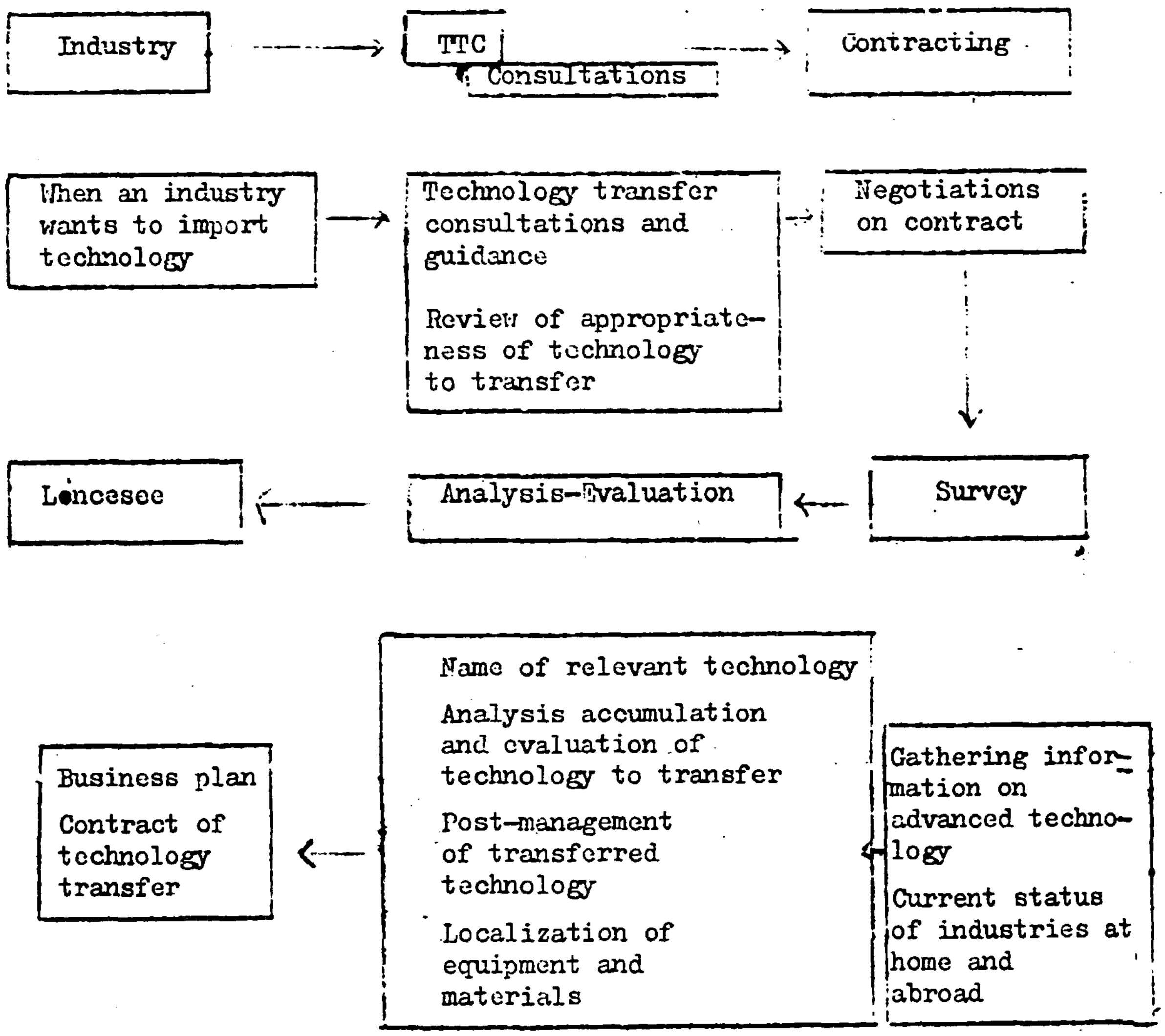
Technology Transfer Centre

Advantages of prior investigation of technology transfer through TTC

- To save a considerable amount of time and money required for technology transfer
- To transfer optimal technology and to save royalties
- To obtain speedy and accurate information about technology transfer
- To eliminate unfavourable terms of contract
- Effective post-management of transferred technology and its assimilation

* President Decree of Foreign Capital Inducement Act

TABLE 17: Procedures for Consultations on Technology Trarsfer



Some considerations as to the effectiveness of the Technology Transfer Centre

In 1975, the Technology Transfer Centre conducted a fact-finding survey of imported technology in order to identify problems arising due to the import of foreign technology, and provide solutions for such problems. The survey revealed problems related to the type, the licence period and the application of imported technology as discussed below.

Problems related to contract conditions and terms:

As in other developing countries, in Korea importers of technology are required to obtain the government's approval for technology import contracts concluded with foreign suppliers. Because many technology importers are not well aware of the government-established standards and regulations concerning technology import, they are apt to obtain a conditioned approval for their import contracts.

According to the above mentioned survey, about 80 per cent of technology import contracts concluded by industries were conditionally approved by the government.

Technology import contracts conditionally approved by the government up to 1975 are shown below:

Table 18: The major contents of technical assistance agreements conditionally approved by government and their frequency:

CONTENTS CONDITIONALLY APPROVED BY GOVERNMENT	FREQUENCY
1. Shortening of contract period in agreement	24.8 %
2. Reduction of technical fees	22.1 %
3. Request of quality guarantee of product	7.0 %
4. Recommendation of utilizing local raw materials available	6.1 %
5. Amendment of royalty payment method	2.9 %
6. Shortening of foreign technical expert's invitation and reduction of its fees	11.7 %
7. Ban of using foreign trade mark to local market goods	10.2 %
8. Request to export all of the products	7.9 %
9. Request to merely export some parts of the products	7.3 %
TOTAL	100.0 %

Recently, the Technology Transfer Centre, after eight months of survey and research, came up with a list of 1758 needed foreign technologies for the next five years - plus the names of the technology owners - considered necessary for the production of 1500 items in the machinery, electronics, metal, and chemical industries. In addition, a further survey and research project is under way 1978- to select another 3000 technologies needed.

A R G E N T I N A

The following are the most recent criteria for the importation of technology:

<u>Implicit clauses</u>

Article 8:

Any act included in the system of this Law will be subject to the following provisions whether or not they are included in its text, except when the Enforcement Authority expressly decides otherwise and gives grounds for such decision at the time of approval.

(a) The suppliers guarantees that the technology to be transferred, enables the recipient, through such acquisition, to achieve his proposed technical aims with the scope described in the voluntary act of legal consequences;

(b) The suppliers of technology shall directly or indirectly supply adequate training for assimilation and handling of that technology, if such training should be necessary;

(c) In the event that the party receiving the trade marks or technology has no alternative other than to purchase capital goods, inputs, raw materials and/or spare parts from the suppliers of said technology or trade marks, or to sell its production to the latter, the sale or purchase price shall be in keeping with that of such goods or products ruling in the international market. The Enforcement Authority will be authorized to estimate this price when no current international price quotation is available;

(d) The recipient shall keep confidential those technical secrets specified as such in the voluntary act of legal consequences for the agreed term, which may exceed the term of the contract;

(e) In those acts that include the use of the supplier's trade mark or names or similar forms of identification vis-à-vis customers, the recipient shall maintain the quality levels of products or services specified in the voluntary act of legal consequences when such products or services are identified by means of such trade marks or names.

When the Enforcement Authority deems it advisable, it may request that the foregoing provisions be expressly included in the act to be registered as a condition for its approval.

Contractual features that may be liable to objection

Article 10:

Registration of those coluntary acts of legal consequences that are subject to non-automatic registration according to the foregoing article, may be rejected when they incorporate one or more of the following features:

(a) When technology to be transferred can be proven to be obsolete;

(b) When the technology having the same specifications, nature and quality as that which is the object of the transfer can be proven to be of public knowledge and freely available in this country. It shall be understood that it is of public knowledge when it is not protected by secrecy or by rights inherent to industrial property. It shall be understood that technology is freely available in this country when any interested party may have access thereto under reasonable conditions;

(c) They forbid or limit exports by the recipient, except to those countries where the suppliers produces for its own account or has granted exclusive production, use or sales licences;

(d) The agreed consideration bears no relation to the transferred technology or trade marks and to the direct or indirect benefits to be achieved through their use.

It will be presumed that such lack of relation exists, unless proof to the contrary can be produced when:

(i) The acts consist of licences to use trade marks without the contribution of technology, and the payment to the suppliers or for his account exceeds one per cent of the net sales value of the products or services using such trade marks;

(ii) The technology related to the final motor vehicles or auto parts industries, according to the definition of Law No. 19,135 and the payment to the suppliers of for his account exceeds two per cent of the net sales value of the products manufactured with such technology;

(iii) In other cases, payments to the supplier or for his account, exceed five per cent of the net sales value of the products manufactured or services rendered with the transferred technology. When it is a case of single or periodic fixed payments, the percentage equivalent of such payments in relation to the recipient's estimates sales during the full terms of the contract shall be taken into account.

(e) They compel the recipient to assign or grant licences with respect to the innovations, improvements or decevelopments that may be achieved in regard to the transferred technology, except when a reciprocity clause exists;

(f) They do not grant the recipient the right to receive the improvements relating to the transferred technology that the supplier may develop during the life of the voluntary act of legal consequences;

(g) They exempt the suppliers from the liability to which it may be subject towards the recipient or by reason of eventual legal action by third parties, arising from flaws or defects that are inher... in the products or services rendered by the supplier under the act in question. Such liability shall include both that arising from the eventual infringement of industrial property rights of third parties, as well as that which may correspond under the applicable legal provisions, as a consequence of damages suffered by the recipient or by third parties that are the direct and immediate result of the correct use of the transferred technology or of the use that may result from the supplier's instructions if any;

(h) They impose the obligation to acquire raw materials, intermediate products or capital goods from a specified origin or source of supply;

(i) They establish sales prices to wholesalers, retailers, to the public or to the suppliers of the technology or trade marks, or the application to third parties of unequal conditions for the sale of equivalent merchandise or services;

(j) They impose upon the recipient the obligation to employ personnel to be appointed by the suppliers, whose remuneration shall be for the account of the recipient, unless such obligation is considered indispensable taking into account the work to be performed by such personnel in relation to the transferred technology and that the remuneration of such personnel is in line with that generally current in the international market for the services to be rendered by the aforesaid personnel;

(k) They allow the supplier to control or regulate the production or marketing of the recipient beyond what is necessary for the protection of his rights under the act in question

I N D I A

As mentioned in an earlier chapter, the Government is considering the creation of a national registry with the following features:

1. The National Registry Unit will attend to the work relating to the recording of foreign collaboration agreements being at present handled by the various administrative ministries;

2. It will maintain registers containing perticulars of all proposals relating to technical and financial collaboration between Indian entrepreneurs and foreign firms approved by Government such as:

   - Name of the Indian entrepreneur;
   - Sector and type of technology or services;
   - Description of product;
   - Name of foreign licensor and country;
   - Foreign equity participation, indicating the amount and proportion of foreign holding;
   - Duration of contract;
   - Remuneration payable to the foreign firm (a) for production on process technology (type of payment such as lumpsum fees, annual royalty etc. to be specified); (b) for technological services including management training and foreign personnel;
   - Annual likely production of Indian enterprise as a result of technology agreement.

3. Monitoring the progress of the proposals on the basis of annual returns from the establishment in a proforma;

4. Examining the steps taken by the Indian form to establish R and D facilities to enable the absorption of technology;

5. Follow-up action on the efforts made by the Indian firm with the collaborator to get information on improvements in the technology supplied;

6. Effecting comparison of the quality of the product with the specifications provided for;

7. Examining the reports concerning the training facilities offered-cum-taken by the employees in the collaborator's industrial units and the services provided by experts who are deputed to work with the firm;

8. Examining further steps involved in the adaptation of the technology with respect to raw materials, modernization of equipment, and improvement in the specification of the end product.

During the period 1961-1977, 4429 proposals for foreign collaboration have been approved by the Government. Out of these 1078 proposals involved foreign equity participation also. During the past 3 years, about 400 foreign collaboration proposals per year on an average were approved by the Government. Since the particulars of these proposals are at present scattered over various administrative ministries, a systematic effort is needed to collect the information on an industry-wise basis, weed out the proposals which have not fructified/lapsed/expired and to classify the ongoing proposals on a foreign country-wise/industry-wise basis. Since the processing and shifting of the existing information relating to about 4500 proposals involve considerable volume of work, this would have to be computerized. At the same time, proposals approved from 1 January 1978 onwards (about 400 per year) will have to be posted in the National Register and monitored on a regular basis in turue.

Criteria for the evaluation of technology importation

Technical collaboration (technology importation) is considered on the basis of annual royalty payments which are linked with the value of actual production. The percentage of royalty will depend on the nature of technology but should not ordinarily exceed 5 per cent. Royalty is calculated on the basis of the exfactory selling price of the product net of exise duties minus the landed cost of imported components and standard brought-out components. Royalty payments are subject to Indian taxes. Wherever appropriate, paunents of a fixed amount of royalty per unit of production will also be permitted. Royalty payments are generally limited to a period of 5 years.

Lumpsum payments are also considered in appropriate cases for the import of drawings, documentation, and other forms of know-how. In deciding on the reasonableness of such payments, account will be taken of the value of production so that lumpsum and the recurring royalty, if any, is an acceptable proportion of the value of production. Such payments qill be subject to deduction of Indian taxes. The lumpsum payments should be normally phased out as follows:

1/3rd to be paid on taking the agreement on records

1/3rd to be paid on the transfer of documentation etc; and

1/3rd to be paid at the commencement of production.

General guidelines for foreign collaboration arrangements:

Entrepreneurs are advised to take note of the following guidelines in negotiating foreign collaboration agreements so as to ensure that their proposals conform to the policies of the Government:

1. They should, to the fullest extent possible, explore alternative sources of technology, evaluate them from a techno-economic point of view and furnisht he reasons for preferring the particular technology and the sources of import;

2. The Indian party should be free to sublicense the technical know-how product design/engineering design under the agreement to another Indian party on terms to be mutually agreed to by all parties concerned including the foreign collaborator and subject to the approval of the Government;

3. There should be no requirement for the payment of a minimum guaranteed royalty regardless of the quantum and value of production;

4. Arrangement or clauses which in any manner bind the Indian party with regard to the procurement of capital goods, components, spares, raw materials, pricing policy, selling arrangements, etc. should be avoided;

5. To the fullest extent possible, there should be no restrictions on free export to all countries;

6. The use of brand names will not be permitted for internal sales;
7. Suitalbe providions should be made for the training of Indians in the field of production and management. There should also be adequate arrangements for Research and Development, engineering design, training of technological personnel and other measures for the absorption, adaptation and development of the imported technology.

Exemptions are available for proposals envisaging substantial exports. Lists of gaps in technology have also been published subjsequent to 1968.

Separate lists of industries where technology transfer is not considered necessary are published for the benefit of the entrepreneurs. There is a further sub-category of industries in which foreign investment can be considered.

Effectiveness of guidelines so far applied:

Implementation of the guidelines has not posed any serious difficulties and in fact has greatly strengthened the bargaining power of licensees. Undesirable and restrictive provisions have also been avoided. Limiting the duration of agreements to five years (with exceptions in a few special cases involving highly sophisticated technology) has had a salutary effect in licensee enterprises to make maximum efforts to absorb imported technology effectively as rapidly as possible. Royalty payments can usually be adjusted within the limited prescribed, though, in some cases, these have been accompanied by fairly high initial lumpsum fees. The avoidance of restrictive export provisions has posed some problems, which have usually been satisfactorily resolved. Sublicensing provisions initially provoked some controversy, but most foreign licensors now accept that the Government's insistence is primarily, to ensure that similar technology shall not be imported through numerous foreign technology agreements, all at considerable cost. Repetitive purchases of technology now receive greater attention, but it is still too early to evaluate the potential benefits of such a clause vis-à-vis the commercial obstacles in enforcing it.

The criteria for approving technology agreements are well defined. Basically, no collaboration will be permitted if the industry is not eligible for foreign collaboration. In many cases, the letter of intent itself makes this position clear, thus making an application for foreign collaboration unnecessary. With regard to industries that are prima facie eligible, the views of the technical authorities and of the Council of Scientific and Industrial Research on the availability of the know-how within the country must be considered. Payment of a royalty is not allowed for a period of more than five years. Since projects take time to reach the production stage after the signing of the contract, the period of the agreement could be up to eight years from the date of the signing of the agreement, provided that the period of the payment of royalties does not exceed five years. For royalties, the ceilings described in the guidelines are taken into account. Past cases of import of similar technology are also considered. Where an investment is involved, the royalty may be fixed at a slightly lower level, since dividend remittances will also be entailed. Lumpsum payments are allowed where specific services are to be performed at the beginning of the contract.

After the terms of the approval are communicated to the entrepreneur, he executes the agreement and submits copies to the relevant production ministry, which scurinizes the agreement and asks the entrepreneur to revise clauses that do not conform to the Government's policy. It is only after the agreement is taken "on record" that the Department of Economic Affairs authorizes the Reserve Bank of India to permit the remittances.

No "validity period" (period after which the approval will expire if the agreement has not been implemented) is specified. The period imposed for the implementation of the industrial licence ensures the implementation of the agreement. Since 1970, the Indian entrepreneur has had to submit an annual return indicating the royalties remitted, the steps taken for research and development and other relevant particulars. The follow-up is not, however, strictly monitored or scrutinized.

Extensions of technology agreements are not encouraged, with the result that they are generally not sought. About 15 per cent of the agreements approved in recent years have been extended. The test for granting extensions is whether the applicant has had sufficient time to absorb the technology. Extensions are allowed only for those products in respect of which the applicant has not had sufficient time to absorb the technology. Generally, lower royalty rates are prescribed for extensions; sometimes, royalties are allowed only for exports.

The existence of patents and the payment of fees, therefore, do not appear to be checked when licence agreements are scrutinized. The Government has recently issued instructions to the effect that in scrutinizing licence agreements, the validity of the patent should also be taken into account, and it should be specifically provided in the agreement that the royalty paid in pursuance of the agreement will constitute compensation paid to the holder of the patent for its use.

The royalties in India are taxed at a rate of 50 per cent. The rates do not seem to have been fixed with any specific reference to the desirability of importing technology, nor do they affect imports.

The Indian Investment Centre, an autonomous institution financed by the Government, provides information and assistance to entrepreneurs in securing technology from abroad.

A few detailed studies on collaboration between foreign and Indian companies are available. It is not possible to do more than mention them here.

The following table gives a breakdown, by industry, of the approvals of foreign technology agreements from 1946 to June 1973. The machinery and machine tools, electrical and transportation industries account for 48 per cent of the approvals during the period up to 1968 and 58 per cent of the approvals from 1968 to June 1973. Together with chemicals, they account f for 70 per cent of the approvals in recent years. This shows the extent to which licensing is used to diversify the manufacturing capabilities in the machinery and engineering sectors.

Table 19: Breakdown of foreign technology agreements approved in India, 1946 to June 1973

(Number)

Industry	1946–1967	1968 – 1973 June
Food, beverages and tobacco	24	14
Textiles	116	10
Pulp and paper	52	14
Rubber products	34	13
Chemicals	267	110
Pharmaceuticals	148	7
Metallurgical industries and metal goods	339	49
Machinery and machine tools	804	295
Electrical	374	164
Transportation	168	83
Consultancy	18	16
Others	448	264
Total	2792	939

Source: 1946–1967: Foreign Technology and Investment (New Delhi 1971) National Council of Applied Economic Research; 1968–1973: data supplied by the Ministry of Industrial Development, New Delhi.

BRAZIL

Functions of the "National Industrial Property Institute"

Article 1 : The National Institute of Industrial Property (INPI) is hereby established as an autonomous federal organ attached to the Ministry of Industry and Trade, with head office and domicile in the Federal District.

Sole paragraph: The Institute shall enjoy the privileges of the State in respect of the assets, income and services relating to or deriving from its essential purposes.

Article 2: The primary purpose of the Institute shall be to execute at the national level the provisions of law government the social, economic, legal and technical functions of industrial property.

Sole paragraph: Without prejudice to any other duties that may be allotted to the Institute, it shall adopt for the purpose of national economic development measures to accelerate and regulate the transfer of technology and to improve conditions for the negotiation and use of patents. It shall also advise on the signature, ratification and denunciation of conventions, treaties, contracts and agreements relating to industrial property.

Article 5 : The President of the Institute shall be nominated by the Minister of Industry and Trade and may be appointed and dismissed only by the President of the Republic.

Article 6 : The Executive shall make regulations for the structure, duties and operation of the various organs of the Institute and for the conduct and engagement of its staff.

Criteria for Technology Import in Brazil

Where coming from abroad, the technology to be transferred must :

(a) be consistent with the criteria of priority selection based on the nature of the product or process and its significance for national development, according to government policy for the sector concerned;

(b) correspond to levels that cannot be attained or obtained in the country, as verified by comparison with effective and available domestic capacity to carry it out or with already existing alternative sources;

(c) afford, within the short term, effective advantages for progress in the sector concerned, consistently with the objectives of national policy or plans with regard to industrial technology and development;

(d) create qualitative conditions for the product resulting from its application, primarily with a view to export;

(e) permit import replacement in respect of the product, including inputs and components necessary for its manufacture;

(f) the degree of novelty of the technology, evaluated on the basis of the length of time for which it has been known and used;

(g) the degree of complexity of the technology, by comparing it, where feasibl with techniques and processes designed for the same objective, whether furnished by the same or another party;

(h) the qualitative level of the product resulting from application of the technology, in the market context;

(i) the continuing and subsequent furnishing of everything relevant to the updating of the information and technical data, particularly in the case of a sector in which technology is dynamic, i.e. is subject to continuing development and where innovations are not eligible for protection;

(j) the reputation and importance of the furnisher in the sector;

(k) where applicable, the furnisher's capacity for research and development;

(l) the type of production or branch of activity, according to the degree of essentiality;

(m) the term stipulated for complete transfer of t content of the technology and for full and complete absorption of it by the acquirer.

The amount of the remuneration shall be calculated on a percentage basis or as a fixed value per product unit, in either case on the basis of or in relation to the net sales price, net receipts from sales, or where applicable, shall likewise take into account the profit derived from the product resulting from application of the technology.

Note: For the purpose of calculating the remuneration, the "net price" shall be deemed to be the invoice value, based on actual sales, after deduction of taxes, charges, inputs and components imported whether from the furnisher of technology or from any furnisher directly or indirectly linked to him, commissions, return credits, freight, insurance and packaging expenses, and any other deductions agreed upon by the parties.

Law no. 5.772/71 (Industrial Property Code) and Law no. 4.137/62 (concerning the repression of abuse of economic power), in particular prohibit any clause which :

(i) regulates, determines, alters or limits the production, sale, price, publicity or disclosure, distribution, marketing or export, and likewise the hiring of personnel and the reservation or distribution of markets or the exclusion of any market except, in the latter case, when permitted by the industrial property legislation, when it is proved to be required by specific legislation of the furnisher's country, or furthermore when resulting from an international instrument or agreement to which Brazil is a party;

(ii) stipulates as an obligation or condition the purchase of inputs or components necessary for manufacture of the product or utilization of the process, or of machinery and equipment, from the furnisher of the technology and/or any other source determined by the latter, including those of domestic origin;

(iii) imposes the use of a foreign, trade mark or publicity slogan for the furnishing of the technology;

(iv) contains provisions likely to limit, regulate, alter, interrupt or hinder the research and technological development policy and activities of the acquirer of the technology;

(v) is designed to prevent the acquirer from challenging, whether administratively or through legal proceedings, the industrial property rights claimed or obtained in the country by the furnisher of the technology;

(vi) prohibits the free use of technology after a reasonable period of time has elapsed following each transfer of the latest information;

(vii) exempts the furnisher from responsibility in the event of any action brought by third parties in respect of faults, defects, or infringement of industrial property rights inherent in the technological content of th contract.

THE PHILIPPINES

Criteria for Technology Importation

Section 3: Requirements for Approval and Registration :

The requirements for approval and registration as provided for in Section 2 above include, but are not limited to, the following :

(a) The royalty/rental contracts provide for a fixed term not exceeding five (5) years and shall not contain automatic renewal clauses. This requirement shall not apply to contracts existing as of the date of this Circular, the unexpired term of which does not exceed five (5) years from the date of this Circular.

(b) The royalty/rental contracts shall not contain restrictions or restrictive business practices prohibiting the local licensees to export the products manufactured under the royalty/rental contracts or limiting their exportation abroad only through the foreign licensors as the exclusive distributors; and

(c) The royalty/rental contracts involving "manufacturing" royalty, e.g. actual transfers of technological services such as secret formulate/processes, technical know-how and the like shall not exceed five (5) per cent of the wholesale price of the commodity/ies manufactured under the royalty agreement. For contracts involving"marketing" services such as the use of foreign brands or trade names or trade marks, the royalty/rental rate shall not exceed two (2) per cent of the wholesale price of the commodity/ies manufactured under the royalty agreement. The producer's or foreign licensor's share in the proceeds from the distribution/exhibition of the films shall not exceed sixty (60) per cent of the net proceeds (gross proceeds less local expenses) from the exhibition/distribution of the films.

However, in meritorious cases, the Monetary Board, in consultation with the Board of Investments, may authorize, subject to such conditions it may impose, remittance of royalties on contracts providing for higher royalty/rental rates or for terms longer than five (5) years or containing restrictive provisions prohibiting the local licensees to export the products manufactured under the royalty/rental agreements or limiting their exportation abroad only through the foreign licensors as exclusive distributors.

<u>Guidelines in Evaluating Licensing Agreements adopted by BOI and the Department of Industry</u>

For purposes of evaluating licensing agreements covering patents, trade marks or know-how, the staff shall consider the following factors :

I - - Need for the technology and/or trade mark (e.g. Indo-Phil Case)
II - Reasonableness of the cost of know-how of trade marks
III - Restrictive Clauses in the Contract

A. Category A clauses - which are prima facie restrictive in nature, and can only be allowed if there is an overwhelming economic and industry justification therefor.

1. Restrictions requiring that the licensee does not contest the validity of the patents involved in the license and any other patents of the licensor.

2. Restrictions as to the use of the subject matter of a patent and any unpatented know-how licence which directly relates to the working of the patent once a patent has expired.

3. Direct or indirect restrictions on exports whether or not protected by patents in other markets (e.g. higher royalty for export sales, prior approval of licensor before exportation, restrictions on level of production, fixing prices manufactured by licensor).

4. The charging of royalties on patents after their expiry or during the entire duration of manufacture of a product or the application of the process involved and, therefore, without any specification of time.

5. Restrictions or a prohibition on the use of know-how after termination or expiry of the contract (Exception would be necessary where early terminatoon of the contract took place on account of breach of the contract by the licensee).

6. The use of protection afforded under the trade mark system to restrict a licensee's activities, for example, to act as a distributor rather than a manufacturer of the trademarked product, unless "house marks" or "family marks" were involved.

7. The tying of the supply of imports of a product bearing a particular trade mark owner and thereby prohibiting imports from a third party by a licensee.

8. Obligations to use a particular trade mark with the know-how supplied.

9. Restrictions tying the purchase of goods such as raw materials and equipment to the licensor or a person designated by him (exemption can be made where the purchases of particular inputs are essential to safeguarding the value of a trade mark).

10. Requiring the licensee to accept additional patents or know-how not desired by the licensee, as a condition of obtaining a licence, and requiring the payment of royalties for such patents or know-how.

11. Restrictions on obtaining patents and know-how or trade marks from other licensors with regard to the sale or manufacture of competing products.

12. Obligations to use the distribution channels of the licensor.

B. - Category B Clauses - which may be restrictive in nature, but may be allowed where advantages can accrue to the economy directly or indirectly.

1. Limitations on the scope or field of use of a patent product or products produced under a patent process (e.g. two or more products come within the scope of patent and licence is only given to some).

2. Limitation on the scope or field of activity in trade mark licensing.

3. Obligations to communicate, for example by way of grant back or otherwise to the licensor improvements and knowledge acquired in respect of the working of a patent or the use of know-how licenced (such obligation could be burdensome to the licensee when it already pays high royalty charges, however, it may be permitted on a reciprocal or non-exclusive basis).

4. Obligations to transform royalty payments or technical know-how fees into capital stock. (Exception can be made in case of urgent need for foreign exchange for the project or if this is the way to ensure continuing technical know-how).

5. Insistence by licensor that the law of his country governs the con tact.

6. "Manufacturing" royalty in excess of 5%, or for contracts involving "marketing" services including use of foreign brands, trade names or trade marks), in excess of 2% of the wholesale price of the commodity manufactured under royalty arrangement (Assuming royalty is within the ceiling aforestated, the industry group should also look into its reasonableness).

7. Contract term in excess of five (5) years and/or with automatic renewal clause.

C. With respect to a global ban to export, this clause as a rule shall accept no exception, and should not be allowed.

D. Any other shall not be declared restrictive without prior Board Approval.

IV - Factors to consider if renegotiation of restrictive clauses is not possible or probable.

A. For Category "A" Clauses

1. Whether the technology is pioneerigg in nature.

2. The expertise of the licensor in the field and the licensor's ability to absorb the technology.

3. Highly complex technology.

4. The non-availability of comparable technology.

5. The ancillary industries that may be benefited by the entry of such technology in the country.

6. The existing relationship between the licensor and the licensee, i.e. whether at arm's length or not.

7. Unusually high labor generation.

8. Foreign exchange savings.

9. Export potential.

10. Effect on existing facilities and/or research activities in the country

B. For Category "B" Clauses - It is sufficient that the industry is not in overcrowded list and some form of extra benefit to the economy e.g. not necessarily in the magnitude of Category A, warrants acceptance of such clause.

Analysis of Licensing Agreements :

A study of the agreements concluded up to 1970 showed that over 80 per cent of the 527 companies questioned had entered into no technical-collaboration agreement. Many of the foreign subsidiaries were not parties to such agreements. The study examined 254 agreements and found that 129 pertained to foreign subsidiaries or branches, 53 to minority foreign capital participation, and only 72 to pure technology licensing. Of these 254 agreements, 170 were with firms in the United States and 20 with firms in Japan. Fifty-eight agreements related to pharmaceuticals and 50 to food and beverages, together accounting for more than 40 per cent of the agreements examined. Cosmetics and cigarettes accounted for 33 agreements, 13 per cent of the total. Only 45 agreements, about 18 per cent, related to the machinery and engineering industry. Of the 254 agreements, 87 related solely to trade marks. Taking the agreements as a whole, 196 out of the 254 provided for trade marks and trade names, 113 for patents and 162 for know-how. The durations were as follows: 174 agreements were for an indefinite period; 21, for 1 - 4 years; 55, for 5 - 10 years; and 4, for over 10 years. Of the agreements for an indefinite period, 55 per cent were with foreign subsidiaries and branches. With regard to royalties, the study revealed a somewhat peculiar pattern. Of the 254 agreements, no details were available for 90, and, of the rest, 49 provided for only nominal or no royalties. In 26 the royalty rate went up to 5 per cent, and in 1966 it was between 5 and 10 per cent. The study concluded that in agreements providing for nominal or no royalties, there might be some hidden pricing.

During the period October 1971 to September 1973, 74 agreements were approved, of which 35 related to trade marks, trade names etc. and 39 to services and know-how. These figures show the continuing use of trade marks and their predominance in licence agreements. Import of technology from the United States is involved in 34 per cent of the agreements and from Japan in 12 per cent. Table 5 gives the products covered and compares the position up to 1970, to the extent possible. The number of engineering agreements has somewhat increased; but, even so, some agreements are still concerned with non-essential items. The incidence of restrictive clauses, the extensive use of trade marks, and the import of technology for non-essential items would appear to underline the need for a closer scrutiny of licence agreements in the Philippines.

TABLE 20

Licence Agreements in the Philippines classified by Industry

GERMANY	JAPAN	USA	INDUSTRY	Up to 1970	October 1971 to September 1973
		15 %	Plantation, mining and petroleum	1	5
		15 %	Food	31	4
		9 %	Beverages	19	-
			Textiles and wearing apparel	5	-
	20 %		Electrical supplies, appliances and accessories	20	-
		9 %	Chemicals and paints	24	11
30 %	35 %	16 %	Pharmaceuticals	58	2
38 %		8 %	Metals, metal products and construction equipment	27	-
			Petroleum products	9	-
		10 %	Cosmetics, toiletries, soaps and detergents	19	2
			Motors, engines, machinery	7	15[a]
		8 %	Cigarettes and tobacco products	14	2
		7 %	Office supplies and equipment	13	-
			Cars, car parts and rubber prod.	7	-
			Electronics	-	3
			Shoes	-	1
			Films and motion pictures	-	13
			Phonograph records	-	5
			Ceramics	-	1
			Pulp and paper	-	2
			Total[b]	254	66

Source: Up to 1970: Restrictions on Exports in Collaboration Agreements in the Republic of the Philippines (UN publication, sales no.72.II.D.8). October 1971-September 1973: Central Bank, Philippines

a : Classified as engineering — b = Details on eight agreements not available

S P A I N

Functions of the Registry - Ministry of Industry & Trade in respect of Technology Importation

Article 2 : In respect of contracts in any form for the transfer of foreign technology, concluded by individuals or corporations other than the Administration of the State domiciled, resident or legally established in Spain, the Ministries of Industry and Trade shall have the following functions and powers :

(a) The Ministry of Industry shall take appropriate administrative measures, in co-operation with the other departments specifically concerned, to ensure that foreign technology is acquired in the manner most beneficial to the national economy.

(b) The Ministry of Trade shall take the final decision regarding the authorization of foreign currency payments in connexion with the above mentioned contracts.

Article 4 : Before reaching a decision concerning the registration of the contracts to which the present Decree refers, the Ministry of Industry shall call for a mandatory report, which shall be binding, from the department or departments competent to deal with the subject of the contract or the type of technology to which it refers.

Both the time taken to reach a decision concerning applications for the registration of contracts and that taken by the Ministries concerned to issue their reports shall conform to the provisions of the Administrative Procedure Act.

Article 5 : If in the opinion of the Ministry of Industry or, as appropriate, of the competent Ministry the contracts include restrictive clauses which present, jeopardize or hinder the technological development of the recipient of the technology, limit his managerial freedom or represent an unfair practice by the party, ceding the technology, entry of such contracts in the Register shall be refused or, where appropriate, they shall be recorded with a note of such circumstances which shall produce the effects referred to in Article 7 of this Decree. No contract on which the report of any of the departments [illegible] article 4 is unfavourable may be registered.

In particular, no contract which implies any limitation on the export possibilities of the "resident" party or of his or its sources of supply shall be registered until a report has been received from the Ministry of Trade.

The aforesaid reasons for refusing registration, or for permitting registration with a note in the Register, shall apply in general to all contracts except those relating to the transfer of technology for the production or use of equipment for national defence, in which certain restrictive clauses may be justified as in the national interest.

A contract on international technical co-operation that lays down in adequate detail the specific conditions binding on the co-operating parties to private contracts for the transfer of technology shall in each specific case be registered without the note of the circumstances prescribed in the first paragraph of this article.

Refusll of registration shall be communicated together with the reasons therefore to the party concerned, which shall be allowed a month to remedy the indicated deficiencies. In such case any new application for registration shall comply with the procedures and time-limits laid down in the preceding articles.

Criteria for Technology Importation

For the purposes of the provisions of article 5 of Decree No. 2343 of 1973, the Ministry of Industry or the Ministry competent to deal with the matter shall make a comprehensive evaluation of the situation of the sector and of the features of the process and the product for which the technology covered by the contract is to be used, in relation to the rights and obligations which the parties assume under the contract.

In this comprehensive evaluation, provisions of the following types shall be among those regarded as unfavourable terms or aspects of the contract :

1. Provisions which prohibit, impose conditions on, or limit the use of the recipient's own technology or the acquisition of technology from other sources, or the use of non-patented special knowledge on the expiry of the contract, or which impose conditions on, limit or annul research,

innovation and technological development by the recipient;

2. Provisions for the obligatory transfer of the patents, improvements or innovations introduced or developed by the recipient after acquiring the technology covered by the contract;

3. Provisions for the transfer of technology in packages which include unnecessary parts or components or in respect of which there is proved to exist an available domestic supply of equivalent quality and reliability; provided that such parts or components are technically separable from the other considerations covered by the contract;

4. Provisions for the transfer of technology which is wholly or partially obsolete, insufficiently competitive or deficient for other similar reasons or by reasons of an obligatory standardization of typification of quality incompatible with the standards established by Spanish law, unless the product is intended primarily for markets in which such standards and qualities are required;

5. Provisions prohibiting, imposing excessive geographical restrictions on, or not expressly authorizing in respect of specific areas, the export of goodes produced by the recipient, and provisions obliging the acquisition of raw materials or components and other intermediate goods or equipment from the transferer or supplier specified in the contract.

6. Provisions establishing minimum levels of activity or limiting the freedom of the recipient to determine features of production in respect of levels, model,competitive articles, prices and terms or entitling the supplier to fix unilaterally the prices of the goods produced by the recipient;

7. Provisions imposing conditions favourable to the interests of the supplier on the sale in the domestic market of goods produced by the recipient, and obliging the recipient to form an exclusive relation with the supplier or to use brands registered by the supplier in Spain;

8. Provisions obliging the recipient to sell, under conditions contrary to the interest of the Spanish economy, to the supplier or to specified third parties goods produced with the assistance of the transferred technology;

9. Provisions giving the supplier a right, not acquired previously by other means to intervene in, control or impose conditions on the business management of the recipient or his strategy of expansion or diversification;

10. Provisions requiring payments appreciably higher than the normally charged in the market in similar situations, or minimal co-part services when the payments are based on fees proportional to the various levels of activity;

11. Provisions establishing payments in the form of fees proper to the level of production without deduction of the value of product components imported and incorporated in the production process to which the acquired technology is applied, or without excluding invoicing lines of goods not affected by the acquired technology;

12. provisions establishing payments based on fees above the line of activity of the recipient, where he is a subsidiary of the supplier and his share of the supplier's authorized capital exceeds 50 per cent or where the supplier of the technology has furnished raw materials of intermediate products used in the process in quantities exceeding 30 per cent of the total cost of the product, or where the recipient of an advisory or project developing enterprise and process technology not transferred for activities in which the process is continuous;

13. Provisions "overpricing" (charging a difference between the prices agreed on in the contract and those charged on the international market by the supplier or his principal competitors) for supplies, materials and equipment associated with the process of technology transfer and obtained from the transferer or from suppliers specified in the contract;

14 Provisions fixing an unsuitable duration, either too short or too long, for the contract or its direct consequences, or providing an automatic extension of the contract and fixing payments for a period longer than the life of the patents involved;

15. Provisions stipulating that where the contract has been drawn up in a language other than Spanish the foreign-language version should prevail in its interpretation.

ANDEAN PACT

Criteria for Technology Importation as adopted in Decision 24 of the Junta Cartagena

Article 20: Member Countries will not authorize the signing of contracts concerning the transfer of foreign technology or patents which contain :

(a) Clauses by virtue of which the furnishing of technology bears with it the obligation, for the recipient country or company, to acquire from a certain source capital goods, intermediate products, raw materials or other technologies, or of employing in a permanent way personnel indicated by the company which supplies the technology. In exceptional cases, the recipient country may accept clauses of this nature for the acquisition of capital goods, intermediate products or raw materials, provided that their price corresponds to current levels in the international market;

(b) Clauses in accordance to which the company which sells the technology reserves the right to establish the prices of sale or resale of the products that may be manufactured on the basis of the respective technology;

(c) Clauses which contain restrictions regarding the volume and structure of production;

(d) Clauses which prohibit the use of competitive technologies;

(e) Clauses which establish an option to purchase, totally or partially in favour of the supplier of the technology;

(f) Clauses which compel the purchaser of technology to transfer to the supplier the inventions or improvements, that may be obtained by virtue of the use of the respective technology;

(g) Clauses which compel (the users) to pay royalties to the owners of patents for patents which are not uses; and

(h) Other clauses with equivalent effects.

Except in exceptional cases, duly qualified by the competent body of the recipient country, no clauses will be accepted in which the exportation of the products manufactured on the basis of the respectiv technology is prohibited or limited in any way.

In no case shall clauses of this nature be accepted in connection with subregional trade (interchange) or with the exportation of similar products to third countries.

Article 21 : Intangible technological contributions shall grant the right to the payment of royalties, after authorization is given by the competent national body, but they cannot be computed as capital contributions.

Article 25 : Licensing contracts for the exploitation of trade marks of foreign origin in the territory of the Member Countries, may not contain restrictive clauses such as :

(a) Prohibition or limitation to export or sell in certain countries the products manufactured under cover of the respective trade mark, or similar products;

(b) Obligation to use raw materials, intermediate goods and equipment supplied by the owner of the trade mark or his affiliates. In exceptional cases, the recipient country may accept clauses of this nature provided the price of same corresponds to current levels on the international market;

(c) Establishment of prices of sale or resale of the products manufactured under cover of the trade mark;

(d) Obligation to pay royalties to the owner of the trade mark for trade marks that are not used;

(e) Obligation to permanently employ personnel furnished or indicated by the owner of the trade mark; and

(f) Other obligations of an equivalent effect.

Requirements which are satsfied :

(a) Shortage of internal savings;

(b) Shortage of foreign exchange;

(c) Lack of directive or administrative capacity;

(d) Need of access to scarce technological knowledge;

(e) Lack of capacity or of commercial contacts, for the sale of merchandise in international markets;

(f) Lack of local impresarial spirit.

Plan for progressive national participation :

(a) Percentage of shares to be placed in the hands of national investors;

(b) Period of time and conditions for carrying out this transfer;

(c) Form of determining the value of each placement.

Effects of the new investment :

(a) Approximate date of beginning of normal operations;

(b) Operation capacity;

(c) Exportable production;

(d) Additional employment generated;

(e) Importation of raw materials or intermediate products in annual production;

(f) Use of national raw materials and items.

Functions and Prerogatives of National Regulatory Bodies as adopted in Decision 24 of the Junta Cartagena

Article 22: National authorities will undertake a continuous and systematic task of identification of available technologies on the world market for the different industrial fields, in order to make available the most favorable and advisable alternate solutions for the economic conditions of the subregion and will forward the results of their work to the Board. This work will be furthered in a coordinated way with those which may be adopted in accordance with Chapter V of this regime in connection with the production of national or subregional technology.

Article 23 : The Committee, upon the request of the Board, shall approve, before November 30, 1972 a programme directed towards promoting and protecting the production of subregional technology, as well as the adoption and assimilation of existing technologies.

This programme must contain, among other elements :

(a) Special benefits, tributary or of another kind, to stimulate the production of technology and especially those connected with the intensive use of items of subregional origin or those which may be designed to take advantage efficiently of subregional productive factors;

(b) Development of exports to third countries of products manufactured on the basis of subregional technology; and

(c) Channeling of internal savings toward the establishment of subregional or national centres of research and development

Article 24 : The Governments of the Member Countries shall give preference in their acquisitions to products which include technology of subregional origin in the form that the Committee may consider advisable. The Committee, upon request of the Board, may propose to the Member Countries the establishment of taxes (or duties) against the products which use trade marks of foreign origin and which cause the payment of royalties, when technology of public domain or easy access is used in their production.

Article 26 : The Committee, upon request of the Board, may indicate production processes, products or groups of products, with respect to which no patent privileges may be granted in any of the Member Countries. Likewise, it may decide on the treatment of privileges already granted.

Article 54 : Member Countries shall create a Subregional Office of Industrial Property (Trade marks and Patents) which will have the following functions :

(a) Serve as a liaison organization between the national offices of industrial property (trade marks and patents);
(b) Gather and publish information regarding industrial property (trade marks and patents) for the national offices;

(c) Prepare typical licensing contracts for the use of trade marks and exploitation of patents in the Subregion;

(d) Advise the national offices on all matters connected with the application of common regulations on industrial property (trade marks and patents) which may be adopted in the regulations referred to in Provisional Articles G);

(e) Further study and present recommendations to the Member Countries on invention patents.

Article 55 : The Committee, upon request of the Board, will establish a subregional system for the development, promotion, production and adoption of technology, which in addition will have the function of centralizing the information referred to in Article 22 of the present regime and distribute it among the Member Countries, together with the Information it may obtain directly on the same subject and on the conditions of commercialization of technology.

General Analysis of Technology Importation to Member Countries of the Andean Group prior to the adoption of Decision 24

The countries of the Andean subregion are not prepared to handle technology well; in general, there is a lack of personnel and adequate structures to generate or acquire technology in keeping with the development programmes of the respective countries.

Subregional nations pay between approximately 40 and 45 million dollars a year in direct expenses related to the purchase and use of technology; this figure is expected to rise to 60 million dollars per year in 1975. In the same year, the subregion will be paying 100 million dollars abroad for advisory services. In addition to these direct costs or payments there are also very steep indirect costs, such as those related to the impossibility of making sound decisions in matters related to technology; failure to use or develop possibilities of generating technology, advisory services, and teaching; not having the proper information on hand to aid in choosing among different solutions to technological problems available in different parts of the world.

Studies performed in countries belonging to the Andean Group show that many of the contracts supplying capital or technology include restrictive clauses imposed by the owners. Technology granting firms presently have much stronger bargaining power than the acquirers in the Andean Group countries, and have been able to insert clauses in the contracts tying capital, technology, supply of machinery, intermediate goods and raw materials, prohibiting exports incorporating the acquired technology, and preventing many activities basic to the development and independence of the Andean nations.

In a study of 150 contracts in Bolivia, Colombia, Ecuador and Peru, it was found that more than two thirds of these included restrictive clauses.

One of the most characteristic clauses ties the supply of technology or know-how to the supply of raw materials or intermediate goods. A survey of those contracts and real cases of sale of raw materials and intermediate goods showed that the subsidiaries of foreign companies in the Andean countries "overbilled" (defining overbilling as the fob price paid in those countries for raw materials, less the international fob price, divided by the international fob price and multiplied by hundred), by an average of 155%, and national companies overbilled by 19%. As an overall sum, the money spent for these items by these countries was six times the total paid in royalties (the 40 or 45 million mentioned above) and 24 times the earnings declared by the same companies.

In Chile, in a study of 39 companies, 110 products were found without overbilling; 9 were from 1 to 30 per cent overbilled; 14 from 31 to 100%, 12 between 101 and 500 per cent, and 2 more than 500%. Again, the percentage of overbilling was noticeably higher in the case of the foreign company subsidiaries.

This method of overbilling is what has allowed foreign companies to remove money from the Andean countries while declaring lower incomes, thus avoiding payment of the corresponding taxes.

Another clause which appears again and again is one limiting exports. An analysis of 247 contracts in Bolivia, Colombia, Ecuador and Peru found that 200 contained clauses totally prohibiting export of products manufactured with the imported technology; 12 allowed exports to bordering countries only and 35 allowed exports throughout the world. In Chile, of 162 contracts 117 included clauses prohibiting exportation and 86% contained clauses restricting export activities. In this case, 92% of the clauses prohibiting export were applied to national firms manufacturing with imported technology. This is logical since technology sellers try to close export doors to companies owned by natives of the Andean countries; however, these clauses forbidding exportation are not applied to their own subsidiaries, so that these are able to act in the international sphere, producing in one country and selling to another.

In the case of the relationship between the home office of a foreign company and its subsidiary in the Andean countries, bargaining power from the national viewpoint is nil: the contract is negotiated between the home office and the branch, which obviously has the same interests. Naturally companies work this system to their own advantage and not the country's. In such cases the national governments should establish some way of regulating these company actions.

Finally, to demonstrate other types of restrictive clauses, I wish to present an analysis of 34 contracts in Bolivia: 24 of these offered strings ; attached technical assistance (technical assistance could only be bought from the home office); 22 tied future know-how to the know-how originally delivered; three set prices for the final product; 11 flatly prohibited the manufacture of similar products, effectively eliminating competition; 5 specified that controversies would be judged in the country supplying the technology; 28 left quality control of the raw materials and intermediate products up to the home office, which is very important since it is through quality control of the raw materials that the home office can act when there is no tying clause for the purchase of inputs; by indicating that certain raw materials do not meet the quality control standards set for the process they can prevent purchases from being made except where they stipulate. There are even contracts in which any patentable improvement of the originally transfered technology becomes the property of the parent office, even if its is discovered by natives of the acquiring countries.

Finally, studies of the patent system in countries of the subregion show that 90% of the patents belong to foreign companies and only 2% are commercially exploited. The patent system has been used by large foreign companies to hinder production and to obtain the monopoly for importing the articles patented by these countries.[1]

What do all these cases of licence contracts and patent laws which work against the fulfilment of national development objectives have in common?

To a large extent the present situation is due to a lack of awareness of the importance of the matter in our countries: we have not thought about the problem enough. Neither do we have the people nor the structure to acquire and create proper technology. It is necessary to design ways to keep this situation from continuing. Naturally, the developed nations are not concerned with helping us dominate technology, nor will they teach us to become independent as this would go against their own interests.

Another conclusion we can derive from the above information is that we should treat the matters of foreign capital, ownership of knowledge, and technology itself in a coherent manner, so as to effectively handle

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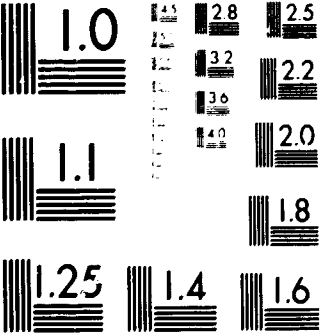
*) A patent holder in a country of thessubregion can demand that a product he acqiired through him, even though production in that country does not incorporate the technology subject of the patent; he often takes advantages of this by offering the buyer very unfavorable conditions



MICROCOPY RESOLUTION TEST CHART

NATIONAL BUREAU OF STANDARDS-1963-A

capital and technology to the benefit of our countries.

PORTUGAL

Functions of the Institute of Foreign Investment

The Foreign Investment Institute to be set up under the authority of the Minister responsible for Planning shall co-ordinate, guide and supervise direct foreign investment in Portugal.

The Foreign Investment Institute shall :

(a) receive and guide potential foreign investors and foreign exporters of technology and ensure the representation before them of all State Departments and bodies responsible for matters in connexion with the fulfilment of their investments or transfers of technology, as well as take action on and submit proposals or give opinions on such legal and administrative measures as are required for the promotion and stimulation of direct investment or of transfers of technology;

(b) grant the authorizations legally required for direct foreign investment and for agreements for the transfer of technology;

(c) submit to the Government, together with its opinion, the papers in connexion with the granting of authorization of investments under the contractual regime;

(d) carry out all necessary procedures for the registration of direct foreign investments, of foreign reinvestments and of agreements for the transfer of technology in accordance with the terms of the law and maintain an up-to-date record of all companies having foreign capital participation;

(e) act as the controlling instrument of direct foreign investment or of any transfers of technology and accompany the application and implementation thereof except where competence for so doing has been relegated by law to another body.

Criteria for Technology Importation as per recent legislation

Article 5 :

1. The appraisal of transfers of technology shall take into account, primarily, not only their possible effect on the national economy but also the scientific and technological capacity already available in

Portugal, such as the availability of research and consultancy services, including engineering, in departments, centres, institutes or companies both public and private.

2. Specific guidelines or criteria for appraisal and authorization purposes may be established for a certain sector, branch of activity or product by means of a joint order of the Minister of Planning and Economic Co-ordination and the minister responsible for the sector concerned and these shall be taken into account by the Institute.

3. The National Board for Scientific and Technological Research shall keep the Institute informed of the existence in Portugal of those departments, centres, institutes or companies engaged in technological research and its application.

Article 6 :

1. Agreements for the transfer of technology shall contain :

(a) A detailed description of the nature of the transfer and of the practical form it will take as well as the type, form and amount of payments envisaged;

(b) an indication of the period for which the agreement is to remain in force;

(c) a guarantee that the recipient of the technology concerned will be kept informed of all or any improvements introduced into it during the agreement period unless such improvements are patentable or constitute an invention;

(d) an indication that components, spare parts and services related with the technology concerned will be supplied at the request of the recipient of the technology as well as an indication of the terms governing the supply thereof;

(e) a statement to the effect that the selling price of goods and services will be fixed at levels not exceeding those in force on the international market whenever transactions in such goods and services between the supplier and the recipient of the technology are envisaged.

2. Whenever transfers of technology include rights protected in the country receiving the technology by means of patents, trade names, models, drawings or other legal forms of industrial property, the agreement shall include the following :

(a) A detailed list of the ownership of the titles to the industrial property involved;

(b) an indication of the time scale for the use of the rights conferred by means of the titles referred to in the above paragraph.

3. Agreements for the transfer of technology shall include, whenever possible, appropriate programmes for the training of personnel.

Article 7 :

1. In agreements for the transfer of technology, particularly those governing relations between foreign companies and their branches in this country, the following clauses shall not be permitted:

(a) Those which tie the provision of technology to the acquiring of capital goods or of intermediate products and other technologies from a specific source;

(b) those which oblige the purchaser of the technology to transfer free of charge to the seller all or any inventions or improvement arising from the use of the technology concerned;

(c) those which restrict the volume and structure of production;

(d) those which either directly or indirectly restrict markets to which the importer of technology could have access;

(e) those which limit the distribution channels to be used if such limitation is harmful to the buyer of the technology or to the economic and commercial policy of the country;

(f) those which reserve to the seller of the technology the right to fix the selling or re-sale price of products incorporating such technology;

(g) those which insist on the predominance of a foreign language in the agreements for interpretation purposes.

2. In cases where the transfer of technology assumes special interest for the national economy, agreements containing one or more of the clauses listed in the preceding paragraph may be authorized.

Article 28 :

1. In agreements for transfer of technology, particularly where these regulate relations between foreign firms and their branches in this country, the following clauses shall not be permitted :

(a) those which tie the provision of technology to the acquiring of capital goods or of intermediate products and other technologies from a specific source;

(b) those which oblige the purchaser of the technology to transfer free of charge to the seller all or any inventions or improvements arising from the use of the technology concerned;

(c) those which restrict the volume and structure of production;

(d) those which either directly or indirectly restrict markets to which the importer of technology could have access;

(e) those which limit the distribution channels to be used if such limitation is damaging to the buyer of the technology or to the economic and commercial policy of the country;

(f) those which reserve to the seller of the technology the right to fix the selling or re-sale price of products incorporating such technology;

(g) those which insist on the predominance of a foreign language in the agreements for interpretation purposes.

Survey of Technology Import

No annual statistics are vailable on payments stemming from licensing agreements. However, a study of 152 companies conducted through the Ministry of Finance revealed that in 1972 these payments amounted to Esc. 211,903,000[1/], of which Esc. 129,635,000 related to manufacture under licence and the licensing of technical processes; Esc. 42,061,000 to the registration of patents and Esc. 42,207,000 to research and/or experimental work. The values recorded by the Bank of Portugal for patents, trade names, models, drawings, inventions and copy-rights amounted in that same year to a total of Esc. 293,000,000.

More recent statistics on payments made through the banking system point to a rise to Esc. 500,000,000 in 1976. However, judging from several cases which have recently been under analysis, we believe that these values

1/ 1 US$ = approximately 40 Esc.

are underestimated and that at the present moment expenditure on the importation of technology must have risen significantly.

We are therefore forced to conclude that Portugal's technological requirements cannot be solved by means of licensing agreements.

The purchase of capital goods abroad seems to be one of the most important means of acquiring technology not only in the case of small and medium companies but also for certain activities entailing high levels of investment.

This is confirmed by the conclusions reached in the medium and long-term plan which reads as follows : "In the case of most industries, the ratio of imported equipment to total equipment used is higher than the percentage that was established for the purpose of identifying the dependence on imported inputs. This reveals high widespread technological dependence despite the fact that the value of the imported capital goods in the total imports is not very high (20% in normal periods)".

Table 21

Types of agreements in the sectors in which licensing agreements predominate (4/73 - 6/77)

SECTOR	TRADE NAMES		PATENTS		KNOW-HOW		MODELS AND DRAWINGS		ENGINEERING		TOTAL	
	n°	%	n°	%	n°	%	n°	%	n°	%	n°	%
Textiles, clothing and footwear	11	4	3	2	18	7	14	14	1	0,4	115	8
Chemical industries, petroleum sub-products	56	24	38	26	83	32	11	11	50	21	332	[illegible]3
Non-metallic mineral products excepting petroleum by-products and coal	[illegible]	1	4	3	16	6	6	6	12	5	74	5
Base metallurgical industries	[illegible]	1	8	5	12	5	9	9	31	13	103	7
Metal products, machinery, equipment and transport material	56	24	57	39	75	29	42	42	19	8	314	22
Building and public works	5	2	5	3	10	4	6	6	47	20	104	7

Total:1,042

The total number of agreements drawn up by the chemical industries was 332, the majority of which related to basic chemicals. However, mention should also be made of the following : 74 agreements in the fertilizer sector; 45 in the sector engaged in the manufacture of soap, detergents, and cleansing products, perfumes etc.; and 73 in the oil refining sector.

With regard to metal products, machinery, equipment and transport material, non-electircal machinery accounted for 120 agreements followed by radios, TV sets, telecommunication and other electronic material with 75 agreements; metal products, excepting transport material, with 64; and the construction of transport material with 51.

Table 22

TYPE OF AGREEMENTS	TRADE NAMES	PATENTS	KNOW-HOW	MODELS and DRAWINGS	ENGINEERING
% in relation to total agreements	17	10	17	7	16
	Management	Personnel	Personnel Training	Technical Assistance and others	
	8	6	7	12	

In the metallo-mechanical sector licensing rights for models, drawings or inventions accounted for 42 % of the agreements; patents for 39%; know-how for 29% and trade for 22%.

In the chemical sector the granting of know-how predominated (32%) followed by patent rights (26%), trade names (24%), trade names (24%) and engineering studies (21%).

With regard to textiles, the highest percentage of the agreements relate to personnel training (20%), personnel management studies (17%) and models, drawings or inventions (14%).

TABLE 23

Agreements by Countries

	FRANCE	GREAT BRITAIN	GERMAN F.REP.	U.S.A.	SPAIN	SWITZERLAND	BELGIUM	OTHER	TOTAL
No	324	188	181	137	133	118	98	275	1,454
% in relation to toal	22	13	13	9	9	8	7	19	100

It should be added that Portugal's dependence on French technology rises if we include the agreements covering models and drawings (25%) and engineering (24%), in which case the average comes fairly close to the average percentage relating to the know-how agreements (22%).

Great Britain and Western Germany were the generators of 13% and 15% respectively of the engineering agreements.

TABLE 24

	TRADE NAMES		PATENTS		KNOW-HOW		MODELS AND DRAWINGS		ENGINEERING		MANAGEMENT	
COUNTRY	No	%	No	%	No	%	No	%	No	%	No	%
France	41	19	29	20	57	22	25	25	57	24	22	19
Great Britain	22	10	22	15	27	10	11	11	30	13	26	22
Fed.Rep.Germany	30	13	15	10	37	14	11	11	36	15	13	11
U.S.A.	24	11	17	11	19	7	9	9	23	10	16	14
Spain	20	9	14	9	25	10	14	14	11	5	5	6
Switzerland	19	9	10	7	23	9	6	6	16	7	11	9
Belgium	21	10	13	9	13	5	5	5	15	6	11	9
Other	43	19	28	19	59	23	20	19	48	20	13	11
TOTAL	220	100	148	100	260	100	101	100	236	100	118	100

In order to evaluate the freedom of action of the licensee the study was aimed specifically at detecting restrictive clauses of the following types: prohibiting or restricting exports; making the use of trade names compulsory; placing limitations on the supply of raw materials and capital goods as well as limitation on the extent of the technology; obligations relating to new products; predominance of a foreign language for interpretation purposes.

The total number of restrictive clauses found in the 1494 agreements under consideration was 82 - which is negligible.

The most salient were clauses forbidding or restricing exports and these appeared in 36 agreements. In 27 agreements a foreign language was to prevail for interpretation purposes.

On examining the restrictive clauses by sectors of activity, agreements in the chemical sector were found to contain 18 and those in the metallo-mechanical sector 23. Then we may conclude that the agreements were not found to contain any significant number of restrictive clauses.

To sum up, a total of 997 involving 1494 agreements were signed by 474 companies which reveals a highly concentrated demand for the purchase of technology. These figures take on even more significance if we bear in mind that ten of these companies were responsible for 173 agreements.

Seven of these companies, reponsible of 89% of the agreements, are large public corporations engaged in fundamental sectors and it is therefore reasonable to assume that the technology they acquire will be properly assimilated and developed.

Considering the number of companies existing in Portugal, and the fact that 474 companies referred to above are among those having the highest technological standard, it may be concluded that the foreign technological requirements of the small and medium companies have not been provided for.

Despite the fact that Portugal is essentially an importer of technology, 35 agreements to supply technology to foreign countries were signed in the last four years. This means that Portugal's technology is now on an international standard in certain sectors such as pharmaceutical products; rolling stock; shipbuilding and repair; oil refining; air transport and engineering and other technical services.

VENEZUELA

The following are broadly defined criteria for the evaluation and approval of technology agreements as outlined in Decree No 746 of 11 February 1975:

Article 1:

Imported technology, patent and trade mark contracts in effect on 1 January 1974, that were submitted for registration within the period legally established in Decree No 502 of 29 October 1974, will have to be adjusted on or before 31 December 1975, to the dispositions of Decision 24 Articles 20, 21, 25 and 51, and to the norms stipulated in Chapter VII of the Reglamento, contained in Decree No 63 of 28 April 1974, so as to eliminate the prohibited clauses there in indicated as well as those clauses which:

(a) Prohibit the manufacture or sale of products made with the imported technology after completion of the contract period;

(b) Prohibit the use of technical knowledge acquired through the contracted technology after completion of the contract period;

(c) Prohibit the use of commercial trade marks that are similar or resemble the one contracted for, after completion of the contract period;

(d) Require the use of a predetermined system of quality control;

(e) Require the user to sell a part, or all, of the production to the technology suppliers;

(f) Call for royalty payments for technical assistance not transferred;

(g) Involve royalty payments even when the user has purchased the technology outright;

(h) Oblige the user to pay taxes which are the responsability of the technology supplier;

(i) Require the technology user to grant an irrevocable autorization to the suppliers for the sale of the products manufactured with the technology;

(j) Require the use to license the technology suppliers to use any improvements or inventions made by the user in relation to processes or products covered by the contract.

Unique paragraph:

The Superintendency of Foreign Investments can, in each case, evaluate the degree of restriction or prohibition of any of the clauses indicated in this Article, in the context of the technological development and economic and social interests of the nation.

Article 2:

The Superintendency of Foreign Investments, having received prior approval from the Council of Ministers, may prohibit other clauses as restrictive, defining them as having an effect equivalent to those spelled out in the previous Article, and this not allowable for the purpose of contract registration.

Article 3:

Imported technology, patent and trade mark contracts in effect as of 1 January 1974, which have not been submitted to the Superintendency of Foreign Investments for registration within the legal limits, should be revised within three months of the date of promulgation of the present Decree.

Article 4:

Within the periods established Articles 1^{o} and 3^{o}, the interested parties must present to the Superintendency of Foreign Investments all the documents which contain legal acts, contracts or agreements duly revised.

Article 5:

Having first evaluated the content of the documents, with their annexes and other pertinent information, the Superintendency of Foreign Investments will indicate within 90 legal working days following the deadlines established in the previous Articles, or from the moment when the last of the pertinent information is in the hands of the Superintendency of Foreign Investments, whether the contract is acceptable for registration.

Article 6:

Once the deadlines stipulated in Articles 1^{o}, 3^{o} and 5^{o} have passed, the competent authorities will require the presentation of the technology, patent or licence contract's Proof of Registry issued by the Superintendency of Foreign Investments, in order to concede, or allow, any class of fiscal incentives, assistance, benefits, facilities, or stimulate of any form for companies operating in the country, established by national laws or reglamentos.

Article 7:

All technology, patent and trade mark contracts which foreign, mixed or national companies contemplate signing must receive prior Superintendency of Foreing Investments authorization and be registered after signing with the Superintendency of Foreign Investments. The Superintendency must, in each case, decide within 60 legal working days following the date a petition is submitted, whether a contract is acceptable.

Unique paragraph:

When the contract presented for registration corresponds exactly to the draft contract authorized, the period will be reduced to 15 days.

P E R U

Cricteria for evaluation and approval

Peru will not agree to the approval of contracts for technology transfer containing the following provisions:

1. Obligation for the licensee to acquire from a specific source capital goods, intermediate products or raw materials, or to make permanent use of the technology supplier;
2. Claims giving the licensor the right to fix the sale or resale prices of the licensee's products;
3. Claimes prohibiting the use of competing technologies;
4. Those obliging the licensee to grant back any improvements or inventions;
5. Clauses requiring payments of royalties for not used patents or trade marks;
6. Any payments of royalties originating from the subsidiary of an affiliate to the parent company;
7. Obligations to sell products, wholly or in part, to the supplier of technology;
8. Agreements where settlement of disputes and conflicts are to be settled outside of Peru;
9. Clauses prohibiting or limiting export of the products to Third countries.

Table 25: Brief assessment of results of Peruvian legislation regulating the flow of technology 1/

ROYALTY PAYMENTS IN US$ OVER 1971-1974 by PERU

Year	Gross royalties	Net royalties
1971*	1,306,249	663,465
1972	12,381,277	6,148,646
1973	11,404,430	5,799,152
1974*	5,873,840	2,853,366
TOTAL	30,965,796	15,464,629

* first and second trimester respectively

1/ Data available from "Efecto del proceso de importacion de tecnologia en el Peru by ITINTEC, Lima

Table 26: Payments of royalties (%) in terms of their destination

DESTINATION	1971	1972	1973	1974	CONTRACTS Number	%
USA and CANADA	60,4	43,0	42.3	34,6	185	46.5
EUROPE	33.5	38.9	48.5	52.3	170	41.6
OTHER AMERICAS	6.1	7.6	7.0	6.9	40	9.2
OTHERS	–	4.5	2.2	6.2	9	2.7
TOTAL	100.0	100.0	100.0	100.0	404	100.0

Table 27: Number of agreements containing restrictive provisions

COUNTRIES	AGREEMENTS Number	%	RESTRICTIVE CLAUSES Number	%
USA	188	46.5	875	52.2
EUROPE	168	42.0	634	37.8
OTHER AMERICAS	37	9.0	130	7.7
OTHERS	11	2.5	38	2.3
TOTAL	404	100.0	1677	100.0