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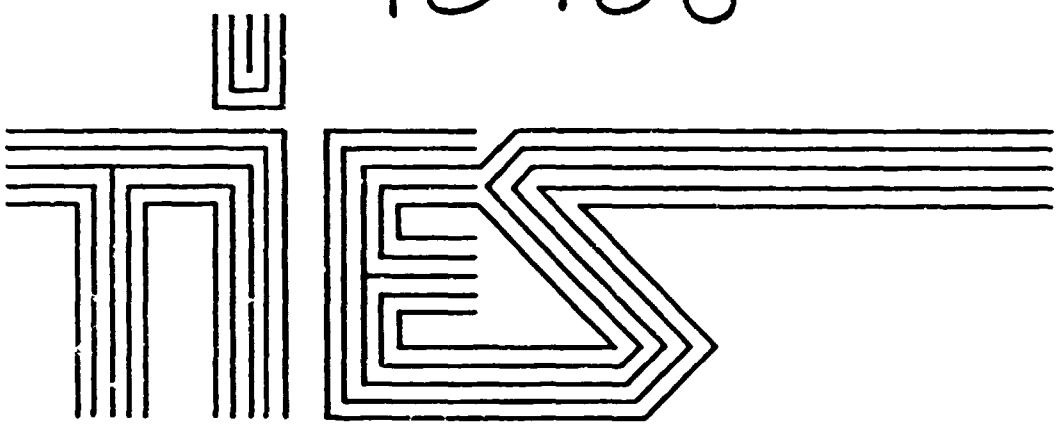

# NEWSLETTER

## 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,

TIES is now completing its 10th anniversary and this issue of the Newsletter gives an account of the preparatory work for the next Meeting of Heads of Transfer of Technology Registries, planned to take place in Lima, Peru, from 5-9 December this year.

The occasion seems appropriate to recall that TIES is a network through which the institutions in charge of evaluating the transfer of technology agreements in developing countries, normally designated as Transfer of Technology Registries, co-operate in strengthening the capabilities of the member countries in their negotiations with foreign suppliers of technologies and in optimizing the use of the imported technologies for the building up of their endogenous technology base. Within the framework of TIES, a substantial amount of infomation on the characteristics of the technology market is available and exchanged on a reciprocal basis.

It should also be recalled that it was the experience accumulated in the operation of TIES that shaped the programme of UNIDO on Technology Acquisition whose main purpose is to stimulate mechanisms aimed at facilitating the technology flows from developed to developing countries and among developing countries themselves, and to strengthen the capabilities of the developing countries for the acquisition and negotiation of technology, not only in equitable terms reflecting arms-length transactions but also in conditions appropriate to the local environment, thereby allowing the absorption of the imported technologies and the upgrading of the local technological capacities.

The programme underscores the role of negotiation of technology and requires the handling of an integrated and mutually supportive package of programme elements oriented to the different levels of decision making while impacting at different layers of the technology system.

All our readers are familiar with our training activities for negotiators in the form of workshops and seminars, or with our Technological Advisory Services designed to provide assistance to government insitutions or companies of developing countries in the negotiation they have to face with their suppliers and partners.

In parallel with such practically oriented activities, a substantial effort is being made to prepare guides and materials for the use of negotiators, in particular a Manual on Negotiation which is intended to cover all relevant issues that decision-makers and government officials who handle matters of technology acquisition should be aware of.

In subsequent issues we will not fail to provide our readers with details on the progress of the work in this important area.

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

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## UNIDO NEWS

### 12th meeting of Heads of Transfer of Technology Registries

UNIDO is making preparations for the next meeting of Heads of Transfer of Technology Registries which is planned to take place in Lima, Peru, from 5 to 9 December 1988.

This meeting is regarded as an important event, not only because it earmarks the 10th anniversary of the TIES System, but also because the time is ripe to initiate a new dimension for TIES.

The meeting will provide an opportunity for discussions on issues such as the effective role of TIES members in the formulation and implementation of technology policies in their own countries; in stimulating regional co-operation and South-South transfer of technology and in introducing innovative approaches to cope with transfer of hazardous technologies; environmental impact of imported technologies; and licensing practices in new and emerging fields, as in the case of biotechnology or software.

Naturally, the CORIS software will be an indispensable ingredient of the meeting, this time to be presented as a final and suitable product already tested and operational in some transfer of technology offices. The opportunity offered by the meeting will be taken to revitalize some TIES-related programmes of an on-going nature and oriented either to strengthening the capabilities of negotiators, or to improving the efficiency of the transfer of Technology Registries. In this connection, work is being undertaken on the following matters:

(a) Regulations and jurisprudence on transfer of technology

This work will consist of detailed country profiles on transfer of technology organized in such a way as to transmit to the utilizers a clear understanding of the legal and institutional infrastructure directly or indirectly related to technology evaluation and negotiation. The country profile will include:

- The list of laws and regulations touching on transfer of technology and, in principle, also on foreign investment because of the usual interrelationship between foreign investment and transfer of technology;
- The presentation of such laws and regulations, either partly or in its entirety, as appropriate;
- The identification of the institutions with which the technology suppliers have to deal while on business in the countries concerned, as well as the respective hierarchy or interrelations;
- Particularly concerning the evaluation and the negotiation of transfer of technology agreements the work should include the jurisprudence of the transfer of technology offices, i.e. on their actual practices in comparison with the prescriptions of the law.

(b) Periodical reviews on technology flows

Within the framework of this activity UNIDO is intending to prepare a software for the processing of information collected from the TIES members which will allow for the retrieval in different combinations of the data to meet *ad hoc* requests as well as prepare periodic studies and reviews on the transfer of technology. This software will permit a full exploration of the potential of the information exchanged within TIES. It is envisaged to predominantly use the TIES I information which can however be supplemented by additional data of a non-confidential nature.

(c) Compendium on model forms of agreements and sample agreements

The objective of the work is to create a library of model forms and sample agreements covering the widest possible range of sectors, clauses and circumstances thereby making sufficient material available to negotiators to help in the drafting and negotiating of agreements as appropriate to the specificity of their problems. Additional to the compilation of the material it will be necessary to carry out further work of abstracting, classification and publication of lists of the available elements for reference by the potential utilizers. Such work is being carried out for the purpose of creating an expert system for the use of negotiators in the future.

## REGISTRY NEWS

### Portugal's new deal for foreign investors

New regulations for foreign investment in Portugal were published on 18 July 1986.

Portugal's entry to the European Economic Community six months earlier required the adaptation of previous legislation during the transition period and to conform to general Community norms.

Basically the new package simplifies the process of foreign investment, substituting the former system of assessments for one of prior declaration, and giving this institute a pre-eminently promotional role.

The contractual system however remains in force for investments of particular interest to the national economy.

The new system is governed by the following principles:

(a) Equal rights for national or foreign, resident or non-resident, investors;

(b) Rights to establishment in all sectors open to private investment;

(c) The rules apply to all foreign investment independent of its origin, made or otherwise, by nationals of EEC member States.

Under the system of prior declaration the investor provides the institute with details of his planned investment in Portugal.

The institute has two months to assess it. At the end of this time the project is tacitly considered as approved.

Apart from this general system, the contract system has been maintained because of its importance in attracting selected projects canvassed specifically by the institute, which now assumes the role of chief promoter of Portugal as an area for investment.

Contracts are reserved for investment projects of special significance to the economy and any

Portuguese company, already existing or in formation, and having foreign partners, may be included in this system.

Investment contracts are signed between the investor and the Portuguese State (represented by this institute) and available incentives considered most suitable to the individual investment may be applied.

New transfer of technology regulations in Spain

Pursuant to its accession to the European Economic Community, the Government of Spain reformulated the regulation on transfer of technology towards liberalizing the technology flows into the country although keeping a monitoring function in this important area.

The preamble of the Royal Decree 750/1977 of 18 December 1977 reads as follows: "The decree 2343/1973 of 21 December 1973 published in the Official gazette of 2 October has been, together with the respective normative acts, the instrument that had so far regulated the transfer of foreign technology to Spanish enterprises. During the period in which the above-mentioned decree was enforced, the administration was able to exercise control on this especially important matter concerning the national economy. However, due to the important industrial development that our country has experienced since that date, on the one hand, and to the imperative need for liberalizing such transactions as a result of its "current" nature, on the other, it has become urgent to establish a more liberal legislation on transfer of technology than that contained in the above-mentioned decree."

The present Royal Decree reflects this change and expressly derogates the normative acts so far enforced. At the same time it aims to accommodate the essential principle of liberalization contained in article 2.1 to the need felt by the administration of having available a detailed qualitative knowledge of the type of technology and technical assistance imported by Spanish enterprises as well as on the expenses of participation of Spanish enterprises in projects of technological research undertaken outside our national borders both by international consortia of enterprises with the participation of Spanish enterprises and by the Spanish mother enterprises themselves.

The objectives of liberalization and information are made compatible through the establishment of a process of prior administrative verification of such transactions, similar to that presently enforced, for certain foreign investments in Spain, the process of which has proved to be a valuable source of statistical knowledge which in no way conflicts with the principles of liberalization and mobility of international market flows. As a guarantee that this process of prior verification does not imply the granting of discretionary powers to the public administration in relation to the foreign transfer of technology and technical assistance, Article 2.6 emphasizes that the favourable verification can only be denied when the value of the consideration is ostensibly higher than the real value of the technology transfer from the technical assistance rendered.

The Royal Decree empowers the Office of the General Direction of External Transactions as the only organization in charge of verifying the details of transactions but establishes a mechanism which permits the Office of the General Direction of Industrial Innovation and Technology to have a case-by-case knowledge of the operations submitted for verification. At the same time the Royal Decree declares that the registration of transfer of technology agreements subsists for the sole function of statistical control, without implying that the registration of contracts has the nature of a discretionary administrative act or of being a requisite for the validity of the contracts.

## TECHNOLOGY ACQUISITION

International technology licensing: survey results

We have recently received the above-mentioned paper published by the Organization for Economic Co-operation and Development (OECD) in Paris, the summary and introduction of which we reprint hereunder. We found many of the results extremely interesting and those of our readers who wish to obtain a copy may do so by writing to Mr. Graham Vickery, c/o Industrial Policy Division, Directorate for Science, Technology and Industry, OECD, 2 rue André-Pascal, 75775 Paris, France.

Summary

This paper presents results of a survey of international licensing-out activities. The survey sample was heavily weighted towards large enterprises operating internationally with foreign production facilities, and which were licensing in the chemicals, machinery, drugs, electronics and computing, food and metals industries. The survey consisted of two parts concentrating in turn on:

(i) Licensing-out activities; and

(ii) Problems associated with licensing out.

Key findings on licensing activities include:

- Technology licensing is increasing for most enterprises, particularly the smaller and the larger enterprises, but less so for medium-sized enterprises;

- Licensing is a particularly important strategy for one sub-group of enterprises which receive relatively large returns on licensing compared with R&D, and which tend to be enterprises of smaller size;

- Licensing enterprises reported that they were engaged in a wide variety to other kinds of technology transfer activities, ranging from joint ventures (the most common) and sales of technology, through technical service contracts and supply of turn-key plants to managment contracts and other forms of technology transfer;

- Technology licensing is not increasing as fast as other technology transfer activities, notably joint ventures, sales of technology and technical service contracts;

- Licensing is concentrated in industrialized countries and in the developing countries of Asia. Licensing to developing countries in Latin America, and especially in Africa and the Middle East, is less frequent;

- Two-thirds of enterprises reported that they directed licensing towards enterprises unrelated by equity holdings. One-quarter of enterprises reported that they take equity participations when licensing out, and one in seven enterprises licensing mainly to independent enterprises reported that they take equity;

- In most cases the technology being licensed is still being actively used by the enterprise

licensing-out the technology. It is more likely to be process than product technology, but most commonly enterprises reported licensing both product and process technology;

- Patents and know-how, or know-how alone, were the basis of most licensing agreements, and technical services were most frequently provided as part of licensing activities;

- Most licensing arose from requests from foreign enterprises. Joint venture activity is an occasional source of licensing to third parties, particularly for enterprises which reported that they took equity participation when licensing;

- The majority of enterprises considered that territorial limits (e.g. areas to which the licensed enterprises may not export), exclusivity provisions and market limitations are the most important elements in licensing agreements.

The chief problems and disincentives associated with licensing include:

- Exchange controls, government regulations and inadequate protection of industrial property rights in developing countries. Problems in developing countries were by far the most frequently cited in the survey;

- The same set of problems were also common in Eastern Europe;

- In industrialized countries, competition (anti-trust) legislation and taxation gave particular problems;

- Government regulations - notably in developing countries and Eastern Europe - gave particular concern when enterprises were asked which problems gave them the most severe difficulty. These were followed by competition legislation and inadequate industrial property rights protection. Respondents thought that all these matters will be continuing problems;

- One-half of enterprises reported that the major problems listed above had prevented agreements being reached, and three-quarters reported that they had caused undue delays;

- Similar problems were experienced in the home country of the enterprise licensing-out the technology, particularly regarding taxation and competition legislation. But all problems in the home country were cited much less frequently than, for example, problems in developing countries;

- Finally, a significant minority of enterprises reported that they faced disincentives when licensing due to export controls for reasons of national security, and due to restraints on licensing when the technology had been developed with government subsidies or under government contracts.

## I. Introduction

The development and application of new technologies are of fundamental importance for economic growth and change. The speed and efficiency with which enterprises and countries can apply new technologies and use the technology developed elsewhere is one determinant of their long-term ability to compete. Technology is transferred between enterprises and countries by a variety of mechanisms with varying degrees of control - ranging from internal transfers within the same enterprise, through joint ventures with potential competitors, technology licensing, and sale of technology outright, or incorporated in turn-key plants, machinery and equipment.

Despite a great deal of interest in this subject, relatively little research work has been carried out on many important aspects of the processes whereby technology is transferred internationally. Work has concentrated either on regional or development issues (particularly North-South issues) (1), on examination of aggregate national statistical data requiring careful interpretation (2), or is drawn from a relatively small sample of national enterprises (3). The survey which is summarized in this paper attempts to fill one of the gaps in our knowledge of recent trends and issues in international licensing-out activities of enterprises. The survey concentrates on:

- The relative importance and role of licensing-out in enterprise strategies (licensing-out is undertaken by the proprietor of the technology being licensed); and

- Important problems and issues encountered by enterprises when they are licensing-out.

### (a) Survey method

The survey was carried out through a postal questionnaire sent to a selected sample of individual members of the Licensing Executives Society International (LES), a non-profit association of licensing professionals with membership drawn from the professions and company executives based in countries throughout the world and involved in licensing technology. The questionnaire is attached in annex I. The sample is limited in two ways:

(i) It was drawn from a restricted group comprising LES members directly concerned with licensing in manufacturing; and

(ii) The sample was drawn from members who had been contacted in advance and asked to consider completing and returning the questionnaire.

However, by selecting those who are directly involved in licensing technology it was possible to obtain a high and reliable survey response.

### (b) Sample size and response rate

A total of 255 survey questionnaires were posted, and responses were received over the period from end-1985 to mid-1986. There were 119 usable responses, i.e. a 47 per cent response rate, out of a total of 155 responses (including inapplicable and inadequate responses, changes of address, changes of function, etc.), i.e. a reply rate of 61 per cent. The distribution of usable responses by country and region is shown.

* * * * *

## Joint venture agreements

"Joint venture" is a term used to describe a form of international long-term co-operation, and the joint venture agreement (hereinafter referred to as "JVA") is a contract which embodies the will and intention of the parties engaged in such co-operation.

One of the characteristics of international economic relations is that, from time to time, they create new forms of international co-operation and thereby necessitate the creation of new contractual

arrangements. Such new contractual arrangements become new types of contracts with their own problems, principles, solutions and rules.

Joint ventures came into being after the Second World War as a new form of foreign investment. Already, before the Second World War, it was a standard practice that enterprises from developed countries invested assets into other developed or developing countries. However, most of these investments were made without any local partners. They were a hundred per cent foreign-owned investments.

After the Second World War investors from developed countries, before investing into new and independent developing countries, started to search for local partners. Such partners were suddenly considered as an asset in establishing new businesses in foreign countries, since they could better solve local problems and could give a local image to a foreign investor. On the other hand, local entrepreneurs were eager to acquire foreign capital, know-how and technical skills, which foreign investors were ready to bring with them and which would enable them to start new and more profitable industrial undertakings faster.

Thus, all the ingredients for a successful start of a new form of international economic co-operation were there. Starting from the early fifties until today, joint ventures became a more and more used tool for foreign investment into productive capacities of developing countries.

At the same time, the very success of this form of international economic co-operation brought new problems and doubts. Some joint ventures turned out not to be as beneficial for developing countries as expected. Some JVAs were considered as one-sided in favour of foreign partners and too expensive for local participants. Local investors started to feel that, when all the profits, management and licence fees and other expenses are put together, they are paying too much and over too long a period for what they receive through a joint venture arrangement.

Joint ventures, as a form of international economic co-operation, started to be questioned as a vehicle for industrial development of developing countries. At the same time, international practice of joint ventures as well as the JVA, became objects of intensified studies.

During the last two decades, in many international fora it was pointed out that developing countries do not have enough experience in negotiating such arrangements, while transnational corporations, which became the best known and the largest international foreign investor, mastered the techniques and skills of negotiating and structuring of joint ventures.

In this situation, many international bodies, primarily various agencies of the United Nations, stepped in and a long and tedious process of elucidation and exposing of various aspects of foreign investment practices has started to grow. This process is not yet finished.

The reason why this process is not yet completed is the fact that joint ventures, as a form of international long-term economic co-operation, has shown itself to be a very resilient instrument. In spite of all the criticism and doubts, in the field of international economic co-operation, there is no substitute for joint ventures. If parties from different countries wish truly to join their forces in starting a new industrial production, if they truly wish to combine their efforts by linking their risks, they do not have a better instrument today than to form a joint venture. All other forms of co-operation, such as for example, licensing, long-term industrial co-operation, sub-contracting, etc., are forms in which the risk of the participants is not really coupled to such a degree as it can be achieved through a joint venture arrangement.

These are the reasons why a continuation of studies of various aspects of joint venture arrangements and agreements is necessary and desirable. For these reasons, UNIDO has decided to continue with publications dealing with this problem.

What is a "joint venture"?

The term "joint venture" is not used consistently in international business terminology. The plain meaning of the term "venture" means an undertaking involving chance, risk or danger. The term "joint venture" means a "joint undertaking", and parties in international business transactions tend to describe different kinds of their joint efforts to achieve a common aim, as a "joint venture".

Thus, for example, the term "joint venture" is very often used in civil engineering, construction, building, and equipment supply industries. Contractors, who decide to join their forces for a limited period of time in order to jointly build a plant, often call their agreement a "JVA" (sometimes also referred to as "consortium agreement").

The name "joint venture" in the construction industry does not in itself reveal the different types of possible internal relations of the parties who have concluded it. Internal relations of parties in such "joint venture agreements" are basically of two different types: one type is created on the basis of a complete pooling of funds under a unified leadership with joint and several liability toward the client, while the other type is an arrangement where every participant works for himself, although they have also undertaken joint and several liability toward the client. Such joint ventures are formed through a contract and they are therefore sometimes referred to as "contractual joint ventures".

However, regardless of the type the parties decided to create, such joint ventures are formed only for a limited period of time, namely only until the project for which the venture was formed has not been completed. At the same time, such joint ventures do not become legal entities and, as a rule, are not even registered in any public register. They exist as long as the contract which created them remains in force. As soon as such a contract is terminated, the joint venture disappears. In many jurisdictions such associations are simply considered as partnerships.

"Joint ventures" which are the subject of this article are of a different character. Such "joint ventures" were until recently referred to as "direct foreign investments" or only "foreign investments". Although these terms are still correct today, they have fallen out of use because these days foreign investments into developing countries are in most cases made with a local partner and not any longer so often by foreign investors alone.

Consequently, we may describe a joint venture in the field of foreign investments, to have the following characteristics:

In the first place, a "joint venture" in the field of foreign investments is a long-term arrangement. Such joint ventures usually have a life span of between 10 and 30 years. Sometimes, parties do not even provide a time limit for the duration of their contracts. The assumption under which these joint ventures are sometimes established is that the parties will jointly run an undertaking for as long as the venture is viable.

In the second place, the "joint venture" arrangement itself is only a framework for a much wider co-operation in four different aspects, namely:

(1) In the partnership aspect;

(2) In the incorporation aspect of the whole arrangement;

(3) In the field of transfer of technology; and

(4) In the field of services which one partner may undertake for the joint venture.

Joint ventures in the area of foreign investments imply the creation of a new legal entity by incorporation of the partnership which was established through the JVA. The newly incorporated body has an existence of its own, apart from the joint venture contract which made the basis for its creation. Therefore, such joint ventures are sometimes called "incorporated joint ventures", in contrast to the "contractual joint ventures" which are practised in the field of construction.

Moreover, JVA very often consist of a "package" of various contracts, since joint ventures are usually made when there is a need for new technology. Therefore, transfer of technology contracts and various other types of service contracts which may accompany an incorporated joint venture, make the legal structure of joint ventures even more complex.

As a consequence of indiscriminate usage of the term "joint venture", one should be careful to identify in practice exactly the type of the joint venture in question. In further discussions, unless we specify otherwise, our reference to "joint ventures" shall mean the joint venture in the foreign investment field and not in the construction field.

## Legal framework of joint ventures

The practice of international economic co-operation knows several distinct types of foreign trade contracts. Such contracts may be in the field of international trade, international construction, international long-term industrial co-operation, foreign investment, transfer of technology, etc. All such contracts have different rules and principles. Therefore, it is very important to identify the contractual type into which an intended business arrangement will fall.

All contracts have a legal environment into which they have to fit. Some contracts are more "international" than the others. For example, an international sales transaction may barely be concerned with domestic legislation of the exporting or the importing country. An international construction contract will probably be closer to the domestic legislation of the country where the works are being executed than an import sales contract into that country.

However, it is a feature of foreign investment contracts, that they are very deeply connected with the legislation of the host country. Not only that such contracts have to be made in accordance with the rules and regulations provided in the local legislation for such contracts, but the future joint venture enterprise will be located on the territory of the host country and will, therefore, be entirely subject to the rules and regulations of that country.

As a consequence of such close ties of joint venture agreements and operations of joint venture units with local legislation, attention has to be drawn to areas of law to which joint venture arrangements have to pay attention.

We shall, therefore, try to identify the legal framework of joint ventures, depending on the area of law which may be applicable to such arrangements.

JVAs have to pay attention to the rules contained in the following national areas of law:

### (a) Contract law

JVA is a contract and therefore such agreements fall under the applicable national laws which regulate contracts.

National contract laws or "codes of obligations", as they are often called, have, as a rule, a general part and a special part. General parts usually contain general rules applicable to all contracts which are subject to that law, like, for example, rules on the formation of contracts, authority to conclude contracts, mistakes in making contracts, penalties, damages, payment of interest, statute of limitation, etc. Special parts contain rules on the rights and obligations of parties which conclude specific contracts. Such specific contracts are then regulated in detail in such codes.

For example, the contract on the sale of goods is usually the most detailed contract contained in various national laws. National codes also contain extensive rules on various other types of contracts like, for example, tenancy, contract of work, agency, mandate, lease, surety, etc.

The above-described system of national codes is such that, for the contracts which are nominated in them, they contain specific rules on the rights and obligations of parties in such contracts. However, they do not contain any specific rules on rights and obligations of the parties in contracts which are "new" and which came into use only after the code was enacted and are, therefore, not even mentioned in such codes. However, even such "new" contracts are subject to the rules applicable to all contracts as contained in special parts of the national codes.

That means that all contracts, regardless whether they are nominated in the national codes or not, fall under the provisions of a national code.

Contracts on joint ventures are of a recent origin. Some 40 years ago they were hardly known to exist. This is one of the reasons why most national codes do not contain any specific rules for such contracts. The other reason is that many countries have enacted special legislation for joint venture agreements, providing elaborate rules for such contracts in the legislation.

The fact is, that the rules on the rights and obligations of the parties in a joint venture agreement are not contained in national codes on contracts, although such contracts fall, along with all other contracts, under the general part of national contract laws or codes.

### (b) Administrative law

There is a noticeable tendency in developing countries to regulate JVAs through sepcial laws and through various administrative regulations. Many countries have enacted special legislation regarding foreign investments. Such special laws contain rules on the special conditions under which a JVA may be concluded, administrative procedure for registration of such contracts, approvals of State administrative organs necessary to be obtained for such contracts to enter into force, rights and duties of foreign investors, of domestic partners, etc. The same is also very often true for the transfer of technology contracts.

The purpose of such legislation was manifold. On the one hand, the rules were shaped in order to protect the domestic partner from excessive demands of foreign partners, and to secure a certain degree of control over foreign capital investments into their national economies.

On the other hand, such laws were also meant to be of help to foreign investors, since they have usually consolidated in one act the whole regulatory area of interest for the status of a foreign investor and technology supplier in that country. Furthermore, the whole field of JVA and transfer of technology agreements was contained in one act for each area, and they were thus easily accessible to all the interested parties.

(c) Company law

As a rule, a JVA will be followed by incorporation of an enterprise or a company in the country where it will be registered and established. Such registration may be effected in a country only in accordance with the provisions of the local company law.

Similarly, the internal management structure of the new company, the type of the company, the position and rights of shareholders, the rights of managers, the operation of the company, as well as many other questions, will all be regulated by the relevant national company laws.

(d) Taxation laws

The newly established company, as well as the foreign and local investors, will have to pay taxes in accordance with the taxation laws of the country of incorporation, while the foreign investor will also have to pay taxes on profits transferred to his country of origin or to another country in accordance with the competent taxation law.

(e) Foreign exchange laws

The incorporated company will exist and work on the territory of the local partner. Therefore, this company will in all respects be subject to the laws of the country where it was incorporated and where it has its seat, including to its foreign exchange laws. Therefore, the whole foreign exchange regime, including transfer of profits abroad, transfer of the invested capital, will be subject to such laws.

(f) Other laws

Whatever was stated under (e) above, is also true for the whole field of labour relations, customs, immigration, accounting and reporting, etc.

(g) International law

Foreign investments, in relation to other types of commercial transactions, have a peculiarity. Namely, in certain cases foreign investments could fall under the scope of international law. If that happens, governments will take over the case of their citizens and pursue the matter in direct negotiations with foreign governments. If governments reach an agreement on the issue, they will arrange for a mutual compensation of agreed damages and/or of nationalized property, and the respective government will later compensate its citizens with the proceeds received from the foreign government.

It is an established rule of international law, that countries have the right to intervene in order to protect their citizens against acts of foreign governments, if citizens need such protection. This rule was extended by developed countries in the 19th century also to situations when the property of their citizens was taken away as a result of an act of nationalization or expropriations of a foreign government.

As a result of these historical developments, it is claimed, that modern international law contains rules whereby States can protect their citizens against taking away of their property, as well as certain rules on the duty of governments to pay a prompt, effective and adequate compensation. The existence of these rules is not always readily recognized by some developing countries.

(UNIDO is preparing an extensive study covering all aspects of joint venture agreements, of which the above is the introduction. The final document will be available later this year.)

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## Sources of financing

The objective of this article is to make the reader familiar with the main factors which play a role when outside financing is required. Special emphasis is placed upon the requirements and criteria set forth by banks and the way financiers are to be approached.

The structure of the article includes the following parts:

- What are the basic thoughts which have to be kept in mind during the whole process of the search for funds for any project?
- What are the main forms by which a project can be financed?
- What are the main requirements which outside financiers usually impose?
- What are the special requirements by banks and by development banks?
- What are the special procedures which are adhered to by banks and development banks?
- What are the main development banks in the region?
- What is the development institute in your country which might be involved in the financing of your project?
- Can part of the project be financed by a donor country in the industrialized world?
- Financial aspects (advantages and disadvantages) of joint ventures.
- What do we need to know about a project before banks can be approached?
- How should outside financiers be approached?

What are the basic thoughts to keep in mind:

Any project - whether it implies technology transfer or not - requires to be financed. In many cases, the financing represents a bottleneck. This is especially true where plans have been made and the financial end of the matter is decided to be dealt with later on.

- Financing should be considered from the very beginning.

- The sourcing of funds is a difficult, delicate and time-consuming matter.

The purchase of know-how and equipment requires an investment plan. Such a plan needs the input of all parties involved, including the financiers! This means that the plan cannot be definite, before financiers have been approached. And before approaching a financier the project promotors should have a clear view of the approximate amounts of money involved:

- Land;
- Buildings;
- Equipment, etc.

It should be stressed here that the financial market is imperfect, which means that there are no standard "financial packages" for sale. This is the case even in the most developed countries. Names of potential financiers may be available, even their goals and objectives may be known etc., but all this does not imply that for some project the financier X can be signed up for Y equity or Z loan. No generally valid guidelines can be given as to how financing sources should be searched and approached.

The financing of each individual project is custom made:

- The equity/loan ratio will depend on how the parties involved view the risks, which again depend on many factors: political, economical, social and above all the market-place;
- The percentage of equity participation which each partner can claim depends on his strength and negotiating power, which again depends on the quality of his input. Many factors play a role, such as uniqueness of technology, relationship with authorizing government bodies or political parties, etc.

The three basic forms of financing are:

- Equity;
- Loans;
- Credits.

Participants in the financial market should have a clear insight into the motives of all parties which can be approached. The following scheme should be kept in mind:

| Equity | Main features |
|---|---|
| Entrepreneurs | Promotor |
| Private co-investors | Promotor |
| Technology suppliers | Future profits abroad |
| Development banks | Basic goal |
| **Loans** | |
| Development banks | Mainly long-term (5-10 years) |
| Mortgage banks | Land/estate as collateral |
| Commercial banks | Short-term on debtors/stocks |
| Leasing institutions | Equipment as collateral |
| Factors | Debtors are collateral |
| **Credits** | |
| Suppliers | Equipment is collateral |
| Technology suppliers | Payments/instalments |
| Customers | Certain rights |

All financiers have their own interests and their own requirements:

- A reasonable return on the investment.

  What is reasonable depends on the financier's position vis-à-vis other clients, which is not known by the project promoter. Other financing opportunities may be more attractive for the financier.

- A project should be viable in the eyes of the financier.

  He wishes to know whether there is a chance to get his money back, including a certain interest. This does not always include that the project must be feasible in the short term because the financier may get his money back by selling his part to another.

Some financiers impose special requirements:

- Development banks have development purposes.

  They shall not participate if the project does not serve a development purpose and each development bank has its own policy.

- Foreign financiers finance in hard currency.

  They may request guarantees from government or central bank as to the repatriation of their initial investment and the transfer of dividends and/or royalties in hard currency.

- Suppliers of equity demand influence.

  Suppliers of equity and sometimes also big lenders may request a voice in the matters of the company, which can be fulfilled by giving them a seat on the Board.

Development banks

Development banks have been created in order to provide funds (equity or loans or both) for (development) projects which lack total or partial financing from private sources.

Main suppliers of capital for these development banks are governments and international institutions. Money is also borrowed by the development banks on the open capital market.

The main types of development banks are:

| | |
|---|---|
| International development banks: | World wide<br>In developing countries only<br>In donor country |
| National development banks: | In developing country only<br>As subsidiary of donor country<br>Banks in developing country. |

Development banks play an important role in all kinds of projects such as infrastructure, agriculture, industry, etc. The terms upon which they finance differ in so far as those of commercial banks in that they emphasize the influence of the project on the development of the country. Development banks may thus have a major influence on the technology purchasing process, especially in four areas:

Technology search: They have a network of relations both in the financial and technological worlds.

Through these relations, they can put project promoters into contact with research institutes, universities, data bases and many other valuable sources of know-how.

Technology evaluation: Through their knowledge of and access to consultants and experts, they can help a promotor with technology evaluation. So they help determine which is the right technology to be used in a given project.

Technology valuation: It is the business of a development bank to handle projects where technology transfer is the main item. So, from their experience they know what rates and conditions are applied for certain types of technology transfer in the industrialized world and in the developing world.

Technology purchase: It is their business to know the ins and outs of complex technology transfer contracts and hence they can be of invaluable help in assisting with technology purchase.

It cannot be stressed strongly enough that development banks should be actively involved (at little or no cost), particularly when the promotor wants them to participate in a project. It then becomes also in their interest that:

- The right technology is used;
- The right price is paid;
- The right contracts are made.

Nowadays the World Bank is heavily involved in development financing and therefore plays a major role. The World Bank's conditions however are rather conservative: the project must be feasible in the sense that the rentability of the investments is high enough. Also when the World Bank is involved it is not allowed to use a party which one favours. The World Bank uses the tender-system to select suitable partners, and in most cases itself directs more to government projects than to those from the private sector and in the latter case is seldom "the only" financier.

When a promotor approaches a bank he should also consider that banks in general have certain preferences; they want:

- Technology from well-known companies;
- A reputable local party;
- Collateral in their home country, or collateral with a great deal of security;
- A high equity/loan ratio, which means, for instance, that loans should be less than equity;
- Government backing; preferably both from the suppliers' side and from the buyers';
- Projects in fast-growing markets;
- Low risk ventures, which most of the time is contrary to the project at hand.

Commercial banks prefer that:

- Development banks take the greatest risks by supplying a large part of the equity (if allowed) and of the loans.

The kind of criteria that can be set forth by development banks can be summarized as follows:

- The scope of the project must be within the policy of the bank;
- The project should have a great deal of development value;
- The ratios used in finance should be within the margins as set forth by the banks; they are
  * local/foreign
  * equity/loan
  * private equity/bank equity
  * a development bank's equity and loans/other bank's equity and loans
- They have a maximum percentage and amount of money that can be supplied in each of the above-mentioned forms;
- They have limitations on duration, interest rates, grace periods for repayments and interests and the currencies used.

It is of paramount importance that a project promotor knows his possible financier's requirements before he approaches them. It may influence his negotiating position.

Procedures of (development) banks:

Each bank has its own set of procedures through which financing applications are channelled. They may be complicated and time consuming. Forms have to be filled in and many figures and other data have to be produced. Several departments are involved, each looking at the project from a different angle. These procedures may hamper the realization of the project, particularly in the beginning, when the first contacts are made. These procedures vary from bank to bank. An example may be:

| Internal | Example of requirements |
|---|---|
| Project department | Standard forms<br>Pre-feasibility study |
| Authorizing officer | Again forms<br>Additional data<br>Feasibility study |
| Technology department | Forms<br>Technical detailed data<br>Origin of know-how |
| Authorizing officer | Again forms<br>Foreign experts' opinion |

The bank may also want to ensure the co-operation of the government and will force the promotor to approach, for instance, government agencies such as the National Planning Board, upon acceptance of which final authorization of a development bank may depend.

Apart from the interregional banks, there are also development banks in many developed countries that work internationally. They can often be approached directly by an entrepreneur from a developing country. They sometimes have the drawback that (because they are mostly financed by the government) they require the purchase of certain goods from that particular developed country.

In many developing countries there are local or national development banks. Also these banks should be contacted before any international bank is approached, preferably as co-promotors of the project vis-à-vis their "big brothers".

Finance sources from donor countries:

Financial assistance to develop a project can also be obtained from donor countries. Of course, the promotor is then dependent on the supplier but in

certain cases it may be of great help to overcome the basic financial needs in the initial phases. It is even more important in this case to realize the necessity to import certain goods from that particular donor country in many cases.

The forms of financial assistance are:

- Direct government gifts or loans:

  This is only the case when the project is a part of an accepted development co-operation project between the local and the donor government.

- Direct government subsidies on (pre-)feasibility studies:

  This is the case in many countries where the government wants to push the sales of know-how and equipment.

- Indirect government subsidies on feasibility studies:

  In many donor countries the promotor may approach the foreign development bank for assistance and for participation in the costs of (pre-)feasibility studies. This can sometimes be done directly or via a foreign party or a foreign consultant.

In view of the above one must realize that, like in any country, the various parties involved (suppliers, financiers, project-developers, consultants and government agencies) do have connections with one another, which may only be discovered during the negotiation phase. Many times the party from the developing country and the party from the donor country do not start their negotiations after all preparations have been concluded, but start negotiations at a much earlier stage, for instance, at the time of the pre-feasibility or feasibility study. It is of paramount importance that these connections between parties involved in a project are well known to the promotor before he sets off the negotiations.

Influence of joint ventures on finance:

In many cases the promotor of an industrial investment in a developing country is considering setting up a joint venture with the supplier of the envisaged technology, who is mostly located in a developed country. There are all kinds of reasons, of which the most important one is the input of the vast experience of the foreign party. Apart from that, the following financial aspects should be considered:

Advantages

Financing institutes tend to be more willing.

All financial institutes are looking for securities when they put up capital, be it in the form of credits, loans or equity. Any improvement to the position of the company that asks for finance is welcomed. The set-up of a joint venture gives the financier the feeling that his interests are better looked after, particularly when the foreign joint venture partner is a well-established company with a good reputation. The old adage is valid here: good money attracts good money.

If, as a consequence of a foreign participation, less local finance is needed, lower interests are sometimes obtainable abroad.

Many times the joint venture partner is willing to pay a high percentage of the equity (say 50 per cent). If we assume that the local party has already made available his equity and collateral for the financier, he may now have a chance of diminishing his requirements for loans and because of his better ratio of collateral/loans, he may be able to negotiate better terms with the financier, especially a lower interest rate.

Disadvantages

Dividends are to be paid to the foreign joint venture partner, and he may ask for preferential rights which may result in a lower rate of return for the local partner.

The joint venture partner who participates in the equity will demand dividends as a return on his investment. So far so good, but many times the foreign partner wants those dividends in hard currency, or he asks for preferential rights: first a percentage of the profits to the partner, before the remaining dividends are equally divided between the two parties (which means that the local partner for the period of validity of the joint venture will receive less return), or he wants a seat on the Board, or he wants other rights that will hinder the other (local) partner in his actions.

One may conclude that again, the local partner must weigh all the pros and cons before deciding.

Necessary data before banks are approached

Financing is taking risks. One of the methods to reduce these is the preparation of a feasibility study: the whole business, from start to operation, is pre-thought, pre-studied, pre-calculated.

This is not an easy job and it is recommended to have it done by an expert outsider which the bank trusts. Therefore it is recommendable to involve the bank in the choice of such an expert, be it someone working freelance or maybe with a consultancy firm. It is not uncommon that when the bank's special departments are involved, this would greatly increase the trustworthiness of the project vis-à-vis the bank's decision makers.

Financiers should be presented with concrete information and preferably no vague ideas or unrealistic projections! The minimum financial information necessary, which a feasibility study should include, is:

| | |
|---|---|
| Projections of: | Sales |
| | Costs |
| | Gross profits |
| Investments fixed: | Land |
| | Buildings |
| | Equipment, etc. |
| | Working capital |
| | Material |
| | Debtors, etc. |

It would be too lengthy for this article to go into all the details of the above-mentioned required data, one could however easily make use of UNIDO's Manual for Feasibility Studies on Industrial Investments (ID/206). In any case, at the end of the study one must conclude with a:

| | |
|---|---|
| Financial Plan: | Equity |
| | Loans |
| | Credits |

This financial plan should contain not only the various necessities, but also various alternatives, all of which should be included in the financial analysis of the project. This is necessary because even a small change in the division of the capital

over equity and loan may in some cases lead to negative results with financiers.

The following calculation may clarify this point:

Say the equity is 50 and the loans total 50. The payment of interest over the loans is an average of 12 per cent. The "overall R.O.I." is 10 per cent.

Although this 10 per cent is too low to pay the interest of 12 per cent, one is still capable of continuing, in case one takes this 2 per cent off the 10 per cent over the equity. The 10 per cent, less the 2 per cent still gives enough rentability on the equity (10 per cent minus 2 per cent for the loan is 8 per cent).

But in case the equity is 40 and the loans total 60, this is different: 10 per cent overall R.O.I. on the total (40+60=100) is 10. The 12 per cent over the loans of 60 is 7.2. This leaves only (10 minus 7.2 is) 2.8 as rentability over the equity of 40 and that is (2.8 divided by 40 times 100) 7 per cent.

All data presented are of course assumptions, and everybody is entitled to his own opinion. One must be prepared that especially the financier will look at the financial plans from a different angle to the entrepreneur, and many times his view on the financial plans may even differ from what he has indicated at an earlier stage. One should not complain about that. The financier's views are highly dependent on the situation of the day, which means that they may differ according to the latest information: what was good yesterday, may have turned out to be bad the next day. Anyway all data should be based on realistic offers, calculations, assumptions, and each and every figure should be clearly explained.

Contact methodology

It cannot be overstressed that finance sourcing is a continuous process including search for financiers, study of their goals, criteria, procedures and attitudes, but above all it concerns knowing people.

As early as possible in the orientation stage, people within and outside the banks (i.e. government) should be contacted, in order to have a first idea of the bank's possible interest in financing. Does the project fit into their scope? At this stage, knowledge of the bank should be gathered, keeping the project idea still provisional, even if the promotor has it all clearly in his head.

This also applies to the search phase, which should always start at the local level: if the local bank with its knowledge of actual circumstances is not favourable to a project, regional or international banks will certainly decline it. Contacts should be kept at a low profile as no certainty exists yet on whether and how the project will be realised, how it will be financed and by which parties. Try to have one financier to present himself as a promotor of the project towards other financiers: he knows his colleagues better than you do!

Even if the financiers have been found and their approximate amounts of participation are clear, still no definite money requests should be made. At first, drafts should be presented and if personal relations are good, the bank's officers will advise as to the definite version which will then have a better chance to be approved. It may be necessary to contact high officers at the decision level to ask their opinion.

Most important of all is that written and unwritten rules of all levels in the bank are complied with.

It is recommended to start drafting the investment plan - including alternative options as to level of technology, output, manpower needed etc. - right from the beginning. Financiers know the many dilemmas promotors are subject to and will appreciate being confronted with draft investment plans, provided these are well conceived. Besides, they may get the impression that you are someone who knows what he is talking about, which may result in more trust with the bank's officers.

Much depends on:

- Personal relationships;
- How a financier considers the management capabilities of the promotor;
- How he considers the risks involved:
- Other (more interesting?) projects envisaged;
- His actual availability of funds;
- His workload;
- His priorities, etc.

A last remark:

Each party in the game has his own motives, and these should be clearly understood by the parties involved:

| | |
|---|---|
| Entrepreneurs | want future profits, but may also envisage the safeguarding of their existing interests; |
| Co-investors | may envisage future opportunities; |
| Government | may stress development aims; |
| Technology suppliers | may not only envisage profits but may also be concerned with their world-wide position (strategic decision); |
| Development banks | vary widely in their outlook on development goals: employment, education, training, interregional co-operation, etc.; |
| Commercial parties | such as banks, leasing institutions and factors normally request ample collateral and may reason that they will miss a chance if they do not participate. |
| | The same applies to suppliers and customers. |

## LEGISLATION

### Brasilian Normative Act No. 60 - Agreements for the rendering of specialised technical services - revocation of item 6 of Normative Act No. 45/75

The Brasilian Patent and Trademark Office (INPI) published Normative Act No. 60 in the Official Bulletin dated 13 April 1982.

This new Act, established guidelines for the approval and subsequent recordal of Agreements involving Specialized Technical Services and revokes the provisions of Item 5 of Normative Act 15, which had previously established concepts and basic conditions for said Agreements.

Normative Act 60 has brought about certain innovations and the following can be pointed out:

(a) Specialized Technical Services which involve amounts inferior to US$35,000.00 may be formalized by means of the submission of an invoice. In certain situations, it is possible to formalize, by means of submission of an invoice, Specialized Technical Services which exceed the amount of US$35,000.00;

(b) The contracting of Specialized Technical Services by means of an invoice must be preceded by prior consultation to the INPI, in which there must be a detailed description of what is intended to import, the qualification and the number of technicians and the amount involved;

(c) Specialized Technical Services relating to "emergency situations" are not subject to prior consultation. "Emergency situations" are understood to be those intended to overcome an unexpected shutdown of a machine or of a production unit or sub-unit, or "similar events";

(d) Specialized Technical Services involving the import of design technology shall be made with the participation of a national (Brazilian) engineering company. This latter company shall be the main contracting party for the consultancy engineering, the executive engineering and, if any, the basic and process engineering.

The philosophy behind Act 60 is an attempt to reduce Brazilian dependence on foreign technical services, such as detail, basic and process engineering, since the Brazilian Government understands that the local engineering companies have already reached a level which qualifies them to successfully carry out this type of engineering.

## Brazilian Normative Act No. 61 - Trademark license agreements as basic condition for evidencing use of trademarks

The Brazilian Patent and Trademark Office (INPI) published Normative Act No. 61 in the Official Bulletin dated 13 April 1982.

The complete English translation of this new Act is printed hereunder. The Act established certain rules relating to the licensing of trademarks which are formed by mere variations of the contents of trademarks already covered by prior registrations or applications.

In rather confusing language, the new Act provides that no royalties are payable for the use of trademarks which are formed by mere variations of contents of previously existing trademarks. The Act appears to have been prompted by the need to prevent royalties from being payable for the use of "variations" of trademarks which had previously produced royalties, but due to the expiry of their respective first ten-year terms are no longer royalty-bearing. The strategy which was apparently adopted was to "create" a new royalty-bearing trademark formed by "variations" of the former trademark whose royalty producing capacity terminated.

Act 61 has also established that Trademark License Agreements which were recorded prior to the effective date of the present Code of Industrial Property (Law No. 5772/71), that is to say, prior to 31 December 1971, which included clauses for an unlimited term, or which did not properly identify the trademarks included therein, shall only cover and "support" the licensing of trademarks for a period of 180 days, as of 13 April 1982. Following this date, the trademarks become vulnerable to cancellation on the ground of non-use.

It can be inferred from Act 61 that if there is no Trademark License Agreement applied for or recorded at INPI prior to 13 October 1982, which Agreement must be based on the provisions of Normative Act 15 (which set the guidelines for Trademark License Agreements), those trademarks which are owned by foreign companies in Brazil and which are not covered by Trademark License Agreements worded in accordance with the said Act 15, and duly submitted for recordal prior to 13 October 1982, shall be vulnerable to cancellation on the ground of non-use.

## English translation of Brazilian Normative Act No. 61 (Published in the Official Bulletin dated 13 April 1982)

Subject: Establishes norms regarding the licensing of trademarks which are formed by the mere variations of the contents of trademarks covered by prior registrations or applications and regarding the licensing of trademarks for an unlimited term.

THE PRESIDENT OF THE NATIONAL INSTITUTE OF INDUSTRIAL PROPERTY, in the exercise of his office:

CONSIDERING the social, economic and juridical objectives referred to in Article 2 of Law No. 5648/70;

CONSIDERING that the registration and the use of trademarks, either directly by the respective owner or by means of a Trademark License Agreement, are governed by precepts of public order, of immediate application to juridical proceedings;

CONSIDERING that § 4(b) of Article 90 of Law No. 5772 of 21 December 1971 (the Code of Industrial Property) only permits the payment of royalties for the use of trademarks belonging to owners which are resident or domiciled abroad when the trademark applications are filed with a claim to priority, based on pertinent International Acts;

CONSIDERING that an application filed in Brazil with a claim to priority of a trademark which is formed by the mere variations of the contents of trademarks covered by applications or registrations previously existing in the country, do not comply with the said legal provision;

DECIDES:

1. The recordal of a Trademark License Agreement relating to registrations owned by parties resident or domiciled abroad, covering trademarks which are formed by mere variations of contents of previously existing trademarks covered by registrations or applications, shall only produce effect for the purpose of evidence of use.

1.1. Mere variations of the contents of previously existing trademarks covered by registrations or applications shall be held to be those trademarks which, being registered by the owner of the trademark in view of Article 65, Item 19 of the Code of Industrial Property, could not be registered by third parties in view of the provisions of Item 17 of the said article;

2. Trademark License Agreements which were recorded prior to the effective date of Law No. 5772/71, with no limitation on the term of the Agreement or which did not identify the trademarks included therein shall only cover or "support" licensed trademarks for a period of one hundred and eighty (180) days, counting from the date of publication of this Normative Act;

2.1. Following the said date, the said Trademark License Agreements shall no longer produce the effects referred to in § 3 of Article 90 of the Code of Industrial Property, including for the purpose of evidencing the use of trademarks in cancellation proceedings.

3. This Act shall become effective on the date of its publication.

Arthur Carlos Bandeira
President

Computer programs (software) in Brazil - Normative Act No. 22. Issued by the Special Secretariat for Informatics (SEI)

By means of Decree No. 84067 of 8 October 1979, the Brazilian Government created the Special Secretariat for Informatics ("Secretaria Especial de Informática" - SEI), as an Agency of the National Security Council.

The SEI has now issued Normative Act No. 22 (published on 7 December 1982), whereby it has instituted the compulsory registration of software. An English translation of this Act is hereunder.

This Normative Act has established certain definitions and guidelines for the registration of software. It has also established that registration of software with the SEI is a prior condition for, inter alia, the recordal of acts or agreements involving computer programs (software) at the Brazilian Patent and Trademark Office (INPI).

There are many practical aspects involving registration of software which still remain obscure. The Authorities hope to clarify these nebulous points shortly.

English translation of Normative Act No. 022/82, which provides for the registration of Brazilian and foreign computer programs made available to the public in the Brazilian marketplace. Published in the "Diário Oficial" of 7 December 1982

The Secretary for Informatics, in the use of his attributions and in view of the provisions of items V, VII, VIII, XIV, SVI, XVII, XIX, XXII, XXV, XXVI and XXX of Article 5 of Decree No. 84,067, of 8 October 1979, and of paragraph 3 of Article 7 of Decree No. 84,266, of 5 December 1979, with the wording given by Decree No. 87,701, of 24 October 1982.

CONSIDERING that the growing importance of computer programs requires the adoption of measures leading to the absorption and generation of corresponding technologies;

CONSIDERING that it is indispensable that governmental efforts be directed towards promoting the development of computer programs in Brazil and the consolidation of the corresponding sector of the Brazilian service industry;

CONSIDERING that it is convenient to qualify and quantify Brazilian expenditure directly or indirectly related to the acquisition, contracting and utilization of computer programs, mainly aimed at import substitution;

CONSIDERING the need to identify the computer programs circulating in Brazilian territory, in connection with those responsible for their respective economic exploitation,

DECIDES AS FOLLOWS:

Article 1: Registration in the Special Secretariat for Informatics (SEI) is established of computer programs intended for use in automatic information processing machines and peripheral units installed in Brazilian territory.

Paragraph 1 - For the purposes of this Act, a COMPUTER PROGRAM is understood as a set of instructions enabling said machines to operate in a particular manner and for a particular purpose, once externalized into a physical support readable by automatic data and information registration and processing machines.

Paragraph 2 - Computer programs shall be registered individually or collectively, when they are programming systems for particular applications.

Paragraph 3 - Programs intended for those specific activities referred to in item VI of Article 5 of Decree No. 84,067, of 8 October 1979, are not subject to the effects of this Act.

Article 2: The provisions of this Act are applicable to:

I. computer programs made available to third parties;

II. computer programs developed by both direct and indirect Federal Administration organs and entities, foundations set up or maintained by the Government and other State companies, following the rules of Decree No. 84,128, of 29 October 1979.

Article 3: For the purposes of registration, computer programs shall be classified in 3 (three) categories;

I. CATEGORY A: Covers those programs provenly developed in Brazil by natural persons resident or domiciled in Brazil or by juristic persons which are properly incorporated in Brazil, have its headquarters and main address in Brazil and is under the permanent and sole control regarding the decisions, technology and capital of natural persons resident and domiciled in Brazil.

II. CATEGORY B: Covers those programs developed abroad, of relevant interest to Brazil, and without a national alternative, and whose program technology and rights of economic exploitation in Brazil, as well as the obligations relating to the corresponding complementary services (updating, maintenance, etc.), in accordance with an appropriate agreement, previously recorded with the Brazilian Institute of Industrial Property (Brazilian Patent and Trademark Office), have been effectively transferred to specialized national companies capable of rendering, with their own personnel, in Brazil, said complementary services and of developing new programs or services;

III. CATEGORY C: Covers those programs not fitting into the previous categories.

Sole Paragraph - For the purposes of this Act, the following definitions are considered:

(a) Program technology - Comprises all technical knowledge, art, skills and experiences necessary and used for conceiving, developing and presenting a computer program and which enable a full understanding, maintenance and updating of said program, including object-code, source-code, user's manual, algorithms, formulas, theoretical bases,

mathematical solution methods and other data, documents and elements employed in the concept, development and presentation of the program;

(b) National alternative - Comprises those computer programs of Category A, registered with the Special Secretariat for Informatics (SEI) and which are functionally equivalent to a program classifiable in Categories B or C and which can be carried out on equipment for which programs of Categories B or C are intended. The expression "national alternative" also includes those computer programs that, at the discretion of the SEI, can be adapted or developed in Brazil, within a period of time suitable for their use by the final user, in conditions that are functionally equivalent to a program classifiable in Categories B or C and which can be carried out on equipment for which programs of Categories B or C are intended.

Article 4: Registration of computer programs of Category C shall not be allowed where there is:

(a) a national alternative or a program registered in Category B;

(b) the possibility or convenience, at the discretion of the SEI, of the utilization or development of similar programs in Brazil.

Sole Paragraph - exceptionally, and without prejudice to the provisions of Article 6 of this Act, registration shall be granted to the following programs in Category C submitted to the Special Secretariat for Informatics for this purpose, within a period of 120 (one hundred and twenty) days from the date of publication of this Act:

(a) programs that have been "internalized" in Brazil before Decree No. 87,701, of 27 October 1979, came into effect, following an act or agreement recorded with the Brazilian Patent and Trademark Office;

(b) programs that, having been developed outside Brazil by a company based abroad, are being marketed by a branch, a subsidiary or by a concern under the control of said company and established in Brazil.

Article 5: Without prejudice to other requirements provided for in the prevailing legislation concerning payment of technical services, technical assistance or the like and their respective fiscal and exchange effects, the registration provided for in this Act is a prior condition for:

(a) contracting of computer programs by direct and indirect Federal Administration organs and entities, foundations set up or maintained by the Government and other State companies (Decree No. 84,128, of 29 October 1979);

(b) a favourable opinion by the Special Secretariat of Informatics (SEI) for the recordal, by the Brazilian Patent and Trademark Office, of acts or agreements involving computer programs;

(c) the acts or agreements relating to computer programs to produce effects of any nature with Federal Administration organs and entities;

(d) a favourable opinion by the SEI for the grant of fiscal benefits or of any other nature on the part of governmental organs to projects relating to computer programs;

(e) the approval, by the SEI, of Informatics Director Plans of direct and indirect Federal Administration organs and entities, foundations set up or maintained by the Government and other State companies, regarding computer programs being used by those institutions;

(f) an analysis, by the SEI, of the prior consultations for the import of data processing equipment, for computer programs necessary for putting said equipment into operation;

(g) an analysis, by the SEI, of the projects for the manufacture of computer equipment in Brazil, regarding the programs required for putting said equipment into operation.

Article 6: The registration of computer programs shall be limited to a specific certificate and shall be valid for 2 (two) years, and may be renewed by a request of the interested party, provided that:

(a) the interested party has provided all the information of a statistical nature that has been requested by the SEI;

(b) in the case of programs in Category C, a technical analysis made by the SEI on renewal of registration has shown that there is no national alternative to the program concerned or a corresponding program registered in Category B.

Article 7: Registration of any computer program shall be cancelled at any time:

I. when, as a result of a substantiated representation made by a user, the program is subjected to evaluation tests and does not meet the technical features and properties and performance conditions made public on the market when it was marketed;

II. when the information submitted by the interested party to the Secretariat at the time of registration have not been found correct;

III. if the interested party prevents or causes difficulties to inspection visits by agents authorized by the SEI to its establishments, to check the accurateness of the information supplied for the registration.

Article 8: The initial registration of computer programs, as well as their renewals, shall be requested following an appropriate procedure available to interested parties at the SEI to those rightly entitled to it.

Article 9: The provisions of items e and f of Article 5 shall become effective from the 120th (one hundred and twentieth) day of the date of publication of this Act.

Article 10: This Act shall become effective on the date of its publication.

Brasilia, DF, 2 December 1982
Joubert de Oliveira Brízida
Secretary of Informatics

## Brazilian Normative Act No. 64 of 16 September 1983: Investments in Research and Investments of Risk Capital as a Condition for Recordal of Agreements Involving Technology Transfer

The Brazilian Patent and Trademark Office - INPI - has issued Normative Act No. 64, published in the Official Bulletin of 20 September 1983. This Act has set new guidelines regarding agreements involving the transfer of technology. An English translation of said Act is printed hereunder.

The objective of Act 64 is to develop, by means of compulsory investments, the research facilities of Brazilian companies and local research institutes, in the hope of reducing the existing technological gap between Brazil and developed countries.

The investments foreseen in the Act may be defined as follows:

(a) investments in technological infrastructure and in local research and development, to take place at the premises of the local contracting company and/or at a research institute, and

(b) foreign capital investments.

A further objective of these new guidelines is to reduce the amount of payments remitted for technology obtained from abroad, and thus reduce the overall deficit in Brazil's balance of payments.

Notwithstanding the significance of the subject matter involved, it must be pointed out that Act No. 64 is not a law, but merely an internal act issued by the President of the Brazilian Patent and Trademark Office. However, the consequence of the non-compliance with this Act would be the refusal to record the respective agreement.

English translation of Normative Act No. INPI-0064 (published on 20 September 1983). Investments in Research and Investments of Risk Capital as a Condition for Recordal of Agreements involving Technology Transfer

The President of the National Institute of Industrial Property (INPI), in the use of his powers, and

CONSIDERING that by the terms of Article 2, sole paragraph, of Law 5.648 of 11 December 1970, the regulation of technology transfer for the economic development of the country is an attribute of INPI;

CONSIDERING the need to improve national capabilities in technical areas;

CONSIDERING that increases in investment in technological infrastructure and in research and development in the country are essential to the attainment of this end;

CONSIDERING that, parallel to the contracting of foreign technology, one of the forms of achieving this objective is to involve national companies in a programme of investment in technological infrastructure and in research and development;

CONSIDERING, on the other hand, that it is crucial to minimize the effect of payments for foreign technology contracts on the balance of payments;

CONSIDERING the advantages that these investments may bring to the improvement of the quality of Brazilian products and the resulting contribution to the increase of the national potential for exportation;

CONSIDERING, finally, that by the terms of Article 126 of Law 5.772 of 21 December 1971, these objectives must be attained by the mechanism of recordal at the INPI of agreements involving technology transfer.

DECIDES that:

1. In the cases where the INPI has concluded that the characteristics of the market, or of the company involved, and the interests of technological policies call for the substitution of imports of technological knowledge, the recordal of agreements relating to foreign technology shall be conditioned to the implementation of a programme of investments in technological infrastructure and in local research and development, to take place at the premises of the contracting firm and/or at a Research Institute.

1.1. The investment programme shall be defined on the basis of what is held to be necessary so that the national company may absorb, on more favorable conditions, the technology to be contracted, as well as assure its progressive technological autonomy;

1.2. The amount of investments to be applied will be defined on the basis of the actual or estimated amount of the technology transfer agreement.

2. In the case of a national company under foreign control, that intends to diversify its activities in the country and when this diversification is made by the contracting of technology from a supplier or licensor which does not belong to the same controlling economic group, as a consequence of the fact that this group does not have the technology at its disposal, the recordal shall be contingent not only upon those stipulations mentioned in the previous item, but also on a commitment by the controlling group to invest risk capital in an amount equivalent to that which the local company will have to remit as payment for the technology, and prior to the respective remittances.

3. The Directorate of Contracts, Technology Transfer and Related Matters - DIRCO - shall monitor the implementation of said investment programmes.

4. This Normative Act shall become effective on the date of its publication in the Official Bulletin.

Arthur Carlos Bandeira
President

Brazilian Normative Act No. 65 of 1 November 1983: Prior survey of Patent Documents as a Condition for Contracting Foreign Technology

The Brazilian Patent and Trademark Office - INPI - has recently issued a new Normative Act, numbered INPI-0065. This Act was published in the Official Bulletin of 1 November 1983 and became effective on 1 January 1984. An English translation of said Act is printed hereunder.

These new guidelines have been expected for some time as INPI has increasingly laid stress on the importance of the Bank of Patents, which has been receiving substantial amounts of regular new information under co-operation with WIPO (World Intellectual Property Organization). According to recent news releases, the Bank of Patents maintains about 14 million documents which can be consulted by Brazilian companies wishing to purchase technology.

As you will note, this Normative Act forces Brazilian companies to conduct a search at the Bank of Patents so that they become acquainted with existing local and international technologies before contracting. One of the objectives of the Act is an attempt to avoid the purchase of obsolete or unsuitable technology and the unnecessary remittance of US dollars, thus contributing to achieve the break-even point of Brazil's balance of payments, which is presently in a critical situation, as well as developing the purchase/sale of local existing technology.

In so proceeding, INPI believes that the potential Brazilian technology buyer would be in a better position to negotiate with foreign companies, since he would have a broader idea of the technology available in Brazil.

It should also be pointed out that the official fees paid to INPI for a search at the Bank of Patents will be deducted from the official fees to be paid when requesting the prior consultation, which is compulsory, according to Normative Act 32/78.

English translation of Brazilian Normative Act N . 65. (Published in the Official Bulletin dated 1 November 1983): Prior survey of Patent Documents as a Condition for Contracting Foreign Technology

THE PRESIDENT of INPI, in the use of his powers, and

CONSIDERING that the sole paragraph of Article 2 of Law No. 5648 of 11 December 1970 calls for the adoption of measures capable of regulating and accelerating technology transfer and of establishing better conditions for negotiation and for the utilization of patents;

CONSIDERING the important function that the Bank of Patents of the Centre of Documentation and Technological Information of INPI (CEDIN, can perform as a subsidy to national firms in the se ection of foreign technology, by indicating the technological alternatives available on the international market;

CONSIDERING that with the information furnished by the Bank of Patents national firms will be aided in negotiations for contracting of technology;

CONSIDERING the gains that this procedure will bring to these companies and to the country by making it possible to avoid the contracting of technology which is inadequate to national technological and economic conditions.

DECIDES:

1. At the time the prior consultation established by Normative Act No. 32 is effected, those companies intending to contract foreign technology must justify the need for importation (of the technology) and the choice of the supplier, based on a comparative economic and technological evaluation of the technology to be imported with that available from other sources and technologies, based on a survey to be effected at the Bank of Patents of the Centre of Documentation and Technological Information of INPI (CEDIN).

2. For the purposes of this Normative Act, CEDIN shall furnish applicants with a list of pertinent documents which will include the country of origin, the number of the document, the date of filing, information on priority, title, classification, owner and inventor covering the field of the invention, and, if available, bibliographic data from sources of information on non-patented technology in the technological area in question.

2.1. Along with the listing, CEDIN will furnish copies of all relevant documents.

3. The amount to be paid for the search effected by CEDIN will be deducted from the value to be paid for the prior consultation.

4. The present Normative Act will be effective counting from 1 January 1984.

Arthur Carlos Bandeira
President

Technology Transfer in Brazil - Brazilian Normative Act No. 55 of 20 August 1981: Compulsory prior consultation whenever technical assistance or specialised technical services, acts and contracts involve inspection services, assembly supervision, performance testing and initial equipment operation

We are furnishing hereunder the English translation of the above Act, which is self-explanatory.

Normative Act No. INPI-055 (published on 1 September 1981)

The President of the National Institute of Industrial Property, in the use of his powers and in consideration of the precepts of the sole paragraph of Article 2 of Law No. 5.648 of 11 December 1970 and of Article 126 of Law No. 5.772 of 21 December 1971; and

CONSIDERING that Normative Act No. 32/78 of 5 May 1978 exempted from compulsory prior consultation the contracting of specialized technical services and/or technical assistance, whenever said services involved inspection and/or supervision of equipment and/or assembly of equipment;

CONSIDERING the necessity of establishing parameters to be complied with by companies, when contracting said services;

CONSIDERING the need to strengthen the national engineering sector,

RESOLVES:

1. Whenever acts and contracts covering specialized technical services and/or technical assistance involve inspection services and/or assembly supervision, performance testing and initial equipment operation they shall, before being executed, be subjected to compliance with the system of prior consultation established by Normative Act No. 32/78.

2. The contracting of supervisors, be they private or juristic persons which are not resident or located in Brazil, shall in principle be admissible, provided that:

I. the contracting relates to machines and equipment, the technology of which goes beyond the locally available state of the art.

II. the contracting relates to mechanical, hydraulic and electric units with a high degree of specialization and low degree of nationalization.

Sole § - In the case of item II above, only the contracting of chief engineers for inspection, assembly, supervision and maintenance of electric, electronic and/or pneumatic instrumentation; of process engineers and operation supervisors may be admitted as a guarantee for and responsibility of the suppliers of the equipment as to its performance, initial operation and operational testing.

3. Inspection services shall only be authorized when not available in Brazil.

4. The present Normative Act shall become effective on the date of its publication, all stipulations to the contrary being hereby revoked.

Arthur Carlos Bandeira
President

RECENT PUBLICATIONS

Table of contents of les Nouvelles, Journal of the Licensing Executives Society, Volume XXII, No. 4, December 1987

Profit and Technology Transfer (Peter L. Waite)

Late Developments in EEC (Gonzalo Ulloa)

Patent Term Restoration Act Update (Walter H. Kirn)

Trademark Licensing in Korea (Y.S. Chang)

PRC Domestic Tech-Market (Chi Shaojie)

Investment Theory for Royalty Rates (Russel L. Parr and Gordon L. Smith)

How Licensing, Franchising Differ (John S. Perkins)

Brazilian Policies More Flexible (Mauro Fernando Maria Arruda)

Venezuela Eases Licensing Rules (Franklin Hoet and Alain Coriat)

Update on Licensing in Argentina (Jorge Otamendi)

Trade Secrets Protection in Brazil (Georges Charles Fischer)

United Nations Industrial Development Organization

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| ID.350 (ID/WG.467/5) | First Consultation on the Fisheries Industry. Gdansk, Poland, 1-5 June 1987. Report |
| PPD.51 | Industrial development review series. The Caribbean region |
| PPD.56 | Situación y perspectivas de las industrias de bienes de capital en América Latina. Volumen III - Costa Rica. Serie de documentos de trabajo sectoriales Núm. 63 |
| PPD.57 | Guidelines for the development of the agricultural machinery and implements industry in Latin America. Volume I. Sectoral studies series No. 38 |
| PPD.58 | Industrial development review series. Malawi |
| PPD.59(SPEC.) | Reestructuración de la industria textil andina: Hacia un programa andino de cooperación |
| PPD.60 | Industrial development review series. Indonesia. Changing industrial priorities |
| PPD.61(SPEC.) | Comparisons between industrial statistics and national accounts: An empirical study on measures of manufacturing value added |
| UNIDO/PC.26/ Rev.2 | UNIDO model form of cost-reimbursable contract for the construction of a fertilizer plant including guidelines and technical annexures |
| IPCT.42(SPEC.) | Bibliography of documents relating to the development and transfer of technology |
| IPCT.43 | Technology trends series No. 7. The changing technological scene: The case of OECD countries |
| IPCT.44(SPEC.) | Materials developed through space-related technologies |
| IPCT.45(SPEC.) | Some considerations for the establishment of silicon foundries and design centres |
| IPCT.47(SPEC.) | Industrial information sources on selected non-ferrous industries |
| IPCT.48(SPEC.) | Production of cellulose from waste cones of the Agave Tequilana |
| PPD.63 | Industrial development review series, Zimbabwe |
| PPD.66 | Posibilidades de la pequeña y mediana industria metalmecánica en el empleo de nuevas tecnologías de información. Serie de documentos de trabajo sectoriales No. 64 |
| PPD.68(SPEC.) | Improving the international comparability of industrial statistics: illustrations of UNIDO methods |
| ID/SER.M/22 | Industry and development No. 22 (ISBN 92-1-106222-5/ISSN 0250-7935) (Sales No.: E.88.III.E.2 US$18) |

MEETINGS

21-30 March - Meeting of the System of National Accounts Expert Group on Production Accounts and Input/Output Tables. Vienna, VIC.

11-22 April - United Nations Commission on International Trade Law, 21st session. New York, USA.

26 April - 3 May - Renewable Energy Equipment Projects Identification and Promotion Programme. Rome, Italy.

4-12 May - Renewable Energy Equipment Projects Identification and Promotion Programme. Milan, Italy.

12-19 May - Renewable Energy Equipment Projects Identification and Promotion Programme. Vienna, VIC.

April/May - Second Regional Workshop on the Application of UNIDO Model Contracts for the Construction of a Fertilizer Plant. Mexico.

30 May - 3 June - Workshop for UNIDO/INTIB National Focal Points on Industrial Information Network and Co-operation. Moscow, USSR.

May (1st week) - Regional Expert Group Meeting on Small- and Medium-scale Enterprises including Co-operatives (African region). Harare, Zimbabwe.

27-30 June - FAO/WORLD BANK/UNIDO Working Group on Fertilizers (UNIDO Meeting). Vienna, VIC.

June - Workshop on the Fisheries Industry in the Caribbean Islands. Port-au-Prince, Haiti.

5-15 July - UNCITRAL - Working Group on International Payments, 17th session. New York, USA

September (4 days) - Expert Group Meeting on Electronics Industry. Grenoble, France.

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

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| | | | | | | | | |
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| 03 | ☐ | International non-governmental organization | 14 | ☐ | Bank or financial institution | 25 | ☐ | Information centre |
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| 06 | ☐ | Government body for development aid | 17 | ☐ | Trading concern | 28 | ☐ | News agency/press |
| 07 | ☐ | Ministry for industry | 18 | ☐ | Engineering organization | 29 | ☐ | Radio and television |
| 08 | ☐ | Other governmental department | 19 | ☐ | Consultant | | | |
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| 10 | ☐ | Chamber of industry or commerce | 21 | ☐ | Vocational or technical institute/school | | | |
| 11 | ☐ | Manufacturers' association | 22 | ☐ | Industrial training or productivity centre | | | |

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| | | | 018 | ☐ | Transport equipment | C31 | ☐ | Industrial property |
| | | | 019 | ☐ | Precision instruments | 032 | ☐ | Transfer of technology (licensing) |
| 001 | ☐ | Food processing | 020 | ☐ | Agricultural machinery | 033 | ☐ | Industrial research and development |
| 002 | ☐ | Beverages | | | | 034 | ☐ | Standardization |
| 003 | ☐ | Tobacco | NON-MANUFACTURING INDUSTRIES AND PROJECTS | | | 035 | ☐ | Industrial organization and administration |
| 004 | ☐ | Textile and garment | | | | 036 | ☐ | Industrial co-operatives |
| 005 | ☐ | Leather | 021 | ☐ | Mining and quarrying | 037 | ☐ | Industrial information and documentation |
| 006 | ☐ | Wood processing | 022 | ☐ | Utilities (including power plants) | 038 | ☐ | Industrial promotion |
| 007 | ☐ | Pulp and paper | 023 | ☐ | Public services (transport, communications, tourism) | 039 | ☐ | Industrial training |
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