Legal aspects of international joint ventures in agriculture

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STUDY
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AND
AGRICULTURE
ORGANIZATION
OF THE
UNITED NATIONS

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Contents

1. Introduction

Two features characterize the evolution of foreign investment in recent years: a friendlier climate in developing countries[1] and an increase in the number of small and medium-size businesses involved in foreign investment.[2] Thus, in the Buenos Aires Platform (1983), the Group of 77 acknowledged that private direct investments substantially contribute to the development and strengthening of the economic capacities of the developing countries.[3]

This changing attitude may be a consequence of the curtailment of commercial bank loans following the increasing indebtedness of these countries in the last few years. One of the crucial economic problems of many developing countries is the reactivation of investment. Some have therefore issued new investment codes to attract foreign investment to replace foreign loans. One may even speak of competition between developing countries in their efforts to be attractive to overseas investors. An increasing interest in foreign investment has been expressed by countries as different as China, Ghana, the Republic of Korea, Mexico, Turkey, and the Andean Pact countries.[4]

Many governments in developing countries are also beginning to look to the private sector to play a more important role in their nations' economic development. There are programmes in some countries to privatize parastatal or statal enterprises, e.g. in Chile, Guinea, Malaysia and Turkey.[5] One form of privatization consists in the transformation of state enterprises into international joint venture enterprises (IJVE).

Transnational corporations have traditionally dominated the foreign direct investment market. However, in the last few years small and medium-size enterprises have entered this market in numerous developing countries with considerable success.

Both features are important for the scope of this study: equity joint ventures (IJVEs) constitute a specific form of foreign (usually direct) investment and small and medium-size enterprises seem to be particularly appropriate for entering IJVs in agriculture.

Agricultural rehabilitation and development are increasingly recognized by governments of developing countries to be areas demanding priority. IDA loans

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1 For the reasons behind this changing attitude, see International Chamber of Commerce, *Promotion of private foreign direct investment in developing countries—a practical approach.* Report adopted by the ICC Commission on Multinational Enterprises and International Investment, Document No. 191/261 rev., p. 1 *et seq.* and annex.

2 See e.g. the Overseas Private Investment Corporation, 1985 annual report, p. 3 *et seq.;* 1986 annual report, p. 3; J.-P. Béguin, *Les entreprises conjointes internationales dans les pays en voie de développement*, Genéve (1972), p. 226.

3 The Buenos Aires Platform: Final document of the fifth ministerial meeting of the Group of 77, held at Buenos Aires, Argentina, 28 March to 9 April 1983, *in: Proceedings of the UNCTAD sixth session*, Belgrade, Vol. I, reports and annexes.

4 IFC, annual report 1986, p. 10.

5 *Ibid.*, p. 9 *et seq.*

(without interest obligations) have shifted significantly toward agricultural projects in the least developed countries.[6]

The provisions of recent multinational treaties illustrate this trend. The Lomé III Treaty[7] brings the agricultural sector into prominence (arts 26 through 49) and more explicitly emphasizes the great importance of foreign private investment in the development of African, Caribbean and Pacific (ACP) countries (arts 16, 20, 240 *et seq.*). The objectives of promoting and guaranteeing foreign private investment form part of the treaty (art. 240). Joint ventures between a contracting party and EEC enterprises may even be concluded in the form of investment treaties (art. 243 s. 2).

IJVs[8] are considered to be a useful way to increase the capital needed for investment in developing countries (*cf.* art. 245 lit. b). Special measures are provided to help medium and small-scale enterprises to acquire capital by entering JVs (art. 245 lit. e). And the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1975) recognizes the utility of industrial cooperation, especially in the form of IJVEs and joint production and sale.[9]

DEFINITIONS

The term international joint venture[10] does not have a universally accepted meaning. International joint ventures may take different forms and cover any shorter or longer[11] inter-enterprise cooperation (pooling of resources for joint advantage)[12] in respect of research, production and marketing—whether the parties have established a separate entity (equity joint venture) or not (contractual joint venture), excluding only trading activities. Non-equity joint ventures are formed by solely contractual relations between the parties. Because of their generally temporary nature, their typically absent risk-sharing and their enormous variety, pure non-equity joint ventures are not dealt with in this study.

In recent years, at least in connection with foreign investment in developing countries and non-market economy countries, the term joint venture usually signifies a separate enterprise (corporation or partnership) jointly owned and managed by a foreign enterprise on one side and either directly or indirectly by a host government, a host government enterprise or a local private firm on the

6 1984: 44% of newly granted loans. In the same year, 24% of the World Bank's loans concerned agriculture.

7 Effective 1 May 1986.

8 General bibliography: J.-P. Béguin, *op. cit.;* W. Friedmann & G. Kalmanoff (eds), *Joint international business ventures*, New York (1961); W. Friedmann & J.-P. Béguin, *Joint international business ventures in developing countries*, New York (1971), with comprehensive general bibliography on JV, p. 419 *et seq.*

9 *Cf.* International Legal Materials 1975, 1302.

10 Entreprise conjointe internationale; internationales Partnerschaftsunternehmen; internationals Gemeinschaftsunternehmen. See also J.-P. Béguin, *op. cit*, p. 59 *et seq.*

11 W. Friedmann, *in:* Friedmann & Kalmanoff (eds), *op. cit*., p. 6.

12 F.E. Nattier, Dispute settlement, *in:* J.T. Moskoso (ed.), *Legal aspects of doing business in Latin America* (1980), p. 197, 199.

other side.[13] So a joint venture normally implies the sharing of ownership (i.e. equity), risks, profits[14] and management.

For the purposes of this study, cases where the local shareholder is a private, individual investor are included. These forms constitute a species of "direct investment". The term direct investment is used for any investment made "for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof"[15] or to create or expand some kind of permanent interest in an enterprise implying a degree of control over its management.[16] When a foreign investment is not intended to provide control over the management it is called a portfolio investment. Standard forms of (foreign) direct investment are:[17]

- the creation or extension of a wholly owned enterprise, subsidiary or branch, or acquisition of full ownership of an existing enterprise by non-residents;
- participation in a new or existing enterprise by non-residents; and
- long-term loans (five years or longer) by non-residents.

We refer to the participation of non-residents in new or existing enterprises and call them international joint venture enterprises (IJVEs).[18] Thus, in this study, IJVE refers to any company jointly owned and managed on the one side by the host government or by one or more local investors and on the other by one or more foreign participants. The term IJVE includes both voluntary and involuntary international joint venture enterprises (i.e. IJVEs compulsorily prescribed by investment legislation) and also comprises international joint venture enterprises with fading-out provisions for the foreign partner. Fading-out clauses are agreed on at the request of host governments or in compliance with domestic regulations.

Some authors distinguish between a "real" JV, in which equity is distributed more or less equally and where no partner holds a controlling interest, and simple minority investments.[19] However, for the purposes of this study the relative participation in the venture is immaterial as long as the venture corresponds to our definition of an IJVE.

In the case of equity JVs, often the JV in the proper sense (separate legal entity established by the venturers with proportional equity participation) is

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13 *Cf.* e.g. Friedmann & Béguin, *op. cit*, p. 3; G. Young & S. Bradford, *Joint ventures: planning and action* (no year), p. 11. For a practitioner's definition see A.R. Janger, *Organization of international joint ventures*, a research report from the Conference Board, 1980, 4/5.

14 *Cf.* C. Oman, *New forms of international investment in developing countries*, OECD, Paris (1984), p. 14.

15 See the definition given under the OECD Code of Liberalisation of Capital Movements *in:* OECD, *Introduction to the OECD codes of liberalisation*, Paris (1987), p. 37.

16 International Monetary Fund, *Balance of Payments Manual*, 3rd ed. Washington (1961), No. 367, p. 118.

17 See OECD, *op. cit*, p. 37.

18 The term may be restricted to jointly created "third" enterprises: e.g. M. Canizal, *Elaboración de una estrategia empresarial de transferencia tecnológica*, ARAL 3/10 septiembre 1983, 29, 32.

19 Young & Bradford, *op. cit*, p. 12 f.

preceded by a basic agreement among the parties in which the venturers agree upon the establishment of the IJVE. For this precursory contract the terms master contract, joint venture agreement, investment agreement, shareholders' agreement, basic agreement and formation agreement are common. We will use the expression "formation agreement" in contradistinction to the IJVE which, for our purposes, features a separate legal entity jointly established by the partners (possibly in executing a formation agreement) or originating in the acquisition of shares of an existing company.

The present study concentrates on IJVEs in the proper sense without neglecting, when appropriate, formation agreements. The terms JV or IJV are used here in the wider sense which includes both formation (and collateral) agreements and IJVE.

The term IJV here shall include IJVEs as well as formation agreements, and also complementary contracts.

HISTORY[20]

International joint ventures were known even before the First World War, when European and American enterprises were involved in cooperative operations, such as plantation agriculture in developing countries. The cooperating partners however usually belonged to industrialized countries and not to the host countries. Before the Second World War private international corporate activity concentrated on commodity trade or direct investment involving full ownership. Local capital and management were insignificant. Only after the war did the participation of local nationals become important, both in their number and the size of their participation.[21]

In this sense, international joint ventures are a relatively new form of investment. The political independence of developing countries achieved after the Second World War gave the impetus toward economic independence. Governments of developing countries increasingly strove, especially during the 1970s, to control, modify or preclude the traditional forms of international business by expropriating foreign-owned enterprises, by reserving investment in certain fields for the state or domestic investors, insisting on national capital participation in foreign-owned corporations and imposing restrictions on imports, exports and exchange. Thus in some areas, especially those where foreign equity investment was totally precluded, investment was restricted to purely contractual (i.e. non-equity) ventures, such as licensing agreements or management and technical assistance contracts.

The evident danger that the acquisition of control over foreign-owned enterprises by the host state might deter badly needed new foreign capital led most developing countries to a policy favouring international equity joint ventures. They appeared the most appropriate way to conciliate the developing countries' desire not to allow foreign control of local enterprises (and so of the

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20 For historical trends in the international joint venture activity of US enterprises from 1950 to 1982, see K.J. Hladik, *International joint ventures*, Lexington (1984), p. 5 *et seq.*, p. 39 *et seq.*

21 See J. Tomlinson, *The joint venture process in international business: India and Pakistan*, Massachusetts (1970), p. 5.

national economy) with the attraction of new foreign capital and technological know-how. Therefore most developing countries insisted on replacing foreign capital with local capital in existing enterprises until local investors were in the majority and precluded the take-over of a majority position through foreign capital (or management) in companies to be established.

Thus, international equity joint ventures best suit the objectives of developing countries. They make it possible for foreign and local investors to work side by side in securing the effective and successful transfer of technology. At the same time, IJVs safeguard the legitimate property rights of the foreign investor.

International joint ventures have been proposed especially in Islamic countries as a means of strengthening agriculture's contribution to economic growth.[22]

In recent years the establishment of international joint ventures has been expressly favoured by bilateral agreements on economic cooperation,[23] by multilateral treaties[24] and welcomed or even prescribed by national investment legislation.[25]

One may conjecture that the age of the multinationals is soon to be superseded by the age of international joint ventures.[26]

FUNCTIONS

The establishment of an IJV offers advantages to both the investor and the host country.

The principal advantages for the investing country include:

- safeguarding or expanding of markets (instead of exports)
- risk sharing
- security of supply (raw materials)
- local marketing know-how
- contacts with local banks and public authorities
- eventually (in certain political, social or economic circumstances) it may be the only way to invest in a foreign country, gain new markets or defend or expand acquired markets
- sharing of capital cost
- low labour and transport costs.

The most important advantages for host countries are:[27]

- foreign exchange earnings through capital import and commodity export

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[22] *Cf.* J.A. Mollet, The state of food and agriculture in Islamic countries, *Food policy*, vol. 11,4, 1986, p. 279, 284.

[23] *Cf.* e.g. art. 2, Treaty between the Netherlands and Indonesia of 17 July 1971 (Tractadenblad, 1968 No. 88): "With regard to the form of cooperation in the activities referred to in the preceding paragraph, the Contracting Parties, without excluding any other form, recognize the importance of joint ventures in which nationals of both States take part."

[24] *Cf.* e.g. Treaty for the establishment of the Economic Community of Central African States (CEAC), annex X: Protocol on cooperation in the field of industrial development of CEAC (art. 3 (b) and art. 6 (a)).

[25] *Cf.* e.g. Egypt: arts 23 to 29, Law No. 43/1974 (ILM 1977, 1482).

[26] A Conference Board research suggests that most of the Fortune 500 companies and roughly 40% of those industrial companies with more than $100 million in sales are engaged in one or more international joint ventures and the number of international joint ventures appears to be increasing: *Cf.* Janger, *op. cit.*, p. 1.

[27] *Cf.* art. 2 Romanian JVL.

- acquisition of new technology
- acquisition of technical skills
- acquisition of management know-how
- import substitution
- creation of employment
- utilization and processing of local resources for export
- food security.

Cooperation and partnership between foreign and local investors by means of IJVs seems the most suitable way to accommodate an enterprise in the economy of the host state and harmonize the interests of all the parties involved. According to the experience of development banks in industrialized countries, local participation is always recommended. IJVs meet the requirements of many developing countries in the control and integration of foreign investment.

TYPES OF INTERNATIONAL JOINT VENTURE[28]

Joint ventures may be established by partners exclusively from the home country (national JV), by partners exclusively from one or several foreign countries and excluding host country nationals (foreign JV), or by both foreign and local (host country) partners (IJV). Occasionally the term IJV is reserved for local *private* partners, whereas IJVEs between the host government or a host government organization and a foreign partner are called mixed IJVs, mixed ventures, mixed companies or mixed economy companies.[29] Especially in non-market economy countries, the term "joint venture" may be used for mixed (or joint) enterprises with foreign capital, i.e. *international* joint ventures in the meaning of this study.[30] This is the most widely known form.

It is not necessary here to distinguish between local private or government participation. Both are covered by our definition of IJV(E)s. National JVs and foreign JVs are not covered. Enterprises established in country A doing business or establishing a branch in country B are not considered international joint ventures, even when a proportion of the capital is held by nationals of country B.

Partners to an IJV(E) may be states, state enterprises, international institutions, private individuals or corporate bodies.[31]

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28 For a classification of US-foreign international joint ventures see Hladik, *op. cit.*, p. 13.

29 E.g. Algeria.

30 See e.g. Ungarische Handelskammer, *Gemischte Unternehmen in Ungarn*, Budapest (1986), p. 4.

31 Examples in the agricultural sector:

1. State/state/international organization — Agroindustrial Zulia Urena (Colombia 45%, Venezuela 45%, Corporatión Andina de Fomento 10%); development of sugar production and processing facilities in the border region.

2. State/state/state — Arab Company for the Development of Animal Wealth (Damascus), created by the Council of Arab Economic Unity in 1974 and signed by 12 Arab countries; Arab Company for Agriculture and Food Production, approved by resolution 724 of the Council of Arab Economic Unity; Comunbana, Pan-American company, established by the members of the Union of Banana Exporting Countries (UBEC): Colombia, Costa Rica, Honduras, Panama, Nicaragua, Dominican Republic (export organization dealing mainly with new markets, particularly those in eastern Europe; own maritime transport facilities); Pancafe (joint marketing corporation of members of the Bogotá Group: Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Venezuela); Multifert, established by Bolivia, Costa Rica, Cuba, Guatemala, Mexico, Nicaragua, Panama, Peru, Venezuela (joint procurement of fertilizers; since 1979 under the auspices of SELA).

3. State/private foreign company — Ndola Sugar Company Ltd (Tate & Lyle Ltd) United Kingdom

In a joint venture between two partners a 25 percent equity participation is, in practice, the minimum for any stockholder wishing to share in the management. Where more institutions are parties to the venture (for instance oil company consortia), the percentage of equity may be smaller.[32]

For a number of years, multipartite and multinational joint ventures have occurred in sectors where the magnitude of the project was beyond the means of two partners.[33]

In practice, most JVs are established between foreign and local companies rather than between foreign and third country companies, with the exception of extractive industries where the partners largely come from outside the host country. In general, IJVEs are smaller than their parents but exceptions exist, for example Aramco and Caltex.

IJVEs may be exclusively production units, or both manufacturing and marketing units.

Most IJVEs are long-term ventures and open ended. Nevertheless, joint venture companies do exist as a primarily temporary or transitional device, for example in eastern Europe, where the USSR traditionally has used joint ventures as temporary devices for the construction of the enterprise in cooperation with foreign partners, who retrieve their investment and profit in the form of manufactured output.

Legal forms

Occasionally the term JV is used in the sense of a contract in which the partners agree on the establishment of a joint venture as a separate business entity (company).[34] Since the contract concerns the establishment (formation) of the JV, not the JV itself, one should not apply this term to such agreements, which should rather be designated as "formation agreements" or in similar terms.[35] These formation agreements should be distinguished from the "establishment agreements" which are to be found in many African investment codes. The latter are agreements concluded between a host state and foreign investors where the

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11%, Zambia 89%; New Britain Palm Oil Development Ltd, New Guinea Government 50%, Harrisons & Crossfield PLC 50% (palm-oil plantation); Kapiura Plantation (PNG) Ltd, Papua New Guinea Government 30%, Harrisons & Crossfield PLC 70% (palm-oil plantation)

4. State/international organization/private foreign company — Kenana Sugar Co. Ltd (based at Khartoum), shareholders include Kuwait and Sudan, the Arab Investment Company (a regional financial institution), the Sudan Development Corporation (a national financial institution), an Arab private company (Gulf Fisheries Company of Kuwait) and two foreign private companies (Lonrho Ltd of the United Kingdom and Nissho-lwai Co. Ltd of Japan); Mumias Sugar Company, Kenya Government 71%, CDC 17%, Kenya Commercial Finance Corporation 5%, Booker McConnel, United Kingdom, 4%, East African Development Bank 3% (nucleus estate including a processing plant, a core farm owned by the investors of the plant, surrounded by independent producers).

5. State corporation/private foreign company/local investors — Prolasa, Nestlé, Nicaraguan Instituto de Fomento Nacional, Central American investors (powdered milk).

6. Private companies/national and/or international finance corporation — regional enterprise0073, e.g. Andean Multinational Enterprises (EMA).

7. Private foreign companies/local investors — Carling Brewery, Hong Kong, Canadian brewing company 50%, Consortium of Hong Kong businessmen 50%; Coromandel: two US companies 47%, Indian manufacturer and private investors 53% (fertilizer plant).

32 *Cf.* Janger, *op. cit*, p. 5.

33 *Cf.* Friedmann & Béguin, *op. cit*, p. 20.

34 See e.g. F.H. Paetzolt, *Joint ventures in Entwicklungsländern*, Köln (1986).

35 See above, Definitions.

host state may or may not become a partner in the IJV. In such establishment agreements the investment conditions (e.g. guarantees, benefits, dispute settlement) for the foreign investor are determined.

Formation agreements are mainly used in the establishment of equity joint ventures. They are not necessary for JVs that are not a separate legal entity (IJVE). The latter may take the form of a partnership or of a purely contractual relationship.[36] However, non-equity agreements often form part of equity JVs, particularly in respect of technical services contracts, licensing agreements and management contracts. Thus, an IJV will often take the form of a network of different agreements: (1) a formation agreement between the partners of the IJV which generally contains provisions on the establishment of the joint company (IJVE), the transfer and issue of shares, the board of directors, reference to "associated agreements" (e.g. licences) and clauses on arbitration and applicable law; (2) the articles of the IJVE; and (3) various "associated agreements" between the newly established company (IJVE) and the foreign partner concerning technical services, licensing, management, consulting and distribution.

In the food-processing sector, the following types of associated contractual arrangements between local enterprises in developing countries and foreign partners are commonly used:[37]

- technical assistance and licensing agreements (more than 50 percent in the sample)
- technical service agreements including management contracts (10-15 percent in the sample)
- pure licensing agreements (less than 10 percent in the sample)
- JV agreements (about 20 percent in the sample).

It would seem that in large projects, transnational corporations tend to predominate as partners in mainly majority-owned subsidiaries.[38]

Special legislation in respect of formation agreements for IJVs does not exist. The general legal rules[39] are applicable everywhere; general rules also govern the associated agreements.

Until recently the same was true for IJVEs. The general domestic company law of the host state exclusively governed the IJVE. Only in very recent years have some countries or groups of countries introduced special regimes for IJVEs, possibly based upon and supplemented by the relevant domestic company law. As a rule, such special regimes are introduced by national legislation. Most frequently this occurs in socialist states which had earlier abolished traditional company law forms.[40] Occasionally such regimes are established by multilateral treaties.[41]

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36 E.g. technical services assistance contracts; licensing agreements (know-how, trade marks, copyrights, patents, combinations of these); management contracts; production snaring and risk service contracts (mainly in the petroleum industry); production contracting (which can be a cooperative model); franchise agreements; turnkey contracts (including product-in-hand contracts).

37 See J. Cieslik, Food-processing contracts with developing countries, *J. Wld. Trade L*, 1985, 387, 388/389.

38 *Ibid.*, p. 390.

39 E.g. "joint venture" in the proper sense of US law.

40 E.g. Bulgaria, China, Cuba, Ethiopia, the USSR and Yugoslavia.

41 E.g. EMA (Andean Multinational Enterprises).

Unlike equity JVs, no common enterprise with separate legal personality is formed in the case of contractual JVs.

TRANSNATIONAL CORPORATIONS

Traditionally, multinational or transnational agribusiness corporations owned large plantations in developing countries to grow crops for export to industrialized countries. Many of these estates have been taken over by the developing countries. Thus, the importance of transnational corporations in direct agricultural production in developing countries has diminished in the last few decades.[42] It seems that contract production plays a major role in the activities of these corporations in this sector.

In some sectors, for example in the production of sugar, transnational corporations have entered management and consulting contracts with governments of developing countries which occasionally lead to a JV including the transnational corporation. The Mumia sugar project which combines the management and technological experience of the global British company Booker McConnel with the resources of Kenya in a JV is probably the best known example.[43]

Nevertheless, the role of transnational corporations seems to be of major importance in the pre-production industrial sector: agricultural chemicals (pesticides, herbicides, fungicides), fertilizers, agricultural genetic resources (seeds, animal resources) and agricultural machinery, and in post-harvest operations (food and beverage processing industries).[44]

Apparently the main transnational corporations in agribusiness have rarely entered, at least in recent years, JVs with local partners in host countries. The usual approach has been, and is still today, export trading or operations through 100 percent controlled subsidiaries in foreign countries. This is especially true of one of the world's largest food enterprises, Unilever, an Anglo-Dutch group which has very substantial interests in, for example, plantations.[45] The Swiss transnational corporation Nestlé tries to establish wholly owned milk-processing plants but also enters joint ventures, as is illustrated by the construction of a milk powder plant in Nicaragua.[46] Tate & Lyle Ltd, a United Kingdom company mainly involved in sugar, entered some joint ventures in Africa, including one with the Zambian Government's industrial development corporation (INDECO).[47]

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42 See however T.G. Parry, Foreign direct investment in Papua New Guinea, *J. Wld Trade L*, 19, (1985) 411, 413.

43 Booker McConnel holds a 5% equity interest in the Mumias project. *Cf.* Solomon, *Case Western Reserve, J. int. L*, 12 (1980) 363, 367.

44 *Cf.* UN-CTC, Transnational corporations in world development, 3rd survey (1983) No. 655 *et seq.*

45 Unilever N.V. Holland; Unilever Ltd UK; see the list of Unilever subsidiaries in Africa, *in:* B. Dinham & C. Haines, *Agribusiness in Africa.* London (1983), p. 168. This list shows no IJVs.

46 Shareholders, besides Nestlé (31%), are the Instituto de Fomento Nacional (15%) and other local and regional private investors. See Solomon, *op. cit*, 363, 368 *et seq.*

47 Ndola Sugar Company Ltd, founded in 1965, 11% holdings of Tate & Lyle Ltd. See Dinham & Haines, *op. cit*, p. 171. *Cf.* also the list of African subsidiaries which shows participation in some African-based companies. However, the list does not indicate whether the partners are local or are other companies established in industrialized countries. The same is true for the UK-based transnational company Booker McConnel, which has a major interest also in sugar *(ibid.*, p. 176 *et seq.)* and Lonrho, in whose JVs the company generally holds large majorities *(ibid.*, p. 178 *et seq.*).

Another example is the Liebig Company, which financed jointly with the then colonial government in Kenya in as early as 1935 a meat-processing plant at Athi River, south of Nairobi.[48] Similarly, a French firm, Pien & Glasson, has established a JV with a private Brazilian investor for meat processing in Brazil; the French partner also provides technical and marketing assistance.[49]

THE AGRICULTURAL SECTOR

This study covers IJVs in agriculture and the "agribusiness" sector. Agribusiness[50] comprises input,[51] production, food processing[52] and distribution[53] in the agricultural sector[54] (forestry and fishing are not included in this study).

In principle this study has no geographical limits, but for practical reasons it concentrates on a selection of countries. The selection criteria were the following: the importance of agriculture in the economy of the country, availability of legislative materials, enactment of the legislation within the last ten years, special legislation for IJVs, the use of IJVs in agriculture and related fields, preference for developing countries, and exclusion of countries party to a treaty which introduces a common regime for foreign investments.

If foreign investment is aimed at domestic markets it tends to go into large countries; if it is aimed at export markets it follows natural resources or seeks the advantage of low-cost labour.[55]

Legislation

The study covers as far as possible any relevant source of legislation (international treaties, conflict of laws, legislation applicable to foreigners), common legal regimes concerning investment legislation (general, sectoral, entrance conditions, agricultural estate legislation, investment guarantees and incentives, applicable law and dispute settlement), technology transfer legislation and industrial property, company law, taxation, and exchange control. It includes (non-comprehensive) references to doctrinal writings and—occasionally—to concrete examples of IJVs in agriculture.

Thus, investment legislation covers not only investment codes in the proper sense, but all other laws related to investments (e.g. constitutional provisions, tax laws, customs laws, exchange control laws, etc.). However, we shall concentrate here on investment codes.

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48 Kaplinsky, Readings, p. 57.

49 The French firm holds 30% and the Brazilian partner 70% of the shares; see Solomon, *op. cit.*, 363, 367/368.

50 The term "agribusiness" was developed in 1957 at the Harvard Business School: *cf.* R.A. Goldberg, *Agribusiness management for developing countries* (1974), p. 5.

51 "Upstream" production of equipment (machines, seeds, fertilizers, insecticides, herbicides, etc.).

52 "Downstream" production.

53 Storing, transport, commercialization.

54 *Cf.* J.E. Austin, *Agribusiness in Latin America* (1974), preface by R.A. Goldberg.

55 IFC, annual report 1986, p. 10 f.

INTERNATIONAL INSTITUTIONS

Finance corporations

International Finance Corporation (IFC). [56] IFC is a multilateral development institution, created in 1956 as an affiliate of the World Bank, whose objective is to promote the growth of productive private investment and to assist enterprises that will contribute to the economic development of its developing member countries. The corporation concentrates on investment in larger private enterprises.

Its capital resources are provided by the 128 member countries, 107 of which are developing countries. The members collectively determine the policies and activities of IFC.

The corporation's principal tasks are to provide and bring together the financing, technical assistance and management needed to develop productive investment opportunities in its developing member countries. IFC therefore makes both equity investments and loans without government guarantees. Sometimes equity investments and long-term loans are separated, sometimes they are combined.

Commitments concern both new and expanded projects.[57] IFC is basically an investment institution insisting on local participation in the share capital of the enterprise.[58] No investment will be made unless appropriate arrangements are provided for the repatriation of the investment and its earnings.[59] Investment agreements are negotiated by the sponsor, IFC and co-investors.[60]

IFC provides technical assistance for specific investment projects and enterprises but does not provide management.

IFC investments cover in principle all economic branches, but the food and agribusiness sector has grown in importance in recent years. As of 30 June 1986 IFC's portfolio contained loans and equity investments in 377 companies located in 72 developing countries and two regions, and one investment of worldwide scope. The total value was US$2 001 billion in loans, and US$386 million in equity investments.

Food and agribusiness accounted for about 15 percent of the total number of ventures (plus 9.5 percent fertilizers, chemicals and petrochemicals). In the fiscal year 1985/86 investments in food and agribusiness amounted to US$64.7 million for 14 ventures. This represents 15 percent of the number of investments and 6 percent of the amount of money invested in that year. In Africa, especially, the focus of IFC activity that year was in the agro-industrial sector. Thus, the agriculture and food sector is one of the most important investment fields of IFC.

In 35 out of 85 projects approved in 1986 foreign companies from 17 industrial countries were equity investors. Of all the 1986 projects 53 percent

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[56] See IFC, annual report 1986.

[57] Peperzak, IFC, plays a pivotal role in supporting agriculture; project criteria outlined, *in: Agribusiness worldwide*, November 1985, p. 12.

[58] *Ibid.*, p. 12.

[59] *Ibid.*, p. 12.

[60] *Ibid.*, p. 13.

were majority locally owned (private), 9 percent were majority locally owned (public), 14 percent were majority foreign owned and 26 percent had minority shareholders only. Of the investments approved by the board of directors 37 were in wholly privately owned enterprises and 48 were in mixed private/government enterprises.[61]

The Africa Project Development Facility and the Caribbean Project Development Facility provide advisory services to private entrepreneurs for the preparation of viable projects. These facilities do not provide financing for projects. They are heavily involved in agribusiness, food processing and beverage advisory services.[62]

IFC's Foreign Investment Advisory Service aims to help member governments review and adjust policies, regulations and investment promotion strategies that affect direct foreign investment.[63]

Regional development banks (regional finance corporations). Regional finance corporations have been established all over the world. The most important are listed here.

In Africa:

- African Development Bank (AfDB).[64] The AfDB created the African Development Fund (AfDF) with African and non-African (industrialized countries) members in 1972. The fund makes loans primarily in the sectors of agriculture, transport and energy for projects involving more than one country.
- Banque Arabe de développement économique en Afrique (BADEA).[65]
- Banque de développement des états de l'Afrique centrale (BDEAC).[66]
- Banque Ouest-Africaine de développement (BOAD).[67]
- Société internationale financière pour les investissements et le développement en Afrique S.A. (SIFIDA).[68]
- East African Development Bank.[69]

Arab states[70] have established a number of international institutions for the promoting of foreign investment. Among the most important are the following:

- Arab Authority for Agricultural Investment and Development (AAAID), established in 1977 by 13 Arab countries to implement the Basic Programme for

61 IFC, annual report 1986, p. 20.

62 *Ibid*, p. 35.

63 *Ibid*, p. 37.

64 Abidjan, Côte d'lvoire, founded in 1963. African and (since 1979) non-African membership.

65 Khartoum, the Sudan.

66 Brazzaville, Congo.

67 Lomé, Togo.

68 Luxembourg and Geneva.

69 Established in 1968. It is assumed that the bank stopped activities with the ending of the East African Community in 1974/75.

70 On inter-Arab equity joint ventures, see I. Shihata, Inter-Arab Equity Joint Ventures, *in:* Int. Center for Law in Development (New York), *Public enterprises and development in the Arab countries- —legal and managerial aspects*, New York (1979), p. 180 *et seq.*

Agricultural Development of Sudan (1976-1985), which is aimed at the promotion of about 100 public, mixed and private investment projects in agriculture.

• The Council of Arab Economic Unity (CAEU) has promoted the creation of multinational enterprises acting as regional holding companies in certain sectors, including in the agricultural field the Arab Company for Livestock Development and the Arab Company for Agricultural Development.

The League of Arab States has established a number of institutions relevant to this study: the Arab Fund for Economic and Social Development;[71] the Arab Bank for Economic Development in Africa;[72] and the Islamic Development Bank,[73] which is authorized to make direct investments.

A bilateral development institution is the Arab-Brazilian Development Company which is involved in investment related to agriculture, mining, etc.[74]

The following Arab promotional institutions also deserve mention: the Arab Food and Agricultural Organization (Khartoum); the Kuwait Fund for Arab Economic Development (KFAED);[75] the Arab-African Company for Investment and International Trade, which can be a partner in other JVs in African countries; and the Abu Dhabi Fund for Arab Economic Development (ADFAED),[76] which is explicitly authorized to enter JVs.

In the Americas:

• Inter-American Investment Corporation. A total of 25 Latin American and Caribbean countries, the United States and nine non-American states have signed an agreement establishing the Inter-American Investment Corporation (IAIC).[77] It is to be an international corporation in its own right but maintaining close relations with the Inter-American Development Bank.[78]

The purpose of IAIC will be to promote the economic development of its developing member countries by encouraging the establishment, expansion and modernization of private enterprises, preferably those of small and medium scale, in such a way as to supplement the activities of the Inter-American Development Bank (art. I, section 1, subsec. 1). Small and medium-scale private enterprises are vital in economic development in Latin America because of their relatively high rate of job creation and their competitiveness in various sectors. They also

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71 In operation since 1972, head office in Kuwait. The fund is bound to give priority to Arab joint ventures.

72 Intended to promote development in non-Arab African states, in operation since 1975, head office in Khartoum.

73 Established by 24 Islamic states.

74 Established in 1975, 50/50 participation.

75 Kuwait.

76 Abu Dhabi, United Arab Emirates.

77 Inter-American Investment Corporation: Agreement established with the purpose of encouraging private enterprises to supplement activities of the Inter-American Development Bank, Washington, 19 November 1984. Text: ILM 1985, 438. The Federal Republic of Germany belongs to the signatory nations and has ratified the agreement: Gesetz zu dem Übereinkommen vom 19.11.1984 zur Errichtung der interamerikanischen Investitionsgesellschaft vom 10.7.1986 (BGBI. II S: 750).

78 The Inter-American Development Bank does not have the financial means to fulfil the task of IAIC and beyond that is not allowed to invest in private enterprises.

contribute to the improvement of the balance of payments and to the decentralization of resources to the rural areas. Often they are not able to obtain the necessary financial support from local banking institutions.[79] Enterprises with partial share participation by government or other public entities, whose activities strengthen the private sector of the economy, are eligible for financing by IAIC (art. I, section 1, subsec. 2).

The corporation is authorized to make direct investments through the granting of loans and, preferably, through the subscription and purchase of shares or convertible debt instruments in enterprises in which the majority of the voting power is held by investors with Latin American citizenship, and to make indirect investments in such enterprises through other financial institutions (art. Ill, section 1 (b)).[80]

Action may be brought against the corporation only in accordance with competent jurisdiction in the territories of a member country in which the corporation has an office and has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No action shall be brought against the corporation by member countries or persons acting for or deriving claims from member countries (art. VII, section 3 (a)).

- The Caribbean Development Bank (CDB).[81]
- The Caribbean Investment Corporation (CIC).
- The Caribbean Development Project Identification Facility.
- The Caribbean Food Corporation (CFC).[82] The objectives of CFC are to identify, plan, organize and finance agricultural production schemes.[83]
- Corporación Andina de Fomento (CAF). The members of the Andean Pact established, by the Agreement of 7 February 1968, the Andean Development Corporation (Corporación Andina de Fomento).[84] CAF is a legal entity of public international law (art. 1 (2)) and is based in Caracas, Venezuela (art. 2 (1)). Its purpose is to further economic integration in the subregion through the creation of production or service enterprises and the expansion, modernization or conversion of existing enterprises (art. 3). CAF is empowered to subscribe to stocks or shares and may transfer the stock, shares, rights or securities which it may acquire by first offering them to public or private entities in the subregion and, failing their interest, to third parties interested in the area's economic and social development (art. 4 (j)). Under articles 46 *et seq.* CAF enjoys in the territory of the parties immunity (art. 47), transferability and convertibility (art. 48) of assets and exemption from controls on assets (art. 50). In addition, CAF is exempt from all kinds of taxes (art. 52).

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79 See BT-Drs. 10/5512.

80 The corporation shall possess juridical personality and, in particular, full capacity to contract, to acquire and dispose of immovable and movable property; and to institute legal and administrative proceedings (art. VII, section 2).

81 Founded in 1970, Barbados.

82 CFC was founded by 12 members of CARICOM.

83 See also Caribbean Financial Services Corporation (CFSC) in Bridgetown, Barbados, and Adela Investment Company S.A., Luxembourg; Mexico.

84 English text: ILM 1969, 940.

• Proindustrial CE Ltda. This is a joint Colombian-Ecuadorian institution. Its objectives are to identify agricultural projects, elaborate feasibility studies and participate financially in new enterprises. The institution has initiated vegetable and fruit-processing schemes, processing of potatoes and palm-oil and the packing of tea.[85]

In Asia:

• The Asian Development Fund, instituted by the Asian Development Bank (ADB).[86] Its priorities include agriculture and agro-industry.

In Europe:

• The European Investment Bank, Luxembourg. This is the investment bank[87] of the European Economic Community (EEC). The bank has two fields of operation: the EEC countries and countries outside the Community, especially ACP countries. The bank finances productive investment projects within the Community and lends finance or participates as a minority shareholder in the A-Programme for ACP countries ("Finanzierung in Form von haftendem Kapital"). Besides direct investment, it sometimes offers a quasi-capital participation in the form of special loans. Direct participation and other forms of financing are often combined. The bank acts on behalf of the EEC, i.e. the minority capital participation is formally held by the Community. Such direct investment is made in enterprises or development banks in ACP countries. This participation is intended to be temporary and sold in due time to nationals or institutions of the host countries. Agro-industry is a main field of development.[88]

The basis of this form of financing is to be found in the Lomé Treaty. Under the Lomé Treaty I, for example, the European Investment Bank has taken over shares of the Société Ivorienne de Coco Râpé (SICOR) in Cote d'lvoire. It has also acquired shares under the treaty in the Liberian Bank for Development and Investment, the Development Bank of Zambia, the Development Bank of Seychelles and the Société Financière de Développement (SOFIDE) of Zaire.

In 1985 the European Investment Bank acquired shares in the Banque Internationale pour le Commerce et 1'Industrie de Guinée and in the Joint Venture Company of Fiji.

The bank would seem to finance primarily small and medium-size projects and is not substantially involved in energy resource financing.

• Interact Group. The national development banks of the EEC countries have joined forces in the Interact Group.[89] Member banks often work together in the financing of development projects, including IJVs.

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85 Pavlic, Uranca, Cizelj & Sothui (eds), *The challenges of south-south cooperation*, Colorado (1983), p. 237 f.

86 Manila, the Philippines. Founded in 1965, with 30 regional (including Australia and Japan) and 14 non-regional shareholders (1982).

87 *Cf.* Annual report, 1986, of the European Investment Bank.

88 See e.g. *EIB Informations*, February 1987, No. 2, p. 8.

89 See below, Finance corporations.

Guarantee agencies

Inter-Arab Investment Guarantee Corporation.[90] At present the only functioning multilateral guarantee institution is the Inter-Arab Investment Guarantee Corporation in Kuwait. This corporation is exclusively reserved for Arab member countries.

Multilateral Investment Guarantee Agency.[91] On 11 October 1985 the Board of Governors of the International Bank for Reconstruction and Development (World Bank), at the bank's annual meeting in Seoul, approved the convention establishing the Multilateral Investment Guarantee Agency (MIGA).[92]

MIGA's objective is the encouragement of foreign investment among its members by promoting such activities and by issuing guarantees for new investments (art. 12 (c)) made in a developing member country (art. 14)[93] against non-commercial risks, i.e. transfer risk, expropriation risk, repudiation risk, risk of armed conflict and civil disturbance (art. 11 (a)). Only investors who are nationals of a member country are eligible for MIGA's guarantee.

In case of corporate investors the corporation must either be incorporated and have its principal place of business in a member country or the majority of the capital must be owned by nationals of member countries (art. 13 (a)). In order to assure the host government's consent, article 15 provides that MIGA "shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the agency against the risks designated for cover". However, MIGA will not issue a guarantee without being satisfied that the investment will enjoy fair, equitable treatment as well as adequate legal protection in the host country.[94]

The MIGA Convention covers "investments" without giving a definition of this term. Nevertheless, eligible investments will comprise in any case equity interests and equity-type loans.[95] Thus, IJVs in agriculture in a developing country may be covered by the MIGA protection scheme.

MIGA is designed so as not to compete with but to complement the activities of existing national or international investment guarantee agencies and private political risk insurers[96] (arts. 19 through 21 MIGA Convention).

NATIONAL INSTITUTIONS

Finance corporations

National development banks play an important role in the promotion of IJVs. There are national institutions that aim at the promotion of their own national

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[90] *Cf.* I. Shihata, Arab Investment Guarantee Corporation—a regional investment insurance project, *J. Wld Trade L*, 6 (1972) 185.

[91] English text with commentary: ICSID review, *Foreign Investment L. J.*, 1(1986), 147 and 193. See also I. Shihata, Towards a greater depoliticization of investment disputes: the role of ICSID and MIGA, *ibid.*, p. 1 *et seq.;* Voss, *Introductory note*, ILM 1985, 1598.

[92] The board transmitted the convention to the member countries of the bank and to the Government of Switzerland, inviting them to sign the convention.

[93] Developing countries are those countries listed in category 2 of schedule A of the convention.

[94] *Cf.* in this context art. 23 (b) (ii) MIGA Convention.

[95] Loans by owners of equity in the enterprise concerned and forms of direct investment: *cf.* art. 12 (a) MIGA Convention.

[96] E.g. Lloyd's (London); a few US insurance companies.

economies, but national institutions have been created, occasionally in the same countries, in order to foster projects outside the national territory. The Belgian Société Nationale d'Investissement (SNI: Belgian National Investment Corporation) may be quoted as an illustration of the former type in an industrialized country; many developing countries have created similar national finance corporations.[97]

These corporations are relevant to IJVEs insofar as they may subscribe to part of the capital of an IJVE to be established within the country concerned.[98] The prototypes of the second type of institution are the French Caisse Centrale de Coopération Economique (CCCE), founded in 1946 in Paris, and the British Colonial Development Corporation (now the Commonwealth Development Corporation).[99] They were originally established for the appropriate placement of financial resources designated for French and British overseas colonial territories. Following the examples of CCCE and CDC, "international" development banks (finance corporations, investment companies, investment corporations) have been established in many industrialized states to contribute to the establishment of enterprises abroad, in particular in developing countries.[100]

Development banks generally act as financial and consultative institutions. They take over—with the intention of fading out—(minority) capital participation in JVs and/or grant long-term loans with equity features. One of the few exceptions appears to be the US Overseas Private Investment Corporation (OPIC) which is not authorized to make equity investments in projects.

Development banks and/or investment corporations have also been founded in numerous developing countries.[101] Some developing countries have also created promotion companies, for example, the Saudi-German Development and Investment Company Ltd (SAGECO, Riyadh). The purpose of SAGECO is the promotion of German JV investments in industrial and agricultural projects in Saudi Arabia. Certain development banks of East African states[102] are following the British example (development finance companies), while countries in Central and West Africa seem to be influenced by the French model.

Two European finance corporations heavily involved in agricultural IJVs in developing countries are described below.

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97 E.g. the Brazilian Banco Nacional do Desenvolvimento Econômico; the Chilean Corporación de Fomento; the Mexican Nacional Financiera. The Saudi Investment Banking Corporation (SIBC) provides medium-term financing for industrial and agricultural projects; SIBC was established by a multinational consortium, 35% of the shares are held by non-Saudis.

98 The Belgian SNI, for example, is empowered to enter IJVEs with foreign investors; see *Doing business in Belgium*, Price Waterhouse (1983), p. 18.

99 See below, Commonwealth Development Corporation.

100 Australia: Australian Guarantee Corporation; Belgium: SBI (Société Beige d'Investissement International S.A., Brussels); Denmark: IFU (The Industrialization Fund for DCs, Copenhagen); France: CCCE; Germany: DEG (Deutsche Entwicklungsgesellschaft, Köln), KfW (Kreditanstalt für Wiederaufbau); Japan: Overseas Economic Cooperation Fund, and Export-Import Bank of Japan; Netherlands: FMO (Financierungs-Maatschappij foor Ontwikkelungslanden N.V.); Sweden: Swedfund; United Kingdom: CDC; United States: OPIC (Overseas Private Investment Corporation, Washington).

101 see e.g. the National Investment Corporation of Cameroon (Decree No. 64/DF/486 of 16 December 1964).

102 E.g. Development Finance Corporation of Kenya, established in 1954.

Commonwealth Development Corporation.[103] This was established as the Colonial Development Corporation in 1948 to assist in the economic development of the British Dependent Territories. In 1963 it was renamed the Commonwealth Development Corporation (CDC) and Commonwealth countries that had previously attained independence were included in the area of the corporation's operations. Since 1969 CDC has been allowed to operate in any developing country, subject only to the approval of the Minister for Overseas Development.

CDC was founded by Act of Parliament in 1946. The actual constitution and powers of the corporation are to be found in the Consolidated Commonwealth Development Corporation Act, 1978. This Act entrusts CDC with the task of assisting overseas countries in the development of their economies by investing in development projects. CDC had carried out activities by the end of 1985 in 34 independent Commonwealth countries[104] as well as Cameroon, Costa Rica, Côte d'lvoire, Ecuador, Ethiopia, Honduras, Indonesia, Liberia, the Philippines, the Sudan and Thailand.[105] The area of operations is concentrated in Africa (48.2 percent), Asia (25.9 percent), the Caribbean and Latin America (14.2 percent) and the South Pacific (11.3 percent). CDC aims at realizing not less than half of its new commitments in the poorer developing countries.

Activities include investment in productive and revenue-earning enterprises capable of servicing their capital, alone or in partnership with government/statutory authorities, private interests or other development agencies. Projects are chosen for their development value and their capacity to generate or save foreign exchange. CDC also invests in regional and national development finance institutions (development banks). In 1985, no less than 72 percent of new commitments by CDC were in natural resources, including planting of hardwood forests, sawmilling, development and cultivation of oil-palm, rubber, coffee, oil-seeds, tea, cocoa and food crops.[106] The promotion of food crop production is important in CDC policy. Also, small-farmer projects continue to receive special attention.[107]

An interesting characteristic is that relatively few British private firms or individuals are partners of JVs in which CDC is a shareholder. In agricultural projects, host governments and development banks are often partners.

Renewable natural resources accounted for 52.2 percent of the CDC portfolio by the end of 1985.[108] A wide variety of food crops, fruits and dairy products are grown and processed in CDC projects. The natural resources investment covers the following areas:

- annual and perennial food crops 48 percent

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103 See annual report and statement of accounts, year ended 31 December 1985. Further information has been made available to the author by CDC orally and in a printed form which cannot be quoted (information leaflets, etc.).

104 The target of Commonwealth percentage of the overall portfolio of CDC is about two-thirds of commitments, *cf.* CDC annual report 1985, p. 8.

105 *Ibid*, p. 3.

106 *Ibid.*, p. 9.

107 *Ibid.*, p. 9.

108 *Ibid.*, p.11.

- rubber 20 percent
- beverages 13 percent
- forestry and forest products 10 percent
- fruits and nuts 3.5 percent
- dairy, livestock and ranching 2 percent.

CDC services cover a very large field. The corporation provides not only project financing, development, identification, advice, monitoring and feasibility studies, but also specialist advice on project engineering, project implementation (including marketing, procurement and housing) and applied research. CDC provides the initial project management in certain sectors, especially for large agricultural enterprises, development finance companies and so on, particularly in IJVEs in which it holds a majority position. Currently, the corporation provides agricultural management in Botswana, Cameroon, Costa Rica, Indonesia, Malawi, Malaysia, Papua New Guinea, the Solomon Islands, Swaziland,[109] Tanzania, Vanuatu, Zambia and Zimbabwe.

CDC involvement covers nucleus estates and smallholder schemes, nucleus estates and outgrower schemes, smallholder schemes without nucleus estates, inputs and services for smallfarmers and transfer of estates to smallfarmers.

German Development Corporation (DEG).[110] DEG is the German finance corporation for investment in developing countries. It was established in 1962 and is owned wholly by the Government of the Federal Republic of Germany. The corporation is a financial and consultative institution whose purpose is to support economic growth by promoting and cofinancing joint ventures. The principle of partnership is the main guideline for its policy. Therefore, the participation of an appropriate local partner as shareholder is normally a condition for cofinancing by DEG. DEG usually operates in partnership arrangements involving a German or other EEC partner, a local partner and DEG. DEG does not normally take over management functions and therefore regularly holds minority equity positions.

DEG finances JVs in developing countries by taking over equity and/or long-term loans with equity features, in either case with the intention of fading out in a period of 12 to 15 years. Thus, it belongs to the rare number of internationally operating financing companies in a position to offer venture capital and long-term loans for private JVs. Besides the cofinancing of IJVs, DEG cofinances about 50 national and regional development banks in developing countries. Since 1962 DEG has cofinanced about 350 JVs in more than 75 developing countries.

DEG's consultative function consists of the identification and systematic preparation of investment projects, assistance in arranging financial packages by combining its own funds in the form of equity and long-term loans with funds from private investors, local development banks and international financial institutions such as CDC, CCCE, IFC and the European Investment Bank.

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109 CDC trains managers at the Mananga Agricultural Management Centre, set up by CDC in Swaziland in 1972, see CDC annual report 1985, p. 103.

110 Deutsche Entwicklungsgesellschaft.

DEG operates worldwide, in all developing countries and in every type of viable private industry including development banks. Promotional activities and investments are concentrated in small and especially medium-size enterprises. By cofinancing development banks DEG cooperates indirectly in the financing of additional projects.

Overall, German foreign investment in agriculture is relatively low (1 percent). However, DEG's agricultural foreign investment is as much as 7 percent (1985), and is increasing. In 1986 a special concept was introduced to promote agricultural and agro-industrial investment projects, primarily in African countries. The implementation of IJV programmes in these sectors is difficult because of the lack of appropriate German partners for agricultural production in developing countries. The lack of German firms specialized in agriculture is the reason DEG has turned to foreign EEC partners for its agriculture-oriented projects. This accounts for the relatively low percentage of investment in agriculture. Nevertheless, about 40 IJVs cofinanced by DEG in the agricultural and agro-industrial sector are actually operating.[111]

National guarantee schemes

Most of the important industrialized states[112] have organized a national investment guarantee programme for direct private investment on behalf of their nationals in foreign countries.[113] Without exception these guarantee agencies cover equity investments so that investments in foreign JVs are insured against risks of expropriation, war and transfer. Geographically the national guarantee schemes cover the whole world[114] or at least the developing countries.[115] Here are just two examples.

Federal Republic of Germany. The Federal Republic of Germany provides a guarantee scheme against political risks in favour of capital investments of German enterprises in developing countries.[116] These risks include nationalization, expropriation or similar, war or similar, payment prohibitions, moratoria, impediments to conversion and transfer of funds. The guarantee covers equity participation in foreign enterprises, long-term loans with equity features, capital investment in 100 percent-owned foreign subsidiaries, earnings from equity

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111 See DEG annual report 1985, p. 48 f.

112 At present 22 countries, including virtually all OECD members, India and the Republic of Korea.

113 Australia: Export Finance and Insurance Corporation (EFIC); Austria: Österreichische Kontrollbank (ÖKB); Belgium: Office National Ducroire (OND); Canada: Export Development Corporation (EDC); Denmark: Danish International Development Agency (DANIDA); France: Banque Fran&ccedill;aise pour le Commerce Extérieur (BFCE) and Compagnie Fran&ccedill;aise pour le Commerce Extérieur (COFACE); Federal Republic of Germany: Treuarbeit; Japan: Overseas Investment and Insurance Scheme (MITI); Netherlands: Netherlands' Credit Insurance Company (NCM); Norway: Export Credit Guarantee Agency (GIEK); Sweden: Export Credit Guarantee Board (EKN); Switzerland: Office for Guaranteeing Export Risk (GERG); United Kingdom: Exports Credit Guarantee Department (ECGD); United States: Overseas Private Investment Corporation (OPIC).

114 EFIC, ÖKB, OND, COFA, MITI, GIEK, ECGD.

115 EDC, DANIDA, Treuarbeit, NCM, EKN, GERG, OPIC.

116 The Federal Republic is acting through Treuarbeit AG, Wirtschaftsprüfungsgesellschaft, Steuerberatungsgesellschaft, Zweigniederlassung Hamburg, New York-Ring 13, 2000 Hamburg 60.

participation and from long-term loans with equity features. Guarantees are granted only in cases where the investment enjoys sufficient legal protection in the host state.

Overseas Private Investment Corporation (OPIC).[117] OPIC is a wholly owned government corporation chartered by the United States Congress to encourage US private investment supporting the economic objectives of developing countries. For this purpose OPIC operates two main programmes: insurance of US private investment against political risks (inconvertibility, expropriation, war, revolution and insurrection), and participation in the financing of private and mixed public-private projects through loans and loan guarantees. OPIC also provides pre-investment assistance (e.g. investment missions). In contrast to other finance corporations, OPIC is not authorized to enter equity participation. OPIC is heavily involved in agribusiness. From 1981 to 1986 it provided insurance or loan guarantees to 169 agribusiness projects in 45 developing countries.[118]

INTERNATIONAL LAW PROTECTING FOREIGN INVESTMENT

Bilateral treaties

At the beginning of this century it became the practice to include clauses on investment and establishment of juridical persons in general treaties on commerce, for example, in the treaties of the United States. Other countries, especially the Federal Republic of Germany and Switzerland, introduced a new model: a separate treaty on the encouragement and mutual protection of investments.

Nowadays there are three types of treaty protecting foreign investment:

1. Treaties of friendship, commerce and navigation, such as those concluded by the United States, the United Kingdom and Japan. France has used this type in its relations with former colonies.

2. Investment guarantee treaties. Such treaties have been concluded by the United States with an important number of developing countries. These agreements complement the institutional framework of the American Export Guarantee Scheme. In contrast to treaties of friendship, investment guarantee treaties do not impose obligations on the host government except in the recognition of certain rights of the US Government in case of violation of private interests (subrogation).

3. Specific investment protection treaties. Investment protection treaties have been concluded by the Federal Republic of Germany and Switzerland, starting in the 1960s. Numerous industrialized and developing countries have since concluded such treaties, including Japan, Sweden and Norway.

Attempts at codification

The first attempt at a codification of the international law of foreign investment was made by the League of Nations in 1929. A draft convention concerning the treatment of foreigners sought to guarantee non-discrimination with regard to establishment, commercial activities, fiscal treatment, acquisition of property and

117 See e.g. OPIC annual report 1986.

118 *Ibid.*, p. 5.

treatment of foreign societies.[119] The initiative failed.

The next (unsuccessful) attempt took place in the framework of the Havana Charter in 1948, providing for an international trade organization which codified, for the first time, the rights and obligations of member states with regard to foreign investments. Article 12 was entitled "International Investments, Economic Development and Reconstruction". The United States refused to ratify the charter, as did most other countries.

In 1953, a United Nations General Assembly resolution asked for the codification of the principles of international law with regard to the liability of states. However, the reports[120] of the Secretary-General concluded that there seemed to be no immediate prospect for a new charter on the protection of investments.

No further attempt has since been made under the auspices of the United Nations to codify the principles of international law on investment.

The European Organisation of Economic Co-operation and Development (OECD) elaborated in 1962 a draft convention on the protection of foreign property.[121] This draft was inspired by the ABS Shawcross Convention.[122] The text is influenced by the bilateral investment protection treaties of the Federal Republic of Germany. In substance, the draft was based on the classical principles of international law. The Council of OECD approved the project on 12 October 1967, but the draft has not yet been submitted for signature to member states.

However, the Code of Liberalisation of Capital Movements of OECD, adopted on 18 December 1961 and later several times amended, includes direct investment, liquidation of direct investment and the main aspects of the right of establishment.[123] Furthermore, OECD member countries agreed, under the OECD Declaration on International Investment and Multinational Enterprises, to apply—with certain exceptions—"national treatment" to foreign-owned or foreign-controlled enterprises operating within their territories.[124]

In the Council of Europe, the Economic Committee of the Consultative Assembly elaborated a document[125] concerning the status of investments and a guarantee fund. However, no convention has been signed.

The International Chamber of Commerce proposed in 1949 an International Code on Equitable Treatment of Foreign Investment,[126] but it was not approved by governments.

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119 Cf Documents de la Société des Nations Nr. C.I.T.E.I. C.36.M.21 1929 II; Khun, The International Conference on the Treatment of Foreigners, *American J. int. L.*, 24 (1930) 571; Cuttler, The treatment of foreigners in relation to the draft convention and conference of 1929, *American J. int. L.*, 27 (1933), 225 f.

120 E/3325-1960, E/3492-1961, E/3665-1962.

121 ILM 1963, 241.

122 *J. Public L. (Emory Law Journal)*, 9 (1960), 119 *et seq.*

123 See OECD, *Introduction to the OECD codes of liberalisation*, Paris (1987), p. 22 *et seq.*, 37.

124 *Ibid.*, p. 24 *et seq.*

125 No. 1027, of 8 September 1969; E/3492, par. 261.

126 ICC, brochure No. 129. The Chamber's Commission on Foreign Investment and Economic Development later issued brochures on financing economic development (No. 142) and a "Guide pour les investissements internationaux" (No. 272).

2. International joint ventures in regional legal regimes

In Africa, Latin America and the Caribbean common legal regimes for foreign investment and even for international joint ventures have been created within the framework of regional common markets. The Council for Mutual Economic Assistance (CMEA) has elaborated common provisions for intrasocialist, international economic organizations. No specific legal regimes have been devised for IJVs in agriculture or agro-industry. A brief outline of common investment and IJV regimes actually in operation is given here.

AFRICA

Several regional economic organizations have been created in central and western Africa: the Economic Community of West Africa (CEAO),[1] the Economic Community of West African States (ECOWAS),[2] the Central African Economic and Customs Union (UDEAC)[3] and the Economic Community of Central African States (CEAC).[4] Until now, only UDEAC has introduced a common legal regime for foreign investment. Nevertheless the foreign investment legislation of most individual francophone African countries—whether integrated in a common market or not—is very similar to the UDEAC regime. The different political orientation of the francophone African states does not have much influence on the relevant rules.

The anglophone East African Community (EAC), founded in 1967 by Kenya, Tanzania and Uganda with the objective of establishing an East African Common Market, broke down in 1977. The institutions of the community are no longer operating, and even when they were operational the community did not succeed in coordinating policies concerning foreign investment.[5]

Central African Economic and Customs Union (UDEAC)

UDEAC was founded in 1960 by Cameroon, the Central African Republic, Chad, Congo and Gabon.[6] Pursuant to article 45 of the treaty, the Council of Heads of State of UDEAC signed in 1965 a Common Convention on Investments in the

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1 Member states of the Communauté économique de l'Afrique de l'ouest (effective 1974): Burkina Faso, Côte d'lvoire, Mali, Mauritania, Niger, Senegal.

2 Treaty signed at Lagos on 28 May 1975. Member states: Benin, Côte d'lvoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

3 Union douanière et économique de l'Afrique centrale (UDEAC).

4 Communauté économique des Etats de l'Afrique centrale (CEAC).

5 The East African Industrial Licensing Act *(cf.* chapter 496 of the Laws of Kenya) had provided procedures for spreading foreign investment by granting subsidies and concluding licensing agreements.

6 Geneva, 8 December 1960.

States of the Union (investment code).[7] This convention constitutes the first regional common investment regime. Its goal is the harmonization of foreign investment legislation in member countries. To achieve this, member countries have introduced the provisions of the convention into their national legislation.[8] The investment code concentrates on guarantees, incentives and the settlement of disputes.

Guarantees. Acquired rights are guaranteed to all undertakings lawfully established in the countries of the union (art. 1 IC). The exchange regulations guarantee the transfer of capital, of profits lawfully acquired and of funds originating in the transfer of shares or the winding up of business activities (art. 2 IC). Undertakings using capital from other countries are entitled to acquire any rights necessary for the exercise of their activities (art. 3 IC).

In the exercise of their professional activities, foreign employers and employees rank as nationals of the member states of the union (art. 4 IC). In their private capacity, foreign employers and workers may not be subject to duties, taxes or contributions of any kind other or higher than those of the nationals of countries of the union. Foreign enterprises enjoy the same rights and protection as local businesses regarding industrial property (art. 5 IC). The conditions of access to judicial or administrative courts are the same for foreign business organizations and individuals as those guaranteed to nationals of the various states of the union by their respective laws.

Incentives. Enterprises wishing to launch a new activity or expand an activity (excluding marketing) already existing may benefit from a special decision admitting them to a preferential schedule (art. 6 IC), particularly if they belong to one of the following categories of agriculture (art. 7 IC): (1) industrial plantation works engaged in the processing of products; (2) stock-farming installations for the protection of livestock health; (3) industrial preparation or processing of animal or vegetable products.

For preferential schedules the investment code distinguishes between undertakings belonging to and operating in only one country (arts 15 to 29 IC: schedules I and II) and undertakings and establishments of interest to two or more countries of the union (arts 30 to 40 IC: schedules III and IV). For the latter a joint approval procedure applies.

Schedule I provides exemptions and reductions regarding import and export duties and taxes. Schedule II concerns undertakings of cardinal importance to national economic development, involving exceptionally high investments; in addition to the benefits in schedule I, schedule II contains fiscal stabilization clauses.

Any enterprise approved under schedules I or II or considered particularly important to the social and economic development plans of member states may benefit from an establishment agreement granting additional guarantees (and

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7 *Brazzaville*, 14 December 1965. For the text see, for example, loi No. 18/65 of 14 December 1965, *Journal officiel* of Cameroon 1966, 609.

8 *Ibid.*, see e.g. Cameroon.

imposing certain obligations), such as:

- guarantees as to financial, legal and economic stability and stable conditions for financial transfers and the marketing of goods
- guarantees as to entry and movement of labour, freedom of employment and free choice of suppliers and services.

Schedule III contains customs and fiscal benefits. Schedule IV applies a single tax and offers the benefit of an establishment agreement containing, in principle, the same guarantees as the establishment agreement for enterprises under schedules I and II (art. 35 IC). Enterprises important to economic and social development and involving high investments may be granted stability of the special or ordinary fiscal provisions applying to them.

Applicable law, dispute settlement. Enterprises subject to a decision to withdraw approval may appeal under schedules I and II to an administrative court of the country of establishment, and under schedules III and IV to the Council of Heads of State of the Union (art. 42 IC). Any dispute concerning approval may be settled, if necessary, by the arbitration procedure laid down by article 43 IC, if such procedure exists in the national legislation (art. 44 IC).

Disputes arising from the application of clauses of an establishment agreement and the calculation of any penalty due because of non-performance of obligations assumed may be settled by arbitration. The procedure shall be established with each agreement. However, article 43 IC regulates some elements of this procedure, especially the final and binding nature of awards rendered by a majority of the arbitrators who are entitled to determine their own procedure and to decide cases on equitable grounds; for enterprises where most of the initial capital came from abroad, the decision of approval may provide for a procedure of international arbitration.

The investment code does not contain specific provisions for international joint ventures (multinational enterprises) created by nationals of different member states of the union.

Economic Community of Central African States (CEAC)

The treaty for the establishment of the Economic Community of Central African States (CEAC)[9] was concluded in Libreville on 19 October 1983. CEAC includes all members of UDEAC and other Central African states.[10]

The community strives for harmonious cooperation, and a balanced and self-maintaining development in all fields of economic and social activity, particularly in industry and agriculture (art. 4 (1)).

Cooperation in agriculture and food production is regulated in article 43. Under paragraphs 2(d) and 3 of this article, and in accordance with protocol IX[11] annexed to the treaty, the gradual preparation of a joint policy is aimed at

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9 English text: ILM 1984, 945 *et seq.* The depositary is the Government of Gabon.

10 Parties to the treaty are: Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe, Zaire.

11 Protocol on cooperation in agricultural development between the member states of the Economic Community of Central African States. English text: ILM 1984, 993 et seq.

research and training, production, processing and marketing of agricultural and forest products, livestock and fishery. The cooperation extends to the production, supply and distribution of agricultural goods; it also covers cooperation in the promotion of related industries and trade (arts 3 *et seq.* protocol IX).

The intended cooperation in industry is regulated by arts 45 *et seq.* CEAC treaty and by protocol X.[12] It comprises the preparation of a common investment code (art. 46 (1)(a) CEAC treaty) and cooperation in setting up multinational industrial enterprises (community industrial enterprises)[13] in strategic sectors (art. 3 protocol X) which include food and agro-industries (art. 5 (b) (i) protocol X).

LATIN AMERICA AND THE CARIBBEAN

Of the various common markets and organizations for economic cooperation in Latin America and the Caribbean (CARICOM,[14] MCCA,[15] ALADI,[16] SELA,[17] ANCOM[18]), only the Andean Group has enacted a comprehensive common legal regime for foreign investments. The creation of IJVEs (multinational enterprises) is one of the objectives of CARICOM, SELA and ANCOM.

Andean Foreign Investment Code (AFIC)

The Andean Common Market (ANCOM, Andean Pact)[19] is a subregional group of ALADI and was established by the Cartagena Agreement on Andean Subregional Integration of 16 May 1969.[20]

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12 Protocol on cooperation in the field of industrial development of the Economic Community of Central African States. English text: ILM 1984, 995 *et seq.*

13 Community industrial enterprises include joint operations and enterprises in industrial projects or other industrial production units solely owned by at least two member states of CEAC or by nationals of at least two member states (art. 1 (d) protocol X).

14 Comunidad del Caribe; founded in 1973. For the text of the treaty establishing the community see Phillips, *Freedom in the Caribbean, a study in constitutional change* (1977) app. IX, p. 488 *et seq.* Members of CARICOM are: Barbados, Guyana, Jamaica, Trinidad and Tobago, and from 1974 also Antigua, Belize, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia and Saint Vincent.

15 Mercado Común Centroamericano; founded in 1960. Members of MCCA are: Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica. A draft treaty for a Central American economic and social community containing common rules to control foreign investments and to promote regional multinational enterprises was prepared (1976) but not completed: UNCTC, *Measures strengthening the negotiating capacity of governments in their relations with transnational corporations* (1983), No. 89.

16 Asociación Latino-Americana de Integratión; formerly (until 1980) ALALC (Asociación Latino-Americana de Libre Comercio). Member states of ALADI are: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela. Plans to introduce common rules on foreign investment have up to now failed: *ibid.*, No. 73, 79.

17 Sistema Económico Latino-Americano.

18 Andean Common Market.

19 General bibliography: G. Foeth, Investitionen in Lateinamerika. Internationale Verträge und nationale Bestimmungen (ed. G. Zieger), Frankfurt, 1979, p. 42 *et seq.;* A. López Valdez, The Andean Foreign Investment Code: an analysis, *J. of int. L. and Economics 7* (1972) 1; Riesenfeld, Legal systems of regional economic integration (with bibliography), *Am. J. Comp. L* 22 (1974), p. 415, 436; C.F. Schill, The Mexican and Andean investment codes: an overview and comparison, *L. and Policy in int. Business* 6 (1974) 437.

20 ILM 1969, 910. Parties to the agreement are Bolivia, Chile (withdrawal in 1976), Colombia, Ecuador, Peru and—since 1 January 1974—Venezuela (see Final Act of the negotiations on the entry of Venezuela into the Cartagena Agreement, 14 February 1973, text: ILM 1973, 344).

The Commission of the Cartagena Agreement, which constitutes the administrative body of ANCOM, promulgated in Lima on 31 December 1970 its Decision 24 on the common regime of treatment of foreign capital and of trade marks, patents, licences and royalties (Andean Foreign Investment Code, AFIC).[21] The purpose of the code is to provide a general framework for the regulation of foreign investment, focused on the industrial sector.

Decision 24 has the same objective as the older UDEAC code[22]—the harmonization of foreign investment legislation in member countries. However, in contrast to the UDEAC code, the Andean Foreign Investment Code was created, for historical reasons, not primarily as a means of attracting capital from abroad but rather as an instrument to control foreign capital already invested in the Andean countries. In recent years, however, the formerly "defensive" countries have been more favourably inclined toward foreign capital. In May 1987 the members of ANCOM concluded a supplementary protocol which allows more flexible national policies in the regulation of foreign investment.[23] So it is not clear to what extent the following description will be valid for the future.

Every member country of the Andean Pact has to implement the Andean Foreign Investment Code (decision 24) within its legal system. The code permits the imposition of severer restrictions on foreign investment but not the enactment of rules which are more liberal than those contained in it (art. 33), except in specific cases provided for in decision 24 (art. 44). The purpose is to harmonize the national foreign investment laws of the Andean countries at the level of a minimum standard. However, the supplementary protocol of 1987 gives each country more flexibility in allowing foreign investment, especially with respect to the 49 percent limit for foreign participation.[24]

The main original characteristics of the code are the exclusion of foreign investors from certain sectors of the economy (arts 3, 41-43), limitations on investment in the remaining areas in the form of entry controls for foreign capital (art. 2) and disinvestment requirements (arts 3, 27, 28).

Definitions. "Direct foreign investments" are defined as contributions coming from abroad and belonging to foreign individuals or legal persons, made to the capital of an enterprise, in freely convertible currency as well as specific physical or tangible resources, whose value may be exported and the profits thereof transferred abroad (art. 1 (1)). The same rule shall apply to investments of transferable local funds as well as to reinvestments in conformity with the Andean Foreign Investment Code (art. 1 (2)).

A "foreign investor" is defined as every owner of a foreign investment (art. 1 (8)). For the purpose of its regulatory system, the code classifies all locally based enterprises in three categories: national enterprise: more than 80 percent

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21 English text: ILM 1972, 126; amended version ILM 1977, 138. Spanish text: Institute) para la Integración de América Latina (INTAL), Régimen jurídico de las inversiones extranjeras en los paises de la ALADI, vol. VII, 1: Grupo Andino, Régimen Común—Bolivia.

22 See above, Central African Economic and Customs Union.

23 See *Bull, of Legal Developments* 1987, 106.

24 *Ibid.*

of the capital belongs to national investors (art. 1 (10)), mixed enterprise: 51-80 percent of the capital is owned by national investors (art. 1 (11) and foreign enterprise: 51 percent or more of the capital is owned by foreign investors (art.1 (12)).

It is necessary that these percentages be reflected in the technical, financial, administrative and commercial management of the enterprise (art. 1 (10), (11) and (12)).

Article 36 defines as mixed enterprises those in which the state or a state-run enterprise participates, even if the participation is less than 51 percent but not less than 30 percent of the capital (decision 47), provided the state participation has, by agreement or otherwise, a determining position in the decisions of the enterprise.

The investments of international or foreign government finance corporations made with the purpose of cooperating in economic development, whatever their juridical nature, are considered "neutral capital", and therefore are not subject to classification as national, mixed or foreign.[25]

Entry conditions. All foreign investors must submit an application to the competent national authority, which after evaluation authorizes the investment when it corresponds to the development priorities of the recipient country (art. 2 Andean Foreign Investment Code). All direct foreign investments have to be registered with the competent national authority, together with the agreement specifying the terms of the authorization (art. 5). No investment of foreign capital is to be allowed if the activities concerned are adequately covered by existing enterprises (art. 3 (1)). Furthermore, no direct foreign investment, the purpose of which is the acquisition of shares, participations or rights owned by national or subregional investors, shall be authorized (art. 3 (2)).

Two exceptions are made: investments in national firms threatened by bankruptcy (art. 3 (3)) and investments which increase the capital of the enterprise, provided the enterprise remains at least in the category of mixed enterprises (art. 4).

Each Andean Pact member country may reserve specific sectors of economic activity for national enterprises and determine whether the participation of mixed enterprises in those sectors shall be admitted (art. 38 (1)). New direct foreign investment shall not be permitted in enterprises engaged in domestic marketing of products of any kind (art. 43 (1)).

However, under the escape clause of article 44, in a recipient country in which "special circumstances" are thought to exist, regulations other than those provided for in the code may apply. In fact, due to reservations and special regulations by member states based on article 44, the situation is rather complex. Thus, even within the Andean Pact states the legal regime for foreign investments does not seem to be completely uniform.

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[25] By decision of the commission, the investments of the following entities are considered neutral: International Finance Corporation, Banco Interamericano de Desarrollo, Corporación Andina de Desarrollo (decision 124), Deutsche Entwicklungsgesellschaft (decision 125).

Divestment.[26] The Andean Foreign Investment Code's objective is to arrive at mixed enterprises in which the national share of capital is major and in which national interests will have a decisive impact in the basic decisions of such companies (Andean Foreign Investment Code, Declaration No. 7). The code therefore imposes fade-out requirements on all new and existing foreign investments (arts 28, 30) in order to transform them gradually and progressively into mixed enterprises, by offering foreign-held shares, etc., for sale to national investors.

The duty-free programme of the Cartagena Agreement covers only those products of national or mixed enterprises of member countries and of foreign enterprises in the process of being transformed into national or mixed enterprises (art. 27). An exception is made for foreign enterprises which export at least 80 percent of their production to third countries; these are exempt from the fade-out procedure but are not eligible for the duty-free programme of the Cartagena Agreement (art. 34 (1)).

Foreign enterprises for which special regulations exist are not obliged to abide by the provisions of the code regarding the transformation of foreign enterprises into mixed or national enterprises (art. 39).

Investment guarantees. Foreign investors are entitled to re-export invested capital after payment of the pertinent taxes (art. 10), when they sell their shares, participations or rights to national investors or when liquidation of the enterprise occurs (art. 7 (1)). However, the sale of shares to another foreign investor must be previously authorized by the competent national authority (art. 7 (2)).[27] Foreign investors have, upon authorization by the competent national authority, the right to transfer verified net profits abroad in freely convertible currency, but not more than 20 percent of that investment annually (art. 37 (1)); however, every member state may concede a higher percentage (art. 37 (2)). Under article 17 foreign firms are allowed to obtain only domestic credits and these only on a short- or medium-term basis. Member countries are not allowed to grant concessions to foreign investors more favourable than those granted to national investors (art. 50).

Incentives. The Andean Foreign Investment Code does not contain any special fiscal or other incentives to attract foreign investment.

Technology transfer legislation. All contracts on the importation of technology, and on patents and trade marks, must be examined and submitted to the competent authority of the relevant member country for approval (art. 18). Certain licence provisions are expressly prohibited (art. 20), as are royalties under certain circumstances, if the licensee is a foreign enterprise (art. 21).

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26 See E.E. Murphy, The Andean Common Market and Mexico: a foreign investment profile, *Texas Int. L. J.* 13 (1978) 312: Table V: Compulsory commitment of foreign enterprises to national equity participation.

27 Bearer shares are not allowed in the case of corporations (art. 45, Andean Foreign Investment Code).

In 1974 the Commission of the Cartagena Treaty passed Decision 85[28] establishing a common regime of industrial property. The regime has gone into force in Colombia,[29] Ecuador[30] and Peru.[31] It serves as an instrument to control the property of technical know-how and is characterized by the following points:

- abolition of the exclusive import right of the patentee
- limitation of the protection period to five years, with the possibility of one further five-year period
- obligation to make use of the patent
- forfeiture of the patent in case of non-use
- compulsory licences.

Applicable law, dispute settlement. Article 51 of the Andean Foreign Investment Code provides that instruments relating to investments or to the transfer of technology may not contain clauses which purport to remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country, or allow the subrogation by states to the rights of their national investors. In spite of this clause, known as the Calvo clause, Ecuador is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as is Chile).

Andean multinational enterprises

By virtue of Decision 169 (1982), the Commission of the Treaty of Cartagena established the regime of Andean multinational enterprises (Empresas Multi-nacionales Andinas: EMA). This regime has been incorporated into the legal systems of the member states.[32]

The status of EMA may be accorded to corporations (art. 9) whose place of business is situated in one of the member countries and at least 80 percent of whose capital is held by two or more nationals of a member country (art. 1 (a) (b)). The competent national authorities must be satisfied that this majority is reflected in the technical, administrative, financial and commercial management of the enterprise (art. 1 (d)). The enterprise is governed by the articles of the company, Decision 169, the law of the state of incorporation and the municipal law applicable under the rules of private international law of the latter (art. 12). EMAs enjoy a number of advantages under article 18 of Decision 169: the

28 Spanish text: La Propiedad Intelectual 1974, 133; English text: ILM 1974, 1478; German text: GRUR Int. 1975, 134. For comments see: F. Abbott, Bargaining power and strategy in the foreign investment process: a current Andean code analysis, *Syr. J. int. L. & Com.* 3 (1975) 319; E. Aracama-Zorraquín, Der gewerbliche Rechtsschutz in Lateinamerika—Beginn einer neuen Entwicklung, GRUR Int. 1976, 53; CM. Correa, Principales aspectos del régimen de patentes de invención aprobado en el Pacto Andino, La Propiedad Intelectual 1975, 131; P. Schaiger, Entwicklung und aktuelle Probleme des gemeinsamen Patentrechts im Andenpakt, GRUR Int. 1982, 33.

29 Decree No. 1190 of 26 June 1978, Diario Oficial 35054 of 13 July 1978; text: Revista del Derecho Industrial 1979, 173.

30 Law-Decree No. 1257 of 10 March 1977, Registro Oficial No. 304 of 28 March 1977.

31 Law-Decree No. 22.532 of 15 May 1979, El Peruano of 26 March 1979.

32 Instituto para la Integratión de América Latina (INTAL), Régimen jurídico de las inversiones extranjeras en los países de la ALADI, vol. VII, 1, p. 98. The former regime of Andean multinational enterprises (decision 46) had failed.

benefits of the Andean Common Market, national treatment in tax matters (art. 19), access to credits (art. 20) and the guarantee of transfer of capital and profits (arts 24, 25).

Examples of EMA in agricultural enterprises are not available. However, other relevant examples of IJVEs in the Andean Pact states may be cited. An example of a trilateral IJVE between two public corporations of Andean Pact states (Colombia, Venezuela) and a Dutch transnational corporation is Monóme-ros Colombo-Venezolanos, a fertilizer production plant.[33]

The Centro de Almacenes Congelador C.A. is an IJVE established in Venezuela between a Venezuelan, a Brazilian and a Swedish company. The majority is in Venezuelan hands.

CARICOM multinational enterprises

In 1976 the CARICOM enterprise regime was adopted by member countries[34] but the implementation process does not seem to be completed yet. The application of the regime requires the participation of either public or private organizations or persons of at least two member states which together must hold the majority voting power. CARICOM enterprises are allowed to operate in the development of natural resources and the marketing of agricultural products. The establishment is under the control of a special supervisory authority. The organization is regulated by the laws of the state of incorporation.

The regime of CARICOM enterprises has the following characteristics:

- legal person in all member countries
- right to operate foreign accounts
- free repatriation of principal and profits
- most-favoured enterprise treatment in the member states.

According to available sources it seems the regime has not yet resulted in the establishment of a regional CARICOM enterprise.[35]

SELA multinational enterprises

The Sistema Económico Latino-Americano (SELA)[36] is a permanent regional organization of economic and social cooperation and promotion of Latin American states. It came into effect in 1975 with the participation of all Latin American countries and has among its objectives the creation and promotion of Latin American multinational enterprises.[37] The capital of such multinational enterprises may be statal, parastatal, private or mixed.

However, the role of private capital participation seems to be limited,[38] because these enterprises are supervised by the member states.[39] At least one

33 Participation of Colombia and Venezuela 45% each, the Dutch enterprise 10% (in exchange for its technological input): see UNCTC, *op. cit*, No. 197.

34 See above, footnote 14.

35 Uranga, *in* Pavlic *et al.* (eds), *op. cit*, p. 169.

36 Spanish text of the convention for the constitution of SELA: Derecho de la Integratión VIII (1975),159.

37 Art. 5 sec. 1 (a) (1) SELA Convention.

38 *Cf.* UNCTC, *op. cit*, No. 118.

39 Art. 5 (1) (a) (2) SELA Convention.

multinational enterprise relevant to this study has been created under the SELA regime: the fertilizer trading company Multifert, established in 1980. It involves the participation on equal terms of state enterprises of 11 member countries of several subregions.

In 1977, under the general auspices of SELA, Comunbana[40] was created by the seven member countries of the Union of Banana Exporting Countries.[41]

ASIA

In 1983, Indonesia, Malaysia, the Philippines, Singapore and Thailand entered a Basic Agreement on ASEAN Industrial Joint Ventures (AIJV)[42] to promote the greater utilization of their agriculture and industries.[43] However, AIJVs are not newly created business organizations with a specific legal regime but are defined as any entity which produces an AIJV product in any of the participating countries and has a minimum equity participation of 51 percent held by nationals of at least two participating countries.[44] Approved AIJV products are granted the privileges of a minimum margin of tariff preference of 50 percent[45] and possibly, in the case of new AIJV products, rights of exclusive production for three years.[46] So AIJVs are not IJVs as defined in this study.[47]

EUROPE

Societas Europea

A draft decree setting out a regime for the Societas Europea has been elaborated. This form of IJVE resembles a corporation (company limited by shares) and is intended to serve as the legal basis for transnational activities within member countries of the European Economic Community. This draft has not yet been adopted as Community legislation.

Council for Mutual Economic Assistance[48]

Within the framework of the Council for Mutual Economic Assistance (CMEA), international joint ventures have been established on the basis of agreements

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40 Comercializadora Multinacional de Banana.

41 Colombia, Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, Panama.

42 At Jakarta, 7 November 1983. Text: ILM 1983, 1233.

43 *Cf.* Preamble.

44 Art. I s. 3 Basic agreement. Exceptions from the majority requirement are made in certain cases, e.g. where more than 50% of the production of an AIJV will be exported to non-ASEAN countries (art. I s. 5).

45 Art. III s. 1 Basic agreement.

46 Art. Ill s. 5 Basic agreement.

47 See chapter 1, Definitions.

48 Bibliography: M. Andrae, Gemischte Unternehmen in sozialistischen Ländern, *Staat und Recht* 1981, 420; P. Buzescu, Joint ventures in eastern Europe, *Am. J. of Comp. L.* 32 (1984) 407; D. Campbell (ed.), *Legal aspects of joint ventures in eastern Europe*, 1981; P. Glasmacher, *Möglichkeiten grenz- und systemüberschreitender Unternehmenskooperation durch westliche Beteiligungen an Unternehmen in Jugoslawien, Ungarn, Rumänien, Polen und Bulgarien*, 1986; D.H. Loeber, Kapitalbeteiligung an Unternehmen in der UdSSR, RIW 1976, 396; J.G. Scriven, Cooperation in east-west trade: the equity joint venture, *Int. Bus. Lawyer* 10 (1982) 105; Joint venture legislation in East Europe—a practical guide, *Harvard int. L. J.* 21 (1980) 633.

between governments.[49] A programme (comprehensive programme for the further deepening and perfection of the cooperation and development of the socialist economic integration of the member states of CMEA) adopted in 1971 in Bucharest provides for the creation of "joint enterprises".[50] To implement this, CMEA elaborated by-laws[51] for international economic organizations in 1973.[52] Arts 35-48 of these by-laws regulate "joint undertakings". In principle, enterprises in non-member states of CMEA may become a party to such 'joint enterprises".[53] However, to date this does not seem to have happened. It is not evident from the sources available how many joint enterprises exist and in which sectors of the economy they are operating.

It is worth mentioning here that the Final Act of the Helsinki Conference on Security and Cooperation in Europe acknowledges that new forms of industrial cooperation and "mixed companies" could be useful.[54]

49 *Cf.* Loeber, RIW 1976, 396, 397/398.

50 Chapter I section 8 No. 4.

51 *Cf.* also Jakubowsky, Entreprises internationales des pays du CAEM, *Journal du droit int.* 107 (1980) 829.

52 German text: Informationen für den Außenhandel der sozialistischen Länder. Allgemeiner Teil, Ausgabe 1974 *(sine loco)*, p. 57 *et seq.*

53 *Cf.* Model statutes art. 1 No. 4.

54 Loeber, RIW 1976, 396, 400.

3. International joint ventures in national legal regimes: a comparative survey

For various reasons, the foreign investment legislation of industrialized and developing countries differs widely. However, one can clearly discern a number of special features by which the legislation in specific geographical areas is characterized.

In Latin America there is a clear geographical split between countries with and countries without special legislation. While all member states of the Latin American Association of Integration (ALADI) have enacted special laws, the states of the Central American Common Market (MCCA) and the Caribbean—except Nicaragua and the Dominican Republic—are without such laws.[1] The reason may be found in the mainstream of foreign investments directed to the ALADI states. The first provisions on foreign investment were enacted during and soon after the Second World War in Argentina, Mexico, Paraguay, Brazil and Colombia.[2] The first register for foreign investments was created in 1946 in Brazil.[3] Most of the investment laws of Latin America entered into force after 1970. Only Brazil[4] and Nicaragua,[5] apparently, have older legislation still in force.

As to the policy of investment legislation, or the attitude toward foreign investment, formerly a distinction between "promotional" and "defensive"[6] states was possible: foreign investment legislation was aimed either at controlling foreign capital or attracting it. However, in recent years the former "defensive" countries are showing a more flexible attitude.

Under the different common market regimes in Latin America only the Andean Group has enacted a common legal regime for foreign investments.

The investment climate in most parts of Africa is characterized by the following features: (1) Political independence was reached by most African

1 For an overview see R.L. Cherol & S. Zalduendo, El marco legal de la inversión extranjera en el Caribe y Centroamérica. *Integración latinoamericana, derecho de la integración*, 1984, p. 32 *et seq.*

2 C.M. Correa, Características y tendencias de la regulación de las inversiones extranjeras en América Latina y el Caribe. *Integración latinoamericana, derecho de la integración*, 1984, p. 20 *et seq.*

3 *Ibid.*, p. 21.

4 Brazil: Law No. 4.131 (1962) as amended by Law No. 4.390 (1964); Decree 5.562 (1965).

5 Nicaragua: Decree No. 10 (1955).

6 The "defensive" investment laws are characterized by the following features: entrance control and registration of foreign investments; divestment (fade-out) procedures; compulsory local capital majority (compulsory IJV); lack of special incentives; technology transfer control; Calvo clauses.

countries around 1960, while Latin American countries generally won their political sovereignty more than a century ago. (2) The level of economic development in a number of African countries is substantially lower than in Latin America; 18 of the 25 least-developed countries are situated in this continent. (3) The ties with the former colonial powers remain strong in African countries and foreign investments mostly come from them, while US investments prevail in Latin America. During the 1970s the bulk of investment directed to developing countries went to Latin America and Asia. (4) Until at least 1980, foreign investments in Africa seem to have been concentrated in the extractive sector and in agricultural primary commodities.[7]

As a result most African countries, regardless of their political orientation, actually have a very positive attitude toward private foreign investment, particularly in agriculture. They try to attract foreign capital by providing various guarantees and incentives, and compete with economically richer and more attractive regions in other parts of the world. Most of the African foreign investment laws are substantially less restrictive than the corresponding legislation formerly in force in Latin America.[8]

Like Latin America, Africa has a split between countries with and without special legislation on foreign investment, but it is defined by language, not geography. While francophone states[9] introduced special investment codes from the very beginning, anglophone African countries[10] traditionally enacted industrial development acts and have started introducing investment codes only in the last few years.[11] As a result of this codification movement most African countries actually have an elaborate foreign investment legislation.

Most western European countries[12] do not have specific rules for foreign investment. Within the European Economic Community, in particular, the system of free movement of capital is in force. Sectoral and regional regulations on the encouragement of investment generally apply to both domestic and foreign investors.

During the last 20 years or so almost all eastern European countries have enacted legislation making provision for foreign investment (exclusively) in the form of international joint ventures. In 1967, Yugoslavia became the first eastern European state to introduce legislation on IJVs and to permit non-socialist investment in state-managed enterprises. Romania and Hungary passed similar legislation in 1971 and 1972, respectively. Poland and Bulgaria followed in 1976

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7 T. Ocran, The legal framework of foreign investment in Africa, *Zambia L. J.* 1980, 1; D.R. Allen (ed.) *Legal aspects of doing business with Black Africa*, vol. 2, New York (1981).

8 See above, footnote 6.

9 E.g. Central African Republic, Congo, Madagascar, Rwanda.

10 E.g. Ethiopia, Ghana, Kenya, Liberia, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia, Zimbabwe.

11 E.g. Zimbabwe 1982, Sierra Leone 1983, Ghana 1985, Zambia 1986.

12 For an exception, see e.g. Spain. However, recent legislation brought Spanish rules in line with EEC law on the free movement of capital; *cf.* Royal Legislative Decree of 27 June 1986 on foreign investment in Spain (English text: ILM 1987, 727); Royal Decree 2077/1986 of 25 September 1986, of the Ministry of Economy and Finance, to pass the Regulations on Foreign Investment in Spain (English text: ILM 1987, 734); Royal Decree 2374/1986 of 7 November 1986, of the Ministry of Economy and Finance on Spanish investment abroad (English text: ILM 1987, 744, 9).

and 1980. In January 1987 the USSR issued a decree allowing IJVEs with foreign enterprises.

Thus, most eastern European states[13] now allow the creation of IJVs with enterprises from western and developing countries. Because of approval procedures, conditions of property (socialist control of the means of production), central planning and central regulation, the establishment of IJVEs in socialist countries turns out to be somewhat more complicated than in other countries. However, eastern European foreign investment legislation is designed to attract and not to reduce foreign participation in the domestic economy.

Special legal regimes for IJVs in agriculture and related sectors do not exist anywhere in the world. Foreign investment in these areas is covered by general legislation which only occasionally contains provisions concerning enterprises in agriculture.

INVESTMENT LEGISLATION

Definitions

Investment codes. As a rule, African investment codes cover the whole field, for example commercial, fiscal, customs and labour matters. Thus, investment codes determine the entity of legal relationships between the host state and the investor. They regulate the admitted types and areas of investment, establish the approval authorities and procedures and determine the conditions of establishment and the rights and obligations of the investor and the host state. They enumerate the available incentives and the criteria enterprises must meet in order to be eligible for any benefits.

Most of the codes create different categories of enterprise with special graduated incentive regimes for each.[14] Some codes, especially but not exclusively in states with nationalized industries, are only applicable to foreign investment. This is especially true in non-market economies[15] where private companies are lacking and in countries in which the laws' primary objective is or has been the control of foreign investment.[16] However, most codes cover both foreign and domestic investment,[17] although numerous provisions—especially those containing guarantees—will apply only to foreign capital.[18]

Investment codes do not cover foreign grants-in-aid or commercial loans but only foreign capital in the form of direct or portfolio investment. Investment codes are applicable to direct foreign investment in the form of IJVs no matter what proportion of foreign capital is involved.

National and foreign enterprises. The terms "national enterprise" and "foreign enterprise" are ambiguous. In some countries they refer to whether (the

13 In 1986 Czechoslovakia issued directives concerning IJVs.

14 E.g. Tunisia (art. 9, 14 IC; criteria: number of jobs created, zone of investment).

15 E.g. Cuba, Ethiopia and eastern European countries.

16 *Cf.* Latin American countries, e.g. Venezuela (Decree No. 1.200 of 16 July 1986).

17 E.g. Benin (1972), Cameroon (IC 1984), Congo (1982), Guinea-Bissau (1984), Côte d'lvoire (art. 1, 5 IC), Tunisia (art. 2 IC); Zaire (art. 3 (a) IC).

18 E.g. Côte d'lvoire (art. 18 *et seq.)*, Madagascar, Tunisia (art. 18, 25 IC: transfer guarantees, dispute settlement by arbitration).

incorporation and organization, etc., of) the enterprise is subject to domestic law.[19] In others the distinction relates to domestic or foreign control of a national enterprise.[20]

In the first case, we are facing the problem in private international law on whether domestic law is applicable to the enterprise or not. The second distinction presupposes the applicability of domestic law to the company and has to do with the municipal law problem, where such a "national" company is considered "foreign" because shares are held by foreign individuals or companies,[21] by domestic companies with foreign participation or by non-resident nationals.

The problem of nationality of companies is a crucial one, except when all the relevant connecting factors (place of incorporation, principal business place,[22] nationality and residence of the shareholders) are situated in the same country. If they are not, the applicable law is controversial, if legislation does not precisely decide the point. The guiding principle in Anglo-American law countries is that the existence and powers of a corporation should be determined by the law of the country in which it claims its existence, i.e. the country in which the place of its alleged incorporation is situated.[23] Numerous civil law countries apply the law of the central administration or of the principal place of business ("real seat" theory).[24] Many countries subscribe to the "control theory", i.e. the determination of the nationality of a company according to the nationality of the (individual or legal) persons having power to decisively influence the management of the company.

While the determination of the nationality of a company is indispensable for any jurisdiction in order to fix the applicable law, the need to distinguish between domestic companies under foreign or national control only emerges when different rules for these categories exist or if a state tries to extend its jurisdiction extraterritorially over foreign (non-domestic) companies controlled by its own citizens or companies.

Only the first problem concerns this study: special rules for domestic companies with capital participation by alien citizens or foreign-based/incorporated companies. Many countries, in particular western industrialized countries, grant equal treatment to foreign-owned domestic companies.[25]

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19 E.g. Brazil (art. 60 Law-Decree 2.627 of 26 September 1940: incorporated in Brazil and having its place of management in Brazil).

20 *Cf.* Andean Pact countries: art. 1 AFIC; Argentina (art. 2 (2) (3) FIL); Brazil (art. 1 sec. 1 Law No. 5703/71); Mexico (art. 2 FIL).

21 I.e. subject to foreign law.

22 E.g. Brazil (art. 60 Law-Decree 2.627 of 26 September 1940: incorporation and principal place of administration in Brazil).

23 See e.g. *Charlesworth's Company Law*, 13th edition, by G. Morse, London (1987) p. 70, for the United Kingdom.

24 See e.g. Ferid, *Internationales Privatrecht*, 3rd edition, Frankfurt/M. (1986) sec. 5-63 (Fed. Rep. of Germany); Loussouarn/Bourel, *Droit international privé*, Paris (1978) No. 707 ("siège social réel"); Rigaux, *Droit international privé*, vol. II, Brussels (1979) No. 1392 *et seq.*; Vander Elst/Weser, *Droit international privé belge*, vol. I, Brussels (1983) No. 55.1 ("établissement principal").

25 E.g. Belgium.

Other countries, however, distinguish between different categories of domestic companies according to the influence of foreign capital participation. The criterion chosen by most of their legal regimes is whether the majority of the capital (with a corresponding majority of votes or a dominating voting power) is in the hands of foreign or domestic individuals or of legal persons controlled by foreign or domestic individuals.[26] Others simply consider an enterprise, especially a company, "foreign" if it is under the control of foreigners.[27] However, a local company may already be considered a "national" entity if its business address is established in the host state and at least 30 percent of its equity is held by nationals.[28]

Other legal regimes introduce three categories: national companies (70 or 80 percent to 100 percent local capital participation), mixed companies (50 percent to 70 or 80 percent) and foreign companies.[29] These percentages must be reflected in the commercial, financial and technical administration of the enterprise.[30] In other jurisdictions, especially countries with non-market economies and lacking private companies, the term "mixed company" means companies jointly created and owned by domestic state-run and foreign enterprises.[31]

The term "national mixed enterprise" is used by some investment laws for an enterprise where the capital is held by the state and national private investors.[32] Article 36 of the Andean Foreign Investment Code refers to "state-mixed enterprises", defined later on in Decision 47 of the Commission of the Cartagena Agreement[33] as companies in which the equity participation of the state or of state-run companies is not less than 30 percent and in which the state party has a veto in basic decisions concerning the enterprise.

Finally, in some countries a company is automatically considered foreign when the capital is not wholly and exclusively invested by nationals.[34]

Foreign nationals or investors. A "foreign national" is generally considered to be a person who is not a citizen of the host state, including corporate bodies not incorporated in the host country.[35] However, for the purposes of investment legislation, some jurisdictions do not distinguish between *nationals* and *foreigners* but between *residents* and *non-residents*, irrespective of their nationality. In this sense, the term foreign investor is applied to every person or entity *residing*

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26 *Cf.* Andean Pact countries: art. 1 AFIC; Argentina (art. 2(2)(3) FIL); Brazil (art. 1 sec. 1 Law No. 5703/71); Mexico (art. 2 FIL).

27 *Cf.* e.g. Madagascar (art. 6 IC).

28 See art. 1(r) CEAC Treaty.

29 E.g. the Andean Pact states (art. 1 AFIC: 50-80%); Venezuela (arts 21 *et seq.* Decree No. 1.200 of 16 July 1986); El Salvador and the Dominican Republic (50-70%).

30 *Cf.* e.g. the Dominican Republic (art. 1 Law No. 861, 1978).

31 This is the terminology of, e.g., eastern European countries, but also of the Algerian JVL.

32 See Bolivia (art. 9 IL).

33 ILM 1973, 373.

34 E.g. Nigeria.

35 See e.g. Kenya (art. 2 FIPA).

abroad[36] or to individuals residing abroad and enterprises whose capital has its origin abroad.[37]

An investment is basically considered foreign if the investor is domiciled abroad or if it is a foreign-controlled local company. In some legal systems the terms "foreign capital" or "investment of foreign capital" are commonly used.

Entry conditions, sectors of foreign investment

The investment legislation of many countries, particularly African and Latin American, and also—although to a lesser extent—OECD countries, distinguishes between different types of business activity:

- activities reserved for government or public enterprises[38]
- activities reserved for national investors[39] or mixed companies[40]
- activities open, in principle, to national and foreign investors.[41]

To give some examples of the reservation of economic activities: El Salvador reserves external commercial business concerning the country's main agricultural products (coffee and sugar) to the state. Similarly, Nicaragua's exports of bananas, coffee, sugar, cotton and meat are a state monopoly. The Dominican Republic reserves agriculture, stock farming and poultry farming for national and mixed enterprises.[42] Ireland[43] may restrict foreign investment in flour milling to EEC residents and Finland[44] restricts foreign investment in agriculture. The same is true for agriculture, forestry and fisheries in Japan.[45] While former eastern European legislation was rather restrictive in the fields of activity allowed for IJVEs, recent amendments and recodifications show a gradual relaxation. Actually JVs are permitted in the most important sectors, such as industry and agriculture.[46]

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36 E.g. Argentina (art. 2 (2) FIL); Chile (art. 1 FIL); Cuba (art. 5 FIL).

37 See e.g. Bolivia (art. 9 lL).

38 E.g. Ethiopia (sec. 4 (2) JVEP: public utilities, domestic trade); Madagascar (mining, petroleum; possibility of private participation) and the petroleum sector in the Andean Pact states; for the tobacco industry in Austria, Japan (manufacturing only), Spain, France and Turkey (OECD, *Controls and impediments affecting inward direct investment in OECD member countries*, Paris, 1987, p.15)

39 E.g. Guinea-Bissau (mining, forestry; authorization for foreign investors possible); Venezuela (art. 21 Decree No. 1.200 of 16 July 1986).

40 See e.g. Venezuela (art. 22 Decree No. 1.200 of 16 July 1986).

41 The Republic of Korea classifies foreign investments into and ineligible projects: Kim & Rogier, Int. trade and investment law in the Republic of Korea, J. *Wld Trade L.* 10(1976)462/463.

42 Cherol & Zalduendo, *op. cit.*, p. 36.

43 OECD, *op. cit*, p. 45.

44 *Ibid.*

45 *Ibid.*, p. 48.

46 See e.g. Bulgaria (sec. 2 (1) JVL); Hungary (sec. 2 Decree No. 28/1972 as amended); Romania (sec. 1 JVL); Yugoslavia (sec. 10 JVL, 1985).

Numerous states, especially socialist[47] and developing countries in Africa,[48] Latin America[49] and Asia,[50] but also some industrialized western states,[51] require prior authorization and/or registration for all foreign investment projects. Thus, in all eastern European countries the formation of IJVEs is subject to approval by government authorities. Occasionally, authorization is given by law to investments which fulfil specific criteria.[52] Some legal regimes require approval only in certain cases[53]—as a prerequisite for admittance to priority status[54] (benefits and guarantees) or for significant investments,[55]—while minor investments may be subject only to notification.[56]

In some countries special admittance requirements exist for agricultural activities: in France, foreigners (with the exception of EEC nationals) who wish to set up an agricultural enterprise must obtain authorization.[57] In Australia, proposals to establish new projects in the agricultural, pastoral, forestry or fishing sectors are subject to approval where the total investment is A$10 million or more; authorization is normally granted if the new venture is not contrary to the national interest and is established as a joint venture with at least 50 percent Australian participation.[58]

Occasionally the enjoyment of priority status benefits requires an application only.[59] The authorization is often limited to a definite period[60] but may be renewed. In some countries, for example Hungary and Romania, the duration of the IJV is a matter for decision by the parties.[61]

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47 In particular, all eastern European countries admitting IJVs have enacted special investment laws in order to regulate the conditions of approval and operation of mixed enterprises (enterprises jointly created by domestic state-managed and foreign enterprises): Bulgaria (sec. 5 JVL); Hungary (sec. 3 Decree No. 28/1972 as amended); Poland (art. 5 (1) JVL; only approval); Romania (arts 16-18 JVL); USSR (sec. 1 JEL); Yugoslavia (art. 4 (2) JVL 1985); China (art. 3 IJVL).

48 E.g. Algeria (art. 10 JVL); Tunisia (art. 5 IC).

49 In particular the Andean Group (art. 2 AFIC), e.g. Venezuela (arts 13 *et seq.* Decree No. 1.200 of 16 July 1986); Mexico (arts 4 and 5 FIL) and some states of Central America and the Caribbean: El Salvador (art. 6 Decree 146, 1961; arts 37 and 39 Decree 147, 1961); Nicaragua (arts 3 and 9 Decree 10, 1955); Dominican Republic (art. 5 Law No. 851, 1978).

50 E.g. Indonesia.

51 E.g. Finland, Ireland, New Zealand, Norway, Sweden and Turkey (OECD, *op. cit*, p. 11).

52 *Cf.* Venezuela (art. 19 Decree No. 1.200 of 16 July 1986) e.g. establishment in less developed zones of the country; export-oriented enterprises.

53 See e.g. Argentina (e.g. if the investor is a foreign government: art. 4 No. 5 FIL); similarly (investments by foreign governments or their agencies) in Australia (OECD, *op. cit*, p. 17).

54 E.g. Argentina; Chile; Kenya; Paraguay; Uruguay; Barbados: Exchange control regulations (1971). In the Andean Pact countries a local capital majority may be prescribed as a prerequisite for according the Cartagena Agreement benefits for trade between the member countries of the pact: art. 27 AFIC; Cameroon (art. 3, 11 IC); Côte d'lvoire (arts 1, 2, 7 IC).

55 See e.g. sections 2, 14 Investment Canada Act; Australia (OECD, *op. cit*, p. 17).

56 See e.g. section 12 Investment Canada Act.

57 OECD, *op. cit*, p. 40.

58 *Ibid*, p. 32.

59 Senegal.

60 E.g. 15 years; sec. 8 Bulgarian JVL.

61 *Cf.* Scriven, Joint venture legislation in eastern Europe: a practical guide, *Harvard Int. L. J.* 659.

Other states require only registration but no authorization.[62] Occasionally, the admittance of foreign investments specifies a minimum amount[63] of capital[64] the investor has to bring into the country. In most cases the investment must be new, that is, be in a newly established enterprise or at least in a clearly discernible amplification of an existing enterprise.[65]

Many countries, such as the Andean Pact group and Mexico, have introduced restrictions on the acquisition of existing enterprises.[66]

There are also many countries, not necessarily industrialized, which have no formal restrictions for foreign investors[67] and offer safe admission to a priority status[68] and, possibly, safe landownership. In particular foreign investments in agriculture and related sectors are admitted and often even fostered. Most investment codes enumerate the types of allowed or fostered enterprises. These often include agricultural activities.[69] Venezuela exempts foreign investment in the agricultural and agro-industrial sectors from a number of limitations.[70]

Many countries, particularly in Africa and Central America, do not demand host state or domestic private participation.[71] But even where no limitation on the share of foreign participation is fixed by law, joint ventures with domestic partners are increasingly favoured.[72] Other states expressly require such participation, at least for specific sectors[73] or forms of business,[74] for priority enterprises[75] or small and medium-size enterprises.[76] Australia, for example, requires a minimum of 50 percent Australian equity, together with at least 50 percent of the voting strength on the managing or controlling body of the venture to be held by Australians.[77]

In Finland, foreign-owned or controlled companies in the sectors of agricultural products, forestry and forest industries are not permitted or are allowed a limited participation only.[78] Under a number of legal regimes a local cap ital majority is even a *general* entry condition for foreign capital.[79] In these

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62 E.g. Brazil; Costa Rica (arts 3, 5, 10 to 13 Reglamento de Registro Selectivo de Capitales, 1983); Guatemala (arts 32 and 33, Exchange control regulations, 1980).

63 E.g. Argentina: excess of a fixed investment amount (arts 4 and 6 FIL); Chile: US$5 000 000 (art. 16 FIL); Republic of Korea: US$200 000 (Kim & Rogier, *op. cit*, p. 463).

64 For an enumeration of investment forms *cf.* e.g. Madagascar (art. 2 IC).

65 E.g. Côte d'lvoire (art. 12 IC); Madagascar (art. 3 IC).

66 E.g. art. 3 (2) AFIC; Mexico (art. 8 (1) (2) FIL).

67 E.g. Belgium, Cameroon, Senegal, Honduras, Panama.

68 See above, footnote 47.

69 E.g. Cameroon (sec. 4 IC); Côte d'lvoire (art. 2 (a) and (f) IC).

70 Arts 2 and 83 Decree 1.200 of 16 July 1986.

71 E.g. Burundi, Cameroon, Côte d'lvoire, Kenya, Senegal, Liberia, Madagascar, Tunisia.

72 See Kim & Rogier, *op. cit*, p. 463 (50/50 participation).

73 Honduras, for instance, requires the JV form for foreign investment in the exploitation of forestry resources: Decree-Law on forestry No. 103/1974 of 10 January 1974.

74 E.g. Angola (empresa mista); Ethiopia (IJV).

75 E.g. Benin (art. 28 IC).

76 E.g. Cameroon (art. 26).

77 OECD, *op. cit*, p. 32.

78 *Ibid*, p. 37.

79 E.g. Mexico. For details see below, Company law.

cases, it is compulsory for every foreign investment to be made in the form of an IJV. Also, the investment legislation of some states demands the offering of shares to nationals.[80]

However, in the interests of the national economy foreign investment laws generally provide for an alleviation of entry conditions, to be decided individually by specialized agencies. Thus, the Mexican National Investment Commission may grant up to 100 percent capital participation to foreign investors (art. 5 FIL). The same is possible within the framework of the Andean Foreign Investment Code, which, by virtue of reservations, allows differential regulation of specific sectors of the economy in the Andean Pact member countries.[81] In 1987 the member states signed a supplementary protocol giving each country more flexibility in allowing foreign investments, especially with respect to the 49 percent limit on foreign shares.[82]

Some states expressly require local incorporation of enterprises which operate permanently in the country.[83] Thus, IJVEs incorporated in the investor country may not operate in the host country even when nationals of the latter are shareholders. Other countries demand the establishment of the centre of management in the host country.[84]

Compulsory employment of indigenous management and other local labour is required in some countries if appropriate personnel is available.[85]

Approval procedure. Generally, the approval system is very flexible.

Many countries, particularly in Africa, have established specialized interministerial and interdisciplinary administrative bodies (investment commission, investment board, etc.) in charge of carrying out the rights and obligations of the host state under the investment code: they have to evaluate, approve, administer, encourage, supervise and coordinate foreign investments. Upon application, the agency approves or rejects the project. The decision is issued in written form and in the case of approval the certificate fixes the category of priority enterprises and the relevant incentives and guarantees, as applicable. In some investment codes the admission takes the form of a contract.[86]

In some African francophone countries this occurs on approval of projects of particular importance to the economy of the country; these so-called establishment agreements (conventions d'établissement) determine the rights and obligations of the foreign investor and the host state.[87] The most common and important contents of these agreements are clauses stabilizing for a longer period the fiscal, economic and legal conditions of the investment—for example regarding the transfer of capital. Before or after the conclusion of such contracts

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80 E.g. Central African Republic.

81 Art. 44 AFIC, *cf.* e.g. Bolivia: Decreto-Ley No. 18751/81; Ecuador: Decree No. 900-B of 10 November 1976, Diario Oficial 26 November 1976.

82 *Cf. Bull, of Legal Developments* 1987, 106.

83 E.g. Mauritania (art. 3 (c)).

84 E.g. Congo (art. 2 IC).

85 E.g. Angola, Central African Republic.

86 E.g. Angola.

87 E.g. Congo (art. 39 IC); Cote d'lvoire (arts 22 *et seq.* IC).

or the granting of priority status by decree it may be necessary, according to the constitution of the host states, to pass a special legislative act embodying the contract and to promulgate it in the official gazette to give it legal validity.[88]

In Romania *every* IJVE is created by a specific act of legislation.[89] In other eastern European states the Council of Ministers may make the decision.[90] In Indonesia, the President of the Republic grants final investment approval. Failure to fulfil the conditions of a priority status regime or of an establishment agreement is subject to the withdrawal of incentives or even of the approval of establishment.[91]

Investment guarantees

Investment guarantees have the purpose of winning the confidence of foreign investors. The forms these guarantees take show a great variety in both national and international law.

International law. Generally, public international law recognizes the right of any sovereign state to expropriate, for public purposes, domestic and foreign property situated in its territory. Under traditional international law the expropriating state has to pay prompt, adequate and effective compensation. While there is widespread controversy in recent international law theory on the existence of such an international obligation, and on the formula to be used to compute compensation, a very large number of states (especially African) include in their investment legislation the principle that expropriation is allowed only in the public interest and subject to compensation.[92] Other states have the pertinent provision in their constitution.[93] Some countries at least guarantee compensation.[94]

Beginning in the 1960s, many states wishing to attract foreign investment entered bilateral treaties on the mutual encouragement and protection of investment. Most of these have been concluded between western industrialized countries on the one hand and developing countries on the other. More recently, however, treaties between western and socialist countries,[95] and between developing countries,[96] are not unusual. Actually, the Federal Republic of Germany seems to have concluded the largest number of such treaties.[97]

Latin American states, however, have been very reluctant to enter investment protection treaties. The agreements concluded between Latin American countries

88 E.g. Cameroon (art. 14 IC); Madagascar (art. 21 IC: Contrat de partenariat).

89 Romania (sec. 17 (1) JVL).

90 See e.g. Bulgaria (sec. 5 JVL); Hungary (sec. 1 Decree No. 62/1982); Romania (sec. 16, 17 JVL); Yugoslavia (sec. 4 (2) JVL 1985).

91 E.g. Cameroon (art. 43 IC); Côte d'lvoire (art. 15 IC).

92 E.g. Algeria (art. 8 JVL); Ethiopia (art. 5 JVEP: "for reasons of national interest", "fair and equitable price"); Ghana (art. 14 IC); Kenya (art. 8 FIPA); Madagascar (art. 8 IC). *Cf.* also art. 14 African Charter on Human and Peoples' Rights, which came into force 21 October 1986. English text: ILM 1982, 59 *et seq.*

93 E.g. Cameroon: Constitution of 2 June 1972.

94 E.g. Tanzania (art. 8 FIPA: "full and fair value" compensation, amount subject to arbitration).

95 E.g. between the Federal Republic of Germany and Bulgaria, China, Hungary and Romania.

96 Sri Lanka/Korea (1980), Sri Lanka/Singapore (1980).

97 On 31 December 1986, 60 treaties were effective.

and the United States, mainly in the period 1955 to 1968 (prior to the Andean Pact), are conceived as instruments guaranteeing the subrogation of the United States in the case of an expropriation of investments in which the US organization Overseas Private Investment Corporation (OPIC) is involved. However, a few Latin American states had already concluded such treaties in the past.[98] In 1987 two more Latin American states changed their position by concluding investment protection treaties with the Federal Republic of Germany.[99]

National law. Usually the investment legislation of African countries guarantees freedom of economic activity for foreign enterprises, either by referringto the pertinent provisions in the constitution of the host state[100] or by spelling out these guarantees in special investment legislation.[101] Occasionally the guarantees presuppose the enterprise has been granted a priority status. African investment codes, as a rule, guarantee to foreign investors the repatriation of investment capital, liquidation proceeds and compensation payments.[102] The same is true for the transfer of earnings from the investment. The transfer guarantee is sometimes given without any restriction;[103] more often the guarantee refers to existing exchange regulations[104] or is limited to a certain percentage of the investment.[105]

Special stabilization clauses in respect of the fiscal regime or the whole legal regime of the investment in force at the moment are provided for in numerous African investment codes.[106] Non-discrimination guarantees are to be found in quite a number of investment codes,[107] occasionally under the condition of reciprocity. As far as the availability of local credits is concerned, some countries do not distinguish between local and foreign investors.[108] In others the granting of local credits to foreign investors is restricted.[109]

98 Paraguay/France (1978), Paraguay/United Kingdom (1981); Costa Rica/Switzerland (1965); Panama/United States (1982).

99 Bolivia (23 March 1987) and Uruguay (5 May 1987).

100 E.g. Ghana (art.22 IC); Madagascar (art.3 IC); Kenya (art.8 FIPA).

101 E.g. Algeria (art. 48, in the case of compulsory acquisition by the state of shares held by foreign investors); Burundi (art.2 IC); Congo (arts 4-6 IC); Madagascar (art. 8 IC); Niger (art.2 IC); Rwanda (arts 2 *et seq.* IC); Senegal (arts 6 *et seq.* IC).

102 Regarding the repatriation of capital, some states provide a waiting period: e.g. Burundi (art. 14 (1) IC: five years); Niger (art. 10 IC: three years). Some investment codes expressly guarantee the payment of compensation in the currency of investment; e.g. Ethiopia (art. 5 (4) JVEP); Madagascar (art. 8 IC); Tunisia (art. 18 Law No. 81.56).

103 E.g. Central African Republic; Chad (art. 3 IC); Congo (art. 2 IC); Côte d'Ivoire (art. 9 IC); Kenya (art. 7 FIPA); Tanzania (art. 7 FIPA).

104 E.g. Cameroon (art. 9 IC); Congo (art.3 IC); Kenya (art. 7 FIPA); Madagascar (art. 6 IC).

105 E.g. Algeria (art. 11, 1:15% JVL); Burundi (art. 14 (2) IC: 5%).

106 E.g. Rwanda (arts 15, 16 IC).

107 E.g. Congo (arts 4-6 IC); Côte d'Ivoire (art. 8 IC); Madagascar (art. 7 IC); Tunisia (art. 3 IC).

108 E.g. Argentina: art. 18 FIL; and, in principle, the countries of the Central American region, with the proviso that El Salvador gives priority to small enterprises reserved for nationals (art. 16 Decree 279/1969) and in Costa Rica banks of the state have to give preference to enterprises with national capital majority (art. 62 Law No. 1.644/1953 as amended by Law No. 4.646/1970); see Cherol & Zalduendo, *op. cit.*, p. 44.

109 E.g. art. 17 AFIC (no long-term credits) and in the Caribbean states, *cf.* Cherol & Zalduendo, *op cit.*, p. 44 *et seq.*.

Comparable guarantees are to be found in Latin American and Asian countries with a market economy. Some constitutions or investment codes expressly guarantee non-discrimination against foreign capital[110] or foreign investors.[111] In Argentina, foreigners may invoke a special procedure if they consider government measures are discriminatory toward their business activities. The Andean Code also lays down that foreigners may not be treated more favourably than nationals.[112]

In general, the repatriation of registered foreign capital is guaranteed by domestic law.[113] However, certain investment laws provide that registered capital may not be repatriated until three years have elapsed from the date of registration.[114] In most Latin American countries[115] the transfer of profits is regulated by investment legislation[116] or exchange control regulations[117] and/or taxation.[118] Occasionally a repatriation guarantee by the national bank is available.

Payment of royalties is restricted in some states to affiliated enterprises, i.e. when the licensing and the licensee enterprises form one group of companies.[119]

Compared with the investment legislation in other continents, fiscal "freezing clauses" exist in very few Latin American countries: Bolivia (five to ten years) and Chile (ten years). Apart from the fiscal freezing clause, only Bolivia concedes stability of the rights and benefits granted to registered investors, and guarantees that no expropriation in any form will take place.[120]

Similarly, the guarantees available to foreign investors in eastern European and other non-market economy countries mainly concern expropriation,[121] transfer of salaries,[122] benefits[123] and liquidation proceeds[124] in convertible currency,[125]

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110 *Cf.* Chile (art. 9 (1) FIL).

111 E.g. Argentina; Chile (art. 9, 10 FIL).

112 Art. 50 AFIC; similarly the law of the Dominican Republic which closely follows AFIC.

113 *Cf.* e.g. in the Andean states: art. 7 AFIC; Cuba; Guatemala; El Salvador; Honduras; Nicaragua; Panama.

114 E.g. Argentina; Chile (art. 4 FIL); Paraguay; Uruguay; Costa Rica (art. 14 Reglamento de Registro Selectivo de Capital, 1983: four years). In Indonesia no repatriation is allowed while tax holidays are granted.

115 Mexico and Panama have no restrictions in their investment legislation on the transfer of profits.

116 *Cf.* e.g. the Andean Pact countries: art. 37 AFIC (20% of registered capital per year); Argentina (art. 14 FIL); Dominican Republic (art. 20 Law No. 861 (1978) as amended by Law No. 138 (1983): 25% of the registered capital per year).

117 E.g. El Salvador (art. 40 Decree No. 147 of 30 May 1961: 10% of the registered capital).

118 Argentina (art. 16 FIL: 25% tax on remitted profits in excess of 20% of the registered capital); Brazil (art. 43 Law No. 4131 as amended by Law No. 4390 of 11 September 1964: 60% of remitted profits in excess of 25%); Uruguay (Law No. 14179 of 28 March 1974 as amended, *Diario Oficial* of 5 April 1974: profits remitted in excess of 20% of the registered capital are taxed by 40%).

119 E.g. Andean Pact countries (art. 21 (2) AFIC).

120 Bolivia (arts 10 to 16 Decreto-Ley No. 18751/81, Ley de inversiones).

121 See e.g. Yugoslavia (sec. 5 (2) JVL 1985).

122 See e.g. Romania (sec. 33 Decree JVL).

123 See e.g. Bulgaria (sec. 19 JVL).

124 See e.g. Bulgaria (sec. 20 (2) JVL).

125 See e.g. Bulgaria (sec. 19 JVL); Hungary (sec. 11 (1) Decree No. 28/1972 as amended in 1977); Romania (sec. 7 JVL).

protection against changes in legislation affecting the foreign investor's interests (stabilization clauses),[126] and JV obligations toward the foreign investor.[127] Occasionally there is even a constitutional protection for resources invested by a foreign investor.[128] However, the foreign investor's right to repatriate profits generally depends on the IJVE's reserves in convertible currency.[129] In some states, protection of foreign investment is provided for in the constitution.[130] As a rule, at least the ordinary investment legislation contains specific protection provisions.[131] Also host country bank guarantees are available.[132]

The legislation of industrialized western countries does not usually contain special guarantees for foreign investment.

Investment incentives

Apart from those countries which do not distinguish between domestic and foreign capital for the purpose of granting incentives,[133] almost all regional or national investment legislation grants certain fiscal, economic and legal incentives for foreign investments which satisfy specific conditions.[134] Such incentives cover a very large field of benefits and advantages.

Several regional organizations in Africa and Latin America have concluded treaties in order to harmonize their national legislation on fiscal incentives for industrial activities. This is the case for the Central African Customs and Economic Union,[135] for the Mercado Común Centroamericano (MCCA)[136] and for some members of the Comunidad del Caribe (CARICOM).[137]

El Salvador[138] and Honduras[139] have introduced national regimes for the development of agriculture.

Priority enterprises. A large number of African investment codes provide priority schedules (schemes, categories) for enterprises which are of particular importance

126 See Yugoslavia (sec. 6 JVL).

127 Hungary (sec. 11 (3) Decree No. 28/1972 as amended in 1977).

128 *Cf.* art. 18 (2) 2 of the Chinese constitution of 1982.

129 See e.g. Law on foreign exchange transactions and foreign credit relations, *Official Gazette* No. 17/77 as amended.

130 See Yugoslavia, *cf.* Buzescu, Joint ventures in eastern Europe, *American J. of Comparative L.* 32 (1984) 435.

131 See e.g. Yugoslavia (sees 5 *et seq.* JVL 1985).

132 See e.g. Bulgaria (sec. 17 JVL).

133 E.g. Belgium.

134 See above, Entry conditions, sectors of foreign investment.

135 Common convention on investments in the States of the Union.

136 In 1969 the members of MCCA concluded a treaty to harmonize their legislation on fiscal incentives for industrial development excluding the primary sector. *Cf.* Cherol & Zalduendo, *op. cit.,* p. 43 *et seq.* with an overview of the different benefits.

137 Barbados, Jamaica, and Trinidad and Tobago: *ibid.*, p. 41 *et seq.* The Dominican Republic has adopted a similar regime *(ibid.*, p. 42).

138 Decree No. 522 (1961) reserved for cooperatives.

139 Decree No. 69 (1970).

for economic development.[140] In any case the granting of priority status is subject to prior approval.[141] Often investment codes offer the possibility of establishment agreements for priority enterprises.[142] The investment codes of the member countries of the Central African Customs and Economic Union make a further distinction between enterprises that are active in only one country[143] and those that cover more than one of the member countries.[144] In East African countries[145] and some other parts of the world[146] there is only one category of "approved enterprises". In Saudi Arabia a "priority system" favours enterprises with a Saudi capital stake of at least 50 percent, in government contracts.

Tax incentives. Most important are tax incentives:[147]

- corporate income tax holidays, usually for five to ten years[148]
- exemption from dividends tax[149]
- exemption from taxes on share capital[150]
- exemption from taxes on land and land acquisition[151]
- exemption from surtax on expatriate salaries[152]
- exemption from regional taxes[153]
- exemption from taxes on credit distribution[154]
- exemption from fuel taxes for agricultural priority enterprises[155]
- tax credits[156]

  accelerated depreciation of fixed assets[157]
- carrying forward of losses.[158]

Other incentives. Non-tax incentives include:

- exemption from or reduction of import duties on commodities generally,

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140 E.g. Benin (A-D + common regime); Cameroon (A-D + common regime); Central African Republic (I-IV + common regime); Congo (A, A1, B1, C, D + common regime); Côte d'Ivoire (Zones A-C, establishment agreement enterprises); Madagascar (priority investment; small and medium-size approved enterprises, agreements of partnership); Senegal (common regime, priority regime); Tunisia -F, different zones); Zaire (general regime, conventional regime, industrial free zone regime).

141 E.g. Madagascar (art. 9 IC).

142 E.g. Cameroon (art. 14 (2) IC, Schedule D); Congo (art. 39 IC); Côte d'Ivoire (arts 22 *et seq.* IC).

143 E.g. Chad (schedule A). The legislation of other members of the union (Cameroon, Central African Republic, Congo, Gabon) is similar.

144 E.g. Chad (schedule

145 E.g. Kenya (art. 3 FIPA).

146 E.g. in eastern Europe.

147 E.g. Benin (art. 15 IC); Ethiopia (art. 27 JVEP); Côte d'Ivoire (art. 20 IC).

148 E.g. Côte d'Ivoire (art. 20 IC).

149 E.g. Indonesia.

150 E.g. Cameroon (art. 27 (2) IC).

151 E.g. Algeria.

152 E.g. Zaire.

153 E.g. Zaire.

154 E.g. Cameroon (art. 27 (2) Ic).

155 E.g. Senegal (until 1987, art. 24 IC 1981).

156 E.g. Zaire (arts 19 *et seq.* IC).

157 E.g. Indonesia; Nigeria.

158 E.g. Indonesia.

or for products considered necessary for the development of the enterprise or which are not available on the local market[159]

- exemption from registration fees[160]
- exemption from patent and licence fees
- deferment of fiscal burdens (e.g. company registration fees, stamp duties)
- export incentives[161]
- temporary interest-rate subsidies[162]
- general subsidies
- high-tariff customs protection against the import of competitive products[163]
- quantitative import restrictions for products of competitors.[164]

Most of the investment legislation of African countries grants—by virtue of an establishment agreement between the foreign investor and the host state—further unspecified tax incentives or other guarantees and advantages to important priority enterprises,[165] for example, water or electricity at reduced prices or even without payment.[166] Fiscal or other stabilization clauses are often granted by such establishment agreements.[167]

The investment code of the Central African Customs and Economic Union (UDEAC) has a comprehensive stabilization clause guaranteeing, in the case of establishment agreements, the *status quo* in respect of legal, economic and fiscal conditions and of the transfer of funds and marketing of products (art. 35). This provision has been introduced into the domestic legislation of the member states.[168]

Investment legislation may also contain a general clause guaranteeing legal or fiscal stability to foreign investors, irrespective of whether there is an establishment agreement, providing that changes in the host state's law after the establishment of the IJV are not applicable to the individual IJVE.[169]

Latin American investment laws generally offer substantially lower incentives than those offered in the legislation of most African countries. Many important guarantees and incentives granted by African states at present are not available to investors in Latin America:[170]

- unrestricted guarantees for the repatriation of capital and benefits

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159 *Cf.* Benin (art. 16 IC); Cameroon (art. 23 IC); Côte d'Ivoire (art. 17 IC); Ethiopia (art. 27 JVEP).

160 E.g. Cameroon (art. 27 (2) IC).

161 E.g. Zaire (art. 16 IC: exemption from export duties).

162 E.g. Senegal (until 1987, art. 13 IC 1981).

163 E.g. Burundi (art. 18 IC); Chad (art. 21 IC); Gabon (art. 22 IC); Guinea (art. 11 IC); Kenya; Rwanda (art. 23 (a) IC); UDEAC (art. 14).

164 E.g. Kenya, Nigeria.

165 E.g. Zaire (art. 28 IC).

166 E.g. Congo (art. 40 IC); Madagascar (art. 19 IC).

167 E.g. Benin (arts 18 *et seq.* IC, conventional enterprises); Cameroon (arts 31 (2), 34 IC); Congo (art. 32 IC); Madagascar (arts 15, 20 IC); Senegal (until 1987, arts 30 *et seq.* IC 1981); UDEAC (arts 21 *et seq.).*

168 E.g. Chad (art. 44 (c) IC); Congo (art. 40 (b) IC); Gabon (art. 15 (3) IC); similarly Algeria (art. 29 JVL); Tunisia (art. 3 IC).

169 See sec. 6 Yugoslav JVL (1985).

170 *Cf.* Juncadella, The foreign investment laws of Latin America: present and future, *Int. Lawyer* 1982, 463, 470 f.

- temporary stable regimes for direct and indirect taxes as well as for customs duties
- absence of price control for a reasonable period for products manufactured by the foreign investor.

Only a few Latin American countries guarantee, by agreement with the foreign investor, a temporary limitation of income tax[171] and indirect taxation,[172] or of customs duties on equipment necessary for the enterprise.[173]

The situation is similar in eastern Europe and non-market economy countries in other parts of the world. Compared with African legislation, the incentives are relatively meagre. Nevertheless, several states grant temporary exemptions and reductions on taxes for newly created IJVs and for reinvestments, on a case-by-case basis or on general terms.[174] Apart from tax incentives, some countries exempt IJVs from customs duty on imports destined for the production of export commodities.[175]

Applicable law

It seems appropriate to distinguish between the determination of the law applicable to establishment agreements and the law governing international joint ventures (formation agreements, memoranda and articles of association, etc.). Occasionally all these coincide under certain foreign investment laws: the agreement for the establishment of an IJVE also constitutes the statute of the enterprise which is subject to the permission of the authorities.[176]

Establishment agreements (investment contracts). Provisions determining the law applicable to investment or similar contracts between a state and a foreign private company or individual are very rare.[177]

In legal writing there is much controversy about these contracts (economic development agreements, quasi-international agreements, establishment agreements, quasi-international law contracts[178]) and the applicable law.

The main theories concerning which law to apply to these establishment agreements are:

- the traditional theory[179] that establishment agreements are *administrative* contracts belonging to the municipal legal system determined by the rules of conflict of laws

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171 E.g. Chile (art. 7 FIL: 49.5% for a 10-year period).

172 Chile (art. 8 FIL).

173 Chile (art. 8 FIL).

174 See e.g. sec. 3 Romanian JVL; sec. 38 Bulgarian JVL.

175 See e.g. sec. 39 (1) Bulgarian JVL.

176 See e.g. Bulgarian JVL (sees 5, 7, 21 (2) JVL).

177 For exceptions see Ethiopia (art. 15 (5) JVEP); Madagascar (arts 28, 38, 39 IC; in the case of silence of Madagascan law: general principles, custom and case-law are generally applicable).

178 *Cf.* Häberli, *Les investissements étrangers en Afrique*, Paris (1979), p. 152 note 195 with references.

179 The traditional theory on the applicability of international law presupposes states (subjects of public international law) as parties to an international contract. See e.g. H.S. Amerasinghe, *American J. of int. L.* 58 (1964) 881, 899, 906-913.

- *lex contractus*[180]
- transnational law[181]
- public international law.[182]

A sounder theory allows the parties to choose the *lex contractus* from the laws of the host state or the home state of the investor or of a third state, and also allows the parties to agree on public international law as the proper law of the contract. The parties may even freeze the applicable law at the time of concluding the contract. If the parties have not chosen the *lex contractus*, the law of the host state should apply.

Formation agreements and company charters. All the above theories refer to investment contracts between a state and a foreign investor (foreign individuals, foreign companies). Such contracts should not be confounded with the formation agreements, memoranda or articles of association (articles of incorporation/by-laws) between the parties of the planned IJVE, which may include a state-run venture.

These latter contracts or instruments are undoubtedly subject to the domestic company law rules designated by the conflict of laws rules of the forum concerned. Under most systems of private international law, formation agreements are subject to the proper law of contract, i.e. usually the law chosen by the parties or the law of the state where the contract's centre of gravity is to be found. The proper law of the company[183] is determined most often (1) by the place of incorporation (the company's registered office), or (2) by the principal place of business, or (3) by the controlling members' nationality. As IJVEs generally are incorporated and have their principal places of business and management in the host state, they will normally be subject to the host state's company law. Some host states expressly declare their own laws applicable.[184]

However, within the legal framework of the domestic company law or IJV legislation the parties may often freely determine the most important aspects of their relations.[185]

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180 A. Verdross and M. Bourquin argue that these contracts create a new positive legal order: *Yearbook of world affairs* 1964, 230, 234.

181 I.e. "All law which regulates actions or events that transcend national frontiers": P. Jessup, *Transnational law*, New Haven (1956), p. 2. For further references see P. Weil, *Recueil des cours* 128 (1969) 101, 179 f.

182 "International agreement doctrine." Some authors categorize establishment contracts as quasi-international agreements and propose to apply international law *per analogiam:* F.A. Mann, *British yearbook of int. L.* 35 (1959) 34, 44; see also Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen* (1971), p. 18 ("beschränkt völkerrechtliche Verträge"). Other authors are even in favour of a *direct* application of international law arguing that the contracting state acknowledges the private party as an international law subject: *cf.* Weil, *op. cit.,* 184 *et seq.* with further references.

183 It covers establishment, operation, winding up of the company.

184 E.g. China; Ethiopia; art. 14 (2) of the Hungarian Decree No. 28/1972, relating to Hungarian economic associations with foreign participation. Sec. 6 (1) of the Bulgarian JVL subjects the relations between the Bulgarian and foreign partners of a (Bulgarian) IJV to the JVL and the agreement.

185 See e.g. Poland (art. 4 JVL).

The law applicable to relations between the IJVE and domestic physical persons or corporate bodies is basically determined by the domestic rules of conflict of laws which, normally, will designate the domestic substantive provisions. In rare cases, investment laws expressly prescribe the applicability of domestic substantive law.[186]

The Council for Mutual Economic Assistance (CMEA) rules on procedure for arbitration provide that the choice of applicable law by the parties for the settlement of their disputes binds the court.[187] Under eastern European investment legislation the parties may expressly choose, for the settlement of disputes, a domestic court or an arbitration court in the host country, in the country of the foreign investor or in a neutral country.[188]

Dispute settlement

A distinction has to be made in respect of the partners involved in the dispute. Disputes may arise between the state of the investor and the host state, between the foreign investor (and the IJVE) and the host state or the host state national investment partners, or, finally, between the IJVE and third parties.

Disputes between the state of the investor and the host state may arise in the interpretation of bilateral treaties relating to the promotion and protection of investment. The jurisdiction of the International Court of Justice may cover such disputes as public international institutions are involved on both sides. However, these treaties as a rule make provision in favour of *ad hoc* arbitration or of ICSID arbitration.[189] The Federal Republic of Germany[190] and Austria, for example, have included a clause in favour of *ad hoc* or ICSID arbitration in their model investment treaties concerning the reciprocal encouragement and protection of investments.[191] Such arbitration clauses are usual in bilateral investment protection treaties.[192]

As far as disputes between foreign investors and host states or host state-managed organizations are concerned, most investment laws provide procedures for the settlement of disputes, even if they do not contain provisions regarding the applicable law. Out of the various instruments for the settlement of disputes (consultation, conciliation, arbitration, litigation), arbitration procedure has proved to be the most appropriate. It avoids both the eventual problem of subjection of a sovereign state to the jurisdiction of foreign courts and the fear of the foreign partner that tribunals of the host state may not be impartial in litigations.

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186 E.g. sec. 26 (1) Bulgarian JVL.

187 Reczei, East-West arbitration as administered by institutions, *Int. Bus. L.* 10 (1982) 141, 143.

188 See e.g. sec. 21 Bulgarian JVL; sec. 38 Romanin JVL; sec Yugoslav JVL (1985).

189 *Cf.* the listing of ICSID clauses in bilateral treaties, *in: Investment promotion and protection treaties*, compiled by ICSID, London/Rome/New York (looseleaf). Indices p. 23 *et seq.*

190 The Federal Republic of Germany has concluded the greatest number of investment protection treaties—more than 60 at 31 December 1986.

191 Art. 10 of the German and art. 9 of the Austrian model treaties, respectively.

192 See e.g. the official comment concerning the pertinent art. 7 of the treaty between the Federal Republic of Germany and Bulgaria (Bundestagsdrucksache 11/359 of 25 May 1987, p. 15).

As well as most African[193] and western European[194] states, numerous Asian,[195] Arab[196] and Near East[197] states are parties to the convention on the settlement of investment disputes between states and nationals of other states administered by the International Centre for Settlement of Investment Disputes (ICSID Convention, 65).[198]

Of the eastern European countries only Yugoslavia (1967), Romania (1975) and Hungary (1987) are contracting states to this convention at present. Increasingly, bilateral treaties relating to the protection of investments make reference to ICSID facilities for the settlement of investment disputes between one contracting state and nationals of another.[199] Many investment laws, especially in Africa, which became effective after the conclusion of the ICSID Convention refer to this treaty in respect of disputes arising from the relations between the home state and foreign investors regulated by the investment legislation, including investment contracts (establishment agreements).[200]

ICSID conciliation or arbitration procedures are commonly referred to in investment laws in one of two ways. The first is a unilateral and express offer to settle investment disputes with the help of ICSID arbitration.[201] This unilateral offer needs to be accepted by the investor since both parties must agree upon ICSID procedure. The second makes reference to ICSID procedures as one of several ways to settle investment disputes. For example, Madagascar[202] offers three alternative means of settling disputes by arbitration: (1) *ad hoc* arbitration according to articles 31 *et seq.* of the investment code, i.e. Malagasy law itself;

193 Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, the Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, the Sudan, Swaziland, Togo, Uganda, Zaire, Zambia. Ethiopia signed the convention in 1965 but had not yet ratified.

194 Austria (1971), Belgium (1970), Cyprus (1966), Denmark (1968), Finland (1969), France (1967), Fed. Rep. of Germany (1969), Greece (1969), Iceland (1966), Ireland (1981), Italy (1971), Luxembourg (1970), the Netherlands (1966), Norway (1967), Portugal (1984), Sweden (1967), Switzerland (1967), United Kingdom (1967).

195 E.g. Australia (signed 1975), Bangladesh (1980), Indonesia (1968), Japan (1967), Republic of Korea (1967), Malaysia (1966), New Zealand (1980), Pakistan (1966), Papua New Guinea (1978), the Philippines (1978), Singapore (1968), Sri Lanka (1967), Thailand (signed 1985).

196 Egypt (1972), Jordan (1972), Kuwait (1979), Morocco (1967), Saudi Arabia (1980), Tunisia (1966), United Arab Emirates (1982).

197 Israel (1983).

198 575 United Nations Treaty Series 159.

199 See *News from ICSID,* vol. 2, No. 1 winter 1985 p. 12 (out of a sample of 210 treaties 100 refer to ICSID). Arts 11 and 8 of the German and Austrian model investment treaties, respectively, refer to the ICSID Convention; so do the Model Bilateral Agreements on Promotion and Protection of Investments prepared by the Asian-African Legal Consultative Committee (ILM 1984, 237).

200 E.g. Madagascar (arts 30 and 31 IC); Togo (art. 4 IC); Tunisia (art. 20 IC); Zaire (art. 45 (2) IC). For further references see *News from ICSID*, vol. 3, No. 2 summer 1986, p. 8.

201 E.g. Togo (art. 4 IC).

202 Art. 30 IC; similarly Côte d'Ivoire (art. 10 IC), Zaire (art. 45 IC) and Tunisia (art. 20 IC).

(2) the ICSID Convention, (3) the Additional Facility[203] administered by ICSID. Here, the choice has to be made by the parties involved.

Consent to ICSID settlement of disputes may also be stipulated in investment agreements.[204]

Host states not adhering to the ICSID Convention may include in their investment legislation special rules for the settlement of questions connected with the economic activity of the IJVE by arbitration or otherwise.[205] Sometimes only amicable settlement and—if this fails—*ad hoc* arbitration are provided for. Occasionally in disputes between a host state and investors which require arbitration, the choice of both procedure and applicable rules is left to the arbitrators.[206] Sometimes a conciliation procedure is required before any arbitration procedure.[207]

Disputes between foreign investors and their private host state domestic investment partners are settled according to the rules of the forum normally applicable to private disputes, except when legislation provides special rules for the settlement of such controversies, especially in investment laws.[208] In the latter, disputes are subject to domestic courts or, by agreement of the partners, to domestic or foreign arbitration.[209] Sometimes failure of mediation is a prerequisite for settlement through arbitral or ordinary tribunals.[210]

In disputes between IJVEs and third parties, foreign investment laws occasionally make provision for settlement.[211] Disputes are subject to the jurisdiction of the courts of the host country or, in certain cases, to an arbitration tribunal, by arrangement of the parties.[212] Otherwise, the normal jurisdictional rules on dispute settlement of the forum state apply. Arbitral awards issued by the arbitration court of a member country of the New York Convention on the

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203 The Additional Facility extends ICSID settlement of disputes between a state and a national of another state to cases which are not within the scope of the ICSID Convention because the requirements *ratione personae* are not met or because the dispute is not an investment dispute or the type of proceeding is not provided for in the convention; see ICSID, Additional Facility, *Document ICSID* 11, Washington D.C. (1979), p. 4.

204 See *News from ICSID*, vol. 3, No. 2 summer 1986, p. 8.

205 See e.g. sec. 20 JEL of the USSR: disputes of the joint enterprise with the Soviet State, Soviet cooperatives, and other social organizations, disputes between joint enterprises themselves, as well as disputes between "participants" of a joint enterprise, regarding issues connected with the activities thereof, are considered in accordance with USSR legislation in the courts of the USSR or, by arrangement of the parties, in an arbitration tribunal.

206 E.g. Congo (art. 52 (b) IC.

207 E.g. Madagascar (art. 31 IC).

208 Art. 57 Yugoslav JVL (disputes between the foreign partner and the domestic Organization of Joint Labour); sec. 20 JEL of the USSR (for disputes between "participants" of a joint enterprise; however, on the Soviet side, only state-managed organizations can participate).

209 *Cf.* e.g. sec. 20 Soviet JEL; art. 57 Yugoslav JVL.

210 E.g. China.

211 Sec. 26 (1) Bulgarian JVL, disputes between the "association"–i.e. IJVE – and Bulgarian physical and juridical persons; sec. 38 Romanian JVL, disputes between (Romanian) joint companies and Romanian natural persons or corporate bodies; sec. 20 JEL of the USSR, disputes between (Soviet) joint enterprises which, however, must always have a Soviet majority as far as shares are concerned: sec. 5 JEL; see also art. 38 Polish JVL.

212 E.g. Bulgaria (sec. 27 JVL); Poland (art. 38 JVL); Romania (sec. 38 JVL); USSR (sec. 20 JEL).

Recognition and Enforcement of Foreign Arbitral Awards of 1958 are enforced in all member countries, for example in all eastern European countries.[213]

Dispute settlement law in Latin America. Dispute settlement law in Latin America merits separate treatment because it is heavily influenced by the Calvo Doctrine. This doctrine was promulgated by and named after a well-known nineteenth century Argentine lawyer and diplomat. Its essential objective is the preservation of national sovereignty. The doctrine asserts that foreigners are not entitled to treatment according to international law standards but only to the treatment enjoyed by nationals of the host state.[214] In accordance with the doctrine, host countries require the waiver by the investor of his country's diplomatic protection.[215]

The Calvo Doctrine has been shaped to become the theoretical basis of a variety of so-called Calvo clauses incorporated in Latin American constitutions.[216] Similarly, article 51 of the Andean Foreign Investment Code prescribes for Andean Pact countries that disputes relating to foreign investments or transfer of technology have to be settled in the host country (exclusive local jurisdiction).

The Calvo Doctrine is generally considered the main reason most Latin American countries do not adhere to the ICSID Convention. Until 1980 only three smaller states had signed and ratified the convention.[217] In recent years, however, this attitude has changed. Since 1980 an increasing number, in particular Ecuador (1986) and Paraguay (1983), have became parties to it.[218]

The doctrine has also influenced the attitude of Latin American states toward arbitration procedures in use in other parts of the world for the settlement of disputes in international business activities. Only Bolivia, Colombia, Ecuador,[219] El Salvador, and to some extent Chile,[220] admit direct enforcement of agreements to submit future disputes to arbitration *(clausula compromisoria)*[221] In Brazil, Ecuador and Venezuela such agreements are not enforceable unless they have been concluded after the rise of a dispute.[222]

TECHNOLOGY TRANSFER LEGISLATION

A characteristic feature of many Latin American legal systems consists of special legislation concerning the transfer of technology[223] by foreigners to domestic

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213 *Cf.* Buzescu, *op. cit.*, p. 438.

214 *Cf.* the Andean Pact countries: art. 50 AFIC.

215 E.g. Mexico.

216 E.g. Mexico (art. 27 of the constitution).

217 Guyana (1969), Jamaica (1966), Trinidad and Tobago (1967).

218 Barbados (1983), Belize (signed 1986), Costa Rica (signed 1981), El Salvador (1984), Haiti (signed 1985), Honduras (signed 1986), St. Lucia (1984). By 4 February 1987, 96 states had signed the convention, and 89 had ratified the treaty.

219 Law on commercial arbitration. Ecuador is a party to the UN Convention on Foreign Arbitral Awards.

220 Chile is a party to the UN Convention on Foreign Arbitral Awards.

221 *Cf.* F.E. Nattier, Dispute settlement, *in* J.T. Moscoso (ed.), *Legal aspects of doing business in America*, New York (1980), p. 249, 254 *et seq.*

222 *Ibid.*, p. 255.

223 Know-how, patent and trade mark licences.

enterprises.[224] Such legislation requires that the fairness of terms of technology transfer agreements and the economic value of the technology imported be guaranteed. Therefore, the relevant laws prescribe the approval and registration of technology transfer contracts.[225]

Most of the technology transfer laws[226] exclude certain restrictive clauses, as, for example, the prohibition that the licensee cannot export the manufactured goods or the obligation that the licensee must buy equipment or raw materials exclusively from a certain supplier (particularly from the licensing enterprise), or submission of disputes to foreign courts.[227] In many countries non-registration or non-approval invalidates the contract.[228] However, in some countries registration is only a prerequisite for the transfer of royalties.[229]

Some statutes limit the payment of royalties etc. to a fixed percentage of gross sales[230] or restrict the deductibility of payments for income tax purposes to a certain percentage of the gross income or sales of the licensee[231] or even prohibit payment in special cases.[232] In this context there is a recent tendency among Latin American countries to prohibit the granting of patents in certain sectors, such as food and beverages for human and animal use, fertilizers, herbicides and fungicides.

Countries in other parts of the world, particularly in Africa,[233] Asia[234] and Europe,[235] rarely have specific technology transfer regulations. However, some subject technology transfer agreements to examination and approval.[236] This seldom causes impediments to IJVs.

LANDOWNERSHIP

Some states prohibit the acquisition, possession or administration of rural agricultural properties by commercial stock companies, even if wholly owned by national investors.[237]

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224 For texts of legislation see: Instituto para la Integración de America Latina (Banco Interamericano de Desarrollo), Régimen de la transferencia de tecnología, Buenos Aires (looseleaf).

225 *Cf.* e.g. Brazil: Ato Normativo No. 15 of the Instituto Nacional da Propriedade de Industrial of 11 September 1975; Andean Pact states: art. 18 AFIC.

226 Except those of Argentina.

227 See e.g. Andean Pact countries (art. 20 AFIC); Dominican Republic (arts 29 to 38 Ley 861 (1978).

228 E.g. Mexico.

229 Barbados, El Salvador, Guatemala, Jamaica, Nicaragua, Trinidad and Tobago: see Cherol & Zalduendo, *op. cit.*, p. 45.

230 E.g. Brazil (art. 12 FIL: 5% of sales).

231 E.g. Brazil (art. 12 FIL).

232 Argentina (between affiliates: art. 5 TTL); Brazil (between affiliates: art. 14 FIL).

233 E.g. Cameroon, Côte d'Ivoire, Ethiopia, Kenya, Zaire.

234 E.g. Indonesia, Saudi Arabia.

235 E.g. Belgium. With the exception of Yugoslavia, even eastern European legal systems apparently do not contain special laws on the transfer of technology. For Yugoslavia see Law on long-term production cooperation, business and technical cooperation and acquisition and transfer of material rights to technology between organizations of associated labour and foreign persons, *Official Gazette* No. 40/78 of 14 July 1978, amended in 1983; the amended text was published in Official Gazette No. 10/83 of 4 March 1983.

236 E.g. China and Yugoslavia.

237 *Cf.* e.g. arts 15 (3) and 28 Polish JVL.

Most countries do not restrict the acquisition by foreigners, or by domestic companies with national or foreign[238] capital participation, of rural land for agricultural or related purposes, except the acquisition of public land by aliens and companies incorporated abroad[239] or for reasons of national security.[240]

Under other legal systems, the acquisition of *any* real estate by foreigners requires the authorization of the state authorities[241] which sometimes presupposes the foreigner's agreement to be treated as a domestic national with respect to the property concerned and therefore not to invoke the protection of his government for any matter relating thereto.[242] In some legal regimes the ownership of certain categories of land is reserved for national or mixed enterprises.[243]

In Guatemala, agricultural activity on state-owned land is reserved for nationals or for companies with national shareholders holding nominal shares.[244] The constitution of El Salvador[245] prescribes that foreigners or companies with foreign shareholders may acquire land for agricultural purposes only if reciprocity is guaranteed. Under the agrarian reform laws of El Salvador,[246] Honduras[247] and Nicaragua[248] only national individuals, associations of peasants or cooperatives are eligible to buy land.

Occasionally countries will impose a general prohibition or severe limitations on the acquisition of agricultural land by individual (or corporate) alien or non-resident persons,[249] and also on the acquisition by domestic companies when an alien control exists. Such restrictions, varying in their extent, are effective in many states of the United States.[250] In Australia the acquisition of rural properties is permitted provided proposed on-farm development expenditure is at least one-third of the acquisition price.[251] Sometimes foreign investors can obtain an exemption from prohibition in the form of a leasehold.[252]

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238 Under Saudi Arabian law, for example, licensed (domestic) foreign capital enterprises are entitled to own the necessary real estate provided the necessary authorization is granted in accordance with the Decree for non-Saudis taking possession of real estate in the Kingdom (art. 7 (c) FCID) although non-Saudis are otherwise prevented from owning land: See Hoppe, Saudi Arabia, *in*: D. Campbell, *Legal aspects of doing business in the Middle East* (1986), p. 167.

239 F. Morrison, *in* J.H. Davidson (ed.), *Agricultural law* (1981) vol. 2 sec. 7.19 (US federal law).

240 E.g. Argentina, Federal Republic of Germany.

241 Special approval for the acquisition of any immovable by foreigners is prescribed, e.g., in Trinidad and Tobago (Cherol & Zalduendo, *op. cit.*, p. 33 footnote 3); in Austria (acquisition of real estate by established foreign-controlled companies: OECD, *op. cit.*, p. 35); in Switzerland *(ibid.,* p. 60).

242 E.g. Mexico.

243 E.g. Bolivia reserves the property of natural forests for national Bolivian or– possibly –"mixed" enterprises (art. 19 Law-Decree No. 11.686/1974). An enterprise is "national" or "mixed" when the shares held by Bolivian investors are at least 80% or between 50 and 80%, respectively (art. 9 IL).

244 Arts 104 and 138 Decree No. 1551 (1962) as amended by Decree 27 (1980).

245 Art. 108 (1984).

246 Arts 18 and 21 Decree No. 153 (1980).

247 Arts 79, 88 and 112 Decree No. 170 (1974).

248 In special cases foreigners may obtain such land by a grant of the competent ministry: arts 13 and 27 Decree No. 782 (1981), Reglamento de la Ley de Reforma Agraria.

249 E.g. New Zealand (rural land, including farm land: OECD, *op. cit.*, p. 51); Turkey *(ibid.*, p. 61).

250 *Ibid.*, p. 67 *et seq.*

251 *Ibid.*, p. 33.

252 E.g. Poland (arts 15 (3) and 28 JVL); Kenya (for up to 99 years); Indonesia.

In some countries all land[253] or the land used for professional purposes[254] is the property of the state. Occasionally, foreign joint venture laws expressly declare that IJVEs may not own immovable property in the territory of the host state.[255] Instead of property the IJVE may obtain a leasehold interest in land granted by the government[256] or contributed by a member of the IJVE[257] for the duration of the venture.

COMPANY LAW

Specific forms of business organization for the establishment of international joint ventures in agriculture do not exist in international or municipal legal systems. Except for the rare companies created on the basis of regional international treaties[258] and the specific forms of business organization for international joint ventures, ordinary general company forms of municipal company laws are used for such ventures everywhere.

It is remarkable that until now the different regional legal regimes for multinational enterprises[259] have not been used for international joint ventures in agriculture, and they have been rarely applied to such ventures in agriculture-related sectors.

Some legal systems have introduced specific forms of company for agricultural activities,[260] but they are all basically designed for agricultural and horticultural *family* enterprises. Membership is reserved for physical persons and shares are transferable only to members of the company or of the family.[261] These company forms are not appropriate for international joint ventures.

In order to protect the family farm, some legal systems prohibit corporations from owning agricultural real estate and from engaging in farming operations.[262]

Specific forms of association for international joint ventures in whatever economic sector have been created only in states with non-market economies

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253 E.g. USSR, Zaire (art. 10 of the constitution).

254 E.g. China.

255 *Cf.* e.g. sec. 22 (3) Bulgarian JVL.

256 *Cf.* e.g. art. 14 (2) Romanian JVL; sec. 4 Edict of the Presidium of the USSR Supreme Soviet of 13 January 1987 (ILM 1987, 759). In China a "right to the use of a site" may be acquired by IJVEs; assignment of the right is forbidden (art. 5 (3) IJVL; art. 53 sentence 1 IJVL regulations).

257 See sec. 22 (1) Bulgarian JVL.

258 See chapter 2 of this study: Economic Community of Central African States (CEAC), Andean Common Market (ANCOM), Comunidad del Caribe (CARICOM), Sistema Econòmico Latino-Americano (SELA).

259 See chapter 2: Andean multinational enterprises (EMA), CARICOM multinational enterprises, SELA multinational enterprises, CEAC community industrial enterprises.

260 E.g. the French *groupement fonder agricole* (GFA), *groupements agricoles d'exploitation en commun* (GAEC) and the *exploitation agricole à responsabilité limitée* (EARL), as well as the Belgian *société agricole.*

261 *Cf.* e.g. arts 5 and 15, Belgian law on agricultural companies. The French GFA, GAEC and EARL are basically reserved for physical persons (see J. Hudault, *Droit rural*, Paris (1987) No. 241 *et seq.*; J. Megret, *Droit agraire*, vol. 3 Paris (1978) Nos. 1078 and 1139. According to agricultural cooperation statutes, the administrators of associated cooperators must be French, EEC nationals or nationals from countries with which reciprocal agreements are in force; exceptions are possible in other cases (OECD, *op. cit.*, p. 40).

262 E.g. Mexico, and several states in the United States.

because legal forms of association for private (domestic or foreign) investors are not available in most of these countries. This is true, for example, in China,[263] Cuba and Ethiopia. Eastern European legal regimes are particularly interesting and therefore deserve special attention.

In eastern Europe, IJVEs are enterprises registered in the host country and thus considered domestic companies. The regulations of the host country are applicable. Only Romania treats IJVEs as foreign enterprises.[264] Hungary and Poland have maintained their old company laws and apply the pertinent provisions to IJVEs. As Bulgaria, the USSR and Yugoslavia had repealed their company laws, they were forced to enact special regulations for IJVEs. In general, these follow the usual patterns of legislation in industrialized countries.

In Hungary, IJVEs may be organized according to Law No. XXXVII/1875 (partnerships), Law No. V/1930 (companies limited by shares, limited liability companies) or pursuant to sec. 1 Decree No. 28/1972 (as amended in 1977) which created a new business form, the joint enterprise. Actually, about 100 IJVEs are operating.[265]

In Poland, "companies with foreign capital participation" (IJVEs) operate as limited liability companies or stock companies[266] based on the provisions of the Polish Commercial Code of 1934. This new law is intended to provide the legal basis for cooperation on a large scale. Already before this law became effective (1 July 1986) the establishment of IJVEs with Polish corporate bodies or physical persons was allowed in the field of small-scale industries,[267] a possibility which is not available in the investment legislation of other eastern European countries.

In Romania joint stock companies (companies limited by shares) or limited liability companies may be used for IJVEs, these types of organization being regulated in the IJV legislation itself.[268]

Bulgaria has created new forms of business organization which resemble the western European models of partnership and corporation but leave room for individual arrangements according to the particular needs and interests of the parties.[269]

In 1987 the USSR created a business form of joint enterprise for ventures with western and developing countries.[270]

In Yugoslavia foreign investors are only allowed to join an existing legal entity of economic "self-management", that is to say an organization of associated labour. The creation of a new enterprise in order to start an IJVE is

263 For a description of the draft of a new company law see A. Lauffs, *Neuere Entwicklungen im Chinesischen Gesellschaftsrecht*, RIW 1987, 433.

264 Sec. 17 (1) Decree No. 424/1972.

265 *Frankfurter Allgemeine Zeitung*, Blick durch die Wirtschaft, 21 October 1987.

266 Art. 2 (1) and (3) JVL (1986).

267 Law of 6 July 1982 on the Principles of conducting economic activities in the field of small-scale industries by foreign legal and natural persons on the territory of the Polish People's Republic, as amended Dziennik Ustaw *(J. of Laws = Official gazette)*, 1985 No. 13 item 58.

268 Sec. 9-19 JVL.

269 Sec. 4 (2), 7, 21 *et seq.* JVL.

270 See sec. 4 *et seq.* JEL.

not possible under the laws of Yugoslavia. At present, about 275 IJVs are operating, by far the largest number in an eastern European country.[271]

In principle all eastern European countries,[272] as well as other non-market economies[273] but also some countries with a market economy,[274] require a domestic equity majority. However, most of these countries allow in general or in specific cases a foreign participation exceeding 50 percent. Bulgaria expressly prescribes that foreign participation may exceed 50 percent of the capital.[275] The same is true in China.[276] In Poland foreign investors may set up wholly owned enterprises in the small industry sector.[277]

An amendment of the ordinary JVL is under way which is expected to allow a foreign capital majority of 51 percent.[278]

Establishment of an IJVE principally means joint management. However, the legislation of some eastern European states reserves the position of chairman of the board or director-general of the IJVE for nationals of the host state.[279]

Under Yugoslav law a foreign capital majority is legal, but it cannot be reflected in a voting majority on the joint managing board just as the number of a foreign person's representatives on this board cannot exceed the number of domestic representatives.[280] However, the investment contract may stipulate that for specific questions unanimity is required.[281] In general, a shareholder's right to transfer shares is subject to a right of pre-emption by the domestic shareholders or to their agreement with the transaction.[282] The transfer may also require the approval of the government authorities.[283] Generally IJVE regulations do not provide for minimum capital participation by the foreign investor.[284]

The company laws of countries with non-market economies in other parts of the world basically correspond to the pattern of eastern European investment legislation in creating special provisions for IJVEs applicable to all fields of economic activity.[285]

Countries with market economies have company laws which provide appropriate domestic company forms for the organization of IJVEs. The

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271 *Frankfurter Allgemeine Zeitung, op. cit.*

272 See Poland (sec. 3 Decree No. 24/1979), Romania (sec. 4 JVL), USSR (sec. 5 JEL) and, in principle, Hungary.

273 E.g. Cuba, Ethiopia.

274 E.g. Indonesia.

275 Sec. 9 (3) and 29 JVL.

276 Art. 4 (2) Chinese IJVL

277 Sec. 1 (2), 5 (2) Law of 6 July 1982 (see above, footnote 267).

278 *Frankfurter Allgemeine Zeitung, op. cit.*

279 See e.g. Bulgaria (sec. 10 (3) JVL); Poland (art. 17 JVL); USSR (sec. 21 JEL).

280 See sec. 15 (5) sentence 1 Yugoslav JVL (1985).

281 *Ibid,* sentence 2.

282 See e.g. sec. 13 Romanian JVL; sec. 30 (1) Yugoslav JVL (1985).

283 See e.g. art. 5 (1) Polish JVL; sec. 30 (6) Yugoslav JVL (1985).

284 For an exception see art. 4 (2) Chinese IJVL (25% minimum foreign capital participation).

285 E.g. Angola (Lei No. 10/79 de 22 de Junho, Diario da República 1979 I Serie-No. 161, p. 471); Ethiopia; China; Cuba; Dem. People's Rep. of Korea (Democratic People's Republic Act on Joint Venture of 8 September 1984; English text: ILM 1985, 807).

enactment of special legal regimes for IJVEs has therefore not been necessary and has not actually been realized anywhere. IJVEs have to be established in the forms of business organization provided by the municipal legislation of the host country[286]—possibly with the proviso that shares of corporations must be nominal[287] and that a decisive domestic influence be guaranteed.[288] In general, the domestic legislation of market economy countries does not hinder foreign investors from selecting among the business forms available.

The choice for international joint ventures, generally, is between the (stock) corporation (public limited company, public company limited by shares or guarantee) and the limited liability company (private limited company, private company limited by shares or guarantee).[289] The limited liability company[290] is characterized by freedom of the parties and a simple organization, by a small number of participants whose shares are not easily transferable. This business form seems particularly adapted to medium- and small-scale international joint ventures. The stock corporation is more appropriate for large-scale activities which need huge capital amounts affordable only by large groups of shareholders; hence the shares have to be easily transferable.

It is worth mentioning here that former colonial countries have regularly retained the company laws introduced by the colonial powers. Thus, many African countries' company law is patterned on French,[291] Belgian[292] or English[293] law.

FOREIGN EXCHANGE CONTROL REGULATIONS

Exchange control regulations are in force in nearly all developing and non-market economy countries.[294] Transfer guarantees are, however, available in many of them.[295] Very often the remittance abroad of profits in foreign currency has to be made by matching the foreign exchange income of the international joint venture itself.[296] In contrast, most states with a market economy have not enacted foreign exchange regulations.

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286 E.g. Belgium, Argentina, Mexico.

287 E.g. Argentina (art. 17 FIL).

288 E.g. Mexico (art. 5 FIL). In Trinidad and Tobago, participation in local companies is subject to approval, and a local capital majority is required: Cherol & Zalduendo, *op. cit.*, p. 33 footnote 3, p. 36.

289 Sociedad colectiva (société en nom collectif; general partnership); sociedad en comandita (société en commandite; limited partnership); sociedad de responsabilidad limitada (société à responsabilité limitée; limited liability company); sociedad anónima (société anonyme; corporation).

290 The limited liability company is a business form created about a century ago in Germany as *Gesellschaft mit beschränkter Haftung (GmbH)* which has spread, as a company type, all over the world.

291 E.g. Cameroon, Côte d'Ivoire, large parts of northern and central Africa.

292 E.g. Zaire.

293 E.g. Kenya and Nigeria. Also Pakistan, Sri Lanka, Singapore, Israel, Liberia and the Philippines.

294 E.g. Argentina, Nigeria, Zaire. For Latin America *cf.* e.g. Cherol & Zalduendo, *op. cit*, p. 34; for eastern European countries see e.g. the Yugoslav Law on foreign exchange transactions and foreign credit relations, *Official Gazette* No. 17/77 as amended.

295 See above, Investment guarantees.

296 E.g. China, Yugoslavia.

TAXATION

An extraordinary variety of taxes relevant for IJVEs is to be found in different parts of the world.[297] Nevertheless IJVEs have to pay taxes on their income everywhere and sometimes, for example in Latin America, as a combined income tax (corporate income tax plus remittance of profits-dividends tax). Very common are taxes on business licence, real estate, capital gains, payroll, turnover, interest, dividends and royalties. Occasionally an additional tax is imposed on profits transferred abroad[298] or on the remuneration of the management.[299] Some countries distinguish for tax purposes between nationals and foreigners. It would appear, however, that more important than categories and rates of taxes are the exemptions and reductions granted by many investment laws.[300]

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297 For an overview of the taxation on benefits etc. transferred abroad under the laws of Caribbean and Central American states see Cheron & Zalduendo, *op. cit.*, p. 40 *et seq.* A table showing the maximum corporate income tax rates for the ANCOM states and Mexico (as of 1 July 1977) is to be found in E.E. Murphy, The Andean Common Market and Mexico: a foreign investment profile, *Texas Int. L J.* 13 (1978) 307, 309.

298 See e.g. sec. 37 (2) Bulgarian JVL; sec. 13 Romanian JVL.

299 Hungary.

300 See above, Investment incentives.

4. Conclusions

SUCCESS FACTORS FOR INTERNATIONAL JOINT VENTURES

Favourable investment climate

The most important factor in the stimulation of foreign investment, particularly in the form of international joint ventures, seems to be a politically favourable investment climate in the host state. A basic requirement for such a climate is to be found in bilateral investment protection treaties[1] which contain third party dispute settlement procedures, especially with regard to differences between the host state and foreign investors. A code creating favourable investment conditions appears to be another important requirement.

In recent years these requirements have been met by a steadily increasing number of countries.

Hundreds of investment protection treaties have been concluded. Some of the traditionally reluctant socialist and Latin American countries have changed their position by entering such treaties in very recent years.[2] A large number of states have become members of the ICSID Convention and the Multinational Investment Guarantee Agency (MIGA). MIGA was created under the auspices of the World Bank, and is expected to start operations in the near future, substantially ameliorating the investment climate worldwide.

At the level of municipal law, two positive trends are emerging. First, a remarkable liberalization of a large number of older investment codes has occurred. Second, the admission, for the first time, of foreign investments in the form of international joint ventures in socialist countries is worth noting.

The investment climate has thus substantially improved during the last few years, especially for international joint ventures. Many developing countries are more favourably disposed toward foreign investment, irrespective of their political system.[3]

Favourable legal conditions[4]

This study has found that international joint ventures in agriculture and its related sectors are admissible in all the legal systems explored. However, admissibility does not suffice to attract foreign investment.

As far as legal framework is concerned, the following factors seem to be

1 *Cf.* OECD, *Intergovernmental agreements relating to investment in developing countries*, Paris (1985), No. 4, 89.

2 In particular China (1982), Bolivia (1987) and Uruguay (1987).

3 *Cf.* International Chamber of Commerce, *Promotion of private foreign direct investment in developing countries-a practical approach.* Report adopted by the ICC Commission on Multinational Enterprises and International Investment, Document No. 191/261 rev., p. 1.

4 See e.g. I. Shihata, Inter-Arab equity joint ventures, *in*: Int. Center for Law in Development (New York), *Public enterprises and development in the Arab countries-legal and managerial aspects*, 1979 (New York), p. 180, 190 *et seq.*

essential from the point of view of foreign investors: legal guarantee against expropriation of investments; the maintaining of a decisive or at least material managerial influence on the operations of the undertaking; a workable legal form for the venture (adequate company law); a clear and firm legal basis for the entrepreneurial operations under which business can be conducted[5] in a normal and efficient manner, and the guarantee of fair and equitable treatment as well as a dispute settlement procedure by an independent arbitration tribunal. Government commitments should be made only when it is sure they can be honoured.[6] A preferential treatment for foreign companies does not seem necessary.[7] Government policies have to be coordinated and clear. They also have to be made public and implemented consistently.[8]

In principle, these key prerequisites are largely fulfilled by the majority of countries.

The investors' need for protection against expropriation and other restrictions has been realized by most governments. The same is true regarding the remittance (or reinvestment) of earnings and the possible repatriation of sales or liquidation proceeds originating in the investment. However, it is necessary to take possible changes in the relative value of the investor's and host state's currencies into account to maintain the real value the investment had at the moment of its entrance into the host country. The risk of devaluation can be a major impediment for foreign investors. Thus, the repatriation of the full capital value of the investment has to be guaranteed.

At the international law level, investment promotion treaties have become widespread. In this context, the changing attitude shown by Latin American and socialist countries in respect of bilateral treaties containing special provisions on the material and procedural protection of foreign investment deserves special attention.[9]

In addition to or instead of these bilateral public international law treaties, many countries have enacted *general* protective rules in their constitutions or special provisions protecting foreign investment through foreign investment codes.

Measures of open or creeping expropriation have thus become increasingly rare in recent years. The forthcoming MIGA Convention will further improve security for foreign investment.

The formerly widespread impediment of compulsory domestic capital majority, or at least of compulsory local control of the enterprise's managing body, has been removed by a number of states. However, in some countries compulsory control over local international joint ventures remains effective and hinders the promotion of foreign investment, especially where potential investors are in a strong bargaining position. Finding a solution for each individual case seems to be preferable to a rigid general rule.

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5 International Chamber of Commerce, *op. cit.*, p. 2.

6 *Ibid.*, p. 5. The report does not require a preferential treatment for foreign companies.

7 *Ibid.*, p. 2.

8 *Ibid.*, p. 6.

9 See in particular China (1982), Bolivia (1987) and Uruguay (1987).

As far as appropriate legal forms for international joint ventures are concerned, single "international" public enterprises created for a venture by virtue of international treaties between the sponsoring states seem to be the best solution. In fact, any procedure of establishment and adaptation of a venture is politically and legally complicated and therefore time-consuming, and has sensibly delaying effects. The problems of filling up the lacunae left in the convention may be hard to resolve.

Specific association types for international joint ventures put at the disposal of transnational ventures by regional common market regimes, like for example Andean Multinational Enterprises (EMA),[10] are mainly adapted for large undertakings and do not appear to be widely used yet. Reliance is commonly placed on the national business association forms of the host state's municipal law.

The establishment conditions and the essential rights and obligations of the partners of the future international joint venture have to be given careful consideration. A formal understanding in the international joint venture formation agreement on these questions is highly recommended. The clauses of the formation agreement should regulate, in particular, all questions which cannot be contained in the memorandum or in the articles of the IJVE or should not be disclosed for reasons of confidentiality.

The formation agreement usually settles points like the following: objectives, timetable of the venture, production, financing (equity, long-term loans, know-how, etc.), cooperation, reporting, engineering, competition clauses, management appointment and control, prices, reinvestment and returns for shareholders, obligations to deliver raw materials and/or to buy products, profit-sharing with employees, evaluation of contributions in kind or of technology, accounting and dispute settlement procedures; furthermore, it covers preconditions for the establishment of the international joint venture enterprise itself (e.g. agreement on the memorandum/articles of the IJVE, administrative approvals and confirmation of benefits, availability of loans, management and technical infrastructure).

Prior agreement on these points is particularly important if the local partner of the venture is the host state itself or a host state-managed enterprise, because these entities tend to regard the socio-economic impact of the joint activities as more important than the return from the investment. In these situations the decision-making autonomy of the venture is threatened, especially where the domestic partner is a state-run entity in a centrally administered economy and holds the capital majority or otherwise controls the venture.

The members of the managing body of a state enterprise appointed by the government frequently need the approval of their authorities, at least when important transactions are at stake. The lack of autonomy of the domestic partner will often intrude on the decision-making process of the venture. Thus, the decisions of the board of directors may have to be submitted for ratification to the public enterprise which holds the shares of the joint venture or even to its supervisory body, for example a ministry. The delaying effects of such

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10 See Chapter 2 of this study.

procedures can endanger the chances of economic success.

Therefore, a clearly "private" enterprise management structure would appear to be vital to maintain a competitive standard. Decisions of international joint ventures should be independent of the approval of political institutions. Investors are otherwise likely to put their money elsewhere. The parties should be afforded maximum freedom to shape their relations.[11] This may be fixed in the formation agreement.

In general, workable and appropriate business association forms for international joint venture enterprises, both at holding and operating company levels, exist in the municipal laws of all countries. However, notwithstanding the positive attitude toward international joint ventures in the agricultural sector, special legal forms for such ventures have not yet been created. The forms used in some municipal legal systems for agricultural associations are designed to sustain the family farm structure—for example, in Belgium and France—and are not suitable for an association of domestic and foreign investors.

However, the *common* legal forms of association placed at the disposal of foreign investors are generally adapted for such undertakings. In most legislation company law is codified, either by statute laws or company acts. Specific legislation to create a new business organization form for international joint ventures does not seem necessary where a modern general company law is at the disposal of the parties. The lack of domestic business organization forms meeting international standards is disadvantageous to prospective host countries.

In many municipal legal systems, in particular those of market economies, the appropriate legal forms of association for the establishment of international joint ventures in agriculture or agroindustry can be found among the common business organization forms available. The choice of the most appropriate form for the individual venture is up to the partners of the future joint enterprise.

Occasionally, Arab host countries require foreign investors to enter joint ventures with domestic investors in accordance with a model form established by the government.[12] Virtually everywhere, specific legal forms for minor and major undertakings limiting the liability of the shareholders are placed at the disposal of the entrepreneurs: larger ventures can take the form of a corporation (public company limited by shares), and medium and small undertakings can make use of the limited liability company (private company limited by shares).

Partnerships or similar business organization forms which do not limit the shareholders' liability are not advisable for international joint ventures. In fact, such unincorporated association forms are not used for permanent international cooperation in the agricultural sector.

Countries with centrally administered economies do not have legal forms of association for private persons (e.g. the USSR), or if they exist they have usually been reduced to a paper law existence during the last decades.`

The desire to attract foreign investors has led to a revitalization of old company laws where these had not been formally abolished (e.g. Hungary,

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11 International Chamber of Commerce, *op. cit.*, p. 3.

12 E.g. Egypt. See I. Shihata, *op. cit.*, p. 200.

Poland). Occasionally, a specific form of association for international joint ventures has been created in addition to the traditional company forms (Hungary) which, however, apparently have not been adopted by international practitioners. States with non-market economies like the USSR which had repealed their former company laws have had to introduce a specific legal form for the association of domestic and foreign partners as a prerequisite for the establishment of international joint ventures. These new forms are often based on the traditional company models.

The creation of special association forms for international joint ventures by centrally administered countries has been a signal of the opening of their economies to foreign capital and entrepreneurs. This signal has been given, in recent years, by numerous and important countries (e.g. China, the USSR).

Foreign investors are particularly interested in business organization forms that limit the liability of the shareholder to the amount of capital to which he subscribes. Clear provisions on the rights and obligations of the shareholders are especially claimed by foreign investors in the position of minority shareholders. Unspecific legal rules with regard to the protection of minority interests seem to be particularly discouraging to foreign investors. Therefore, unanimous decision in strategic or vital questions should be at least allowed by law.

A procedure for resolving deadlock situations is also a vital element for the success of joint ventures. Here, professional assistance in the drafting of the instruments of association becomes particularly important. Further problems which specifically concern potential foreign investors include representation on the managing body of the joint venture, and valuation of the technology and know-how they contribute to the enterprise. A number of countries have made provision for these problems in their investment codes. Under other legal systems uncertainty remains or there is a shortage of sufficiently qualified local experts for the evaluation of investment contributions.[13] This may turn out to be a crucial question because technology and know-how are indispensable elements for development in many countries.

In some countries problems arise due to lacunae left in the municipal legislation on a number of questions. Here again, careful drafting of the joint venture agreement, of the memorandum and of the articles of association (articles of incorporation/by-laws) are vital for the success of the venture.

Freedom is necessary, too, in the operation of the international joint venture. Performance requirements (e.g. export share) or requirements concerning the transfer of technology and research imposed by governments may result in poorer economic returns or in the decision not to invest. The same is true of exaggerated controls and reporting requirements which may endanger business confidentiality.[14]

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13 See S.V. Goekjian, The role of Arab public enterprises in international transactions, *in:* Int. Center for Law in Development (New York), *Public enterprises and development in the Arab countries–legal and managerial aspects*, 1979 (New York), p. 216 *et seq.*

14 International Chamber of Commerce, *op. cit.*, p. 3.

Another important point is the adequacy and stability of legislation[15] beyond company law. Changes in legislation and arbitrary interpretation may well deter foreign investors. This is especially true of taxation laws, which should guarantee that the fiscal take be related to the venture's effective profit/loss situation and that all costs be deductible from income for tax purposes. [16] The conclusion of double taxation treaties is strongly recommended in order to avoid conflicts between tax jurisdictions. Another factor which carries great weight in a foreign investor's evaluation of a host country's investment climate is the operative protection of industrial property rights (patents, trade marks, copyrights).

Fair and equitable treatment has to include the free access to local credit because foreign credit conditions are often not as favourable as those in the host country.

The reservation of marketing for nationals or state-owned enterprises may deter foreign investors when a qualified local infrastructure, for example for high-technology products, is not available.

As far as training, employment and industrial relations are concerned, the OECD *Guidelines for multinational enterprises* of 1976 and the ILO *Tripartite declaration of principles concerning multinational enterprises and social policy* may serve as important reference points. As the appointment of suitably qualified local staff has generally economic advantages for the joint venture because of the higher costs of expatriate employees, foreign investors will employ foreign personnel only where this solution is necessary to maintain standards. For key positions in management or the technical field the investor must have free choice. Therefore, compulsory requirements for the employment of national personnel could be superfluous or even detrimental.

Restrictions on transfer of investment-related funds are usually harmful to the investment climate. They should not be imposed. If restrictions are unavoidable, they should be introduced in a non-discriminatory way and in compliance with relevant IMF/GATT rules. [17]

Finally, an important factor influencing the choice made by a potential foreign investor concerns provisions on the settlement of disputes. An investor will only invest in a country if the question of the applicable law is settled and if he is sure of a fair settlement procedure in the case of differences arising from the investment either in relation to the host state or the local investment partner.

Parties to international contracts, including agreements on the formation of international joint ventures, should be allowed by the domestic law to choose the substantive law applicable to their agreement.

As no international tribunals for international disputes exist, an operational arbitration procedure is of vital importance for the establishment of international joint ventures. Arbitrators with international business experience are basically better qualified to settle international disputes than local courts. Experience shows that institutionalized arbitration bodies (e.g. the International Chamber of

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15 *Ibid.*, p. 7. *Cf.* in this context the OECD *Guidelines for multinational enterprises* of 1976 (section on disclosure of information).

16 International Chamber of Commerce, *op. cit.*, p. 11.

17 *Ibid.*, p. 13.

Commerce) serve this objective best.

The ICSID arbitration specializing in investment disputes between host countries and foreign investors is proving to be an appropriate means to settle such disputes. The increasingly favourable acceptance of this procedure confirms our positive evaluation.

Host states are more and more aware of the importance of a third party dispute settlement procedure, especially where the state allows its own agencies and state-owned enterprises to enter such agreements. The choice of the judges is basically up to the parties and neither the host state nor the state of the investor has jurisdiction over potential disputes. In this context, adhesion to the 1958 New York convention on the recognition and enforcement of foreign arbitral awards is important in order to ensure the carrying out of the award.

Favourable economic conditions

A favourable legal framework is essential but is not sufficient to attract foreign investors. The decisive factor for foreign (and local) private investors is a common economic interest for all the prospective partners which presupposes working conditions promising good economic results. Apart from special fiscal or extrafiscal incentives this means, in particular, equal treatment with national or international (public) entities and stability of the "rules of the game". These conditions can and should be guaranteed as far as possible through legislative measures.

Many of the host states fulfil these requirements. An additional finding of this study has been that the large majority of countries examined not only admit but welcome and often especially foster joint ventures for the development of the agricultural and agro-industrial sectors of their economy.

The nature of the products of international joint ventures in agriculture is characterized by standardization and continuous markets. Therefore, the establishment of separate and continuing enterprises is appropriate; purely contractual relations between partners of different countries without the establishment of a legally and financially separate enterprise are not well suited for such ventures. The form of international joint venture enterprises is well qualified for direct foreign investment in this field because local conditions are decisive for production and often also for the market.

Qualified sponsors

As a rule, foreign investors have difficulty in recognizing economically viable projects and finding suitable local partners for projects they consider promising. This is especially true in the agricultural sector. Here, the situation is often characterized by a market structure which makes it difficult and often even impossible to identify projects and find appropriate partners. The help of a qualified, impartial and trustworthy sponsor can be indispensable for the establishment and operative success of international joint ventures.

The sponsor should first act as a "clearing-house" — a market-place for international projects and prospective partners. He may and probably should provide expert advice in the formation stage of a venture, carrying out pre-investment feasibility studies or serving as an agency to procure the assistance of external experts and consultants for the venture. Like an institutional arbitration organization, the sponsor should keep registers of consultants and experts. The sponsoring body can assist the parties in the correct drafting of the constitutive legal instruments either by providing legal advice or by making available expert help.

Sponsoring bodies operate at several levels and under various guises. At the state level, many capital exporting and importing countries have created development corporations (development banks, investment banks, finance corporations). The African Development Bank is an example of a regional sponsoring body. The International Finance Corporation, founded under the auspices of the World Bank, is the only organization operating at world level.

All these institutions may participate as equity shareholders in the venture or operate as financing corporations by extending loans. In addition, there are sponsoring bodies which are not allowed or are not in a position to take over equity participation, for example the Overseas Private Investment Corporation, or special organizations of the United Nations (e.g. UNIDO).

RARITY OF INTERNATIONAL JOINT VENTURES IN AGRICULTURE

In spite of the admissibility of international joint ventures, the availability of appropriate organization forms and the fostering of investments in agriculture and its related fields, comparatively few international joint ventures are operating in this sector. In other areas—for example in the financial, petroleum and real estate sector—they occur more frequently.[18] There are various reasons for this phenomenon.

In a few countries companies with legal personality are not admitted as an organization form for agricultural activities. Thus, the liability of shareholders in associations operating in this sector is unlimited. Investors will not take the risk of unlimited liability in a foreign country, and therefore will not invest in this sector.

Other laws compulsorily demand an *ab origine* or subsequent domestic majority (devestment) and require that nationals have a voice in the day-to-day management of the venture. As a result foreign majority international joint ventures are not allowed.

In other countries, foreign majority joint ventures are allowed but not equally treated and therefore are not competitive with domestic companies.

More important than the legal restraints are the economic and psychological impediments.

In most countries the large majority of agricultural holdings have the structure of small family farms producing more or less for the subsistence of the family and not oriented toward the market. Non-market orientation, small farm size, lack of capital and technical know-how, the individualistic or family-oriented philosophy of the holders—these are all major impediments to international joint ventures in agriculture. This explanation is supported by the fact that special company forms created for agricultural exploitation are basically

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[18] See e.g. I. Shihata, *op. cit.*, p. 182 *et seq.*

designed for family farms. And even the acceptance of these company forms is—at least in Europe—very limited.

From the point of view of potential foreign investors, the economic interest in small family-run farms is virtually non-existent. The risks are too great and the prospective benefits too uncertain. The lack of international joint ventures in this sector of the economy is, therefore, quite understandable and the reasons are even obvious. Thus, the chances of establishment and success of international joint ventures in this sector are minimal.

Another relevant reason is the overproduction of specific crops (e.g. coffee, cacao, wheat). It is unreasonable to expect investment in those sectors where the chances of an adequate return are very low if not illusionary.

However, numerous examples confirm the success of the international joint venture where large production units (especially plantations or livestock[19]) are concerned. In general, these enterprises produce at least partially for export. Export is an essential condition for international joint ventures where the laws of the host state allow the transfer of the investor's benefits only if the venture itself earns sufficient foreign currency to cover the amount due to him.

International joint ventures are relatively widespread also in agro-industry.[20] Like plantations, these undertakings require large amounts of capital, experienced management and technology. Food-processing plants are particularly likely to produce for foreign markets.

Summing up, international joint ventures are to be found mainly in large agricultural undertakings and in agro-industry. In both sectors, these enterprises are primarily directed toward the exportation of their products.

THE ROLE OF FAO

In the opinion of the writer the Food and Agriculture Organization of the United Nations (FAO) could play a major role in the promotion of international joint ventures in agriculture. The International Chamber of Commerce expressly encourages the relevant intergovernmental organizations to take a favourable attitude toward applications by developing countries for technical assistance with the promotion of private foreign direct investment.[21]

As this study has shown, the number of international joint ventures in agriculture is comparatively small, in spite of an investment climate which is basically favourable. This is especially true for agricultural and agro-industrial ventures in almost all the developing countries explored. The factors already pointed out explain the situation only in part.

The writer has the impression that many projects in agriculture remain unidentified and numerous potential investors are undiscovered. Other projects may fail because the assistance of experts is insufficient to overcome the difficulties connected with their establishment, especially in developing countries.

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19 *Ibid.,* p. 183 (Sudan and Somalia).

20 See e.g. the list of foreign direct investment in Spain in this sector given by M. del Pozo, ARAL 7/14 September 1985, p. 15 *et seq.* About half the enterprises listed are international joint ventures.

21 International Chamber of Commerce, *op. cit.*, p. 2.

Another reason could be the lack of information for potential investors.

It may well be that FAO could act as a sponsoring body in this area. This United Nations organization is probably best prepared to take over such a task. Being an organization supported by both industrialized and developing countries, FAO is in a position to act as an independent sponsor, impartially serving the interests of both the host and investor states as well as those of the partners of the venture. Thanks to its worldwide organization and close working relationship with the relevant authorities of its member countries, FAO is suited to serve as a clearing centre for agricultural and agro-industrial projects. It has experts and consultants in all the disciplines concerned, especially economists, technical experts and lawyers. No other institution combines all these qualifications in the agricultural sectors.

While the Organization's objectives and funds would not allow an active participation at the operational stage, FAO should be well able to act as a sponsoring body of international joint ventures in agriculture in the pre-investment and formation period.

FAO is particularly prepared for the following essential tasks—eventually in cooperation with other agencies and experts:

- identification of appropriate investment projects for international joint ventures in the sectors of agriculture and agro-industry (project identification)
- evaluation of projects through pre-investment studies on their economic viability, including financing plans, and technical feasibility, carried out by FAO staff or by trustworthy independent external experts and consultants (project evaluation)
- presentation of the project to potential partners in the case of positive evaluation (project information centre)
- stimulation of contacts between potential partners of positively evaluated projects (partner contact forum)
- assistance in the drafting of legal instruments (investment agreements, formation agreements, deeds of association, etc.) including, possibly, the evaluation of contributions in kind (especially technology and know-how), if desired by the parties.

At least at present, the elaboration of general model forms for the legal instruments concerning international joint ventures in agriculture would be premature. The particularities of such ventures vary too much to be moulded into one and the same form. However, it should be possible to draft a check-list[22] of issues to be tackled by the parties to an undertaking in a specific sector, such as the production of crops. [23]

THE FUTURE

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22 See e.g. F.H. Paetzolt, *Joint ventures in Entwicklungsländern*, Köln (1986), p. 20 *et seq.;* G.R. Young & S. Bradford, *Joint ventures: planning and action*, A.D. Little, Inc. (about 1973), p. 71 *et seq.*

23 See also the Model provisions for joint venture agreements in fisheries, prepared by FAO (Indian Ocean Programme 1975; 1 OFC/DEV/75/37) and the UNIDO manual on the establishment of industrial joint venture agreements in developing countries (ID/68).

International joint ventures are a rather recent phenomenon whose increasing use in the economic world is basically due to political, legal and economic causes. Politically, the cooperation they entail corresponds with the aspiration of developing countries to extend their recent political independence to transnational economic relations. This desire is reflected in many countries by legal rules admitting foreign direct investment only in the form of joint ventures. Some states have even introduced special compulsory disinvestment provisions in order to turn wholly foreign-owned subsidiaries into joint ventures.

The economic reasons vary widely and cannot be thoroughly dealt with in this study. However, the transfer of technology and the financing of ventures with foreign capital instead of loans which are no longer available are undoubtedly reasons for the fostering of international joint ventures. From the point of view of the foreign investor, the establishment of a joint venture may be the only way to open a new market while any business expansion at home is excluded.

The characteristics of small and medium-size enterprises make them especially appropriate partners for international joint ventures established in developing countries. Smaller firms are often not in a position to establish wholly owned subsidiaries abroad. They need to complement their limited financial resources and management capacities by joining other, preferably local, investors. Therefore, smaller enterprises show a tendency to realize their investment projects in the form of joint ventures, particularly in developing countries. [24]

This need for cooperation is in harmony with the policies of developing countries, which for various reasons seek higher participation in local enterprises. Transnational corporations operate in relatively narrow sectors of the economy and are not always interested in entering joint ventures, preferring to establish wholly owned subsidiaries. Also, the pursuit of the interests of the entire transnational group may have detrimental consequences for individual joint ventures.

The business form of international joint ventures in agriculture expresses the changing relationship between industrially developed and developing countries, formerly characterized by direct investment in the form of wholly owned subsidiaries established by large western companies in developing countries. This may well turn out to be a transient phenomenon because every country aspires to full economic sovereignty. Nevertheless, this form of transnational cooperation will last as one of the best means to foster economic development for the coming decades.

However, it is a highly sophisticated device whose use requires careful consideration in the choice of organization and of its modalities. The advice of competent sponsors, such as the Food and Agriculture Organization of the United Nations, in the sector of agriculture and agro-industry will surely reduce the considerable risks inherent in such ventures.

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24 J. Campos & E. White, *Small and medium-sized German firms as partners in the industrial development of Argentina: experience and perspectives*, presented to the Seminar on Investment Promotion and Industrial Cooperation between the Federal Republic of Germany and the Argentine Republic (Hamburg, 5 November 1986), p. 8.

Annex

INVESTMENT LAWS

AFIC (Andean Foreign Investment Code): Commission of the Cartagena Agreement, Decision No. 24 of 31 December 1970, Concerning Treatment of Capital, as amended.

Algeria, JVL: Law No. 82-13 of 28 August 1982 as amended by Law No. 86-13 of 28 August 1986, Journal Officiel of 19 September 1986.

Angola: Law No. 10/1979 of 22 June 1979 concerning foreign investment, Diário de República 1979 I série No. 161, p. 471.

Argentina, FIL: Law No. 21.382 of 12 August 1976 as amended.

Benin, IC: Loi No. 82-005 of 20 May 1982.

Bolivia, IL: Decreto-Ley No. 18751/81 (Ley de inversiones).

Brazil: Law No. 4.131 (1962) Dispone sobre inversión de capital extranjero, préstamos externos y pagos de regalías, as amended by Law No. 4.390 of 11 September 1964.

Bulgaria, JVL: Edict No. 525 Concerning Economic Collaboration Between Bulgarian Juridical Persons and Foreign Juridical and Physical Persons of 25 March 1980, Durzhaven Vestnik No. 25 of 28 March 1980, p. 273.

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Guinea-Bissau: Investment Code, Ordinance No. 229/PRG/84 of 3 October 1984.

Hungary: Decree No. 28/1972 as amended.

Kenya, FIPA: Foreign Investment Protection Act (chapter 518) 1964 as amended.

Liberia: Investment Incentive Code 1973.

Madagascar, IC: Law No. 85/1 of 18 June 1985, Code des Investissements. Mauritania: Law No. 71.028 of 2 February 1971, Investment Code.

Mexico, FIL: Law of 16 February 1973.

Nicaragua: Decree No. 10 (1955).

Niger, IC: Law No. 68-24 of 31 July 1968.

Nigeria, EPD: Nigerian Enterprises Promotion Decrees of 1977, as amended. Poland, JVL: Law on Companies with Foreign Capital Participation of 23 April 1986, J. of Laws 1986 No. 17, item 88.

Romania, JVL: Decree No. 424/1972 on the Constitution, Organization and Operation of Joint Companies in the Socialist Republic of Romania.

Rwanda, IC: Law-Decree No. 30/77 of 21 September 1977 (Code des Investissements) J.O. 1977, p. 420 et errata, J.O. 1977, p. 572, et 1978, p. 296.

Saudi Arabia, FCID: Foreign Capital Investment Decree, Decree-Law No. M/4 of 1978 (1399 H) Official Gazette No. 2757 of 27 January 1979 (28. 2. 1399 H).

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