or requested by the purchaser to secure or protect the works, the cost of repatriating personnel and equipment, to the extent that this has not already been included in the amount to be paid to the contractor, and damages payable by the contractor for terminating contracts with sub-contractors or other third parties. Losses of this nature may be made compensable to the contractor by way of damages.

(*c*) *Termination arising from circumstances not attributable to either party*

37. The contract might provide that, if the contract is terminated for reasons not attributable to either party (i.e. suspension for a specified period of time because of an exempting impediment, see paragraph 25, above), the contractor is entitled to receive the portion of the price which is attributable to the construction which he has satisfactorily performed. The parties should consider, however, the most equitable way to deal with their respective expenses occasioned by the termination. One possibility is to share these expenses equally or in accordance with an agreed formula. Another possibility is for each party to bear his own expenses.

(*d*) *Termination for convenience*

38. If the contract permits the purchaser to terminate at his convenience, it might, in the event of such a termination, require the purchaser to pay to the contractor the portion of the price which is attributable to the construction satisfactorily performed prior to the termination, as well as for extra expenses incurred by the contractor incidental to the termination (see paragraph 36, above), to the extent that those costs are not already included in the amount to be paid to the contractor. The parties should consider whether the contractor should be entitled to be compensated for some or all of the lost profit on the portion of the contract remaining to be performed. On the one hand, the contractor might have forgone other contracting opportunities in anticipation of completing the contract in its entirety. On the other hand, an obligation on the purchaser to compensate the contractor for his lost profit might make it financially prohibitive for the purchaser to exercise his right of termination for convenience.

39. At the time when the contract is terminated for convenience the purchaser may have received the design for the works from the contractor, but the value of the design may not yet be adequately reflected in the price which would be due to the contractor on the basis of the work which the contractor had satisfactorily performed. To deal with these cases the contract may specify that the purchaser must compensate the contractor for the design insofar as such compensation is not otherwise reflected in the price due to the contractor.

(*e*) *Damages, liquidated damages or penalties*

40. In addition to the payments mentioned above, if the termination is for grounds attributable to a party, the other party may be entitled to damages (see chapter XX, "Damages"), liquidated damages or penalties (see chapter XIX, "Liquidated damages and penalty clauses").

F. *Survival of certain contractual provisions*

41. In some legal systems termination of the contract might be interpreted as bringing to an end all contractual provisions, including those which the parties might wish to survive, such as the rights and obligations of the parties upon termination, guarantees for construction performed, remedies for defective performance, and provisions such as those concerning settlement of disputes and the preservation of confidentiality. The parties should take care to ensure that rights, obligations and remedies which they wish to survive do not lapse upon termination. To do so, the parties should specify in the contract those provisions which are to survive and continue to bind the parties even after termination.

C. Future work in the area of the new international economic order: note by the secretariat (A/CN.9/277)

[Original: English]

CONTENTS

INTRODUCTION

1. At its eleventh session (1978), the Commission included in its work programme a topic entitled "The legal implications of the new international economic order", and accorded priority to the consideration of this topic. The Commission also established a Working Group on the New International Economic Order.[1] At its twelfth session (1979), the Commission considered possible subjects on which it might commence work, and requested its Working Group to make recommendations as to specific topics which could appropriately form part of the work programme of the Commission.[2]

2. At its first session (1980), the Working Group decided to propose to the Commission that work be undertaken on the 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 contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.

3. At its thirteenth session (1980), the Commission endorsed the view expressed by the Working Group that the subject noted above was of special importance to developing countries and to the work of the Commission in the context of the new international economic order. The Commission welcomed the recommendation of the Working Group, and requested the Secretary-General to carry out preparatory work in respect of contracts for the supply and construction of large industrial works and on industrial co-operation.[3]

4. At its fourteenth session (1981), the Commission decided that a legal guide should be prepared that would identify the legal issues involved in contracts for the supply and construction of large industrial works and should suggest possible solutions to assist parties, in particular from developing countries, in their negotiations. It also requested the Secretary-General 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.[4]

5. The Working Group on the New International Economic Order proceeded with the examination of clauses to be found in contracts for the supply and construction of large industrial works at its second and third sessions, and has been examining draft chapters of the legal guide (hereinafter referred to as "the Guide") at its fourth to eighth sessions. It is expected that at its ninth session (1987) the Working Group will consider all the draft chapters of the Guide as revised by the secretariat in the light of the comments by the Working Group, and will thereby complete its mandate. It is further expected that the Guide will be placed before the Commission for approval at its twentieth session (1987).

6. At its second session (1981), the Working Group considered a note by the secretariat entitled "Clauses related to industrial co-operation".[5] In that note the secretariat observed that it did not have the resources to deal simultaneously with both contracts for the supply and construction of large industrial works, and for industrial co-operation. It also observed that despite a note verbale of 31 October 1980 from the Secretary-General soliciting from States members of the Commission copies of industrial co-operation contracts and other relevant materials, not a single contract had been received up to the date of the note. It may be mentioned that no contracts have been received up to the present date. The secretariat also noted that many of the issues in

[1]Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 71.

[2]Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 100.

[3]Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 143.

[4]Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 84.

[5]A/CN.9/WG.V/WP.5.

relation to industrial co-operation which it had identified as possible subjects for study (see paragraph 21, below) also arose in relation to contracts for the supply and construction of large industrial works. In the light of those considerations, the Working Group agreed that the examination of contracts for industrial co-operation should be deferred.

7. With completion by the Commission of its work on the Guide now in sight, and in view of the fact that six years have elapsed since the deliberations at the Commission's thirteenth session on a possible work programme in the context of the new international economic order, the Commission may wish to consider its future work in this area. This report comments on some possible subjects which the Commission may wish to consider.

I. Possible subjects for future work

A. *Contracts for industrial co-operation*[6]

8. Contracts for industrial co-operation are of different types. However, certain characteristics are common to most of the types:

(*a*) The transactions reflected in these contracts, while containing elements similar to well-known categories such as the sale or lease of goods, also contain additional elements which result in mixtures of obligations which do not fall under recognized categories in most legal systems. In particular, the arrangements for remuneration in respect of obligations performed often do not fall within traditional patterns.

(*b*) The transactions are complex, consisting of several interrelated and interdependent obligations. The transactions sometimes include more than two parties.

(*c*) The transactions are intended to endure for several years (in some cases as long as 20 to 30 years).

(*d*) The interrelationship and interdependency of the obligations of the parties, and their long-term nature, create the need for close co-operation between the parties in the performance of the contracts, and for a relationship of mutual trust if the contracts are to be successfully implemented.

9. It is difficult to specify the types of contract which may be regarded as industrial co-operation contracts. Studies on this subject by the Economic Commission for Europe (ECE) have identified six main categories: licensing with payment in resultant products; supply of complete plants and production lines with payment in resultant products; co-production and specialization; sub-contracting; joint ventures; and joint tendering and joint construction or similar projects.[7] It may be noted that the co-operation may extend to fields such as the transfer of technology, production of goods, or the exploitation of natural resources. The categories may overlap. Thus, a joint venture may be formed for joint tendering and construction. These categories cannot be regarded as exhaustive.

10. Within each of the categories mentioned above, the totality of the arrangement which is entered into will be tailored to the particular needs of the parties. For example, in the case of licensing with payment in resultant products, the parties may agree that the licensor pass on to the licensee improvements made to the technology after the date of the licence. Even closer co-operation may be envisaged by provision for joint research and development in the licensed process. In the case of supply of complete plants or production lines with payment in resultant products (often referred to as a buy-back agreement; see paragraph 35, below), payment may be envisaged not only with products of the plant, but also with other products manufactured by the purchaser of the plant.

11. Sub-contracting, i.e. the employment by one enterprise of another to produce goods which the first enterprise needs for the performance of contracts of supply entered into with third parties (see paragraph 17, below), often matures into co-production and specialization, together with joint marketing. The subject of sub-contracting covers the manufacture and supply of goods by the sub-contractor, and also includes the supply of services (e.g. when the personnel of a sub-contractor are more suitable for managing certain projects which the contractor has undertaken). In regard to the manufacture and supply of goods, the sub-contractor may merely process or finish materials supplied by the contractor, or may himself procure new materials and manufacture the goods in accordance with designs or technology provided by the contractor. In the case of co-production and specialization (see paragraph 17, below), additions to the basic arrangements may include co-operation in research and development in regard to production, and the joint operation of after-sales services. In regard to joint ventures, legislation regulating joint ventures may result in variations in their structure in different countries and the business activities which the joint ventures can undertake.

12. Contracts for industrial co-operation are normally concluded between two parties. Tripartite agreements, however, are also sometimes concluded. In such tripartite agreements, one of the parties is sometimes from a developing country. The contracts, whether bipartite or tripartite, may relate only to the countries of the parties (e.g. specialization in production in the respective countries), or to a third country (e.g. a joint venture to be

[6] A fuller description of these contracts is contained in *International Contracts in the Field of Industrial Development: Study by the Secretary-General* (A/CN.9/191) paras. 106–140. They are also described in *Guide on Drawing Up International Contracts on Industrial Co-operation* (United Nations publication, Sales No.E.76.II.E.14) and in *East-West Industrial Co-operation* (United Nations publication, Sales No.E.79.II.E.25).

[7] *Guide on Drawing Up International Contracts on Industrial Co-operation* (United Nations publication, Sales No. E.76.V.E.14), p. 2. The study by the Secretary-General (A/CN.9/191) treats joint ventures as a separate category.

established in a third country, or a joint tender for construction in a third country).

13. Contracts for industrial co-operation have been a feature of trade between the socialist states of Eastern Europe and developed market economy countries, in particular of Western Europe, for the past two decades. As a result, such contracts have been extensively examined and documented in studies prepared by the ECE.[8] Some of these studies include an examination of tripartite industrial co-operation contracts. They refer also to the financing arrangements for such contracts, and also cover some legal issues arising out of the contracts.[9] Comparable studies are not available of bipartite industrial co-operation contracts between enterprises from developed and developing countries.

14. In deciding whether work is to be undertaken in regard to industrial co-operation contracts, two questions need examination. First, whether these contracts are of significance in trade between developed and developing countries; second, if the answer to that question is in the affirmative, whether legal difficulties arise in relation to such contracts which may be alleviated by work of the Commission. With regard to the first question, while these contracts have contributed significantly to East-West trade in the past two decades, the extent to which they are of actual or potential importance to North-South trade is not easy to determine.[10] The information at present available to the secretariat in respect of each of the main categories of industrial co-operation contracts is noted in the immediately succeeding paragraphs.

15. There is evidence that contracts for the supply of complete plants and production lines with payment in resultant products are entered into between developed and developing country enterprises. The fact that products have to be taken back as payment by the supplier of the plant from the developed country creates in the supplier an incentive to supply an appropriate plant and to train the personnel of the purchaser in the operation of the plant. It also creates an incentive in the purchaser from the developing country to operate the plant so as to produce high quality products which will be accepted in payment and be competitive on international markets.[11] There is much less evidence of the practice of licensing by developed country enterprises to developing country enterprises with payment in resultant products.[12]

16. Developing country enterprises are often parties to tripartite industrial co-operation contracts entered into for the purposes of joint tendering and joint construction.[13] In such cases the developing country enterprise will be a member of a consortium of contractors. It will generally supply local labour and locally available equipment and materials, and also sometimes supply building and civil engineering services. Such supply will generally be cheaper than supplies from a source outside the developing country, and payment for these supplies can absorb the local currency component in the funds available for a project. Where a project is located in a remote region or work has to be done under extreme conditions, participation by a developing country enterprise may be essential. Work has been undertaken by other organizations on the contractual terms needed to create consortia, and on the terms on which responsibility may be allocated among the members, and there would appear to be little need for work by the Commission on this subject.[14]

[8]See, for example, *Analytical Report on Industrial Co-operation Among ECE Countries* (United Nations publication, Sales No.E.73.II.E.11); *East-West Industrial Co-operation* (United Nations publication, Sales No. E.79.II.E.25); "Prospects for the expansion of East-West industrial co-operation" (TRADE/AC.21/R.3 and Add.1).

[9]*East-West Industrial Co-operation ...*, part B, chap. 1; "Legal-organizational and financial aspects of tripartite industrial co-operation: a review of recent Yugoslav experience" (TRADE/R.470); John R. Mikton, "Tripartite co-operation involving countertrade among European and developing countries", in the proceedings of the International Workshop on Countertrade, organized jointly by the International Association of State Trading Organizations of Developing Countries and Generalexport, Belgrade, Yugoslavia, 1985.

[10]In relation to the relevance of East-West experience in industrial co-operation to that between developed and developing countries, the second meeting (1981) of the *ad hoc* UNCTAD/UNIDO Group of Experts on Trade and Trade-related Aspects of Industrial Collaboration Arrangements noted as follows: "Some experts noted that many aspects of East-West trade and industrial co-operation may be relevant to similar co-operation between enterprises in developing and developed countries including at the intergovernmental level. In this connection, the Group noted the network of industrial and trade co-operation agreements which socialist countries had with many developing countries. However, other experts pointed out that while East-West experience provided useful guidelines for co-operation with developing countries, it might not be suitable or possible to extrapolate or transfer many of the practices applied in East-West trade and industrial co-operation to developing countries in view of the divergencies among these countries, e.g. as regards natural resource endowments, adequacy of infrastructure, and generally at the levels of industrial or economic development." (ID/WG.337/9/Rev.1), para. 58.

[11]There is no reliable data on the frequency of such transactions, although each transaction would be of considerable value. This category of transaction is also regarded as a form of countertrade. One publication, relying on data given by a selection of United States enterprises on their countertrade activities world wide, puts this category at 9 per cent of the total countertrade transactions entered into (Stephen F. Jones, *North-South Countertrade. Barter and Reciprocal Trade with Developing Countries* (London, Economist Intelligence Unit, 1984), chap. 3). Mikton states with reference to this type of transaction involving tripartite co-operation "This type of tripartite co-operation is the most frequently encountered today; it generally involves deliveries of engineering, erection and maintenance services or capital equipment (sometimes both) by the CMEA and Western parties in return for counter-deliveries of resultant goods by the developing country client. The resulting project may create new industrial capacity, expand exports, develop resources or otherwise contribute to the country's economic development" (see note 9, above).

[12]This practice is not noted in the World Intellectual Property Organization *Licensing Guide for Developing Countries*, WIPO publication No. 620 (Geneva, 1977).

[13]See references cited in note 9, above.

[14]For a fuller description of this type of association, see draft chapter III, "Procedure for concluding contract" of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (A/CN.9/WG.V/WP.17/Add.2). Issues relating to groups of firms acting as contractors are discussed in the *ECE Guide for Drawing up International Contracts between Parties Associated for the Purpose of Executing a Specific Project* (United Nations publication, Sales No.E.79.II.E.22). Guides and model forms on these joint ventures have also been produced by the Fédération Internationale Européenne de la Construction (FIEC) and the Organisme de Liaison des Industries Métalliques Européennes (ORGALIME). Work has also been undertaken by national associations, e.g. the Joint Venture Agreement for Tender and Execution of Turnkey Project, by the Japan Machinery Exporters Association.

17. International sub-contracting appears to be of some significance for the industrial development of developing countries, and it has been widely discussed.[15] "Sub-contracting consists of the manufacture by the sub-contractor of parts, components or semi-processed products in conformity with the specifications laid down by the principal firm. The inputs are often provided by the principal who, as a rule, also provides a varying amount of technical assistance, supplemented occasionally by financial backing".[16] Sub-contracting between enterprises from developed and developing countries has grown in relation to various sectors of industry. Nevertheless, legal difficulties in the drawing up of sub-contracts do not appear to be regarded as a constraint on sub-contracting.[17] A principal reason for this may be the fact that the main components involved in a sub-contract are well-known in international commerce: definition of the kind and quality of goods, a time-schedule for deliveries, specifying the price and mode of payment, and arrangements for transportation. Sub-contracting between parties sometimes develops into specialization and co-production, e.g. an arrangement under which each of two parties specializes in the production of different components of an item. The components are then put together by one party to produce the complete item, or the components are exchanged and each party produces the complete item. The extent to which such arrangements are at present entered into between enterprises of developed and developing countries is unclear.[18]

18. The material at present available to the secretariat therefore suggests that, of the well-recognized categories of contracts for industrial co-operation, that which may merit investigation at the present time is the supply of complete plants and production lines with payment in resultant products. The examination of this category has two further advantages. First, it may be regarded as a natural sequel to the study by the Commission of contracts for the supply of industrial works. Second, this form of transaction is regarded as a form of countertrade and it is suggested below (see section C) that a further examination of countertrade practices may be justified.

19. The conclusions of the present survey of contract practice may accordingly be summarized as follows. Certain forms of contracts for industrial co-operation do not at present appear to be of much significance in trade between enterprises of developed and developing countries. Other forms, while assuming some significance, do not appear to present legal problems of a scale which would justify the undertaking of work by the Commission.

20. In making a decision concerning work in this area, the Commission may also wish to consider the possible end-products of the work. It was suggested (A/CN.9/191) that it might be conceivable to elaborate general conditions to be recommended for use by parties to a particular category of contract. An example of this type of instrument is the General Conditions of Specialization and Co-operation in Production between Organizations of Member Countries of the Council for Mutual Economic Assistance (CMEA), approved in 1979 by the CMEA Executive Committee. These General Conditions consist of detailed rules regulating the type of industrial co-operation in question, and dealing, *inter alia,* with the rights and obligations of the parties (section IV), the responsibility of the parties (section V), claims (section VI), arbitration (section IX) and applicable law (section X).

21. It was also suggested that the work might lead to the formulation of model clauses on certain issues. Among the issues suggested were the interdependence of the constituent parts of industrial co-operation complexes, the effects of *force majeure,* the effects of changed circumstances, revision of contract, termination and rescission, applicable law and settlement of disputes.[19] Such model clauses would need to be accompanied by explanatory texts, and it is not certain that a single model clause on a particular issue would be appropriate for all the categories of industrial co-operation contracts. The production of either general conditions or model clauses would entail the commitment of considerable time and resources.

22. In the circumstances, it is suggested that the preferable course might be to defer work in this area for a further period until the need for work is more clearly established. The secretariat might be requested to survey the further development of industrial co-operation contracts in trade between developed and developing countries,[20] and to report to the Commission at a future

[15]Over the years, UNIDO has directed attention to this transaction; see for instance, *Subcontracting for Modernizing Economies* (United Nations publication, Sales No.E.74.II.B.12); H.C. Paruthi, "International subcontracting: an approach to economic and technical co-operation among developing countries" (ID/WG.308/3). A new study entitled "Small and medium enterprises, some basic development issues", including an examination of sub-contracting, will be published by UNIDO in 1986.

[16]"Trade-related industrial collaboration between firms of developing countries and developed countries: forms and policy issues" (TD/B/C.2/212), chap. 1, B, "International subcontracting," para. 28. A detailed examination of sub-contracting in relation to certain developing countries is contained in *"Industrial Subcontracting: a New Form of Investment"* (Paris, Organization for Economic Co-operation and Development, 1980).

[17]The OECD study, which examines international sub-contracting in relation to Haiti, Morocco, Tunisia, Sri Lanka and the Caribbean does not mention legal difficulties arising out of contract practice.

[18]"Looking into the future, it may be hypothesized that the contractual forms which are likely to gain prominence in North-South relations will be those which at present prevail between firms of developed countries, irrespective of their economic and social systems i.e. specialization and co-production, co-marketing, joint activities in R and D, and like arrangements. Such forms are actually materializing, but readily available information is so inadequate that no opinion can be ventured as to their relative importance" (TD/B/C.2/212), chap. 1, C, "Trade-related industrial collaboration ...", para. 50.

[19]A/CN.9/191, para. 139.

[20]This difficulty of obtaining adequate evidence of contract practice has been felt even by other organizations with a potentially greater capacity to gather information on trade practice. "What was said in Chapter I about sub-contracting applies equally to the state of information concerning other forms of collaboration: case studies are rare; such studies as exist usually follow different methodologies, which often makes international comparison and generalization virtually meaningless. What seems to be badly needed as a first step is a systematic inventory of collaboration arrangements as practised in a number of

session if in the view of the secretariat work in the area might usefully be undertaken.

B. *Joint Ventures*

23. At some past sessions of the Working Group on the New International Economic Order and of the Commission, suggestions have been made that work should be undertaken in the field of joint ventures. The suggestion has sometimes been that the work should relate to the construction of industrial works undertaken by a joint venture. The suggestion at other times appears to be that work should be directed to the legal aspects of joint ventures in general.

1. *Construction of industrial works by joint ventures*

24. A joint venture may be described as an association of two or more persons for the purpose of implementing a project and includes, in varying degrees, the pooling by the associated persons of financial resources or other assets, the sharing by them of the control and management of operations, and the sharing of the profits and losses of the venture.

25. In the context of the construction of industrial works, joint ventures are often undertaken for one of two purposes. First, two or more enterprises may combine as a joint venture to undertake as a contractor the construction of industrial works for a purchaser. Such a joint venture project is, therefore, limited to the construction of the works. It has been suggested above that work on joint ventures undertaken for this purpose appears to be unnecessary.[21] Second, a joint venture between two or more enterprises for the construction of an industrial works may also include joint operation and management of the works, marketing the products produced by the works, and sharing the profits and losses of the venture. Such a joint venture is frequently created between an enterprise from a developing country and an enterprise from a developed country.

26. Joint ventures of the second type are attractive because they tend to satisfy the usual needs of the two parties in relation to industrial projects. The partner to the association from the developing country often obtains from the developed country partner technology, management and marketing skills, and capital. The ownership of the works which is constructed is usually vested in the partner from the developing country. The partner from the developed country often obtains access to the developing country market, and sometimes obtains cost advantages and assured raw materials supply by production in a developing country. A joint venture may also be considered by a developed country enterprise when direct investment in a developing country is either not feasible or not attractive. The sharing of the risks of the venture stimulates each party to perform his obligations with diligence.

27. The suggestion has been made that the value of the Guide might be enhanced by including in it (possibly as an annex) a discussion of the contractual arrangements which may be entered into for the construction of industrial works under the latter type of joint venture. Differing contractual arrangements may be entered into, depending on such factors as the construction capabilities of the partners, the source of the design for the works, any mandatory legal regulations which are applicable in the country where the works is to be constructed, and the extent to which the joint venture partners can supply equipment and materials needed for the works. Another factor which may affect the contractual arrangements is whether the partners have established a body corporate in which they both have shareholdings for the purpose of implementing the joint venture project (usually called an equity joint venture), or whether their association is solely based on contractual arrangements (usually called a contractual joint venture).

28. Where neither party has construction capabilities, the construction will have to be entrusted to one or more third parties. The works contracts with those parties are usually entered into by the joint venture corporate body, if such a body has been created, or by one of the joint venture partners. If the design for the works has been supplied by the developed country partner, it may be convenient for him to enter into that contract, as the construction can more effectively be supervised by him. Mandatory laws in some developing countries provide that certain aspects of the construction (e.g. building and civil engineering) have to be entrusted to local contractors. Some of the equipment and materials may be supplied by one or both of the parties, if they can do so at lesser cost than outside sources. Whether a single contractor or more than one contractor is engaged, the contracts entered into with the third parties will be of the type dealt with in the Guide (see chapter II, "Choice of contracting approach").[22]

29. In some cases, one or both of the parties may have some construction capabilities which they wish to utilize. In particular, a foreign partner who supplies the design and technology for the works may also have the capability of constructing the works. In such cases it is usual for the joint venture corporate body, or for the developing country partner, to enter into a contract with the developed country partner for the construction of the works. The developed country partner may himself construct the whole works, or, while being responsible for the whole construction, he may construct only a portion

selected countries. Conducted along uniform methodological lines, such an inventory should provide basic information about the principal forms of such arrangements, their growth, frequency and sectoral distribution, about how these arrangements work in particular sectors and industries and about the types of entities involved. The inventory should provide the basis for studying in depth selected categories of arrangements and for determining the conditions which could optimize their use by the developing countries." (TD/B/C.2/212, para. 118; "Trade-related industrial collaboration ...".

[21]"Trade-related industrial collaboration ...".

[22]These arrangements are also noted in *Manual on the Establishment of Industrial Joint-venture Agreements in Developing Countries* (United Nations publication, Sales No. E.71.II.B.23).

of the works and sub-contract with others for the construction of the remaining portions. The contract entered into with the developed country partner, however, will also be of the type dealt with in the Guide. Whether the developed country partner has entered into the construction contract with the joint venture corporate body, or with the developing country partner, the corporate body or the developing country partner will require contractual safeguards that the construction will be effected in time and without defects by the developed country partner.

30. It is possible that the content of some of the terms in the construction contract with the developed country partner may deviate from usual commercial practice because of the mutual confidence existing between the two contracting parties (e.g. the amounts of liquidated damages or penalties for delay may be lower, greater periods of time may be allowed for remedying defects). A more significant deviation may concern the payment conditions for the construction. Payment to the developed country partner may take the form, for example, of a grant to him of share capital in the joint venture corporate body. However, the nature of the great majority of the clauses included in the construction contract, and their functions, will remain the same as in a contract with a third party. The treatment of contract clauses in the Guide will accordingly remain relevant.

31. It would therefore appear that a purchaser from a developing country who undertakes the construction of industrial works in the context of a joint venture agreement will obtain sufficient guidance from the existing contents of the Guide, and that the addition of an annex dealing with construction by joint ventures may not be justified.

2. *Legal aspects of joint ventures in general*

32. In the earlier study by the Secretary-General (A/CN.9/191) it was stated that "The research by UNIDO appears to show that it is impossible to find any joint venture that could be called typical or serve as a prototype for other agreements. In view of this finding and taking into account the work already done, the Commission may wish to conclude that, for the time being, no work should be commenced on joint venture contracts."[23] This recommendation appears to be still applicable.[24]

[23]This conclusion is reinforced by a later UNCTAD study "Trade-related industrial collaboration ...". "The contractual joint ventures comprise a variety of *ad hoc* or more permanent arrangements with profit and risk sharing as the only common denominator" (para. 81); "Indications are that *the flexibility of contractual joint ventures, where according to the objectives of the partners virtually any rules can be adopted,* will make this form increasingly attractive to firms from both developed and developing countries" (para. 83) (emphasis added); "As regards the equity form of joint venture, it should be clearly understood that there is no uniform model, even within a given sector" (para. 84).

[24]In addition to the guides and manuals referred to in A/CN.9/191, UNIDO has since produced "Guidelines for the establishment of industrial joint ventures in developing countries" (UNIDO/IS.361). At its 1986 session in Arusha, United Republic of Tanzania, the Asian-African Legal Consultative Committee decided to undertake a detailed examination of joint ventures.

C. *Countertrade*[25]

33. At its eleventh session (1978) the Commission, in its decision on its new programme of work, decided to include as a priority item the subject of international barter and exchange.[26] At its twelfth session the Commission had before it a report of the Secretary-General entitled "Barter or exchange in international trade".[27] The Commission was of the view that barter-like transactions took too many different forms to admit of regulation by means of uniform rules. However, it decided to request the secretariat to include in the studies then being conducted in respect of contract practices consideration of clauses of particular importance in barter-like transactions. The Commission also requested the secretariat to approach other organizations within the United Nations engaged in studies on such transactions, and to report to it on the work being undertaken by those organizations.[28]

34. At its seventeenth session (1984) the Commission had before it a report of the Secretary-General entitled "Current activities of international organizations in the field of barter and barter-like transactions".[29] A number of delegations stated that they attached great importance to that subject, and that further consideration of it would be useful. It was agreed that, in the light of a report to be submitted by the secretariat at a future session on the developments in the field, the Commission might consider whether concrete steps in the field should be undertaken by it.[30]

35. There is no agreed definition of countertrade. The following types of transactions are, however, generally regarded as being forms of countertrade, although the terminology used below to describe the transactions is not universally adopted:

(*a*) *Compensation:* a transaction in which there is a direct exchange of goods between the parties. The goods may be of approximately equal value, with no payment of money by the parties involved. A transaction of this form is often called barter, or full compensation. In some cases, the goods to be supplied by each party are not of equal value, and the party supplying goods of lesser value makes good the difference in value by payment of money. This is sometimes referred to as partial compensation.

[25]In various reports submitted to the Commission, the subject has been referred to as international barter or exchange, or barter and barter-like transactions. At present the term countertrade is current in international usage.

[26]Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), paras. 67–69.

[27]A/CN.9/159.

[28]Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras. 21 and 22.

[29]A/CN.9/253.

[30]Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 132.

Such a compensation transaction is generally reflected in a single contract. Compensation may sometimes involve more than two parties. Thus two contracts which are inter-linked may be entered into under which A in country X is to supply goods to B in country Y, and in return C in country Y is to supply goods to D in country X;

(*b*) *Counterpurchase:* a transaction between two parties under which the first party agrees to purchase goods of a certain value from the second, and in return the second agrees to counterpurchase goods of a certain value from the first. On their face the two contracts usually appear to be independent, the interdependence of the two purchases being created and defined by a third agreement between the parties (often called a protocol). Each transaction is settled in money. One of the principal objects of this form of transaction is to balance the expenditures of convertible currency on each side. It is usually provided that the counterpurchase obligation can be discharged by the person obligated arranging for a purchase by a third party. If the value of the counterpurchase is less than the value of the purchase, the difference in value is made good by the payment of money;

(*c*) *Buy-back agreement:* a transaction in which plant and production lines are supplied by one party to the other, to be paid for with products resulting from the operation of the plant. The transaction is usually reflected in a single long-term contract.

36. Other types of transactions are also sometimes included in discussions of countertrade. Two countries sometimes enter into an intergovernmental clearing agreement under which goods supplied by each country to the other are not paid for, but valued in a specified unit of account. At an agreed time a balance is struck between the values of the supplies, with the debtor country having to make good the imbalance. This system is sometimes referred to as countertrade under clearing arrangements. In some cases the country which is the creditor or debtor at the time the balance is struck may unofficially use a third party to make good the imbalance. The third party will purchase goods from the debtor country, and remit the proceeds to the creditor country. This type of dealing is sometimes referred to as switch trading.

37. Opinions differ widely on the proportion of international trade which is based on countertrade. It would appear, however, that the number of developing countries engaging in countertrade with developed countries has increased over the past few years.[31] On the part of developing countries, this increase has been motivated by a variety of reasons: shortages of convertible currency to finance imports in the traditional manner, a desire to sell non-traditional products through the use of a developed country partner's marketing skill by nominating these products as goods to be taken in countertrade, a perception of countertrade as a means of obtaining a reliable and long-term market for primary commodities which are nominated as goods to be taken in countertrade, and a desire to obtain a competitive advantage over other suppliers of a commodity by requiring purchases of the commodity as the price for certain imports. Enterprises from developed countries are usually motivated to countertrade because certain exports are only possible if it is agreed that payment is to be in countertraded products. In addition, if there is strong competition for the award of a particularly advantageous contract, an enterprise may offer a countertrade commitment to obtain a competitive advantage. There also appears to be some amount of countertrade between developing countries.

38. The increase in countertrade activities has also resulted in institutional, commercial and legal developments. In some developed countries, institutions have been created both by governments and the private commercial sector which, while they do not engage in countertrade, give advice and information to traders wishing to enter into countertrade transactions. In a few cases, the institutions go beyond providing information and advice, and assist enterprises in concluding countertrade transactions (e.g. by finding buyers for goods offered in countertrade).[32] In addition, trading houses have grown with special interests and expertise in countertrade. They are willing to find buyers for products offered in countertrade, advise on financing, and thus facilitate the conclusion of countertrade transactions. In a few developing countries, there has been some degree of governmental intervention in the field of countertrade (e.g. through regulations providing that certain types of imports may be paid for only through countertraded products or prohibiting the offer of certain products in countertrade, or through administrative instructions to government state trading agencies to explore the possibility of countertrade when negotiating certain types of contract).

39. Among international organizations, work has continued on countertrade in the Economic Commission for Europe (ECE).[33] As a further step in this work, the secretariat of the ECE has proposed to the ECE Group of Experts on International Contract Practices in Industry the preparation of a guide on the drafting of contracts for

[31]See *Countertrade: Developing Country Practices* (Paris, Organization for Economic Co-operation and Development, 1985); *Primary Commodities: Countertrade and Co-operation Among Developing Countries* (Yugoslavia, Research Centre for Co-operation with Developing Countries, 1984); Jones, *op. cit.;* "International Workshop on Countertrade" (see note 9, above). The secretariat of the Economic and Social Commission for Asia and the Pacific has noted that it is exploring modalities to expand trade, such as the use of positive aspects of countertrade and other compensatory arrangements (E/ESCAP/TRADE/MMT/L.1, 14 March 1986).

[32]"Short-term compensation transactions in East-West trade: Institutional measures designed to assist exporters with countertrade obligations in some countries of the ECE region" (TRADE/R.499/Add.1).

[33]Since the date of the survey of the work of other organizations contained in "Current activities of international organizations in the field of barter and barter-like transactions" (A/CN.9/253), the following studies have been prepared by the ECE secretariat, "Short-term compensation transactions in East-West trade" (TRADE/R.499); "Institutional measures designed to assist exporters with countertrade obligations in some countries of the ECE region" (TRADE/R.499/Add.1); "Contractual features of countertrade transactions in East-West trade" (TRADE/GE.1/R.33/Add.1).

compensation transactions in East-West trade.[34] It was suggested that the guide could consist essentially in the following:

"(*a*) A comprehensive statement of the types of contracts and contractual clauses used in various forms of compensation transactions.

"(*b*) Indications of "best-practice" contractual provisions employed to avoid or overcome difficulties liable to arise in compensation trade.

"(*c*) Guidance on the provisions, both in substance and in form, which international experience suggests it is desirable to include in compensation contracts, differentiated as to type."

A decision on this proposal was deferred by the Group of Experts to its twenty-eighth session (21–23 July 1986), and the ECE secretariat was requested to prepare a fresh note dealing with the legal aspects of compensation transactions.[35]

40. In its previous report, the UNCITRAL secretariat expressed the view that most of the studies on the subject of countertrade tend to indicate that problems encountered in such transactions were far more economic and financial than legal. Nevertheless, the report identified certain contract clauses which needed to be carefully drafted in order to give business efficacy to the transaction and to avoid disputes between the parties. These were clauses specifying the nature, quality and price of the goods to be offered for counterpurchase, clauses permitting assignment of counterpurchase obligations, penalty clauses for failures of performance by either party, and agreements defining the nature of the interdependence between the obligations of the two parties in countertrade transactions. The work done by the ECE has drawn attention to other contract clauses of importance included in countertrade transactions: clauses defining methods of price revision when deliveries are to occur over a long period, clauses giving the initial exporter the right to fulfil his countertrade obligations by purchase from a person other than the party to the export contract, clauses restricting markets in which goods which are counter-purchased may be sold, clauses specifying fulfilment schedules for a countertrade commitment, clauses defining payment conditions, clauses providing how proof of the fulfilment of countertrade obligations may be obtained (e.g. letters of release), clauses providing for performance guarantees from either party, and termination clauses. Other clauses which have been referred to are exemption clauses, choice of law clauses, and clauses providing for the settlement of disputes.

41. The main sources of information on countertrade at present available to the secretariat consist of published material.[36] On the basis of this material, it is difficult to be certain as to the extent to which work directed to legal issues would be useful, or to determine the most useful form which such work might take. A consideration which supports the undertaking of work is that some informed circles believe that even among enterprises engaged in East-West trade, where countertrade has been a regular feature for a number of years, there is a need for a survey and analysis of contract practice and legal issues. Such a need would be much greater in relation to developing countries. As against this, it may be noted that many of the clauses referred to above are commonly used in international transactions, and their drafting in the setting of a countertrade transaction may not present very serious difficulties. Furthermore, it is not apparent that North-South countertrade contains contract structures or legal issues which are not present in East-West countertrade. The information and analysis that has developed over the years in relation to East-West trade may be useful to enterprises engaged in North-South trade. However, the extent to which this information and analysis is readily available in developing countries is uncertain. On balance, it appears probable that work by the Commission on legal issues arising in countertrade arrangements would be of benefit to developing countries.

42. If the Commission is of the view that work might be undertaken on countertrade, it may wish as a first step to request the secretariat to undertake a survey of contractual provisions occurring in countertrade arrangements, and of legal difficulties arising in relation to such provisions. The survey would be directed, in particular, to ascertaining the legal difficulties facing developing countries engaged in countertrade, and the possible means of alleviating their difficulties. In view of the absence in developing countries of information on and analysis of countertrade practices, the survey is likely to be in itself of great value. Further work may take the form of the preparation of a legal guide or the drafting of a model law, if the survey shows that work of this kind is feasible and will be useful.

43. The work proposed in the previous paragraph closely resembles that proposed in relation to East-West countertrade by the secretariat of the ECE to the ECE Group of Experts on International Contract Practices in Industry (see paragraph 39, above). If at its forthcoming twenty-eighth session (21–23 July 1986) the ECE Group of Experts decides to proceed with the work proposed to it, inter-secretariat consultations can be held to establish

[34] "Proposal for a guide on the drafting of compensation contracts in east-west trade" (TRADE/GE.1/R.33). The proposal was made to the twenty-seventh session of the Group, Geneva, 9–11 December 1985.

[35] Report of the twenty-seventh session (TRADE/GE.1/67), para. 16. The fresh note is contained in document TRADE/GE.1/R.34.

[36] The published work on countertrade cannot be easily divided into literature dealing with commercial issues and literature dealing with legal issues. The secretariat has found very few articles on countertrade in legal journals. There is a very large volume of articles and notes in commercial journals published in North America, West Europe and East Europe. It is probable that very little of this literature is available in developing countries. The documents of the ECE may be more readily available, though readers in developing countries may be inhibited from studying them by their overt orientation to East-West trade. The report of the "International Workshop on Countertrade" (see note 9, above) states "The dearth of information on countertrade practices and requirements in developing countries was a widely felt problem".

co-ordination. Collaboration with other interested international organizations,[37] and with commercial organizations engaged in countertrade, would also be needed.

D. *Procurement*

1. *Introduction*

44. The term procurement has no universally agreed meaning. It is sometimes regarded as one segment within a wider process known as supply management.[38] It is usual to apply the term to procedures for the purchase of goods and services on a commercial scale by governments, government entities, or private enterprises, and the term is sometimes used to include activities which occur after the conclusion of a contract. For example, the functional scope of procurement has been said to cover:

"(*a*) Specification of the kind and quantity of goods or services to be acquired;

"(*b*) Investigation of the market for supply, and contacts with potential suppliers;

"(*c*) Placing the order or contract, including negotiation of terms;

"(*d*) Supervising delivery and performance;

"(*e*) Taking necessary action in the event of inadequate performance;

"(*f*) Payment; and

"(*g*) Dealing with disputes."[39]

45. Generally, however, the term procurement is used to cover only items (*a*), (*b*) and (*c*) above, and the present study considers procurement in that restricted meaning. In traditional legal terms, the area considered is that of the formation of contract. Suggestions have been made during past sessions of the Working Group on the New International Economic Order that work should be undertaken in this area.

2. *Approaches to procurement*

46. The international procurement of goods and services forms a necessary part of most industrial development projects undertaken by developing countries. An efficient procurement procedure leading to the selection of the most economical responsive supplier is of cardinal importance to the success of a project. In relation to the construction of industrial works the view is sometimes expressed that the selection of the appropriate supplier is as important as the drafting of an effective works contract, since with such a selection the possibility of difficulties arising during project implementation leading to legal conflicts between the parties is significantly reduced.

47. Because of its importance, procurement has been often examined from different but sometimes overlapping viewpoints. Many industrial development projects in developing countries are financed by international lending agencies (ILAs), of which the leading agency is the World Bank. ILAs wish to ensure that procurement with the use of money lent by them is used in accordance with certain policies. These policies are set forth in guidelines for procurement issued by the various ILAs,[40] and the policies are also embodied in the loan agreement between ILAs and borrowers.

48. Many ILAs have the following policy objectives: securing economy and efficiency in the procurement process; giving the widest range of suppliers an opportunity to compete on equal terms for the supply of the goods and services required; and, as development institutions, encouraging the growth of suppliers from the borrower's country. Some ILAs provide that in certain circumstances the goods or services to be procured should be supplied from, or purchased in, member countries of the ILA. These policies are reflected in the procurement procedures required by the ILAs. In particular, almost all ILAs require that international competitive tendering be followed as the norm for procurement.

49. International procurement by government agencies was also considered during the Tokyo round of multilateral trade negotiations in the framework of the General Agreement on Tariffs and Trade (GATT). During those discussions, it was recognized that there was a "need to establish an agreed international framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade".[41] The discussions led to

[37]The secretariat has been informed by the International Centre for Public Enterprises in Developing Countries, Lubljana, that the Centre has under study a survey of contract practice with specific reference to buy-back transactions. A study on the economics of buy-back has also been produced by UNIDO "Buy-back financing of international sales of factories" (UNIDO/EX.99).

[38]See *Supply Management. Towards Better Use of Equipment and Material Resources in Developing Countries* (United Nations publication, Sales No.78.II.H.5). This publication regards supply management as including supply policy and planning; procurement planning and standardization; purchasing; inventory control; shipping and parts administration; storage, distribution and maintenance; and usage and disposal.

[39]Gösta Westring, *International Procurement. A Training Manual* (International Trade Centre UNCTAD/GATT; UNITAR; World Bank, 1985), part A.1.1.

[40]See, for example, *Guidelines for Procurement under International Bank for Reconstruction and Development Loans and International Development Agency credits* (1984); *Guidelines for procurement of goods and construction services under Inter-American Development Bank loans* (1982); *Guidelines for procurement under Asian Development Bank loans* (1981); *Guidelines for procurement under loans extended by the Organization of Petroleum Exporting Countries Fund for International Development* (1982); *Rules of procedure for the procurement of goods and services by borrowers from the African Development Fund* (1976); *Guidelines for the borrower on procurement of goods and services and technical reporting requirements of the Saudi Fund for Development* (1979). There has also been published *Procurement of goods, Sample bidding documents* (1983) and *Procurement of works, Sample bidding documents* (1985), by the Inter-American Development Bank and the World Bank.

[41]Preamble to the Agreement on Government Procurement, Geneva, 12 April 1979.

the adoption of the GATT "Agreement on Government Procurement" (hereafter referred to as "the Agreement"). The Agreement is applicable to the procurement of products, but also applies to the procurement of services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves. The Agreement is not, however, applicable to service contracts *per se*. For the Agreement to be applicable to a procurement contract the goods and services to be procured must have a value of SDR 150,000 or more.[42] One of the main objectives of the Agreement is that in procurement by a government which is a party to the Agreement, products or suppliers of other parties to the Agreement should not be discriminated against,[43] while another is to provide for the transparency of laws, regulations, procedures and practices regarding government procurement. The Agreement also provides that in the implementation and administration of the Agreement, the parties thereto should take into account the developmental, financial and trade needs of developing countries, and it contains several provisions directed to this end.[44] The Agreement favours optimum effective international competition in tendering procedures, and contains detailed rules to be observed in those procedures.[45]

50. The European Economic Community (EEC) has considered procurement from the standpoint of the economic integration of the Community countries. "The free movement of goods and services between the Member States of the European Community is one of the fundamental principles of the Treaty of Rome establishing the Community. Public supplies must therefore also be assured of the same freedom of movement, even if their administration is subject to special procedures. It is therefore essential to co-ordinate these procedures and make them 'transparent' in order to ensure that suppliers are guaranteed full information and equal treatment in tendering for such contracts. This will also help to eliminate such barriers to freedom of movement as the exclusion of non-national tenders, and to promote genuine competition in Europe".[46]

51. Many countries, including some developing countries, have laws regulating government procurement. These laws have various objectives, for example, securing a wide choice of suppliers, the observance of fairness in the selection process, conformity with other government rules and regulations (e.g. regulating the expenditures of foreign exchange, or financial accountability), and the conferment of preferences on national tenderers.

3. *Nature of procurement law*

52. Procurement laws and regulations are drafted to reflect a variety of policy choices. A requirement that, absent very exceptional circumstances, procurement must be on the basis of international competitive tendering reflects a policy that the purchasing entity's interests are best served by having the widest possible choice of suppliers. A requirement that advertising of invitations to tender should be on a global basis giving all potential readers of the advertisement an approximately equal time to submit tenders reflects a desire to confer equality of opportunity on tenderers. The requirement that a certain margin of preference is to be given to tenderers from the country of the purchasing entity reflects a policy fostering local industry. A requirement that tenders must be opened in public reflects a policy that publicity is a safeguard against unfair practices in the award of tenders. The range of policy issues involved is wide, and within major policy issues are sometimes to be found what may be termed sub-issues: on one view, after tenders have been submitted on the basis of international invitations to tender stating the criteria for award, no negotiations should be conducted with tenderers after the opening of tenders, and the contract should then be awarded to the tenderer who has submitted the lowest responsive tender as judged in accordance with the stated criteria. On another view, negotiations are permissible after the opening of tenders, since negotiations with responsive tenderers may lead to further advantageous terms being offered to the purchasing entity.

53. Procurement laws and regulations also reflect the essentially procedural character of procurement, and contain requirements which are needed for the orderly carrying out of the procurement process. For example, they contain requirements as to the form in which tenders have to be submitted, the number of copies of tenders to be submitted, the time for the opening of tenders, and the procedure to be followed at the opening. Such rules will have little policy content. Other procedural rules, however, may reflect an overall concern with efficiency or fairness in the procurement process, e.g. a rule that, after the opening of tenders, each page of each tender is to be initialled by the opening authority to prevent subsequent tampering.

54. While procurement laws and regulations govern specific aspects of procurement procedures, these procedures also operate within the framework of an applicable legal system. This will usually be the legal system of the country of the purchasing entity. That legal system may impose obligations of good faith during negotiations, determine the extent to which a tender may be revoked or amended, or the point of time at which a contract is

[42]Article 1, 1(*a*).

[43]The Agreement does not apply to all government procurement, but only to procurement by a governmental entity which the government in question has listed in an annex to the Agreement.

[44]Article III.

[45]Article V.

[46]*Public Supply Contracts in the European Community* (Brussels, Office for Official Publications of the European Communities, 1982), sect. 2. The policies expressed in this passage have been given effect to by Council Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public contracts (*Official Journal of the European Communities*, No. 11, 1971), and Council Directive of 21 December 1976 co-ordinating procedures for the award of public supply contracts (*Official Journal of the European Communities*, Nos. 20, and L13). The EEC is a party to the GATT Agreement, as are the individual member States of the EEC.

concluded between the tenderer and the purchasing entity.

55. An examination of the legal rules regulating procurement in a sample selection of developing countries reveals a varied picture. Some countries have procurement rules which have historically formed part of the system of law prevailing in that country, while in others the rules are recent developments. Some countries have rules with detailed provisions covering many procedural aspects, others have rules only dealing with a few elements of tendering procedures and leaving considerable discretion to the procurement entity in the manner of administering the procedures, while yet others do not appear to have any rules. In the latter countries, the procurement procedure appears to be devised on an *ad hoc* basis when an individual case for procurement arises. Many countries have a tradition of awarding high value contracts on the basis of competitive tendering, but a few have a preference for award on the basis of negotiation alone, or on the basis of a combination of tendering and negotiation. The general impression gained is that the procurement rules and practices are compounded of rules contained in inherited legal traditions and of the commonly understood elements of the competitive tendering process.[47] The Agreement has up to date been accepted by very few developing countries.[48]

4. *Possible work*

56. In view of the importance of the subject to developing countries, it is suggested that the Commission should undertake work on procurement. This work might be conducted in two stages. The first stage might consist of a study of the major issues arising in procurement. Major issues to be considered would include the choice of procurement methods by a purchasing entity, the documents to be prepared to implement a particular method, issues connected with the submission of tenders (including the obligations of the parties after a tender has been submitted), legal issues related to the evaluation of tenders, and the conclusion of a contract based on an award. In examining the issues, the study might include descriptions of commonly used procedures, articulate policies in favour of and against particular procedures, and, to the extent possible, describe how the issues are dealt with in the procurement rules and practices of developing countries. Such a study would be valuable in informing governments and government entities of relevant policy considerations, and would enable them to reassess the adequacy of their rules and practices.

57. In regard to areas of procurement to be dealt with, the study might focus on the procurement of various types of industrial works and infrastructural projects and public facilities such as harbours and hospitals. This focus would be justified by the importance of such projects for developing countries. Whether the procurement of goods alone could also be conveniently covered in the study might be left for investigation by the secretariat.

58. As a second stage of the work, and depending on the extent of the need revealed by the study, the work might develop into the formulation of rules regulating procurement. Such rules could be models for governments, government entities and private enterprises in developing countries in formulating rules appropriate to their needs.

59. The secretariat has already undertaken some research in the area of procurement for the purpose of drafting the chapter dealing with the conclusion of a works contract in the Guide.[49] The secretariat is of the view that it would be undesirable to expand the scope of that chapter to encompass a study of the kind described in the previous paragraph. The study envisaged above would differ in approach from that adopted in a draft chapter of the Guide, in that a draft chapter is primarily directed to advising a purchaser of industrial works in regard to drafting. Furthermore, the particular draft chapter would need to be expanded to an extent which would result in an imbalance between that chapter and other draft chapters of the Guide. In addition, the further research on procurement needed to accomplish the objectives set forth in the previous paragraph would delay the completion of the Guide. It may be noted, however, that the fact that materials on procurement have already been collected by the secretariat in connection with the work on the Guide would enable it to commence work on this subject immediately following the completion of work on the Guide.

II. Conclusions as to future work

60. The conclusions reached in the present Note as to future work in the area of the new international economic order may be summarized as follows. With regard to contracts for industrial co-operation (section A, above), it is suggested that work be deferred till the need for it is more clearly established (paragraphs 18–21 above). With regard to joint ventures (section B, above), it is suggested that where an enterprise from a developing country has combined with an enterprise from a developed country in a joint venture whose objects include the construction of industrial works, the Guide will provide sufficient assistance to the enterprise from the developing country (paragraphs 27–30 above). In regard to the legal aspects of joint ventures in general, it is noted that the forms of

[47] One authority has remarked: "It has been difficult to find any up-to-date studies showing what methods of procurement are applied in developing countries" (Westring, *op. cit.*, sect. A.2.3.2.).

[48] It may be remembered that in any event the Agreement applies only to the procurement of products and services incidental to the supply of products.

[49] Chapter III, "Procedure for concluding contract".

joint venture agreements are very different and that accordingly it is difficult to envisage work which the Commission can usefully undertake in this area (paragraph 31, above).

61. It is noted that at present countertrade (section C, above) forms an increased part of the trade of many developing countries, and it is suggested that work might be undertaken to ascertain and resolve legal difficulties experienced by developing countries in this area (paragraph 41, above). It is also noted that procurement (section D, above) is an area of great importance to developing countries, and that a study of major issues arising in procurement might be beneficial. This study might be followed at a later stage by the drafting of model rules regulating procurement (paragraphs 55–58, above).