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DESIGNING AND FORMULATION OF GUIDELINES AND CRITERIA FOR  
SCREENING OF TECHNOLOGY TRANSFER AGREEMENTS AND  
ESTABLISHING OF POSSIBLE CO-OPERATION LINKAGE BETWEEN  
GHANA AND NIGERIA IN THE FIELD OF TECHNOLOGY  
ACQUISITION AND NEGOTIATION

MISSION REPORT

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## 1. SCOPE AND OBJECTIVES OF THE MISSION

Ghana like most other developing countries is undertaking measures aimed at encouraging investment in the country with a view to revamping the economy within the shortest possible time. As part of her efforts to achieve this objective, the country has embarked on measures in ensuring that appropriate technologies are imported into the country, and also ensure that such technologies are acquired by Ghanaian nationals under terms and conditions which are considered fair, reasonable and equitable. Consequently, UNIDO has requested the expert to put at the disposal of the relevant authorities in Ghana the experience which the expert had acquired in the setting up and running of the Nigerian Technology Transfer Registry. Specifically, according to the job description, functions during the mission include:

- (i) To assist the Ghana Technology Transfer Centre in the Design and Formulation of Guidelines and Criteria in evaluation and Screening of Technology Transfer Agreements, and
- (ii) To initiate and forge possible co-operation linkage between Ghana and Nigeria in Technology Transfer offices in the Field of Technology Acquisition and Negotiation.

## 2. LEGAL AND INSTITUTIONAL MECHANISMS FOR SCREENING OF TECHNOLOGY AGREEMENTS IN GHANA

In recent years, a number of laws have been promulgated and institutions established to regulate the flow of imported technology into the country. Among the regulations are the Provisional National Defence Council (Establishment and Consequential Provisions) Law, 1982 PNDC L.42, the National Energy Board Law, 1983, PNDC L.62, Minerals and Mining Law, 1986, PNDC L.153, Ghana National Petroleum Corporation Law, 1983, PNDC L.64, Petroleum (Exploration and Production) Law, 1984, PNDC L.84 and the Investment Code, 1985 PNDC L.116.

Under the various laws, institutions have been established to regulate the flow of imported technology in specified sectors of the economy. The institutions performing the roles of technology transfer registries are: Ghana Investments Centre (GIC); National Energy Board (NEB), Minerals Commission (MC) and Public Agreements Board (PAB). Recently, the Environmental Protection Council (EPC) has been added to the list of technology transfer registries.

3. Under the new Investment Code, the GIC was established as a Government agency for the encouragement, promotion and co-ordination of investments in the Ghanaian economy. The Centre has power to approve the establishment of an enterprise where the investor seeks fiscal benefits and guarantees provided under the Code, or where a technology transfer agreement is intended to be entered into as part of the establishment or operation of the enterprise, provided that at least 20 percent of the enterprise is owned by Ghanaian citizens. In making its decision whether or not to approve of the enterprise, the Centre must have regard to, inter alia, the capacity of the enterprise to contribute to the development and transfer of technology, including the upgrading of indigenous technology.

4. Where an approved enterprise wishes to enter into a technology transfer agreement, the Centre will evaluate the agreement, advise the investor with regard to the choice and suitability of the technology, and monitor and ensure compliance with the terms and conditions of the agreements. No technology transfer agreement can come into effect without the approval of the Centre, which will grant a certificate of approval. The Centre is enjoined by law to maintain a record of all technology transfer agreements. Provision is made in the law for the adoption of regulations pertaining to approval procedures, remuneration, duration of agreements and restrictive practices.

The Code does not apply to investment in petroleum exploration and production, or to mining activities which are governed by separate legislation. Proposed agreements in these areas are examined, respectively, by the NEB and the minerals Commission. In the case of petroleum exploration, the contractor is obliged to use appropriate and advanced technology.

The Minerals Commission is responsible for collecting and up-dating information on inter alia, technologies for exploration for/or exploitation of minerals.

The Public Agreements Board under section 42 of PNDC Law 42 is empowered to review all public agreements and prescribe recommended procedures for all government agencies or organs, public corporations or other public bodies in relation to the negotiation and conclusion of public agreements.

5. Recently, the Government has directed all agencies and organizations granting investment approvals to adopt an environmental impact certificate policy. Under the policy, all agencies dealing with project approvals are required to submit copies of project documents to the Environmental Protection Council (EPC) for Environmental Impact Assessment (EIA). The EPC would be required to issue a Certificate of Clearance indicating that no damaging environmental impact would result from the implementation of the project or that adequate provisions had

been made in the project proposals to contain any potentially adverse environmental impact. The EPC is to monitor environmental impact of already approved projects.

#### 6. THE TECHNOLOGY TRANSFER CENTRE (TTC)

One institution which plays an advisory role to the technology transfer registries in Ghana is the Technology Transfer Centre (TTC). In line with several international declarations calling on developing countries to establish Centres to deal with issues relating to the transfer, utilization and development of technology, the TTC was established as a policy research Centre of the Council for Scientific and Industrial Research (CSIR) and charged with the responsibility of conducting research into technology transfer policy issues and for providing definitive guidelines on rules and regulations on imported technology as well as the development of indigenous technology.

As may be discerned from the functions and activities of the TTC, the role of the Centre is to serve as a coordinating mechanism for institutions dealing with Research and Development and those in the productive sector. In this regard the Centre is supposed to render advisory services to policy makers, research institutes and investors and technology transfer registries. This role, it is envisaged, will be played through the provision of technological information services (both local and outside), assistance to entrepreneurs on negotiation of technology transfer agreements, advise to policy makers etc.

#### 7. EXISTING GUIDELINES FOR SCREENING TECHNOLOGY AGREEMENTS

Existing guidelines for screening technology agreements in the country at present are those being used by the GIC and the PAB. The Minerals Commission and the Ministry of Fuel and Power use model agreements as aids to screening technology agreements.

#### 8. THE GHANA INVESTMENT CENTRE GUIDELINES

The GIC guidelines contain elaborate provisions dealing with issues such as duration of agreements, payments, restrictive business practices, criteria for the approval of technology transfer agreements, form and procedure, for approval and monitoring of technology transfer agreements and training of local manpower.

It is understood that screening of technology agreements is being done in accordance with the draft guidelines even though the GIC Board has not yet given its formal approval to it. It is recommended that the draft guidelines should be approved and published as soon as possible. This should then form the basis of further improvement in future guidelines.

## 9. THE PUBLIC AGREEMENTS BOARD REGULATIONS

The guidelines issued by the PAB contained only provisions dealing with project feasibility or economic and financial implications of investment. Provisions dealing with duration of agreements, restrictive practices, remuneration for technology transfer are completely missing. The guidelines need a review, taking into account the provisions mentioned.

## 10. THE MINERALS COMMISSION MODEL AGREEMENTS

The body responsible for screening technology agreements in the mining sector is the Sub-Committee of the Minerals Commission. It comprises experts from government organizations or agencies, namely, Geological Survey Department, the Mines, Lands Commission Secretariat, the Minerals Commission and the Ministry of Lands and Natural Resources. The Committee also draws on the expertise of outside consultancies.

Screening is done in accordance with a Model Lease Agreement drawn by the Commission. Most of the agreements deal with mining leases without any significant technology content. Emphasis is on economic and financial implications of investment.

The Model Lease Agreement contains provisions dealing with duration (30 years and renewable), training of local manpower, Ghana Laws to govern transactions, and provisions relating to financial and technical competence of prospective investors. Part 4 of the Minerals and Mining Law, P.N.D.C. L.153 makes provision for incentives and allowances such as 50% capital allowance, 45% of earnings to be remitted and exemption from payment of customs duties on capital equipment.

It is understood that investors in the mining sector do not enjoy tax holidays. This factor has been the main source of complaint by foreign investors. It is, however, felt that incentives provided under the mining law should more than compensate for whatever taxes that had to be paid.

## 11. SCREENING OF ENERGY AGREEMENTS

In spite of the fact that the National Energy Board (NEB) is enjoined to receive and assess public agreements relating to energy, this function is not being performed as at the time of this study. Information available indicate that this function is rather being performed by the sector ministry - the Ministry of Fuel and Power (MEP).

Screening of technology agreements relating to energy is done by a Negotiating Committee comprising experts drawn from various disciplines (law, economics, taxation etc.). Presently, the only form of guideline used for screening is a Model

Agreement to govern technology agreements in the petroleum sub-sector. It contains provisions on duration of agreement, applicable law, royalty payment, training of local personnel etc.

It is learnt that the only problem arising from the implementation of the Model Agreement on the Petroleum sub-sector is over issues relating to tax payment and definition of what should constitute Force Majeure.

12. EXISTING PROCEDURES FOR ENTERING INTO TECHNOLOGY TRANSFER AGREEMENTS

(i) Existing Procedures at the Ghana Investment Centre (GIC)

The existing procedure for entering into technology transfer agreements at the GIC can be categorised into six stages. These are:

Stage 1: The applicant submits Project Proposals together with Technology Transfer Agreements to the GIC.

Stage 2: The GIC evaluates and accepts the applicant's Project Proposals together with the Technology Transfer Agreements.

Stage 3: The GIC submits the Draft Technology Transfer Agreements and the Project Proposals to its Technical Committee on Technology Transfer.

Stage 4: The GIC Technical Committee on Technology Transfer evaluates the Technology Transfer Agreements.

Stage 5: The GIC Technical Committee prepares and submits an advisory memorandum on the Draft Technology Transfer Agreement to the Board of the GIC for consideration and approval.

Stage 6: Final approval is given by the GIC Board and the applicant notified promptly. The applicant then writes to the GIC to confirm his intention to proceed with the approved project within 21 days of being notified.

Furthermore, the Technology Transfer Department of the GIC is expected to monitor and ensure that the applicant complies with the terms and conditions of the approved agreements as implied in section 27(2c) of the Investment Code 1985, (P.N.D.C.L.116).



The department is also expected to issue copies of reports on the project to the Technical Committee on Technology Transfer at the GIC.

(ii) Existing Procedures at the Public Agreement Board (PAB)

The existing procedures at the PAB can be outlined in the following stages:

Stage 1: Copies of the final draft agreements from earlier negotiations between the sponsoring agency (foreign) and government delegation comprising officials of the Ministry of Finance and Economic Planning, the Bank of Ghana and the Attorney-General's department are submitted to the PAB.

Stage 2: The public Agreements Board (PAB) reviews and evaluates the draft agreement.

Stage 3: The PAB holds deliberations with the sponsoring, (foreign) agency on the draft agreement.

Stage 4: The PAB sends its final comments on the agreement to the Secretary to the Committee of P.N.D.C. Secretaries.

Stage 5: The Committee of P.N.D.C. Secretaries holds discussions on the final comments submitted by the PAB and gives the final approval.

Stage 6: The sponsoring agency is notified of the approval and the project is initiated.

The role of the PAB is limited to the analysis of the legal aspects, foreign exchange, external debts and budgetary implications implied in the public agreements.

(iii) Existing Procedures at the Minerals Commission (MC)

To apply for a mineral prospecting licence, the applicant submits the following documents to the MC, through the Ministry of Lands and Natural Resources (MLNR);

- (i) Copies of completed Application Forms obtained from the MC Secretariat.
- (ii) Copies of sketch Map of the area being applied for, with reference to a typographic sheet.
- (iii) An official search report from the Lands Commission Secretariat in Accra.
- (iv) A Work Programme for the proposed general prospecting operation, indicating expenditure in both local and foreign exchange for the first, second and the third years in relation to various stages of the programmes.
- (v) Particulars of the company.
- (vi) Annual Reports of the Company(ies) which will carry out the prospecting.
- (vii) Power of Attorney, if the company is registered outside the country, applicant employs an agent to act on his/her behalf, and
- (viii) Evidence of financial capability to carry out the proposed operations.

The application for the licence is then processed by the MC. The MC contacts the Chief Inspector of Mines (CIM), Regional Lands Officer (RLO), Chief Conservator of Forests (CCF), Director of Geological Survey Department and the District Chief Executive for their comments during the processing of the application.

The application is then published in the offices of the District Chief Executive, the local information centre, Post Office and other public areas for a period of 21 days to afford the general public the opportunity to examine the application and to react if necessary. The application is also published in the Gazette.

As part of processing the application, the bankers of the applicant are contacted by the MC to give a report of the financial ability of the applicant with respect to the proposed work programme.

The MC, then submits its recommendations to the P.N.D.C. Secretary for Lands and National Resources after a careful consideration of the application together with comments from other organizations contacted. Final approval is given by the P.N.D.C. Secretary who notifies the applicant in writing through

- Stage 1: A questionnaire is filled by the applicant and submitted through the sector Ministry of the EPC.
- Stage 2: The Internal Review Committee (IRC) of the EPC examines the submitted questionnaire.
- Stage 3: If the IRC is convinced that a full environmental impact assessment is not needed, a report is sent to the applicant through the sector Ministry.
- Stage 4: If the IRC agrees that an environmental impact assessment is essential, a panel is set up to draw up a range of action and guidelines.
- Stage 5: The environmental impact assessment is carried out and recommendations submitted to the EPC.
- Stage 6: The EPC examines the recommendations and issues a certificate to the applicant when satisfied. If unsatisfied, the EPC notifies applicant through the sector Ministry.

The applicant can file an appeal through the sector ministry to be considered.

13. It is important to mention that existence of the five different offices in Ghana dealing with this important subject of Transfer of Technology underscores the importance which the Government of Ghana attaches to this subject. The function of the offices though different in some respects, are in many respects highly complimentary. One may wish to recall that even in the United Nations System, several agencies are equally involved in the issues of Technology and Technology Transfer with varied functions equally complimentary which also make for emphasis. Such agencies with specialised but complimentary functions include UNIDO, UNCTC, WIPO, UNCTAD and GATT.

14. The expert had examined the various guidelines currently being used by the various Registries including the questionnaire. The questionnaire had been found to be adequate for collecting information from various enterprises. With respect to the Guidelines, which are in existence they cannot be considered to be adequate in enabling those whose duty it is to screen agreements to effectively undertake the function. Consequently I have prepared the following set of guidelines for use by the various Registries:

- (1) Policy Guidelines and Criteria for the Evaluation of Technology Transfer Contract. .. Appendix I.
- (2) Internal Guidelines. .. Appendix II.
- (3) Guidelines in Evaluating Licensing Agreements. .. Appendix III.
- (4) Internal Control Data for Economic Analysis of Technology Agreements. .. Appendix IV.
- (5) Internal Control Data for Legal Analysis of Technology Agreements. .. Appendix V.
- (6) Internal Control Data for Legal Analysis of Technology Agreements. .. Appendix VI.
- (7) Monitoring Form. .. Appendix VII.

General Recommendations for further enhancement  
of Technology Transfer Transactions in Ghana.

Considering the fact that there are five different Registries in Ghana dealing with the issue of Technology Transfer, the following recommendations are made which may further enhance their efficiency with greater benefit to the national economy:

- (i) The Government should in the long run explore the possibility of having a Central Registry mainly to deal with agreements on Transfer of Technology. The existing Registries should continue to deal with the Technical aspects which are not associated with Technology Transfer. A single registry on Technology Transfer will enhance the expertise of the officers in the secretariat and also make for consistency in terms and conditions under which Technology is transferred. Such a Registry should have highly trained personnel in various fields to enable them undertake techno-economic evaluation and make recommendations to the Board.
- (ii) In the short run, copies of the guidelines should be circulated to all Registries to enhance their screening procedures.
- (iii) Since the issue of Technology Transfer agreements can be considered as sensitive in some countries, it is important that all Records should not be kept in a single registry to avoid total destruction of records in the event of fire outbreak. Consequently, all approved agreements should be sent to a Central Registry. It is recommended that TTC which has been

designated to co-ordinate the activities of all the Registries could undertake such fields. This is without prejudice to the records being kept by the various Registries.

- (iv) It is recommended that TTC should serve as a data base or focal point on the issue of information storage and provide information to users including CORIS Information. Such information should include those relating to manpower information on inventions from medium and small enterprises, including local technologies from national Research Institutions.
- (v) It is recommended that TTC should be mandated to undertake the commercialization of Research results even on pilot scheme basis. Consequently, all Research Institutes should be mandated to provide the list and details of their R & D results to the Centre.
- (vi) Without prejudice to whatever specialised training each Registry may arrange for its staff, it is recommended that TTC could also reserve as a focal point for arranging training courses, seminars and conferences to enhance the effectiveness of all the Technology Registries in the area of Technology Transfer. A minimum of four Training courses and seminars a year should be arranged. UNDP should be requested to provide funds to supplement the national resources.

#### Monitoring of Technology Transfer Agreements.

In order to ensure the proper absorption and assimilation of Technology in the country, the various Registries should undertake the functions of monitoring the execution of the projects involved in approved agreements particularly before the applications for renewals are considered. This is to ensure that the companies comply strictly with the terms and conditions of the registered agreements. Such monitoring exercise should scrutinize, among other things, the compliance of the establishments with the provisions of the agreement, the manufacturing plan, the management succession programme and the Training and indigenization programmes. A Monitoring Form which should be completed by each establishment is attached as Appendix VII

#### Possible Co-operation Linkage Between Ghana and NIGERIA

##### 1. Technology Transfer Office in the Field of Technology Acquisition and Negotiation.

Discussions were held with various Registries and particularly the Technical Committee on the evaluation of agreements under the GIC, and the officials of TTC which

co-ordinates the activities of all the Registries on the issue. All with whom the expert held discussions agreed on the need for a linkage and co-operation between Nigerian office and Ghana in the field of Technology acquisition and negotiation. On the basis of the background information from the various Registries, and the fact that very little in depth training had yet been undertaken to improve the screening skill of the various Registries, it has become necessary to make the following recommendations.

- (i) UNDP/UNIDO should provide the services of high level experts in the organization and running of a Technology Registry to advise and assist the Government of Ghana in the preparation of Guidelines to assist national enterprises in the negotiation of Technology agreement. Such Guidelines will use the input from the laws establishing the various Registries and the General Guidelines which had been produced for use by the various registries during the present mission.
- (ii) UNIDO/UNDP should provide experts with practical experience in other registries, also should advise and assist in the preparation of information procedures in the various Technology Registries in the country, to ensure that key aspects of information related to technology transactions are properly secured, classified and organised for retrieval purposes. It is noted that the TTC also had secured assistance from UNIDO in terms of equipments - computers etc., and already proposing to join the TIES membership. An officer should therefore be sent to UNIDO Headquarters to receive the necessary training regarding the completion of Contract cards and the supply of TIES information.

## 2. Provision of Sub-Contractual Services

The authorities in the TTC and the Technology Registries have agreed in principle to have a sub-contracting arrangement between Nigeria office and Ghana. In order to put it into effect, UNDP/UNIDO should make an effective arrangement in a Project Document to link the Ghana Registries on a sub-contractual basis, with Nigerian Registry which is presently ready and equipped to provide such a service to Ghana. Similar sub-contractual arrangements should equally be arranged to cover similar advanced Registries/offices in order to secure in a flexible and more expeditious manner specialised services in the implementation of the project. Such Registries in addition to Nigeria should include Philippines, Argentina and Mexico. It may be mentioned here that Nigeria had a similar sub-contractual arrangement during its early years of operation.

### 3. Training

As mentioned before, the issue of Training is a prerequisite for the success of any Technology Registry. Since the Registries in Ghana are relatively young, it is imperative that UNDP/UNIDO make Training a priority in the execution of the project. Such Training includes training on the job in various Registries outside the country including Nigeria. In this respect, the Nigerian office in the spirit of the sub-Regional and Regional Corporation, is willing to provide this training to the Ghanaian counterparts either in Lagos or in Ghana. In this connection, UNDP/UNIDO is requested to make it possible for officers in Ghana to participate in the various training programmes currently being planned for the Nigerian officers who are recently recruited. Both UNDP/UNIDO and the Ghana authorities will be notified early enough to enable Ghana send any number of officers who should take part in the general training, before such officers are attached to the various departments for sectorial evaluation.

### 4. Seminars, Workshops and Conferences

It is gratifying to note that Ghana through the TTC has been organising seminars and workshops in an attempt to sensitize the public on the issues of Transfer of Technology Agreements. It is recommended that more of such seminars, workshops and conferences be organised in order to create greater awareness. UNDP/UNIDO is also requested to assist Ghana in providing experts from Nigeria Technology Registry and other Registries who would share their experiences in their various countries during such conferences and seminars.

APPENDIX I

POLICY GUIDELINES AND CRITERIA FOR THE  
EVALUATION OF TECHNOLOGY TRANSFER CONTRACTS

1. Some of the issues to be considered in the preparation of these guidelines are the following:

- All technology contracts should include a provision whereby the recipient enterprises in Ghana acquire explicit rights for the use and exploitation of the technology in question, and the period covering these rights should be clearly specified in the contract.
- For the evaluation of a contract, the main features of the process or products to be licensed should be clearly defined.
- In cases where the Ghanaian enterprise is acquiring the right to practice a process, the concept of know-how should be clearly expressed and defined in the contract. In this connection, concepts such as "technical information" or "technical services" should only be treated as complementary to the know-how.
- The remuneration for the various aspects of the contract is to be related to the most essential elements of the said contract in order to properly ascertain the value of licensor's contribution.
- When a technology contract involves various components, each should be evaluated separately and the corresponding remuneration determined, not only to ascertain the relative cost of each, but also to provide the basis for determining the licensor's responsibility concerning the performance of any of these elements.
- In projects of special importance, the concept of net present value should be introduced as a tool for evaluating the overall remuneration.
- Where the main element of a contract relates to a technological process, licensor has to provide process performance guarantees as required, in order to critically identify its adequacy.
- Process guarantees are to be covered by licensor's financial responsibility and his liability would have to be in close relation to at least the value of the know-how.



- If the option to pay liquidated damages is available, there should be a provision for the Ghana enterprise to exercise this right in an independent manner.
- To ensure a continuous flow of information between licensor and licensee during the life of the contract such a contract should provide for access to licensor's plants and related R & D facilities.
- The licensor should inform licensee about any "improvements on the technology" and ensure that licensee has the option to use such improvements commercially.

2. The considerations outlined above are only descriptive and are presented to highlight some areas that deserve the attention of the screening office. These considerations would assist in attaining some of the following objectives:

- That there is a continuous and efficient transfer of know-how from a foreign company to a licensee in Ghana.
- That the recipient company acquires the technology with adequate knowledge of all the critical and technical aspects, so that it can ensure its successful operation.
- That a clear definition of "know-how", "technical information", etc. is incorporated in contracts.
- That remuneration to the foreign licensor is determined in relation to the main elements that form the technology contract (i.e. know-how, patents, engineering supply and services etc.).
- That the fees and other forms of compensation bear a close relationship to the technology or services acquired, and are kept in line with international norms in specific sectors.
- That the recipient company in Ghana is adequately protected concerning the technical performance of processes and technology through the introduction of explicit process guarantees.
- That the contract clearly specifies the responsibilities of the foreign company, in achieving performance of the technology.
- That a dynamic flow of information on technological improvements is secured.

- That the recipient company in Ghana will be in a position to efficiently operate the plant after the technology contract terminates.

3. An important element in the evaluation of foreign contracts is the payment for technology. This question is primarily dependent on the technical know-how or services to be acquired, and the appropriate criteria for its assessment will have to be developed over a certain period of time.

4. Considering that this issue will be of particular importance for the initial work of the screening office, certain features and possible requirements in this area are highlighted.

5. It should be recognised that the evaluation of the cost of technology is a rather complex exercise; however, one of the main responsibilities of the Office would be to develop the necessary skills to judge upon the direct cost of technology contracts and its effects upon the national economy.

- (i) From the viewpoint of the recipient company, the adequacy of compensation is normally determined on the basis of a cost-benefit analysis at the enterprise level.

- (ii) From the point of view of the economy, additional to the cost benefit criteria at the enterprise level, it is important to judge upon the cost of technology in relation to its value-adding potential, i.e. the maximum use of local raw materials, the up-grading of local capabilities, employment of local personnel, foreign exchange implications, fiscal considerations, etc.

6. At this stage it would not be possible to suggest specific rules concerning the most appropriate level of payments in all instances; what is needed is to conduct a techno-economic evaluation of each contract and to determine if the payments involved, do in fact, relate to the services and technical knowledge that is to be provided. In this connection:

- It would be essential that in the contract the base and formula to calculate royalty payments are clearly specified.
- It is important that the contract clearly specified that taxes due on royalties are the responsibility of the foreign company (which is the one that receives this income).
- A differentiation should be established between the concept of payments for know-how and that of continuing

royalties.

7. In order to accurately determine the total flow of payments involved in a contract, the following should be considered:

- (a) The manner in which said payments are going to be effected.
- (b) The projected amount of sales or volume of production during the life of the contract.
- (c) The duration of the contract itself.
- (d) The specified dates when payments are to be covered, given special attention to a scheduled programme for implementing an industrial project.

8. In practice, there are differences between various modalities to cover payments, however, it is possible to evolve adequate methodologies for evaluation purposes.

In this connection the following reference indices are considered important:

- (a) 
$$\frac{\text{Royalties related to products covered by the contract}}{\text{Projected sales of products covered by the contract.}}$$
- (b) 
$$\frac{\text{Royalties related to products covered by the contract}}{\text{Total (aggregated) sales of the recipient company.}}$$
- (c) 
$$\frac{\text{Royalties related to products covered by the contract}}{\text{Net income obtained from the sale of products covered by the contract.}}$$
- (d) 
$$\frac{\text{Total Engineering fees}}{\text{Total investment in machinery and equipment.}}$$
- (e) 
$$\frac{\text{Total payments for technology}}{\text{Total investment in machinery and equipment.}}$$

The above reference indices could be found useful in determining to what extent the various payments involved affect the manufacturing cost and financial position of the recipient company.

9. As a general rule, it would not be advisable to accept minimum royalties. However, if the foreign company insists on a minimum royalty, the approval authority should request the incorporation of a maximum royalty in the contract as well.

The concept of a minimum royalty may not be acceptable because there will be cases where, for reasons beyond the control of recipient company, (such as lack of market responses, inflationary conditions, shortage of raw materials etc.), the recipient company in the country may be put in an unfavourable position, particularly in cases where new products are involved.

10. Although the definition of what may be construed as a negative effect to the economy is a difficult question and requires the technical support from other government agencies, the screening office can at least examine some of the most obvious implications that result from contractual arrangements with foreign companies.

In this connection it will be important to determine:

- (i) the effect of payments on the recipient company.
- (ii) how this affects the country's balance of payments.
- (iii) the characteristics of the industrial sector in question.
- (iv) the effect of said payments on the cost of goods and services to the consumer.

#### 11. Technical Assistance

Payments for technical assistance would normally be covered through "know-how fees". This should be examined in close detail and a differentiation made between lump-sum payments and those for the continuing supply of technical assistance over the life of the contract.

In connection with the question of know-how payments, the following should be taken into consideration:

- When the object of the contract covers technical know-how that could be assimilated by the recipient company over a short period of time, i.e. use of formulae, drawings, specifications, etc; payments on a continuous basis should not be accepted.
- Concerning the know-how incorporated in drawings formulae etc., no limitations should be accepted other than those pertaining to a limited confidentiality obligation.
- Concerning the use of non-patented know-how, the screening office should not accept any restriction on the use of said know-how after termination of the

contract.

## 12. Basic or detail engineering

The supply of engineering services relies on the technical capability of licensor. In practices, basic and detail engineering could be obtained from different sources, and it is therefore important to define the degree of responsibility of all parties involved.

An important aspect on the supply or engineering services relates to the type and scope of guarantees required by the recipient company in Ghana.

When licensor is responsible for supplying basic engineering together with process technology, licensee should obtain specific guarantees in the following areas:

(i) Volumes of production.

(ii) Yields.

(iii) Quality of products.

It is important that the amount of payments for engineering services should be compared with alternative offers on substantially similar basis.

Finally, it would be essential that contracts covering the supply of basic and/or detail engineering should clearly specify the type and scope of these services as well as the manner in which the corresponding payments should be effected.

## 13. Continuing technical assistance

For practical purposes the evaluation of payments concerning technical assistance is classified in the following manner:

### A. PRE-OPERATIONAL PHASE

(i) Pre-investment studies.

(ii) Technical assistance for the purchase of equipment.

(iii) Design, fabrication, and supply of equipment and machinery.

(iv) Technical assistance in the erection and installation of plants.

(v) Plant start up.

- (vi) Training of technical personnel in the above areas.

B. OPERATIONAL PHASE

- (i) Assistance in the purchase of equipment spares, raw materials, etc.
- (ii) Quality control.
- (iii) Assistance in the operation of the plant including repair and maintenance, efficient production, etc.
- (iv) Technical services to clients.
- (v) Technical improvements of precesses, and products.
- (vi) Training of technicians in licensor's or licensee's plants.

The following should be taken into account:

- The technical capability of licensee.
  
- That the contract clearly specifies the various services involved and the corresponding payment for them.
  
- That the contract determines the time required to efficiently cover the various services in the pre-operational phase.
  
- That the contract determines the relationship between the kind of assistance to be supplied by licensor and complexity of the manufacturing process.
  
- That the degree of technical change in the sector of industry in question is appraised.

14. Managerial Assistance

The kind and scope of these services will greatly depend on the functions to be covered. In general terms, these services should be obtained over a specific period of time, covering among others, the following aspects:

- (i) Planning and programming.
- (ii) Research and development activities.
- (iii) Inventory control and accounting.

- (iv) Financing and purchasing.
- (v) Promotion and marketing.

Managerial or administrative services have to be evaluated in consideration of the following:

- (i) The sector in which they are applied.
- (ii) The requirements of the recipient party.
- (iii) The type and scope of the recipient party.

In this context, the following should be considered:

- (a) A definition of the different services involved.
- (b) The provision for training programmes in order that the various functions can gradually be covered by licensee's staff.
- (c) Payments for this concept shall be viewed in relations to the economic benefits to the recipient company.
- (d) The responsibility and functions of licensor should be clearly delineated.

#### 15. Duration of Contracts

An issue closely linked with the remuneration for technology is that of the duration of the agreement. The "life of the agreement" should be carefully defined at the initial stages of negotiations, taking into account training, and other related activities. An important objective will be to limit payments for technology to the shortest possible period of time; on the other hand, the duration of the agreement should never be shorter than the time required to fully absorb the know-how in question. In other words, the life of the agreement should be closely related to the type of process or technical know-how under consideration.

#### 16. Other Agreement Clauses

In addition to the questions related to payments for technology and duration of agreements, it will be necessary to consider other relevant provisions that are normally included. In this connection, it is of utmost importance to clearly define the know-how under consideration, the technical services required, and the parties involved in the execution of a contract.

17. The screening office would be required to identify all or some of the following aspects:

A. In Relation to the Parties

I) Licensor:

- Licensor's capabilities and experience as a producer or supplier of technology;
- Information on Licensor's financial ability to meet its own obligations.
- Endurance that licensor has full and complete access to the technology under consideration.
- Determination of licensor's past licensing experience in other countries.

II) Licensee

- Determination of licensee's place in the market.
- Determination of licensee's technical and financial ability to meet its obligations under the contract.

B. In Relation to the Nature of the Technology

- Determine that the technology is commercially proven, and at the same time is not obsolete.
- Selective preparation of a comparative evaluation of alternative technologies in relation to local conditions.
- Provision of information on all inputs required for all technologies studied.
- Selective preparation of a comparative evaluation of production costs and profitability for various alternative technologies.

C. In Relation to Product or Processes

- Definition of all necessary inputs and outputs, including specifications.
- Definition of each step of the process including major equipment required.
- Determination of sources of supply of raw materials intermediate products, spares and components and equipment.



- Identification of plant capacities.

D. In Relation to the Patent Situation

- Determination of the nature of the product or process involved is patented and if so, if it is patented in Ghana.
- To specifically determine the life of all patents involved.
- To determine if an exclusive license covering know-how or patent rights have been granted to a third party; and if so, to determine if it provides access to the national economy.

18. Access to Improvements in Technology

There is a need to provide for access to improvements on technology during the period of the agreement. This should include both patented and non-patented developments. When the technology acquired under a contract has been clearly defined, there is less scope for disagreement between the parties as to what constitutes an improvement.

It is frequently considered in technology contracts, that the recipient enterprise is also obliged to assigned to the technology supplier the patents, trade marks, innovations or improvements achieved through its own efforts. These are normally referred to as grant-back provisions.

There is a need to ensure that national enterprises are duly protected by retaining the ownership of said improvements and to provide that the exchange of information between the parties, during the life of the agreement, is to be conducted on the basis of reciprocity concerning:

- (i) the degree of exclusivity concerning the use of said improvements.
- (ii) the territory in which improvements are going to be applied, and
- (iii) the remuneration for obtaining access to said improvements by either party.

In actual practice, most of technological developments during the life of the agreement will be achieved by the foreign company, but, it is essential to establish as a matter of principle, that national enterprises have to obtain adequate recognition for their own technological efforts.

19. Supply of Components and Intermediate Products by Foreign Companies

In addition to the revenues obtained through technology payments, a most significant source of income to the foreign company is often the supply of equipment components, or intermediate products.

In this connection, it is important to ensure that the recipient company is not contractually obligated to acquire said products from a specific source only. The national enterprise should have the right to decide the most convenient source for acquiring these products on an internationally competitive basis. If the recipient enterprise decides on its own free-will to acquire certain products from licensor, on a continuing basis, the cost of such products should be deducted from the base that will be used for the computation of royalties. Additionally, the following should receive the attention of the screening office:

- The contract should provide that components or intermediate products are to be supplied by licensor at internationally competitive prices.
- The manner for determining such prices should also be prescribed either in the contract or in a related document.
- On a selective basis, the "most favoured licensee clause" should be incorporated in the contract; particularly, if the same component or intermediate product is supplied by licensor to any other licensee in a third country.
- Where the licensor buys on account of licensee, equipment, components or intermediate products, a provision should be made to ensure that the price to be charged to the Ghanaian enterprise shall be the same as the price paid by licensor, plus reasonable handling charges (normally) not to exceed a pre-determined ceiling between 2 and 5%. Finally, where the licensor is the manufacturer of said products, a provision should be made to ensure that the price to be charged to the Ghanaian enterprise shall not be higher than the cost at licensor at the next stage of production, in his own plant.

20. Territorial Considerations

Under this heading, two questions deserve special attention:

- The first is the territory of manufacture which is normally restricted to one country. In this

connection, the degree of exclusivity to be obtained should be clearly specified in the contract.

- The second relates to the territory of sales. This aspect requires careful consideration to ensure the possibility for exports to other countries. As a general rule, the Ghanaian enterprise should acquire the right to export to countries that constitute a natural market and the names of these countries should be specified in an annex to the contract. In connection with the issue of export, the approval authority may adopt the following criteria:
  - (a) A contract may not be accepted when it contains a total prohibition for the export of products manufactured under license, as it precludes the possibility of sales abroad during the whole duration of the agreement.
  - (b) When the contract imposes the obligation not to export to certain countries of interest where the licensor has not granted exclusive rights.
  - (c) When the contract establishes ceilings on export sales values and the economic viability of the project depends on an important export component.
  - (d) When it obliges the national enterprise to export only through the licensor, to the detriment of licensee's successful marketing efforts in third countries

The screening criteria to deal with territorial restrictions will be applied with the necessary flexibility in order to eliminate those provisions that in actual practice affect the possibilities of growth of the National enterprise and the external trade policy of the country.

It is to be recognised that by simply eliminating contractual provisions that limit or condition the export of products, the recipient company may not be in a position to obtain access to export markets, as this will be governed by economic and commercial considerations that applied to the international market, such as: the cost and quality of products, time of delivery, etc. However, as already stated, one of the objectives of the proposed legislation will be to ensure that the products manufactured in the country could participate in export markets, on a competitive basis.

21. CURRENCY PAYMENTS

- Payments for technology are normally requested in convertible currency.
- Initial payments for know-how should be made in a foreign currency not at a fixed rate of convertibility but at the rate when the remittance is effected.
- Licensor would probably request payment in his own currency or in other convertible currency of a third country.

22. SUB-LICENSE

- On a selective basis it would be desirable to obtain the right to sub-license the technology in Ghana.
- A sub-license to be granted to a third party may require the prior consent of the licensor.

23. TRAINING

- The extent of training programmes should be well defined in the agreement.
- A good training programme is desirable to effectively take over plant operations within the shortest period of time.

24. ASSIGNABILITY

- The Screening Office should ensure that the Licensor agrees to the assignment of licensee rights, obtained under the agreement, in the event of change of ownership of licensee's under-taking.

25. CONFIDENTIALITY

- The incorporation of a confidentiality clause is normally required by a licensor.
- The Screening Office would have to ensure that Licensee does not assume any unreasonable degree of responsibility in this regard, particularly in respect of licensee's personnel.

26. ARBITRATION

- The manner of selection of arbitrators and the procedure for arbitration should be clearly specified in the agreement. However, the legislation should

specifically provide that the governing law of the contract should be that of Ghana.

27. - The Screening Office would have to ensure that Licensee cannot accept a provision under which he is restricted to obtain technological know-how from other sources.
- This is most relevant in respect of new technological developments achieved by third parties during the life of the agreement.

28. GUARANTEES

- The Screening Office should make every effort to secure guarantees at the various stages of the project, however applicable.
- Performance guarantees are considered essential in projects where licensor is providing basic engineering and where his responsibility extends beyond the supply of process technology.
- Performance guarantees should always be provided in the purchase of equipment and machinery.
- A guarantee clause related to delays that may be incurred by Licensor in the supply of technical information, i.e. research, reports, drawings, specifications, operating manuals etc., may be negotiated in the following manner:
- The licensor should furnish a Bank guarantee wherein the concerned Bank would return to licensee certain sums of money if a claim is made by licensee, in relation to the contract, if licensor has not fulfilled its obligation in the provision of said services. This Bank guarantee is also applicable in all cases of front-end payments.

NOTE: This paper could serve as a general background for the preparation of the operating guidelines to be followed by all Registries in respect of Technology Transfer Agreements.

CONFIDENTIALDISTRIBUTION RESTRICTEDINTERNAL GUIDELINES1. PURPOSES

These internal guidelines are intended to help the staff to carry out the evaluation of the transfer of technology agreements, in accordance with the provisions of the Law.

The Law gives the Office the power to determine after the evaluation, the acceptance or denial of registration of all contractual transactions concerning transfer of technology in any form that take place in the country.

2. EVALUATION OF TRANSFER OF TECHNOLOGY  
AGREEMENTS3.1 TRANSFER OF TECHNOLOGY AGREEMENTS

A transfer of technology contract is a legally binding instrument. It contains the will of the parties thereof. It is, properly speaking, an agreement reached among two parties; the supplier or transferor and the recipient or transferee.

The contract may be seen as a legal document. But it is also the way in which a commercial transaction takes place. The contract is a unity in itself.

The main provision or clause of the contract is the one that refers to the obligations of the transferor to supply the technology or the obligation to authorise the use of patent or a trademark

that has been previously registered in the country and has been issued by the national competent authority.

The main purpose of the transferor to enter into such an agreement is to obtain from the transferee a sum of money which is called a "royalty".

The principal legal obligation of the transferee is to pay the price in accordance with the provisions of the contract and in the terms and conditions he has agreed therein.

The main legal right of the transferee is to receive in a proper manner the technology that he is acquiring or to use the patent for the production of the patented goods or items, to be able to put the trademark on those items as may be included in the agreement.

Other provisions usually contained in a transfer of technology agreement are those relating to the time and form in which the payments are going to be made; the currency in which those payments will be done; the terms and conditions under which the technology is going to be supplied; the right of the transferee to receive the innovations and modifications of the technology acquired; the term of the agreement; the provisions for the settlement of disputes; the authorization to visit the transferor or the transferee's plant and the laws governing the agreement.

### 3.2 PURPOSE OF THE EVALUATION

At first the analysis should try to classify the contract into one of several of the categories established in the Law.

This is a very important task to be executed because the contracts should be treated and analysed in a different manner in accordance with its nature.

It happens very frequently that a single contract could cover several types of these categories to be listed in the Law. For instance, a contract for the authorization to use a trademark frequently shall involve also the supply of technical know-how or technical assistance.

The overall purpose of the evaluation once the contract has been classified is to carry out a social cost benefit analysis to be able to get to the final conclusion about if the commercial transaction involved in the agreement do comply with the goals of the National Technological Policy.

To be able to realise the so-called social cost benefit analysis, there is a need to examine the agreement under three different points of view; the legal, economic and technical approach.

Each of these different analysis must be done by highly experienced and trained personnel and in a very careful manner. They should be carried out by different branches of the Office and send them to the Director who shall match them all and give the final decision about the registration of the contract.

In any event it is better to ask the parties involved in the technology transfer agreement all the explanations needed to clearly understand all the clauses of the contract before giving a final decision about the registration.



From the point of view of the Office, the transfer of technology agreement must be one instrument for achieving of national objectives like the industrialization of the country. If it is not, the agreement should be rejected.

### 3.3 SOCIAL COST BENEFIT ANALYSIS

Some of the criteria that must be used to perform the social cost benefit analysis are:

- (a) Type and nature of the technology to be transferred.  
Special reference has to be made concerning:-
  - (i) The age of the technology;
  - (ii) The industrial sector in which it is going to be applied;
  - (iii) The degree of complexity it involved;
  - (iv) The type of items to be produced;
  - (v) If it contributes to the creation of new jobs;
- (b) The royalty payments (cost of the Technology):
  - (i) Total amount of payments during the term of the agreement;
  - (ii) Its impact at the national balance of payments;
  - (iii) The rate of royalties with respect to other sources of technology already available;
  - (iv) The impact in the profits of the recipient enterprise.
- (c) The way in which the agreement contributes to the improvement of national technological capabilities,

- (d) The existing relationship among the parties involved, i.e. a parent-subsidary agreement,
- (e) The other contributions or disadvantages of the agreement in the light of the national interest.

4. GENERAL CRITERIA FOR THE IMPLEMENTATION OF SECTION  
ON RESTRICTIVE CLAUSES

The section on Restrictive Clauses is the most important provision of the Law because it goes into considerable detail to enumerate the type of restrictive business practices that must be eliminated from transfer of technology agreements.

The Restrictive Business Practices affect the transferee to use the technology or to exercise the rights he has acquired in the agreement.

The restrictive business practices not only harm the transferee, but also the national economy as a whole.

The main objective of this section is to ensure that the country's Technological Policy is not surrendered or diluted, in the process of acquiring technology by the local enterprises.

The general criteria are intended to explain and give a clear interpretation concerning each and all of the provisions of that section.

The criteria cannot substitute the analyst's own judgement of the contract. They must be seen as an instrument conceived to establish some general rules, about how to evaluate the contracts, but in any event, they need to be completed with the careful examination of other books, and national and international bibliography and working papers concerning the process of transfer of technology.

It is recommended that officers in the Office read all and each of the guidelines published by International Organizations such as UNIDO, UNCTAD AND WIPO. Those guidelines could be very useful because they describe the experience accumulated to date by the specific agencies that regulate the process of transfer of technology in several developing countries.

- (A) "Where its purpose is the transfer of technology freely available in the country".

This provision means that the Office should not accept those agreements in which the transferor is trying to sell a technology that may be obtained without a payment, for instance, in a technical book, because it is a well-known process that has been applied for many years. This section must be applied, and the contract rejected, when:

- (i) The scope of the agreement is the exploitation of a patented invention but the patent has already expired and then is no longer valid in the country.

Frequently, patent licenses also covered know-how. In that case, the Office is expected to obtain from the parties an amendment of the agreement and a reduction of royalty payments to suppress the granting of the use of the null and void patent and authorise only the supply of the technical know-how.

- (ii) It refers to foreign technical know-how a local research institute or university may provide to the national enterprise at a lower cost or freely.
- (iii) It involves technical knowledge that national technician could provide.

- (B) "Where the price or other valuable consideration therefore is not commensurate with the technology acquired or to be acquired".

Without any doubt this is the most important provision among restrictive clauses and among the law itself. It calls for the economic analysis of the royalty payments included in the agreement.

The question of payments involved in the transfer of technology agreements depend heavily on the technology that is going to be supplied, the technical assistance required to support the transferee's activities, or the

degree of complexity of the patent, or the prestige of the trademark that are going to be used.

It is very important for the staff to obtain up to date information concerning the "on going international price" in relation to a specific technology and also to be aware of the value of that concrete technology for the recipient National Enterprise.

The fair remuneration of the technology to be transferred is the most important element to be negotiated by the Office with the parties to the agreement.

Unfortunately, it is not possible to establish fixed rules concerning the most adequate level of payments for all kinds of contracts. The staff of the Office will have to evaluate each contract in its own merits, and to determine if the the payments involved, do in fact relate to the technical knowledge that is going to be provided or the services to be rendered or the patent or trademark to be used.

Technology payments could be established in any of these forms :

- (i) A fixed lump-sum fee;
- (ii) A running royalty. This means a certain percentage of the net sales of the products involved in the agreement; or
- (iii) A combination of a lumpsum fee and a running royalty for a specific period of time.

This last formula may be the most frequently used. The lumpsum is considered by the transferor as an initial payment for basic documentation that he has to deliver to the recipient enterprise and the royalty start running when the plant is start-up and the production has begun.

It has been already mentioned that there are not general rules concerning the adequate level of payments but nevertheless, there are some good rules to be taken into account where a transfer of technology agreement is going to be analysed.

The rules are the following:-

- (i) It is very important that the base and the formula to calculate royalty payments is clearly specified in the contract. The person that is analysing the agreement should demand any explanation needed from the parties as to very clearly understand all the payments involved in the agreement. Wide and open formulas to calculate payments must be rejected.
- (ii) It is very important that the contract clearly provides that taxes due on royalties are the responsibility of the transferor. When the contract establishes all taxes to be paid by the transferee it should be rejected.
- (iii) Calculation should be done by the Office considering the total flow of payments involved in the contract, including those to cover technical services or technical assistance.

To determine the total flow of payments involved in a transfer of technology agreement, the following should be considered:

- a) The form and time in which the payments are going to take place,
- b) Projected volume of sales or production during the term of the contract,
- c) The duration of the agreement,
- d) The other specific payments involved, for instance, the ones related to the visit of technical personnel coming from the transferor's plant,
- e) The dates when payments should take place.

Once the Office has the total flow of payments already calculated, the first step of economic evaluation has been completed. The Office has then the "cost" of the technology.

Now the Office should carefully analyse "the benefit" that the agreement shall bring to the national enterprise (recipient party) and to the national economy.

How to establish the contribution of a concrete technology as such? How to defined the "real" price of the technology and its "social" value?

To answer those questions the following should be done:

- (i) To establish the "on-going" international price of that technology,
- (ii) To establish the price of similar technologies acquired by national enterprises,
- (iii) To take into consideration the rate of royalty payments in the industrial sector concerned,
- (iv) To establish the impact of royalty payments on the profits of the enterprise (recipient party).

With all these elements put together, the Office shall have a clear picture of the "value" of the technology, in terms of "private economy" as such.

Concerning the "social" value of the technology, the following should be taken into consideration:

- (i) The importance of the technology agreement for the national economy, considering specially the industrial sector involved. It is a rather different situation when the technology involved in the agreement is devoted to the production of "capital goods" than when it is going to be applied to manufacture "cosmetics". A different treatment should be given to those contracts.
- (ii) If the products to be made are "consumption" goods or industrial inputs. Again it is important to support the industrialization process of the country and to give priority to those agreements that contribute to obtain that purpose.



- (iii) If the production of goods locally will substitute imported items,
- (iv) If the products to be made with the technology involved are going to be exported,
- (v) If a new plant is going to be built up,
- (vi) If new jobs are going to be created,
- (vii) If the products to be manufactured are going to enhance the living standards of the people,
- (viii) If the establishment of the plant is not going to pollute the atmosphere or the weather,
- (ix) If the new industrial activity is not going to substitute national products already being manufactured and with a good quality, because of its foreign origin, without any benefit for the country's national economy.

These are some of the questions that the staff should answer when analysing a technology transfer agreement.

In order to determine if the payments involved are appropriate, it is necessary to examine them at the scope of "social cost benefit analysis", and to compare the "cost" (royalties to be paid, and other burdens) with the "benefit" the agreement should bring to the country.

In addition to the general criteria mentioned above, it is necessary to specify the rules and procedures for the evaluation of each of the types/kinds of agreements in order to ensure proper treatment to be given in the analysis.

## USE OF TRADE MARKS

These contracts are very frequently used in developing countries.

Prestige attached to well-known international trade marks has crossed the borders of the countries and the local businessmen enter into agreements to obtain authorization to use those trademarks because they want to penetrate easily in the market and they know that unfortunately in our countries there is still a great preference for foreign goods, and foreign trade marks do help and contribute to maintain that trend.

The agreement for the use of a trademark is internationally known as "licensing agreement" because the owner of the trademarks grants a license to the licensee to use his trademark within a certain territory.

In some cases, it may be necessary to acquire certain technology in order to obtain the use of the trademark which may have considerable impact on the marketability of the product in the domestic market. In others, the licensor (the owner of the trademark) may require that the licensee (the user of the trade mark) should buy from him certain inputs or raw materials.

When the staff is going to perform the analysis of such kind of contracts, the following should be considered:

- (i) The agreement should provide that the transferee or licensee may use the trademark whenever necessary, No restrictions should be allowed concerning this matter.

(ii) It should take into consideration that the use of a foreign trademark in the local market expand the market for the licensor's products and being so the licensor obtains several benefits from the agreement:

- a) The income from the royalty payments for the use of his trademark; and
- b) the expansion of the market for his products.

(iii) Agreements for the use of foreign trademarks in the local market do create a great deal of dependency for the country.

The more foreign trademarks entering into the country, the more dependent we are likely to become. Then it is essential to gradually reduce the use of foreign trademarks in the domestic market, and this purpose may be obtained by cutting down royalty payments for such contracts or by ensuring that the foreign trademark should be used jointly with a local trade mark belonging to the local enterprise.

(v) It is very important to promote the creation and development of locally owned trade marks in order to gradually identify the products as national products.

Notwithstanding the above-mentioned, the licensing agreements could be authorised:-

1. When they are considered to be important for the export of the products;
2. When the trademarks bring a recognised technical prestige and is required under a particular market situation.

About royalty payments involved in agreements for the use of foreign trademarks, they should be established at a minimum level:

Two rules are important to apply to these agreements:

- (a) If the owner of the trademark does not participate in the capital of the recipient enterprise, the authorised payment should be at a maximum rate of of .7% royalty on net sales of the products bearing the trademark;
- (b) No payment for the use of a trademark should be authorised when the recipient enterprise (licensee) is a wholly owned subsidiary of the licensor.

#### THE RIGHT TO USE PATENTED INVENTIONS" SECTION

Patenting inventions in a world wide basis was an activity carried out mainly by huge and large transnational corporations. Actually, patented inventions tend to diminish because the most important part of technical knowledge nowadays assumed the form of unpatented know-how, and transnational corporations do prefer to protect its very valuable know-how by the means of the secrecy clauses in transfer of technology agreements.

Patent agreements generally relate to a specific process equipment or to the manufacture of a given product. There are usually three kinds of patents granted by the Industrial Property Offices all over the world, which are the following:

- (a) Patents on invention;
- (b) Patents on improvements or innovations; and,
- (c) Patents on industrial models or designs.

The staff should always take the following aspects of patent agreements into full account:

- (i) The licensee should have the right to use all of the patents needed to manufacture the product or to perform the process.

A list of such patents should be annexed to the agreement and the Office should demand to include a clause in the agreement by which the licensee shall be able to use all the patents relating to the technology even when they were not mentioned in the annexed list.

- (ii) The agreement should provide that if the transferor patented new inventions relating to the transferred technology during the life of the agreement, the licensee will be entitled to use those new patents.

- (iii) In case that the life of a certain patent extends beyond the term of the agreement, the transferee should be authorised to continue to use such a patent until it has expired.

- (iv) It is very important that the staff try to incorporate in the agreement, when needed, a clause about the infringement of third party patent right by the transferee, establishing that the transferee (or licensee) would not be liable for such an infringement and the

owner of the patent (licensor) will be responsible for all damages caused and will have to pay all expenses due to the infringement.

This is a very important legal matter because sometimes transnational corporations fight among each other and they sue and may be sued, so the transferee must be protected against aht possibility of being sued by one of those corporations above-mentioned.

The criteria to be followed by the staff for the examination and analysis of royalty payments included in patent agreements are the following:-

- (i) To determine if the agreement covers also non-patented know-how to be used in the manufacturing process.  
If that is the case, the staff should define its importance in light of the process and compare it with the patents to be used so as to distinguish them and to be aware of the proper value to be assigned to each one.
- (ii) To define <sup>if</sup> the patents granted for the use of transferee in the agreements are really needed for the manufacturing process and to which extent.
- (iii) To differentiate between the basic patents for manufacturing process and those who are less important (secondary patents).

The staff of the Office should not allow royalty payments of the same level for all kinds of patents. Here the technical analysis of the agreement is most important to decide this question.

- (iv) The scope, duration and legal status of the patents covered by the agreement.

To be able to meet this requirement the staff should badly need guidance and information from the Patent Office.

- (v) It is very important to find out if the patents involved in a particular agreement have been registered abroad.

If the patents have been registered previously in another country, it is necessary to know for how long have they been used, in which countries, and under which financial arrangements.

- (vi) It is necessary to determine the degree of exploitation of the patents in the territory of the agreement.

This question must be asked to the technical personnel working for the transferee.

- (vii) The staff of the Office should not accept any contractual provisions that try to limit or diminish the "scope of field of use" of the patent.

(viii) The transferror (licensor) should be responsible for the expenses related to the registration and maintenance of all the patents in the country.

"THE SUPPLY OF TECHNICAL EXPERTISE IN THE FORM OF THE PREPARATION OF PLANS, DIAGRAMS, OPERATING MANUALS OR OTHER FORM OF TECHNICAL ASSISTANCE OF ANY DESCRIPTION WHATSOEVER"

This is the main channel for transfer of technology. Under this broad heading we find out a great variety of contracts, that cover specific technical services to be provided by the foreign enterprise.

When the acquiring party really learn how to use his rights under contractual provisions and demand all and everything that he could expect to receive from the transferor, this type of agreement could be very useful for the industrial development of the country.

The Office strongly support national enterprises by obtaining from the transferor all types and kinds of technical services. The staff should be very careful in putting some pressure on the transferor to get all he may give.

There are certain technical services that may be required by the recipient enterprise:

- (i) Training programme;
- (ii) Specific technical services to be performed at the transferor's facilities;



- (iii) Technicians to be provided from the transferor;
- (iv) Visits to the facilities of the transferor by technical personnel of the transferee;
- (v) Technical information to be delivered by the transferor.

Concerning royalty payments related to this kind agreements, the following should be taken into account:

- (a) To ensure that the agreement clearly specifies the various services involved and the corresponding payment for each one in a separate manner.
- (b) To define the scope and field of application of the technical assistance to be provided by the transferor;
- (c) To determine the time effectively required to efficiently cover the various services.

This is a very important question to be answered by the staff because payments are related to man/hours to be used by the transferee, so the duration term should be established in a very clear provision.

- (d) To determine the relationship between the kind of technical assistance to be supplied by the transferor and the type of technology involved in the agreement, specially the complexity of the manufacturing process in its various phases;

This is a question that be answered in the technical ground by technicians of the Office.

- (e) When the contract only covers technical know-how that could be assimilated directly and in a short term by the transferee, a payment on continuous basis should not be allowed.
- (f) The staff should be very careful to obtain that the transferee may continue the use of unpatented know-how at the end of the life of the agreement without any other payments.

This is a basic principle to be ensured by the Office performance to all national enterprises. In any event, the staff of the Office should not accept any restrictions for the use of technology that has already been paid by the transferee.

#### "THE SUPPLY OF BASIC OR DETAILED ENGINEERING"

The engineering services agreements may be very different in its length and complexity. For instance, a short-term contract may be needed for the purpose of building up a plant, let us say to produce vehicles or cars. In that case, the engineering agreement will consist mainly in a listing of the technical work the supplier is required to perform.

In other cases, the engineering services agreements could be very complicated. This happens when process know-how is supplied by one enterprise, engineering by another and even the client himself could provide some inputs into the relationship.

In some cases, the engineering supply commits himself to advise the transferee about raw materials, locating and preparing the plant site, recruiting personnel, obtaining governmental clearances, procuring construction materials, constructing buildings, installing machinery and equipment and many other subjects such as those above-mentioned.

It is very important that the staff be aware of governmental regulations on where a plant can be located, the types of services that must be procured locally, the equipment that could be imported, etc.

Usually the transferee's objective when entering into such type of contract is to establish a manufacturing plant at its first estimated cost, that will produce certain items at a certain volume and cost and meeting a prescribed standard of operation at a given date.

Usually too, engineering agreements prices are established taking into full account the cost of man-days to be used for the design work, the field supervision and the construction job itself.

The engineering firms generally ask for the payment of certain fixed sums at fixed times; for instance, a 20% of the estimated fee when the agreement is signed, 40% after 6 months and the rest after the plant has been built.

The personnel should try to use event-indexed payment and not time-indexed, because this way the transferee's control of the project could be exercised in the best form.

In practice, basic and detailed engineering may be obtained from different sources and it is therefore very important that the staff define the degree of responsibility of all parties involved.

When at the same time, the transferor is responsible for supplying basic engineering together with process technology, the transferee must obtain specific guarantees in the following areas:

- (i) Volumes of product;
- (ii) Yields;
- (iii) Quality of the products;
- (iv) Time in which the plant shall be ready to start up.

The amount of payments of these contracts should be compared by the staff with alternative offers, and for that purpose, it is very important to obtain information in technical magazines and other sources.

#### "THE SUPPLY OF MACHINERY AND PLANT"

Transfer of technology agreements between enterprises in developed countries are usually linked to the transfer of specific technical knowledge, and the recipient party usually has a considerable level of expertise of its own.

That is not the case of transfer of technology agreements with enterprises of developing countries, that are much broader in nature and scope.

The much more broad agreements included in most cases the supply of machinery or equipment. It is very important to take into full account that with very few exceptions, machinery and equipment for most categories of products can generally be acquired from more than one source. The personnel should try to examine at full length all suppliers in a given industrial sector in order to be able to advise properly the national enterprise about the best choice.

It is also very important that before approving a contract the staff should analyse the on-going international prices for machinery and equipment. In any event a differentiation should be made between the technology to be provided and the acquisition of machinery and equipment in order to know the right prices of each one.

"THE PROVISION OF OPERATING STAFF FOR MANAGERIAL ASSISTANCE AND THE TRAINING OF PERSONNEL"

These agreements are very frequently used by the enterprises in developing countries, because they are addressed to help them to obtain greater profits.

A distinction should be made by the staff when dealing with those arrangements about those performed on a parent-subsidary relationship and those between independent enterprises. In the first case, a managerial assistance agreement, among the parent transnational corporations and a wholly-owned subsidiary should

only be approved when it is royalty-free. So, no payments must be accepted by the personnel of the Office in that situation and the recipient party only could be allowed to pay for the expenses incurred by the transferor in providing the managerial assistance.

Managerial assistance agreements, cover among others the following functions:

- (i) Planning and programming;
- (ii) Research and development activities;
- (iii) Inventory control and accounting;
- (iv) Financing and purchasing; and,
- (v) Promotion and marketing.

Managerial assistance agreements have to be evaluated by the personnel of the Office in consideration of the following:

- (i) The definition of the kind of services that are going to be supplied by the transferor;
- (ii) The industrial sector in which they are going to be applied;
- (iii) The requirements of the recipient party;
- (iv) The provisions for training programme to be carried out by the transferor in order that the various functions can gradually be covered by the transferee's staff.

GUIDELINES IN EVALUATING LICENSING AGREEMENTS

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

- I - Need for the technology and/or trademark.
  - II - Reasonableness of the cost of know-how or trademark.
  - III - Restrictive clauses in the contract.
- A. Category A Clauses - which are prima facie restrictive in nature, and can only be allowed if there is an overwhelming economic and industry justification.
1. Restrictions requiring that the licensee does not contest the validity of the patents involved in the license and any other patents of the licensor.
  2. Restrictions as to the use of the subject matter of a patent and any unpatented know-how licensed which directly relates to the working of the patent once a patent has expired.
  3. Direct or indirect restrictions on exports whether or not protected by patents in other markets (e.g. higher royalty for export sales, prior approval of licensor before exportation, restrictions on level of production, fixing prices manufactured by licensor).
  4. The charging of royalties on patents after their expiry or during the entire duration of manufacture of a product or the application of the process involved and, therefore, without any specification of time.
  5. Restrictions or a prohibition on the use of know-how after termination or expiry of the contract (Exception would be necessary where early termination of the contract took place on account of breach of the contract by the licensee).
  6. The use of protection afforded under the trademark system to restrict a licensee's activities, for example, to act as a distributor rather than a manufacturer of the trademarked product, unless "house marks" or "family marks" were involved.
  7. The tying of the supply of imports of a product bearing a particular trademark owner and thereby prohibiting imports from a third party by a licensee.
  8. Obligations to use a particular trademark with the know-how supplied.

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

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

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

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

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

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

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

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

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

5. Insistence by licensor that the law of his country govern the contract.

6. "Manufacturing" royalty or Technical Assistance in excess of 5% of net sales value or 5% of PBT in respect of Management agreements.

7. Contract term in excess of a total of ten years and/or with automatic renewal clause.



- C. With respect to a global ban to export, this clause as a rule shall accept no exception, and should not be allowed.
- Factors to consider if renegotiation of restrictive clauses is not possible or probable:
- A. For Category "A" Clauses:
1. Whether the technology is pioneering in nature.
  2. The expertise of the licensor in the field and the licensor's ability to absorb the technology.
  3. Highly complex technology.
  4. The non-availability of comparable technology.
  5. The ancillary industries that may be benefited by the entry of such technology in the country.
  6. The existing relationship between the licensor and the licensee, i.e., whether at arm's length or not.
  7. Unusually high labour generation.
  8. Foreign exchange savings.
  9. Export potential.
  - 10 Effect on existing facilities and/or research activities in the country.
- B. For Category "B" Clauses - It is sufficient that the industry is not in overcrowded list and some form of extra benefit to the economy e.g. not necessarily in the manitude of Category A, warrants acceptance of such clause.

## FACTORS TO BE CONSIDERED IN THE EVALUATION OF ROYALTY FEES

1. In case the Agreement provides a minimum royalty fee, is there a possibility for such fee to exceed the limitation in Sec.3(c) of Central Bank Circular No. 393? In this connection, please consider the existing operations of the business, or the projected income where newly-operating enterprises are concerned.
2. Is the royalty fee justifiable after due consideration of the "process" involved and/or the nature of the "products" manufactured in the case of know-how transfer?
3. Is the "process" under consideration an intricate or a simple one? Is it vital to the growth of industrialization and economy of the nation? Does it involve a pioneer project in the country? Are the products geared primarily for exports?
4. In the case of trademarks or tradenames, is the "product" or "service" one that is new in the country? Is the "product" commonly manufactured or produced, or the "service" sufficiently available, in the country?
5. Do you find the same reasonable in the light of comparison with similar technology or product? please note whether the agreement involves know-how, trademarks and/or patents as well as technical service fees. In this connection, a rate exceeding the limitations may be allowed when several subjects are involved. Also, considered whether the license is exclusive or non-exclusive, in its effects.
6. If the amount or rate exceeds what is provided in the guidelines, can allowance thereof be justified by economic factors?
7. Where there are restrictive business practices contained in the Agreement, like gratuitous grant-backs, prohibition to export to several countries, and limitations in the scope of the use of particular trademarks, as indicated in the checklist, should the stipulated royalty fee be allowed?
8. If the agreement contains a tie-in provision wherein the licensee is bound to import its raw materials from licensor or any of its agents, should the royalty fee be reduced in view of the onerous nature of this arrangement? Inquiry into the annual remittance made there on by the licensee should also be taken.
9. Does the Licensee undertake to pay other expenses like registration of patents and trademarks, withholding taxes, initial downpayments and series fees, to provide bonds? These items should be considered in determining as to whether the limitation in the ceiling has been exceeded?

**APPENDIX IV**

**INTERNAL CONTROL DATA FOR ECONOMIC  
ANALYSIS OF TECHNOLOGY AGREEMENTS**

INTERNAL CONTROL DATA

ECONOMIC ANALYSIS ON TECHNOLOGICAL AGREEMENTS:

I. GENERAL INFORMATION OF THE RECIPIENT PARTY:

1.1 NAME OF THE ENTERPRISE .....

1.2 SOCIAL CAPITAL .....

1.3 TOTAL AMOUNT OR PERCENTAGE OF FOREIGN INVESTMENT  
IN THE RECIPIENT'S CAPITAL .....

1.4 NAME, NATIONALITY AND PARTICIPATION OF MAIN  
SHAREHOLDERS .....

If the transferor and/or a subsidiary of the transferor  
are shareholders of the transferee, it must be clearly  
pointed out.

1.5 DATE OF STARTING BUSINESS IN THE COUNTRY .....

If the transferee is not already working, it must be  
considered on estimated date of starting.

1.6 MAIN PRODUCTS OR SERVICES OF THE TRANSFEREE

If there are many, they must be listed in order of  
importance based on sales.

1.7 OTHER TECHNOLOGICAL AGREEMENTS SIGNED BY THE  
TRANSFEREE

.....  
If any, it must be stated the name and nationality of the  
transferor, the date of signature, the products involved,  
the royalties, the purpose and the term of the agreement.

II. GENERAL INFORMATION ABOUT THE PRODUCTS OR SERVICES  
IN THE AGREEMENT

2.1 LOCAL VALUE ADDED (%)

If the agreement involves manufacturing activities, it must be stated for each product, the percentage of local components or local value added.

2.2 IMPORTED RAW MATERIALS, INPUTS AND COMPONENTS

If any, it must be stated the amount and source of these importations related to the products to be manufactured under the agreement.

2.3 PLANT CAPACITY

It must be stated the plant capacity (actual/rated/expected) for each product.

2.4 LOCAL AND FOREIGN MARKET

2.4.1 Local Competition

If there is any competitor already established in the country it must be listed the name of the enterprise and the kind of enterprise (private firm 100% national, public enterprise or private firm with foreign capital)

2.4.2 COMPETITOR'S TECHNOLOGY

If, any, it must be listed for such enterprise. The name and nationality of the transferor, the products involved, the date of signature, the purpose the royalties and the term of the agreement.

2.4.3 MARKET SHARING

If possible it must be stated, for each product, with percentage of the local market is covered by the Transferee's production or the expected percentage in the short term.

#### 2.4.4 PRODUCTS IMPORTED FROM ABROAD.

If the manufacture of the products involved in the agreement represents some sort of competition for products imported abroad, it must be stated the expected effect on the volume of this imports and the advantages for the local market.

#### 2.4.5 FOREIGN MARKET.

If the products involved in the Agreement are exportables it must be stated the amount of these sales and its destination.

### III. GENERAL INFORMATION OF THE SUPPLIER PARTY:

3.1 NAME OF THE ENTERPRISE .....

3.2 NATIONALITY .....

3.3 NAME, NATIONALITY AND PARTICIPATION OF MAIN SHAREHOLDERS .....

3.4 MAIN ACTIVITIES OF THE ENTERPRISE .....

3.5 OTHER LICENCES GRANTED IN THE COUNTRY OR AT ANY OTHER COUNTRY .....

If any, it must be listed the name and nationality of the transferee. For those Agreements celebrated with national Enterprises it must be stated the date of signature, the products involved, the purpose, the royalties and the term of the Agreement.

3.6 INVESTMENTS IN THE COUNTRY

If the transferor or a subsidiary has any investment in the country it must be stated the name of the company, its main activities and the shares owned by the foreign company.

#### IV. INFORMATION ABOUT THE AGREEMENT:

##### 4.1 TERM OF THE AGREEMENT

It must be stated clearly the clause of the Agreement which established the term of the Agreement and specify the date of starting and ending of the agreement obligations. If any, it must be specified the conditions for renewal.

##### 4.2 PURPOSE OF THE AGREEMENT

It must be stated clearly the clause or clauses of the Agreement which establishes the purpose of the contract, specifying in each case the correspondent item of article 4 of the Law and explain briefly the text of each clause.

##### 4.3 TYPE OF LICENCE

It must be stated if the licence granted under this agreement is exclusive or not and the licensed territory.

##### 4.4 CLAUSES CONTRAVENING THE PROVISIONS OF THE LAW

It must be stated the clause or clauses which contravenes the Act, one by one, In each case it must be specified briefly the text of the clause and the reasons to consider it contravening the specifications.

The analyst must suggest an acceptable text for these clauses when they may be modified or recommend to delete them.

##### 4.5 PAYMENTS

It must be listed clearly all the clauses of the Agreement involving any kind of payments, specifying briefly the provisions of each clause.

V. PAYMENT ASSESSMENT:

For the assessment it must be considered the following elements.

5.1 CHARACTERISTICS OF THE RECIPIENT PARTY

5.1.1 TYPE OF ENTERPRISE -- It must be stated if it is a private firm 100% national or a public enterprise or a private firm with foreign capital.

If it is an enterprise with foreign capital it must be clearly specified if the transferor or any other company linked with the transferor is a shareholder in the recipient enterprise and point out the percentage of this participation.

5.1.2 SIZE OF THE ENTERPRISE -- It must be considered the amount of the social capital, the annual average of sales and the level of employment.

5.1.3 ENTERPRISE CAPABILITIES -- It must be considered the existing skilled manpower not only in technical areas but also in management levels. It also have to be considered the previous experience of the enterprise in manufacturing processes related to the products involved in the agreement. If any, it must be pointed out other technological agreement with the same transferor or with other transferors linked with the same products. If any, it must be considered the conditions of other technological agreements celebrated by other local enterprises working in the same industrial sector for the manufacture of similar products.



5.2 TOTAL PAYMENTS AND ECONOMIC INFORMATION

At first it must be calculated, the total amount expected to be paid to the transferor during the term of the

Agreement in a yearly basis

<u>YEARS</u>	<u>LUMP SUM PAYMENT</u>	<u>ROYALTIES</u>	<u>FIXED PAYMENTS</u>	<u>TECHNICIANS FEES</u>	<u>TOTAL PAYMENT</u>
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It must be described the economic importance of the enterprise and calculated the following ratios: total payment/sales; total payment/profits. profit/sales in a yearly basis during the term of the Agreement.

<u>YEARS</u>	<u>SALES</u>	<u>PROFITS</u>	<u>TOTAL PAYMENT</u>	<u>3/1</u>	<u>3/2</u>	<u>3/1</u>
	1	2	3			

\*It must be stated the information about the cost of imported inputs, raw materials and components; the cost of imported machinery and equipment and export earnings, if any, in a yearly basis during the term of Agreement.

<u>YEARS</u>	<u>COST OF IMPORTED INPUTS RAW MATERIALS</u>	<u>COST OF IMPORTED MACHINERY, EQUIPMENT</u>	<u>EXPORT EARNINGS</u>
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In this part of the economic analysis it is also important to point out as clearly as possible the number of NEW employments that the technology to be transferred is going to create. Here it is important to advise that there are a lot of cases that the technology does not create employments, by the contrary it eliminates some of them. So the analysis around the creation or not of employment has to be in total accordance with the NATIONAL GOALS on this field.

#### 5.5 ADDITIONAL COMMENTS

If the Agreement involves the use of trade marks, then it is important to consider the transferee's expenses in advertising, promotion and quality control for the products involved in that Agreement. Because this expenses normally increase the total of the licence for the licensee.

Other important thing is to consider the different expenses that the registration of the trade marks are going to motive. Who is going to pay such registration, the number of trade marks.

In this area is necessary to understand that the expenses in advertising, promotion, control of quality and registration, represent benefits especially to the transferor because it increase the commercial VALUE and goodwill of such trade-marks. This increased goodwill of the trademark is also caused for the penetration of them in new markets.

finally in these cases which involve trademarks is important to see if the use of them has the obligation for the transferee to deal with problems resulting from affected "third parties Rights".

If the Agreement involves the right to use patented inventions is important to consider if the registration has been already granted in the country the term of validity, the sufficiency of licensed patents to cover the scope of the agreement, if they are basic or secondary patents and the Licensor obligation to help Licencee against infringements of third party rights.

If the Agreement involves the supply of Engineering services is very important to consider the relation between the cost of those services and the total amount of the project investment, instead of the "cost/sales" ration.

Finally, if the agreement includes administrative or management services is so important to consider the real needs of the recipient or Transferee just to determine if that services are imposed by the Head Office (Transferor) or if the Transferee in fact, does not have the necessary capacity to develop them by himself. In this area and is also necessary to point out as clearly as possible the Transferor's capacity and skills the frequency, the personnel and documentation to be supplied and the term for Transferee's personnel training.

APPENDIX V

INTERNAL CONTROL DATA FOR TECHNICAL  
ANALYSIS OF TECHNOLOGY AGREEMENTS

INTERNAL CONTROL DATA

TECHNICAL ANALYSIS ON TECHNOLOGICAL AGREEMENTS

(TO BE USED AS COMPLEMENT OF THE ECONOMIC ANALYSIS)

- (I) NAME OF THE PARTIES INVOLVED IN THE AGREEMENT.
- (I.1) RECIPIENT PARTY \_\_\_\_\_
- (1.2) SUPPLIER PARTY \_\_\_\_\_
- (II) RELEVANT INFORMATION OF THE AGREEMENT.
- (2.1) PURPOSE OF THE AGREEMENT: In this PART OF THE TECHNICAL ANALYSIS IT HAS TO BE pointed out clearly the COMPLETE PURPOSE OF AGREEMENT DESCRIBING all the LICENSES, RIGHTS AND TECHNICAL ASSISTANCE, in any form, which may be PLANS, DIAGRAMS, OPERATING MANUALS or ANY OTHER FORM OF TECHNICAL ASSISTANCE; The ENGINEERING SUPPLY, THE SUPPLY OF MACHINERY AND PLANT, THE PROVISION OF OPERATING STAFF or other technical services to be provided by the Transferor.
- (III) COMMENTS ON THE TECHNOLOGY PROVIDED IN THE AGREEMENTS:  
IT MUST be considered THE FOLLOWING ELEMENTS:-
- (3.1) The Purpose of the Technology Provided  
Here the Technical Analyst Must Describe where it is going to be applied the technology that the Recipient Party is Purchasing. It also Must describe the Technical Process that such Technology involves, in order to be Ready to understand later if the Technological supply if complex or not.

3.2 ASSISTANCE INTENSITY: In this area it must be stated clearly the intensity of the Technological INFORMATION and/or The Technical Assistance to be provided, it means the frequency of the services to be supplied to the Recipient Party and the efforts to be performed by the Transferor.

There is also the possibility that the technology could be involved or incorporated in different documents which show the way to applicate that Technology. Here it required a better understanding and interpretation of the technical data served because of this, the technicians of the Transferee will applicate completely by then solves the know-how of doing things.

TECHNOLOGY'S IMPORT IN THE USE OF LOCAL  
RAW MATERIALS, IMPORTS OR COMPONENTS

In this area of the analysis the technical analyst must point out as clearly as possible if the technology purchased by the transferee will produce an important demand of local Raw Materials, imputs or components needed in the manufacture of the products involved in the Agreement or if the technology involved in such agreement only permits the Assembling of different imported componets needed for the final manufacture of the products.

3.4 TRANSFEROR'S INNOVATIONS AND NEW PRODUCTS

Here it is necessary to indicate if the celebrated Agreement put the Recipient Party in condition to obtain from the supplier all its innovations or new products, developed during the Term of the Agreement.

3.3 TECHNICAL COMPLEXITY OF THE INFORMATION  
AND/OR SERVICES PROVIDED

This point may be is one of the main parts that a Technical Analysis must contain and of course its clear description will be very useful in the Final Recommendation. For an Adequate presentation and interpretation at this point, the Following Elements have to be considered:

THE AGE OF THE TECHNOLOGY TO BE TRANSFERRED:

Here it is important to establish if the Technology that the Recipient Party is purchasing is an old Technology Developed and utilized by the Transferor for a long time before or if such Technology has just been discovered and developed by the supplier party:

This information is useful to determine if the Technology needs some sort of changes or adaptations in order to work within profitable basis and in accordance to the local resources (inputs, skilled manpower, machinery and other manufacturing facilities).

The consideration of the Technology's Age is very important to be evaluated in accordance with the economy sector where such Technology is going to be applicable or a Dynamic Technology which involves several and frequent changes.

### 3.5 GUARANTEES TO BE ESTABLISHED IN THE AGREEMENT

Here it must be pointed if the Agreement contains specific clauses that give to the transferee complete Guarantees for the use of the Technology, in a right way, will obtain good or normal levels of production and acceptable levels of quality.

If the Agreement established that the Transferor does not Guarantee the levels of production of the Transferee's plant, or does not guarantee the quality of the products involved in the agreement, then it is important to state this produce and look for a re-negotiation which permits the Transferee to obtain complete guarantees.

It is also very important to describe the way that the Technology is going to be provided, this means if the Technological supply consists in the visits of the Transferor's Technicians in the Recipient's plant or offices or the visits that the technicians and personnel of the Recipient company are allowed to do in the plant or plant of the transferor. The period of time that this kind of visits are going to take. And the number of official visits that are going to be made during the term of the agreement.

Another relevant information which has to be pointed out here is if the technology is going to be provided in operating manuals, diagrams, plans, information bulletins, catalogues or any other documentation. Here the frequency on the provision is always important and it has to be described as best as possible.



TRANSFEREE'S CAPACITY TO ASSIMILATE AND ADAPT  
THE TECHNOLOGY PROVIDED

In this point the technical analysis must describe if the Recipient part has technical capacity so as to develop research programmes; training of technicians, operative staff and workers or to develop some programmes aimed at the adaptation and assimilation of the technology transferred.

Then it has to be pointed out the training to be performed, and how many national technicians will be trained. It is also important to specify for how long time the foreign technical assistance or services will be needed and when the enterprise could perform the manufacturing process by itself without the transferor's support.

For this purpose it is important to establish the amount of investment needed to achieve the purposes of the transfer of technology agreement.

Then it is also needed to specify if the technology to be transferred could be used without any adaptation, and if it happens there is need to point out how much it cost and how many times does it take.

WHERE DOES THE TECHNOLOGY SUPPLIER INVOLVE: This point must establish where the technology is incorporated, the transfer of technology may be involved in the machinery or equipment needed in the manufacture of the products involved in the agreements, in this case the only thing that the transferee's personnel has to do is read and understand the operation manuals of such machinery and equipment.

IV. OTHER TECHNOLOGICAL ALTERNATIVES

Here the Technological Analyst must research in the information contained in the questionnaire or in other information centres. (National or International) if there are around the world different potential suppliers of technology who have developed similar technologies. If any, it must be investigated the conditions that these suppliers of similar technology have imposed to their transferees and the formula of payments and of course the royalties established.

V. ADVANTAGES OF THE TECHNOLOGY INVOLVED IN AGREEMENT IN COMPARISON WITH OTHER SIMILAR TECHNOLOGIES

This part of the technical analysis is also very important because analyst has to point out as clearly as possible all the different technical advantages that the technology involved in the agreement has in comparison to other similar technologies which could be provided by other companies.

VI. TRANSFEROR'S INTERNATIONAL EXPERIENCE

Here the analysis must describe all the information relating with the experience that the transferor has obtained different research of development programme in its own centre or in other centres from its subsidiaries. Also the experience of the transferor on negotiation with other Agreements in the world or in Nigeria, the way that the transfer company has handled them providing the technology.

FINAL COMMENT:

All these information contained in the technical analysis has to be given to the Economic Department in order that such Department will be able to pronounce a final recommendation to the Director of the Office or to the Council.

APPENDIX VI

INTERNAL CONTROL DATA FOR LEGAL  
ANALYSIS OF TECHNOLOGY AGREEMENT

DISTRIBUTION RESTRICTED

INTERNAL CONTROL DATA

LEGAL ANALYSIS ON TECHNOLOGICAL AGREEMENTS

- I) Name of the Recipient Party: .....
- II) Name of the Supplier Party: .....
- III) PURPOSE OF THE AGREEMENT IN ACCORDANCE WITH THE PROVISIONS OF THE LAW. In this section, it has to be clearly established the different items which are described in such Article pointing out all the Articles or Clauses of the Agreement which have relation with those items.

Example: If the purposes of the Agreement are the use of trademarks, the right to use patented inventions and the supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance, it has to be pointed out as follows:-

<u>ITEM IN ARTICLE 4-D</u>	<u>ARTICLE OR CLAUSE OF THE AGREEMENT</u>
i)	(Article II Clause 2.01)
ii)	(Article II Clause 2.02)
iii)	(Article III Clauses 3.01, 3.02, 3.03, etc).

IV) TERM OF THE AGREEMENT: In this section it has to be established in an abridged version the Article and/or the clauses of the AGREEMENT WHERE THE TERM of the life of such agreement is pointed, indicating its number.

Example: THE AGREEMENT that is being studied, has a 3 year-term and this term is indicated in the Article V Clauses 5.01 of it, then it is necessary to establish as following:

Article V Clauses 5.01: This article established that this agreement has a 3 - year period of term.

NOTE: It is important to clear the initial date.

V) Clauses contravening the Law: In this area at the legal analysis, it has to be pointed out all the different articles and/or clauses of the agreement which are contravening the provisions of the Law.

For this purpose, it has to be stated the number of the agreement's Articles and/or clauses which contravene the Law, and an abridged version of its contents. After there has to be an application of the problem and a recommendation of the way that the agreement has to be modified in order to have no problem at all.

Example: Let us suppose that one Agreement has some problem in one of its clauses because there are limitations imposed on the technological reasearch or development by the Transferee, or the Recipient Party, there also is provided that the exportation of the transferee's products or services are prohibited, then you have to put:

Article VI Clause 6.01 of the Agreement contravenes the Law in its Article No. 6-E because there is this or that limitations for the technological researches of Transferee. To avoid this problem it has to be recommended to take out completely of the agreement this kind of provision.

Article VII Clause 7.01: This article established that the Recipient Party is not able to export its products at all in the international market without the authorisation of the Transferee. Because of such provision, this article contravenes the Article No.6-G of the Law. In order to avoid the limitation here stated it is recommended to suppress totally the Article and/or clause. It may be accepted that the agreement established that in some areas or countries where the transferor has arrogated exclusive licenses to other transferees, the recipient party does not have the opportunity to export.

VI. CLAUSES CONTRAVENING OTHER NATIONAL LAWS:

Because the control on transfer of technology is a public law and it has relation with other Laws, the Legal Department has to review of the relation between the law which controls the transfer of technology and other local laws. Just to be sure that the agreements do not have any legal problem.

If the agreement contains some legal problem in connection with other laws, then it has to be indicated the law which has been contravened and the legal recommendation the way to avoid such problem.

VII. ROYALTIES: The legal department does not have to do any type of analysis about this item. It only has to indicate that the economic opinion has to be considered.

VIII: CONCLUSION: In this point the Legal Department has to establish its final resolution if it is recommended to accept the agreement or to deny it. If it is a negative recommendation, the conclusion has to contain all the different legal problem that such agreement has.

For Example:

If there are some legal problems indicated in the area of "clauses which contravene the Law" the conclusion must say:-

Because this agreement contravenes the provisions of the Law in its Article 6 items a,b,c,d,e,.....: it is recommended to refuse the registration of it in this Office.

At the end of the analysis, it is important to print the name of the person who did it, just in case that this person has to be in the negotiation of the agreement, or if there are doubts about it for the Director, under Director or the Head of the Department.



APPENDIX VII

MONITORING FORM

MONITORING QUESTIONNAIRE ON THE EXECUTION  
OF TECHNOLOGY TRANSFER AGREEMENT

(to be completed annually by the company - transferee)

Reporting year

19.....
---------

1. DATA OF THE AGREEMENT

- 1.1 Title of the agreement.....
- 1.2 Registration No.....
- 1.3 Effective date of the agreement.....
- 1.4 Expiry date of the agreement.....
- 1.5 Transferee.....  
(Name of the Company)

Address.....  
(indicate number, street, city, country)  
.....

2. ECONOMIC INDICATORS OF THE RECIPIENT ENTERPRISE  
(TRANSFEREE) IN THE REPORTING YEAR

- 2.1 Total employment level of the transferee (recipient) at the  
end of reporting year  
19.....
- 2.2 Total net sales of the recipient enterprise in the reporting  
year.  
19.....
- 2.3 Total exports of the recipient enterprise in the reporting  
year.  
19.....

2.4 Total net profits before tax of recipient enterprise in the reporting year.

19.....

3. ECONOMIC AND TECHNICAL INFORMATION ON THE IMPLEMENTATION OF TECHNOLOGY TRANSFER AGREEMENT.

(Note: All data supplied in this section should be strictly related to the registered agreement).

3.1 Production volume of the product involved in the agreement in the reporting year (indicate units).

19.....

3.2 Total net sales of the products involved in the agreement in the reporting year.

19.....

3.3 Total net profit before tax derived from the manufacturing activities within the scope of the agreement in the reporting year.

19.....

3.4 Landed cost and source of imported raw materials and components used in the manufacture of the licensed products in the reporting year.

Raw Materials	Supplier/Nationality	Cost
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
		=====
		Total

3.5 Imported equipment and machinery for the manufacturing under technology transfer agreement in the reporting year:

Machinery	Supplier/Nationality	Cost
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
		=====
		Total

3.6 Percentage of local value added (i.e. net sales less landed costs of imported raw materials, inputs and components) in the reporting year:

19.....

3.7 Export earnings of the licensed products in the reporting year.

19.....

3.8 Total remittances (including royalties, lump sum payments, fixed fees and other forms of payments) in the reporting year.

	Lump sum	Royalties	Technical/ Management Fees	Total
19.....	.....	.....	.....	.....

3.9 Employment generated because of the transfer of technology agreement (end of reporting year):

19.....

4. TECHNICAL ASSISTANCE, TRAINING AND R & D

4.1 Foreign technicians/consultants who rendered services to the recipient enterprise in the reporting year.

Number of technicians/ consultants, nationaliti- ty and field of activity	Rate for techni- cian per day	Time to perform the service (No. of days)
.....	.....	.....
.....	.....	.....
.....	.....	.....

4.2 Specify training programmes for Ghanaian technicians conducted in the reporting year.

.....  
.....  
.....

4.3 Specify the scope and effects of the research and development programme conducted by the recipient enterprise aimed at adapting and improving the imported technology:

.....  
.....  
.....

4.4 Other remarks about the implementation of the registered agreement in the reporting year:

.....  
.....  
.....  
.....

5. FINAL STATEMENT

I.....  
(Name)  
citizen of.....and residing  
at.....  
(number, street, city, state, country)

after having been sworn in accordance with the Laws of Ghana hereby depose and say:

(a) that I am.....  
(position in the Company)

of the.....  
(Name of the Company)

addressed in.....

(b) that I am duly authorised to furnish the foregoing information;

(c) that the foregoing information is true and correct to the best of my knowledge.

Name:.....

Signature:.....

ANNEX

1. Latest audited financial statements (reporting year) of the recipient company.

## APPENDIX VIII

### List of Document Examined

The following documents were supplied to me as source material by Mr. Bedi-Bella, a staff member of TTC :

- (1) National Energy Board law 1983
- (2) Petroleum (Exploration and Production) Law 1984
- (3) Petroleum Legislation and Model Petroleum Agreement
- (4) Procedure for the Acquisition of Mineral Prospecting Licence in Ghana.
- (5) Small Scale Gold Mining Law, 1986
- (6) Minerals and Mining Law, 1986
- (7) Strengthening the National Capacity for the Transfer, Utilisation and Development of Technology. Project No. UNDP/88/008
- (8) Industrial Property System and Patent Documentation in Ghana.
- (9) The Registrar-General's Department - Narrative Statement
- (10) Facts about the Environmental Protection Council in Ghana
- (11) Ghana Investment Code 1985
- (12) The Annual Estimates for 1981 part 1 - Administration of Justice.
- (13) The Processing of Public Agreements and the Public Agreements Review Committee
- (14) Ghana Investment Centre (GIC) Application form GIC T.T.A.I.
- (15) Ghana Investment Centre (GIC) Questionnaire
- (16) A copy of the Contract Card
- (17) A Sub-Committee Draft Report on the Regulations for evaluation of Technology Transfer Agreements (22nd July, 1986)

- (18) UNDP project Document for the Strengthening the National Capacity for the Transfer, Utilisation and Development of Technology.
- (19) Technology Policy and Legal Issues, Report by the TTC UNDP/TTC/7 June, 1989.

APPENDIX IX

Organisations and Institutions with  
whom the expert held discussions

- (1) Technology Transfer Centre
- (2) Ghana Investment Centre
- (3) Technical Committee of Ghana Investment Centre
- (4) Environmental Protection Council
- (5) Minerals Commission
- (6) Registrar-Generals office
- (7) Public Agreement Board
- (8) Regular discussion and consultation with the staff of  
Technology Transfer Centre
- (9) National Energy Board



APPENDIX X

Personnel with who the mission held discussions

Mr. William Halm	Chief State Attorney and Member of Public Agreement Board	Attorney-General's Department
Dr. P. C. Acquah	Head of Monitoring Department	Minerals Commission
Mr. William Appiah	Public Relations Officer	Environmental Protection Council
Mr. E. Amoah	Principal Assistant Secretary	Environmental Protection Council
Mr. George Ofosu	Programme Officer	Environmental Protection Council
Mr. A. A. Ofe	Head, Projects Department	Ghana Investments Centre
Mr. Major (Rtd) T. A. Darceh	Legal Counsel	National Energy Board
Mr. D. M. Mills	Registrar-General	Registrar General's Department
Mr. J. D. Essuman	Chairman	Technical Committee on Technology Transfer of Ghana Investments Centre (TCTT/GIC)
Mr. O. Y. Osafo	Secretary	TCTT/GIC
Mr. J. K. Asare	Member	"
Mr. Quaye	"	"
Mr. Adjei	"	"
Dr. J. K. B. A. Atta	"	"
Dr. K. G. Adanu	"	"
Dr. M. N. B. Ayiku	"	"

Mr. Leo Lamptey	Asst. Sec.	TCTT/GIC
Dr. M.N.B. Ayiku	Co-ordinator	TTC
Mr. D. K. Bedi-Bella	Research Officer	TTC
Mr. George O. Essegbe	Scientific Secretary	TTC