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MANUAL ON TECHNOLOGY TRANSFER NEGOTIATIONS

THE DYNAMICS AND TECHNIQUES OF NEGOTIATION

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Contents

NOTES FOR THE TRAINER

The objectives of this Chapter are to provide trainees with:

- a general introduction to the negotiation process;
- an understanding of the key elements of that process;
- a degree of knowledge of some useful negotiating techniques;
- a recognition of some of the more frequently utilized negotiating tactics;
- an exposure to the dynamics of the negotiation process through participation in simulated negotiations on issues arising in connection with transactions involving technology transfers.

These objectives can best be achieved by an introductory presentation by the trainer of the negotiation process, describing the various stages of that process and the elements that are crucial to its successful application and culmination.

It is strongly recommended that the trainer in making this presentation (1) give as many illustrations or examples as possible from actual negotiations in which the trainer has personally participated, and (2) encourage the trainees to describe their own experiences in analogous circumstances and to comment on how the actions taken by them and their counterparts affected the progress of the negotiations and their eventual results. This recommendation is particularly applicable to the discussion on negotiating techniques and tactics that concludes the descriptive part of the presentation.

The introductory presentation should then be followed by simulated negotiations that highlight not only the issues relating to technology transfers that have been discussed in other chapter of this Manual, but also the key elements, techniques and tactics that were discussed in the descriptive presentation. To assist the trainer, this Chapter includes a detailed case study whose facts are designed to highlight those very aspects.

The case study is comprised of two parts: the first is a description of the background facts of an industrial joint venture project up to the point where detailed negotiations are about to

take place, and the second is a set of issues for each of three contractual elements of that project. These three elements consist of the joint venture agreement, the technology licensing agreement, and the engineering and construction agreement.

It is suggested that the trainer distribute the case study to the participants at as early a stage as possible, explaining that they will be divided up at the end of the descriptive presentation into teams who will be asked to negotiate the issues relating to each of the three contractual elements of the project covered by the case study. During the descriptive presentation and in the light of the contributions to the discussion made by the trainees, the trainer and the other experts involved in the workshop should divide up the trainees into six negotiating teams, consisting of three sets of two teams, each representing the principal negotiating parties in the three contractual negotiations. These teams should be as balanced in experience, personality and training as possible.

It is also suggested that the trainer and the other experts involved in the workshop act as monitors during the simulated negotiating sessions. The monitors should refrain from participating in the actual discussions on any of the issues; their principal role should be as observers to note how the negotiations are proceeding, how well the trainees are applying the concepts discussed during the descriptive presentation, what techniques and tactics are being used, what traps they are falling into and generally how the dynamics of the negotiation process are developing. However, if the negotiations bog down, or veer off into tangential issues, the monitors may intervene to facilitate the progress of the negotiations or to bring the negotiations back to the central issues contained in the relevant list of issues.

It is recommended that enough time be allocated to the simulated negotations to permit the negotiating teams to have in depth discussion and resolution of the many issues listed in the case study, and to let the dynamics of the negotiation process impact upon the negotiating teams. Adequate time should also be allocated for each of the team leaders to report on the outcome of their respective negotiations and for the monitors to make detailed comments on how the negotiations were conducted by the various teams and on their outcome.

The principal task of the trainer, both in the course of the descriptive presentation and during the simulated negotiations, should be to convey to the trainees a feeling of what takes place during the course of negotiations, and to dramatize the fact that the way they prepare themselves for the negotiations, present or rebut arguments, utilize techniques amd tactics, and in general interact with each other and with members of the opposing team, can have a substantial impact on their eventual success or failure as negotiators.

The Dynamics and Techniques of

Negotiation

A D V A N C E H A N D - O U T

Whether negotiations succeed or fail often turns on an undertanding of the dynamics of the negotiating process, and how it can be utilized either to advance or to undermine the objectives of the negotiating parties. This chapter will review the most important factors that permit this dynamics to operate in a positive fashion, will discuss the various prevailing attitudes and approaches that can either advance or retard the process of negotations, and will illustrate some of the techniques and tactics that are frequently utilized as positive or negative tools.

Questions:

* What exactly does "dynamics" mean?
* How can you recognize it?
* How does it work?

The first step that permits the dynamics to operate in the negotiating process occurs during the pre-negotiation stage. It requires that before negotiations even commence, whether formally or informally, there be a firm and detailed proposal on which negotations will eventually take place, that all relevant data be collected in one place, and that a preliminary concept of the contractual structure be formulated.

Questions:

* Why is a firm proposal required?
* Why cannot the structure be developed in the course of negotiations?

The next two steps are even more crucial to the dynamics of the negotiating process. These steps are the selection of a negotiating team composed of the appropriate mix of qualified

persons, and the preparation by the entire team for the up-coming negotiations.

Questions:

* How should the team be selected?
* What should be the qualifications of team members?
* How should the prepare for the negotiations?

The dynamics of the process comes to the fore as the negotiating team becomes involved in the drafting of contractual documents, in formulating the objectives to be accomplished through negotiations, and in determining how the negotiations are to be actually conducted.

Questions:

* How does drafting of contractual documents affect the dynamics?
* What should be the objectives to be accomplished?
* What factors affect the actual conduct of negotiations?

In order for the dynamics of negotiation to operate positively, negotiators have to remain constantly aware of cultural differences and communication distortions, and have to avoid using negative negotiating styles, techniques and tactics, even while recognizing and warding off their use by the other side.

Questions:

* Why are cultural differences relevant?
* Why is it not appropriate to respond to the other side's negative approach in similar fashion?

This chapter will then conclude with a general discussion of the context within which the negotation process operates, and the approach that is most appropriate for that context.

THE DYNAMICS AND TECHNIQUES OF NEGOTIATION

1 An introductory overview of the negotiation process

The key to arriving at a satisfactory agreement involving any long-term relationship between two or more parties, including an agreement for the transfer of technology from a supplier to a recipient, consists of two principal elements: (1) the preparation of a proposed agreement between the parties that is balanced and comprehensive to serve as the basis of negotiation, and (2) the manner in which the negotiations are conducted in the effort to arrive at a mutually acceptable final text.

Whether the manner in which negotiations are conducted will be conducive to a successful end result will depend on the negotiators (a) obtaining and mastering all the relevant information required, (b) developing the internal communication and chemistry that will mould them into an effective team, and (c) demonstrating the attitudes and utilizing the approaches and techniques that will create ease of communication with the other party's negotiating team and will develop mutual confidence and trust between them.

This chapter will discuss the various steps that need to be taken at each stage of the negotiating process to develop those elements that will maximize the chances of success, not necessarily in terms of what provisions are incorporated in the contract but, ultimately, by how successfully the project involved is implemented, and by how amicably the relationship of the parties continues to be conducted. The cumulative effect of those elements constitutes what is generally referred to as the "dynamics" of the negotiation process.

2 The pre-negotiation stage

There are certain pre-requisites that need to be fulfilled even prior to the commencement of negotiation if the negotiations are to culminate in a successful agreement. These pre-requisites consist of four elements.

2.1 Necessity of firm and detailed proposal from the other party

One would think that an elementary rule of successful negotiation is to know what one is negotiating about, and yet far more frequently than one would imagine parties begin to negotiate without being clear as to the nature and scope of the contractual relationship that they wish to establish. Because there is no mutual understanding of what that relationship should be, parties often appear to have reached agreement on a fundamental aspect of that relationship which turns out not to have been the case when the negotiations later reach the stage of detailed discussion of terms and conditions. Not only does this lead to serious ambiguities and misunderstandings, but in most cases to the far more serious stage of distrust and mutual accusations of bad faith, the death knell of successful negotiations.

It is crucial, therefore, that a firm and detailed proposal by one side or the other be prepared and submitted to the other side as at least the starting point for subsequent negotiations. This is not to say, of course, that exploratory talks should be avoided; such exploratory talks are necessary to establish the broad parameters within which a proposal can be formulated that will be acceptable in its broad lines to both parties as a basis for subsequent negotiations.

2.2 Analysis of proposal and identification of additional required information

Most proposals, unless they are submitted in response to detailed tenders or invitations to bid, are presented either in summary form, lacking important details, or in such incomplete fashion as to raise more questions than provide answers. The first step to be taken after receipt of a proposal, therefore, is to appoint a technical group to analyze it, list all of the questions it raises, and identify and request the additional information that is required from the party submitting the proposal. There should be no reluctance to do so; in fact, most parties who have submitted a proposal welcome questions and requests for information, for it indicates to them that the proposal is being taken seriously, and gives them a better concept both as to what is of particular interest to the other party and as to what may be the shortcomings of their proposal.

In addition to the information requested from the party submitting the proposal, information concerning the subject-matter of the proposal should also be sought from independant sources. Such information may relate, for example, to the nature and effectiveness of the technology

being proposed, the market for the proposed product, the quality and production cost of the product, the potential sources of financing, and many other areas that would be relevant to the formulation of even a preliminary structure of the proposed transaction or relationship.

2.3 Collection and review of required additional information

All the information received either from the party submitting the proposal or from independant sources should then be collected by the technical group and reviewed in the same manner as the original proposal. To the extent that the new information raises additional questions, they should again be posed to the proposing party or directed to the independant sources, until the technical group is satisfied that they have all the information they need to attempt the formulation of the preliminary structure of the transaction or relationship.

2.4 Formulation of preliminary structure of the transaction

Once the required information is collected and analyzed, and it is determined that the proposal should be pursued, a preliminary structure or even alternative structures should be formulated and evaluated in terms of whether any of the preliminary structures meets the needs and objectives of the state or local enterprise to which the proposal was submitted. In formulating the proposed structures, the technical group should address whether the transaction should be cast in the form of a joint venture, whether it should be a contract to construct, deliver and start up a plant, whether it should be just a contract to transfer the desired technology through a license agreement, whether there should be a management contract, a marketing agreement, or a technical assistance or training agreement, or whether it should encompass a combination of two or more of these contractual arrangements.

3 The selection of the negotiating team

When a preliminary structure has been agreed upon, a negotiating team should be selected to take over the negotiation of the transaction.

3.1 The composition of the negotiating team

A negotiating team should, as a minimum, consist of a chief negotiator, a technical expert, a financial expert and a legal expert, all of whom should thereafter be involved in all subsequent activities relating to the preparation for and actual negotiation of the

transaction. Unfortunately, in many countries a negotiating team, if one is constituted at all, is appointed only on the eve of the commencement of formal negotiations, without adequate opportunity to study the proposed transaction and the back-up information in depth and without an opportunity to have an input into the positions that the chief negotiator will present during the negotiations.

3.2 The characteristics of the team members

The chief negotiator should be a person with broad business experience who is capable of taking decisions. The latter quality is of primary importance, as many a negotiation has dragged on and eventually foundered because the chief negotiator has constantly delayed taking decisions, sometimes even on relatively minor issues, or referred them to "higher authority". It takes courage and experience to take decisions, and the chief negotiator should have both.

The technical expert should have special competence in the sector involved in the transaction, and should either have, or should acquire once he has been appointed to the negotiating team, knowledge of alternative processes or equipment to those in the proposal and of their cost. It goes without saying that the technical expert should, if at all possible, be drawn from the members of the technical group that analyzed the proposal and formulated the preliminary structure that is to form the starting point of the negotiations.

The financial expert should be familiar with various types of financial arrangements and with both potential sources and terms of domestic and international financing. He should also be able to calculate the long-term impact of changes in interest rates, repayment periods, and principal amounts of the financing being discussed, as well as the long-term financial returns and cash flows from the transaction as it is modified during the course of negotiation.

The legal expert should have experience in drafting contracts, and, in particular, be knowledgeable about the provisions that should be contained in agreements dealing with joint ventures, technology transfers and other aspects of an economic development or investment project. He should also be familiar with the meaning and scope of such juridical terms and provisions as force majeure, arbitration, applicable law, limitation of liability, etc.

To the extent that any of these experts with the requisite qualifications are unavailable locally, they should be recruited from abroad as consultants. It will be money well spent, for a knowledgeable expert can have a positive financial import on the ultimate cost of a transaction to the domestic entity that will be

many time the amount of the fees that are paid to the expert. If such a foreign expert is retained, he should participate both in the preparation for the negotiations and in the actual negotiations themselves.

3.3 The roles of the team members

Each member of the negotiating team has his own distinct role to play during the negotiations. The chief negotiator should be the principal spokesman for the team. The other members may take the forefront in the negotiations only where their areas of expertise are involved; otherwise, they should advise and assist the chief negotiator by analysing the arguments presented by the other side, finding their weak points, studying their implications and generally providing the chief negotiator with appropriate arguments and positions.

The legal expert has a further role, and that is to be the principal drafter of contractual language to reflect agreements reached in the negotiations that require changes in the provisions of the initial draft. It is important that all modifications, whether changes in existing provisions or the addition of new provisions, be drafted by the same person who prepared the initial draft. Legal practitioners, like most professional experts, have their own styles of drafting and use of language, and if one is to avoid ambiguities and potential conflicts from creeping into an agreement, there should be consistency of terminology and phrasing. Many a case based on a contractual claim has been lost because the same word or phrase has been used in different parts of the contract to mean different things.

3.4 The need for team discipline

A negotiating team should speak with but one voice. Experienced negotiators make a point of looking for any disagreement between the members of an opposing negotiating team which they can exploit to their advantage. Obviously, open disagreements and arguments between team members must be absolutely avoided. However, disagreements need not only be expressed verbally; they can just as easily be conveyed by facial expressions and body language.

It becomes crucial, therefore, that team members maintain a calm demeanor when in the negotiating room, and avoid revealing any difference of opinion that they may have with what the chief negotiator is saying. If the issue being discussed is of sufficient importance and the disagreement is substantial, the chief negotiator should be asked to call a recess so the issue can be discussed and agreement reached on an acceptable position before returning to the negotiating room.

In fact, regular team meetings prior to each day's negotiating session to go over the points to be discussed that day and to agree on the position to be taken on them, followed by similar meetings at the end of each day's session to review the points agreed upon and their general impact on the over-all progress of the negotiations, will go a long way towards drastically limiting the chances of disagreements during the actual negotiating sessions.

4 The preparation for negotiations

Once the negotiating team has been appointed, it should start preparing for formal negotiations with the other party. Adequate preparation is an often neglected but critical aspect of successful negotiations. Moreover, it requires focusing on these key elements not only from one's own perspective, but also from the perspective of the other party.

4.1 Mastery of key elements and data relating to the proposed transaction

Negotiators representing foreign companies invariably either have an in-depth knowledge of the subject-matter of the negotiation that they are being called upon to conduct or, if not, have had years of experience in covering up their lack of such knowledge by the use of a variety of tactics. To be able to stand up to such in-depth knowledge or to cut through the cover-up of its lack, the negotiating team must itself be thoroughly familiar with all the key elements and supporting data relating to the transaction.

These key elements include the technical aspect of the proposed transaction, such as the nature of the technological process being proposed and alternatives thereto, the type of equipment such process requires, the raw materials and utilities required, the material flow and production specifications, etc. They also include such cost aspects of the transaction as the estimated capital costs, whether derived from other similar projects or through the use of generally accepted "rules of thumb." They include information about the availability and cost of infrastructure facilities, such as water, power, ports, roads and railroads, housing, etc. Finally, they include information concerning land-use codes, safety standards, and other regulations that may affect design of foundations and buildings and the sizes, loads and designs of equipment.

4.2 Formulation of objectives, priorities and preliminary positions on key issues

Adequate preparation for negotiations also requires that the

negotiating team identify the commercial and economic objectives to be achieved through the transaction, and where such objectives conflict or work at cross purposes, to establish priorities, if not make actual choices, between them.

Once the objectives are identified and agreed to, the negotiating team should set down all of the key issues that need to be negotiated, and establish the team's initial positions on them. These may consist of non-negotiable positions on a number of issues, of preliminary and fall-back positions on others, and alternative approaches on still others.

Carrying out this task in advance of the commencement of the formal negotiations compels the negotiating team to reflect in some depth on each issue and thus avoid being caught by surprise by arguments advanced by the other side or being forced to formulate off-the-cuff positions.

4.3 Collection of information concerning the competence and performance history of the other party

Another important factor contributing to successful negotiation is knowledge concerning the other party's background, financial standing, experience and prior performance in similar projects in other countries. The team, in preparing for negotiations, should therefore obtain as much information as it can on these aspects of the other party's background.

Information concerning the financial position of the other party should in the first instance be obtained from the party itself, which can then be checked out and supplemented with information from other sources. If the other party is a publicly traded company, extensive financial information can be obtained from annual and quarterly filings with regulatory agencies in their respective countries; such information can also be obtained from such United Nations agencies as UNIDO and UNCTC, which have established extensive data banks covering the financial backgrounds and activities of transnational corporations. If the other party is privately owned, such information can be obtained from large money-centre banks and credit agencies.

Information concerning the experience and prior performance of the other party in similar projects is more difficult to obtain. Again, the negotiating team should request such information in the first instance from the other party; once it has received the information, which should disclose the type and country location of the project, the team can contact the appropriate government ministries or state enterprises involved in the project to determing what has been the

outcome of the project and generally what were the terms and conditions governing the relationship of the parties with respect to that project.

The acquisition of this information will permit the negotiating team to avoid a pitfall that is much too common: entering into a relationship with a foreign party which does not have the financial standing and experience required for the success of the project. As a minimum, it will permit the team to establish terms and conditions to be obtained during the negotiations that will specifically address the areas of the other party's financial and technical weaknesses and thus reinforce the prospects of success of the project.

4.4 Identification of objectives, priorities and possible concerns of the other party

The acquisition of background information about the other party also assists the negotiating team to achieve another important element contributing to successful negotiations; it will permit the team to identify the objectives and priorities of the other party and thus formulate positions on issues which would either meet, without violating its own objectives and priorities, as many of those objectives and priorities as possible, or, if the two sets of objectives and priorities are incompatible, be aware of that fact sufficiently early in the negotiating process to address the issue and either resolve it or terminate the process.

The same holds true with respect to the possible concerns that the other party may have concerning the project and the proposed relationship. The identification and understanding of those concerns will permit the formulation and the presentation to the other party of positions, and in due course contractual provisions, that would meet those concerns. The willingness of the negotiating team to recognize and alleviate those concerns will create the kind of favorable negotiating atmosphere which will greatly facilitate and accelerate the process of arriving at a mutually satisfactory arrangement.

5 The drafting of contract documents

The next key element in the negotiating process is the drafting of contract documents: when and how they should be drafted, who should draft them, and what they should cover.

5.1 Preliminary negotiations on broad aspects of a transaction may be carried on without contract documents being drafted

Contract documents are frequently prepared before there have been

sufficient preliminary discussions to adequately establish the parameters of the transaction and the relationship between the parties; in many other instances, terms and conditions are negotiated without any written contract documents having been prepared and thus without a framework within which they fit.

Clearly, preliminary discussions of broad aspects of a transaction are not only permissible, but are in fact desirable. The premature drafting of contract documents could well establish positions on various fundamental and difficult issues of a relationship before they have been mutually explored and some consensus reached between the parties; formulating these issues from the perspective of one party often leads to an over-reaction by the other party, creating unnecessary friction that could pervade the rest of the negotiating process. Such over-reaction and friction can often be avoided if preliminary discussions are held and agreement reached as to how those fundamental issues are to be addressed and resolved.

5.2 Detailed negotiations should, however, be based on specific contract documents

Just as premature drafting of contract documents can harden positions and unduly limit the process of reaching agreement on basic issues, negotiation of detailed terms and conditions governing a transaction, and the relationship of the parties with respect thereto, outside the context of a contract document can create misunderstandings and serious conflicts when agreements purportedly reached in such negotiations are subsequently incorporated in a contract document.

Contract documents provide two important elements: first, they establish the parameters of the transaction and the relationship, as well as the context within which the specific terms and conditions fit, and secondly, they define in very specific language the scope of the terms and conditions that are being negotiated and agreed upon.

5.3 Contract documents should be drafted by the negotiating team well in advance of the start of detailed negotiations

Once preliminary negotiations have been conducted and the basic elements of the transaction and the relationship of the parties have been agreed upon, the negotiating team should proceed to draft the contract documents that are required to reflect those elements.

It is important that the first draft of the contract documents be prepared by the host country's negotiating team. The process of drafting such documents will focus the attention of the

negotiating team on the structure of the project, the implementation of the transaction and on the terms and conditions which will establish the rights and obligations of the respective parties. It can then more effectively select and incorporate in the draft documents provisions that will reflect not only the agreements reached on the broad issues during the preliminary negotiations, but also the terms and conditions that will protect the interests of the host country. It can at the same time include provisions which meet to the maximum extent possible the legitimate needs and concerns of the other party, thus setting the foundation for a fair arrangement which will bode well for the success of the project being negotiated.

Preparing the first draft of the contract documents and using them as the basis of the ensuing negotiations has always been considered by experienced negotiators, especially by negotiators who subscribe to the theory that the negotiating process is an adversarial one, as "winning half the battle." Without going that far, it must be recognized that preparing the first draft and using it as the basis of subsequent negotiation between the parties does constitute a major advantage, in that it sets the agenda for the negotiations and places on the opposing party the onus of arguing for and justifying any substantive changes, particularly if that first draft is balanced and represents an equitable allocation of rights and obligations as between the parties.

When the process of selection of both required and desirable provisions has been completed, and the contract documents have been drafted, reviewed and internally approved, they should be sent to the other party in sufficient time for that party to review it and possibly suggest additional or modified provisions prior to the commencement of detailed negotiations. Nothing is gained by delaying presentation of the draft to the other party until the last minute; on the contrary, such tactics frequently turn out to be counter-productive, since at best they cause delay and at worst engender accusations of bad faith and unfair dealing.

5.4 Contracts should be written in simple, clear language and be as balanced as possible

In drafting contract documents, it is important to ensure that they not be one-sided; in other words, they should not merely include provisions that are favorable to or in the interests of the party preparing the draft, but also provisions that reflect the legitimate requirements or which meet the reasonable concerns of the other party.

There are unfortunately a substantial number of contract drafters and negotiators who believe that the drafter of the contract should only concern himself with provisions that protect his client's interests,

and leave it to the other party to come up with provisions protecting its own interests. The problem with this approach is that the ensuing negotiations, rather than focusing on reaching agreement on outstanding issues, degenerate into a battle of one-sided contract drafts. Even if agreement is finally reached on a contract that the parties are prepared to sign, the resulting document becomes so replete with ambiguities, inconsistencies and internal conflicts that it guarantees future disputes and creates the basis for undermining the relationship between the parties.

There are also a substantial number of contract drafters who believe in using convoluted language and legalistic phrasing in describing the rights and obligations of the parties, i.e., who use so-called "boiler-plate" language. There is nothing magical about such "boiler-plate" provisions, however; their extensive use has been due principally to the belief that because their scope and meaning have allegedly become clear and unambiguous through court interpretation, they avoid misunderstanding and prevent future disputes. This rationale would not apply, however, to contractual language in international contracts, which are often interpreted by non-judicial arbitrators or by court judges operating under legal systems other than those under which such "boiler-plate" provisions have been interpreted and defined.

Moreover, what is lost sight of in this process of rationalization is the fact that the contract documents are intended in the first instance to be used by and to guide the executives or engineers who have to direct, supervise or monitor the activities of the contracting parties; thus, the simpler and clearer the language of the contract, the easier the task of the executive or engineer in determining what is required to be done by the parties to the contract. There is no justification, therefore, for using anything other than simple every-day language in drafting contract documents.

5.5 Contract drafts should be as complete as possible; use of side letters, protocols and other peripheral agreements should be avoided

While contract drafters should not attempt to cover in a contract draft aspects of a transaction or a relationship where the necessary factual elements have still not been ascertained, they clearly should cover in them all of the provisions which are clearly ascertainable and relevant to that transaction or relationship.

Unfortunately, a tendency has developed over the past couple of decades of excluding certain key provisions covering a proposed transaction or relationship from the main contract document and to relegate them instead to side letters, protocols or other forms of

peripheral agreements. This is most frequently done where the provision represents a major concession the disclosure of which might create political embarassment or might trigger requests by other parties to be granted the same concession.

The contents of such side agreements seldom remain secret, however, and whatever value there may have been initially in separating these key provisions from the basic contract document is then more than offset by the lack of a formal structure and context within which such provisions would be interpreted and applied, and by the ambiguity that necessarily accompanies the often cryptic language utilized in such side letters, protocols and peripheral agreements.

6 The organizational aspects of negotiations

There are a number of organizational aspects in arranging negotiating sessions which at first blush would seem to play a minimal role in the actual conduct of negotiations, but which often turn out to have far greater impact than one would anticipate.

6.1 Physical arrangements can affect negotiators' reactions and attitudes

The physical and psychological state of negotiators during negotiating sessions frequently affect the dynamics of the negotiation process, and these in turn are affected by the physical arrangements that surround the negotiators during crucial stages of negotiations.

There are two categories of physical arrangements that can have an impact on the outcome of negotiations: arrangements outside the negotiating room, and arrangements within the negotiating room.

The first category includes such elements as satisfactory hotel accomodations, familiar and high quality food, and such logistical facilities as secretarial services and long-distance telephone and telefax services. The second involves the relative size of the negotiating teams, the size of the negotiating room, and the seating pattern around the negotiating table.

If the outside physical arrangements are inadequate, or even unfamiliar, negotiators become uncomfortable and uneasy, which eventually is transformed into impatience and irritability. Such a state of mind makes the search for compromise solutions and eventual agreement more difficult.

Similarly, being substantially outnumbered by the opposing negotiators or being forced to negotiate in too small a room for long hours (particularly if there are chain smokers among the team members) also makes negotiators uncomfortable and irritable, and detracts from the dynamics of the negotiation process.

There are negotiation experts who believe in using physical arrangements as part of their tactics, believing that discomfort, impatience and irritation will induce negotiators to concede on issues where they might not otherwise have done so. Some of them have gone so far as to suggest that air conditioning units conveniently "break down", or that opposing negotiators be seated around the negotiating table so as to face sunlight streaming through the windows, on the theory presumeably that the negotiators would get so drained and tired that they would be anxious to get the negotiation over with by conceding on disputed issues.

Even if these theories were valid (as one would expect, there is no empirical evidence to support them; what support is provided is in the form of anectodal evidence), they go counter to the role and objectives of the negotiating process, which is to arrive at mutual agreement without creating resentment and mistrust between the parties.

6.2 Length and frequency of meetings can also have an impact on the the process of arriving at agreement

As in the case of physical arrangements, the length and frequency of meetings can affect a negotiators' state of mind and either speed up or delay the process of arriving at agreement. Lengthy meetings, in addition to creating both physical and mental fatigue, tend to build up tension, in that they force negotiators to arrive at resolutions of sometimes thorny issues that should be deferred to give the negotiators time to reflect and even come up with alternatives. If negotiating time is short because of unavailability of one or the other negotiating team, or a key member of such team, the meetings should be broken up by frequent recesses, even if for relatively short periods.

Detailed negotiating sessions should not, on the other hand, be dragged out. Major breaks between sessions tend to break up the momentum that develops in a negotiating session as agreement is reached on a series of issues. In fact, many experienced negotiators will deliberately take up during early stages of negotiation those issues on which they expect easy agreement, and defer to later discussion the more thorny issues, in order to build up just such a momentum; that momentum then helps achieve agreement on the more

difficult issues when they are later taken up. Long delays in addressing these issues would eliminate whatever positive impact the momentum might have had on their accelerated resolution.

6.3 Informal and social get-togethers can facilitate communication and help break impasses

Informal get-togethers between various members of the respective teams permit them to explore, without their being considered firm positions or official proposals, alternative solutions to issues that have reached points of impasse in the formal negotiating session.

In addition, social get-togethers between members of the opposing negotiating teams should be arranged. As a minimum, these get-togethers permit the members of the respective teams to get to know each other better and possibly to develop a personal relationship that will facilitate communication and understanding between them. However, they can also be used for trying out, as in the informal get-togethers, alternative solutions or for sending to the other party messages which cannot be appropriately conveyed in negotiating sessions or the more business oriented informal get=togethers.

6.4 Language differences can create pitfalls and set traps for negotiators

Nearly all negotiations are carried on either in English or in French, or if not in those languages, are translated into the negotiating teams' native languages by interpreters who may or may not be interpreting into their native languages. Ordinarily, members of the two negotiating teams are sufficiently fluent in one of these two languages, or to provide interpreters who are, to communicate adequately for purposes of carrying on negotiations.

One must remain aware, on the other hand, of the fact that, however fluent may be the negotiators' or interpreters' use of the language being used in the negotiating discussions, their understanding of what is said may not be exactly what is intended to be conveyed. There are expressions in every language that are the product of its country's culture and business practices, and that have nuances and special meanings which can only be fully understood within those contexts.

It is important, therefore, to use as simple phraseology as possible in presenting proposals or making arguments. In fact, many experienced negotiators have developed the habit of re-stating points or arguments with different words and phrases in order to avoid ambiguity and minimize the chances of misunderstandings.

6.5 Premature publicity can limit options

Many a project has foundered because premature disclosure has either raised expectations or created opposition before it has been structured sufficiently to appear as economically feasible and desirable. Sometimes the disclosure is in the form of a press release by the foreign party; in other cases the disclosure is through a newspaper article in the host country based on an interview with an official or executive charged with responsibility for implementing the project.

In either case, the information contained in the release or article is often quite limited, if not inaccurate, since the project is presumeably still undergoing structuring and detailed negotiation; to the extent that the information is valid, it announces publicly positions, on what may turn out to be key issues, which may be difficult to change during the course of subsequent negotiations.

The parties should, therefore, maintain confidentially about the project and about the progress of negotiations until the project has been firmly structured and the key terms and conditions of the relationship with the other party have been agreed upon.

7 The role and objectives of negotiations

Parties often enter into detailed negotiations without establishing in their own minds exactly what they expect to accomplish through negotiations. While specific objectives may differ from project to project, the role of negotiations remains essentially unchanged. That role is to provide a forum and a process that will permit the accomplishment of three results.

7.1 To structure jointly with the other party a mutually satisfactory transaction

In the course of preparing for detailed negotiations, the negotiating team presumeably formulated a preliminary structure for the proposed transaction. The role of negotiations is to convert this preliminary structure into a final structure which will be satisfactory to both parties.

7.2 To record all agreed-upon terms and conditions in one or more contract documents

As in the case of the structure of the transaction, the negotiating team has prepared a draft of the contract documents which contain

accomodation in a joint undertaking of a transaction and the establishment of a business relationship. The heat generated in a negotiation through the use of the adversarial process in order to arrive at mutually acceptable terms and conditions is the very heat that would undermine the desire for cooperation and accomodation that would be indispensable to ensure the successful implementation of the transaction and the continuing effective and amicable relationship between the parties to it.

8.2 Mutual understanding and trust is an indispensable element in bringing about successful implementation of a transaction or business relationship

As discussed earlier, the principal objective of the negotiation process is to structure a mutually satisfactory arrangement in a manner that would not jeopardize its successful implementation. To ensure such a successful implementation, it is imperative that there exist mutual understanding and trust between the parties to the arrangement. However well-structured the arrangement and however complete the contract documents containing the terms and conditions governing the rights and obligations of the respective parties, there are bound to be many areas of potential disagreement which are not expressly covered by any contractual provision, as well as future developments that could adversely affect the structure and upset the equilibrium of the relationship. It is under those circumstances that mutual understanding and trust is most needed to be the catalyst to induce the parties to agree to a mutually acceptable resolution of those disputes or to a mutually satisfactory re-structuring of the transaction.

8.3 Such mutual understanding and trust must begin during negotiations

Mutual understanding and trust between parties to a proposed relationship cannot be pulled out of thin air; it has to be created and nurtured through the contacts between the parties and their actions towards each other both before the relationship is created and during the subsequent period of their relationship.

The negotiation period is the first opportunity to create and nurture mutual understanding and trust, and the manner in which the negotiators conduct themselves during the negotiating sessions can either destroy it or help it grow. Approaching the negotiations as an adversary process would tend to destroy it; misstatements and insensitive comments and arguments would undermine it. Recognition of the validity of the other side's requirements and concerns would, on the other hand, nurture it and help it grow.

8.4 Cultural differences can adversely affect the growth of mutual understanding and trust

In presenting arguments in support of one's position, one has to be constantly aware of the fact that there are cultural differences between the two groups of negotiators, and to recognize that these cultural differences can affect the way each side hears and absorbs what is being said by the other side. Cultural differences are like screens, which can either filter or distort light; similarly, cultural differences can either highlight and clarify or distort and confuse what is said.

It is important, therefore, to determine early in the negotiating sessions how the cultural differences between the negotiating team members, on the one hand, and the members of the other party's team, on the other, are affecting the discussions. If they operate to highlight and clarify, they will facilitate the creation and growth of mutual understanding and trust; if they operate to distort and confuse, then special effort must be made to counter their impact and care must be taken in what arguments are put forth and how those arguments are phrased if mutual understanding and trust is to be created and nurtured.

8.5 While negotiating styles may differ, there are some general rules of conduct that all negotiators should adhere to

Over a period of time and as he gains experience, a negotiator develops a style that is unique to himself - a combination of personality and manner of expression. It is generally agreed that there is no ideal negotiating style; what may be effective for one negotiator may turn out to be disastrous for another. What a beginning negotiator must do is to try out different styles or approaches until he feels comfortable with a particular style, then proceed to develop it until he can use it naturally, without prior planning and deliberation.

Whatever style a negotiator ends up adopting as his personal style, there are a number of rules of conduct, i.e., a number of do's and don't's, that nearly all experienced negotiators adhere to. Discussed below are some of the principal rules:

8.5.1 Arguments should be presented calmly and without personalizing

One of the most disagreeable experiences during negotiating

sessions is to have negotiators become emotional, raise their voices, and vent their anger on the opposing negotiators by casting aspersions on their integrity, motives and ancestry. Experienced negotiators recognize that such conduct is ineffective, and even counter-productive. It alienates the opposing negotiators and makes even more determined to maintain their positions. But what is even more critical is that such conduct irrevocably eliminates all chances of creating and developing mutual understanding and trust in the relationship, and thus renders all agreements that may be reached in such negotiating sessions vulnerable and possibly illusory.

8.5.2 Personal prejudices should not be injected into arguments or permitted to color responses

Some negotiators find it difficult to avoid letting their prejudices show through, even if they do refrain from overtly questioning the attitudes, beliefs and motives of their opposite numbers. They let these prejudices show through by their body language, their facial expressions, their tone of voice and eventually by their choice of words. While possibly not as destructive as outright angry accusations and aspersions, they can be almost as harmful.

8.5.3 Positions should be fully explained and supported by logical arguments

A constantly recurring theme in discussions among experienced negotiators is how powerful and effective logic is in swaying people and in persuading them to accept proposals made to them. In fact, it is generally recognized that the ability to come up with logical arguments in support of one's position is one of the marks of a successful negotiator. Negotiators should be prepared, therefore, to explain, as fully as possible, the reasons for the various positions they are taking, and to support them with cogent and logical arguments.

8.5.4 Unreasonable or arbitrary positions should be avoided

One of the more difficult and unpleasant tasks that a negotiator has is to have to present and argue in favor of an unreasonable or arbitrary position that has been imposed by higher authority or by a client, as the case may be. Having to support and justify such positions eventually undermines the credibility, and in due course the effectiveness, of the negotiator.

8.5.5 Ultimatums and other forms of non-negotiable demands should also be avoided

This is the third facet relating to the impact of logic or lack of it upon the negotiation process. Use of ultimatums, demands that are announced as being non-negotiable, and other positions on issues without presentation of justification, is counter-productive. All that these tactics succeed in achieving is to make the other side respond in kind. As a consequence little progress is made; even if eventually an agreement is reached, it is likely to be a collection of inconsistent and possibly unreconcilable provisions.

8.5.6 Where appropriate, the validity of the other side's arguments and the legitimacy of their concerns should be admitted

One of the serious mistakes made by inexperienced negotiators is to refuse to admit that any argument advanced by the other side's negotiators is valid, or that any concern expressed by them is legitimate and needs to be addressed. But probably the best way to create understanding and trust is to concede the validity of logical and reasonable arguments presented by the other side's negotiators and to accept provisions or modifications proposed by them when they are justified. Refusal to do so undermines the willingness of the other party to continue to negotiate; as a minimum, it is likely to generate accusations of bad faith and arbitrariness.

9 Typical negotiating techniques and tactics

It is often difficult to distinguish between negotiating techniques and negotiating tactics (or what one experienced negotiator refers to as gambits). One possible way to distinguish between them is to categorize negotiating techniques as those methods of approach during negotiations designed to advance the general resolution of issues, and negotiating tactics as those designed to obtain or possibly extort agreement from the other side on specific issues.

9.1 Some useful negotiating techniques

There are a number of techniques that have proven useful over the years in bringing about and speeding up over-all agreement in contractual negotiations.

9.1.1 Deferring difficult issues; creating momentum of agreement

Probably the most useful technique for advancing the process of reaching agreement is to defer those issues that appear to be the most difficult to resolve, and instead to tackle first those issues that appear most susceptible of agreement. Experience has shown that a series of agreements on even lesser issues creates a momentum and atmosphere which induces negotiators to seek ways and means to reach agreement on the more difficult issues so as to avoid being the party that halts the momentum or otherwise alters the cooperative and amiable atmosphere. To the extent possible, therefore, the agenda for the negotiations should be so set that the more difficult issues are relegated to the later stages of the negotiating sessions.

9.1.2 Taking up general propositions before specific ones; agreeing on the principle before the specific language

The effectiveness of this technique relies on essentially the same rationale as that applicable to the technique discussed above. It is frequently far easier to agree on a general proposition, in contrast to a specific one, where, because it more clearly highlights its impact of the issue, agreement may be more difficult. Similarly, agreement on a principle is often more easily obtainable than agreement on the specific language that applies the principle to the appropriate facet of the transaction. It thus relegates the more difficult phase of the negotiations to a later stage and permits the earlier stages to create the desired momentum and atmosphere.

9.1.3 Using committees and subcommittees to explore solutions to the more difficult issues

Initial discussions on certain issues may reveal that they will be difficult to resolve and might require exploration into alternative ways of resolution that may have better potential of being acceptable to the parties. It is often difficult to explore such potential ways within the context of the principal negotiating sessions, partly because they may take too much time from the tightly scheduled available time, but more because exploration of alternatives in a context where the explorers are also the decision-makers is more difficult. Consequently, it is often more effective to set up a special committee of negotiators or subcommittee of experts outside the negotiating teams to conduct such exploration and report back to the negotiating teams.

9.1.4 Keeping score of concessions; offering quid pro quo's; proposing package deals

It is often useful to keep a summary record of the issues on which concessions have been made; they constitute a form of "credit" which can later be called upon to obtain concessions by the other party on issues which may be unrelated to the ones on which concessions had been made in earlier sessions of negotiation. They may also form the basis of a package deal, provided, of course, that final agreement on those earlier concessions had been reserved in one form or other. Another simple and frequently used technique is to offer a quid pro quo - one concession for another, or a package deal - one set of concessions for another set. All of them are essentially designed to break an impasse by balancing the concessions or "sacrifices" of each side.

9.1.5 Using the "two-way street" argument

Often proposals are advanced which may be difficult to oppose because they appear reasonable on their face, although they may have long term implications which may be objectionable to the other party. One technique used to counter such proposals is to bring home the objectionable aspect to the proposing party by agreeing to the proposal provided that the proposing party agree to its inclusion of an equivalent provision in favor of the objecting party. If the proposal does in fact have long term objectionable implications, it is very likely that the proposing party will find a graceful, and sometimes not so graceful, way to withdraw the original proposal.

9.1.6 Applying the "Most Favored Nation" solution

There are occasions when concessions are requested which, while otherwise reasonable, may not be justifiable in the light of the limited scope of a particular project. These frequently involve fiscal incentives and infrastructure assistance from the Government in projects where the Government or a Government enterprise is a party in the negotiations. A flat rejection of the request may come across either as an unreasonable and thus uncooperative attitude on the part of the negotiators, or as a lack of support of the project by the Government. One technique to avoid this is to propose a "most favored nation" clause, i.e., a clause that states that the requested fiscal incentive or infrastructure assistance will be provided to the project in the event that the Government agrees to provide it in the future to

any similar project. The technique can also be appropriately used, incidentally, to counter a refusal by the other party to grant a request on the grounds that it would set a "precedent" - a commonly used tactic discussed below.

9.1.7 Using the "slicing the salami" technique

Negotiators are occasionally faced with issues whose resolution requires a concession by the other party of such magnitude that it would clearly render the chances of obtaining it very slight. A technique that experienced negotiators often use in such cases is to break down the issue into its various components, and the concession into a series of relatively minor elements, and then intersperse them through the various negotiating sessions as relatively minor concessions i.e., they "slice the salami", so that it becomes easier to swallow. In contrast to negotiating tactics or gambits, there is nothing underhanded about this technique; in many instances, its use is announced by some phrase such as "let me try to break this issue down and see if we can agree."

9.2 Frequently used tactics

The above are some of the more useful negotiating techniques. There are, on the other hand, a much larger number of negotiating tactics or gambits, developed by experienced and ingenious negotiators over the years, which, while they may advance the process of reaching agreement, are designed primarily as traps for presumeably less experienced negotiators on the other side, to exert undue pressure on them, and thus to extort concessions on important issues. A few of the more frequently used ones are discussed below.

9.2.1 Role playing - the "good guy/bad guy" gambit

The most frequently used negotiating tactic is to designate one influential member of the negotiating team to play the role of the "good guy" and another to play the role of the "bad guy." The term derives from the practice of interrogators in the military and security services of having one interrogator be very physically and intellectually harsh, followed by a second interrogator who appears to be friendly, sympathetic and willing to help. The psychological impact of these contrasting approaches on the person under interrogation often leads to his opening up to the second interrogator and providing the desired information.

In the negotiating context the "bad guy" projects the negative image, the person who rejects the other side's request, however reasonable it may appear, who presents the most extreme demands, and who verbalizes arguments in the harshest language. The "good guy", on the other hand, presents himself as the reasonable person, who is pained by his colleague's adamant and harsh approach to the negotiations, and who proposes the "reasonable" compromise solution to the issue under discussion. The objective of the gambit is, of course, to create an "empathy" with the negotiator on the other side so that he will accept the "reasonable" solution which, absent such empathy, he would not have accepted.

A number of experienced negotiators have questioned the effectiveness of this gambit; many more, on the other hand, have asserted that its effectiveness has been demonstrated time and again in their negotiations.

9.2.2 Undercutting the team leader - the "Divide and conquer" ploy

The converse of the "good guy/bad guy" gambit is the "divide and conquer" ploy. Where in the former it is the negotiating team itself that determines the roles and who will play them, in the latter it is the opposing team that selects the members of the other team to play the roles of the "good guy" and the "bad guy". In most cases the team leader is cast as the "bad guy" since, as the decision-maker of the team, he is often the one who rejects requests presented by the other team. The "good guy" takes longer to identify; he not only has to be someone on the other team who either explicitly or through body language appears to disagree with his team leader, but also someone who has some stature or standing within his own negotiating team. Once identified, he is incessantly played to, both in terms of ego enhancement and of argumentation.

The objective of this ploy is, of course, to isolate the team leader, to bring about a division of viewpoint and position on important issues, and eventually to create enough internal presssure on the team leader to induce him to make the desired concession.

9.2.3 Sending up "trial balloons"; presenting "red herrings"; creating "straw men"

"Trial balloons", "red herrings" and "straw men" are three

variations on the same theme: arguments or proposals on issues that are presented not because they are sincerely adhered to, but simply to obtain information, to mislead, or to instill a false sense of confidence.

A "trial balloon" is essentially an argument or proposal that the presenting party neither seriously intends to pursue nor really expects to be accepted by the other party. Its primary purpose is to obtain, from the reaction of the other party to the argument or proposal, information that the presenting party requires in order to formulate the right argument or proposal for what that party really wants to obtain acceptance for. A "red herring" is an argument or proposal that has little relevance to the issue under discussion; it is presented primarily to redirect the focus of the other side's argumentation from the issue under discussion to the rebuttal of the irrelevant argument or the rejection of the tangential proposal. A "straw man" is an argument or proposal so weak on its face that it can be easily demolished, thus creating a false sense of confidence in the negotiators on the other side, and making them less wary of what may be coming up subsequently.

9.2.4 Threatening a "walk-out"

Threatening a "walk-out" is a tactic that works effectively only once or twice in any negotiation, however extended it may be. Like the boy who cries "wolf" too often, a repeated threat to walk out of the negotiations if a given point is not conceded loses its impact and soon becomes counter-productive, even if the earlier threats were successful in obtaining the related concessions. The tactic needs to be used very judiciously, and only where the issue in question is sufficiently crucial to the party making the threat so that, if the point at issue is not conceded, there will be no hesitiation in carrying out the threat.

9.2.5 Setting deadlines; stretching out negotiations; making last minute requests

Deadlines, stretch-outs and last minute requests are all different aspects of the same tactic: to created time pressures so that decisions are made under stress, and presumeably in a manner favorable to the party using these tactics. Setting a deadline for completing negotiations would seem at first glance to work both ways, in that it would put pressure on both

negotiating teams to reach agreement before the deadline. However, it generally favors the party that sets the deadline, because in order to use it, that party must have evaluated the relative desire for the project of the two parties, i.e., its leverage position vis-a-vis the other party, and determined that it was in a better position to withstand the time pressur .

Stretching out negotiations, on the other hand, clearly favors the party in whose city or country the negotiations are taking place. The stretch-out may take different forms: lengthy discussions on every point at issue, however minute, shortening the daily negotiating sessions, cancelling particular sessions, or postponing subsequent sessions because of "intervening" demands. Whatever the form, the impact on the visiting negotiating team is progressively greater pressure as their frustration mounts, the other duties and responsibilities thus being neglected continue to grow, and the messages from their offices become from frequent. This pressure eventually induces a desire to "get the matter over with", even at the cost of making concessions on key issues.

Making last minute demands is a tactic used most frequently by Governments and Government enterprises. These demands generally relate to pricing elements of the project under negotiation, and they are made by an official or body senior to the negotiating team leader. It is generally made after negotiations have been completed and the visiting negotiators, under the impression that they now have a valid agreement, are about to return to their home office. The pressure to accede to any demand made under such circumstances may often be irresistible.

9.2.6 Utilizing the "meet the competition" gambit

This is a tactic that can take various forms, depending on which party utilizes it and what is its role in the project. It is used by Governments and Government enterprises quite explicitly, since in most projects involving these entities there may have been several proposals, submitted by competing groups for participation in the project, to which they can point as the "competition" to be met. It is also utilized quite frequently by foreign enterprises and investors, but in a somewhat less explicit fashion; these entities make vague reference to their need to decide where they can best apply their efforts or invest their "limited" human and financial resources, and mention what incentives, concessions, exemptions from fiscal obligations, or other forms of support or assistance they have been accorded in other places. The "competition" in these cases is more amorphous - it can sometimes mean the rest of the world.

9.2.7 Presenting "standard terms", "national practice", "setting a precedent" as counter arguments

A tactic commonly used by large transnational companies is to resist otherwise reasonable and valid requests by conceding the reasonableness of the requests but asserting that they cannot be granted because the proposed conditions that they have presented are either their "standard terms" or are in line with and possibly even required by their "national practice", or that the requests, if granted, would set a precedent which would force them to modify all their existing arrangements in other parts of the world.

None of these arguments have any validity, of course. So-called standard terms are constantly revised by the companies themselves as their lawyers think up additional protective or advantageous clauses to insert. Except for very limited instances based on juridical requirements, there are no conditions imposed by "national practice". As for certain requests "setting a precedent", that may be true but irrelevant; since no two negotiations and ensuing contracts are identical, there is no way to avoid setting precedents, particularly where agreements are reached on the merits and not on the form of the underlying transaction.

10 Concluding comments

In describing their contractual relationship with another party businessmen often use terms which are more commonly applied to a marriage between a man and a woman than to two parties entering into a contract; many even refer to the relationship as a commercial marriage. While there are some experienced negotiators who find this analogy inappropriate, if not derisive, there are others who find in the analogy many common elements: a set of mutually recognized rights and obligations within a given relationship, repeated clashes brought about by minor and major disagreements that create frictions which undermine and can eventually break up the relationship, and changes of circumstances over a period of time that upset the fine balance created during that time, often laboriously, between rights, obligations and self-interest.

The element that manages to keep a marriage going despite disagreements, changes of circumstances and other vicissitudes of life is something that transcends the specific societal and personal rules that govern the relationship - it is the emotional attachment

between the couple that induces them to overcome their disagreements, to accept certain inequalities between them, and to re-adjust their relationship to each other when outside circumstances bring about a disequilibrium within the existing relationship.

There needs to be a similar intangible element in the business relationship if it is to overcome the frictions that inevitably will arise between the parties as they implement their contractual agreement and carry out and expand their relationship. That element is mutual understanding and trust. With it present, the parties can, as in a marriage, overcome frictions, resolve disagreements, overlook inequalities, renegotiate rights and obligations and, should it become necessary, re-structure the relationship. Without it, the frictions generate progressively more heat, the disagreements fester and escalate, the inequalities become more apparent, and the respective rights and obligations become more sacrosanct, leading inevitably to a break up of the relationship. Mutual understanding and trust acts as the glue that will hold the relationship together, and will provide the incentive for the parties to make the necessary adjustments to make their relationship, and thus their project, continue to flourish.

One final thought for neophite negotiators - it is more important in evaluating the success of a negotiation that mutual understanding and trust between the parties has been created than that the contractual agreement that has resulted from the negotiation contain all of the favorable terms and conditions that had been desired or envisaged during the preparation stage of the negotiation. In the first situation, what is being acquired is a fundamental and enduring aspect of the relationship; in the second, what is being acquired may well turn cut to be fragile and short-lived.

BACKGROUND FACTS OF PROPOSED PETROCHEMICAL JOINT VENTURE IN TERITANIA

This proposed joint venture involves the establishment of a plant in Teritania to manufacture and export nylon and other petroleum based synthetic fibers. The joint venture is to be between United Petrochemical Corporation ("UPC"), a United States company incorporated in the State of Delaware, the Teritania National Oil Company ("TNOC"), a Teritanian State-owned enterprise, and the Investment Bank of Teritania ("IBT"), a Teritanian State-owned development bank.

Background of the Parties

Teritania is located on the West Coast of Africa, and became an independent country in the early 1960's. Its laws are based on and are similar to the laws of France, and its official language for the conduct of government activities is French. While initially run by a single-party government, which established a centrally controlled economic system, Teritania has within the past two years embarked on a liberalization program encompassing both its political and economic structure.

In the early 1970's a major oil and gas reserve had been discovered along the southern coast of Teritania and off-shore adjacent to it. Over the next decade several wells were put into production pursuant to a co-production agreement with each of three large Western oil companies. In 1980, the Government of Teritania established TNOC as a wholly-owned State enterprise to take over ownership of the oil wells and to act as the Teritanian counterpart under the co-production agreements.

During the 1980's TNOC entered into a series of joint ventures with various Western and Asian companies to establish and operate oil refineries and down-stream plants to convert the crude oil it received under the co-production agreements into consumer products for both its domestic market and for export. TNOC is at the present time a majority owner of an oil refinery, a methanol plant, and a PVC plant. In addition to the synthetic fiber plant that is the subject of these negotiations, TNOC is also evaluating the feasibility of establishing plants to produce carbon black, nitrogenous fertilizers and detergents.

IBT was established by the Government of Teritania in 1989 as a development bank to assist Teritanian entrepreneurs in establishing private sector medium and light industries by providing them investment advice, seed capital and local

financing. Except for some small loans to a few cottage industry operations, this will be the first project in which IBT will be playing an important role and making a substantial investment.

In early 1991 IBT obtained, with the assistance and through the efforts of the International Finance Corporation, a 15-year low-interest loan from the World Bank of $100,000,000, to be used for foreign currency loans to private sector companies. Although the proposed project does not qualify as a private sector project, IBT has been able to obtain the consent of the World Bank to participate in it upon the commitment of the Government, IBT and TNOC that at least 25% of the shares of the joint venture company will be sold to private sector investors within five years.

UPC is a wholly-owned subsidiary of ESMOB Inc., one of the five largest oil companies in the world. ESMOB is already active in Teritania, having entered into a co-production agreement with the Government of Teritania (now replaced by TNOC) and an agreement with the TNOC joint venture company producing methanol for the export marketing of nearly 75% of the company's methanol production. UPC owns and operates five plants in the United States and three plants in Europe which produce nylon, dacron, orlon and certain other synthetic fibers; it has also designed and built, and has operated under management contracts, similar plants in Egypt, India, Indonesia and Taiwan.

History of Prior Negotiations

UPC became interested in this project when the ESMOB Project Director in Teritania was informed by one of his friends in TNOC that TNOC considered the synthetic fiber plant to be of high priority. The Project Director immediately informed his home office, and within a month a senior executive of UPC, Mr. George Lamont, arrived in Teritania for meetings with TNOC to discuss the possible participation of UPC in the project, either as the design engineers, contractors, technology suppliers, contract managers or joint venture partners. While he was informed that any detailed discussions on the role of UPC in the project was premature, Mr. Lamont was given a certain amount of information concerning the types and quantities of products projected for the plant, the cost at which petroleum-based raw materials and utilities would be provided to the plant, and the prices at which the products would be expected to be sold.

Upon his return to the United States, Mr. Lamont, after consulting with the President of UPS, set up a team to prepare a

preliminary proposal to be sent to TNOC outlining the scope and nature of UPC's participation in the project. The proposal would contain capital cost estimate for the construction of a plant with the product production capacity indicated by TNOC, a cost of production analysis for each type of product, a proposed financing plan, a sources and application of funds statement, a ten-year projected profit and loss statements and proforma balance sheets. Because of its prior experience in other developing countries in establishing and operating similar plants, UPC was able to utilize prior studies, as well as other technical and financial data relating to those projects which it had in its files, as the basis for an adjusted and up-dated proposal reflecting the data obtained from TNOC by Mr. Lamont.

UPC's Project Proposal

The proposal prepared by UPC contemplated the construction and operation of a plant of three separate production lines designed to produce, respectively, 100 tons of nylon, 50 tons of dacron and 30 tons of orlon, yarn per day. The total capital cost of the project, including the equivalent of $ 5 million of working capital, came to $ 160 million. Of this amount, approximately $ 112 million was required in foreign currencies, and $ 48 million in local currency.

In calculating production costs, UPC had proceeded on the assumption that for at least the first ten years of operation the plant would require at least 32 expatriate skilled operators and supervisory technical personnel, not including senior technical management personnel. In preparing the projected profit and loss statement and proforma balance sheets, UPC assumed a debt/equity ratio of 3/1, with debt obligations totalling $ 120 million and equity capital totalling $ 40 million; it further assumed that the debt would be in the form of 15-year loans at a cumulative interest rate of 9% per annum, with the interest for the first three years being capitalized and the principal and capitalized interest being repaid in 24 semi-annual installment, the first such installment being repayable 42 months after the effective date of the loan.

Based on these assumptions, and on sales revenues reflecting UPC's projections of world prices for nylon, dacron and orlon from 1997 onward, UPC's cash flow statement showed that the proposed project would not only be able to service a loan or loans of this magnitude and with these terms, but would also generate profits after servicing the loan or loans of $ 1.5

million by the end of operating year 3, $ 3 million by the end of year 5, and upwards of $ 5 million per year thereafter.

The proposal did not describe the role and scope of participation of UPC in the project with any specificity. It merely listed the areas of UPC's technical and managerial expertise and invited TNOC to define what role and participation it wished to have from UPC. These areas ran the gamut from doing the design and engineering of the project through all the elements required for the construction, equipping, starting up and management of the operations of the plant, including the supply of technology, equipment and materials.

Mr. Lamont sent this proposal to the President Director General of TNOC, Mr. Christian Ampora, within one month after his return to the United States. In his cover letter, Mr. Lamont made a point of the speed with which UPC was responding to TNOC's "needs", emphasized that TNOC could avoid spending a lot of money by implementing the project on a negotiated rather than a public tender basis, and offered to bring a team to Teritania at TNOC's convenience for further talks. Mr. Lamont admitted that the UPC proposal would require considerable discussion and modification before it could form the basis of mutual agreement, but offered his personal cooperation and involvement in bringing these discussions and eventual contract negotiation to a successful and mutually satisfactory conclusion.

Preliminary Negotiations

Upon receipt of the proposal from UPC, Mr. Ampora appointed a "Technical Committee" to review the proposal and submit its comments and recommendations to him and to TNOC's Board of Directors for consideration. The members of the Technical Committee consisted of TNOC's Director General for Development and four senior engineers, including one from the British consulting firm that was involved in the preparation of the feasibility study for the synthetic fibre plant that was then in progress.

The report of the Technical Committee was submitted to Mr. Ampora three months after the proposal was referred to it. After reviewing it and making some non-technical changes, Mr. Ampora sent copies to each member of the Board of Directors, as well as to Mr. Jean-Marie Enoga, the President Director General of IBT, with a note indicating that he would like to have IBT assist in the financial evaluation of UPC's proposal and the

Technical Committee's recommendations, and to participate to the maximum extent permissible in the financing of the project.

The proposal, together with the Technical Committee's recommendations and some general comments on the financial plan from IBT, was submitted to TNOC's Board of Directors. After a certain amount of discussion, the Board of Directors authorized Mr. Lamont to commence preliminary negotiations with UPC on the project, but within certain defined parameters and subject to certain conditions. These parameters and conditions were as follows:

1. Although negotiations would be commenced with UPC at this time, work on completing the feasibility, including preparation of tender documents, would continue.

2. UPC would be invited to become a joint venture partner, with an equity interest of not less than 30% and not more than 49%.

3. UPC would be asked to supply the technology (i.e. patent right, proprietary know-how and related intellectual property rights) required for the production of nylon, orlon and dacron, and any other similar products that UPC may develop or obtain the licence to produce in the future.

4. Membership on the Board of Directors and management of the joint venture would be commensurate with the equity ownership of the joint venture partners.

5. Design and construction of the synthetic fiber plant, including performance and financial guarantees, would be contracted for on a public tender basis.

6. IBT would be asked to underwrite the issue for public subscription in Teritania of up to 25% of the shares of the joint venture company (to be named Teritania Fibers & Plastics Company, S.A.) and to provide not less than $ 40 million in long-term loans, part in foreign exchange and part in local currency.

7. UPC would be primary responsible for negotiating and arranging for the balance of foreign exchange loan financing required for construction and start-up of the plant.

8. UPC would be required to purchase annually not less than 50% of the plant's production, at a price that would not be less than the actual cost of production of each product plus a mark-up which would insure a minimum of 10% net profit on equity. To the extent that more than 50% of the plant's production is to be exported, UPC will, if so requested, market the additional quantity on the basis of a marketing fee of not more than 3%.

9. To the extent that the plant would need chemicals or other materials and supplies which are produced by UPC, they will be provided to the joint venture company at a price no higher than it supplies such materials and supplies to its own affiliates or its best customers. If not produced by UPC, UPC will procure them for the new plant on the basis of a procurement fee that will not exceed 3%.

Mr. Ampora then wrote to Mr. Lamont inviting him to come to Teritania for preliminary discussions, and summarized the parameters and conditions established by TNOC's Board of Directors. In the ensuing telephone and telefax exchanges, certain preliminary agreements were reached and certain issues were identified for further negotiation during the visit of Mr. Lamont and his team to Teritania scheduled for the week of 18-23 November 1991.

Agreed Points and Open Issues

The points agreed upon in principle prior to the arrival of Mr. Lamont and his team to Teritania were as follows:

1. UPC would become a joint venture partner in the project as an investor and as the technical partner, up to a maximum of 35% of the equity. No agreement was reached, however, as to the manner of payment, timing and eventual repatriation of the investment, nor on UPC's participation in any increase in the total amount of equity over the

$ 40 million assumed as the equity base contemplated in UPC's proposal.

2. UPC would provide the technology required for the production of nylon, dacron and orlon, and similar synthetic fibers that it may have or will develop in the future, and agreed to exert its best efforts to obtain the rights to, and provide to the joint venture similar technologies newly developed by other companies. No agreement was reached, however, on the question of the price to be paid for the technologies and its manner of payment, nor on such technical issues as improvements, modifications, grant-backs and performance specifications.

3. UPC would have management responsibility for the operations of the plant for the first five year of operations, but no agreement was reached as to the scope of management, the manner in which it would be implemented, and the extent of payment, if any, for such management.

4. While UPC might provide some proprietary equipment and materials, and as technical partner would supervise the design, engineering, construction, equipment procurement, erection and start-up of the plant, it was agreed that the actual construction of the plant would be carried out by an unrelated contractor through a public tender procedure.

5. UPC would provide all the technical support that might be required to satisfy financial institutions about the technical and economic feasibility of the project.

6. Other issues, such as export marketing, were touched upon, but were deferred to later stages of negotiations.

Ten days before the arrival of the UPC team in Teritania, Mr. Ampora received from Mr. Lamont drafts of a proposed joint venture agreement, a technology licensing agreement, an engineering and technical assistance agreement, an equipment and materials supply agreement, and an operating management contract. Mr. Lamont admitted in his letter to

Mr. Ampora that the drafts contained provisions that had not as yet either been discussed or agreed upon, but expressed his view that the negotiations would be expedited if the negotiators could focus on the specific provisions contained in these drafts.

Mr. Ampora circulated the drafts to some of his senior executives, but otherwise took no further action to prepare for the coming negotiations, such as appointing a negotiating committee to review the draft agreements, to identify unacceptable provisions and to prepare non-negotiable, preliminary and fall-back positions on key provisions in these agreements. He did, however, send out a memorandum to the members of the Technical Committee asking them to come to a meeting in his office at 9:00 a.m. on 18 November 1991 to discuss the UPC proposals prior to his first meeting with Mr. Lamont and his team at 11:00 a.m. that same day.

At the 11:00 a.m. meeting Mr. Lamont introduced the other members of his team to Mr. Ampora: they were, respectively, UPC's Chief Financial Officer, its Vice-President in charge of New Projects Division, and its General Counsel. After some exchanges of a social nature and some preliminary discussion of schedules and agendas for subsequent meetings, Mr. Ampora invited Mr. Lamont and his team to a formal luncheon attended by the Deputy Minister for Energy and Petroleum Affairs, several members of TNOC's Board of Directors, Mr. Enoga, President Director General of IBT, and two of IBT's senior executives. Upon returning to his office after the luncheon, Mr. Amphora suggested that in view of the late afternoon hour it might be best if formal negotiating sessions began the next morning, and the first meeting was set for 10:00 a.m. the next morning.

As soon as Mr. Lamont and his team returned to their hotel, Mr. Ampora called the head of TNOC's legal department and asked him to the next day's meetings. He also called Mr. Enoga and asked if he could have one of his senior financial experts attend the meetings to represent IBT and to assist TNOC in the negotiations with UPC. He told Mr. Enoga that he would have a set of the draft agreements proposed by UPC waiting for the IBT expert when he arrived for the first meeting.

ISSUES IN JOINT VENTURE AGREEMENT
TO BE RESOLVED IN SIMULATED NEGOTIATION SESSIONS

1. Capital Structure

- Total investment required
- Total equity required
- Equity sources and distribution
- Sources, types and ranges of financing

2. Subscriptions to Equity Capital

- Method of payment for shares
- If not in cash, method for valuing investments in kind
- Transfers of shares: whether to have puts, calls or rights of first refusal, and on what basis

3. Management

- Make-up of Board membership
- Which partner appoints the Chief Operating Officer or General Manager
- Whether there should be a separate management contract, and if so, its scope and broad outlines

4. Marketing Arrangements

- Whether there should be any export marketing restrictions
- Whether there should be a separate marketing agreement and with whom

5. Role and Responsibilities of Parties Prior to Construction of the Plant

- During Period for Firming Up Financing Plan
- During Plant Design and Construction Period
- Subsequent to Start Up of Operations

6. Duration and Termination of Joint Venture

- Prior to Establishment of Joint Venture Company
- After Establishment through Construction Period
- Subsequent to Start Up of Operations

7. Supply of Technology, Equipment, Materials and Services

- Technology: already agreed to have separate license agreement with foreign partner affiliate owning the required technology

- Proprietary equipment and materials: already agreed to have separate purchase agreement with appropriate affiliate of foreign partner
- Construction of the plant: already agreed to award construction contract on basis of public tender
- scope and principal terms of these separate agreements remain to be negotiated

8. Dispute Resolution

- Whether through courts, arbitration or mediation
- If arbitration, whether institutional or ad hoc and under what rules
- Where the arbitration will take place
- What will be the applicable law

ISSUES IN LICENSE AGREEMENT
TO BE RESOLVED IN SIMULATED NEGOTIATION SESSIONS

1. Scope of the License

- What is to be included: whether patents and related know-how, or proprietary know-how only
- If patents, treatment after validity period for the patent or patents expires
- Whether it includes improvements and modifications, and if so, under what terms and conditions
- Whether it includes use of trade marks or brand names

2. Nature of the License

- Whether it is to exclusive or non-exclusive
- Whether there are to be territorial restrictions, and if so, what and for how long

3. Grant-Backs by Licensee

- Whether licensee should be obligated to grant back rights to licensor for improvements and modifications to the technology by licensee
- If so, under what terms and conditions

4. Guarantees and Quality Control

- The scope of production performance or product specification guarantees to be given by licensor
- The quality control rights to be given to the licensor
- The technical assistance and training to be provided by teh licensor

5. The Compensation for the License

- The amount of compensation
- The method of payment: whether lump-sum paymnet in advance, annual royalty paymnets based on production, or combination of both
- If annual royalty payments, how calculated and for how long
- When and how are the compensation payments to be made
- What, if any, will be the impact of improvements and modifications on the compensation arrangements

6. Infringement and Its Consequences

- Consequences in case of claim of infringement against licensor/licensee
- Consequences in case of claim of infrigement against thir party
- Consequences where claims involves improvements and modifications made by licensee

7. Duration and Termination of License

- Period of license
- Conditions permitting prior termination
- Consequences of termination

8. Dispute Resolution

- Whether through courts, arbitration or mediation
- If arbitration, whether institutional or ad hoc and under what rules
- Where the arbitration will take place
- What will be the applicable law

ISSUES RELATING TO SUPPLY OF SERVICES, EQUIPMENT AND MATERIALS TO BE RESOLVED IN SIMULATED NEGOTIATION SESSIONS

1. Supply of Design Services

- Whether the design of the plant will be the responsibility of the foreign joint venture partner or will be awarded to an unrelated engineering firm selected by the joint venture company
- If the former, what will be the terms and conditions, including compensation, under which such design services will be provided
- If the latter, what will be the procedure for the selection of and the terms of the contract to be awarded to the unrelated engineering firm
- Whether, in the latter case, the participation and/or approval of the foreign joint venture partner will be required
- If so, what will be the terms and conditions, including compensation, if any, for its participation
- What will be its impact on the performance guarantees of the various parties involved in the design and construction of the plant

2. Supply of Equipment and Materials

- What, if any, will be the extent of proprietary equipment to be provided by the foreign joint venture partner, and under what terms and conditions, including pricing formula, will it be supplied
- What, if any, will be the role of the foreign joint venture partner in the procurement of the balance of the equipment required for the construction and start-up of the plant
- What will be the extent of proprietary raw and component materials to be provided by the foreign joint venture partner, and under what terms and conditions, including pricing formula, will it be supplied

3. Construction of the Plant

- What will be the procedure for the award of the construction contract
- What should be the type of contract: turnkey, semi-turnkey, split function, etc.
- What should be the pricing arrangement: lump-sum, unit price, cost plus, cost plus target, etc.

- What should be the scope of the guarantees to be required of the contractor: completion, product quality, product quantity, raw material and utility consumption, etc.
- What is the nature of the security to be demanded: retention, performance bond, gurantee letter of credit, etc.

4. Dispute Resolution

- Whether through courts, arbitration or mediation
- If arbitration, whether institutional or ad hoc and under what rules
- Where the arbitration will take place
- What will be the applicable law