produce agricultural machinery, implements and tools; (c) the construction and building industries, particularly real estate development and road construction; and (d) enterprises concerned with the development of the tourist industry provided they are not earneers of foreign exchange.

The Code sets aside some economic activities for nationals, particularly in the commercial sector (Annex 1). Similarly, some economic sectors are set aside for enterprises with national participation amounting to 60 per cent and others for enterprises in which national participation amounts to 40 per cent or in which agreements have been concluded by foreign investors and national enterprises. Such agreements have to be approved by the Ghana Investment Centre (Annex 2).

Investments in the petroleum, mineral and energy sectors are governed by the Petroleum Exploration and Production Law of 1983, the Minerals Code and the National Energy Board Law, 1983.

Nigeria

The negotiation, establishment and evaluation of joint ventures operating in Nigeria is governed by Decree No. 70 of 1979. The Decree establishes the National Office of Industrial Property(NOIP) as a corporate body with legal entity and its functions include: to protect the interests of Nigerian economy by assisting national enterpreneurs in their negotiations with foreign partners in order to ensure that the terms and conditions they enter into are fair, reasonable and equitable, that there are adequate safeguards for the efffective transfer and adaptation of knowhow to local enterpreneurs and that efforts are made to achieve maximum use of local raw materials and adequate manpower development through joint venture enterprises.

The Decree reserves some economic activities exclusively for nationals (Schedule 1). Similarly, some economic sectors are set aside for enterprises with national participation amounting to 60 per cent or more (Schedule 2) and others for enterprises in which Nigerians must have at least 40 per cent equity.

Enterprises in which Nigerians must have a majority interest, i.e. 60 per cent or more equity participation, are as follows:

Banking — commercial, merchant and development banking.

Basic iron and steel manufacture;

Beer brewing;

Boat building;

Bottling of soft drinks;

Business services (other than machinery and equipment rental and leasing), such as business management and consulting services, fashion designing;

Canning and preserving of fruits and vegetables.

Clearing and forwarding agencies.

Coastal and inland waterways shipping.

Construction industry.

Department stores and supermarkets with annual sales of not less than 2 million naira.

Distribution agencies for machines and technical equipment.

Distribution and servicing of motor vehicles, tractors and spare parts thereof or similar objects.

Establishments specializing in the repair of watches and clocks.

Fish and shrimp trawling and processing.

Garment manufacture.

Grain mill products, except rice milling.

Industrial cleaning.

Insecticides, pesticides and fungicides.

Insurance (all classes).

Internal air transport (schedule and charter services).

Lighterage.

Manaufacture of: bicycles, biscuits and similar dry bakery products; cocoa, chocolate and high-grade confectionary, cosmetics and perfumery; dairy products, butter, cheese, milk and other milk products; food products, such as yeast, starch, baking powder, coffee roasting, processing of tea leaves into black tea; furniture and interior decoration, metal fixtures, for households, offices and public buildings, jewelry and related articles, including imitation jewelry; matches; paints; varnishes or other similar articles; plastic products such as plastic dinnerware, tableware, kitchenware, plastic mats, plastic machinery parts, bottles, tubes and cabinets; rubber products, rubber footwear and industrial and mechanical rubber specialities such as gloves, mats, sponges and foam rubber; soap and detergents; tires and tubes for bicycles motorcycles and motor vehicles; wire, nails, washers, bolts, nuts, rivets and similar articles; and other manufacturing industries such as nonrubber and non plastic trays, pens, pencils, umbrellas, canes, buttons, brooms and brushes, lampshades, tobacco pipes and cigarette holders.

Mining and quarrying.

Oil milling, cotton ginning and crushing industries.

Paper conversion industries.

Petro-chemical feedstock industries.

Photographic studies, including commercial and aerial photography.

Printing of books.

Production of sawn timber, plywood, veneers and other wood conversion industries.

Pulp and paper mills;

Restaurants, cafes and other eating and drinking places.

Rice milling.

Salt refinery and packaging.

Screen printing on cloth, dyeing.

Inland and coastal shiping.

Salughter, storage associated with industrial processing and distribution of meat.

Tanneries and leather finishing.

Tin smelting and processing.

Wholesale distribution of imported goods.

Enterprises in which Nigerians must have at least 40 percent equity are as follows:

Cement manufacture.

Distilling, rectifying and blending of spirits, such as ethyl alcohol, whisky, brandy, gin.

Fertilizer production.

Manufacture of: basic industrial chemicals (organic and inorganic) except fertilizers; synthetic resins, plastic materials, and man-made fibres, except glass; metal containers; pottery., china and earthenware; glass and glass products; burnt bricks and structural clay products; miscellaneous nonmetallic mineral products such as concrete, gypsum and plastering products, including ready-mixed concrete, mineral wool, abrasive; asbestos products, graphite

products; primary non-ferrous metal products, such as ingots, bars and billets; sheets, strips, circles, section-rods, rods, tubes, pipes and wire rods; casting and extrusions; cutlery, hand tools and general hardware; structural metal products, such as components of bridges, tanks, metal doors and screens, window frames; miscellaneous fabricated metal products except machinery and equipment, such as safes and vaults, steel springs and furnances, stoves; engines and turbines; agricultural machinery and equipment; metal and woodworking machinery; special industrial machinery and equipment, such as textile and good machinery, paper industry machinery, oil refining machinery and equipment; office, computing and accounting machinery; electrical industrial machinery and apparatus; radio; television and communication equipment and apparatus; electrical apparatus and supplies not classified anywhere, such as insulated wires and cables, batteries, electric lamps and tubes, fixtures and lamp switches, sockets, switches and insulators; electric appliances and houseware; shipbuilding and repair (excluding boat building); railroad equipment; motor vehicles and motorcycles; professional and scientific and measuring and controlling equipment, such as laboratory and scientific instruments, surgical, medical and dental equipment, instruments and supplies and another orthopedic and prosthetic appliances; aircraft; photographic and optical goods; watches and clocks.

Ocean transport/shipping.

Oil servicing companies.

Storage and warehousing, the operation of storage facilities and warehouses (including bonded and refrigerated warehouses) for hire by the general public.

Tobacco manaufacturing.

Textile manufacturing industries.

Hotels, rooming houses, camps and lodging places.

Data processing and tabulating services (on fee or contract basis).

Production of cinema and television films.

Machinery and equipment — rental and leasing.

Sugar plantation and processing.

Agricultural plantation for tree crops, grains and other cash crops.

All other enterprises that are not included in schedules 1 and 2 and are not public sector enterprises.

Guinea-Bissau

The Decree (Act No. 2/85) of 13 June 1985 instituted a new regime for foreign investment. The special advantages of the regime are granted for investments in the following areas : agricultural projects; projects requiring significant amounts of manpower; projects which involve the processing of national resources; projects which achieve significant added value; projects which have a marked impact on the balance of payments; and projects requiring few or no outside credit facilities.

Foreign investment is subject to authorization and registration. Projects will be accepted according to certain criteria: whether the project is compatible with the country's development targets; its technical economic and financial viability; the availability and use made of national resources; the siting of the project; the amount of employment generated for nationals; the technology used and the arrangements for its transfer; and the direct effects on the economy.

Mozambique

Act No. 4/84 of 18 August 1984 instituted a legal framework to govern foreign investment in Mozambique. Investment is permitted in all sectors of the economy, except those reserved for the sole ownership or control of the State. Except by ministerial agreement, no investment may be made in fisheries, oil production or the extractive industry. All foreign investments for the purposes of creating or expanding enterprises must take the form of a joint venture with Mozambique private or public enterprises or form a wholly foreign-owned enterprise geared to foreign market. To be eligible for the guarantees and advantages available under the law, direct foreign investments are considered to be those with a value of not less than 10 million meticais in a freely-convertible currency. (1 US $ was equivalent to 625.33 metacais as on 31 December 1988).

Francophone and Lusophone States

In some of the States in the African continent, mainly the Francophonic ones, the investment legislation has common characteristics and therefore they are being dealt with cumulatively. These States have enacted legislation designed to promote and increase national and foreign investment. These regulations have taken the form of Investment Codes, viz. *Benin*—Investment Code of 1982; *Burkina Faso*—Investment Code of 1984; *Cameroon*—Investment Code of 1984; *Congo*—Investment Code of 1982; *Equatorial Guinea*—Investment Code of 1985; *Gobon* Investment Code of 1961, *Guinea*—Investment Code of 1987; *Ivory Coast*—Investment Code of 1984; *Mali*—Investment Code of 1976; *Mauritania*—Investment Code of 1979; *Niger*—Investment Regime of 1974; *Rwanda*— Investment Code of 1977; *Sao Tome and Principe*—Investment Code of 1986; *Senegal*—Investment Code of 1987; and *Togo*—Investment Code of 1985.

These codes establish several investment regimes which may be divided into two categories: ordinary regimes and special regimes. The latter include serveral types, authorization regimes and establishment agreement regimes; long-term tax regimes; small and medium sized industries; export industries regime; and tourist industries regime. These regimes grant a number of advantages, chiefly of a tax and customs nature, in return for which enterprises have to fulfill various obligations.

The Codes of Benin, Cameroon Burkina Faso, Cameroon Equatorial Guinea, Congo, Guinea, Gabon, Mali, Niger and Sao Tome and Principe establish a separate ordinary regime for investments and enterprises which do not benefit from the other regimes and whose activities are carried out in one of the economic sectors defined in the codes. In some of these countries, an authorization is necessary (Gabon, Congo, Mali, Togo, Niger). In addition, investments must total a certain amount (Niger, Togo and Mali), give priority to the use of local products and encourage local employment (Niger and Senegal).

Authorisation regimes grant tax and customs advantages for a specific period of time. In order to benefit from such a regime, enterprises have to apply for an authorization and meet the requirements applicable to this type of regime. In Burkina Faso, there are three categories of authorization regimes. There are four types of regimes in Cameroon depending on the size of investment. Gabon has two authorization regimes. In Mali, such regime applies to priority enterprises whose investment amounts to CFAF 75 million. Mauritania applies such a regime for enterprises whose investments amount to between UM 10 million and 200 million. Niger grants such a regime for a period of time that may vary from 5 to 11 years. Togo establishes such a regime for enterprises investing at least 300 million CFAF and those making an investment of 3 billion CFAF.

Long-term tax regimes are granted to those enterprises which invest in large investment projects. Gabon gives enterprises benefiting from this regime tax equalization guaranatees for the life of the authorization. Cameroon, Mali, Mauritania and Niger grant this regime only to enterprises which sign an establishment agreement.

Establishment agreement regimes are applicable to investment projects of particular importance to the country's development. The enterprises have to conclude an establishment agreement with the States concerned. Nearly all the codes provide for such a regime. In Cameroon, an establishment agreement is valid for 15 years and is concluded only with enterprises whose investment projects amount to CFAF 5,000 million during the first five years of activity. In Ivory Coast, foreign enterprises which have shares in the capital of national corporations and whose invetments have been authorized may be parties to an establishment agreement. In Mali, investments have to amount to between CFAF 250 million and 750 million and the establishment agreement is valid for 20 years. Mauritania makes this regime available to authorized enterprises with investment of UM 400 million over four years and the establishment agreement is valid for 20 years. Niger grants this regime for a period of 10 to 15 years to enterprise whose investments amount to at least CFAF 500 million, which create 500 jobs for nationals and whose new activity provides added values amounting to CFAF 500 million or more. In Sao Tome and Principe this regime is applicable to those projects which require an investment in excess of 15 million dobras.

The regime for small and medium-sized industries is provided for in the codes of Cameroon, Benin, Guinea, Sao Tome and Principe, Senegal and Togo. The majority of the capital of these industries must be held by nationals, the enterprises must be authorized and the investments may vary between CFAF 50 million and 75 million, depending on the country.

The export industries regime is provided for in the Codes of Equatorial Guinea, Congo, Guinea, Gabon and Ivory Coast. Under this regime, export enterprises are granted reductions on or exemptions from export duties and taxes and import duties under a duty-free regime.

The main economic sectors of activity covered by these Codes include :

Manufacturing and assembly of consumer goods;

Industry in general;

Energy production;

Processing and preparation of plant and animal products;

Mineral and petroleum prospecting and mining;

Agriculture and fisheries;

Animal husbandary;

Transport; and Tourism.

C. Legal Framework in Asia and Africa

Host Country Legislation

Joint ventures in developing countries, including Asian and African countries, generally involve at least three major parties: foreign investors, national partners and Governments of host countries. Other parties, such as national investors, external or internal financial institutions, and on occasion, home Governments, may also be involved. However, since the joint venture company is required to be registered and/or incorporated in the host country where its principal operations have to be carried out, the Government of the host country virtually becomes a 'third party' to the establishment of the joint venture. Consequently, in most of the developing countries, the principal element that gives legality to a joint venture is its approval by the authorities concerned. Without their approval, no joint venture can be set up even if the parties have reached an agreement, signed a contract and drawn up articles of association. The host country legislation dealing with the establishment and operation of joint ventures and applicable intergovernmental treaties should therefore be carefully studied and analysed.

Until the early 1950s the traditional policy instruments used by the developing countries, including those in Asia and Africa, to govern foreign investment had been foreign-exchange controls, tax administration, tariffs and import restrictions, immigration and work-permit controls, central bank controls over the lending policy of banking institutions, and various other fiscal and monetary measures. Under these policy instruments, the developing countries did not distinguished between "local" and "foreign" enterprises and treated them on equal footing. However, during the 1950s and 1960s, many developing Countries became increasingly aware that, to promote self-reliant development and ensure that the benefits associated with

foreign direct investment were maximized and costs minimized, there would be a need to frame national policy and procedures specifically related to foreign participation in industrial ventures. This was reinforced by a recognition that the national objectives of a host country and global objectives of a foreign investor may converge in some respects, but diverge in others, and those differences would need to be reconciled. To meet this need, many countries introduced special laws and regulations relating to foreign direct investment and established specialized agencies to be responsible for their implementation. Today, most developing countries, including Asian and African countries, have such laws and regulations to supplement their general and traditional policy instruments.

Almost all Asian and African countries, which actively seek foreign investment, have enacted legislation to regulate foreign investment in the form either of a foreign investment law or an investment code.[7]

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7 ASIA-*Afghanistan* – Domestic and Foreign Investment Law of 1983; Bangladesh-foreign Private Investment (Protection and Promotion) Act, 1980; *China* – Law on Joint Ventures using Chinese and Foreign Investment, 1979 and Regulations for the Implementation of the Joint Venture Law, 1983; *Indonesia* – The Foreign Capital Investment Act of 1967 as amended in 1970; *Jordan* – Law of Encouragement of Investment, 1972; *Iraq* – Law No. 60 of 1985 concerning the Implementation of Major Development Projects and Arab Investment Law No. 46 of 1988; *Laos* – Law on Foreign Investment, 1989. *Japan* – Foreign Exchange and Foreign Trade Control Law, 1979; *Mongolia* – Foreign Investment Law of 1990. *Myanmar* – Foreign Investment Law of 1988. *Nepal* – Foreign Investment and Technology Act, 1982; *Pakistan* – The Foreign Private Investment (Promotion and Protection) Act, 1976; *Philippines* – Foreign Investment Act of 1991. *Republic of Korea* – Foreign Capital Inducement Act (as amended in 1983); *Vietnam* – Law on Foreign Investment, 1987; and *Yemen Arab Republic* – Act No. 1 of 1975 concerning the Promotion and Regulation of Foreign Investment.

AFRICA; *Angola* – Foreign Investments Act of 16 June 1988; *Benin* – Law No. 90-002 of 9 May 1990 setting forth the Investment Code; *Burkina* – Faso-Investment Code of 1984; *Burundi* – Law No. 1\005 of 14 January 1987 setting forth the Investment Code; *Cameroon* – Investment Code of 8 November 1990; *Central African Republic* – Law No. 88.004 of 9 May 1988 concerning the Investment Code; *Chad* – Ordiance No. 025\PR\87 of 8 December 1987 setting forth the Investment Code; *Comoros* – Law No. 84-005\PR of 25 May 1984 setting forth the Investment Code; *Congo* – Law No. 26\82 of 7 July 1982 setting forth the

7 (contd.)
Investment Code; *COTE D'Ivoire* – Law No. 84-1230 of 8 November 1984 setting forth the Investment Code; *Djibouti* – Law No. 88\AN\84\Ire of 13 February 1984 setting forth the Investment Code; *Egypt* – Investment Code (Law No. 230 of July 1989); *Equatorial Guinea* – Investment Code of 1985; *Ethiopia* – Special Decree on Investment No. 17 of 1990; *Gabon* – Law No. 7\89 of 6 July 1989 setting forth the Investment Code; *Ghana* – Investment Code, 1985, as enacted by the Provisional National Defence Council Law No. 116 of 13 July 1985; *Guinea* – Ordinance No. 001\PRG\87 of 3 January 1987 setting forth the Investment Code; *Guinea-Bissau* – Decree Law No. 2\85 of 13 June 1985 defining the regime applicable to foreign investments in the Republic of *Guinea-Bissau; Ivory Coast* – Investment Code of 1984; *Madagascar* – Law No. 89-026 of 29 December 1989 setting forth Investment Code; *Mali* – Investment Code of 1976; *Mauritania* – Investment Code of 1979; *Mozambique* – Foreign Investment Law No. 4\84 of 18 August 1984; *Namibia* – Foreign Investments Act, 1990 (Act 27 of 1990); *Niger* – Ordinance No. 89\19 of 8 December 1989 enacting investment Code of the Republic of Niger; *Nigeria* – Decree No. 70 of 1979; *Rwanda* – Law No.21/1987 of 5 August 1987 setting forth the Investment Code; *Sao Tome and Principe* – Investment Code of 1986; *Senegal* – Law No. 87-25 of 18 August 1987 setting forth the Investment Code; *Somalia* – Foreign Investment Law No. 19 of 9 May 1987; *Sudan* – The Encouragement of Investment Act, 1980; *Tanzania* – The United Republic of Tanzania National Investment (Promotion and Protection) Act No. 10 of 1990; *Togo* – Law No. 85-3 of 29 January 1985 providing for readjustment of the Investment Code of the Tongolese Republic; *Zaire* – The Investment Code of Zaire, *Ordinance* – Law No. 86-028 of 5 April 1986.

It may be mentioned that Brunei Darusalaam, Bahrain, India, Malaysia, Qatar, Singapore, Sri Lanka, Thailand and Zambia have no specific legislation devoted to regulation of foreign investment. Provisions concerning foreign investment are contained in various laws and regulations. However, the main legislation affecting foreign investments in these countries are as follows :

Bahrain – Order No. 6 of 1984 concerning the regulation of industry; Brunei *Darusalaam* – Investment Incentives Act, 1975; *India* – Foreign Exchange Regulation Act, 1973; Monopolies and Restrictive Trade Practices Act, 1969; and Industries (Development and Regulation) Act, 1951; *Malaysia* – Industrial Coordination Act, 1976 and Promotion of Investment Incentives Act, 1986; *Qatar* – Act No. 3 of 1985 concerning the participation of non-Qatari capital in economic activities; *Singapore* – Control of Manufactures Act (Cap. 57); *Sri Lanka* – The Greater Colombo Economic Commission Area Act, 1978; *Syria* – Decree No. 35

These laws and codes define *'foreign capital'*, *'investment'*, and *'foreign company'*; establish investment priorities; set out in a schedule incentives and privileges granted to the *'foreign capital'*; formulate the terms and conditions under which foreign investment will be accepted; specify the guarantees the Host Government will provide to the foreign capital in terms of repatriation of capital and dividends; compensation in case of nationalisation or expropriation, and indicate the statutory authority that the jurisdiction over the implementation of the law or the code. Since these laws vary considerably in the tone and tenor of their provisions, it is possible to refer only to certain features common to them.

These laws and codes define *'foreign investment'* to include cash and non-cash inputs which may include machinery and equipment, supply of intangible assets such as patents, trademarks, know-how, services, pre-invested expenses, reinvested capital etc. which would represent the foreign investor's contribution to equity. However, in India, foreign investment without transfer of technology is generally not allowed. Moreover, the law insists on equity contribution in cash only. Bangaldesh and Pakistan do not encourage foreign investment by a foreign government or governmental agency.

Sectors open to foreign investment under these laws and codes include specified product and service sectors; investments in free trade zones, special economic zones, remote or industrially backward areas; investments in products intended for total or substantial export; investments in non-conventional sources of energy and non-traditional sectors such as exploration and exploitation of the living or non-living resources of the exclusive economic zones. Some of these States specify the economic sectors which are closed to foreign investment. For example, in India, there is an illustrative list of industries in which foreign collaboration (technical or financial) is not permitted.

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of 1986 defining the scope for investment in the industrial sector; and *Zambia* – Industrial Development Act, 1977.

It should be noted that in Iraq, the legal structure applied to foreign investors makes a distinction between Arabs and non-Arabs. Arab investors are treated on an equal footing with Iraqi investors. Non-Arab investments in Iraqi companies are not allowed, and under the comapanies Law, non-Arab investors are restricted to registered branches and agencies. There is, thus, no scope for joint ventures between Non-Arab Investors and Iraqi partners.

In Indonesia, foreign investment in activities concerning national security or affecting the daily life of the population, arms and ammunition, war equipment etc. is totally closed. The list is reviewed annually. In Malaysia, industries reserved for the State are not open to foreign capital and approval for investments in newspapers and related fields is not granted. Similarly, in the Philippines, manufacture of arms and ammunition and development of hydro-electric and nuclear power, retail trade, rural banking, and mass media are closed to foregin capital. In Thailand under the Alien Business Law, business categories 'A' and 'B' are closed to foreign investment and only category 'C' businesses are open to foreign investment. In the Republic of Korea, the Foreign Capital Inducement Act has adopted a negative list system in which it enumerates only those industries in which foreign investment is prohibited or temporarily restricted, the rest being left open for foreign investment. In Singapore, except public utility and telecommunication services which are reserved for the State, other activities are open to foreign capital. In the Islamic Republic of Iran, limited foreign investment in selected industries, like engineering, textiles, pharmaceuticals and agriculture may be allowed on the condition that foreign companies guarantee transfer of technology, training to workers and acceptance of Iranian government's share in mangement. In Nepal, foreign investment is limited to medium and large industrial projects. In Saudi Arabia, foreign investors are granted licences on a priority basis only whilst participating in projects of capital intensive nature. In Kenya, foreign investment is not allowed in public utilities and it is discouraged in agricultural sector involving large scale land ownership without value added to farm produce. In Ghana and Nigeria, the Relevance Law sets aside economic sectors exclusively for national investors.

With a view to attract foreign investment as well as channelise it in the economic sectors desired by the host State, the laws provide for various investment regimes offering at the same time a number of corresponding privileges and incentives. Some laws list out priority sectors where foreign investment is more welcome than in others and where they might attract additional benefits in the shape of full capital participation, repatriation of capital and dividends without any restrictions, more tax incentives and privileges. The Franchophonic States in Africa have established investment regimes which may broadly be divided into *oridinary regime* and *special regimes*. The latter has several types, namely authorization regime, establishment agreement regime, small and medium-sized industries regime; long-term tax regime; export industries regime; and tourist industry regime. These regimes grant a number of advantages chiefly of a tax and customs nature in return for the eligible enterprises fulfilling various obligations. In Brunei Darusalaam, Ghana, Philippines, Lesotho, Liberia, Nigeria, Rwanda and Singapore, industries are classified as '*pioneer*' and '*non-pioneer*' with the former obtaining better incentives. On the other hand, India does not give any factor incentive to attract foreign investment by way of tax exemption or exemption from customs duties. Indirectly, however, foreign investors are eligible for a large number of incentives available to national companies if equity participation is 40 per cent or less and the technology transfer package is suitable.

Generally speaking, the investment laws offer a number of privileges to foreign investors. These include tax holidays, reduction of tax over a period of time, capitalisation of pre-incorporation costs, accelerated depreciation on capital equipment and structure, availability of low-cost government loans, subsidized land and power, duty free importation of raw materials and equipment, refund of customs and excise duties and drawback, exemption from income-tax for profits reinvested in fixed assets, the right to carry forward losses for purposes of income tax. The modalities of providing these incentives differ from country to country. Whilst the Philippines has a complicated pattern of deductions, exemptions and tax credits, Singapore offers straight forward exemptions. Malaysia has structured incentives to encourage exports, the location of enterprises in less-developed areas, and the use of local content in the manufacture of priority products.

Apart from the tax-related incentives, the laws often grant non-fiscal operational concessions covering a wide range. These include guarantee of stability in legal, economic and financal matters; the marketing of products; guarantees of entry and movement of workers; freedom of selection of suppliers and employees; guarantees ensuring the use of water, electricity and other resources necessary for the operation and transport of production to the place of shipment; guarantees on the allocation of foreign exchange, the supply of raw materials, protective measures relating to finished products and in the case of certain countries, reservations of government and armed forces' contracts to beneficiary enterprises. Other non-fiscal benefits include the grant of land and industrial sites at preferential rates, assistance in obtaining loans and in the provision of necessary utilities and infrastructures.

For the foreign investor to be eligible to the incentives and privileges under a foreign investment law, the joint venture which he helps form alongwith a national partner is required to comply with certain terms and conditions prescribed by that law. Usually, there is a requirement that the proposal for a joint venture be approved by a prescribed authority or the joint venture company be registered with a prescribed authority. There may be a maximum ceiling to the share of foreign capital or voting stock[8]; and/or the requirement of a minimum shareholding by national investors[9] or by the general public;[10] *'fade out'* or *'spin off to minority'* requirements may be present[11] except perhaps for high priority areas, the law indicating the time by which such *fade out* or *dilution* should occur. Some countries specify a minimum level of investment by the foreign investor to ensure that, where foreign direct investment is allowed to take place, it is of a worthwhile magnitude and that foreign captial does not intrude into petty ventures. For example, in the Republic of Korea, the minimum amount of foreign equity investment is US $ 200,000 although it can be reduced to US $ 100,000 for the electronics and machinery industries and to US $ 50,000 in the industrial engineering field.

The investment laws generally designate a statutory body to approve proposed investment levels; the degree of foreign ownership and management; to clarify tax privileges, exemptions and immunities; to administer those cases of foreign investment which are not specifically identified in the law; and to register investment levels. Registration may also be required with the other government bodies or organs, such as the National Bank or the Registrar for Company Affairs.

Ownership, control and management of joint ventures

A central issue in regulating joint ventures in developing countries relates to ownership, control and management of joint ventures. It is an avowed political objective of most developing countries that majority ownership and control should be in local hands, at least within a period of time, and that local personnel ultimately should take over the key mangement positions. But policies in respect of these issues have been kept flexible by most countries with a view to attracting foreign investment, especially in high-priority, areas. As a general principle, most developing countries, while retaining local ownership and control as a basic objective, allow higher levels of foreign participation in (i) priority industries; (ii) capital-intensive ventures; (iii) technology-intensive ventures; and (iv) in export-oriented ventures.

In Indonesia, under Decision 12/SK/1986, the local participation at the outset may be 5 per cent, but must increase to 20 per cent within five years from the start of commercial production; and ten years thereafter, the foreign partner should offer the local partner the opportunity to increase his participation to 51 per cent. In Malaysia, companies geared primarily for the domestic market are required to have at least 50 per cent local equity participation, but foreign-majority equity may be permitted in export-oriented, high technology or priority ventures. In the philippines, *'pioneer'* and *priority industries*, which include export-oriented ventures, may be allowed foreign ownership up to 100 per cent, but within 30 years, it must be reduced to 40 per cent. For the *'non-pioneer'* industries, the foreign ownership is limited to 40 per cent even at the initial stage. The policy followed in India is that foreign-equity participation, if found necessary (because the preference is for outright purchase of technology or limited duration licensing arrangements), will normally not be allowed to exceed 40 per cent, but higher foreign equity may be allowed if the technology is of a sophisticated nature and is closely held aboard or if the venture is export-oriented, including 100 per cent foreign ownership for ventures that export their entire production. In Africa, Ghana and Nigeria have adopted comprehensive domestic ownership policies, their main thrust being the reservation of certain businesses exclusively for domestic people, and limiting the maximum level of foreign ownership from 40 to 60 per cent, depending on the nature and character of the investment.

Although local ownership is in itself an important aspect, it is being increasingly recognised that there is more to control and management than mere ownership. Majority local ownership, it has been realised, does not automatically lead to effective local control over the operations of the joint venture, and conversely, it has also been seen that even with minority local ownership, it is possible to

8. The law in China sets a minimum of 25% for investment by the foreign investor. On the other hand, Indonesia requires 20% equity to remain with the national partner at the beginning of the venture. Foreign investors are permitted majority control in Bangladesh, China, Republic of Korea, Arab Republic of Egypt, Malaysia, Pakistan and in the case of Ghana and Nigeria in specified sectors. Countries which insist on majority control by national partners include Afghanistan, India, Indonesia, Philippines, Iraq, Qatar, Syria and Yemen Arab Republic.
9. China, Ghana and Nigeria.
10. Philippines and many middle East countries.
11. The Government of India carried out the most comprehensive programme to reduce foreign ownership in existing manufacturing subsidiaries from 1976 to 1980 under its Foreign Exchange Regulation Act. 1973. The Government of the Republic of Korea, which basically limited foreign equity to 50 per cent in most investment projects for many years, changed its policy in 1980 to allow majority-owned foreign investments in many industries.

regulate the overall parameters within which a venture is to conduct its operations. A major reason for the cleavage between local ownership and local control is due to the fact that foreign companies are known to exercise effective control and magement not only through the voting or decision-making power arising from their equity investments, but also through their supply of technology and knowhow, technical services, management and marketing expertise, patents and trademarks etc.

The developing countries have sought to bridge this gap by instituting regulatory mechanisms at two levels, *viz.* the national level and the enterprise level. At the national level, one of the objectives chosen is the building up of local technological and managerial capabilities. It is in pursuance of this objective that India, Republic of Korea, Ghana and Nigeria and other developing countries have imposed upon foreign investors the obligation for training of technical people and setting up of research and development facilities for absorption and adaptation of foreign technology. At the same time, they have laid down the parameters within which the enterprise must operate. Thus, for example, the scope of their operations as well as the performance obligations to be fulfilled by them (level of exports, extent of employment generation, localization of manufacturing programme, training of domestic personnel etc.) are clearly specified and their observance monitored through reporting system. At the enterprise level, the controlling measures recommeded include the appointment of a sufficient number of local directors on the Board of the enterprise, regardless of the equity contributions of the two partners, together with the stipulation that they can be removed only by the local partner; appointment of local personnel to important managerial positions; a requirement that key decisions relating to the venture should have the joint approval of the directors appointed by both the partners; and requiring that certain decisions should have the approval of the host government as well (such as major changes or diversification in the production plan of the venture).

Transfer of Technology

Joint ventures are sought principally for the transfer of technology. A foreign owner of technology, intending to transfer it, will naturally be concerned over the protection he will get in the host country and the terms and conditions he can legally impose over the use of his technology. National statutes in developing countries generally protect the ownership, use and confidentiality of technology. These protect patents,[12] trade-marks and copyrights, collectively referred to as '*industrial property rights*'. The transfer of industrial property rights across national borders is protected not only by national legislation but also by international conventions such as the paris Convention on the Protection of Industrial Property, 1887 (amended in 1967).

The typical goals of host country regulations are: (i) to attract new technology; (ii) to utilize and extend the productive capacity of existing enterprises; (iii) to employ and instruct the citizens in the new technology in order to further technological development; and (iv) to close the technological gap. Countries in the Asian-African region have adopted the following approaches to govern the transfer of technology : (a) a specific legislation to regulate the import of technology (Egypt, Ghana, Nepal, Nigeria, Phillippines, Republic of Korea and Zambia) and (b) a system of administrative handling based on general laws and often supported by guidelines which are publicised (China, India, Malaysia and Pakistan). These are often supplemented by specific legislation devoted to patents, trademarks and copyrights.

Where the host countries have enacted a specific legislation regulating transfer of technology, its provisions are generally devoted to definitions given to '*technology*'; sectors where the use of foreign technology is permissible; conditions to be met by the recipient of technology; terms and conditions that may be imposed on the use of technology; modes of payment for technology; registration requirements; and the statutory authority which will be concerned with the implementation of the law.

Almost invariably, the following elements of the technology package are included in the definition of technology; patents, trademarks, knowhow, technical assistance/services and basic/detailed engineering. However, elements such as copyright licences, consultancy services, management services and personnel training may or may not find such expression or they might be clubbed together with '*other technological services*'.

The laws generally pinpoint the sectors where the use of foreign technology would be permitted or prohibited. Technologies which can

12. In India, product patents are not allowed in the areas of food, drugs or medicines, or substances produced by chemical processes. Duration of a patent is 14 years except in the case of food, drugs and medicines and chemical sectors in which case it is 7 years. In Ghana, product patents are prohibited in the pharmaceutical sectors.

bring demonstrable gains to the national economy—exports, employment opportunities, harnessing of natural resources, product diversification, increased productvity—are generally welcome. However, technologies for products for which indigenous technological capabilities already exist or for products in overcrowded sectors may not be permitted.

Laws relating to transfer of technology generally impose conditions on the exploitation and use of technology. On the one hand, these laws lay down a set of conditions to be contained in arrangements for the transfer of technology and expertise, and, on the other, a set of conditions that may not be contained in such agreements.[13] Conditions to be contained in technology and expertise agreements include; royalties or fees charges must bear a reasonable relationship to the use of such technology or knowhow, royalties or fees must cease upon the lawful termination of the agreement or if such technology or knowhow becomes public knowledge otherwise than through the fault of licencee; royalities must be reduced if a third party acquires and uses such technology or knowhow otherwise than through the fault of the licencee; training of local personnel; provision for technical assistance in connection with marketing programmes and the purchasing of equipment involving the use of such technology or knowhow; the recipient of technology or knowhow must acquire the right to continued use of such technology or knowhow after the termination of the agreement; and if the recipient so requires, the transferor must continue to supply spare parts and raw materials for a certain period following the termination of the agreement.

Conditions that may not be incorporated in such agreements include restrictions on the use of competitive techniques; imposing any form of control over the management of the licensee's enterprise; restricting the manner of production or the export of products to any country; restricting the sources of supply of inputs or the volume or structure of production; limiting the way in which any patent or other knowhow may be used or for the payment of royalties or fees in foreign currencies or outside the host country except with the prior approval of the National Bank.

Mandatory provisions which the intending partners to a joint venture must take into account appear to be as follows :

13. Philippines, China and Zambia

(a) *Licensor's restrictions on the use of technology*—As referred to above, technology transfer laws or regulations generally prohibit registration of technology agreements if the licensor imposes certain restrictions on the licencee, for instance, not to export goods or to export goods to certain countries only or to impose limits on the levels of production.

(b) *Incorporation of mandatory clauses*—In a number of Asian and African Countries, the governing law of the contract has to be the National Law.[14] In some of the developing countries, agreements may not be registered if the supplier does not warrant the quality and results of the contracted technology.[15]

(c) *Time-limits that must be incorporated:* In the Philippines, for example, the duration of a technology contract cannot exceed five years or contain automatic renewal clause. In Ghana, such a contract is valid for five years and can be renewed. In Malaysia, the technology contract is approved for a period of five years. In China, it should not exceed a period of ten years. In India, only in exceptional cases, can the '*trade secrets*' clause extend over five years. Similarly there could be set limits or ceilings to royalty rates. In Ghana, royalty payments shall not ordinarily exceed 5 per cent of net sales which should be split up as follows : (a) 2 per cent for patents, which should not have a duration of more than 10 years; (b) 2 per cent for knowhow, which should have a duration of upto 5 years; and (c) 1 per cent for the trademarks only if goods/products are to be exported. Where in addition to royalties, lump-sum payments are involved, the two together shall not ordinarily exceed 8% of the net sales of the first five-year period. In China, royalty payments are usually equivalent to 2 to 5 per cent of the net sales of products and duration of payments should not exceed 7 years. In the Philippines, the royalty payments should not exceed 5 percent of net sales. In the Republic of Korea, only contracts containing royalty payment periods of more than three years or certain royalty categories that require such approval are : (i) a lump sum royalty payment of more than US $ 100,000; (ii) an initial payment of more than US $ 50,000 in combination with any running royalty; and (iii) a running royalty exceeding 2 per cent of net sales.

14. China, Malaysia and Philippines.
15. Republic of Korea.