(d) *Reciprocal rights:* The same rights should prevail for both the transferor and the transferee. This is usual for the '*grant back*' clauses of agreeements pertaining to product and process improvements.[16]

(e) *Permissible restrictions (if not contrary to national interest)* : Most Asian and African countries permit discretionary arrangements between the transacting parties and may accept licensor's restraints on export rights to countries where the licensor has operating licences or owns production plants; location of a production plant, its capacity and production range; and exclusivity of licence (i.e. the grant of a non-exclusive licence etc.).

(f) *Technology payments*—Technology laws and regulations generally set forth the allowable range of royalties rates for various sectors; set overall limits; or leave them open for negotiation subject to clearance by the registering authority. Lump sum payment, '*term royalties*', their combinations or variation may or may not be allowed. Payment modalities for the use of trademarks, patents and knowhow may vary. For instance, royalties on trademarks are not permitted in India except in relation to exported goods. On the other hand, trademark licensing in the Republic of Korea is quite liberal, and in 1988, the Government removed the requirement for technology inducement as a condition for accepting applications for trademark licences. Tademark licences have been permitted to continue there beyond the life of any accompanying technology inducement agreement. In Ghana, registration of patents is prohibited in the pharmaceutical field. Initial lumpsum payments in addition to running royalties are not encouraged in Malaysia. In China, the current practice is the payment of an appropriate amount as an initial fee followed by recurrent payments.

Taxation of technology payments varies greatly among the Asian-African countries. Laws and regulations may specify who is liabale for the payment of taxes and whether royalty/fee remittances will be allowed on a pre/post tax basis. Often laws and regulations require the licensor to furnish bank guarantees against lumpsum and similar payments. Payment of lumpsum fees in instalments may be a regulatory requirement (e.g. India). Legislation in these countries generally stipulate that remittances may be made only through the National Bank or other banks so authorized by the National Bank.

16. Ghana and Zambia.

While the registration authority for technology agreements may be the same as that for approving foreign investments[17], they are often different.[18] Together with the registration of technology agreements, other registration requirements usually included are registration of patents and trademarks with the Registrar of Patents and Trademarks.

Investment Protection

As the foreign investor is concerned about the safety of his investment, the investment laws generally specify a number of safeguards and guarantees. These relate to compensation in cases of nationalisation or expropriation of property; its seizure or sequestration; the right to repatriate capital, dividends and profits; revocation of foreign ownership rights; reduction in control of management; equality in the treatment of foreign and local investments etc. In addition thereto, a number of Asian and African countries have concluded bilateral investment treaties with western governments or amongst themselves setting forth the necessary guarantees of protection of foreign investment in their countries. Such guarantees in inter governmental agreements are more reliable than that provided in the domestic laws which could be modified unilaterally.

The bilateral investment protection treaties concluded by the Asian-African countries include :

Bangladesh—with Belgium, France, Republic of Korea, West Germany, UK and USA; *Benin* with West Germany and Switzerland; *Burkina-Faso* with Switzerland; *Burundi* with West Germany; *Cameroon* with Belgium, West Germany, Netherlands, Romania, Switzerland, UK and USA; *Central African Republic* with West Germany and Switzerland; *Chad* with West Germany, Italy and Switzerland; *China* with Australia, Austria, Belgium, Denmark, France, West Germany, Finland, Italy, Japan, Kuwait, Netherlands, New Zealand, Norway, Romania, Poland, Singapore, Sri Lanka, Sweden, Switzerland, Thailand and UK. *Congo* with West Germany and Switzerland; *Egypt* with Belgium, Finland, France, West Germany, Greece, Italy, Japan, Netherlands, Romania, Sudan, Sweden, Switzerland UK, USA, and Yugoslavia; *Ethiopia* with

17. Arab Republic of Egypt, Bangladesh, Brunei Darusalaam, China, Equitorial Guinea, Ghana, Guinea, Guinea Bissau, India, Indonesia, Malaysia, Nepal, Mozambique, Pakistan, Philippines. Qatar, Sri Lanka, Senegal, Singapore, Syria, Thailand, Togo. and Vietnam.
18. Nigeria, Philippines and Republic of Korea.

West Germany; *Gabon* with West Germany, Italy Romania and Switzerland; *Ghana* with West Germany, *Guinea* with France, West Germany, UK and USA; *India* with West Germany; *Indonesia* with Belgium Denmark, France, West Germany, Netherlands, Norway, Switzerland and UK; *Iran* with West Germany; *Iraq* with Kuwait; *Ivory Coast* with Denmark, West Germany, Italy, Netherlands, Sweden and Switzerland; *Japan* with Egypt and Sri Lanka; *Jordan* with France, West Germany, Switzerland and UK; *Kenya* with West Germany and Netherlands; *Kuwait* with China, Iraq, Morocco, Pakistan and Tunisia; *Lesotho* with West Germany and UK; *Liberia* with Belgium, France, West Germany and Switzerland, *Libyan Arab Jamahiriya* with Malta, *Malagasy* with Denmarks, West Germany, New Zealand, Norway, Sweden & Switzerland; *Malawi* with Denmark; *Malaysia* with Austria, Belgium, France, West Germany, Netherlands, Norway, Sweden, Switzerland and UK, *Mali* with West Germany and Switzerland; *Mauritania* with West Germany and Switzerland; *Mauritius* with France, West Germany and UK, *Morocco* with Belgium, France, West Germany, Kuwait, Netherlands, Switzerland and USA; *Nepal* with France and West Germany; *Niger* with West Germany and Switzerland; *Oman* with West Germany; *Pakistan* with France, West Germany, Kuwait, Romania and Sweden; *Philippines* with France, West Germany and UK, *Republic of Korea* with Belgium, France, West Germany, Netherlands, Sri Lanka, Switzerland, Tunisia and UK; *Rwanda* with Belgium, West Germany and Switzerland; *Saudi Arabia* with West Germany, *Senegal* with West Germany, Netherlands, Romania, Sweden, Switzerland, UK and USA; *Sierra Leone* with West Germany and UK; *Singapore* with Belgium China, France, West Germany, Netherlands, Sri Lanka, Switzerland and UK; *Somalia* with West Germany; *Sri Lanka* with Belgium, China, France, West Germany, Japan Netherlands, Norway, Romania, Republic of Korea, Singapore, Sweden, Switzerland, Turkey and UK; *Sudan* with Egypt, France, West Germany, Netherlands, Romania and Switzerland; *Syrian Arab Republic* with France, West Germany, Switzerland and USA; *Tanzania* with West Germany, Netherlands and Switzerland; *Thailand* with Belgium, China, West Germany, Netherlands and UK; *Togo* with West Germany and Switzerland *Tunisia* with Belgium, France, West Germany, Italy, Kuwait, Netherlands, Republic of Korea, Sweden and Switzerland; *Turkey* with Belgium, West Germany, Netherlands, Sri Lanka and USA; *Uganda* with West Germany, Netherlands and Switzerland; *Yemen* with France, West Germany, Netherlands, Sweden

and UK; *Zaire,* with Belgium, France, West Germany, Switzerland and USA; *Zambia* with West Germany.

The bilateral investment treaties concluded beween Asian-African Countries, include; *Bangladesh* with Republic of Korea; *China* with Australia, Kuwait, Japan and Switzerland, Singapaore, Sri Lanka and Thailand; *Egypt* with Japan and Sudan; *India* with Thailand, *Iraq* with Kuwait; *Japan* with China, Egypt, and Tunisia; *Republic of Korea* with Sri Lanka, Thailand and Tunisia; *Singapore* with China and Sri Lanka; *Sudan* with Egypt; *Thailand* with India, Japan and Republic of Korea; and *Sri Lanka* with China, Japan, Republic of Korea, Singapore and Turkey.*

The basic pattern followed in most of these *treaties* provides for MFN treatment, full freedom in the matter of repatriation of capital and profits, adequate and effective compensation in the event of expropriation on nationalisation, and provisions for settlement of disputes. Some of the treaties such as those concluded between Japan and Egypt and Sri Lanka, by Netherlands with Malaysia and Singapore and by Sri Lanka with Singapore and Republic of Korea seem to further provide that the investor of the Contracting Parties shall not only be provided with MFN treatment, but also treatment no less favourable than accorded to their nationals. Some treaties also provide for treatment in accordance with International Law as in the cases of the investment agreement between Egypt and USA. In the course of the Euro-Arab Dialogue for the conclusion of a model multilateral Convention, the Arab States have, however, been reluctant to concede to the national standard of treatment although they have been willing to accept other terms such as MFN treatment, full freedom in the matter of repatriation of capital and profits, full market value as compensation and a provision for settlement of disputes.

To promote inter-Arab investments, the Arab countries in the Middle East and North Africa have established a number of multilateral arrangements. These include the Unified Economic Agreement concluded by the Gulf Cooperation Council (GCC) States (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and U.A.E.) and the Consolidated Agreement for the Investment of Arab Capital in the Arab Countries. The GCC Agreement sets forth guarantees and facilities for investments by nationals of these States in other GCC States. The Consolidated Agreement provides for free movement of Arab capital within States parties to that Agreement and guarantees non-discrimination of Arab

* (**Source:** UN Centre for Transnational Corporations. *Bilateral Investment Treaties*, (New York 1988) (ST/CTC/65).

capital and secures for the Arab investor the right to transfer his capital to any participating country after paying his obligations without any legal, administrative or bank regulation. Egypt, Iraq, Kuwait, Qatar, Syria and Yemen Arab Republic are also members of the Inter-Arab Guarantee Corporation which has been established to insure private Arab investors against certain non-commercial risks in investments in other Arab countries.

D. SETTING UP A JOINT VENTURE

One element common to all successful joint ventures is the compatibility of partners. It is, therefore, imperative for the potential partners seeking a joint venture partnership to make sure about each other's competence and intentions and the complementary roles expected of them in a given legal environment for the successful execution of the project before they conclude the contractual arrangements. The parties should note that tne basic objective of a joint venture is not the maximization of immediate interests, but "*creation of a legal structure in which they can work harmoniously over the long-run to achieve results which they cannot achieve alone*". At the same time, note should also be taken of the basic differences in the attitude and goals of the respective partners. The foreign party desires profits and access to the local market, and the local party desires domestic development, technology and exports. Because of these divergent attitudes, differences may possibly develop during the operation of the joint venture and mechanisms, therefore, need to be provided in advance to deal with the potential problems.

Once the partners have been identified and selected, the next step is the setting up of the joint venture which requires a careful and systematic preparation. A multitude of different questions needs to be studied and analyzed by the parties and a number of documents drafted before the joint venture project could be presented to the host country authorities for approval.

Invariably, the first step is the preparation of an initial feasibility study which would serve the important function of indicating whether the project is in line with the objectives which the host country legislation stipulates for the joint venture, and whether it would accordingly be approved by the relevant authorities of that country. Although each joint venture project would have its own premises for the initial feasibility study and individual host country may also set

their own requirements or preferences it would seem that the initial study should set out the following information:

(i) Data on the technical and technological standards of the envisaged production, services and other activities in comparison with the best world standards;

(ii) Analyses and forecasts on marketing, and data about the economic and foreign currency efficiency of the project, including its self-financing in foreign exchange and in domestic currency;

(iii) Information on the existence of vacant building or premises that would be placed at the disposal of the projected joint venture for manufacturing and administrative needs, and in the absence of such information on the measures to be taken to secure quicker new construction;

(iv) Information on the kinds, quantities and prices of raw and prime materials, fuels and energy resources required for the envisaged production, whether to be purchased locally or imported; and

(v) Data about the requirements of skilled and semi-skilled manpower and training programme.

(vi) A brief study on the host country legislation.

If the initial feasibility study leads the parties to an understanding that there is a common long-term interest for a mutually advantageous partnership, the parties should then proceed to prepare a comprehensive feasibility study on the economic, technical and organizational aspects of the project followed by the preparation of the joint venture and related agreements.

The feasibility study on the economic aspects should concentrate on the following elements; the various sources of funding, proforma, balance sheets and profit and loss statements; cash flow predictions; accounting and auditing; customs and tax implications; incentives; foreign exchange regulations, including repatriation of capital, dividends and profits, reinvestment etc; the markets aimed at, the demand in those markets and growth prospects, sales strategies including marketing outlets, pricing, sales promotion, after sales service; trademark policies; structure and intensity of competition and the important trends in the field.

The feasibility study on technical aspects should focuss on machinery and equipment requirements and the sources from which they will be purchased; patent and knowhow licence requirements and the respective suppliers; plant location and plant services requirements; sources for the supply of raw materials, including the requirements of imported goods both at the implementation stage of the project and during operation; continuity of supply, including prices and delivery schedules; factory design and layout and local factors to be taken into account in this respect; host country standards and specifications affecting production etc.

The feasibility study on the organizational aspects should cover the following subject; organizational structure of the joint venture; management organs, their control and liabilities; composition of statutory organs as regards representation of each party; election or appointment of the members of these organs and their term of office; quorum for the meetings of the management organs, working language, names and qualifications of the key personnel when operations are started, and related time schedules; necessary backup teams at the parties' own organisations; availability of manpower and its real cost; manpower requirements and recruitment policies, training, conditions of employment etc.

Since in the legislative and regulatory environment of the host country, the Government is empowered by decree or legislation to mediate in the allowability or otherwise of certain types of equity structures, debt-equity ratios, technology fees, the manufacturing of certain types of products, and above all, to approve or disapprove the joint venture project, it is usual for the intending partners to conclude a formal joint venture agreement making it subject to clearance by the host government.

The joint venture agreement between the partners should be comprehensive and cover all major aspects of the business. The contract should state the major goals of the partners; their specific contributions of assets, their responsibilities and obligations; the equity contributed by each party and their share of ownership, the means of raising other financing, including working capital; the products, the customers and markets served; the composition and responsibilities of the Board of Directors; procedures for the selection of key personnel, provision for technical training and management development; the supplementary licensing, technical and management agreements which are intended to be part of the joint venture contract; provisions for safeguarding patents, trademarks and technical secrets; duration of the contract and ways of modifying it; sources of supply for raw materials, intermediates and components; accounting standards, reporting requirement, the audit and review of financial statements; means of settling disputes including mediation and arbitration; and procedure for dissolution of the business and distribution of assets. It would also be advisable for the contract to cover major matters, such as prior agreement on policy concerning the declaraion and distribution of dividends, reinvestment of earnings, major marketing programmes; the capital structure, including debt-equity relationships and future financing; the rights, if any, of either partner to veto the appointment of key personnel or the establishment of key managerial policies. Such comprehensive provisions in the contract can help to deal with many sources of possible disagreements and conflict in a joint venture. However, in the final analysis, mutual confidence and trust and continuous interaction between the partners are the essential ingredients for the operation of a successful joint venture.

Joint venture arrangements frequently include a series of related agreements for provision of various services by the foreign partner. The careful specification of roles and responsibilities is as important for these agreements as for the overall joint venture contract.

Joint ventures often include licensing agreements between the foreign partner and the joint venture. The foreign partner, which provides significant manufacturing and product technology, patents, knowhow and trademarks to a joint venture in a developing country, usually enters into a licensing agreement with the joint venture in order to gain a return on these assets. The transfer of those resources becomes an essential ingredient for the establishment and operation of a joint venture manufacturing operation. The terms and conditions of the licensing agreement (including the payment of royalties) with the joint venture have to be negotiated with the national partner and often have to be approved by the host Government. Such licensing agreements as part of joint ventures work satisfactorily when the foreign partner provides suitable technology and when the royalties are considered to be reasonable to the national partner and to the authorities of the host government. The royalty payments should be related to the uniqueness, the availability and costs of similar technology from other sources, and to its contribution to the successful operation of the joint venture.

The licensing agreement with the joint venture company is basically a variant from that involved in direct licensing in that the foreign partner, on the one hand, is the owner-supplier of technology, and on the other, as a partner in the joint venture, is also its recipient. The standard licensing agreement should cover the substantive elements of the technology transfer process under the following four provisions; (i) its scope; (ii) its appropriateness to the recipient country environment; (iii) assurances that its technical performance (outputs, yields, efficencies etc.) will be consistent with the economic expectations of the project; and (iv) adequacy and availability of services from the licensor so that the use of technology by the enterprise can be extended for its greater benefit.

In case where the foreign partner provides substantial inputs in the management of the joint venture and engages in major training of local managers for the joint venture, a joint venture may include a management agreement as part of the arrangement. The foreign partner may assign considerable management talent to the joint venture (for example, in production, marketing, planning and control) and train national managers so that they are able to assume important responsibilities in formulating policies and managing the operation. The critical issues in the management agareement are that the management fees should be justifiable and that the contract should be of limited duration so that the national managers are able to take over key responsibilities in the business within a specified period of time.

A technical assistance contract may also form part of the joint venture arrangements. Technical assistance, which includes all such functions as will involve the planning and layout of physical facilities, the design of hardware and equipment, procurement, erection, and the commissioning of the plant, being a one time service is not a *'licensed'* input as it does not have a proprietory character. If it is an input of the foreign partner, and if he does not capitalize it in the joint venture agreement, it is normaly the subject of technical assistance contract, and a lump sum fee would be the usual compensation for such assistance.

Indirect technology—related supplies and services provided by the foreign partner generally comprise some or a combination of the following: (i) machinery and equipment supplies; (ii) specialized services such as site or soil survey; (iii) pre-investment services; and (iv) *'head office'* (parent company office) services. The foreign partner may wish to capitalise his supplies of machinery and equipment. If their valuation is reasonable, capitalisation is equivalent to an investment of cash. Specialised and pre-investment services furnished by the foreign partner prior to, or concurrent with, the establishment of the joint venture are one time services. Technically, if the national investment laws permit, they are capitalisable. Their valuation can, however, pose problems. Many Asian-African countries, therefore, do not permit this capitalisation or set limits to it. Where such situations apply, the foreign partner may attempt the recovery of costs by requiring that payments be made from subsequent profits of the enterprise, or by escalating the otherwise capitalisable costs, or raising royalties on licenced elements of technology.

Payment of *'head office services'* are normally effected under special and separate agreements. Payment for head office expenses is generally disfavoured by countries of the region, but where allowable, they are usually limited to a fixed amount, a fixed percentage of the turnover of the enterprise, or to the lower of the two costs. The capitalisation of these services is generally resisted by the Asian-African countries.

E. THE JOINT VENTURE CONTRACT

1. Parties

The contract should contain the exact names and addresses of the parties with a description of the legal status and capacity of each of them with regard to the conclusion of the contract.

2. Definitions

It is advisable to set out in the joint venture contract the precise definitions of the key concepts used therein, in order to ensure uniform interpretation and understanding of these terms by all the parties. For example, the duration of the joint venture should be clarified to indicate whether it starts from the date of the approval of the contract or from the date when the joint venture formally goes into operation. The term 'profit' should be clarified to indicate whether it means profits before or after tax.

3. Scope of the joint venture

This would include provisions on such matters as the nature and objectives of the joint venture, the corporate form to be used, the implementation schedule of the necessary investments, and the duration of the joint venture.

Nature and objectives: The contract should spell out the nature and scope of business activities in which the joint venture company is to engage. In view of the fact that any changes in the nature and agreed objectives of the joint venture may have to be approved by the host country authorities, it may be advisable to agree on a very broad definition of the nature and objectives, including therein all such activities which the parties might at a later stage wish to embark on. If this is contemplated, either party may wish to include in the contract a provision to the effect that starting some of these activities would require mutual agreement by both the parties, and where relevant, of the host government. Most of the Asian-African Governments generally impose specific limitations on the scope of joint venture operations which may take the form of specifying a product, the location, a minimum production capacity and/or a maximum production level, the latter normally applying in cases where the production is oriented to a local market or where the venture involves the exploitation of a non-renewable source. Where such limits are placed on the scope of activity of the venture, any extension into new products, change of location or alternation in the production would require the prior approval of the host government.

Corporate form: The party should specify in the contract the appropriate corporate form in which the joint venture activities will be carried out. Under the company laws in Asia and Africa, generally speaking, the joint venture can take the form of a limited liability company, a joint stock company or a partnership. The necessary details regarding the practical steps to be taken for the incorporation should also be agreed upon.

Implementation Schedule: The contract must set out the dates by which the various measures must be undertaken and completed. The schedule could cover such items as measures necessary for the completion of the approval procedures, incorporation of the company, conclusion of agreements complementary to the joint venture contracts (such as licence, construction, lease, purchase, employment contract etc.), taking possession of the facilities where the company is to operate, completion of the technical lay out for the plant, installation of the production equipment, testing and comissioning of the plant etc.

Duration: A joint venture can be established either for an indefinite time, or for a limited period only. If the legislation of the host country does not contain provisions regarding this matter, the parties can choose either alternative. Normally, a joint venture is established for an indefinite time.

In Asian and African countries, since the joint venture company is to be organised as a legal entity under their company laws, as a general rule these countries permit a company to have a perpetual existence, unless the duration is otherwsie specifically limited to a stated period (for example, in China, it is 30 years). However, the agreement with the host government can override this provision or the host government can require the articles of association to specify a duration of the entity, in so far as the time limit of involvement of the foreign entity is concerned as the government may wish the venture in its corporate form to continue, but without the foreign partner. Thus, many countries in Asia and Africa, in general manufacturing or services ventures especially, require the phase-out of foreign involvement over a period of time, rather than the termination of the venture as such, so as to allow the corporate vehicle to continue its existence.

4. Co-ordination with host country and its constituents

Co-ordination with the host country authorities—In most of the Asian and African countries, such co-ordination is not merely a matter of necessary and useful practice, but a requirement prescribed by law. For these reasons, the parties should carefully study the requirements set by host country legislation and practice regarding the coordination of the joint venture company activities with the relevant authorities. Having done this, they should insert the necessary provisions in the contract.

Co-ordination between the joint venture company and its partners: As part of their joint venture concept, the parties may wish to agree on the questions related with the coordination of the activities of the company with the respective activities of each of the parties. For instance, it may be necessary to include in the contract provisions regarding the competing activities of the parties, on the one hand, and of the joint venture company, on the other. However, when providing for these issues in the contract, the parties should take account of the applicable national and international rules against the restraint of competition. In particular, exporting companies must be sensitive to anti-trust laws if the technology transfer takes place by means of a joint venture. Both the United states anti-trust laws (Sherman Act and Clayton Act), and the EC regulations (Treaty of Rome) extend to joint ventures in foreign countries if (i) one of the participants is a citizen of the U.S. or of an EC country respectively,