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Legal Aspects of Doing Business in Pakistan‡

I. Introduction

During the last several years, the Government of Pakistan has introduced numerous measures which have been designed to encourage foreign investment and generally to promote private business in that country. These measures coupled with a major aid scheme that the United States Government has entered into with the Pakistani Government have made it a country that companies may wish to include in their investment programs. The Pakistani and U.S. Governments recently finalized arrangements for a U.S. $4.02 billion package of economic and military assistance for 1988–1993, continuing on from the existing assistance program (1981–1987) totaling U.S. $3.2 billion. (Economic assistance generally consists of a grant representing two-thirds of the amount involved and with the remainder being in the form of a commercial loan.)

Pakistan has a large population (around ninety-five million)[1] and, although it is generally a poor country, there has been evidence of a growing middle class in the past ten years due to a substantial number of persons working in the oil-producing countries of the Middle East. Remittances from these countries to Pakistan have in recent years been around U.S. $2.9 billion per year which has assisted in encouraging the growth of a new middle class.[2] Pakistan's GNP has grown rapidly over the last six years and,

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‡The description of laws and regulations in this article is current as of June 1, 1986.
1. Government of Pakistan, Federal Bureau of Statistics, Statistics Division, Pakistan Statistical Yearbook 1985, 5.
2. Remittances which were only U.S. $578 million in 1976–77 rose to U.S. $2,886 in 1982–83

for the 1984 fiscal year, it grew at the rate of approximately 7.3 percent.[3] Pakistan's geographical location also offers easy access to the Middle East, Africa and the Near Far East.

The legal system of Pakistan is a mixture of Anglo-Islamic law[4] which grew out of the interaction of English and Islamic laws prior to 1947.[5] In recent years there has been a trend in Pakistan, similar to that experienced in other countries in the Islamic world, towards the implementation of Islamic principles and the deemphasis of previous Western-imposed influences.[6] These changes have included the introduction of Islamic forms of criminal punishment, the prohibition of alcohol and certain developments in the areas of taxation and interest.[7] The legal system is administered

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but, affected by economic recession in the Gulf countries, these fell to U.S. $2,740 in 1983–84 and U.S. $2,450 in 1984–85. Falling remittances have caused the Government to accelerate measures intended to mobilize domestic resources and attract foreign investment to create an industrial structure based on modern technology. The apparent motive of these efforts is to create infra-structural facilities, stimulate industrial and agricultural growth and thus help reduce the balance of payments deficit and meet the country's debt servicing requirements. *See* STATE BANK OF PAKISTAN ANNUAL REPORT 1983–84, 118–119; Economic Advisers Wing, Finance Division, Islamabad, PAKISTAN ECONOMIC SURVEY 1983–84, 70–71.

3. The growth rate, however, reflects the effect of an unusually low level of GNP in 1983–84. Computed at 1982–83 levels the average annual increase would be approximately 5.1%. *See* PAKISTAN ECONOMIC SURVEY 1984–85, *supra* note 2 at 40. With agriculture and industry currently showing sharp improvements GDP is likely to increase by 10% according to the World Bank Annual Report, 1985.

4. *See* Esposito, *Perspectives on Islamic Law Reform: The Case of Pakistan*, 13 INT'L LAW AND POLITICS, 217 (1980).

5. English rule over the Indian subcontinent ended in 1947 with the creation of independent Pakistan on August 14, 1947 and Independent India on August 15, 1947.

6. A five-member Federal Shariat Court (FSC) has replaced the various Shariat Benches of the High Court by substituting chapter 3-A in Part VII of the 1973 *Constitution vide* President's Order 1 of 1980. The FSC exercises revisional jurisdiction over the criminal courts responsible for trial of offenses under Islamic Penal statutes. It can also be petitioned to rule as to whether any law (other than the Constitution), Muslim personal law or the law of the procedure of any court or tribunal conforms with Islamic principles. Appeals arising from any proceedings before the Federal Shariat Court are heard by a specially constituted Shariat Bench of the Supreme Court.

7. Prohibition of alcohol has been introduced in Pakistan pursuant to Islamic principle. No Muslim may consume, sell, keep or manufacture alcohol, and violators face stiff punishments including whipping.

Criminal courts have been empowered to order amputation in the case of theft (ORDINANCE VII OF 1979) and, in the case of adultery, stoning to death (ORDINANCE VII OF 1979) although the evidentiary requirements for such orders are extremely strict and the courts have so far been reluctant to impose these maximum penalties.

On December 31, 1984, the BANKING AND FINANCIAL SERVICES (AMENDMENT OF LAWS) ORDINANCE (LVII of 1984) was enacted. This provided the banks with additional powers to carry out interest free banking which has become mandatory as from January 1, 1985. These powers include, among other matters, the ability to (i) issue "musharika" and "modaraba" certificates, (ii) participate in import and export activities in the normal course of business without a license, and (iii) invest in companies through a new share capital medium (participatory redeemable capital).

The MODARBA COMPANIES AND MODARBA (FLOATATION AND CONTROL) ORDINANCE, 1980 by civil and Shariah courts.[8] In general, commercial activities of the type undertaken by most foreign investments are regulated by Western-style laws and by the civil courts.

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regulates the registration and management of modarba companies defines modarba as "a business in which a person participates with his money and another with his efforts or skill or both his efforts and skill and shall include Unit Trusts and Mutual Funds by whatever name called." "Modarba Certificate" is defined as "a certificate of definite denomination issued to the subscriber of the modarba acknowledging receipt of money subscribed by him" and a "Modarba Company" as "a company engaged in the business of floating and managing modarba." Only companies registered as "Modarba companies" can float a modarba. To be eligible for registration the company must be registered under the COMPANIES ORDINANCE, 1984 or any other law; if it is solely engaged in floatation and management of modarba its paid up capital should not be less than Rs 5 million, and where it is engaged in other business the company must have capital of such amount and nature as may be prescribed. In addition its promoters must possess the necessary qualifications and means and its managers and employees be free from the specified disqualifications.

No statutory definition of Musharika has been enacted as yet. It may, however, be defined as an arrangement of business or its financing based on the concept of profit-loss sharing in which parties contribute their money or efforts or skills or a combination of these. Profits may be shared in pre-agreed proportions but the loss if any shall be borne by the capital alone strictly in the proportion contributed by each party. *See* Ahmed, Iqbal & Khan, MONEY AND BANKING IN ISLAM, 262–63 (Institute of Policy Studies, Islamabad, 1983).

The conduct of Musharika is governed, like any other contract, by the terms and conditions of the agreement. The Musharika Financing Scheme launched by the banks was meant initially for the corporate sector alone but from April 1, 1985 firms and individuals have also become eligible for financing on this basis.

A tax called "Zakat" is levied at a rate of 2.5% on the assets of Muslim Pakistani citizens and companies in which a majority interest is held by such citizens. ZAKT AND USHR ORDINANCE (XVIII) 1980. Under the same Ordinance, a tax (Ushr) on produce from land has also been instituted. Ushr is levied at a rate of 5%. The purpose of these taxes is to give effect to the Islamic obligation of Muslims to donate part of their wealth to assist persons such as orphans, widows and the handicapped. Certain exemptions from and tax concessions in relation to Zakat and Ushr are available. Zakat and Ushr are also not levied on a Muslim who has filed a declaration that his faith and fiqh (a school of religious thought) do not oblige him to pay Zakat or Ushr. ZAKAT AND USHR (AMENDMENT) ORDINANCE (LII), 1980.

The QANUN-E-SHAHADAT (LAW OF EVIDENCE), 1984 makes some changes in the law of evidence which was otherwise based on the principles of the English common law. The only notable change for the present purposes is that, with regard to future and financial transactions, an instrument must be attested by two men or one man and two women.

8. On July 5, 1977 the government was taken over by the Chief of Army Staff, General Zia-ul-Huq who assumed the office of Chief Martial Law Administrator, and who proclaimed martial law.

The structure of the Constitution has been substantially altered under the Revival of the Constitution Order, 1985. Through a proclamation issued on December 30th, 1985 by the Chief Martial Law Administrator, martial law has been withdrawn, the Proclamation of July 5th, 1977 imposing martial law revoked and the Provisional Constitutional Order, 1981 repealed. All military courts and tribunals have been abolished. THE MARTIAL LAW (PENDING PROCEEDINGS) ORDER, 1985 transfers all cases pending before military courts and tribunals to ordinary courts of criminal jurisdiction. A S.R.O. issued by the Ministry of Justice enforces all provisions of the Constitutions, including fundamental rights.

Subject to the above, the highest court in Pakistan is the Supreme Court of Pakistan which resides in Rawalpindi. Civil and criminal appeals from the various High Courts are heard by the Supreme Court. There are four High Courts with one being located in each of the four Provinces. Beneath the High Courts are the District Courts for civil matters and the Sessions

II. Approvals

Prior to forming a business entity in Pakistan, the foreign investor must obtain certain approvals relating to the investment, the issuance of shares, certain foreign currency transactions and the importation of products.

A. Investment Approval

Foreign private investment (including subsequent changes thereto) regardless of its form and the amount involved requires prior written approval from the Department of Investment Promotion Bureau (IPB)[9] through its Central Investment Promotion Committee (CIPC)[10] of the Federal Ministry

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and Magistrate's Courts for criminal matters. There are also a number of special tribunals and courts whose decisions may be appealed or reviewed by the superior courts.

Federal Shariah Courts have certain review functions to ascertain if laws and regulations are Islamic in nature (*see* note 6, *supra*) and also have jurisdiction in non-contentious matters.

On December 31, 1984, the BANKING TRIBUNALS ORDINANCE LVIII was enacted which, pursuant to Section 4 created specially constituted Banking Tribunals. These Banking Tribunals are to provide a speedy remedy for banks in respect of bad loans. A decree from such a tribunal will allow a bank, without recourse to court, to sell any property held as security (section 11(3)).

9. The application is processed in the first instance by the IPB. This application is circulated to the various ministries concerned and the State Bank of Pakistan for their comments. After consultation with the foreign investor these comments together with a summary of the application prepared by IPB are submitted for circulation to the CIPC. The general functions of the IPB include:

(i) dissemination of investment information;
(ii) processing of proposals involving foreign private investment equity as well as loan or foreign technical collaboration;
(iii) regulation of employment of foreign personnel in Pakistan; and
(iv) assisting foreign and local investors in obtaining import licenses, land, buildings, raw material, power, water and other facilities for which approval of Federal or Provincial governments is necessary.

See generally Investment Promotion Bureau, Ministry of Industries, Government of Pakistan, PAKISTAN FOREIGN INVESTMENT GUIDE (1982).

10. The Chairman of CIPC is the Secretary of the Federal Ministry of Industries. CIPC members include the Secretaries Industries of all the four provinces, a representative from Federal Ministry of Defense, Federal Ministry of Finance, State Bank of Pakistan, Pakistan Industrial Credit and Investment Corporation (PICIC), Industrial Development Bank of Pakistan (IDBP) and the Director General of IPB who also acts as secretary to the CIPC. The committee meets at least once a month and decides all applications submitted to it. If the CIPC decides that an agreement requires revision the investor is invited to discuss the proposed revisions before a final decision is announced.

In certain specified areas, (i.e., national security and defense, where religious and socio-economic considerations are paramount, subjects of national importance, sectors where it is necessary to regulate price or where industrialization has already reached a saturation level) the final decision is that of the Economic Coordination Committee (ECC) of the Federal Cabinet, and the CIPC is only authorized to refer the matter with its recommendations to the ECC. Projects which fall within these areas include arms, ammunition, high explosives, security printing, currency, mint, defense oriented electronics, radioactive substances (National Security and Defense); alcoholic beverages, foreign brand concentrate-based synthetic beverages of Industries in Karachi. Only upon receipt of the necessary approvals should the foreign investor proceed with the registration of a corporate entity.

Investment approval will only be granted if the proposed investment (i) will provide sophisticated technology that will assist in creating a sound industrial and agricultural base; (ii) will be export-oriented and, preferably, use local raw materials; or (iii) is an import substitution industry.[11] Investment in purely commercial or professional activities is actively discouraged. Some areas previously reserved for nationalized industries have now been opened up to the private sector and may provide opportunities for the foreign investor.[12] Investors must submit twenty-five copies of Application Form IPB-1 to the IPB.[13] In addition, it is advisable to submit draft technical, management and loan agreements for approval. Provisions in these agreements relating to financial arrangements will be subject to scrutiny by and will require the specific additional approval of the Federal Ministry of Finance (Ministry) and the State Bank of Pakistan (State Bank).

The procedure may take many months to complete,[14] and the foreign investor will be encouraged to grant a majority Pakistani holding in the investment. The investment approval may be subject to certain conditions relating to, for example, the sales and marketing policy that is to be adopted, the remuneration of the directors and, on occasion, the number of employees that the new investment may have. In addition, it may be a condition

(religious and socio-economic considerations); basic steel, manufacture of basic metals and alloys, heavy mechanical plants, heavy electrical plants, basic chemicals, petrochemicals, public utilities, ships, aircrafts, railway locomotives (projects of national importance); fertilizer, cement, drugs, pharmaceuticals, vegetable ghee (price regulation); sugar and cotton spinning (saturated markets).

11. FOREIGN PRIVATE INVESTMENT (PROMOTION AND PROTECTION) ACT, 1976, § 3.

12. Pursuant to the ECONOMIC REFORMS ORDER NO. 1 OF 1972, ten industries were reserved for the public sector: iron and steel; basic metals; heavy engineering manufacturing; heavy electrical manufacturing; assembly and manufacture of motor vehicles; assembly and manufacture of tractors and farm machinery; heavy and basic chemicals; petrochemicals; cement; and public utilities. In October 1977, the government opened up certain of these areas by subdividing them into activities in which private investment could be made. A Disinvestment Committee composed of the Federal Ministers of Finance, Production and Industries has been set up and currently the government has decided to sell Rs 2 billion worth of shares of profitable industrial units in the public sector. The Committee also analyzes problems of non-profitable operations of the public sector. In its meeting of September 22, 1985 the ECC approved a charter of terms and conditions under which the private sector would be invited to participate in the generation of power in the country.

13. The application form requests information on the foreign participants, the Pakistani participants, repatriation and remittances, the proposed project, machinery and equipment, technical know-how, the proposed schedule of completion, the cost of the project, financing, the production programme, the proposed market and various miscellaneous matters. The application also states the method of capitalization and IPB expects that required local expenditure should be met from local equity capital.

14. However in certain priority areas, e.g., computers, it is completed within weeks.

that, over time, local materials must be substituted for imported raw materials. These conditions should be carefully analysed and negotiated to ensure that the successful operation of the investment will not be adversely affected.

B. Issuance of Shares

If the investment is to be made through a company, the prior approval of the Controller of Capital Issues (CCI), which is a separate discussion within the Ministry, and of the State Bank is required before the company may issue shares or securities or undertake certain other actions.[15] CCI approval for the initial issuance of shares is part of the initial approval procedure involving the IPB, the Ministry and the State Bank. Subject to any conditions in the original approval, future issues of shares or debentures will, however, require additional consents from the CCI. CCI approval is made in the form of orders which have the force of law and may contain such conditions as the CCI considers appropriate. CCI approval is also required for (i) the creation by instrument of a charge or lien on a company's assets, (ii) the terms of employment of a chief executive officer, and (iii) the remuneration of directors in respect of any additional services that they may perform.

Certain transactions do not require CCI approval but companies in which there is foreign investment cannot claim the benefit of these exemptions.[16] A private company (including one having foreign investment) that proposes to have a paid up share capital in excess of Rs 10,000,000 must convert itself into a public company and offer fifty percent of its capital to the public on the Stock Exchange and the National Investment (Unit) Trust (NIT). In addition its shares must be quoted.[17] However, in such a situation, foreign capital is exempt from this requirement and need not be offered to the public.

15. Capital Issues (Continuance of Control) Act, 1947.

16. Issues of capital in Pakistan by companies other than banks, insurance companies or provident societies, may be made without consent up to Rs 10,000,000 unless the company is one in which foreign capital is wholly or partially associated.

17. The CCI approval is a mere formality except when shares are to be offered to the public and NIT, in which case the procedure and mode of issue is specified. Generally the sponsors and promotors are allowed 50% capital participation. Where the company does not propose to issue capital in excess of Rs 10 million it is not obliged to go public and the total capital may be subscribed by the foreign investor and his local partner, if any. Deviations from this framework are possible but these will depend primarily on the importance of the project to the country so that, for example, export oriented projects will often be permitted liberal deviations.

C. Foreign Currency Transactions

A company is deemed to be controlled by a person resident outside Pakistan if fifty percent or more of the shares are issued in favour of a foreign national (Non-Resident Company). Such a company will be subject to certain regulations of the State Bank with regard to the issue of shares and debentures and certain other financial transactions.

No shares or debentures in a company registered in Pakistan may be issued or transferred to a person who is a non-resident of Pakistan without the prior permission of the State Bank. Certain blanket permissions have, however, been given for certain categories of transactions. The prior permission of the State Bank is also required before a Non-Resident Company may accept loans, advances or other credit facilities from a local bank.[18] In general, the State Bank permits a Non-Resident Company engaged in industrial operations to borrow up to an amount equal to 50 percent of its issued share capital plus reserves. For Non-Resident Companies engaged in commercial or trading operations the permitted borrowing level is reduced to a figure between 10 percent to 25 percent of such amounts. These limits are subject to review in each case. The impact of the State Bank regulation must be carefully considered in deciding whether or not the foreign investor should be a minority shareholder thereby qualifying the ocmpany as resident for the purpose of these regulations.

D. Initial Import License

Once the investment project has been approved, the foreign investor must apply to the IPB for a license to import any plant or machinery that may be required for the investment's start-up operations. Subsequent licenses will be required for future imports of plant, raw materials and spare parts. Foreign investors should be aware that certain difficulties have on occasion been experienced in obaining sufficient import licenses for raw materials, components and spare parts and careful monitoring of their availability should be undertaken. Licenses are issued by the Chief Controller of Imports and Exports and are generally valid for six months although, in the case of parts and accessories relating to machinery and mills, they are valid for twelve months. It is also possible, in certain instances, to obtain

18. State Bank Foreign Exchange Control Manual of 1982, chap. 19, p. 126. Permission is granted on form "L" on the basis of matching funding and other criteria. Foreign trading, manufacturing and semi-manufacturing companies are permitted to borrow on a percentage of their paid-up capital, reserves, undistributed profits and undistributed dividends. Loans are permitted only for meeting working capital requirements and not for the acquisition of fixed assets.

twenty-four month terms. A fee based on 2 percent of the value of the goods covered by the license is payable upon its issue.

III. Business Entities for Foreigners in Pakistan

A. Introduction

Foreign investors may use a partnership or some type of corporate entity as the vehicle for their investment. Partnerships are regulated by legislation which is based on English common law.[19] Registration with the Registrar of Firms is not compulsory but is advisable to permit the firm and its partners to sue on claims exceeding Rs 100.[20]

However, most foreign investors wish to obtain the protection of limited liability and accordingly adopt an entity that is subject to the Companies Ordinance.[21] The Companies Ordinance is generally patterned on English legislation and contains detailed rules on the organization and operation of companies incorporated in Pakistan and branches of foreign companies. This article assumes that the foreign investor will operate through a company or a branch and, except as otherwise specified, the term "company" will refer to one of these two forms of corporate investment.

B. Limited Liability Company

A foreign investor which proposes to incorporate a company with limited liability in contrast to establishing a branch office may choose either a private or a public limited liability company. The IPB may, however, require the use of a public company.

19. Partnership Act of 1932.

20. Under section 69 of the Partnership Act where a partnership has not been registered, claims arising from the partnership agreement or Act cannot be enforced by legal action by a partner against another partner or the firm. In addition the firm cannot legally enforce its contractual claims against third parties and this will apply *mutatis mutandis* to set-offs and other proceedings. The section however has no application to claims not exceeding Rs 100, to firms or partners of firms which have no place of business in Pakistan or if their place of business is situated in areas which have been exempted from the application of this section. *See also* Habib-ur-Rahman, *About Partnership*, Pakistan & Gulf Economist, January 1983, at 22–28.

21. The Companies Ordinance (XLVII) 1984 has repealed the Companies Act, 1913, Companies (Foreign Interests) Act, 1918; Companies (Amendment) Act, 1930; Undesirable Companies Act, 1958; Companies (Managing Agency and Election of Director) Order, 1972; Companies (Shifting of Registered Office) Ordinance, 1972 and sections 11 to 15 of the Securities and Exchange Ordinance, 1969. The Ordinance has been implemented in phases in order to provide time to the corporate sector to switch over to the new system. All the sections of the Ordinance, as of date, have been enforced except sections 41 and 226 which will be enforced on January 1, 1986 and sections 88, 295 and 296 whose enforcement dates have not yet been notified. Under section 11 of the Ordinance a Corporate Law Authority has been established to regulate corporate law matters.

Regardless of the type of company chosen, the formation is evidenced by two documents, namely the Memorandum of Association (Memorandum) and the Articles of Association (Articles).

The Memorandum describes the activities that the company may lawfully undertake, the subdivision of its share capital, the registered office, the initial subscribers and the fact that their liability is limited. The Articles contain the internal rules and regulations by which the company is to operate. The Companies Ordinance contains a standard form of Memorandum and Articles which, subject to the provisions of the Ordinance, may be amended to meet the requirements of a particular transaction.[22] These two documents must be filed with the Registrar or Assistant Registrar of Joint Stock Companies (Registrar) in Karachi, Lahore, Peshawar, Quetta, Multan or Hyderabad.

A private company is one whose Articles restrict the right to transfer shares, limit the number of its members to fifty (but excluding persons that are in the employment of the company), and prohibits any invitation to the public to subscribe for the shares or debentures of the company. It must have at least two shareholders and two directors while a public company must have at least seven shareholders and seven directors. A public company is a limited liability company that is not private. It offers its shares to the public and advertises these through a prospectus. It does not impose restrictions on the transfer of its shares and there is no maximum limit on the number of its members.[23]

On registration of the Memorandum and Articles and all other relevant documentation, the Registrar, if satisfied that everything is in order, will issue a certificate of incorporation at which time the company will have a valid legal existence. The company's name must include the word "limited," and in the case of a private company the words "private limited." The name must not be identical to or resemble an existing company name and must not include certain proscribed words.[24]

There is no minimum share capital requirement although, with foreign investments, the licensing procedure will invariably mean that a specific minimum equity contribution will be required. No-par shares are prohibited and shares must be transferred in accordance with the company's Articles.

A private company must hold its first annual meeting not later than eighteen months from the date of incorporation while a public company must hold such meeting within six months of such date. Thereafter annual meetings must be held at least once every calendar year within a period of six

22. COMPANIES ORDINANCE, 1984, First Schedule, Table B.

23. *Id.* §§ 2(28) and 2(30).

24. The name must not denote royal, government or municipal patronage. It must not contain the word "Finance" and must not be deceptive or offend religious principles. *Id.* § 37.

months following the close of the financial year and not later than fifteen months after the preceding meeting.

Unless otherwise specified in the Articles, ordinary resolutions are passed by majority vote and special and extraordinary resolutions require at least a seventy-five percent majority. Cumulative voting on a pattern similar to that found in certain U.S. states is permitted. All special and extraordinary resolutions must be filed with the Registrar. A special resolution is required to amend the Memorandum or Articles and such a resolution must be confirmed by the Courts.

It is important to note that the Companies Ordinance forbids the appointment by a company (whether or not incorporated in Pakistan) of a "managing agent."[25] The device often used by foreign investors of having the local company appoint the foreign investor to manage its affairs is, therefore, generally impossible in Pakistan. The Government may, however, upon application or otherwise, grant exemption from this rule by notification in the official Gazette, to agreements, already approved by it, relating to investment advisors, hotels and joint ventures with public sector financial institutions or industrial undertakings.[26]

Every private company must have at least two directors and a public company at least seven.[27] Although the Articles need not provide that directors hold qualification shares, such a requirement is normally imposed by the CCI.[28] Directors may only hold office for three years at which time, if they wish to continue in office, they must offer themselves for re-election. With Board approval, alternate directors may be appointed. Directors must disclose any interest they may have in a contract being considered by the Board and refrain from voting thereon.

Companies having a paid-up capial of Rs 5,000,000[29] or more must retain at least one legal advisor to provide advice on its operations and on the discharge of its legal duties and obligations.[30] The minimum fee payable to legal advisors is Rs 350 per month. A legal advisor must be a lawyer admitted to practice in Pakistan[31] and may only represent up to three companies in such capacity.

25. *Id.* § 206.

26. *Id.* § 206(2).

27. *Id.* § 174.

28. *See supra* note 15. Under Section 187(h) of the COMPANIES ORDINANCE also a director must be a member except where he is a representative of (i) the government, (ii) a creditor, (iii) a financial institution, which is a member or if he is an employee or chief executive officer of the company.

29. The principal unit of currency is a Rupee. As of April 4, 1986, the rate of exchange was U.S. $1 equals 15.98 Rupees.

30. COMPANIES (APPOINTMENT OF LEGAL ADVISORS) ACT, 1974, as amended by the COMPANIES (APPOINTMENT OF LEGAL ADVISORS) (AMENDMENT) ACT 1975.

31. A legal advisor must be a lawyer entered on a Roll under the provisions of the LEGAL PRACTITIONERS AND BAR COUNCILS ACT, 1973.

C. Branches

If a foreign investor decides to establish a branch office, certain provisions of the Companies Ordinance will apply.[32] Within one month of establishing a branch office, the parent of foreign company, after securing IPB permission, must register under the Companies Ordinance. It must file three printed copies of its charter or Memorandum and Articles of Association, the address of its principal registered office, a list of its directors, chief executive officer and secretary, the names and addresses of one or more persons in Pakistan authorized to accept service of process and notices together with their consent, the address of its principal office in Pakistan and the name and address of the principal officers of the company in Pakistan.[33] Any subsequent changes to the above information must generally be reported to the Registrar within thirty days.[34]

Documents that are submitted by the parent company must generally be certified as being true copies. For this purpose a certified true copy may be obtained from (i) an official of the government in whose custody the original is to be found certifying the same as a true copy and with his signature being confirmed by an authorized official of the body dealing with the incorporation of companies or by a Commissioner of Oaths; or (ii) a notary public in the place of incorporation authenticating the document as a true copy; or (iii) an officer of the company certifying the document as a true copy before a notary public.

In every calendar year, a branch must file with the Registrar three copies of its annual audited balance sheet and profit and loss account and three copies of the annual accounts that are filed in the country of its incorporation. As with a locally incorporated company, a branch must register details of certain mortgages, charges and other security interests with the Registrar generally within twenty-one days of their creation.[35]

IV. Publicly Quoted Companies

If the foreign investment is made through the vehicle of or converted into a quoted public company, it will be subject to the Securities & Exchange

32. Companies Ordinance §§ 420–465.
33. This information is provided on Forms XXXVI–XLIII (inclusive).
34. Companies Ordinance § 452.
35. Registration is required in respect of a mortgage or charge for the purposes of securing any issue of debentures; a mortgage or charge on uncalled share capital of the company; a mortgage or charge of any immovable property wherever situated, or any interest therein; a mortgage or charge on any book debts of the company; a mortgage or a charge, not being a pledge of any immovable property of the company except stock-in-trade; or a floating charge of the undertaking or property of the company. A copy of the instrument creating the mortgage or

Ordinance.[36] The Corporate Law Authority (CLA) enforces this legislation.[37] In addition to the CLA, the stock exchanges, which are located in Karachi and Lahore, have their own set of regulations which are self-regulatory and not statutory.[38]

These detailed regulations, in general, impose greater reporting requirements on publicly quoted companies than are found in the Companies Ordinance. Financial statements must be submitted to the CLA, the stock exchanges and the stockholders on both a semi-annual and annual basis. The statements must be audited and show that (i) proper books have been kept pursuant to the Companies Ordinance, (ii) the accounts have been prepared in accordance with that statute and, where applicable, with the requirements of the Second Schedule to the Securities and Exchange Rules, and (iii) the financial statements represent a true and correct view of the company's affairs. The CLA and the Institute of Chartered Accountants of Pakistan define and promote the application of generally accepted accounting principles.

V. Antitrust Legislation

During the late 1960s and the first half of the last decade, the Pakistani Government attempted to remove the perceived stranglehold on business by a small number of families.[39] Certain industries were nationalized[40] and

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charge must also be filed for public recordation. Failure to do so will make the mortgage or charge unenforceable against creditors.

36. SECURITIES & EXCHANGE ORDINANCE, 1969. This Ordinance appears to have been based upon U.S. legislation, and some commentators believe that the detailed provisions found therein are not relevant for a developing country such as Pakistan; *see* paper prepared by Dr. Parvez Hassan for the first session of the National Seminar on the New Socio-Economic Order for Pakistan, 15–16 October, 1982, the Economist's Discussion Group of Experts, WAPDA House Auditorium.

37. The words "Securities & Exchange Authority" have been substituted by the words "Corporate Law Authority" by Notification S.R.O. No. 669(I)/82 of July 10, 1982 in Section 2(a) of the Securities & Exchange Rules 1971.

38. Listing Rules of Karachi Stock Exchange & Listing Rules of Lahore Stock Exchange.

39. During the late 1960s, a popular political slogan directed attacks at the "Twenty Families" who were perceived by some persons as unfairly controllng the Pakistani economy.

40. Pursuant to the ECONOMIC REFORMS ORDER, 1972, as amended by the ECONOMIC REFORMS (AMENDMENT) ACT, 1973 and the ECONOMIC REFORMS (AMENDMENT) ORDINANCE, 1974, ten categories of industries were nationalized. Further nationalizations followed, including, among others, the LIFE INSURANCE (NATIONALIZATION) ORDER, 1972; BANK (NATIONALIZATION) ACT, 1974; HYDROGENATED VEGETABLE OIL INDUSTRY (CONTROL AND DEVELOPMENT) ACT, 1973; FLOUR MILLING CONTROL AND DEVELOPMENT ACT, 1976; RICE MILLING CONTROL AND DEVELOPMENT ACT, 1976; COTTON GINNING CONTROL AND DEVELOPMENT ACT, 1976; and the PAKISTAN MARITIME SHIPPING (REGULATION AND CONTROL) ACT, 1974.

In September 1977, the flour and rice milling and cotton ginning industries were denationalized. Legislation has also been passed permitting the Government to offer, in the national interest, shares in those maritime industries that have been nationalized. ORDINANCE No. XXII of 1980.

legislation was introduced more closely regulating industry in general. Although current Government policy is to encourage foreign investment and to simplify the investment procedure,[41] foreign investment may still be affected by this earlier legislation and, in particular, by the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (MRTP).[42] The law prohibits undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices.[43] The Monopoly Control Authority (MCA) implements the provisions of the MRTP.[44]

The Government's policy of encouraging foreign investment in new industries will often mean that the foreign investor will be the major, and perhaps the only, participant in that economic activity. This may result in foreign investors encountering problems with regard to the prohibition on "undue concentration of economic power" which is defined as having been brought about, maintained or continued if:

(a) There is established, run or continued an undertaking, the total value of whose assets is not less than Rs 50,000,000, or such other amounts as the MCA may by rule prescribe and which is:
 (i) not owned by a public company, or
 (ii) is owned by a public company in which any individual holds or controls shares carrying not less than 50 percent, or such other percentage as the MCA may by rule prescribe, of the voting power of the undertaking; and

(b) there are any dealings between associated undertakings which have, or are likely to have the effect of unfairly benefiting the owners or shareholders of one such undertaking to the prejudice of the owners or shareholders of any other of its associated undertakings.[45]

As many foreign investments operate through the form of a private limited liability company it is possible that they may be affected by MRTP.

41. On 23 May, 1985, the Government set up a Deregulation Commission. The first three terms of reference of the Commission deal with review and evaluation of existing economic controls. The fourth requires it to make recommendations regarding reduction, restructuring or expanding of existing industries, or the setting up of new industries, removing restrictions on setting up private commercial banks, removal and reduction of price and distribution controls, privatization of domestic and export trade in cotton, privatization of power distribution, establishment of an autonomous corporation for telephones and telecommunications and such other issues which may be referred to it by the Federal Finance and Planning Minister. The Commission is chaired by the Governor of State Bank of Pakistan and includes two Senators, two Members of National Assembly, the Chairman of the Agricultural Development Bank, the Principal of the Administrative Staff College and two industrialists.

42. Many aspects of the MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (CONTROL AND PREVENTION) ORDINANCE, 1970 (hereinafter cited as the Monopolies Ordinance) are similar to U.S. anti-trust legislation.

43. *Id.* § 3.

44. *Id.* §§ 8 and 10.

45. *Id.* § 4; *see also id.* §§ 5, 6 and 7 detailing circumstances constituting unreasonable monopoly power, restrictive trade practices and other circumstances constituting concentration of economic power.

The key test is to ascertain whether the value of a company's "assets"[46] exceeds Rs 50 million. The MCA has issued certain rulings on the definition of "assets," the effect of which has been to make it difficult to exclude certain items from being classified as assets. In particular, the MCA has concluded that "assets" includes both current and fixed,[47] that liabilities cannot be deducted,[48] and that investments must be included even if they are made from borrowings.[49]

If the MCA decides that there is or may be a violation and that, in the public interest, this violation warrants action on its part, the company is notified of the MCA's proposed remedial action. Upon receipt of such notification, the company is given an opportunity to prove why the proposed action is unwarranted or unnecessary. The MCA is empowered to order that:

> (i) the firm or company concerned be converted into public limited company; or
> (ii) . . . the controlling shareholders of the public limited company concerned . . . offer such part of the stocks and shares held by them within such time and in such manner as may be specified in the order to the general public including the National Investment Trust and an investment institution established or controlled by the Government.[50]

These orders prevail over any other law, practice, contract, regulation or the provisions of the company's Memorandum and Articles.[51] Such an order may be appealed to the High Court.[52] Failure to comply with an order of the MCA will result in the imposition of penalties up to Rs 100,000 together with a daily fine thereafter for continued disobedience of Rs 10,000.

In the case of a wholly-owned company, recent practice of the MCA has been to require that thirty percent of the share capital be offered to the public. Careful consideration should therefore be given by foreign investors as to the possible impact of the MRTP.

VI. Protection of Foreign Investments

The Government has enacted two laws in an attempt to promote foreign investors' confidence. These laws are the Foreign Private Investment

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46. *Id.* § 2(1) defines "assets" as "the value of assets of an undertaking at cost less depreciation at the normal rates at which depreciation is calculated for the purpose of assessment of income tax."

47. In re Lahore Textile and General Mills, Lahore, PLJ 1973 Tr. C. 9 (Monopoly); In re Metalex Corporation Limited, PLJ 1978 Tr. C. (Monopoly) 320.

48. In re CIBA-Geigy (Pakistan) Ltd., PLJ 1973 Tr. C. (Monopoly) 68.

49. In re Lasani Cotton Mill Ltd., PLJ 1974 Tr. C. (Monopoly) 1978.

50. Monopolies Ordinance §§ 12(1) (i) and (ii).

51. *Rafhan Maize Products Company Limited,* PLJ 1983 Tr. C. (Monopoly) 134.

52. Section 20 of the Monopolies Ordinance provides that an appeal must be made within sixty days from receipt of the order.

(Promotion and Protection) Ordinance (FPI)[53] and the Protection of Rights in Industrial Property Order (PRIP).[54]

A. FPI

The main effect of the FPI is that certain foreign investments are not to be discriminated against and are to be treated on an equal basis with Pakistani investments. In particular, foreign private investments shall not be subject to additional or more burdensome income taxes than those applicable to investments made in similar circumstances by citizens of Pakistan.[55] The FPI applies to an enterprise that (i) is an industrial undertaking that has been established at any time since September 1, 1954, (ii) has foreign private investment, [56] and (iii) has been established with Government approval.

The foreign investment must be an industrial undertaking before it can claim the FPI's protection. To be an industrial undertaking, the foreign investment must be engaged in certain Government-approved activities. In addition, the enterprise must be of a type that (i) does not exist in Pakistan, (ii) the establishment of which is desirable and will contribute to the economic and social welfare of the country, or (iii) will contribute to certain other defined economic criteria.[57]

A foreign investment that meets these requirements can claim specific rights in the event of the Government performing certain actions. If the Government decides, in the public interest, to take over managerial control or claim the shares of any Pakistani citizens in the undertaking, this action must not prejudice any arrangements that may exist between the foreign investor or any creditor of that undertaking and any other person in Pakistan. In addition, foreign capital or foreign private investment may only be acquired under due process of law and adequate compensation must be paid in the currency in which the foreign capital was paid.[58]

The FPI also has certain other benefits that affect not only the foreign

53. The FOREIGN PRIVATE INVESTMENT (PROMOTION AND PROTECTION) ACT, 1976 (ACT NO. XLII OF 1976).

54. PRESIDENT'S ORDER NO. 5 of 1979, February 9, 1979.

55. FOREIGN PRIVATE INVESTMENT (PROMOTION AND PROTECTION) ORDINANCE, 1976, § 8 (hereinafter cited as Foreign Investment Ordinance).

56. "Foreign private investment" includes investment of foreign capital by (i) a person who is not a citizen of Pakistan or (ii) by a company incorporated outside Pakistan, but does not include investment by a foreign government or an agency of a foreign government.

57. Foreign Investment Ordinance § 3. The other criteria include contributions to (i) the development of capital, technical and managerial resources of Pakistan; (ii) the discovery, mobilization or better utilization of national resources; (iii) the strengthening of the balance of payments of Pakistan; (iv) the increase of employment opportunities in Pakistan; and (v) the improvement of Pakistan's economic development in any other way.

58. *Id.* § 5.

investor but the creditors and employees of the undertaking. The foreign investor is able, subject to the Foreign Exchange Regulation Act, to repatriate, in foreign currency, the original capital investment, subsequent profits and reinvested profits.[59] Creditors of such undertakings may repatriate foreign currency loans and interest thereon which have been approved by the Government.[60] Subject to the rules of the State Bank, employees may obtain foreign exchange for private remittance outside Pakistan.[61]

B. PRIP

The provisions of PRIP have effect regardless of any conflicting provisions in the Constitution or in any other law. The basic protection is that if a person is to be deprived of his or her "industrial property"[62] it must be in a manner that is in accordance with the law. Industrial property may only be compulsorily acquired for a public purpose and in such event adequate compensation must be paid within a reasonable time. In addition, the legal instrument ordering the acquisition must either specify the compensation to be paid or the principles upon which the figure is to be computed. If a person considers the compensation to be unfair, application may be made to the courts for a ruling as to whether the compensation is adequate. If the courts find the compensation to be inadequate, they are empowered to decide what is a fair figure.[63]

VII. Export Processing Zones

The Government has created special economic zones called Export Processing Zones (EPZ), to encourage foreign investment.[64] The first EPZ has been set up in Karachi and is administered by the Export Processing Zones Authority (EPZA). Investments within the EPZ are approved not by the IPB but by the EPZA. One advantage, therefore, is that the foreign investor need only deal with one body to obtain all the necessary consents and

59. *Id.* § 6(a).
60. *Id.* § 6(b).
61. *Id.* § 7. Foreign nationals employed by the joint-venture must produce a service contract approved by the Department of Investment Promotion & Supplies. The employer must submit a certificate giving details of all remuneration. Remittances may be made to cover family expenses.
62. PROTECTION OF RIGHTS IN INDUSTRIAL PROPERTY ORDER § 2. "Industrial property" is defined as 'property, movable or immovable, used in the production, manufacture, processing or assembling of any goods or the development and extraction of mineral resources, or both in such production, manufacture, processing or assembling and in such development and extraction, and includes any right, title or interest in such property.'
63. *Id.* Art. 4.
64. EXPORT PROCESSING ZONES AUTHORITY ORDINANCE, 1980, February 6, 1980.

approvals. The application that is submitted to the EPZA must provide details on certain aspects of the investment including the foreign investors.[65] Preference is shown for investments in industries not present in Pakistan, which offer advanced technology and which do not compete with export-orientated industries outside the EPZ. Industries located within the EPZ are exempt from Federal, Provincial and local taxes, including, among others, all custom and excise duties, sales taxes and octroi charges.[66] Recent amendments now allow local investors to take up to 15 percent of the equity in a company establishing operations in an EPZ. This investment is to be made in foreign exchange purchased from State Bank and any dividends on this capital may be repatriated in foreign exchange.[67]

VIII. Imports and Exports

Pakistan uses the Customs Co-operation Council Nomenclature system in the classification and description of imported and exported goods. Beginning with the fiscal year 1983–84, which commenced on July 1, 1983, Pakistan adopted a negative listing of imports as opposed to the previous positive listing. Under this system, all items may be imported except those appearing on a Negative List or on a Restricted List. The previous method utilized a Free List which specified those goods that could be imported. The Free List is being kept temporarily during the switchover and was recently expanded.[68] The Negative List bans certain items for religious or security reasons, luxury consumer goods, and items that are protected by tariff in order to encourage local industry. The Restricted List includes (i) items that may be imported only by the public sector, (ii) items importable exclusively under tied sources of loans, barters or credits, and (iii) consumer goods subject to specific quantitative restrictions. The Prohibited List prohibits the import of a number of items on religious, moral and economic grounds. Items not covered in the aforesaid three lists are considered to be freely importable.[69] Imports may be subject to customs duties[70] and a sales tax.

65. The application form (Form No. EPZA 05 Edition: April 1983) is four pages in length and requests information on the investors, the proposed industry, cost of production and sales, infrastructure requirements, utilities and other services, time schedules and manpower requirements.

66. Export Processing Zones Authority Ordinance, *supra* note 64, § 25. Notifications have been made by the Government, from time to time, exempting the EPZ from application of certain laws including the labour laws.

67. Decision of the Economic Coordination Committee of the Cabinet in its February 21, 1985, meeting.

68. An additional 122 new importable items were added in 1983; Business America, September 5, 1983, at 34. The IMPORT & EXPORT POLICY 1985–86 removes a number of items from the negative list.

69. S.R.O. 636(J)/85 of July 1, 1985. However sections 2(i) and 5 of the FINANCE ACT, 1985

It is possible to obtain non-binding advance rulings on the customs duty tariff classification of an item from the Collector of Customs in Karachi. Customs duties are payable in Pakistan rupees at the rate of exchange prevailing on the date when the bill of entry is presented to customs. Duty is normally levied on the invoice price although with regard to certain imports, additional duties may be levied when the export price is artificially low or when the country of origin has provided a subsidy or other financial assistance to promote the product's manufacture or export.[71] Samples up to the value of Rs 3,000 per annum can be imported without involving foreign exchange or import authorization.[72]

Sales tax is chargeable at standard rate of 12.5 percent on the value of goods or classes of goods produced or manufactured in Pakistan except on such goods or classes of goods specified in the general exemption.[73] All goods chargeable at a higher or lower rate are separately notified by the Government.[74] The standard rate on imports is 20 percent.[75] On some items a tax is levied at a higher rate.[76] Certain staple goods are taxed at lower levels and a number of items have been exempted.[77] In the case of manufacturers who import raw materials for use in the manufacture of goods, sales tax paid at the time of clearance for home consumption is adjusted against sales tax payable on manufactured goods.[78] A number of articles falling under the heading numbers of the First Schedule to the Customs Act, 1969, specified by the Government are exempt from sales tax provided they fall under the definition of machinery or component parts of machinery.[79]

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levy a 5% general surcharge and a 5% "Iqra Surcharge" on all imports excluding certain items like medicine, books and duty free baggage. Exemptions from customs duty under any other law do not apply to these surcharges. The Iqra Surcharge has been levied to finance the promotion of education and mass literacy.

70. THE CUSTOMS ACT, 1969, as amended by the PREVENTION OF SMUGGLING ORDINANCE 1977 Chap. VI (AMENDMENT OF CUSTOMS ACT, 1969) consolidates and amends the law relating to the levy and collection of customs duties. It also deals with certain other related matters.

71. IMPORT OF GOODS (ANTI-DUMPING AND COUNTERVAILING DUTIES) ORDINANCE, 1983; International Trade Reporter, July 26, 1983, at 125–26. Such items include pig iron; various iron and steel products; copper rods; cement; coal and synthetic rubber.

72. S.R.O. 459(I)/72 of 1 July 1972.

73. A list is contained in S.R.C. 666(1)/81 of 25 July 1981, as amended.

74. S.R.O. 667(1)/81 of 25 June 1981, as amended.

75. S.R.O. 662(1)/80 of 26 June 1980.

76. *Id.*

77. S.R.O. 661(I)/80 of 26 June 1980.

78. SALES TAX CIRCULAR NO. 12 of 1972, as amended and SALES TAX CIRCULAR NO. 2 OF 1982.

79. S.R.O. 697(I)/77 of 4 August 1977, as amended. Machinery is defined by this S.R.O. as follows:

> i. Machinery operated by power of any description (excluding agricultural machinery or implements imported into Pakistan) such as is used in any industrial process, including the generation, transmission and distribution of power, or used in processes directly connected with the extraction of minerals and timber, construction of buildings, roads, dams, bridges and similar structures and the manufacture of goods.

IX. Exchange Controls

The Government of Pakistan controls the outflow of foreign currency through a series of detailed exchange control laws and regulations.[80] During the investment approval procedure the foreign investor should obtain certain consents with regard to the repatriation of capital and profits. Subject to any specific approvals contained during that procedure and the provisions of other laws,[81] the foreign investor will be subject to these exchange control laws and regulations.

The State Bank is empowered to implement the exchange control policies of the Government and has delegated certain of its functions to a number of banks and financial institutions (authorized dealers).[82] The State Bank fixes the rates at which foreign exchange may be sold and bought and foreign exchange transactions may only be effected through an authorized dealer. Controls are also imposed on the import and export of currency notes and bank notes (whether Pakistani or foreign), gold, silver and precious stones. Securities are also subject to controls and may not be transferred to a person resident outside Pakistan without prior permission. A foreign resident in Pakistan and a Pakistani company that is controlled by non-residents are, for this purpose, deemed to be non-resident. In addition, a company that is controlled by Pakistanis may not cease to be so controlled except with prior State Bank permission. Permission is also required for loans to be made or securities to be issued to any company (other than a bank) which is controlled by non-residents.

Violations may result in a two-year imprisonment or a fine, or both, and confiscation of the property which was the subject matter of the offense.

X. Technology Transfer Agreements

The Federal Government through Annexure II (Guidelines for Agreements for Transfer of Technology) to the Industrial Policy Statement of

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ii. Apparatus and appliances, including metering and testing apparatus and appliances specially adapted for use in conjunction with machinery, specified in item (i) above;

iii. Mechanical and electrical control and transmission gear adapted for use in conjunction with machinery as specified in item (i) above;

iv. Component parts of machinery as specified in items (i), (ii) and (iii) above, identifiable as for use in or with such machinery.

80. FOREIGN EXCHANGE REGULATION ACT of 1947, as amended by FOREIGN EXCHANGE REGULATION (AMENDMENT) ACT, 1973. This legislation imposes restrictions on payments and dealings in foreign exchange and securities in addition to the export and import of currency and bullion.

81. *See supra* notes 52 and 54.

82. The delegated powers include the authority to deal in all foreign currencies, to supervise the surrender of foreign currencies, and to sell foreign exchange for specified purposes within limits imposed by the State Bank. By NOTIFICATION NO. F.5(2)-ADMN.I/85 of July 1, 1985 a

June, 1984, has stipulated standard terms for technical fee and royalty agreements. If these conditions are met, the approval of IPB is not needed and these agreements will be automatically approved and registered by the State Bank.[83] If the agreement, however, deviates from the standard terms[84] it must be submitted to the IPB for consideration and approval.

National Taxation Commission has been constituted. Its terms of reference include the review and evaluation of the existing tax structure and identification of areas in need of reform.

83. STATE BANK OF PAKISTAN F.E. CIRCULAR NO. 55 OF 17 JULY 1984.

84. Following are the standard terms:

(a) Royalty—

(1) Definition of Royalty:
Royalty is a fee paid by a local firm to the foreign collaborator in consideration of:—License to use the foreign manufacturer's patent/brand name for marketing the product(s).

(2) No Royalty will be allowed:—
(i) On consumer goods for home market; and
(ii) In cases where more than 50 percent shares are held by the owners of the patent/trademark/brand name.
Existing agreements will, however, continue as per terms and duration already determined.

(3) In other cases, the Royalty shall be allowed:—
(i) Up to 3 percent on consumer goods manufactured for exports; and
(ii) Up to 2 percent on consumer goods manufactured for exports; and
(iii) Up to 1 percent on capital goods manufactured for home market.

(4) A Royalty shall be for a period not exceeding 5 years.

(5) A Royalty will be calculated and certified by the applicants' auditors on the basis of ex-factory price less Excise Duty and Sales Tax, if any, for home market and F.O.B. price for exports.

(b) Technical Fee—

(1) Definition of Technical Fee:
It is a fee paid by the local firm to the foreign collaborators in consideration of:—
(i) Engineering and Technical Services including assistance on the manufacturing process, testing and quality control, assistance by way of making available patented process and/or secret know-how, and rights to avail of technical/confidential information resulting from continuous technical research and development etc; and
(ii) Technical training of local personnel.

(2) No Technical Fee shall be allowed on consumer goods or for simple conventional process goods, which are being produced in the country without foreign technical collaboration.

(3) Technical Fee may either be determined in a lump sum to be paid in installments or be allowed:—
(i) Up to 3 percent on engineering goods and for such basic manufacture which requires sophisticated technology.
(ii) Up to 1.5 percent for product(s) other than (i) on new products only.
(iii) The aggregate rate of Royalty and Technical Fee should not exceed 5 percent.
(iv) Technical Fee shall not be allowed for more than 5 years.
(v) Lump-sum Technical Fee will not exceed 5 percent of foreign exchange cost of plant and machinery and will be admissible only for items (i) and (ii).

(4) For basic manufacturer, Technical Fee will be calculated and certified by the company's auditors on the basis of ex-factory price.

XI. Taxation

Income tax is a Federal tax[85] and is administered by the Central Board of Revenue (CBR). The tax year runs from July 1st to June 30th. All assessees who have no business or professional income must have the accounting year ending June 30 but where the income of the assessee includes business or professional income then he may opt for the year ending December 31. If the assessee wants to adopt any other year end, permission is required from CBR. A tax return must be submitted within six and a half months from the end of the tax year and whichever year is chosen it will apply to all sources of income.

Companies. A company that is resident[86] in Pakistan will be subject to standard rates of tax. A company incorporated in Pakistan in which there is foreign investment and which is controlled and managed from within Pakistan will be a Pakistani resident for tax purposes. Such a company will be taxed on its worldwide income whether or not actually received in Pakistan. Income tax will be levied at a flat standard rate of 30 percent on taxable

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(5) For assembly/manufacture, Technical Fee may be calculated on FOB price of deleted components of parts of the product(s) which would be manufactured by local licensed firm of ex-factory price of locally produced components or parts of the product(s) whichever is less.

(6) While calculating Technical Fee, the Excise Duty, Sales Tax and the value of imported components and parts should be deleted from ex-factory price. Documentary evidence in support of the above may be called for from the applicant(s).

(7) In the agreement no provision should be made for any compulsory minimum payment of Royalty/Technical Fee.

(8) In case of payment of Technical Fee in lump-sum it should be spread over a number of years and should be linked with transfer of technology/services rendered. Further the supplier of technology should affirm that the price is in line with the agreement made in other countries.

(9) There should be no requirement for the purchase of raw material/components from a particular source.

(10) Agreements should be subject to Pakistan Law.

(11) Arbitration should be held in Pakistan under Pakistan Law.

85. The federal income tax laws are to be found in INCOME TAX ORDINANCE, 1979 which came into effect on July 1, 1979. The rates of tax are set forth in the First and Second Schedules thereto and are subject to amendment each year by the pertinent FINANCE ACT.

86. A resident for any tax year is, *inter alia*,

(a) an individual who:

(i) is in Pakistan in that year for a period of, or for periods amounting in all to one hundred and eighty-two days or more; or

(ii) is in Pakistan for a period of, or periods amounting in all to, ninety days or more in that year and who, within the four years preceding that year, has been in Pakistan for a period of, or periods amounting in all to, three hundred and sixty-five days or more;

(b) a Hindu undivided family, firm or other association of persons, the control and management of whose affairs is situated wholly or partly in Pakistan in that year; or

(c) a Pakistani company or any other company, the control and management of whose affairs is situated wholly in Pakistan for that year. (Section 2(40)). *See also* CBR CIRCULARS NO. 4 AND 10 OF 1979.

income[87] and a super tax at a rate of 25 percent (35 percent in the case of a banking company) will be levied on a certain proportion of income.[88] A tax credit in respect of income tax liability is generally allowed pursuant to certain double taxation treaties[89] and certain reliefs from super tax are available under the Federal tax laws.[90]

A branch of a foreign company is non-resident for tax purposes and is only taxed on income that (i) is received or is deemed to be received in Pakistan and (ii) is generated or is deemed to be generated in Pakistan. However, as management and control resides abroad a legitimate proportion of head office expenses for managing and controlling the branch can be claimed as an admissible expense.[91]

Companies are subject to an advance income tax payment scheme under which they pay taxes in four installments during the fiscal year on September 15, December 15, March 15 and June 15. The payments are based upon the

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87. Taxable income is deemed to include business and professional income and income from rents, royalties and technical assistance fees. Deductions include exempt income, casualty losses, salaries, rents, bad debts, repairs, insurance premiums, depreciation and interest on loans for the purpose of the business. Income from dividends, bonus or bonus shares is excluded. Foreign source income is included in taxable income at an amount "grossed up" to include foreign taxes paid thereon although the provisions of certain double taxation treaties may have lessened the Pakistani tax consequences. See *infra* note 88.

88. Super tax is levied on a company's taxable income excluding the amounts retained for purposes of capitalisation or for meeting working capital requirements.

89. Pakistan has entered into double taxation treaties with Austria, Belgium, Canada, Denmark, France, Germany, Greece, India, Ireland, Libya, Malta, Netherlands, Philippines, Poland, Romania, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, the United Kingdom, and the United States. In addition, it has entered into limited treaties with Italy (airlines and shipping), Iran (airlines), Lebanon (airlines) and Saudi Arabia (airlines).

90. Certain rebates in respect of super tax may be claimed by a resident company:
- (a) 5% for a public company, other than a bank;
- (b) 5% for a public company whose paid-up capital and free reserve does not exceed (i) Rs 1,000 in the case of an industrial undertaking and (ii) Rs 500,000 in any other case;
- (c) 5% for a company commencing commercial production at any time from July 1, 1975 to June 30, 1988 provided that the original cost of fixed assets (excluding land) owned and used by the company does not exceed Rs 500,000.
- (d) 10% for a company engaged in processing, freezing, preserving and canning of food, vegetables, fruit, grain, meat, fish or poultry; or profits and gains derived by a company from exploration of mineral deposits (other than petroleum and gas), and
- (e) 15% for a company whose profits and gains arise outside of and are remitted to Pakistan.

91. The commonly accepted method of determining such proportion is:

$$\text{Proportionate Head Office Expenses} = \text{Total allowable head office expenses.} \times \frac{\text{Pakistan gross revenue}}{\text{World gross revenue}}$$

From July 1, 1982 new rules have been promulgated whereby head office expenses will be allowable on the above basis or on the basis of the average head office expenses allowed in the preceding one, two or three years, as the case may be, whichever is lower.

tax assessed for the previous fiscal year. At the end of the fiscal year any shortfall based upon actual income for that fiscal year must be paid when the tax return is submitted and if an overpayment has been made a tax rebate can be claimed.

The Government has introduced various tax holiday schemes to encourage certain industries and less developed regions which generally exempt qualifying companies from taxes for certain periods of time.[92] There are also special incentives for companies engaged in the exploration and production of petroleum and minerals.[93]

Individuals. A resident individual is subject to income tax on his or her "taxable income" which includes, among other items, salary, interest and rental income. If a person's income is less than Rs 24,000 no income tax is levied. However, if a person's income exceeds this level, an amount equal to Rs 24,000 is deducted to compute that person's taxable income. The first Rs 4,000 of taxable income creates a tax liability of Rs 60. On taxable income between Rs 4,001 and Rs 22,000, tax is Rs 60 plus 15 percent of the amount exceeding Rs 4,000. Where the taxable income exceeds Rs 50,000 but does not exceed Rs 100,000, tax is Rs 5,000 plus 25 percent of the amount exceeding Rs 50,000. Where the taxable income exceeds Rs 100,000 but does not exceed Rs 200,000 tax is Rs 17,500 plus 35 percent of the amount exceeding Rs 100,000. Where the taxable income exceeds Rs 200,000 tax is Rs 52,500 plus 45 percent of the amount exceeding Rs 200,000; up to one-third of the income but subject to a maximum of Rs 50,000, may be deducted from taxable income in respect of contributions made to certain approved investments. A foreign technician providing services under a contract of service approved by the Commissioner of Income Tax prior to or within one year of the commencement of employment, is exempt from income tax for a three-year period provided that he is neither a citizen of Pakistan nor was resident in Pakistan in any of the four years immediately

92. Companies that invest in certain areas that include, among others, the Province of Baluchistan and certain approved industrial estates in the N.W.F.D., Sind and Punjab are entitled to a five-year tax holiday. Five-year tax holidays were also available for companies which started commercial operations by June 6, 1983 in certain industries such as poultry and dairy farming, fish farms, cattle and sheep breeding, and the manufacture of garments made from cloth produced in Pakistan.

93. These incentives relate to the computation of profits of such companies. In respect of petroleum companies, they are to be found in Part I of the Fifth Schedule of the INCOME TAX ORDINANCE, 1979 and, in respect of companies involved in the exploration and extraction of minerals, in Part II of the Fifth Schedule. Some of the main tax concessions include (i) depreciation of 100% on below-ground installations; (ii) a depreciation allowance (other than for petroleum industries) of 100% for machinery and equipment used for extraction in the year of first use; and (iii) companies engaged in exploration activities relative to iron ore, byarite, dolomite, fireclay, limestone, flourite, baurcite, phosphate, chrome, soapstone and copper may claim a tax holiday for five years and thereafter pay taxes at 50% of normal rates for a further five years.

preceding the year in which he arrived in Pakistan. Expatriate staff are entitled to remit 50 percent of their salary after deducting taxes of $750 per month whichever is less.

Other taxes. Dividend income received by a company will be subject to super tax at rates ranging from 5 percent to 30 percent.[94] If the company is owned in the majority by Muslim Pakistanis, it will be subject to the Zakat tax on its assets.[95]

Capital gains realized on the transfer of shares of public companies are exempt from Federal tax until June 30, 1988. Capital gains realized on the transfer of capital assets (excluding (i) assets on which tax depreciation is claimed and (ii) immovable properties) which are held for twelve months or less from the date of acquisition are taxable at normal corporate rates, but if they are held for more than twelve months, they are taxed at a rate of 25 percent. Gains on the sale of immovable property are subject to provincial taxes at graduated rates.

XII. Labor

Numerous labor laws in Pakistan cover, among other matters, health and safety, salaries, worker participation, employee funds and foreign personnel.

Factories. If ten or more workers are working in premises including the precincts thereof and in any part of it a manufacturing process is being carried on, the operation will be a "factory" subject to the Factories Act.[96] This law seeks to ensure that the health and safety of employees are protected. Certain minimum standards are prescribed with regard to, among other matters, cleanliness, ventilation, artificial humidification and

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94. Intercorporate dividends received by a company, other than a public company, are taxed at the following rates:

(a) Where a shareholder is a public company and dividends are declared and paid by a company formed and registered in Pakistan under the COMPANIES ORDINANCE, 1984, or a body corporate formed in pursuance of an Act of the Federal Legislature, in respect of the shares issued, subscribed and paid after August 14, 1947: 5%.

(b) Where such dividends are received by a body corporate incorporated by or under the law of a country outside Pakistan relating to incorporation of companies or a foreign association declared to be a company by the Central Board of Revenue under clause (16) of section 2 of the INCOME-TAX ORDINANCE, 1979: 15%.

(c) In other cases: 20%.

Exemption is granted to dividend income received from any public company registered under the COMPANIES ORDINANCE, 1984 at any time between the first day of July 1978, and the thirtieth day of June 1983, having its registered office in Pakistan and engaged in an industrial undertaking set up at any time within the aforesaid period out of the profits of the undertaking, for a period of five years beginning from the year in which commercial production is commenced.

95. *See supra* note 7.

96. THE FACTORIES ACT, 1934, as amended (*see* § 2(j) for the definition of "factory").

lighting. Other provisions relate to working hours, holidays, rest periods, overtime and shift systems.

Salaries. Employees whose salaries are less than Rs 1,500 per month must be paid at minimum specified periods and must not suffer unfair fines and salary deductions.[97] If the organization is deemed to be an "industrial undertaking," it must pay its employees the minimum wage (if any) specified by the Minimum Wages Council.[98]

Worker Participation. Companies having fifty employees or more must form a joint management board. At least one-third of the members of such a board must be employee nominees. The employer's representatives must be directors or senior executives. The board's responsibilities include, among other matters, consideration of methods to improve production, productivity and efficiency; the setting of job and piece rates; the transfer of employees; and the structuring of remuneration systems. The board may demand reasonable information on the operations of the company and the management is obligated to supply such information.[99]

Certain labor practices on the part of the employer and others on the part of the employees have been prescribed as unfair and violations thereof may result in four years imprisonment and a fine of Rs 5,000.[100] The National Industrial Relations Committee and the Labour Courts have jurisdiction to try offenses relating to unfair labor practices.

Employee Fund. A Company that has (i) fifty or more employees or (ii) a paid-up capital of Rs 2 million or more, or (iii) fixed assets in excess of Rs 4 million, must establish an employee's participation fund into which 5 percent of annual profits must be paid.[101]

Foreign Employees. Foreigners may only be employed with the consent of the IPB. Permission will only be given if there are no Pakistanis available for the position. As part of the investment approval procedure, foreign companies must often undertake progressively to increase the percentage of local employees and may be required to submit annual compliance reports. However, a foreign-owned company may permanently maintain a foreigner as its chief executive officer. There are no nationality restrictions or residence requirements on executives, managers or technical personnel employed, but a balancing of Pakistan and non-Pakistan nationals at the executive level is generally a prudent idea.

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97. PAYMENT OF WAGES ACT, 1936, as amended.
98. MINIMUM WAGES ORDINANCE, 1961.
99. INDUSTRIAL RELATIONS ORDINANCE, 1969, as amended, § 23.
100. A list of unfair labor practices by an employer is given in section 15, and penalty is stipulated under section 53(1A), of the INDUSTRIAL RELATIONS ORDINANCE, 1969.
101. COMPANIES PROFITS (WORKERS PARTICIPATION) ACT, 1968, as amended by the COMPANIES PROFITS (WORKERS PARTICIPATION) ACT, 1972.

Miscellaneous. Employees also have certain rights against employers with respect to industrial accident[102] and old-age benefits.[103] Both employers and employees are entitled to establish and form associations of their choice.[104]

XIII. Intellectual Property

Pakistan has detailed legislation relating to patents, trademarks and copyrights.[105]

Patents. The inventor or the assignee of the inventor may apply for the registration of a patent regardless of his nationality. When submitting the application it is necessary to appoint a local agent for service of process and of notices. Upon receipt of the application, the proposed patent will undergo a novelty examination and prior public knowledge or use in Pakistan will be prejudicial to the grant. There is an opposition period of four months and once granted a patent is valid for sixteen years and may be extended for a further five-year or, in some cases, ten-year term. A patent must be worked within four years of its grant, otherwise compulsory licensing is possible. Although Pakistan is not a member of the Paris Union,[106] it offers reciprocal priority rights with regard to applications filed in the United Kingdom and certain other Commonwealth countries.

Trademarks. A trademark may be registered by a person who is either using or is proposing to use the trademark.[107] It is not possible to register trade names or trademarks that are scandalous, deceptive, or contrary to law, morality or religious principles. If, prior to registration, another person has been honestly using the trademark concurrently with the applicant, that other person may be permitted to obtain a dual concurrent registration with the original applicant.

An application is valid for seven years and may be renewed upon payment of certain fees. The opposition period is four months and a trademark may be cancelled if it is not used on a continuous five-year basis. A registration that remains unchallenged for seven years becomes incontestable. There are also registered-user provisions.

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102. WORKERS COMPENSATION ACT, 1923, as amended.
103. EMPLOYEES OLD-AGE BENEFITS ORDINANCE, 1975.
104. INDUSTRIAL RELATIONS ORDINANCE § 3.
105. Patents are regulated by the PATENTS AND DESIGNS ACT, 1911. Trademarks are regulated by the TRADEMARKS ACT, 1940, and copyright is regulated by the COPYRIGHT ORDINANCE, 1962 as amended by the COPYRIGHT (AMENDMENT) ACT, 1973.
106. International Convention for the Protection of Industrial Property (Paris Convention), 13 U.S.T. & O.I.A.1, T.I.A.S. No. 4931.
107. Applications are submitted to the Registrar of Trademarks, Muslimabad, Dadabhai, Maoroji Road, Karachi.

Copyright. Copyright registrations are handled by the Registrar of the Copyright Office which also deals with the registration of assignments and licenses. Copyright protection is available for certain original works including literary, dramatic or musical works, artistic works, cinematographic work, and records. Generally the term of the copyright is fifty years.

XIV. Tenders

The Government of Pakistan, together with its agencies and instrumentalities (government entities) are one of the main sources of business opportunities in Pakistan. Many central government tenders are issued by the Director General, Department of Supplies in Karachi, although a large number of govemment entities have their own independent purchasing departments.[108]

Many government entities require that a foreign bidder be represented by a Pakistani agent and that the agent be registered in accordance with the rules and regulations of that government entity. It is also often necessary to produce a legalized copy of the agency agreement which must be exclusive. The agent may also be required to provide bank references in respect of the foreign company. A company containing foreign investment that has received investment approval from the IPB does not require an agent and may submit bids in its own name.

XV. Agents and Distributors

Agency or distributor agreements are governed by their contractual terms subject to the provisions of general contract law. A reasonable notice of termination must be given, otherwise damages resulting from such unreasonable conduct must be paid.[109] The principal cannot terminate the agency where the agent has an interest in the property which forms the subject matter of the agency[110] and cannot revoke the authority where it has been partly exercised as regards such acts and obligations which arise from acts already done in the agency.[111] If a foreign company wishes to appoint a distributor (i.e., an independent merchant as contrasted to an agent) it must ensure that the proposed distributor is a Pakistani national or a Pakistani

108. Some ministries, agencies and instrumentalities which have their own purchasing departments include, among others, the Ministry of Defense which operates through the Directorate of Procurement for the Army, Navy and Air Force; the Department of Telegraph and Telephone; Pakistan International Airlines; and Pakistan Steel Mills Corporation Limited.

109. CONTRACT ACT 1872, § 206.

110. *Id.* § 202.

111. *Id.* § 204.

controlled company. The distributorship agreement must grant exclusive rights to the distributor.[112] In addition, the distributor must register with the Chief Controller of Imports and Exports in order to be able to import the products into Pakistan. It is forbidden, however, for a company incorporated in Pakistan or outside Pakistan which carries on business in Pakistan to appoint a sole purchase, sale or distribution agent unless the prior approval of the Corporate Law Authority has been obtained.[113]

XVI. Conclusion

The Government's recent Sixth Five-Year Plan which began on July 1, 1983, continues to encourage foreign investment. With its central location with regard to the Middle Eastern, African and Far Eastern markets together with its large local population, Pakistan offers foreign investors major opportunities in many fields of investment. The detailed laws and regulations that are present in Pakistan coupled with certain administrative uncertainties with regard to their implementation, however, require that foreign investors carefully consider their impact when structuring their investment.[114]

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112. Pursuant to the Import Policy Order, 1985–1986, an "indentor" is:

> "a firm, institution, body, organisation, person or group of persons, holding sole agency, sole dealership or sole distribution rights from, or representing any other trade or commercial interest of a supplier abroad."

A distributor is therefore an "indentor" and subject to the requirements relating to nationality and registration.

113. Companies Ordinance § 206(3) 1984.

114. Useful additional information can be obtained from such sources as: the U.S. Department of Commerce, USAID-Pakistan, the Investment Corporation of Pakistan, the American Business Council of Pakistan, the Pakistan section in MARTINDALE-HUBBELL, and certain international banks operating in Pakistan.