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Fundamentals of Negotiating Cooperation Agreements

My task is to comment on the fundamentals of negotiating industrial cooperation agreements. I would now like to share with you some of my experiences.

Within the context of negotiating industrial cooperation agreements, I would define and characterize negotiating as identifying and defining the complex elements of reciprocity embedded in a major industrial undertaking, and, on this basis, forging an instrument of negotiated consensus despite legal disparities inherent in a transaction between capitalist and socialist legal systems, with the goal of structuring a complex system of intertwined agreements reflecting economic interreaction and interdependence of the parties. This is not a matter of negotiating a simple contract, but rather a process in which rights and obligations shift over a period of time and specific factors change so that economic equilibrium can be maintained, restored and redressed when necessary.

I will draw now on my client's experience, so you will hear an industrial point of view of a highly technology-oriented producer in the petrochemical area.

Although the ingredients of a major cooperative agreement have been enumerated, I will try to do it again my way. The ingredients could probably be, at least the way I see them, manufacturing projects for production, transfer or exchange of technology, joint capacity planning, supply and availability of raw materials, management, finance, and other factors such as plant site, infrastructure, and utilities.

These ingredients are the very fundamental economic premises on which the project is predicated, and whose interreaction and interrelation form what I call the fabric of the cooperative undertaking. The interplay of related basic functions such as joint planning, co-production, joint research, and exchange of technology, cross-supply of feed stocks, constitute the so-called dynamics of the undertaking.

The dynamics produce and must maintain a flawless balance, an economic equilibrium, a regulated modicum of economic interaction, inextricably linked. We will come back to this point later. It is in this interdependence that we have perhaps the strongest basis of enforceability of the undertaking or the protec-

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tion that your client seeks.

These very elements, ingredients and commitments related thereto should be reflected in strong and clear representations at the beginning of the agreement. They are essential for the creation of a sense of order in the undertaking. These representations should be drafted and placed before the operative clauses of your agreement.

I will illustrate with an authentic, multi-hundred million dollar project in which I was engaged.

This petrochemical complex includes facilities for production of diverse monomers, plastics and hydrocarbons, and will revolve around a 400,000 metric unit ethylene plant. The complex will be based on the client's technology. The site was chosen on the Adriatic next to large refineries, which provide the essential feed stocks at the starting point of a projected 400-mile pipeline to be built by the Yugoslavs, Czechoslovakia, and I think Hungary, one-third of the cost of which pipeline will be financed by Kuwait. The complex will have at least a dozen interrelated plants, each providing adequate feed stocks to each other. It will be built itself in interdependence with the international bases in Western Europe, which will supply feed stocks to the complex in Yugoslavia or on the Adriatic. The production from these plants will serve the Yugoslav industries, but also some of the client's Western European requirements.

All this results in a concrete, permanent interlocking of the complex with Western economies and among the Eastern European participants. Now, having linked all these parties together in this manner, we may have achieved what I call a modicum of economic interaction, legally, inextricably linked, so that the default or non-performance would bring about an imbalance which should trigger an automatic sanction against the defaulting party.

Mr. Pisar has talked about the fluid and dynamic environment as the first challenge to us lawyers, wherein the dogma of the state sovereignty of a socialist legal economic system has to be faced, where the sources of raw material, the essential instruments of production, distribution, and other institutions related thereto are the exclusive jurisdiction of the state. Except for the U.S.S.R., Eastern European Socialist countries seem to give signs of more flexibility in blending their interest in trade, industry and technology into business organizations of one sort or another which may provide some independence from the grip of the Socialist state structure. With some ingenuity the theory that there shall be no private enterprise can be circumvented with respect to a particular industrial project.

Your client may want to acquire a vested interest and may be entitled to seek an interest in the business organization where his technology is used in some form of participation, at least such as a vested interest in a percentage of the production, or a secured source of raw materials.

Your objective is to forge a consensus, despite deep disparities and dissimilar

backgrounds of the respective partners or associates, overcoming obstacles and barriers by reducing, to the extent possible, every issue to a negotiable, non-ideological middle point, and fit all this into a coherent juridical pattern.

For example, there is no point in arguing whether there is private property, whether the land where the plant is going to be established could be owned by an independent business enterprise. It must belong to the state.

You are facing now, in a different environment, a situation where your opposite number may be inclined from time to time to subordinate primary economic reasons to other considerations that appear alien to you or not germane to the subject matter.

Somebody asked, "Which language are you going to use?" I could refer to one only if you asked me that question, and I am referring to a common-sense language that will enhance the parties' ability to find that common ground of interest and principles that will bridge the gap between such basically dissimilar legal systems. In other words, I am talking about an economic, business or legal language of common sense, based upon an understanding of the different culture involved. I am not talking about whether you speak Romanian or Hungarian.

Now, once you have armed yourself with the correct mental attitude and are ready to draft and negotiate, the first fundamental issue is to properly identify your opposite in the negotiations, to assess his negotiating authority and bargaining powers and to ascertain, if possible, the various entities involved in the implementation of the provisions of the main or primary agreement that you are negotiating. In addition to the primary agreement, there will be separate agreements that will be a reflection of the primary agreement. In any event, you are faced with a state instrumentality, whether ministry, state agency, or political subdivision. Although the subsidiary agreements may be executed by a state enterprise that could be deemed to be a separate legal entity, as far as I am concerned you are really dealing with a sovereign power, with all the inherent problems of state jurisdiction and sovereign immunity this entails.

Your prospective partner has considerable bargaining power, which rests basically on the sovereign control over natural resources and over entry of the foreign firm in the local market. On the other hand, your partner's bargaining power is impeded or is encumbered by constraints of the sovereign state, impeding your opposite number or its negotiator from departing from certain conventional, legal and other norms. This brings inexorably into focus the responsibility of the state as a major issue of the negotiations within the context of sovereign powers, and of it, the sovereign state, ratifying in one form or another, in a legally binding form if possible, any transaction you may enter into. In my view, quite a variety of solutions are possible if the state policy dictates their acceptance.

Now you have gotten to the "whereas" clauses, where I think should be

written the very fundamental economic premises on which the ultimate agreement or transaction is predicated. The motivations, guiding principles and ultimate intent must be clearly spelled out and reflected in a set of clearly defined representations set out before the operative clauses or verbose boilerplate which is so common in the Western world.

In most instances, you will want to agree to sign a preliminary agreement or letter of understanding or protocol which would spell out intent, consideration, premise and principles; and then other more inclusive instruments covering in detail the whole spectrum of the transactions could be negotiated. You have, in other words, hopefully structured a set of agreements with the inherent capacity to produce a sense of order in the long run and a tolerable degree of predictability.

The economic equilibrium, the negotiated *quid pro quos*, should be the superior governing, permeating norm of the instrument. The instrument should be normative to the extent possible in structure and prescriptive in pattern, and then the balance of equal and permanent economic interdependence should be written in so that the set of reciprocal respective considerations can withstand the vicissitudes of change.

I would complete these remarks by saying again that there is room for creativity, there is room for innovation, as long as the parties achieve a modicum of economic interaction inextricably linked, so that any imbalance resulting from one party's non-performance could be redressed, not by recourse to a court of arbitration, but by virtue of your bargaining situation.