



**TOGETHER**  
*for a sustainable future*

## OCCASION

This publication has been made available to the public on the occasion of the 50<sup>th</sup> anniversary of the United Nations Industrial Development Organisation.



**TOGETHER**  
*for a sustainable future*

## DISCLAIMER

This document has been produced without formal United Nations editing. The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations Industrial Development Organization (UNIDO) concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries, or its economic system or degree of development. Designations such as “developed”, “industrialized” and “developing” are intended for statistical convenience and do not necessarily express a judgment about the stage reached by a particular country or area in the development process. Mention of firm names or commercial products does not constitute an endorsement by UNIDO.

## FAIR USE POLICY

Any part of this publication may be quoted and referenced for educational and research purposes without additional permission from UNIDO. However, those who make use of quoting and referencing this publication are requested to follow the Fair Use Policy of giving due credit to UNIDO.

## CONTACT

Please contact [publications@unido.org](mailto:publications@unido.org) for further information concerning UNIDO publications.

For more information about UNIDO, please visit us at [www.unido.org](http://www.unido.org)

17898

Distr.  
LIMITED

IPCT.106(SPEC.)  
19 January 1990

UNITED NATIONS  
INDUSTRIAL DEVELOPMENT ORGANIZATION

ORIGINAL: ENGLISH

---

**ASSESSMENTS OF GUIDELINES AND REVIEW PROCEDURES  
USED BY TECHNOLOGY TRANSFER REGISTRIES IN GHANA \***

Prepared by

**Dr. V.R.S. Arni**  
**UNIDO Consultant**

---

\* The views expressed in this document are those of the author and do not necessarily reflect the views of the Secretariat of UNIDO. This document has not been edited.

V.90-80510

### ACKNOWLEDGEMENT

I would like to thank Dr. M.N.B. Ayiku, Project Co-ordinator, Mr. D.K. Bedi-Bella, Research Officer and Mr. George Essegbey, all of TTC (CSIR), in particular, and the staff of TTC for their kindness and help in the analysis and putting together of this Document.

## EXECUTIVE SUMMARY

### ASSESSMENTS OF GUIDELINES AND REVIEW PROCEDURES USED BY TECHNOLOGY TRANSFER REGISTRIES IN GHANA AND RECOMMENDATIONS RELATING THERETO

#### PURPOSE OF THE MISSION

The purpose of the Mission is to assist the Government of Ghana through the Technology Transfer Centre (TTC-CSIR), a policy analysis organisation, and other Government organisations, in the basic matter of developing regulations and guidelines for the evaluation of technology transfer agreements and making recommendations on agreements processing.

#### BACKGROUND

Due to serious set backs in its economy in the past due to a variety of factors, Ghana embarked on its National Recovery Programme - a structural readjustment programme - in 1983. This programme is now beginning to pay dividends. One of the key objectives of this programme is to use technology transfer as a motive engine of economic growth.

To this purpose recent legislation has led to the setting up of four registries for the evaluation of technologies entering Ghana, namely :

1. The Ghana Investments Centre
2. The Public Agreements Board
3. The Minerals Commission
4. The National Energy Board

The Environmental Protection Council is also a 'registry' set up in 1974.

The key objectives of these registries is to review and screen projects and technology transfer agreements for convergence to national goals.

#### REVIEW OF REGISTRY GUIDELINES AND PROCEDURES: FINDINGS OF THE MISSION

The Mission Consultant together with Mr. F.J.Okono, UNIDO Consultant, jointly visited, or obtained information, on the five key registries. The findings of this Mission are:

The National Energy Board and the Minerals Commission, under rights accorded by specific enabling laws, basically use Model Agreements for incorporating technology transfer regulations, wherein there is relatively little scope for negotiation. It is to be noted that the Board ( particularly the Ghana National Petroleum Corporation) and the Commission play the role of LICENSORS relative to the security of national

property (minerals and hydrocarbons) and that the licensees are ex-patriates. Where 'guidelines' are used, they relate to matters of project feasibilities and project clearance procedures rather than to technology agreements.

The Environmental Protection Council exercises its role through its acceptability of PROJECTS rather than the acceptability of technology transfer agreements. Per se, its functions under the concept that 'the environment is not negotiable'. Hence its guidelines are non-negotiable instruments, are sector oriented, and unrelated to the common provisions of technology transfer agreements.

The Public Agreements Board (PAB), created under specific legislation, reviews public sector purchase, loan and other such agreements, along with technology transfer agreements. Regulations and guidelines have been developed, to various degrees of completion, for the review of such agreements. There is very little substantive matter in respect of technology transfer agreements. The screening of agreements takes place on a clause-by-clause review by legal personnel, unassisted by economists and technical people trained in the review of technology agreements.

It is only in the areas supervised by the Ghana Investments Centre(GIC) that guidelines are found which affect the conclusion and registration of technology transfer agreements and where there is potential for negotiated matters. Its guidelines and regulations, empowered under the Ghana Investments Code, have been developed after examining the procedures and experience of key developing countries (unassisted by international consultants). This Mission gave most of its attention to this agency since much of the technology entering the country was assessed as taking place through the aegis of this body.

No comments are made in the Report on methods of sectoral screening for project feasibility.

In respect of (a) the regulations and guidelines employed for Legal-Economic-Technical screening (LTE-screening) of technology agreements - the parameters followed by most developing countries with technology transfer registries, and (b) assessment methodology, this Mission finds:

(1) that screening is conducted against a weak set of 'regulations' and 'guidelines' in which there appears to be lack of clarity between non-negotiable and negotiable matters; that the regulations and guidelines are also silent or deficient in many matters concerning of project reliability and national benefit requirements;

(2) that there is excessive reliance in Ghana on legal personnel to review technology transfer assurances and

licensee's alternatives; that such personnel acting alone are normally not competent to evaluate the technical and economic effects of the project which will emerge and the trading advantages being secured by the licensee;

(3) that the present ad hoc system of clause-by-clause review emphasises legal obligations and does not inter-relate them to technical and economic obligations of the licensor; that there is need for a dedicated secretariat structure;

(4) that screening specialists have had inadequate exposure to terms and concepts used in technology transfer agreements and the practices and experiences of other developing countries which otherwise would greatly benefit the reviewing agency;

(5) that each of these areas need correction which can be accomplished in the short term.(see Recommendations)

#### RECOMMENDATIONS

It is recommended:

1. That GIC and PAB give consideration to the adoption of draft regulations (Attachment A) and the internal guidelines (Attachment B) developed by this Mission for the evaluation and negotiation of technology transfer agreements

2. That GIC establish a dedicated secretariat for the LTE-screening techniques of evaluation and negotiation of technology transfer agreements; that the secretariat act as a skill pool, data bank and permanent repository of evaluation experience

3. That case study workshops be organised in Ghana to develop negotiating skills in all registries

4. That, till structures are developed, personnel of all the registries and TTC (CSIR) be trained at Accra and at developing country registries in the evaluation of agreements, particularly that of Nigeria. Besides direct effects it would give rise to a common language of technology transfer which is confusing issues at the present time.

5. That key members of TTC (CSIR) obtain exposure to technology transfer policies of developing countries, particularly Egypt, Philippines, Nigeria and India

6. That a model clauses bank be developed for the effective use of the regulations developed in Attachment A

7. That the provision in the Investment Code that technology agreements of less than 18 months duration are not supervisable under the Ghana Investments Code be annuled.

#### **MISSION RECOMMENDATIONS TO UNIDO**

The Mission makes the following recommendations to UNIDO for further assistance to the Government of Ghana:

1. That case study workshops and seminars be organised in Ghana to train entrepreneurs and government personnel (all concerned registries and supervising bodies) in the negotiation of technology transfer agreements

2. That assistance be provided to personnel of GIC, PAB and TTC (CSIR) for training in the review practices obtaining in Nigeria, the Philippines and Egypt

3. That UNIDO develop a model clauses bank - linked to CORIS - which can be used by GIC ( and regulatory bodies in other countries) for enforcement of regulatory and other protective conditions.

## MISSION REPORT

### PURPOSE OF THE MISSION

The purpose of the Mission is to assist the Government of Ghana through the Technology Transfer Centre (TTC), Council of Scientific and Industrial Research (CSIR), and other Government organisations, in the basic matter of developing regulations and guidelines for the evaluation of technology transfer agreements and making recommendations on agreements processing.

More specifically the counterpart agency (the Technology Transfer Centre) has required the Mission to:

- prepare Draft Transfer of Technology Guidelines based on draft guidelines prepared by the Technical Committee of GIC (Ghana Investments Centre) as basis, taking into account that there are five registries in Ghana to which the Draft Guidelines will apply
- recommend guidelines or rules as specified in PNDC Law 42 for the Public Agreements Board
- provide comment on the current work on guidelines by the National Energy Board
- review model agreements used by the Minerals Commission and the need for further specialised guidelines for the energy sector
- need for guidelines for Environmental Protection Council and contents thereof
- to make other relevant comments to TTC

### MISSION METHODOLOGY

The hosting body for this Mission is the Technology Transfer Centre (CSIR) which had requested UNIDO to send two consultants for the setting up of guidelines for technology evaluation and negotiation. This Consultant and Mr. Fred Okono, Director National Office of Industrial Property (NOIP) were designated by UNIDO. Mr Okono joined the Mission a few days after this Consultant had started work.

After briefing on the role and functions of TTC (CSIR) visits were arranged to meet various key personnel of 'registries' operating in Ghana, the identification of which is provided below. A courtesy call was also made to the Technology Transfer Committee (Ghana



Investments Centre) during one of its working sessions. There were several substantive discussions. This Consultant also attended a Workshop on the Capital Goods and Food Industries, organised with respect to two UNDP/TTC studies carried out by ad hoc consultants. The Workshop provided some information on the nature of Ghanaian industry and the nature of problems encountered. (The Mission Consultant also addressed the Workshop on potential causes for the frustration of agreements, citing the experience of several developing countries).

The following organisations and persons were interviewed during the course of the Mission:

**Technology Transfer Centre (CSIR)**

Dr. M.N.B. Ayiku	- Coordinator, TTC
Mr. D.K. Bedi-Bella	- Research Officer
Mr. George Essegbe	- Scientific Secretary

**Ghana Investments Centre**

Mr. A.A. Ofe	- Head, Projects Department
--------------	-----------------------------

**Public Agreements Board**

Mr William Halm	- Chief State Attorney and Member of PAB
-----------------	--

**Council of Scientific & Industrial Research**

Dr. A.M. Goka	- Principal Research Officer
---------------	------------------------------

**Minerals Commission**

Dr. P.C. Acquah	- Head of Monitoring Department
-----------------	---------------------------------

**Environmental Protection Council**

Mr. William Appiah	- Public Relations Officer
Mr. E. Amoah	- Principal Assistant Secretary

**National Energy Board**

Major (Rtd) T.A. Darteh	- Legal Counsel
-------------------------	-----------------

**Registrar General's Office**

Mr D.M. Mills	- Registrar General
---------------	---------------------

## **GHANA - BACKGROUND**

Ghana is a West African republic with a population of about 13 million people and a landmass of 240000 sq.km. with 56% of the land being agricultural land. The country is rich in mineral resources ( gold, bauxite, diamonds, manganese, etc), in forestry and in agricultural products ( cocoa, maize, cassava, oil palm, etc) .

At the time of its independence in 1957, Ghana was a prosperous country with perhaps the highest per capita incomes in Africa and a diversified small and medium-scale manufacturing sector. Between 1960 and 1975 GDP at current dollar rates increased at an average rate of 9.5% per annum. The share of industrial output in GDP at current prices grew from 10% to a peak of 20% in 1975. However the period between 1970 and 1975 saw the beginning of the decline in the economy which deteriorated very rapidly thereafter. For instance between 1975 and 1983 the percentage contribution of industry to national GDP declined from 20% to a mere 7%. The country's gross capital formation declined very substantially from 22% of GDP in 1960 to 12% in 1975 and 5% in 1980. The causes of the decline are ascribed to many factors including foreign exchange constraints, lack of imported production inputs and non-availability of suitable spare parts for repair and maintenance.

In order to change the situation, Ghana tightened its belt and launched its Economic Recovery Programme (ERP) - a structural readjustment programme . This appears to have turned the tide. There have been other efforts also to aid economic development. It has been recognised that technology transfer and technology development are the engines of growth and economic development and due concern is being paid to them.

The industrialisation of Ghana has been based on import substitution aimed at replacing final consumer goods by locally produced goods via the imports of raw materials and intermediates. The basic form in which technology has been imported is through its manifestation in equipment and machinery forms. Till 1971 there was substantial use of expatriate technical personnel in foreign-assisted projects which also formed a part of technology transfer. Licensing of technology, tied to investment or on self-standing terms, appears to be on a minor scale. Management agreements appear to be the dominant mode of skill transfers.

### **INSTITUTIONAL STRUCTURES FOR TECHNOLOGY TRANSFER IN GHANA**

Under various legislation, and at different stages in the evolution of the Ghanaian economy, five bodies have been created by the National Redemption Council ( environmental laws) and the current Provisional National Defence Council of Ghana (PNDC) for the review, evaluation and registration of technology transfer agreements. These bodies formed by the respective laws are:

(a) The Technology Transfer Committee (TTC-GIC) of the Ghana Investments Centre, formed under Ghana Investments Code, 1985

(b) The Mining and Minerals Commission formed under the Minerals and Mining Law, 1986

(c) The National Energy Board formed under the National Energy Board Law, 1983

(d) The Public Agreements Board (PAB) formed under the PNDC Law 42, 1982

(e) The Environmental Protection Council formed under NRC Decree 239, 1974

Further, the Petroleum (Exploration and Production) Law, 1984 PNDC 84 allows the Secretary, PNDC to make rules and regulations concerning the terms and conditions of petroleum agreements.

#### The Ghana Investment Code

The Ghana Investments Code 1985 (PNCL 116) has been legislated by PNDC under the Economic Recovery Program for the study, promotion, regulation and management of investment in Ghana. The Ghana Investments Centre is a body created under this legislation and it is empowered to approve the formation of national enterprises (in which Ghanaian citizens have 20% or more of equity), foreign investments, joint ventures and technology transfer agreements.

However, since separate codes exist for the management of the energy, mining and minerals industries, petroleum exploration and production and the environment, the Ghana Investments Code is generally applied in relation to the private and public industrial sectors, although in respect of technology transfer agreements the concern is more with private sector agreements.

The Ghana Investments Code provides the legal basis for Governmental scrutiny of technology agreements in this private sector. The specific enabling section is Section 27 (2) of the Code states that " No technology transfer agreement relating to enterprise requiring approval of the Centre under this Code shall come into effect without the approval of the Centre (GIC). The 'Centre' referred to here is the Ghana Investments Centre, a body charged by the Investment Code, among other things, to encourage, promote and coordinate investments in the Ghanaian economy and to register technology agreements in force, newly entered into or amended. The Centre confers its approvals through the issuance of a certificate.

The Code further provides for the Centre to evaluate agreements submitted to it, to monitor and ensure compliance with the terms and conditions of such agreements, and to render advisory services to the licensee enterprise on the choice and suitability of technology. Licenses in existence at the commencement of the Code are not renewable without the approval of the Centre.

To effect its purposes, the Code calls for the establishment of a Board consisting of a Chairman and six persons, all of whom will be appointed by PNDC. The Board is invested with the right to establish Committees to carry out various functions.

The Board is authorised to make regulations with respect to the following :

- (a) criteria for the approval of transfer of technology agreements
- (b) remuneration for technology transfer
- (c) duration of agreement
- (d) restrictive practices (NOT FURTHER DEFINED)
- (e) transfer and absorption of technology
- (f) procedure for approval (and monitoring) of technology transfer agreements
- (g) 'other matter' relating to the agreements which appear as reasonable to the Investments Centre.

The term 'enterprise' is interpreted broadly and includes industry, project or undertaking, or business or enlargement of the same.

The 'term technology transfer agreement' is defined to mean any agreement involving :

- (1) the assignment of patents, trade marks or other industrial property rights;
- (2) the supply of foreign technical knowhow or technological knowledge;
- (3) foreign technical assistance, design and engineering, consultancy or other technical services in whatever form they may be supplied; and
- (4) foreign managerial, marketing or other services

These provisions are common to many developing country registries. However, an uncommon feature is the exception made in that technology transfer agreements are excluded from purview if their duration does not exceed 18 months.

Transfer of technology agreements are submitted to GIC along with other prescribed project-related application forms, which after sectoral screening (ie feasibility, etc) are forwarded to a Technology Transfer Committee (sometimes also referred to as TTC) for the evaluation of contractual terms and approval of agreement. Where agreements are approved, they are forwarded to the Chief Executive of the Ghana Investments Centre who then recommends its acceptance to the GIC Board.

The Technology Transfer Committee, drawn from various concerned governmental agencies, and assisted by a Secretary of the Board reviews the agreements at its periodic sittings. The Mission was invited to meet Committee members before their working session. Most of the members introduced to the Mission appeared to be lawyers. There was general absence of economists and technical specialists.

#### Public Agreements Board Law, PNDC Law 42, 1982

Since the public sector plays a major role in imports and other aspects of the economy, Law 42, among other things, makes provisions for the setting up of the Public Agreements Board (PAB) for the scrutiny, review, approval and registration of all agreements entered into by public bodies and to act as a depository for said agreements. Public bodies are broadly defined as 'any establishment in which the Government has proprietary interest'. Minerals and energy agreements, however, do not come within the purview of the Board.

The Board is also charged with the establishment of substantive criteria to govern all government agencies in the negotiation and conclusion of public agreements. The Secretary of the Board is a nominee of the Attorney General. Other essential members of the Board are nominees of the Secretary for Finance and Economic Planning and the Governor of the Bank of Ghana.

'Public Agreements' relate to public sector projects ( mining, industrial, agricultural and commercial sectors) and include agreements relating to purchases of goods and services, loan agreements and technology agreements associated therewith. The projects involved are those initiated by component ministries of the Government, the technological parameters of which are embedded in the 'project'; that is, when the agreements are sent to the board for approval, it is essentially 'project approval' that is sought and not technology and licensing approvals of the agreements pertaining thereto.

'Guidelines' have been prepared by the Public Agreements Review Committee for the selection of projects and the negotiation of agreements.

The first part of the Guidelines state that the project submitted for approval should be of high national priority, that it should not place an intolerable foreign exchange burden on the country, that negotiations should be carried out by a team of experts, that public interest must be safeguarded, that agreements should be in the best interests of the country and that they should make a meaningful contribution to the country's balance-of-payments situation.

The second part of the guidelines addresses itself to methods of carrying out feasibility studies, the need for developing negotiating strategies, procedures for obtaining approvals at various points of the governmental system, etc.

At no point in the guidelines are there provisions for the screening of technology transfer agreements as per the model used by the Ghana Investments Centre or the technology transfer registries of the developing countries. The agreements are however screened at PAB from the legal angle - conformance to national laws, reciprocity of obligations, dispute settlement procedures, the governing law of the contract and the like.

Thus, any recommendation of guidelines by this Mission, would not be an amendment, modification or expansion of current PAB provisions but a whole set of complementing guidelines, made specifically in the context of the foreign-technological content of project-related agreements.

#### The Minerals and Mining Law, 1986

The Minerals and Mining Law (PNDCL 153) promulgated in 1986 by the Provisional National Defence Council vests the mineral wealth of the country with PNDC for and behalf of the people of Ghana. Subject to the right of pre-emption of all minerals raised, won or obtained in Ghana, the Law invests in the PND Council Secretary for Lands and Natural Sources, the right to grant a license for the exploitation of discovered mineral resources (subject to area limitations) and define the terms under which the license is awarded. The Mining Commission, an autonomous body formed under PNDC Law 154, is the advisory body to the Secretary, who is guided by the recommendations of the Commission. The mining lease is granted after a workplan for the mining of the concerned minerals is approved, and environmental factors are taken into account. Leases are renewable under the Law.

Under limitations of surface rights, a mining lease does not permit the Lessee to further process the minerals to end products without a further license from the Secretary. The Mining law also

applies to building and industrial minerals. Gold, diamonds, bauxite, and manganese are the principal minerals of interest to the economy.

The prospecting licenses are granted using model agreements drawn up by the Commission. The terms of the license are not negotiable. Mining leases granted after the proving of resources and the Workplan are, however, negotiable but model agreements have also been drafted for the purpose.

Such (model) agreements have not been drafted for industrial minerals and technology transfer licenses are sought to be negotiated under practices prevalent in other registries, such as

GIC, for the evaluation and conclusion of licensing agreements. The Commission has also issued Guidelines for Entrepreneurs which has helped in quick processing of prospecting licenses and mining leases. It is to be noted that in both of these cases royalty becomes payable to the Ghanaian Government.

The introduction of the law with its clear provisions and the creation of the Commission to implement the law has seen a spurt in the number of prospecting licenses issued and the activity in the minerals sector has developed rapidly. Over 70 prospecting licenses have been granted. Eight companies are at present covered by mining leases. There is, however, still dearth of activity in the industrial minerals area.

The Minerals Law excludes petroleum products from the ambit of its operations.

#### National Energy Board Law, 1983

The National Energy Board Law (PNDC 62), enacted in 1983 created the National Energy Board. This Board is charged with several responsibilities among which are the formulation of overall policy, planning for the development and utilisation of national energy resources, monitoring public bodies with regulatory powers and databanking in respect of energy. In respect to agreements, the functions of the Energy Board are to "assess public agreements".

Only limited discussions were possible with the personnel of the Board due to the absence on leave of senior personnel. From the information obtained, it appears as though there are no formal procedures for the review of agreements other than a clause-to-clause review (by lawyers mostly) which takes place at almost the end of project approvals. There are also no specific guidelines for the evaluation of agreements. The 'guidelines' often referred to are in respect of procedural matters such as the sequencing of sectoral appraisals and their movement through various screening bodies.

## Petroleum Legislation, 1983 PNDC Law 42

In order to encourage the exploration, development and production of domestic petroleum the Government, under the national recovery plan, has set up the Ghana National Petroleum Corporation (GNPC) to accomplish its objectives.

It has published a Model Petroleum Agreement whose main terms are that GNPC will operate in association with foreign companies in the said areas; that at the exploration stage the Government will have a 10% 'carried interest' (equity holding without providing proportionate capital) but after the production stage is reached it will pay its proportionate share of production costs; that the contracts will provide a framework for the transfer of petroleum technology to Ghanians involved in local operations; that the duration of agreements will be for 30 years, but if no commercial discovery is made within 7 years (maximum) of the effective date of the agreement, it will be terminated; that the enterprise formed for the purpose should outline a work plan coincident with the submission of the agreement. The model agreement provides for GNPC assuming majority participating interest and that the rate of royalty on production is 12.5%. Production sharing arrangements are negotiable.

As in the case of the Minerals and Mining Law, the guidelines are made in the context of Government as Licensor and royalties accrue to it.

### Environment Protection Council

The Environment Protection Council (EPC) was established under NRC Decree 239 of 1974 which took effect from Sept 1973. The creation of this unit brought together, under one national body, all activities and efforts at protecting and improving the quality of the environment.

EPC has the responsibilities of coming to grips with problems relating to the environment, striking a balance between the needs of economic development and protection of the country's natural heritage and safe-guarding public health and welfare.

It is very evident from discussions with EPC that it has seriously pursued its mandate and that a large number of evaluation committees and regulatory/monitoring systems are in place in Ghana. The Council have framed comprehensive rules and regulations which it closely monitors.

Under a PNDC Circular issued to all registries it is now incumbent on them to have all technology transfer agreements sent to the EPC to obtain environmental clearance certification, in the awarding of which contractual conditions may be imposed on the nature of licensee operation.



## The Technology Transfer Centre (TTC-CSIR)

The Technology Transfer Centre (TTC-CSIR), which is the host Governmental organ and counterpart organisation to UNIDO vis-a-vis the purposes of this Mission, is a body created by the Council of Scientific and Industrial Research (CSIR). In 1982, it became a 'special project' placed directly under the Director-General of CSIR.

It is to be noted that the acronym 'TTC' is often applied to both the Technology Transfer Committee (Ghana Investments Centre) and to the Technology Transfer Centre.

TTC (CSIR) is a policy consultancy/analysis wing of the CSIR in the matters of organising and carrying out studies and making recommendations in respect of matters such as:

- technology selection, relevance and aquisition;
- the negotiation, evaluation and ratification of technology agreements so as to obtain best terms and conditions;
- unpackaging of technology
- the adaptation and absorption of imported technology;
- assisting the diffusion and assimilation of technology among its users

It is a substantive member of the Technology Transfer Committee of GIC through the right of the CSIR to have a representative on the Committee.

## Industrial Property Protection

The Registrar-General's Department is responsible for the administration of the industrial property system in Ghana. The department falls under the Ministry of Justice.

The Patents Registry and the Trade Marks registry lie within the Department.

## Patent System

Ghana is a member of the Paris Convention for the Protection of Industrial Property, the Convention establishing the World Intellectual Property Organisation (WIPO) and the Patent Cooperation Treaty. The Patents Registration Ordinance of 1925 makes provision for the registration of patents in Ghana only after initial registration in the UK and after the granting of the patent in the UK. Thus it has a dependent patents system. The Patents Registration Decree of 1972 amended the Ordinance by excluding drugs and pharmaceutical products from patent protection

. The decree, however, allows for the registration of process patents for the products.

Ghana is also a member of ARIPO - the African Region Industrial Property Office, established in 1986 (Harare, Zimbabwe). Under the ARIPO patent system a national or resident in Ghana can patent his invention in Ghana and in designated member states of ARIPO. Reciprocal rights prevail for nationals and residents of other ARIPO countries. An application filed in Ghana is sent to Harare for checking and examination. Ghana has proposed draft new legislation, details of which were not made known to the Mission.

Almost all of the Ghanaian patents are currently owned by foreign parties of which the United States and W.Germany dominate. The total number of patents in Ghana appears to be of the order of few hundred.

#### Trade Mark System

The Trade Marks Act 1965 (Act 270) governs the registration and administration of trade marks in Ghana. The Registrar General is the Registrar of Trade Marks. The Registry registers marks and symbols on application. Registration is initially for a period of 7 years and renewable thereafter for further periods. A trade mark can be registered as either in Part A or Part B.

Assignments of trademarks and changes in particulars of registration are also registrable.

Local trademarks are being associated with foreign-owned trademarks - the so-called hybrid trademarks - in order to develop local recognition of quality products.

#### ASSESSMENT OF LEVEL OF TECHNOLOGICAL COMPLEXITY IN GHANA

On the basis of participation in a workshop on the food and fertiliser industries in Accra during the course of this Mission, discussions and general literature made available by TTC (CSIR), this Consultant views the technological complexity of Ghanaian industry at about 15-20 on a log scale that equates the United States at 100 and India 40-45. At this level of complexity, it is opined that a major part of the 'technology' entering Ghana - in the next 10 year or so - would have, with exception, the following aspects:

- it would be high in 'technique'; be equipment and machine-oriented and moderate on 'knowhow' (that is, it will be technology associated with products such as forging, metal casting and working, plastics forming, assembly); be agriculture and food-oriented, etc

- it would be substantially natural-resources based
- it would involve the use of a high content of imported chemical raw materials and intermediates and imported components (kit-culture)
- it would constitute of simple compounding operations such as tableting in the pharmaceutical industry and powder or emulsion formulation in the pesticides industry, etc
- it would involve a relatively low-level of value addition, except in the case of exports
- it would not be controlled by industrial property rights except in cases of trade marks and brand labels of multinational consumer-product based companies
- it would call for the transfer of managerial expertise
- success of the enterprise would depend on substantial reliance on technology supplier for investment
- consumer-product multinationals would play a major role in the technical economy
- computer and other software generation would be at a modest level

#### CURRENT AGREEMENT REVIEW PROCEDURES

##### Draft Guidelines

Under the aegis of TTC (CSIR), various attempts have been made in the past for the development of national guidelines for the evaluation of technology agreements which would be of assistance to the various registries referred to above. In developing these guidelines, TTC (CSIR), GIC and other Ghanaian registries have carried out studies of the legislation and administrative practices followed by the governments of different developing countries, namely India, S.Korea, The Philippines, Egypt, Brazil, Nigeria, etc and have also made study tours to examine the evaluation processes and discuss experience. Various reports have been made in this connection. Such studies and visits are continuing. The studies have been assisted by UNDP, UNIDO and other international agencies.

More recently ( July 1986), the Board of GIC appointed a Technical Committee on Technology Transfer Agreements which appointed a Sub-Committee on Technology Transfer Agreements. The assignment given to this sub-committee was to draft guidelines and

regulations for the evaluation of such agreements. This committee submitted its 'Draft Regulations (sic) for Evaluation and Approval of Technology Transfer Agreements' in 1986, together with the supporting 'Questionnaire' proposed to be sent to technology recipient.

These regulations are now being referred to as 'Draft Guidelines' (and are so referred to in this Report). They form an important part of the documentation provided to the Mission for study, comment and recommended modification. They have been termed 'Draft Guidelines' since they have not yet been approved by the Board.

(Since the Mission has recommended modification of these guidelines and have proposed in place a set of 'regulations' and a set of 'internal guidelines - Attachments A and B of this Report - the Guidelines given to the Mission is not attached to this Report).

#### Review Procedures at GIC

The review of technology transfer agreements at GIC is done by the Technology Transfer Committee using the said Draft Guidelines as the guide. The screening process itself constitutes a clause-by-clause review, unaided by any memorandum prepared for the evaluating committee. Personnel have expressed the opinion that the Draft Guidelines lack 'clarity' and 'specificity'. Lack of professionalism in the reviewers is also an issue.

The type of agreements being currently met with by the Technical Coordination Committee of GIC are management agreements in which technological undertakings and obligations are embedded as secondary issues. Secondly, the agreements being currently screened are renewal agreements (but important) and these are being presented in plural agreements, complexing issues. The Draft Guidelines do not offer much in the way of dealing with such agreements. Concern is also expressed that the Committee wishes to see more of 'technical' rather than 'management' agreements.

#### Review Procedures at PAB and other Registries

The Public Agreements Board has little comment to make on the suitability of the Draft Guidelines in as much as the main screening done by them is without reference to technology transfer elements. Their concern is with the feasibility of the 'project' and project-related agreements such as purchase and loan agreements. The terms relating to the acceptability of technology transfer elements are actually finalized when the project-sponsoring body selects the technology and tests its economic and technical feasibility.

What is actually needed is that the project-sponsoring body have access to the said Guidelines. PAB however said that the Draft

Guidelines should provide greater guidance on the evaluation of royalty rates.

The Mining and Minerals Commission as yet finds no effective use for the Draft Guidelines in as much as they do not now have technology transfer proposals before them for industrial minerals, or for downstream processing of now-exported minerals, which otherwise could require agreement scrutiny of the type encountered by GIC or PAB.

As can be anticipated, the Draft Guidelines are of little practical use to the Environmental Protection Council since it is the environmental acceptability of the PROJECT which is of concern rather than the representations or undertakings of the licensee and licensor or the costs of the technology. Further 'environment is not negotiable'. In the worst of circumstances, only the licensee enterprise can be held liable for adverse environmental impact and not the licensor since liability for circumstantial and consequential damages are rarely negotiated in normal licensing agreements.

Discussion with the personnel of the Energy Board indicated that the 'guidelines' which they use are for sectoral screening and not for the evaluation of licensing contracts.

No visits were made to the Ghana National Petroleum Corporation. While the 'Draft Guidelines' could, in other circumstances, be applicable in their evaluation processes, the documentation examined by the Mission reveals that the Corporation also works with Model Agreements where there is specific rather than general or open negotiating flexibility. Royalty rates (the State as Licensor), agreement duration periods, cost- and production-sharing, etc are already set down in the agreement (practically the same situation as with the prospecting and mining agreements). However, there is an express provision in the enabling legislation that a framework be provided for the transfer of technology to Ghanians.

#### REVISED REGULATIONS AND INTERNAL GUIDELINES

This Mission finds that the said Draft Guidelines are being used only by the Ghana Investment Centre (TCC-GIC) and by no other body. They appear, in present circumstances, rather immaterial to the process of reviews being carried out by other registries.

The said Draft Guidelines were developed as 'regulations'. Contending that regulations have the character of non-negotiability or limited negotiability, while the normal use of the term 'guidelines' in technology transfer relates to negotiable parameters, clarity becomes one of the issues in the application of the said draft Guidelines. The Guidelines do not separate 'regulatory provisions' from 'guidance provisions'.

It is found that in some areas rather rigid provisions are made which otherwise are normally negotiable features.

#### **Mission Recommendation of Regulations and Internal Guidelines**

Attachment A of this Report presents the recommended 'regulations' for GIC use with an important preface. These should be seen as non-negotiable issues in Ghanaian agreements. They have been developed so that they may be issued, after selection and modification, as regulations having the force of law under the Investment Code. They represent an innovative approach to technology regulation.

At the agreement screening stage, it will be open to GIC to merely 'tick mark' those conditions in Attachment

A which should appear in the revised candidate agreement.

This permits the licensee or licensor to develop the appropriate clause which fits the substantive requirement of the regulating condition.

Attachment B of the Report presents recommended revised Guidelines with the terminology of Internal Guidelines, somewhat similar to those recommended earlier to Nigeria by this Consultant. They have been prepared in the perceived Ghanaian context. Besides some important administrative provisions, such as desired types of agreements, Attachment B comprises of conditions with restricted negotiability, such as royalty rates, duration times, etc. Attachment A and B items have been developed for simultaneous use and for strengthening each other's effects.

Many features of the agreement such as the exclusivity of grants, secrecy provisions, arbitration and other have been left out from both the 'regulations' and the 'guidelines' on the basis they should be freely negotiable issues between private sector transacting parties in the perceived Ghanaian context.

The Internal Guidelines also provide a basis for the development of 'Guidelines to Entrepreneurs', corresponding to the External Guidelines used by the Nigerian registry.

It is anticipated that revisions may be necessary at a later stage and thus that redrafting in both the Attachments may be called for.

However, it is opined that for the effective use of the Regulations and the Internal Guidelines, some training of the assessors in terminology and concepts is necessary.

#### **Model Clauses**

However, to tide over difficult circumstances, it is recommended that GIC and PAB use a bank of alternate sample or 'model clauses' - appropriate to each of the regulatory conditions - developed in

the context of developing country experience. UNIDO may be able to assist in their development. (The Mission Consultant has in the past independently recommended to UNIDO the development of such model clauses as an aid to developing countries. TTC-CSIR may make a recommendation to this end to UNIDO at the forthcoming TIES Meeting in Accra).

It is also to be noted that many of the conditions in the Regulations will lead to clauses which are in the nature of the 'boiler plate' clauses - those which appear routinely in good agreements.

It is, however, opined that major international companies may be unwilling to use clauses with which they are not fully familiar and which do not have the support of their national 'case law'. In these cases, the requirement of the 'substantive condition' will help.

Since model agreements are much in vogue in the Ghanaian environment, it is opined that model clauses will be acceptable to licensors and licensees in the context of currently anticipated technologies.

Model agreements are not recommended for GIC usage since the range of negotiability in general technology agreements (as opposed to sectoral agreements like the Prospecting and Mining Leases) is very wide and topical. Model agreements seem to be the prerogatives of licensors - Ghanaian and foreign!

#### ANALYSIS OF AGREEMENT SUPERVISION OPTIONS AND METHODOLOGIES

Considering the experience of many developing countries, and the requirements seen in the Ghanaian situation, there appear to be several options and methodologies open to it for more effective screening of technology transfer agreements. These are:

(1) Legal Intervention models where a specific enabling law, such as a Transfer of Technology law, makes explicit the rights and obligations of the technology transferor and the limitations and prohibitions imposed on the acquisition and use of transferred technologies. The available models are those of the more advanced Latin American countries, and erstwhile Portugal and Spain.

These laws by their explicitness require very little secretarial support. Besides they are strengthened by comprehensive legislation in respect of Trademarks and Patents and other industrial property rights, including Copyright, whose provisions carry over to the licensing of computer software and firmware, where specific legislation does not cover the latter. The countries involved are generally industrialising countries with substantial industrial and institutional structures. The ambit of negotiation between licensors and licensees is very wide and all arrangements are

acceptable so long as they do not contravene the provisions. ( basically restrictive practices or excessive royalties) of the enabling and other industrial property laws.

(2) the Administrative Intervention models adopted by countries such as India, Egypt, the Philippines and China where specific enabling legislation may or may not be present but there is sufficient centralised legislation within whose ambit it is feasible to control, through regulations or administrative intervention, the acquisition and control of imported technology; that is, to affect the rights of the licensor and the operational ambit of the transferred technology.

This system provides for great latitude and discretion but carries the disadvantage that all licensors and all projects of similar nature may not be treated equally and decision-making can be erratic and subjective.

The presence of five registries in Ghana, most of them formed under relatively recent legislation, invalidates the option of an immediate centralised legislation and a single-point registration system, particularly as evidence cannot be marshalled that such centralisation and registration will make technology transfers more effective or more efficient than at present. A parallel is drawn with Egypt where there are also five registries guided by different laws. Four of these registries subscribe to a common set of guidelines.

The administrative system, already in place in Ghana, appears to be the better alternative if its deficiencies in the screening of agreements are overcome. The change is particularly critical for the Ghana Investments Centre which is receiving and expects to receive numerous agreements.

The administrative system is also better in the context of the types of technologies entering, and expected to enter Ghana in the medium-term as determined above in terms of the technological complexity in Ghana.

#### Methodologies of Screening

It is necessary to distinguish between two types of screening exercises carried out by technology administration groups in developing countries: (1) sectoral screening and (2) legal-technical-economic screening ( abbreviated to LTE-screening in this Report) of the type prevalent in many developing countries and particularly Nigeria and the Philippines.

In sectoral screening, project feasibility is assessed by considering the uses of differing raw materials, different processes, ranges of end products, plant capacities and operating levels, financial costs and returns, etc and the optimisation of



chosen variables. Such screening appears to be taking place in all the registries. (Some of the 'Guidelines' seen relate to this type of screening). This Report has no comment to make on them.

In LTE-screening, however, the objective is to see, among other things, whether the obligations of the licensee expressed in the technology transfer agreement, and its associate agreements, are equitable in terms of the material and economic gains sought by him; whether he is protected in matters of product choice, design and marketing rights; the protection he requires for working and controlling the technology, etc; together with the ultimate good the licensed technology brings to the national economy. As is evident such review calls for the play of different disciplines, ( economic, technical, legal) all of which constantly interact with each other.

In respect of LTE-screening, this Mission finds:

- (1) that there is excessive reliance in Ghana on legal personnel to review technology transfer assurances and licensee's decision alternatives which is incomplete and inadequate in terms of efforts needed to protect the licensee and bring material and economic benefit to the economy
- (2) that screening is conducted against a weak set of 'regulations' in which there appears to be lack of clarity between non-negotiable and negotiable matters
- (3) there is no dedicated secretariat to professionally review technology transfer agreements and act as skill pool and repository of experience. Such a secretariat could readily prepare some type of a standard memorandum which the review committees can use to take its decisions; in place of it there is an ad hoc system of clause-by-clause review, and
- (4) that the screening specialists have had inadequate exposure to terms and concepts used in technology transfer agreements and the practices and experiences of other developing countries which otherwise would greatly benefit the reviewing agency.

Each of these areas need correction and are incorporated in the recommendations which follow.

#### RECOMMENDATIONS

It is recommended:

1. That GIC and PAB give consideration to the adoption of draft regulations (Attachment A) and the internal guidelines

(Attachment B) developed by this Mission for the evaluation and negotiation of technology transfer agreements

2. That GIC establish a dedicated secretariat for the LTE-screening techniques of evaluation and negotiation of technology transfer agreements; that the secretariat act as a skill pool, data bank and permanent repository of evaluation experience

3. That case study workshops be organised in Ghana to develop negotiating skills in all registries

4. That, till structures are developed, personnel of all the registries and TTC (CSIR) be trained at Accra and at developing country registries in the evaluation of agreements, particularly that of Nigeria. Besides direct effects it would give rise to a common language of technology transfer which is confusing issues at the present time.

5. That key members of TTC (CSIR) obtain exposure to technology transfer policies of developing countries, particularly Egypt, Philippines, Nigeria and India

6. That a model clauses bank be developed for the effective use of the regulations developed in Attachment A

7. That the provision in the Investment Code that technology agreements of less than 18 months duration are not supervisable under the Ghana Investments Code be annulled.

ATTACHMENT A  
DRAFT TECHNOLOGY TRANSFER REGULATIONS

[NON-NEGOTIABLE FEATURES IN THE ] TRANSFER OF UNPATENTED TECHNOLOGY

PART A

[Trial Statement]

The Government of Ghana has the right to require the incorporation of one or more of the following conditions, without modification of substance, in any technology transfer agreement entered into by Ghanaian residents with non-Ghanians after Jan 1, 2000. They will apply to all transfers of technology involving manufactured products, manufactured machinery or equipment or technology-based services (eg electroplating). Technology is here defined as unpatented know-how, trade secret, (unpatented) industrial technique or combinations thereof. Management agreements relating to manufactured products will be treated as technology agreements for the purposes of these regulations. Non-compliance will lead to non-registration of agreement and to the consequences thereof.

General Provisions

1. The technology transfer agreement must define the objectives of the licensing agreement and define the 'licensed product' [product, design, process or service ]
2. Licensor must represent that product [ drugs, pesticides, food products and additives, etc ] use is not contra-indicated for general use in Ghana [ and for designated export markets]
3. Licensor must represent that samples of licensed product [designs, prototypes, models ] have been inspected and tested by licensee and that the quality [ design ] features are acceptable to him (licensee)
4. For a manufactured, processed or assembled product, the agreement must provide a non-confidential but complete description of the process to be used for the production of the licensed product stating the starting or basic materials or components which will be employed

5. The technology transfer agreement must specifically make clear each of the following aspects for a manufactured or processed product: (a) the design and planned operating capacity of the first-installed [or expanded] plant and (b) the range, types and specifications of the products which will be produced

6. Licensor must certify that the 'licensed product' is being commercially produced or used by licensor or his licensees [ in named territory ] and in his and licensee's opinion it is suitable for use in Ghana [ and/or for export to designated markets]

7. Licensor must certify in the agreement that he is lawful owner of the technology and is competent to service the technology himself or through his agent to obtain optimum performance

8. Licensor should represent that to the best of his knowledge that the technology is not freely available from any source within Ghana

9. The Licensor must commit himself to training the operators, technical personnel and managerial staff [ in Ghana or acceptable overseas site] in the technical operation of the plant and in the technical servicing of the plant, supporting it with manuals and a training plan, so that the national company (licensee) will be in a position to self-reliantly, safely and successfully maintain and operate the plant before the termination of [ a stated] training completion date.

10. Licensor should commit himself to assisting the Licensee for the procurement of scarce and critical raw materials, intermediates, catalysts and components over the duration period of the agreement and guarantee supply of those materials wholly within the control of the Licensor

11. Licensor must provide the undertaking that, to the best of his capability, he will furnish all data and information to obtain Governmental product ( equipment, machinery ] registration requirements in Ghana, including requirements under the NRC Decree 239 [ EPC ].

12. Licensor must make the representation that hazard potentials in plant design, commissioning, operation and shutdown [ or mode of machinery operation ] and in the disposal of wastes, as currently known to him and related to licensee's operations, have been made known to the licensee

13. Licensor must undertake to promptly furnish licensee all new information that he gathers or receives pertaining to hazards in plant design, commissioning, operation and shut-down as, in his opinion, is relevant to licensee's operation

14. The Effective Date of the Agreement will be the date on which the Ghana Investments Centre approves the Agreement

15. The Law governing the provisions of this Contract will be the laws of Ghana

## **PART B**

### **[ RESTRICTIVE PROVISIONS ]**

#### **[ Preface:**

'Restrictive provisions' - listed by UNCTAD in Code of Conduct deliberations - comprise of several restrictions, some of which find expression in national laws of developing and developed countries. When it is in this form, the statements are quite rigid but invariably, in developing countries, registries are given the right to allow them, or allow them in a modified condition, if such is 'in the national interest'. Since the formulation here is that of 'regulations' made under existing laws, the liberty has been taken to select restrictions in the light of our perception of the Ghanaian environment together with the needs of practicality. These can easily be modified.

#### **[Trial Statement ]**

Unless determined to be in the public interest to do so, the Government of Ghana will not generally allow the application of any of the following restraints or provisions in unpatented technology transfer agreements involving products or services to be produced, marketed or furnished ( as applicable ) within the country and which appear in new or renewal agreements or agreements submitted for modification :

- (a) limitations on the volume of production, sale or use; or limitations on the right to expand or diversify
- (b) any committment on the licensee to the compulsory use of licensor-supplied equipment, machinery, spare parts, raw materials, intermediates, etc
- (c) any committment on the licensee to the compulsory use of licensor-supplied materials to meet warranted quality of the product [ unless such is not commercially available elsewhere]

- (d) any commitment of the licensee to market products at licensor-stipulated rates or prices
- (e) any commitment by the licensee to use licensor-identified personnel for the operation of the manufacturing plant after its installation and commissioning is completed
- (f) any restraint on licensee not to carry out R&D on product and/or process or to the use of the results of such work
- (g) any pre-commitment on the licensee to sell all or part of manufactured product to the licensor or his agent [unless such product is object of sub-contracted production]
- (h) any restraint on the licensee for the licensing or use of third-party knowhow or patent to improve output, cost of production, product life or product quality
- (i) any commitment on the licensee to cease production or marketing after the expiry of the agreement
- (j) any commitment on the licensee to return documents, drawings, designs [ unless such are part of a subcontracted arrangement]

**[NON-NEGOTIABLE FEATURES IN THE ] TRANSFER OF PATENTED TECHNOLOGY**

**Preface:**

Patents are of little importance in countries where is a modest level of technological complexity. Rights under patents are exercised mostly in pharmaceutical, drug and pesticide products . The objective of requiring complex assurances by the licensor, in these circumstances, is to make patent licensing difficult and potentially costly.

**[Trial Statement ]**

The Government of Ghana has the right to require the inclusion of the following provisions in agreements and to place obligations on the licensor in agreements involving the transfer of technology wherein Ghanaian patents are sought to be exploited

1. The patent agreement must make reference to knowhow, trade mark and other agreements being entered into by the negotiating parties
2. The patent agreement must state the objectives of the license agreement and specify the output in terms of rates of production, product nature and product quality

3. Licensor must declare that he owns patent property in Ghana which he has maintained and that a license under such property is required by the licensee for the right to manufacture [process or use] licensed product

4. The licensor must make reference to the 'lead' or 'basic' Ghanaian patent under which he wishes to license the manufacture of the licensed product and enumerate the dependent and associate Ghanaian patents, if any, rights under which are also required to operate licensed product [ and furnish copies thereof]

5. Licensor must commit himself to employ in Ghana the most optimum product or process route described in the basic patent

6. Licensor should state the balanced unexpired life of the lead or basic patent and acknowledge that no patent royalties will be payable to licensor on the expiry of this patent, despite the longer unexpired lives of the dependent and associate patents.

7. The Licensor should commit that on the expiry of the basic patent, the licensee will have the right to continue to manufacture licensed product despite the unexpired life of the dependent patents and warrant that no charges of infringement will be brought against him by the licensor

8. Licensor should commit himself to provide knowhow and other secret and non-secret information necessary and sufficient to install, commission and operate the manufacturing facility to attain the objectives of the licensing agreement

9. Licensor should commit himself (a) that to the best of his knowledge and investigation the patented process or product is not infringing on third-party patents (b) to undertake to maintain patents in force in Ghana over the duration period of the agreement (c) be vigilant on infringement (d) to promptly defend the patent in Ghanaian courts at his expense when notice is given to him that there is evidence of third party infringement of his patents (e) to defend at his expense any infringement suit brought against him or licensee that licensed patent is infringing on third party patents

10. Licensee shall have the right to maximise production and to sell any and all of patented product in any territory of Ghana

11. Licensor undertakes to favourably license licensee all future patents granted to him in Ghana which represent actual or potential improvements on licensed patents

12. Licensor commits not to limit any export rights of licensee to countries outside of Ghana except where licensor does not have a licensee or where he himself is operating directly or through a subsidiary under the patents

13. The Effective Date of the Agreement is the date on which the Ghana Investments Centre approves the agreement

**[NON-NEGOTIABLE FEATURES IN ] TRADE MARK AND FRANCHISE AGREEMENTS**

**[ Trial Statement]**

The Government of Ghana considers the trade mark owned by a non-resident Ghanian valuable property, deserving of protection in Ghana, and rewardable in the context of its use, only when the trade mark is associated with the transfer of substantive technology to Ghana which aids in the production of goods and services desirable to the economy of Ghana.

For licenses involving the use of trade marks on goods to be marketed in Ghana, and where the licensee is obligated to pay royalties [wholly or in part for trade marks ], the Government of Ghana has the right to require the incorporation of one or more of the following provisions in trade mark and franchise agreements without modification of substance:

1. The trade mark agreement must make reference to knowhow, patent and other related agreements being entered into by the parties to the trade mark contract
2. The licensor must declare that he has valid and valuable trade marks registered and maintained in Ghana which the licensee wishes to apply on his (licensee's) products so as to gain maximum commercial advantage
3. The licensor agrees to grant to the licensee right to the use of the trademarks over the duration period of the agreement
4. [The licensor agrees to register the licensee , if required, as a registered user of the trade mark in Ghana [ and agreed territories ] and to supply all information and data as required by the licensee for the purpose of registration]
5. The licensor agrees to maintain the registration of his trade marks, at his expense, over the duration period of the agreement
6. The licensor will allow the export of the licensed product to markets in which the licensor has not licensed a third party for the use of the trade mark on locally produced goods



7. Licensor will not compete with the licensee in Ghana and will defend any infringement of the licensed trade mark in Ghana

8. Licensee will not be obligated to the use any of the raw materials, intermediates, components, etc supplied by the licensor, [unless the same cannot be legally procured from other than the licensor or his licensees]. The use of alternate materials should not result in licensor denying the licensee the right of use of trade marks or the approval of product quality on these same grounds

9. Licensor will not deny the licensee the right to use any trade marks or brand labels registered by him (licensee) in Ghana as an associate trade mark over the duration of the agreement or to its use during a renewed period

10. The licensor will give a notice of 6 months to licensee if he wishes to cancel the license for failure to maintain quality and to revoke any cancellation provisions if such product quality deficiency is rectified by the licensee

11. The agreement should carry rights of renewal

10. The Effective Date of the agreement is the date on which the Ghana Investments Centre approves the agreement.

11. The Governing Law of the Contract will be the laws of Ghana

#### [NON-NEGOTIABLE FEATURES IN ] MANAGEMENT AGREEMENTS

1. Agreements involving the training of national personnel must provide an organisation chart showing the objective structure of the organisation as at the end of the proposed training period and indicate national and expatriate personnel in all functions and positions ( by number, function and position ) where at any time expatriates have held such function or position

## ATTACHMENT B

### DRAFT GUIDELINES FOR THE EVALUATION OF TRANSFER OF TECHNOLOGY AGREEMENTS (INTERNAL GUIDELINES)

#### 1. DEFINITION OF TECHNOLOGY AND TECHNOLOGICAL SERVICES

1. Technology transfer agreements are defined here as agreements relating to manufacture or processing of products or relating to the offer of technology services ( eg electroplating, design of plant) in which a foreign company represents itself as the owner of Ghanaian patents, as supplier of the secret technology (knowhow), as an expert organisation ( eg industrial process computer software) or as recognised specialist services organisation (packaging, construction).

2. Investment, joint venture and management agreements involving the use of technology in any of the forms set forth in 1(1) are here defined as technology transfer agreements

#### II. TYPES OF EXCLUDED AGREEMENTS

1. The following classes of technology agreements would not come within the purview of the evaluatory process:

[Trial list]:

- Military project agreements
- Contracts relating to bilateral aid-based projects
- Architectural contracts
- Civil construction contracts
- Export sales contracts ( involving technology supplier)
- Business and office [computer] software contracts not involving the development of or modification of software in Ghana

### III. PREFERRED TECHNOLOGIES

1. Preferred technologies: [ see ITEM VI on incentive royalties ]

Preferred technologies are those technologies which will:

- (A) yield products of international standing and quality; which enable the substitution of currently imported products with minimum loss of product quality or product use life and which can be made available enduringly at consumer-acceptable prices
- (B) which use scarce foreign exchange resources efficiently or those which generate high levels of net foreign exchange
- (C) which demonstrably are efficient in the use of energy, critical raw materials or intermediates; which reduce the cost of production or increase product quality and use-life; which generate products or processes safer than those in use at present ; which are less damaging to the environment than technologies in current use
- (D) which are demonstrably value-adding or cost - effective; which advantageously use national raw materials and products; which will generate exports of products and services
- (E) which are High-Tech technologies: tele-communications, computer equipment, etc

### IV. PREFERRED AGREEMENT STRUCTURES AND FORMS OF INVESTMENT

[Trial Statement]

1. The Government preferentially welcomes foreign capital when such is associated with the establishment of manufacturing, processing and technical service facilities in Ghana.

2. The Government also welcomes transfers of valuable technologies in the form of internationally-recognised 'straight-licensing' arrangements. Patent and trade mark agreements not involving the transfer of proprietary knowhow or expert services are not acceptable.

3. The Government discourages management and other service agreements in which technological knowhow or technological services are not the main and featured part.

4. The Government encourages the submission of separate agreements for the transfers of rights in patents and trademarks when they involve payments not integrated with proprietary knowhow.

5. Where technical service, technical assistance and associated agreements are set out separately, or separate from proprietary knowhow, all agreements on the projects must be cross-referenced; that is, the respective agreements must mention the other agreements in order to show supplier accountability for integrated performance.

6. Where a joint-venture agreement exists or is sought to be executed in connection with the licensing (transfer) of proprietary knowhow, the latter agreement must make reference to the joint-venture agreement to establish areas of accountability.

#### V. CONSIDERATIONS IN PRODUCT AND PROCESS FEATURES AND RELATED FEATURES IN TECHNOLOGY AGREEMENTS

1. The licensed product, process or service should, as far as feasible, utilise raw materials, components and supplies, personnel and services available in Ghana. Where foreign supplies or personnel are involved, their use should be to the economic minimum.
2. The technology sought to be licensed must be up-to-date proven technology which can be demonstrably shown to be suitable for consumption and use in the economic and social environment of Ghana
3. To establish licensor accountability in the transfer of proprietary and/or non-proprietary knowhow, the 'technology' to be licensed should be fully described in the agreement, consistent with the requirements of confidentiality
4. By- and co-products of licensed process should be identified in the agreement; licensor should provide his best and most recent knowledge he possesses on the toxicity and hazardous nature of the waste products of the licensed process and measures for safeguarding worker and public safety

5. The technology licensor should be encouraged to make provisions ('best efforts' clause) in the agreement for providing assistance in licensee's establishment of quality control, R&D, design, workshop and maintenance departments

## VI. COMPENSATION TO LICENSOR

Preface to royalty administration:

Compensation to licensor (or services provider) will depend on the advantage it brings to the licensee enterprise in terms of his speed of market entry, profitability, quality and stability of earnings, market-share and level of investment - risk.

Where the gain is expected to be substantial, the royalty rate the enterprise will be prepared to pay is limited by its ability to pay. For the public sector agency, the above earning factors are generally only part of enterprise objectives as there are larger economic and social objectives and limitations.

In the matter of private sector royalty (and other fee) payments, the Government intervenes in the negotiation process and determines the royalty and other fee payments as though the Government was itself licensing the technology or receiving the services.

In royalty administration, therefore, developing country governments use some average royalty base and then modulate this up and down depending on the deliberated merits of the technology and its suitability in a given social and economic environment. The term 'Base Royalty Rate' is used henceforth to refer to the said average rate.

[ Although the Mission Consultant is totally opposed to this ad hoc form of setting royalties, preferring the rationally set out UNIDO Method, the ad hoc determination procedure is employed here ]

### ROYALTY ADMINISTRATION - PROPRIETARY KNOWHOW

1. Except for the technical assistance a licensor firm may render to the licensee enterprise, for which a lumpsum fee may be negotiated, royalties for the use of unpatented knowhow and expert services will generally be in the form of payments for realised annual production ( royalty rate per unit of product being the preferred form) or annual sales value of

licensed product; other consistent forms of royalty payment may be allowable such as royalty on profits (less depreciation and taxes)

2. 'Front-end' payments of royalty ie. lumpsum royalties will be permitted on proprietary technology where it can be demonstrated that licensor will be spending out-of-pocket funds for acquisition of third-party services or other project-related services ; such a payment will be construed as part of total royalty payment for proprietary technology Front-end payments will be allowed to be paid in installments based on a work-plan of outputs and certification by the licensor that such outputs have been obtained

3. 'Minimum royalties' are unacceptable ; where however, there is a requirement of such a royalty, a maximum fee for the contract will be negotiated on the attainment of which no further royalties will be payable to the licensor

4. 'Disclosure fees' for demonstration of know-how capabilities will not be allowed. However, 'Look-see' fees are encouraged and will be permitted if sufficient access is permitted to licensee to visit licensor facilities and obtain an appreciation of licensee's knowhow, production facilities and modes of operation. Such fees will have to be negotiated in a separate precedent agreement and will be deducted from the royalties payable to the licensor in the event the licensee enters into an agreement with the licensor

5. Where the licensor is sole supplier of any components, catalysts, base active materials, etc the royalties payable will be calculated on net sales value from which is deducted the cif cost of licensor supplies; that is royalty will be determined on local value added

6. Incentive remuneration - that is, royalty payments in excess of the Base Royalty Rate will be allowed for Preferred Technologies (see III above ) [provided performance warranties are provided in the agreement]

#### ROYALTY PAYMENTS - PATENTED TECHNOLOGY

1. Payments of patent royalties will be discouraged. Where patents exist and licensor incorporates rights under the patents, payments made by the licensee for knowhow will be construed as including compensation for the patents.

2. Where payments for patents are called for, the normal rights of the patent licensee as set out in the [draft new] regulations will be incorporated in the license agreement together with indemnification of any costs borne by the licensee for defense of licensed patents or for

infringed use of third-party payments on which licensor has made representations

3. Royalties where permitted will be construed as payments for the 'base patent' over the life of the base patent and payments made over the legal duration of the agreement will be construed as total payments due over the unexpired life of the patent
4. Incentive royalties will be approved on sales of licensed products in overseas territories in which licensor has valid patents covering the licensed products

#### ROYALTY PAYMENTS - TRADE MARKS

1. Payments of trade mark royalties for national sales of licensed products will be discouraged. Where trade mark rights exist with the licensor, the compensation for knowhow will be construed as including compensation for the use of the trade marks.
2. Where specific payments are to be made for trade marks the licensor will indemnify the licensee against any and all charges he may incur in the defense of the trade marks and the costs he may incur from damages arising from infringed use of third party trade marks
3. Trade mark royalties will not be permitted where the licensee is a controlled-subsiary of an overseas 'parent' company
4. Incentive royalties will be approved for sales of licensed products in overseas territories if marketed under licensor trade marks. Such approvals will extend to subsidiaries of overseas firms.

#### LICENSOR COMPENSATION - TECHNICAL SERVICE AND TECHNICAL ASSISTANCE AGREEMENTS

1. Technical service fees will be regarded as payments for the rendering of expert services ( and not for secret knowhow) even though such rendering may span several years
2. The Government retains the option of allowing 'running' or 'lumpsum' fees considering the nature of the technical service, its duration and dependence of the national enterprise on continued foreign technical expertise. Where continuing services are deemed to be required 'running' fees will be favoured
3. Technical service will be evaluated in terms of man-hours of skilled and knowledge-based services rendered

4. In order to prevent loss of accountability where there are several contracted industrial services, through the technology supplier and his associates, all such agreements must make the suppliers of the services jointly and severally responsible for the success of the project.

#### COMPENSATION IN MANAGEMENT AGREEMENTS

1. For industrial facilities, output-based fees and royalties, as applicable, will be the preferred norm of compensation in Ghanaian agreements. Thus management fees in lieu of technical fees and royalties will not be acceptable, particularly since such payments cannot be directly and legally related to technical performance. Where this is not feasible, management fees will be calculated in terms of the output although the fees are not referenced to output

2. Where management agreements relate to the service industries (franchise agreements) - such as hotels and the like - payments need to be considered in terms of (a) image and reputation of the service supplier and the quality of the franchised trade-mark (b) the nature and value of the continuing services he will provide (c) the proportion of the advertising costs he incurs to promote the franchisee business (d) proportionate costs of centralised services such as the international reservation system for hotels and (e) training costs for national personnel. Output-based fees are preferred such as 'occupied rooms during the year', number of 'MacDonald Hamburgers' sold rather than turnover or profits.

3. Where management agreements relate to training of national personnel, costs incurred by the services supplier will be balanced against the quality (organisation level) of the nationals trained and the number of such nationals.

4. No payments relating to 'headquarter overheads' will be permitted

[ Management agreements for training must append an organisation chart showing the organisation structure of the company at the end of the training period, identifying national managers and skilled worker positions.

The management agreement must hold that its proposed management structure is designed to maximise the efficiency, profitability and durability of the enterprise consistent with other 'best management practices'].



## VII. DURATION PERIOD OF AGREEMENTS

1. Several 'duration periods' may be desirable in an agreement considering:

- period over which royalty payments are permissible (royalty period)
- period over which licensee is constrained from employing technology ( secret information) to expand/diversify his operations or set up facilities at different sites (secrecy period)
- period of dependence of the licensee on licensor for (a) components and single-source supplies and (b) development of export markets
- period required to establish hybrid trademarks ( in composite agreements)
- period terminating payment of patent royalties (in composite agreements)
- period over which long-term warranties of process performance prevail
- period required to absorb technology (training period)
- period over which the general obligations of the agreement prevail ( the conventional duration period of a licensing agreement)

## VIII. PROCESS PERFORMANCE WARRANTIES AND GUARANTEES

Preface:

Process performance warranties and guarantees are normally important only for large projects which involve considerable technical complexity and which is not explained to the licensee at the time of negotiations or before the licensee makes front-end payments. Further, the drafting of a process performance warranty is a specialist operation in which technical personnel or consultants play a great part and lawyers have to have considerable experience.

In most cases, simpler forms of warranties can be established. Where this poses the danger of accountability, the practice of the licensee entering into 'look-see' and 'process disclosure' agreements is to be recommended. By making most things obvious, or by showing the most critical areas of operation, risk assessment and provisional cover are facilitated.

## PROCESS GUARANTEES ADMINISTRATION

Simpler forms of warranty representation ( as applicable):

1. The agreement must provide a warranty by the licensor that the PRODUCT proposed to be made under the license will be identical in all respects to the Approved Product whose further specifications are set down in appendix to the license agreement.
2. The agreement must provide a warranty by the licensor that the PROCESS proposed for the licensee will produce Approved Product on a continuous basis at the minimum rate of 300 tonnes per 24-hour day [ and consume no more than XX tonnes of steam per unit of saleable product produced] to produce a product of 99.2% minimum purity.
3. The agreement must provide a warranty by the licensor that the PROCESS proposed for the licensee will be, in all respects, identical to the Process practiced by licensor [and witnessed by the licensee] and will produce Product whose specifications are provided in the appendix to the license agreement, at the minimum warranted rate of 300 tonnes per 24-hour day.

The liability of the licensor for Deficient Performance will be to rectify licensee's process at his cost [ upto an accounted cost of \$XX, without allowance of personnel costs], and at additional expenses the licensee may be willing to incur to obtain Warranted Performance. Should Warranted Performance not be attained after such correction, the licensee will have no further royalty or other obligations to the licensor and will enjoy the right to have third parties correct the technology.

The liability of the licensor for failure to yield warranted product [ process] will be {some proportion of the fees already paid} or {royalties reduced in a manner to compensate the licensee for loss of profit due to Defective Product [Deficient Process]}

For more complex aspects of process guarantees, UNIDO Guidelines ID/233 ( prepared by the Consultant) may be reviewed. Legal aspects of guarantee agreements are also covered in a special document available from UNIDO.