in favour of payment for such retransfer and in favour of applying the same principle for the transfer of improvements of the technology from the contractor to the purchaser.

88. It was agreed that UNCITRAL should not duplicate the work in regard to the proposed code of conduct on transfer of technology. However, it was generally felt that it would be desirable for the legal guide to refer to relevant issues under consideration by UNCTAD so that the parties would be made aware of them.

FUTURE WORK

89. There was general consensus that the remaining topics listed in the study by the Secretary-General in A/CN.9/WG.V/WP.4, para. 36 should be completed by the Secretariat and examined by the Working Group.

90. It was pointed out that other topics such as maintenance, spare parts, customer's service, technical assistance, variations, financial arrangements, time limits, feasibility studies, modes and effects of notices, supply of raw materials and industrial input, tenders, liability of a consulting engineer, joint and several liability of several contractors and bankruptcy might also be included.

91. The Working Group requested the Secretariat to complete the remaining preparatory work for its next session. It was suggested that sufficient time should be made available to the Secretariat to prepare the remaining aspects of this subject in order to make the documents available well in advance to the participating countries for their study. However, the Group agreed that the Secretariat should be given a discretion regarding the organization of work including the selection of the additional topics suggested.

92. The Working Group also entrusted the Secretariat with the drafting of the legal guide.

93. As regards clauses related to industrial co-operation, the Working Group considered the note by the Secretariat on the subject (A/CN.9/WG.V/WP.5)* and agreed that work on it be deferred. The Working Group agreed to concentrate its work on contracts for the supply and construction of large industrial works at the present moment. However, it requested the Secretariat to submit, at a future session, a preliminary study on specific features of industrial co-operation contracts after the preparation of the legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works.

94. Some views were expressed on when the next session should be held. One suggestion was to hold the next session early in 1982. Another view was that the next session of the Working Group might be arranged just before the next session of the Commission as was done this time so that again many members may be represented. The Working Group expressed its wish to the Commission to take into account the urgency of the project in determining the date of the next session of the Working Group.

* Reproduced in this volume, part two, IV, B, 2.

B. Working papers submitted to the Working Group on the New International Economic Order at its second session (Vienna, 9-18 June 1981)

1. STUDY OF THE SECRETARY-GENERAL: CLAUSES RELATED TO CONTRACTS FOR THE SUPPLY AND CONSTRUCTION OF LARGE INDUSTRIAL WORKS (A/CN.9/WG.V/WP.4 AND ADD.1-8)*

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Part one

[A/CN.9/WG.V/WP.4*]

INTRODUCTION

1. The Working Group on the New International Economic Order at its session held in New York in January 1980 recommended to the Commission for possible inclusion in its work programme, *inter alia:*

> "4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produits en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general."[1]

2. The Working Group was of the opinion that this item would be of special importance to developing countries and to the work of the Commission in the context of the new international economic order. The Group therefore requested the Secretariat to prepare a study on this item and submit it to the Commission at its thirteenth session. That study[2] reviewed the various types of contracts used in the context of industrialization, described their main characteristics and content and referred to the work carried out in this field by other organizations.

3. The Commission, at its thirteenth session, welcomed the recommendations of the Working Group concerning subject-matters to be included in the work programme of the Commission and agreed to accord priority to work related to contracts in the field of industrial development.[3]

4. In considering the various different types of contracts set forth in the study of the Secretary-General, there was wide agreement in the Commission to commence work on contractual provisions relating to contracts for the supply and construction of large industrial works and contracts on industrial co-operation in general. It was noted that these contracts were of a complex nature and included elements found also in other types of contract. It was thought that these contracts would, therefore, form a basis for possible future work in respect of other related contracts. It was also felt that the elaboration of model clauses, model contracts or model rules in regard to the supply of large industrial works was a logical sequence to the law of sales.[4]

5. The Commission, therefore, requested the Secretary-General to carry out preparatory work in respect of contracts on the supply and construction of large industrial works and on industrial co-operation.[5] The present study is submitted in compliance with that request.

6. It was generally agreed that the Secretariat in carrying out the preparatory work should have a certain measure of discretion.[6] The Commission endorsed the suggestion by the Secretariat that its work should comprise studies of the available literature and the relevant work of other organizations and should analyse international contract practices. It was noted that the work of the Secretariat would be facilitated if members of the Commission provided the Secretariat with copies of such contracts.[7]

7. The Secretariat is not yet in a position to base its study on an analysis of actual contracts except in a few instances. The collection of contracts in the field of industrialization which the Secretariat has at its disposal is so far too limited to permit substantial conclusions. The Secretariat, however, based its findings on the study of general conditions, model forms of contract and available relevant literature.

A. *Work done by other international organizations*

1. *Conditions and models under study*

8. The present study took into account, in particular, the following documents:

(*a*) General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, No. 188A and 574A prepared by the United Nations Economic Commission for Europe (ECE), referred to as the ECE General Conditions or as ECE 188A/574A;

(*b*) Guide on Drawing up Contracts for Large Industrial Works (ECE/TRADE/117), referred to as the ECE Guide;

(*c*) Conditions of Contract (International) for Electrical and Mechanical Works (including Erection on Site)

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* 21 April 1981.

[1] A/CN.9/176, para. 31 (Yearbook . . . 1980, part two, V, A).

[2] A/CN.9/191 (Yearbook . . . 1980, part two, V, B).

[3] Report of UNCITRAL on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 143 (Yearbook . . . 1980, part one, II, A).

[4] *Ibid.*, para. 136.

[5] *Ibid.*, para. 143.

[6] *Ibid.*, para. 141.

[7] *Ibid.*, para. 139. By a note-verbale dated 31 October 1980 the Secretary-General solicited the member States of the Commission to provide copies of such contracts and other relevant materials assuring to keep confidential all materials that are of a confidential nature when received. At the time of the preparation of this study, only an industrialized State communicated its willingness to provide the Secretariat with such materials in the near future.

with Forms of Tender and Agreement prepared by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), second edition 1980, referred to as FIDIC-EMW; and,

(*d*) Conditions of Contract (International) for Works of Civil Engineering Construction with Forms of Tender and Agreement also prepared by the FIDIC, third edition 1977, referred to as FIDIC-CEC.

9. In addition to those general conditions which are intended for use in international commercial relations, the present study took into account the work of the United Nations Industrial Development Organization (UNIDO) which is engaged in drafting model contracts for the fertilizer industry. The relevant documents are:

(*a*) Second Draft of the UNIDO Model Form of Turn-key Lump-Sum Contract for the Construction of a Fertilizer Plant (ID/WG.318/1), referred to as UNIDO-TKL;

(*b*) First Draft of the UNIDO Model Form of the Semi-Turn-key Contract for the Construction of a Fertilizer Plant (ID/WG.318/2), referred to as UNIDO-STC;

(*c*) Third Draft of the UNIDO Model Form of Cost Reimbursable Contract for the Construction of a Fertilizer Plant (ID/WG.318/3), referred to as UNIDO-CRC;

(*d*) Consolidated Comments upon the Second Draft of the UNIDO Model Form of Turn-key Contract for the Construction of a Fertilizer Plant (ID/WG.318/4), referred to as comments; and,

(*e*) Alternative Draft to the Third Draft of the UNIDO Model Form of Cost Reimbursable Contract for the Construction of a Fertilizer Plant (ID/WG.318/5), referred to as counter-proposal.

2. *Work of UNIDO*

10. The Second Consultation Meeting on the Fertilizer Industry at Innsbruck, Austria, 6-10 November 1978, reviewed a Preliminary Draft of the UNIDO Model Form of Cost-Reimbursable Contract for the Construction of a Fertilizer Plant (ID/WG.281/12). This meeting also discussed the preparation of other UNIDO model forms of contract for the construction of a fertilizer plant (ID/WG.281/2).[8]

11. An Expert Group Meeting on UNIDO Model Forms of Contract for Fertilizer Plants was held at Vienna, Austria, 26-30 November 1979. To this meeting the following documents were submitted:

(*a*) Second Draft of the UNIDO Model Form of Cost Reimbursable Contract for the Construction of a Fertilizer Plant (ID/WG.306/1);

(*b*) First Draft of the UNIDO Model Form of Turn-key Lump-Sum Contract for the Construction of a Fertilizer Plant (ID/WG.306/2).

12. After that Expert Group Meeting the UNIDO Secretariat prepared further drafts (ID/WG.318/1-3, see paragraph 10, *supra*). Some members of the Expert Group, representatives of contractors from France, Germany, Federal Republic of, Japan, United Kingdom and the United States of America, referred to in this study as an international group of contractors, prepared their consolidated comments upon the Second Draft of the UNIDO Model Form of Turn-key Contract and their Alternative Draft to the UNIDO Model Form of Cost Reimbursable Contract (ID/WG.318/4-5, see paragraph 10, *supra*).

13. These UNIDO documents were submitted to the Third Consultation on the Fertilizer Industry at São Paulo, Brazil, 29 September-2 October 1980, but only part of the UNIDO-TKL model contract was discussed.[9] Therefore, another Expert Group Meeting on Model Contracts for the Construction of a Fertilizer Plant took place at Vienna, Austria, 23 February-6 March 1981, which considered the UNIDO-TKL and UNIDO-CRC models. Another meeting will be held 13-16 April 1981 and it is hoped that these two models will be finalized at the meeting. The UNIDO-STC model and another model on know-how and transfer of technology are expected to be ready by the end of the year.

3. *Work of ECE*

14. The ECE has published several sets of general conditions for contracts on supply and construction of large industrial works.[10] Among them only ECE 188A and 574A, prepared in 1957, have been taken into account, because it was felt that they are representative of approaches undertaken by ECE.

15. The differences between ECE 188A and ECE 574A are marginal. They relate mainly to the formulation of the exonerating circumstances and to the settlement of disputes by arbitration. These differences have their origin in the elaboration of the General Conditions No. 188 by West European countries in 1953 and their later revision in an East-West context in 1955 which led to the adoption of No. 574.

16. The ECE General Conditions relate to a contract which may be called a semi-turn-key contract. They do not relate to any particular branch of industry and are in general oriented on the model of relations between parties from developed countries.

4. *Work of FIDIC*

17. The FIDIC Conditions have been drafted separately for civil engineering works and for electrical and

[8] Report of the Second Consultation Meeting on the Fertilizer Industry (ID/221).

[9] ID/260, paras. 49-56.

[10] See A/CN.9/191, para. 47 (Yearbook . . . 1980, part two, V, B).

mechanical works. The latter relate more or less to all branches of industry. In both cases it is assumed that the purchaser will retain the services of an engineer as his agent, but that the engineer will nevertheless act fairly between the contractor and the purchaser.

18. The FIDIC Conditions are aimed at holding a fair and reasonable balance between the requirements and interests of the parties concerned. The two sets of FIDIC Conditions (see paragraph 8, *supra*) were inadvertently omitted in the study on international contracts in the field of industrial development (see footnote 2, *supra*).

B. *Aim and scope of the study*

1. *Aim of the study*

19. The present study aims mainly at identifying legal issues in contracts on the supply and construction of large industrial works (referred to as "works contracts"). For each topic the study attempts to describe the main characteristics, examines and compares the provisions contained in the various forms under study (see paragraphs 8 and 9, *supra*) and comments on them where appropriate.

20. The analysis of the various forms under study is not exhaustive. This is because the purpose of the analysis is not to evaluate existing models as such but to identify legal issues on which the Commission might usefully undertake work without necessarily duplicating the efforts of other organizations. It does not matter, therefore, that the UNIDO model contracts are still in draft form or that all the forms under study have been prepared for different types of contracts, for specific sectors of industry or for an industry in general.

21. It is to be noted that our study proceeds mainly with an examination and comparison of similar provisions on a given issue found in the various forms under study. Of necessity, these provisions have to be isolated from their context. However, no value judgment is intended when comparisons are made as each provision has to be evaluated in its own context. Where a provision appears to favour one party, there might be other provisions which favour the other party. And it has to be borne in mind that all provisions can be more or less counter-balanced by the price.

2. *Contract on supply and construction of large industrial works: a definition*

22. In a previous study the contract on supply and construction of large industrial works has been defined as a "comprehensive contract between the client [the purchaser] and *one* contractor (supplier) only. This contract comprises all the various aspects of such a transaction: design, drawings, documentation, delivery, assembly, building, installation, putting into operation, demonstration tests, controls, initial operation of the plant and taking-over. Thus the main characteristic of this contract is its comprehensive nature and complexity."[11]

23. This comprehensive contract, in a pure form, would be a turn-key contract. However, for various economic, financial and technical reasons, not all purchasers favour the turn-key concept.

24. Often, the purchaser participates in the construction of the plant (e.g. in the provision of the necessary connexion for power and water and supply of materials). Very often the purchaser provides all civil engineering work including the construction of buildings; he may also provide the personnel for the assembly, erection, testing and start-up of the plant.[12] Through such participation by the purchaser, the contract becomes a semi-turn-key contract.

25. The purchaser in a turn-key, and more often in a semi-turn-key, situation may make use of a consulting engineer. The involvement of such an engineer, however, does not change the contract into a tripartite transaction: the engineer is acting on behalf of the purchaser.

26. Where the engineer represents the supplier's side, he himself becomes the contractor, who will be responsible for the procurement of all necessary supplies and services. In this situation a cost reimbursable contract will usually be concluded.

27. These are only the main types of contract on supply and construction of large industrial works. Various industries require to a certain extent different approaches (e.g. see part two, XV, *Guaranties*). A chemical plant is different from a rolling mill, and a machine-tool factory is different from a textile mill. The division of labour and the responsibility between the contractor and the purchaser may be different according to their specific purposes.

3. *Legal nature of a contract on supply and construction of large industrial works*

28. While it may not always be easy to distinguish between a contract for work on goods where the contractor also provides the materials and a contract for sale of goods yet to be produced, contracts on supply and construction of large industrial works are clearly distinct from contracts for the sale of goods.[13] Nevertheless, contracts for the supply and construction of large industrial works have some common features with contracts

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[11] A/CN.9/191, para. 40 (Yearbook . . . 1980, part two, V, B).

[12] *Ibid.*, para. 42.

[13] *International Encyclopedia of Comparative Law,* vol. VIII, *Specific Contracts,* chapter 8, "Contracts for Work on Goods and Building Contracts" Tübingen, J. C. B. Mohr (Paul Siebeck, 1980), pp. 3 *et seq.*

for sale of goods as a part of the obligation of the contractor is to deliver a plant or equipment.

29. Article 3 of the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna in April 1980* (A/CONF.97/18, hereinafter referred to as Sales Convention), provides that contracts for the supply of goods, to be manufactured or produced, are to be considered sales. There are, however, two important exceptions.

30. The contract is not a sales contract if the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. Except for a pure turn-key contract, in the sphere of manufacture of plants, a supply of materials by the purchaser is quite frequent.

31. The contract is also not a sales contract if the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or other services and the "delivery" of the project, the transfer of technology, the erection of the plant, and the putting into operation are supplies of labour and other services.

32. However, the Sales Convention may become applicable in such situations where a contractor and a purchaser conclude a series of separate contracts, e.g. for the supply of equipment, licensing or assembly.

33. Even though the Sales Convention may not be applicable to all works contracts, nonetheless, reference is made to it as it may provide the analogy on how related issues in a works contract may be solved.

34. The study did not, however, look into any national law. It has already been observed that most national legislations do not contain provisions relating specifically to contracts for supply and construction of large industrial works.[14] Most provisions which courts would apply are not of a mandatory nature. As far as mandatory rules are concerned, the Secretariat was unable to obtain them.

4. *Scope of study*

35. Part two of this study examines clauses which relate to the following:

I. Drawings and descriptive documents
II. Supply
III. Erection
IV. Passing of risk
V. Transfer of property
VI. Transfer of technology
VII. Quality
VIII. Inspection and tests
IX. Completion
X. Take-over and acceptance
XI. Delays and remedies
XII. Damages and limitation of liability
XIII. Exoneration
XIV. Renegotiation
XV. Guaranties
XVI. Rectification of defects
XVII. Termination
XVIII. Applicable law

36. The subjects which are not included in part two and on which the Secretariat intends to carry on its preparatory work for the next session of the Working Group are, *inter alia,* the following:

(*a*) formation of contract; (*b*) definitions; (*c*) subcontractors; (*d*) assignment; (*e*) performance bonds; (*f*) insurance; (*g*) price calculation; (*h*) price revision; (*i*) invoicing; (*j*) payment conditions; (*k*) currency and rates of exchange; (*l*) storage on site; (*m*) liaison agents; (*n*) personnel and additional labour; (*o*) training; (*p*) taxes and custom duties; (*q*) settlement of disputes; (*r*) language of the contract; and, (*s*) interpretation of the contract.

37. Part three contains some questions which the Working Group may wish to discuss in addition to the general questions for future work as described below.

5. *Terms and notions*

38. In the various forms under study and also in those contracts in the Secretariat's collection, the names of parties in a works contract have been variously described. Thus, "contractor" is also referred to as "erector", "holder of contract", "client's contracting party", "vendor", "supplier" or "seller" (provided "supplier" and "seller" are not defined in a contract as denoting a third party as in a cost reimbursable contract). "Purchaser" is also referred to as "client", "customer", "buyer" or "employer". However, throughout our study, the parties to a works contract shall be referred to as "contractor" and "purchaser".

C. *Future work*

39. In its suggestion for possible work to be done by UNCITRAL, the previous study suggested the following courses of action open to the Commission: (*a*) to consider widening the scope of the General Conditions prepared by ECE; (*b*) to prepare new general conditions; (*c*) to prepare a model contract form for transactions in the field of industrial plants in general; (*d*) to deal with

* Yearbook . . . 1980, part three, I, B.

[14] A/CN.9/191, para. 46 (Yearbook . . . 1980, part two, V, B).

certain specific clauses of such contracts; and (*e*) to consider the desirability of a draft convention on international contracts for the supply and construction of large industrial works.[15]

40. At the same time, however, it was also suggested that any decision on the direction the work should take and the ultimate end product should be taken in stages on the basis of progress made in the course of preliminary work.[16] This was confirmed by the Commission at its thirteenth session.[17]

41. However, some general direction of work would have to be agreed. In this connexion, in view of the importance given by the Commission to the legal aspects of contracts for the supply and construction of large industrial works, the Working Group might wish to consider whether the preparation of a legal guide in order to assist parties in the negotiation of contracts might be adequate as a preliminary objective.

42. Certainly there are in existence several guides or guidelines such as those prepared by ECE and UNIDO.[18] The ECE Guide, however, addresses itself to enterprises in Europe. Moreover, this Guide is rather brief and general and does not discuss all the legal issues in depth. The various UNIDO documents, on the other hand, deal mainly with economic, technical, administrative and financial aspects of the installation of large industrial works.

43. It appears desirable to have a more comprehensive legal guide which, *inter alia,* identifies the legal issues to be kept in mind when negotiating and drafting contracts on industrial works, describes various approaches pointing out the advantages and disadvantages of each approach and suggests alternative solutions.

44. As work progresses, the contents for inclusion in such a guide may become clearer and a stage may be reached when a model clause approach would be feasible in the context of some clauses. The work may also reveal that a uniform law approach would be appropriate in the light of conflicting national rules as regards other legal issues involved (e.g. in a manner similar to the project currently undertaken by the Working Group on International Contract Practices on liquidated damages and penalty clauses). The examination may further reveal that the preparation of UNCITRAL definitions on some contract terms might be desirable because of the frequent use of legal shorthand in the drafting of contracts—confusion as to their meanings is likely to ensue particularly when parties to an international contract belong to a different legal system or where trade practices differ, (i.e. a similar consideration which prompted the International Chamber of Commerce to adopt INCOTERMS in order to eliminate such difficulties.[19]

45. The process of identifying the proper formula for end products on distinct legal issues and the implementation may very well progress in parallel with the preparation of guidelines. As the work develops, the scope of each area (e.g. types of contract to be covered) would also become clearer. In fact, such process in stages would be essential in order to attain a meaningful guide designed to contribute to the establishment of a new international economic order in a pragmatic manner. And, only after such processes, a more ambitious approach may become more feasible.[20]

46. Whatever the future decision may be, it appears indispensable first to analyse all relevant issues in depth on each concrete legal issue involved, taking into account the interest of both parties and the need for equitable and balanced solutions. Keeping these considerations in mind, this preliminary study has been prepared to assist the deliberations of the Working Group.[21]

Part two

[A/CN.9/WG.V/WP.4/Add.1*]

I. Drawings and descriptive documents

A. *Preliminary remarks*

1. Throughout the various phases of a contract for the construction of large industrial works, a number of documents are issued by the parties in order to determine the scope of the work to be performed, to follow up on its performance and to enable the purchaser to operate the plant. These documents may consist of catalogues,

[15] A/CN.9/191, paras. 52-55 (Yearbook . . . 1980, part two, V, B).
[16] *Ibid.*, para. 148.
[17] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (A/35/17), para. 141 (Yearbook . . . 1980, part one, II, A).
[18] A/CN.9/191, paras. 48 and 50 (Yearbook . . . 1980, part two, V, B).

* 26 May 1981.
[19] The ECE General Conditions do not contain a distinct provision on definitions. The FIDIC Conditions and the UNIDO model contract contain many definitions but they are often different from one another.
[20] Since contracts for supply and construction of large industrial works are frequently concluded on the basis of public tenders, it has been suggested that drafting of procurement regulations with contract conditions may be a useful and promising approach for UNCITRAL. As the work progresses to a mature stage, such an undertaking may also become a relatively easy task.
[21] Since a future decision would ultimately have to be taken by the Commission, the Working Group may also wish to note that a report of the Secretary-General (A/CN.9/203) (reproduced in this volume, part two, V, B), which will be before the fourteenth session of the Commission, has discussed, *inter alia,* future courses of action which are open for the Commission.