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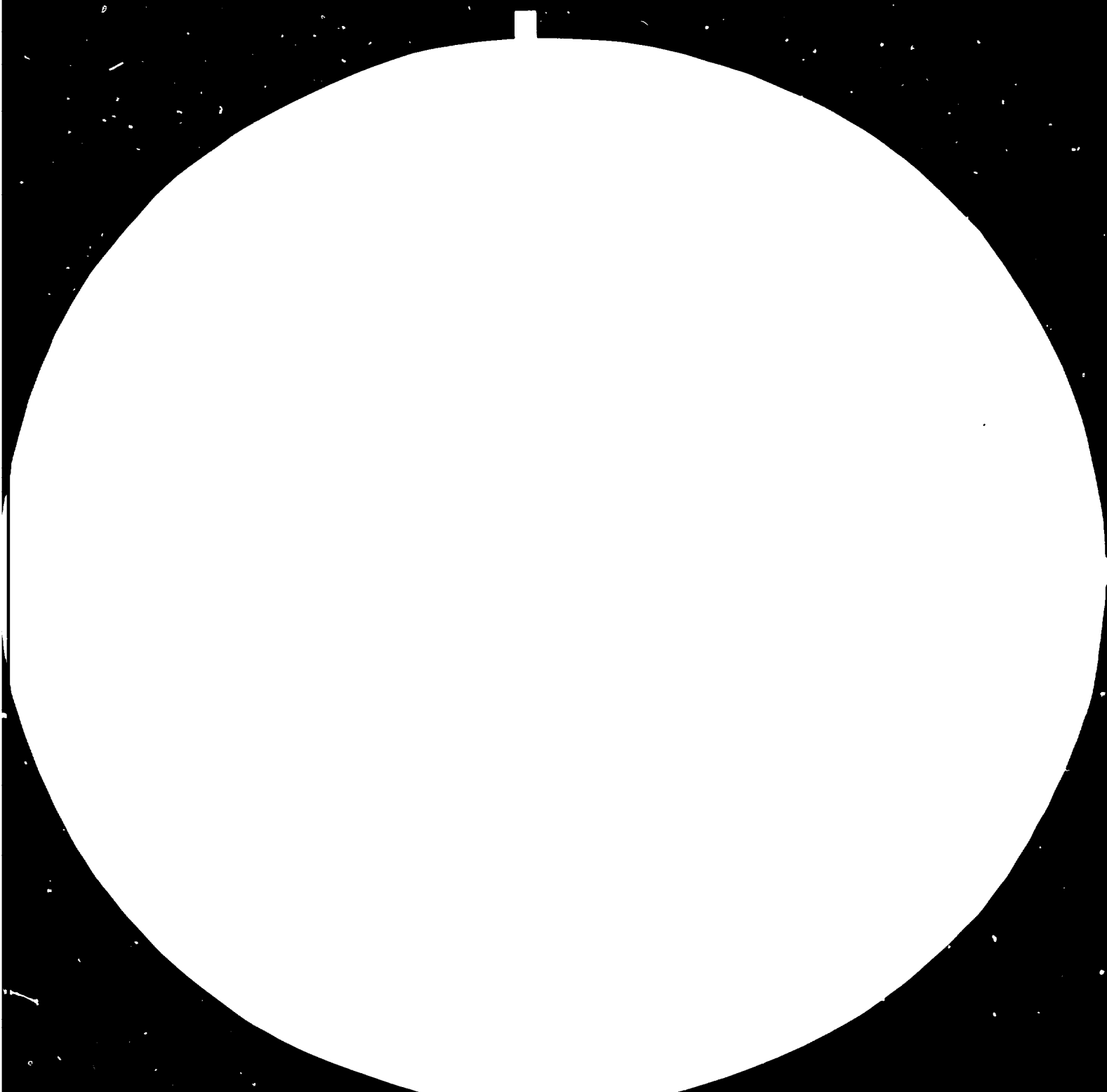
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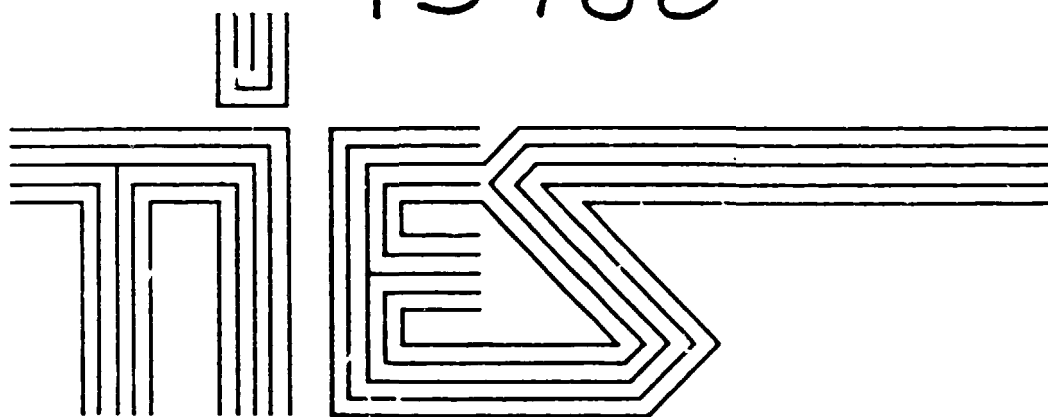




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NEWSLETTER

Technological
Information
Exchange
System

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Compiled by Development and Transfer of Technology Division, Department for Industrial Promotion, Consultations and Technology, UNIDO, P.O. Box 300, A-1400 Vienna, Austria.

Dear Reader,

The Third Meeting of the ASEAN Network Co-ordinators for the project on ASEAN Technological Information Exchange System (ASTIS) was held in Kuala Lumpur, Malaysia, on 2-5 November 1987. The project is a joint undertaking of the ASEAN Committee on Industry, Minerals and Energy (COIME), the United Nations Development Programme (UNDP) and the United Nations Industrial Development Organization (UNIDO), with the objective of establishing a technological information exchange system among ASEAN countries (ASTIS). The meeting was attended by representatives from Brunei Darussalam, Indonesia, Malaysia, Philippines and Thailand who assessed the progress achieved in the implementation of the project and formulated recommendations on the future course of action. In this respect, the meeting agreed to submit proposals for the creation of a Regional Support Centre for ASTIS and a programme for training in the negotiation of technology transfer contracts to COIME for its consideration. In this regard, the meeting requested Malaysia and the Philippines to prepare the respective working papers on the said proposals for submission to the regional co-ordinator.

The meeting had a twofold significance. On the one hand it represented an important step towards regional co-operation with a view to a better understanding of the technology market forces and the strengthening of the negotiation capabilities of the member countries; on the other hand it earmarked the successful completion and practical application of a software package currently designated as CORIS which was developed for application in the institutions in charge of evaluating and monitoring transfer of technology agreements, particularly the TIES members.

This fact was witnessed by the TIES members, particularly at the last TIES meeting held in Warsaw, and underlines once again how important it is for developing countries to share their experiences and ideas in order to accelerate their learning process towards technological self-reliance.

CORIS, rather than being a "trade mark", is an abbreviation for "computerized registry information system" and embodies the collective efforts and a combined mix and inputs which are very much in line with the spirit of TIES itself. CORIS is a software designed as a tool for the handling of information related to transfer of technology agreements by providing the technical means for a more efficient data collection, storage and processing, as well as for the establishment of interlinkages with other computerized information systems, whether national, regional or international.

The demonstration of the software package emphasized the significance of the information system for technology transfer, specifically with regard to effective decision-making, policy-making, strategic planning, monitoring, reporting and networking.

At present, thanks to further developments undertaken in Poland and Malaysia, CORIS is installed and fully operational in the transfer of technology offices of Nigeria and Malaysia, namely the Nigerian Office of Industrial Property and the Industries Division at the Malaysian Ministry of Trade and Industry.

In the near future CORIS will be installed in the ASEAN countries and it is conceivable that by the next TIES meeting, to take place in Lima, Peru, in November 1988, the programme will be routinely operating in a number of other transfer of technology offices.

Although the TIES and ASTIS members represent the prime target group for the implementation of CORIS, this software may serve as an excellent management tool for other institutions of developing countries dealing with information related to transfer of technology agreements. For further information on this subject our readers may address their inquiries to the Transfer of Technology Programme Branch, Development and Transfer of Technology Division, Department for Industrial Promotion, Consultations and Technology, United Nations Industrial Development Organization (UNIDO), Vienna International Centre, P.O. Box 300, Vienna A-1400, Austria.

Development and Transfer of Technology Division
Department for Industrial Promotion, Consultations
and Technology

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UNIDO NEWS

Technological Advisory Services

In previous issues of the TIES Newsletters we published information on the Technological Advisory Services which aims to provide advice to governments and entrepreneurs of developing countries on the negotiation of transfer of technology agreements.

To further inform our readers on the scope of the TAS programme, we thought it would be useful to present some examples of advisory services rendered during 1987.

Whenever appropriate, and for the sake of confidentiality, the names of the countries or companies involved have been omitted.

As you may know, the TAS services are basically operated at two levels:

(a) They can be provided from UNIDO Headquarters as a desk service. This aspect of TAS is more appropriate in situations where the requesting organization needs advice on specific contractual issues, for example on the assessment of a reasonable level of payments, drafting specific clauses, or review and advice on draft agreements under negotiation. At this level advice can be provided by using the experience accumulated within UNIDO, eventually supplemented by contributions from outside specialists or institutions.

(b) When complex negotiations are involved, e.g. in relation to major industrial projects, short-term field missions by appropriate staff members or specialized consultants become necessary. Services such as TAS have to be performed in a very competent manner and a roster comprising a solid and diversified range of expertise is an essential tool for a viable work.

TAS assistance involving field missions

1. Assistance to a steel company on the main issues related to the negotiation of a steel complex and identification of the main area problems requiring future assistance from UNIDO. This preliminary form of assistance resulted in subsequent projects, namely:

- Techno-economic study allowing the assessment of the feasibility of the project in order to take a final decision on the investment.
- A larger scope and comprehensive assistance along the different phases of the negotiation process.

2. Mediation and assistance in the negotiation of a collaboration agreement including transfer of technology between business firms from Sweden and India. In addition to leading the negotiations to a successful outcome the mission was instrumental in structuring and drafting a contract suitable to meet the parties' objectives in a totally fair and equitable way.

3. Assistance to a Dutch and Thai firm in the discussions intended to lead to a joint venture in the food processing industry and formulate the results of the discussion into a Memorandum of Understanding towards the establishment of a joint venture for the development, production and marketing of the contractual product to be manufactured by utilizing the combined know-how of both companies.

4. Assistance to prospective partners, participating at the Investment Promotion Forum, in individual negotiations including draft of Letters of Intent and the draft of agreements corresponding to arrangements negotiated between participants.

5. Assistance to the management of a cement plant in the resolution of a judicial dispute related to the construction of a cement plant.

6. Assistance to a petrochemical company on the selection of technological options and preparation of tender documents related to the revamping of a phosphoric acid plant.

TAS assistance provided from Headquarters

1. Assistance to a public fertilizer company on the alternative payment formulas and methodologies for the negotiation of a contract for the construction of a chemical plant.

2. Information on methods and lump sum payments for know-how manufacturing technology of switch gear panels.

3. Identification of potential suppliers for technology (turnkey) on the plants for production of citric acid, sorbitol, manitol and vinyl acetate.

4. Information on sources of raw materials, procurement of equipment and identification of technical partners related to the production of sulphuric acid and allied chemicals.

5. Information on payment criteria including data related to know-how and patent rights for the manufacture of isopropanol.

6. Information on payment criteria and royalty base in licensing agreement with specified technology suppliers for the manufacture of automobiles.

7. Experience on licence fees on computer software developed by specified consultants in the field of petrochemicals.

8. Identification of potential technology suppliers relating to button mushroom culture for joint venture arrangements.

9. Supply of sample contracts and elements for the evaluation and formulation of guidelines related to contracts product-in-hand.

10. Information on average conditions for cosmetic cream, deoderant, perfumes and baby powders.

11. Information on experience available in evaluating technical assistance contracts and comments on contractual terms, form of payments, approved validity referring to transfer of technology in financial, administrative, commercial and technical management for this type of contract.

12. Information on computer policy as related to technology acquisition in developing countries and other information related to computer industry research and development.

13. Identification of suppliers in the manufacture of casual wear made of denim.

14. Information on payment criteria in the tyre manufacturing industry.

15. Identification of technology and machinery manufacturers in order to study a new project to produce bottles and bags used in the canning of edible plant oil.

16. Information on costs of turnkey plants for various manufactured products including plant capacity and scope of supply.

17. Information on sources of technology for an ethanol plant and guidance when approaching prospective negotiations.

18. Research and supply of information on trade mark policy in transfer of technology agreements in a selected number of countries.

19. Supply of techno-economic data for the decision on the investment of a carbon black plant.

COUNTRY NEWS

Philippines - One-stop shop for investments opened

The one-stop shop action centre for foreign and domestic investors is now in operation to act on all matters concerning the setting up of business or the inflow of investments in the Philippines.

Trade and Industry Secretary Jose S. Concepcion, Jr. said the centre forms part of an inter-agency council on investments and will have the power and capability to assist local and foreign investors seeking information and assistance on investment matters. It will be tasked with "co-ordinating investment development efforts of the Government, so that domestic and foreign investors need only to go to the centre for their needs," he elaborated.

The centre which is located at the Board of Investments (BOI), will be under the supervision of Assistant Minister Gloria Macapagal-Arroyo.

Minister Concepcion said the centre will be manned by representatives from the departments of trade and industry, tourism, agriculture, natural resources, and transportation and communications.

He stressed that representatives of these government agencies are authorized to receive, process and act on the application of businessmen and investors and on the clearances required by their respective offices. (Source: TIIC)

(In this issue of the TIES Newsletter you will find details of the proposed Investment Code of 1987 for the Philippines.)

Senegal - Second African TIES Meeting, Dakar, 8-10 October 1987

For most developing countries, and in particular for African countries, industrial development is, and will continue to be, dependent on imported technology due to the difficulties these countries have in meeting the demands for industrialization in a self-reliant manner.

It is known, however, that in many cases the technologies imported from abroad do not achieve the expected results due to lack of information and capabilities to efficiently handle the process of selection, negotiation and adaptation of the technology originating from foreign suppliers.

Within this background ARCT and UNIDO have jointly undertaken the creation of a network among the institutions in charge of technology acquisition in the African countries - African TIES - for exchange of information and experience on transfer of technology evaluation and negotiation. The African TIES involves, among others, the collection and dissemination of information on the technology market characteristics and the existence of legal and institutional infrastructure to deal with the technology inflows and the transfer of technology agreements in a systematic manner. The African TIES network started functioning with the membership of Ethiopia, Cameroon, Nigeria, Senegal and Tunisia and is now being extended to Egypt, Sudan, Côte d'Ivoire, Zimbabwe and Kenya.

A substantial number of developing countries have established institutions, usually referred to as Transfer of Technology Registries, with the functions of evaluating and registering the transfer of technology agreements and ensuring that the technology is negotiated in equitable terms and in conditions appropriate to the local environment and allowing the absorption of the imported technologies and the upgrading of the local technological capacities.

This objective underscores the role of NEGOTIATION of the TECHNOLOGY and the importance of the interaction between the imported technology and the domestic engineering and consultancy services, technological institutions and R&D facilities towards the achievement of a suitable technology base in developing countries.

Under the sponsorship of UNIDO the Transfer of Technology Registries have formed a network designated as TIES (Technological Information Exchange System) for exchange of information, on a confidential and reciprocal basis, on the economic and technological information contained in the approved and registered contracts.

The TIES system has developed into a fully operational one and so far information on 8,000 contracts has been exchanged.

The experience accumulated so far by Transfer of Technology Registries clearly indicates the importance of an effective organization of the information flows related to Registry activities. It was found that improving the system of collecting, storing, processing and disseminating information may substantially contribute to the overall Registry performance as well as to the increase of its benefits resulting from the access of information exchanged under TIES where every possible element on conditions of contracts and experience of the respective negotiation and implementation is likely to be found.

Another important aspect relates to the need for improving the skills and professionalism of government officials and entrepreneurs of developing countries to efficiently negotiate the transfer of technology agreements with their foreign counterparts.

Within this context, and in connection with the next African TIES meeting, special reference is to be made to the following:

(a) UNIDO has developed a computerized programme - CORIS - aimed at providing a tool to facilitate the exchange of information among the TIES members, to assist the Registries in the evaluation and monitoring of the implementation of the transfer of technology agreements and to ensure the interlinkages between the Registries and the other components of national technological systems.

(b) UNIDO is compiling the experience and materials resulting from its training programmes on technology negotiation into a manual which is intended, on the one hand, to cover the whole range of issues and subjects that negotiators, decision-makers and government officials dealing with technology acquisition and negotiation should be aware of; on the other hand, the manual is expected to serve as a basis for developing countries, especially the African countries, to build up their own training capabilities in this field.

The TIES system has been extremely useful in assisting the member countries in substantially improving the conditions of technology acquisition, and jointly with ARCT, UNIDO is undertaking efforts to extend the TIES activities to the African region.

The first African TIES meeting took place in Dakar from 1-3 October 1985 and set a basis for the creation of a TIES network which is expected to help African countries obtain correct and appropriate information on contractual agreements covering their technology acquisition efforts.

The discussions at the first African TIES meeting concluded that the absence of well-established regulatory functions for technology transfer has been detrimental to African countries and that efforts should be made to develop institutional capabilities, provisional capacities and ensure access to information allowing the strengthening of negotiation position vis-à-vis the foreign technology suppliers. The meeting also recognized the need for a legislative framework that will give the Technology Transfer Registries the authority they need to fulfil their tasks. The meeting decided to give priority to the design of a network for exchange of information among African countries covering the terms and conditions of technology acquisition including the financial, legal and technical aspects of technology transfer. ARCT and UNIDO would constitute a co-ordinating committee for the network to follow up, monitor and evaluate the activities of the network.

The main objectives of the Second African TIES meeting are the following:

(a) To follow up the progress made in the prospective member countries concerning the creation or consolidation of legal and institutional infrastructure oriented towards technology acquisition and negotiation as well as to the operationality of the focal points;

(b) To present the computerized programme developed by UNIDO with a view to facilitating the technological information management at the national level and the exchange of information among the members of the network in particular and within the TIES system in general;

(c) To assess the draft manual on technology negotiation under preparation by UNIDO and identify the training needs of African countries in this field in order to finalize the manual intended to be used for building up self-sustained training capabilities in the region.

Rwanda - Seminar and advisory programme on contract negotiation, Kigali, 7-11 December

For most developing countries, industrial development is and will continue to be dependent on imported technology. Experience has shown that in many cases the imported technologies fail to meet the recipient's expectations because the suppliers impose not only high costs but also a variety of conditions which do not allow the absorption of knowledge nor the development of indigenous technological capabilities. African countries, in particular, have become increasingly aware that the lack of skilled entrepreneurs and government officials in the negotiation of technology may have a negative impact on their industrial development, and their concern has been reflected in the Lagos Plan of Action which states: "With regard to the development of technical entrepreneurship there is a need to direct attention to current practice in the training of technical manpower to include various dimensions of the technology development process".

This is also reflected in the report of the Fourth General Conference of UNIDO which stated that "UNIDO should organize programmes in a number of specialized areas related to the development of human

resources for industrialization, *inter alia*, training for contract negotiators" (resolution No. 1, para. 10 (b)), and "... Strengthening the negotiation capabilities in developing countries" (resolution No. 2, para. 12 (f)).

The Government of Rwanda, through the Ministry of Industry, Mining and Handicrafts, has requested UNIDO's assistance in organizing a programme to assist government officials and entrepreneurs on negotiation and evaluation of transfer of technology agreements. Accordingly, a preparatory mission to Rwanda was carried out in early 1986 which found that a significant number of projects requiring foreign technology are being implemented or are in the phase of pre-feasibility or feasibility study, but that the respective promoters have no experience on the issues of transfer of technology negotiation and strongly need advice on how to appropriately deal with the foreign suppliers.

On the basis of these findings it was decided to hold a five-day seminar on issues of negotiation, to which about 30 government officials and managers of private and public enterprises with responsibilities in the conducting of negotiations with technology suppliers are expected to attend.

The seminar will include presentations and guidance on selected topics of negotiation of common interest for all the participants. Among such topics, the following were identified during the preparatory mission:

- International legal framework for transfer of technology negotiation;
- Forms of transfer of technology;
- The transfer of technology in the joint-venture context;
- Technology selection and financing sources;
- Structure and types of contracts;
- Pre-contractual arrangements (optional agreements, letters of intent, etc.);
- Post-contractual arrangements (distribution agreements, management agreements, etc.);
- Principles and methods for evaluation of technology costs:
 - (i) Direct costs;
 - (ii) Indirect costs, e.g. tied transactions;
- Unpackaging of technology;
- Guarantees and warranties;
- Adaptation and improvement of processes;
- Contract implementation;
- Contracts for the supply of equipment, services and public works:
 - (i) The terms of reference;
 - (ii) The performance and guarantee bonds.

Presentation of a case study;

A case study, to be presented by the counterpart organization, will reflect the experience of Rwanda in the transfer of technology negotiation.

Advisory services:

In addition to the subjects presented in the group briefing, experts will be made available to provide free advice to the participants on a confidential basis on issues related to agreements they may currently have under consideration or negotiation.

TECHNOLOGY ACQUISITION

Experience and practice of technology transfer in the Republic of Korea with particular reference to remuneration and government regulations

Introduction

Since 1962 the Republic of Korea (ROK) has launched a series of five-year economic development plans in order to facilitate an industrialization process which requires much advanced technology from developed countries. From that time until the present, ROK's reliance upon foreign know-how and technology has been significant, and it is generally recognized that foreign technology will continue to play an important role during ROK's economic development plans for the 1980s and beyond.

In addition to encouraging joint-ventures through direct equity investments in Korean industries, the Government of the Republic of Korea hopes to increase the level of inducement of foreign technology, and has taken a number of steps to encourage foreign enterprises to license their technology (including, but not limited to, technical information, trade secrets, know-how and other information, whether or not patented) to Korean industries.

Within the context of planned economic development, importation of foreign technology has been undertaken as a means of improving the international competitiveness of Korean products exported abroad and of facilitating domestic production of products which would, otherwise, have to be imported. The main sources of foreign technology were Japan and the United States (although the inflow of technology from European sources is increasing and the sources have become more diversified in recent years) and the industries which have made the greatest use of transnational licence agreements were electronics, machinery, chemicals (including synthetic fibres) and metal products. The terms of these technology licensing agreements have historically been subject to extensive controls by statutes, regulations and guidelines, and by case-by-case approval or acceptance procedures where the relevant officials have exercised considerable discretion.

An example of such government regulation of the terms of agreements was a policy, in effect until recently, of the Ministry of Trade and Industry (which was the ministry responsible for accepting most agreements in the manufacturing industry sector) not to accept agreements which provided for royalties in excess of 5 per cent of net sales or terms in excess of five years. However, there is a general feeling that government intervention in the economy is becoming less appropriate now that the economy is becoming more advanced, and the trend of allowing the parties freedom to negotiate their own terms in licensing agreements as well as in other forms of contracts is advancing slowly but steadily. Thus, there is now greater flexibility in the royalty rates which may be accepted and the term of the agreements, as well as in other areas.

Government approvals for licensor's remuneration

The issues of government approval and of remuneration are inextricably intertwined, because some form of government approval is always required for any transaction which involves payments of fees or royalties or the establishment of a credit relationship between a Korean licensee (a resident) and a foreign licensor (a non-resident). That is true irrespective of whether the payment obligation is expressed in foreign or in Korean currency. In addition, certain types of government approval carry with them tax exemptions with obvious implications for the amounts of compensation which may actually be received by the licensor.

There are three basic laws under which technology licensing agreements may be approved such that the approval could be the basis for the remittance of foreign exchange:

(1) The agreement could be approved under the terms of the Foreign Capital Inducement Law ("FCIL") by the Ministry of Finance ("MOF"). This is the most desirable form, as it entitles the licensor to a guarantee that the fees paid for the technology may be remitted abroad in foreign currency and it carries with it substantial tax exemptions.

(2) The agreement could be approved under the terms of the Technical Services Business Promotion Law ("TSBPL") by the Ministry of Science and Technology.

(3) The agreement could be approved under the terms of the Foreign Exchange Control Law ("FEL") by a designated foreign exchange authority.

In practice, faced with the fairly restrictive limits which have historically existed in regard to the terms which could be included in a technology licensing agreement that had to be accepted by governmental authorities, foreign technology owners have sought other ways (instead of or in addition to licensing fees and royalties) in order to maximize the total level of profits which they could realize through the transfer of their technology. One possibility was for the foreign technology owner to enter into a joint venture agreement with a Korean partner to form a Korean joint venture corporation.

In that case, approval would have to be obtained for the foreign investment and also for any fees paid by the joint venture for the use of the foreign partner's technology. Assuming the foreign investment had been duly approved, however, the foreign partner would not have to obtain any additional approval for the remittance of its share of the dividends arising out of the profits generated by the joint venture through, among other things, its use of the foreign technology.

Yet another way in which a foreign technology owner might obtain profits through the licensing of its technology to a Korean licensee would be through granting an independent Korean corporation or a Korean affiliate a licence to use the technology for no fees, pursuant to an arrangement whereby the foreign technology owner would purchase the products produced through the use of the technology at a low price. Under the Foreign Trade Transactions Law, the Ministry of Trade and Industry ("MITI") could theoretically regulate the export price of specific items so as to prevent the parties from agreeing to an unreasonably low price, but in practice such regulatory power is not exercised. No approval is required for the

licensing of the foreign technology when no licensing fees are charged and the only applicable foreign exchange regulations are an obligation on the Korean party to collect the payments which are due to it and to have them channeled through the Bank of Korea or a foreign exchange bank.

Government intervention in technology transfers

As a civil law country with an essentially capitalist economy, ROK theoretically accepts the principle that international contracts may be entered into pursuant to the agreements which the parties have reached through their negotiations, based solely on their own discretion. Thus, the types of technology to be induced, the array of rights and obligations provided for in the contracts, the duration of the contractual obligations, and the fees to be paid should all be decided upon by the parties themselves. In practice, however, the Korean Government has played an active role in regulating the inducement of foreign technology in order to maximize the economic benefits and minimize the costs for both the licensee and the Korean economy as a whole.

The mildest form of government intervention was the publication of a recommended "Standard Technical Licence Agreement" by the Fair Trade Office of the Economic Planning Board. This aids unsophisticated Korean licensees by alerting them to the types of contractual provisions which would be desirable from their perspective. In addition to being a form of legal advice for the licensee, though, the recommended standard form also puts considerable pressure on potential licensors who realize that their agreements with Korean licensees will have to be accepted by Korean governmental authorities. Some of the provisions in the standard form are, in fact, mandatory, and others may be required on a case by case basis by the authorities responsible for approving particular licensing agreements.

The laws, regulations and guidelines relating to the inducement of foreign technology can largely be understood as a means of advancing the same objectives.

One important legal provision for maximizing the value of the induced technology is contained in the criteria enumerated in the Enforcement Decree of the FCIL for foreign technology, which may be accepted under that law. (Though an agreement which is not accepted under the FCIL might still be approved under some other law, there are substantial advantages for the licensor, including tax exemptions, which follow from the agreement being accepted under the former law, so a potential licensor will frequently structure an agreement to conform to requirements of that law.) The relevant ministries of the Government are directed not to accept a technology licensing agreement under the FCIL if it contains any of the following characteristics:

- (1) The agreement is intended mainly to exploit a simple design, trade mark, or exclusive franchise;
- (2) The agreement is intended mainly to serve as a pretext for sales of raw materials, parts or accessories;
- (3) The agreement contains significant terms which are unfair, such as export restrictions;
- (4) The agreement relates to obsolete or otherwise inferior technology;

(5) The agreement relates to technology similar to that which is used by a manufacturer using protected domestically-produced technology as determined by the Ministry of Science and Technology;

(6) The agreement relates to the inducement of technology which is unsuitable under the provisions of other laws or regulations.

In a similar way, the FCIL provides that foreign capital (which is defined to include foreign technology) may not be induced if it would have a negative effect on the sound development of the national economy.

On the basis of the above criteria, government officials conduct an appraisal of the value of the licensed technology as a fundamental part of their discretionary review. In conducting that appraisal, they consider whether the technology is locally available, whether it could be obtained on better terms from another foreign source, and whether it is consistent with the priorities set forth in the current economic plan.

The consequences of the review of the technology involved are not just a "yes or no" determination of whether the agreement may be accepted under the FCIL, but also a determination of what fees may be charged. In the past, if the royalty rates to be charged were above a certain amount, that would trigger a requirement that a full governmental review of the royalty rates should be conducted, and approval was rarely granted for royalties in excess of 10 per cent of net sales. At this time there are no codified maximum royalty rates, and the formal review procedure has been abolished, but the 10 per cent ceiling does remain in effect as a practical policy matter. Furthermore, the maximum amount which may be charged in any given case depends on the technology involved. In the case of technology for low-priority industries (e.g., foods, or pharmaceuticals) the permissible royalty rates appear to be no more than 5 per cent, and royalty rates from 5 to 7 per cent are most common, but for high technology items which enjoy high priority in the overall economic development plans, royalty rates as high as 7 or 8 per cent of net sales may be accepted.

Examination of the phrase "significant terms which are unfair", as stated in item three of the above list of unacceptable agreements, reveals a consistent policy designed to maximize the value and minimize the cost of foreign technology. The Fair Trade Office of the Economic Planning Board issued a list (entitled Notification No. 50) enumerating unfair clauses including:

- (1) "Tying-in" clauses which unreasonably obligate the licensee to purchase raw materials or components from the licensor or a person designated by the licensor;
- (2) Restrictions on the areas in which the licensee may sell the licensed products except where such sales would conflict with the licensor's pre-existing activities or obligations;
- (3) Other restrictions on the licensor's sales activities;
- (4) Restrictions on the licensor's handling of competitive products unless such restrictions are justified by the licensee having been given an exclusive license from the licensor;

(5) Non-reciprocal obligations on the licensee to share information regarding improvements in the licensed products;

(6) Royalties charged on products which do not use the licensed technology;

(7) Requirements that the licensee return the technology and discontinue use of it after the expiration of the agreement unless the term of the licensor's exclusive (patent) rights survive the agreement or the agreement was terminated due to the licensee's breach;

(8) Any other unreasonably restrictive clauses which are not generally acceptable under international commercial practice.

If a licensing agreement has clauses which, according to the above list, are deemed unfair, the parties will be asked to change them. If they fail to do so, the agreement will not be accepted.

Calculation of the fees payable for the transfer of technology

Payment for a licence of technology may be in the form of either (a) a lump sum payment, (b) a running royalty, or (c) a combination of the two. Other payments such as compensation for out-of-pocket expenses incurred by the licensor in connection with the licence, or remunerations for expatriate technicians on the basis of a certain rate (per diem) for each individual involved may be considered in addition to the above-mentioned payments. In principle the per diem rates which may be charged for foreign technicians is left to the discretion of the parties, but in fact the qualifications of the technicians and the reasonableness of the per diem charges are actually scrutinized by the Ministry of Science and Technology and/or some other relevant ministry.

The maximum allowable royalty rate will vary depending upon the structure of payment for the licence. The government will not normally permit royalties for sale of products not utilizing the licensor's technology. There have been instances, however, of approved technology inducement contracts requiring royalties on the whole output of a manufacturing facility even though a particular product manufactured in the manufacturing facility does not directly contain specific product technology of the licensor. The royalty payable on all output irrespective of specific product technology has been approved on evidence that the licensor's technology is incorporated into the overall design, construction, operation and maintenance of the manufacturing facility and that, therefore, even though a specific product does not contain product technology licensed by the licensor, the ability of the licensee to manufacture the non-licensed products is directly related to the licensor's technology. The royalty rate for these non-licensed products has been significantly lower than that for specifically licensed products.

In regard to the calculation of royalties payable on sales of the licensed product, the parties were previously required to base their calculations on a standard definition of "net sales proceeds" which was issued by the Korean Government. Although as a result of some liberalization in the law, that definition is no longer mandatory, the Ministry of Finance ("MOF") and other ministries still frequently insist upon including the standard definition and require use of such definition for calculation of royalties. Even if some deviation is allowed in the details of the definition, it is unlikely that approval would be granted if the overall result were not substantially the same.

The standard definition of "net sales proceeds" is as follows: "The 'net sales proceeds' for the purpose of paying royalties or other fees in connection with a technology inducement contract shall be the total sale proceeds of the licensed goods (or parts) produced or manufactured under the contract, less: (1) sales discounts including any sales rebates; (2) sales returns; (3) indirect taxes (value added tax, etc.) on sales of goods; (4) insurance premiums for goods sold; (5) packing expenses for goods sold; (6) freight and delivery expenses for sales of goods; (7) sales commissions; (8) advertising expenses for sales of goods; (9) expenses incurred in the installation of goods; (10) CIF price, import duties, other duties and taxes and sales commissions on raw materials, parts, or components purchased from a licensor."

If any expenses not related to the contract are included in computing the net sales proceeds, such expenses may be deducted upon the mutual agreement of the parties. Another variation which may be allowed if the parties agree would be fixed royalty charged on each unit sold without regard to the actual net sales price.

As mentioned above, if a running royalty is the only payment for the license and it is determined on the basis of "net sales proceeds", the royalty rates will normally be limited depending on the technology involved, to in most cases, between 3 and 8 per cent. If there are substantial lump sum payments or other fees, the maximum royalties will be correspondingly reduced.

Systems of taxation and their impact

If there are no tax exemptions, a foreign licensor's liability for Korean taxes imposed on royalties received from the licensee will depend, to a certain extent, on whether the licensor is deemed to have established a "permanent establishment" ("PE") in Korea. If the licensor has a PE in Korea and the licensed technology is "effectively connected" to the PE, the royalties are included in the gross income of the PE as business profits and taxes accordingly. Although there are numerous factors to be considered, in order for the technology to be effectively connected to the PE, two of the important factors the tax authorities consider are whether the technology constitutes an integral part of the business conducted by the PE and whether the PE included the relevant technology among its assets in its accounting practices. In the absence of a PE, for corporation tax purposes royalties are taxed at the withholding rates set forth in the Korean tax laws as modified by an applicable tax treaty.

As was mentioned above, however, the FCIL provides tax exemptions to foreign licensors as a means of attracting foreign technology pursuant to its terms. If a technology licensing agreement has been accepted by the relevant authorities, the FCIL grants a complete exemption from such taxes on royalties earned during the first five years of the technology inducement contract, commencing with the date of government approval. In addition, other forms of tax exemptions, including exemption from Korean Personal Income Tax for expatriate technicians serving in the ROK in connection with the technology transfer is also available under the FCIL. After the exemption period, assuming the licensor does not have a PE in the ROK, a lowering of the regular tax rate under the Corporation Tax Law (i.e. 25 per cent of gross receipts), or an applicable Treaty rate will be applicable.

Settlement of payment

Under the FCIL, the remittance of payment under a licence of technology is guaranteed in accordance with the terms and conditions of the approval of the

licence. Therefore, if the licence is approved by the MOF or competent ministry the payment received pursuant to the licence agreement may be converted into foreign exchange and remitted out of ROK. For remittance of the payment, the confirmation by a foreign exchange authority is required but the foreign exchange authority merely confirms the calculation of the amount paid and the conformity of the payment to the amount due under the licence agreement, and approval is routinely granted.

The procedure normally takes only a few days and no substantial documentation is required. Most licence agreements are drafted so as to require the Korean party to take all necessary steps for the remittance of the payment to the technology provider and such agreements have been accepted by the MOF and other ministries.

No guarantee of remittance is provided for licences of technology approved in accordance with the FECL or the TSBPL, so in such cases approval of a particular remittance might be subject to the Korean Government's assessment of its foreign exchange situation at the time. In practice, however, no limitations have ever been imposed on the remittance of payments which have become due pursuant to a licence approved under the FECL or the TSBPL.

Procedures for obtaining Government approval

For a technology inducement agreement (TIA) to be accepted under the FCIL, the licensee must report it to the relevant ministry which has jurisdiction over the industry or the enterprise involved. Before accepting the report, the ministry will forward the TIA to the Fair Trade Office of the Economic Planning Board for review and comment.

The Fair Trade Office will comment on provisions of the TIA which may be deemed unfair under Notification No. 50. The ministry will scrutinize the TIA to determine whether or not the technology is sufficiently sophisticated to warrant introduction into the ROK. It will also scrutinize the business terms and, upon the recommendation of the Fair Trade Office, it may require changes in one or more provisions.

The relevant ministry must ordinarily respond to the report of the TIA within 20 days after its submission, or the report is deemed to have been accepted without modification. This report/acceptance system was adopted by an amendment of FCIL in 1985. (Before that date amendment authorization for a TIA by the relevant ministry, and not merely acceptance of the report of the TIA, was required.) If additional time is necessary to review the report, the ministry may notify the licensee to that effect, but such additional time is rarely required. However, if within the 20-day period the MTI imposes conditions upon its acceptance of the report which require modifications of the TIA, then the TIA may be accepted by the Government only after the parties have submitted an appropriately modified TIA to the ministry within 60 days from receipt of the letter requiring the modification.

Certain issues which are often the subject of objection by the Government may nevertheless be negotiated to some extent, in the light of the trend toward liberalization in the laws and practices. Instead of waiting for the formal government response, many parties find it advisable to make inquiries of the appropriate officials within the relevant ministry and the Fair Trade Office prior to and shortly after submitting the report of the TIA, both to ascertain their attitude toward the project and to explain matters which will help them understand the value of

the technology involved and the reason for contractual provisions in the TIA with which they may not be familiar. In this regard it should be noted that though the party submitting the reports and receiving the Government's response is the Korean party (the licensee), the foreign party also has an obvious interest in having the report accepted, and the foreign party may enter into informal contacts or negotiations with the relevant officials.

Conclusion

Although most transfers of foreign technology into the ROK have been pursuant to licensing agreements entered into by private parties (licensor and licensee), the Government's role in influencing the kind of technology being introduced and the terms and conditions of the transfers has been very important. At the present the ROK is facing considerable pressure from its trading partners to liberalize its foreign trade policies and to relax or abolish many of the regulations on international transactions. Perhaps in response to such pressure or perhaps pursuant to its own internal policies, changes are being made, but sometimes the changes involve no more than a transfer of the regulatory authority from one government agency to another. It is unlikely that Korean and foreign parties will be left to act at their own discretion in arranging for technology transfers in the near future.

(This article is based on a paper presented by Dr. Sang Hyun Song, Professor of Law, Seoul National University, Republic of Korea, at the Workshop on Licensing and other Industrial Property Transfer Arrangements, Karachi, April 1986. First published in Asia-Pacific Tech Monitor, May/June 1987)

Technology transfer in China

Technology imports into China

With a view to promoting the development of her economy, the People's Republic of China has been fostering technological co-operation with more than 30 countries spread over different parts of the globe during the past three decades. During the period, China concluded contracts for the import of more than 2,300 items, by way of technology and equipment worth about US\$24 billion.

Scenario during the first six Five-Year Plans

In the 1950s, a total of 156 industrial projects were set up in China utilizing technologies transferred from the Soviet Union and Eastern Europe. These were in the metallurgical, machine building, automobile, coal, petroleum, chemicals, power, aviation, telecommunication and other industries. Import of technologies and their application in these vital sectors gave China her industrial infrastructure. In the 1960s China imported comparatively more sophisticated technologies and equipment from Japan, Federal Republic of Germany, United Kingdom, Italy, France and others. These were for application in the petroleum, chemical, metallurgical, mining, electronic and precision machine tools industries. The 1970s witnessed a further spurt in China's import of know-how when complete plants for chemical fertilizers and fibres, steel rolling, power generation and coal mining were purchased from as many as 20 countries. During her Sixth Five-Year Plan period (1981-1985), China's technology import entered a new phase. Contracts were signed for the import of technologies worth about US\$5 billion for 1,300 priority projects with suppliers from USA, Japan, USSR, West and East Europe, Canada, Australia and so on.

Prospects during the current Plan

China's Seventh Five-Year Plan (1986-1990) envisages more absorption of foreign investment and import of advanced technologies with a view to accelerating the country's socialist modernization. The imported technologies will be utilized for manufacturing better quality products for export, and increasing the country's foreign exchange earnings. The transferred technologies will be adapted and innovated, as appropriate, to suit Chinese conditions. For creating better conditions for import of foreign technologies into the country, the Chinese People's Congress has adopted a series of laws and regulations on patents and trade marks, foreign economic contracts and examination and approval of technology import contracts, etc.

Technology-imports control and planning

The Chinese Government exercises administrative control over the planning of technology import. Projects for technology import are included in the Central Plan if the cost involved is US\$5 million or more and in the local plan if it is less. The project planning process consists of three stages: (i) proposal of the project for its identification; (ii) feasibility study for the formulation of the project and (iii) negotiations and conclusion of contract and its approval by the Government.

Sources of finance for technology transfer

Foreign exchange and local currency are the two sources of financing technology transfer in China. The foreign exchange sources are: (i) central Government; (ii) local governments; (iii) royalty (certain percentage of the foreign exchange earned and retained by an enterprise through export); and (iv) loan from the Bank of China.

The different kinds of loans available for technology transfer are: (1) foreign exchange loans with preferential interest rate (7.5-8.5 per cent); (2) Buyer's credit loan (10 per cent interest); (3) Special foreign exchange loan available in a limited way at the interest rate of 5.04-6.48 per cent for repayments in foreign exchange and 7.5-8.5 per cent for repayments in local currency; and (4) deducted interest loan mainly for export-oriented products at a reduced interest rate of 4 per cent. Besides, foreign exchange is also available from external sources such as (i) foreign Governments; (ii) export loan (buyers' or sellers'); (iii) international financial organizations like the IMF, World Bank, etc.; and (iv) direct investment of foreign enterprises under exclusive or co-operative management, or as joint venture.

Procedure for setting up joint ventures

Foreign investors who intend to come to China to set up joint ventures may get in touch with the local authorities, government departments or enterprises directly. In the absence of definite Chinese counterparts, they may submit their preliminary plans for the projected joint venture by mail or telex to the China International Trust and Investment Corporation, Beijing, or to the provincial trust and investment agency, municipality or autonomous region, and ask them to identify suitable parties.

A proper approach to investment in China that might save investors' time and expense and get better expert services and more conveniences is as follows: contact by communication, face-to-face discussions, preliminary feasibility study, subsequent discussions, preparation for finalizing and execution of the documents. All these procedures can be accomplished easily by asking any Chinese agency to identify a proper partner for mutual investment.

Technology exports from China

Following a decision of the Central Committee of the Chinese People's Congress in 1980, China's science and technology management system is being reformed. China has started commercializing her technological achievements and rapidly exploiting the international technology market. For example, in 1985 China signed technology export contracts with UK, USA, Japan, Luxembourg, Sweden, Brazil and many others. During the period 1980-85, technologies for a total of 98,245 items were developed in China. Out of these, the technologies for a total of 5,247 items have reached world standards and those for 34,821 items have come up to advanced world standards. China has a total of 4,690 R&D institutions, employing 770,000 people. Out of these, 231,000 are scientists and engineers. This relatively large trained technological manpower has given China the potential for indigenously generating many new technologies and exporting them.

The Department of Science and Technology Achievements of the State Science and Technology Commission and the Department of Technology Import and Export of China are the two agencies responsible for the routine administration of technology transfer in China. The Chinese policy of technology transfer is built on the principle of equality and aims at bringing dividends to both the exporter and the importer.

With the commencement of the seventh Five-Year National Economic Development Plan in 1986, there exist bright prospects for future technology transfer and development in China.

(Following the reprinting of the Chinese legislation for technology acquisition, foreign investment, etc. in earlier issues of the TIES Newsletter, we reprinted here an appropriate article based on a contribution from Mr. Pan Feng, Chief Engineer, Department of Science and Technology Achievements, State Science and Technology Commission of the People's Republic of China, Beijing, which first appeared in Asia-Pacific Tech Monitor, May/June 1987)

LEGISLATION

The Proposed Investment Code of 1987 of the Philippines (by Wills Bautista, Under-Secretary for Trade and Industry)

Today competition for foreign investments is at its peak. Each developing country, particularly in the Far East, has an incentive scheme to attract the flow of foreign investments in their respective countries to supplement scarce capital resources for their development plans. The Philippines is no exception. While the investment incentive scheme of the Philippines has been in place for a long time, refinement of its existing scheme appears to be in order in the light of the nation's intensified quest for increased foreign investments as well as redirecting domestic investments in preferred areas which will contribute to an accelerated development of its economy.

Immediately after the Philippines regained its independence from the United States in 1946, the Philippine Congress enacted what was then called the New and Necessary Industries Act which gave tax incentives in the form of tax- and duty-free importation of capital equipment and to a certain extent, income tax holidays, to new and necessary industries. This law did not define the guidelines of new and necessary industries; hence, assembly industries which could easily be established resulted from the said scheme. As a reaction to the New and

Necessary Industries Act, an incentive scheme to basic industries was adopted which created what was then called the Board of Industries.

The law listed the basic industries for which tax- and duty-free importation of capital equipment will be given. But the interpretation of this law was such that almost all industries linked with the list were defined as basic in order to accommodate new industries which were set up during the period. One may recall the birth of industries concentrated in certain sectors resulting in overcrowding and performance at less than normal capacity. Subsequently, through the initiative of the Council for Economic Development and the late Sen. Jose W. Diokno, a new incentive scheme which is one of the most sophisticated in the region was adopted. This was R.A. 5186 which created the Board of Investments. This incentive scheme is premised on a yearly Investment Priorities Plan (IPP) which will identify the industries which need to be promoted. The preparation of the IPP takes into account various economic criteria. In addition, it considers what is now called the "measured capacity" which shall mean "the estimate additional volume of production or service which the Board determines to be desirable in each preferred area of investment in order to supply the needs of the economy at reasonable prices, taking into account the export potential of the product, including economies of scale which would render such product competitive in the world market".

Today, the Government, through the Department of Trade and Industry, in its desire to encourage private domestic and foreign investments in projects that develop agricultural mining and manufacturing industries, in projects that promote diversification of Philippine exports in labour-intensive projects, in pioneer enterprises which utilize domestic raw materials, and in projects which promote the dispersal of industries in less developed areas, has formulated a draft Omnibus Investment Code of 1987 for public discussion. The proposed Code is a compilation of the foreign investment laws and various incentive schemes administered by the Department of Trade and Industry through either the Board of Investments or the Export Processing Zone Authority. It provides a new package of incentives which will be simpler to implement. It gives foreign and local investors complete information on all the incentives of which they may avail themselves, the alternative incentives schemes available to them and the requirements for registration of foreign investments without incentives. Implicit in this alignment is the need to avoid any form of export subsidy which would make the Philippines vulnerable to countervailing measures imposed by developing countries to Philippine exports, as well as to honour national commitments to GATT (General Agreement on Tariffs and Trade) when the country acceded to the GATT Code on Subsidies.

The Code is an improvement of the provisions of P.D. No. 1789, as amended by B.P. 391, otherwise known as the Omnibus Investment Code of 1981 because it is simpler to administer and consolidates the following incentives and privileges which were found in separate legislations:

1. The additional incentives to enterprises located in less developed areas;
2. The privileges granted to regional headquarters and regional warehouses located in the Philippines; and
3. Incentives to firms located in the export processing zones.

Under the Code, the following fiscal incentives shall be granted:

1. Income tax holiday to new registered firms for a period of eight years for pioneer enterprises and five years for non-pioneer enterprises, counted from the date of commercial operation. It seems that this is the most attractive incentive under the Omnibus Investment Code of 1987.
2. Investment tax allowance to an investor to the extent of his actual investment paid in cash or property not exceeding 30 per cent for investments made from 1 December 1986 to 31 December 1986 and 20 per cent for less developed area enterprises or 10 per cent for other registered pioneer enterprises for investments made thereafter.
3. An additional deduction from the taxable income of 50 per cent of the incremental direct labour wage for skilled and unskilled workers for a period of five years from the date of registration for expansion projects.
4. Tax- and duty-free importation of machinery, equipment and accompanying spare parts for a period of five years without repayment from the date of effectivity of the Code.
5. Tax credit on domestic capital equipment equivalent to 100 per cent of the value of the compensating taxes and customs duties that would have been waived on the machinery, equipment and spare parts had these items been imported.
6. Exemption from contractor's tax whether local or national.
7. Exemption from all taxes and duties on imported breeding stocks and genetic materials within 10 years from the date of registration or commercial operation.
8. Tax credit for taxes and duties on raw materials of export products.
9. Exemption from export tax, duty, import and fee on exports by a registered enterprise of its non-traditional export products.
10. Accelerated depreciation at twice the normal rate of the equipment and machinery for an expansion project.
11. Tax credit equivalent to 100 per cent of the value of taxes and duties that would have been waived on the breeding stocks and genetic materials had these been imported for registered enterprises which purchase breeding stocks and genetic material from a domestic producer.
12. Exemption from taxes and duties on imported spare parts for export producers exporting 100 per cent of production and having customs bonded manufacturing warehouses.
13. Tax credit on power cost differential equivalent to the difference between the power cost in the Philippines and those of other countries in the region.

Likewise, the following non-fiscal incentives shall be granted:

1. Guaranteed repatriation of any cash investments within two years from the date of effectivity of the Code shall be immediately repatriable at any time.
2. Deemed compliance with General Order No. 47 requiring large companies to produce rice and corn for their employees.
3. Clearance for the importation of equipment, spare parts, raw materials, etc. of registered enterprises shall be simplified by the Bureau of Customs.
4. Unrestricted use of consigned equipment.
5. Employment of foreign nationals for a period of five years from date of registration extendable for limited periods.
6. Registered export enterprises shall have access to the utilization of the bonded warehousing system in all areas required by the project subject to such guidelines as may be issued by the BOI upon prior consultation with the Bureau of Customs.
7. Upon recommendation of the BOI, after consultation with the Tariff Commission or NEDA, the President may issue a certification that a pioneer industry shall be entitled to post-operative tariff protection for a specified time and to such an extent that the total duty does not exceed 50 per cent of the dutiable value of imported items similar to those manufactured or produced by such an enterprise.

Enterprises locating their plant in less developed areas shall be entitled to pioneer incentives and the additional incentive of deduction from taxable income, 100 per cent of the expenses incurred in the necessary and major infrastructure and public facilities undertaken.

Another equally important provision of the Omnibus Investment Code of 1987 is the creation of the Council for Investment in Trade, Tourism, Agriculture, Natural Resources, Transportation, Communication and Services which shall (i) co-ordinate the investment development efforts of the Government; (ii) facilitate the marketing of the country as an attractive investment area in identified sectors; (iii) maintain close contact and liaison with government officer or agencies concerned with investments; (iv) act as a "one-stop action centre" for foreign and local investors; (v) establish an effective system of disseminating information on Philippine investment prospects and opportunities; (vi) submit annual reports to the President regarding the activities of the Council; and (vii) recommend the modification/amendments of existing legislation and procedures to remove disincentives for investments, both local and foreign. It is not a superbody but will merely facilitate the flow of papers of investors in securing government permits and the like. It is now embodied in Executive Order No. 36, dated 26 February 1987.

The Omnibus Investment Code was presented for public hearing on 27 February 1987. Comments have been received from various sectors, some of which are under consideration by the BOI. A number of comments, however, would seem to indicate a need to give some background about the Code.

One of the comments brought forward was the use of the concept of measured capacity. It was pointed out that this will bring about a new set of cronies and monopolies. ...

In this regard, it must be pointed out that measured capacity is never used whenever there is no "incentive" or foreign investment involved. Moreover, there is no measured capacity for export, hence it accepts flexibility where a product has export potential. It must also be stressed that "MC" is only one among the many criteria for listing in the IPP.

There are also other powers of the BOI, such as the power to rationalize industries and extend the enjoyment of incentives for a limited period currently under attack, which have been in the BOI law for the last 10 years and are now perceived to be new powers which can be abused. We would like to think that if the past BOI management has not abused such powers, present conditions would make such abuse improbable. A comparison of the proposed Code and the existing Code would show in the fact that the power to extend availment of incentives cannot go beyond 10 years, unlike at present where there is no such limitation. Similarly, under the present Code, the power of the President to rationalize incentive schemes is very broad compared to the provision in the proposed Code.

With respect to the proposed income tax holiday in lieu of the tax credit on net local content and net value earned, these are in fact more cost-efficient and simpler to administer and are in line with what neighbouring countries give to investors. The criticism that this new incentive scheme is biased in favour of big business does not seem to be borne out by facts. On the contrary, the big firms are very much against the loss of tax credits since they effectively give them a tax holiday of 10 years on top of having tax credits negotiable with their raw material supplier. These big firms have the ability to set up a whole department to prepare the necessary documentation for incentive applications, particularly net local content and net value earned, which they would like to get every quarter so they need not pay their quarterly income tax. Smaller firms have no such resources.

With respect to the alleged loss of performance orientation if it were decided to shift to income tax holiday, what better gauge of performance is there than making profits. The alleged loss of local content/value added is illusory since these are preconditions for continued enjoyment of incentives as borne out by conditions of registration.

On the tax- and duty-free importation of capital equipment, it should be noted that this is valid only for five years from the enactment of the Code. While the economist theory that incentives should be neutral in terms of factor choices of production has its merits, a valid exemption can be made in this critical period where it would be preferable to encourage the setting up of new plants and rehabilitate old ones. Hopefully, after five years, such an incentive will no longer be necessary. It should also be pointed out that under the incentive scheme, export producers can bring in equipment tax- and duty-free under the theory that they are required to operate without any tax burden on their inputs or machineries needed to produce export products. To be non-countervailable, it should be generally applicable to other producers. Hence the proposed provision which makes no distinction between export and domestic producers.

Starting from 1987, the Philippines expects no less than a 17 per cent increase of investment from both local and foreign investors and has projected greater investments for the succeeding years. But the increase of foreign investments should not cause alarm to Philippine nationals. While it is agreed that the wealth of the nation should be in the hands of the Filipino people, it is necessary that domestic capital be supplemented by foreign investments. Regulations have limited the extent of foreign investments that

may be allowed in certain types of business activities. Thus, foreign investments are limited to 40 per cent of nationalized areas of investments as provided for in the Constitution and other existing laws, as well as in preferred areas of investments. Preferred areas of investments are listed in the Investment Priorities Plan (IPP). Those areas have been determined to provide significant employment opportunities, increase productivity of land, mineral, forestry, agricultural and other resources of the country; improve the technical skills of the workers; provide the foundation for the future development of the economy; meet the tests of international competitiveness; accelerate development of less developed areas and result in the increased volume and value of exports.

Foreign investments in preferred or promoted areas of investments, however, are allowed to the extent of 100 per cent (i) where at least 70 per cent of the total production is geared for export; (ii) where the area of activity is not adequately exploited by Philippine nationals and does not conflict with the Constitution and laws regulating the degree of ownership by Philippine nationals in an enterprise; (iii) in pioneer preferred areas of investments declared by the Board of Investments and (iv) in areas being promoted in the Export Processing Zone.

In summary, while it is recognized that there are various factors that would encourage investment, it should be mentioned that fiscal incentives is one of these factors. This has been borne out by the studies of the Task Force on Foreign Investments by the World Bank. Also, BOI experience in discussing with investors indicates that it is competitive enough to attract investments.

Manual on the Jurisprudence for the Transfer of Technology

In accordance with one of the recommendations of the 11th Meeting of Heads of Transfer of Technology Registries held in November 1986 in Warsaw, Poland, whereby UNIDO was requested to compile a manual on the jurisprudence for the transfer of technology, it was felt appropriate to reproduce a couple of the texts we have received for the benefit of our readers until such time as the appropriate texts from our other TIES members and/or associates have been submitted. Perhaps these two texts will serve as a gentle reminder that we are still waiting for replies.

Brazil

1. Levels of payment

Levels of payment considered acceptable by the National Institute of Industrial Property (INPI) for Technology Transfer Contracts vary in pursuance with the technology up to a maximum limit of 5 per cent of the selling price of the products to be manufactured with the negotiated technology. In the case of a contractual fixed price for the said technology, the calculation is made based on sales projection.

To calculate the maximum level of payment, in addition to the internal norms of INPI, other contracts signed by similar companies engaged in the same market segmentation are used. (Art. 12 of Law No. 4,131 dated 1960)

2. Duration of agreements

The National Institute of Industrial Property agrees that contracts considering remuneration shall

be valid for periods of up to five (5) years. In special cases, INPI permits the extension of contracts for another period of five (5) more years.

In the case of unremunerated contracts involving industrial property rights the duration of contracts equivalent to that afforded the said rights are permitted (Brazilian law stipulates a 10-year duration for patents of invention and a 10-year duration for industrial designs, pursuant to Law No. 5,772 dated 1971 which created the Code of Industrial Property). (Art. 12 of Law No. 4,131 dated 1962)

3. Minimum royalty clauses

Clauses which anticipate minimum royalties payment are not accepted. (Art. 2.I.(g), Law No. 4,136 dated 1962)

4. Use of know-how after termination

Restriction to free use of know-how transferred after termination of contract is not accepted. (Normative Act No. 15, items 4.5.2(d), dated 11 September 1975)

5. Export restrictions

Export restrictions are not permitted. (Law No. 5,772, Art. 29) (Normative Act No. 15, item 4.5.2(d), dated 11 September 1975)

6. Quality standards

Technology is demanded to have quality standards, but there is no penalty to the technology importing company if it does not succeed in obtaining the desirable quality standard.

7. Access to improvements

Improvements to the technology during the duration of the contract should be supplied to natural or legal persons acquiring such technology. (Normative Act No. 15, item 4.5.1(c), dated 11 September 1975)

8. Obligation to use of trademark

The purchaser of the technology is not obliged to use the seller's trademark. (Normative Act No. 15, item 4.5.2(d)(iii), dated 11 September 1975)

9. Grant-back

Grant-back clause is not accepted. (Law No. 4,137, Art. 2.I.(g), dated 1962)

10. Unpacking and local contributions

INPI demands that the contract object is to be clearly defined and every specific object of the negotiation (mark, patent or technical services) shall be negotiated under a specific contract, it being necessary to enter into as many contracts as the number of objects to be negotiated. Importation of technology or technical services available in Brazil is not permitted. (Normative Act No. 15, item 1.1.1, dated 11 September 1975)

11. Sub-licensing and sub-contracting

Sub-licensing contracts are permitted only when they follow the norms used for their elaboration.

12. Tie-in clause

Clauses binding the technology purchaser to acquire technology supplier's goods are not

permitted. (Normative Act No. 15, item 4.5.2(d), dated 11 September 1975)

13. Field of use

Restrictions to the use of transferred technology are not permitted. (Law No. 4,137, Art. 2.I.(g), dated 1962)

14. Taxation

When contracts are recorded by INPI at their maximum values, the income tax is not allowed to be paid by the purchaser. If the purchaser is responsible for payment, it will be deducted from the technology's sum to be paid.

Tax payable is 25 per cent (twenty-five per cent) on the technology transfer fee.

15. Law of contract

Contracting of technology is governed by Brazilian law.

16. Settlement of disputes

Disputes may be settled in any country, but with observance of Brazilian law.

Greece

1. Greece does not have specific legislation governing transfer of technology transactions. However, the law applicable to transfer of technology contracts is that which the contracting parties have chosen. This is in accordance with Article 25 of the Greek Civil Code which states that liability arising from contracts is settled according to the law to which the contracting parties have been subjected. If no such law exists, the applicable law is that which, in accordance with all special conditions, is suitable to the contract. To this effect the provisions of private international law are applicable for contract liability.

2. Special legislation has been enacted within the frame of government control of exportation of foreign exchange, and more specifically, in regard to the payment of royalties from the recipient to the supplier of the transferred technology. Greek Law No. 1360 dated 1983 regarding the promotion of investments, provides in Article 22, the approval of the Minister of National Economy concerning any sum of money as payment abroad for rights, on the use in Greece, of inventions, secret industrial methods, etc. The Minister's approval is given on a yearly basis for a specified amount and is forwarded to the Bank of Greece for payment. The Minister of National Economy reserves the right to reduce the amount of royalty fees for which the exportation of foreign exchange is requested.

In addition to the above Law, Presidential Decree No. 170 dated 1986 regarding the flow of capital between Greece and the European Economic Community is also valid. According to this regulation, in the case where member countries of the EEC are involved, the approval of the Minister of National Economy is given without right of restricting the requested sum.

The archives of the transfer of technology contracts in Greece and the corresponding approvals for exportation of foreign exchange are kept in the Ministry of National Economy. Statistical data for

the amounts of foreign exchange which are spent for purchase of foreign technology are presented every year in the Annual Report of the Bank of Greece.

3. It is generally accepted that monitoring of transfer of technology contracts, on a national level, from a legal as well as economic aspect is realized through the following:

- Provisions for patent licensing based on national legislations regarding inventions;
- Provisions for the protection of free competition based on national anti-monopolistic and anti-trust legislations;
- Provisions for transfer of technology contracts based on specific national legislations regarding the essential content of the contracts and/or the payment of royalties.

4. In Greece the jurisprudence of transfer of technology transactions can be summarized as follows:

A. Contracts of transfer of technology which involve patent licensing

This is the most common form of transfer of technology in Greece which is based on Law No. 2527 dated 1920 regarding patents and amended by Law No. 1023 dated 1940 regarding inventions. Jurisprudence has accepted the clause of complete rights in favour of the licensee excluding even those of the licensor. The possessor of complete licence rights may take legal action on behalf of the licensor in cases of infringement of patent rights by third parties. Few cases have been tried on these grounds (Law No. 2527 dated 1920). More detailed and specific jurisprudence is not found.

B. Application of provisions regarding illicit competition practice in transfer of technology contracts

It is generally accepted that Law No. 703 dated 1977 regarding control of monopolies, oligopolies and protection of free competition is applied in patent licenses as well as in transfer of technology contracts, provided that free competition rules are affected by these contracts. However, regarding the jurisprudence of this opinion it has not yet been directly applied due to lack of tried cases.

C. Specific legislation regarding transfer of technology

This has been dealt with in paragraphs 1 and 2 above.

Portugal

We have recently received a list of the legislation governing foreign investment in Portugal, a condensed version of which is listed hereunder. Should any of our readers wish to have copies of the full text we shall be happy to send a photocopy upon request.

Decree-Law No. 197-U/86 of 18 July 1986 - adapts Portuguese legislation relating to the Foreign Investment Code to the requirements of the European Community. Revokes Decree-Laws Nos. 348/77 of 24 August 1977 and 174/82 of 12 May 1982, and also Regulatory Decrees Nos. 51/77 and 55/77 of 24 August 1977.

Regulatory Decree No. 24/86 of 18 July 1986 -
Regulates the contractual system for foreign
investment. Revokes Regulatory Decree No. 54/77 of
24 August 1977.

Decree-Law No. 214/86 of 2 August 1986 - Permits
the establishment of nationals and foreigners in all
economic sectors open to private enterprise, with the
exception of such limitations and stipulations as are
established or foreseen in international agreements or
treaties to which Portugal is a party.

Decree-Law No. 38/86 of 4 March 1986 - Permits
the acquisition of portions of rural property by
individuals who are not resident in Portugal.

Decree-Law No. 326/85 of 7 August 1985 -
Regulates the systems to which transactions and
transfers relating to the import and export of capital
by persons resident on national territory and in other
member states of the EEC will be subject.

Decree-Law No. 351-C/85 of 26 August 1985 -
Regulates the carrying out of operations relating to
current invisibles between residents and non-residents
on national territory. Revokes legislation contrary
to the provisions of this law.

Normative Order No. 93/85 of 27 September 1985 -
Establishes that the drawing up, alteration or renewal
of contracts or agreements which involve or may
involve payments abroad by means of current invisible
operations will be subject to prior registration with
the Central Bank ("Banco de Portugal").

Normative Order No. 98/85 of 17 October 1985 -
Establishes that the drawing up of contracts for the
export of technology between residents and
non-residents on national territory, as well as their
alteration or renewal, will in every case be subject
to prior registration with the Central Bank ("Banco de
Portugal"). Revokes Normative Order No. 151/78 of
20 June 1978.

Normative Order No. 95/86 of 20 October 1986 -
Establishes that the provisions of the Normative Order
No. 98/85 of 3 October shall be applied, with the
required adaptations, to the signing of, alterations
to and renewal of contracts made between residents and
non-residents on national territory for the
importation of technology.

PUBLICATIONS

Thesaurus of licensing words and phrases given by
International Patent and Technology Licensing
Committee (by Cruzan Alexander, Chairman)

The LES International Patent and Technology
Licensing Committee has developed a thesaurus of
licensing words and phrases. The following is the
publication of this thesaurus for the purpose of
soliciting comments and suggestions of additional
words and phrases. It would be helpful if all
suggestions of additional words and phrases would also
include a general definition, the perceived problem,
and a possible solution.

International licence negotiation thesaurus

The following list of words and phrases is
intended to help negotiators in international
licensing to more clearly understand each other and to
generally improve communications. This is a special
list of words and phrases that may have plural or
different meanings and includes suggestions on the
most appropriate word or phrase or a possible
resolution of misunderstandings. This list is not
intended to be a dictionary. The list will alert the
international negotiator of potential
misunderstandings.

Act of God

An event beyond the reasonable control of the
parties preventing the carrying out or delaying
of an obligation. Words or phrases sometimes
used for the same meaning: force majeure,
catastrophic event or happening. Preferred
phrase: force majeure.

Agreement

A binding contract between parties such as a
licence, however some countries such as China
interpret an Agreement as non-binding but a
contract is considered binding. Preferred term:
contract or licence contract.

Agreement date

See Execution date and Effective date.

Agreement not to license others

See Sole licence.

Arms-length transaction

Idiomatic English, means a transaction between
strangers who have no financial interest in each
other or no ties.

Assign

Used primarily in connection with the transfer of
the tangible evidence of a right such as a patent
or trademark or copyright. Words sometimes used
for the same meaning: grant, transfer, convey.
Preferred word: assign.

Authorize

See Licence.

Best effort

Means the degree of commitment to an obligation.
Has been interpreted by court decisions to mean
the highest degree of effort ever used.
Preferred phrases: bonafide effort, reasonable
effort or diligent effort as appropriate or set
minimum standards.

Cancel or cancellation

See Terminate.

Certified or registered mail

Terms primarily used only in USA. Do not use in
international licences unless each country has
this kind of mail.

Composed of

See Consisting of.

Comprising

Means a group of items which includes those named
and others not named - open-ended. Other words
and phrases sometimes used for the same meaning:
including, such as. Preferred phrase: including
but not limited to. See Consisting of and
Composed of which are sometimes erroneously used
to mean comprising.

Confidential agreement

See Secrecy agreement.

Confidential information

Means information not generally known to the
public. Supplier may not necessarily own
information. Other words and phrases sometimes
used for same meaning: proprietary information,
secret information, trade secret, know-how.
Preferred phrase: confidential information.

Consisting of

Means only those items mentioned - closed-ended.
Other phrase sometimes used for the same
meaning: composed of. Preferred phrase: use
the word "only" in conjunction with any of the
above. See Comprising which is sometimes
erroneously used to mean Consisting of.

Contract
See Agreement.

Convey
Used in connection with real property and assignments, not often used in licensing. See Grant and Assign.

Covenant not to sue
See Nonexclusive licence.

Customer
Usually a purchaser of goods or services, term is general in time - first purchaser such as distributor or last purchaser such as retail purchaser. Term sometimes used for same meaning: end user, purchaser. Preferred phrase: final customer if end user is intended, or intermediate customer or customer as appropriate.

Domicile
Means place of residence, used in connection with tax law, should not be used in licences. Sometimes used to indicate place of incorporation. See Place of business.

Down payment
See Lump sum.

Effective date
Means the date agreement comes into full force and effect. Date may be before or after date of signing or agreement by all parties. Words and phrases sometimes used for same meaning: execution date, agreement date, signing date. Preferred phrase: effective date. See Execution date.

Election
A requirement to make a choice. Word sometimes used for same meaning: option. Preferred word: election when appropriate. See Option.

Employment agreement
An agreement between employer and employee setting forth obligations of employee regarding confidential information, assignment of inventions, and obligations after termination of employment. Normally does not deal with monetary matters. Words and phrases sometimes used for same meaning: technical agreement, secrecy agreement, confidentiality agreement, assignment agreement. Preferred phrase: employment agreement.

End user
Means final customer or purchaser. Is an idiomatic English term and may be difficult to translate. Preferred phrase: final customer. See Customer.

Exclusive licence
Means licensor grants the licensee the sole right to practise the invention or use trademark to the exclusion of licensor and others, may be limited to territory, field, product or time; normally exclusive licensee has right to license others. Phrases sometimes used for same meaning: sole licence, single licence, assignment, limited licence. Preferred phrase: exclusive licence. See Sole licence.

Execution date
Means the date all parties have signed the agreement. Sometimes means the date an executory obligation has been fulfilled. Words and phrases sometimes used for same meaning: agreement date, signing date, effective date of agreement. Preferred phrase: agreement execution date. See Effective date.

First-class mail
Does not have meaning in most countries outside the USA. In international licensing use term regular mail or airmail as appropriate.

Force majeure
An event beyond the reasonable control of the parties preventing the carrying out or delaying of an obligation. Words and phrases sometimes used for the same meaning: act of God, catastrophic event or happening. Preferred phrase: force majeure.

Generally known to the public
Means information not confidential or secret. Information may, however, be subject to proprietary rights, such as information described in a valid unexpired patent. Words and phrases sometimes used for same meaning: in the public domain, non-confidential, not secret, available to public, publicly known. Preferred phrase: generally known to the public. See Public domain.

Grant
Used primarily in connection with a licence, such as "grant a licence". Words and phrases sometimes used for same meaning: convey, transfer, assign. Preferred word: grant.

Hold harmless
See Indemnification and Nonexclusive licence.

Immunity from suit
See Nonexclusive licence.

Including
See Comprising.

Indemnification
Usually the licensee agrees to repay any monetary damages to licensor if he infringes another's patent or trademark in practising licensor's invention or using licensor's trademark. Words and phrases sometimes used for same meaning: hold harmless, guarantee, warranty. Preferred phrase: indemnification.

Industrial property
See Intellectual property.

Intellectual property
Ownership rights given by law in intellectual information such as inventions, patents, trademarks, trade names, logos, copyrights, know-how, trade secrets. Words and phrases sometimes used for same meaning: industrial property, proprietary information. Preferred phrase: intellectual property.

Know-how
See Confidential information and Trade secret.

Letter of intent
Has different meanings in different countries. In USA merely an outline of objectives for negotiations, not binding. In Japan, usually a binding agreement with terms in letter of intent having been agreed upon - further negotiations only on other terms not set out in letter. Unless intended to be a binding agreement, use another term such as "nonbinding proposal".

Licence
Means permission to practise all or a part of a proprietary right. Words and phrases sometimes used for same meaning: right, right and licence, permission, authorize, freedom. Preferred word: licence. See Nonexclusive licence.

Licence rights
See Proprietary rights.

Lump sum

Ideomatic English, means a single monetary payment. Words and phrases sometimes used for same meaning: down payment, initial payment or fee, fixed fee. Preferred phrase: lump sum.

Minimum royalty

Obligation to pay certain amount periodically otherwise the licence may be changed or terminated automatically or at option of licensor. Words and phrases sometimes used for same meaning: promise to pay, promissory notes, fixed royalty. Preferred phrase: minimum royalty.

Nonconfidential

See Generally known to the public.

Nonexclusive licence

A licence that does not prohibit the licensor from licensing others in the same field, or on the same product, or same territory, etc. Words and phrases sometimes used for same meaning: licence, sublicense, immunity from suit, hold harmless, covenant not to sue. Preferred phrase: nonexclusive licence.

Option

Right to make a choice, not a requirement. Word sometimes used for same meaning: election. Preferred word: option. See Election.

Owned

See Proprietary rights.

Paid-up licence

A licence that does not require further royalties because some consideration has been given in advance including cash but not necessarily cash. Phrase sometimes used for same meaning: royalty-free licence. Preferred phrase: paid-up licence with no future royalty payments.

Permission

See Licence.

Personal licence

Ideomatic English, means a nonassignable, nontransferable licence, usually terminates on death or dissolution of corporation or firm.

Place of business

Means principal place of business or corporate offices. Words and phrases sometimes used for same meaning: domicile, corporate address, place of incorporation, location of corporate offices, principal place of business. Preferred phrase: a place of business. See Domicile.

Proprietary information

Means information owned by supplier but not necessarily confidential. Misused to mean confidential information. Words and phrases sometimes used for same meaning: confidential information, all right and title in, owned, controlled. Preferred phrase: proprietary information. See Confidential information and Intellectual property.

Proprietary rights

Rights conferred by law for ownership or control of intellectual property. Words and phrases sometimes used for the same meaning: patent, trademark and copyright rights, licence rights, right, proprietary information, confidential information. Preferred phrase: proprietary rights.

Public domain

Means free to use; free to patent, trademark and copyright rights. Misnomer for generally known to the public. Words and phrases sometimes used for same meaning: nonconfidential, not secret, publicly known, available to the public. In the context of nonconfidentiality, preferred phrase: generally known to the public.

Publicly known

See Generally known to the public.

Right

Means permission to practise all or part of a proprietary right. Has different meanings in different countries. Sometimes broader than a licence but with restrictions on grantor. Words and phrases sometimes used for same meaning: licence, right and license, permission, authorize, freedom. Preferred word: licence.

Royalty-free licence

See Paid-up licence.

Secrecy agreement

An agreement between two or more parties on conditions of accepting confidential information. Words and phrases sometimes used for same meaning: confidential agreement, nonconfidential agreement, employment agreement, technical agreement. Preferred phrase: secrecy agreement.

Secret information

See Confidential information and Proprietary information.

Signing date

See Execution date and Effective date.

Single licence

See Exclusive licence and Sole licence.

Sole licence

Means licensor grants licensee exclusive licence except for retained nonexclusive licence of licensor. Has different meanings in different countries and regions. Phrases sometimes used for same meaning: single licence, exclusive licence, agreement not to license others. Preferred phrase: exclusive licence, except for a nonexclusive licence retained by licensor. See Exclusive licence.

Sublicence right

The right of a licensee to grant others licences. Phrase sometimes used for same meaning: nonexclusive licence right. Preferred phrase: right to grant licences.

Technical agreement

See Employment agreement.

Term of agreement

Means length of agreement until it automatically terminates by an event or date certain. Not to be confused with right to terminate or cancel agreement before term is up. Words and phrases sometimes used for same meaning: expiration of agreement, expiration date, termination date. Preferred phrase: term of agreement.

Terminate or termination

Termination of an agreement prior to its normal term as the result of an event or the option of one of the parties. Not to be confused with term of agreement. Words sometimes used for same

meaning: cancel or cancellation, abrogate, default, rescind. Preferred word: terminate or termination.

Trade name

Usually the name of business enterprise. May or may not be protected by law. See Trademark.

Trademark

A mark, word or phrase for which the law has given the owner a right to exclude others from using. Often confused with trade name. Words sometimes used for same meaning: trade name, logo, motto, character. Preferred word: trademark.

Trade secret

Means confidential information protected by law. Has different meanings in different countries. No protection in some countries. Words and phrases sometimes used for same meaning: confidential information, proprietary information, secret information, know-how. Preferred phrase: confidential information.

Transfer

Used in connection with real property and assignments, not often used in licensing. See Grant, Assign and Convey.

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International licensing

Readers may be interested in the above booklet published by International Licensing Limited of the United Kingdom. International Licensing is a monthly bulletin providing an international forum for the negotiation of manufacturing licences and transfer of technology and know-how, industrial investment, joint ventures, agencies and distributorships, and other commercial arrangements. The bulletin contains information on licences offered and sought; joint ventures and investment propositions; preliminary proposals for industrial projects; agencies and distributorships and book services. The annual subscription rate is £35 - for Europe, US\$73 everywhere else. This publication could be of special interest to industrialists and entrepreneurs in the emergent countries wishing to set up new small/medium-scale industries and requiring, without commitment, preliminary information on cost of plant, raw material, space and personnel requirements, and other basic essentials to determine the viability of different projects and compare investment costs and other criteria. International Licensing is published and distributed by: International Licensing Limited, 92 Cannon Lane, Pinner, Middlesex, England HA5 1HI. Cables: Licensing Pinner. Telephone: 01-800 2812.

UNIDO documents

- ID/WG.466/23(SPEC.) Issue Paper II. International co-operation related to: Exchange of information and experience; Integrated development of the pharmaceutical industry; And development of pharmaceutical ancillary industries
- ID/WG.469/10(SPEC.) Training of manpower in maintenance from the standpoints of equipment design, manufacture and operation
- ID/WG.470/5 Technological alternatives for copper, lead, zinc and tin in developing countries
- ID/WG.470/6 The development and restructuring of the non-ferrous metals industries
- IPCT.39(SPEC.)* The UNIDO programme on technological advances

MEETINGS

- 2-7 October. Workshop for heads of INTIB sub-network members in Africa on the ways and means of co-operation. (UNIDO Meeting), Dakar, Senegal.
- 5-9 October. Third Consultation on the Pharmaceutical Industry. (UNIDO Meeting), Madrid, Spain.

* This document is a revision of UNIDO/IS.411/Rev.2.

- 8-10 October. African ILS Meeting. (UNIDO Meeting), Dakar, Senegal.
- 12-15 October. Forum for Joint Ventures with Foreign Capital Participation. (UNIDO Meeting), Warsaw, Poland.
- 2-4 November. Meeting of Network Co-ordinators for the Project ASEAN/ASTIS. (UNIDO Meeting), Kuala Lumpur, Malaysia.
- 2-5 November. Investment Project Promotion Forum. (UNIDO Meeting), Cairo, Egypt.
- 2-6 November. First Regional Meeting on the Agricultural Machinery Industry in Latin America. (UNIDO Meeting), Santiago de Chile, Chile.
- 2-13 November. UNCITRAL - Working Group on International Payments, 16th Session. Vienna, VIC
- 23-27 November. Investors' Forum for Indonesia. (UNIDO Meeting), Jakarta, Indonesia.
- 30 November - 4 December. First Consultation on Non-Ferrous Metals Industry. (UNIDO Meeting), Budapest, Hungary.
- 20 November - 6 December. Expert Group Meeting on International Industrial Joint Ventures. (UNIDO Meeting), Tallin, USSR.
- 2-4 December. Preparatory Committee for the International Conference on Genetic Engineering and Biotechnology. (UNIDO Meeting), Vienna, VIC, Conf. Rm.III.
- 7-11 December. UNCITRAL - Expert Group Meeting on the New International Economic Order. Vienna, VIC, Conf. Rm.VII.

