

THE TRANSNATIONAL CORPORATION  
AND TRANSFER AND DEVELOPMENT OF TECHNOLOGY:  
THE KENYAN CASE.

A thesis submitted in part fulfilment of the requirements  
for the Degree of Master of Laws, University of Nairobi:

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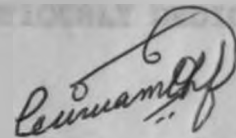
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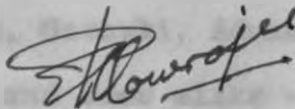
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OKECH-OWITI, M.D..

This thesis has been submitted with my approval as University of Nairobi Supervisor.



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DEDICATION

To All Workers and Peasants of this Country

(To you we owe much of our existence, and in your Revolutionary Potential actively trust our future);

To All Patriots (Revolutionary Change needs your committed contribution);

To All Internationalists (Revolution knows no boundaries):

TO YOU ALL, DEAD AND LIVING, IS UNPRETENTIOUSLY DEDICATED

THIS HUMBLE INQUIRY.

ACKNOWLEDGEMENTS

Mose: your active patience and understanding - we need it to struggle on;

Andzazi and friends, Kilunga and friends, Achero, Andale - it is gratifying to know that people can physically labour so much for "nothing";

Nowrojee, Ong'ondo, Mutunga, Gachuki, Aduke, Nyoike, Date-bah, Mutungi: all friends and foes alike - your various contributions, whether in material, or as encouragements or provocations, are deeply appreciated. Negativity can be put to good use.



C O N T E N T S

Abbreviations .. .. .	viii
List of Tables .. .. .	x
List of Acts/Conventions .. .. .	x
List of Appendices .. .. .	xi
<u>INTRODUCTION</u> .. .. .	1
A. Preliminary .. .. .	1
B. Summary on Research .. .. .	5
C. Some Problems .. .. .	10
D. Summary of Conclusions .. .. .	11
Footnotes .. .. .	13
<u>CHAPTER I. THE POLICY, LEGAL AND INSTITUTIONAL</u>	
<u>FRAMEWORK</u> .. .. .	18
A. Domestic Policy on Transfer and Development of Technology .. .. .	18
B. Law and Institutions .. .. .	23
1. Industrial Property Law .. .. .	25
2. Sanctity of Property .. .. .	52
3. Specific Protection of Foreign Investments .. .. .	60
4. Institutional Organization: The Ministry of Industry .. .. .	80
Footnotes .. .. .	92
<u>CHAPTER II. PRACTICAL ISSUES: TRANSFER AND</u>	
<u>DEVELOPMENT</u> .. .. .	104
A. Introductory .. .. .	104
B. Transfer of Technology .. .. .	105
1. The Process of Negotiations .. .. .	105
2. The Agreements .. .. .	123
3. Implementation .. .. .	187
C. Development of Technology .. .. .	211
Footnotes .. .. .	217
<u>CHAPTER III. IN LIEU OF A CONCLUSION:</u>	
<u>A SYNTHESIS</u> .. .. .	234
Footnotes .. .. .	260

APPENDICES

SELECTED BIBLIOGRAPHY

	.. .. .	xii
A. Books .. .. .		xii
B. Articles .. .. .		xiv
C. United Nations and Government Publications .. .. .		xv
OECD	- Industrial Development Centre	
UNEP	- Development Finance Company of Kenya	
DFC	- Danish Foreign Investment	
OE	- Economic and Social Commission for Africa	
UNEP	- Industrial Property Organization for English-Speaking Africa	
FAO	- Federal Republic of Germany	
UNEP	- International Bank of Economic and Development	
UNEP	- International Centre of Economic Studies	
UNEP	- Industrial and Commercial Development Corporation	
ICJ	- International Court of Justice	
UNCTAD	- International Centre for the Settlement of Investment Disputes	
IDA	- Industrial Development Bank	
IBRD	- International Monetary Fund	
UNEP	- International Bureau for the Protection of Intellectual Property	
UNEP	- Industrial Property and Technical Drawing	
ITC	- Trade Centre	
UNEP	- East African States	
UNEP	- East African States	
UNEP	- The International Centre for the Study of Intellectual Property	

ABBREVIATIONS

(a) General:

- BIRPI - International Bureau of the Union for the Protection of Industrial Property
- CBK - Central Bank of Kenya
- DFCK - Development Finance Company of Kenya
- DFI - Direct Foreign Investment
- DM - Deutsche mark (the German currency)
- ESARIPO - Industrial Property Organization for English-Speaking Africa
- FRG - Federal Republic of Germany
- IBRD - International Bank of Reconstruction and Development
- ICC - International Chamber of Commerce
- ICDC - Industrial and Commercial Development Corporation
- ICJ - International Court of Justice
- ICSID - International Centre for the Settlement of Investment Disputes
- IDB - Industrial Development Bank
- IMF - International Monetary Fund
- International Bureau - International Bureau for the Protection of Intellectual Property
- ISPC - Industrial Services and Promotion Centre
- JV - Joint Venture
- MFN - Most Favoured Nation
- NPC - New Projects Committee
- Paris Union - The International Union of the Paris Convention for the Protection of Industrial Property

(ix)

- PCIJ - Permanent Court of International Justice
- PRO - Public Relations Officer
- R & D - Research and Development
- TNC - Transnational Corporation
- UK - United Kingdom
- UN - United Nations Organization
- UN-ECA - United Nations Economic Commission for Africa
- UNTS - United Nations Treaty Series
- US - United States of America
- US\$ - United States dollar
- WIPO - World Intellectual Property Organization
- £ - Sterling pound

(b) Statutes/Conventions/Treaties:

- ECA - Exchange Control Act
- FIPA - Foreign Investments Protection Act
- Paris Convention - Paris Convention for the Protection of Industrial Property
- PRA - Patents Registration Act
- TMA - Trademarks Act

(c) Journals:

- AJIL - American Journal of International Law
- EALJ - East African Law Journal
- ILM - International Legal Materials
- ILW - Investment Laws of the World

(x)

**T A B L E S**

- Table IA: Patents+**  
(a) Annual Registrations/Recorded Licences and Assignments.  
(b) Annual Applications/Registrations by Country of Origin.
- Table IB: Trademarks:**  
(a) Annual Applications/Registrations; Subsequent Developments; General Data  
(b) Applications/Registrations by Country of Origin
- Table IIA: Holding Structure in Sample Firms**
- Table IIB: Local/Foreign Shareholding in JVs.**

**ACTS/CONVENTIONS**

**(a) Municipal:**

- Companies Act (Cap 486 of the Laws of Kenya)  
Constitution of Kenya (Act No.5 of 1969)  
Exchange Control Act (Cap 113)  
Foreign Investments Protection Act (Cap 518)  
Immigration Act (Cap 172)  
Patents Registration Act (Cap.508)  
Prevention of Corruption Act (Cap.65)  
Registration of Patents Ordinance (1953) (Ordinance No.11 of 1953)  
Statute Law (Miscellaneous Amendments) ( No.2) Ordinance, (1961)  
(Ordinance No.28 of 1961)  
Statute Law (Miscellaneous Amendments) Act, (1973)  
Act No. 4 of 1973

**Trade Marks Act (Cap 506)**

**(b) International:**

**Convention on the Settlement of Disputes between States and  
Nationals of other States, 1965 UNTS, Vol 575. p.159**

**Paris Convention for the Protection of Industrial Property,  
1883**

**(c) Miscellaneous:**

**(English) Patents Act, 1977 (Cap.37).**

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**APPENDICES**

- A. Letter of Request to ICDC**
- B. Letter of Request to private companies**
- C. Reply from B.A.T. (K) Ltd**
- D. Reply from Cadbury Schweppes (K) Ltd.**
- E. Reply from Firestone East Africa (1969) Ltd.**
- F. Form A: Application to the NPC for approval for an  
Industrial Project**
- G. Investment Agreement**
- H. Integrated Investment Agreement**
- I. Technical Assistance Agreement**
- J. Management Agreement**
- K. Consultancy Agreement**
- L. Licencing Agreement (Trade Marks)**
- M. Licencing Agreement (Trade name).**

THE TRANSNATIONAL CORPORATION AND  
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I N T R O D U C T I O N

A. PRELIMINARY

The question of equitable transfer and development of technology from the so-called developed to the so-called developing or Third World economies has become crucial in the last two decades. Not out of mere coincidence, this period has also seen the general emergence of politically independent states out of formerly subjugated colonies, and, more importantly, an upsurge in the struggle for economic independence. Whereas the early part of the post-World War II period was characterized, in the main, by a fight for an end to the colonialist stage of imperialism, the period under review has been characterized by a more marked realization that, indeed, imperialism does not manifest itself only in political terms; that direct political subjugation is only a more open aspect of the overall relationship that the colonialist has with the colony. That relationship also consists of other economic, social and cultural "ties" which can easily be, and have been, continued despite the termination of direct political dependence.

This realization has brought to the fore the desire, and, therefore, the struggle, on the part of the politically independent states to achieve economic independence: the ability to organize their economies and to develop and utilize their natural and human resources principally for the benefit of their peoples. It is in this general context that the question of technology becomes important. This organization and the

beneficial utilization of resources requires some knowledge of what these are and how they can be exploited profitably. Basically, technology is, to put it simply, the specialized knowledge that is required to understand man's environment and to alter it to suit and satisfy his requirements.

In the context of this paper, the knowledge of concern is that which is required in manufacture - the process of making products or articles. In this process, several forms of technology may be identified. There is the technology that is embodied in machinery and other equipment used in manufacture. There is also the technology which is embodied in the formulae which forms the basis of the product. Where there are other manufactured material inputs, the technology embodied therein constitutes another form. And then there is also the technology embodied in the final product. All these are forms of technology which exist within the innate, "non-human" aspect of the process of production at a specific point in time.

At the "human" level, there is the form of technology which is normally referred to as know-how. Basically, this constitutes the human skills which make the whole process move - the managerial, organizational and technical skills (whether specialized or general) possessed by the human beings engaged in the process of production. The phrase "technology and know-how" which is commonly used is, strictly speaking, a misnomer. However, its use is intended to draw a distinction between the two levels of technology discussed here - that is, the "innate" and the "human" aspects of the process of production



(also referred to, respectively, as "embodied" and "disembodied" technology). It is in this sense that the phrase is employed wherever it appears herein.

The importance of technology is a generally recognized fact. Economic observers, Marxist-Leninist and bourgeois alike, do generally agree on one thing: scientific and technological progress is essential not only for simple growth, but also for development. (Of course, their respective definitions of such terms as "progress", "growth" and "development" accord with their relative perspectives). Indeed, to Marxism-Leninism, scientific-technological revolution is central to the development of the productive forces and the character of the ensuing production relations. Marx himself noted that reification of the power of knowledge indicates the degree to which social knowledge has become transformed into a direct productive force. Technology provides the material foundation for the development of production. In his words:-

"It is not the articles made, but how they are made, and by what instruments, that enables us to distinguish different economic epochs<sup>1</sup>".

It is this centrality of technology in general, and in the process of production of articles in particular, which must of necessity raise the question of how it is to be acquired and/or developed. This question is obviously more crucial, from a comparative point of view, with respect to those countries whose deficiency in technology is high. From a global point of view, such countries are usually referred to variously as "developing", "underdeveloped" or "Third World"

or "poor" countries. (The controversies regarding the use and specific definitions of these terms are noted, but they are beyond the scope of this paper. The terms are here used only for general reference and specifically as registering deficiency in technology). Kenya is one such country.

In the specific context of technology, the contrast is with the technologically more advanced countries. Such countries, mainly comprising the hardly homogenous countries of the "Western" hemisphere (or "the West", basically "capitalist") and countries of the "Eastern" hemisphere (or "the East", basically "socialist"), have, at varying levels, a pool of technology already developed or being developed. The international question at issue is how this pool can be acquired and used by the technologically deficient economies. The socialist states do supply technology to the countries they have relationships with principally through government-to-government transactions (for example, technical aid and technical co-operation agreements) or state enterprises. In the case of capitalist states, the bulk of transactions are subject to a phenomenon that characterizes such economies - private or individual ownership of the means of production. Technology in these economies is basically owned, developed and exploited by private enterprises, of which Transactional Corporations (TNCs) are an important variety. Thus, the question of technology transfer from, and development with the aid of, these economies must take direct cognisance of this fact. Dr. Henry Kissinger, the Secretary of State in Nixon's and

Gerald Ford's administration in the United States (US), told delegates as much when addressing the 1976 session of United Nations Conference on Trade and Development (UNCTAD) in Nairobi<sup>2</sup>.

Kenya, whose official policy in terms of holding of social property is similar to that of these latter economies, relies largely on TNCs in its efforts to reduce technological deficiency through the use of the global pool. The broad question that this paper raises and investigates is whether TNCs significantly contribute to this reduction.

#### B. SUMMARY ON RESEARCH

The research which forms the basis of this paper was limited to the manufacturing sector and focused only on Nairobi, the largest single industrial complex (indeed, the centre of industrial activity) in Kenya. It began with an inquiry into, and an analysis of, the industrial policy of the government in general and in relation to matters of transfer and development of technology, the municipal and international legal framework which governs transactions related thereto, and the institutional machinery laid down to facilitate such transactions. The material which this inquiry yielded is contained in Chapter I hereof. The basic sources therefor were the fourth Development Plan (1979/83), the various relevant Acts of Parliament of Kenya (and others which are applicable to Kenya) and international treaties or conventions, and interviews with government officials in the Ministry of Industry and the office of the Attorney-General. Documents prepared by these

officials were also referred to where necessary. All this was basically intended to reveal the broad framework within which technological transactions take place.

It then proceeded to inquire into basic practical issues: how technological transactions are negotiated, the results of such negotiations and the extent to which the same are implemented (Chapter II hereof). With respect to how the parties to technology transactions negotiate or bargain before the terms governing the transaction are agreed upon, officials of the Ministry of Industry, Industrial and Commercial Development Corporation (ICDC) and the Central Bank of Kenya (CBK) were the principal sources (both in interviews and prepared documents). To confirm or balance views expressed by such officials, interviews were also conducted in the private sector with representatives and/or employees of firms which constituted the research sample.

The inquiry on the results of the negotiations had as its basic source the agreements and various understandings entered into by the parties to the transaction. The same applied to part of the inquiry into implementation of the said agreements and understandings. However, much of the information on this latter aspect was based on free interviews with representatives and/or employees of sample firms.

Interviews in the private sector were conducted with representatives and/or employees of firms which are subsidiaries/affiliates of TNCs and fully local firms which have some technological relationship with TNCs. These sample firms were

chosen by manufacturing sub-sectors and the total number of persons employed therein on a "permanent" basis. This information was derived from the current "Directory of Industries"<sup>3</sup> prepared in 1974, to which a supplement covering the period after 1974 was added in 1977. The Directory contains basic information regarding firms which are engaged in the manufacturing sector, including: the names of the firms, their dates of establishment and addresses; the sub-sectors within which they operate and the general class of products they manufacture, and the number of persons employed by them. The Kenyan classification of manufacturing activity<sup>4</sup> contains effectively seven manufacturing sub-sectors, viz: food, beverages and tobacco; textile, wearing apparel and leather; wood and wood-products (including furniture); paper products, printing and publishing; chemicals and chemical petroleum, rubber and plastic products; non-metallic mineral products, excluding petroleum; and fabricated metal products, machinery and equipment. Regard was had of the more important sub-sectors (in terms of value-added). Further, consideration was given to the time of establishment to create some sort of balance between the older firms and the more recent ones (approximately, a 30-year progression from 1948 upto 1976). Only firms in the "E" and "F" categories of the number of employees code<sup>5</sup> were considered. However, within these confines, the choice was more or less random, regard also being had to whether such firms were subsidiaries/affiliates of well-known TNCs<sup>6</sup>.

As a cautionary remark, it must be emphasized that the main aim of this work was not to specifically identify which

firm does what in the field of transfer and development of technology. On the contrary, the prime objective here was to identify within the limitations, certain broad trends, the overall tendencies which characterize the whole process. The first objective would require detailed analysis of the activities of each particular firm the resources for which (in terms of finance, human in-put and time) were in this case deficient. This is, of course, without mentioning the amount of goodwill, patience and trust that would otherwise be required of the sample firms. Most firms, especially subsidiaries/affiliates of TNCs, are generally unwilling to open up to interviews even at a superficial level, let alone at the level of what is considered secret.

It will be noticed that the identities of the private firms and interviewees (except in a few cases) are not revealed. This may, of course, make verification difficult, and holds the risk that the material relating thereto may all be fiction (indeed!). Full responsibility is accepted for this "criticism", but its limits and possibilities must also be appreciated. The reason for this position is, however, a basic one. Much of the information contained herein is fairly sensitive in the view of the firms and the individuals concerned. The basic pre-condition to acceptance of interviews and grant of access to documents was that the connection between the firms and the interviewees, on the one hand, and the information given, on the other, must not be revealed. Neither, in some cases, should any information be provided which may make it possible for this connection to be deduced! The latter condition is, indeed, difficult to satisfy, and this was made quite clear to them: whereas we could strive to keep our word, it would not be possible to anticipate the varied ingenuities of the human mind!

It is on this broad basis that much of the material was acquired. The writer is obviously not about to breach that trust. As it is, we do not believe any substantive advantage accrues from a breach. (Not that we have much respect for the activities of TNCs and their local compradors. This, we believe,



is obvious). This is a personal stand point. Further, consideration must be given to those whom such breach may put in jeopardy, especially in cases where the information/documents given should not have been by such persons (their daily bread is obviously just as important as ours, and must be taken into account). It is also important to realize that such a breach could affect those who may in future embark on similar, or even different, research projects. It may not be made obvious, but the effect would be felt all the same. And, finally, we must here recall our prime objective - that of identifying tendencies. It is submitted that this position does not, in any way, retract from the basic objective: it does not make the observations made herein any the less real.

As a penultimate cautionary remark, it is stressed that the general approach taken in this investigation is that law is a social phenomenon. As such, it interacts with all other social phenomena to create the totality of human existence in society. Law can, therefore, not (and should not) be discussed in the air, in a vacuum, as if it were capable of independent existence, unless the discussion is raised to the absurd level of abstraction. Its essence is in its operation in society; its effect is determined by the various social forces at work (indeed, even its being raised to the level of "pure" existence serves a social, though for some, injurious, purpose). Thus, the investigation herein, even though having law as a point of departure, nevertheless broadens its scope as much as is permitted by the available material and the overall focus. To strict legalists angered by this

"corruption" of the "neutral" purity of law, we offer no (absolutely, no) apologies precisely because the problem is theirs (lying in their inability to appreciate social phenomena contextually) rather than ours. History has its own lessons, and it gives them everyday in the form of the very totality of human existence alluded to.

Finally, the contribution of this paper, if any, must be seen for just that: a small contribution that does not ask all the questions, raise and tackle all the issues, nor offer all the explanations or answers. It may be a starting point or may aid further analysis; but the principal problems it addresses ought to be taken seriously.

### C. SOME PROBLEMS

The principal set-back in the research was the unwillingness of those with information to part with it to the writer. This was so even in government departments where one would assume that the public is entitled to access to certain information. The problem was, however, more marked in the private sector where almost every bit of information is secret if the relevant person decides at any point that it is.

Notable also was the difficulty in tracing certain files in government departments, either because nobody knew where they were (?), or because they were under lock and key and were not available for scrutiny. Another problem worthy of mention was the difficulty in getting people to grant interviews, or give the necessary information. Either it was difficult to get appointments, or, when they were finally set, they would not be honoured, for this was not considered



"as important as other matters". Postponements were not uncommon either, not to mention empty promises.

Parenthetically, it may be mentioned that unnecessary delay caused by laxity in supervision has, where it has arisen, been pointed out to the relevant persons, and it is hoped that this will be taken note of.

#### D. SUMMARY OF CONCLUSIONS

1. Kenya, an economy based on private enterprise, is deficient in both capital and technology and know-how (which it needs to facilitate its industrial process). It has as a policy decided to involve TNCs in its economy as a principal source of these requirements.
2. TNCs are not philanthropists; their involvement in the Kenyan economy is based on their ability to profit from it as much, and for as long, as is possible. The continuation of the deficiency of the economy in the said industrial inputs ensures this. It is necessary for these on the Kenyan side to lay down conditions that will ensure that the TNCs deliver the goods, so to speak, under terms which are not socio-economically onerous.
3. The policy, legal and institutional framework provided by Kenya for this involvement does not adequately achieve this purpose: rather it, in the main, facilitates exploitation of the Kenyan economy by these TNCs.
4. From a practical point of view, the negotiation process which is intended to procure for Kenya tangible benefits from its relationship with the TNCs is essentially a process for

legitimising the interests of TNCs. This is confirmed by the terms of the agreements/understandings which ensue thereupon. These, instead of facilitating self-sustaining development which would eventually ensure self-sufficiency in the inputs and socio-economic independence, do, on the contrary, place specific barriers thereto. Their implementation further aggravates and emphasizes these barriers.

5. The end product is that whereas there is technology engaged in production, the prime objective here is the use of the resources available in the Kenyan economy for further generation of surplus for the benefit of the TNCs, and, to a smaller extent, their internal agents, all of which is dependent on the exploitation of a majority of the Kenyan peoples. Further the technology so engaged is inappropriate.

6. The inability of the Kenyan economy to procure tangible benefits from the TNCs is significantly contributed to by those who are in direct control of the state apparatus, who have a symbiotic relationship with TNCs. They cannot be expected to bring changes which will significantly alter the relations of production which exist in the economy precisely because they have an interest in maintaining and further entrenching the same.

7. Any solution to the problem must aim not only to extinguish the continued and exploitative dependence of the Kenyan economy on the TNCs, but also to ensure the emancipation of the exploited peoples in Kenya. That solution must involve and centre around these same peoples, both at the level of

recognizing and understanding the source of the problem as the exploitative socio-economic system, and at the level of action and its continual sustenance. History must be aided in all this by people for whom the achievement of this emancipation forms the centre-piece of social existence.

1. KARL MARX: Capital (foreign languages publishing Hse. Moscow. 1954). Vol.I, p.180.
2. This session, the fourth, was held in May, 1976. It set the ball rolling as regards the on-going international debates on, and efforts to realize, equitable transfer to deficient economies. The efforts to establish an international code of conduct for the transfer of technology have, however, not produced any tangible results. This is owing to the divergence of views, principally between the capitalist states, on the one hand, and the socialist and the so-called Third World States on the other.
3. The Kenya Directory of Industries: Central Bureau of Statistics, Ministry of Finance and Planning (Government Printer. Nairobi. 1974). Supplement September, 1977.
4. Industrial Classification of Economic Activities. The new Kenya classification is based on the 4-digit UN International Standard International Classification (ISIC), 1968:

<u>Major Division</u>	<u>Division</u>	<u>Major Group</u>	<u>Kenya Group</u>
3	31	311 - 312	311 - 3119 3121 - 3122
<b>MANUFACTURING:</b>	<b>Food Beverages Tobacco</b>	<b>Food</b>	<b>Slaughtering, dairy, fruit, fish, grainmill, sugar, cocoa, bakery, animal feeds, etc.</b>
		<u>313</u>	<u>3131 - 3134</u>
		<b>Beverages</b>	<b>Spirits, malt, liquors, soft drinks, carbonated waters</b>
		<u>314</u>	<u>3140</u>
		<b>Tobacco</b>	<b>Tobacco Manufacturing</b>
	<u>32</u>	<u>321</u>	<u>3213 - 3219</u>
	<b>Textile, Wearing Apparel and leather</b>	<b>Textiles</b>	<b>Knitting, rope and twine, cotton, other textiles</b>
		<u>322</u>	<u>3220 - 3229</u>
		<b>Wearing apparel</b>	<b>Wearing apparel except footwear</b>
		<u>323</u>	<u>3231 - 3233</u>
		<u>324</u>	<u>3240</u>
		<b>Footwear</b>	<b>Leather footwear and wearing apparel</b>
	<u>33 - 34</u>	<u>331-342</u>	<u>3311 - 3420</u>
	<u>35</u>	<u>351</u>	<u>3511 - 3514</u>
	<b>Chemical, Chemical petroleum, Rubber and plastic products</b>	<b>Industrial Chemicals</b>	<b>Industrial Chemicals, Pyrethrum extraction, wattlebark, fertilizers and pesticides.</b>
			<u>3515</u> Manufacture and repairs of aircraft
			<u>3516</u>
			<u>3517</u>

<u>Major Division</u>	<u>Division</u>	<u>Major Group</u>	<u>Kenya Group</u>
3 contd.		<u>352</u>	<u>3521 - 3529</u>
Manufacturing		Other chemical products	Paints, varnishes, lacquers, medicine and drugs, soaps, perfumes cosmetics and toilet preparations, other chemical products
		<u>353</u>	<u>3530</u>
		<u>355</u>	<u>3550</u>
		Rubber products	Rubber products
		<u>356</u>	<u>3560</u>
	<u>36</u>	<u>361 - 369</u>	<u>3610-3699</u>
	<u>37</u>	<u>370</u>	<u>3700</u>
		Basic metal industries	Basic metal industries
	<u>38</u>	<u>381</u>	<u>3811 - 3819</u>
	Fabricated metal products, machinery and equipment	Fabricated metal products	Cutlery, hand tools, hardware, metal furniture and fixtures, structural metal products, and others
		<u>382</u>	<u>3820</u>
		<u>383</u>	<u>3830</u>
		Electrical machinery and appliances	Electrical machinery and appliances
		<u>384</u>	<u>3841-3843</u>
		Transport Equipment	Ship building and repairing, rail road equipment, manufacturing and assembly of motor-vehicles
			<u>3845</u>
			Manufacture and repairs of aircraft.
		<u>385</u>	<u>3850</u>
	<u>39</u>	<u>390</u>	<u>3900</u>

Source: Directory of Industries: pages (i), (iii), (iv), and (v).

5. See Directory of Industries *ibid.*, p. (ii)

The full code is as follows:

Code	Number of Employees
A	5 - 19
B	20 - 49
C	50 - 99
D	100 - 199
E	200 - 499
F	Over - 500

6. The following is a full list of the firms (in code), their year of establishment and areas of operation, and the number of "permanent" employees engaged therein:

<u>Firm</u>	<u>Year of Establishment</u>	<u>Division</u>	<u>Major Product Group</u>	<u>No. Of Employees</u>
(1)	(2)	(3)	(4)	(5)
A	1952	31	314	F
B	1950	31	311-312	F
C	1956	31	313	E
D	1949	35	352	F
E	1969	35	356	E
F	1975	38	384	F
G	1958	35	352	E
H	1960	31	313	F
I	1969	38	381	E
J	1968	38	381	E
K	1948	37	370	F
L	1975	31	313	E
M	1967	35	352	E
N	1972	32	324	E

6 Contd.

<u>Firm</u>	<u>Year of Establishment</u>	<u>Division</u>	<u>Major Product Group</u>	<u>No. Of Employees</u>
(1)	(2)	(3)	(4)	(5)
O	1949	35	351,352	E
P	1975	35	352	E
Q	1967	38	383	E
R	1959	35	352	E
S	1949	35	352	E
T	1976	32	321,322	E
U	1968	32	322	E

(a) For decoding of column (3) and (4), see footnote 4, above.

(b) For decoding of column 5, see footnote 5 above.

Source: Directory of Industry *ibid.*

*[The following text is extremely faint and largely illegible, appearing to be a continuation of a report or document.]*



CHAPTER I

THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK

A. DOMESTIC POLICY ON TRANSFER AND DEVELOPMENT OF TECHNOLOGY

Governmental policy on technology transfer and development is part of the overall domestic policy on industrialization. The latter is based upon the deficiency of the economy in capital, technology and know-how, the major inputs in industry. The broad outlines of this industrial policy<sup>1</sup> envisage firstly a "mixed economy" in which the government is to contribute only a small part of the overall investment, placing greater reliance on the private sector investment - which includes investment from abroad. Secondly, the government is to continue to welcome foreign investment and to provide measures to safeguard such investments. And thirdly, the government is to continue pursuing a policy of dispersing industrial growth throughout the country through promotion of resource-based and footloose industries, confining investment allowances to enterprises located in semi-urban and rural areas, and provision of infrastructural facilities.

Within this broad outline is to be achieved the major objectives of industrial development<sup>2</sup>, which include expanded and diversified production for domestic and foreign markets at comparatively efficient levels; reduction of dependence on foreign inputs and increase in government revenue; creation of employment



opportunities and promotion of Kenyanization, and achievement of overall high growth rate of industries compatible with the nation's social aspirations (meaning small scale rural and labour intensive and resource based industries).

This outline of industrial policy and objectives forms the basis of the domestic policy on science and technology in the manufacturing sector<sup>3</sup>. However, let us first, as a background to this, deal with the general science and technology policy<sup>4</sup>. This recognizes as a national priority the need for technological revolution since the "productivity of the nation and the income earning opportunities associated with it depend crucially on the application of modern scientific knowledge to the identification and generation of improved technologies, and the use of the technology in the production process". The policy therefore attaches high priority to scientific development and to the use of technology for the social and economic development of the nation. Limited resources necessitate that research programmes must be defined on the basis of clearly identified priorities, and must be co-ordinated to avoid wasteful duplication. But the specific technological needs may be met either by original research and new technologies designed in Kenya, or by the transfer to and adaptation in Kenya of research results and modern technologies found elsewhere in the world. With regard to the latter, the scientific capacity of the economy must be developed to the point where the results of such research can be readily

assimilated in, and, more importantly, modified and adapted to the needs of Kenya. "In this way, transfer of technology will be used as a stimulus leading to the further development of technology<sup>5</sup>". The facilitation of this requires the development of basic supporting facilities, including standardisation, patent control, documentation and information. The responsibility for expanding on these policies and co-ordinating their implementation is placed upon the National Council for Science and Technology, which will liaise with other relevant institutions, either existing or to be created.

That is the broad policy outline. With regard to industrial technology<sup>6</sup> in particular, it is recognized that Kenya imports much of her machinery, equipment and manufacturing processes from industrialized countries, and, further, that such technology has mostly tended to be capital intensive and labour saving "whereas the reverse is more appropriate to Kenya. The main thrust of policies with regard to industrial technology... will be towards making better use of capital in new industrial investments to encourage increased opportunities for employment creation<sup>7</sup>". However, because "foreign investments will continue to be important in the industrial development of the country, industrial technology will continue to rely heavily on foreign investments and hence on technology to be imported from abroad<sup>8</sup>". This, policy-makers realize, calls for

a more systematic compilation and use of world technological information, which, it is hoped, will facilitate better choices among available technological alternatives, more effective bargaining, and more emphasis on 'unpackaging' and modifying manufacturing processes to utilize more efficiently Kenyan factor endowments, especially manpower"<sup>9</sup>. And in the field of R.&D,<sup>10</sup> as opposed to transfer, the private sector manufacturers, "particularly the multinational companies, will be encouraged to perform more of their research and development in Kenya than has been the case in the past especially with a view to creating opportunities for increasing employment effects, whenever this can be done"<sup>11</sup>.

This policy further calls for the laying of conducive ground for the introduction of technology and research results from foreign sources in the manufacturing sector. The protection offered to private foreign investment must therefore be emphasized with a view to attracting investors.<sup>12</sup> But, of course, some machinery is also established for purposes of analysing and sieving through this foreign involvement to certify that it accords with the needs of the economy<sup>13</sup>.

From all this, one can emphasize the following as the crucial features of the Kenya government policy on industrial technology. The policy recognizes the deficiency of the economy in technology generally and in industrial technology in particular. This deficiency is to be tackled via a twofold approach: Local development, and transfer from industrialized countries. In both cases, the policy envisages massive involvement of private investment as a crucial aspect of the mixed economy.

A large part of this investment is, and will continue to be, foreign. Therefore, it is necessary to prescribe specific protection for this foreign investment. And, so as to ensure benefit for the economy, the technology transferred or developed must be appropriate, and the capacity of the economy to analyse, choose and utilize technology improved.

As policy guidelines, these pronouncements must be seen within the context of the Kenyan economy as a whole to be fully appreciated. As such, they do disclose little of the dynamics of the economy and how this affects matters of transfer and development of technology. What perhaps needs to be emphasized here is the unequivocal commitment to the institution of private enterprise as forming the backbone of economic activity in the country. And, of course, in the realm of private enterprise, foreign based private enterprises have an integral part to play in this policy. The policy makers have never failed to emphasize this themselves at every moment considered opportune: in the development plans, in "harambee" meetings, in rally speeches, in conferences, on begging missions, etc., etc..

But the institution of private enterprise itself entails a large measure of unhindered private decision-making which may or may not be opposed to the broader interests of the larger dimensions of society. It, as a base, obviously shapes people's thinking and actions on the lines of private interests which emphasize individual benefit rather than those of society at large. With the

coalescence of these individual interests into concrete groups with different and decisive positions within the production process, it produces class struggles within the economy. This struggle gives quality to social life. Thus the superstructural features of the economy (in our case policy, politico - legal and institutional frameworks) must be looked at in their interaction with this base, which interaction will in fact give the former their material content. This interaction will determine whether government policy stays at the level of intentions, or transcends this onto the level of concrete obligations, or whether the politico - legal and institutional framework will achieve its declared objectives. For the moment, however, we attempt to deal with the politico - legal and institutional framework provided for the facilitation of the policy discussed above.

#### B. LAW AND INSTITUTIONS

It has been mentioned that the government is committed to private enterprise, and further that foreign private enterprises have a crucial role to play in the provision of capital, technology and know-how. Apart from offering incentives, the government has also laid down certain rules and established institutions that seek to guide the activities of those foreign owners of capital, technology and know-how in a direction that the government hopes will be beneficial to the economy.

Of specific relevance here are those laws which deal with the grant of rights in industrial property and their subsequent protection; sanctity of property in general, and, protection of foreign investments in particular.

In the first category of laws falls the legal regime which governs patents and trademarks. Both the municipal and the international aspects will be discussed here.

In the second category falls the constitution, the most important. This is the supreme law of Kenya, and provides, as one of its fundamental rights, the protection of private property from a broad point of view. However,

as a state, Kenya is also governed by that part of international law which deals with the sanctity of

property. This also requires consideration since the parties in technological transactions in the Kenyan case are nationals of different states. The third and last

category constitutes those laws which protect foreign private property specially, and, further, give incentives to owners who may want to invest in Kenya.

Kenya has enacted, at the municipal level, legislation which, by protecting the foreign investors and their investments and giving them fiscal and other benefits, will,

the legislators hope, attract the latter to invest in the national economy. This is the Foreign Investments Protection Act.

Apart from this, Kenya has, at the international plane, and for similar purposes, entered into bilateral arrangements with the states from which the investors emanate for the further guarantee of such investments.

These fall into the same category.



All of these legal formulations are relevant to the process of transfer and development of technology since they provide the broad framework within which the process takes place. Each of the categories will be discussed in turn.

With respect to institutions, the government has established structural machinery within the ministry of industry whose function it is, inter alia, to analyse any foreign involvement in the national economy, and, taking into account the broad policy and legal formulations, to determine to what extent the same may be beneficial to the economy, and whether it should be authorized or not. A discussion of this machinery will follow upon that of the legal framework.

## 1. INDUSTRIAL PROPERTY LAW

### (i) The Municipal System I: PATENTS

A patent may briefly be defined as the totality of rights granted to an inventor, or to his assigns or to his representatives in relation to his innovation. A United Nations study defines it as

"a statutory privilege granted by the Government to inventors, and to other persons desiring their rights from the inventor for a fixed period of years, to exclude other persons from manufacturing, using or selling a patented product or from utilizing a patented method or process. At the expiration of the time for which the privilege is granted, the

patented invention is available to the general public or, it is sometimes put, falls into the public domain"<sup>14</sup>.

Note the stress on "granted". The present writer does not subscribe to the notion that property rights as such are natural rights.<sup>15</sup> The totality of property rights is invariably dependent upon the overall property relations that exist within a given economy, a matter which is in fact the expression of the economic system that such economy adopts. The rights may be restricted or expanded, or made absolute, or even abolished in certain cases, depending on the dictates of the economic policy that guides the governing institutions within the state.

Patents may be granted in relation to a formula or method (process patent) or in respect of a product (product patent). Sometimes they encompass both. Being property rights, they are transferable, assignable and mortgageable, either "in toto" or in part.

In general, an innovation has to fulfil certain conditions before it qualifies for the grant of a patent. It has to be novel, that is, it must be relatively new taking into account the present state of the art. It has to be capable of industrial application; that is, it must be capable of utilization in manufacturing, if a process, and of being produced, if a product. It may also be required that such invention constitute an inventive step; that is, it must not be an obvious development in the circumstances; and that it be capable of contributing to "progress" (however this may be defined).



The Kenya patent regime may aptly be described as a rubber-stamping institution as the discussion hereinbelow illustrates. The Patent Registration Act<sup>15A</sup> (hereinafter PRA), the embodiment of the present Kenya patent regime, was in fact passed in 1935, approximately thirty years before Kenya's political independence. It has been amended three times, but such amendments have been of little consequence to its substantive provisions.<sup>15B</sup> The PRA provides for the establishment of a Registry of Patents, headed by a Registrar of Patents aided by a Deputy Registrar and several Assistant Registrars. A Register kept at such Registry shall contain entries

"of the names and addresses of grantees of certificates of registration under (the Act), such particulars regarding the subject matter of the patent as the Registrar deems necessary to identify it and entries of all corrections, amendments, assignments, transmissions or other matters which the Registrar is empowered or required by law to record" Section 3(1) APRA).

Only a person who has been granted a patent in the United Kingdom (UK), or who derives his right from such grantee, may apply, within three years, to have his patent registered in Kenya (S.4 PRA). The application, to be made in a prescribed form, must be accompanied by the prescribed fee, two certified copies of the specification or specifications of the UK patent and a certificate of the UK Comptroller-General of Patents, Designs and Trademarks (S.5 PRA). Once these conditions are satisfied, the Registrar of patents "shall" issue a certificate of registration in the

prescribed form (S.6 PRA). The issue of such certificate confers upon the grantee privileges and rights "as though such patent had been granted in the UK with an extension to Kenya" from the date of the grant, and as long as such grant remains in force, in the UK (Ss. 7 and 8 PRA). Any extension, lapse, revocation or restoration after lapse in the UK of any patent registered in Kenya shall be notified to the Registrar in the prescribed manner, whereupon he "shall" register the same accordingly and make any necessary endorsements on the certificate (S.15 PRA).

Several general features of this regime are worthy of note. Firstly, the Kenya regime does no more than make provision for registration. It is important to underline this fact. Kenya has no machinery for granting letters patent. It merely provides a system whereby those who have been granted patents in the UK can register such grants here in Kenya. This means that a local inventor who may claim any rights in any innovation must make his application to the UK, whereupon if he is granted letters patent, he may then register the same in Kenya. Apart from the fact that this makes the process that much more inconvenient and expensive, it, more importantly, removes from the control of the Kenyan government the vital role of deciding what innovations patents shall be granted for and who shall be the grantees thereof, and under what conditions. Taking into account that patent rights involve property relations, and that such relations are a matter of public concern essential to a government's control, this position is indeed undesirable.

Secondly, the basic objective behind this whole legislation appears to be unqualified protection within Kenya. Thus there can be no use of a patent in Kenya without the grantee's license. What this protection creates is in fact a monopoly in favour of the grantee (and for a reasonable period of twenty (20) years!<sup>16</sup>) without any consideration as to whether such monopoly is for public benefit or not.

Thirdly, this legislation must be placed against the background of traditional arguments (which in themselves are inconclusive) for the maintenance of a patent system, the most prominent of which is the encouragement, within the relevant economy, of inventive activity through recognition and material benefit. Since inventive activity is crucial to industrialization it is therefore assumed by extension that a patent monopoly is essential to economic development. Even on a broader theoretical plane, it has not been conclusively established that grant of patent monopolies as such promotes inventive activity<sup>17</sup>. However, assuming, without conceding, that this is a cardinal objective of a grant of a patent monopoly it is posited that the Kenya patent system is structurally incapable of achieving this objective precisely because it does not itself grant any substantive rights. It merely recognizes those that are already granted through mechanisms that are alien and are not at all subject to its control and direction. It cannot influence to any degree the policy considerations that must underlie decisions to grant or refuse letters patent, and as such is itself totally ineffective with regard to initiation and acceleration of inventive activity.

Indeed, as evidenced by Table I:A, there is no indication in the statistics that there has been any influence at all on inventive activity within the economy in the years under review. Further, the serious domination of registrations of foreign grantees over local ones has continued unaffected. This structural absence of Kenyan legal control accurately reflects the colonial economic base and the dominance of metropolitan interests.

While moving the Bill that eventually became the then Registration of Patents Ordinance, 1953 (the forerunner of PRA), the then Attorney-General declared that

"a recommendation was made throughout the Crown Colony Empire as well as in the Dominions that similar legislation [to those in His Majesty's Government] should be enacted throughout the empire in the interests of British industry and British commerce as a whole. That is the justification for these two Bills. [The other bill was the Registration of Designs Bill] The necessity for corresponding modern legislation... is ... immediately apparent when one bears in mind that in a colony such as this where there is no highly qualified technical officer to advise on the innovation of any suggested patent, the only course which can be properly adopted is to restrict the registration within the Colony to patents and designs which have already been registered in the UK"<sup>18</sup>.

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Unless we want to admit that/still needs to achieve the same objective and is subject to the same justification as was stated by this servant of the Crown, we have to declare this legislation as having by a long stretch outlived its justification. But, of course, this declaration does not answer the crucial question as to why this legislation, like many others, has so survived, a question beyond the present stage of analysis.

It is evident, however, that this legislation was not enacted with effective transfer of technology to, and its development in, the Kenyan economy as a focus; neither does it even appear that this was a consideration at all. Whereas it protects owners of technology (whose rights are initially granted elsewhere), it does not regulate how such owners use their technology. It does not even require them to use or exploit such technology for the benefit of Kenya. And where such owners decide to exploit their technology in Kenya, the legislation does not lay any conditions under which that is to be done; neither does it provide any protection for those Kenyans who may either be party to, or otherwise be affected by, such exploitation. Thus, the most important legislation on industrial property is conspicuously silent on the most crucial issue relating to that property in respect of Kenya: its exploitation for the benefit of Kenya. Let us see whether the other legislation follows this, or adopts a different, position.

(11) The Municipal System II: TRADE MARKS

A trademark is no more than what it says; a symbol or mark used by a producer which, in the course of trade, identifies certain goods or class of goods and distinguishes the same from others. The term "brand-name" which is sometimes used in its stead, has not gained general legal acceptance as a term of art, and is more a "market-place" or business reference.

Trade marks as such have no technological content. They are merely a way of referring to a product already manufactured through a particular technological process. But they are industrial property, rights in which are protected by the law. And in their modern form, they are not functionless.

Trade marks are explained on the basis that they protect, firstly, the owner's business from what is termed unfair competition, and, secondly, the public with respect to competing products in the market<sup>19</sup>. In the first case, trademarks do this by identifying the owner's goods and in the process distinguishing them from goods that are sold by others who may be his competitors. By so doing, they prevent other manufacturers from "passing off" their goods or products as those of the owner of the trade marks. In this sense, trademarks may, in fact, be a source of market power to the owner where loyalty to the brand(s) is developed, usually through time, quality, and advertisement. The value of such market power will of course be reflected not only in the sales, but, ultimately, also in the phenomenon of "good will"<sup>20</sup>, an abstract concept but economically tangible asset.



In the second case, trademarks are said to assist consumers in identifying the goods from a particular source, and the quality of such goods as well, in relation to others. As the market becomes more and more complex, however, this explanation of trademarks as a benefit to consumers becomes more and more debatable. It may be stated outright that trademarks as such have absolutely nothing to do with the quality of a particular product, except in the remote sense that once a consumer identifies a particular product as of good quality, he may use the trademark for purposes of further pointing out and purchasing this same product. In the words of an observer, a "trademark does not necessarily guarantee quality. What it does guarantee is consistency"<sup>21</sup>. And the consistency may be in respect of "good" or "bad" or even "average" quality, as the case may be, all this being relative. The quality is in the product; the trademark is, in this sense, only a reference to the said product.

However, further developments in the market constitute even a more tangible indictment of trademarks as protecting the consumer through source and quality identification. Mention may be made of the use of trademarks in "product differentiation", and also the practice of "brand marketing", which gives rise to brand proliferation and brand loyalty.

Without trademarks, a manufacturer of, say, bathing soap or detergent would have to explain in detail to the consumer how his product differs from, and is possibly



better than, another product in the same class made by a fellow manufacturer. He would have to convincingly show (through fact or believable fiction) that although both are bathing soaps or detergents, his has (or does not have) certain properties that the other manufacturer's does not have (or has). And, of course, product differentiation is important to the manufacturers. Through it, he attempts to influence the demand for his product in relation to that of other manufacturers. And, in some cases, it even takes place as between the same manufacturer's own products, like where he introduces a new brand of a product already in production. Trademarks thus constitute one of the short-cuts (and a legally protected one at that) used by manufacturers and which may lead to a preference for one brand of a product over another, the basis for which distinction may be real or imagined. In a situation where the consumer already has knowledge of the good or bad qualities of the product, the trademark "protects" him by making it possible for him to purchase that same product or avoid it. But where the trademark takes the place of usefully revealing information, as is often the case in modern markets, the possibility of subterfuge is increased, and protection cannot be guaranteed.

This is especially so when one takes into account the fact that product differentiation resides in the same market place with advertising, a process whereby the producer either directly or indirectly tries to influence

the consumer to purchase his product - and in the same vein not to purchase other manufacturers' products - usually by pointing to, and emphasizing, the "good" qualities as opposed to the "bad" ones. A caveat must be added here, that there is the "informative" content - as opposed to the "persuasive" - in advertising, but this is less visible and is generally found in areas where the general body of consumers is more likely to discover defects and take appropriate (and may be damaging) action, like in capital goods.<sup>22</sup> Advertisement has tended to focus more and more on the brand name - to the extent that the trademark becomes synonymous with, and, therefore, an integral part of, the product, sometimes even displacing the generic name. As Morein<sup>23</sup> puts it:

"Brand marketing is built around a simple concept. The brand is usually a single product, although it may have more than one model, size or flavour .... Sharply focussed advertising and promotion efforts support such brands, enabling them to maintain high levels of consumer awareness and acceptance despite significant internal and external competition."

With time and continuous bombardment, and with little or no other specific knowledge to fall back on, the consumer, after a stretch of mental confusion, develops loyalty to a particular brand, often with little or no substantive explanation for this "choice". And the position is not made any better for the consumer by proliferation of brands,

which is a logical extension of brand marketing. With many brands of a particular product on the market (some belonging to different manufacturers, and others to the same manufacturer) the function of trademarks of identifying origin and avoiding confusion for the consumer becomes less of a protection. In practical terms, one winds up with a consumer whose best explanation for drinking "Tusker" (beer) instead of "Pilsner" is that the one is "less sour" than the other (he has no time for alcoholic contents); or for smoking "Sweet Monthol" cigarettes instead of "Sportsman" that one is "softer" than the other (tar-level is not his business); or for using "new Blue Omo" detergent instead of "Omo" that the former is "new" (that it actually "washes brighter" need not be considered); or for driving a "Mercedes" instead of a "Volkswagen" that it is a mercedes (differences in purchase and running expenses are no food for thought); or ... The list is endless. In the absence of useful knowledge, which is not supplied, or which is usually masked by this state of affairs, other less important factors intervene:

"Consumers may judge the richness of ice-cream flavour on the basis of colour, the cleaning strength of detergent on the basis of suds and aroma, the thickness of syrup on the basis of darkness, the 'pick-up' of cars on the basis of tension in the spring controlling the accelerator pedal, the quality of beer on the basis of price level and the power of kitchen mixers on the basis of noise."<sup>24</sup>

If this means protection, it is obviously the kind of protection that consumers would prefer to be without. The remark has of course been made that this general effect becomes less apparent as one approaches the level of capital goods mainly because of the knowledgeable nature of consumers or their ability to make use of experts, and also in some cases actual information is an integral part of the marketing of the product. But it calls for a constructive re-assessment of trademarks as functionally useful tools for consumer protection. For owners, yes; for consumers, doubtful.

The Kenya trade mark law is contained in the Trade Marks Act<sup>25</sup> (hereinafter TMA), an Act (then Ordinance) passed in 1955 (with no substantive debate) in order to bring into line the trademark laws in the three East African territories (Kenya, Uganda and Tanganyika), and all of them "into line with modern practice ...in the UK."<sup>26</sup>

For purposes of the TMA, a trademark is defined as "except in relation to a certification trademark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connexion in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark ...<sup>27</sup> [a] mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of the origin,

material, mode of manufacture, quality, accuracy or other characteristic from goods not so certified..."<sup>28</sup>

The TMA provides for the "continuation"<sup>29</sup> of a register of trademarks at the office of the Registrar of Trademarks which shall contain the mark and information thereon and on the proprietor and/or registered user. The register shall continue to be divided into two parts. In Part A is registered certification trademarks and those marks which do not distinguish the goods in respect of which they are taken out, and which consist of the name of a company or individual or firm; or, the signature of the proposed proprietor or his predecessor in business; or, invented word or words; or, any word(s) having no direct reference to the goods as to character, quality, or geographical name or surname.<sup>30</sup> And in Part B is registered those which are capable of distinguishing goods with which the proprietor deals or proposes to deal either inherently or as a matter of fact.<sup>31</sup> The TMA expressly prohibits the registration, as a trade mark or part thereof, of any scandalous design, or of any matter whose use would be contrary to law or morality, or would, by reason of its being likely to deceive or cause confusion or otherwise be disentitled to protection in a court of justice.<sup>32</sup> Further, the law provides for what it calls "the defensive registration of well known trade marks," a process whereby the proprietor of a well known trademark registered in respect of certain goods may prevent the use of such trademark in respect of other goods by registering it in respect of such other goods notwithstanding that

he does not, or does not propose to, use the trademark in relation to those other goods.<sup>33</sup>

The registration of a mark in either Part A or B in respect of any goods gives to the proprietor "the exclusive right to the use of the trademark in relation to those goods" "subject to any conditions or limitations entered on the register".<sup>34</sup> This protection is given for an initial period of seven years (with an additional "period of grace" between removal from register for non-renewal and application for renewal) renewable strictly at the the option of the proprietor for further periods of fourteen (14) years, apparently without end.<sup>35</sup>

Any rights that a proprietor has in his trademark are capable of transfer, assignment or transmission<sup>36</sup> or by licencing of a registered user,<sup>37</sup> save that a certification trademark shall not pass by assignment or transmission except with the consent of the court<sup>38</sup> (the High Court<sup>39</sup>).

As far as procedure<sup>40</sup> is concerned, a proposed proprietor applies to the Registrar in prescribed form for registration either in Part A or B. The Registrar may then either reject or absolutely or conditionally accept the application, his decision being subject to appeal to the High Court. The accepted application is then advertised in the form in which it is accepted. Any person opposing the registration of such accepted application shall give notice of such opposition, whereupon he shall state his grounds therefor. The Registrar shall then hear the proposed proprietor and the person opposing the registration, and decide appropriately, such decision also



being subject to appeal to the High Court. Where an application for registration has been accepted and no opposition has been filed within the prescribed time, or an opposition has been decided in favour of the proposed proprietor, the Registrar shall register the trademark (in Part A or B as the case may be) "as of the date of the application for registration" which "date shall be deemed for the purposes of this Act to be the date of registration" save where international arrangements provide otherwise.

This, in totality, is, legislation whose principal purpose is to provide for almost unconditional registration of property rights. In the process, again, it grants a monopoly the exercise of which is uncontrolled in any measure. The central aim of this legislation is to protect the proprietor of a trademark against non-proprietors for a theoretically unlimited period (or, in other words, a period determined by the monopoly-rights holder). The legislation does not force or obligate the proprietor to use the trademark, or to license its use, in Kenya.

It does not in fact govern, at all, the use that the proprietor will put his trademark to, or, most importantly, the conditions under which licences, if any, shall be granted to a licensee. It does not limit unnecessary and confusing product differentiation, or the development of brand loyalty and unnecessary proliferation of brands through unfair or deceitful advertising based on the trademark.



Indeed the protection of the consumer is not its concern, and may be it should be argued that it did not set out to achieve this objective. In a nutshell, this legislation beyond registration-based protection of the proprietor of the trademark, leaves all else to the so-called market forces, and makes possible the effects of trademarks in the market as discussed earlier.

In the end, it means that any effect which trade marks may have on the process of transfer and development of technology is essentially not governed by the TMA and is left to the determination of "negotiations in the market place," so to speak.

It cannot be denied that trademarks have an important part to play in this process. This is so because they have in many respects taken the place of generic names of products and are to a large extent the names by which most products are referred to. They have become as important in distribution and marketing as the processes or formulae are in production. The consumers of such products have been made to see them in terms of their "brand-names." This means that at any point that one deals with the effective transfer and development of technology, it is necessary to consider to what extent trademarks may be a barrier to this process. For example, if a particular local manufacturer were to produce a product under licence and under an unknown trade mark and place such product side by side with a similar product manufactured by the

technology licensor whose trade mark is well known to the customers, such manufacturer would have to make very heavy sacrifices (in terms of promotion) to create even minimal impact. The licenced technology would then be an economic liability. And it would be worse in the export market, especially in Western Europe, America, and Japan, where the extent of brand loyalty is quite high. This state of affairs necessitates continued dependence on the licensor's trademarks, unless other methods of countering this negative impact could be developed. (For example, in countering the impact contained in the above illustration, it could be required that a licensee's trademark shall be conspicuously displayed or used together with that of the licensor, with a view to the eventual phase-out of the latter). Therefore, any legislation which deals with trademarks needs to take account of such possibilities if it is to facilitate independent and profitable exploitation of technological relationships. In this respect, the Kenya TMA fails miserably. It has been shown that its prime objective is not to do this, but to protect the owners of industrial property for their benefit. As legislation which deals with an important facet of the process of transfer of technology, its effect is largely negative owing to the absence of provisions which ensure that the protected owners of industrial property do not in any way use their protection to either preempt or frustrate development of other (especially local) trademarks, or exploit the licensees thereof or the consumers of the relevant products.

It is pertinent to point out at this stage that at no time during the review period (see Table IB) has the number of annual registrations of trademarks on application of nationals and/or residents exceeded 30% of the total, with the average annual percentage being 21% (see Table IB (b)). And some three-fourths or more of the trademarks registered annually in the names of the so-called nationals and/or residents are in fact properties of subsidiaries/associates of TNCs, which means that even the protection is not in the main for the benefit of Kenyans.

(iii) The International Regime:

Kenya acceded to the Paris Convention,<sup>41</sup> thus becoming a member country of the Paris Union<sup>42</sup> on June 14, 1965.<sup>43</sup> The Paris Convention, signed by eleven countries<sup>44</sup> at a Diplomatic Conference on March 20, 1883, was ratified by these countries in June, 1884, at which time instruments of accession were deposited by three other countries.<sup>45</sup> It entered into force on July 7, 1884. In the post-World War I period,<sup>46</sup> it has been revised four times: at the Hague (1925); in London (1934); in Lisbon (1958) and in Stockholm (1967).

Briefly, the Convention in its present state, establishes a Union, constituted by the countries to which it applies as a legal entity with certain organs to carry out its objectives. The principal organs of the Union are the Assembly, the Executive Committee of the Assembly and the International Bureau of Intellectual Property. The Assembly, established under Article 13, consists of all the countries whose instruments of ratification or accession under

Article 20 do not exclude the application to them of Articles 13-17 of the Convention, each country being represented by one delegate, who may be assisted by alternate delegates, advisors and experts. Members of the Union who are not members of the Assembly may, however, be admitted therein as observers (Article 13 (6)). Its broad function is to deal with all matters concerning the maintenance and development of the Union and implementation of the Convention in their different forms (Article 13 (2)). The Executive Committee is in turn an organ, and consists of one-quarter of the current membership, of the Assembly: Article 14. Its members are elected by the members of the Assembly, and its basic function is to ensure that the programmes of the Union as outlined by the Assembly are implemented (Article 14 (6)). The International Bureau, which is a continuation of the International Bureau of the Union for the Protection of Industrial Property (BIRPI), has as its main function the performance of administrative tasks of the Union. In particular, it provides the secretariat of the various organs of the Union, acting as an information collection and distribution, and a studies and services, centre. In addition to these organs, the Assembly may, under Article 13 (2) (a) (viii), establish various committees of experts and working groups as may be required by certain of its functions.

The prime objective of the Convention, evident even in its title, is the protection of industrial property. The objects of such protection include, under article 1(3), patents, utility models, industrial designs, trade and service marks, trade names, indications of source or

appellations of origin and the repression of unfair competition between holders of industrial property rights. However, provisions relating to patents and trademarks will be the principal concern here, since these are the property rights given specific protection by the Kenyan domestic regime. They are specifically relevant to the process of transfer and are in any case, the most important under the Convention. A point to be noted here is that the Convention in its general rules leaves considerable latitude to member countries to legislate on various aspects of industrial property according to their particular interests. Such aspects include:-

(a) in relation to patents - criteria for patentability; necessity, and mode and nature of examination; who to be granted a patent as between first inventor and first applicant; whether patents are to be granted for products only, for processes only, or for both; restrictions on field of industry in which patents are to be granted; duration of patents; extent of protection of patentee where there are no specific provisions, and, restoration of lapsed patents.

(b) in relation to trade marks - mode of acquiring rights to a trademark (registration, use or both); mode and nature of trademark examination; scope of protection of trademarks where there are no specific provisions, and conditions for protection of collective marks.

(c) in any case - domestic laws are free to grant a more extensive protection of industrial property so long as this does not prejudice the protection granted in the Convention.

On a general note, Article 2(1) of the Convention states the principle that nationals of any country of the Union shall as regards the protection of industrial property enjoy in all the other countries of the Union the advantages that their respective laws grant or may in future grant to nationals "all without prejudice to the rights specifically provided for by this Convention." This provision embodies the "national treatment" principle well known in international law. And such nationals need not be domiciled or even established in the relevant country in order to enjoy this national treatment (Article 2 (2)). Much as this principle may be desirable in international relations generally, it, however, does not take into account those situations where preferential treatment may, in fact, be advisable. Indeed, the very fact that the convention applies to countries of differing levels of economic development would in itself, without more, invite a certain degree of preferential treatment in favour of nationals of weaker economies. And preferential treatment is no stranger to international relations anyway: most conferences, especially under UN auspices, dealing with equitable distribution of world resources and enjoyment of world services concern themselves with this very principle in one way or another.

Secondly, any person who duly files a first application for a patent or trademark in one of the countries of the Union, or his successor in title, shall enjoy for purposes of filing in the other countries, a right of priority (Article 4A (1)) for a period of twelve months in the case of patents,



and six months in the case of trademarks beginning from the date of such first application (Article 4 C). The effect of this general provision is to ensure that in any issue relating to priority of rights in industrial property in any of the countries of the Union arising during the prescribed periods such first application shall prevail over any other even if no subsequent application has been made in such country by the priority-right holder. No action taken during such period shall invalidate this priority.

Thirdly, Article 2(3) expressly reserves national laws relating to such matters as judicial or administrative procedure, jurisdiction, designation of address for service and appointment of any agents who may be required. And finally, Article 5bis provides for a period of not less than six months to be granted to holders of industrial property rights for payment of fees prescribed for the maintenance of such rights.

Provisions on patents: It has already been mentioned that regulation of certain matters is left to the domestic law of the member Country of the Union. Apart from the general principles enumerated above, the following are among the other requirements of the Convention.

Under Article 4bis, patents applied for in any of the member countries of the Union shall be independent of patents obtained for the same invention in other countries whether members of the Union or not. In particular, this shall be deemed to be so with regard to the grounds for nullity and forfeiture, and as to the normal duration of such patents. Secondly, an inventor has the right to be mentioned as such in the patent (Article 4ter). Thirdly, an application for a patent shall not be refused, nor a patent invalidated, on the ground that the sale of a patented product,



or a product obtained through a patented process, is subject to restrictions or limitations under the domestic law (Article 4 quater).

It should be noted, however, that this provision does not apply to the manufacture of such product, or the application of such a patented process. Fourthly, a patent shall not be subject to forfeiture on grounds of importation by the patentee of articles manufactured in any of the countries of the Union (Article 5A(1)). And finally, each member country may take legislative measures providing for the grant of compulsory licences to prevent such abuses as may result from the exclusive rights conferred by the patent (Article 5A(2)). However, a compulsory licence may not be applied for on the ground of failure to work or insufficient working of the patent before the expiration of four years from the date of filing of the patent application, or three years from the date of the grant of the patent, "whichever period expires last." Neither shall it be granted where the patentee justifies his inaction. In any case, where it is granted, it shall be non-exclusive and non-transferable even in the form of the grant of a sub-licence, save with that part of the enterprise or goodwill exploiting such licence. Further, forfeiture of the patent shall not be provided for save in cases where grant of compulsory licences would be insufficient to prevent abuses. And proceedings regarding forfeiture or revocation shall not be instituted before the expiration of two years from the grant of the first compulsory licence.

Provisions on Trademarks: The Convention leaves the conditions for filing and registration of trademarks to the domestic laws of each of the member countries. But no application may be refused, nor a registration invalidated, on the grounds that filing, registration or renewal has not been effected in the country of origin (Article 6 (1), (2)). Secondly, a mark duly registered in any

member country of the Union shall be independent of marks registered in the other countries of the Union (Article 6 (3)). Thirdly, a trademark duly registered in the country of origin shall be entitled to be registered and protected in that form in the other countries of the Union (Article 6 quinquies A). But this may be denied when:-

(a) it is of such a nature as to infringe third party rights in such country;

(b) it is devoid of any distinctive character or consists exclusively of signs or indications which serve in the trade to designate kind, quality, quantity etc. or have become customary in the current language or trade practice; and,

(c) it is contrary to morality or public order (Article 6 quinquies B).

Finally, each member country undertakes, where its legislation permits, or where an interested party requests, to refuse or cancel registration, or prohibit use, of a trade mark which constitutes a reproduction, imitation or translation liable to create confusion, of a mark considered by the competent authority of such country to be well known therein as being already the mark of a person entitled to the benefits of the Convention and used for identical or similar goods (Article 6bis). Whether the conditions are satisfied will be determined by the member countries themselves.

These provisions of the Convention on patents and trademarks, taken in totality, have one principal objective. Like their municipal counterparts, they are intended for the protection of the owners of industrial property, albeit from the international view-point. Their central concern is to ensure that any holder of industrial property enjoys all advantages that the national

laws of all the member states offer, and more, including a right of priority, and protection in all such countries against refusal of registration, unauthorized exploitation of the property, and forfeiture or cancellation. Once again, no obligation is directly placed upon such holder to exhibit the property at all, or for the benefit of the respective states, neither are there any provisions protecting licencees of the rights or the consumers of any products that may be the subject of such rights.

Of specific significance as well is the fact that the Convention does not draw any particular distinction between the different states, which are, obviously, at different levels of economic development. It, therefore, provides no preferential treatment for weaker economies. Placed in the Kenyan context, the Convention merely operates to gain non-Kenyans protection herein: the number of Kenyans who can take advantage of these provisions at the international level are insignificant. It does not in any way contribute positively to the process of transfer and development of technology, which process is, noticeably not its concern. This international regime on industrial property, far from recognizing the need to regulate the activities of the owners of such property with a view to promoting the development of Kenya's economy through meaningful exploitation of the property, only concentrates on fortifying the interests of such owners, the majority of whom have been shown to come from the capitalist states. It operates to emphasize the dependence of the national economy on the external holders of such property.

And, as has been observed, even in situations where the Convention allows for enactment of national legislation governing some aspects of the grant, subsistence and exploitation of industrial property rights, the municipal regime is basically deficient.

Before concluding this section, it is, however, necessary to take note of certain possible changes with regard to municipal legislation on industrial property. According to information given by the office of the Deputy Registrar of Trade Marks and patents, Kenya is "in the process" of adopting measures that will lead to an independent patent-granting system, scrapping the present patent-registration one. The measures "are at an advanced stage of development". This whole process began with the conferences leading to the formation of the Industrial Property Organization for English-Speaking Africa (ESARIPO). The agreement establishing this organization was adopted in Lusaka, Zambia, on December 9, 1976, and entered into force on February 15, 1978.<sup>47</sup> One of its principal objectives is to promote the harmonization and the development of the industrial property laws of the countries of the region.<sup>48</sup>

Kenya is apparently racing to be able to produce drafts of an independent body of industrial property laws, and in particular a patent system, before the next meeting of ESARIPO likely to be held in Nairobi in the next few months. It is not known what form these will take, but most likely, they will, to a large extent, draw from the Model Laws on patents and trademarks already produced respectively by the "Committee for Patent Matters"<sup>49</sup> and the "Committee for Trade Mark and Industrial Design Matters"<sup>50</sup> of the Conference on Industrial Property Laws

of English-Speaking Africa. These Model Laws, despite some flaws, differ from the Paris Convention in at least one significant respect. They do not set out to only protect the industrial property owners, but also to balance against this the right of society to benefit, through individuals or the government, from such industrial property without unnecessary fetters. The balance may not come out in full favour of community rights, but it is impressive under the circumstances where one finds diverse economies in which pre-capitalist and capitalist modes of production are still at war, and in which socialist modes are struggling against both. All in all, they remain model laws which may be adopted wholly, in part or not at all, by the concerned states. And once adopted, in whatever form, their operation is still subject to the whole range of socio-economic conditions domestic to such states.

## II. SANCTITY OF PROPERTY:

### (1) Municipal Law: The Constitution:

The Kenya Constitution<sup>51</sup> is the supreme governing law, and any other law which is inconsistent with it is void to the extent of such inconsistency. Historically, its underlying principles have to be traced to the pre-independence bargaining process when British imperialism realised that it was time to change strategies of exploitative control from "open" to "hidden". Colonialism had lived its full life. But it was necessary to end colonialism without fundamentally disrupting the beneficial property relations that had been established and the continuous flow of resources from the independent state to the "motherland". On the surface, the

policy was, of course rationalized on the basis of such meaningless phrases as "creating a multi-racial society"; "ensuring that foreign investors and skilled man-power are not scared away"; "showing that an African government is not run by beasts and can be nature", etc. etc. - phrases which even today, over "Fifteen Great Years" since that independence, seem to carry much weight with the government, evidencing the momentary success of that smooth transition.

The provisions of the Constitution relevant to industrial property are contained in Chapter V, and, more particularly in sections 70 and 75 thereof, which heavily protect the institution of private property. Section 70 entitles "every person"<sup>52</sup> in Kenya" as a fundamental right, to "protection for ... property and from deprivation of property without compensation". There are two important points to underline here. Firstly, that this entitlement is not restricted to Kenyan citizens only. Secondly, that whereas deprivation is possible under the law, it must be accompanied by compensation. These provisions are elaborated in Section 75 which prohibits the compulsory acquisition of any property "of any description" or "any interest in or right over" such property, except where three conditions are satisfied. The first of these is that such acquisition must be necessary in the interests of "defence, public safety, public order, public morality, public health, town and country planning" or the "development or utilization of any property in such manner as to promote the public benefit". Strict legalists may argue, in accordance with the interpretational principle of "ejusdem generis", that the last part of this condition ("development or utilization ...")



must be interpreted within the confines of the first part ("defence, public safety ....."), so that it is in fact of no additional value. It is here submitted, however, that that would make it superfluous, and further that, interpreted independently, it can be used to justify any expropriation with any measure of social benefit outside those enumerated in the first part. But this interpretation presupposes a government committed to principally social, rather than private, property institutions, needing to justify its actions under these provisions.

The second condition requires that the necessity for the expropriation must be such as to afford reasonable justification for the causing of any hardship to the victim thereof. The sense in this provision escapes us. Clearly, by the time a proposed expropriation satisfies the first condition, the balance has already been tilted against individual considerations, and it becomes unnecessary to again refer to the hardship caused to the individual. Perhaps this was simply meant to emphasize further the importance, in terms of policy, of the singular rights of the individual!

Finally, in the event of any expropriation, "prompt payment of full compensation" must be provided for. The recipient of such compensation is entitled to remit "within a reasonable time" after receipt thereof, "the whole of that payment (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Kenya". (It cannot, therefore, be seriously argued that Kenyans were meant to be the direct and immediate beneficiaries of this kind of provision). Terms like "prompt", "full" or



"reasonable time" are, however, open-ended and may be defined to achieve all manner of purposes as may be required.

Any actions taken under these provisions is subject to question at the behest of the aggrieved party, who is granted direct access to the High Court. The High Court may determine questions relating to the rights of the aggrieved party, the legality of the expropriation and the amount, and manner and time of payment, of compensation.

As noted earlier, the benefits of these provisions are available to foreigners and nationals alike. It may, however, be emphasized that the provisions start at the point when a person already has property, and is completely unconcerned about how the property was acquired in the first place. In other words, it is totally unconcerned with distribution or redistribution of social wealth and has as its main object the protection of already acquired wealth. Secondly, the exceptions to these general provisions are very stringent and allow for little beyond deprivation in respect of lawful taxes, levies or penalties or based on contractual and other limited legal obligations.

(ii) International Law and Sanctity of Private Property

The Kenya position recognizes the sanctity of private property first and the right of expropriation only as an exception to be exercised under exceptional circumstances. International law, however, starts from the position that expropriation is a right that every state has, though its exercise is subject to certain qualifications, namely, the promotion of public welfare of the expropriating state, non-discrimination between foreigners and nationals,

and provision for just compensation. And, as exemplified by the UN General Assembly debates and legally non-binding resolutions, the first qualification has, in fact, been rejected by international opinion.

Although the term "expropriation" in international law is a general one embracing all manner of compulsory acquisition or taking of property by the state, it is very often used to denote the most important of these, viz. nationalization, the most controversial as well. Loosely defined, it is the compulsory transfer to the state or its agents of private property dictated substantially by economic motives and having as its purpose the continued exploitation of the particular property.<sup>54</sup> It is well accepted, both by international jurists and capital - exerting,<sup>55</sup> and, needless to add, expropriating states, that each state has a right to nationalize foreign-owned private property. This is a well-established rule of international law.<sup>56</sup> The taking of property, however, must be in the "public interest".<sup>57</sup> It is doubtful whether this is of any additional value in the face of modern nationalizations which principally aim at socializing the means of production and exchange. Secondly, there should be no discrimination against, and as between, aliens in the process of nationalization. On this point, the Permanent Court of International Justice (PCIJ) took the view that:

"the form of discrimination which is forbidden is ... discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national states."<sup>58</sup>

This is, of course, not easy to establish in practice. If there is a situation, as there may be, where it is the nationals of a particular state or particular states who predominate in ownership in a particular sphere or particular spheres of the economy, a dogmatic application of this principle would really serve no useful purpose. Moreover, as we have had occasion to mention before, under certain conditions, preferential treatment is justifiable. Thirdly, in the event of nationalization, there must be "adequate, prompt and effective" compensation, although some jurists now prefer to use "appropriate".<sup>59</sup> However, no full agreement has been reached as to the meaning to be attached to "adequate" (which refers to the value or amount), "prompt" (which relates to the time of payment) and "effective" (which relates to the form in, and the conditions under, which payment is made) or to "appropriate" (which embraces all the three).

Whereas the so-called western states, the major exporters of exploitative capital, for a long time interpreted the term "adequate" to mean the full value of the property (and even included goodwill) at the particular time of expropriation, the socialist states and many of the so-called third world states, have argued that the adequacy of the compensation must of necessity take account, over and above the "full value", of the returns which the holder of the property has gained through exploiting ownership thereof. The value of such returns over time must be placed against the current "full value" of the property. It is only where the former is less that the holder may get the difference. Where it is higher, it is, indeed, the holder who needs must compensate the expropriating state.

With regard to the time of payment, the term "prompt" has, to the said Western States, the exponents of orthodox international law, meant payment of compensation before, or simultaneously with, expropriation. On the insistence of socialist, and the said third world, states international law has now come to recognize the necessity of directly considering the ability of the state to pay the requisite compensation. This means that where the inability of the expropriating state makes it impossible to pay the compensation before, or at the time of, expropriation, international law accepts that such may be paid in the future.

The same kind of controversy has bedevilled the term "effective". From an original position, again supported largely by the capitalist states, which required that the compensation be paid in foreign exchange, with the recipient having the discretion to determine the country to which he would repatriate it, there has been a shift towards accepting control by the compensating state of the form in, and the conditions under, which payment is made. Such controls in practice include: payment, fully or partially in the currency of, or chosen by, the compensating state; payment by instalment; a condition that the compensation be, fully or partially, invested in the compensating state or simply not repatriated, and, an insistence that an owner/foreign property recognise the jurisdiction of /of municipal laws and institutions as final (this last condition referred to as the "Calvo Clause"<sup>59A</sup>).

It is these transitional controversies in the development of international law, necessitated by the impact, on international economies, and other relations, of the world socialist system and the desire of the newly-independent states to develop

meaningful economic independence, that has prompted the adoption of the term "appropriate" compensation in international law. This is basically in recognition of the possible theoretical and practical changes in international relations which contribute to the dynamic development of international law.<sup>59B</sup>

In comparison, it would appear, therefore, that the Kenya Constitution is more well disposed towards the institution of private property in terms first, of policy, and secondly, of the qualifying conditions. And in particular, whereas international law provides for "effective" compensation, the Kenya Constitution expressly allows the recipient of such compensation to remit to a country of his own choice outside Kenya, thus giving him the right to choose the form of payment!

As far as international opinion goes, the Charter of Economic Rights and Duties of States<sup>60</sup> provides under Article 2(2)(c) that:

"Each state has the right

To Nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals..."

An amendment<sup>61</sup> proposed principally by the so-called Western States<sup>62</sup> would have made nationalization, expropriation or acquisition of foreign property a right only "provided that just compensation in the light of all relevant circumstances

shall be paid,"<sup>63</sup> and required the exhaustion of national jurisdiction (which presupposes recourse to international tribunals thereafter) in case of controversy.<sup>64</sup> As it is, however, only the proposing states and Austria, Iceland, Norway, Spain and Sweden voted for the amendment, which was defeated by 87 votes to 19, with 11 abstentions.<sup>65</sup> The original Article 2(2)(c) was subsequently adopted by a vote of 104 to 16,<sup>66</sup> with 6 abstentions.<sup>67</sup>

The effect of this charter provision is not to change international law on the matter, as General Assembly resolutions have no legally binding (may be, moral) effect. It nevertheless recognizes in word and in spirit, not only the right to nationalize, but also national rather than international jurisdiction as regards questions of expropriation, emphasizing in the same vein the need for economic independence.

### 3. SPECIFIC PROTECTION OF FOREIGN INVESTMENTS:

#### (1) Foreign Investments Protection Act:

The Foreign Investments Protection Act (FIPA)<sup>68</sup> was enacted in 1964 for the specific protection of foreign investments in Kenya.<sup>69</sup> The highly controversial debate<sup>70</sup> on the Bill that eventually became FIPA makes very interesting reading: it reveals, through at times emotional, at times incisive, and at yet other times downright humorous statements, contradictions that lay at the basis of the Kenyan society then and now.

The then Minister for Commerce and Industry<sup>71</sup> outlined at the beginning of the debate the objectives and essential features of the Bill. Having made it clear that "the encouragement of foreign investment" was one of the four ways in which the



government hoped to accelerate industrialization (the other three being government investment encouragement of local investment, and promotion of the co-operative movement) the Minister proceeded to explain that the Bill was intended to achieve three distinct aims:

one: to encourage foreign investments through the restriction of compulsory acquisitions of foreigners' property, and grant of compensation where acquisition had to be carried out;

two: to abolish discrimination against certain foreign investments through the removal of the distinction between investments from "sterling areas" and those from other (yen, dollar, rupee or deutschemark) areas; and

three: to protect local investments against "knock down" external competition through governmental control of the areas, and the nature, of foreign investment. The government view was that the present Bill would achieve these objectives if passed by the House.<sup>72</sup>

The government stand got active support<sup>72A</sup> from a number of members, notably Kibaki (Parliamentary Secretary to the treasury, and seconder), Gatuguta (who a member pointed out was a member of the Board of Overseas Touring Company<sup>73</sup>), Gichuru (Minister of Finance and Economic Planning), Odero-Jowi (the Parliamentary Secretary for Labour and Social Services) and Khasalchala. The thrust of this support was that, indeed, Kenya needed capital - and also skill - to develop. This capital could not by any means be constituted from local sources, since it was in any case unavailable:" How



many industries have been built by our own people?", one member asked.<sup>74</sup> It was thus imperative that Kenya must get this capital from outside, "no matter from where the money may come from (sic), either from the East or from the West".<sup>75</sup> Such capital had to be attracted to Kenya, and since "investment and philanthropy are not synonymous",<sup>76</sup> it was necessary to provide measures that would guarantee both the safety and the profitability of the investment. The measures contained in the Bill had absolutely nothing to do with issues of capitalism or socialism: Kenya needed capital for development and this was the best way of getting it.

Criticism of this stand shall be left to the opposers of the Bill, actively and, admittedly, a bit more incisively, represented by Kaggia, Muliro, Anyieni, Masinde, Ngala-Abek, Ngala, Mutiso and Shikuku. Their starting point was that Kenya needed real independence, and also to correct the socio-economic imbalances that had beleaguered it in the colonial past: and this was not the best way of achieving these. True, Kenya was in need of capital - and skill - and some of it had to be imported from outside, although the level of required importation was being, apparently deliberately, exaggerated by those who supported the Bill. This having been granted, however, it was doubtful, indeed untenable, that this Bill was the solution. For a start, the Bill was "based on the very unrealistic fears on the flight of capital from Kenya".<sup>78</sup> Whereas the Bill was being explained on the basis of attracting future investment, it really was meant to avert the foared flight of capital from Kenya, which

fears were largely groundless. For a second, there already were guarantees in (the then) Section 19 of the Constitution. And in any case, the top leadership had also demonstrated the political will to uphold these guarantees (not to mention, of course, "the attractiveness of Kenya itself, geographically and otherwise"<sup>79</sup>(!)). Why was it then necessary to have this extra protection? If anything, it was the local people, the citizens, who needed to be protected, not the foreigners. More importantly, this whole legislation derogated from the very principles that the government had declared to be at the basis of its policy. The government had declared it was committed to building a socialist society: how could this be done on the basis of protection of capital, especially exploitative foreign capital? The government was committed to economic and political independence: but was this legislation not evidence of the fact that we were yielding to external pressure and "giving them (the investors) the freedom of coming and investing on their own terms"<sup>80</sup> and that we were "still economic slaves of the Western Capitalists"? The government was committed to ending economic exploitation of its citizens: yet was not this legislation guaranteeing such exploitation by allowing foreigners to "bring fifty shillings here and ... take back ten thousand shillings"?<sup>81</sup> The government was committed to fighting corruption: yet the legislation opened avenues for foreign investors "to seek a private interview with the Minister"<sup>82</sup> by giving him and the Front Bench, the discretion to decide who shall be licenced. The government was committed to "the ultimate ownership of all means of production by

the indigenous people";<sup>85</sup> but was not this legislation intended to achieve just the opposite?

Such was the debate. Ultimately, the supporters of the Bill, helped by the desperately reconciliatory mood that had been set by Prime Minister Kenyatta and his close political allies, both in and outside the House, carried the day, and the Bill was read a third time and passed on November 10, 1964, making the fiercely contested protection a reality. What, then are the basic provisions of that reality?

The principal provisions of the Act deal with the conditions under which protection will be provided, and with the nature and extent of such protection. Under section 3, FIPA, a foreign national who proposes to invest foreign assets in Kenya may apply to the Minister responsible for finance to issue him with a certificate to the effect that the enterprise in which such assets are to be invested is an "approved enterprise". The Minister is granted "conditional" discretion with regard to such applications. In any case in which the Minister is satisfied, after consideration, that the enterprise would "further the economic development of, or would be of benefit to" Kenya, he may issue a certificate to the applicant "in his discretion". The conditions governing the exercise of the discretion are non-specific and are not defined or elaborated in the Act. But reference may here be made to general government policy, as revealed by interviews to give meaning to "economic development" and "benefit". Questions on this matter elicited broadly similar answers from all the different sections of the

government where interviews are conducted. Indeed, even corporation officials in the private sector (including expatriate ones) seemed to reproduce the same with unconcerned ease.

High on the list is the earning or saving of foreign exchange. The "earning" part of this is satisfied when a company says that it, in the long run, intends to engage in the promotion of exports for its products. It was intimated that the government was moving away from the singular import - substitution policy that it had hitherto followed. It had been realized that this policy depleted foreign exchange reserves while leaving much of the corresponding contribution thereto to agricultural raw materials to shoulder. The "saving" part, on the other hand, demands a decrease in foreign exchange spending through a reduction of imported manufacturing inputs to a minimum. An important element of this is the utilization of local raw materials, which while saving foreign exchange, also contributed to the development and exploitation of local resources, and the expansion of employment opportunities. The combined effect would be to enable Kenya to purchase those foreign products that it needed for purposes of the general development of the economy, especially intermediate and capital goods, and service equipment.

Equally important is the creation of employment opportunities, expressed in whether an enterprise is labour or capital intensive. Unemployment is admittedly one of the grave problems confronting the government.

Its solution requires that any investment intended must be such as "will employ the abundant labour resources that the country possesses". Akin to this is the relatively less-emphasized man-power development. This refers to the transfer of skills to local personnel through training. The impression given was that the government is more concerned about numbers than the quality of training, so that the training of 200 single-production-stage "experts" impressed it more than that of one factory manager with the ability to man any part of the factory and, given the proper facilities, to train such "experts". This is obviously alright with the private sector.

This list would be incomplete without the addition of one very important condition: development also means that the national income should be boosted. Contribution to further accumulation of overall national wealth is a cardinal requirement of any investment. This means not only that investments should be made in profitable areas, but also that they should not be concentrated in too few areas, but should be diversified. Increase of national wealth would mean that government revenue is itself boosted, which in turn enable it to "deliver the goods" to the Wananchi.<sup>84A</sup> This would result in a more satisfied, and, therefore, a more peaceful and stable, society, contributing further to the realization of "our philosophy" of love, peace and unity. The excitement that discussions on this last condition ( i.e. accumulation of national wealth) generated was quite out of proportion to the actual knowledge of how to ensure that the said wealth was actually accumulated,

and that it is national. What appeared to be even less understood was how this wealth could be distributed to ensure that the Wananchi were satisfied and that the much coveted "uyago philosophy" would be realized. The difference between "national income" and "government revenue" (which only could be "distributed" directly) escaped many. Neither was it clarified what difference would arise as between starting distribution at the production level on the one hand, and leaving it to the stage of government-revenue expenditure, on the other, in an economy such as this, assuming it was possible.

These conditions were summarized by Lubar in the following terms: an investment, to be regarded as contributing to economic development or benefit, must be such as will

- "a. lead either to an earning or saving of foreign exchange;
- b. result in a gain of technical knowledge to the country;
- c. result in an increase in the economic wealth and the social stability of the country by raising the national income or promoting the diversification of the economy"<sup>85</sup>

This was in 1971. They have not changed much, except probably in relative emphasis.

Once the Minister has exercised his discretion in favour of a particular applicant, he shall issue such applicant with the "certificate of approved enterprise", which certificate shall contain such information regarding the proposed investment as the names of its holder and the enterprise, description of the enterprise, the amount invested or to be invested<sup>86</sup> and the relevant currency,



in the case of assets not yet invested, the period within which they shall be invested, and any other matters that may be provided for. As regards foreign nationals who have already invested foreign assets in Kenya, the Act entitles them to grant of a certificate unless the Minister is not satisfied that the enterprise is of benefit to Kenya. The difference between this provision and that relating to proposed investments is that whereas in the latter case (proposed investments) the Minister can in theory refuse to grant a certificate even where the conditions are satisfied, it is obligatory upon him to grant a certificate in former case once he is satisfied that the enterprise is of benefit to Kenya. This subtle distinction appears to have been based on the argument that the enterprise covered in the former case is already operative any way, and the discretion of the Minister should not be equated with his discretion where the investment is yet to be made and the enterprise made operational. The applicant in respect of the operational enterprise has no choice of either investing all the same or refraining from doing so where the Minister exercises his discretion against him; the applicant in respect of a proposed investment has.

What then is the nature and extent of the protection given to the holder of a certificate of approved enterprise? A holder of such certificate, if he has not already invested any foreign assets or part thereof, which such certificate relates, in the approved enterprise, must do so within the approved period (which is subject to possible extension: (Section 4(g)). Otherwise the certificate shall be deemed to have been revoked: (Section 5). But where such certificate



remains effective, it guarantees the holder protection in respect of repatriation and compulsory acquisition. As regards repatriation, Section 7 FIPA enables the holder of a certificate, "the provisions of any other law for the time being in force" "notwithstanding", to transfer out of Kenya "in the approved foreign currency and at the prevailing official rate of exchange":

(a) the profits made out of his investment of foreign assets after appropriate taxation has been made;

(b) the capital specified in the certificate as amended or varied, as representing his equity in the enterprise, and -

(c) the principal and interest of any loan specified in the certificate.

An amendment to section 7 introduced by Statute Law (Miscellaneous Amendments) Act, 1976,<sup>87</sup> disqualifies the repatriation of any capital gain arising out of the sale of the capital assets of the relevant enterprise. Such increase in the capital value of the investment shall not be deemed to be pro fit under section 7(a). Neither shall any amount representing any increase in the capital value be added to the capital specified in the certificate (Section 7 (b)(ii)). These amendments were introduced to avoid the confusion which had hitherto reigned with regard to the proper definition of "profits" and "capital", definitions which ranged from case to case depending on the reactions of the relevant government officials in each particular case.

A highly placed official of the Central Bank argued that the previous position left an undesirable loophole which could be exploited by external influence, which may

not always be based on economic analysis. On the question of the meaning to be given to the phrase "notwithstanding the provisions of any other law for the time being in force" (Section 7), the same official stated that this phrase, read with section 6 FIPA, required even dealings in foreign exchange under a certificate to comply with the provisions of the Exchange Control Act.<sup>88</sup> However, with relation specifically to repatriation under FIPA, the main objective was not approval as such, but merely the guarantee that the funds to be repatriated were such as are covered under the Act. In other words, it entailed only a formal declaration that the assets to be transferred were permitted by the Act to be so transferred.

Compulsory acquisition in relation to approved enterprises is provided for under section 8 FIPA. This provision prohibits the compulsory acquisition of any "approved enterprise or any property belonging thereto" or "any interest or right over such enterprise or property", except in accordance with the provisions of Section 75 of the Constitution. The said section 75 is reproduced in full in a schedule to section 8 FIPA. Its provisions have already been discussed and need no further comment here.

It need only be added that the political will to apply the provisions of FIPA has been amply demonstrated. The fact that the political leaders exhort investors in every possible forum and reiterate the safety of investments is evidence of this. There has not been any significant acquisitions of any foreign enterprise (Voice of Kenya aside), neither does the government impose upon them any heavy

economic obligations aside from taxation whose severe effects can be easily avoided through numerous methods, including double (or even triple) annual performance reports (with the copy for tax purposes showing a poorer performance!), over-valuation of inputs; over-expenditure on expatriates etc. In addition, investors consider Kenya a relatively profitable area for investment and Kenya (and Nairobi in particular), acts as regional headquarters of many of these investors. In interviews conducted in the private sector, most corporation officials admitted that they had no fear of acquisition, neither had they had any problems in relation to repatriation of funds. Some, when pressed further on their relationship with the government, said that it was "obviously" important, and valuable too, to maintain good relations, not only with the government as such, but with specific officials in specific positions who could be relied upon to "make operations smooth".

The significance of this Act to transfer and development of technology lies, firstly, in the policy behind it, and, secondly, in the impact of its provisions. In terms of policy, it demonstrates an open-door approach to economic development; an approach which is predicated upon the fact that foreigners are an integral part of the development of the national economy, and that such foreigners cannot take part in this task unless attractive incentives are made part of the bargain. It, further, demonstrates the willingness of the dominant classes in the Kenyan social formation to use law and legal institutions to service, internally, the interests of such foreigners. It does not, of course, formally discriminate against foreigners from

difference economic systems of the world: but because imperialism is an epoch of capitalist development which is predicated upon export of capital for further accumulation (and since the Kenya economy is organized on the basis of individual enterprise and the satisfaction of individual, as opposed to broadly social, interests), this policy becomes a ready tool therefor. The implications for transfer and development of technology are very apparent. From a theoretical point of view, it means that this process will be characterized by a desire to satisfy the interests of such foreigners and, that such desire will not in any significant way depend on the extent to which they effectively engage in transferring and developing technology for independent economic development.

The practical aspects of this approach are just as important. The provisions of the Act reveal a very generous attitude towards these foreigners and their property, typified, basically, by the protection of this property against expropriation, and in the largely unhindered permission to repatriate funds. This property includes industrial property, while the funds also include returns from the exploitation of such property. Further, foreign investment, whether fully direct, or in the form of joint venture, is the most important form of transfer and development of technology. All this then beg the question: to what extent does the Act as a body of rules ensure the effective transfer and development of technology? That is, as opposed to the incentives, what obligations does it place on the owners of technology which have relevance to this process and ensure its achievement?

Formally, the only condition that the Act provides is that the investment should be such as would further the economic development of, or would be of benefit to, Kenya. It has been observed that this is the complete formal requirement. This is in marked contrast to the incentives, which are detailed and precise, emphasising the specific concern for the interests of the foreign investors. The interpretations which have been accorded the requirement do not reveal any obligation on such investor to effectively engage in transfer and development of technology; neither do they offer any programme which will ensure this. However, they deal, obliquely, with the type of technology that should be engaged in production, by reference to its impact on foreign exchange, local raw materials, employment and man-power development. Ironically, those who are entrusted with the determination as to whether the requirement is satisfied or not, have been stated to be members of the dominant classes whose approach is demonstrably characterised by a desire to service the interests of such foreign investors.

Thus, from both a theoretical and practical point of view, the Act does little to ensure the effective transfer and development of technology. It demonstrates an open-door policy whose basic function is to enable the foreign investor to peacefully make his investment and reap and repatriate the benefits thereof. It places no tangible obligation on such investor to ensure that any technology integrated in such investment effectively passes to Kenya, or that he locally develops technology. And this trend is logically extended to those treaties which Kenya enters into with the states from which foreign investors emanate, as is demonstrated in the succeeding discussion.

(ii) Bilateral Arrangements:

Kenya has entered into some international bilateral arrangements for the direct protection of investments from certain countries. Generally referred to as investment guaranty agreements, their main objective is to further boost the protection of investors by putting behind them directly the support and power of their national state through a treaty. Most of the major "capital-exporting" countries have found it beneficial to enter such agreements. The analysis here is drawn from those entered into with the US,<sup>89</sup> The Federal Republic of Germany (FRG)<sup>90</sup> and the Kingdom of the Netherlands.<sup>91</sup> The rights enjoyed by investors under such agreements will be discussed first, and the conditions underlying them second.

The most significant right under these agreements is that of subrogation. This right entitles the national government of the investor to step into his shoes, so to speak, and claim any rights he may have in its own right. The Kenya - US treaty puts it in the following terms:

"If an investor transfers to the Government of the USA pursuant to an investment guaranty,

(1) lawful currency, including credits thereof, of Kenya, (2) any claims or rights which the investor has or may have arising from the business activities of the investor in Kenya or from the events entitling the investor to payment under the investment guaranty, or

(3) all or part of the interest of the investor in any property (real or personal, tangible or intangible) within Kenya, the Government of Kenya shall recognize such transfer as valid and effective."<sup>92</sup>

The Kenya-Netherlands counterpart provides on the same



point as follows:

"The Contracting Party in the territory of which an investment approved by it has been made, in respect of which investment the other Contracting Party or a national thereof has granted any financial security against non-commercial risks, recognizes the subrogation of the grantor of that security into the rights of the investor as to damages if payment has been made under that security, and to the extent of that payment".<sup>93</sup>

Whereas as between Kenya and the Kingdom of the Netherlands, the right of subrogation is reciprocal and in theory can be enjoyed by either Contracting Party, this is not the case as between Kenya and the US, where only the latter enjoys the right. In practice, of course, this has very little or no significance at all owing to the "present" impossibility of investment by Kenyans in either country in any appreciable amount.

The right of subrogation puts the state in the shoes of its national. What implications does this result have for the Kenyan Government and people? The overall effect of this is that it changes completely, or to a large degree, the power structure that would otherwise exist between the investor and the Kenya Government. This is not, of course, to under estimate the power that investors as a body may wield within such a social formation that is Kenya. It is merely to make the point that such power is less as between the investor and the Kenya Government, and indeed diminishes further when a single investor rather than "the body of investors" is threatened. This change in the power structure introduces several concrete factors within the relationship between the investor and the Kenya government which cannot be



ignored. It means that the investor may have his case taken up by his national state without having to exhaust domestic remedies, which in some cases may in fact be limited,<sup>94</sup> as would otherwise be required by conventional international law.<sup>95</sup> It also means that the whole mass of economic coercion and diplomatic pressure capable of being exercised by the investor's national state may be brought to bear on the "defaulting" state on behalf of an essentially individual right. And indeed, the coercion and pressure need not be actually exercised: their very hovering existence is enough to keep matters in line through a process akin to remote-control blackmail. It further means that the dispute-settling process of the International Court of Justice (ICJ), which could otherwise not be moved to act by the individual investor,<sup>96</sup> may be utilized indirectly by such investor through his national state. And, finally, it gives an investor an added sense of security and power that can be misused if not properly checked. This is even more likely in a country like Kenya where any check is more rhetoric than real.

The agreements also guarantee that investments of nationals or companies of the "capital-exporting" countries "shall enjoy full protection as well as security" and:

"shall not be expropriated in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually realizable transferable and shall be made without delay."<sup>97</sup>

The treaties further provide for the repatriation of funds. Kenya is thereunder obligated to permit the repatriation of capital, profits and other current income, funds in satisfaction of credits and, in the event of liquidation

(partial or total), the proceeds from such liquidation.<sup>98</sup> Authorization shall be given, and transfer carried out, without undue or unreasonable restriction or delay,<sup>99</sup> the exchange rate being based on the par value agreed with the International Monetary Fund (IMF), or, failing this, the official exchange rate with a convertible currency or gold.

The agreements also require Kenya to accord the nationals or companies of the relevant countries both national and most-favoured-nation (MFN) treatment in all its dealings with them.<sup>100</sup> The national treatment principle requires that Kenya must accord these aliens the same treatment it would accord its own nationals under similar circumstances. The MFN principle requires that Kenya must NOT accord the nationals or companies of the relevant countries treatment that is less favourable than that it would accord nationals or companies of third countries. Only in one case is the possibility of preferential treatment of Kenyan nationals recognized, but even then, it is only made a subject of future consideration if need arises, which may or may not result in "mutual agreement".<sup>101</sup> It has been argued before, and the same is here reiterated, that the principle of national treatment is most iniquitous in cases of extreme differences such as exist between the economies of Kenya and the relevant states. It has to be accepted that only preferential treatment can contribute to ameliorating the effects of such differences. Under the circumstances, the standard is nothing more than a vehicle for further entrenchment of the exploitation process, and, therefore, for nurturing underdevelopment. The same may be said of the MFN principle under similar circumstances.

There is absolutely no reason why Kenya (or any developing country for that matter) should treat investors from "capital-exporting" countries with profit as the prime motive, in the same way as investors who have the development of the Kenyan resources for the benefit of Kenyans as their principal motive. In a sense this may also devalue any intra-developing country industrialization programmes that may require preferential treatment in order to gain proper footage. But then it must be borne in mind that these agreements were not drawn with the Kenyan masses in mind; the "capital-exporting" countries must surely have been thinking of their nationals and companies, and they should not be expected to be at one and the same time our keepers.

As regards duration, the Kenya-US agreement is silent. The Kenya-FRG agreement provides for an initial five-year period (terminable by one-year's notice) after which it shall continue in force indefinitely unless denounced by either party giving one year's notice.<sup>102</sup> The Kenya-Netherlands agreement also provides for an initial five-year period, followed by self-renewing five-year periods, in all cases terminable by a notice of six months before the expiry of the current term.<sup>103</sup>

Finally, in case of dispute, the agreements provide for solution through negotiation between the parties, failing which the dispute shall be submitted to arbitration in the manner prescribed.<sup>104</sup>

As far as conditions are concerned, the only one that needs to be satisfied is that the investment, and the activities thereunder, be approved by Kenya, which condition, it is supposed, is satisfied once an investor is allowed to invest and continue with his activities. Thereafter, the investor

enjoys all the benefits under the relevant agreement.

Once again the most important functions of these legal formulations are the protection of foreign property and the facilitation of repatriation. To these is now added the principle of non-discrimination, which FIPA does not deal with directly. Moreover, the principle of subrogation now brings the weight of the state of which the investor is a national behind the latter with all the consequences already discussed. And, once again, the obligations on the government in relation to the foreign investor are dealt with meticulously. Obligations on the foreign investor are, on the other hand, conspicuously absent: it is only required that the investment, and the activities thereunder, be approved by the Kenya government. The effective transfer and development of technology, are, as earlier noted, not central to these bilateral arrangements. It is unnecessary to belabour the point further.

From the preceding discussion of the legal rules (both municipal and international) which deal with industrial property, sanctity of property in general, and the specific protection of foreign investments, emerges the general picture that the legal framework emphasizes the inviolability and protection of property, predicating such emphasis on individual ownership. It further emphasizes the importance of foreign property in the development of the national economy and, upon this, bases its protection. However, this emphasis is not adequately counter balanced with any significant obligations which would directly facilitate the effective transfer and development of technology:

this does not appear to be a central issue, in the whole framework. It remains to examine the institutional framework which the government establishes to deal with this issue.

4. INSTITUTIONAL ORGANIZATION: The MINISTRY OF INDUSTRY:

Following the division of the former Ministry of Commerce and Industry into two separate ministries, there has been a further reorganization of the Ministry of Industry. In its present set-up the Ministry is composed of three sections, viz.: the Industrial Promotion, the Industrial Development and the General Administration sections, the first two of which are the most important.

The Industrial Promotion section, under which the Industrial Services and Promotion Centre (ISPC) operates, is further divided into three departments. The industrial planning department deals with planning, programming and policy articulation, industrial management and extension services and training of required personnel, the project studies department with problems of technology application and project preparation and appraisal and the industrial information department with documentation and market research, offering library and registry facilities.

Overall this section, in relation to foreign investments, gathers the material, through necessary studies and research, which forms the basis for negotiations, including information on possible areas of investment and nature and profitability thereof, possible costs (establishment and running), possible benefits to the economy, alternative ventures etc. Although some of the information-gathering

is project-specific, that is, relates to a particular project for which an application has been made, some of the studies are anticipatory; that is, based on a general hope of future investment.

The Industrial Development section, with two departments, is more actively involved in the actual negotiation, establishment and continuous development and administration of industrial projects. The projects implementation department is responsible, not only for initial negotiations on projects, but also for follow-up action as well as for problems relating to their financing. The New Projects Committee (NPC), which is constituted under this department, acts as a sort of secretariat and is also involved in the direct negotiation on proposed projects. It evaluates all the applications made and the studies prepared thereon by the Industrial Promotion section, and gives its findings and recommendations to the Permanent Secretary to the Ministry of Industry who passes such report, together with his observations, to the Minister. The Minister in turn presents the report and any comments thereon (including his own), to the Cabinet Economic Committee chaired currently by the Vice-President and Minister for Finance. This Committee, after deliberating the report makes its decision regarding any proposed investment, which decision is final.

The NPC also advises the treasury on whether it should issue a certificate of approved enterprise to a particular investor after determining whether such proposed investment satisfies the requisite criteria. Its membership is fluid: it is composed of representatives from the Ministry of Industry, and any other ministry or ministries under which the economic activity which is the subject of any particular proposed investment falls, the treasury and any parastatal body



involved (like the Industrial and Commercial Development Corporation (ICDC)).

The Industrial administration department, the other department of the Industrial Development section, mainly concerns itself with the administration of legislation relating to industrial investments, the regulation of industrial imports and industrial protection. Under this department exists the Industrial Protection Committee whose principal preoccupation is the protection of industrial investments. It determines, within the framework of current policy and legislation, what precise protection shall be given to a particular project, and the extent of such protection.

The third and last section, General Administration, is responsible for the overall administration and co-ordination of the diverse activities of the various departments within the Ministry. In particular, it is responsible for the approval and allocation of finances and the preparation of accounts.

This is the government machinery that oversees industrial investment in general and therefore technology transfer and development activities of TNCs in particular. This machinery is supposed to ensure not only that the government is always informed of the priority investment areas, but also that whatever proposed investment is accepted on the whole accords with the needs and capabilities of the economy. This means first that it must produce adequate information regarding the proposed investment and any alternatives that may exist. This information, to be useful, must be wide-ranging, precise and complete, since it forms the backbone to the negotiation process. Secondly, the machinery must ensure effective negotiation. This



requires that, apart from having the necessary information, it must have competent, forceful and dedicated negotiators who are able not only to articulate government policy, but also to ensure that the product of the negotiations is on the whole beneficial to the further development of the economy.<sup>105</sup> Thirdly, this same machinery must ensure that whatever is agreed upon during negotiations is actually performed; that is, it must be capable of follow-up action to ensure that the obligations assumed during negotiations are actually performed in the manner intended. As regards this specific point, whereas it is stated that follow-up action on the part of the government is "being developed", it is admitted that no effective machinery has yet been established to ensure that there is little or no deviation from the agreement, and that the proposed targets are by and large achieved by the investor.

or where they are not achieved, the reasons are clarified. Equally conspicuous by its absence is machinery for scrutinizing licencing and management, consultancy or technical services agreements where there is no partial or full direct foreign investment. The present machinery is only concerned with situations where a foreign investor intends to invest directly or in joint-ventures with local investors (and even here, technology transfer agreements rarely get an all-pervading scrutiny). Yet there are situations where there is direct sale of technology and knowhow without attendant transfer of investment capital. Presumably, "scrutiny" in this case takes place when the parties apply for approval for the transfer of funds under such agreements.

Table I:A: P A T E N T S

(a) Annual Registrations/Recorded Licences and Assignments

Year	Annual Registrations	Live Patents on Register	Recorded Licences	Recorded Assignments
1960	62	638	2	-
1961	112	711	-	-
1962	83	790	-	1
1963	72	860	-	2
1964	87	902	-	6
1965	90	877	-	2
1966	93	905	1	3
1967	104	920	-	-
1968	88	1,017	-	-
1969	157	1,174	-	3
1970	106	1,280	-	2
1971	122	1,402	-	4
1972	131	1,532	-	-
1973	117	1,519	-	-
1974	126	1,645	-	-
1975	95	1,740	-	-
1976	98		-	-
1977	124		-	1
1978	106		-	-
1979				
1980				

- Source: 1. Annual Reports of the Department of Registrar-General, Office of the Attorney-General, Nairobi.  
 2. Annual Reports to World Intellectual Property Organization (WIPO), formerly International Bureau of the Union for the Protection of Industrial Property (BIRPI)

Notes:

1. Dash (-): represents "nil" figures
2. Blank spaces: represent cases where statistics were not readily available or where similar analysis was not done in the report.

(b) Annual Applications/Registrations by Country of Origin (Patents)

Column A: Applications; Column B: Registrations

(1) Applicants Country of Residence.	(2) Number of Applications for Registration Made and Registration Effected Annually																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Argentina	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Australia	1	1	-	-	-	-	1	1	-	-	2	2	1	1	1	1	-	-	2	2
Austria	-	-	-	-	-	-	-	-	2	2	-	-	-	-	1	1	-	-	-	-
Bahamas	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-
Belgium	1	1	-	-	-	-	2	2	-	-	5	5	1	1	-	-	-	-	1	1
Brazil	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Bulgaria	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Canada	-	-	-	-	4	4	-	-	2	2	6	6	-	-	-	-	1	1	-	-
Czechoslovakia	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Denmark	-	-	-	-	1	1	2	2	-	-	1	1	1	1	-	-	4	4	-	-
Finland	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
France	2	2	4	4	1	1	-	-	1	1	-	-	6	6	4	4	2	2	1	1
German Democratic Republic	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Federal Republic of Germany	15	13	19	21	23	22	27	27	22	20	-	-	18	16	15	17	35	34	26	27
Greece	1	1	1	1	-	-	-	-	1	1	-	-	1	-	-	-	-	-	-	-
Hungary	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-	1	1	-	-

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(1)	(2)																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
India	1	1	2	2	1	1	1	1	2	2	-	-	1	1	1	1	-	-	-	-
Ireland	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-	1	1
Israel	1	1	-	-	-	-	-	-	1	1	-	-	-	-	1	1	-	-	-	-
Italy	-	-	1	1	2	2	8	8	1	1	-	-	1	1	4	4	3	3	6	6
Japan	1	1	-	-	2	2	3	3	4	4	6	6	5	5	3	3	4	4	1	1
Liechtenstein	-	-	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-
Luxembourg	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Mexico	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Netherlands	3	2	5	6	-	-	3	3	4	4	1	1	2	2	1	1	-	-	1	1
New Zealand	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Norway	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1
Panama	2	2	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-
Poland	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-	-	-
Romania	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
South Africa	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	2
Soviet Union	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Spain	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1
Sweden	1	1	-	-	-	-	1	1	-	-	1	-	-	1	1	6	6	-	-	-
Switzerland	18	18	18	18	9	9	11	11	-	-	7	7	16	16	19	19	17	15	15	16
United Kingdom	44	44	30	30	36	36	37	37	-	-	31	31	11	9	27	27	24	27	21	23
United States of America	68	67	17	18	-	-	31	31	40	40	32	32	35	33	13	15	21	23	7	21

Cont./.....

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(1)	(2)																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Yugoslavia	-	-	-	-	-	-	-	-	-	-	3	3	-	-	1	1	2	2	-	-
Others: Bahamas Is.	-	-	3	3	10	10	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Hong Kong	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-
Kenya	-	-	-	-	1	1	2	2	1	1	-	-	-	-	-	-	-	-	1	1
Swaziland	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-
Lebanon	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	-	-
Sri Lanka	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1
<b>T o t a l s</b>	161	157	102	106	123	122	131	131	120	116	126	126	101	95	93	98	122	124	101	106
Nationals and/or Residents	-	-	-	-	1	1	2	2	1	1	-	-	-	-	-	-	-	-	1	1
Foreigners	161	157	102	106	122	121	129	129	119	115	126	126	101	95	93	98	122	124	100	105
%age of National and/or Residents in Total	0.00	0.00	0.00	0.00	0.80	0.8	1.51	1.5	0.80	0.9	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.00	0.9

Source: Annual Reports to WIPO (formerly BIRPI) from the Registrar-General, Attorney-General's Office, Nairobi.

Table I : B : TRADE

(a) Annual Applications/Registrations; Subsequent Developments

Year	Annual Applications		Annual Registrations		Registration under Schedules of the Trade Mark Rules		Applications Withdrawn, Abandoned, Refused	Total Number of Trade Mark on the Register as at 31 December
	Part A	Part B	Part A	Part B	Schedule II	Schedule III		
	1960	738	39	590	47	1		
1961	655	46	492	45	1	536	66	7,897
1962	651	19	692	45	-	737	39	8,622
1963	546	53	526	41	-	567	47	9,186
1964	581	43	392	57	-	449	63	9,619
1965	892	-	487	38	-	525	20	12,345
1966	942	-	288	1	-	289	33	11,066
1967	791	3	729	3	-	732	61	11,590
1968	899	-	1,522	44	-	1,566	89	11,952
1969	887	-	710	26	-	736	53	11,751
1970	980	-	582	34	-	616	32	12,382
1971	992	-	1,269	67	-	812	13	13,705
1972	774	-	605	70	-	675	80	14,300
1973	805	-	724	72	-	796	12	14,358
1974	877	-	577	89	-	666	4	14,713
1975	762	-	658	80	-	738	12	14,949
1976	1021	-	670	29	-	-	-	-
1977	941	-	865	39	-	-	-	-
1978	1025	-	1,020	87	-	1,107	72	16,987
1979								
1980								

Sources: 1. Annual Reports of the Department of Registrar-General Office  
 2. Annual Reports to WIPO (formerly BIRPI).



(b) Applications/Registration by Country of origin (Trademarks)

(Column A : Applications; Column B: Registrations)

Applicants' Country of Residence.	Applications made and Registrations effected Annually																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Algeria	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	8	3
Argentina	-	-	-	-	2	2	-	-	1	1	-	-	-	-	-	-	-	-	-	-
Australia	14	6	9	7	8	10	14	7	13	9	11	5	2	4	9	7	4	8	8	6
Austria	-	-	-	-	2	2	5	-	-	5	-	-	-	-	-	-	1	2	-	-
Bahama Islands	-	-	17	17	2	11	1	2	8	8	4	2	13	7	6	12	-	3	1	-
Belgium	2	4	8	3	12	12	-	5	-	-	5	1	11	7	1	9	1	2	-	1
Bermuda	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-	-	-	-	-
Brazil	-	-	-	-	-	-	-	-	1	1	1	-	-	-	-	-	-	-	1	-
Canada	1	11	5	-	-	-	-	-	5	6	3	4	7	12	2	4	-	4	6	5
National Rep. of China (Taiwan)	4	-	-	3	-	-	-	-	-	-	1	-	-	1	-	-	-	-	-	-
China	-	-	1	-	-	-	-	-	-	-	2	2	-	12	9	4	5	4	9	-
Cuba	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-
Cyprus	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Czechoslovakia	1	1	-	-	-	-	-	-	-	-	9	6	1	2	-	1	-	-	-	-

Applicants' Country of Residence.	Applications made and Registrations effected Annually																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Denmark	4	8	15	1	4	6	10	15	4	3	2	6	1	2	2	-	8	5	13	6
Finland	-	-	7	-	-	3	1	-	-	2	-	-	-	-	-	-	-	-	2	3
France	16	18	8	3	13	17	20	17	38	45	23	19	15	21	43	22	18	54	40	25
German Democratic Rep.	-	-	3	1	1	1	4	5	2	-	-	2	-	3	-	-	-	-	-	-
Federal Rep. of Germany	112	65	200	92	103	234	83	61	87	112	70	74	101	103	74	63	53	56	91	92
Ghana	1	1	-	-	1	-	-	1	-	-	-	-	-	-	-	-	-	-	3	-
Greece	2	-	-	2	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-	-
Hong Kong	-	-	-	-	-	3	-	-	13	15	2	3	4	2	-	2	-	-	-	-
Hungary	-	-	-	-	-	-	5	5	6	-	-	6	-	-	1	-	3	-	1	5
India	1	16	2	1	17	3	1	5	2	8	8	1	3	9	-	-	-	-	6	1
Iran	1	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Ireland	3	3	1	-	1	5	-	-	-	-	-	-	2	-	-	-	1	1	1	11
Israel	1	3	-	-	-	-	12	5	-	2	-	-	-	-	-	-	-	-	-	-
Italy	12	3	30	5	10	28	13	25	36	30	48	25	16	39	45	26	21	24	26	22
Jamaica	-	-	-	-	-	-	2	-	-	2	-	-	-	-	-	-	-	-	-	-
Japan	37	60	28	76	92	17	32	30	33	36	30	11	22	29	13	33	34	49	44	

...../91.

Applicants' Country of Residence.

Applications made and Registrations effected Annually

	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
	Kenya	155	131	190	132	207	204	160	105	165	136	205	105	203	153	339	180	300	247	367
Korea	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10	1	-	4	-	6
Liechtenstein	8	10	3	8	11	11	8	6	1	2	-	4	4	2	2	3	-	1	1	1
Malaysia	-	-	-	-	-	-	-	-	-	-	1	1	-	-	-	-	-	-	-	-
Mexico	-	-	-	-	-	-	-	-	-	-	1	2	-	-	-	-	-	-	-	-
Netherlands	19	10	25	16	20	29	11	21	5	4	15	17	1	5	21	5	11	21	13	20
New Zealand	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-
Nigeria	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-
Norway	1	-	-	-	-	-	2	1	-	1	-	-	1	-	1	-	1	1	-	1
Pakistan	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Panama	-	1	-	-	2	2	2	3	-	-	9	6	4	5	-	2	10	7	-	6
Poland	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	3
Portugal	-	-	-	-	-	-	-	-	2	-	-	2	-	-	-	-	-	-	-	-
Singapore	-	-	8	-	3	8	-	2	1	-	-	-	-	-	-	-	-	-	-	-
South Africa	2	1	1	-	3	4	10	5	-	-	-	-	-	-	12	-	-	-	-	-
Spain	-	-	5	3	1	3	-	1	2	1	8	3	1	1	5	-	6	7	8	9
Swaziland	-	-	4	1	1	4	-	-	1	-	-	-	-	-	-	-	-	-	-	-
Sweden	8	2	7	5	7	18	8	3	-	5	16	5	12	15	13	7	4	8	4	9
Switzerland	29	22	15	21	59	55	42	33	22	15	33	33	49	41	42	34	62	63	36	53
Tanzania	4	12	6	5	11	9	-	-	11	-	-	7	3	2	-	2	-	-	-	-
United Kingdom	-	-	119	162	196	163	146	180	143	127	141	114	158	133	153	187	165	157	-	-
Uganda	-	-	1	4	-	-	-	-	2	-	-	-	-	-	-	-	-	-	1	1
United States of America	-	-	139	217	144	137	195	174	217	166	184	166	193	165	144	149	168	292	-	-
West Pakistan	-	-	-	-	1	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-

VI6/.....

Applicants' Country of Residence	Applications made and Registrations effected Annually																			
	1969		1970		1971		1972		1973		1974		1975		1976		1977		1978	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Yugoslavia	-	1	1	-	1	2	-	-	-	-	-	-	-	-	1	-	-	1	-	-
Zambia	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Totals	887	736	980	616	992	1336	774	675	805	796	877	666	762	738	1021	699	941	904	1025	1107
Nationals and/or Residents	155	131	190	132	207	204	160	105	165	136	205	105	203	153	339	180	300	247	367	316
Foreigners	732	603	768	484	785	1132	614	570	640	660	672	561	559	585	682	519	641	657	658	791
%age of Nationals and/ or Residents in Total	17.5	17.8	19.4	21.4	20.9	15.3	20.7	15.6	20.5	17.1	23.4	15.8	26.6	20.7	33.2	25.8	31.9	27.3	35.8	28.5

**Note:** There were no applications from Bulgaria, Luxembourg, Rumania and The Soviet Union.

**Source:** Annual Reports to WIPO (formerly BIRPI) from the Registrar-General, Attorney-General's Office, Nairobi.

1. Fourth Development Plan 1979/83 (Government Printer, Nairobi. 1979). Part I: Paras 7.22 et seq.
2. *ibid.*, paras. 7.12 - 7.21.
3. *ibid.*, paras. 7.52 - 7.55.
4. *ibid.*, paras. 2.128 - 2.140.
5. *ibid.*, para. 2.129.
6. see note 3.
7. *ibid.*, para 7.52.
8. *ibid.*, para 7.53 (emphasis supplied)
9. *ibid.*, (emphasis supplied)
10. Research and Development.
11. Para. 7.55.
12. Paras 7.24, 31-33.
13. Paras. 7.26 - 28.
14. The Role of Patents in the Transfer of Technology to Developing Countries (UN Publication Sales No. 65.II.B.1) (emphasis supplied).
15. See FRITZ MACHLUP and E. PENROSE: "The Patent controversy in the 19th Century" (1950) 10 Journal of Economic History pp. 1-29. which dwells on the historical development of the patent system;  
F. MACHLUP: "An Economic Review of the Patent System" (Study No. 15 of the Senate Sub-Committee on patents, Trademarks and Copyrights. (Washington, 1958) which contains a literature review on this subject;

E. PIGNOSE: The Economics of the International Patent System (Baltimore, John Hopkins Press, 1951);

G. TUMINE - MUKUBA "Patents and Technology Transfer To Underdeveloped Countries" (1975-77) Vols. 7-9, Zambia Law Journal, pp. 1-31, at pp 3-4.

15A. Presently Cap 508 of the Laws of Kenya (Revised Ed., 1962)

15B. In 1953 by Ordinance No. 11 of 1953 (Patents Registration (Amendment) Ordinance); in 1961 by ordinance No. 28 of 1961 (Statute Law (Miscellaneous Amendments) (No.2) Ordinance); and 1973 by Act No. 4 of 1973 (Statute Law (Miscellaneous Amendments) Act).

16. s.25(1). The English Patents Act, 1977. (Cap 37). Under s.25(3), this period is subject to extension on payment of a renewal fee within the prescribed time. Further, if the renewal fees is paid within six (6) months after the expiration of this prescribed period, the patent shall be deemed not to have expired (s.25(4)), and where a patent has expired for non-payment of renewal fees within the prescribed period, an application for the restoration of such patent may be made within one year from the date it ceased to have effect. In this case, the comptroller may restore such patent if he is satisfied with the diligence of the applicant (s.28(1)).

17. Indeed a British study on economic contribution of patent monopolies concluded that there was no correlation between industrial research and the patent system with the possible exception of pharmaceuticals: C.T. TAYLOR and Z.A. SILBERSTON: The Economic Impact of the Patent System (Cambridge, Cambridge University Press, 1973) p.346.



- And in countries where patents are not granted for drugs on grounds of public policy, there has been no evidence that inventiveness has slowed down or died off: R.F. DALE and J. K. HUNTON; in "a cost-Benefit study of Domestic and International Patent Systems" (1967) 3 IDEA 351-406, who assert that "statistics point toward drug industry growth not being supported by patents" (at p.371).
18. Kenya Legislative Council Debates, 1933, Col. 46. (emphasis supplied). The Bill went through the Second Reading and the Committee stage with no significant debate or amendments.
19. See J.J. MCARTHY: Trade marks and Unfair Competition (Rochester, New York, The Lawyer's Co-operative Publishing Co., 1973), Vol. I., p. 86.
- UNCTAD Secretariat: The Role of Trade marks in Developing Countries (UN Publication, Sales No. E.79.II.D.5) TD/B/C.6/AC.3/3/Rev.1.
- WILBUR L. FUGATE: Foreign Commerce and the anti-Trust Laws, 2nd Edn. (Boston, Little Brown & Co., 1973) p.303.
- STEPHEN P. LADAS: Patents, Trademarks and Related Rights: National and International Protection (Cambridge, Massachusetts, Howard University Press, 1975) Vol.II, pp 967-9.
- See also F.I SCHECHTER: The Historical Foundation of the Law Relating to Trademarks. (New York, Columbia University Press, 1925) Chaps.II & III for the historical development of trademarks.

20. H.R. EDWARDS defines "goodwill" as "the attachment of buyers to, and their propensity to purchase, the product of the particular firm": Competition and Monopoly in British Soap Industry (Oxford, Clarendon Press, 1962) p.26.
21. S.A. DIAMOND: "The historical development of trademarks" The Trade mark Reporter, New York, (1975) Vol. 65, p.289.
22. The Role of Trademarks in Developing Countries, (op.cit) paras 48-57. "Advertising is least informative where the need for information is greatest (consumer-experience goods) while being most informative where the need for information is least" at para 48.
23. A.J. MOREIN: "Shift from brand to product line marketing." Harvard Business Review (Boston, Massachusetts) Sept-October, 1975, p.56 (emphasis provided).
24. A summary of results of studies carried out in the US as expressed in The Role of Trade marks ..... supra, footnote 14.
25. Cap 506 of the Laws of Kenya (Revised Edn., 1962)
26. Report of the Kenya Legislative Council Debates, 1955 Col. 558. See generally Cols. 436, 557-60, 617 and 625.
27. s. 2(1) TMA.
28. s. 40(1) TMA.
29. s. 4 TMA. ("continue" is used in the Act since the then Ordinance had in fact repealed and replaced an earlier ordinance under which a register had been established.
30. ss. 12(1) and 40 TMA.
31. s. 13(1), (2) TMA.
32. s. 14 TMA.

33. s. 30 TMA.
34. ss. 7, 8, 30 and 40 TMA.
35. s. 23 TMA.
36. s. 25 TMA.
37. s. 31 TMA.
38. s. 40 (8) TMA.
39. s. 2(1) TMA.
40. ss. 20, 21, 22 TMA.
41. The Paris Convention for the Protection of Industrial Property, 1883 (as revised by the latest conference of Revision, Stockholm, 1967). Kenya is presently bound only by the Lisbon Act, 1958 (to which it acceded to at the same time) and not by the subsequent amendments.
42. The Paris Union is the general (geographical) area constituted by the member countries in which protection of industrial property provided in the Paris Convention applies.: article 1(1) of the Convention.
43. See PROF. G.H.C. BODEN HAUSEN: Guide to the application of The Paris Convention for the Protection of Industrial Property (as revised at Stockholm, 1967) Geneva, BIRPI, 1968), p.254.
44. Belgium, Brasil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland.
45. Equator, Tunisia, and the UK.
46. Pre-world War I Revisions took place in Rome (1886) Madrid (1890 and 1891), Brussels (1897 and 1900) and Washington (1911). These are unimportant, having been superseded by later revisions., see Bodenhansen, supra, § 1.

47. See Model Law for English - Speaking African Countries on Patents, prepared by the Secretariat of WIPO and UN-ECA under the auspices of the Committee for Patent matters of the Conference on Industrial Property Laws of English-Speaking Africa (Geneva, 1978) para.4
48. *ibid*, para 4
49. Model Law..... *supra*.
50. Model Law For English-Speaking African Countries on Trade marks, prepared by the Committee for Trademark and Industrial Design Matters and endorsed by the Council of ESARIPO (at its 2nd session, Nairobi, December, 1976) (Published by WIPO on behalf of the Interim Secretariat, WIPO and UN-ECA) (Geneva, 1979).
51. Act No. 5 of 1969.
52. s. 123(1) of the Constitution interpretes "person" to include "any body of persons corporate or incorporate"
53. For international law on the different aspects of expropriation, see:  
IAN BROWNLIE: Principles of Public International Law  
(Clarendon, London, 1973) at 523 et seq.  
GREIG, D.W: International Law (London, 1976) at 576 et seq.  
AMERASINGHE: State Responsibility For Injury To Aliens  
(Clarendon, Oxford, 1967) at 123 et seq.
54. See FOIGHEL, I: Nationalization (1957) at 19.  
AMERASINGHE: supra, at 126-7.
55. See: Views expressed by the Governments of France, UK and USA on the nationalization of the Suez Canal Company: The Suez Canal Conference (Selected Documents) Egypt, No.1(1956)  
Cmd. 9853 at 2.

U.S. view on the Ceylonese nationalisations of 1962;  
USIA Bulletin, February 8, 1963 as reported in the  
Times of Ceylon, February 9, 1963.

(all cited in AMERASINGHE, op.cit. at 131)

See also G. WHITE: Nationalization of Foreign Property (1961)  
at 36 ff.

56. BROWNIE at 524; GREIG at 575; AMERASINGHE at 131.

57. BROWNIE, 523; GREIG, 575; AMERASINGHE, 135-8 DOMKE, M.  
"Foreign Nationalization" 55AJIL 588, at 590.

O'CONNEL, D.F.; International Law Vol 2 (London, 1970) at  
777-9.

58. Oscar Chinn Case P.C.I.J Series A/B.No. 63 at 87.

See also an earlier case, German Settler's Case, P.C.I.J.  
series B No. 6, at 24.

59. BROWNIE, 518-21; GREIG, 579; AMERASINGHE, 142 et seq.

59A. See J.B. STARKE: An Introduction to International Law  
(Butterworths), London, 1977) 327-9.;

SCHWARZENBERGER & BROWN: A manual of International Law  
(Professional Books Ltd., Oxon, 1976) 144, 464.

and D.F.O'CONNEL: International Law (Vol II)  
(Stevens & Sons, London, 1970) 1059-66.

59B. For a discussion of these issues, see generally footnotes  
57 above and:

O'CONNELL, supra, 766-9, 780-92, 798-809.

F.A.MANN: Studies in International Law

RICHARD J. ERICKSON: International Law and the Revolutionary  
State (Oceana Publications, New York, 1972.)

and,

P. J. ILM de WART: "Permanent Sovereignty over natural Resources as a Cornerstone for International Economic Rights and Duties" in H. MEIJERS and E. W. VIERDAG (eds.): Essays on International Law and Relations (Sijthoff - Leyden, The Hague, 1977) 304 - 322.

60. Annexure to the UN General Assembly Resolution 3281(XXIX) of December 12, 1974, adopted by a large majority of 120 votes to 6 with 10 abstentions (emphasis in quote supplied) (see (1975) 14 ILM 251).
61. See (1975) 14 ILM at 262.
62. Australia, Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Ireland, Japan, Italy, Luxembourg, The Netherlands, UK and USA.
63. Proposed amendment, article 2 (2) (d).
64. *ibid.*, articles 2 (2) (e) and (f) and 3.
65. Cyprus, Finland, Israel, Ivory Coast, Jordan, Khenr Republic, Kuwait, Malta, New Zealand, Qatar and Turkey.
66. All those states which had proposed the amendment save Australia, and Greece, plus Austria, Norway, Spain and Sweden.
67. Australia, Barbados, Finland, Israel, New Zealand and Portugal.
68. Cap.518 of the Laws of Kenya (Revised Edn., 1967).
69. For commentaries on this Act, see.

CHARLES G. LUBAR: "Government Protection of Foreign Investment in East Africa" (1971) 7 E.A.L.J. 108.

DAVID K. GACHUKI: "Government Policy on Private Foreign Investment In Kenya: an analysis" (mimeo).



and DAVID H. GACHUKI " M-Ben International vs. The Kenya Government: who conned who?" ( a paper prepared for presentation at the Workshop on Investment Management Agreements, held at the University of Warwick, Coventry, England, 18th - 20th October, 1979.

70. See Kenya House of Representatives Official Reports, Vol 3, parts 1 and 3, 1964.

First Reading, August 8, 1964; Part 1, 1964, Col. 1466

Second Reading, October 7, 1964; Part 3, 1964, Cols.3242 - 60.

October 14, 1964; Part 3, 1964, Cols.3533 - 38.

October 21, 1964; Part 3, 1964, Cols.3718 - 39.

Committee Report, Third Reading and adoption:

November 10, 1964; Part 3, 1964, Col. 4451.

71. Gikonyo Kiano

72. See KHROB, supra, Part, 3, Cols. 3243 - 5.

72A. For views of supporters of the Bill see, ibid.,

Cols. 3242-5 and 3735-9 (Kiano);

Cols. 3254-7 (Gatuguta);

Cols. 3537-8 and 3718 (Gichuru)

Cols. 3726-9 (Odero-Jowif); and,

Cols. 3732-5 (Khasakhala).

73. ibid., Col. 3257.

74. Gatuguta, ibid., Col. 3256.

75. Gichuru, ibid., Col 3538.

76. Kiano, ibid., Col 3736.

77. For views of those who opposed the Bill see, ibid.,

Cols. 3245-8 (Kaggia)

Cols. 3248-9 (Mutiso)

Cols. 3249-54 (Anyieni)

Cols. 3257-9 (Masinde)

Cols. 3259-60 and 35-7 (Ngala-Abok);

- Cols. 3718-24 (Ngala);  
Cols. 3724-6 (Mutiso; and,  
Cols. 3729-32 (Shikuku)
78. Ngala - Abok, *ibid.*, Cols. 3718 - 9
79. Ngala, *ibid.*, Col. 3723.
80. Kagia, *ibid.*, Col. 3247.
81. Anyieni, *ibid.*, Col. 3250.
82. Mutiso, *ibid.*, Col. 3724. See also Col. 3725.
83. Ngala - Abok, *ibid.*, Col. 3536.
84. Ministry of Industry (Industrial Development and Industrial Promotion Sections), Ministry of Finance, and I.C.D.C., the government representative in Joint Ventures.
- 84A. This is a Swahili term which means "citizens" or "nationals". However, it has in public use acquired a more egalitarian character, being equated with "the popular masses" i.e. The exploited and oppressed classes within the society. In this sense, it is used in contradistinction to "Weryachi". i.e. owners of the country" meaning its resources.
85. Charles Lubar: *op.cit.* p. 168.
86. See amendment to s. 3(4) (c) by the Statute Law (miscellaneous amendments) Act, 1976 ( act No. 6 of 1976).
87. *ibid.*
88. Cap 113 of the Laws of Kenya (Revised 4<sup>th</sup> edn, 1967).
89. Agreement between the United States of America and Kenya: Guarantee of Private Investments (signed at Nairobi on March 19, and April 20, 1964 entered into force on April 20, 1964): ILN. 11: 41A p. 20.

- ILN series are published by the International centre for the settlement of Investment Disputes (ICSID).
90. Treaty between the Federal Republic of Germany (FRG) and Kenya concerning the Encouragement and Reciprocal Protection of Investments (signed at Nairobi on December 4, 1964):  
ILN 11:4B p.22.
91. Agreement on Economic Co-operation Between Government of the Kingdom of the Netherlands and Government of the Republic of Kenya (signed at Nairobi on September 11, 1970)  
ILN 11:4C p. 32.
92. US - Kenya agreement, supra, s.11:4A-5.1(e)
93. The Netherlands-Kenya agreement, supra, s.11:4C-4.3.
94. See the case of Banco Nacional de Cuba v. Sabattino, US 376 at 398. and The Underhill case US 168. 250.
95. See ZOUCHAIR A. KRONFOL: Protection of Foreign Investment (AW Sijthoff Leiden, 1972).
96. The Statute of the ICJ, article 34.
97. FRG - Kenya Agreement: supra, s. 11:4B-3. 2(a), (b).  
See also to the same effect s. 11:4C - 3.3 of the Netherlands - Kenya agreement and s. 11:4A-5.1 (d) of the US - Kenya agreement.
98. FRG - Kenya agreement: s.11:4B-3.3.  
The Netherlands - Kenya agreement: s.11:4C-3.2.  
US - Kenya agreement: s. 11:4A-5.1(d).
99. FRG - Kenya Agreement: s. 11:4B-3.4.  
The Netherlands - Kenya Agreement s. 11:4C-3.2.  
US - Kenya agreement: s. 11:4A-5.1(d).

100. **FRG - Kenya Agreement: s. 11:4B - 3.1.**

**The Netherlands - Kenya agreement: s. 11: 4C - 3.1.**

**US - Kenya Agreement: s. 11: 4A - 5.1 (d).**

101. **FRG - Kenya Agreement: s. 11:4B-3.1 (f).**

102. **s.11:4B - 1.2 (b).**

103. **s.11:4C - 1.2.**

104. **FRG - Kenya agreement: s.11:4B-4.1.**

**The Netherlands - Kenya agreement: s.11:4C-3. 1(e).**

**US - Kenya agreement: s.11:4A-4.1 & 2.**

105. **The evaluation of this framework and its contribution will be dealt with in detail in the next chapter.**

## CHAPTER II

### PRACTICAL ISSUES: TRANSFER AND DEVELOPMENT

#### A. INTRODUCTION

In the preceding chapter, we attempted to deal with a whole range of issues, having in common one thread: they form the official background against which transactions of transfer and development of technology take place. We discussed the national policy on technology issues against the overall domestic policy on industrialization and came to the general conclusion that it envisaged a high degree of individual enterprise, foreign private participation included.

We next dealt with the domestic and international legal framework that governs the acquisition, protection and assignment of industrial property, which is what industrial technology is. We expressed the general view that this, apart from presupposing ownership of industrial property (that is, not considering how and under what conditions this property was acquired in the first place), tends to lay emphasis on benefits to the individual owner rather than to the wider dimensions of society, playing true to the tunes of private enterprise. And within this framework, we also noted what we called the over-protection of foreign property of which technology is a constituent part.

Finally, we dealt with the structural organization of the Ministry of Industry, the institution that deals with involvement in industrial production in the country. We noted that it suffers from certain deficiencies which placed question marks against its activities.

We now venture to discuss what goes on within this framework in relation to transfer and development of technology. We aim to discuss hereunder (in relation, first, to transfer and next, to development) the negotiations (or bargaining process) which precede the transactions, the formal or informal understandings which follow thereupon, and what Kenya gets (or does not get) from the activities which result from the above. The material contained in this chapter is derived from direct free interviews with government officials, officials of parastatals and executives and workers of private fully domestic, joint venture and fully foreign enterprises; from reports and other documents prepared by the said persons; from 113 assorted agreements which we had the guarded opportunity of perusing, and from published materials in the form of books, articles, pamphlets, magazines or newspapers.

**B. TRANSFER OF TECHNOLOGY**

**1. THE PROCESS OF NEGOTIATION:**

Any process of negotiation presupposes certain fundamental factors. It presupposes that there is an objective which the bargaining parties are trying to achieve, although it may be looked at variously from the parties' different points of view. They must at least know from their sides what this objective is. In the process of understanding their objectives, they also define and concretize their interests as they see them. It, secondly, presupposes some degree of conflict (however small) wither in the interests as such, or in the manner in, or extent to, which they should be made to prevail. And finally, and quite importantly, it presupposes that the parties are each prepared to exact as much benefit for the side and interests they represent as possible. In the process, they try as much as possible to reason out their respective cases (and in the same vein, out-reason the opponents), so that whatever comes out as the compromise, or the "results of negotiation" is as close to their interests as possible.



In looking at practical situations, it comes to light that a negotiation process may become so complex and intertwined with so many other issues and considerations that it is difficult to gauge what were the overriding ones (especially where some of them are unrecorded or are not readily apparent). On many occasions, what should and does influence the parties may differ very widely. It is for this basic reason that we eschew merely presenting herein what should govern the negotiators on the Kenyan side. We instead attempt to present the picture that is revealed to us of the varied factors that do influence or affect, either negatively or positively, the negotiation in matters relating to the transfer of technology to Kenya through the TNCs. We have already touched on some of the general aspects of the bargaining process in dealing with the institutional framework. Here we endeavour to present a relatively more complete picture.

Every proposed investor who intends to invest in (or expand on already existing ) manufacturing project, whether foreign or national, has to apply to the Ministry of Industry for approval. Such application is made on form A, entitled "Application to the New Projects Committee for approval for an Industrial Project" (a copy of which we append hereto, for ease of reference, as appendix F). Before completing the said form, the applicant is "strongly advised" to read a Ministry of Industry hand book titled "Guidelines for Completion of the Project Application form A to the NPC", which guideline explains to the applicant the requirements of the form in more detail.

The form requires the applicant to give an adequate description of the project. Such description must disclose what the project will manufacture and the franchise or royalty arrangement under which it is to be manufactured; the proposed and other possible location of the project, and the sponsors of the project, including who will provide management and technical know-how. Information is also

required on the name (or proposed name) of the project company, its authorized, issued and fully paid up capital and the share-holders as well as its profitability if it has been trading.

The applicant must further disclose the capital cost of the project and the source-structure of such capital: in particular, the foreign-local content; the terms of any proposed loan finance and machinery suppliers' credits and whether guarantees are required therefor and the source of overrun finance in case of under-estimation.

Other information required include the estimated construction and commercial production dates; profitability estimates (including estimated periods of grace); market possibilities and marketing procedures; details on factory; nature and source of machinery and equipment and technical processes and the procedure for obtaining the same; nature and source of raw materials; the basis upon which management services and technical know-how will be provided, the costs thereof and the form in which the same is to be paid; employment capacity and training programme; any protection and incentives required from the government; any future expansion envisaged, and, finally, details of environmental requirements of the project, and in turn, what effect the project will have on environment. This list is not deemed/ the exhaustive and the applicant is expected to give any and all information "which may be of interest or assistance to the NPC", including any feasibility/market studies prepared by the sponsors.

The said application is directed to the Secretary of the NPC. On receipt thereof, he, under normal circumstances, passes it over to "appraisal officers" within the Ministry. These officers are supposed to appraise the project as a

whole on the basis of the information provided in the application. Where this is inadequate, they may notify the secretary who then communicates this to the applicant. The latter is expected to provide the information required, otherwise the appraisal officers are entitled to judge the project on the available information.

Where the project is a "large and complex" one, and involves "a high amount of capital" the application is usually passed to the ISPC instead of the ministry's appraisal officers. When we inquired as to what constitutes a "large and complex" project and "a high amount of capital", the retort was that there is actually no set criteria except that where the proposed capital "runs into millions of (Kenya) shillings" and the project "requires a high level of expertize and experience to appraise, and may be, also necessitates the making of international enquiries and comparative analysis" the application in respect thereof will normally go to the ISPC. Each application is normally treated on its own to determine whether its appraisal should be carried out by the ministry officers or by the ISPC. Apart from having a "more experienced and qualified personnel", the ISPC also has "international connections" and is therefore better placed to analyse these applications in the light of similar projects elsewhere in the world.

The appraisal process is intended to establish, in the view of the appraisal officers or the ISPC not only whether the project is viable in the first place, but also whether it fulfils the criteria that is laid down by government policy on industrialization. After appraisal, a report thereon is forwarded to the NPC. It is on the basis of this report that the NPC confronts the negotiat ors on the applicant's side, drawing on the knowledge and expertize of members of the Committee themselves and also on the information and explanations provided by the applicant during the negotiation.

At the end of the negotiations the NPC compiles a report on its findings and recommendations and forwards the same to the Permanent Secretary in the Ministry who presents it to his minister. The report, together with any comments thereon by the minister and his Permanent Secretary is discussed by the Committee of the Cabinet on Economic Affairs whose decision on the matter is supposed to be final. The decision is then communicated to the applicant.

What criteria is the NPC expected to apply in its appraisal of the projects before it? They are numerous but there is no set of priorities: it is not a question of which is the most important criterion followed in order of priority. On the contrary, the NPC engages in/balancing act, its main aim being to establish to what extent a particular project satisfies the criteria generally. In the process, it may emphasize certain of the criteria in evaluating one project and different ones in respect of another. The weight each criteria carries varies from one project to the next, depending on the particular circumstances of each.

The criteria include the following:

- (a) the overall profitability of the project and the amount of local value-added to be generated thereby;
- (b) the net foreign exchange savings and/or earnings under the project;
- (c) the utilization of local raw and semi-manufactured materials, including any possible backward integration by which certain of the inputs are locally developed;
- (d) the degree of employment opportunities generated either directly or indirectly by the project, and the level of personnel;
- (e) the introduction of new skills through on-the-job and other training programmes;

- (f) the competence of those entrusted with the management of the project in terms of both qualification and experience;
- (g) the source and cost of technical processes and machinery and equipment;
- (h) the market structure, both national and international, in relation to the product proposed to be manufactured;
- (i) the effect of the project on the environment, and
- (j) in the case of direct foreign investments and local/foreign joint ventures, the level of capital inflow.

As can be seen, technology transfer plays some part, officially, in the evaluation of projects by the NPC, specifically in the form of an appraisal of the source and cost of technical processes and machinery and equipment, and of the introduction of new skills. But this is in principle, in practice, the actual part played by technology issues in the appraisal of projects is less distinct and less prominent than many appear. In fact, even in general, criteria as such /these sometimes get little consideration in practice and may at times be ignored completely or not given the prominence they deserve. The reasons are numerous, some applying to technology issues specifically and others to all or most of the issues relating to the criteria. A few will be discussed.

Firstly, Kenya has no firm and definite technology transfer policy and programme, nor a set of priorities in relation to industrial technology. Whereas it is clearly stated in the Fourth Development Plan (and most documents on industrialization in general and industrial technology in particular) that Kenya needs technology in order to achieve its industrial goals, and, further, that importation of technology is an integral part of this. In particular, those officers with whom this matter was discussed admitted that, indeed, as things were now, they had no guiding official policy and programmes on technology transfer. The best they could give was an apologetic justification on the basis of the Kenyan economy being a young one which needed "time

to formulate some of these things". They could not say whether such plans were at all in the pipeline.

Basically then, there is no elaboration on how best Kenya can ensure that technology is not only assumed to be transferred, but that it is actually so transferred. This means that the members of the MPC, (indeed, all those engaged in the appraisal of, bargaining over, and approval of, projects) have more or less to use their own ideas (if any) as to what constitutes technology, a proper transfer thereof, and a good and sure programme which will ensure such transfer in a minimum of time, and at reasonable economic and social costs.

It is of course arguable, like a one-time member of the MPC suggested with a cynical grin, that there is policy, and that the policy is to leave matters undefined! If this is the case, the question remains whether such a policy is proper for a system that claims to control and direct its economy for the benefit of the harambee, and in a world where strict and undiluted laissez faire approaches have been discredited as archaic even by their most ardent supporters, the "pragmatic" triumvirate of Western Europe, Japan and North America. Governmental control and direction and undiluted laissez faire economics are, indeed, strange bed-fellows.

Further to this, whereas the government insists that the technology imported must be "appropriate", what this means is unclear. We are not here talking of a definition simpliciter: aside from the fact that this is difficult to achieve, it is doubtful whether such an exercise is fruitful. We are referring to definitive criteria to which those who are engaged in analysis and bargaining with respect to technology transaction can



functionally relate. "Appropriate" technology, we were confidently informed by the Principal economist in the Ministry of Industry, the I.C.D.C. P.R.O. (a development economist) and a one-time member of the NPO, is that which satisfies the following criteria, that is to say technology which:-

- (a) will create employment opportunities and therefore utilise our abundant labour resources;
- (b) will either directly or indirectly contribute to the enhancement of our foreign exchange reserves;
- (c) will use and further develop local raw materials, and
- (d) is reasonably priced in terms of direct purchase costs.

We were invariably cautioned against pursuing academic and non-functional definitions which have no place in the "real" world, and reminded further that, of course, "appropriate" technology is not defined or elaborated anywhere!

That, at a general level, these are in themselves noble targets is a matter beyond question in our view. Neither can it be denied that they concern themselves with some very basic problems plaguing the Kenyan economy. It will be noticed, however, that these criteria constitute no more than, and are in fact a reproduction of the general criteria which the NPO applies in its general appraisal of a project as a whole and are not peculiar to technology as such. This would not be of a particularly negative consequence if there was a clear understanding of the notions involved; that is what level of labour-content, foreign exchange earning or saving, local raw material content or costs would be considered "appropriate" in relation to technology. The relativity involved in these

notions demands a comparative standard against which what is "appropriate" is measured. Such information was not forthcoming, apparently not because it was "non-existent". This is odd when one takes into account the fact that the notions have actually been used in the course of appraisal and negotiations. It appears more logical to assume therefore, that some standard must have been used, except that what it is is beyond articulation on the part of the officers concerned.

But perhaps the dual shortcomings discussed above should be seen in light of a third one which came to light during discussions: that technology transfer as such does not form a distinct subject of appraisal and negotiation. This is obviously out of step with the prominence that policy and rhetoric places on technology issues, and also with the significance of technological deficiency in an economy in general. The fact is that, as far as policy is concerned, technology is one of the factors upon which the government explains its open-door policy and protective attitude towards TNCs (the other significant one being capital). It is because the government believes that Kenya can in the process of industrialisation gain the TNCs' capital and technology that it welcomes them, gives them incentives and protects their assets. Coupled with the fact that Kenya is deficient in technology, this obviously suggests that technology is, or ought to be a crucial factor in negotiations with TNCs. Its transfer therefore ought to be brought up distinctly and discussed incisively in its own right with a view to establishing, all else aside, whether the project as such will transfer the technology it claims to embody, and whether such technology is in fact

necessary, and if so, whether the costs thereof are commensurate to the technology in terms of both nature and conditions of the transfer. The fact is that this kind of prominence is not given to the subject of technology transfer. In practice, it is assumed that negotiations on the matters mentioned implicitly entail an adequate discussion of technology transfer issues.

A fourth shortcoming of the process of negotiations is lack of adequate independent information, and partial or full ignorance in the particular field/bargaining. The negotiators/ of largely depend on the information given to them by the applicants. The official machinery that deals with data collection is, admittedly, "not yet" fully developed and gaps in the data are sometimes left unfilled or further information sought from the applicants themselves. Where gaps exist, then, depending on their importance, these will disadvantage the negotiators and inevitably have a negative impact on the negotiations in terms of the benefits to be derived by Kenya. Moreover, too much dependence on the applicants without other, independent, sources of information holds the danger that they can distort the facts to achieve their interests.

Further, there frequently are occasions when the negotiators themselves have little or no knowledge on some particular, but important, aspects of the field of negotiation, which means that they are less effective than they would otherwise be. A one-time member of the NPC put it quite graphically when he said:

"This is obviously not the order of the day.... But the problems it poses are real. It is painful when you look at a fellow negotiator and there is an obvious look of awe

(which...) suggesting he is overwhelmed by the mass of figures, explanations, technical detail, etc. etc. You realize that under these circumstances, apart from being a morale-booster to the adversary, and I put adversary in quotes, the possibility of engaging in successful bargaining is - well - diminishes. I have found myself in such a situation, but I have denied them the psychological satisfaction by looking confident and probing for answers. But I can imagine situations where sometimes even the questions are difficult to form. All in all, the effort is commendable and ... well, I suppose some of the situations can be explained and appropriate remedies found".

Akin to these and having the same practical effect are the relative lack of experience or expertise in bargaining and apathy and indifference, which may and do sometimes prevent the negotiators from using the available information and leverage to exact maximum benefits from their "adversaries". All these pose a real hurdle when placed against the fact that the Kenyan negotiators are invariably poised against representatives of TNCs. The TNCs' business operations are of international proportions and their experience is not only varied, but stretches back many years. Of equal importance is the leverage they hold in the form of that very capital and technology and the power they possess not only internally, but also in the form of the apparently remote but effective backing of their "home-governments".

Finally, there is the problem of "extra-economic" considerations: a situation where either the negotiators themselves or other government officials use criteria based on narrow individual interests rather than on socio-economic benefit to the national economy in general. It is obvious that if there is some conflict between the duty to protect the welfare of the society at large and personal interests in a negotiating process, it cannot always be guaranteed that the latter will not override. Indeed, this becomes even more likely when put in the circumstance of Kenya, where personal or individual aggrandizement is recognized and (ignoring the meaningless rhetoric of commitment to egalitarian social ideals), plays a direct role in the day to day life within the community. Becoming a "man" (or "woman"?) so to speak (that is to say, rising in the social ladder as an individual or a family), is more admirable than making a social contribution to the betterment of society at large. Individual enterprise and success, even if it at the same time contributes negatively to development within the community, and pushes the wider dimensions of society further down into the gutter, in development. Once the individual has "made it" - that is attained that narrow, but coveted, social position of "wealth and power" - he can then contribute to the "betterment" of the "unfortunate members of the society" through contributions to "worthy causes" in the form of "gifts" to harambee (self-help) efforts and charitable organisations (and, of course, in the process boosting further his social and, perhaps, political status). In a nutshell, an atmosphere of competitive capitalist existence based on primitive accumulation is not the best for

the kind of negotiations at issue, especially when those who either directly control or can use the state apparatus see a symbiosis of interests, real or imagined, with their very "adversaries".

The frequency with which this has been borne out in practice, in one form or another, leads one to believe that it is more or less the norm rather than the exception. Although most of the interviews were guarded and in some cases preferred to point an accusing finger at others in other levels of government, the cumulative evidence suggested, especially where TNCs were concerned, that this conflict of interest was quite common, and that it inevitably preempted a full-fledged well-balanced negotiation process.

This conflict of interest seems to manifest itself in two forms. On the one hand, there are situations where particular members of the negotiating team, because of the personal gains that they receive or expect, fail to use the available information and leverage to exact maximum benefits for Kenya during the negotiations and, in fact, take into account considerations that appear largely irrelevant. A case in point here is that of the negotiations involving Firestone Tire and Rubber Company of Ohio, U.S.A., preceding the establishment of Firestone East Africa (1969) Ltd. This case, together with that of the still-born H-Ren International - sponsored Ken-USA, seem to have gained notoriety in these circles. Although an ICDC<sup>3</sup> official's view was that:



"I cannot personally say that there was anything out of the ordinary. I prefer to believe that the negotiations in this case were bona fide, although I cannot in general rule out personal motives in other cases".

A one-time member of the NPC was more categorical, his retort underlined by a discernible angry tone:

"It was obvious that somebody somewhere was getting something out of it. I cannot say who or what. But you see, the atmosphere appeared ... was too cordial, too knowing, too ... I mean, when you get a situation where bargaining becomes or approaches confirmation ... But perhaps it is better unmentioned".

Of course, it cannot entirely be ruled out that this particular individual may also have had his own motives for his perception, but we have no information on this and cannot therefore confirm or deny it. However, the benefits that Firestone got from the "deal" are more consistent with the view that external "irrelevant" considerations played an important role in the negotiations. Despite the fact that there were nine competing proposals, Firestone got very advantageous concessions, including a virtual monopoly of the Kenya tyre market, a right to use its own sales-price formula, control of government participation level with a virtual managerial and technical control, duty-free import of machinery and material inputs, etc.

On the other hand, there are instances of the negotiators not being allowed to bargain freely owing to "interference from above": a situation where highly-placed government officials

dictate terms to the negotiators as a result of lobbying outside the bargaining forum. Again Firestone T.R.C. and N-Ran International sponsored projects came up as obvious examples, but amongst numerous others. The principal economist in the Ministry of Industry preferred to argue that if there was any "political influence" (especially in the case of the still-born N-Ran), it did not involve the NPC and could only have occurred after the Committee had finished its work because "it is difficult to influence politically the twenty or so odd members of the (NP) Committee".

Evidence from other sources, including a one-time member of the NPC and an ISPC official suggested that there were situations where the hands of negotiators were tied by the fact that their "adversaries" had "top level contact with government officials". This in itself meant that their "adversaries" were more confident and, consequently, aggressive, and, secondly that it could not be ensured that the proper criteria would be considered, thus minimizing the possible benefits to Kenya from the negotiation process.

In the private sector views of TNC executive representatives took three principal approaches to this question. The "diplomatic" approach preferred to look at it as a question of having good relations with your prospective business partners. A classic view went thus:

"It is normal in a process of negotiation that you take both a formal and informal approach. It is not out of tune with the informal approach to meet your partners and have light discussions on the sides. You will find people are freer, relaxed and more approachable under these circumstances".

He declined to comment on whether "light discussions on the sides" included handing out or promising certain material incentives to individual or groups during social gatherings or private, or Sunday-golf sessions.

The "aggressive" businessman's approach was well illustrated by this remark:

"The problem with academics is that they moralize too much. Business is business. I have heard it said before and I believe it is true, that business and philanthropy - I hope that is the word - or charity do not go hand in hand. So whatever can be done to achieve your interests and aims must be done if business demands it. And if others are approachable and well, except what you offer, why should I (sic) want to moralize over it. For academicians like you, it may appear hard, but that is business!

He protested at his compartmentalizing us, but he had made his point.

A third approach, which was as rare as it was pious, argued that, in fact, it was because business was business that it was necessary to have some sane and positive principles upon which to operate. One of the only two interviewees who expressed this view argued that:

"Seriously, business may be business as you say some of us argue, but that does not, at least in my view, it does not make it the same thing as mercenary work. There is something attractive about scratch-my-back-and-I will scratch-yours, and I know that international firms, especially those from my managing director's home-country-without

meaning any harm of course - these firms engage in it. But it has its risks. Surely if you have to scratch one's back to get your way, it is also obvious that when he leaves the position - as he must one time - when his authority disappears, you run the risk of being in disfavour. Unless you can scratch the back of everybody who matters. Perhaps that is why some of them struggle to control governments. But even governments you realize are not entirely indispensable, as events in the world show everyday. Some of us cannot afford to be in that kind of situation - so that you are always afraid of change. There is also another side to it: If you can't get what you want unless - in the normal way, without underhand means - it is an admission also that you are not competitive, or worse still, there is a lot wrong that you are hiding. Even psychologically, or may be morally, one is in a less precarious position without it".

He is Polish who has been resident in the USA for "several years" and technical director/PRC to the firm.. His managing director is American.

The only other interviewee who took a broadly similar view protested vehemently with a heavy Swedish accent made even heavier by his apparent conviction:

"It is wrong. It spoils the name of the profession, and business is professional(sic). I cannot accept a professional businessman engaging in unofficial or corrupting talk so that his investing terms can be accepted. He must face competition and if he has a good offer he does not need to do secret negotiations separate from the official.

That is bad business. I have heard about this kind of thing happening but it is bad!".

Whereas only two out of fifteen TNC representatives took this view, the ratio of those who took the first to those who took the second view was roughly one to two. "Bargaining" on the sides did not appear very uncommon and out of the ordinary, at least from the point of view of TNC executive representatives.

What appears then is that the process of negotiation is itself intertwined with other problems and issues in the society and these invariably affect it in turn. It would therefore be inadequate, indeed fallacious, to discuss it in the light of strict technology transfer issues only. A discussion of the official criteria only would be a misrepresentation of the bargaining process as these other socio-economic issues interact with it and give it quality.

Within the limitations one thing can at least be observed: that the possibility of Kenya not being able to get the full benefits out of this process is quite high. And this is not only due to the machinations of the TNCs, but also due to the weaknesses that encumber the process from the Kenya side. These must be kept in mind in the discussions relating to the understandings which result from the bargaining process and the activities consequent upon the latter, since they may help in explaining some of the issues which arise therefrom.

2. THE AGREEMENTS:

(1) Explanatory:

At the end of the negotiations, the results are generally embodied in a formal agreement or some kind of formal document. Obviously not everything agreed upon will appear in the final document, either because this is unnecessary in particular instances, or because they must not be so embodied. It is most unlikely, for example, that an agreement on the sides that an official, or his friend or relative, will be appointed as a director or agent or distributor of the project company if the application is approved will appear anywhere in writing, let alone being embodied in a legal document. Yet such "terms and conditions" are, as we have mentioned, just as important as those which are included in the consequent agreement.

One other factor that needs mentioning at this point is the existence of situations where "agreements" are not formalized as such. They are generally contained in the reports or in briefings, instructions or just general control and direction. This takes place principally in the case of full or substantial direct foreign investments where the local firm is either a wholly owned subsidiary of the TNC or has a nominal and largely inconsequential local share-holding. Our reference to the contents of agreements take account of the terms and conditions which prevail in such relations where they were made available.

The agreements are, in general, strikingly similar either in their provisions as such, or in the effects thereof. Apart



from these provisions which are obviously peculiar to each situation (for example, those on share-capital, its source and holding structure, or particular products or property rights), most provisions are fairly standard either in form or in substance or both. This may be explained on the one hand by the wide network of TNCs' operations which require standardization and the fact that the present stage of monopoly capitalism is characterized by unwritten understanding amongst the "monopolists" on the general rules of the game (where normal conditions prevail). On the other hand, the fact that the Kenyan negotiators are guided by more or less similar policy considerations may also contribute to this phenomenon.

And yet a third explanation may lie in the fact that most of the agreements analysed were drawn by one or the other of three firms of advocates, all of which pre-date Kenya's political independence and were until recent times fully white. Most of the partners were non-Kenyans who became citizens (where they did) when the world community became convinced that Kenya would be a peaceful and stable country, but some still easily refer to Britain as "back home". The indigenization process in these firms is quite recent, but in some cases, the integration of such indigenous Kenyans is characterized by sour relationships including lack of confidence in the indigenous (pervasive superiority complex?), caution and formality and a window-dressing approach. That such indigenous Kenyan gets a salary lower, and "enjoys" terms and conditions less favourable than a (white or brown) secretary is not seen to be odd in these firms (Freedom of contract, of course!). The relationship between these three firms and TNCs and their subsidiaries or affiliates stretches back-wards beyond the period of Kenya's

independent political life. Some of the partners, then and after, have acted as agents in the formation and registration of subsidiaries and affiliates of TNCs and also as nominees in share-holding. The firms themselves also act as general advocates of the said subsidiaries/affiliates in their day-to-day dealings. It is also not uncommon to find some of the partner holding positions of directorships or secretaryships in the said firms at one time or other.

Whereas our analysis of the agreements shall be based on the sample agreements appended hereto, we shall draw generally from, and relate such analysis to, the general body of agreements which we had opportunity to peruse. It should be noted that these agreements are sometimes given various names when their provisions or effect thereof are, in fact, similar. For example, investment agreements may be variously referred to as such, or as promotion agreements, or joint venture agreements where they relate to JVs specifically, and technical agreements as such, or as technical assistance, technical cooperation or consultancy agreements. Or they may not even be given such tags at all. Further, these agreements may be "integrated" or "specific". In the first case, one may find, for example, investment agreements which either have provisions relating to technical assistance, management services, and licencing of trademarks and tradenames, or contain schedules, annexes or appendices which incorporate such agreements. In the second case, one may find agreements which deal strictly with a specific area.

Owing to the fact that the agreements are more or less similar, it would involve unnecessary repetition if they were discussed depending on whether they relate to DFIs, JVs or non-investment licences. As such, we shall adopt the method of

discussing them according to their nature and type, which method allows more selective analysis. We shall, however, highlight any distinctive differences where they exist.

As a final preliminary point, let us here define the method of classification in relation to the means employed in the process of transfer of technology, and also the ratio of sample firms in each.

(a) Direct Foreign Investment:

In this category, we include only those subsidiary firms whose share-holding is 100% foreign, whether held directly or indirectly through nominees. We noticed, however, the tendency of Kenyans holding a nominal number of shares (sometimes one or two), but these are either advocates or other persons engaged in the promotion of the firms, or director or other executives whose holding of such shares depends on the term of their directorship, or such other position. And then there are also those situations where certain political figures or prominent businessmen hold a small number of shares in the subsidiary firms. These appear like cases of window-dressing or minimal patronage which should not, in our view, be regarded as cases of JVs owing to the very low level of local interest. We therefore, prefer to treat all these as cases of DFI rather than of JVs.

Whereas DFI has in fact been and still is the most prominent method used by TNCs in their global maximization of accumulation in the Kenyan context, its importance has been encroached upon by the hybrid JV. In fact, some of the present JVs between TNCs and the government or local investors were originally

cases of pure DFI whose nature was changed by the allotment of some shares to the latter. The significance of DFI is, however, still appreciable, this notwithstanding. Amongst the firms we dealt with, 35% were cases of DFI of which 91% were established before 1963 (see table IIA).

(b) Joint Ventures: The local content of share-holding in JVs in general varies greatly, stretching the whole length from 15% in some to 75% in others. With respect to our sample group, it is between 20% and 75%, about 40% falling in the over-50% local ownership category (See Table II:B). This local content is held either by the government or by members of the public in their individual capacities. In the case of government share-holding, the shares are held either by nominees (like permanent secretaries), or through statutory or parastatal bodies (like ICDC or Industrial Development Bank (IDB)).

In our sample group JVs constitute 50%. Of these, it will be noticed (Table II:B) that over 85% were established or became such after 1963. This is, in effect, a reflection of the tendency that has prevailed in the last fifteen or so years, that is the growth in the level of JV enterprises established by TNCs. This increase was confirmed by both the Principal economist in the Ministry of Industry and the PRO of ICDC. Their explanation was that it was a reflection of the government's policy to curtail its stake in the TNC - sponsored projects for at least four reasons.

The first was based on overall governmental concern with the economy of/country: Since Kenya has a policy of both /the public and private enterprise, it is just a matter of common

sense that the government should engage itself in enterprises in partnership with private investors, so the argument went. Secondly, participation would ensure that the government had some control over the direction of development such firms would take by contributing to policy decisions and day-to-day running of these enterprises. Thirdly, JVs were one of the methods through which the government could use capital from the private sector, especially that of the TNCs, in its effort to maximize investment in certain "crucial" areas of the economy. And finally, it was felt that the government could benefit by sharing the profits made by these enterprises, over and above the revenue received in the form of taxes and other levies.

That TNCs did not only acquiesce in, but, in many cases (and especially the relatively larger and well-known ones) preferred JVs was explained by the same sources on the basis that the TNCs recognised the inevitability of government concern, and, more importantly, that the Kenya Government was a stable, peaceful one with which it was easy, and even enjoyable, to work (1).

That JVs are becoming significant and increasingly popular was also confirmed by executive representatives of TNCs in the private sector. The reasons given were varied. It was argued, firstly, that JVs enabled TNCs to benefit from local capital-contribution, thus lessening the risks related to the volume of capital investment.

Secondly, JVs enable the TNCs, through sponsored enterprises, to contribute to government revenue (over and above the traditional modes of levying) by profit-sharing, since, as one executive director put it, "we are concerned about development in this country as much as the government and, therefore take pride in knowing that, through a joint venture we can contribute more to this than we otherwise could".

Thirdly, the importance of JVs was also a reflection of the confidence that TNCs have in Kenya's "pragmatic leadership". "We are proud to be associated with such a stable, beautiful and prosperous country, its government and people, and we have nothing to lose in it", exclaimed an American executive, with an enthusiasm bordering on naivety. Such slogans as "Partners in Progress", "With full confidence in Kenya's future", "Kenya's future is, our future", "Fully contributing to Kenya's development", "We are proud to be associates with Kenya" etc. etc. aptly express this "confidence".

Finally, JVs ensured government support as a result of its stake therein. This last explanation was not expanded (may be deliberately) to its blunt and practical limits, which was simply that, in terms of both risk and benefit, the TNCs engaged in JVs were better guaranteed owing to the government stakes. The government has an interest in both their continuance and their profitability. This not only ensures political support, but also makes it easier for such firms to demand and get specific protection and advantages. In a sense, the phrase "our company" is more palatable when applied to a JV than to a wholly-owned subsidiary of a TNC. This is obviously more advantageous



to the TNCs when translated into concrete concessions like exclusive manufacturing franchise and market (monopoly); duty-free importation of raw materials and other inputs; absolute control of product sale-price; etc. Apart from this, the TNCs can use their Kenyan counterparts in the JVs to push the government to grant required advantages. The possibility is that the government is likely to be more sympathetic to "one of its own" than to a foreign executive. Ultimately, the sense of belonging that JVs give the government also ensures security and additional benefits to the TNC - sponsors.<sup>3A</sup>

Finally, it is necessary to briefly comment on the question of ownership and general control with respect to JVs. In general ownership and control in these enterprises seem to be equated with share-holding. This is, however, contrary to the actual situation. There are enterprises in which the government actually holds over 50% of the shares, as opposed to those in which it holds the minority shares. Whereas it appears logical to argue that the majority is in effect the decisive force as far as policy of a JV enterprise, and implementation thereof, is concerned, the actual facts reveal that share-holding is just one factor amongst others and is frequently unimportant, especially in relation to policy decisions. These others include: the actual understanding of the share-holders of both the overall and the day-to-day operations of the enterprise (a rare commodity); the nature of persons appointed to look after the interests of the share-holders (their number in relation to that of foreigners; their ability to handle

the affairs of the enterprise; their dedication to, and interest in their work, and their relationships with their foreign counterparts); and, most importantly, who exercises managerial and technical control within the enterprise. The last of these is quite crucial to actual control. It is these people who possess intimate knowledge of the actual operations of the enterprise and its future capacity and direction. In many respects, even formulations of policy by Boards of Directors take direct account of their reports and activities, not to mention that in many cases they form a constituent part of the boards. Yet it is in this area where Kenya seriously lacks representation, many of these positions being occupied by the foreign "partners in progress" who, despite this appellation, quite understandably owe their first allegiance to their headquarters back home rather than to their "partners".

(c) Non-investment Relationships: Here we deal strictly with situations in which there are agreements between TNCs owning technology and wholly-owned local firms using such technology. The distinguishing factor here is that the TNC has no stake in the capital investment and simply sells technology and related know-how to the local investor, this being their only relationship. It is possible to have, and, indeed, there are, situations where the TNC or its subsidiary that supplies these requirements to the local investor is also locally incorporated.

In the Kenyan context, this non-investment relationship is quite rare as compared to the first two forms of "co-operation", probably because it is easier for TNCs or their subsidiaries to supervise and control the process of transfer of technology

in those first two forms, and further because the returns are higher. (In the case of DFIs and JVs, returns also accrue in the form of profits and other incomes unrelated to licensing fees and royalties). Thus, the situations where this relationship exists constitute only 15% of our sample firms.

(ii) Investment Agreements:

Although transfer of technology through DFI by definition involves investment of capital by TNCs in an enterprise established in Kenya, there are many instances where the terms of such investments are not embodied in a formal agreement. This is most likely because there are no other parties in the structure of capital investment save the relevant TNC either directly or through nominees. Under such circumstances, there may be necessity for embodying the commercial arrangements in any formal contract. In all the DFI cases that we dealt with, we were informed that there were no formal investment agreements, the relationship being based on general corporate understanding (which was just as binding), and on various inter-corporate documents. However, investment matters are also outlined in the application documents which the investors submit to the NPC.

Investment agreements define the wide-ranging conditions under which the investment takes place, and the relationship between the investors. Matters of technology as such are only a small part of what they deal with. Whereas the temptation here may be to concentrate on these to the exclusion of the other matters, we will not adopt this position. On the contrary, we will deal with all the important wide-ranging

provisions. They, in our view, form an integral part of the process of technology transfer and, indeed, define the circumstances under which technology transactions take place.

(a) The Project: The project gets very brief mention in the agreements, and is usually presented in terms of the overall objectives of the investment. Essentially, the agreements simply mention the fact that the investment is intended for the establishment and equipment of a factory for the manufacture or assembling of particular products (for example vehicles) their distribution and marketing, and also the site of such a factory (Nairobi, and its industrial satellite - towns, and Mombasa are quite attractive as project sites). Quite rarely, the training of local personnel may also be mentioned as one of the prime objectives. More often than not, however, this is dealt with as part of the specific obligation of the foreign sponsor rather than as one of the overall objectives of the project.

It appears then, that the description of the project in the agreements is merely intended to reveal no more than the general area in which the investment is made. This is understandable for at least two reasons. First, the investment agreement is a legal document mainly intended to define the overall interests and obligations of the parties rather than a detailed project analysis. Secondly, the project will presumably have been described in detail elsewhere (specifically in the application and accompanying and additional documents and the report which follows upon the project appraisal).

(b) The Project Company: Invariably, the formation of of a new company or the local registration of a foreign one is provided for in the investment agreements. (Even in the case of DFIs, where the foreign sponsor holds virtually all the shares, the usual practice is to incorporate a new company - sometimes several - locally to carry out activities on behalf of such sponsors). Such provisions stipulate the name of the new company and its share-capital, and, where it is a JV, the proportion in which each of the parties shall subscribe to the shares or any future increase thereto. (Quite often, the name borne by the new company is substantially similar to that of the foreign sponsor).

Whereas the local content of the share-capital is paid in cash, the foreign content is paid either in cash, or by the capitalization of accounts payable to the foreign share-holders on the books of the new company. Sometimes both cash and capitalization methods are engaged. Such "accounts payable" may, initially, be in respect of transfers of plant, machinery and other equipment to the new company, or of any reimbursements due from the new company to such share-holders. They may also, eventually, encompass any fees that may become due and payable to such share-holders in respect, for example, of such items as technical or management services.

Provision is also usually made for the reimbursement of any pre-formation or formation expenditure on the new company to the foreign sponsors. This situation appears anomalous since under normal circumstances, those who promote companies do not usually get this kind of reimbursement, this expenditure being

regarded as necessary to the overall investment whose benefits will be enjoyed when the project eventually becomes profitable. Further, there are difficulties attendant to proving the genuineness of the expenditure, seeing it includes even expenditure incurred abroad, not to mention the possibility of collusion resulting in a form of the now legendary "transfer pricing". Such "expenditure" usually means "any expenditure necessarily and directly incurred or paid ... for the benefit or account of the new company", which includes, but is not limited to, those payments directly made in respect of incorporation; land survey and acquisition costs; loan negotiation and acquisition expenses; feasibility study costs, and any legal fees paid in respect of any of the above. The overseas sponsors generally decide who will render any services in respect of any of these matters, a factor which may sometimes result in high expenditure (based on foreign standards), where equally good and sometimes better services could be engaged at cheaper rates.

Based on the possibility that after the incorporation of the project company and the full subscription for all the shares in the capital thereof, the company may (and usually does) need additional capital funds, the agreements provide for the borrowing of such funds, sources of which may be either foreign or local. In some cases, the amount to be so borrowed (and the schedule for such borrowing) is actually specified, but is subject to revision. Finally, although the project company is in some cases still in formation when the agreements are signed (and cannot, therefore, be party thereto) it is usually made a party by either express inclusion, or by a subsequent or supplemental



agreement so that it becomes a beneficiary of the rights, and suffers the obligations, contained therein.

(c) Obligations of the Investor - The Government:

The following are the substantive obligations which the government accepts to perform in its relationship with the investor—investors:

(1) Status of investment and foreign employees:-

Invariably, the government undertakes to grant "approved enterprise status" in respect of foreign investments under FIPA, and also accepts that such investments qualify for protection under bilateral arrangements that may exist between Kenya and the country of origin of the investors. In some cases, the provisions of FIPA and such bilateral arrangements, "as at present in force", are deemed to be incorporated in the agreement.

A most far-reaching provision was found in at least three agreements: it grants a monopoly status to the respective firms so that the government undertakes not only that the investment is protected, but also that no other enterprise, firm, company or individual shall be permitted to engage in the manufacture of similar products for a specified, reasonable period (ranging between five to eight years). And flowing from this, no approval may be granted by the government under FIPA or the Exchange Control Act (ECA) or "any future comparable legislation". The provision in fact stretches to importation of these products, which is subject to quotas and import licenses to prevent "excessive stockpiling", regard being had of the ability of the firms to satisfy local demand (only in terms of quantity, not quality!). This, apart from restricting the government's hand

in accepting and despersing further industrial activity in the affected products goes against the capitalist principle of "competitive production" which is intended to ensure that only the most competitive producers stay on the scene. It holds the possibility within the present system of production that the producer may introduce into the market goods of a low quality because of lack of competition as well as comparative standards.

Further, the government undertakes to issue promptly upon application such entry, work and residence permits under the Immigration Act<sup>5</sup> as may be required for such foreign employees (and their dependants) employed by the project firm. In some cases, the number of such employees, and the period (renewable) of their stay is also given in the agreement. There is generally no schedule for their reduction. In the only case it exists, it does not go down to zero foreign employment, which would, indeed, be compatible with a full transfer of technology and related know-how.

(2) Factory site and services:- Whereas in most cases the government undertakes to grant the project firm land for a factory in or near Nairobi, and in many cases selected by the investor or the project firm, in some, it undertakes merely to help the investor or the project firm to procure site-land suitable for the relevant factory. In the former case, the term of the grant and the minimal stand premium and annual rent are also provided in the agreement.

In both cases, the government undertakes that such site shall be adequately provided with such services as road or rail access and other communicational links, water and electricity supply and sewage systems. However, extensions for the particular and exclusive use of such firm shall be made by the firm.

(3) Imports and exports:- In a majority of cases, the government permits the unrestricted importation of construction materials, machinery and equipment and components, as well as spare parts, raw materials not produced in sufficient quantities and quality locally and, in some cases, fuel free of import and customs duties, and any other tax. It, further, undertakes to procure unrestricted export licenses with an accompanying exemption from export duties or grant of duty draw back on exportation of manufactured goods. These obligations, apart from denying the government essential revenue, are also attended by the risk of abuse of the "unrestricted license" which puts the discretion ent rely into the hands of the firms. Unnecessary use of foreign exchange in the case of unrestricted imports may also result, especially when the government is also under obligation to make available "necessary" foreign exchange.

(4) Foreign Exchange:- The government is under the obligation to procure all necessary permissions and consents under ECA, and, further, to make available necessary foreign exchange as and when required for purposes of paying for imports, loans, and interests thereon, and services rendered, and of remitting permitted funds (including those belonging to foreign employees) And where rationing becomes necessary, the government is denied the freedom to decide on, and give preferential treatment to, priority areas by being required to give equal treatment to all.

(5) Finances and payments:- The government undertakes to give permission to the project firm to take loan from outside Kenya, and to repay such loans, and interest thereon as agreed with the lending institution. In at least two cases, the actual amounts that the firms are permitted to borrow at a time (not within

(d) Obligations of the Parties - The TNCs:

In contrast to the obligations of the government (which are wide-ranging and numerous) those of the TNCs, are quite limited,<sup>6</sup> except in cases of integrated investment agreements.<sup>7</sup> They include an undertaking on the part of TNCs that they are duly established corporations, firms or companies according to the laws of their home countries; that they are duly authorized to enter into the relevant agreements, and that their execution and performance of such agreements do not violate any existing contracts or obligations. They also undertake to ensure that the project firms become party to the agreements and perform their obligations, beginning with preparation of the factory, through to continuous and profitable manufacture of the products. Finally, they undertake to execute and maintain any further agreements which may be necessary to ensure production of the relevant products.

(e) Settlement of Disputes and Governing Law:

All agreement exhort the parties to carry out their obligations "in the spirit of mutual co-operation and good faith" and to solve any disputes or controversies that may arise "amicably". They, however, recognize that this may not be possible at times. In this event, the dispute, in all cases is to be submitted to arbitration. (Only in one case is international conciliation provided for).

The procedures for choosing arbitrators and for conducting the arbitration take two forms depending on which process is chosen. As is to be expected, they all provide for involvement of international arbitral processes. In all the cases, either of two international organizations are provided for, the first being the International Centre for the settlement of investment Disputes (ICBID), and the second, the International Chamber of Commerce (ICC).

a particular period of time), are stated in the agreement: not exceeding 15 million US dollars in one case, and not more than 22 million US dollars in the other.

The government also recognizes that any payments made to foreign investors under such agreements as technical assistance, management and licensing are deemed to be reimbursements of expenses actually incurred and shall therefore be granted approval under exchange control regulations, shall not be subject to tax reduction and shall be deductible in computing the local firms taxable profits.

(6) Products sale-pricing:- the pricing of the products manufactured by the project firms is recognized by the government as a prerogative of such firms, but a further rider is added that in any case, the government shall permit the sale of such products at prices including a "reasonable profit" above total ex-factory costs. Possibilities of the government exercising price-control are recognized, but without prejudice to the "reasonable profit" clause.

(7) Treatment of firms:- Apart from promising all possible incentives and concessions to the project firms, the government further undertakes to give full protection from unfair competition by means of "dumping" through such measures as duty customs regulation, and licensing quotas. In addition, the government is to ensure most favourable treatment by all internal competent authorities which may concern themselves with the operations of the project firm. In at least two cases, withdrawal of the foreign investor is envisaged where the government in any way makes the profitable operation of the firm impossible.

(8) Submission to jurisdiction:- Finally the government undertakes to submit to the jurisdiction of whichever authority is designated to settle any disputes arising from, or in relation to, the agreement.

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The ICSID was established under article 1 (1) of the Convention on the Settlement of Disputes Between States and Nationals of other states, 1965.<sup>8</sup> The Convention, which was formulated by the Executive Directors, and under the auspices, of the International Bank of Reconstruction and Development (IBRD) (generally known as the World Bank), and submitted to governments on March 18, 1965, entered into force on October 14, 1966. Its main aim was to provide international commerce with international methods of settlement of disputes where these proved appropriate. As at January 10, 1977 (the latest figures available), 72 states had signed the convention. Of these, 67 had also ratified it and attained the status of "Contracting states". Kenya specifically signed it on May 24, 1966 and deposited its instrument of ratification on January 3, 1967. The Convention entered into force in relation to Kenya on February 2, same year.

The ICSID, which is seated at the IBRD headquarters in New York USA, was established "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention"<sup>9</sup> or, more elaborately:

"to be available to the parties to international investment arrangements concluded between Governments or public agencies and foreign private investors by providing them with an assured forum on which they may agree for the settlement of future disputes by conciliation or arbitration, and to assist in settling disputes that have already arisen"<sup>10</sup>

The procedures<sup>11</sup> for arbitration under the aegis of ICSID are laid down in both the Convention<sup>12</sup> itself and the Rules of Procedure for Arbitration Proceedings. Arbitration proceedings are conducted,

with the consent of the parties by the Arbitral Tribunal which, after receiving relevant evidence, gives an award in accordance with the decision of the majority of its members. The award is subject, on request of either of the parties, to interpretation and, where justified, revision or annulment by the same tribunal. Generally, arbitrators and conciliators must be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement."<sup>13</sup>

The ICC, based in Paris, France, is an international non-governmental organization formed immediately after World War I with the aim of representing business circles internationally at all levels of activity through its affiliation with national bodies representing Commercial interests. Its arbitral body, the court of Arbitration, was formed in 1922 as a system of organizing arbitrations to settle disputes arising from international contracts. Procedure for conciliation and arbitration is currently governed by Rules of Conciliation and Arbitration of International Chamber and Commerce, 1955<sup>14</sup> which entered into force on June 1, 1955.

The Arbitral Court does not itself settle disputes: it is merely a supervisory body. On receiving a party's request for arbitration, replies thereto, and any other memoranda, it:

(i) supervises the appointment of the Arbitration Tribunal whose members are appointed, either by the parties and confirmed by the Court, or where there is no agreement, by the court;

(ii) decides the place of arbitration, and,

(iii) determines the amount to be deposited by the parties for fees and other expenditure.

The Arbitration Tribunal is responsible for conducting the proceedings. After hearing the submissions of the parties and

ascertaining the facts in relation to the issues raised, the Tribunal gives an award by a majority vote where there are more than one arbitrator. Where there is no majority, the Chairman of the Tribunal alone shall make an award. The arbitral award shall be final.

These are the two international arbitral processes that the agreements envisage. The spread between the two is more or less 50%. Only one of the agreements states the place of arbitration, that is London, England. Presumably, the others envisage the place where the two arbitral processes are respectively situated, that is New York in the case of ICSID, and Paris in the case of ICC. It is also possible that they leave this to be determined at the time of dispute according to the rules of procedure of the respective processes.

In all the agreements, the government undertakes to submit to the jurisdiction of the arbitral institutions, thus giving the requisite consent in advance. In at least three agreements, the provisions go slightly further than merely stating the process of arbitration to be followed. They also state the number of arbitrators (but not the procedure for their appointment), and provide for an undertaking by the government that it shall not raise the plea of sovereign immunity to counter arbitral proceedings. Additionally, they specifically provide that the rights of the foreign investor to seek arbitration, or take any steps pursuant thereto, shall not be affected by the fact that it has, on a conditional or absolute basis, received partial or full compensation from any third party, ("whether a private person, a state, a governmental agency or an international organization"), in respect of any loss or injury that is the subject of the dispute.

As far as governing law is concerned, all but four agreements provide for their formation, validity, construction and performance to be governed by the laws of Kenya. Of these, one also includes "applicable international law", besides Kenya laws. Two agreements are governed by the laws of the USA in general, and the relevant states in particular, and two by the laws of the "United Kingdom of Great Britain and Ireland".

It is arguable that these provisions relate to arbitral processes that are alien to Kenya. The IBRD, under whose aegis the ICSID operates, has not been known to be particularly sympathetic to the independent development of the economies of the so-called developing countries, not to mention that it is controlled substantially by the capitalist nations. It must be remembered, however, that Kenya's relationship with IBRD has been better than that of most of such countries, perhaps because it is more amenable to the process of reproduction of capital by the international bourgeoisie and bourgeois institutions. The ICC, on the other hand, was formed at a time when the focus of commerce was the Capitalist World, and specifically to protect private interests of capitalist entrepreneurs.

It is also arguable that the processes involves a lot of inconvenience and high expenditure on the part of Kenya, seeing that the centres are either in Europe or USA. To involve itself fully, Kenya has to either hire representatives abroad, or send them from here. And then there are witnesses and other personnel who may need to be ferried to the centres. There are definitely problems of delay in communication and expenses involved, quite apart from the foreign nature of the law and processes, and the psychological disadvantage that may be associated with the atmosphere.

All these are arguable. There is indeed, no reason at all why Kenya should undertake to submit to the jurisdiction of the respective tribunals, precisely because the investors have accepted that the Kenyan socio-economic atmosphere is conducive to investment and accumulation, and should, therefore, accept to be governed not only by the Kenyan laws, but also by the judicial and quasi-judicial processes of the country. After all they preach full confidence in Kenya.

However, the arguments though largely valid, are, as at now, unnecessary. They are unnecessary precisely because the provisions under discussion are presently more or less dormant. The present system is sold to foreign private investment and is consequently, engaged in a continuous exhortation of private foreign investors to come and invest in Kenya. The protection of foreign private investors is systemic: it stems from the belief of the ruling classes that development lies in foreign private investment (for from this comes our capital and technology!). Therefore, the demands of such investors should be promptly met. It is, under these conditions, unthinkable that any "disputes" can arise that require even international conciliation, let alone arbitration. Not because the foreign investors in Kenya prefer amicable settlement of disputes. On the contrary, it is because the government goes out of its way to accommodate foreign investors and to avoid disputes. Where they arise it strives to ensure that these are resolved in a way that satisfies the foreign investors (lest it scare away the investors, the geese that lay the golden eggs!). Indeed, the principal economist was at pains to point out that the relationship between the government and the general body of foreign investors is, on the whole, quite good. He could not remember any case where it was necessary to resort to any

"unnecessary" wrangling.

The foreign investors in the private sector confirmed this verdict, the general opinion being that the government understood fairly well the "importance" of these investors to the economy and treated them accordingly, answering to their needs "appropriately".

These provisions may, therefore, look objectionable, but this is "mitigated" by the fact that their rate of application has so far been zero. They may become important if and when the attitude towards TNCs changes from what it is now. And, perhaps, it is this eventuality that they are intended to cater for.

(iii) Technical and Management Services and

Licensing Agreements:

Our treatment of all these agreements together has been prompted by at least two factors. First, they are all intimately connected:

they all relate directly to the process of transfer of technology. Secondly, the use of the appellations ("technical services" etc. agreements) in practice appears unsystematic. It is very often that these appellations are, in fact, no indication at all of the nature and extent of the specific subject-matter: more often than not, an agreement referred to by one name may be dealing with all aspects of technology transfer. Pure or specific agreements seem to be quite rare, at least in our samples. This may be as a result of the desire of the parties to cover as much ground as possible, and to include in the particular agreements any matters that could reasonably be connected with those directly in consideration.

A more fundamental explanation seems, however, to be in the nature of the transfer process itself: the fact that, in almost all



cases (indeed, including non-investment arrangements), there is a high element of packaging. The tendency is that one foreign supplier (either directly or through subsidiaries / affiliates or other concerns in which such suppliers have an interest), supplies most, and in many cases, all, of the technological components necessary for a particular industrial complex, or otherwise determines such source. The effect of this is to create a situation where the distinction between the different components of technology being supplied, and the conditions under which each is so supplied, becomes blurred. The overall tendency in this case is to treat all these components in one formal agreement. Although there were two cases where each of the important components of technology was the subject of a different formal agreement, they were, nevertheless all supplied by one foreign firm, either directly or through a declared "wholly-owned subsidiary company". And even in these cases reference to the other relevant agreements, and sometimes, inclusion of some provisions in several of them, appeared inevitable from the point of view of the parties.

The approach in analysing these agreements then, will be to identify the specific areas relevant to each particular type of agreement and the provisions relating thereto, and then to highlight more distinctly, the extent to which the formally limit or restrict the effective access to, and diffusion and use of, technology.

Samples of agreements in respect of each are appended hereto for purposes of reference ( appendices G to M inclusive).

(a) Technical Services: Basically, provisions on technical services deal with three main areas in relation to technology, namely, the disclosure, communication or furnishing of technical data; the supply of equipment and other inputs; and the offer of training facilities for personnel of the recipient firm. A fourth area is the over all consideration given by the recipient (that is,

costs).

(1) The furnishing of technical data:- The foreign counterpart agrees to furnish the local recipient with technical information or data, or trade secrets (including inventions, whether patentable or otherwise), and to give full advice and assistance in all matters within its competence relating thereto. The information to be so furnished relates to such varied items as the building, design and layout plans for a suitable industrial facility; machinery and equipment planning, assembly, operation, inspection and service, and processes or formulae for the production of the relevant products. In a small number of cases the relevant items are mentioned. However the prevalent situation is simply the provision of a blanket statement that the foreign counterpart will "disclose any and all technology and know-how relating to the manufacture and selling of the products" or "furnish information or trade secrets in sufficient detail to enable the commercial/production of products of a quality comparable to that of those manufactured and sold by (it) and its subsidiaries" or "which (the foreign counterpart's) experience indicates to be important in the (local firm's) manufacture, use or sale" of the relevant products.

This pledge to furnish information usually relates only to specific products, which in all cases are mentioned and are referred to either as "licenced products" or simply as "the products". But the agreements also allow for the addition to, or improvements of, these products, in which case information relating thereto shall be furnished, usually at the request in writing of the local firm. Also included is the possibility of furnishing information relating to future inventions, or new process or machinery for manufacturing either same or new products, but with no obligation on the foreign counterpart to supply the same on request.

In all cases any information furnished is so done on a confidential basis and must be used only for the particular purposes it is furnished, and in the specific manner provided by the understanding. The recipient is obliged not to transmit or to disclose or make available the information to any third party other than its employees (and only to those whose duties require such knowledge, and to the extent reasonably necessary for the performance of such duties) under any circumstances, or except with "prior consent" of the supplier. The latter has no obligation to give such consent. (In some cases, the recipient is also required to get a commitment from such employees that they will not transmit the information disclosed to them either during their employment or after the termination thereof). This obligation to keep information confidential subsists during the term of the agreement and continues after its expiration, either indefinitely, or before the expiration of a specified period (varying between five and ten years), or until such information shall have come into the public domain (meaning that it generally becomes available to the other manufacturers of similar products). The recipient is further obliged not to use the information for the manufacture, use or sale of any products other than the specific products, and then, only in the place and within the territory designated by the agreement.

Finally, although in some cases the supplier represents that the information supplied is that which is available to, and used by, it and its subsidiaries, it makes no representation or warranty, and accepts no responsibility, with respect to the information or its application or use. The same applies to personnel made available for the purpose of transmitting the information or giving advice or demonstrations in connection therewith. Some 70%

of the agreements go further than this by specifically providing (but without prejudice to the generality of the blanket provision), that the supplier shall not be liable for damage resulting from the use of the information, assistance or advice, and that no warranty is given thereby as to the final product in terms of quantity or quality. The recipient shall, therefore, indemnify and hold harmless the supplier from any direct or consequential liability.

(2) The supply of equipment, machinery and other inputs:-

All agreements provide that the foreign counterpart shall either supply, or assist in the procurement of, instal and put into commission, all machinery and other equipment necessary for the establishment and operation of a facility for the manufacture of the relevant products, and also offer advice on, and assist in, maintenance and improvement. What this entails in practice is that the foreign counterpart is responsible for the design and layout of the factory buildings as well as of the plant and equipment and their installation; in other words, the whole process of putting up a functional manufacturing facility.

With specific reference to machinery and other equipment supplied, certain obligations are placed upon the recipient. The first of these is that the latter shall not purchase or procure machinery and other equipment except within the terms and spirit of the agreement. This, in effect, means that the recipient has to procure the same either from, or with the assistance or advice of, the foreign counterpart. Further, a blanket provision requires the recipient to use the machinery and such other equipment in the specific manner, and for the specific purposes, provided by the agreement or "as understood by the parties". In a number of cases this is the formal extent of the provision, but its meaning is understood to encompass a whole range of obligations comparable

in effect to those specifically provided in agreements which formally go beyond this blanket provision. They include the obligation: (i) not to sell or re-sell machinery and such other equipment to others within a defined territory (usually Kenya, Uganda and Tanzania, and, rarely, Kenya only), or in any other way dispose of them without the prior written consent of the foreign counterpart; (ii) not to use or engage the machinery and equipment in the manufacture and sale of products other than the specified or licenced products; (iii) not to use or engage the machinery and equipment in the manufacture, sale and use of licenced or other products outside the defined territory; and, (iv) not to imitate the supplied machinery and equipment, and, further, not to buy, from any source whatsoever, any machinery and equipment which is the imitation of those supplied, without the express permission of such foreign counterpart.

In all cases, the type of machinery and equipment, and the expenditure involved in purchasing or procuring it is not stated in the agreements. One would, therefore, assume that questions of costs and other expenditure are left to later negotiations. However, in practice, the suppliers usually determine these and merely inform the local counterpart. Overpricing cannot in this case be avoided, especially when put against the background of certain prevailing conditions. On the one hand, there are situations where the recipient is, in effect, a representative of the supplier, in which case any overpricing, seen as one of the means of repatriating funds,

cannot be contested or revealed. On the other, there is, admittedly, lack of information and comparative data on the part of some of the recipients so that over-pricing is not even known. And finally, there are yet those situations where there is actual collusion between the suppliers and local personalities so that such over-pricing is in fact glossed over.

There are two agreements in which some loose manner of pricing and paying for the machinery and equipment is provided for. Both agreements provide that these will be supplied at the supplier's "regular sales prices," or "in the case of machinery usually manufactured by the (suppliers) for its own use or for the use of its subsidiaries, and for which there is no such regular sales price, at the total cost thereof to the (supplier) plus" 10% in one case, and 15% in the other. The recipients are required to pay for packaging, insurance and freight from the factory, payment for the machinery being made in full in London in one case, and New York in the other. (The suppliers also have the discretion to require the recipients to open and maintain irrevocable letters of credit in foreign currencies with banks in the formers' home countries),

The costs of the machinery and other equipment are paid either in cash, or, in cases where there is also investment by the foreign counterpart, by the allotment of the appropriate number of shares in the recipient firm following the capitalization of such costs.

Finally, the foreign counterpart also agrees to supply, or assist, or act as an agent of the recipient firm in the procurement of, raw materials. Again, the relevant raw materials and the attendant expenditure are not specified in any of the agreements. However, the same two agreements referred to above further provide that where the foreign counterpart is acting as a buying agent, it is entitled to keep and retain any discounts, commissions, rebates or other emoluments



or deductions paid or allowed to it by the suppliers, and also to charge the recipient a commission (ranging between 1% and 5%, depending on the type of goods procured) on the total purchase price of the raw materials supplied or produced.

(3) The offer of training facilities:- Only about 57% of the agreements specifically provided for the offer of training facilities by the foreign counterpart. Under these agreements, the supplier agrees to allow access of a selected number of the recipient's employees or representatives to its own or its subsidiaries' factories, plants and machine shops for purposes of inspecting their operation. Further, the supplier agrees to furnish technical training to such persons and assist them in the study of the products which are the subject of the agreements. The time, place and duration of such inspection and training is, in half the cases, to be mutually determined, and in the others, to be determined unilaterally by the supplier. Which party decides the particular employees or representatives who are to engage in the programmes, and their number, is not provided in most cases. In the three where it is, this is to be done by the recipient but with the approval of the supplier. However, the recipient is wholly responsible for all the expenses incurred, including salaries, maintenance and travelling expenses of such persons.

(4) Consideration for technical services:- Technical services are, of course, not offered gratis. They are bought. As such, all the agreements provide for some payment for services rendered (or purported to be rendered). However, the payments considered here do not include the prices of machinery and equipment and raw materials as such, which as has been observed, are usually determined, as and when the need arises, by the supplier and communicated to the recipient. Neither do they include expenses connected with the offer of training facilities which are

not provided for in the agreements. But they include payments for services, related to machinery and equipment in the form of design, plant lay-out, equipment specification, installation, etc.

The payments to be made by the recipient for technical services rendered vary from one agreement to the next. However, 50% of the agreements provide for payments, alternatively, of either a fixed amount or an amount calculated on the basis of performance of the recipient firm, but with the rider "whichever is the greater". A few sample provisions will here suffice.

Sample A: a. In payment of all design ... and pilot run-up supervision, a total fee of Shs. 1,978,000/- net of withholding tax will be paid ... and payment shall be 20% on signing this agreement and thereafter 40% ... on 31st December, 1975 and 20% ... on 30th June, 1976 and 10% ... on 31st December, 1976 and 20% ... on 30th June, 1977, subject to increase should the actual costs exceed the above, but no reimbursement should they be less.

b. Commencing on the 1st October, 1977 the company shall pay annual (technical service) fee of £ 30,000, or if greater 8% ... of the company's gross adjusted profit in each financial year of the company.... In addition, the company shall reimburse the Technical Advisor monthly for all costs, charges and expenses incurred by the Technical Advisor with the consent of the Board in performance of the Technical Advisor's duties hereunder and not disbursed

to be paid to the month immediately following the  
directly out of the Company's funds".

Sample B: "In consideration of the undertakings

by the consultant herein contained, the Manufacturer shall (in addition to any royalties commissions and other payments hereinabove provided) pay to the consultant in respect of each period of twelve months ending on the thirty-first day of March during the continuance of this agreement, a fee which shall be the greater of:

- (a) Twenty five thousand pounds (£25,000), or
- (b) A sum computed by reference to the aggregate net sales price of all (products) sold by the manufacturer during that twelve months period as follows:

follows:

- (i) ... 1% on the first ... £ 1,000,000 of sales;
- (ii) ... 1% on the next ... £ 1,000,000 of sales;
- (iii) ... 1% on the next ... £ 3,000,000 of sales;
- (iv) ... 1% on all sales in excess of £5,000,000....

On the first day of January, April, July and October in each year the Manufacturer shall remit to the Consultant the sum of ... £ 5,250, the first of such payments to be made on the First day of April One thousand nine hundred and sixty seven". (Note: agreement dated 24/7/1967).

Sample C: "L. shall pay C. on all (products) made and sold

under this agreement a royalty of ... 2% to ... 5% of the invoice price depending on L's performance ...and.. 2% of the invoice price of all other products manufactured pursuant to this agreement which amounts shall be paid in four quarterly payments ending with the months of March, June, September and December of each year....

to be paid in the month immediately following the quarterly ending periods named above .... L. shall upon execution of this agreement pay US\$ 5,000 to C, as minimum royalties for the first year of operation ... provided ... that no refund or credit shall be made if total royalties from the first year's operation do not equal the amount of the minimum royalties paid ....

In the event that the earned royalty for the first year as computed hereunder shall exceed the minimum royalty of \$ 5000.00 L. shall pay to C the difference between the minimum and the full year's royalties as computed".

Some 33% of the agreements, on the other hand, provide for payments calculated only on the basis of the recipient firm's performance. While the payment in all the cases is to be charged at between 2% an 5% per annum of the "net sales value" of all the products manufactured and sold by the recipient firm, one-half of these agreements provide for quarterly, and the other for monthly, payments.

Certain points relating to these provisions require closer scrutiny. First, the basis upon which these payments are determined is nowhere formally explained. Worse still, no explanation was forthcoming from either government officials or executives of parastatals as to how in their view these rates of payments were arrived at. The very fact of these rates being in the formal agreements suggests that they were discussed and agreed upon. However, it transpired that the technology suppliers calculated their figures and offered them for negotiation. But owing to lack of comparative or verifying information, the negotiators were generally hard put to effectively challenge or deny the propriety of such figures. One official pointed out that:-

" To a large extent we are handicapped by lack of actual

information on which to base our negotiations,  
I mean as far as prices are concerned. If you get a  
load of figures telling you how these gentlemen  
arrived at their price and they are the ones supplying  
you with the background information, who are you to say  
no if you can't counter such information with your own  
facts and figures? Under circumstances, I can only  
use my sense of proportion to decide whether it is too  
much or not".

Whatever else "sense of proportion" may be, it is doubtful whether  
it is a "fact" which can be used to counter "facts and figures"  
supplied by the "gentlemen". One of the local private purchase  
of technology, however, laid the blame more or less on lack of  
governmental support and machinery. Describing himself as "one of  
the frustrated entrepreneurs" he declared that:

" We try hard. Whenever we want to negotiate we try to  
get as many facts as we can. We also try to consider  
the basis of these calculations. But we have two problems.  
It appears like these people are always confident of getting  
their way that small people like us do not scare them.  
They seem to have everybody on their side, anyway. If  
you ask too many questions you may end up getting nothing  
because a lot of things are secret ... Also, I have heard  
in other countries they have centres for such accurate  
information and also the officials help you to get the  
best bargain. But why we don't have this here I don't know".

In his observations suppliers of technology seemed to have a lot of  
support from, and influence with, government officials which they

used as a weapon in their negotiations with local purchasers of technology. Over and above that, there was need for official information-supply centres (which could be used by such purchasers), and also for more effective governmental support in their relationships with TNCs.

TNCs' representatives were a bit more "knowledgeable" on this question of the basis for the calculations. Their view was that the calculations were based on the cost of actual inputs in the technological process and on the expenditure directly incurred in the process by persons individually involved in transferring such knowledge. Further than this mystique of "actual inputs" and "expenditure directly incurred" none of the interviewees dared to venture, even when pressed for a breakdown of components. There was apparently, a general consensus amongst them that beyond this lay sacred ground of confidential matter. One is therefore left with the possibility that these figures, either as fixed amounts or as percentage rates, may not represent the actual value (where such can be put to it) of the technical services rendered or purported to be rendered under such agreements.

Secondly, in all the cases where the payment is based on the performance of the recipient, the percentage is calculated on the "net sales value" of all products manufactured and sold, or, in only one case, the "gross adjusted profit" made by such firm within a specified period. The net (or total) sales value, is generally taken to be the total of actual invoice prices for all the products manufactured and sold by the recipient firm (and in one agreement, its subsidiaries) to all customers within a particular period, less,



to the extent stated on the invoice, any cash, trade or other discounts; sales, use and other excise taxes, and claims accrued and/or paid for defective goods. One agreement also includes "transport charges" as a deductible expenditure where paid by the recipient. As will be noticed from this definition, the amounts payable to the suppliers of technical services are the first major expenditure to be made by the recipient firm, even before the operational costs are deducted. Indeed, in two agreements, it is expressly stated - perhaps just for good measure - that such net sales value shall not be reduced by the amount of the technical services fee! Thus, irrespective of whether a recipient firm eventually makes trading losses or not the supplier of technical services gets paid notwithstanding that, perhaps, the loss may have been contributed to by these very services. The "gross adjusted profit", which is used as a basis of calculation in only one agreement, is slightly different in that it is defined to exclude operating expenditure, depreciation and amortization.

Thirdly, payments are in all cases to be made in foreign funds; in 75% of the cases, at the local rate of exchange prevailing at the time of payment, and, in the others, at a fixed rate of exchange agreed upon at the time of the agreement, irrespective of any future fluctuations. Payments are in all cases to be made not in Kenya, but in the payee's home country or as directed by such payee. This, of course, means that all expenses relating to the transfer of these funds (for example conversion commissions and transfer charges) are shouldered by the recipient firm and not the supplier. Indeed, it is expressly stated in some of the agreements that such expenses are not deductible from the amount payable to the supplier firm, and in two agreements, that any taxes or charges deductible

amount must be made good by the recipient firm so that amount actually received in the end is equal to the amount would have been received had there been no such taxes or charges!

Finally in all cases, the recipient firm is required to keep accurate and proper records and accounts on all its operations, and to provide the supplying firm with accurate statements and reports in reasonable detail. The former must also allow representatives or agents of the latter access to these records and accounts for purposes of inspecting and verifying them.

The last 17% of the agreements which have not been considered so far have a rather unique provision in relation to consideration. The provisions thereon state that the supplier firm shall charge the recipient firm, and the latter shall reimburse the former, for the costs and expenses incurred by such supplier in furnishing the technical data and assistance. But it is expressly stated that payments made under these agreements "are reimbursements of expenses actually incurred" so that they shall be granted approval under Kenya exchange control regulations for remittance in the appropriate foreign currency; shall not be subject to prior deduction of withholding or other taxes under Kenya income tax legislation, and shall be deductible as an expense in computing the local firms' taxable profits under Kenya income tax laws. The general effect of these provisions is that the payments are not to be regarded as income, and, therefore, escape tax deductions and relevant exchange control regulations.

(b) Management Services: Provisions on management services relate primarily to the supply, or engagement, of management personnel by or through the foreign counterpart. Basically, the foreign party agrees to provide expert services through its employees in various

fields of management. Such employees are either attached to the local firm indefinitely (hence the usual term "resident" managers /advisors/consultants etc), or engaged for specific limited periods and, usually, for specific assignments (sometimes referred to as "special" consultants/advisors, or just as consultants/advisors etc.). Invariably, the "resident" personnel occupy crucial decision-making and policy-formulating positions, controlling both policy matters and the day-to-day operations of the local firm (but within the framework provided by the headquarters back home). The positions mostly occupied include the following (or their equivalents); managing director, general manager, financial director, factory manager, technical director, marketing manager, personnel manager, supply manager and public relations manager. The "special" consultants are on the other hand, "visiting experts" who are engaged for a limited period in specific programmes at the end of which they either return to base or are given other assignments here or elsewhere.

In all cases the local firm is responsible for the expense involved and for obtaining all necessary governmental authorizations, consents or permits. The local firm pays, or undertakes to reimburse the foreign party, for such expenses as: travelling expenses for such personnel and their families (to Kenya, for home leaves, business trips, visits etc); living expenses and allowances for such personnel and families (settling expenses, housing or equivalent, schooling for dependants); base salaries, bonuses or other allowances, and retirement insurance or other fringe benefit; tax protection and membership and dues in business-oriented organizations. Any payments made in relation to the personnel are based on standards of their home countries, are made in foreign currency (and/or Kenya currency in only two cases)

and in a sizeable number of cases, are determined and paid directly, not by the local firm, but by the foreign party. This, of course, means that such personnel receive more in real terms in the form of salaries and other allowances and benefits, than they would in their own countries, life being generally less expensive locally. It also opens avenues for possible indirect expropriation and transfer of funds abroad through over-pricing of the services and over-expenditure by the personnel.

The personnel are not deemed to be agents or representatives of the foreign party. The latter extends no warranty in relation to the services supplied by, and does not take any responsibility for the actions of, such personnel. Any direct or consequential losses arising from the relationship must be shouldered by the local firm, and, where the foreign party pays therefore, the former must indemnify the latter.

Apart from the expenses mentioned above some 45% of the agreements also provide for a direct management services fee ranging from 1% to 6% of the net sales value of all the products manufactured and sold, while another 33% include such fees as part of the consideration for technical services.

(c) Licences: Licences, the limited formal rights granted to the purchasers of technology to use the property that belongs to the sellers, accompany every technology purchase transaction constituted in the samples. They relate to information on the processes or formulae for the manufacture of the specified products, and to the products themselves; to the trademarks, and, finally, to tradenames, although in many cases (and, in fact in all cases in the samples where they are licensed), tradenames of the grantor-enterprises are also their trademarks.

(1) Process and product licences:- Under these licences, the vendor grants the purchaser first, the right to use information relating to the manufacture and use of the relevant products, and secondly, the right to manufacture, use and sell the said products. A small amount of information and number of products are not the subject of patent grants or pending applications. In such cases, the required protection lies in the secrecy of the information or its complexity.

These grants of rights are, however, subject to various conditions. The right to use the information and to manufacture the relevant products is non-exclusive in 50% of the cases, and exclusive in the other 50% (the former meaning that the grantor has a right to grant further licences, and the latter meaning that he has not). However, in all cases, the exclusiveness or otherwise of the grant is only in relation to a defined territory, that is, the territory within which the grantee is authorized to use the information and to manufacture the licenced products. About 33% of the "exclusive" cases relate to the territories of Kenya, Uganda and Tanzania, and the other 67% to the territory of Kenya only. All the "non-exclusive" cases relate to the territory of Kenya only.

However, in the case of the right to use and sell the products, the ratio increases in favour of the "non-exclusive" to 67% to 33%. And here, the right in all cases relates to the territories of Kenya, Uganda and Tanzania, although 17% make this right only temporary in relation to Uganda and Tanzania (that is, subject to termination by the grantor at will). A further 17% (all "non-exclusive" cases) also include Zambia as one of the territories.

Thus, the grantee has the right to use the licensed information and to manufacture, use and sell the defined territory or territories only. All this amounts to one simple fact: the granters have the power to, and do, delineate territories for purposes of manufacture, and also to, and do, curtail, restrict and control the markets of the grantees. This allows them to easily relate each area of manufacture of, and each market for, their products to the others which they may already have established, or may in future establish. The grantee firm thus cannot independently develop further its manufacturing area or market, even if it had the financial and manpower capacity to do so.

Secondly, the rights granted here are non-transferable either as a whole (in the form of complete assignment), or in part (in the form of sub-licences) without the express written consent of the grantor except in 17% of the cases. In these exceptional ones, however, the grantees have a right to grant such sub-licences only to their subsidiaries in which, in any case, the grantor will also have an interest, since they are all cases of investment by the grantor as well.

Thirdly, the information licenced must, in all cases, be used solely for the manufacture, use and sale of the specific licenced products. Thus, the grantee is not free to use it for the manufacture, use and sale of any other product. This means that the grantee cannot use the information to develop products other than those specifically licenced by the grantor, a fact which contradicts the oft-repeated claim that TNCs help not only to transfer, but also to further develop technology. The provision is largely unimportant in effect, in cases where the grantor has control over the grantee since any development would be for the benefit of the former. It is



doubtful whether the grantor would in this case insist on its observance in practice. And in the course of the use of the information, improves upon the existing data or products, or discovers further information, or invents further products, a grant-back provision requires such grantees to avail the information relating thereto, or to grant a reciprocal licence thereon to the grantor on a first-priority basis. In practice, this provision is superfluous where there is also investment, since the FICs have effective control of the operations of the local firm anyway.

Fourthly, the production of the relevant products must be in strict accordance with the materials, standards and specifications of the grantor.

The grantee is expressly obliged to submit specifications for, and samples of, products for verification and testing by the grantor in some 50% of the cases. It is also provided that the grantor may commission its engineers, or other technicians, to inspect the process of manufacture and the products, and ensure that the provision is complied with. In effect, quality control is in the complete hands of the grantor so that the hue and cry about the inferior quality of "local" products amongst the members of the Kenyan purchasing public is clearly misplaced. Yet at the same time, the grantor gives no warranty as to the result that would accrue from the use of the information licenced.

Fifthly, the grantee undertakes not to contest the title of the grantor to the information, inventions etc, (whether patented or unpatented). The grantor, at the same time, gives

no express warranty as to the eventual validity or priority of such title, and the right to grant licences, except in 17% of the cases. And where there is any infringement of the rights of the grantor or grantee by a third party, the grantee undertakes to promptly notify the grantor thereof. But the latter reserves the sole and exclusive right to institute, maintain or settle any proceeding or claims in relation to these rights, even where the infringement also affects the grantee. Further the grantee must keep secret the licensed information, and must not under any conditions transmit it to a third party in any form whatsoever, without the express written consent of the grantor.

Finally as relates to fees 57% of the agreements include fees for the grant of licence as part of the consideration for technical services while in the rest of the cases, a royalty of between 2% and 5% per annum is charged on the invoice price of all products manufactured and sold by the grantee, with a minimum annual royalty ranging between Shs. 40,000 and Shs. 85,000 in foreign currency.

(2) Trademark and Tradename licences:- The vendor grants the purchaser of technology the right to use certain trademarks (either generally or as specified) upon, and in connection with, the relevant goods. The right is granted on a non-exclusive basis in about 83% and is non-transferable in all cases. The territories to which the right to use the trademarks extend coincide directly with those which the right to use and sell the relevant products relates: that is Kenya, Uganda and Tanzania in all cases, with the right being

temporary (terminable by the grantor at will) in relation to the latter two in 17% and Zambia being included as one of the territories in a further 17% of the cases. The right to use trademarks and the territorial extent of such use obviously has to be subject to the overall delineation and control of the markets.

The grantee is under obligation to use the trademarks on and in connection with, the licensed products only, and/or other, and only on, /no and in connection with, goods manufactured, used and for sold in the defined territories. Further, the grantee is required to ensure that all products are under trademarks licensed by the grantor only. The grantee must not use any other, "unlicensed", trademarks on, or in connection with, the relevant products without the express written permission of the grantor. It is made absolutely clear that the grantees must not manufacture, use or sell products under its own trademarks which may be regarded by the grantor as competitive. In the event that such question arises, the grantee must abide by the decision and follow the instructions of the grantor (at the pain of the grantor cancelling the agreement).

Seriously it would be more conducive to effective transfer of technology as such, if the grantee was formally permitted, and indeed, encouraged, to develop and use its own trademarks on, or in connection with, the products alongside the trademarks licensed by the grantor (if not on their own) with a view to eventual phasing out of the grantor's trademarks. From this angle, effective transfer of technology is obviously not one of the fundamental considerations of the TNCs. It would appear that the more important aim is to further

and promote the grantor's interests in relation thereto; to promote their trademarks (and suppress or preempt other persons'), and, in the process, their products, and to protect their markets, ensuring for themselves income therefrom.

The grantee must use trademarks only on, or in relation to, goods of standards and specifications, and made according to instructions laid down by the grantor, and the grantee must allow duly authorized representatives of the grantor to inspect the goods as well as the manufacturing process for the purposes. Further, the trademarks (which must be a faithful reproduction of the grantors marks), must be used on all packaging and labels, and advertising and other materials, and must be displayed in the form approved by the grantor. In practice, the grantee usually shows on these materials, clearly, that the goods are manufactured and the trademarks used by the grantee only as licensee of the grantor. Although in most cases the condition is taken for granted, as came out from interviews, some agreements expressly require the grantee to adequately promote and advertise the products together with the relevant trademarks, some going to the extent of prescribing the minimum annual expenditure on advertising. This ranges from the equivalent of shillings 40,000 to shillings 80,000 or 3% to 4% of the invoice price.

It is through advertising that the public is made aware of the product and the accompanying trademark. Through it the consumers' tastes are shaped by the manufacturers; either through factual qualitative description or through some mind-attracting or eye-catching information that glorifies or creates idealistic images of the products of their users, but which have next to nothing in terms of useful data for qualitative analysis. And as was noted in the previous chapter, trademarks are a very useful substitute (to the manufacturer) for qualitative data in the area of advertisement.

The grantee is only licenced to use the trademarks as long as the technical processes or formulae supplied by the grantor are engaged in manufacturing, and also as long as the agreement continues to operate. Immediately the grantee ceases to use such processes or formulae or the agreement terminates the grantee must forthwith cease to use the trademarks and transfer to the grantor all information and material relating to such trademarks or their use.

Here again, as in the case of process and product licences, the grantee undertakes not to contest the title of the grantor to the trademarks, although the grantor does not give any warranty that such use of the trademarks by the grantee shall not in any way infringe third-party rights. In case of any infringement of the rights of the grantor and/or grantee, the latter must notify the former thereof, although the grantor reserves the sole and exclusive right to institute, maintain and settle any proceedings or claims. Provisions as to fees are similar to those relating to process and product licences and therefore need no specific discussion.

Finally, in cases where the local firm adopts as part of its corporate designation the name of the foreign counterpart, either in full or in part, the latter grants the former the right so to do, mainly through a licence at will (which can be withdrawn at the will of the grantor). In all the cases under consideration, such trade names are also the subject matter of trademark rights so that provisions relating thereto apply mutatis mutandis.

**(d) Assignment, Duration and Governing Law:**

In all the cases, the recipient of the services or grantee of licences has no right to assign or transfer the agreements, and rights and obligations provided for thereunder, without the prior written consent of the supplier/grantor. Whether the latter has the right to assign is not provided for in 85% of the samples. However, seeing that the right to assign on the part of recipient grantee has been expressly restricted the absence of a similar prohibition on the part of the supplier/grantor would appear to suggest that the latter enjoys this right unconditionally. Moreover, in the 15% where it is provided for, the rights and obligations of the supplier/grantor are expressly stated to be "freely transferable" without any condition as to consent on the part of the recipient/grantee.

Duration of these agreements vary widely from "three years" to "indefinite" - as can be gleaned from the following sample provisions:

- (1) 3 years, and thereafter as long as the recipient/grantee is engaged in the manufacture of the licenced products;
- (2) 5 years, subject to extension by mutual consent;
- (3) 5 years subject to "from month to month" yearly extensions;
- (4) 10 years, and thereafter continues indefinitely;
- (5) 25 years, renewable by successive period of 5 years;
- (6) Unlimited, unless sooner terminated;
- (7) So long as supplier/grantor remains a shareholder in the recipient/grantee.



It is apparent that the mention of a particular period is merely a formality, and that, effectively, most agreements in which a definite term is set without any mention as to possible extension constitute no more than 10% of the samples. In one of these latter cases, the term has actually expired, but, as was observed by the personnel manager of the recipient/grantee, the parties are still being governed by "the spirit of the agreement," and the agreement is deemed in practice, to apply as if it has been extended by a further similar term.

It is important to note, however, that all the agreements are subject to a possible earlier termination by the parties - by notice. The periods of notice vary from two months to one year. None of the agreements had so far been terminated in this manner, nor were there any such terminations in process. Apart from legal termination by notice as expressly provided in the agreements it is also possible to terminate prematurely for various reasons, including:

(1) falling of share-holding of the supplier/grantor in the recipient/grantee below a specified percentage; or a significant change in the ownership of the latter through merger or acquisition by a third party; or seizure in any way of the former to exercise fundamental rights as share-holder in the latter;

(2) bankruptcy or liquidation or winding up (whether partial or otherwise, whether voluntary or ordered by a competent authority);

(3) taking over of recipient/grantee by superior authority (presumably, governmental);

(4) transfer of interest in recipient/grantee where such transfer results in ownership by a competitor (or affiliate thereof) of either the recipient/grantee or supplier/grantor;

(5) material breach of the obligations under the agreement by, or default on the part of any of the parties;

(6) mutual consent between the parties.

Apart from the second, fifth and sixth reasons which are normal bases for terminating contractual relationships, the others are specifically meant to benefit the foreign party. It will also be noticed that they are aimed at preserving the interest and control that such party has in and over the local firm and at preventing a situation whereby the foreign party may be obliged to continue to maintain licences and grant services when it loses such interest and/or control.

At the expiration or termination of the relationship, the recipient/grantee loses all the rights granted by virtue thereof, and must forthwith cease to use the technology and to manufacture use and sell the relevant products. In some cases, it is explicitly provided that the recipient/grantee must deliver up to the supplier/grantor all the secret information, data, plans, processes, models, designs, etc. and must thereafter keep any knowledge relating thereto secret for a specified period, or until it falls into the public domain.

Finally, only 20% of the agreements provide for the application of Kenya law as the governing law. The other 80% provide for the laws of the countries in which the suppliers/grantors are based: USA (the States of New York, Ohio, Nevada and Wisconsin), Japan, FRG, Switzerland and UK.

This is in marked contrast to provisions on the governing law relating to investments, a majority of which prescribe Kenya law. This may perhaps be explained by the fact that Kenya law on investment is generally favourable to private foreign investors (and so is the political atmosphere) and that, on the other hand, the property rights are granted initially under the laws of their respective base countries under which they may feel safer and more knowledgeable.

What has been discussed above are the provisions which directly govern the transfer of technology. They deal not only with what is to be transferred but also the conditions under which the transactions must take place. It will be noticed that a large body of these conditions formally limit the effective acquisition, diffusion and use of technology. Such are usually referred to as restrictive business practices. It is important to emphasize these practices more distinctly and to indicate the manner in which they operate to make access to technology difficult. It is not possible to cover all such limitations and the intricacies of their operation. The succeeding discussion will thus highlight only a few prominent ones in order to illustrate the negative effects they have on the process of transfer.

(a) Formal Limitations relating to technology<sup>15</sup>

It is important to understand from the outset the basis of these limitations or restrictive business practices. In a system based on individual ownership of the means of production and their exploitation for individual benefit, the importance of technology as a commodity lies in the owner's position vis-a-vis the purchaser:

In simple terms, the fact that the purchaser needs it (or believes he does) but cannot get it except with the compliance of the owner. The owner's bargaining power here depends on his monopoly in relation to the purchaser. The higher his monopoly of the technology, the higher his bargaining power, and, consequently, the higher the possible commercial returns, other things being equal. Diffusion of the knowledge (the technology) in any particular market obviously reduces the monopoly. As access to the technology increases, so is the commercial value of the technology also eroded provided, of course, the access is not controlled directly or indirectly by the owner himself.

Since this value is the cornerstone of the ownership under these conditions, owners would normally wish to limit the eventual acquisition, diffusion and use of the technology so as to maintain its commercial value. Left to their own designs, they would therefore, not hesitate to include limitations that would make it difficult for a specific market to have full access to and benefits of the technology, a situation that would reduce efficiency and, therefore, dependence. This way, they preserve their monopoly and ensuing dependence on them, and thereby ensure continuity in commercial returns for themselves. Some of the limitations and their effects on the process of technology transfer, are considered hereunder.

(1) Limitations on field of use:- It has already been noted that the recipients use of the technology is restricted to particular fields and areas and to the particular manner provided by the agreement.

Such restrictions have the effect of severely limiting the dynamic effects of technology transfer: the user cannot develop other processes and products through the technology engaged, neither can it extend its production to other goods by using the same technology. In effect, the knowledge of the user is formally limited to that passed to it by the supplier. Since such is the property of the latter, dependence is merely extended (and of course, at a cost). Such cost is both direct and indirect in terms of opportunities foregone ("opportunity costs"). Looked at from a national perspective, such limitations contribute to a continuation of the dependence of the national economy, as a whole, on the base-countries of the TNCs. Moreover, such restrictions may also have the effect of restricting the markets of the user in the sense that the products to which he is limited may be required only in certain, but not other markets.

The restriction on acquisition and use of other technologies which is akin to the above, operates to limit the competition by reducing the technological alternatives of the user. This denies the latter the opportunity of taking advantage of other, and, perhaps, more competitive, technologies and perpetuating dependence.

(2) Limitations on sources of other inputs:-

Restrictions which oblige the recipient of technology to purchase capital goods, intermediate products, spare parts and/or raw materials from the supplier, or from sources designated by the supplier, are quite prevalent in technology transfer arrangements.

The reasons for such restrictions may lie in the desire to control and guarantee quality through the use of specific inputs. However, the level of standardization in the world today which has been necessitated and promoted by the international and tentacular nature of the operations of TNCs, reduces the significance of this reasoning drastically. It is also possible that the nature of the technology supplied may require that the supplier thereof also supply connected materials. Such situations are, however, very rare, and, perhaps, exist only in relation to very specialized and complex technologies. A third reason is the maximization of receipts from the transaction over and above that of the supply of technology stricto-sensu. The supplier ensures a ready market for its or the designated supplier's, goods. It also enjoys the right to determine the price without strict reference to the prevailing market conditions, since market forces no longer directly affect the transaction as such.

In terms of effects, this situation, first, prevents the recipient from taking advantage of the market conditions which may well have favoured it. Secondly, by giving the supplier a monopoly, such restrictions enable the latter to put disadvantageous conditions on the recipient and to over price such inputs in relation to comparable inputs available elsewhere. This possible over pricing, a mechanism of withdrawing profits from the national economy (now referred to in international transactions as "transfer pricing"),



will directly affect production costs and contribute to appreciation in the cost of the final product. Its price may then become uncompetitive both in the internal, and more so, in the export, market. The negative effect on the overall growth of the national economy (especially in respect of import substitution and export promotion and therefore on foreign exchange and balance of payments) is readily apparent. Thirdly, more likely than not, a supplier in this position will have a bias in favour of imports of such inputs rather than on their local acquisition or development, a bias which is understandable from the point of view of its commercial interests. Finally, the inputs, following upon the technology, will generally be based on the factor endowments of the country of origin, and not that of the recipient. This factor (depending on the extent of the differences) may prevent backward and forward linkages within the national economy.

### (3) Limitations relating to market (export):-

Limitations in this area invariably relate to the external (export) rather than the internal, market. This bias may be attributed to the fact that the internal market is rather small for most production capacities (which sometimes have to be scaled down when imported, anyway) in terms of general population, and more so in terms of the restricted body of consumers. (A large number of the products are simply out of reach of a large section of consumers either because such consumers do not appreciate their use value, or when they do, the products are too costly for them).

It would, therefore, be uneconomical to divide up the internal market. Generally, therefore, the suppliers of technology prefer, for their own benefit, to franchise it to only one recipient or several but related recipients so as to maximize returns.

Such restrictions on the export market take many forms. They may be in the nature of total prohibition of exports or a requirement (without a concomitant pledge from the supplier), that the recipient get prior approval; of prohibition of exports to certain countries and permission to others; of permission to export specified products only; of export quotas; of price control or predetermined price levels on exports; of higher royalties and other fees on export products, or of extra quality requirements regarding export products or restraints on export promotion. They may also be, implicitly, in the nature of restrictions on the field of use of the technology and tied purchases of inputs or on production volume.

Whatever their form, their most immediate effect on the natural economy is to hamper the acquisition and development of potential export markets and the skills related to export marketing. The former directly affects foreign exchange returns, and the latter results in a continued dependence on imported skills. Indirectly, such restrictions also constitute a barrier to regional economic co-operation, taking account of the market needs of the supplier rather than the benefits foregone by the national economy.

Another less apparent effect of such restrictions is to raise the unit-costs of the products by impeding high or full capacity production, and thereby partially erasing the benefits that would otherwise accrue from the attainment of the economies of scale. Finally, from a general point of view, the market allocation that is implied in these restrictions may make a lot of sense to the supplier, but is purely arbitrary from the point of view of the national economy, and is not attended by any collateral advantages that may off-set the ill-effects.

(4) Limitations relating to financial provisions:-

There are numerous and varying terms attached to financial provisions which do put strains on the technology recipient in particular, and the national economy in general. The most obvious here relate to payments and their duration. Package transfers are the order of the day. In many cases it is practically impossible to distinguish and define the constituent elements of technology and the payments made therefor. Such package transfers may impose on the recipient elements which he has no need for - and then at a price. This may again be seen in light of the fact that it is the suppliers who determine the price, and of their tendency to over-price technology. A further compounding factor is that, in the Kenyan circumstances, the recipient is at a grave disadvantage with regard to analytical or comparative information which can be used to counter the suppliers' terms.

Modalities of payment (if aspects of transfer-pricing are put aside) include lump-sum and royalty payments. Lump sum payments do not usually take account of the actual contribution of the technology (in terms of value of production) and, as has been noted, are, at times, even paid before the recipient firm is engaged in actual production, or in instalments which bear no relation thereto. Royalty payments on the other hand take into account the use of the technology in production as such, but still at a distorted level<sup>16</sup>. As has been emphasised the tendency is to charge royalties at a percentage of the "net sales value", which, as defined, is far above the value of the technology from an economic point of view. The more appropriate level would be 'value added' or value of production, appropriate because it is the relevant measure of the actual contribution of the particular technology in production.

Further, royalty payments continue for the duration of the agreement. Such duration in the Kenyan case would appear to be indefinite for all practical purposes. This does not take into account the fact that grants of rights in industrial property are themselves temporal (though renewable), so that the duration of payments for licences thereon need to reflect the subsistence or otherwise of such rights. Otherwise, royalties could easily be paid for non-existing rights.

One of the most important constraints which affect technology-importing countries is that of lack of requisite finance.

This being so, such terms as are discussed above are quite crucial in the process of acquisition of technology, either in the sense that they may prevent the recipient from purchasing the technology altogether, or in the sense that they place a financial burden on the economy (via the recipient) which is in turn reflected in stagnation in other areas of socio-economic development.

(5) Limitations on disclosure, assignment and sub-licensing:- Provisions which prohibit disclosure, assignment and sub-licensing are not always confined to the life of the industrial property rights, but extend beyond it. (Indeed, the obligation not to disclose even extends beyond the agreement itself). These prohibitions have the general effect of confining the technology, and the benefits thereof, if any, exclusively to the contractual recipient. Consequently, any other entrepreneurs who may wish to engage the technology have to enter into contractual agreements with the specific supplier or other suppliers or affiliates, despite the fact that such technology may already be available with the recipient within the national economy. The attendant repetitive import of technology is a pillar of continued dependence on such supplier or affiliates which at the same time places the very financial burdens already noted on the economy.

(6) Limitations on contesting of validity:- The validity of proprietary rights in technology goes to the very roots of the relationship between the vendor and purchaser thereof.

Without it, the vendor has no basis at all for saddling the purchaser with any conditions or restrictions. Provisions obliging the recipient not to question or contest the validity of the supplier's proprietary rights in effect disable the very person who is directly affected by it and is frequently in the best position to question the same. Yet such challenge could contribute either to the invalidation of some restrictions or to the reduction of the direct costs payable to the supplier.

(7) Limitations relating to employment and skill-formation:- In all cases there is included a promise by the supplier of technology to offer employment opportunities and training facilities to local personnel. From the point of view of the national economy, this, if carried out properly, should mean that at the end of a certain period (which except in the very complex skills should not exceed the generous estimate of five to ten years), there is adequate local skill to take over all the stages of production and supervision. This would then imply an appropriate phase-out of expatriate personnel. Indeed, to talk of effective transfer of technology when this cannot ever be imagined, let alone carried out, is a misnomer of the extreme order.

For real and imagined reasons, suppliers of technology usually include in agreements, either explicitly or otherwise, provisions whose effect is to facilitate the maintenance of control over the recipient through the injection of expatriate personnel.



Through such provisions, certain key managerial and technical positions are reserved for expatriate staff. The reasons range from non-availability of trained local personnel, through high risks or delays that might ensue if untrained local personnel are used, to quality control, and the maintenance of control over high-level decision making process of the recipient firm, not to mention the sensitive: the use of such personnel for purposes of transferring profits from the recipient to the supplier. Such provisions have the effect of limiting not only the employment opportunities available to local personnel, but also the complete formation of local skills capable of fully running and supervising the process of production and distribution in the recipient firm. Apart from these opportunity costs, there are the direct costs of paying for such expatriate personnel, much higher than would be in the case of local personnel.

Even in cases where the agreements envisage the reduction of such imported personnel, there is no provision for a programme for such reduction. Even more significant is the fact that there is no provision for complete phase-out. On the contrary, there are express provisions requiring that such reduction shall not affect certain specific positions (for example those of the managing and financial directors). And then there are those provisions which oblige the recipient to permit the supplier or its representatives to inspect the former's production process, products, packaging, labelling, records etc (usually at the cost of the recipient) for purposes of quality control, verification, etc..

All these put the recipient basically in the control of the supplier who may then direct the former for its benefit rather than for that of the economy. Ultimately, the promise by the supplier to open employment opportunities and offer training facilities is limited at a high social and direct financial cost, by the restrictive conditions which attend it.

Of course, the suppliers of technology have their own interests which they, presumably, have to protect at all times, either directly or through proxies; after all they are not philanthropists. But these interests (and their necessary protection) should be brought to the fore rather than being cloaked in mystifying phrases which suggest philanthropy (rather like the case of the colonialist and the bible and his sacred mission of civilization!).

(8) Limitations relating to duration and post-expiration obligations:- The duration of the agreement or any form of understanding is important to the recipient in two ways. In the first place, the obligations that are placed upon the parties, and the rights they enjoy, generally subsist only during the operation of the agreement. If the duration is long, this would burden the recipient and the national economy with all obligations that have already been considered for an unnecessarily long time. It also raises the possibility of the recipient being prevented from taking the benefit of any significant technological advances which may since have taken place,

or of being saddled with technology which its needs may have surpassed. This latter problem may, however, be ameliorated, to some extent, where the recipient benefits from improvements or changes made by the supplier, but only if these are appropriate.

Secondly, the duration is important in that there may be certain obligations which do follow upon the expiration of the agreement. The most important of these, as has been noted, requires the recipient to cease the use of the technology (usually under pain of penalty), or to pay for such illegal use, after the expiration of the agreement. Some agreements even require the recipient to deliver up to the supplier all technical information. Yet these obligations are not even pegged to the life of the proprietary rights, the termination of which means that the legal basis for the agreement itself is liquidated. Such provisions are clearly a negation of effective transfer of technology. They, further, suggest that what is crucial to the supplier is really not the benefits that the recipient gets from the transaction, but, rather the extent to which its interests (admittedly, basically maximization of returns) are satisfied.

And finally, is the indefinite continuation or renewal of the agreement itself (or the relationship of vendor and purchaser), without more, surely not a reflection of the need for "further" transfer? It is impossible to ignore this compelling possibility.

No explanation has so far been given (nor was any forthcoming in interviews in the private sector and with government officials) as to why else the relationship should continue if technology is being effectively transferred by the TNCs. The indefinite continuation of the technology transfer transaction strongly suggests that the effective transfer of technology is not the central objective of the relationship, or if it is, then it has not been achieved. It gives an irresistible suggestion that the situation of dependency is continuing. It is obviously not in itself conclusive, but neither can its significance be brushed aside.

This discussion on formal limitations cannot even claim to be exhaustive: far from it. Yet as it is, the theoretical and practical trend that it reveals puts an enormous question-mark on the celebrated transfer of technology through the TNCs: the claim that the TNCs aim to and do transfer technology to and for the benefit of the Kenyan economy. This trend is that the TNCs prefer to, and do, limit access to technology and thus continue the beneficial (to them) attendant dependence. And, quite importantly too, those who are in charge of affairs on the Kenyan side not only permit but in certain cases even encourage it, for, as has been demonstrated, the formal agreements and understandings that have been discussed above are the result of negotiations between the TNCs and their Kenyan counterparts.

At this juncture, however, it is necessary to further illustrate the dominance of this trend by discussing some basic issues which seem to characterize the process of transfer at the level of implementation. These, to a large extent, also act as limitations both at the narrow level of transfer as such, and at the broader level of socio-economic repercussions of the process as a whole.

### 3. IMPLEMENTATION

It has been observed that the conditions governing transactions formally limit the possibility of effective acquisition, diffusion and utilization of technology offered by TNCs. It is, however, important to relate the consequent though limited obligations of the technology vendors to the activities which take place after the establishment of the formal relationships, with a view to illustrating the extent to which these facilitate the process of transfer. The discussion hereunder will of necessity relate more specifically to those obligations and activities which are connected with the various components of technology.

This, however, is one of the areas in which we met a lot of difficulty in getting data, specifically from TNCs' subsidiaries and JU affiliates. There was, officially general reluctance on the part of these firms to supply information in relation to certain aspects which they considered sensitive (for example, financial and management aspects).

One would have thought, with the insistence that TNCs contribute significantly to the transfer of technology that the relevant firms would be readily willing, and only too happy, to give information showing the extent of this contribution, if for no other reason than to prove TNCs critics wrong. This was not the case, however. Whereas one would not like to conclude from this, without more, that TNCs do not contribute much in this respect, this trend raises doubts which, it is suggested, it is in the interest of TNCs to expel (assuming, of course, that the doubts are unfounded!) This is more so when the available information reveals a tendency which is more in line with a desire on the part of TNCs. to continue technological dependence than to facilitate effective transfer, and therefore, provide impetus for independent economic development.

(1) Machinery and Processes:

The machinery (and other equipment) and the technical processes engaged in production are of the same nature as those used in the source-countries where they were first developed<sup>16A</sup>. It is only in the case of machinery where efforts are sometimes made to scale down capacity, (where it is found that market requirements of the area encompassed by local production are lower), or to modify accordingly where local atmospheric differences (temperatures, humidity, etc) have an obviously detrimental effect on them.



It is not in question that local factor endowments significantly differ from those of the source-countries. This means, therefore, that the equipment and processes engaged in production largely ignore the specific differences. The general effect is an over-expenditure of scarce capital, minimal creation of employment opportunities, depletion of foreign exchange reserves, and a worsening of the balance of payments position of the national economy as a whole vis-a-vis the said source-countries. From the point of view of TNCs, the reason behind this state of affairs perhaps lies in the following view:

'What is the need to do that'<sup>17</sup> when we are essentially manufacturing here the same types of products which we would use these methods and equipment to manufacture in the UK and everywhere else where we operate? There isn't. The costs are in any case reduced, first because we do not spend any extra cash on alternations and also because we make better use of the idea of mass production - you know, the idea of economics of scale (in the production of the equipment).'<sup>18</sup>

The idea expressed in the somewhat rhetorical question was the general explanation given by those interviewees who dealt with the issue. And it makes a lot of sense. Once Kenyan policy-makers decide that a particular product developed in the UK (or any other source-country, for that matter) is "essential" for Kenyan consumers, the suppliers of equipment and processes seriously have no reason to modify equipment or processes.

It is however, doubtful whether the reduction of costs mentioned by the particular interviewee is significant at all for the Kenyan consumers, taking into account the prevalent over-pricing and the burden on foreign exchange and other social costs which go along with import-substitution type of industrialization.

With respect to machinery in particular, a rather interesting phenomenon, which contributes to the perpetuation of dependence on TNCs was encountered. In at least three wholly-owned TNC subsidiaries and five JU affiliates, there was a continuous replacement of specific equipments or components with newly-developed ones from the original, or other suppliers. Such replacement was, in a very limited number of cases, also, accompanied by slight changes in the production processes and/or products. The general and rather inconcrete explanation was that these firms had to keep pace with "international developments" in machinery and processes (meaning, of course, developments in Western Europe, Japan and North America) if they were "to maintain the very highly competitive international standards." Only one executive of one such firms was candid enough to declare that theirs was simply a question of "latest is best":

"We are manufacturing products through franchise granted by our overseas office. It is really a natural(?) phenomenon that whatever developments take place there have to be incorporated in our production whether in the form of machinery or processes, or just in the products themselves."

Even if they are unnecessary, and perhaps socially costly to Kenya?

"Unnecessary and socially costly? In what way? The products are selling still. The price increases are minimal. And Kenya, as you are well aware, has a policy of keeping abreast of the latest technologies available". Not just "latest", but also "appropriate", at least as far as policy goes. This is a crude interpretation of the official policy on technology. However, it is a fair reflection of what goes on, and the basis upon which such is explained, in practice.

Interestingly, some of the replacements which take place do not make any substantive changes in the products themselves. For example, in one case, certain sections of machinery were replaced so that the packaging could be changed from the hitherto white background colouring to creamy golden grey. Not a single alteration was made on the product itself. In another, the colour of an edible product was changed from light to bright yellow with no substantial addition to, or removal of, the ingredients. Machinery components had to be replaced for this purpose. In a third, the taste of a product was changed because research in the UK had revealed that consumers there preferred the new taste! This necessitated (or was it an excuse for (?)) the replacement of all machinery used in one stage of production. In a fourth, a whole range

of machinery had to be imported because it was decided that a bottle containing a particular product should have a special re-inforced paper-ring around the neck: "It looks more sophisticated and is more appealing to the consumers" was the explanation given by the sales manager of the manufacturing firm. And in yet a fifth, the management decided to replace all the machinery because the old ones were "obsolete by international standards". The firm continued to manufacture the same products. The new machinery had to be scaled down because consumption was below the production capacity by half. And the firm had considered declaring a few workers redundant ostensibly because "business is low". It was, however, admitted that the new machinery did replace "some" labour input, although it was also stated that the number of possible redundancies would be higher than this replaced labour input. The declaration of redundancies was only held off by the fact that there was already a redundancy dispute regarding another firm altogether: "We want to see the outcome of this dispute", the personnel manager said.

All the machinery in these cases was imported at direct costs ranging from two hundred thousand to 1.7 million shillings. And where there were the slight changes in the products (or packaging), heavy advertizing campaigns were undertaken to tune the psychology of the consumers to these "new developments". In one case, however, the technical manager showed us machinery which after "many years of use" had been affected by atmospheric changes (humidity and corrosive acidity) which had not been envisaged initially. The machinery was

lying idle, having been replaced a year ago. The firm was considering offering it for sale to any person who had any use for it. Let them have the benefit of doubt.

These replacements are not without consequence to the economy in general, and the transfer of technology in particular. The direct financial costs which prey on the foreign exchange reserves, have already been mentioned. Apart from these, the phenomenon engenders a continuous need for know-how, since as new machinery is imported personnel has to be trained for its operation<sup>19</sup>. And it creates a reason (or an excuse) for expatriate personnel being continually retained, or imported. Indeed, one local employee who had been "in training" for the last three-and-a-half years asserted that the last two occasions on which the term of this expatriate "supervisor" was about to expire, either new machinery and processes or new products were introduced so as to justify the extension of such supervisor's employment with the firm. He rejected the suggestion that these could have been merely coincidences. There were other oblique references to this kind of situation in other firms but they were in the nature of suspicions rather than concrete experiences.

Finally, the psychological reorientation that is implicit in the advertisement campaigns and which is not based on any concrete developments is socially injurious<sup>20</sup>: It creates tastes that the economy cannot afford for the broad majority of its constituent citizenry. All in all, the contribution of this whole phenomenon to continued technological dependence is noteworthy.

(ii) Disclosure of Technical Data:

The obligation to disclose technical data in sufficient detail to enable production is apparently taken as an obligation to facilitate production and no more. In the case of non-investment relationships there was the general complaint that the information revealed was quite sketchy and barely enables the recipient to produce the licenced products. A production manager of one of the wholly-locally owned recipient firms expressed the following view:

"When we were granted the right to make these things (products), the licensors made arrangements for the factory equipment. The installation was done by the supplier. We then got a representative of the licensor who instructed us on the various stages of production for about a year and then left ..... The licensors representatives come in once in a while to check how things are proceeding and receive any specific complaints which they then act on after consulting the head office. To a large extent we have to continue relying on them in all important aspects of production."

It was then suggested to him that it was perhaps, owing to their complacency that they "have to continue" the reliance. He protested that:

"You need to be in our position to understand the complications ..... Even if we decided to cut links today that would perhaps be the end of our production. They would take away everything



But apart from that, the knowledge they give is not enough for us to fully run this factory independently.....There is a lot that remains secret, and we can't complain. We accepted the situation.....yes, we did because as things are you either take it or leave it. I don't want to indulge in sensitive areas.... I mean, there is no other ways.....and surely you must know that too."

But a member of the Board of Directors of the same firm who had earlier summoned the interviewer "upstairs" to find out "what is your problem" had a significantly different view on this point:

"They don't reveal to us everything and I don't expect them (to). I would definitely not myself. You see, this is how they get their - well, daily bread. If they tell us everything, how can they continue to earn it (their daily bread)? They have a right just like any other owner of property to keep to themselves what they have used their sweat to discover and use it as I have said....."

When it was inquired whether his view was not irreconcilable with the overall desire (at least in official documents and in rhetoric) of the policy-makers to acquire technology for independent production with a view to nurturing independent economic development, his reply was that:

"I leave that to talkers. You see, we are Kenyans. We run this factory, produce and get profit. We pay tax which is used for development. We employ Kenyans also. It is through their help (the TIC - suppliers of technology) that we produce and get profit. Is that not development?" (Emphasis added).

And, with a deep scornful laugh (presumably aimed at the "talker"!), he pushed his bulk further into his correspondingly bulky, executive chair, satisfied.

What this situation illustrates is the fact that the suppliers of technology in this case prefer to continue dependence on them by restricting the technology they pass to the recipients in its various forms. With continued dependence also goes the financial and other social costs that underlie the relationship. Now the two persons above view this phenomenon of dependence as quite illustrative of the social conflicts that constitute the Kenyan social formation. On the one hand, there is a member of the management, who, despite (or perhaps, because of) his high position feels frustrated by the inability of the firm to run as a fully independent local concern, but who is capable of seeing that the problem is not isolated and could be explained by the socio-economic conditions which prevail in Kenya. He is in a sense saying that producing and making profit is not enough and that there is a necessity for, and possibility of, ending this dependence.

On the other hand, there is a director (who is, by his own accounts, a director in 17 other firms, 9 of which are TCB subsidiaries and JV affiliates!) who sees the dependence but does not recognize it. To him, it is interdependence, an equal partnership out of which each party gets the best possible: citizens producing and getting the profits and paying tax for developments; and the TCBs keeping secret some essential parts of their technology and earning their "daily bread" for doing so. It is a partnership for progress; it is development despite the secrecy (which is, indeed, a right of TCBs!) significantly, whereas this director took it for granted that certain documents, including the licencing agreement, were confidential, the production manager, on the contrary, felt that they ought to be available to the public:<sup>22</sup> "After all shouldn't Kenyans know what is happening?"

In the case of subsidiaries or JV affiliates, the situation was slightly different. There was no direct complaint of restricted disclosure as such. The interesting aspect of it, however, was that, whereas TNC representatives gave an unqualified "no", their local counterparts were less unequivocal, the general opinion being that it was difficult to know. There was a general assumption by such local personnel that if the firm was operating and producing the licenced products then there must have been full disclosure. Yet it was at the same time, generally, admitted, even by highly placed Kenyans that, in fact, it would be difficult, if not outright impossible for the local personnel to fully run the enterprises on their own if the expatriate personnel (ironically, referred to as "owners" on many occasions) were to leave. And this was so even in JVs. The reason was, apparently, that certain basic or crucial information or data was only available to expatriate personnel, who also occupied important management positions.<sup>23</sup> If one were to go by the opinion of the TNC's representatives, then the explanation may lie in the fact that in such firms, the disclosure is in the nature of inter-firm transactions which do not by themselves jeopardize the positions of the technology suppliers.

(111) Training:

Training is definitely a crucial component of technology transfer. Through it, the beneficiaries are supposed to acquire knowledge on the nature and use of the products; the theoretical and practical aspects of the manufacturing processes or formulae engaged in production; the organization, and the actual stages, of production and preparation for distribution; the markets and marketing procedures; and the compilation and analysis of results and the subsequent resource-allocation. Training can only be said to accord with effective transfer of technology if it prepares the beneficiaries for, and facilitates, a full overall and profitable control of the whole system of production. This, it must be

stressed, does not exclude the receipt of equitable returns by the owners of technology.

Quite a large number of employees at all levels are engaged in various positions in these firms on the basis of their qualifications and work therein with no further training at all.<sup>24</sup> In such cases, the only form of "training" is the acquaintance of the employee with his specific job and the manner in which he is expected to do it. The end result is that, in such cases, these firms absorb and use already-acquired skills, but leave the employees substantially as they found them - that is, without offering any further development of their basic skills. The percentage in the total work-force of such employees ranged from 57.7% in some firms to 90% in others. Any further development of the basic skills in such cases takes place only on the basis of the initiative, and working experience, of the employees.

Further, training, where it is done, is more concentrated in medium and high level positions, particular where specialized knowledge beyond the entry qualifications and experience is needed for the proper performance of the job. However, in all cases, the training is job-specific and is intended primarily to enable the individual to perform the functions which his position demands. The knowledge acquired is thus limited to that which is necessary for the specific job the performance of which the individual is engaged. This means that it is only in cases where such job requires an overall understanding of the different stages of production and distribution that the individual acquires general knowledge. The level of compartmentalization of skills is very high, but is much higher in relation to those engaged in actual production than those in supervisory or managerial positions.

It must be noted as well, that even where there is training, certain positions are excluded either by formal agreements, informal understandings or by design in practice. It has already been mentioned, in the discussion on agreements, that certain positions are reserved for expatriate

staff, and are not available to local personnel. Invariably, they are policy-formulating positions in management, the very positions which enable the holder to have an overall perspective of the process of production and distribution and control the direction of activity; in essence, the nerve-centre of the whole process of production, distribution and the subsequent resource-allocation. The essence of this is that no training can be offered to local personnel for such positions, which means that control remains virtually in foreign hands. The actual positions so secured vary from firm to firm, but depend on the structural distribution of responsibilities to the various positions.

Here again there are certain practices which warrant mention for their contribution to technological dependence. First, is the practice of keeping local personnel from getting "sensitive" inside information relating to the overall operations of the firms, and of subjecting them to strict control, either from locally based expatriate personnel or (rarely, because there almost invariably are expatriates in between) from the head offices overseas.<sup>25</sup> This makes it difficult for such personnel to have a complete grasp of the whole organization and operations of the firm. Above all it retards the development of analytic and decision-making abilities, thus making it necessary for such firms to ever continue requiring staff in the relevant fields.

Second, is the practice of engaging and training local personnel, and then creating other positions for the replaced expatriate (and, of course, getting renewal of the necessary permits on this same basis). In two firms, expatriate financial controllers whose positions had been occupied by local staff were thereafter given the titles of "financial director" in one and "financial manager" in the other. In another, the replaced expatriate factory manager was given the new title of "productions manager". In a fourth, a former expatriate personnel manager became a "consultant on labour relations". And in two other firms, a productions manager and a sales manager became "productions consultant" and "marketing and distribution manager" respectively, positions created for their specific

benefit. The effects on employment opportunities and financial costs of continuous engagement of expatriate personnel has been pointed out already. It need only be added here that this practice also serves to ensure that information relating to, and those aspects of policy-formulation and decision-making in respect of, these positions remain in the general control of expatriate hands; in other words that the INCs continue, through their representatives, to control and direct the operations of the respective firms.

Third and final, is the practice of frustrating engaged and/or trained local personnel out of their jobs, or outrightly dismissing them, thus making it "necessary" for the expatriates' contracts to be renewed.<sup>26</sup> The renewal is then explained on the need for such expatriates either to occupy the positions while suitable local persons are being sought, or to train other local persons.

The forms of frustration include: high preferential treatment of expatriate over local personnel; giving local personnel inadequate training, leaving them without any specific duties or allocating to them tasks that are alien to their field; subjecting local personnel to too much control and to paternalistic attitudes; by-passing them in discussions and decision-making processes and keeping from them important information; denying them chances of individual advancement, and charging them, continuously, with incompetence, which eventually creates in them a sense of inadequacy, inferiority and, ultimately, insecurity. This has at times been extended even to the very silly extent of abuse of individual personality and insult<sup>27</sup> - sometimes with racial undertones implicit in such terms as "bloody african." Outright dismissal may, on the other hand, be based on claims of incompetence and insubordination, and on all manner of charges suggesting criminal intent. All this is sometimes done with the connivance of other local personnel employed by the same firms either by reason of ignorance or, more often, for reasons based on personal interests.<sup>28</sup>



In one wholly-owned TNC subsidiary, a local personnel manager, a retired senior civil servant, explained that he had gone to great lengths to encourage the newly-installed factory manager to react positively to the inevitable frustrations for the sake of the future of this country. (The expatriate factory manager whom the new one had replaced only two weeks back, and still had in his favour a year of his contractual term, had been earlier described by his successor as "incompetent", "unstable" and "indecisive", and know very little of what was going on in the factory. Yet he was always "hovering" around, although no other title had been granted to him then). He had apparently had some experience in this field:

"You see, I worked as a .....in the civil service.

In the process I came to know a great deal of how these organizations operate. I also had to know, by virtue of my position, I knew a large number of multinational executives and other employees, both expatriate and my fellow country men. I still have close connections with highly placed civil servants both in my former department and others..... My employers here know my background very well, and label that is to my advantage and his (the newly -installed factory manager's) also, because they cannot do these things too openly. But, of course, I can't do such myself: you can't cut the hand that feeds you....<sup>30</sup> I can give just now the names of five people, or even more, people who had to look for jobs elsewhere within one year because they couldn't just continue....<sup>31</sup> They use all manner of tactics: frustration, victimisation and sometimes even improper dismissals..... Don't forget some of them (dismissals) are genuine. But a large number are not, which are the ones I am talking about."

One of the persons mentioned had been a personnel manager in a wholly-owned subsidiary of a TNC. Whenever new appointments were to be made, he would draft, sign and post the advertisements and also receive the applications. On one occasion, interviews were conducted and appointments made "deliberately" in his absence. On another, he was overruled by a former expatriate personnel manager who had not even been present during interviews. On a third, he was accused of favouritism because three of the four people he had recommended came from one tribe - not his tribe! When he finally left his job, the former expatriate personnel manager resumed the position. Another, a purchases officer in a JV affiliate was forced to resign at the pain of criminal prosecution when he left the store-keys in the expatriate technical manager's office in the latter's absence at three o'clock in the afternoon on a working day. (He had been granted permission to leave early so as to go and pick up his wife and newly-arrived child from hospital). The following day, some of the raw materials were found missing. The expatriate "agreed" that he had found the keys two hours later when he went back to his office but argued that he could not be held accountable for somebody else's responsibility. No further investigations were carried out to establish how these materials could have disappeared. But why did he not face trial and prove his innocence instead of resigning?

" I could not. Let me tell you if you don't know:

If these people want to get rid of you, they will do so by any means right or wrong. They can even make up charges and even bribe people to put you in.....I could not risk it because of my domestic condition."

A third, a sales manager, resigned when he was thoroughly rebuked by the expatriate general manager for general incompetence in front of his departmental staff to whom he was allocating duties. This was after a

series of "minor" confrontations. The staff threatened a sit-in, were answered with a threat of prompt dismissal and everything fizzled out into a tension-ridden normalcy.

A local service and parts manager, who was still in his employment with a subsidiary of a ~~firm~~ explained how he had been taken for three two-month "tours": one, of the headquarters in U.S.A. and other two of subsidiaries in East Africa and Latin America respectively - all expenses paid by the headquarters but re-imbursed by the Kenya subsidiary. All were intended to be training programmes. His hosts were always overly courteous and eager to help - with everything except things related to service and parts. He attended several seminars held for the specific employees of the respective firms, meetings which briefed him on the history and worldwide operations of the firm, and luncheons and dinners hosted in his honour or in the honour of one or other person. The training programmes turned out to be more of familiarization tours than concrete educational and skill-advancing courses which he was made to believe they would be. His employers still engage "visiting consultants" (from the headquarters or other subsidiary firms for limited periods) who act as his supervisors. From his knowledge and prior experience he "can do my job without confused and arrogant supervisors". He hoped that his ability would be recognized in its own right before he got "too bored with them and quit".

These, amongst others, are case-histories. No cause was given to place doubts on the basic trends they evidence. It must, however, be added that possible exaggerations in the presentation of these practices by the interviewees cannot be entirely ruled out. Neither can it be gauged, precisely, how widespread such practices are in general. But within these limitations, what suffers in the process is Kenya's ability to acquire and utilize basic skills needed for running the particular

industries which in fact use its locally available resources to prosper. This stagnation is obviously a recipe for continued dependence on external know-how, with all the social consequences. Decisive control of the enterprises virtually remains in the hands of external "experts" who cannot be relied upon to take account of the socio-economic needs of the country, and especially the need for independent economic development.

(iv) Financial and Social Effects:

The Kenyan economy suffers other specific liabilities during the implementation of the programmes under the technological relationships already discussed. For one, technology is not engaged in production for free. It is paid for, as the agreements clearly indicate. Again, from a social point of view the whole process of production and distribution, which constitutes the implementation of the formal agreements and understandings entered into between Kenya and the TNCs, makes certain broad impressions on the national economy, because of both its nature and the relationships that it creates amongst those engaged in production (at both productive and non-productive levels). These require specific emphasis.

(a) Direct Financial Costs: Financial matters are apparently very sensitive as far as the relationships between the technology suppliers and recipients are concerned. Except in <sup>32</sup>one case, there was complete rebuff to any inquiries as to the actual amount or estimates of money which has been periodically paid by recipients to the suppliers of technology. (This was so even in the case of the limited number of wholly locally-owned firms constituting the samples). It was made fairly obvious that this information was regarded as highly confidential (even by firms which easily volunteered other information), most firms openly saying so, and others using excuses which unmistakably amounted to the same verdict. One executive even came up with the ingenious explanation that it might be detrimental to his firm's business if its rivals should come into possession of this information. Now, he could not elaborate.

The Central Bank of Kenya (CBK), which has all this information since it participates in the authorization of repatriation of funds, was just as unhelpful. Initially, it was suggested by / a reluctant official of the CBK that the various firms be contacted to give this information. When he was finally convinced that these firms had refused to oblige, he grudgingly promised to give the information except that it would "take sometime to compile". That, however, was the end of it!<sup>33</sup> Thus, the only indications available as to the magnitude of direct financial costs actually incurred by the Kenyan economy in paying for technological inputs are those contained in the provisions of the agreements. These have already been adequately dealt with.

(b) Some general social effects: The type of manufacturing which TNCs engage in / Kenya is basically import-substitution. This was / in actually recognized in the Fourth Development Plan. Although this very plan stated that policy would veer from this course, no significant change has so far taken place.

Import-substitution, as a form of industrialization, primarily seeks to do two things: one, to protect and exploit the markets for the products which would otherwise be manufactured in the so-called developed economies and then exported to these markets; and, two, to utilize the available, and generally cheaper, resources of the countries in which manufacturing is done, especially labour and raw materials. In this process advantage is usually taken of such factors as available local capital (which lessens investment risks); less stringent rules and regulations or leniency in their implementation (and investment, labour relations, safety, quality standards etc), and a favourable political atmosphere characterized by open-door policies and a flexible and approachable body of persons wielding the state apparatus. But by its very nature, its effects on foreign exchange are negative, depleting without adding much to it. This is because imported intermediate and capital goods and even basic raw materials (alas, even

investment funds when one considers the attendant expenses and rates of interest and the value of returns thereon!) are more highly priced than primary products. Yet it is these primary products which contribute over 80% of the foreign exchange reserves. This is bound to affect balance of payments, as well, as between Kenya and the base-countries of the T.C.s, the exchange in goods and services being weighted in favour of such countries. Under these circumstances, the producers of primary products get minimal real returns & now they have to subsidize the reduction of this unfavourable balance-of-payment (even when the scourge of middle men is put aside). From a general point of view, the economy remains virtually indebted (loans and tied-aid being added on top to worsen the situation), and social welfare programmes suffer owing to lack of investment funds. These same producers of primary goods, already getting minimal returns and getting no "subsidies" in the form of welfare programmes, are bound to suffer negative, static or at best minimal development in their social conditions. Large scale producers are, of course, less susceptible to this in that the volume of their production offsets to some extent the effects of that subsidy. Further the scourge of middle men is alien to them, not to mention the fact that they may, and usually, have other commercial interests and also possess some political clout.

But this is only one aspect. Another is unemployment. Certain job opportunities (principally the most important in terms of overall control) are simply out of the market for local personnel owing to the presence of their expatriate counterparts.<sup>35</sup> Of course, there is always the case put in favour of this phenomenon, that the expatriates are, and must continue to be, in Kenya because the jobs are specialized and local personnel are not available to fill them (even secretarial and administrative jobs?). This argument does not, however, explain the fact that certain jobs are expressly reserved for expatriate personnel



in investment and technology transfer agreements without any possibility, within the framework of the agreements (and undoubtedly, the framework of policy within which they operate), of local personnel ever taking over. Moreover, it is doubtful, highly so, whether there is any job position within any of the stages of actual production and of supervision and distribution which TNCs engage in in Kenya for which a person cannot be trained, and take over competently, within a period of ten years. And this is quite a generous estimate. Yet the agreements are renewed and production goes on on the basis of external control and continuous dependence even for firms established as early as 1949.

Explanations have to be sought elsewhere. From the point of view of TNCs this position gives them the opportunity to control the process as a whole, to have a firm grip and ensure the smooth operation of the process of production and reproduction of capital and therefore control and direct the economy in general.<sup>36</sup> Theirs is the ideology of accumulation which requires the conditions prevailing in Kenya to thrive. They are not, and should not be, expected to act against it for the sake of a diametrically-opposed idea of "independent economic development of Kenya.

In the case of those who formally control the state apparatus, it would appear that explanations range from sheer ignorance and inability to understand the socio-economic implications of this phenomenon, through indifference (both equally culpable in our view), to a firm belief in the capitalist mode of production in which, to such minds, decisive foreign involvement in the economy is inevitable. And, quite significant too, are the benefits which accrue to such individuals from the relationship, especially in an economy principally organized on the basis of individual enterprise. These come in the form of, inter alia, directorships or other positions in the TNC - sponsored enterprises, financial stakes therein, and specific financial emoluments (donations towards community or individual efforts, which are in fact disguised kickbacks),

and even in the nature of praise, in rhetoric, of the personalities of such individuals, which has significant impact on their psychology. /a

Again, the very fact that the technology engaged is basically imported from industrialized countries, with little or no modification, by itself means that the employment opportunities generally available are reduced to a minimum, that minimum necessary to profitably operate a capital-intensive technology. Optimal use of available labour resources is structurally made impossible.<sup>37</sup> and the social condition of this very labour that is engaged in production is characterized by low wages and inadequate provision for such basic social needs as housing, medical and recreational facilities, transport, social security education and industrial safety, and generally contemptuous attitude. (It is not odd, under those circumstances, that "labour" cannot even afford to utilize or consume some of these articles and products which are its very embodiment!). The social differentiation that exists between the personification of labour and that of capital can only be aptly described as "Two nations!"<sup>38</sup> the one exploited, impoverished and barely surviving; the other wallowing in absolute wealth that cannot be adequately consumed otherwise than conspicuously. A two hour survey (in the early hours of the morning and late hours of the afternoon) at the junctions of Mt. Road and Muru Highway, or of Jogoo and Lusaka or Mkonj Roads, or along Enterprise Road; or a comparison of the Mathares and Kariobangi with the Matharas and Lower Matharas, all of Nairobi, (among many, many others in Nairobi and elsewhere) will suffice to dramatize the extremities which characterize the social conditions of these basic elements of capitalist production. Long, endless multi-files of bare - or near-bare-footed, shabbily dressed humans walking with a determination that could only have been conditioned by others' dictates, with a pride based on nothing but sheer humanity, and simply the ability to earn the barest daily bread - and survive whatever the difficulties (but still finding things and jokes to muse about in their wretched condition, despite expectations unfulfilled). At work: toiling, in sometimes hazardous conditions, with the unconcerned rhythm of a near-automaton and with

orders breathed down one's neck (and dismissed as little as an arm's-length away), receiving the only thanks (a meagre salary) at the end of long arduous thirty days with perhaps as usual after 5, 10, 15, 20, 30 or 40 or so years for "obedient" "loyal" long service. At home: a crowded squalid neighbourhood, with ever-near-collapse structures for houses, the insides of which are inhabited at the rate of two-square-feet a person: the only recreation, beyond a tin or two of the "homo-brew" over a joke or two, being the sounds of wives and children complaining in words, or through other equally effective means, of the lack of adequate edibles. No matter how sound the sleep may be, it cannot as little as blunt the monotonous and socially degrading effects of reproduction of capital that slavishly pervades the life of labour at this end of the scale- the one nation.

Then, of course, there are the gleaming automobiles occupied by equally gleaming images of humanity with contempt and satisfaction mingling freely on the faces, sometimes daring the steering wheel and at other times taking refuge (from death?!) in far back corners of the insides (obviously not because the iron and steel house is full). At work: supervising and overseeing the process of reproduction from a comfortable vantage point, collecting labour's fruits periodically and distributing them to his satisfaction, provided labour does not once in a while become wildly unreasonable and demands "more than its share" of its fruits. At home: a quarter-kilometre drive upto the coolness and abundance (both in space and contents) of the home in which the effects of a "hard day's work" can now be reduced according as to choice. The headaches suffered are definitely not the result of the struggle to simply survive in this other nation: may be of over-indulgence and the struggle to extract more from labour.

These are obviously glimpses of the extremities of the existence, the social conditions, of labour and capital, to which technology, as a component of labour that capital has expropriated to itself, contributes. Across this whole spectrum must obviously lie other less

dramatic contrasts. However, the important phenomenon to note here is the exploitation and the resultant social differentiation that characterizes the process of transfer of technology as a constituent part of the whole process of production from which it cannot be fruitfully divorced.

lastly, the nature of the products which are manufactured in this process also requires consideration. The general tendency is to manufacture consumer - oriented, rather than intermediate and capital, goods. Exceptions exist, especially in the form of machine tools and implements. Mention may also be made of the assembling of some of the intermediate and capital goods, especially in the agricultural and construction sectors. But this is very limited: basically, consumer products are the mainstay of manufacturing by TNC subsidiaries and affiliates. This means first, that Kenya still continues to import quite a high percentage of its needs in intermediate and capital goods, very important and expensive components of production. Secondly, the type of consumer products manufactured are those already developed and produced in the developed countries, the base-countries of TNCs., where capitalist development has made conspicuous consumption a basic tenet of daily life, both physically and psychologically.

The promotion of these products is carried out via an intensive network of advertizing activity. Such advertisement uses very available means of communication: theatres and mobile cinemas, television and radio; newspapers and magazines; bill boards and signs (neon-lighted and otherwise); pamphlets, posters and stickers( on street-posts and buildings, on and in vehicles, through individual distribution etc); tee-shirts, jackets and other wearing apparel; salesmen(sometimes with free-samples); competitions and raffles; parties in the name of one thing or another; all manner of donations and sponsorships; calendars - the list is endless! The intensity of such advertisement is bound to, and does, have, a psychological effect on the listeners and watchers, which effect is translated into a desire to possess the relevant product. It becomes

even more effective when placed against the background of a society which is being moulded on the basis of the capitalist ideology, where the "success" of an individual is measured in terms of the conspicuousness of his ownership of such products. Some of those who are incapable of such ownership either hope for future "success", or fall back on all manner of myths to rationalize their condition. This, from a social point of view we would call the transfer of inappropriate tastes. Not because Kenyans (or citizens of any other so-called developing country in a similar situation for that matter), are too backward to appreciate these tastes. It is precisely because the opportunity so to do is available only to a minority of the citizenry and is in fact dependant on the exploitation of the majority of Kenyans. The satisfaction of these minority tastes contributes to the inability of the economy to improve the basic social conditions of that majority. As the saying goes, the rich get richer and show it, the poor get poorer - and cannot hide it.

C. DEVELOPMENT OF TECHNOLOGY

Up to this stage, the discussion on the bargaining process, the agreements and issues of implementation has only been in relation to transfer of technology. This section aims to deal with the importance of development of technology, commonly referred to as research and development (or R&D), in this whole process. Basically, it is negligible.

The contribution of any T.F.-proposed or joint project to E.S.D. in Kenya is not one of the criteria used in the process of negotiation with foreign investors. This was expressly confirmed by both the principal economist in the Ministry of Industry and ICDC P&O and also by a one-time member of the NPC. Further, it does not actually feature in the negotiations as such, leaving aside the fact that it does not form part of the criteria.<sup>41</sup>

The agreements contain no direct references to such contribution either, and there are no specific obligations on either the foreign suppliers or the local recipients of technology to contribute to, or promote, the development of technology relevant to local economic and social needs. The only two agreements which make oblique reference to R&D provide that the licensee shall inform the licensor, in reasonable detail, of any processes or formulae or products developed by the former in the course of using the respective technologies or manufacturing the licensed products.

As far as practice is concerned, the principal economist again observed that "development of technology - I mean technology of specific local relevance - in conjunction with foreign investors as a joint project is minimal if not non-existent". The general response from the private sector was that R&D was basically performed in the base-countries of the TNCs, any local R&D restricted to simple modifications or alterations, where these were required by such local conditions as weather or lack of, or inadequacy in, certain infrastructural facilities (for example rugged roads). For example, one vehicle assembling firm had to alter the size and material of the mudguard on their vehicles so as to cater for muddy terrain. Another had to reinforce the type of paint it uses so as to make it less susceptible to corrosion.

Also prevalent (in fact more so), is the form of R&D that goes into product differentiation either within the same firm or as between different firms. Much of this takes place in the base-countries, the results being merely applied in Kenya. However, several firms stated that they engage, to a limited extent, in this kind of R&D locally, for example in differentiating certain tastes and colours of edible foods and beverages or certain containers or packages for their products. Thus, the limited level of R&D which is carried out locally is rarely substantive and is, in virtually all cases, done within the international framework which the TNCs operate in, satisfying in the process their need to diversify, widen and control their markets - and thus remain the international commercial giants that they have become.



FIRMS	Nominal Share Capital (Shs)	Issued Share Capital (Shs)	Nominal Share Value (Shs)	Share-holding			Nature of Firm (Private/Public)	Year of Establishment	Joint Venture	Year made	Indebtedness (Outstanding) loans only (Shs.)	Information Valid as at:
				Local	Foreign							
					Number	Source country						
A	75,000,000 <sup>a</sup>	75,000,000 <sup>b</sup>	10	600,000 <sup>d</sup>	2,399,996	UK	PB	52	69		2/2/79	
B	20,000,000	11,235,000	5		2,257,000	UK	PV	50		20,000,000	2/5/79	
C	5,000,000	5,000,000	20		250,000	US	PV	56			7/12/79	
D	64,152,000	64,152,000	20	1,449,835	1,757,765	UK	PB	49	49	(£323,000)	13/5/79	
E	41,420,000	41,420,000	20	621,300	1,449,700	US	PV	69	69		1/2/79	
F	23,500,000	23,500,000	20	720,750	693,250	US	PV	75	75	34,300,000	12/3/30	
G	6,000,000	5,321,600	20		266,080	FRG	PV	58			26/2/30	
H	340,000,000	320,000,000	10	b	b	UK	PV	60	b	170,000,000	6/7/79	
I	11,000,000	11,000,000	20	275,000	275,000	S	PV	69	69	4,713,500	31/12/79	
J	200,000	200,000	20		10,000	UK	PB	63			23/12/79	
K	55,000,000	40,230,010	5	2,056,004	5,999,998	UK	PB	43	69	6,000,000	1/3/79	
L	6,000,000	6,000,000	20	300,000			PV	75		5,000,000	3/1/30	
M						US		67				
N	3,000,000	2,550,000	20	127,500			PV	72		4,049,2370	28/3/79	
O	5,000,000	5,000,000	20	100,000 <sup>e</sup>	150,000	UK	PV	49	78	3,000,000	22/3/79	
P	3,000,000	1,520,900	20	76,045			PV	75		2,444,025/70	11/9/79	
Q	3,653,000	3,653,000	1000	3,023	5,625	US	PV	67	67		6/6/30	
R	2,000	2,000	20		100	UK	PV	59			14/5/79	
S	1,500,000	1,000,000	20		50,000	UK	PV	49			1/1/79	
T	12,362,330	12,362,330	20	412,096	206,043	S	PV	76	76	7,362,330	10/12/79	
U	2,000,000	1,800,000	20	31,630	62,320	S	PV	63	63	2,315,100	2/2/30	

SOURCE: Files of the respective firms in the Companies Registry, Dept. of the Registrar-General, Office of the Attorney-General, Nairobi.

...../214

Notes to Table IIA:

- (a) Although the figures for nominal and issued share-capital are operative as at 2/2/1979, those relating to share-holding are only available as of 1972, when both the nominal and issued share-capital stood at Kshs. 6,000,000. From 1972 onwards, particulars of allottees were not entered in the main file, but in other "mini-files" which were under lock and key and were not available for perusal.
- (b) Out of the 32,000,000 allotted shares, two are held by a Kenyan of British origin who is a director of the company. The other 31,999,998 are held by a holding company which is incorporated in Kenya but is a public company whose shares are understandably owned by locals as well as foreigners. However, the relevant file was unavailable in the registry. The structure of this share-holding could, thus not be analysed.
- (c) There are further outstanding loans of DM: 1,124,800 and £S100,725.
- (d) This is a company incorporated and organized under the laws of the State of Nevada, USA. It was registered in Kenya as a foreign company in 1967 and carries on its manufacturing activities as such. It is not required to file such details as are contained herein.
- (e) These shares were allotted to prominent Kenya Businessmen and politicians, including three Cabinet ministers, on 26/6/78.

**Source Countries:**

- UK - United Kingdom
- US - United States of America
- FRG - Federal Republic of Germany
- S - Switzerland

**Nature of firm:**

- PU - Private Company
- PB - Public Company

Source	Nature of firm	Value	Year	Month	Value	Date
60,000	PU	60,000	10	10	60,000	1/2/79
2,445,000	PB	2,445,000	10	10	2,445,000	10/3/79
421,300	PB	421,300	10	10	421,300	1/2/79
724,750	PB	724,750	10	10	724,750	10/2/79
275,000	PB	275,000	10	10	275,000	10/16/79
2,056,000	PB	2,056,000	10	10	2,056,000	12/1/79
100,000	PB	100,000	10	10	100,000	10/2/79
3,000	PB	3,000	10	10	3,000	1/6/80
412,000	PB	412,000	10	10	412,000	10/10/79
37,321	PB	37,321	10	10	37,321	1/6/80

... ..

(a) ... ..

**Table II B: Local/Foreign Share-holding in JVs**

Firm	Shareholding			Percentage Share-holding		Total Issued Shares	Information Valid as at:
	Local		Foreign	Local	Foreign		
	Shares	Holder					
A	600,004 <sup>a</sup>	MOP	2,399,996 <sup>a</sup>	20	80	3,000,000	2/2/79
D	1,449,835	G	1,757,765	45	55	3,207,600	18/5/79
E	621,300	G	1,449,700	30	70	2,071,000	1/2/79
F	726,750	G	698,250	51	49	1,425,000	12/3/80
I	275,000	G	275,000	50	50	550,000	31/12/79
K	2,056,004	G & MOP	5,999,998	25.5	74.5	8,056,002	1/8/79
O	100,000	MOP	150,000	40	60	250,000	22/3/79
Q	3,028	G	5,625	35	65	8,653	6/6/80
T	412,096	G	206,048	67	33	618,144	10/12/79
U	31,680	G	63,320	33	67	95,000	2/2/80

**SOURCE:** Files of respective firms in the Companies Registry, Department of the Registrar-General, Office of the Attorney-General, Nairobi.

**NOTES:** (a) See similar note to Table IIA.

MOP Members of the Public.

G Government.

(The SAHARA TIMES, Sunday February 2, 1981, pp. 1, 2, 3, 11.)

1. Cont. IIA of the Law of Companies.

...../217.

2. Cont. IIB of the Law of Companies.

\*\*\*\*/208

1. The procedure described here relating to these applications was outlined by the principal economist in the Ministry of Industry in direct interviews held with him.
2. The answer to this question was compiled from interviews with the principal economist in the ministry of industry, the Public Relations Officer of ICDC (a "development economist" by his own claim) and two one-time members of the NPC, and also from documents prepared by the NPC.
3. ICDC, according to the latest form of annual return available at the companies registry (dated 1/2/1979) holds 414,200 shares of shs. 20/- each to DFCK's 207,100 shares and Firestone Tire and Rubber Company's 1,449,700 shares.
- 3A. See a general opinion expressed in an editorial comment of a local weekly in discussing foreign exchange drain:

"Perhaps even more worrying is the fact that the government continues to fall victim of so-called foreign investors whose projects are condemning this country to years of foreign exchange drain. Some of the projects the government has approved in recent years are investments only in name. The investors concerned are entering into joint ventures with the government in an arrangement in which the foreign investor procures equipment for the joint venture and recovers more than he has invested by creaming off huge sales commissions for equipment procurement. Often the foreign investor negotiates lucrative management fees payable in foreign exchange, and invariably it is the government which ends up guaranteeing the foreign component of loans advanced to the joint venture. Whether such ventures succeed or fail makes little difference to the foreign investors, for usually they have already made their profits long before the ventures get off the ground. This is capitalism gone hay-wire. The government takes all the risks while the capitalist takes most of the profits!"

(The NAIROBI TIMES, Sunday February 8, 1981, p.4, Cols.1,2).
4. Cap. 113 of the Laws of Kenya.
5. Cap. 172 of the Laws of Kenya.

6. It must be remembered that the discussion here relates, specifically, to investment agreements so that this statement should be seen within this limitation.
7. "Integrated" here refers to those investment agreements which have substantive provisions on technical and management services and licencing (trademarks and tradenames) integrated in them. These provisions will, however, be dealt with in the discussion of the specific relevant agreements to avoid duplication.
8. U.N.T.S. Vol. 579, 159 See text in ICSID: ILW:1. (Oceania Publications, Inc. N.Y., March, 1977) and CLIVE M. SCHMITTHOFF (ed): International Commercial Arbitration (Oceania Publications Inc., N.Y., 1974-75, 35.
9. Article 1(2) of the Convention.
10. ICSID: ILW: 1, Preface
11. Conciliation proceedings (which as has been mentioned, are envisaged in only one agreement) are instituted by either a Contracting State or a national thereof, and are conducted by the Conciliation Commission whose member(s) is (are) appointed by the parties, or, where they fail to agree, by the Chairman of the Administrative Council of ICSID. Being a conciliatory body, the Commission merely considers the issues and makes recommendations to the parties endeavouring as it were to get them to a mutually acceptable understanding. On procedure for conciliation, see: Articles 12-16, 28-35 and 56-63 of the Convention and also Rules of Procedure for Conciliations Proceedings made under the Convention.
12. On arbitration procedures see Articles 12-16 and 36-63 of the Convention.



13. See articles 14, 31 and 40 of the Convention.

14. See text in SCHMITTHOFF (ed) supra, 273.

15. For a more elaborate discussion of this subject, see:

UNCTAD: Restrictive Business Practices in Relation to the Trade and Development of Developing Countries, Report by the Ad Hoc Group of Experts (UN Publication Sales No. E.74.II.D.11).

UNCTAD Secretariat: Major Issues arising from the Transfer of technology to Developing Countries (TD/B/AC.11/10/Rev. 2., N.Y. 1975).

UNCTAD Secretariat: An International Code of Conduct on Transfer of Technology (TD/B/C.6/AC 1/2 Supp. 1/Rev. 1., N.Y. 1975)

UNCTAD Secretariat/WIPO Bureau: The Role of the Patent System in the Transfer of Technology to Developing Countries (TD/B/AC.11/19/Rev. 1., N.Y., 1975)

K.K. SUBRAHMANYAN: Import of Capital and Technology (New Delhi, People's Publishing House, 1972)

16. "Minimum royalties" are in the same category as lump-sum payments in the sense that they are no longer pegged to production and subsequent sales. Worse still, they actually safeguard the supplier against "uneconomic" returns which it would otherwise get in the event of poor performance on the part of the recipient.

16A. A participant in a seminar for engineers on "Development in Africa" (organized by the International Federation of Independent Consulting Engineers held at Kenyatta Conference Centre, Nairobi, in October, 1980) expressed the opinion that:

"The shelves of the World's supermarkets for technology are full of the blue-prints,

gadgets, systems, that is, with 'technology' that has been designed in the first instance for, and is suited best to, industrialized economies and societies Little else is readily available."

(See DAILY NATION, October 29, 1980, p.4 cols 2-5)

See also, comment of managing director of Firestone East Africa (1969) Ltd., Stephen Julius Fabian, during an interview with a "special correspondent" on the activities of the firm. In the interview, ironically titled, "Firestone follows 'Nyayo' with a firm but gentle tread", he states (in answer to the question "Where does Firestone East Africa obtain its technology?") that:

"We have an agreement with The Firestone Fire and Rubber Company in the United States which enables us to obtain the latest processing, manufacturing and tyre engineering technologies developed by the company's research and development centres ...~~which~~ are operated by Firestone in Europe as well as in the United States...."

(See SUNDAY NATION, October 26, 1980, p. 12, Cols. 1-6 (emphasis supplied)).

17. That is to modify or alter equipment and processes.
18. A managing director of a J.V. affiliate of a UK TNC.
19. It also contributes to the displacement of some workers by Machines, who are then declared redundant. This threat to workers by the introduction of new technology (either in processes or machines or both), was at the base of a controversy between two firms, Technical Engineering Services Ltd. (TESL) and Plessey (East and Central Africa) Ltd. (PECAL), on the one hand, and the Union of Post and

Telecommunications (UPT). According to the secretary-general of UPT, Ali Mohamed, workers were being dismissed on the basis of new technology which employers claimed to be benefitting the country. Forty-five had already been issued with quit notices while hundreds were threatened with sacking by various telecommunication organizations. TESL had dismissed over ten workers, while PECAL wanted to terminate the services of thirty-five. The managing director of PECAL, Graham Bacon, in a letter to UPT dated November 10, 1980, explained that the introduction of the new technology needed reduced labour. He stated:

"We estimate that the direct labour involved in installing and commissioning an electronic exchange is approximately 10% of that required to instal an equivalent electrical one, although we agree that some of the direct labour remains relatively constant. Clearly, therefore, we are experiencing a reduced requirement for labour."

(See SUNDAY NATION, November 30, 1980 p.3 cols. 2-4)

20. See, for example, the remarks of the minister for information and broadcasting - Peter Oloo Aringo, in a speech read on his behalf by his assistant minister, Alphonse Okuku, at a Marketing Society of Kenya luncheon in Nairobi. He castigated the unscrupulous abuse of advertising and condemned advertisers who exaggerated the qualities of goods, making wild claims about them and sometimes telling outright lies:

"There are those which misreflect the world around us to our children; then there are those which are downright unethical".

(See DAILY NATION, December 4, 1980, p.5, cols. 5, 6 and DAILY NATION, January 31, 1981; p. 3 , cols. 2-5-).

Interestingly, however, radio and television, both government owned, get much of their income from advertisements and from programmes sponsored by such advertisers. The latter have quite a strong bargaining position in relation to programme allocation and determination of charging rates. (See DAILY NATION, January 1, 1981; p. 1 cols. 2-6 & p. 20, col. 5, and February 8, 1981; p. 4, cols. 5,6).

21. The licencing agreement provides that in the event that it is terminated, the licensee must cease the use of the manufacturing process(es) and the manufacturing of the licenced products. It must also return all the documents, plans, print outs, formulas, etc, to the licensor, at the same time giving the licensor the option "of disposal of any of the licenced products which shall at the time have been partly or wholly manufactured and/or packaged and shall not have been sold and delivered to their lawful purchasers".
22. He gave us a helpful opportunity to peruse the documents despite the director's view of which we informed him.
23. For example, in one case, not a single Kenyan knew of the formulae for the manufacture of a particular product. The highest placed Kenyan only knew that the basic ingredient was a powder which was imported and was mixed in certain quantities with other materials including distilled water and sugar. This powder was referred to only by a name which was neither generic nor otherwise scientific. The firm has been in operation since 1956.

In another, the co-ordination between two sections of a factory, one of which was preparing intermediate inputs and the other using them, was done strictly on a confidential basis. The Kenyans in the different sections did not even know that their work was complementary: those in the first section did not know what was the destination of the intermediate products, and those in the second did not know where their inputs came from.

In yet a third, the distribution and accounting systems, (the latter was in fact changed at intervals) were known only to the expatriate personnel.

24. This lack of training has been lamented even at high levels of government:

The Minister for Labour, Titus Mbathi, while addressing guests at a ceremony in honour of employees who had served the East African Power and Lighting Company Ltd. for 20 years and over, noted that many employers were not using the opportunity of the training levy which continued to grow larger: "There were many employers who contributed to the training levy but did not undertake any training themselves". (See SUNDAY NATION, November 16, 1980; p.3, cols. 5,6).

President Daniel arap Moi, in a speech read on his behalf by a minister of state in the president's office, Nicholas Biwott, at the official opening of the extensions to the East African Industries Ltd. factories (on November 13, 1980) stated that:

"But as industry becomes more sophisticated and the whole economic panorama in Kenya becomes injected with more doses of technology and science,

so the demand for skilled and fully-trained manpower is rapidly increased. I am making this point deliberately because I am simply not satisfied with progress in the training field .... At present, we are certainly not drawing upon the country's fullest potential for the training of skilled workers, yet our people are our greatest asset in the development of our country. We must therefore give training higher priority so that our people can become a more effective instrument in the development struggle."

(The full presidential speech is contained in the NAIROBI TIMES of November 23, 1960, p. 70, cols. 1-4).

25. This practice is so prevalent that whenever we ventured to interview any local personnel, they would in many cases either contact the "upper" or "inner" office to seek permission, or instruct us to approach one or other of the expatriate staff. (The division is even emphasized by the allocation of office space in some firms). This is, of course, easy to rationalize on the basis of delegation of authority within an organization. However, it is difficult to so explain away the fact that a responsible local factory, sales or personnel manager, for example, does not have authority, intelligence and initiative to decide within the framework of the whole organization, what information within his jurisdiction could properly be disclosed - while an expatriate one in a comparable position has.
26. One illustration of this is the case of Hoechst East Africa Ltd.. Employees of this company reportedly wrote letters of complaint to the Kenyanization of Personnel Bureau, the ministry of labour and the ministry of home affairs accusing the management of the company of being Anti-African, and



using irregular tactics to force African's in top positions to resign. Between the end of 1977 and early 1980, fifteen Africans in managerial positions and about thirty in the lower echelons had been forced to resign through either being forced to work under unqualified personnel of Asian origin, or being made to work in areas unrelated to their professional training and thereafter charged with incompetence. In case these failed the employee was then offered lucrative material incentives in exchange for his resignation. The management in this case reportedly enlisted the co-operation of an African administrative manager, Peter Ndungu Kanari, who had joined the company earlier after resigning as deputy director of Central Medical Stores of the Ministry of health, and who had what the employees called "unshakeable connections within the government" (P. N. Kanari, according to the current form of annual return dated 10/5/1978 and filed in the companies registry on 14/7/1978, and notification of directors dated 26/2/1980 and filed on the same day, is an alternate director of the Company). Expatriates in the company, whose continued existence the company had unsuccessfully sought to justify to the Bureau on the basis that they were trained in specialist fields (like textile engineering) for which qualified Africans were unavailable, nevertheless stayed AND also had their work permits renewed. (See NAIROBI TIMES, January 20, 1980; p. 1, cols. 2-4). According to an employee in the firm, there is now a clear-cut social division between the employees on the basis of whether they are "Anti-Kenyans" and support the expatriate managerial staff or not. Some of the Africans who have in the past been known to side with the expatriates have tried to "join the pro-Kenyans camp, but /to

have been given a cold shoulder because they may only be acting as spies."

Of interest in this respect is another dispute, which was before the Industrial Court, between the Kenya Management Staff Association and Johnson and Johnson Company Ltd. relating to the sacking of a production manager. According to the Association, the employee was arrested by Criminal Investigations Department officers on instructions of his employers, and taken to a police station, where he was handed a letter of dismissal from his employers before the investigations were even completed (He was alleged to have been involved in a theft in the company. No criminal proceedings were filed against him). (See The STANDARD, August 6, 1980; p. 5, cols. 2-6).

27. A very recent case is that of East African Industries Ltd. The workers here, some 271, staged a sit-in and procession strike on 6/2/1981 to demand the dismissal of an expatriate engineer who they said had insulted a shopsteward (calling him "stupid African") and locked him in his office. The chairman of the firm, an indigenous Kenyan, Joseph Bamage Manjui (who is, among other positions, also the Chairman of the Kenya Association of Manufacturers and the Kenya External Trade Authority) denied the claims and categorically stated he would not succumb to the request: "I don't tell them who to elect and they can't tell me when to sack my managers" (DAILY NATION, February 7, 1981). One hundred and two employees of the company and two shopstewards were respectively charged in court on 7/2/1981 with holding an unlawful public procession and inciting the employees (SUNDAY NATION, February 3, 1981). They were released on 13/2/81 when the Attorney-General gave instructions for withdrawal of the case (The STANDARD, February 14, 1981). The Board of Directors

and Management of the company placed a full-page announcement under the hand of Wanjui in the daily newspapers of February 13, 1981, referring to the strike and assuring the consumers that the factory was operating at full capacity.

The Management was then "negotiating the re-employment of the workers who lost their jobs by engaging in an illegal strike. Those who are interested in re-employment should submit written applications to the Personnel Manager .....

Other Kenyans may also apply giving age, education and experience." (DAILY NATION, February 13, 1981, p. 10).

Out of the 271 employees who were dismissed for engaging in the strike, 243 have now been re-instated. The cases of the other 28 are still being negotiated between the company and the representative union. It is not clear what is delaying their reinstatement, or what result will eventually be reached (The STANDARD, February, 19, 1980; p. 3, Col. 6).

On another occasion, President Moi himself warned expatriates against insulting Kenyans. In a speech at the official opening of the Kenya Breweries plant at Kisumu on Wednesday August 6, 1980, he said:

"Expatriates should never insult my people .....

They should strictly observe the tenets of the

Nyayo philosophy of love, peace and unity".

The STANDARD, August 6, 1980, p. 1, cols. 1-5)

28. See footnote 21A, first illustration.
29. "Labda" is a Swahili word for "may be" or "perhaps".
30. Just then, he received a call from a senior official of the immigration department who informed him, inter alia, of an application for the renewal of the relevant permits of an expatriate employed in a wholly-owned subsidiary of a

INC so that he could continue, for a further one-and-a-half years, the training of certain local personnel. After a one-and-a-half years of training, they were still incapable of taking full control of the relevant positions.

31. He, in fact, gave names of eight such persons (and their case-histories). Only five of these were former employees of our sample firms. We were only able to trace three of the latter.
32. Even in this one case, the data was too sketchy to merit specific consideration.
33. That was sometime before mid-1980. Numerous periodic calls at the relevant person's office for a period of months have not borne fruit; he is either in a meeting or somehow out of the office. (The official remained with the names of the firms on which information was required, and also a breakdown of the specific data required - plus a contact address). Supposedly, that promise still stands save that he cannot be found to give the information! Or is the information sensitive and therefore confidential even in the view of the CBK? This cannot be ruled out altogether - in practice, if not in principle.
34. We attempted to use the available statements of account, together with the financial provisions in the agreements, to arrive at some estimates. However, the result was inadequate for a number of reasons. First, the figures in the statements were not broken down to give an indication of the various components which they represented, and since there were numerous components which were irrelevant to technology, the value of technological components was next to impossible even to estimate. (Note that financial statements available

to the public are usually lacking in detail). Secondly, there is the possibility that the financial statements which were available did not represent the actual performance of the relevant firms. There have been claims that TNCs, their subsidiaries and affiliates have two, or even more financial statements, each available depending on who is the recipient: perhaps one for the tax-man - and the general public, another for the share-holders, and perhaps a third for the headquarters. Although this is/question /a which was not dealt with directly, reference was made to it in the case of two firms, where the persons interviewed referred us to the expatriate financial controller, in one case, and expatriate financial director, in the other, if we needed to have "a more real", or "a better picture" in the other case, of the financial activities of the firms (after they had given us "proper" financial statements) - provided the expatriates did not know of the preceding discussions. This practice is prevalent even among local businessmen, and the possibility that subsidiaries and affiliates of TNCs engage in it (even in collusion with local personnel) cannot be summarily dismissed. Thirdly, such financial statements would be of no value at all where lump-sum payments have been made before any years under consideration, since such would not be provided for therein.

35. For example, British American Tobacco Kenya Ltd. has 8 expatriates, East African Industries Ltd. has 11, Firestone East Africa (1969) Ltd., 7, and General Motors Kenya 5.

According to a statement made in parliament in answer to a member's question (by a minister of state in the office of the president, Nicholas Biwott) on Tuesday September 23,



1980, there were 10,177 expatriates in the private sector, 792 in Government and 1,050 in teaching, making a total of 12,019. Of these, 2,947 were general managers; 432 accountants; 375 technical managers; 69 advisors and 65 secretaries (Whereas government officials are generally concerned with the quantitative value of such personnel, it is important to take specific account of the positions that these persons occupy in whatever areas they engage). The minister further stated that some expatriates will never go from Kenya, arguing that it was unfair to Kenyanise posts held by people who had invested their money in Kenya! But expatriates employed by the investors would be replaced as soon as Kenyans were trained to take over these posts. (Ironically, such training is left to the investors to carry out) DAILY NATION, September 24, 1980; p. 1, cols. 1-5).

36. This foreign ownership and control of the economy has been continually decried by Kenyans, including, ironically, government officials. Shariff Nassir, then minister for commerce, while closing a two-week seminar for Kenyan commercial attaches<sup>s</sup> abroad, remarked that Kenya's economy is still foreign-dominated, adding that political independence was not enough when the expected beneficiaries thereof, the Wananchi, had not had a full grip of the national economy: "I am not happy when I look around and find that most Wananchi are not involved in the running of our economy, on which the stability of this country rests". (The STANDARD, November 8, 1980; p. 3, col. 6). Titus Mbatia, the minister for labour, while addressing the staff of Benham Holdings, said:

"It is through devotion and commitment that Kenya can achieve economic independence. Otherwise as long as we look upon foreigners as managers of our industries,



we shall never break the yoke of economic dependence on foreign experts".

(The STANDARD, October 20, 1980; p.3, cols. 3-5).

President Moi, on the occasion of the 25th Anniversary of the House of Manji remarked that:

"In the case of ownership, I am sure that good sense and business acumen are adequate considerations for convincing foreign controlled companies and large private Kenyan companies of the importance and urgency of involving Kenyans, including company employees, in ownership".

(The STANDARD, September 11, 1980; p.11, cols. 1-6).

These laments are, however, futile since they are not accompanied by concrete policies and programmes for the achievement of that independent economic development.

See footnote 27A, for example.

A phrase used by Vladimir Il'ich (Lenin) to describe two

extremely contrasting (economically, politically, socially and culturally) areas of London during walks through its various districts. See DAVID SIMS: Lenin: A Biography (Penguin Books, Unabridged Edition, 1977), p. 70.

See for example, a recent illustrative survey of working conditions in Kenya's industrial area by George Omari, titled "Dangerous Work" (WEDNESDAY STANDARD, December 7, 1980 pp. 16 and 17).

The following are some of the amounts spent by a few of the firms in our sample on advertisement:

A: "Over Kshs. 6 million annually" on direct advertisements only. It was suggested that this was bound to increase in the coming months if the absolute monopoly enjoyed by the firm was lost. This was possible because a rival producer based in

the US, not producing in Kenya) had sponsored a major rally event in Kenya and followed it by the introduction of some of its products. Whether it will establish a manufacturing plant is not yet known.

B: 1978: Direct (newspapers/magazines/radio and [redacted] television only):

Kshs. 275,000/-.

Promotional (raffles/competitions):

Kshs. 100,000/-.

1979: Direct: Kshs. 1.02 million

Promotional: Kshs. 186,000/-

It was mentioned that these figures are low since these were the first two years of full-scale production, and that there were already plans to increase this amount. This appears to have been done: there are now almost daily advertisements in the daily papers and in the Kenya weeklies. Also a new concept has been introduced of an inanimate object (representing a vital energy input) which addresses itself to, and instructs consumers on, the advantages of the firm's products, especially the introduction of diesel-powered vehicles.

C: 1978: Conventional (Newspapers, magazines, Radio and television): Kshs. 9,314,000/-;

Others: (Raffles, competition, posters, bill boards etc): Kshs. 1,157,000/-

1979: Conventional: Kshs. 10,47,000/-

Others: 1,200,000/-

D: "Used to be about 10 million shillings annually, but since 1978, over 13 million shillings annually, and is [redacted]

bound to increase since a local plant established in 1975 and manufacturing similar products is definitely edging in on the market".

41. A glance at Appendix F will confirm further the lack of reference to any issues relating specifically to the possible contribution of the proposed projects to R&D.

CHAPTER III

IN LIEU OF A CONCLUSION: A SYNTHESIS

It has been noted and emphasized that the foundation of economic activity in Kenya is private enterprise. Governmental involvement, which is seen to give this economic activity the stamp of "mixed economy" is not dominant, and is, in any case, essentially an augmentation of, and subservient to the dictates of private capital. Private enterprise, as an abbreviated expression of the ownership of the means of production and exchange by, and its exploitation principally for the benefit of, individual entrepreneurs is the centre-piece of organization of production on capitalist lines.

The industrial process which the government has declared must be promoted, requires capital, technology and know-how. The national economy is admittedly, deficient in all these in-puts. It is upon this deficiency that is based the involvement of the TNC in the national economy. The government believes that these in-puts are largely unavailable locally, and must, therefore, be imported. The TNC, private, profit-oriented institutions which have developed with the structural transformation of competitive into monopoly capitalism, have been accepted by policy makers as the major (albeit not the only) answer to this deficiency. Thus, private foreign investment must - and does, play a crucial part in the industrialisation process in the country (inevitably in the thinking of these policy-makers). Their assumption is that these institutions will enable the national economy by their contribution to be increasingly self-sufficient in these inputs, by transferring adequate investment funds, providing capital goods and manufacturing processes or formulae, and supplying technical and managerial know-how necessary for the profitable operation of the investment enterprises.

The major objective of this industrialization process is industrial development which, as has been mentioned, basically entails the expansion and diversification of efficient production (for both internal and external markets); the reduction of dependence on foreign in-puts; the creation of employment opportunities for Kenyans specifically; the increase of state revenue, and the achievement of high growth rates in small scale rural and labour and resource-based (capital saving) industries. In short, government policy, with a capitalist mode of production as its foundation, hopes to use TNCs as tools for nurturing independent industrial development, and in the process satisfy the socio-economic aspirations of Kenyans.

There are certain basic contradictions at this fundamental level of policy. First, it ignores the fact that TNCs themselves are profitmaking private enterprises which have their own objectives to achieve. Independent industrial development, if and when eventually achieved, obviously precludes the full participation in, and control of the national economy by TNCs by the very fact that it presupposes reduced dependence on foreign in-puts. This is not in the best interest of TNCs and they can, therefore, not voluntarily contribute to it unless they are made to. (We were reminded over and over again during research that TNCs may be anything else, but they are definitely not philanthropists!). Their importance lies in their ownership of things that others are deficient in, and they are not, and should not be, expected to freely reduce that deficiency. The open-door-in Kibaki's language, "Open-arm" <sup>1</sup> policy that

the Kenya government follows in its relation with the TNCs is not an adequate measure to counter the objectives of the TNCs. Independent development and an open-door policy are, it is submitted, incompatible when applied to the relationship between Kenya and the TNCs.

Secondly, TNCs as we have had occasion to point out, are a product of the historical development of capitalism, an off-shoot of the cut-throat competition that characterized the early stages of capitalist development. They are, therefore, principally based in the capitalist nations of Western Europe, Japan and North America, from which they spread their tentacles around the world. Their technology and know-how basically take account of the factor endowments of their economies, and development thereof, and that of the specific products, is in turn influenced by the demands of and the specific conditions within, such economies. Thus, the only way that Kenya can use the technology developed by TNCs to promote and achieve high growth-rates in small-scale, labour-intensive and resource-based industries is through their extensive modification or their use as a basis for applied research. But it is difficult to see how such technology can simply be applied to achieve these objectives.

Finally, reference to rural-based and labour-intensive industries appears to suggest a concern for the broader majority of the Kenyan population; that is, the mass of Kenyan peoples. This policy is, therefore, intended to satisfy the aspirations of the majority. Is the satisfaction of the aspirations of the majority of Kenyans on the basis of individual enterprise not a contradiction in terms of policy? It is submitted it is.

In line with this predominantly individual enterprise which incorporates an open-door policy in relation to TNCs, the industrial property and investment laws have as their basic function the protection of the owners of such property and investment funds, and the facilitation of the



profitable exploitation thereof. The protection of those who may be the objects of this exploitation is not the central issue: it is only a subsidiary one which comes into sharper focus only when such objects react in a manner that may, if not checked, jeopardize the process of maximization. The PIA, the TMA, the Paris Convention, the Kenya Constitution, the FIPA and all the bilateral agreements that have been considered here were shown to have this protection and facilitation of exploitation as their principal function. And the ownership of this industrial property and the investment funds is itself concentrated in limited hands; it has not been socialized. As institutions which directly or indirectly own such property and funds (or have direct access thereto<sup>2</sup>), TNCs are prime (and in some cases - like in FIPA and bilateral agreements - the only) beneficiaries of this state of affairs.

The negotiation process between the TNCs and the Kenyan officials is essentially intended to "wrest" from the former maximum advantage for the economic development of the national economy, and, specifically, with a view to nurturing self-sustaining independent development of the national economy,

in the process alleviating the characteristic social ills (for example: unemployment, poverty, illiteracy, lack of proper shelter, social security, health etc). That is as a policy. The institutional structure that deals with this process is,

as a collection of functional offices, innate. What is of actual significance here is the relationships that exist amongst those persons who occupy these offices, and between them and their "adversaries", and the criteria which are supposed to guide them and how they view these criteria: more precisely, the totality of economic, social and cultural conditions under which the negotiators operate.

It has been noted that in the specific circumstances of Kenya, these conditions include not just the official criteria (project profitability, foreign exchange earnings/savings, local input utilization, employment creation, capital technology and know-how sources, local protection, etc), but also lack of proper understanding of these very criteria, lack of a definite technology transfer and development policy and programme (plus the fact that appraisal and negotiation do not take specific and adequate account of transfer and development issues); lack of adequate information; sheer ignorance and inefficiency, indifference or lack of experience and expertise on the part of the negotiators, and self-interest, and what was referred to as "extra-economic considerations (both by actual negotiators and other government officials) which is generally welcomed and even encouraged by INCs.

Such factors also include the very nature of INCs and their prime objective of global maximization. And, underlying all these, and interacting therewith is the system of economic development that has been produced by the specific historical circumstances of Kenya: a capitalist system that was directly shaped by the demands of British-

imperialism for close to a century, and which, after the achievement of formal independence, has continued to develop as such and generally opened itself to the non-monolithic imperialist world.

These conditions, as may be expected, have fully interacted to produce both formal agreements and informal understandings which, both generally, and in relation to transfer and development of technology specifically, do not accord with the objective of fostering independent and self-sustaining economic development, on the one hand, and of realizing the social aspirations of the economically, socially and culturally exploited and oppressed peoples, on the other.

With respect to investments, these agreements saddle the government with heavy and largely unreciprocated obligations, varying from protection of investments (including, in some cases, monopoly rights) and grant of all official authorizations for expatriate personnel; through guarantees of factory sites and services, and procurement of duty-free import and export licences, all necessary permissions under exchange and currency control regulations and necessary foreign exchange; to recognition of the investors prerogative in price-fixing (which, in any case, shall take into account "reasonable profit"), most favourable treatment and submission to designated arbitration authorities (which are alien).

The technology aspect is just as profoundly onerous. Basically, the TNCs promise to furnish technical data (processes and formulae, blue prints, etc);

to supply machinery and other equipment (including the attendant services); to offer training facilities and to provide requisite management services. They also undertake to grant licences for the use of the processes/formulae, trademarks and tradenames. They do not specifically undertake to engage in locally-oriented R&D.

But these obligations are subject to various in-built and substantive restrictions which limit the acquisition, diffusion and utilization of the technology despite the fact that the latter (and all the services relating thereto) is paid for. These limitations relate to use and disclosure of the technology and assignment and sublicensing of the rights granted; to contest of the validity of property rights; to employment and skill-formation, and to the utilization of the respective rights after the expiration of the contractual relationships. Further, it has also been noted that the implementation of these limited obligations is characterized by various practices on the part of TNCs which are calculated to (or incidentally(?)) continue dependence on imported process and product technology, machinery and other equipment, and know-how, with the concomitant heavy financial burden on the national economy. The misapplication of social wealth, the transfer of inappropriate tastes and the further development of structural social differentiation are some of the resultant social effects.

What then is the trend as far as transfer and development of technology is concerned? Do the TNCs effectively transfer and contribute in developing appropriate technology? It has been argued, and the same is here reiterated, that "effective" transfer must mean that at the end of the technology transfer transaction Kenya is capable of fully and independently utilizing the technology, and if necessary, developing it further. It must mean that Kenyans can wholly man the process of production. This presupposes a complete knowledge and understanding of the various processes and formulae used in production and the various stages of production and packaging, and of the managerial, supervisory, accounting and marketing functions related thereto. It also presupposes a knowledge of the construction and engineering requirements, including factory, and plant layout, and machinery operation and servicing. In other words, the relationship must end dependence, when all is said and done. And, as has been argued herein this need not be incompatible with equitable returns for the owners of technology. What, however, is happening in the case of Kenya does not accord with this.

There is, indeed, technology and know-how in the country. This is undeniable. The technology and know-how is engaged in the process of production and distribution, and Kenyans, it must be added, also engage in this process at various levels, and particularly, at the level of actual production. However, the effective transfer and development of this technology and know-how is made difficult, if not altogether impossible, by formal limitations and by practices which ensure that these largely remain in the hands of the suppliers. These practices include non-disclosure

of formulae and/or some crucial information relating to the process of manufacture; continuous replacement of machinery and other equipment which makes any acquired knowledge obsolete, while at the same time renewing dependence on expatriate personnel and making it inevitable for the next planning period(s); reservation of certain important and controlling positions for expatriates; lack of, or inadequate, training and numerous forms of frustration or victimisation. The central objective of the whole process is not the transfer and development of technology. On the contrary, it is the utilization of the technology and know-how by the owners, or their representatives, in production with a view to manufacturing more cheaply certain products which would otherwise be manufactured more expensively abroad, and selling the same in Kenya and surrounding markets to generate and further accumulation. This generation of surplus is, it is submitted, the cornerstone of the relationship. And it takes place in various forms, including direct payments for the use of, and for licences for, processes, trademarks and tradenames, and for machinery and other equipment; payments for know-how; returns on investments; all sorts of emoluments enjoyed by the owners or their resident/temporary representatives; savings on cheaper labour and other local in-puts and returns on over-priced imported in-puts or fresh use of superseded machinery. It is aided by an open-door economic policy which believes in strict protection of the external in-puts; an equally favourable legal and institutional framework and a government well-disposed to the demands of capital.



Of equal significance is the fact that the technology which is engaged in the process of production is inappropriate. First, it does not take adequate account of some of the important characteristics of the national economy, like deficiency in capital; abundance of labour-resources; lack of capital and intermediate products; low level of foreign exchange reserves; and a generally negative balance of payments position in relation to the source-countries.

Secondly, the products that are manufactured through the technology are basically consumer-oriented, satisfying the needs of only a small, the more affluent, section of the society and emphasizing further the social differentiation that exists within this society. Finally, the process of production in which the technology is engaged facilitates the exploitation of the workers of this country by the TNCs (as owners of the means of production), since the latter, as opposed to the former, are the principal beneficiaries thereof, simply by virtue of that ownership.

It is evident, then that there is need for change if the negative effects of the relationship between the Kenyan economy and the owners of technology are to be eradicated and a more meaningful partnership established.

There is a whole range of reforms which could be made. For example, the policy which requires that there be a more systematic compilation and use of world technological information so as to facilitate "better choices" among available technological alternatives, "more effective bargaining" and more emphasis on "unpackaging and modifying manufacturing processes to utilize more efficiently Kenyan factor endowments, especially man-power"<sup>3</sup> could be taken more seriously and concrete measures undertaken to ensure implementation. The same could be said of the policy to encourage the private sector "particularly the multinational companies... to perform more of their research and development in Kenya"<sup>4</sup>. In the field of industrial property, the government could institute a patent-granting system which at the same time imposes specific obligations: for example, the obligation to disclose to governmental authorities, in reasonable detail, the precise nature of the invention; or to work the patent locally or grant a compulsory licence. The government could, as well, determine precisely the rates of payment which are appropriate to each case, and also limit the length of time within which the inventive process contained in the patent must pass to the local licensee. In the alternative the government could easily assert its right to exploit the invention while at the same time giving the inventors equitable returns either

ation. It may also be necessary for the government to exclude certain crucial industrial activity (for example, pharmaceuticals and food products) from patent grants.

With respect to trademarks, the government could insist that each TNC - licensed trademark must be accompanied in use by a local registered trade mark with a view to the former's eventual phase-out. The government could also regulate trade-mark proliferation, unnecessary and non-substantive product differentiation and advertising to make the content more informative, and thus protect the eventual consumers, and also determine the possible returns to the licensor.

All in all, the government could ensure that property laws have more broadly social objectives, catering more for the overall needs of society than the specific, often narrow, ones of individual owners. After all, the conditions which enable the individual to have industrial property are contributed to by society at large.

In the field of expropriation, the government having recognized this as its inalienable right, could, of course, accept the principle of compensation, but in so doing, take into account the returns which have already been received by the owner since the investment was made, in computing the amount. It could also insist that part, or the whole, of it be further invested within the national economy. The protection of foreign investment could easily be reduced to accord more with the needs of the economy. Whereas the government argues that its liberal policy towards TNCs is partly based on its need for capital, it is common knowledge that the TNCs favour use of local capital and that the returns on TNCs invested capital (to the TNCs) which are largely repatriated, are a continuous drain on the country's resources, and a negation of this very claim. In any case, it must be realized that the theory that it is us who need TNCs while they can "jolly well" do without us is-absolutely - without foundation. The argument that any bit of a squeeze on TNCs will inevitably result in a flight of investment is a figment of imagination of those whose self-interest in their relationship with TNCs stops them from taking an objective look at the "giants". The fact that these "giants" actually have more meaningful relationships with socialist countries is evidence of this thesis. To become or remain "giants", they have to further and diversify their investments. They also have to widen and

protect their markets. Most of all, the Third World production unit subsidises the cost of R & D in the industrialized centre (for example, super surpluses through cheaper labour costs), a factor which contributes to the maintenance of their leadership in terms of both production and market domination. They cannot afford to ignore these factors if they have to survive as such, and if they are pressed to make certain basic sacrifices they will, they must, to stay "giants" as between themselves. It is, therefore, ~~theoretically~~ theoretically possible to regulate foreign investment and make it - if only eventually - serve the specific socio-economic needs of the national economy.

The institutional framework could be strengthened by training negotiators in the specific field of bargaining within a wide ranging framework of the possible fields of negotiation while at the same time offering them good conditions to prevent dissection to the private sector. These ought to be people who are well - versed in any field which is the subject of negotiation. They also ought to know in detail the precise capital and technology needs of the economy in relation to a particular investment proposal. A network of information services could be established to collect relevant information and make it available when needed. In addition the reports of the negotiators and the final decisions could be made public so as to open the whole process to public scrutiny (provided this does not adversely affect future negotiations with other prospective investors).

There is, however, one problem that would be difficult to erase if the approach of reform is adopted: that of self-interest and extra-economic considerations. This is because the economy is organised on the basis of private enterprise, which, as has been argued, breeds individually-centred values. It is, therefore, difficult to ensure under these circumstances, that these will not overide.

A process of scrutiny and registration of formal agreements could be instituted. It could be required that all such agreements be registered, and only after they have been found by qualified analysts to accord both with the specific terms and conditions of investment, and with the broad requirements of the national economy.

No agreement would be valid and enforceable unless so scrutinized and registered.

With respect to the proper implementation of the obligations of the parties, the government could establish a body with qualified personnel which would ensure that the layout of the factory is as agreed, the machinery is not obsolete, is the type required and is not over-priced; the process/formulae are available to local personnel in reasonable detail, the training process is thoroughly done and expatriate personnel promptly phased out, and that, the transfer of technology is effectively completed within a given (absolutely) necessarily short period.

In other words, an effective follow-up machinery could be instituted to oversee the specific and proper performance of the obligations placed upon TNCs. And in all these efforts, use could, to the extent possible, be effectively made of Unctad, which has an advisory body with knowledgeable service personnel and a wide-ranging information bank and service within its technology Division, 5.

More and more recommendations for reform could be made. But really, does this serve any useful purpose within the context of the social formation that forms the subject of discussion here? The more this question of reform is addressed, the more scepticism intervenes. The reasons come out when one looks at the apparent relationship of government with the general body of subsidiaries and affiliates of TNCs.

It has been emphasized that the basis of economic activity in Kenya is private enterprise, which, as a basis for social activity, interacts with other social conditions to produce a predominant ideology of the individual: beliefs and values, and activities which have at their base the satisfaction and furtherance of private interests as opposed to broadly-based social ones. These interests can definitely not be, and are not, monolithic. The coalescence of these interests into concrete social groups with different and decisive positions within the process of production (classes), is an historical process which

inevitably produces struggles as between these classes. Any recommendations for reforms must, therefore, of necessity take account of these classes and the role they play in the economy as a whole.

From this perspective, are the recommendations useful? In other words, can "the government" undertake reforms which not only require TNCs to transfer and develop technology for the benefit of the economy as such, but also ensure that the benefits of this technology (and of all means of production for that matter) are meaningfully enjoyed by the society at large as opposed to an elite?

While the first part of this question deals more directly with the relationship between the national economy as a whole and the TNCs (in other words its dependence on the latter) and the second concerns the internal relationships (in other words, the manner in which the means of production and exchange are owned and exploited or enjoyed within the national economy) the interplay between these two forms of relationships is inevitable, and each has an impact on the other.

A very important factor seems to militate against this. This is the apparent relationship between the subsidiaries or affiliates of TNCs and the government in Kenya, as evidenced by policy formulations, legal enactments and the day-to-day activities of the dominant classes within this government which, most significantly, effectively control the state apparatus and are, therefore, decisive in the direction of state activity. It is posited here that because of this relationship, these classes are structurally incapable of effectively controlling the activities of TNCs in a direction that will ensure effective transfer and development of technology by the latter.

The policy on foreign investment already dealt with, as an

expression of the attitude towards such investors, demonstrates that these dominant classes within the Kenyan socio-economic organization accept the "inevitability" of the presence of such investors, welcome them, give them incentives and protection, and do in fact, believe that the best way to benefit from such investors is to largely provide for their demands and champion their interests. This policy emphasizes the importance of such investors in the economic development of Kenya, and also the incentives and other benefits available to such investors. As an expression of the attitude of the government towards TNCs, it is quite favourable and has obviously been partly responsible for the confidence which the TNCs have in the country.

The legal enactments, a form of the implementation of this policy framework, have shown the same liberal attitude towards TNCs, be they those relating to industrial property, to sanctity of property or to protection of investments. Such enactments have been shown to underline protection of the owners of property in general, industrial property in particular, and guarantee of foreign investments. But whereas such emphasis has concentrated on enabling the holders to more or less freely and profitably exploit such property, it has been balanced by distinct concomitant obligation or requirement that the holders thereof exploit the same in a manner that will not only benefit Kenya as an economic entity, but also effectively better the social condition of the exploited classes within the society. They demonstrate the fact that those who have control of the institutions for making legal formulations are more inclined to



benevolence towards the TNCs at the expense of these exploited classes.

A consideration of some of the relevant activities of the members of these classes reveals a strand of strong support for the TNCs and the activities that they engage in. First, there is a continuous exhortation of foreign investors to invest in Kenya by persons both within and outside the government, coupled with equally incessant assurances as to the safety of, and the returns on, the investments: Kenya is a politically stable and peaceful country, a haven for investors.<sup>6</sup>

Secondly, the negotiation process, a system intended to exact benefits for the Kenyan economy from the proposed investors, eventually yields agreements which give the TNCs heavily beneficial concessions. It thus becomes a process by which subsidiaries and affiliates of TNCs officially gain significant privileges within the economy. These very agreements are obviously analysed and signed on behalf of Kenyans, which suggests that those who sanction their legality and implementation approve of such concessions.

Thirdly, the conspicuous appearance of members of these classes in either affiliating or other capacities in functions organized by TNCs within the country, and obvious endorsement of the activities,<sup>7</sup> thereof, do in themselves give a reflection of a close relationship.

Lastly, the intercession on behalf of TNCs when the latter have problems with either the workers within their organizations (on the pretext of the maintenance of industrial peace) or with some government departments,<sup>8</sup> or with general public opinion<sup>9</sup> cannot be seen, except incorrectly, as a mere functional activity on the part

of such actors based on purely official duty.

All these are reflections of a concrete relationship, a relationship from which the subsidiaries and affiliates of TNCs have been shown to gain significant concessions. As was observed, representatives of TNCs maintained that it was not only advisable, but highly essential to have basic links, and above all, a good relationship with the latter. The importance of this relationship lay basically in the possible privileges that it would ensure.

However, the relationship must not be seen as one-sided-that is, benefitting only subsidiaries and affiliates of TNCs through such privileges. Basically, it is a symbiotic relationship in which both parties thereto hope to, and do, gain something from. (Of course, whether the gains are quantitatively or qualitatively comparable is an entirely different matter!). The point to be stressed here is that those who dominate the government see in this relationship certain concrete benefits which accrue to them from either a personal or general point of view or to the state. The state, as a collective but non-neutral entity, benefits through two processes. It does, firstly, through the collection of tax revenue, (the benefits of which may be minimized through all manner of practices referred to generally as tax evasion). The benefits here are however purely monetary. It does, secondly, also benefit through equity participation. Here, the benefits are more than just monetary.

Apart from the shares of profits the state receives, it may, also in theory, be involved in policy formulation and in the day-to-day management operations of the firm. Again the benefits may be minimized through such practices as transfer accounting, and also through control and direction by representatives of TNCs under management and technical services and licencing arrangements.

From a strictly individual point of view the members of these dominant classes get direct benefits through, for example, ownership of shares in the subsidiaries of TNCs (which ownership assures them a share in the profits and continuously reminds them that the subsidiary is "Our Company"); directorships (which promise concrete economic benefits and raise their social status and ultimately give them a sense of belonging - true or false), and other forms of high level appointments which are accompanied by exorbitant economic rewards in the form of high basic salaries, motor vehicles or equivalents, housing (sometimes with furnishing, water and power bills paid), benefits like school fees and transportation expenditure for children and high medical benefits, not to mention bonuses and other emoluments which accrue during the subsistence of such appointments. Such concrete benefits may also be in the form of appointments in auxiliary positions like distributorships or other forms of agencies or subcontracting. In a limited number of cases they may also take the form of business partnerships, with the locals being mostly junior (and sometimes sleeping) partners, especially in terms of effective managerial and technical control and direction. And finally, they may be in the form of donations and contributions<sup>10</sup> in the name of, or through, an individual (witness the practice of donations from "so and so and friends"!)

for harambee, or other, projects, which in any case help to raise the social status of the individual.

This is all at the generally "legal" level. At the other end of the scale may be found practices which go under the generic name of corruption. Strictly speaking, even some of those already discussed could be seen as forms of corruption by sensitive social analysts, but the law on corruption<sup>11</sup> does not admit of the "extravagance" on the part of these analysts). These may be in the form of direct and indirect monetary benefits, or in the form of rewards

in kind, some of which may be difficult to connect with corruption as such, but which do all the same create obligations in the mind of the recipients and affect their psychology in relation to the subsidiaries of TNCs.

All in all, the process of co-optation takes many and varied forms. However, its central effect is to create a psychology of dependence on and reverence for, TNCs in the co-opted, which is consequently translated into concrete benefits through the use of the state machinery.

Broadly then, those who dominate the government see specific benefits in this relationship. And just to recall, the principal economist and the ICDC public relations officer made it quite clear that from the official point of view, the relationship between the subsidiaries and affiliates of TNCs and the government and its agents was, in general, quite good, even despite the fact that the TNCs have been shown not to take their obligations seriously!

Can this alliance, then allow meaningful change to take place? This is very doubtful. It is so because the evidence considered here shows a tendency of those in control of the state apparatus to utilize the same to protect and further their individual interests and more importantly, the interests of the subsidiaries and affiliates of TNCs through policy, laws, institutions and other activities. As long as it remains so, any change will be minimal and will not structurally alter the overall relationship between the TNCs and the Kenyan economy. This overall relationship, as has been observed, is that of exploitation through investment and the engagement of technology in production, the latter of which ensures huge returns to the TNCs while at the same time making acquisition, diffusion and utilization of such technology for the independent development of the Kenyan economy, at best, difficult.

At the base of this relationship, of course, lies an economy organized on the basis of individual or private enterprise, production being done along capitalist lines. The means of production are basically owned and controlled by a limited number of individuals and are exploited principally through individual direction and for individual benefit. To this economic system, the benefits received by the individual are sacred and largely determine reactions to any set of possible changes: any broad socio-economic changes which put the means of production in the hands, and enable exploitation thereof for the benefit, of society at large - that is, socialization of national wealth - is obviously an anathema. Thus, the best that can be expected under these conditions is populist rhetoric accompanied by modest reforms here and there (which are supposed to demonstrate a non-existent concern for the broad masses of Kenya) and continuous softly-phrased warnings (in fact, requests) to TNCs to carry out their obligations properly (warnings which TNCs representatives have come to accept for what they are - barks of either toothless or friendly dogs.) Such may be accompanied by dead-letter policy formulations, legal rules and directives the implementation of which such people have no will to facilitate, since this would be inimical to their interests. All of these basically leave intact the use of technology to exploit Kenya as an economy and continue dependence, and do little to positively change the social condition of the exploited classes in Kenya.

However, under the capitalist organization of the economy, it is still possible to envisage a situation in which transfer and development of technology by TNCs is facilitated through the effective use of the state apparatus. This would be a situation where there has been a concrete and decisive development of classes within the national economy which cherish economic independence, and parallel capitalist development which is self-sustaining, and whose interaction within the international capitalist system is on a relatively equal or at least better balanced basis.

The development of such a class, a stable national bourgeoisie (at times supported by a vacillating petty - bourgeoisie), mindful of its existence as a decisive force and capable of using the state apparatus to sustain itself and satisfy its interests, can facilitate the formulation of policies, enactment of laws and sanctioning of activities which put the TNCs in check and require them to perform any obligations they undertake. In this case, it would be in the interest of such a class to acquire the technology and use it for its benefit. As opposed to the present predominantly service-oriented classes, content with making economic gains on the basis of using the state machinery as a tool of service to finance capital, such class would exact more tangible and lasting stakes from TNCs, for only then would it be able to ensure its existence and prevent itself from degenerating into a mere tool for the metropolitan bourgeoisie.

Under the specific conditions of Kenya, the development of such a class is faced with a paradoxical situation. The paradox is that in order to effectively use the state apparatus to serve its interests, it must either directly capture and hold such state machinery, or be able to otherwise control it through its agents. This however, presupposes the existence of such class, which existence must be characterized by a dominating ownership and control of the means of production, enabling not only their profitable exploitation, but also the effective use of other instruments (social, political, cultural etc) within society to predominantly serve this class. If the state apparatus is used by those who dominate the government to largely serve their interests, which they believe are closely connected with those of the TNCs by some veiled umbilical cord, as opposed to those of any national bourgeois class - prophetic, nascent or otherwise - then the development of such national bourgeoisie is inimical to this service class.



It is, therefore, unlikely that this service class can permit, least of all, use the state machinery to encourage, the development of an effective national bourgeoisie. What is expected, on the contrary, is that this class uses the state apparatus in all its forms, and all available social instruments, to pre-empt or suppress the development of a self-sustaining national bourgeoisie.

But is a "palace coup" possible under such circumstances? In other words, is there a possibility of persons within this service class successfully denying their class, renouncing their class interests, and quite importantly, employing the state apparatus for purposes of enabling the development of the kind of national bourgeoisie suggested here? This is obviously a difficult question, and the answer to it is made even more elusive by the fact that the social process is a dynamic phenomenon which reacts to numerous variables. However, bearing this central feature in mind, certain observations may be made.

This possibility requires that such persons must have a violently strong reaction against the excesses of the interests they represent as part of a service class. It further, requires that they have a formidable alternative economic base to act as a foundation, which base must be capable of some independence from both the service and the international bourgeois classes. They must develop and use the support of those who own some means of production or are otherwise capable of determining the direction of their exploitation at the relevant point in time. And finally, it requires that they must be in decisive control of a substantial portion of the state apparatus, capable of wielding effective influence on the other and making changes necessary to enable the achievement of this possibility.

Indications, however, are that it is difficult to find a favourable combination of these conditions which would enable the occurrence of such a change. The colonial and post-colonial development of the Kenyan economy on the basis of private enterprise that is subservient to the demands of the metropolitan bourgeoisie has produced a dependant class at the control of the state apparatus. Such class, as has been observed, sees and receives some concrete benefit from its relationship. It is difficult to envisage the members thereof having any violent reaction against these interests and using the state apparatus in their control accordingly.

More importantly, such a "coup" would find itself against a distinct barrier: the fact that the means of production and exchange are predominantly held and controlled by this bourgeoisie which would obviously not be impressed by such antics. The reaction of this bourgeoisie would be to strangle and hold to ransom any governmental structure set up or controlled by such "plotters" seeing that latter have little economic leverage. Whereas this bourgeoisie allows some limited form of reform so as to keep social forces in check, and pre-empt or diffuse upheaval against its interests, it is not likely to allow changes which drastically alter its position vis-a-vis the means of production, and diminish its control, direct or remote, of the state apparatus. It is not expected to relinquish this position and the control voluntarily: It can only be forced to do so. And in its fight to remain this position, it will call upon the remnant service class to its aid. The force facing such "plotters" would be formidable.

Thus, a palace coup in this sense is difficult to envisage precisely because those who predominate the government have not shown a willingness to fight domination by the metropolitan bourgeoisie; and, secondly, this bourgeoisie is in a position to counter such move

Even supposing the development of a self-sustaining national bourgeoisie which would facilitate the effective transfer and development of technology through TNCs within a capitalist organization of the economy, there would still remain the major problem of the use of technology as a means of exploitation. In this event, the means of production would be predominantly owned by this national bourgeoisie, the exploitation and use thereof would largely aim to satisfy the interests of such bourgeoisie. Under conditions of capitalist production, those who own the major means of production are the principal beneficiaries of the process; they continuously exploit those who do not enjoy the same and who are forced to sell their labour to such owners cheaply. Since under these conditions, such ownership is restricted to an elite within the society, a large majority of the people constitute an exploited class. In essence, therefore, a parallel capitalist development of the economy, based on the interests of a national bourgeoisie would not eliminate the scourge of, and would, in fact, itself be based on, exploitation. It would thus do little to emancipate the exploited and oppressed people in Kenya. Thus for those who have a genuine concern for this exploited and an interest in its socio-economic liberation, this would be, if at all, a temporary social medicine, carrying revolutionary change one step ahead, but still falling short of the ultimate.

It is necessary therefore, to appreciate not just the problem of continued dependence as such, but also that of the exploitation that characterizes both this, and nationally - centred capitalist development.

This calls for an approach which would focus on and aim at, eliminating both evils. Basically, the problem is rooted in the ownership of the means of production and the control of the state

apparatus to satisfy the interests of such owners. It has been observed that within capitalist relations of production this ownership is enjoyed by a restricted few. It is necessary, therefore, to change this structure of ownership, so as to eliminate the possibility of the same being used as an instrument of exploitation. This requires a broadening of the ownership and the control of the state machinery - in other words, socialization of the means of production and social control of instruments of state. This process would give the exploited classes in society a dominant role in determining the acquisition, distribution and exploitation of social wealth and the use to which the state apparatus would be put.

However, the realization of this process must take into account a basic factor. Whereas the owners of the means of production may be compelled to give various concessions to the exploited many (and they do this on the basis only that it gives that ownership a further lease of life), they are definitely not expected, to and will not, relinquish, altogether, this beneficial ownership and control voluntarily. This is precisely because the exploitative benefits enjoyed by them depend on this very ownership and control. The necessity, therefore, arises of developing a force, a revolutionary force, that will successfully counter this resistance, liquidate it and establish the new basis for socio-economic relationships. This force must obviously develop out of the exploited classes, the workers and the peasants: the exploiting classes do not have any historical need for this change, since they are the major beneficiaries of the status quo.

Briefly, and at the risk of simplicity, the development of this force requires that these exploited classes appreciate that they are, indeed, being exploited. It requires that they properly understand the relationship that exists between them and the exploiting

classes and why it exists. It further requires that they appreciate the possibility of changing this relationship, and what form this change should take so as to facilitate the systematic elimination of exploitation. Finally, it requires that they fully understand the sacrifices that need to be continually made to sustain and entrench this, guarding it against any possible draw-backs. History has shown that, left to itself, it will develop conditions that will make it inevitable that the exploited masses understand their role in social dynamics: the very conditions that capitalism creates to sustain or enlarge it self educate the exploited classes in the process of bringing about revolutionary change.

The historical development is long and arduous, but those who are concerned about the dependence of the Kenyan economy on TNCs (which are unwilling to voluntarily unfold their tentacles), and the exploitation which sinks the broad majority of Kenyans further down into the gutter of wretchedness, want and dejection can, and must help history in bringing about the requisite conditions.

...../ 260

1. The establishment of national, sub-regional and regional centres to deal with the transfer and in a speech welcoming the Chairman of a French Bank, Societe Generale, Maurice Lawrie. He also assured French bankers they were always welcome to invest in Kenya (The STANDARD, January 22, p. 8, Cols. 2-5).
2. Note the high level of direct fusion of industrial with bank capital as exemplified in the level of borrowing from financial institutions: Table 11:A, last column. This is a structural phenomenon of the epoch of imperialism: see, on the general development of this thesis, V.I. LENIN: IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM. (Progress publishers. Moscow. 1968).
3. Fourth Development Plan (1979/1983) (Government Printer Nairobi, 1979); Para. 7.53.
4. Ibid Para. 7.55.
5. This is the Advisory services on Transfer and Development of Technology (A S T T), established within the Division in accordance with Resolution 87 (iv) adopted at the Nairobi session of the Unctad Conference (1976). The Advisory Service cooperates with, and assists, developing countries in solving basic technological problems, including:
  - a) The preparation of national technological policies and plans and their coordinated implementation;



- b) The establishment of national, sub-regional and regional centres to deal with the transfer and development of technology;
- c) Dealing with the techno-economic, legal, commercial and developmental aspects of technological arrangements;
- d) The evaluation of the economic and developmental aspects of technological information (industrial property); and
- e) The establishment of coordinated training programmes at national, sub-regional, regional and international levels. (For this, see an UNCTAD informal note for information titled UNCTAD: "Advisory Service on Transfer and Development of Technology"(Geneva, October, 1978).

6. See for example:

- a) Eliud Mwasunga, minister for commerce, in a message to Kenya Cannery (a subsidiary of Del Monte of US) on the celebration of its fifteenth anniversary (The STANDARD, September 6, 1980; p.21, cols. 1-5).
- b) Joseph Barrage Wanjui's speech at a luncheon at Mount Kenya Safari Club, Manyuki, in honour of American businessmen visiting Kenya (The STANDARD, October 13, 1980; p.5, cols. 1,2). The Americans were apparently quite impressed by the so-called peace and political stability (DAILY NATION, October 17, 1980; p.3, cols. 1-3).
- c) The chairman of Societe Generale of France (the World's seventh largest bank), Maurice Laurie at a press

conference. He and his group were in Nairobi to officiate at the opening of the bank's Eastern Africa headquarters in Nairobi (DAILY NATION, January 22, 1981; p. 9, cols. 2-4).

d) Mwai Kibaki, vice-president and minister for finance at a ceremony to welcome the chairman of Societe Generale (The STANDARD, January 22, 1981; p. 8, cols. 2-4).

e) US Ambassador to Kenya, William Harrop at a Voice of Kenya (Television) press conference of February 10, 1981 (DAILY NATION, February 11, 1981; p. 3, col. 6).

f) Robert Patton, chairman of the US Amory Group of Companies, when he called on the President at State House, Nairobi, to inform the latter of a proposed joint venture with a Kenyan company, Agrindex (The STANDARD, September 18, 1980; p. 2, cols 1-4).

g) The President's remarks in his address to delegates from thirty-six African countries attending the Pan-African Employers Symposium at Nairobi's Kenyatta Conference Centre. He was reported to have said that:

"The third world cannot win economic independence unless there is a good investment climate which depends on political stability.... To win our economic independence, we need investors, and to attract them, we have to create the climate conducive to those investments.... Posterity will tell what generation of leaders contributed more to the welfare of mankind".

(DAILY NATION, October 17, 1980; p. 1, cols. 1-3 and p. 3, col. 1). See also the President's speech at the celebrations marking the twenty-fifth anniversary of

the House of Manji Limited, at which he was guest of honour. (The STANDARD, September 11, 1980; p.11,cols.1-6).

7. See for example:

- a) John Keen, assistant minister for economic planning and development's launching of Magadi Soda Company Limited's new soda ash transporting wagons (The STANDARD, September 4, 1980; p. 8, cols. 2-4).
- b) Shariff Nassir, assistant minister for commerce's opening of a seminar for textile specialists arranged by an FRG company, W. Schlafhost & Co. in Serena Hotel, Nairobi (DAILY NATION, September 15, 1980; p. 5, cols. 1-4).
- c) Minister for constitutional and home affairs Charles Njonjo's launching of Ossica Limited's new radio alarm system at a ceremony held at the Ossica control centre off new Muthaiga Estate, Nairobi (The STANDARD, November 6, 1980; p.3, cols. 1-3).
- d) President Moi's attendance as a guest of honour at an annual dinner marking the twenty-first anniversary of the Kenya Association of Manufacturers (KAM) held at Hotel Intercontinental, Nairobi. He was accompanied by the Vice-president and other Government officials. In his speech, he assured manufacturers of continued Government protection and assistance, and scrapped a rule made in 1978 which limited remittable dividends for foreign companies to not more than 10% of equity

capital in an effort to reduce foreign payments. He directly welcomed co-operation between the private sector and the Government in policy formulation and review (NAIROBI TIMES, December 21, 1980; p. 9, cols. 1-9). The President was, on this occasion, presented with a cheque for Shs. 200,000/-,

"in support of the fund for the year of the physically disabled which you launched a few years ago. Many of our members have already contributed to this worthy cause directly through you or indirectly. Others are still planning to support the fund as the year for the disabled is still young. Therefore Sir, our cheque tonight is only a token endorsement by our members for your tireless efforts in support of the needy in this country."

(Joseph Barrage Wanjui's speech, *ibid*, col. 5).

The KAM is basically a pressure group that was formed

(as the Association for the Promotion of Industry in East Africa) in 1959 to represent the interests of East African manufacturers. Its name was changed to East African Association of Manufacturers in 1963, and to the present one in 1970. It now operates mainly in Kenya, and has a membership of 456 (1980), mostly big manufacturers. Its executive committee consists of:

- Joseph Barrage Wanjui, Chairman (East African Industries);
- John Savage, Vice-Chairman (P.J. Products);
- T.W. Syrrrell, Director and Secretary;
- S.M. Ita, Executive Officer;
- Manu Chandaria (Comeraft Services Ltd.);
- A.A.A. Ekirapa (Nation Printers & Publishers Ltd.);
- L. Gill (Mecol Ltd.);
- V.H. Harding (Mackenzie (K) Ltd.);
- Brian H. Hobson (Kenya Breweries Ltd.);
- S.W. Karanja (East African Portland Cement Ltd.);
- M. Kennel (Bata Shoe Co. Ltd.);
- J.M. Keriri (Development Finance Co. Of Kenya Ltd.);

- 265 -

J.G. Mutiga (Metal Box (K) LTD.);  
L.R. Ndungi Food Specialities (K) Ltd.);  
T.C.G. Nantu (Industrial Promotion Services Ltd.);  
S.J. Shah (Steel Africa LLTD.); and  
K.M. Thanawall (KICOMI).

- e) President Moi's opening of the Kenya Breweries Ltd's plant at Kisumu. Other Government officials also attended: Mwai Kibaki, Vice-president and minister for finance; Charles Njonjo, minister for constitutional and home affairs; Zachary Onyonka, minister for economic planning and development; assistant ministers, councillors etc.. On this occasion, the president received a cheque Kshs. 100,000/- from Kenneth Nyindo Matiba, the chairman of East African Breweries Ltd., (and M.P. for Mbiri) in aid of the disabled, (THE STANDERD, August, 8, 1980; p. 3 col. 6).
- f) The Vice-president and Minister for Finance, Mwai Kibaki's launching of a diesel engine pick-up truck (Chev Luv) at a party organized in Nairobi by the assemblers, General Motors (K) Ltd., for this purpose. (He officially opened the G.M. (K) Ltd's assembly plant in 1977 when he was minister for finance and Planning) (SUNDAY NATION: September 21, 1981; p. 3 cols. 1-6). At another function at the beginning of the year (Feb. 1980), he officiated at a ceremony to mark the assembling of the 10,000 th vehicle by the Leyland (K) Ltd's plant at Thika. Here, he was presented with a Range Rover, and his wife with a Marina, both assembled locally by the company. (Information given by a senior employee of the company)
- g) Kibaki's attendance as a guest of honour at a dinner hosted at a Nairobi Hotel by the foreign dominated Insurance Institute of Kenya. (The dinner was also attended by Titus Mbathi (Labour minister), Nathan Kahara (Nairobi Mayor) and Fred Mati (National Assembly speaker). The Vice-president
- ...../266

- stressed that there was no way that the government would complete with the private sector. Foreign investors "here would not be subscribed to any political ideology as the government had full faith in them" (SUNDAY NATION; November 9, 1980; p. 3 cols. 2-4). That capitalism as an economic organization has its ideology seems to have escaped(?) the Vice-president, and "everybody" else. That is so convenient a blindness it can't be accidental for so long.
- h) President Moi's opening of factory extensions of East African Industries, Nairobi (a Minister of state in the Office of the President deputised) (NAIROBI TIMES; November 23, 1980 pp. 10-11).
- i) Minister of Energy, John Okwango's opening of a two-day exhibition of electrical equipment organized by Warren (K) Ltd. at a Nairobi hotel (His Deputy Secretary, W. N. Mbote, deputised) (DAILY NATION, November 23, 1980; p. 4, cols 2-5).
- j) Minister for Information and Broadcasting Peter Oloo Aringo's attendance as a guest of honour at a reception given by Rhode and Schwarz Co. (K) Ltd. to introduce the latest video tape machines manufactured by Bosch T.V. of FRG (DAILY NATION, February 13, 1981; p.4, col. 6).
- k) Minister for Transport and Communication Henry Kosgey's opening of an A.M.I (K) Ltd. container terminal in Nairobi (THE STANDARD, January 17, 1981; p. 8, cols. 6).
- l) Minister for Labour, Titus Mbathi's officiating at a ceremony to present long service awards to 80 employees of B.A.T. (K) Ltd. who had served the company for a period of 10-25 years (The STANDARD, November 2, 1980; p. 7, cols. 1,2).



8. See for example, President Moi's blasting of the Central Bank of Kenya and the Ministry of Commerce (for not processing manufacturers' import licences promptly and for delaying clearance of imported goods at Nairobi's International Airport. He was opening an industrial complex, Mathupaper International (The STANDARD, January 22, 1981; p. 1, cols. 2-6; p.2 col. 6).

9. See for example:

a) Defeat of a motion in Parliament asking the government to urge B.A.F. (K) Ltd., a monopoly, to take over the responsibility of drying tobacco leaves from farmers (The STANDARD, November 6, 1980; p. 2 cols. 1-2).

b) Defense of a French company, Delmas Derfusion in Parliament by Elon Wamaya, Assistant Minister for health. The company was alleged to have dumped anti-tetanus drugs that were of unspecified lifespan and did not meet other fundamental requirements for all injections in the country (ibid, cols. 4-5).

c) President Moi's assurance to foreign investors of the government's full support and protection at the same time asking them not to listen to "rumour-mongers" (a reference to public opinion both in and outside Parliament) on this issue. He was the guest of honour at the tenth anniversary celebrations of Kenya Commercial Bank (DAILY NATION, December 9 1980; p.1, cols. 1-5; p. 24, cols. 1-2).

d) Minister of State in the Office of the President Nicholas Biwott's Parliamentary support for a

Foreign company's ownership of 10,000 acres of land (used as a game-cum-tourist sanctuary area) in a region where Wananchi had no land (DAILY NATION, September 26, 1980; p. 4, col. 6).

e) Nicholas Biwott's intercession on behalf of expatriates (DAILY NATION, September 24, 1980; p. 1, cols. 1-5).

f) Kibaki's support for bank's freedom over loans, arguing that the Kenya political system did not allow the government to tell financial institutions to whom they can lend money. Banks should be left free to decide all their affairs, he emphasized. (DAILY NATION, November 7, 1980; p. 5, cols. 4-6).

This was despite the fact that there had been an outcry both within and outside Parliament that banks' lending policies were discriminatory and were to some extent responsible for the stagnation of indigenous business (see for example, the chairman of the National Chamber of Commerce and Industry's statement, (DAILY NATION, September 3, 1980; p. 9, cols. 2-3).

10. For example, see note 7, supra, items (d), (e), and (f), and also:

a) On September 29, 1980, the President was presented, at State House, Nairobi, with Kshs. 75,500/- by the managing director of Wellcome (K) Ltd., Hugh Sleneck, in aid of the disabled, and another shs. 20,000/- by the President of Tetra Pak International, Hans Hausing (the STANDARD; September 30, 1980; p. 1 cols. 1-3).

- b) On January, 9, 1981, the Kenya Power Company signed an agreement with a Canadian engineering firm, the Canadian Overseas Engineering Development Company. The Vice-President of the Canadian firm, John Lackowicz, thanked the company for awarding his company the contract which was done on a "competitive" basis. Lackowicz presented the chairman of the Kenyan firm with a cheque for shs. 10,000/- for a Harambee project of the latter's choice. The area representative of the Canadian firm, Christopher Malavu, also presented, on the same occasion, the Chairman of E.A.P.&L Co., J. K. Geasu, with shs. 5,000/- towards a Harambee fund. (The STANDARD, January 10, 1981; p. 5, cols. 2-4).
- c) On January 15, 1981, the President was, at State House, Nairobi presented with a donation of shs. 100,000/- by the managing director of National Industrial Credit (East Africa) Ltd., R.F. Woodwin, for the disabled. The letter was accompanied by two directors of the company, Geoffrey Kareithi (former head of the civil service) and R.G. Ridley (The STANDARD, January 16, 1981, p. 1, cols. 1-4).
- d) The President was presented with a cheque for Kshs. 2,600,000/- for the Kabarak High School building fund by Arthur Morris (deputy Chairman of Lonrho (East Africa) Ltd., and also chairman and Managing Director of East African Tanning Extract company, Eldoret) following an earlier visit to the school by Lonrho chief executive, R.W. "Tiny" Rowland (DAILY NATION, March 13, 1981; p. 3 cols. 4, 5).

e) As reported by a news item on Voice of Kenya radio and television of the morning and evening, respectively, of March 12, 1981 the President was presented with an Audi GLX 100 on arrival in Nigeria by a group of FRG industrialists from Stuttgart. (On March, 13, 1981, he visited a shs. 35,000 million Volkswagen assembly plant in Lagos, Nigeria) (DAILY NATION, March 14, 1981; p. 3, cols. 2-5) .

f) On March 23, 1981 the President was presented with a cheque for shs. 43,330/- by the managing director of Bata Shoe Co. (K) Ltd., M. Kennel, in aid of the scouts movement. On the same day, he was also presented with a cheque for shs. 100,000/- - by the Chairman and chief executive officer of Pfiser Inc., Edmund Pratt Jar., in aid of the disabled.

11. See Prevention of Corruption Act (Cap. 65 of the Laws of Kenya, 1962) as amended by Act No. 28 of 1967. The principal difficulty arised in establishing the connection between the "reward" given and the "favours" done.

P. O. Box 28472,  
NAIROBI.

The Executive Director,  
I.C.D.C.,  
Uchumi House,  
NAIROBI.

Dear Sir,

Re: Permission to conduct Research

Pursuant to our discussion with your Mr. Simba on the afternoon of 20th May, 1980, I hereby make a formal request for a grant of permission to conduct research with respect to certain of the activities of I.C.D.C.

I am a post graduate student taking a master's degree course in law at the University of Nairobi. The general topic on which I am permitted to conduct research is "TNCs as a vehicle for Transfer and development of Technology: The Kenyan Case". However with regard to I.C.D.C. in particular I would like to know the conditions and terms upon which the corporation enters

**A P P E N D I X :**

**Letter of Request to ICDC**

P. O. Box 28472,  
NAIROBI.

The Executive Director,  
I.C.D.C.,  
Uchumi House,  
NAIROBI.

Dear Sir,

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Pursuant to our discussion with your Mr. Simba on the afternoon of 20th May, 1980, I hereby make a formal request for a grant of permission to conduct research with respect to certain of the activities of I.C.D.C.

I am a post graduate student taking a master's degree course in law at the University of Nairobi. The general topic on which I am permitted to conduct research is "TNCs as a vehicle for Transfer and development of Technology: The Kenyan Case". However with regard to I.C.D.C. in particular I would like to know the conditions and terms upon which the corporation enters into Joint Ventures with specified companies. This calls for a perusal of agreements (only in so far as they touch on Transfer & Development of technology) entered into between the corpn. and its joint venture partners viz (where applicable) Investment, Licencing and technical assistance agreements, management and consultancy contracts and plant contracts.

The relevant companies are extracted from your publication entitled "I.C.D.C.: its role and Activities" pages 14, 15, 16, and 17 - that is to say:

1. -----
2. -----
3. -----
4. -----
5. -----
6. -----
7. -----

For your records, I hold a G.K. Research Clearance Permit No. OP.13/001/9C 295/7 issued on 3rd May, 1980.

Awaiting your favourable consideration and reply.

Yours faithfully,

M. OKECH OWITI



c.c.

Mr. Simba,  
I.C.D.C.,  
Uchumi House,  
NAIROBI.

ANNEXURE 1

Letter of Request for Technical Assistance

Request for technical assistance to be provided to the staff of the Ministry of Education (M.E.C.) in the following areas:

(1) TECHNICAL ASSISTANCE/CONSULTANCY/RESEARCH in the following areas:

(a) TRAINING: nature of work, level of personnel involved and the costs incurred;

(b) EQUIPMENT: type, quantity, cost and other inputs and overall costs involved;

(c) PERSONNEL AND DEVELOPMENT (and) if any, other inputs, where applicable, costs involved, if any, and the costs thereof;

(d) RESEARCH: nature and costs thereof.

The undersigned, I hold a Government Certificate of Appointment as a Senior Lecturer in the Ministry of Education, Nairobi, Kenya, since the 1st January, 1968.

Yours faithfully,

\_\_\_\_\_  
Name of the undersigned

\_\_\_\_\_  
Signature

Page No. \_\_\_\_\_  
Date \_\_\_\_\_

**APPENDIX B**

**Letter of Request to Private Companies**

respect thereof and the form in which it is paid; and the form of agreement (oral/written or part both);

(b) **TERMS** of Technical Assistance/Consultancy/Management Agreements if any, and **COSTS** incurred with respect thereto;

(c) **TRAINING**: nature of such training, level of personnel trained and the costs incurred;

(d) **SOURCE** of Plant/Equipment/Machinery and your various raw materials and other inputs and overall costs incurred;

(e) **RESEARCH AND DEVELOPMENT (RAD)** if any; nature, where based, governmental co-operation, if any, and the costs thereof;

(f) **ADVERTISEMENT**: nature and costs thereof; effect.

For your records, I hold a government Research Clearance Permit No. OP/13/001/96 295/7 dated 3rd May, 1980.

Hoping for a favourable reaction.

Yours faithfully,

OKECH-OWITI.

P. O. Box 28472,  
NAIROBI.

Dear Sirs,

RE: RESEARCH

I hereby make a formal request to conduct research on the activities of your company.

I am a post-graduate student at the Faculty of Law of the University of Nairobi and I am conducting research on transfer and development of technology for my LL.M. thesis.

Apart from background information relating to your firm and its activities I have particular interest in the following matters, namely,

(a) TERMS AND CONDITIONS under which you manufacture your various products and use the various trade-names by licence from the proprietors of patents and/or trade marks; fees paid in respect thereof and the form in which it is paid; and the form of agreement (oral/written or part both);

(b) TERMS of Technical Assistance/Consultancy/Management Agreements if any, and COSTS incurred with respect thereto;

(c) TRAINING: nature of such training, level of personnel trained and the costs incurred;

(d) SOURCE of Plant/Equipment/Machinery and your various raw materials and other inputs and overall costs incurred;

(e) RESEARCH AND DEVELOPMENT (R&D) if any; nature, where based, governmental co-operation, if any, and the costs thereof;

(f) ADVERTISEMENT: nature and costs thereof; effect.

For your records, I hold a government Research Clearance Permit No. CP/13/001/96 295/7 dated 3rd May, 1980.

Hoping for a favourable reaction.

Yours faithfully,

OKECH-OWITI.



LEADERS IN QUALITY

## BAT KENYA LIMITED

Likoni Road, PO Box 30000, Nairobi

Telephone 555355  
Telegraphic Address BRAMTOCO

18th June, 1980

Mr. Okech-Owiti,  
P.O. Box 28472,  
NAIROBI.

Dear Mr. Owiti,

Thanks very much for your letter regarding conducting some research on our Company.

We are very sorry that we are unable to help you at this time. We appreciate the interest you have shown in our Company.

Yours very sincerely,

**A P P E N D I X C :**

**Reply from B.A.T. (K) Ltd.**



LEADERS IN QUALITY

# BAT KENYA LIMITED

Likoni Road, PO Box 30000, Nairobi

Telephone 555355

Telegraphic Address BRAMTOCO

18th June, 1980

Mr. Okech-Owiti,  
P.O. Box 28472,  
NAIROBI.

Dear Mr. Owiti,

Thanks very much for your letter regarding conducting some research on our Company.

We are very sorry that we are unable to help you at this time. We appreciate the interest you have shown in our Company.

Yours very sincerely,

A. AMULYOTC  
PRODUCT DEVELOPMENT MANAGER

*Recd 24/80*

*(Signature)*

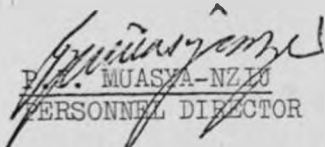
AA/ns


**A P P E N D I X D:**

**Reply from Cadbury Schweppes (K) Ltd.**

research on the activities of our Company but regret to advise you that it is not our policy to grant such request and therefore we are unable to help you in this instance.

Yours faithfully,  
for CADBURY SCHWEPPEES KENYA LTD.

  
P. MUASYA-NZIU  
PERSONNEL DIRECTOR

Recd 24/6/50  


PJMN/sb

DIRECTORS: R. W. MOTTERAM (Chairman)\*, E.L. LUCAS (Managing)\*, J. P. GREGORY\*, N. H. SEARLE,  
M. W. WARLEY, P.KAAGA, P J MUASYA-NZIU

\*British.



# Cadbury Schweppes Kenya Limited

CADBURY PRODUCTS  
SCHWEPPES

PEPSI-COLA

CANADA DRY

Telephone: 559466  
Registered Office and Address:  
KALOU ROAD.  
P.O. BOX 45466.  
NAIROBI, Kenya

Eldoret Factory:  
P. O. Box 1217  
Telephone 2105

Geographic Address:  
"CADSCHWEPPE"  
Box No. 22887 - NAIROBI

Mombasa Branch:  
P. O. Box 90224  
Telephone 25801

Our Ref:

Our Ref: CSK/PF/1

Date: 18th June, 1980

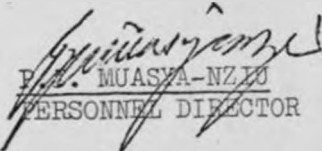
Mr. Okech-Owiti,  
P.O. Box 28472,  
NAIROBI.


Dear Sir,

REF: RESEARCH

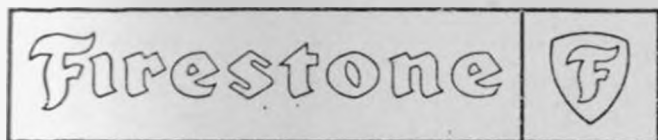
We thank you for your request to conduct research on the activities of our Company but regret to advise you that it is not our policy to grant such request and therefore we are unable to help you in this instance.

Yours faithfully,  
for CADBURY SCHWEPPES KENYA LTD.

  
P. J. MUASYA-NZIU  
PERSONNEL DIRECTOR

Recd 24/6/80  


PJMN/sb



PO BOX 30429 NAIROBI KENYA  
TELEPHONE 559922, 559713  
CABLES FIRESTONE TELEX 22410

FIRESTONE EAST AFRICA (1969) LIMITED

Our Ref: ADM/7567

June 18, 1980

Mr. Okech-Owiti,  
P.O. Box 28472,  
NAIROBI

Dear Sir,

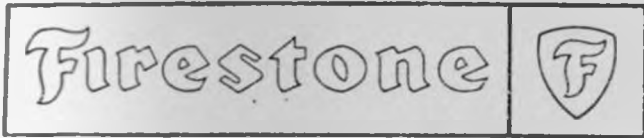
RE: RESEARCH

We have studied the contents of your letter of June 17, 1980 regarding your plans to conduct research on the activities of this Company.

Our View is that we are not in a position to allow this request without clearance from Firestone International Company, our Head and Controlling Office in Akron, Ohio, U.S.A. In this regard, we decline to be of further assistance in this matter.

**A P P E N D I X :**

**Reply from Firestone East Africa (1969) Ltd.**



P O BOX 30429 NAIROBI KENYA  
TELEPHONE 559922, 559713  
CABLES FIRESTONE TELEX 22410

FIRESTONE EAST AFRICA (1969) LIMITED

Our Ref: ADM/7567

June 18, 1980

Mr. Okech-Owiti,  
P.O. Box 28472,  
NAIROBI

Dear Sir,

RE: RESEARCH

We have studied the contents of your letter of June 17, 1980 regarding your plans to conduct research on the activities of this Company.

Our View is that we are not in a position to allow this request without clearance from Firestone International Company, our Head and Controlling Office in Akron, Ohio, U.S.A. In this regard, we decline to be of further assistance in this matter.

If you want to pursue the matter further, you may contact our Head Office direct.

Yours faithfully,  
FIRESTONE EAST AFRICA (1969) LTD.

*T. M. Asamba*  
T. M. ASAMBA,  
ADMINISTRATIVE MANAGER.

*Rec'd 24/6/80*  
*(df)*

Date .....

<b>FOR OFFICIAL USE ONLY</b>
1. Project No. ....
2. Date Received .....
3. Action Taken .....
(REFERENCE ONLY)

**APPLICATION TO THE NEW PROJECTS COMMITTEE  
FOR APPROVAL FOR AN INDUSTRIAL PROJECT**

*Note* (1) Three copies of this Application together with enclosures, if any, should be sent to The Secretary, New Projects Committee, Ministry of Industry, P.O. Box 30418, Nairobi.

(2) Before completing this Application Form it is strongly advised that you should read the Ministry of Industry handbook entitled "Guidelines for completion of the Project Application Form "A".

**A P P E N D I X F :**

**Form A: Application to the NPC for approval of an  
Industrial Project.**

MINISTRY OF INDUSTRY  
P.O. Box 30418,  
NAIROBI

Mwan  
P. Economist  
Min. of Indus

FORM A

3680

Date .....

FOR OFFICIAL USE ONLY
1. Project No. ....
2. Date Received .....
3. Action Taken .....
(REFERENCE ONLY)

**APPLICATION TO THE NEW PROJECTS COMMITTEE  
FOR APPROVAL FOR AN INDUSTRIAL PROJECT**

*Note* (1) Three copies of this Application together with enclosures, if any, should be sent to The Secretary, New Projects Committee, Ministry of Industry, P.O. Box 30418, Nairobi.

(2) Before completing this Application Form it is strongly advised that you should read the Ministry of Industry handbook entitled "Guidelines for completion of the Project Application Form "A".

**PROJECT DESCRIPTION**

**1. Project**

(a) State briefly what the project will manufacture and the franchise/royalty source if any.

(b) State the proposed location of the project. State whether it could be located elsewhere in Kenya, e.g. in a rural area.

**2. Sponsors**

State briefly who is sponsoring the project including information as to:

Project management.

Provision of technical know-how.

**3. Project Company**

(a) State name of project company and whether formed (give date) or whether in formation.

(b) State authorized, issued and fully paid-up capital of company.

(c) Where the expansion of an existing company is involved, state how long it has been trading and whether it is currently profitable. Also list the shareholders.

**4. Capital Cost**

(a) State estimated total capital cost inclusive of working capital.

(b) Provide a break-down of the above cost under the headings as follows:

<i>Fixed Assets</i>	(Sh. '000)	(Sh. '000)
Land ... ..		
Buildings ... ..		
Site improvements ... ..		
Machinery and equipment (including all Govern- ment duties and taxes) ... ..		
Installation costs (including inland transportation)		
Fees (if any) ... ..		
Vehicles ... ..		
Contingencies ... ..		
Preliminary and Pre-operational ... ..		
Working Capital ... ..		
<b>TOTAL</b>		



**5. Capital Structure**

How will the capital cost as in paragraph 4 above be provided—set out as follows:

(Sh. '000)	Equity	%	Loan	Machinery Suppliers Credit	Overdraft	Total
Sponsors and Associates						
Kenya Investment Institutions						
Other Local						
Machinery Supplier						
Commercial Bank (A) .....						
<b>Totals: .....</b>						

*Note: (A) Normally as overdraft for working capital finance.*

**6. Arising from the answer to paragraph 5 above :**

(a) Will the project company be overseas controlled or locally controlled—state the proportions.

(b) State terms of proposed loan finance, i.e. the rate of interest, length of loan period and proposed source of finance.

(c) State terms of machinery suppliers' credit including the effective rate of interest and proposed source.

(d) State whether guarantees are required for the loans/credits as above and the proposed source.

- (e) State who will be responsible for providing the overrun finance should the project cost exceed the estimates.

## 7. Timing

Assuming approval to this application is given within eight weeks of its submission to the Ministry of Commerce and Industry:

- (a) State the estimated date for start of construction work.

- (b) State estimated date for start of commercial production.

## 8. Profitability

- (a) State when it is estimated that the project will be profitable, i.e. in what year of commercial production.

- (b) For the first five years of commercial production provide and append to this application form:

Profitability Estimates without assuming protection or other concessions and subsidies.

Sources and Application of Funds Schedule.

Balance Sheet Projections.

*Note.*—These estimates should be prepared in accordance with the examples given in the handbook "Guidelines for completion of the Project Application Form "A".

- (c) Submit as an appendix to this application form detailed calculations of the local value added in the manufacturing process in accordance with the example given in the handbook "Guidelines for completion of the Project Application Form "A".

- (d) Provide an estimate of net foreign exchange savings under the project—see explanatory paragraph in the handbook "Guidelines for completion of the Project Application Form "A".

## **9. Market**

(a) Provide full details of the market for the project and state whether a market survey has been carried out and if so by whom. Where applicable, these details should include a summary of information, if any, regarding imports of similar products that may be derived from the official Trade Statistics giving averages over the past five years. (If necessary, enclose this information as an appendix to this application form.)

(b) Provide details of competing projects in Kenya both existing and about to be established. Give a comparison between prices projected for the project and competing prices of imported equivalent products free-on-rail Nairobi.

(c) Provide details of competing projects in the East African Region.

(d) State briefly how the marketing of the project/company's products will be carried out.

## **10. Factory, Machinery and Technical Processes**

(a) Provide details of the machinery and equipment to be installed (state the installed capacity on 1, 2 and 3 shift production), its likely source and whether new or second-hand, or reconditioned.

(b) Provide details of the proposed factory and factory site, i.e. size in acres or hectares of the site and its exact location and whether an existing building or a building to be constructed. If the former, is the property to be rented?

(c) State briefly the technical processes involved.

(d) State whether the machinery is to be obtained by competitive tender from selected sources, and selected countries of origin or by open tender on a world-wide basis. State also whether any commitment already entered into.

## 11. Raw Materials

(a) Provide full details of all raw and semi-manufactured materials required in the manufacturing process and their source. If of local origin state whether there is a programme to develop this source (this should include packaging materials).

(b) State whether backward integration is proposed and the programme with timing—see the explanatory paragraph in the handbook "Guidelines for Completion of the Project Application Form "A".

## **12. Management and Employment**

(a) State in detail how the project will be managed and how the technical know-how will be provided. Provide details of the franchise fees, royalties, etc., if any, to be paid for the technical processes, trade marks, etc. State the management fee, if any, the duration of the management agreement and what services will be provided under it. State how many expatriates will be required and for how long.

(b) Provide details of the training programme both locally and overseas to enable Kenyans to replace expatriates at all levels of the project's management.

(c) State how many workers will be employed—both initially and when the project achieves full production.

## **13. Protection and Incentives required from the Kenya Government**

(Note.— It is important that reference be made to the handbook "Guidelines for Completion of the Project Application Form "A". before attempting to answer this question.)

(a) State what protection, if any, will be expected against competing equivalent products at present imported, e.g. increased customs tariff, quantitative restrictions, etc.

(b) State whether other incentives will be expected, e.g. duty refunds/remissions on the imported raw materials.

(c) For the purpose of preparing estimates and calculations for a project proposed it should not be assumed that the Government would grant tariff protection or other concessions.

**14. Future Expansion**

State briefly how the future development of the project is visualized.

**15. Environment**

(a) State how much water will be required on the basis of one shift/two shifts/three shifts operations. State whether the water will then go to waste or be re-cycled.

(b) State what effluent is contained in the waste water and how it will be disposed of, e.g. into a river, into soak-aways, into settling ponds.

(c) State whether air pollution is involved and its nature, e.g. from the effluent, emission of gases, fumes, etc.

**16. Additional Information**

Attach as a separate paper any additional information which may be of interest and assistance to the New Projects Committee, this should include any feasibility/market study prepared by sponsors. This applies also to any question in this application form where insufficient space has been provided to enable you to answer adequately.

Signed .....

Date .....



AN AGREEMENT dated the [FIRST: FIRST] day of [MAY]

One thousand nine hundred and sixty-one BY AND BETWEEN

THE GOVERNMENT OF THE STATE OF TEXAS (hereinafter

called "the Government") and

(hereinafter called) \_\_\_\_\_ a Corporation

organised and existing under the laws of the State of

\_\_\_\_\_, United States of America, and having its Head

Office at \_\_\_\_\_.

**A P P E N D I X G :**

**Investment Agreement**

the currency of the United States of America.

- (e) The term "Effective Date" means the date on which this Agreement is deemed to become effective under the provisions of Section 7.01.

AN AGREEMENT dated the [ ] day of [ ]

One thousand nine hundred and sixty-two

THE GOVERNMENT OF KENYA (hereinafter

called "the Government") and

(hereinafter called a Corporation

organised and existing under the laws of the State of

, United States of America, and having its Head

Office at .

ARTICLE I - Definitions:

Section 1.01 Wherever used in this Agreement or the Schedules hereto, unless the context shall otherwise require, the following terms and signs shall have the following meanings :-

- (a) The term "Commercial Production Date" means the date on which the factory forming part of the Project is ready for manufacturing operations on a commercial scale.
- (b) The term "current rate of exchange" means the rate of exchange applied from time to time by commercial banks in Kenya.
- (c) The term "DFCK" means the Development Finance Company of Kenya Limited a Corporation organised and existing under the laws of Kenya of Post Office Box 30483, Nairobi.
- (d) The term "dollars" and the sign "\$" mean dollars in the currency of the United States of America.
- (e) The term "Effective Date" means the date on which this Agreement is deemed to become effective under the provisions of Section 7.01.

- (f) The term "Existing Company" means  
a Corporation organised and existing under the laws of Kenya of Post Office Box Nairobi.
- (g) The term "ICDC" means the Industrial and Commercial Development Corporation established in Kenya by the Industrial Development Act (Cap.517) having its principal office at Bombay House, Victoria Street, Post Office Box 5519, Nairobi.
- (h) The term "New Company" means the Company to be formed in accordance with the provisions of Article III of this Agreement.
- (i) The term "Option Agreement" means the agreement to be entered into between [redacted] and ICDC and DFCK relating to the subscription for shares the form of which is set out in Schedule 'D' to this Agreement.
- (j) The terms "Partner State" and "Partner States" mean respectively a Partner State or Partner States within the meaning of the Treaty for East African Co-operation.
- (k) The term "Plant Contract" means the contract to be entered into between the New Company and [redacted] for certain services in connection with the Project the form of which is set out in Schedule 'B' to this Agreement.
- (l) The term "pounds" and the signs "£" and "Sh" mean respectively pounds and shillings in the currency of Kenya.
- (m) The term "Process and License Agreement" means the agreement to be entered into between the New Company and [redacted] the form of which is set out in Schedule 'C' to this Agreement.

- (n) The term "Project" means the project described in Article II of this Agreement.
- (o) The terms "Section" and "Sections" mean respectively a Section or Sections of this Agreement.
- (p) The term "shares" means ordinary shares of par value Sh.20/- each in the capital of the New Company.
- (q) The terms "subsidiary" and "subsidiaries" mean respectively any company or companies the whole of the voting capital of which is owned directly or indirectly by \_\_\_\_\_ and which for convenience is designated by \_\_\_\_\_ to fulfil its obligations under Sections 3.04 and 4.03.

## ARTICLE II - The Project:

Section 2.01 . The Project consists in the establishment and maintenance of an economically viable concern

- (a) To construct and equip a fully integrated factory in or adjacent to Nairobi for the manufacture of vehicle  
and repair and retread materials with an initial annual productive capacity of not less than 153,000 and an equivalent number of
- (b) To establish a distribution and marketing organisation in Kenya with the ultimate intention of exporting to Partner States and other neighbouring countries when economically justifiable.
- (c) To train qualified Kenya citizens for administrative, managerial and technical jobs within the Project and to become independent tyre dealers.

ARTICLE III - Incorporation of New Company:

Section 3.01 Immediately following the Effective Date shall cause to be incorporated under the laws of Kenya a private company limited by shares the name of which shall be The Memorandum and Articles of Association of the New Company shall be as set forth in Schedule 'A' to this Agreement and shall not be altered without the consent of the Government until the option to be granted by the Option Agreement has either lapsed or all shares opted for thereunder have been allotted.

Section 3.02 shall pay all the expenses incidental to the incorporation of the New Company which shall re-imburse therefor. In addition the New Company shall re-imburse |for any expenditure necessarily and directly incurred or paid for the benefit or the account of the New Company prior to its incorporation. The said additional expenditure shall include, but shall not be limited to, land survey costs relating to the factory site, costs in connection with arrangements for the acquisition of the factory site, expenses incurred in negotiating loans for the New Company and all legal fees incurred in connection with such matters and in connection with the preparation and completion of this Agreement and the Schedules hereto.

Section 3.03 The New Company shall be incorporated with an authorised capital of £2,071,000 divided into 2,071,000 shares.

Section 3.04 Subject to the exercise by ICDC and DFCK of the option to subscribe for shares contained in the

Option Agreement, or a subsidiary or subsidiaries shall subscribe the whole of the authorised capital of the New Company pursuant to offers and allotments by the Board of Directors, provided that or a subsidiary or subsidiaries shall not be bound to subscribe capital in the New Company exceeding the equivalent in pounds of \$5,800,000 at current rate of exchange. shall be issued with that number of shares at par which is equivalent in value to \$1,000,000 (being the agreed amount of the fee which will be payable to under the Plant Contract) at the current rate of exchange prevailing at the time when the said fee becomes payable. The balance of the shares to be subscribed by or a subsidiary or subsidiaries shall be paid for in cash.

#### ARTICLE IV - Additional Funds:

Section 4.01 The parties recognise that in order to put the Project fully into effect the New Company will require funds additional to its share capital and that the estimated amounts of such additional funds are

- (a) £2,179,000 on medium or long term loans in foreign funds for machinery equipment and plant to be purchased outside Kenya.
- (b) Up to £1,250,000 on bank overdraft facilities in Kenya for working capital and for services to be purchased within Kenya.

Section 4.02 It is agreed that the Board of Directors of the New Company shall from time to time determine the necessity for obtaining such additional funds and that the



New Company shall borrow from reputable financial lending institutions or banks on such terms as shall be reasonable at the time and in the best interests of the New Company.

Section 4.03 If the New Company requires further finance in excess of its share capital and the additional funds mentioned in Section 4.01 this shall be provided or procured by \_\_\_\_\_ or a subsidiary or subsidiaries either by subscription for shares at par or by way of loan as \_\_\_\_\_ may decide. In the event of \_\_\_\_\_ deciding that any such finance shall be provided by subscription for shares, the authorised capital of the New Company shall be increased to such an amount as may be necessary.

ARTICLE V - Obligations of and Undertakings by

Section 5.01 \_\_\_\_\_ shall promptly after the incorporation of the New Company procure that the New Company will

- (a) Join in and become a party to this Agreement by adoption in order that the New Company shall be entitled to the benefits and be bound to perform and fulfil all the obligations and conditions contemplated to be conferred on and performed and fulfilled by it hereunder as if originally a party to this Agreement.
- (b) Enter into and maintain in force according to the terms thereof the Plant Contract and the Process and License Agreement and such other agreements and will perform such other acts as may be necessary or desirable in furtherance of the Project.

- (c) Proceed without delay with the preparation of the site and the ensuing construction of the factory forming part of the Project to the intent that the same shall be ready for manufacturing operations within two years from the Effective Date.

Section 5.02 shall promptly after the Effective Date

- (a) Enter into and maintain in force according to the terms thereof the Plant Contract and the Process and License Agreement and execute and deliver the Option Agreement.
- (b) Negotiate for the New Company in consultation with its Board of Directors, the additional funds in accordance with Sections 4.01 and 4.02.

Section 5.03 shall notify the Government as soon as the Commercial Production Date can be fixed or can be forecast with reasonable accuracy.

Section 5.04 shall promptly after the Commercial Production Date procure that :-

- (a) The New Company will proceed without delay with the implementation of those portions of the Project set out in paragraphs (b) and (c) of Section 2.01.
- (b) The Existing Company will offer to sell to the New Company, at market or cost price whichever is the lower, its stocks of vehicle tyres, tubes and accessories and will transfer to the New Company without cost its business of distributing and marketing products.
- (c) The Existing Company is put into liquidation and wound up.

Section 5.05

undertakes and shall procure that the New Company will undertake that the retail prices in Kenya of manufactured by the New Company shall not exceed the prices shown in Schedule E to this Agreement Provided that :-

- (a) The said prices may be increased at any time by the amount of any excise duty or sales tax which may for the time being be levied on any of the said items.
- (b) The said prices may also be increased from time to time by a reasonable amount not exceeding the percentage amount of any increase in the total cost per one thousand kilogrammes of production above the total cost level obtaining one year after the Commercial Production Date. The New Company shall first consult with the Government on any intended price increases and shall supply all information and explanations, certified by its auditors, to justify the same and shall for this purpose allow sixty days from the first supply of such audited information and explanation before introducing the increased prices.
- (c) In the event of there being any price increases under the provisions of the immediately preceding sub-paragraph and in the event of the total cost per one thousand kilogrammes of production

of the New Company subsequently decreasing to an extent which justifies reduction in the said prices then the New Company shall within sixty days of being called upon so to do by the Government reduce the said prices by a percentage equal to the percentage decrease in the total cost per one thousand kilogrammes of production but not to levels lower than those listed in Schedule E and for this purpose shall from time to time when requested by the Government furnish to the Government all such information and explanations, certified by its auditors, as are reasonably necessary to enable the total cost of production to be determined.

- (d) The New Company shall at all times keep its costs of production as low as possible and in particular but subject to section 6.05 shall procure all materials used in production from the lowest cost source provided such materials meet required specifications.
- (e) When selling to a distributor any item listed in Schedule 'E' which the New Company manufactures, the New Company shall impose and enforce a condition that the distributor shall not re-sell that item at a price higher than the said retail price with any increases and reductions introduced under the provisions of this Section. When itself acting as a distributor, the New Company shall not sell any such item at a price higher than the said retail price with any increases and reductions introduced under the provisions of this Section.

ARTICLE VI - Obligations of and Undertakings by the Government:

Section 6.01 The Government shall promptly procure and carry out the acts and things set out in the following Sections of this Article.

Section 6.02

- (a) Beginning with the Effective Date and for a period ending no sooner than the seventh anniversary of the Commercial Production Date, establishment in Kenya by any individual, firm, company or enterprise other than the New Company of any activity (excluding retail distribution) within the scope of the Project shall not be encouraged in any manner, nor shall such establishment be facilitated in any manner, and any such establishment shall indeed be discouraged. In particular, but without derogating from the generality of the foregoing, the Government undertakes that no such establishment shall be approved under the Foreign Investment Protection Act 1964 or the Exchange Control Act, or under any comparable future legislation. If, during such period, the industrial licencing system is extended beyond its present scope, the same shall be applied to tyre manufacturing in all its aspects and the New Company shall exclusively benefit therefrom so far as may be required to give effect to the provisions of this Agreement.
- (b) Nothing in this Section shall apply to the manufacture of bicycle

Section 6.03

- (a) During the period mentioned in paragraph (c) of this Section, importation in any manner of any tyre, tube

or flap, save only any tyre, tube or flap as originates in a Partner State or is imported as a part of and mounted upon a completely assembled motor vehicle and save any bicycle or aircraft tyre or tube, or any solid industrial tyre, shall be subject to quotas and licences as hereinafter provided. Such quotas and licences shall be established by the following categories :

- (1) Passenger tyres and tubes;
- (2) Truck/bus tyres, tubes and flaps; and
- (3) Agricultural and off-the-road tyres, tubes and flaps.

(b) During the said period, total imports in each such category shall be restricted in quantity so as to prevent any excessive stockpiling thereof at the Commercial Production Date and the Government shall determine the quotas in accordance with this objective, having regard to the average quantity of such imports in the two calendar years 1967 and 1968 and to any likely variation in future demand up to the Commercial Production Date, as well as any other relevant factors including imports originating in Partner States.

(c) Such quotas shall be established on a calendar year quarterly basis commencing at the start of the first calendar quarter after the signing of this Agreement and expiring at the end of the first complete calendar quarter following the Commercial Production Date.

(d) Such quotas shall be allocated by way of licences to all existing importers in the same proportions that each of them imported each category in total during the two calendar years 1967 and 1968.



tubes, flaps, retread materials, raw materials and components;

- (ii) The New Company may notify the Government from time to time of its intention to manufacture or to utilise any such item as aforesaid whereupon the same shall be removed forthwith from the Import List. If the New Company has not commenced the manufacture or use of such item within three months from the date of its removal from the Import List then the Government may restore that item to the Import List;
- (iii) The removal of any item from the Import List under the provisions of this paragraph (e) shall not in any way affect an import licence already granted in respect of that item.
- (f) Beginning one year prior to the seventh anniversary of the expiry of the period mentioned in paragraph (c) of Section 6.03, the Government and the New Company shall consult regarding the extension of the provisions of this Section.
- (g) Notwithstanding anything contained in this Section, in the event of the New Company being unable at any time after the Commercial Production Date to meet the demand in Kenya for tyres, tubes, flaps or retread materials of any size which is manufactured by the New Company, then the Government may, after consultation with the New Company, permit the importation of the item concerned to the extent necessary

to meet the demand until such time as it is estimated that the New Company will be able to do so.

Section 6.05 The New Company shall be granted unrestricted import licences (including the availability of necessary foreign exchange) to the extent that, and for so long as, its requirements for construction materials, equipment, machinery, spare parts, fuel, or raw materials are not produced in sufficient quantity or quality in Kenya and shall also until the seventh anniversary of the Commercial Production Date be granted exemption from import and customs duties and from any other tax for and with regard to the foregoing items so imported by the New Company.

Section 6.06 Notwithstanding the provisions of Sections 6.03, 6.04 and 6.05 the Government shall permit importation by the New Company of any tyres and tubes required by the New Company for test purposes provided that the number of tyres and tubes imported under this provision shall not exceed one hundred of each in any twelve month period.

Section 6.07

- (a) The New Company shall be granted unrestricted export licences and exemption from export duties for and with regard to the products that it produces and exports from Kenya.
- (b) The New Company shall be accorded all such possible concessions and incentives to encourage and enable exports of its tyre products at competitive prices as shall be consistent with Government policies from time to time.

Section 6.08 Subject to the performance by  
and the New Company of the obligations and undertakings  
contained in Section 5.05 the Government shall not control  
any level the prices at which tyres and tubes are  
sold.

Section 6.09

The Government shall ensure that all its own departments and agencies shall extend the same favourable purchasing policy in respect of the New Company's tyre products that is generally extended from time to time to locally manufactured goods and services by Government's and local authorities' purchasing policies.

The Government will endeavour to ensure (subject only to the provisions of the Treaty for East African Co-operation and to the price and quality competitiveness of the New Company's products with other such products of East African origin under the said Treaty) that the New Company secures the right to supply its tyre products to any enterprise established in Kenya for the assembly of motor vehicles.

Section 6.10

Any payment of interest or amounts payable under the Process and Licence Agreement by the New Company shall not for so long as such tax from time to time due

thereon is duly paid be subject to deduction of tax at source, but shall be assessable on and collectible from the recipient at the rate applicable in Kenya to comparable receipts by comparable recipients and tax shall be assessed on the net income after deduction of expenses attributable thereto in accordance with Kenya tax legislation.

- (b) In the event of the investment deduction in the case of capital expenditure to which paragraphs (c) or (e) of Section 27 of the Second Schedule to the East African Income Tax (Management) Act 1958 being reduced below twenty percent of such expenditure, such reduction shall not be applied in respect of any capital expenditures of the New Company up to the Commercial Production Date.
- (c) Any re-imbusement, in whole or in part, by the New Company of the difference between the notional amount of income taxes which would be borne on his income by an employee of the New Company if such income arose in his home country and any higher amount of Kenya income taxes actually borne by that employee shall not be considered taxable income of that employee and such re-imbusement shall not be an allowable deduction in computing the New Company's chargeable income.

Section 6.11 All other Government approvals and licenses necessary to establish and to operate the Project shall be granted, and in particular but without derogating from the generality of the foregoing:

- (a) As the Project shall be deemed to have been granted approval in principle under the Exchange Control Act, all exchange control approvals required for the

construction and operation of the factory shall be granted, including overdraft facilities for the New Company with a bank or banks in Kenya totalling at any time up to KSh.250,000 and appropriate foreign exchange shall be made available to the New Company upon its tender of Kenya currency at the current rate of exchange for:

- (i) Repayment of loans and interest payments thereon;
  - (ii) Raw materials;
  - (iii) Payments pursuant to the Process and Licence Agreement;
  - (iv) Amounts charged to and paid on behalf of the New Company by \_\_\_\_\_ or a subsidiary or subsidiaries in respect of employers' contributions to schemes for the benefit of foreign employees of the New Company. Such schemes shall be a company annuity and pension scheme, a group insurance scheme and a national social security fund and any other scheme approved by the exchange control authorities;
  - (v) Construction materials, machinery, equipment and supplies; and
  - (vi) Payment of dividends.
- (b) Any work or residence permit required by any employees of the New Company who are needed for their specialised knowledge shall be promptly issued for as long as such qualified personnel are not available from Kenya citizens.

- (c) Personal effects of foreign employees of the New Company may be imported by them into Kenya in accordance with the Customs Tariff Act 1967 (Third Schedule, Part B, paragraph 9) and any other laws for the time being in force.
- (d) Exchange control approval shall be granted for the remittance abroad in foreign currency of up to thirty-three and one third percent of the remuneration of any foreign employee of the New Company or up to fifty percent of such remuneration in the case of necessity being proved. In the event of [REDACTED] or a subsidiary or subsidiaries depositing funds to the account outside Kenya of a foreign employee of the New Company to enable that employee to meet commitments outside Kenya, exchange control approval shall be granted for the remittance abroad in foreign currency by the New Company of sufficient of such employee's remuneration to re-imburse [REDACTED] or a subsidiary or subsidiaries for the amount of the deposit, subject to the aforesaid limits.

Section 6.12 [REDACTED] having provided the Government with full details of the Project including the financial plan and the Government having determined that the Project will further the economic development of Kenya, there shall be issued to [REDACTED] and to any other foreign national who, within the meaning of the Foreign Investment Protection Act, 1964, proposes to invest foreign assets in the Project, a Certificate of Approved Enterprise with regard to each investment of foreign assets in the Project, including the services performed as contemplated by the Plant Contract and the Process and Licence Agreement.



thereafter, the provisions of the Foreign Investments Protection Act, 1964, shall apply with regard to each such Certificate of Approved Enterprise.

Section 6.13 The Project being hereby approved for purposes of United States Government investment guarantees, and of guarantees available from the government of any foreign national other than \_\_\_\_\_ that invests in the Project, all certificates and other formal documentation necessary for the issuance of any such guarantees shall be promptly issued. In connection therewith nothing herein contained shall be deemed to be a voluntary agreement by \_\_\_\_\_ to submit to any exercise by Government of its sovereign rights.

Section 6.14 There shall be granted all exchange control approvals necessary for the remittance outside Kenya at any time of past, present and future profits of the Existing Company and of payments in respect of invoices for tyres, tubes and accessories imported by the Existing Company provided that no such approval shall be granted in respect of a remittance to a country with which the Government does not maintain trading relations.

Section 6.15 The Government shall maintain in existence an order in exercise of the powers conferred by Section 11(1)(a) of the Merchandise Marks Act (Cap.505) in respect of all

tyres, tubes, flaps, retread material and any raw material or component required for the manufacture thereof.

ARTICLE VII - Effective Date of Agreement:

Section 7.01 This Agreement shall become effective upon such date as \_\_\_\_\_ shall have notified the Government that each of the following has been secured or waived by \_\_\_\_\_ (and the parties hereto shall promptly use their best endeavours to procure the same:

- (a) United States Agency for International Development investment guarantees with regard to the Project satisfactory to \_\_\_\_\_
- (b) Arrangements satisfactory to \_\_\_\_\_ have been made for the acquisition by the New Company of land in or adjacent to Nairobi for the factory site forming part of the Project, and
- (c) The order provided for in Section 6.15.

ARTICLE VIII - Conciliation and Arbitration:

Section 8.01 The Government and \_\_\_\_\_ hereby consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (hereinafter called "the Centre") all disputes arising out of this Investment Agreement, for settlement by conciliation followed, if the dispute remains unresolved within three months of the communication of the report of the Conciliation Commission to the parties, by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called "the Convention"). It is hereby stipulated by the Government and

that \_\_\_\_\_ is a national of the United States of America. It is hereby agreed that the right of

to request the settlement of a dispute by the Centre or to take any step as a party to a proceeding pursuant to this Agreement shall not be affected by the fact that it has received full or partial compensation, on a conditional or an absolute basis, from any third party (whether a private person, a state, a governmental agency or an international organization), with respect to any loss or injury that is the subject of the dispute. Any conciliation or arbitration proceeding pursuant to this Agreement shall be conducted in accordance with the Rules of Procedure for Conciliation Proceedings or the Rules of Procedure for Arbitration Proceedings, as the case may be, in effect on the date on which the proceeding is instituted. The Centre shall be entitled to publish the report or award rendered by, as well as the minutes and other records of the proceedings of, any Conciliation Commission or Arbitral Tribunal constituted pursuant to this Agreement. The Government shall procure that in connection with any dispute arising out of this Investment Agreement there shall be no plea of sovereign immunity.

ARTICLE IX - Further Instruments and Acts: Default: Notices:

Section 9.01 The parties shall each execute such instruments and perform such other acts according to law as may be necessary to carry into effect the terms of this Agreement and the Schedules hereto.

Section 9.02 The provisions of this Agreement are not severable and any material breach of such provisions by either party shall entitle the other to repudiate the whole of the Agreement without prejudice to any other remedies it

Section 9.03 Any notice or request required or permitted to be given or made under this Agreement to the Government or to \_\_\_\_\_ shall be in writing and such notice or request shall be deemed to have been duly given or made when it shall be delivered by hand, airmail or cable to the party to which it is required or permitted to be given at such party's address specified below or at such other address as such party shall have designated by notice from time to time.

For the Government:

Permanent Secretary

Ministry of Commerce and Industry

Jogoo House.

P. O. Box 30430

Nairobi, Kenya

For

President

  
United States of America

IN WITNESS WHEREOF each of two copies of this Agreement  
signed by the duly authorized representatives of the  
Government and \_\_\_\_\_ (as of the day and year first  
above written.

SIGNED by

\_\_\_\_\_)  
S.D.

21st July 1969

Accounting Officer under  
the Provisions of the  
Government Contracts Act  
IN THE PRESENCE OF: \_\_\_\_\_

SIGNED by

\_\_\_\_\_)  
S.D.

the duly authorized  
representative of  
\_\_\_\_\_ in the presence  
of: \_\_\_\_\_

AGREEMENT made and entered into as of the 1st day of January 1970,  
between [redacted] [redacted] called [redacted]  
[redacted] organized and existing under the laws of the State of New York,  
United States of America, acting by its [redacted] Africa and Middle  
East [redacted] Company having an office at [redacted] New York,

**APPENDIX H:**

**Integrated Investment Agreement**

United States of America, and [redacted] [redacted] [redacted] called  
[redacted], a private company limited by shares organized and existing  
under the laws of [redacted], having an office at Standard Building, Webera Street,  
Winnipeg, [redacted]

WITNESSETH

WHEREAS, [redacted] possesses certain inventions, patented and  
unpatented, technical and business information, data and knowhow relating  
to the manufacture, use and sale of the Licensed Products (as hereinafter  
defined); and

WHEREAS, Licensee wishes to engage in the manufacture, use and sale  
of the Licensed Products; and

WHEREAS, [redacted] is able to furnish Technical Information and  
Services (as hereinafter defined) to Licensee in its manufacture, use and  
sale of the Licensed Products; and

WHEREAS, Licensee desires that [redacted] will license it to use  
such inventions, technical and business information, data and knowhow and  
will furnish it with Technical Information and Services; and



AGREEMENT made and entered into as of the 1st day of January 1978, between \_\_\_\_\_ (herein called \_\_\_\_\_) a corporation organized and existing under the laws of the State of New York, United States of America, acting by its \_\_\_\_\_ Africa and Middle East Inc., Company having an office at \_\_\_\_\_ New York, United States of America, and \_\_\_\_\_ KENYA LIMITED (herein called "Licensee"), a private company limited by shares organized and existing under the laws of Kenya, having an office at Standard Building, Wabera Street, Nairobi, Kenya;

W I T N E S S E T H

WHEREAS, \_\_\_\_\_ possesses certain inventions, patented and unpatented, technical and business information, data and knowhow relating to the manufacture, use and sale of the Licensed Products (as hereinafter defined); and

WHEREAS, Licensee wishes to engage in the manufacture, use and sale of the Licensed Products; and

WHEREAS, \_\_\_\_\_ is able to furnish Technical Information and Services (as hereinafter defined) to Licensee in its manufacture, use and sale of the Licensed Products; and

WHEREAS, Licensee desires that \_\_\_\_\_ will license it to use such inventions, technical and business information, data and knowhow and will furnish it with Technical Information and Services; and

WHEREAS, \_\_\_\_\_ is willing to grant a license and to furnish Technical Information and Services to Licensee subject to the terms and conditions hereinafter set forth;

IN CONSIDERATION of the mutual agreements herein set forth the parties hereto mutually agree as follows :-

1. Definitions

As used herein, the following terms shall have the following meaning ;

1.1 "Licensed Products" shall mean, jointly and severally, \_\_\_\_\_ identified in Appendix A, attached hereto and made a part hereof.

1.2 "Territory" shall mean Kenya, Uganda, Tanzania and Zambia.

1.3 "Patent Rights" shall mean (i) all inventions relative to Licensed Products which \_\_\_\_\_ now owns or controls or hereafter owns, controls, develops or is licensed under and which comprises (A) a Licensed Product commercially manufactured by \_\_\_\_\_ at any time during the term of this Agreement, (B) a process or apparatus employed by \_\_\_\_\_ during the term of this Agreement in the commercial production of any Licensed Product, (C) a method of using any Licensed Product commercially manufactured by \_\_\_\_\_ during the term of this Agreement, (ii) all patent applications of the Territory which \_\_\_\_\_ now owns or controls or hereafter owns, controls, develops or is licensed under claiming any such invention, and (iii) all patents issuing upon any such application.

1.4 "Technical Information" shall mean all confidential knowhow, unpatented inventions, research and development data and technology including but not limited to composition, construction and quality control of the Licensed Products, construction, design and operation of machinery and equi

blue-prints, manuals and other technical data and information relative thereto, application of manufacturing methods, enhancement of operating efficiencies, purchase and evaluation of supplies and other data and knowhow which \_\_\_\_\_ now or hereafter possesses or controls and which is utilized by \_\_\_\_\_ in (i) the commercial manufacture of a Licensed Product during the term of this Agreement, (ii) a process or apparatus to commercially manufacture a Licensed Product during the term of this Agreement, or (iii) a method of using any Licensed Product commercially manufactured by \_\_\_\_\_ during the term of this Agreement.

1.5 "Services" shall mean the expert assistance, services and functions (i) relative to the Technical Information, and (ii) relative to export marketing, cost controls and improvement, financial planning and co-ordination, improvement of operation and production methods, and management personnel development and training, and shall include, without limitation, the work performed by \_\_\_\_\_ for or on behalf of Licensee, whether singularly or on a continuous basis, which is beneficial to the manufacture, use or sale of Licensed Products by Licensee hereunder.

1.6 "Net Sales Value" of Licensed Products manufactured and sold by Licensee shall mean the gross invoice price received therefore, less allowances for returns and less (to the extent separately stated on such invoice) cash and other trade discounts, shipping charges and sales and other excise taxes included in such invoice price.

## 2. Disclosure of Inventions and Technical Information to Licensee

2.1 Promptly following the execution of this Agreement, \_\_\_\_\_ will disclose to Licensee in reasonable detail all patentable and unpatentable inventions included in the Patent Rights on the date hereof, and all Technical Information possessed by \_\_\_\_\_ on the date hereof.

which \_\_\_\_\_'s experience indicates to be important in Licensee's commercial manufacture, use or sale of Licensed Products. From time to time during the term of this Agreement, after the same has been employed by \_\_\_\_\_ in its commercial operations, \_\_\_\_\_ will also disclose to Licensee in reasonable detail all patentable and unpatentable Inventions hereafter included in the Patent Rights, and all Technical Information hereafter possessed by \_\_\_\_\_, which \_\_\_\_\_'s experience indicates to be important in Licensee's commercial manufacture, use or sale of Licensed Products.

2.2 Each party agrees to negotiate with the other party in good faith for a reasonable period of time during the term of this Agreement, upon the written request of the other party given at any time after one year of manufacturing operations by the Licensee concerning the inclusion of additional \_\_\_\_\_ as Licensed Products or the furnishing of technical assistance regarding the adoption and installation of new or different equipment to manufacture the Licensed Products; provided, however, that neither party shall be obligated to agree to any such inclusion or additional products or the furnishing of such technical assistance.

### 3. Grant of Right and License, and Agreement to Furnish Services

3.1 \_\_\_\_\_ hereby grants to Licensee and Licensee hereby accepts the right to use all Technical Information disclosed to Licensee pursuant to this Agreement solely in connection with the manufacture of Licensed Products in Kenya and in the use and sale of Licensed Products in the Territory, for the term of this Agreement.

3.2 \_\_\_\_\_ hereby grants to Licensee and Licensee hereby accepts the license, without the right to grant sublicenses, under the Patent Rights, to manufacture (but not have manufactured for it) Licensed Products in Kenya and to use and sell the Licensed Products in the Territory for the term of this Agreement.

3.3 [redacted] agrees to continue furnishing the Services to Licensee upon the execution of this Agreement.

#### 4. Consideration

4.1 In consideration of the License under the Patent Rights granted by [redacted] to Licensee hereunder, the disclosure of and the grant of the right to use the Technical Information, and the furnishing of Services by [redacted] to Licensee in accordance with this Agreement, and in further consideration of the grant of the right to use the trademarks [redacted] devices in accordance with a written agreement between the parties hereto, Licensee shall pay to [redacted] as technical service fee an amount equal to three (3%) of the Net Sales Value of all Licensed Products manufactured and sold by Licensee during the term of this Agreement.

#### 5. Payment of Consideration and Taxes

5.1 Within thirty (30) days after the end of each calendar quarter-year occurring in whole or in part during the term of this Agreement, Licensee shall report to [redacted] in writing whether or not any technical service fees have accrued to [redacted] under Article 4 hereof during such quarter-year and, if so, such report shall include a statement showing a computation in reasonable detail of amounts so accruing. The payment in full of all amounts therein shown to be due shall be made by Licensee within sixty (60) days after the end of each quarter calendar year, or otherwise as parties may agree upon in writing.

5.2 All payments to [redacted] of the amounts due hereunder shall be made in United States of America funds and shall be subject to all applicable currency control and tax laws and regulations. Any conversions made in accordance herewith shall be made at the average of monthly closing rates of exchange for buying United States funds with Kenya currency as quoted by the Commercial Bank of Africa Limited, Nairobi, Kenya, for the period covered by the accounting being made.

5.3 Any and all taxes and charges imposed in the Territory on the amounts payable by Licensee to \_\_\_\_\_ pursuant to Article 4 hereof, which are allowable as a credit against \_\_\_\_\_'s income taxes in the United States, shall be paid by Licensee for the account of \_\_\_\_\_ : and deducted from the amounts payable to \_\_\_\_\_ pursuant to this Agreement. In the event that Licensee is required to pay or withhold such taxes or charges, Licensee shall deliver to \_\_\_\_\_ the original or true copy of the receipt covering each such payment or withholding.

All other taxes, duties, fees and imposts of any or every kind which may be levied by any taxing authority in the Territory by reason of the execution or performance of this Agreement, or any payments hereunder, shall be borne and paid by Licensee without deduction from the amounts payable to \_\_\_\_\_ under this Agreement.

5.4 Licensee shall use its best efforts to complete such registration of this Agreement with governmental agencies within the Territory as may be required by statute or regulation promptly upon execution of this Agreement and shall do any and all other things necessary to permit payments to be made hereunder to \_\_\_\_\_ in United States funds.

## 6. Records

6.1 Licensee shall keep true and complete books of account containing an accurate record of all data necessary for the determination of the amounts payable hereunder and shall permit \_\_\_\_\_ by its duly authorized representatives, to examine such books of accounts of Licensee for the purpose of determining the correctness of any of the statements to be rendered by Licensee pursuant to Article 5 hereof.

## 7. Training at Plants of

7.1 \_\_\_\_\_ will provide training and instruction for personnel of the Licensee in the practice of the Inventions Included in the Patent Rights, the use of the Technical Information and the manufacture of Licensed Products



at Plants or laboratories of \_\_\_\_\_ or any of its subsidiaries, provided that the time, place and duration of such training and instruction and the number of Licensee's employees to be instructed at any one time shall be as mutually agreed upon by the parties. The salaries, maintenance and travel expenses of any such employees of Licensee so assigned for training purposes will be borne by the Licensee.

8. Technical Assistance to Licensee Concerning  
Manufacture of Licensed Products

8.1 \_\_\_\_\_ /shall furnish in the Territory the services of such engineering, production and other technical representatives familiar with the manufacture of Licensed Products as the parties may agree to be necessary to train, instruct and assist Licensee in the manufacture of the Licensed Products and in the utilization of the Technical Information for such period or periods of time as may be necessary not exceeding thirty (30) working man-days in any one calendar year. All reasonable living expenses of such technical representatives while performing the Services for Licensee in the Territory shall be borne by Licensee.

8.2 Licensee shall secure at its own expense such governmental authorizations as may be required for \_\_\_\_\_ 's representatives to enter into and remain in the Territory in order to train and instruct personnel of Licensee as provided hereunder.

9. Representation by

9.1 \_\_\_\_\_ represents that the Technical Information disclosed pursuant to this Agreement is the Technical Information used by \_\_\_\_\_ in the commercial manufacture of Licensed Products at the time of disclosure hereunder and is the best Technical Information in commercial use for the manufacture of Licensed Products that is known to \_\_\_\_\_ and available for disclosure hereunder. Except as otherwise provided in this Article, \_\_\_\_\_ makes no representation or warranty and shall have no responsibility with respect to the Technical information disclosed pursuant to this

9.2 Without limiting the generality of the foregoing

(i) Shall not in any way be liable for any loss or damage or personal injury or death resulting from or arising out of the use of inventions and Technical Information made available hereunder.

(ii) Gives no warranty as to yields efficiencies, quantities or qualities that will or may be obtained by Licensee on the basis of the inventions and Technical Information, furnished under this Agreement.

#### 10. Secrecy

10.1 During the term of this Agreement and a period of five years thereafter, licensee shall not use except as provided in Article 3 hereof and shall not disclose to any third party other than to those of its employees whose duty requires the possession thereof any and all Technical Information disclosed to Licensee hereunder after the signing of this Agreement except when, after and to the extent such Technical Information is or becomes generally available to the other manufacturers in the world.

10.2 During the term of this Agreement and a period of five years thereafter, shall not disclose to any third party in the Territory any and all Technical Information disclosed to Licensee hereunder after the signing of this Agreement except when, after and to the extent such Technical Information is or becomes generally available to the other manufacturers in the world.

#### 11. Term

11.1 Unless sooner terminated as otherwise provided therein, this Agreement shall continue for five (5) years) from the date hereof, and from month to month thereafter for a period not exceeding one year unless and until terminated by either party by giving notice thereof by registered mail not less than sixty (60) days, prior to the expiration of the said five (5) year period or such subsequent year.

12.1 If either party hereto shall fail to perform or fulfill, in the time and manner herein provided, any obligation or condition herein required to be performed or fulfilled by such party, and if such default shall continue for sixty (60) days after written notice thereof from the nondefaulting party, then the nondefaulting party shall have the right to terminate this Agreement by written notice of termination to the defaulting party given at any time within ninety (90) days after such sixty (60) days. Any termination of this Agreement pursuant to this Article shall be in addition to and shall not be exclusive of or prejudicial to any other rights or remedies, at law or in equity, which the nondefaulting party may have on account of default of the other party.

### 13. Governing Law

13.1 The provisions of this Agreement shall be construed, and the performance thereof shall be enforced in accordance with the laws of Kenya.

### 14. Miscellaneous

14.1 Any assignment of this Agreement or any part thereof by Licensee without the prior written consent of \_\_\_\_\_ which consent shall not be unreasonably withheld, shall be void.

14.2 Captions used in this Agreement are inserted for convenience of reference only, and shall not affect the construction of the respective clauses.

14.3 No waiver by either party of any breach of any of the terms or conditions herein contained to be performed by the other party shall be construed as a waiver of any subsequent breach, whether of the same or of any other term or condition thereof.

14.4 No change in, modification or waiver of any of the terms or conditions of this Agreement shall be effective unless agreed to in writing and signed by a duly authorized representative of each of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement  
as of the date first above written.

THIS AGREEMENT is made and entered into as of

the 19th day of October, 1970, to become operative

on or before the 1st day of November, 1970, between

a corporation of \_\_\_\_\_

having its principal office at \_\_\_\_\_, hereinafter

referred to as \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_ a COMPANY ORGANIZED UNDER THE LAWS OF

the Republic of Kenya \_\_\_\_\_ having an office and place of

**APPENDIX I :**

located at Nairobi, Kenya

**Technical Assistance Agreement**

\_\_\_\_\_

THIS AGREEMENT is made and entered into as of

the 19th day of October, 1970, to become operative

on or before the 1st day of November, 1970, between

, a corporation of                      U. S. A.,

having its principal office at                     , hereinafter

referred to as "                    " and                     

                    , a company existing under the laws of

the Republic of Kenya, having an office and place of

business at Nairobi, Kenya

hereinafter called "LICENSEE."



is specially suited and equipped to furnish manufacturing know-how and merchandising know-how to be utilized in connection with the licensed products, and is prepared to offer licenses to qualified licensees for use of said know-how and marks;

LICENSEE desires to use said know-how and marks; and

and LICENSEE desire to improve the production and distribution of said products; and to promote technical and economic progress in connection therewith;

NOW, THEREFORE, the parties agree as follows:

#### 1. DEFINITIONS

In this agreement the words and phrases used have the following meaning, except where context indicates otherwise:

- (a) "Territory" means that country set forth in Addendum A for which LICENSEE is granted rights hereunder.
- (b) "Licensed products" means those products identified in Addendum B.
- (c) "Invoice price" means the price charged by LICENSEE to the retail store before the deduction of any cash discounts for term payment and before the addition of a sales tax in the event there is such a tax.
- (d) "Operative date" means the date under which operations by LICENSEE are to begin and royalties to be computed. This is to be distinguished from the date upon which this agree-

ment was executed. Where this agreement supersedes a previously existing agreement, the operative date shall be the same as the date of entering into this agreement.

(e) "Marks" means all trademarks, model designations and other words, devices or designs enumerated in Addendum C.

(f) "Manufacturing know-how" means engineering skills and techniques developed by \_\_\_\_\_, including plant layouts, specifications, production services, information and advice as to machines and methods and raw materials suitable for use in manufacturing the licensed products.

(g) "Merchandising know-how" means information, materials, and skills developed by \_\_\_\_\_ suitable for use in distributing, advertising, merchandising, marketing, displaying, promoting and selling the licensed products.

## 2. GRANT

\_\_\_\_\_ grants LICENSEE the exclusive right to make and sell the licensed products in the territory, and to use in connection therewith the manufacturing know-how, merchandising know-how, and marks of \_\_\_\_\_

## 3. ROYALTIES

(a) LICENSEE shall pay \_\_\_\_\_ on all underwear made and sold under this agreement a royalty of two percent (2%) to five percent (5%) of the invoice price, depending upon LICENSEE'S performance as specified Addendum E, and two percent (2%) of the invoice price of all other produ

manufactured pursuant to this agreement, which amounts shall be paid in four quarterly payments ending with the months of March, June, September and December of each year; such payments by LICENSEE for each quarter to be made to \_\_\_\_\_ in the month immediately following the quarter ending periods named above.

(b) Royalties shall be payable on the sale of all of said products sold by LICENSEE; PROVIDED always, that no royalties shall be payable in respect of any of said products which shall be delivered to purchasers without charge in replacement of defective products of the same type already delivered or which shall be returned to LICENSEE with its consent.

(c) Royalties on the sale of irregular products shall be calculated on the reduced price for such products or the price after the discount allowed for irregularities or imperfections.

(d) If because of war, state of national emergency, fire, pestilence, riots, or acts of God beyond LICENSEE'S control the minimum sales shall not be achieved and the royalties due hereunder shall not be paid, \_\_\_\_\_ hereby agrees to defer requiring payment of any such royalties until such emergency ends.

#### 4. INITIAL AND MINIMUM ROYALTIES

LICENSEE shall, upon execution of this agreement, pay \$5,000.00 to \_\_\_\_\_ as minimum royalties for the first year of operation, provided that the accrual of royalties hereunder shall be charged against this initial minimum royalty payment and provided further that no refund or credit of the first year's minimum royalties shall be made, if total royalties from

the first year's operations do not equal the amount of the minimum royalties paid. In the event that the earned royalty for the first year as computed hereunder shall exceed the minimum royalty of \$ 5,000.00, LICENSEE shall pay to \_\_\_\_\_ the difference between the minimum and the full year's royalties as computed. The first year minimum royalty provisions shall not apply where this agreement supersedes a previously existing agreement.

5. CURRENCY BASIS

All royalties shall be paid by LICENSEE to \_\_\_\_\_ in United States dollars, or the equivalent of United States dollars as may be required based on prevailing local currency rates.

6. BOOKS AND RECORDS

LICENSEE shall keep full and accurate records and accounts showing the business done in connection with the licensed products manufactured and sold pursuant to this agreement and upon which royalties shall accrue and be payable. These records and books of account shall be accessible at all reasonable times to \_\_\_\_\_ or any licensed public accountant authorized by it.

7. REPORT AND REMITTANCE FORMS

LICENSEE shall submit information as to its manufacture and sale of licensed products on the International Forms A, B and C to be supplied by \_\_\_\_\_, giving reasonable detail as to production and sale of such products by unit and volume, such reports to be furnished quarterly with the royalty remittance to \_\_\_\_\_ and certified to by LICENSEE'S duly



authorized accountants or officials. LICENSEE shall also provide

certified reports as being necessary to *for auditing*  
quarterly statements, advertising expenditures, and determining *distribution*  
*tion* progress of LICENSEE as detailed in Addendum D.

8. KNOW-HOW

shall; from time to time, and to such extent *that it shall*  
consider to be necessary for the performance of this agreement *provide*  
LICENSEE with manufacturing know-how and merchandising know-how and  
information as to any improvements or inventions which may be made *in*  
connection with the licensed products, whether or not such improvements  
or inventions are patentable. Should any such know-how, *improvements or*  
inventions be patentable or subject to industrial model or design.

shall have the sole right to determine whether such *protection*  
should be sought and to seek such protection in its own name. *Should*  
such protection be obtained in the territory by *shall*  
grant LICENSEE the right to use such protected rights, subject *to*  
ation of this agreement, and LICENSEE shall not be required to *pay*  
additional royalty for such use. Upon request of LICENSEE and if both  
parties deem it necessary, *shall* furnish engineers or other  
skilled personnel to LICENSEE for specified periods, and LICENSEE *shall*  
pay for such services a per diem amount which shall not exceed one and  
one-half (1-1/2) times the salary of such person, plus all reasonable  
sistence and travel expenses.

9. PRODUCT MARKING, PACKAGING and ADVERTISING

LICENSEE shall mark all products made by or for it *under this*

agreement with the mark \_\_\_\_\_, and such additional marks as  
deems appropriate. Packages containing said products shall be marked in  
the same manner, with the name of LICENSEE indicated as LICENSEE of  
\_\_\_\_\_, so that the public may be fully advised that the products were  
made by LICENSEE. Product labels and packages must faithfully reproduce  
\_\_\_\_\_ marks, and such marks must be displayed in a form approved by  
\_\_\_\_\_. LICENSEE'S advertising must also faithfully reproduce  
marks.

10. QUALITY CONTROL

LICENSEE agrees that all products made and sold under this  
license shall be of quality, materials, standards and workmanship equal  
to samples and specifications supplied by \_\_\_\_\_. LICENSEE shall  
submit for \_\_\_\_\_ approval samples of products made by it and to be  
offered for sale under this agreement and shall not sell licensed products  
which have not been so approved. \_\_\_\_\_ shall at all reasonable times  
have the right to inspect such products and methods of manufacture on the  
premises of LICENSEE.

11. INFRINGEMENT NOTICES

LICENSEE shall give notice in writing to \_\_\_\_\_ of any infringe-  
ment of said marks or misappropriation of any rights of \_\_\_\_\_ which  
shall come to its knowledge at any time within the territory and, when  
requested, shall cooperate with \_\_\_\_\_ in stopping such infringements.  
\_\_\_\_\_, with the advice of LICENSEE, shall decide as to the need for  
instituting legal action with respect to any infringement which may occur.

and the cost of any such litigation or the policing of rights granted by hereunder shall be paid by No legal action for infringements or unfair competition relative to any proprietary rights of may be taken or defended by LICENSEE without the consent of and shall have the right to control any such action or defense.

12. DILIGENCE

LICENSEE shall use all due diligence and good faith to manufacture and promote the sale of the licensed products as prescribed by this agreement.

13. ADVERTISING AND SALE

With respect to initial operations, LICENSEE shall, after consultation with , outline a marketing plan for the sale of the licensed products, including a market survey of its territory, and prepare advertising plans and a general scheme for merchandising and pricing said products. LICENSEE shall also advertise said products, after consultation with and shall use, insofar as is practicable, the merchandising know-how submitted by , unless said know-how is not suitable for LICENSEE'S territory. Minimum annual expenditures by LICENSEE for advertising the licensed products shall be as prescribed in Addendum F.

14. DATA - CONFIDENTIAL

All manufacturing know-how and merchandising know-how, specifications, plans, patterns, outlines and other data and information of any kind obtained by LICENSEE from under this agreement shall be



kept confidential and shall be revealed to employees of LICENSEE only to the extent reasonably necessary to enable LICENSEE to enjoy the full rights granted hereunder. LICENSEE shall impose by written agreement on each of its employees to whom such confidential information is imparted the obligation not to disclose such information, during or subsequent to his employment by LICENSEE, to any person, firm or corporation which does not otherwise have access to such information.

15. COMPETING PRODUCTS

LICENSEE shall not use any manufacturing know-how or merchandising know-how hereunder in connection with the manufacture or sale, or both, of any products other than the licensed products. LICENSEE shall not manufacture or sell products under its own brand names which may be regarded by \_\_\_\_\_ as competitive with the licensed products. In the event question arises, LICENSEE shall abide by the decision of \_\_\_\_\_ and will withdraw from its lines any products which \_\_\_\_\_ deems competitive, or label them to conform with \_\_\_\_\_' instructions, as the case may be. The fact that \_\_\_\_\_ may choose to permit LICENSEE to market certain competitive products temporarily under LICENSEE'S own brand, shall not be construed as a waiver by \_\_\_\_\_ of its right to enforce compliance at any time with this paragraph. Should LICENSEE upon request by \_\_\_\_\_ fail to discontinue the manufacture and sale of competitive products, then \_\_\_\_\_ shall have the right to forthwith cancel this agreement and terminate all rights hereunder.

TERM

(a) Unless sooner terminated as hereinafter provided, or unless extended by subsequent agreement of the parties, this agreement shall terminate five (5) years from the operative date.

(b) This agreement may be terminated:

1. by mutual written consent of the parties at any time:

2. by \_\_\_\_\_ upon written notice to LICENSEE in the

event of any of the following:

(A) if LICENSEE fails to pay royalties hereunder at any time, as specified:

(B) if LICENSEE shall go into liquidation or bankruptcy:

(C) if LICENSEE fails to exercise diligently its rights hereunder:

(D) if LICENSEE fails to equip its plant or to arrange proper manufacturing and distribution facilities or provide all necessary means to adequately perform the expected functions under this license:

(E) if LICENSEE'S deliveries during the first twelve (12) months of operation and during any subsequent year of operation have not reached the minimum annual dozens specified in Addendum E:

(F) if LICENSEE fails to manufacture garments of the quality and workmanship required under this agreement.

(G) in the event of the direct or indirect taking over or assumption of control of LICENSEE in whole or in part by any superior authority, including governmental; or

(H) if LICENSEE undertakes to exercise any rights in connection with the licensed products which are not expressly granted herein;

provided, however, that this agreement shall not be terminated under this subparagraph (b)(2) unless and until LICENSEE has an opportunity to correct the breach or default within sixty (60) days after receipt of written notice from

(c) Upon termination of this agreement for any reason, the rights, privileges and obligations of the parties shall be as follows:

1. Such termination shall be without prejudice to rights to recover royalties or other sums due by LICENSEE under the terms of this agreement;
2. Remedy for any breach which has not previously been cured, shall not be lost;
3. shall have the right, but not the obligation, to purchase:

(A) All materials, including labels and packaging, bearing any marks, at the cost to LICENSEE of such materials; and

(B) Any or all of the licensed products manufactured by LICENSEE which are unsold at the time of LICENSEE'S receipt of such notice of termination, at the cost to LICENSEE of such products.

Within thirty (30) days after termination of this agreement, LICENSEE shall provide \_\_\_\_\_ with detailed lists and costs of the items set forth in this subsection (c)(3).

Thereafter, if \_\_\_\_\_ determines to purchase part or all of said items, \_\_\_\_\_ shall at its own expense remove said items from LICENSEE'S premises (to which action LICENSEE hereby gives its consent) within thirty to sixty (30 to 60) days. Payment shall be made within fifteen (15) days after removal of the last of the items.

4. LICENSEE shall remain obligated:

(A) To respect \_\_\_\_\_'s rights in garment construction design and appearance;

(B) To cease all use of marks, know-how and confidential data licensed or communicated under this agreement

(C) To keep confidential all information and data received from \_\_\_\_\_, to discontinue all use of rights granted hereunder and to return immediately all materials belonging to and furnished by \_\_\_\_\_ pursuant to this agreement.

(d) The failure of \_\_\_\_\_ to enforce at any time any of the provisions of this agreement, or any rights in respect thereto, or to exer



cise any election herein provided, shall in no way be considered to be a waiver of such provisions, rights or elections or in any way to affect the validity of this agreement. The exercise by \_\_\_\_\_ of any of its rights herein or any of its elections under the terms or covenants herein shall not preclude or prejudice \_\_\_\_\_ from exercising the same or any other right it may have under this agreement, irrespective of any previous action or proceeding taken by \_\_\_\_\_ hereunder.

#### 17. TRANSFERABILITY OF RIGHTS

(a) \_\_\_\_\_ rights and obligations under this agreement shall be freely assignable, and its said rights and obligations shall inure to the benefit of and be binding upon its successors or assigns.

(b) The rights granted LICENSEE hereunder shall be exclusive to it and shall not, without the written consent of \_\_\_\_\_, be transferred or assigned, including by merger, consolidation or reorganization, to any other manufacturer, person or firm:

(c) Since this agreement is entered into by \_\_\_\_\_ in reliance upon the experience and integrity of the persons having legal control of LICENSEE on the date of execution, \_\_\_\_\_ shall have the right forthwith to terminate this agreement by notifying LICENSEE in writing thirty (30) days in advance of said termination:

1. If the transfer of any interest in LICENSEE results in ownership of any interest in LICENSEE by a competitor or a person, firm or corporation affiliated with a competitor of either LICENSEE or \_\_\_\_\_ or

2. If the transfer of a controlling or substantially controlling interest in LICENSEE results in the present owners ceasing to own a controlling interest, either legal or beneficial.

LICENSEE shall notify \_\_\_\_\_ promptly in writing of any proposed, contemplated or effected transfer of interest which is described in this subparagraph (c).

18. NOTICES

Any notice required to be served by one party upon the other shall be deemed to be served if it shall be sent by telegram or cable to the established office of the other party, and any notice or document so served shall be deemed to be served on the day following that on which the telegram or cable was sent, provided that the party serving any such notice shall send a copy by registered, prepaid airmail as soon as possible after sending the telegram or cable.

19. NOT AN AGENCY RELATIONSHIP

LICENSEE shall not be deemed to be an agent of \_\_\_\_\_ in any transaction relating to this agreement and shall, under no circumstances, pledge the credit of \_\_\_\_\_ or incur any obligations on its behalf.

20. LOCAL LAW COMPLIANCE

LICENSEE shall be responsible for compliance with the requirements of all local laws of the country in which it operates, including recordation, registration of this agreement, final clearance as may be required by governmental authorities, payment of taxes, making reports, and the like.



21.

LEGAL COMPLIANCE

In the event that national laws or regulations, or laws or regulations of the European Economic Community (EEC), Latin American Free Trade Association (LAFTA), Central American Common Market (CACM) or other common market or international trade arrangements conflict with or render illegal any one or more of the provisions of this agreement, the parties will renegotiate such provisions in an effort to satisfy legal requirements. In the event that any such provision shall be held illegal or void by a court or administrative agency for any reason whatever, the remaining provisions shall continue in full force and effect. The parties will in such case amend this agreement to the extent appropriate. The parties mutually waive all damages or restitution claims against one another, with the exception of royalties owing to [redacted] that may arise due to any future holding by a court or administrative agency that this agreement or any portion thereof are illegal or void for any reasons whatever.

22.

PREVAILING LANGUAGE AND CONSTRUCTION OF LICENSE

If this agreement is translated for any purpose into a language other than English, the original English version shall always prevail in the event of differences in meaning. This agreement shall be construed in accordance with the laws of the United States of America and the State of

IN TESTIMONY WHEREOF the parties hereto caused this agreement  
to be executed by their duly authorized officers and their seals affixed as of  
the date first above given.

Territory

The territory in which LICENSEE has the exclusive right to make and sell the licensed products is as follows:

Kenya

Temporary Export Territory

(a) grants LICENSEE the nonexclusive right to sell the licensed products in the following temporary export territories, and to use in connection therewith the merchandising know-how and marks of

Uganda  
Tanzania

(b) may, in its discretion, by giving LICENSEE three (3) months written notice, withdraw any or all said temporary export territories enumerated in this Addendum.

(c) Except as hereinabove provided, all other provisions of this agreement shall apply with full force and effect with respect to the temporary export territories.

APPROVED BY:

*[Handwritten signature]*

DATE: \_\_\_\_\_  
1970

Licensed Products

The products to be manufactured and sold by LICENSEE under this agreement are the following, and no other:

Men's and Boys' Underwear



Trademarks

The following are marks of \_\_\_\_\_ which have been registered or subject to pending applications in the indicated country or countries:

<u>Country</u>	<u>Trademark</u>	<u>Registration or Application No.</u>
Kenya		
Uganda		
Tanganyika		
Zanzibar		



ADDENDUM (D)

Accounting and Manufacturing Reports

The following reports are to be submitted by LICENSEE:

1. A sales analysis annually of the licensed products by dozens and value showing sales made in cities and by number of customers throughout the territory.
2. A record detailed annually of expenditures of all sums spent in advertising.
3. Income Taxes. In countries where income taxes are assessed on royalties paid to licensors, it shall be the responsibility of LICENSEE to pay said taxes in behalf of . LICENSEE shall be permitted to deduct payments of such income taxes from royalty remittances. LICENSEE shall also be required to provide to an official receipt for payment of income taxes.

ALUMINUM (E)

Quota

For purposes of royalty rate determination, underwear quota in dozens is 40,000 annually.

Quota is calculated in terms of the territory only and therefore only shipments to that territory are to be used when ascertaining the accomplishment of quota for purposes of determining the royalty rate. Quota is subject to annual revision by \_\_\_\_\_ based on changes in population and economic conditions.

Royalty Rate Determination Table

Accomplishment	Men's Underwear Royalty Rate % of selling price	Boys' Underwear Royalty Rate % of selling price
Class A 200% and over	3	2
Class B 150% to 200%	3-1/2	2
Class C 75% to 150%	4	2-1/2
Class D 50% to 75%	4-1/2	3
Class E less than 50%	5	3-1/2

All products other than underwear, 2% of selling price.

Minimum annual royalty shall be no less than US \$5,000. Quarterly minimum royalty payments shall be US \$1,250.

ADDENDUM (F)

Advertising

During each calendar year following the operative date of this agreement and beginning with the shipment of products authorized herein, LICENSEE shall advertise said products in the prescribed manner and the minimum costs of such advertising shall be, for the first year, \$ 7,000.00 (U.S. dollars or equivalent in local currency). For the second and all subsequent years of the life of this agreement, the greater of two sums of money, namely, \$ 5,000.00 (U.S. dollars) or three percent (3%) of the total of the net invoice price of all products sold by LICENSEE during the preceding year. Such expenditure shall be regarded by LICENSEE as part of normal cost of doing business and it is not deductible from any money owing to

"Advertising" as used in computing the sums to be included as advertising, for purposes of establishing the required three percent (3%) expenditure per year to this agreement, shall include only the net cost of artwork, plates, printing, publishing, professional fees in connection therewith, booklets, posters, window and store cards, trademark figures, theater advertising, the cost of radio and television programs, and newspaper and magazine space.

**MANAGEMENT SERVICES AGREEMENT**

AGREEMENT by and between .....  
a corporation organized and existing under the laws of the State  
..... United States of America (hereinafter  
called ..... and ..... a company  
organized and existing under the laws of the Republic of Kenya  
(hereinafter referred to as .....

**WITNESSETH**

**WHEREAS**, ..... is a subsidiary of .....

(hereinafter called ..... which, having available to

**APPENDIX J :**

**Management Agreement**

MANAGEMENT SERVICES AGREEMENT

AGREEMENT by and between .....  
a corporation organized and existing under the laws of the State  
..... United States of America (hereinafter  
called ..... and ..... a company  
organized and existing under the laws of the Republic of Kenya  
(hereinafter referred to as .....

W I T N E S S E T H

WHEREAS, ..... is a subsidiary of .....  
(hereinafter called ..... which, having available to  
it the experience and personnel of ..... and  
its subsidiaries, is able to provide management services and  
other services to companies affiliated with .....

WHEREAS, ..... has executed a Joint Venture  
Agreement under which ..... acquires 49% of the  
issued share capital of .....

WHEREAS, ..... and ..... therefore  
desire that commencing with ..... acquisition of  
such shares, ..... benefit from .....  
experience in business and financial management;

WHEREAS, ..... desires to have access to  
such business and financial management and marketing techniques  
and to obtain these services through some of such .....

period from April 1 of the year through March 31

employees who will be selected and assigned by .....  
to serve as resident managers to reside in the Republic of Kenya  
during the period of this Agreement to provide such services and  
assistance on behalf of ..... on a continuing basis,  
in addition to the technical assistance to be provided under a  
separate Technical Assistance Agreement between .....  
and .....

WHEREAS, ..... is willing to provide such access  
and to select and assign some of such ..... employees  
to ..... to serve as resident managers upon  
the terms and conditions hereinafter set forth:

NOW, THEREFORE, the parties hereto agree as follows:

1. The following terms shall have the definitions specified:
  - (a) The term "Management Service" shall mean information concerning business and financial management related to ..... operations.
  - (b) The term "Resident Manager" shall mean an employee of ..... who renders Management Service while assigned by ..... to ..... as a director, officer or manager, for an indefinite period on the basis of establishing residence in the Republic of Kenya.
  - (c) The term "Month" shall mean a calendar month.
  - (d) The term "Payment Year" shall mean a yearly period from April 1 of one year through March 31



of the following year, except that the initial "Payment Year" shall mean the period from the date of this Agreement through March 31, 1976.

(e) The term "Yearly Reimbursement" shall mean the payment which ..... shall make to ..... for Management Service rendered by ..... through such Resident Managers during a given Payment Year.

(f) The term "Special Consultant" shall mean an employe of ..... or someone whose services are arranged and provided by ..... who renders Management Service while assigned to ..... for a specific limited period and for a specific assignment.

2. The Management Services to be rendered by ..... under this Agreement shall be rendered without any charge to ..... other than the reimbursement of any expenses actually incurred by ..... in providing such services.

3. .... shall make the services of six of its employes available to ..... to serve as Resident Managers as soon as practicable after the execution of this Agreement. .... shall utilize these Resident Managers in positions as follows:

(a) Managing Director

(b) Treasurer/Finance Director

(c) Factory Manager

(d) Sales Manager

(e) Supply Manager

(f) Service and Parts Manager

At the request of ..... and with the concurrence of ..... the services of up to an additional eleven employees of ..... shall be made available to ..... to serve as Resident Managers in such capacities and perform such functions as are mutually agreeable.

4. The Yearly Reimbursement to be paid to ..... by ..... for the Management Service rendered by ..... hereunder, for each Payment Year, shall be the estimated expenses established as provided in subparagraph 4(b). Any expenses incurred by ..... or by the Resident Managers, in connection with the furnishing of Management Service hereunder, shall be covered by the aforesaid Yearly Reimbursement, except as provided in Paragraph 7 herein. Such expenses shall include, without limitation, any Kenyan taxes payable by ..... in connection with the furnishing of Management Services hereunder.

(a) Before one month after the date of this Agreement, and before April 1 of each succeeding year, ..... shall present to ..... a written summary of ..... estimated expenses for providing the services of the Resident Managers during the coming Payment Year. Such estimate shall take

into account the payments agreed to be made  
by ..... pursuant to subparagraph 4(c).

Such estimated expenses shall include the  
following:

- (1) Total compensation of the Resident Managers, including base salaries and all provision for bonus or other compensation, retirement and insurance or other fringe benefits, all of the preceding as determined by ..... in accordance with its then current criteria for such personnel performing in positions and functions of comparable extent and responsibility.
- (2) Additional expenses and allowances for the Resident Managers and their immediate families, where and to the extent applicable, for living in a country away from their home country, such as children's schools, housing to maintain reasonably expected standards and settling expenses to permit stays in hotels or other temporary quarters for reasonable periods of time prior to establishment of local residence on a more permanent basis, tax protection, membership and dues in business oriented organizations as deemed essential by ..... transportation of the Resident Managers and their immediate families together with their household goods

to the Republic of Kenya to establish their residence locally, for home leaves back to their home area as well as for children of Resident Managers attending schools or universities away from the Republic of Kenya to visit their families in the Republic of Kenya, on a periodic basis as determined by

(c) ..... and for business trips by Resident Managers back to ..... New York head office in the United States of America, or other ..... for the purposes of reporting or consultation with respect to developments at .....

(d) Each Yearly Statement as established in (b) Before April 1 of each year ..... shall present to ..... a written statement prepared by ..... independent public accountants certifying the total actual expenses incurred by ..... in rendering Management Service through Resident Managers to ..... during the preceding calendar year.

If the total of such actual expenses is less than the total expenses invoiced to ..... during such calendar year, the difference shall be subtracted from the estimated expenses for the Payment Year beginning on the April 1 following the close of that calendar

year in determining the Yearly Reimbursement for that Payment Year. Similarly, if the actual expenses for the calendar year exceed the total expenses invoiced to ..... during such calendar year, the difference shall be added to the estimated expenses in determining the Yearly Reimbursement.

(c) With the written consent of ..... may provide at ..... own expense any or any part of the categories of expense listed in subparagraphs 4(a)(1) or 4(a)(2). Any such written consent may be altered or terminated by ..... at any time.

(d) Each Yearly Reimbursement as established in accordance with this Paragraph - shall be payable in equal monthly instalments in U.S. dollars and/or Kenyan shillings as provided in Paragraph 5 herein.

5. .... shall render invoices to ..... for the expenses provided for in Paragraph 4 herein. Such invoices shall be rendered by the 10th day of each Month with respect to the preceding Month and ..... shall make payment in U.S. dollars to ..... within 15 days after the presentation of such invoices. Alternatively, ..... may invoice part of the expenses in U.S. dollars and part in Kenyan shillings and in such case ..... shall make payment accordingly.

6. .... and ..... shall review from time to time the number and effectiveness of Resident Managers and their functions in ..... shall have the right to substitute and reassign Resident Managers after consultation with .....
7. From time to time ..... may find it desirable to request, in addition to the Management Service furnished by the Resident Managers, additional services of a specific nature. .... will review such request with ..... and will endeavor to arrange for such additional services to be made available to ..... through ..... by means of Special Consultants upon such terms and conditions as are mutually agreeable. The rendition of such services, and the reimbursement of expenses therefor, shall be subject to any necessary prior approvals of the Government of the Republic of Kenya.
8. .... shall at its own expense obtain or assist in obtaining whenever requested by ..... all visas or authorizations required by the laws or regulations of the Government of the Republic of Kenya to permit the Resident Managers and Special Consultants to enter or work in the Republic of Kenya for the purposes set forth herein.
9. .... shall take the necessary actions, including appropriate resolutions at meetings of its shareholders or Board of Directors, to ensure obtaining liabilities of any kind whatsoever arising out of or alleged to result from the carrying out of work



all requisite approvals of the relevant agencies or Ministries of the Government of the Republic of Kenya to enable [redacted] to remit abroad to ..... all payments required hereunder.

10. .... and ..... and any of the subsidiaries of ..... shall have the free and irrevocable right to use, disclose and practice without restriction any and all inventions, ideas and improvements made by the Resident Managers and Special Consultants during the terms of their assignment to ..... which relate to the Management Service.

11. The Resident Managers and Special Consultants during the terms of their assignments to ..... shall not serve as the agent or legal representative of and shall not have any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of or to bind, ..... or any other ..... subsidiary in any manner.

12. No guarantee or warranty of any nature is extended by ..... with respect to the Management Service to be furnished to , ..... by the Resident Managers and Special Consultants. .... shall not be responsible or liable to , ..... or anyone else for direct or consequential damages arising out of or alleged to result from the furnishing of such Management Service; and ..... shall hold ..... harmless from and against all claims and liabilities of any kind whatsoever arising out of or alleged to result from the furnishing of such

Management Service, the parties hereto.

13. Any notices or other written communications given in connection with this Agreement shall be written in the English language and shall be transmitted by personal delivery, prepaid first class registered airmail or prepaid cable. Communications to ..... shall be addressed or delivered to the Office of the President, New York , U.S.A. Communications to ..... shall be addressed or delivered to the Office of the Managing Director, ....., Republic of Kenya.

14. Neither party shall be responsible in any way to the other party for failure to perform any of its obligations under this Agreement when such failure is due to any strike, lockout, war, riot, internal disturbance, natural calamity, disruption of communications, law, regulation, judgement or other governmental action, or any other cause beyond the control of the party failing to perform.

15. This Agreement contains the entire understanding between the parties in respect to the matters covered herein and shall supersede any prior agreements or understandings between the parties.

No modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement

and duly signed by the parties hereto.

16. The provisions of this Agreement shall be construed in accordance with, and under the laws of, the State of New York, United States of America.

17. This Agreement shall continue in effect for so long as ..... remains a shareholder in ..... provided, however, that ..... at its option, may terminate this Agreement if ..... holds less than 49% of the issued share capital of ..... at any time.

IN WITNESS WHEREOF, the parties have executed this Agreement in two counterparts by their duly authorized representatives this ..... day of ....., 1975.

.....  
.....  
.....  
.....  
.....  
.....  
By .....  
Title .....

.....  
.....  
.....  
.....  
By .....  
Title .....

APPENDIX K

Consultancy Agreement

- (ii) metal caps, metal lids and metal covers for receptacles made of any material used for packaging including beverage caps of the kind known as crown caps (whether cork or compound lined) and vacuum caps of the kind commonly known as Whitecaps used for sealing glass and other receptacles with a rigid mouth defining rim.
- (iii) composite cans, used for packaging, the body whereof is constructed of either paper or paper plastic or paper and paper foil and with plastic paper or metal ends having a capacity not exceeding one imperial gallon.

THIS AGREEMENT made the 24th day of July One  
Thousand nine hundred and sixty seven BETWEEN THE  
a company incorporated in  
and according to the laws of England (hereinafter called  
"the Consultant") of the one part and ]  
a company incorporated in and  
according to the laws of the Republic of Kenya (hereinafter  
called "the Manufacturer") of the other part.

WHEREBY IT IS AGREED as follows:

Definition 1. IN this Agreement the following terms shall unless the context otherwise requires have the following meanings:

- (a) "Container" or "Containers" means (except in clause 19) all or any of the following:
- (i) receptacles used for packaging and manufactured wholly or substantially of metal and the parts thereof
  - (ii) metal caps, metal lids and metal covers for receptacles made of any material used for packaging including beverage caps of the kind known as crown caps (whether cork or compound lined) and vacuum caps of the kind commonly known as Whitecaps used for sealing glass and other receptacles with a rigid mouth defining rim.
  - (iii) composite cans, used for packaging, the body whereof is constructed of either paper or paper plastic or paper and paper foil and with plastic paper or metal ends having a capacity not exceeding one imperial gallon.

- (iv) extruded metal tubes
- (v) metal advertising articles
- (vi) receptacles used for packaging made wholly of paper and/or board
- (vii) any article made either wholly or substantially from plastics by injecting moulding methods by extrusion of polythene film by extrusion coating of polythene to other materials or by adhesive lamination of two or more plastic materials

PROVIDED THAT the terms "Containers" or "Container making" shall not include any article or the use of any process as to which the right to manufacture or use or the technique of manufacture or use is purchased or acquired by either party during the term of this Agreement for a consideration consisting wholly or partly of a lump sum whether in the form of cash or shares or in consideration of periodical payments other than royalties payable on a patented article or process. In clause 19 the term "Containers" shall mean any type of receptacle made of any material

- (b) "Machinery" means and includes Manufacturing Machinery Sealing Machinery and Allied Equipment as hereinafter defined
- (c) "Manufacturing Machinery" means machinery for the preparation of materials intended to be used in the manufacture of Containers for carrying out such manufacture and for printing or coating Containers but does not include any machinery device or process for the making of articles not covered by this Agreement



- (d) "Sealing Machinery" means machinery specially designed for any of the following purposes:
- (i) reforming handling and assembling Containers
  - (ii) applying covers lids ends and caps to bottles jars cans and other receptacles or closing and sealing the same It includes equipment for applying and seaming ends to open top cans and for applying caps such as crown caps and vacuum caps to bottles jars and similar receptacles used for packaging
- (e) "Allied Equipment" means certain specialised machinery which is adapted to the packaging of food products in glass and other receptacles other than Sealing Machinery
- (f) "the Territory" means the Republic of Kenya The United Republic of Tanzania and Uganda
- (g) "sterling" means such form of United Kingdom currency as shall be appropriate to the transaction to comply with the provisions of the Exchange Control Act 1947 of any other English Act or Regulation controlling exchange for the time being in force
- (h) "Trade Secrets" of the Consultant means the secret and confidential research and development projects manufacturing processes technical designs technical data formulae and knowledge formulated developed and acquired by the Consultant or of which the Consultant is entitled to make use in the Territory regarding the utilisation or application of industrial techniques which relate t

- (i) Manufacturing Machinery Sealing Machinery Allied Equipment and other technological achievements used in the manufacture of Containers and
  - (ii) Containers and their design manufacture handling packing and usage
- (i) "net sales price" means the invoice price after deducting transport charges sales discounts and allowances and the amount of any sales tax purchase tax or other similar tax PROVIDED THAT where the price charged is greater or less than the price which would be charged in an arm's length transaction "net sales price" means the price appropriate to an arm's length transaction
- (j) "Manufacturer" shall include the majority of whose voting share capital is owned or controlled by either of the parties hereto or by a company which in accordance with the foregoing definition is itself a subsidiary of either of the parties hereto

DURATION (2) THE Consultant as the same is now or may hereafter be constituted shall be the Consultant and Technical Adviser of the Manufacturer on the manufacture of Containers and the use of Machinery and the Consultant and its successors in business whether under the same or any other style or name shall (subject to Clauses 21 22 and 23) continue and be such Consultant and Technical Adviser of the Manufacturer from the First day of April One thousand nine hundred and sixty seven until the Thirty first day of March One thousand anine hundred and eighty six

Services of  
Consultant's  
Employees  
Available to  
Manufacturer

3. (1) THE Consultant will during the continuance of this Agreement whenever requested by the Manufacturer and insofar as in the opinion of the Consultant it is reasonably possible and necessary so to do send to the Territory its representatives technical or otherwise whose services and advice may be required by the Manufacturer at such times and for such periods as may be conveniently arranged. The manufacturer will:

- (a) provide adequate and safe facilities in and equipment and tools with which Consultant's representatives are to furnish the aforementioned services;
- (b) be responsible to such representatives and to the Consultant for any personal injuries which such representatives may sustain whilst within the Territory for the purpose of or in rendering their services; and
- (c) pay or reimburse to the Consultant the travelling hotel and incidental expenses of such representatives together with their cost of employment for the full period of their visit

(2) Throughout the period of this Agreement the Manufacturer will continuously refer to the Consultant as its consultant and for advice upon technical problems. The Consultant shall be entitled to call upon the Manufacturer at any time for assistance (including the use of the Manufacturer's executive directors and staff upon payment of their salaries and expenses) in relation to any

activities or projects in which it or any of its subsidiary companies have any direct or indirect interest or concern

Trade Secrets and other Information 4. (1) THE Consultant will communicate to the Manufacturer all technical information and data and Trade Secrets which the Consultant is entitled to disclose and can lawfully exploit in the Territory

(2) The Consultant hereby grants to the Manufacturer the exclusive right to use in the Territory all such Trade Secrets (subject always to the restrictions contained in this Agreement) during the continuance of this Agreement in the operation of Machinery and the manufacture and use of Containers

(3) The Consultant will further give to the Manufacturer full information advice and assistance in all matters within the competence of the Consultant relating to the operation of Machinery purchased from or through the Consultant and the container making industry in general and the Manufacturer will in like manner keep the Consultant informed of any developments or improvements made or owned by the Manufacturer and relating to Containers and to Machinery.

(4) The Consultant will allow access by such properly accredited representatives of the Manufacturer as the Consultant shall approve to its machine shops laboratories and container making plants in the United Kingdom and permit

and assist such representatives to study the work of and methods employed in the Consultant's factories and so far as the same reasonably can be arranged to work therein

(5) The Consultant will use its best endeavours to procure that the benefits of any existing or future agreements whereby it is or becomes entitled to receive technical information and data from Container makers in the United States of America shall insofar as such agreements relate to matters covered by this Agreement be extended to the Manufacturer

Engagement  
of staff

5. THE Consultant will on behalf and in the name of the Manufacturer from time to time engage on terms to be approved in writing by the Manufacturer for service in the factories of the Manufacturer managers and other technical and sales staff and foremen as the Consultant in its discretion may consider suitable and necessary The Consultant will so far as may be reasonably possible afford training facilities at its factories on behalf of the Manufacturer to men judged suitable by the Consultant to fill any of the aforesaid posts Any man afforded such training facilities shall while under training at the works of the Consultant be deemed to be the servant of the Manufacturer by whom his salary or wages and his travelling hotel and all other expenses shall be paid and the Manufacturer hereby agrees to indemnify the Consultant against all

claims whatsoever for compensation or damages by reason of accidents injury or otherwise which may be made:

- (a) by or in respect of any such person under such training; or
- (b) by anyone else in consequence of anything done or omitted to be done by such person

Machinery 6.  
Sales

(1) THE Consultant will sell to the Manufacturer upon the terms hereinafter mentioned as ordered by the Manufacturer Machinery of its own manufacture free on truck at the Consultant's factories properly packed for export at prices in sterling not greater than the Consultant's regular sales prices thereof or in the case of Machinery usually manufactured by the Consultant for its own use or for the use of its subsidiaries and for which there is no such regular sales price at the total cost thereof to the Consultant plus ten per cent (10%) The certificate of the Auditors of the Consultant shall be so provided if required by the Manufacturer PROVIDED THAT the Consultant shall not be obliged to commence or make any preparation for the manufacture of any such Machinery until it is satisfied that the Manufacturer has obtained valid licences and completed all other formalities to ensure the import thereof into the Territory

(2) Except so far as the same shall be covered by the said regular sales prices the Manufacturer will pay the cost of export packing insurance and freight from the Consultant's



factories to the point of export and the Consultant shall if so requested by the Manufacturer arrange for account of the Manufacturer for shipment and insurance therefrom Unless otherwise agreed by the Consultant payment in full shall be made in sterling by the Manufacturer against delivery of shipping documents in London or if shipping instructions are not given by the Manufacturer within thirty days after the date of despatch by the Consultant of cabled advice that such Machinery is ready for delivery then forthwith on the expiration of such thirty days

(3) The Consultant may at its sole discretion require the Manufacturer as a condition of the acceptance of an order hereunder or of the manufacture or delivery of any Machinery to open and maintain as required by the Consultant an irrevocable sterling letter of credit with a bank in London on terms which shall to the satisfaction of the Consultant ensure payment as aforesaid

(4) All Machinery purchased hereunder shall be delivered within a reasonable time from order or such other time as shall be agreed in writing PROVIDED ALWAYS that the Consultant shall not be liable for any loss or damage caused by delay or failure to deliver due to special priority being given by the Consultant to British Government orders or to fire strikes accidents to plant war-time conditions or other causes

beyond the control of the Consultant but in case such delay shall or shall be likely to continue for an unreasonable time the order affected thereby may be cancelled by either party hereto unless it shall be an order for special Machinery the construction of which has already begun for the account of the Manufacturer

Consultant not to sell Machinery to others 7. THE Consultant will not knowingly during the continuance of this Agreement without written consent of the Manufacturer sell Machinery manufactured by it whether or not patented to any person firm or corporation (other than the Manufacturer) for use in the territory

Consultant not to sell Containers to others 8. THE Consultant will not knowingly quote on any enquiries received from any source for or supply wholly or partly manufactured Containers for shipment empty to the Territory during the continuance of this Agreement but will refer all such enquiries to the Manufacturer PROVIDED ALWAYS that should the Manufacturer not accept any order or part of an order for the reason that it relates to a type or types of Container which are not then currently being manufactured by the Manufacturer or because of lack of manufacturing capacity the Consultant shall be at liberty to accept such order or part for its own account

Patent Licences 9. (1) THE Consultant hereby grants to the Manufacturer sole and exclusive licence for the Territory under all patents registered designs or other similar rights of the Territory owned or (so far as in its power to do so) controlled by the Consultant at the present time or at any time

during the continuance of this Agreement  
The Consultant shall at all times keep the  
Manufacturer fully informed of any inventions  
relating to Containers for which letters  
patent have been or shall be obtained and of  
designs registered in the United Kingdom by  
the Consultant and shall if so requested by  
the Manufacturer and at the cost of the  
Manufacturer apply for and use its best endeavour  
to obtain the grant of corresponding patent or  
registration of such designs (as the case may be)  
in such part or parts of the Territory as the  
Manufacturer shall stipulate

(2) The Manufacturer hereby grants to the  
Consultant sole and exclusive licence for the  
United Kingdom under all patents registered  
designs or other similar rights relating to  
Containers and Machinery owned or (so far as in  
its power to do so) controlled by the Manufacturer  
at the present time or at any time during the  
continuance of this Agreement The Manufacturer  
shall at all times keep the Consultant fully  
informed of any invention relating to Machinery  
and Containers for which letters patent have been  
or shall be obtained and of designs registered  
in the Territory by the Manufacturer and shall  
if so requested by the Consultant and at the cost  
of the Consultant apply for and use its best  
endeavours to obtain the grant of corresponding  
patents or registration of such designs (as the  
case may be) in the United Kingdom.

(3) The parties respectively offering and accepting a licence in accordance with either of the two preceding sub-clauses are hereinafter referred to as "the Licensor" and "the Licensee" All patent applications and resulting patents and all design registrations shall be in the name of the Licensor or its nominees and the Licensee shall reimburse the Licensor on demand for:

- (a) all amounts including royalties which the Licensor must pay to others for use by the Licensee of inventions covered by such applications or patents or for the use of such designs;
- (b) all expenses incurred by the Licensor in filing patent and design applications in the Territory or the United Kingdom (as the case may be); and
- (c) all annual renewal or other fees which the Licensor must pay in connection with letters patent or registered designs or applications for either in respect of which Licensee becomes licensed hereunder

PROVIDED ALWAYS that the Licensor shall whenever it is practicable so to do before paying any annual or renewal fee enquire whether in the opinion of the Licensee it is worthwhile continuing such patent or registered design in force and whenever possible (and subject always to any prior commitment which the Licensor shall in its absolute discretion consider it has to maintain such patent or registered design in force) the Licensor shall endeavour to comply with any request of the Licensee, to allow a patent or registered design to lapse

(4) The Licensor makes no warranties or representations regarding the priority or validity of any present or future patent or registered design to which this Agreement relates but will at the written request and expense of the Licensee reasonably co-operate in prosecuting all infringements and in defending all patents and design registrations and applications for patents and design registrations under which the Licensee shall by virtue of this Agreement be or become licensed PROVIDED ALWAYS that it is understood and agreed between the parties hereto that no action for infringement shall be taken in respect of the importation into any country of Containers which at the time of importation formed part of a filled packaging assembly or are combined or assembled with other articles and which were manufactured by either of the parties hereto or by a Licensee of one of the parties hereto

(5) Every licence shall include power to the licensee to grant sub-licences to its subsidiary companies but the Licensee shall not further or otherwise be entitled to grant sub-licences

(6) References in this clause to licences shall include also sub-licences which the Licensor is permitted to grant in respect of patents or registered designs owned or controlled by a third party

Trade  
Marks

10. (1) If at any time during the continuance of this Agreement the Consultant shall be the registered proprietor of a registered trade mark of the United Kingdom which is then being applied

by the Consultant to Containers of its own manufacture the Consultant shall at the request and expense of the Manufacturer and provided it is satisfied that the Containers of that description made by the Manufacturer conform to the standards of quality currently applied by the Consultant to its own production make application for and use its best endeavours to obtain registration of goods in any trade marks registry in the Territory selected by the Manufacturer

(2) Upon registration of the said mark in its name the Consultant shall by means of a registered user agreement grant permission to the Manufacturer to use and obtain registration of the Manufacturer as permitted user of the said trade mark

(3) The Manufacturer shall use the said mark only upon Containers of the description specified in the said registered user agreement manufactured by it and in advertising matter relating thereto

(4) The said registered user agreement shall contain provisions enabling the Consultant to prescribe standards of quality to be maintained by the Manufacturer and other provisions customarily found in such agreements including a right for the Consultant to terminate such agreement upon breach of any of its terms

(5) The Manufacturer shall not use any trade mark of the Consultant (whether registered or not) otherwise than in accordance with the use permitted by a registered user agreement at the date when such mark is used



(6) In addition to all costs incurred in connection with an application for and registration in the Territory of any trade mark in accordance with the provisions of this clause the Manufacturer shall also repay to the Consultant the amount of any costs from time to time incurred in maintaining in force any such trade mark so registered in the Territory

Restrictions 11: (1) MACHINERY agreed to be sold by the on disposal of Machinery Consultant to the Manufacturer hereunder by is intended and its use authorised solely Manufacturer for the purpose of enabling the Manufacturer to manufacture Containers within the Territory and to use and sell the same

(2) Notwithstanding the provisions of sub-clause (1) of this clause it is hereby expressly agreed and declared that nothing contained in this Agreement shall be deemed to prohibit the Manufacturer from selling or leasing Sealing Machinery and Allied Equipment (whether or not embodying a Trade Secret) to its customers to enable such customers to reform handle or assemble Containers to apply to bottles jars Containers and other receptacles covers lids ends and caps or to close or seal the same provided such Containers covers lids ends or caps shall have been wholly or partly manufactured in the Territory by the Manufacturer

12. THE Manufacturer hereby agrees with the Consultant as follows:

Manufacturer (a) Not knowingly either alone or jointly not to engage with or as agent for any other person firm in certain a or company directly or indirectly to carry activities on or be engaged or concerned or outside interested in the exportation of empty Territory Containers to any country outside the

Territory in which either the Consultant or a subsidiary company of the Consultant or an associate of the Consultant (such associate being a person firm or company with whom the Consultant then has a consultancy agreement whereunder the Consultant has undertaken to act as consultant shall have notified the Manufacturer in writing of the existence of the said agreement) is then engaged in manufacture of Containers without the express consent in writing of the Consultant and of such subsidiary company or associate

- (b) Not knowingly either alone or jointly with or as agent for any other person firm or company directly or indirectly to carry on or be engaged concerned or interested in the manufacture of Containers within any country outside the Territory without the prior consent in writing of the Consultant
- (c) That it will make it a term of all its contracts for sale of Containers that such Containers are not to be exported from the Territory empty without the written permission of the Manufacturer which shall only be given where the Manufacturer is satisfied that the Containers are to be filled in a country or countries to which the Manufacturer could under the provisions of paragraph (a) of this clause itself have exported Containers without the prior consent of the Consultant

13. THE Manufacturer shall not without the  
not to be Consultant's express written permission  
imitated

reproduce or imitate or cause to be reproduced  
or imitated any Machinery manufactured by the  
Consultant or purchase any Machinery or equipment  
from any person firm or corporation which shall  
be a reproduction or imitation of Machinery  
manufactured by the Consultant but this  
provision shall not preclude the Manufacturer  
from (a) repairing or making or supplying new  
parts to any such Machinery where such repair  
or making or supplying of new parts by the  
Consultant would not be reasonably practicable  
(b) making or purchasing from any other person  
firm or corporation Machinery or equipment which  
shall not be such a reproduction or imitation  
as aforesaid

Use of  
Name

14. THE Manufacturer admits that the  
Consultant and its subsidiary Companies have  
created a reputation throughout the British  
Commonwealth for the words \_\_\_\_\_ which  
are commonly accepted as connoting the  
existence of certain technical and business  
standards adhered to by the Consultant To  
preserve the reputation of the said words it is  
hereby agreed that the Manufacturer shall only  
be entitled to use them as part of its name  
so long as it has access to the technical  
methods and processes used by the Consultant  
and that if the Consultant shall at any time  
cease to be such Consultant the Manufacturer's  
right to use those words as part of its name shall  
cease Upon this Agreement terminating or the

Manufacturer purporting to terminate it or committing any breach of its terms the Manufacturer shall forthwith change its name so as not to include the words [redacted] or any sound or sounds similar thereto or capable of being confused therewith and shall not include any such words or sounds in its name or description during a period of ten years after the termination of this Agreement

Buying  
Agency

15. IF and when the parties so agree and for such a period or periods as may be agreed the Consultant will act as Agent for the Manufacturer of tinplate and other goods but so that the Consultant shall not be bound to undertake any duties or assume any obligations other than the placing of orders on behalf of the Manufacturer for such goods the arranging for the shipment of such goods to the Territory and for the insurance of such goods during transit and the Manufacturer shall when so requested by the Consultant place at the disposal of the Consultant in London such funds as may from time to time be required to pay for such purchases shipments and insurance The Consultant shall be entitled to retain for its own sole benefit all discounts commissions rebates and other emoluments or deductions paid or allowed to it by the suppliers of any goods purchased through it as agents as aforesaid and the Consultant shall further be entitled (after giving one month's notice in writing or by cable of its intention so to do) to charge to the Manufacturer commissions (payable in sterling) on the f.c.b.

price of all goods so purchased through the agency of the Consultant at the rate of one per cent in the case of tinplate and two and one half per cent in all other goods

Force Majeure Etc.

16. ADDITIONAL to the immunities provided for in Clause 6 (4) neither the Consultant nor the Manufacturer shall be liable in damages for any breach non-observance or non-performance of any of the stipulations and agreements on their respective parts hereinbefore contained resulting from or caused by reason or on account of any circumstances beyond their respective controls including expressly (without prejudice to the generality of the foregoing) strikes or lockouts of workmen war riot or civil commotion acts of God or the act or decree of any governmental body national or local whether acting under lawful or usurped powers or any inevitable accident

Safe-guarding of Consultant's Trade Secrets

17. WITH a view to safeguarding the Trade Secrets of the Consultant the Manufacturer shall:  
(a) Not except as may otherwise be expressly permitted by this Agreement transmit or make available such Trade Secrets directly or indirectly through or by any means or device whatsoever including among other means or devices the transfer sale lease or loan of Machinery or parts embodying such Trade Secrets to any other person without the prior written consent of the Consultant

- (b) Exercise all reasonable efforts to prevent any person from using any such Trade Secrets otherwise than in the sole interest of the parties hereto  
To that end the Manufacturer shall inform those of its officers and employees to whom any Trade Secrets may be disclosed or made available of the Consultant's property rights therein and of the Manufacturer's obligations with respect thereto and shall take such protective measures as may be available to preserve the secrecy and to prevent the use thereof except as authorized by this Agreement
- (c) Continue to be bound by the provisions of this clause until such time as the information constituting such trade Secret shall have come into the public domain and notwithstanding the prior expiration or termination of this Agreement  
Upon such expiration or termination the Manufacturer shall at the request of the Consultant transmit to the Consultant all embodiments of such Trade Secret except Machinery and parts

Payments 18. (1) IN consideration of the undertakings by the Consultant herein contained the Manufacturer shall (in addition to any royalties commissions and other payments hereinbefore provided) pay to the Consultant in respect of each period of twelve months ending on the Thirty first day of March during the continuance of this Agreement a fee which shall be the greater of:

- (a) Twenty five thousand pounds (£25,000) or



(b) A sum computed by reference to the aggregate net sales price of all containers sold by the Manufacturer during that twelve months period as follows:

- (i) One and one-half per centum (1½%) on the first one million pounds (£1,000,000) of sales
- (ii) One per centum (1%) on the next one million pounds (£1,000,000) of sales
- (iii) One-half per centum (½%) on the next three million pounds (£3,000,000) of sales
- (iv) One-quarter per centum (¼%) on all sales in excess of five million pounds (£5,000,000)

For the purpose of this Clause:

(a) Containers sold by a subsidiary company of the Manufacturer or by any person firm or company with whom the Manufacturer then has an agreement whereunder the Manufacturer supplies technical or other information relating to the manufacture, use or sale of any Containers (as in this Agreement defined) shall be deemed to be sales of Containers by the Manufacturer

(b) Net Sales Prices are to be computed in sterling on the basis that twenty Kenyan shillings are equal to one pound sterling

(2) The said remuneration shall be paid to the Consultant in the United Kingdom in sterling as follows:-

(a) On the First day of January April July and October in each year the Manufacturer

shall remit to the Consultant the sum of six thousand two hundred and fifty pounds (£6,250) the first of such payments to be made on the First day of April One Thousand nine hundred and sixty seven

(b) On the First day of July in each year (beginning with the First day of April One thousand nine hundred and sixty eight the Manufactuer shall send to the Consultant a statement of the total net sales prices of Containers sold by the Manufacturer during the twelve months period ended on the preceding Thirty first day of March and shall with such statement remit to the Consultant in respect of that twelve months period

(3) The Manufacturer shall for the purpose of enabling the Consultant to verify the accuracy of any statement submitted to the Consultant by the Manufacturer in accordance with sub-clause (2) of this clause permit the Consultant and its accountants solicitors or agents at all reasonable times to inspect and take copies of or extracts from any books accounts receipts papers and documents in the possession or under the control of the Manufacturer and relating in whole or in part to the manufacture or sale of Containers

Other Processes 19. IF during the continuance of this Agreement either party shall acquire the right to develop the production of types of containers or machinery or techniques for the manufacture of containers or for printing excepted from the definitions in Clause 1 hereof or otherwise not covered by the terms of this

agreement such party shall before entering into any agreement with any other person or corporation for the use of the same in the territory of the other party (hereinafter called "the grantee") consult with the grantee with a view to the grant to the grantee of rights for the manufacture and sale in the grantee's territory of such containers and the use in the grantee's territory of such machinery or techniques on terms to be agreed and each of the parties hereto hereby undertakes that it will not dispose of such rights in respect of the other party's territory to any other person or corporation if the other party is willing and able (such willingness to be notified by it in writing within four weeks of being informed of the terms so offered) to accept the grant of such rights on the same terms as are offered by such other person or corporation For the purpose of this clause the Consultant's territory shall be deemed to be the United Kingdom of Great Britain and Northern Ireland and the Manufacturer's territory shall be deemed to be the Territory as defined in clause 1 hereof

Agreement 20. THIS Agreement shall not be assigned not to be assigned by either party without the prior written consent of the other but such consent shall not be unreasonably withheld PROVIDED ALWAYS that the Consultant shall be at liberty to carry out all or any of its obligations hereunder through the medium of its subsidiary companies or agents as it shall deem convenient

Consultant's rights in the event of disposal etc. of Manufacturer's business 21. IN the event of the Manufacturer: (a) entering into any agreement for the disposal of its business or of the whole or any part of its property otherwise than in the ordinary course of carrying on its business or

- (b) entering into any agreement for the disposal of a controlling interest in any subsidiary company or
- (c) being wound up at any time during the period of the continuance of this Agreement for the purpose of amalgamation or reconstruction

the Consultant (in lieu of exercising any right to terminate the Agreement which it may have under clauses 22 or 23 of this Agreement) may require the Manufacturer to make it one of the terms of any such disposal amalgamation or reconstruction that the transferee or the subsidiary company or the amalgamated or reconstructed company (as the case may be) shall maintain continue the appointment of the Consultant as its Consultant and Technical Adviser and shall be bound by the other provisions of this Agreement for such unexpired period and with the like powers and authorities and upon the like terms and conditions and stipulations as are expressed in this Agreement and save and except with such conditions and stipulations as one of the terms of the disposal amalgamation or reconstruction the Manufacturer shall not enter into any such transaction as aforesaid

Right to terminate on Significant change in share ownership

22. IN the event of the Manufacturer:

- (a) becoming merged into or consolidated with any other company other than a wholly owned subsidiary company; or
- (b) twenty per cent (20%) or more of the issued stock or shares of the Manufacturer carrying voting rights shall at any time

be owned either directly or indirectly by any person exclusive of any person owning such amount of stock or shares at the date of this Agreement and exclusive of any person becoming entitled to any gift or settlement by or under the will or intestacy of any person or persons owning any stock or shares at the date hereof

The Consultant shall (unless being entitled so to do it exercises its rights under Clause 21) be entitled to terminate this Agreement by giving thirty days notice in writing to the Manufacturer such notice however to be given not later than six months after the date when the Consultant first became aware of the circumstances entitling it to give notice pursuant to the provisions of this clause

Right to terminate on winding-up of party

23. IF either party shall commit any breach of the provisions of this Agreement or shall commence to be wound up (other than voluntarily for the purpose of reconstruction) or in the event of a receiver being appointed of the assets of either party and remaining in possession of such assets for more than three months then in any such case the other party shall (without prejudice to any accrued right of action which it may have against the first mentioned party) be entitled to terminate this Agreement by giving to the first mentioned party thirty days notice in writing.

Law of England Applicable to Agreement

24. THIS Agreement shall be construed and take effect as a contract made in England and in accordance with the laws of England and the Manufacturer hereby submits

to the jurisdiction of the High Court  
of Justice in England and hereby appoints  
[ ] Bank Limited and every clerk  
for the time being of that bank to be  
the Manufacturer's agent in London  
for the purpose of accepting service on the  
Manufacturer's behalf of any writ notice  
order or judgement or any other legal  
process or document in respect of any  
matter arising out of this Agreement  
Such appointment shall not be revocable  
and service of such notice on such  
appointee shall be deemed to be good  
service on the Manufacturer for all purposes  
and the Manufacturer elects domicile at  
the registered office of the said bank  
in England.

Termination  
of old  
Consultancy  
Agreement

25. THIS Agreement supercedes and cancels  
an Agreement between the parties hereto  
dated the Twenty eighth day of July  
One thousand nine hundred and fifty five  
and the Deed of Variation thereto dated  
the Twenty sixth day of September One  
thousand nine hundred and sixty two

Marginal  
notes

THE marginal notes are for reference  
purposes only They do not form part of  
the Agreement In construing any of its  
provisions the marginal notes are to be  
disregarded

IN WITNESS whereof the parties hereto  
have caused their respective Common Seals  
to be hereunto affixed the day and year  
first hereinbefore written

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TRADEMARK LICENSE AGREEMENT

THIS AGREEMENT is made the \_\_\_\_\_ day of \_\_\_\_\_, 1975 between \_\_\_\_\_, a company incorporated under the laws of Japan (hereinafter called "the Owner") of the one part, and \_\_\_\_\_ : KENYA LIMITED, a limited liability company incorporated in the Republic of Kenya of \_\_\_\_\_ Nairobi, Kenya (hereinafter called "the Licensee") of the other part. :

WHEREAS, the Owner is the owner of the various trademarks

**APPENDIX 1 :**

**Licensing Agreement (Trade Marks)**



(hereinafter called "the Goods") in the Republic of Kenya and in such other countries as may be mutually agreed upon from time to time by Owner and Licensee, subject to the absolute control by the Owner of the standards, specifications, quality and advertising of the Goods.

- (b) The Owner shall be paid no remuneration for the grant of the said rights; but the Licensee shall on demand repay to the Owner all expenses incurred by the Owner in connection with the carrying out of this Agreement.

2. The Licensee hereby undertakes:

- (a) To use the said Trademarks in relation only to the Goods produced in accordance with standards, specifications and instructions laid down or approved by the Owner or in relation to the said Goods which from inspection by the Owner are otherwise satisfactory and acceptable to the Owner.

- (b) Before commencing sale or distribution of the Goods and at such other time or times during the continuance of this Agreement as the Owner shall reasonably require, to permit the Owner through its duly authorized representatives, to inspect the Goods, as well as the methods of manufacturing, in order that the Owner may satisfy itself that the Goods meet with the standards, specifications and instructions laid down or approved by the Owner or are otherwise satisfactory and acceptable to it.
- (c) To submit to the Owner for approval, prior to the use thereof, all packaging, labels, advertising and other material on which the said Trademarks appear and to amend to the satisfaction of the Owner any such packaging, labels, advertising and other material.
- (d) To give prompt notice to the Owner of any infringement or threatened infringement of the Trademarks or any of them.

(e) Not to use any trademarks or trade names, devices or other similar kinds of identifying words or marks whether registered or unregistered other than the Trademarks on or in connection with any of the Goods without the prior consent in writing of the Owner.

3. If so required by the Owner or by the Licensee the Licensee shall execute and the Owner shall execute Registered User Agreements in favor of the Licensee in such form as the Owner may determine and shall cause the same to be registered with the Registrar of Trademarks in Kenya in accordance with the provisions of Section 31 of the Trademarks Act (Chapter 506, Laws of Kenya) and with the equivalent Government officer in any other relevant countries.
4. The Licensee recognizes the Owner's ownership and title to the Trademarks, as well as the Owner's ownership of all of the Owner's unregistered trademarks, service marks and other distinctive features used in connection with the Trademarks and it is understood that Licensee shall not acquire, and shall not claim adversely to the Owner, any

right, title or interest in and to the Trademarks, or any of the Owner's unregistered trademarks, service marks or other distinctive features used in connection with the Trademarks.

5. In event of an infringement of the Trademarks by a third party, the Owner shall have the sole right to bring proceedings against the infringer and to retain damages recovered in any such proceedings.
  
6. This Agreement shall become effective on the date of last execution and shall remain in force without fixed limit of period, unless sooner terminated as herein provided. This Agreement may be terminated on ninety (90) days' written notice by either party. The foregoing notwithstanding, this Agreement may be terminated forthwith by the Owner by notice in writing given at any time to the Licensee if:

- (i) The Licensee commits a breach of any of the undertakings or agreements herein contained and on its part to be performed or observed and shall not remedy the same (if it is capable of remedy) within 30 days after notice is given to it specifying such breach and requiring such remedy; or



(ii) The Licensee shall have a receiver appointed over any of its assets or shall go into liquidation or shall enter into any composition with its creditors or if it shall cease or threaten to cease to carry on business.

7. Upon termination of this Agreement, for any reason, Licensee agrees to discontinue use of the Trademarks and any of the Owner's unregistered trademarks, service marks and other distinctive features used in connection with the Trademarks. Licensee also agrees not to attempt to register or use any trademarks confusingly similar to any of the Trademarks or such trademarks, service marks or distinctive features. This covenant shall survive the termination of this Agreement.

8. Upon termination of this Agreement, the Licensee shall join with the Owner in applications to have the entries of the Licensee as a "Registered User" cancelled at the Trademarks Office of Kenya, and for this purpose undertakes to do such acts and sign such documents as may be requisite to this end and in the event of failure by the Licensee to comply with the requirements of this provision the Owner is hereby given full and irrevocable Power of Attorney by the Licensee in the Licensee's place and stead to do such acts or sign such documents as may be necessary on behalf of the Licensee to effect the cancellation of the Licensee as a "Registered User" in respect of the said Trademarks
  
9. This Agreement is personal to the parties hereto and neither it nor any of the rights arising therefrom shall be assigned, charged or disposed of in any way by either party without the prior consent in writing of the other party.

10. Any notice required or authorized to be given by either party hereunder may be left at or sent by registered post (by registered first class airmail in the case of a notice sent to a place outside the country in which it is posted) to the Owner at  
  
Tokyo, Japan and to the Licensee  
at its registered office. Any such notice so posted shall be deemed to have been served at the expiration of 72 hours from the time of posting if sent to a place in the country in which it is posted or 120 hours if sent to a place in another country.
11. This Agreement constitutes the entire agreement and understanding between the parties hereto in connection with the Trademarks and supersedes all documents and correspondence entered into prior to the date hereof.
12. This Agreement shall be governed by and construed in all respects in accordance with the law of Japan.
13. All costs of and incidental to the preparation, execution and stamping of this Agreement and of the said Registered

User Agreements and all registration fees shall be paid  
by the Licensee.

IN WITNESS WHEREOF, the parties hereto have caused  
their respective common seals to be hereunto affixed the  
day and year first above written.

THE SCHEDULE

Trademark	Kenya Registration Number	Registration Date	Description
		27 Feb. 1971	Motor vehicles, a parts thereof in cluded in Class
		31 July 1972	Motor vehicles a parts thereof in cluded in Class
	Application pending		

*J. M. S.*

TRADE MARK AGREEMENT

1975

APPENDIX A:

Licensing Agreement (Trade Names)

WHEREAS, [redacted] is the owner of the trademark "[redacted]" which trademark was registered in the United States of America and also throughout the world, and particularly in Kenya and the said trademark "[redacted]" is also a principal part of the corporate name; and

WHEREAS, Licensee will be incorporated in Kenya with the object of engaging in the business of the assembly, manufacture and sale of motor vehicles and parts and accessories therefor





in accordance with specifications and standards, drawings and designs furnished or approved by ; and

WHEREAS, the said Trustee on behalf of Licensee has requested permission of to use the words " " as part of the corporate and commercial name of Licensee and has granted such permission on the terms and conditions now incorporated in this Agreement;

NOW, THEREFORE, and the said Trustee for and on behalf of Licensee mutually agree as follows:

1. hereby authorizes Licensee to use the words " " as a part of its corporate and commercial name, which name shall be " Kenya Limited" on the express understanding that:

- (a) The permission given to Licensee to use the words " " in its corporate and commercial name is revocable by , in its absolute discretion, and that upon the revocation of this permission the use of the said name shall cease.
- U

(b) Licensee shall specifically include in its Memorandum of Association the following in the name clause thereof, "The Company shall have the name '

Kenya Limited,' permission having been obtained by virtue of a Trade Name Agreement with

\_\_\_\_\_, New York, United States of America, dated \_\_\_\_\_, to use the

words ' \_\_\_\_\_ ' the registered trademark

of the said \_\_\_\_\_ as part of its

name for the duration only of such permission, upon condition that such use shall cease immediately upon the revocation of such permission by the said

."

2. The said Trustee for and on behalf of Licensee hereby covenants and agrees that:

(a) Licensee will formally include in its Memorandum of Association a provision as set forth in clause 1(b) hereof, and will cause the said Memorandum of Association, including such provision, to be approved by the appropriate authorities in Kenya, and to be registered as required by law.

(b) Licensee will use the words " \_\_\_\_\_ " in its corporate and commercial name only for so long as \_\_\_\_\_, in its absolute discretion, may continue such permission, and that upon revocation of the said permission by \_\_\_\_\_, Licensee shall take all necessary legal steps to eliminate and delete from its corporate and commercial name the words " \_\_\_\_\_ " and to amend its Memorandum of Association and Articles of Association to the end that any reference to the said name is deleted therefrom, and it shall not thereafter make use of the words " \_\_\_\_\_ " or any confusingly similar name in any manner or form whatsoever in the conduct of its business.

(c) Should Licensee fail to discontinue the use of the words " \_\_\_\_\_ " in its corporate and commercial name as required above Licensee will pay \_\_\_\_\_ U.S. \$500 per diem while it continues the use of the words " \_\_\_\_\_ "

\_\_\_\_\_ in its name, in violation of this Agreement; but the obligation to pay the said sum to \_\_\_\_\_ shall not in any way prejudice the right of \_\_\_\_\_ to obtain from the proper

judicial authorities an order against the use of the trademark ' ' and to obtain a decree of a court having jurisdiction, ordering Licensee to discontinue the use of the words ' ' in its corporate and commercial name. The said Trustee for and on behalf of Licensee hereby recognizes the inadequacy of money payment as a remedy of for breach of this Agreement and does hereby consent to 's obtaining a decree of a court having jurisdiction, ordering Licensee to discontinue the use of the trademark " " in its name and to enjoin Licensee from continuing to use the words " ' in its corporate and commercial name.

3. Nothing herein shall give Licensee any right or interest whatsoever in the words " ,," it being understood and agreed that the permission hereby given shall be confined solely to use of the said words ' " in the corporate and commercial name of Licensee under the conditions defined herein.

4. The permission hereby given to Licensee is personal to it and shall not be transferable to any successor or assign of Licensee without the prior written consent of

5. It is agreed between the parties that the permission given herein to Licensee shall not prevent from using its name or trademarks in Kenya or from extending a similar permission to other persons in the discretion of .

6. It is agreed between the parties that revocation of the permission herein given by to Licensee shall be deemed to become effective upon the expiration of sixty days from the day notice is given by to Licensee, it being understood that the term of sixty days shall be computed from the day notice is dispatched by cablegram or registered mail to Licensee at its registered office.

7. It is agreed between the parties that the provisions of this Agreement shall be construed in accordance with and under the laws of the State of New York, United States of America.

IN WITNESS WHEREOF, the said Trustee has signed, sealed and delivered this Deed and has hereto affixed its signature



and seal by its duly authorized officer.

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