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The Death of Ideology in Soviet Foreign Investment Policy

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The Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987

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I. INTRODUCTION

On March 30, 1989, the Government of the Soviet Union and a consortium of six major American corporations announced the signing of a momentous trade agreement.[1] The deal, which provides a legal and busi-

1. *Soviets Sign a Trade Accord With Six U.S. Companies*, N.Y. Times, Mar. 31, 1989, at 28, col. 1 [hereinafter *Trade Accord*]; *Pact With U.S. Firms is Pet Soviet Project*, Wall St. J., Mar. 31, 1989, at A6, col. 1. The American corporations involved in this agreement—RJR Nabisco Inc., Eastman Kodak Co., Chevron Corp., Archer-Daniels-Midland Co., Johnson & Johnson, and Mercator Corp.—are members of the American Trade Consortium (ATC). Ford Motor Co., an original ATC member, decided not

ness framework for at least twenty-five Soviet-American joint ventures in the Soviet Union, is expected to involve $5 to $10 billion of American investment capital over the next twenty years.[2] While the precise details of this agreement were not made public,[3] the participants will operate under the shadow of the 1987 Joint Venture Law[4]—a fundamental component of Soviet foreign investment legislation.

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to sign the agreement. *Id.* at A6, cols. 1, 2. For a further discussion of the ATC, see *infra* notes 109, 237.

2. *Trade Accord*, *supra* note 1, at 28, col. 1.

3. *Id.* at cols. 1, 2.

4. On January 13, 1987, the Soviet Union passed three different laws authorizing the formation of joint business ventures between Soviet entities and outside partners. The first law constitutes a general authorization from the legislature (the Supreme Soviet of the USSR acting through its Presidium) for the establishment of international joint ventures on the territory of the USSR. *O voprosakh, sviazannykh s sozdaniem na territorii SSSR i deiatel'nost'iu sovmestnykh predpriiatii, mezhdunarodnykh ob'edinenii i organizatsii s uchastiem sovetskikh i inostrannykh organizatsii, firm i organov upravleniia* [On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies], 2 Vedomosti Verkhovnogo Soveta SSSR [hereinafter Ved. Verkh. Sov. SSSR] Item 35 (1987) (Decree (*Ukaz*) of the Presidium of the USSR Supreme Soviet of January 13, 1987) [hereinafter 1987 Joint Venture Decree]. Operating on the basis of this legislative mandate, the Council of Ministers of the USSR promulgated separate decrees authorizing two types of international joint ventures. The first decree permits joint ventures between a Soviet and a capitalist or third world country enterprise. *O poriadke sozdnaniia na territorii SSSR i deitel'nosti sovmestnykh predpriiatii s uchastiem sovetskikh organizatsii i firm Kapitalisticheskikh i razvivaiushchikhsia stran* [On the Establishment in the Territory of the USSR and Operation of Joint Ventures with the Participation of Soviet Organizations and Firms from Capitalist and Developing Countries], 9 Sobranie Postanovlenii Pravitelstva SSSR [hereinafter SP SSSR] Item 40 (1987) (Decree (*Postanovlenie*) of the Council of Ministers of the USSR of January 13, 1987) [hereinafter 1987 Joint Venture Law]. The second decree provides for joint ventures between a Soviet and a COMECON (Council of Mutual Economic Assistance) partner. *O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii, mezhdunarodnykh obedinenii i organizatsii SSSR i drugikh stran—Chlenov SEV* [On the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations of the USSR and Other CMEA Member-Countries], 8 SP SSSR Item 38 (1987) (Decree (*Postanovlenie*) of the Council of Ministers of the USSR of January 13, 1987) [hereinafter Soviet-COMECON Joint Venture Decree]. The official texts of the 1987 Joint Venture Decree and the 1987 Joint Venture Law appear in Appendices A and B of this Article.

Although the USSR Council of Ministers promulgated the decree outlining East-West joint venture procedures in an executive rather than a legislative capacity, this Article refers to the decree as the 1987 Joint Venture Law for purposes of clarity. For more on the respective roles of the Council of Ministers and the Presidium of the Supreme Soviet in regulating international joint ventures, see *infra* notes 424-32 and accompanying text.

This Article's primary thesis is that the Soviet Government's decision to permit the creation of international joint ventures in the Soviet Union is a major instrument of the policy of *perestroika*. As such, the stability and profitability of any international commercial joint enterprise in the Soviet Union is inextricably linked with the fate of *perestroika*. If *perestroika* succeeds, the Soviet Union will have a market-oriented socialist economy, fully integrated into the world economy. By virtue of this success, Western investors and entrepreneurs will be in a position to make deeper, more profitable, and more lasting inroads into the Soviet economy. If *perestroika* fails, however, the honeymoon between Western capitalism and the Soviet economy will be short-lived.

As a secondary thesis, this Article argues that the component of Soviet law, which may be described roughly as Soviet foreign investment law, operates like an iceberg, with the joint venture legislation of 1987 as the tip. The bulk of this body of Soviet law lies buried beneath the surface. Therefore, it would be tantamount to malpractice for any Western attorney, operating solely on the basis of his knowledge of the provisions of the 1987 Soviet Joint Venture Law, to advise a client on Soviet foreign investment law without a substantial familiarity with other aspects of Soviet civil and commercial law, including the areas of enterprise organization, commercial arbitration, labor, tort, banking and insurance, shipping, and conflicts of law.

Accordingly, this Article will paint a composite picture of the foreign investment landscape of the post-1985 Soviet Union. Its montage will highlight the principal landmarks of this inviting landscape; unravel the hidden agenda of Gorbachev's *perestroika*; assess the efficacy of the many new laws designed to modernize the Soviet economic machine; comment on the new laws governing the various aspects of foreign commercial enterprise operation in the Soviet Union; establish a nexus between the 1987 Joint Venture Law and other relevant domestic Soviet legislation; indicate areas of the Soviet economy that represent potential gold mines for the Western investor; and provide the necessary navigational instruments to guide prospective Western entrepreneurs through the many minefields of modern Soviet foreign investment law. In other words, the author's principal purpose is to offer to those Western entrepreneurs contemplating an investment in the Soviet Union carefully balanced advice that they should consider in the process of making their risk-analyses of the Soviet market.

Part II of this Article provides a general background of the recent Soviet foray into the area of joint ventures. Following a brief assessment of the policy of *perestroika* in Part III, Part IV discusses some of the inherent hazards of doing business in a non-market economy such as the

Soviet Union. Part V next provides an in-depth analysis of the Joint Venture Law of 1987. Part VI discusses recent amendments to the Joint Venture Law. While these amendments are promising, they do raise certain constitutional issues, which are also addressed. Parts VII and VIII then consider some of the gaps in the Soviet joint venture scheme and how they should be bridged. Parts V, VI, and VII allude to other relevant aspects of Soviet law that supplement and sometimes supersede certain provisions of the 1987 Joint Venture Law.

II. WESTERN CAPITALISM AND SOVIET PERESTROIKA: A MARRIAGE OF CONVENIENCE

Mikhail Gorbachev's *perestroika*[5] is like sunshine without warmth. It glitters but does not generate quite enough heat to warm the hearts of those who choose to bask in it. If one accepts the conventional wisdom that sunshine is the best disinfectant and electric light the best policeman, one could say the that the light from *perestroika* illuminates the problems of contemporary Soviet socialism and polices against the deviant atrocities of the Stalin and Brezhnev eras. But the rays from the sunlight are not potent enough to disinfect the system against the congenital disease that has plagued Soviet communism since its inception in

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5. The principal advocate of *perestroika* offers perhaps the best definition of the Soviet reform program. In his recent book, Gorbachev described *perestroika* in the following terms:

> Perestroika is a word with many meanings. But if we are to choose from its many possible synonyms the key one which expresses its essence most accurately, then we can say thus: perestroika is a revolution. A decisive acceleration of the socio-economic and cultural development of Soviet society which involves radical changes on the way to a qualitatively new state is undoubtedly a revolutionary task . . . .
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> . . .
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> [Perestroika] is a direct sequel to the great accomplishments started by the Leninist Party in the October days of 1917. And not merely a signal, but an extension and a development of the main ideas of the revolution. . . .

M. GORBACHEV, PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD 49-50 (1987). In other words, Gorbachev continues, "Perestroika is a revolutionary process for it is a jump forward in the development of socialism, in the realization of its essential characteristics." *Id.* at 51.

As late as February 1989, Gorbachev continued to speak of his reform program as a revolution. In a highly-publicized speech to industrial workers summoned to the Communist Party headquarters for a meeting with most of the leading members of the ruling Politburo, he said: "We have never experienced anything like this before. Perestroika . . . is a revolutionary policy designed to change the state of our society. It requires a new social policy and the creation of a new atmosphere in which people can feel secure and free." *Perestroika May Run Out of Steam Says Gorbachev*, Financial Times (London), Feb. 17, 1989, at 1, col. 3.

1917. The poverty of *perestroika* lies in the fact that it addresses the deviations in Soviet socialism rather than the structural defects in Marxist communism.

At first glance, Gorbachev's *perestroika* looks very impressive. In isolated instances it even promises to introduce reforms that would have been deemed heretical by the founding fathers of Soviet socialism. But a hard look at the entire reform package reveals that it is neither revolutionary nor impressionist. Instead, *perestroika* is a blueprint for disaster from the best of intentions. In its present form it will neither transform the Soviet Union into an enlightened democracy nor turn her into a first-rate economic power; it certainly will not rid Soviet political theory of its Marxist ideology or induce Soviet law to shed its overriding theology. Of *perestroika*'s three component parts—*glasnost* (openness), *demokratizatsiia* (democratization), and *uskorenie* (acceleration of economic growth)—*uskorenie* is least likely to succeed.[6] *Uskorenie* is clearly the most important and the most complex element of *perestroika.*[7] Yet, while *glasnost* and *demokratizatsiia* seem to have generated enough sunlight to captivate Western observers and endear many Soviet citizens, *uskorenie* has not made inroads into the hearts of millions of Soviets. And, as this study will reveal, *uskorenie* may turn out to be the undoing of *perestroika.*

In the final analysis, a fair assessment of Gorbachev's *perestroika* will

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6. Knowledgeable Western observers of the current Soviet economic experiments under *perestroika* unanimously assert that *uskorenie* is doomed to failure. As one editorial noted,

> Mr. Gorbachev plans to introduce some form of market socialism. But successful market socialism has never existed, which is hardly surprising. A market is not even feasible, let alone efficient, without clearly defined property rights, the key requirements being exclusivity and transferability. But such property rights are, of course, the essential characteristics of capitalism.

The Perils of Perestroika, Financial Times (London), Feb. 28, 1989, at 16, col. 1 (editorial) [hereinafter *The Perils of Perestroika*). The editorial goes on to say:

> Even if the socialist market economy were a feasible objective, the transition would still represent a daunting task. The Soviet economy starts without the laws, the values or the patterns of behavior suitable to a market economy (except, ironically, in the black economy); it is burdened with a huge army of interfering bureaucrats; and prices start off by bearing no relation to opportunity costs.

Id. See also Waiting for the New Soviet Economy, N.Y. Times, Mar. 19, 1989, sec. 4, at 1, col. 1 ("Failure suggests that something ambitious has been attempted, has run its course, and has fallen short.").

7. Detailed discussion of *glasnost* and *demokratizatsiia,* the other two elements of *perestroika*, falls outside the scope of this Article. The primary concern here is *uskorenie* and any reference to *perestroika*, unless otherwise indicated, specifically concerns *uskorenie.*

require a careful balancing of its successes against its failures. As Gorbachev enters the Soviet equivalent of a second American presidential term, there is sufficient basis to proclaim the moderate success of *glasnost.* The country's experimentations with *demokratizatsiia* are at this point inconclusive;[8] as such, it is too early to pass judgment on the fate of this component of *perestroika. Uskorenie,* by contrast, has so far been an unmitigated failure. *Perestroika* is intriguing at this stage in its development because of the close relationship between its relative failures and successes. The failure of *uskorenie* seems to have contributed to the success of *glasnost.* On the other hand, the success of *glasnost* is feeding the failure of *uskorenie* because its tranquilizing effect on the country's psyche has not only exposed the enormity of the economic problems that confront the Soviet system, but more important, it has shown the inadequacy of the measures that Gorbachev has put forward in response to these problems.[9] Thus, when the history of the first four years of Gorbachev's reforms is written, it will feature quite prominently what one might describe as the success of *perestroika*'s failure.

Regardless of what it might mean to ordinary Soviet citizens, however, the inescapable fact is that Gorbachev's *perestroika* is synonymous with business opportunities in the Soviet Union for Western[10] venture capitalists and entrepreneurs. The principal architect of the current Soviet economic restructuring program refers to his reform project as a revolution which, by his admission, is solidly anchored in the teachings of Marx

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8. Despite *demokratizatsiia,* the Soviet style is still the same: the Party does all the thinking and brings in the Parliament to ratify its policy. The best example of the Soviet style is the manner in which Gorbachev purged his opponents and restructured the Party machine in October 1988. The changes were announced after a four hour meeting of the Central Committee, which was convened on very short notice. *Gorbachev Purges His Opponents,* The Times (London), Oct. 1, 1988, at 1, col. 1. The recent nationwide election to fill seats in the Congress of People's Deputies should have greater impact on Soviet politics than on democratic processes within the government. *See Power to the People?,* U.S. NEWS & WORLD REPORT, Apr. 10, 1989, at 41.

9. One of the most powerful instruments of *glasnost* today is an obscure Soviet newspaper entitled *Argumenti i Fakti* [Arguments and Facts]. It offers the Soviet people new facts about the failures of *uskorenie* and serves as a public forum in which ordinary citizens can express their anger about the pace of Gorbochev's reforms. *The Soviet Newspaper That Feeds A People Hungry for Arguments and Facts,* Financial Times (London), Mar. 3, 1989, at 2, col. 1.

10. In this Article, the term "Western" refers to nations operating free market economies, including the United States, Canada, Western Europe, and certain Asian nations such as Japan and South Korea. The term "Eastern" refers to nations operating state-controlled, centrally-planned, socialist economies, specifically those of Eastern Europe.

and Lenin.[11] If his assertion is correct, then this is bound to be the first Marxist-Leninist revolution that not only does not promise to bury capitalism at home, but actually invites international capitalists to come in as white knights to rescue a seventy year-old socialist system from itself. Indeed, these are interesting times in the life of the Soviet economy.

One of the many ironies of *perestroika* is that it has created an ideal "chamber of commerce" effect for Western investors and entrepreneurs in the Soviet Union.[12] As a direct result of Gorbachev's efforts to restructure the Soviet economy, the foreign investment climate in the Soviet Union has undergone a major metamorphosis during the past four years. In meteorological terms, the long-range international business weather forecast for the Soviet Union is promising: it is warm and sunny, with spotty clouds, mild winds and occasional showers. Unmistakably, it is springtime again in Moscow for Western entrepreneurs and capital investors who, like robins, have resurfaced from their long hibernation to take advantage of the balmy weather. Thanks to Gorbachev's creeping privatization of the Soviet economy and, more specifically, to the ongoing overhaul of Soviet foreign investment law, doing business in the Soviet Union is once again inviting to foreign investors and entrepreneurs. The

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11. Gorbachev himself made perfectly clear that the policy of *perestroika* is neither anti-socialist nor anti-Leninist in its general orientation:

> The essence of perestroika lies in the fact that it *unites socialism with democracy* and revives the Leninist concept of socialist construction both in theory and in practice. Such is the essence of perestroika, which accounts for its genuine revolutionary spirit and its all-embracing scope.
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> . . .
>
> [W]e are conducting all our reforms in accordance with the socialist choice. We are looking within socialism, rather than outside it, for the answers to all the questions that arise. We assess our successes and errors alike by socialist standards. Those who hope that we shall move away from the socialist path will be greatly disappointed. Every part of our program of perestroika—and the program as a whole, for that matter—is fully based on the principle of more socialism and more democracy.

M. GORBACHEV, *supra* note 5, at 35-36 (emphasis in original).

12. A recent independent study of American companies doing business in the Soviet Union shows that, despite the poor state of the Soviet economy, the Soviet Union gets high marks as a trading partner. According to this survey, "more than half of [the American companies] rated the Soviet Union in the top half of their foreign clientele. Eighty-seven percent of the 106 respondents, all major multinational corporations, said they wanted to continue doing business with the Soviet Union." *Soviet Trade is Rated High in U.S.*, N.Y. Times, May 16, 1988, at 21, col. 2 [hereinafter *Soviet Trade Rated High*]. The study concluded by noting that the "Russians earned their highest grade in reliability. Only five companies encountered failure to meet agreements, and two attributed it to inefficiency rather than venality." *Id.*

clear and unequivocal message emanating from the Soviet Government is that international joint venturing in the Soviet Union is once again to be encouraged because such efforts are seen as an integral element of the overall policy of *perestroika.*

While *perestroika* presents virtually unlimited business opportunities in the Soviet Union, Western investors thinking of entering the Soviet market must be forewarned that in spite of *perestroika*, or perhaps because of it, doing business in the Soviet Union still has its endemic hazards. There will be warm and sunny days, but the Western businessman should also brace himself for the spotty clouds that will hover above his Soviet operations and the occasional showers that may descend on his enterprise in that country. While *perestroika* may have turned the Soviet market into a bed of roses for Western entrepreneurs, the foreign businessman taking advantage of this new opportunity must never forget the fact that roses have thorns; in this case they could be quite sharp.

The ensuing collaboration between Western capitalism and Soviet *perestroika* may be likened to a marriage of convenience between two parties who enter into a union knowing that they harbor different expectations from the partnership. What the Soviet Union wants from this marriage is in many respects different from and even antithetical to the desires of her Western suitors. Under normal circumstances one might say that such a marriage would not last too long. But in this case there is a sufficient commonality of interests between the parties to make the marriage mutually beneficial while it lasts. The author's role in this transaction is that of a business and legal counselor for the respective Western suitors. The task is to prepare a road map to guide them through the journey on which they will embark.

Although the title of this Article indicates that its primary focus will be the international joint venture law unveiled by the Soviet Government in 1987,[13] it should be noted at the outset that this law neither operates in a vacuum nor was intended by its architects to operate in isolation from its Soviet reality. Like any other Gorbachev-era economic legislation, the law must be interpreted both against the backdrop of the socio-economic and political reforms which bear the code name of *perestroika*, and, equally important, as just one element of an intricate web of Soviet legislation affecting international commercial transactions in that country. However comprehensive one law might be, it cannot regulate all aspects of any foreign investment operation in the Soviet Union. As this Article demonstrates, the 1987 Joint Venture Law is far from all-encom-

13. *See supra* note 4.

passing; in fact, it is replete with gaping holes, some of which are intentional, and others obviously unintended.

In the history of Soviet law the year 1985 may yet prove to be as important as the year 1953. The latter marked the death of Stalin and Stalinism in Soviet law and paved the way for the new wave of Khrushchevian reforms and codification which began to take hold in 1958.[14] The former date marked the selection of Gorbachev as the new party leader and the launching of a new wave of legal reforms designed to catapult the Soviet Union and her laws into the modern age. The Gorbachevian law reforms, which began to manifest themselves in concrete legislation in 1987,[15] have thus far shown tangible results only in

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14. The first sign of a comprehensive reform of Soviet law is the adoption of so-called "Fundamental Principles" of that particular branch of law. These Fundamental Principles of Law are adopted by the Supreme Soviet of the USSR pursuant to its authority under article 73(4) of the USSR Constitution of 1977. KONST. SSSR (1977), art. 73(4), *reprinted in* F. FELDBRUGGE, THE CONSTITUTION OF THE USSR AND THE UNION REPUBLICS: ANALYSES, TEXTS, REPORTS 111 (1979). The first wave of Khrushchevian Fundamental Principles of Law, marking Khrushchev's de-Stalinization of Soviet law, was promulgated in 1958. The adoption of Fundamental Principles of Law continued into the early 1980s. The full texts, with amendments, of all of these Fundamental Principles of Law are contained in a one-volume collection of statutes entitled OSNOVY ZAKONODATELSTVA SOIUZA SSSR I SOIUZNYX RESPUBLIK [FUNDAMENTAL PRINCIPLES OF LAW OF THE USSR AND THE UNION REPUBLICS] (1987) (official Soviet publication) [hereinafter FUNDAMENTAL PRINCIPLES].

Many observers anticipate that the current Gorbachevian law reforms will culminate in either the adoption of a new wave of Fundamental Principles of Law or in substantial amendments to existing ones. For example, the Drafts of the Fundamental Principles of Criminal Law of the USSR and the Union Republics already have been published and currently are under discussion. They will be promulgated into law sometime in 1989. *See Proekt: Osnovy ugolovnogo zakonodatel'stva Soiuza SSR i soiuznykh respublik* [Drafts: Fundamental Principles of Criminal Law of the USSR and the Union Republics], 1 SOVETSKOE GOSUDARSTVO I PRAVO [hereinafter Sov. Gos & PRAVO] 3-29 (1989).

15. Very few laws aimed at the policy of *uskorenie* were passed during the first two years of *perestroika* (March 1985-March 1987). With the exception of the joint venture laws passed in January 1987, most of the *uskorenie* legislation was unveiled during the middle of 1987. Among these laws were the following, which specifically sought to reform different components of the Soviet economic mechanism: *O gosudarstvennom predpriiatii (ob'edinenii)* [Law on State Enterprise], 26 Ved. Verkh. Sov. SSSR Item 385 (1987) (adopted by the USSR Supreme Soviet on June 30, 1987); *O perestroike upravleniia narodnym khoziaistvom na sovremennom etape ekonomicheskogo razvitiia strany* [Decree on the Restructuring of the System of Administration of the National Economy at the Present Stage of the Country's Economic Development], 26 Ved. Verkh. Sov. SSSR Item 384 (1987) (adopted by the USSR Supreme Soviet on June 30, 1987); *O perestroike planirovaniia i povyshenii roli Gosplana SSSR v Novykh usloviiakh khoziaistvovaniia* [Decree on the Restructuring of the Planning System and Enhancement of the Role of Gosplan of the USSR Within the New Conditions of Economic

the area of foreign investments in the Soviet Union. This is so because

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Management], 33 SP SSSR Item 115 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); *O perestroike material'no-tekhnotekhnicheskogo obespecheniia i deiatel'nosti Gossnaba SSSR v novykh usloviiakh khoziaistvovaniia* [Decree on the Restructuring of the Material-Technical System of Supplies and the Activities of Gossnab of the USSR Within the New Conditions of Economic Management], 35 SP SSSR Item 118 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987) [hereinafter Gossnab Decree]; *O perestroike finansovogo mekhanizma i povyshenii roli Ministerstva Finansov SSSR v novykh usloviiakh khoziaistvovaniia* [Decree on the Restructuring of the Financial Mechanism and Enhancement of the Role of the USSR Ministry of Finance Within the New Conditions of Economic Management], 36 SP SSSR Item 119 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); *Ob osnovnykh napravleniakh perestroiki sistemy tsenoobrazovaniia v usloviiakh novogo khoziaistvennogo mekhanizma* [Decree on Fundamental Directions for Restructuring the System of Pricing Under the Conditions of a New Economic Mechanism], 36 SP SSSR Item 120 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); *O sovershenstovovanii sistemy bankov v strane i usilenii ikh vozdeistviia na povyshenie effektivnosti ekonomiki* [Decree on the Reform of the Country's Banking System and Enhancement of its Role in Raising the Effectiveness of the Country's Economy], 37 SP SSSR Item 121 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987) [hereinafter Banking System Reform Decree]; *O povyshenii roli Gosudarstvennogo komiteta SSSR po nauke i tekhnike v upravlenii nauchnotekhnicheskim progressom v strane* [Decree on the Enhancement of the Role of the State Committee on Science and Technology in the Administration of Scientific—Technical Progress in the Country], 34 SP SSSR Item 116 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987) [hereinafter Goskomnauk Decree]; *O perestroike deiatel'nosti Ministerstv i vedomstv sfery material'nogo proizvodstva v novykh usloviiakh khoziaistvovaniia* [Decree on the Restructuring of the Activities of Ministries and Departments Dealing with Material Production Under the New Conditions of Economic Management], 38 SP SSSR Item 122 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); *Ob usilenii raboty po realizatsii aktivnoi sotsial'noi politiki i povyshenii roli Gosudarstvennogo komiteta SSSR po trudu i sotsial'nym voprosam* [Decree on the Intensification of Work Relating to the Implementation of the Active Social Policy and Enhancement of the Role of the USSR State Committee on Labor and Social Questions], 38 SP SSSR Item 123 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); *O merakh po korennomu uluchsheniiu dela statistiki v strane* [Decree on Fundamental Improvements of Statistical Services in the Country], 34 SP SSSR Item 117 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987); and *O sovershenstvovanii deiatel'nosti respublikanskikh organov upravleniia* [Decree on the Reform of the Activities of the Union Republican Organs of Administration], 39 SP SSSR Item 124 (1987) (a joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on July 17, 1987).

Soviet foreign investment law has made the greatest strides in the direction of accommodating the interests of resurgent Soviet capitalism. By implication this means that Soviet foreign investment law is out of line with other components of Soviet law. As a result of this disharmony, Soviet law governing foreign economic activities on Soviet territory is murkier than it has ever been. This will continue to be the case until all relevant aspects of modern Soviet law are reformed to reflect the spirit of *perestroika.*

III. GORBACHEV'S CREEPING PRIVATIZATION OF THE SOVIET ECONOMY: PERESTROIKA (RESTRUCTURING) OR PEREDYSHKA (INTERLUDE)?

No one would doubt that a wind of change is sweeping through the Soviet Union. Nor is there any doubt about the good intentions of the principal architect of these changes: Gorbachev desires a radical recasting of the Soviet economic structure and management that will transform his country from a third-rate economic power into a major player in the international economic arena. Good intentions alone, however, are not enough to attain this goal. Today's Soviet economy may be likened to a gravely ill patient who decides to undergo elective surgery. If the patient is to emerge from this surgery as the fully recovered giant it could poten-

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In an effort to accommodate the demands of *uskorenie,* the 1979 law on State Arbitrazh in the USSR was amended three times in 1987 and 1988. *See O gosudarstvennom arbitrazhe v SSSR* [Law on State Arbitrazh in the USSR], 49 Ved. Verkh. Sov. SSSR Item 844 (1979) (adopted by the USSR Supreme Soviet on November 30, 1979); *O voprasakh, sviazannykh s sozdaniem na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii, mezhdunarodnykh ob'edinenii i organizatsii s uchastiem sovetskikh i inostrannykh organizatsii, firm i organov upravleniia* [Decree on Questions Concerning Joint Ventures, International Associations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies], 2 Ved. Verkh. Sov. SSSR Item 35 (1987) (Decree *(Ukaz)* of the Presidium of the USSR Supreme Soviet of January 13, 1987); *O vnesenii izmenenii i dopolnenii v zakonodatel'stvo Soiuza SSR o gosudarstvennom arbitrazhe* [On the Incorporation of Changes and Additions into the Law On State Arbitrazh in the USSR], 7 Ved. Verkh. Sov. SSSR Item 92 (1987) (Decree *(Ukaz)* of the Presidium of the USSR Supreme Soviet of February 18, 1987); *O kooperatsii v SSSR* [On Cooperatives in the USSR], 22 Ved. Verkh. Sov. SSSR Item 355 (1988) (Law of the USSR of May 26, 1988). A new edition of the Law on State Arbitrazh, incorporating all of the 1987 amendments, was published in 1988. *Ob utverzhdenii Polozheniia o Gosudarstvennom arbitrazhe SSSR i o Pravilakh rassmotreniia khoziaistvennykh sporov gosudarstvennymi arbitrazhami* [On the Approval of the Statute on USSR State Arbitrazh and On the Rules for Reviewing Economic Disputes by the State Arbitrage Commission], 19-20 SP SSSR Item 59 (1988) (Approved by a resolution *(postanovlenie)* of the USSR Council of Ministers of April 16, 1988).

tially become, the surgeon's incisions must be deep enough to reach and remove the root causes of the illness. Despite Gorbachev's good intentions, the limited nature of the treatment that he seems to have prescribed for his patient raises serious questions about the future health of the Soviet economy.

When *perestroika* was first unveiled in 1985, it promised a comprehensive, revolutionary, and systematic reform of the entire Soviet social, economic, legal, and political system.[16] But if one were to give a progress report today on the state of these reforms in just one of the targeted aspects of *perestroika*, the Soviet economic system, one would say that the efforts so far have been neither comprehensive nor revolutionary nor systematic. At best the reforms have been episodic, half-baked, internally inconsistent and, most important, lacking in revolutionary zeal. A part of the problem is that there is no master plan for these unfolding reforms. This in turn is due to the fact that Gorbachev and his compatriots have not reached a consensus as to whether or not the Soviet system is in need of a major overhaul, or on the depth of the incisions in the Soviet system that will have to be made by the surgical knife of *perestroika*.[17]

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16. *See* M. GORBACHEV, *supra* note 5, at 49-50; *see also id.* at 10 (*perestroika* is "a policy of accelerating the country's social and economic progress and renewing all spheres of life").

17. Since the inception of *perestroika*, for example, there have been strong arguments for and against the creation of private cooperatives to fill gaps in the country's economy, particularly in those areas in which the state sector is quite weak. The Government finally succumbed to the arguments of the "pro-market forces" and passed a law authorizing the establishment of cooperatives. *See* On Cooperatives in the USSR, *supra* note 15. These private businesses were allowed to charge whatever the market could bear for their goods and services. After a very limited experiment with the free market, however, the Soviet Government realized that it had made a terrible mistake by allowing the private entrepreneurs to charge free market prices. In an effort to rectify this error in judgment, the Soviet authorities imposed a limit on the profits of the *perestroika* entrepreneurs. In August 1988, the USSR State Committee on Prices issued a Letter Ruling in which it imposed a ceiling on the prices that private entrepreneurs could charge their customers. Under these mandatory price guidelines: (1) a cooperative must sell its produce to state enterprises at prices set by the state, the so-called "state market prices"; and (2) if the buyer is a private person, the cooperatives may sell their goods or services at a price that is slightly higher than the "state market price" but no more than 10 kopecks per bottle (if the goods are sold in bottles) or no more than 10% above the state market price (for all the other goods and services). *O nekotorykh voprosakh tsenoobravaniia v sviazi s vvedeniem v deistvie Zakona SSSR 'O kooperatsii v SSSR'* [Decree On Certain Questions Concerning the System of Pricing in Connection with the Coming into Force of the USSR Law "On Cooperatives in the USSR"], 12 BULL. NORM. AKT. MIN. & VED. SSSR 3-4 (1988) (Letter Ruling (*Pismo*) of the State Committee of the USSR on Prices, adopted on August 31, 1988). *See also Moscow Plans New Price Controls to*

Given the various uncertainties surrounding *perestroika*, this section poses the following threshold questions: What is *perestroika*? What are its chances of success? Is it possible for some aspects of *perestroika* to succeed and others to fail? If *perestroika* eventually fails, either in part or as a whole, what would happen to the commercial investments of those Western entrepreneurs who already may have commenced operations in the Soviet Union? Since the jury is still out on the future of *perestroika*, is it advisable for a Western entrepreneur or investor to cast his lot now with this Soviet restructuring program, or should he await the verdict on the survivability of Gorbachev's gambles?

Depending on the context in which the issue is raised, *perestroika* means different things to different segments of Soviet society. The only certainty is that it is a dialectical phenomenon with built-in contradictory qualities. Consequently, *perestroika* is assessed differently by different actors in the process. These actors may be divided into four groups. In the first group are those who believe that *perestroika* represents the doom of Soviet socialism as it is presently practiced. Because most of the people who view *perestroika* in this light have a vested interest in the status quo, they strongly believe that *perestroika* must be resisted and possibly rolled back.[18] In other words, they are positively against *perestroika* and all of its ramifications.[19] The second group consists of those profit-seeking foreign investors who wish to enter the Soviet market: the international white knights of *perestroika*. For this group, *perestroika* is both an irresistible magnet and an economic experiment whose horizons

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Curb Inflation, Financial Times (London), Feb. 4, 1989, at 2, col. 1 [hereinafter *Price Controls*]; *Tax Threat to Soviet Co-operatives*, Financial Times (London), Feb. 22, 1989, at 2, col. 1 [hereinafter *Tax Threat*].

18. The anti-perestroika movement inside the USSR is a loose coalition of opponents, obstructors and Brezhnevites. The most prominent leaders of this group are Mr. Yegor Ligachev and Mr. Viktor Chebrikov. These men represent the most formidable element in what some refer to as "the apparatus"—"the great hidden bulk of the bureaucratic and administrative iceberg who stand to gain nothing from the reforms." *Gorbachev Walks the Perestroika Tightrope*, The Sunday Times (London), Jan. 29, 1989, at B-11, col. 1. *See also A Kremlin Coup*, The Times (London) (editorial), Oct. 1, 1988, at 11, col. 1.

19. The anti-*perestroika* movement is not confined to opposing domestic policy reforms. It includes vehement opposition to any manifestations of "new thinking" in the sphere of foreign policy as well. In a recent speech at a meeting of Communist Party members in Gorky, Yegor Ligachev stated that "Soviet foreign relations must be guided primarily by the model of a class struggle against capitalism and asserted that too much talk of peaceful cooperation with capitalist countries 'only confuses the minds of the Soviet people and our friends abroad'." *Gorbachev Deputy Criticizes Soviet Policy Trend*, N.Y. Times, Aug. 7, 1988, at 11, col. 1.

must be further expanded to permit more capitalism in that country.[20] The Western capitalists typically place a purely economic interpretation on *perestroika* and do not particularly care if these reforms extend to other aspects of Soviet life.[21] The third group includes adherents of *perestroika* inside the Soviet Union, to whom the Soviets refer as *chastniki* (private entrepreneurs).[22] Like the Western capitalists, these practitioners of supply-side economics see *perestroika* merely as an opportunity to make profits for themselves. Soviet citizens who favor this interpretation of *perestroika* do not wish to lose the many "blessings" of Soviet socialism that they currently enjoy in other spheres of life in the Soviet Union.[23] The final group may be referred to as the "Gorbachevists," who, like Gorbachev, see *perestroika* as a pre-crisis attempt to correct

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20. While virtually every Western company seeking to do business in the Soviet Union at this time falls within this group, it is perhaps best represented by the American Trade Consortium (ATC), a group of six American corporations. *See supra* note 1; *infra* note 109.

21. The foreign proponents of *perestroika* would like to separate trade issues from both the political situation inside the Soviet Union and the political climate between the Soviet Union and the United States. Ideally, they want to trade with the Soviet Union in an atmosphere that is, as much as possible, unaffected by the fluctuations in the United States-Soviet political climate. *See Taking a Team Approach to Soviet Trade*, N.Y. Times, July 31, 1988, at C4, col. 2 [hereinafter *Team Approach*].

22. The best representatives of the *chastniki* are those for whom the law On Cooperatives in the USSR, *supra* note 15, was designed and who have since taken full advantage of that law to reap enormous profits in the Soviet marketplace. Many Soviet citizens have since expressed anger at the "obscene" profits that these private entrepreneurs are making; the Soviet Government has moved to set a ceiling on *chastniki* profits in response to this popular outrage. *See Tax Threat, supra* note 17, at 2, col. 1; *Price Controls, supra* note 17, at 2, col. 1.

23. Like any other Soviet citizens, the *chastniki* enjoy all of the "blessings" of Soviet socialism enshrined in the Bill of Rights contained in articles 39-58 of the USSR Constitution of 1977, notably the constitutional provisions that grant all citizens the so-called social and economic rights. Among the rights that the *chastniki* continue to enjoy and would not like to relinquish while they continue to accumulate profits under *perestroika* are the following: right to guaranteed employment (art. 40); right to rest and leisure (art. 41); right to health protection (art. 42); right to social security benefits, including disability insurance and old-age pension benefits (art. 43); right to guaranteed housing (art. 44); right to education for themselves and members of their family (art. 45); right to enjoy cultural benefits (art. 46). KONST. SSSR (1977). In fact, many *chastniki* hold two jobs at the same time—one in the state sector and another in the private sector. The latter supplements the meager salary that they receive from state sector employment. The typical *chastnik* keeps his state sector job because it entitles him to all the social security benefits that flow therefrom. *See* Wren, *Breaking Out*, The New York Times Magazine, Aug. 14, 1988, at 28.

the deficiencies of socialism in all aspects of Soviet life.[24]

Perestroika embodies elements of all four viewpoints mentioned above, and more. Far from being a sign of the Soviet system's rebirth and vitality, *perestroika* reveals the congenital disease that has plagued Soviet socialism since its birth in 1917. But beneath every cloud lies a silver lining; in this case, the misery of Soviet communism may turn out to be a bonanza for Western entrepreneurs. *Perestroika* is Gorbachev's clinical response to the chronic problems of Soviet socialism. And although its progenitors perceived *perestroika* as a revolutionary idea,[25] it is clearly not anti-communist.[26] Because it neither contemplates a frontal attack on the economic vision of Marx and Lenin nor seeks to derail the Soviet Union's movement toward a communist utopia, *perestroika* obviously cannot be branded as an anti-communist manifesto. Its goal is not to steer the Soviet socialist system away from its Marxist moorings or to turn the Soviet Union into a capitalist country. It is much harder, however, to accept Gorbachev's designation of his plans as revolutionary. To the extent that *perestroika* does not seek to precipitate a radically different economic system in the Soviet Union, it falls short of being a truly revolutionary theory. Rather, the fundamental goal of *perestroika* is to find the most cost-effective way to rejuvenate the ailing Soviet economy and thereby rescue Soviet communism from itself.[27] To accomplish this, Gorbachev soon realized that he had to resurrect an old idea that had been tried twice before in Soviet history; that is, he had to devise a

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24. In his recent book, Gorbachev paints a vivid picture of the problems that confront the Soviet economy in particular and Soviet society in general. In his words, *perestroika* is "an urgent necessity. . . . Any delay in beginning perestroika could have led to an exacerbated internal situation in the near future, which, to put it bluntly, would have been fraught with serious social, economic and political crises." M. GORBACHEV, *supra* note 5, at 17.

25. *See supra* note 5.

26. *See supra* note 11.

27. One of the most fundamental challenges facing *perestroika* is reconciling its steadfast belief in the visions of Marx, as crystallized by the infallible Communist Party of the Soviet Union, with its determination to save the country's economy from an impending crisis by resorting to some forms of market capitalism. It is a crisis of confidence in the Communist Party's leadership as much as it is in the efficacy of communism. A Western commentator states the problems as follows:

> A Communist Party, whose claim on power is its special understanding of the forces of history, is openly confessing that it has flunked its specialist subject. The *apparatchiks*, whose *raison d'être* is interference in all aspects of economic and social life, are being asked to abandon that role voluntarily. A people that has been taught for more than two generations that markets are wasteful and profits exploitative is expected to change its beliefs, while continuing to trust the teacher.

The Perils of Perestroika, *supra* note 6, at 16, col. 1.

method that would carefully control the flow of capitalist investments into the Soviet economy and encourage benign manifestations of capitalist entrepreneurship among Soviet citizens without actually acknowledging the bitter fact that Soviet socialism is fundamentally bankrupt.[28] The first and perhaps greatest challenge of *perestroika*, therefore, is to decide how large a dose of capitalism should be allowed to coexist with pervasive socialism in the communist-oriented Soviet economy.

The decision to permit foreign participation in Soviet economic development is a prominent feature of Soviet economic reform. The gradual process of dismantling some of the ideological barriers to such participation took a giant stride in 1987 when the proponents of *perestroika* responded positively to the pivotal question of whether Western venture capitalists should be allowed to become co-owners with Soviet partners of capital means of production and distribution inside the Soviet Union. This move marked a substantial erosion of ideology in the formulation of Soviet policy governing the flow of foreign investment into the Soviet Union.[29] It also effectively conferred upon Western investors three of the economic freedoms that they had long desired: (1) the right to own venture capital in the Soviet Union; (2) the freedom of operational management of the enterprise; and (3) the freedom to repatriate their profits from such commercial operations.[30] The additional decision to exempt East-West commercial joint ventures from the dictates of Soviet central planners[31] injected an equally far-reaching and unprecedented element

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28. A close reading of the reform measures that have been introduced under *perestroika* can only lead to one conclusion: "[T]he party is making an open confession of ideological, economic and financial bankruptcy, while carrying through an extremely complex revolution from above." *Id.*

29. The 1987 Joint Venture Law reverses a policy that dates back to 1930. In the 1920s, Soviet law permitted the establishment of joint USSR-capitalist country business ventures on Soviet territory. Apparently unhappy with this experiment, Soviet authorities withdrew the idea in 1930 and replaced these joint ventures with so-called "all-union combines." For a historical discussion of the Soviet experience with joint ventures in the 1920s, see J. QUIGLEY, THE SOVIET FOREIGN TRADE MONOPOLY 35, 47-58, 62 (1974). *See also* G. SMITH, SOVIET FOREIGN TRADE 60-63 (1973). Prior to 1987, Soviet law permitted the creation of mixed Soviet-capitalist country joint ventures outside the USSR. For a discussion of this latter form of joint venture, see *Does Moscow Mean it This Time?*, N.Y. Times, Jan. 18, 1987, at C4, col. 2.

30. The 1987 Joint Venture Law recognizes the foreign partner as a co-owner of joint venture property and co-administrator of joint venture affairs. 1987 Joint Venture Law, *supra* note 4, arts. 5, 21. The law also allows the foreign partner to repatriate its share of joint venture profits. *Id.* art. 32.

31. *See id.* art. 23 ("A joint venture is independent in developing and approving its business operation programmes.").

of economic dualism into the Soviet economic system: it permitted the coexistence of capitalist enclaves within a centrally-planned socialist economy. Quite understandably, none of these decisions was easy for the Soviet Government to make. The entire action was as pragmatic as it was daring.

As a result of the foreign investment legal reforms of 1987, one could justifiably state that the ideological purists (the "anti-*perestroikists*") suffered a major defeat at the hands of the economic pragmatists (the "*perestroikists*") in the quest for control over the fate of the Soviet economy. Despite this defeat, however, it should be noted that the six key components of Soviet economic ideology remain firmly in place: (1) private entities are still denied ownership of land,[32] the most important means of production; (2) the Communist Party continues to exercise dictatorial control over the economic life of the country; (3) a controlling sector of the Soviet economy remains subject to central planning; (4) the banking and insurance industries are still operated as state monopolies; (5) the state controls the major means of transportation and distribution of goods—the airlines, the railroad system, the shipping industry, and interstate trucking; and (6) Soviet currency remains non-convertible. In other words, the reform of 1987 is not important because it marked the death of communist ideology in the overall Soviet economic thinking;[33] rather, it will be remembered as marking the clinical death of ideology in one important area of the Soviet economic philosophy, the policy governing foreign investments in the Soviet Union. The fact that this death is merely clinical, however, means that it is reversible if the clinical conditions that prompted the death are reversed. Hence, the second challenge that the *perestroikists* face is to make their experiment result in

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32. In a sweeping policy shift on this question, the Central Committee of the Soviet Communist Party adopted a decision in March 1989 that would allow private farmers to lease state land for life and pass it on to their children. This reverses the prior 15-year limit on leasing land. *See Soviets to Allow Private Farmers To Lease State Land for a Lifetime*, N.Y. Times, Mar. 17, 1989, at 1, col. 1. The decision, however, falls short of allowing private citizens to buy, sell, and sublet land.

33. Aware that some interpret *perestroika* as marking the death of Communist ideology in Soviet foreign investment law, Gorbachev argues that if *perestroika* sometimes appears to grant far-reaching concessions to capitalism, it is because *perestroika* is looking not to immediate gains, but to a long-term attempt to save socialism. Consequently, *perestroika* is analogous in many respects to the Brest-Litovsk Peace Treaty of 1918, which Lenin urged Russia to sign with Germany even though the terms of that peace treaty were "disgraceful and dirty." M. GORBACHEV, *supra* note 5, at 52-53. In other words, Gorbachev views *perestroika* not as an unprincipled abandonment of communist ideology, but rather as the economic equivalent of Lenin's political somersault in supporting the Brest-Litovsk Treaty.

permanent changes that will survive long after they have left office.

After many years of hesitation, the Soviet political leadership came to the painful realization that the least costly but most efficient way to energize the ailing Soviet economy, without abandoning the system's communist roots, was to bait the capitalist West into sharing some of its investment capital, advanced technology, and managerial skills. This would occur through the formation of joint business ventures with Soviet enterprises, to be operated inside the Soviet Union. Faced with the clear choice of either doing nothing and seeing the Soviet economy die a slow but sure death as a result of socialist inertia, or seeking an emergency transfusion for the Soviet economy from the country's "capitalist surroundings," the Soviet leaders chose the latter route. By so doing they chose to ignore, at least for now, all the evils of capitalism that their Marxist mentors had taught them.

Thus, on January 13, 1987,[34] Soviet lawmakers debunked a fifty-seven year-old policy[35] prohibiting the formation of East-West business joint ventures[36] within Soviet territory.[37] Before the passage of the Joint Venture Law of 1987, the Soviet Government had maintained that such an enterprise was not only ideologically incompatible with the Soviet economic system but, more important, that it would be impossible to operate such a business organization within the framework of existing Soviet economic laws.[38]

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34. On this date, the Soviets passed three joint venture decrees, two of which authorized distinct forms of joint ventures between Soviet and foreign partners. *See supra* note 4.

35. *See supra* note 29.

36. Before the Soviets promulgated the 1987 Joint Venture Law, Western investors typically did business in the Soviet Union under franchise arrangements, or "BOT Projects." In the usual BOT Project, the foreign business built the project, operated it for awhile, and then transferred it to the Soviet Government. Under this new law, however, the foreign investor comes in as a co-owner of the enterprise. The types of projects envisaged under this law may be referred to as "BOOF Projects," in which Western investors will build, own, operate, and finance the entire operation. The leap from franchising (BOT) to joint venturing (BOOF) is quite phenomenal.

37. As recently as 1974, a leading Soviet Government official was asked to speculate as to when the Soviet Union might be willing to permit Western venture capitalists to participate in international joint venture projects inside the Soviet Union. The USSR Minister of Foreign Trade, Nikolai S. Patolichev, responded that such a move was not on the drawing board for the foreseeable future. *Russia Spells Out the Terms for More Trade with U.S.*, U.S. NEWS & WORLD REPORT, Mar. 18, 1974, at 59, 62.

38. *See id.* at 63. The very thought that Western venture capitalists would be permitted to bring their profit-seeking capital to the Soviet Union to combine with willing Soviet participants in a partnership to exploit the labor of Soviet workers, be allowed to retain co-ownership of major means of production in the Soviet Union, and be given the

The traditional Soviet concern about allowing unscrupulous foreign capitalists to "rape" Mother Russia of her natural resources no longer seems to dominate the thinking of the modern economic pragmatists in the Soviet Union. This is obviously a healthy and welcome development for Western internationalists because it gives the West a chance to invest in the future of the Soviet economy. Although Gorbachev is generally given all the credit for engineering these changes in Soviet policy, it should be noted that the ideological turnabout of 1987 marked the culmination of a lengthy and soul-searching debate that began in 1980.[39] In other words, Gorbachev is merely an intermediate host for an idea that was conceived long before he took office: he merely inherited the mantle of *perestroika* in 1985.[40]

The Presidium of the USSR Supreme Soviet[41] decided to permit the

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opportunity to repatriate their profits from the Soviet Union was, until 1987, violently antithetical to the spirit of the Bolshevik Revolution and an utter insult to the memories of the revolutionaries who fought to put a permanent end to the evils of capitalism in Russia.

39. For a brief discussion of the progressive steps leading to the adoption of the 1987 joint venture decrees, see Recent Development, *Foreign Investment: New Soviet Joint Venture Law*, 28 HARV. INT'L L.J. 473, 474 (1987).

40. Gorbachev himself lends credence to the notion that the ideas culminating in the promulgation of the policy of *perestroika* in April 1985 were planted in the Soviet political consciousness long before he was elected to office in March 1985. A passage in his recent book acknowledges:

> An unbiased and honest approach led us to the only logical conclusion that the country was verging on crisis. This conclusion was announced at the April 1985 Plenary meeting of the Central Committee, which inaugurated the new strategy of perestroika and formulated its basic principles.
>
> I would like to emphasize here that this analysis began a long time before the April Plenary Meeting and that therefore its conclusions were well thought out. It was not something out of the blue, but a balanced judgment. It would be a mistake to think that a month after the Central Committee Plenary meeting in March, 1985, which elected me General Secretary, there suddenly appeared a group of people who understood everything and knew everything, and that these people gave clear-cut answers to all questions. Such miracles do not exist. . . .
>
> I want to make the reader understand that the energy for revolutionary change has been accumulating amid our people and in the Party for some time.

M. GORBACHEV, *supra* note 5, at 24-25 (footnotes omitted). In an earlier passage in the same book, Gorbachev also notes:

> The Communist Party made a critical analysis of the situation that had developed by the mid-1980s and formulated this policy of perestroika, or restructuring, a policy of accelerating the country's social and economic progress and renewing all spheres of life. Soviet people have both understood and accepted this policy.

Id. at 10.

41. Under the USSR Constitution of 1977, the Presidium of the USSR Supreme

creation of international joint ventures with the participation of Western capitalists and to operate such enterprises inside the USSR as part of the general effort to breathe new life into an economic system that was experiencing a process of slow but certain death. Clearly, the drafters of the Joint Venture Law of 1987 did not expect it to be a panacea that would catapult the Soviet Union into the league of major players in the world's economic system. In fact, the goals of the new provisions are quite modest given the enormity of the problems confronting the Soviet economy today. Moreover, the authors of the law of 1987 did not seem daunted by the fact that its Eastern European antecedents have failed woefully. The Soviets embraced a relaxed view of joint ventures with full knowledge that earlier socialists reforms in this area had not triggered chain reactions leading to the modernization of collapsing economies.[42]

Considering both the limited goals of the 1987 Joint Venture Law and the previous socialist shortcomings in this area, the new law reflects the gambling spirit of *perestroika*. The law was conceived as one of the many instruments of "restructuring" of the Soviet economy;[43] in this

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Soviet is a permanent organ of the Soviet federal legislature. The Presidium presently consists of 39 members, all of whom are members of the Supreme Soviet. KONST. SSSR (1977), art. 120. The Presidium is a creature of the USSR Constitution, *id.* art. 119, and is endowed with its separate original jurisdiction. *Id.* art. 121. When the legislature (the Supreme Soviet of the USSR) is in recess, the Presidium assumes certain caretaker powers on behalf of the legislature. The promulgation by the Presidium of one of the three joint venture laws of 1987 was an exercise of its original jurisdiction.

On December 1, 1988 the USSR Supreme Soviet adopted certain amendments to the Soviet Constitution. Under these amendments, the Congress of People's Deputies is the new supreme legislative organ of the USSR and convenes once a year. The Congress will elect a Supreme Soviet of the USSR, which will hold spring and autumn sessions, each running for two or three months. The Supreme Soviet in turn elects a Presidium of the USSR Supreme Soviet which is headed by a chairman. The Supreme Soviet of the USSR will also elect a Council of Ministers of the USSR as it presently does. Thus, under the December 1988 amendments, the subordinate role of the Council of Ministers to the Supreme Soviet remains the same, and the Presidium of the Supreme Soviet continues to operate as the permanent organ. *See Gorbachev's Plan to Realign Power Voted by Soviets*, N.Y. Times, Dec. 2, 1988, at 1, col. 5.

42. The fundamental inadequacy of the Soviet economy may have led the Soviets to disregard these prior socialist failures. *See supra* note 24; *see also infra* Part IV, B (comparing other socialist joint venture programs).

43. Besides offering incentives to attract production-oriented foreign investments to the Soviet Union, the architects of *uskorenie* apparently realize that the flagging Soviet economic reform process needs an additional boost through increased imports of consumer goods. Academician Leonid Abalkin, a leading pro-*perestroika* economist, recently spoke out in favor of a general strategy to supplement the stepped-up production of goods at home with a consumer goods import policy. *Top Soviet Backing for Consumer Imports*, Financial Times (London), Nov. 3, 1988, at 2, col. 6. *See infra* note 111 (discuss-

sense, it owes its existence to *perestroika*, and its fate is inseparably linked to the success or failure of that policy. Unfortunately, the 1987 Joint Venture Law is greatly hampered by the fact that *perestroika* does not go far enough in its efforts to privatize the Soviet economy. As a result, the law was drafted in a way that will prevent it from realizing its fullest potential.

This leads to the question of what exactly *perestroika* seeks to accomplish. In the words of its principal architect, *perestroika* is

> a more or less well considered, systematized program . . . to outline a concrete strategy for the country's further development. [It is] a plan of action [whose] principal priorities are known to lie . . . in a profound structural reorganization of the economy, in reconstruction of its material base, in new technologies, in investment policy changes, and in high standards in management. All that adds up to one thing—acceleration of scientific and technological progress.[44]

Uskorenie, the policy of acceleration of economic growth, goes to the heart of the economic reform of the Soviet system.[45] It consists of two long-range projects: (1) the revitalization of the domestic economy; and (2) the integration of the Soviet Union into the world economic system.[46] These are monumental tasks which, if successful, would constitute the "program-maximum" of *uskorenie*.

The decision to permit the creation of East-West business joint ventures in the Soviet Union may yet be judged the most important cog in the wheel of *uskorenie*. But even if the Joint Venture Law of 1987 manages to bring $5 to $10 billion in Western investments into the Soviet economy during the next ten years, the economic goals of *uskorenie* would remain unrealized. Any serious attempts to restructure the Soviet economy and place it on a sound footing must address various core policy issues. First, meaningful economic reform is not possible unless the Communist Party relinquishes some of its dictatorial powers over the economic life of the country. The meddling of Party bureaucrats in economic planning presents the single most important obstacle to the realization of the full potential of the policy of *uskorenie*. Any economic re-

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ing recent Soviet Government decision to import consumer products).

44. M. GORBACHEV, *supra* note 5, at 27.

45. *See supra* note 15 (listing recent reforms in Soviet economic law).

46. The Soviet Government's calculated attempts to integrate the USSR into the world economic system was evident both in its recent bid to join the IMF (the International Monetary Fund) and the World Bank, and in its abortive attempts to join GATT (the General Agreement on Tariffs and Trade). For a discussion of these Soviet efforts, see Recent Development, *supra* note 39, at 478. *See also infra* note 164.

form that refuses to curtail the powers of these economic czars within the Party's apparatus is doomed to failure.[47]

Second, the Soviet Union cannot become integrated into the world economy unless the ruble is transformed into a convertible currency. At present, the ruble cannot be converted into foreign currency inside or outside the Soviet Union. A foreign investor who wants to invest his capital in the Soviet economy would think twice about doing so if he realized that he could not take out his profits from that investment in the form of some hard currency. This chilling factor alone serves to isolate the Soviet Union from the rest of the world. If the Soviet Union is to play a larger role in the world economy, it must devise at least a partially convertible ruble.[48]

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47. *See* Bovard, *Eastern Europe, the New Third World*, N.Y. Times, Dec. 20, 1987, at F3, col. 1 (editorial) ("Cosmetic changes are not enough to resurrect a bankrupt system. As long as the economy remains the private fiefdom of the Communist Party politicians, Russia will continue reaping a bumper harvest of poverty."). In response to such assertions, two Soviet scholars stated:

> It should be stressed that the proposition according to which "either modernization will fail or the CPSU must give up its leading role" is itself fundamentally false. The objective demands of perestroika consist not in seeking a confrontation between the leadership of the Party and the leadership of the state over the country's economy, but, in the elimination of the duplication and subversion by Party organs of the functions of state organs and other economic instrumentalities in the further development of the principle of democratic centralism, in the substantial improvement in the quality of Party leadership in restructuring the country's economy. After all the Party is the initiator of perestroika and it is the Party that will direct it. At the February, 1988 Plenum of the Central Committee of the CPSU it was noted that it is precisely the Party that can and must "select and equip the entire society with the weapons that would truly serve socialism, that would be responsive to its developmental interests, that would move us towards socialist rather than some other alien or 'borrowered' goals."

Deev & Chetvernin, *Perestroika v SSSR: nekotorye stereotipy politiko-pravovoi sovetologii* [Perestroika in the USSR and Some Stereotypes of Politico-Legal Sovietology], 7 SOV. GOS. & PRAVO 48, 50 (1988) (quoting M.S. Gorbachev, Speech at the Plenum of the Central Committee of the USSR Communist Party, Moscow, Feb. 12, 1988, at 8-9).

48. During numerous conversations with Soviet foreign trade officials, the author was given the impression that the Soviet Government is acutely aware of Western businessmen's concern about this issue in Soviet trade with the West. The Soviets will probably change their attitude toward ruble convertibility in the not-too-distant future. In fact, a recent report from Moscow confirms the widespread expectation that the Soviet Government will soon adopt a position in favor of a convertible ruble. *See Politburo Backs Plan for Convertible Ruble and Trade Expansion*, Financial Times (London), Oct. 10, 1988, at 1, col. 3. Another well-informed Western source cautions, however, that the decision to make the ruble convertible may not be expected anytime soon because Soviet debate on this subject is presently confined to the ranks of the economists, rather than the proper authorities within the government. *See Soviets Openly Discuss Ruble Convertibil-*

Third, the Soviet Union cannot attain the lofty goals of *uskorenie* unless it totally abandons the constitutional principle of state monopoly of foreign trade. The fundamental incompatibility between the spirit of *uskorenie* and state monopoly of foreign trade operations will require alterations in some of the current practices associated with that monopoly. The Soviet Government seems to have acknowledged this problem, as evidenced by recent moves in this area. For example, it has allowed certain enterprises to engage directly in foreign trade operations[49] and permitted direct contacts between Soviet ministries and departments and foreign markets.[50] Nevertheless, the Soviets have not introduced any meaningful measures to decentralize control of foreign trade at the level of the mega-department.[51] While the decision of the Joint Venture Law of 1987 to permit East-West joint ventures to engage directly in foreign trade operations is a welcome derogation from the principle of state monopoly of foreign trade, similar erosions of the state monopoly must occur if *uskorenie* is to succeed.

Finally, Soviet economic development cannot accelerate within the context of the present administratively-determined pricing system and the overwhelming influence of the central planning bodies. Even more fundamentally, the Soviet Union will not become a major economic power until it repudiates the present system of artificially-imposed economic plans. Soviet economic development programs have never shown signs of good planning. And even if the planning were good, past Soviet experience reveals that centralized planning stifles economic growth and harms the economy.[52] Until the modern proponents of *uskorenie* under-

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ity, BUS. E. EUR., July 4, 1988, at 212; *but see infra* text accompanying note 422 (discussing December 1988 directive for specific proposals regarding ruble convertibility).

49. Although foreign trade organizations (FTOs) and foreign trade firms (FTFs) are subordinate to particular ministries or departments, they are allowed to engage directly in foreign trade operations. *See infra* note 262; *see also* Zabijaka, *Soviet Foreign Trade Reforms Offer New Challenges for US Business*, BUS. AM., Aug. 17, 1987, at 6-9 [hereinfter *Soviet Foreign Trade Reforms*].

50. As part of the new wave of measures designed to improve "the foreign trade activity" of Soviet enterprises, twenty-one Soviet ministries and departments were granted the right to enter into direct foreign trade transactions with foreign entities. *Soviet Foreign Trade Reforms*, *supra* note 49, at 6-7 (listing Soviet ministries and departments receiving these rights). Seventy Soviet enterprises received similar rights. *Id.*

51. A recent Soviet study urged similar reforms as well as other more daring changes. *See* Boguslavskii & Smirnov, *Pravovye problemy sovershenstvovaniia vneshneekonomicheskoi deiatel'nosti* [Legal Problems Connected with Measures Aimed at Improving the System of Foreign Economic Activities], 6 SOV. GOS. & PRAVO 29, 31-34 (1987).

52. Under the central planning system, "the rate of growth of the Soviet economy

stand these basic laws of economic management, the Soviet economy will never be cured of its artificially-induced ailments.[53]

Gorbachev's recent economic reforms have the breathtaking sweep of a historic event. Yet, while they are bold in many respects and quite unprecedented in Soviet history, these reforms neither have an innovative greatness nor portend to transform the Soviet Union into a first-rate economic power. To build a new house on an old site, the *perestroikists* will have to knock down a few old walls. Gorbachev's policy of *uskorenie* has yet to show the willingness to knock down enough of the old walls of the existing Soviet economic system to make his reforms work. This prompts the conclusion that the current economic reforms in the Soviet Union do not qualify as the revolutionary restructuring of the Soviet system that true *perestroika* nominally reflects. At best, these reforms may be described merely as a genuine *peredyshka* (an interlude). Although Gorbachev's reforms have taken the Soviet economy forward from the dangerous conditions existing in 1985, the next step must be a complete jump, an overhaul which will ensure that the Soviet economy lands on its feet. Hence, to the extent that the present *peredyshka* could actually lead to a real *perestroika*,[54] it is a welcome development. Half a loaf of

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had been falling steadily throughout the Brezhnev era to a nadir of close to zero during the early 1980's. That performance marked the terminus of the old path of Soviet development, in which growth depended on the exploitation of ever-greater amounts of capital and natural resources." *The Perils of Perestroika*, *supra* note 6, at 16, col. 1. Instead of adhering blindly to the ideology of central planning, the Soviets should seek "improvements in the efficiency of resource use—precisely what the Soviet system of quantitative planning cannot secure." *Id.*

53. Reports from Moscow suggest that Soviet authorities are beginning to reexamine that country's central planning dogma. Relaxation of the present system of central planning is also supported by reform-minded Soviet economists such as Leonid Abalkin and Abel Abanbegyan. *See Soviet Economic Planning to Alter Radically*, Financial Times (London), Nov. 14, 1988, at 32, col. 1.

54. The Soviet Government is reportedly considering various reforms that would establish *perestroika* as a true engine for economic and social change. In fact, on October 15, 1988, the USSR Council of Ministers issued a decree authorizing Soviet enterprises to issue stocks for sale to workers of the issuing enterprise (so-called "workers' collectives stocks") and to other enterprises and organizations (so-called "enterprise stocks"). *O vynuske predpriiatiiami i organizatsiiami tsennykh bumag* [On the Issuance of Stocks by Enterprises and Organizations], 35 SP SSSR Item 100 (1988) (Decree (*Postanovlenie*) of the USSR Council of Ministers) [hereinafter Stock Decree]. Other proposed reforms include a plan to set up an export credit agency (which would introduce a more Western-style foreign trade regime to the Soviet Union), and the creation of a stock market in Moscow. *Soviet Union May Set Up Export Credit Agency*, Financial Times (London), Oct. 28, 1988, at 5, col. 1; *Moscow To Sell Shares In State Bodies and Create Stock Market*, Financial Times (London), Oct. 28, 1988, at 1, col. 2.

bread is better than none.

Although the policy of *uskorenie* is doomed to failure unless the Soviet Government undertakes to reform the Soviet economic machine along the lines discussed in the foregoing paragraphs, the "program-minimum" of *uskorenie* can nevertheless succeed even if its "program-maximum" fails. With proper management, for example, the Soviet Government can attain some, if not all, of the goals envisioned in the 1987 Joint Venture Law. Even if *uskorenie* fails in part or as a whole, there is every reason to believe that foreign investments already in operation in the Soviet Union will be protected against expropriation or any other form of unlawful tampering by the Soviet Government.[55]

While the jury is still out on the future of *perestroika*, the business opportunities offered by the legal reforms of 1987 are too good to be left unheeded by Western entrepreneurs. By entering the Soviet market at this time, the Western businessman will both realize profits and contribute to the success of Gorbachev's economic experiments. Because investments are safe and the margin of profits to be made enormous, the Western businessman should jump now, albeit with some caution, at the opportunities offered by *perestroika*—without awaiting the final verdict on the fate of Gorbachev or his experiment in social engineering.

IV. THE INHERENT HAZARDS OF JOINT VENTURES IN THE SOVIET UNION

A. *Identifying the Hazards*

With or without *perestroika*, doing business in the Soviet Union has been and will be tantamount to an ultrahazardous activity. As in the past, the Soviet system will continue to produce a few unusual headaches,[56] frustrations, and moments of discouragement for the Western

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Other reports indicate that the Soviet Government might allow Western advertising on state television during certain selected programs. Indeed, in September 1988, British Airways became the first European company to advertise on Soviet television. *See Concorde Cracks Soviet TV Advertising Barrier*, The Times (London), Sept. 30, 1988, at 22, col. 2. Although regulations permitting Western advertisements on Soviet television channels have been in effect since June 1987, current practice only permits advertisements concentrating on "new technologies, know how, equipment for the light and food industries, computers and industrial robots." *Soviets Propose TV Ads to Introduce Technology*, BUS. E. EUR., Aug. 15, 1988, at 260-61. According to this scenario, "Western 'spots' will be shown twice a month in a 45-minute block . . ." *Id.* at 261.

55. If any future Soviet Government decides to rescind the 1987 Joint Venture Law, it will likely provide a grandfather exception for the existing foreign investments in that country. *See supra* note 12 (discussing Soviet reliability as a trading partner).

56. A Western company in the process of setting up offices in Moscow, for example,

businessman. This is so because, for the Western entrepreneur, joint venturing in the Soviet Union is like going on a fishing expedition in unfamiliar waters. During such an undertaking, as in any outing at sea, he should expect to encounter high tides as well as low tides. He will run into deep waters and shallow waters. Most important, inclement weather at sea could affect the quality and quantity of his catch. To prepare for all possible eventualities, a good fisherman will set out fully equipped not only with navigational instruments, but also with weather reports and a detailed study of the fauna and flora of the waters in which he expects to fish. Therefore, to embark on a joint venture operation in the Soviet Union without adequate preparation unnecessarily aggravates the inherent risks of any transnational commercial operation of this sort. It is hoped that this study of the Soviet Joint Venture Law of 1987 will help the prospective Western investor know more about the total investment climate in the Soviet Union. Consequently, this Article will consider not only the relevant aspects of Soviet law on the books, but also the business practices of the various Soviet foreign trade institutions and the domestic and international political climate that could affect the results of such investments. The analysis begins by examining the "bait" that lures the Western entrepreneur into the Soviet Union. Of the three laws promulgated on January 13, 1987,[57] one specifically permits East-West business joint ventures in the Soviet Union, and has, for obvious reasons, received the abiding attention of Western commentators.[58] This

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encountered problems with the incredibly restrictive Soviet rules governing the use of photocopiers. The rules provide that "all photocopying equipment must be kept in a room with steel doors. If it is kept on the ground floor there must also be bars on the window. In addition, its use has . . . to be governed by a strict rota with only one authorized person at any one time in the room." *Soviet Originals,* INT'L FIN. L. REV., Dec. 1988, at 6. The Soviet Government recently decided to break the long-standing embargo on free access by Soviet citizens to photocopying and printing machines inside the Soviet Union. The decision to permit two Western companies—Rank Xerox and Alpha Graphics—to set up photocopying joint ventures with Soviet partners in Moscow reflects this change of attitude on the part of the Soviet authorities. *See Glasnost Paves Way for Photocopying Ventures in Moscow,* Financial Times (London), Mar. 10, 1989, at 6, col. 1.

57. *See supra* note 4.

58. Virtually all of the commentaries on the recent Soviet joint venture legislation and decrees published in the West have dealt only with the Joint Venture Law of 1987. *See, e.g.,* Aronson, *The New Soviet Joint Venture Law: Analysis, Issues and Approaches for the American Investor,* 19 L. & POL'Y INT'L BUS. 851 (1988); Carpenter & Smith, *U.S.-Soviet Joint Ventures: A New Opening in the East,* 43 BUS. LAW. 79 (1987); Dean, *New Book on Soviet Joint Venture Law,* INT'L FIN. L. REV., Jan. 1989, at 26 (reviewing THE ICC GUIDE TO JOINT VENTURES IN THE USSR (1988)); Dunn, *The New Soviet Joint Venture Regulations,* 12 N.C.J. INT'L L. & COM. REG. 171 (1987); Hober, *Joint*

law, the Joint Venture Law of 1987, provides the centerpiece of this analysis.

The Soviets carefully prepared the 1987 Joint Venture Law, whose drafting is much better[59] than that of its Chinese counterpart.[60] Yet the law is wanting in many critical respects. The fact that it has already been amended several times during the past year[61] suggests that the Soviets are simply feeling their way as they go along the unfamiliar path of hosting international joint ventures in their territory. In addition, some Western commentators feel that certain aspects of the law are arguably unconstitutional.[62] While many Western observers praise it as permitting

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Ventures With the Soviet Union, INT'L FIN. L. REV., Nov. 1987, at 15 [hereinafter Hober, *Soviet Joint Ventures*]; Hober, *Negotiating Joint Ventures in the Soviet Union,* INT'L FIN. L. REV., Nov. 1988, at 34 [hereinafter Hober, *Negotiating Joint Ventures*]; Sherr, Briefing Paper #1, Socialist-Capitalist Joint Ventures in the USSR: Law and Practice (a project of the Center for Foreign Policy Development, Brown University) (May 1988); Viehe, *Joint Ventures in the Soviet Union Under the New Regime: Boom or Bust,* 1 TRANSNAT'L LAW. 181 (1988); Recent Development, *supra* note 39.

59. The joint venture law adopted by the People's Republic of China in 1979 has been described aptly as "consistently imprecise, significantly ambiguous and marginally advantageous." Note, *The Joint Venture Law of the People's Republic of China: Business and Legal Perspectives,* 7 INT'L TRADE L. J. 73, 110 (1981-83). Another commentator has criticized the law's drafting as "sloppy and inconsistent" and "on its face, replete with ambiguities and open to questions." Rich, *Joint Ventures in China: The Legal Challenge,* 15 INT'L LAW. 183, 209 (1981).

60. The Chinese joint venture law was adopted on July 1, 1979 and became effective on July 8, 1979. Note, *Joint Ventures in the People's Republic of China,* 14 J. INT'L L. & ECON. 133, 133 n.4 (1979). Despite its many faults, the Chinese joint venture law seems to have been quite successful in attracting Western investments to China. Some observers estimate that between 1979 and 1987 over $5.85 billion of Western investments have flowed into China as a result of this law. This is quite a success by any standard of measurement. By contrast, the Eastern European joint venture laws have been obvious failures; they have not attracted any appreciable amount of Western capital into the economies of the respective countries. Early estimates suggest that the Soviet efforts in this regard will succeed as much as, and possibly more than, those of China.

61. The various amendments to the 1987 Joint Venture Law involve such broad areas as Soviet certification procedures, taxation, and extent of foreign ownership. These amendments are discussed in Part VI, *infra.*

62. One American observer has suggested that article 23 of the 1987 Joint Venture Law, which permits international joint ventures to operate outside the framework of state economic planning, contradicts the principle of a unified state plan in article 16 of the USSR Constitution of 1977. *See* Recent Development, *supra* note 39, at 480. Yet, a close examination of these two principles reveals that they are in fact perfectly reconcilable. Article 16 of the USSR Constitution proclaims that the Soviet economy "is an integral economic complex" consisting of different elements, and that the economy shall be "managed on the basis of state plans for economic and social development." KONST. SSSR (1977), art. 16. This does not mean that all "elements" of that economy must be "man-

the creation of "joint ventures,"[63] this law contemplates entities that would not qualify as joint ventures according to Western standards.

The Soviet Government wants this law to accomplish gains for the Soviet economy that are fundamentally at odds with what the Western venture capitalist or entrepreneur has in mind when he agrees to enter a joint venture with a Soviet partner. From this incongruity of expectations flows the first set of problems that one may associate with joint venturing in the Soviet Union: the inability of the foreign investor to repatriate his Soviet profits in the form of hard currency; the expectation that a Western manufacturer who produces goods in the Soviet Union must be prepared to engage in some form of counter-trade; and the inability of the Western enterprise to retain its local employees for a long period of time. Let us examine each of these disincentives.

The American venture capitalist or entrepreneur who agrees to form a joint venture with a Soviet partner does so for one obvious reason—to make a profit, which he in turn expects to repatriate under the most favorable terms and conditions. He wants the Soviet authorities to guarantee the safety of his investments, and to respect his patent rights to any technology that he might bring along. Conversely, the Soviet Government wants the Joint Venture Law to achieve numerous goals, which in their totality constitute the "program-minimum" of *uskorenie.* Accordingly, the Soviets seek to (1) attract foreign capital investments; (2) disallow the outflow of hard currency from the Soviet Union unless such currency entered with the foreign investors; (3) entice advanced Western technology; (4) expose Soviet economic managers to Western management techniques; and (5) produce export income for the Soviet Union.[64] The Soviet government's interest in earning export income from the joint venture is so pronounced that its overall strategy favors manufacturing-oriented foreign investments over those that call for the sale of goods or

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aged on the basis of state plans." For example, private cooperatives are an "element" of the integrated Soviet economy, but they are not subject to "state planning." *See* On Cooperatives in the USSR, *supra* note 15, at preamble (recognizing "the independence of cooperatives in making decisions relating to the fulfillment of their duties under their charter"); *id.* art. 10(2) ("interference in economic and other activities of a cooperative by state . . . organs . . . shall not be tolerated"). Similarly, the international joint ventures are an "element" of the same economy, though they are not subject to "state planning." Recent amendments to the 1987 law, however, include provisions that appear to be plainly unconstitutional. *See infra* Part VI, B.

63. *See, e.g.*, Hober, *Soviet Joint Ventures, supra* note 58, at 15; Recent Development, *supra* note 39, at 481.

64. 1987 Joint Venture Law, *supra* note 4, art. 3.

the provision of services inside the Soviet Union.[65]

Those companies that agree to enter the Soviet Union to manufacture goods are thus forewarned that they must devise a plan that will provide the Soviet Union with export income. This means, for example, that a Western concern attempting a manufacturing joint venture in the Soviet Union must be willing to set up a marketing network for the sale of its goods outside the country and must be amenable to taking out some of its ruble profits in the form of other goods purchased in the Soviet market.[66] Many Western manufacturers have been dissuaded from pursuing opportunities under the new law, expecting that one must also be a trader to form an international joint venture in the Soviet Union.[67]

Luckily for the Soviet Union, many Western banks (notably West German, British, Italian, French, Japanese, and Canadian) have shown interest in offering hard currency loans to the Soviet Government to help it pay for some of its *perestroika* projects.[68] If these loans prove to be

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65. In the unequivocal language of article 3 of the 1987 Joint Venture Law, Soviet Ministries and Departments seeking foreign partners for joint ventures are urged "to expand the national export sector and to reduce superfluous imports." *Id.*

66. Pending resolution of the problem of ruble non-convertibility, there are many ways in which the Western investor in the Soviet Union can minimize the impact of the current operational limitations. Nine such creative devices are discussed in Scherr, *supra* note 58, at 8-14. According to this study, these methods include the following: barter, countertrade and buy-back arrangements; making the most of ruble expenses; shifting hard currency profits from the Soviet to the foreign partner; sales of hard currency to Soviet enterprises; sales by the foreign partner to the joint venture; insistence on exclusive marketing and distribution rights to the final products of the joint venture; access to new markets; getting a corporate foot in the door; and generating hard currency inside the USSR. *Id.*

67. During the past two years, the author has spoken to many prospective Western investors, each of whom had one basic question on his mind: What shall I do with my ruble profits? Many of them seem to be adopting the position that they will not invest in the Soviet Union until the Soviet Government resolves the question of ruble non-convertibility.

68. West German bankers are among the many Western financiers who have offered substantial foreign currency loans to the Soviet Government since the onset of *perestroika. See German Cash to Back Gorbachev Economic Reform*, The Times (London), Oct. 26, 1988, at 8, col. 6 [hereinafter *German Cash*]. British banks have also offered loans to the Soviet Government trade credit facility in the amount of £ 1 billion, backed by Government guarantees. *We Pay for Perestroika*, The Sunday Times (London), Oct. 23, 1988, at B2, col. 1. At first the Soviet Government backed away from negotiating a £ 1 billion trade credit from British banks "after the efforts generated an embarrassing degree of publicity about Soviet foreign borrowing levels." *Moscow To Sign UK Bank Protocol*, Financial Times (London), Feb. 9, 1989, at 30, col. 1. Nevertheless, the Soviet Government now may be prepared to sign a bank protocol with a group of British banks. *Id.*

substantial, they may help to captivate the interest of some prospective Western investors who otherwise would have stayed away from the Soviet market. It is reasonable to expect, however, that some Western governments will oppose any attempts by Western banks to offer large hard currency loans to the Soviet Government on "giveaway" terms.[69]

One very important goal of the new Joint Venture Law, which many in the West tend to underestimate, is to provide the Soviet Union with access to Western management and production techniques. The Soviets expect that the joint venture will provide management training for Soviet managers, who will in turn use their new skills to run the Soviet economy as managers of hotels and other tourist facilities, operators of restaurants, and directors of public transportation organizations.[70] To expose as many Soviet managers as possible to the Western management techniques of these international joint ventures, the Soviet authorities invariably will recruit local employees for these businesses, and feel tempted to rotate the Soviet workers quite frequently. This would naturally deny joint ventures the continuity of service of its local personnel. It would also increase the cost of retraining new employees to replace those

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A report on the availability of Western bank loans to the Soviet Union suggests that the Soviet Union set up credit lines from Western banks in October 1988 totalling more than $6 billion. *He Wants Western Credits*, Wash. Post, Dec. 11, 1988, at C7, col. 5. According to this report, "West German banks led the way with a $1.8 billion package, followed by banks in Italy ($775 million), Great Britain ($1.8 billion), and France ($2 billion)." *Id.* The report also suggested that "[a]dditional credit lines from Japanese and Canadian banks were under discussion," and that the total amount of new Soviet credit is approximately $9 billion. *Id.* United States banks were conspicuously absent from these deals. Indeed, influential United States congressmen reportedly are preparing legislation that would penalize the United States subsidiaries of foreign banks if they extend credit to the Soviet Union. *Congress May Act Over Western Loans to Moscow*, Financial Times (London), Nov. 2, 1988, at 4, col. 6.

69. Prime Minister Margaret Thatcher of Great Britain has steadfastly opposed such loans. According to one of her aides, Mrs. Thatcher regards giveaway loans as "a waste of taxpayers' money to fund the incompetence of the Russian system'." *Thatcher Warns: "Beware of Paying for Russia's Reforms"*, The Times (London), Oct. 23, 1988, at 1, col. 1 [hereinafter *Thatcher Warns*]. While delivering a lecture at Oxford University, the British Foreign Secretary, Sir Geoffrey Howe, noted that Western economic assistance to the Soviet Union would not replace the need for a fundamental reform of the Soviet economy. *Howe Attacks "Marshall Plan" For Soviet Economy*, Financial Times (London), Oct. 28, 1988, at 1, col. 2. In the same speech, Sir Geoffrey opposed a new version of the Marshall Plan for the Soviet Union. *Id.* The Reagan administration was equally opposed to any Western bank subsidies to the Soviet Government. *See Thatcher Warns, supra*, at 1, col. 1.

70. *See* 1987 Joint Venture Law, *supra* note 4, art. 3 (stating that one purpose of the law is "to attract . . . management expertise . . . to the USSR national economy").

removed by the Soviet recruiters.

Closely related to the foregoing set of problems is yet another hazard of joint venturing in a centrally-planned economy; that is, motivating Soviet employees to share the joint venture's zeal for profits. The profit motive is the locomotive that propels the capitalist work machine. Even though the Soviet work ethic proclaims that "he who does not work neither shall he eat,"[71] the system does not predicate the quality of "food" that is to be placed on the workers' tables upon the quality of their work. Because the quality of the workers' food is uniformly poor, the only incentive in the system is for the worker to show up and pretend to work while the employer pretends to pay him. Therefore, workers weaned on the Soviet system of guaranteed job security regardless of the quality of work naturally will reject any attempt to vary pay according to productivity. Transforming the lazy and disinterested Soviet worker into a hard-driving, highly-motivated, profit-oriented worker may yet prove to be one of the most difficult operational problems for the joint venture in the Soviet Union.[72]

An entirely different set of potential problems for a joint venture operation in the Soviet Union derives from the fact that the Joint Venture Law operates against the backdrop of a legal system whose economic law (the branch of Soviet law that governs planned contractual relationships among the respective state enterprises)[73] rejects the operational autonomy of the contracting parties that is proclaimed in the Joint Venture Law itself. Having a capitalist enclave, the East-West joint venture, within a

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71. This principle—the cornerstone of the socialist work ethic—is enshrined in the USSR Constitution. *See* KONST. SSSR (1977), art. 60. It also constitutes the basis for the anti-parasite provision of the Russian Soviet Federative Socialist Republic [RSFSR] Criminal Code, under which it is a crime for any able-bodied Soviet citizen not to be gainfully employed. RSFSR Criminal Code (1964), art. 209, *reprinted in* 23 LAW IN EASTERN EUROPE: THE SOVIET CODES OF LAW 133 (1980) [hereinafter LAW IN EASTERN EUROPE].

72. Evidence of this potential problem may be gleaned from the experience of Western joint ventures in other Eastern European markets. A recent report from Belgrade, Yugoslavia, indicated that local employees of the first McDonald's to open in a communist country are quitting en masse because they refuse "to work like Westerners." *McDonald's Staff in Yugoslavia Finds Work is Too Hard*, Wall St. J., May 27, 1988, at 2, col. 4. In the words of a former McDonald's employee "the work was so hard that I could not stand it any more." *Id.* According to an eyewitness account "[t]hose young people who quit probably . . . expected they could do their jobs the Yugoslav way—relax at work but still receive wages." *Id.* This is happening in a country with a high unemployment rate.

73. The latest codification of the principles of Soviet economic law is embodied in the Law on State Enterprise, *supra* note 15.

rigidly-controlled, centrally-planned economy is as anomalous as introducing a strange animal from a desert into the tundra. The Western partner entering into a joint venture agreement with a Soviet partner may very well be able to reach some agreement as to how the joint venture should operate, only to learn later that the agreement operates as a *lex specialis* which may be rendered inapplicable by an overriding provision of a general Soviet law. The possibility of such a conflict is particularly present in the area of labor law, where a joint venture may find that the terms of its employment contract with its employees are void under the imperative norms of Soviet labor legislation.[74]

Among the many pieces of modern Soviet law that intersect like a jigsaw puzzle with the Joint Venture Law are the following: (1) the Civil Code;[75] (2) the Code of Civil Procedure;[76] (3) the Labor Code;[77] (4) the Land Code;[78] (5) the statutes of the respective state agencies and departments involved in foreign trade operation;[79] (6) the statute of the Arbitration Court attached to the USSR Chamber of Commerce;[80] (7) the statute of the State Arbitration Commission;[81] (8) an extremely com-

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74. *See infra* notes 435-40 (discussing unconstitutionality of the December 1988 amendments to the Joint Venture Law granting the joint venture the authority to determine the terms for the hiring and firing of Soviet employees).

75. The Civil Code defines the legal capacity of the joint venture under Soviet law, governs the numerous contracts which the joint venture will enter, and determines the legal status of state property which may be transferred to the operational management of a Soviet partner in a joint venture. The Civil Code of the RSFSR (1964), *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 387.

76. The Code of Civil Procedure governs all civil actions in the Soviet courts and regulates any conflicts of law problems that might arise in the course of the operation of the joint venture. The Code of Civil Procedure of the RSFSR (1964), *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 673.

77. The Labor Code governs the employment rights of the employees of the joint venture. The Labor Code of the RSFSR (1964), *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 881.

78. The Land Code determines the legal status of the land that a Soviet partner may contribute to the capitalization of the joint venture. The Land Code of the RSFSR (1964), *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 863.

79. These statutes typically define and limit the contracting authority of the respective bodies. *See infra* notes 94-108 and accompanying text.

80. The Arbitration Court attached to the USSR Chamber of Commerce is one of the bodies charged with the resolution of disputes arising from the operation of the joint venture. 1987 Joint Venture Law, *supra* note 4, art. 20.

81. The State Arbitration Commission (Gos Arbitrazh) is responsibile for resolving contract disputes between Soviet enterprises as well as disputes between state enterprises and international joint ventures. *See* State Arbitrazh, Statute, *supra* note 15.

plicated network of insurance rules and regulations;[82] (9) banking and foreign currency control regulations;[83] (10) visa regulations;[84] (11) tax laws;[85] and (12) the Shipping Code.[86] Thus, to operate his business efficiently within this jungle of laws, the Western businessman needs the assistance of a competent expert not only on the Joint Venture Law, but on Soviet law as a whole.

A related source of potential problems with an East-West joint venture derives from the fact that, even when its rules are known to the counsels, Soviet law is generally virgin territory for the Western venture capitalist. Because the principles of that law are alien to the Western businessman, it is difficult to get him to orient his thinking in terms of Soviet law. Furthermore, Soviet law tends to use terms that sound familiar to the Western lawyer, when in fact the terms bear a quite different meaning in the two legal systems. Consequently, although a Western lawyer may find her way through the morass of applicable Soviet law by gaining a superficial familiarity with its principles, she may later discover that legal institutions bearing the same name in both the Soviet

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82. *See, e.g.*, RSFSR Civil Code (1964), arts. 386-90, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 988.

83. Soviet criminal law makes it a capital crime to violate certain Soviet banking and foreign currency regulations. *See, e.g.*, RSFSR Criminal Code (1964), art. 88, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 189. The minimum punishment for violation of these regulations is three years imprisonment, plus confiscation of the objects of the crime.

84. The regulations define the terms of the visa status of the joint venture's foreign employees. The visa and residency status of foreigners in the USSR are governed most comprehensively by three laws. The first two laws were confirmed by a decree of the Council of Ministers of the USSR on May 10, 1984, and entered into force on July 1, 1984. *See Pravila prebyvaniia inostrannykh grazhdan v SSSR* [The Rules for the Sojourn of Foreign Citizens in the USSR], 21 SP SSSR Item 113 (1984); *Pravila tranzitnogo proezda inostrannykh grazhdan cherez territoriiu SSSR* [The Rules for the Transit Passage of Foreign Citizens Across the Territory of the USSR], 21 SP SSSR Item 113 (1984). The final visa law of the USSR is entitled *O pravovom polozhenii inostrannykh grazhdan v SSSR* [On the Legal Status of Foreign Citizens in the USSR], 26 Ved. Verkh. Sov. SSSR Item 836 (1981).

85. In addition to the tax provisions contained in articles 36-43 of the 1987 Joint Venture Law, the other tax law that is relevant to the joint venture and its foreign employees is *O podokhodnom naloge s inostrannykh iuridicheskikh i fizicheskikh lits* [On the Income Taxation of Foreign Juridical Persons and Individuals], 20 Ved. Verkh. Sov. SSSR Item 313 (1978) (Decree of the Presidium of the USSR Supreme Soviet) [hereinafter Decree on Taxation of Foreign Persons]. *See infra* Part V, D.

86. The Shipping Code regulates all aspects of the carriage of goods by sea or in the internal waters of the Soviet Union. The Merchant Shipping Code of the USSR (1964), art. 1, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 1145.

system and her native legal system do not necessarily have the same significance. For example, an applicable Soviet law may regard a business enterprise as a "juridical person." When the joint venture deals with such an entity, its Western experience might lead it to believe that it is dealing with an entity that is separate and distinct from the Soviet Government, that the entity bears all the rights and duties that may flow from such a transaction, that as a legal person the entity is fully responsible for any liability that might flow from its legal act, and that its liability can be satisfied by laying claims against its property. A closer look at Soviet civil law, however, reveals that use of the term "juridical person" to define an economic enterprise means something entirely different from what it means in United States law.[87] In reality, if a Soviet juridical person is also a state enterprise and has had certain state property transferred to its operational management, its juridical personality with respect to such property boils down to an elaborate charade: with regard to much of such state property, the juridical person is expected to act as if it had property rights (even though it has none), while the state is expected to act as if it has no property rights (even though it owns everything). This deceptive arrangement is made possible because of what Soviet law refers to euphemistically as the juridical person's "right of operational management" over the state property entrusted to its care.

Another example of the sort of confusion that could arise from the transposition of American terms into a Soviet legal context may be seen in the general use of the term "joint venture" to refer to what the Soviet decree of January 13, 1987, calls *sovmestnoe predpriiatie* (joint enterprise). In United States law, a joint business venture is formed "when two or more persons combine in a joint business enterprise for their mutual benefit, with an express or implied understanding or arrangement that they are to share in the profits or losses of the enterprise, and that each is to have a voice in its control and management."[88] From this definition one could say that under American law a joint venture involves four elements: (1) the creation of a separate legal entity by the joint venturers; (2) co-ownership of the assets of the enterprise; (3) a pro rata sharing in the profits and losses of the joint venture; and (4) the partici-

87. Under Soviet law, for example, a state property transferred to a juridical person's operational management may not be "provisionally attached or subjected to compulsory execution to satisfy claims against the juridical person if such seizure is not permitted by law or if consent is not given by the appropriate state authority." Osakwe, *A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice*, 23 VA. J. INT'L L. 13, 32 (1982).

88. Chisholm v. Gilmer, 81 F.2d 120, 124 (4th Cir. 1936), *aff'd*, 299 U.S. 99 (1936).

pation by the partners in the management of the joint venture. Under Soviet law, by contrast, a joint venture could be formed merely by the partners' co-ownership of business assets and sharing of profits or losses. Neither joint management of the business nor formation of a separate juridical person is required to form a joint venture under Soviet domestic law.[89] Moreover, even under this broad definition of a joint venture, many of the recent business arrangements between Soviet and Western partners do not qualify as joint ventures under Soviet law, regardless of the label that the partners placed on their relationship.[90]

An even more profound difference exists between Soviet and American law regarding the forms of business associations that could do business in the Soviet Union. Unlike American law, Soviet law does not distinguish between a corporation, limited partnership, general partnership, or joint venture.[91] The RSFSR Civil Code treats all of these business associations as virtually the same type of juridical person, and the legal regime assigned to them under article 32 of the Code approximates that of a corporation in American law.[92] As a result, Soviet law treats the joint

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89. Modern Soviet law recognizes two types of domestic joint ventures: one formed by state enterprises, collective farms and other socialist cooperative organizations inter se, and one formed by private individuals inter se. RSFSR Civil Code (1964), art. 434, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 501. Article 435 of the Civil Code stipulates that the partners in a joint venture may agree to assign the management of the enterprise to only one partner who will then be wholly responsible for the daily management of the affairs of the joint venture, to the complete exclusion of the other partner. *Id.* art. 435, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 501. The creation of a separate legal entity by the joint venturers is not required by the RSFSR Civil Code as a prerequisite to the formation of a joint venture. *See id.* arts. 434-38, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 501-02.

90. Although the Western press refers to certain business arrangements as "joint ventures," many do not satisfy either Soviet or American legal requirements. Two recent examples highlight this point: (1) an arrangement between Pan American Airlines (which resumed non-stop flights to the Soviet Union on May 15, 1988) and Aeroflot to share cabin attendants on flights between New York and Moscow; and (2) an arrangement in which a British tour operator (Virgin Holidays) will receive exclusive rights to the 199-room Hotel Oreanda in Yalta from April 1 through October of each year. *A Fling with Glasnost*, U.S. NEWS & WORLD REPORT, Apr. 11, 1988, at 63.

91. A typical Soviet discussion concerning the concept of a corporation embraces every form of business association. For a concise summary of Soviet corporations law, see Reghizzi, *Corporation*, in 1 ENCYCLOPEDIA OF SOVIET LAW 172 (F. Feldbrugge ed. 1973).

92. *See* RSFSR Civil Code (1964), art. 32, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 401. A concise discussion of the legal attributes of a juridical person under Soviet civil law appears in *Litso Iuridicheskoe* [Juridical Person], in A. SUKHAREV, IURIDICHESKII ENTSIKLOPEDICHESKII SLOVAR' [LEGAL ENCYCLOPEDIC DICTIONARY] 204-05 (2d ed. 1987). The RSFSR Civil Code outlines the minimum at-

venture as a corporation with limited liability,[93] thus limiting a Western

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tributes of a juridical person. First, it must be organizationally identifiable as one unit, structurally integrated, and have operational autonomy. Second, it must possess its own property, which may be derived either from the right of ownership or from the right of operational management of the property in question. Third, it must have the capacity to enter civil transactions in its own name, including the capacity to enter into contracts and to be a plaintiff or defendant in any civil action either in a court of law or before a court of arbitration. Fourth, it must be able to bear independent responsibility for its obligations. All of these attributes must be spelled out in the constituent instrument of the entity in question. *See* RSFSR Civil Code (1964), arts. 23-40, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 399-403.

93. Article 32 of RSFSR Civil Code provides that "a juridical person is liable on its obligations to the extent of its property." *See* RSFSR Civil Code (1964), art. 32, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 401. If the juridical person is a state organization it is liable to the extent of the property that is transferred to its operational management. *Id.* If a portion of the property of a juridical person is by law exempted from attachment, it may not be used to satisfy the obligations of the juridical person. *Id.* Article 33 of RSFSR Civil Code restates more vigorously the principle of Soviet civil law according to which the Soviet state may not be held liable for the obligations of a state juridical person and vice versa. *Id.* at 33, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 401. Under the combined effect of the rules stated in articles 32 and 33 of the RSFSR Civil Code, the liability of a juridical person that is also a state organization is strictly limited to that portion of state property which is assigned to the operational management of the juridical person in question. A Western investor should be wary of this concept of "operational management of state property" whenever it enters into a joint venture arrangement with a Soviet state enterprise as a partner.

Under Soviet civil law, the right of operational management is a proprietary right which is similar to, but somewhat less wholesome than, the right of ownership. A juridical person endowed with the right of operational management, as opposed to the right of ownership, retains the same rights as those that flow from the right of ownership: the right of possession, use and disposition of the property in question. The difference, however, is that the right of ownership, as far as it relates to the possession, use and disposition of a given property, is limited only by those restrictions that are generally imposed by law.

By contrast, an entity that merely enjoys the right of operational management of property may possess, use and dispose of that property not only in accordance with the general legal limitations that apply to the right of ownership, but also in strict accordance with any additional limitations that may be imposed on its operations by its constituent instrument. The right of operational management is a derivative right in the sense that it is inextricably linked with the primary right of ownership of the property in question. Thus, an entity (A) that is granted the right of operational management is responsible to the entity (B) which owns the property in question. Equally important, the scope of the right of operational management tends to vary depending on the particular object over which the right is exercised. Therefore, an entity endowed with the right of operational management may dispose of moveable property, such as excess goods and equipment, but may not dispose of an immovable property such as a building or land that is transferred to its operational management. *See generally Pravo Operativnogo Upravleniia* [Right of Operational Management] in A. SUKHAREV, *supra* note 92, at 270.

investor's ability to take losses through the partnership vehicle.

The sheer monstrosity of the Soviet bureaucracy presents an equally unsettling problem for the Western venture capitalist in the Soviet Union. The paperwork involved in creating a Soviet joint venture is mind boggling. If the joint venture proposes to carry out an import or export operation, for example, it will have to go through a wide range of agencies to obtain the proper permit for its action. Sometimes even Soviet lawyers do not seem to know which agency should be approached for such a permit. To understand the depth of this problem, consider the following list of Soviet agencies involved, in one form or another, in foreign commercial operations: Gosplan;[94] Gossnab;[95] MinFin;[96] Gosbank;[97] MVT-SSSR;[98] GKEC-SSSR;[99] foreign trade organizations (FTOs);[100] Gosarbitrazh;[101] Goskomtrud;[102] GUGTK-Sovmin SSSR;[103]

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94. The USSR State Planning Committee (Gosplan) is involved in the joint venture approval process. *See* 1987 Joint Venture Law, *supra* note 4, art. 2.

95. *See* Gossnab Decree, *supra* note 15.

96. The USSR Ministry of Finance (MinFin), like Gosplan, has an important role in approving joint ventures. *See* 1987 Joint Venture Law, *supra* note 4, art. 2.

97. The State Bank of the USSR (Gosbank) extends credits to the joint venture and controls currency accounts. *See id.* arts. 27-29. A Joint Decree of the Central Committee of the CPSU and the Council of Ministers of the USSR completely restructured the Soviet banking system. *See* Banking System Reform Decree, *supra* note 15. Following this restructuring, the USSR banking system consists of the following banks: Gosbank SSSR, Vneshekonombank SSSR, Promstroibank SSSR, Agroprombank SSSR, Zhilsotsbank SSSR, and Sbergatel'nyi Bank SSSR. *See id.* A new statute of the Vneshekonombank SSSR was adopted by the USSR Council of Ministers on June 4, 1988 and published in *Ob utverzhdenii Ustava Banka vneshneekonomicheskoi deiatel'nosti SSSR* [On the Approval of the Charter of the USSR Bank for Foreign Economic Activities], 22 SP SSSR Item 65 (1988).

98. *See Ob utverzhdenii Polozheniia o Ministerstve Vneshnei torgovli SSSR* [On the Approval of the Statute of the USSR Ministry of Foreign Trade (MVT-SSSR)], 7 SP SSSR Item 30 (1987) (adopted by a Decree of the USSR Council of Ministers on Dec. 2, 1986).

99. *See Ob utverzhdeni Polozheniia o Gosudarstvennom komitete SSSR po vneshnim ekonomicheskim sviaziam* [On the Approval of the Statute on the USSR State Committee for Foreign Economic Ties (GKEC-SSSR)], 5 SP SSSR Item 20 (1987) (confirmed by a Decree of the USSR Council of Ministers on Dec. 22, 1986).

100. *See Ob utverzhdenii polozhenii o khozraschetnykh vneshnetorgovykh organizatsiiakh (ob'edineniiakh) i Tipovogo polozheniia o Khozraschetnoi vneshnetorgovoi firme nauchno-proizvodstvennogo, proizvodstvennogo ob'edineniia, predpriiatiia, organizatsii* [On the Approval of the Statutes on the All-Union Self-Accounting Foreign Trade Organizations (Associations) and the Model Statute on an All-Union Self-Accounting Foreign Trade Firm for a Scientific Production or Production Association, Enterprise or Organization], 6 SP SSSR Item 24 (1987) (adopted by a Decree of the USSR Council of Ministers on Dec. 22, 1986) [hereinafter FTO Statute].

Goskomstroi;[104] VTsSPS;[105] Goskomnauk;[106] and TsSU.[107] In addition, a host of ministries, departments, the Council of Ministers of the USSR, and the corresponding organs of the individual union republics may also have a say in deciding whether the joint venture should go forward. To confuse matters further, quite often these agencies have overlapping and conflicting jurisdictions.[108] One may easily recognize that Western joint venturers will lose precious time and resources in an effort to comply with all the requirements of Soviet bureaucratic procedures.[109] Quite

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101. *See* On State Arbitrazh in the USSR, *supra* note 15.

102. The State Committee of the USSR for Labor and Social Affairs (Goskomtrud) has authority "to adopt special rules for the application of Soviet social insurance legislation to foreign employees of joint ventures." 1987 Joint Venture Law, *supra* note 4, art. 48.

103. The Chief Directorate for State Customs Control Attached to the USSR Council of Ministers (GUGTK-SovMin SSSR) is given various responsibilities with respect to joint ventures. *See, e.g.*, 1987 Joint Venture Law, *supra* note 4, art. 13 (exempting from customs duties imports contributed to joint ventures by foreign partners).

104. The USSR State Construction Committee (Goskomstroi) approves designs for joint venture construction projects. *See* 1987 Joint Venture Law, *supra* note 4, art. 34.

105. The All-Union Central Council of Trade Unions (VTsSPS), like Goskomtrud, can promulgate rules to apply Soviet social insurance to joint venture employees. *See id.* art. 48.

106. A special role is assigned to the State Committee on Science and Technology (Goskomnauk) in the Goskomnauk Decree, *supra* note 15.

107. The USSR Central Board of Statistics (TsSU) specifies the methods of accounting and bookkeeping used in joint ventures. *See* 1987 Joint Venture Law, *supra* note 4, art. 45; *but see infra* text accompanying notes 418, 419.

108. One Soviet study called for a complete overhaul of the mechanism for Soviet foreign economic relations. In a recent work, two leading Soviet experts on Soviet foreign trade law, Professors Boguslavskii and Smirnov, argued that the functions of these various agencies should be consolidated and the various laws and regulations dealing with foreign trade systematized and harmonized. Boguslavskii & Smirnov, *supra* note 51, at 34.

109. In an effort to cut through much of this Soviet red tape, seven United States corporations—RJR Nabisco, Inc., Eastman Kodak Co., Chevron Corp., Archer Daniels Midland Co., Johnson & Johnson, Mercator Corp. and Ford Motor Co.—formed the American Trade Consortium (ATC) in April 1988. The Soviets formed their own consortium consisting of representatives of several ministries in response to this American group effort. The Soviet consortium deals directly with the American consortium on trade matters affecting its participants. *See Team Approach, supra* note 21, at F4, col. 2.

One unintended advantage of the American Trade Consortium is its potential as a "Soviet lobby" in the United States Congress: it should be in a position to use the combined clout of its members to "make any current [US] Administration less willing to impose [economic] sanctions [against the Soviets] should political talks take a sour turn." *Id.* The ATC's opponents, particularly those American enterprises that are not participants in the consortium, have spoken out against the consortium's exclusivity. *See In-*

naturally, failure to comply with the law could result in serious consequences for the joint venture or its participants.

This section has canvassed only some of the many problems that the Western investor or entrepreneur may expect to encounter while doing business in the Soviet Union. These problems, however, are not insurmountable; they should not dissuade the prospective Western businessman from going into the Soviet Union. The Soviet domestic market, if developed to its fullest potential and opened to the Western investor, could become a source of immeasurable profits for the Western venture capitalist.[110] The Soviet consumers' thirst for Western goods[111] is surpassed only by the enormous demands by Soviet enterprises for Western industrial machines.[112] The Joint Venture Law of 1987 merely hints at things to come. Yet in its present form, the law provides more than the Soviet Government is willing to deliver. The Western entrepreneur must therefore accept the invitation with caution and enter the Soviet market with deliberate speed. He must be warned that the Soviet joint venture mechanism is still at an experimental stage and that some of the Soviet

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fighting, Big-guy Image Hobble Efforts of U.S.-Soviet Trade Group, Wash. Times, Nov. 25, 1988, at 1, col. 1. As noted above, the ATC—minus Ford Motor Co.—recently concluded a major joint venture agreement with the Soviet Government. *See supra* notes 1-3 and accompanying text.

110. Even in its present underdeveloped state, the Soviet economy is the second largest in the world: it is larger than Japan's and yields only to that of the United States. *See* 2 COUNTRIES OF THE WORLD 1267 (F. Bair ed. 1989). If and when it is fully developed, the Soviet market could conceivably be the single largest domestic market in the world, larger than both the United States and the post-1992 combined markets of the European countries.

111. At the present time, Soviet consumer demand far exceeds supply. To assuage this demand, the Soviet Government recently announced that it would purchase vast amounts of consumer goods, ranging from razor blades and soap powder to leather shoes and cassette tapes. *Moscow Importing Consumer Goods to Appease Public*, N.Y. Times, Apr. 17, 1989, at 1, col. 3; 4, col. 6 [hereinafter *Moscow Importing*].

Because there is not much to buy in the Soviet market, citizens tend to put away their money in savings accounts. Informed estimates indicate that Soviet consumers save about 25-35 billion rubles per year. Indeed, official Soviet statistics reveal that Soviet citizens maintained bank deposits of 257.4 billion rubles at the close of 1987. *See* Scherr, *supra* note 58, at 8, n.15. At the official exchange rate of one ruble to $1.80, this translates into annual savings of roughly $14-$20 billion and total savings approaching $143 billion. Much of this money can be expected to flow to Western entrepreneurs operating in the Soviet market.

112. The Soviet Union's desperate need for Western industrial machines and products is highlighted in article 3 of the 1987 Joint Venture Law, in which Soviet Ministries and departments are strongly urged to seek "certain types of manufactured products, . . . [and] advanced foreign equipment and technologies . . . to expand the national export sector. . . ." 1987 Joint Venture Law, *supra* note 4, art. 3.

practices that he will encounter are quite bewildering. In negotiating the agreement that would establish a joint venture with a Soviet partner, the Western investor must be willing to show some flexibility. This is particularly important because he will be confronted with both a different method of doing business and numerous cultural disincentives to doing business in the Soviet Union.[113] He will find, for example, that the joint venture cannot own the land that the Soviet partner may contribute to the joint venture.[114]

The Joint Venture Law of 1987 will also compel the Western investor to show some creativity. He will, for example, have to devise new methods to repatriate his ruble share of the joint venture profits. Additionally, he will need patience. Negotiating a joint venture agreement with the Soviet Union is a tedious and time-consuming adventure.[115] A headlong rush into the Soviet joint venture trap today could leave a Western investor with a ruined bank account. Yet, while profits of major joint venture

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113. Lack of adequate sales space is one of many problems facing Western restauranteurs in the Soviet Union. Pizza Hut discovered this deficit the hard way. Almost one year after it signed a joint venture agreement with a Soviet partner to open two Pizza Huts in Moscow, Pepsico, Inc. still had not found a location for its first restaurant. *Soviets' Shortages Slow American Fast-food Chains*, Times-Picayune (New Orleans, LA.) Aug. 7, 1988, at A24, col. 3. Pizza Hut recently found a home for its first Soviet outlet on fashionable Gorky Street in downtown Moscow, and it will open sometime in 1989. *Pizza Hut Ready to March on Moscow*, The Times (London) Feb. 21, 1989, sec. 2, at 25, col. 2 [hereinafter *Pizza Hut*]. Besides these real estate limitations, Western businessmen operating in the Soviet Union for the first time will find that the country's telephone system is antiquated, telephone directories are not readily available, domestic airline services are poor, amenities of the so-called "Western" tourist hotels are substandard, facsimile machines are extremely rare, and telex equipment is not readily available. Finally, it is virtually impossible to find reliable bilingual secretaries.

114. All land in the Soviet Union is within "the exclusive ownership of the state." KONST. SSSR (1977), art. 11 . Land can be transferred to the operational management of a Soviet state enterprise and the latter can in turn contribute that land to the capital fund of the joint venture. However, because the land in question belongs to the state and is held by the Soviet joint venture partner only under the right of operational management, the ownership of that land does not transfer to the joint venture. *See supra* note 93 (discussing joint venture ownership rights).

115. In one case, negotiations for a petrochemical joint venture involving Combustion Engineering took nearly two years. *See Occidental, Italy's Montedison to Build Petrochemical Complex in Soviet Union*, Wall. St. J., Nov. 20, 1987, at 32, col. 1 [hereinafter *Occidental*]. In another case, Armco required "three years, eight months and one day [to negotiate] a 23-volume, 8,000 page, $353 million contract for an electrical steel facility. The Soviets invaded Afghanistan 17 days later and the contract was worth the price of waste paper as President Carter imposed trade sanctions on the Soviet Union." *U.S. Business, Soviets Increasing Joint Ventures*, Wash. Post, Nov. 22, 1987, at K1, col. 2 [hereinafter *Increasing Joint Ventures*].

enterprises will probably fall short of expectations, some businesses may operate profitably, though the period between the initial investment and the first profit could be as long as ten years.[116]

Finally, the American venture capitalist contemplating entering the Soviet market should also be aware of the potential harmful effects of political changes in United States-Soviet trade relations.[117] A reminder of this danger is the fact that under the Jackson-Vanik amendment to the Trade Act of 1974, the Soviet Union still does not enjoy most-favored nation (MFN) trading status with the United States. One would expect, however, that in the near future this particular barrier to United States-Soviet trade will be removed.[118]

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116. Mr. Shinji Oguchi, president of a Japanese book-binding firm that signed a joint venture deal to build a series of sport complexes, ski lodges and resorts in the Soviet Union, stated that his company does not expect to make any profits for the first ten years of the joint venture business. *All That's Glasnost Does Not Glitter*, U.S. NEWS & WORLD REPORT, Apr. 4, 1988, at 51.

117. A casual examination of the development of United States-Soviet trade relations illustrates that the volume of trade between these countries tends to fluctuate according to the political climate. In the words of Mr. Aleksandr Kachanov, the USSR's First Deputy Minister for Foreign Economic Relations, Washington is responsible for "a whole number of discriminatory measures hampering" bilateral trade relations. In his view "the widening of Soviet-American trade is a political rather than an economic matter." *Soviet Asks Trade Treaty With U.S.*, N.Y. Times, Apr. 12, 1988, at 34, col. 4 [hereinafter *Trade Treaty*]. Thus, during the cold war in the 1950s, the Russians pulled all of their dollar deposits out of New York banks and moved them to London. *Talking Deals: Joint Ventures in the Soviet Union*, N.Y. Times, Nov. 19, 1987, at 30, col. 1. In 1971, when relations between the two nations were improving, Mack Trucks Corp. helped build the Kama River truck manufacturing plant in the Soviet Union. *See id.* In 1972, President Richard M. Nixon initiated a major grain sale to the USSR—a deal worth about $750 million. *Will Trade Follow the Summit Talks?*, N.Y. Times, Dec. 6, 1987, at 2, col. 3. In 1974, however, the political barometer fell when the Soviet policy regarding Jewish emigration was strongly attacked in the United States. *See Gorbachev Meets Business Leaders*, N.Y. Times, Dec. 11, 1987, at 10, col. 1 [hereinafter *Business Leaders*]. This ultimately led to the passage of the Jackson-Vanik Amendment to the Trade Act of 1974, 19 U.S.C. §§ 2431-32 (1980 & Supp. 1989). In 1979, the Soviets sent troops into Afghanistan and President Jimmy Carter quickly suspended all grain sales to the USSR. *See Trade Treaty*, *supra*, at 34, col. 4. With the signing of the INF Treaty in 1987 and the scheduled February 1989 withdrawal of all Soviet troops from Afghanistan, however, President Ronald Reagan proposed a plan enabling American businesses to enter the Soviet Union with full speed. *See Soviet Trade Rated High*, *supra* note 12, at 21, col. 2. *See also* Joint Statement on the Further Development of U.S.-USSR Commercial Relations of April 14, 1988, *reprinted in* BUS. AM., May 23, 1988, at 17.

118. Because the Soviet Joint Venture Law will transform every joint venture manufacturer in the Soviet Union into an exporter of goods as well, foreign partners in Soviet joint ventures will probably pressure their respective legislatures, including the United States Congress, to lift the discriminatory tariff barriers against Soviet goods. A future

B. *Comparing the Hazards: The Joint Venture Law of 1987 and Other Socialist Joint Venture Legislation*

By adopting a joint venture law in 1987, the Soviet Union became the eighth socialist country to do so since World War II.[119] The first socialist joint venture law was promulgated in Yugoslavia in 1967.[120] This was followed in quick succession by similar laws in Romania (1971),[121] Hungary (1972),[122] Poland (1974),[123] China (1979),[124] Bulgaria (1980),[125] and North Korea (1984).[126] The Soviets thus had the opportunity to learn from the experiences of these other socialist countries—to gain from their insights and avoid their pitfalls. In designing its law, the Soviet Union chose to a large extent to follow the models of the Eastern European countries, especially Yugoslavia, Hungary and Poland. In many critical respects, however, the Soviet law is different from its Eastern European antecedents.[127] A comparison of the key provisions of the

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Congress will probably restore the MFN status to the Soviet Union. *See Reagan to Sign Tough Trade Bill*, Times-Picayune (New Orleans, LA.), Aug. 4, 1988, at A2, col. 2 (flexibility in Soviet MFN status maintained over the wishes of those who would permanently deny such status).

119. For a brief analysis of the comparative advantages and disadvantages of the various socialist joint venture laws in existence prior to 1987, see Note, *supra* note 60, at 135-40. *See generally* LEGAL ASPECTS OF JOINT VENTURES IN EASTERN EUROPE (D. Campbell ed. 1981); Lorinczi, *U.S.-Hungarian Joint Ventures*, 10 INT'L BUS. LAW. 113 (1982); Scriven, *Joint Venture Legislation in Eastern Europe*, 21 HARV. INT'L L.J. 533 (1980); Note, *Western Investment in State-Controlled Economies: Establishment of Joint Ventures in Eastern European Countries*, 5 N.C.J. INT'L L. & COM. REG. 507 (1980) [hereinafter *Western Investment*].

120. *See Western Investment*, *supra* note 119, at 509.

121. *See* Brisan and Sitaru, *Romania*, in LEGAL ASPECTS OF DOING BUSINESS IN EASTERN EUROPE AND THE SOVIET UNION 244 (D. Campbell ed. 1986) [hereinafter DOING BUSINESS].

122. *See* Ban, Csanadi & Madl, *Hungary*, in DOING BUSINESS, *supra* note 121, at 175.

123. *See* Rajski & Wisniewski, *Poland*, in DOING BUSINESS, *supra* note 121, at 207.

124. *See* Note, *supra* note 60, at 133.

125. *See* Stalev, *Bulgaria*, in DOING BUSINESS, *supra* note 121, at 42.

126. *See* Kim, *North Korean Joint Venture Laws*, 19 CAL. W. INT'L L.J. 175 (1988-89).

127. The Soviet and Hungarian models demonstrate certain crucial differences. First in some situations, such as banking, financing and service joint ventures, the Hungarian law allows the Western partner a controlling majority share in the joint venture, subject to approval by the Hungarian Finance Minister. *Western Investment*, *supra* note 119, at 515-16. Soviet law, by contrast, allows the Western partner in all situations to own a majority share in the joint venture. Second, the rate of Hungarian tax on joint venture profits is 40% unless the Minister of Finance approves a lower rate. Lorinczi, *supra* note

existing socialist joint venture laws reveals that the Soviet approach lies somewhere between the Chinese and the Eastern European models, albeit somewhat closer to the latter.

All socialist countries face a common problem in the application of their joint venture laws: the extent to which the international joint ventures should be integrated into the country's system of planned economy. Along with this problem goes the question of whether or not the international joint ventures should take orders and directions from the state's central planners. The socialist countries have adopted two approaches in dealing with this latter issue. The first is the "economic enclave" model, which exempts the joint venture from the restraints of central planning.[128] The second is the "integrated economy" model, which regards the joint venture as part of the centrally-planned economy and thus subjects the joint venture to the control of the central planners.[129] Here the Soviet and Hungarian joint venture laws provide the sharpest contrast: the former goes to extraordinary lengths to stress the operational autonomy of joint ventures, while the latter quite clearly subordinates joint ventures to the control of the central planners.[130]

The Joint Venture Law of 1987 does not contain only "problem" areas. Compared to the joint venture laws of other socialist countries, the Soviet Joint Venture Law contains several points which will serve as great incentives to Western investors. First, it provides a strong degree of technology protection measures that could satisfy the demands of the foreign businesses.[131] Second, as mentioned above, the law underscores the independence of the joint venture from state central planning. Third, the joint venture enjoys considerable freedom in other areas of its operation; that is, it is self-funding, self-financing, maintains its own separate accounts, and enjoys limited marketing freedom and an independent management.[132]

119, at 115. The Soviet tax rate of 30% for joint venture profits is much lower than that of Hungary. Third, state pricing regulations control prices for joint venture products in both the Hungarian and COMECON markets. *Id.* Under the Soviet scheme, the joint venture fully controls the pricing of its products in all markets. Finally, the Hungarian joint venture is, generally speaking, subject to Hungary's central planning system. *Id.* at 114-15. The Soviet joint venture enjoys much more autonomy from the Soviet central planning system.

128. *See, e.g.*, 1987 Joint Venture Law, *supra* note 4, art. 23.

129. *See, e.g.*, Note, *supra* note 60, at 138-39.

130. *See* Lorinczi, *supra* note 119, at 113-14; *see also Western Investment*, *supra* note 119, at 575.

131. 1987 Joint Venture Law, *supra* note 4, art. 17.

132. *Id.* arts. 6, 21.

The Joint Venture Law also grants the partners considerable latitude to include "other provisions" in their joint venture agreement, as long as those additions are not at odds with the purpose of the joint venture itself and do not contravene Soviet law or public policy.[133] With some imagination, this provision could be exploited to the advantage of Western investors. Given good planning, this freedom of contract could be used by the joint venture planners to address some of the sticky issues connected with doing business in the Soviet Union.[134]

A final comparative advantage to joint venturing in the Soviet Union concerns legal stability. For example, joint venturing is safer in the Soviet Union than in China primarily because the Soviet legal system as a whole is more mature and more stable than its Chinese counterpart. Under Soviet law, once contracts are sealed and delivered, they are respected by all parties;[135] the FTAC (now called Arbitration Court)[136] has a reputation for fairness to foreign parties;[137] the caliber of Soviet lawyers who counsel the Soviet enterprises is uniformly high;[138] Soviet

133. *Id.* arts. 1, 7.

134. *See infra* Part VII.

135. Pursuant to article 160 of the RSFSR Civil Code, a contract is formed when both parties, in full compliance with the requisite form, have reached agreement on all substantive points of the contract. A point in a contractual agreement is considered substantive if an applicable law so specifies, if the point is essential to the particular contract, or if one of the parties to the contract indicates that it wishes both parties to reach an agreement on the particular point. RSFSR Civil Code (1964), art. 160, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 434-35. Article 168 stipulates that once a contract has been entered into the parties must fulfill their obligations under that contract to the fullest extent of the agreement, within the time stipulated in the contract, and in full compliance with any requirements imposed by law. *Id.* art. 168, *reprinted in* LAW IN EASTERN EUROPE, supra note 71, at 446-48. Consequences for a breach of contract are discussed in articles 217-27 of the Civil Code. *Id.* arts. 217-27, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 431-35.

136. The new statute of the Arbitration Court attached to the Chamber of Commerce of the USSR was adopted by a Decree of the Presidium of the USSR Supreme Soviet on December 14, 1987. *Ob Arbitrazhnom sude pri Torgovo-promyshlennoi palate SSSR* [On the Arbitration Court Attached to the USSR Chamber of Commerce], 50 Ved. Verkh. Sov. SSSR Item 806 (1987). According to this Statute, the Arbitration Court "functions as a permanent court of arbitration" and is charged with "resolving disputes which arise from contractual and other civil law relations connected with carrying out foreign trade and other international economic and scientific-technical relations." *Id.* art. 1.

137. Osakwe, *supra* note 87, at 48.

138. Soviet in-house corporate counsels (known as jurisconsults), like members of the other branches of the Soviet legal profession, undergo rigorous training. Prior to certification as jurisconsults, they must complete five years of legal study at a university or juridical institute and must additionally undergo some form of post-university apprenticeship.

commercial laws are less likely to be changed overnight;[139] and access to Soviet commercial statutes (in both Russian and English) is readily available in any relatively well-equipped Western law library.[140] These and other intangible elements of the Soviet legal culture clearly would make joint venturing in the Soviet Union more amenable to risk-planning than would be the case in socialist nations such as China.

C. *Overcoming the Hazards: Advantages of the Joint Venture Law of 1987*

Notwithstanding the aforementioned obstacles to doing business in the Soviet Union, many Western venture capitalists seem to have expressed more than a passing interest in the business prospects that were raised by the passage of the 1987 law. Indeed, numerous Western companies have either signed or are in the process of negotiating[141] joint venture agreements with Soviet partners. Industries in which such agreements

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For a detailed discussion of the system of training for Soviet lawyers in general, see M. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS —MATERIALS, TEXT AND CASES 833-45 (1985) [hereinafter COMPARATIVE LEGAL TRADITIONS]. Soviet jurisconsults have earned the admiration and respect of their Western counterparts.

139. The centerpiece of Soviet commercial law, the RSFSR Civil Code, has undergone relatively few changes since its adoption in 1964. Compared to other branches of modern Soviet law, Soviet civil law is the most stable.

140. A recent bibliographic guide on Soviet legal materials published in English made this point quite eloquently. *See* I. KAVASS, SOVIET LAW IN ENGLISH: RESEARCH GUIDE AND BIBLIOGRAPHY 1970-1987 (1988). Professor Kavass, who ranks among the best bibliographers of Soviet law in the West, states that "[t]he accumulation of English language writings on Soviet law and the Soviet legal system has now reached the point . . . that the subject of Soviet law can be approached with some confidence without knowledge of the Russian language." *Id.* at 3. As this bibliography demonstrates, there has been an immense growth in English-language research on Soviet law during the past two decades.

141. At the end of March 1988, a total of 36 international joint ventures had registered with the USSR Ministry of Finance. Of this number, 30 were between Soviet and Western partners, five were between Soviet and Eastern European partners, and one was between a Soviet and an Indian partner. Scherr, *supra* note 58, at 44-47 (listing joint ventures). By May 26, 1988, the number of international joint ventures registered with the USSR Ministry of Finance had risen to 51. BUS. E. EUR., Aug. 15, 1988, at 259. This number increased again to 70 by July 18, 1988. *Id.*, Aug. 29, 1988, at 276. The latest report, covering the period through December 29, 1988, indicates that at least 188 joint ventures have been created in the Soviet Union. HARVARD UNIVERSITY RUSSIAN RESEARCH CENTER, THE SOVIET JOINT ENTERPRISE DECREE: LAW AND STRUCTURE 193-208d (D. Kelley & J. Saul eds. 1989) [hereinafter HARVARD RESEARCH CENTER].

have been signed include the following: film production,[142] oil refining and petrochemicals,[143] retail food,[144] industrial refrigeration,[145] hotel renovation and management,[146] apparels,[147] and fishing and fish process-

142. A February 1988 film industry joint venture agreement provides for the screening of American films and documentaries before the Soviet legislature, the screening of Soviet films and documentaries before the United States Congress, and the establishment of film exhibitions in both countries. *U.S. and Soviet Film Makers Plan Joint Ventures*, N.Y. Times, Feb. 7, 1988, at 68, col. 1. Additionally, about ten United States studios and independent producers have signed agreements for joint movie productions with Soviet partners. *See Hollywood on the Volga*, Wall St. J., Nov. 20, 1987, at 28, col. 4.

143. Partners from four different countries signed a joint venture agreement to build and operate a petrochemical production plant near the Caspian Sea in 1987. Three Western corporations—Occidental Petroleum Corp. (United States), Montedison S.P.A. (Italy), and Marubeni Corp. (Japan)—joined with a unit of the Soviet oil ministry in the deal. The project will require a total investment of $5-$6.5 billion, with most of that money expected to come from the three Western companies. Under the agreement, the Soviet Union will provide the necessary gas liquids and sulfur in exchange for a 51% share in the venture. Work on the plant is expected to begin in 1989. Upon its completion in three to four years, the project will become "one of the largest petrochemical complexes in the world." *See Occidental, supra* note 115, at 32, col. 1.

Another joint venture agreement that would improve productivity in the Soviet Union's oil refining and petrochemical industries was entered into between Combustion Engineering, Inc. and a unit of the Soviet Ministry of Oil Refining and Petrochemical Industries. The joint venture will be owned by Combustion Engineering (49%) and the Soviet partner (51%). *See id.* A Japanese consortium including Mitsubishi, Mitsui, and Chioda also signed a protocol for a joint venture with the Soviet Union to build a huge $5 billion petrochemical complex in Western Siberia. *Japanese in $5bn Soviet Petrochemical Venture*, Financial Times (London), Nov. 12, 1988, at 2, col. 1.

144. Pizza Hut, a Pepsico subsidiary, recently signed a joint venture agreement with the City of Moscow for the operation of Pizza Hut outlets in the Soviet capital. Pepsico is investing $2 million at the outset and will hold a 49% share in the operation. *Pizza Hut, supra* note 113, sec. 2, at 25, col. 2.

145. Babcock P.L.C. of Great Britain entered into a joint venture agreement with a Soviet partner to manufacture industrial refrigeration equipment in the Soviet Union. *Administration Assails Soviet Car Export Plan*, N.Y. Times, Nov. 2, 1987, at 25, col. 1.

146. The Finnish airlines (Finnair) entered into a joint venture agreement with the Soviet Intourist Organization to renovate the Berlin Hotel in Moscow. In addition, International, Ramada Inn, and Hilton also considered joint venture agreements that would enable American hotel management companies to add hotel accommodations in Moscow and other Soviet cities. *See id.*

147. A joint venture agreement between the House of Zaitsev (the leading Soviet fashion designer) and Tanner Companies, Inc., a North Carolina apparel maker, calls for the manufacture and sale of Zaitsev clothes in the United States. This arrangement will enable Soviet apparels to bypass the hefty tariff levied on Soviet imports. Because they will be manufactured in this country under a licensing agreement between the House of Zaitsev and Tanner, the clothing is not subject to the Jackson-Vanik non-MFN tariffs. *'Eefningwear' for America*, NEWSWEEK, Oct. 19, 1987, at 64.

ing.[148] The computer industry also presents a real opportunity for a good profit-making venture, but only a handful of Western companies have expressed a serious interest to begin operations in the Soviet Union.[149] The technology-starved USSR would welcome Western investment even in slightly outmoded computer goods.[150] Quite clearly, the Soviet Union is currently a ripe market for previous-generation personal computers and no major problems should arise in obtaining United States licenses to export such technology to the Soviet Union. Attempts to export advanced Western technology to the Soviet Union, however, will continue to face virtually insurmountable obstacles posed by Western licensing laws.[151]

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148. The first modern joint venture agreement between a Soviet and an American partner was actually signed in 1978. The fishing and fish processing joint venture was established between Marine Resources Co., Int'l (MRCI), Bellingham Cold Storage Co. and v/o Sovrybflot, a commercial corporation of the Soviet Ministry of Fisheries. The joint venture, which conducts virtually all of its operations outside the territory of the USSR, maintains United States offices in Seattle, Washington and Dutch Harbor, Alaska. Its Soviet offices are in Moscow and Nakhodka. *A Lone, Lonely American on the Soviet Coast*, N.Y. Times, Oct. 11, 1987, at 12, col. 1; *see also Increasing Joint Ventures*, *supra* note 115, at K9, col. 5.

149. To date, only two computer companies have entered into joint venture agreements with Soviet partners. These are ISF of West Germany (for the production and development of personal computers and other products), *see* BUS. E. EUR., Aug. 15, 1988, at 259, and Optimation GmbH of Austria (for the production of calculating centers and programs for sale in the USSR and abroad). *See id.* Aug. 22, 1988 at 256.

150. The Soviet quest for United States computer products and technology is taking a more aggressive posture. According to a 1988 report, the Soviet Union "has launched a three-pronged initiative through a number of US-based companies to incease computer trade and technology transfer with the US." *Soviet Union Seeks Computer Trade with US*, Financial Times (London), Oct. 24, 1988, at 28, col. 1. The Soviet Government may also be devising methods to bypass the embargo on computer technology transfers to the USSR by holding talks with United States companies regarding joint ventures. *Russians Attempt to Beat Hi-Tech Ban*, The Guardian (London), Oct. 7, 1988, at 8, col. 1.

151. At present, it does not appear that the Coordinating Committee for Multilateral Export Controls (COCOM) will soon lift its embargo on the export of sensitive Western technology to the Soviet Union. The Pentagon is expected to continue opposition to any exportation of strategic Western technology to the Soviet Union and other East Bloc countries. *See Soviet Wind of Change Fails to Melt West's Export Curbs*, The Times (London), Oct. 15, 1988, at 9, col. l; *see also Cold War Rages on in a Corner of the Pentagon*, The Times (London), Oct. 8, 1988, at 8, col. l. One may anticipate, however, that Western partners proposing to export non-strategic technologies to the Soviet Union, but who are prevented from doing so because the COCOM list continues to reflect both sensitive and non-sensitive technologies, will pressure COCOM periodically to revise and update its list. There is already some evidence of such pressure being exerted on COCOM by Western businesses as well as by some Western governments. *Cocom: New Pressures To Change the Rules*, BUS. E. EUR., Aug. 29, 1988, at 276; *see also Control*

Both Washington and Moscow are taking aggressive actions to promote trade between the United States and the Soviet Union. Among such efforts is the formation of the joint US-USSR Commercial Commission (Joint Commission), a government-to-government body that oversees the development of bilateral trade between the two countries,[152] and the US-USSR Trade and Economics Council (Joint Council), a private sector organization consisting of United States companies and Soviet ministries and enterprises interested in promoting trade between the two nations.[153] The Joint Commission meets regularly and the Joint Council meets annually.[154] The Joint Commission held its tenth session in Moscow from April 11-14, 1988; the Joint Council held its eleventh annual meeting in Moscow during the same week.[155]

Western businessmen seeking to take advantage of these rejuvenated trade ties may obtain assistance from a variety of sources. The USSR Trade Representative operates a well-staffed office in Washington, D.C. whose sole purpose is to assist American businessmen who wish to enter the Soviet market.[156] The United States Department of Commerce has a Soviet Union Division, and its Bureau of Export Administration has a US-USSR Joint Venture Task Force which provides relevant information to American companies interested in doing business in the Soviet Union.[157] Similar services are provided to Soviet business and trade personnel by the United States Commercial Office in Moscow.[158] Moreover,

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of Strategic Exports, The Times (London), Oct. 17, 1988, at 17, col. 1. A more recent indication of the determination of many Western governments to seek a revision of COCOM's ban on technology transfer to the Soviet Union is the decision of the British Government to join that crusade. *UK in Drive to Lift COCOM Bans*, Financial Times (London), Feb. 8, 1989, at 6, col. 5. On top of all of these developments, the United States Government thinks that the creation of a single market among the EEC countries in 1992 will facilitate the flow of Western technology into the Soviet Union and her Eastern European allies. *US Fears 1992 May Boost Technology Flow to Soviet Bloc*, The Times (London), Oct. 17, 1988, at 8, col. 1.

152. *Secretary Verity Leads U.S. Delegtation to Moscow for Meeting of Joint U.S.-U.S.S.R. Commercial Commission*, BUS. AM., May 23, 1988, at 14 [hereinafter *Joint Commission Meeting*]; *Business Leaders*, *supra* note 117, at 10, col. 1; *Gorbachev Encourages U.S. Ties*, N.Y. Times, Apr. 14, 1988, at 29, col. 2 [hereinafter *U.S. Ties*].

153. *See Joint Commission Meeting*, *supra* note 152, at 15; *Business Leaders*, *supra* note 117, at 10, col. 1; *Increasing Joint Ventures*, *supra* note 115, at K1, col. 2.

154. *See Joint Commission Meeting*, *supra* note 152, at 15.

155. *Id.* at 14-15, 18.

156. *Id.* at 18.

157. *Id.*

158. The United States Commercial Office in Moscow is located at 15 Ulitsa Chaikovskogo, next to the United States Embassy. The office is headed by a Commercial Counselor, Mr. H. Michael Mears, who does an excellent job matching potential Ameri-

at the tenth meeting of the Joint Commission, the parties agreed to establish numerous programs, including: (1) a United States marketing and advertising program through the United States Commercial Office in Moscow; (2) bilateral working groups to facilitate business contacts between two partners; (3) a United States trade mission program in the Soviet Union; and (4) a joint US-USSR legal seminar exchange service on business law to educate lawyers on both sides about the commercial laws of the other trading partner.[159]

V. THE TECHNICAL RULES OF THE JOINT VENTURE LAW OF 1987

A. *General Framework*

The Soviet Union is potentially the largest single market in the world. If and when it is fully developed, it could be larger than the markets of the United States, the post-1992 European Economic Community, and even China.[160] This fact alone is enough to motivate any enterprising Western venture capitalist to formulate plans to gain access to that vast market. This analysis of the Soviet Joint Venture Law of 1987 should serve the needs of those Western entrepreneurs who, after a careful market analysis, decide that the potential advantages of establishing a joint venture with a Soviet partner outweigh the hazards of doing business in that country.

In its original form, the Joint Venture Law of 1987 contained a twenty-two word preamble plus fifty-three articles grouped incoherently into seven chapters.[161] In this analysis, the fifty-three articles will be analyzed under seven thematic headings: formation (articles 1-19); dispute settlement (article 20); management structure (articles 21-35); taxation and insurance (articles 36-43, 14); bookkeeping and auditing procedures (articles 44-46); recruitment and rights of employees (articles 51-53); and dissolution (articles 51-53).

The preamble posits the primary goals of the joint venture law as the

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can investors and traders with prospective Soviet joint venture partners and purchasing agents.

159. For a detailed report of the agreements reached by both parties at the April 1988 meeting of the Joint Commission, see *Joint Commission Meeting, supra* note 152, at 14.

160. *See supra* note 110.

161. These chapters are delineated as follows: I. General Provisions; II. Partners in, Property and Rights of Joint Ventures; III. Operation of Joint Ventures; IV. Taxation of Joint Ventures; V. Supervision of Joint Ventures' Operations; VI. Personnel of Joint Ventures; and VII. Liquidation of Joint Ventures. *See* 1987 Joint Venture Law, *supra* note 4.

furtherance of trade, economic, scientific, and technical cooperation between the Soviet Union and the West "on a stable and mutually beneficial basis."[162] The Soviet Union is painfully aware of the fact that its past trade agreements with Western partners have been routinely suspended or even violated whenever the East-West political climate turned sour. The Soviet Union believes that her Western partners often have invoked the political weapon against her, as evidenced by the United States decision in 1974 to strip the Soviet Union of its most favored nation trading status in the United States.[163] On occasion, the Soviet Government has complained that the sale of American wheat to Soviet purchasers has been embargoed or delivery delayed by the United States authorities for purely political reasons. A more recent example of the politicization of economic relations between the United States and the Soviet Union is the former's decision to block Soviet efforts to join GATT.[164] In short, the Soviet Union has a profound distrust of her American trading partner, believing that the United States infuses politics into trade too readily, and that the United States sells her only those items which the Soviets do not want. As a result, the Soviet Union trades with the Japanese or the Europeans, rather than with the United States, whenever possible. The feeling of mutual suspicion has kept the volume of United States-Soviet trade at a very low level over the years.[165]

A broad reading of the preamble to the 1987 Joint Venture Law seems to provide an agenda outlining the Soviets' long range goals for Soviet-American trade relations, which includes: (1) repeal of the Jack-

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162. *Id.* at preamble.

163. *See supra* note 117.

164. In April 1986, the Soviet Government indicated through informal communications that it wished to join GATT. Under proddings from the Reagan Administration, GATT officials informed the Soviet Union that it would not be welcome as a member of that organization. Notwithstanding that negative response, the Soviet Government formally requested GATT's permission to send an observer to the upcoming round of GATT talks. In compliance with the wishes of the Reagan Administration, GATT turned down that Soviet petition as well. Note, *Soviet "Participation" in GATT: A Case for Accession*, 20 N.Y.U. J. INT'L L. & POL. 477, 484-86 (1988).

165. 1987 was a highpoint in United States-Soviet trade relations. United States exports to the Soviet Union that year totalled roughly $2 billion, but imports from the Soviet Union were estimated to be only $500 million. *Increasing Joint Ventures, supra* note 115, at K1, col. 2. As one United States corporate officer dryly noted: "We do more trade with Canada between 9 and 10 on Saturday morning than we do in a year with the Soviet Union." *Id.* The *Washington Times* reported a somewhat more precise trade figure, stating that United States exports to the Soviet Union totaled $1.48 billion, while Soviet exports to the United States totaled $470 million. *A Trickle of Trade*, Wash. Times, Nov. 25, 1988, at 1, col. 1.

son-Vanik Amendment;[166] (2) the free flow of American advanced technology to the Soviet Union; (3) American business entry into the Soviet Union to assist her in manufacturing high quality goods that may be sold competitively in Western markets; and (4) American agreement for Soviet admission to GATT and the IMF.[167] It will not be easy for the Soviet Union to attain these goals, but she has made her intentions quite clear. Bearing in mind what the Soviets seek to accomplish with this law, let us turn our attention to its substantive provisions.

B. *Formation (Articles 1-19)*

The procedure leading to the formation of a joint venture on Soviet territory has undergone some minor changes since the law's introduction in January 1987. Pursuant to the original text, the USSR Council of Ministers had authority to grant permission for all East-West joint ventures on Soviet territory.[168] This original decree neither contemplated nor permitted the delegation of such authority to any other subordinate organ.[169] Under a subsequent amendment to the 1987 law, however, this authority now is delegable.[170] The prospective parties to any such enter-

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166. *See supra* note 117.

167. *See supra* note 164.

168. 1987 Joint Venture Law, *supra* note 4, art. 2. Notwithstanding the constitutional amendments of December 1, 1988, *see supra* note 41, the Council of Ministers of the USSR remains the highest executive organ of the Soviet Government. Its constitutional status roughly corresponds to that of the United States federal government under article I of the United States Constitution. *See* COMPARATIVE LEGAL TRADITIONS, *supra* note 138, at 728. The Council of Ministers exercises all of the executive authority that is vested in the USSR federal government under the USSR Constitution of 1977, unless that Constitution specifically assigns these powers to another agency of the Soviet Government. Among other things, the USSR Council of Ministers is responsible for coordinating both the foreign policy and the foreign trade policy of the USSR. *See* KONST. SSSR (1977), arts. 128-36 (outlining the constitutional regulation of the USSR Council of Ministers' status).

169. 1987 Joint Venture Law, *supra* note 4, art. 2 ("The agreed proposals for the establishment of joint ventures shall be submitted to the USSR Council of Ministers.").

170. Pursuant to this amendment, lower authorities, such as ministries and departments of the USSR, as well as the Council of Ministers of the individual union republics, may grant final approval for a joint venture agreement. *O dopolnitel'nykh merakh po sovershenstvovaniiu vneshneekonomicheskoi delatel'nosti v novykti usloviiakh Khoziaistvovaniia* [On Additional Measures Aimed at Modernizing Foreign Economic Activities Under the New System of Economic Management] EKONOMICHESKAIA GAZETA 1987, No. 41, at 18 (joint decree of the Central Committee of the CPSU and the USSR Council of Ministers, adopted on September 13, 1987) [hereinafter September 1987 Decree], *reprinted in* N.N. Voznesenskaia, *Sovmestnye predpriiatiia s uchastiem firm kapitalisticheskikh i razvivaiushchikhsia stran na territorii SSSR* [Joint Enter-

prise must hold preliminary talks to define the nature and scope of the business before applying to the USSR Council of Ministers or a subordinate body.[171]

Article 2 establishes a very cumbersome procedure for submitting a joint venture proposal to the USSR Council of Ministers or to another approving authority. The proposal, along with its supporting technical documents, economic feasibility statement and draft of the articles of incorporation, may be submitted to the ministry and department under which the prospective Soviet partner operates.[172] The ministry and departments receiving such proposals must immediately consult with the State Planning Committee of the USSR (Gosplan), the USSR Ministry of Finance (MinFin SSSR), and other interested ministries and departments.[173] The proposal is submitted to the USSR Council of Ministers or other subordinate authority for a final evaluation of the proposed package only after all of these intermediary agencies have given their preliminary approval.[174]

During this pre-formation approval phase, the Soviet authorities likely will scrutinize the terms of the joint venture to determine that they meet the requirements of Soviet law and promote specific aspects of the program-minimum of *uskorenie.* Article 3 specifically directs all ministries and departments involved in the preliminary approval process to ensure that the proposed project satisfies the country's "requirements for certain

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prises Involving the Participation of Firms of Capitalist and Developing Countries in the Territory of the USSR], 1 Sov. Gos. & Pravo 117, 120 n.7 (1988).

171. 1987 Joint Venture Law, *supra* note 4, art. 2.

172. *Id.*

173. *Id.*

174. *Id.* art. 2, *as amended by* September 1987 Decree, *supra* note 170. This new arrangement has advantages and disadvantages. An obvious advantage is that it cuts down on the caseload of the USSR Council of Ministers and thus speeds up the time period for approval of joint venture proposals. The disadvantage is that if the approval is granted by a lower organ, Western partners may believe that the approval does not carry the same weight of authority as one granted by the Council of Ministers. As a result, the provisions of the agreement approved by the lower organ will be more susceptible to collateral attacks by the parties. This difference in attitude, however, is based only on the perception of the parties. Under the current law, approval by a lower organ is as valid and final as that given by the Council of Ministers.

Another point is worthy of mention. In the opinion of Professor Voznesenskaia, the September 1987 amendment also effectively amends article 16, which outlines the procedure through which a foreign partner may transfer his share in the joint venture to another foreign partner. Voznesenskaia, *supra* note 170, at 120. Under this amendment, therefore, the ministry or department that originally approved the formation of the joint venture may also authorize the transfer of the foreign partner's share to another foreign partner.

types of manufactured products, raw materials and foodstuffs, to attract advanced foreign equipment and technologies, management expertise, . . . and financial resources" to the Soviet Union.[175] More specifically, the ministries and departments must strive "to expand the national export sector and to reduce superfluous imports."[176] Although the law does not define the phrase "advanced foreign equipment and technologies," it probably refers to any foreign technology which is more advanced than that presently found in Soviet arsenals. It is particularly important that the ministries and departments discourage the proposed joint venture from importing items for which substitutes are readily available inside the country and items that are not critically important to the purpose of the joint venture. Because any such import would unnecessarily deplete the foreign currency reserves of the joint venture, it would qualify as "superfluous" and should be discouraged by the respective departments and ministries.

Article 3 distinctly reveals a Soviet preference for production-oriented investment over non-productive ventures; that is, for export-oriented industries over service industries or industries that produce non-exportable commodities. This does not mean that the ministries and departments must automatically veto all joint venture proposals that call for the establishment of service industries in the Soviet Union. After all, some service-oriented industries (for example, hotels that cater to foreign currency-paying tourists) are capable of producing foreign currency reserves for the Soviet Union. Instead, article 3 seems to say that the ministries and departments, in the course of giving their preliminary approval to a joint venture proposal, should strike a balance between export-oriented and service-oriented industries.

Once the joint venture is formed and begins to operate on Soviet territory, all of its domestic operations are governed exclusively by Soviet law, unless an international treaty to which the Soviet Union is a party provides otherwise.[177] Article 1 lists the sources of that applicable law, including the following: (1) the January 13, 1987 legislation of the Presidium of the USSR Supreme Soviet on the formation of international joint ventures;[178] (2) the January 13, 1987 Joint Venture Law;[179] and (3) other relevant laws of the USSR and its constituent union repub-

175. 1987 Joint Venture Law, *supra* note 4, art. 3.
176. *Id.*
177. *Id.* art. 1.
178. *Id.*
179. *Id.*

lics,[180] subject to any exceptions contained in any international treaty or agreement to which the USSR is a party. One should add to this list the joint venture agreement entered into by the parties themselves;[181] to a large extent it is this agreement that will govern the enterprise's daily operations.

The prospective Western partner must pay particular attention to this provision of article 1. Hidden behind the innocuous phrase "other legislative acts of the [USSR] and Union Republics"[182] is an intricate web of rules that could spell the difference between the profitability and nonprofitability of the joint venture enterprise. The two laws that are specifically mentioned in the text of this provision constitute the tip of an enormous iceberg. Beneath them lie other laws that will govern the diverse activities of the joint venture, such as its power to enter into a contract, the prerequisites for the validity of such a contract, its tort liability flowing from the actions of its officers or employees, its property rights, the validity of the terms of its employees' employment contracts, the validity of its lease agreements, its banking transactions inside the

180. Of the fifteen union republics in the USSR, *see* KONST. SSSR (1977), art. 71, the Russian Soviet Federative Socialist Republic (RSFSR) is the most important because its laws serve as a model for all of the other union republics. Accordingly, the differences between RSFSR laws and the laws of the other fourteen union republics are quite minimal, especially in those areas relevant to the operations of a joint venture in the Soviet Union. Typically, the other union republics wait to see the structure of RSFSR law and then proceed to model their own laws on the corresponding RSFSR prototype. RSFSR laws are in turn modeled after federal guidelines on the particular subject. Therefore, this study will focus on federal and RSFSR laws only in its discussion of "other relevant laws" of the USSR and its constituent republics. If a particular joint venture is domiciled in a Soviet republic other than the RSFSR, however, the laws of that domicile, along with the relevant federal laws, will govern the activities of the joint venture. If this is the case, counsel for the joint venture must make an effort to consult the laws of that particular union republic.

181. One commentator has suggested that even though the joint venture law stipulates in article 1 that the activities of the joint venture are to be governed by Soviet law, nothing in this law would prevent the parties from electing another law to govern the joint venture contract. In other words, whereas the activities of the joint venture—the relationship between the joint venture and third parties—must be governed by Soviet law, the partners could stipulate in their agreement that the terms of the joint venture contract as they apply to the partners inter se may be governed by foreign law. *See* Hober, *Negotiating Joint Ventures, supra* note 58, at 38. After studying the stipulations in numerous joint venture agreements that already have been signed, Mr. Hober noted that many typically elected Swedish law to govern the joint venture contract itself. *Id.* One would imagine that Soviet law would apply if the parties fail to stipulate the law that governs their joint venture contract.

182. 1987 Joint Venture Law, *supra* note 4, art. 1.

Soviet Union, the housing of its officers, and the granting of entry and exit visas to its foreign officers and employees.[183] Clearly, failure to consult "these other relevant laws" could spell doom for the joint venture.

Article 4 limits Soviet or foreign participation in the joint venture to those entities that enjoy the status of a juridical person under Soviet law.[184] This precludes the participation of individuals acting as sole proprietors in the joint venture. Thus, a participant in a Soviet joint venture may be a corporation, general partnership, limited partnership, professional corporation, another joint venture, or any other form of business association. Again, one should note that the Soviet definition of a juridical person, as well as the attributes of juridical personality under articles 23-40 of the RSFSR Civil Code, are somewhat different from those in Western law.[185] As long as all of the participants meet the tests of a juridical person under Soviet law, it makes no difference from the standpoint of article 4 whether the Soviet or the Western side consists of more than one partner. Consider a joint venture between entities A and B. A consists of entities X, Y, and Z; B consists of entities C, D, and E. The joint venture is valid under article 4 as long as all participating entities qualify as juridical persons. If in this hypothetical situation A is the foreign partner, the law does not require that X, Y, and Z be nationals of the same country. Therefore, X could be American, Y could be Italian, and Z could be Japanese. The only requirement in this respect is that all foreign partners must be from "capitalist" or "developing" countries.[186] The law does contemplate, however, that all the entities constituting partner B must be Soviet nationals.

The original text of article 5 stated that the Soviet equity share in the joint venture could not be less than fifty-one percent.[187] Although many of the East-West joint ventures formed in the Soviet Union before De-

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183. The activities of the joint venture relating to contracts, tort liability, property rights and lease agreements are governed by the applicable Soviet civil code. Its employment relations are governed by the applicable Soviet labor code. Its banking transactions, employee housing relations and the procurement of employee visas and residence permits are regulated respectively by Soviet federal banking law, the applicable housing code and federal visa regulations. *See supra* notes 75-86.

184. 1987 Joint Venture Law, *supra* note 4, art. 4.

185. For a detailed discussion of the attributes of a juridical person under modern Soviet civil law, see Osakwe, *supra* note 87, at 31-34. *See also supra* note 92 (discussing Soviet concept of juridical person).

186. As noted above, the 1987 Joint Venture Law governs joint ventures between Soviet entities and entities from capitalist or developing countries; the Soviet-COMECON Joint Venture Decree governs joint ventures involving Soviet and other socialist entities. *See supra* note 4.

187. 1987 Joint Venture Law, *supra* note 4, art. 5.

cember 2, 1988, strictly followed the "51-49 percent" formula, a recent revision of article 5 now permits other variations of shareholding.[188] Because the law is silent on the relationship between a partner's equity share and the degree of control over the management of the enterprise, it does not necessarily follow that the majority partner will always be expected to have a controlling voice in the management of the affairs of the enterprise.

Under article 6, once the joint venture has met all formation requirements, it enjoys the status of a juridical person under Soviet law.[189] This means that it can enter into contracts; own, sell or buy property; sue and be sued in a court of law or before an arbitration tribunal; and be held liable for its acts.[190] As a juridical person, the joint venture operates on the basis of full economic accountability.[191] Consequently, it is self-financing and will not receive any subsidy from the state budget.[192] There is, however, a trap that should be noted here. Because Soviet law allows no person, juridical or otherwise, to own land in the USSR, the joint venture will not own the land that may be contributed to the joint venture by a Soviet partner.[193] Such land is deemed transferred not to the ownership of the joint venture but merely to its operational management.[194] Therefore, the land may not be "provisionally attached or subjected to compulsory execution to satisfy claims against [the joint venture] if such seizure is not permitted by law or if consent is not given by the appropriate state authority."[195] Similarly, if a Soviet partner contributes to the joint venture any other state immovable property which is merely transferred to its operational management (for example, buildings or other structures), the right of ownership does not pass to the joint venture.[196] This subtle point of Soviet law effectively extinguishes any opportunity for the Western partner to become a co-owner of all of the joint venture's capital assets. More important, it places a heavier burden on a Western partner whose principal contribution to the joint venture is

188. *See infra* text accompanying note 395.

189. *Id.* art. 6.

190. *See id.* arts. 6, 18; RSRSR Civil Code (1964), art. 23, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 399.

191. 1987 Joint Venture Law, *supra* note 4, art. 6.

192. *Id.*

193. *See* Osakwe, *General Principles of Soviet Land Law: Ownership and Use of Land in the Soviet Union*, in ACTA JURIDICA 147 (1985).

194. *See supra* note 93.

195. Osakwe, *supra* note 87, at 32.

196. *Id.* at 31-34.

money.[197]

Article 7 points to issues that must be stipulated in the joint venture agreement, which, for all practical purposes, is the operational law of the joint venture. The agreement must specify, among other things, the object and purpose of the enterprise, its headquarters (domicile), the composition of the participants, its capitalization and the equity shares of its participants, its internal structure, and its rules of procedure.[198] This provision grants the partners considerable latitude to define the terms of their co-adventure. For example, it neither specifies a minimum amount of capitalization nor requires the majority equity shareholder to have majority control over the affairs of the enterprise. This freedom is so extensive that whatever is not specifically prohibited by Soviet law is left to the discretion of the participants to regulate in their joint venture agreement.

Article 8 requires the parties to agree on a fixed term for the operation of the enterprise.[199] Article 9 stipulates that once the joint venture has been formed, it must be registered with the USSR Ministry of Finance, which maintains a current register of all East-West joint ventures operating inside the country.[200] It is important to note that under article 9, a joint venture acquires the rights of a juridical person not from the point of its "formation" or from the time its constituent instrument "enters into force," but from the moment at which its constituent instrument is registered with the USSR Ministry of Finance.[201] Finally, article 9

197. For example, if a Soviet joint venture partner contributed land valued at 20 million rubles and buildings valued at 31 million rubles, neither the land nor the buildings will be regarded as the property of the joint enterprise if they were merely transferred to the Soviet partner's operational management by the state. Let us further assume that the foreign partner contributed the equivalent of 49 million rubles in cash to the capitalization of the joint venture. If at the time of the joint venture's liquidation, it has no other property or assets that could be used to satisfy the claims of its creditors, and the obligations of the joint venture total 40 million rubles, all of the firm's obligations will be paid out of the contribution of the foreign partner because the contributions of the Soviet partner are not deemed to be the property of the joint venture.

198. 1987 Joint Venture Law, *supra* note 4, art. 7. A recent publication offers valuable insights into the issues that should be addressed in the joint venture agreement. *See* HARVARD RESEARCH CENTER, *supra* note 141, at 20-23; *see also id.* at 263-302 (containing representative samples of joint venture agreements).

199. 1987 Joint Venture Law, *supra* note 4, art. 8.

200. *Id.* art. 9.

201. *Id.* This is consistent with art. 26 of the RSFSR Civil Code, which states that "[i]f the charter [of a juridical person] is subject to registration, the legal capacity of the juridical person commences at the moment of registration." RSFSR Civil Code (1964), art. 26, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 400.

provides that notice of the creation of a joint venture must be published in the press, presumably in the national press.[202]

Article 9 raises the issue of the partners' liability for acts of the joint venture prior to its registration. Under Soviet law, the partners are held jointly and severally liable for the obligation of the de facto joint venture, that is, prior to the time when it acquires the status of a juridical person.[203] Because under article 4 all prospective partners must be juridical persons, however, their liability for pre-registration obligations of their joint venture is limited, under article 32 of the RSFSR Civil Code, to the extent of their respective assets.[204] Any juridical acts entered into by officers or agents of the joint venture on behalf of the entity prior to its registration with the USSR Ministry of Finance must be submitted to the joint venture for its ratification as soon as it becomes a juridical person.[205] Even if it fails to ratify the act, the joint venture nevertheless will be held liable if the act was undertaken by an agent of the de facto entity in furtherance of the purpose of the enterprise and in contemplation of its future de jure existence.[206] For example, if the officers of a de facto joint venture entered into an agreement on behalf of the enterprise to

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202. 1987 Joint Venture Law, *supra* note 4, art. 9.

203. Under article 437 of the RSFSR Civil Code, partners in a joint enterprise are liable jointly and severally for the obligations of the joint enterprise, even if the enterprise is not a juridical person. RSFSR Civil Code (1964), art. 437, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 501. Article 437 states that the parties must agree as to their respective shares in the obligations of their joint enterprise. *Id.* If no such agreement exists, article 437 further provides that the obligation shall be paid from the common property of the joint enterprise. *Id.* If such common property is insufficient to meet the obligations of the joint enterprise, each partner must contribute to the remaining obligation in direct proportion to its share in the common property of the joint venture. *Id.*

204. RSFSR Civil Code (1964), article 32, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 401.

205. Under Soviet agency law, a principal does not have to be a juridical person in order to appoint an agent. RSFSR Civil Code (1964), art. 62, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 408. For present purposes, the prospective joint venture partners are capable of appointing an agent to act on their behalf even prior to the formation of a joint venture. It is the general duty of an agent in any case to give an account of his activities to his principals. *See id.* If in the instant case the prospective joint venture partners have transformed themselves into a juridical person which will effectively replace them as the principal in their previous relationship with their agent, the agent must report not to the partners as individuals, but to the joint venture. The latter must then ratify the act of the agent appointed before it was formed. *See id.* art. 63, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 409.

206. *See id.* art. 62, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 408 (outlining Soviet law of agency).

lease premises that would serve as its offices and purchased furniture for those premises, the joint venture will be held liable under the respective contracts even if it fails to ratify them upon registration.

Pursuant to article 10, the joint venture must be capitalized from the contributions of the respective partners.[207] The partners may later add to this initial capital allocations from the profits of the joint venture.[208] In addition, the parties may subsequently contribute additional capital to the fund of the joint venture.[209] In other words, article 10 leaves it entirely to the discretion of the partners to decide how much initial capital they need for their venture, how much of their profits may be subsequently contributed to the capital, and whether to levy additional contributions on the partners for the purpose of augmenting the capital of the enterprise.

Article 11 gives the partners a similarly wide range of freedom as to what they may contribute to the capital fund of the joint venture, whether this be in the form of buildings, equipment, other tangible property, rights to the use of the land or water or other natural resources, or rights to the operational management of a building.[210] The contribution may also be in the form of cash.[211]

Article 12 addresses the thorny issue of the valuation of the Soviet partner's contribution. According to this provision, the Soviet partner's contribution "is evaluated in rubles on the basis of agreed prices with due regard to world market prices."[212] Similarly, the contribution of the foreign partners must be "converted to rubles at the official exchange rate of the USSR State Bank."[213] Article 12 further provides: "In the absence of world market prices the value of contributed property is agreed by the partners."[214] This may prove to be one of the stickiest points in the negotiations leading to the formation of the joint venture. Because the Soviet ruble is grossly overvalued and since it is not easy to determine the world market value of the property that may be contributed by a Soviet partner, the Western partner must take particular care to ensure that the fair value of the contributions by both participants is adequately reflected in the capitalization of the enterprise. Western partners should also insist on an independent evaluation of both partners'

207. 1987 Joint Venture Law, *supra* note 4, art. 10.
208. *Id.*
209. *Id.*
210. *Id.* art. 11.
211. *Id.*
212. *Id.* art. 12.
213. *Id.*
214. *Id.*

contributions. The Soviet partner is likely to exaggerate the value of the land or building that it contributes to the joint venture. Therefore, as a special incentive for the Western partner to contribute capital as well as property and other equipment, article 13 provides that any such material or equipment imported into the Soviet Union as its contribution to the capital of the joint venture is exempt from Soviet customs duties.[215]

Article 15 returns to the issue of the scope of the legal personality enjoyed by the joint venture. Among other protections, this provision states that the joint venture property will not be subject to requisition or confiscation in an administrative proceeding, and that execution may be levied against joint venture property only by a decision of a court of law or a properly constituted joint venture tribunal.[216] In fact, article 15 accords to the joint venture property the maximum degree of protection that Soviet law can afford to any form of property in the USSR: it equates a joint venture's property to state property for the purposes of legal protection.[217]

It is particularly important to note the qualifying language used in the opening sentence of article 15, which stipulates that, "under Soviet legislation," the exercise of whatever property rights the joint venture may have under this law shall be "in accordance with the objectives of its activities and the purpose of the property."[218] Accordingly, limitations on the joint venture's capacity to possess, use or dispose of its property lie buried in those "other legislative acts of the [USSR] and its Union Republics" alluded to in article 1(2).[219] By using this particular language, article 15(1) merely borrows the idea of articles 92 and 93(1) of the RSFSR Civil Code, which stipulate that an owner must exercise its right to possess, use or dispose of its property in accordance with the law and characterizes property by purpose.[220] Thus, a juridical person whose business is to manufacture goods may not operate one of its buildings as a hotel to provide accommodations to the general public. This is yet another warning to the Western partner that it must not confine its knowledge of Soviet law merely to a mastery of the rules of the Joint Venture Law.

Article 16 addresses the issue of whether a partner's interests in the

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215. *Id.* art. 13.

216. *Id.* art. 15.

217. *Id.*

218. *Id.*

219. *Id.* art. 1.

220. *See* RSFSR Civil Code (1964), arts. 92, 93, *reprinted in* LAW OF EASTERN EUROPE, *supra* note 71, at 416.

joint venture can be assigned to a third party. This provision states three conditions for such an assignment: (1) the other partner must consent to the transfer; (2) authorization for the assignment must be obtained from the State Foreign Economic Commission (SFEC) of the USSR Council of Ministers; and (3) the Soviet partner shall be given the priority right to acquire the interest of a retiring foreign participant.[221] This provision closely follows the rules in Soviet law governing the assignment of common property interests to a third party.[222] If a joint venture reorganizes, article 16(2) states that its rights and obligations accrue to its legal successors.[223]

Article 17 grants maximum protection to industrial property rights, including any patent rights, of the joint venture.[224] Furthermore, the law permits the joint venture participants to define in their agreement the procedure for the transfer to the joint venture, as well as the conditions for the use of, any patent right that belongs to a participant in the joint venture.[225] Article 18 limits the liability of the joint venture to the extent of its assets.[226] This rule technically equates a Soviet joint venture to an American corporation or limited partnership for purposes of the participants' liability. Although this rule appears to be clear on its face, it may conflict with article 10, which is discussed above.[227]

Article 18 provides that the Soviet state will not be liable for joint venture obligations even if a participant in the joint venture is a Soviet state organization or enterprise.[228] Following the same reasoning, article 18 provides that the subsidiary of a joint venture operating inside the USSR will not be held liable for the obligations of the joint venture if the former enjoys an independent status as a juridical person.[229] Reciprocally, a joint venture will not be held liable for the obligations of the

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221. 1987 Joint Venture Law, *supra* note 4, art. 16. These requirements may now be less exacting under new rules governing assignability of shares. *See infra* text accompanying note 415.

222. *See* RSFSR Civil Code (1964), art. 120, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 23-34 (outlining law governing the assignment of interests to a third party).

223. 1987 Joint Venture Law, *supra* note 4, art. 16(2). *See also* RSFSR Civil Code (1964), art. 37, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 402 (discussing the legal consequences of the reorganization of a juridical person).

224. 1987 Joint Venture Law, *supra* note 4, art. 17.

225. *Id.*

226. *Id.* art. 18.

227. *See supra* notes 207-09 and accompanying text; *see also infra* notes 477-80 and accompanying text.

228. 1987 Joint Venture Law, *supra* note 4, art. 18(2).

229. *Id.* art. 18(3).

Soviet state or for the debt of any subsidiary established as a separate juridical person.[230] Finally, article 19 permits the joint venture to establish branches or offices of its representatives either in the USSR or abroad if the joint venture agreement so provides.[231] If a joint venture formed outside the USSR with the participation of a Soviet enterprise wishes to open a branch office on Soviet territory, its creation and operation must comply with the applicable law governing the establishment of Soviet joint enterprises.[232]

The provisions of articles 18 and 19 of the Joint Venture Law follow quite closely the language used in articles 32-35 of the RSFSR Civil Code.[233] Therefore, to understand the full implications of the former, one must turn to the corresponding provisions of the latter. Article 32 of the RSFSR Civil Code outlines the procedures used to reach business assets, including the following: (1) if a judgment is rendered against a juridical person, it may be satisfied first from the cash assets of the debtor organization held in a bank account; (2) the organization's other assets may be attached only if the cash assets are insufficient to satisfy the debts; (3) if the juridical person is a state organization that has among its assets state property which has been transferred to its operational management, these assets may not be attached in satisfaction of the debts of the juridical person; (4) if the juridical person is a collective farm, article 101 stipulates that execution in favor of creditors may not be levied on certain debtor property (for example, its buildings, tractors, combines and other machines, means of transportation, and other property constituting its capital assets, stocks of feed or fodder); and (5) if the debtor is a trade union organization or any other non-governmental organization, execution of creditors' claims cannot be levied on certain debtor property (for example, its buildings, equipment, sanatoria, rest homes, cultural centers, clubs, stadia and pioneer camps, and education-cultural funds).[234] In the case of the collective farm and trade union organizations, this rule does not readily leave too much to be attached to satisfy a judgment in favor of a creditor. This means that a joint venture must be particularly wary about transacting any sort of business with a collective farm or a state farm.

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230. *Id.*

231. *Id.* art. 19.

232. *Id.*

233. RSFSR Civil Code (1964), arts. 32-35, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 401.

234. *See* KOMMENTARII K GRAZHDANSKOMU KODEKSU RSFSR [COMMENTARY ON THE RSFSR CIVIL CODE] 61, 129-30, 135, 140 (S. Bratus & O. Sadikov 3d ed. 1982) (discussing articles 32, 98, 101, and 104).

C. *Dispute Settlement (Article 20)*

No one enters into a business venture hoping that a dispute with a partner will arise in the course of its operation, just as no one enters into a marriage hoping that he or she might wind up in divorce court. Disputes arise in both real life situations, however, and the law provides for this eventuality. Article 20 of the 1987 Joint Venture Law sets forth the procedure that governs disputes either between the partners or between the joint venture and a Soviet state agency, cooperative organization, or other governmental organization.[235] According to this provision, any dispute arising in the course of the operation of the joint venture may be adjudicated in Soviet courts or, if the parties agree, arbitrated before the Soviet Arbitration Court.[236] One should note, however, that despite the mandatory language of article 20, a subsequent informal arrangement permits Soviet partners in certain categories of joint ventures to agree to the arbitration of nonlabor disputes in Sweden.[237] Notwithstanding this informal amendment to article 20, the partners still must select from a wide range of arbitration rules if they elect to arbitrate before the Soviet Arbitration Court.[238] If the dispute involves the em-

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235. 1987 Joint Venture Law, *supra* note 4, art. 20.

236. *Id.* The designation of the Foreign Trade Arbitration Commission Attached to the USSR Chamber of Commerce (FTAC) has been changed to Arbitration Court Attached to the USSR Chamber of Commerce. This new Arbitration Court also has a new statute, which is different from that of the defunct FTAC. *See supra* note 136.

237. The American Trade Consortium, *see supra* note 109, has persuaded the Soviets to submit all applicable joint venture disputes to arbitration in Sweden rather than before the Arbitration Court. *See Team Approach, supra* note 121, at F-4, col. 2. This raises an interesting question under Soviet law: If an act of the USSR Council of Ministers (the Joint Venture Law of 1987) directs Soviet partners in an international joint venture to submit all applicable disputes to arbitration before the FTAC, can the parties (including a Soviet party) agree to a different forum (arbitration in Sweden as opposed to arbitration before the FTAC)? The question must be answered in the affirmative. Because the joint venture agreement must be submitted for approval to the USSR Council of Ministers, or to a subordinate organ, the joint venture agreement is of equal standing with the Joint Venture Law itself. As such, the principle of *lex posterior derogat priori* applies. Thus, to the extent that the joint venture agreement is inconsistent with the Joint Venture Law, it supercedes the latter. This arrangement is limited, however, because the exemption that it confers (from the provision of article 20 of the Joint Venture Law) applies only to those East-West joint ventures in which one of the foreign partners is a participant in the American Trade Consortium, and not to all future East-West joint ventures. This in itself raises a different set of problems. *See infra* notes 444-46 (questioning the constitutionality of the Council of Ministers' decision); *see also infra* text accompanying note 488 (addressing unfairness of special treatment for the ATC.).

238. Because international arbitration rules tend to differ as much as the organizations that are set up to provide arbitration services, and since there is no generally inter-

ployment rights of a Soviet employee of the joint venture or arises between the joint venture and the trade union organization of workers at the joint venture, by operation of Soviet labor law these disputes must be submitted to arbitration before the trade union arbitration tribunal (for joint venture-employee disputes) or before a higher organ of the trade union organization (for joint venture-trade union organization disputes).[239]

Article 40 of the 1987 Joint Venture Law also provides an avenue for the settlement of joint venture disputes. As discussed below,[240] article 40 states that if the joint venture decides to challenge the tax assessment determined by a financial institution of the Soviet Government, the challenge must be lodged with that particular financial institution.[241] Appeals from a decision of that agency are taken to the agency's supervising authority.[242] Similarly, article 5 of the 1987 Joint Venture Decree stipulates that certain disputes must be settled by the organs of state *arbitrazh* if this is required under Soviet law.[243]

In each of the five dispute resolution procedures outlined above, Soviet organs provide the exclusive avenue for dispute settlement. This may dissuade some Western venture capitalists from entering into a joint venture with a Soviet partner. Although an ancillary informal agreement permits arbitration of nonlabor disputes to be held outside the USSR,[244] it is a limited exception involving just a handful of joint ventures; the provision of article 20 remains the law on the books.[245] Granting that the defunct Foreign Trade Arbitration Commission (FTAC) had a reputation for fairness to foreign parties, that the successor to the FTAC likely will also prove to be an impartial tribunal, and that very few joint venture cases will actually wind up in Soviet regular courts or before

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national law on the subject, the partners in a joint venture must practically design new rules to suit their needs. For a guide to the choices that are presently available, see Rowe, *Arbitration: Getting the Best Deal,* INT'L FIN. L. REV., Mar. 1988, at 26.

239. These types of labor disputes are regulated by the Labor Code. Thus, disputes between the employer and the employee or group of employees must be submitted to the trade union arbitration tribunal. RSFSR Labor Code (1964), art. 201, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 739. Similarly, disputes between the trade union organization of employees and the management of the enterprise must be submitted to the trade union arbitration tribunal. *Id.* art. 224, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 748.

240. *See infra* notes 320-22 and accompanying text.

241. 1987 Joint Venture Law, *supra* note 4, art. 40.

242. *Id.*

243. Joint Venture Decree, *supra* note 4, art. 5.

244. *See supra* note 237.

245. *See* Osakwe, *supra* note 87, at 49.

organs of state *arbitrazh*, the fact remains that the foreign joint venture partner not covered by the special consortium agreement has no choice but to submit to arbitration or adjudication before a Soviet body. Until this law is changed, therefore, the Western partner will be well advised, in the process of drafting the joint venture agreement, to insist on arbitration of disputes by the Soviet arbitration court rather than regular Soviet courts for two reasons. First, the arbitration court procedure will be more familiar to the Western partner than the procedure before the Soviet civil courts.[246] Second, a foreign counsel appointed by the Western partner to represent it in the dispute resolution proceedings can appear before the arbitration court, but cannot plead before a regular Soviet court unless he is a member of the Soviet bar or is accompanied by a Soviet advocate.[247]

D. *Management Structure (Articles 21-35)*

The 1987 Joint Venture Law grants partners substantial freedom to determine the shape of the management structure of their business. In a few instances the law mandates what the partners must do; in many others, however, it permits the participants to pick the structure that best suits their needs. Under article 21, the management of the joint venture consists of a board of directors (*pravlenie*), a board of administrators (*direktsiia*), and chief executive officer (*general'nyi direktor*).[248] The board of directors, the highest governing body of the joint venture, is comprised of persons appointed by the partners following a procedure to be determined in the joint venture agreement.[249] Members of this board

246. Soviet arbitration rules and procedures are quite similar to those that prevail in the West. Consequently, a Western lawyer who is familiar with Western arbitration rules will have minimal problems adjusting to the rules of the Soviet arbitration court. For a detailed discussion of the principal features of Soviet arbitration procedure, see *id.* at 40-49.

247. Only advocates (members of the Soviet bar) or jurisconsults (in-house corporate counsels) may serve as legal counsels of the parties—individuals or organizations—in civil proceedings before the regular civil courts. *Osnovy Zakonodatelstva Soiuza SSSR i Soiuznyx Respublik o Sudoustroistve v SSSR* [Fundamental Principles of the Law on Court Organization of the USSR and Union Republics] (established by a Decree of the USSR Supreme Soviet on June 25, 1980), art. 14(1), *reprinted in* FUNDAMENTAL PRINCIPLES, *supra* note 14, at 187. Article 16 allows other persons to represent the interests of the parties in civil proceedings, for example, representatives of trade union and other nongovernmental organizations. The latter representatives of the parties, however, do not appear in court as legal counsel. *Id.* art. 16, *reprinted in* FUNDAMENTAL PRINCIPLES, *supra* note 14, at 187.

248. 1987 Joint Venture Law, *supra* note 4, art. 21.

249. *Id.*

are representatives of the partners of the joint venture and are designated to serve on this board by the individual partners.[250] The board of administrators, which includes both Soviet and foreign nationals, runs the daily affairs of the joint venture.[251] Under the law's original text, both the chairman of the board of directors and the chief executive officer (CEO) had to be citizens of the USSR;[252] however, a recent amendment now permits foreign individuals to hold either of these positions.[253] The language of article 21 suggests that the lawmakers did not contemplate that the two positions should be held by the same person. Article 21 does not specify whether representation on the two boards of the joint venture must reflect the percentage of shares held by the participants in the joint venture. The law's initial insistence that the chairman of the board of directors and the CEO be Soviet citizens, however, suggests that the Soviet Government wanted the officers of the joint venture to be tightly controlled by the Soviet partner. Regardless of who holds these positions, if the parties agree, they can dilute the CEO's powers by assigning more management power to the board of administrators and requiring a large enough majority vote in this board to secure the effective participation of both partners in the affairs of the enterprise.

Article 22 establishes a channel of communication between the joint venture and Soviet authorities. All contacts with the central administrative organs of the USSR and the union republics must be channeled through the agencies to which the Soviet joint venture partner is subordinate.[254] The joint venture may communicate directly with all other Soviet agencies, such as local government authorities and other Soviet organizations.[255] Article 23 stresses the fact that the joint venture will not operate as part of the Soviet state economic planning system.[256] This means that the joint venture shall not be bound by state economic planning and that the state will not guarantee the sale of the joint venture products in the Soviet market. Article 24 further stresses the operational independence of the joint venture by granting the joint venture the right to engage in export-import operations independent of state agencies[257] and planning mechanisms.[258] If the joint venture wishes, it may

250. *Id.*
251. *Id.*
252. *Id.*
253. *See infra* text accompanying note 397.
254. 1987 Joint Venture Law, *supra* note 4, art. 22.
255. *Id.*
256. *Id.* art. 23.
257. It is more efficient for the joint venture to bypass the cumbersome procedures that a Soviet foreign or domestic trade organization must follow in order to engage in

import or export commodities through the respective Soviet foreign trade organizations (FTOs).[259] Should the joint venture prefer to carry out its own independent import-export operation, it must receive authorization from the proper Soviet authorities.[260] Article 24 also allows the joint venture to enter into direct correspondence (either by mail, telegraph, teletype or telephone) with outside parties.[261] This probably means that communications emanating from the joint venture do not need to be cleared with any governmental authorities, as would be the case if such correspondence were coming from a Soviet organization.[262]

From the Western investor's point of view, article 25 embodies one of the most objectionable principles in this entire joint venture program. Article 25 stipulates that the joint venture may spend foreign currency, either for the payment of profits or other compensation, to the foreign participants or for any other purpose of the joint venture, only when such foreign currency is earned from the sale of its products abroad.[263] Consequently, unless the joint venture can generate sufficient foreign currency proceeds from the sale of its products or services in the foreign markets or inside the Soviet Union, all distribution of profits to the participants, as well as the payment of compensation to foreign specialists and foreign employees of the joint venture, must be made in rubles.

In its original text, article 26 contradicted the general spirit of the

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import-export operations. The rules that these Soviet organizations must follow are set forth in *Osnovnye usloviia regulirovania dogovornykh otnoshenii pri osushchestvlenii eksportno-importnykh operatsii* [The Basic Conditions for the Regulation of Contract Relations While Carrying out Export-Import Operations], 11 BULL. NORM. AKT. MIN. & VED. SSSR 37-46 (1988) (Decree of the USSR Council of Ministers adopted on July 15, 1988).

258. 1987 Joint Venture Law, *supra* note 4, art. 24.

259. *Id.*

260. *Id.*

261. *Id.*

262. Soviet organizations that have the authority to conduct foreign trade operations with foreign entities, such as the Foreign Trade Organizations (FTO's) and Foreign Trade Firms (FTF's) are nevertheless subordinated to an oversight entity that exercises general control over the organization's operations. Such general oversight includes close monitoring of the organization's communications with foreign entities. For example, the statute governing FTO's adopted by the USSR Council of Ministers on Dec. 22, 1986, states that "control over the activities of the FTO shall be carried out by the ministry or department within whose system the FTO belongs." FTO Statute, *supra* note 100, art. 2(2). Similarly, the Model Statute of FTF's that was adopted by the USSR Council of Ministers on Dec. 22, 1986, provides that "direct control over the activities of the FTF shall be carried out by the enterprise within which the FTF operates." *Id.* art. 1(3) (appendix).

263. 1987 Joint Venture Law, *supra* note 4, art. 25.

Joint Venture Law of 1987. Article 26 stated that although the joint venture could sell its products in or buy needed items from the Soviet market, the payment for the transactions had to be in rubles.[264] The provision further stated that whenever a joint venture wished to sell or buy goods in the Soviet domestic market, it had to do so through an intermediary, such as an FTO.[265] The rule thus treated the joint venture as if it were situated not within the USSR, but rather off-shore. That awkward arrangement guaranteed too large a role for the FTOs and created an artificial barrier between the joint venture and the Soviet domestic market. If it had been left to stand, article 26 would have substantially diluted the principle of operational autonomy embodied in article 24.[266]

A subsequent Council of Ministers decree eliminated the FTOs as intermediaries, thus permitting joint ventures to transact directly with Soviet domestic suppliers and buyers of their products.[267] Furthermore, some Soviet enterprises may pay foreign currency to a joint venture for goods purchased from the latter.[268] Under this new rule, therefore, the joint venture can transact directly with a Soviet enterprise either to sell or buy products, and it can also negotiate payments by the Soviet enterprise to be made in convertible foreign currency. From the vantage point of the foreign partner, this is a substantial improvement over the formula provided in the original decree.

As part of the joint venture's financial autonomy, it possesses the right, under article 27, to borrow money for its operations.[269] This money may be borrowed in rubles or in foreign currency.[270] All ruble loans must be obtained either from the State Bank of the USSR or the Foreign Trade Bank of the USSR.[271] Foreign currency loans may be obtained either from the Foreign Trade Bank of the USSR or, with the latter's permission, from a foreign bank.[272] If the loan is obtained from any of the Soviet banks, article 28 grants the lending bank authority to control the designated use and schedule for the repayment of the loan.[273] Article 29 requires the joint venture to maintain its ruble and foreign

264. *Id.* art. 26.
265. *Id.*
266. *See supra* notes 258-62 and accompanying text.
267. *See* December 1988 Decree, *infra* note 388, art. 2.
268. *See id.* art. 22.
269. 1987 Joint Venture Law, *supra* note 4, art. 27.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* art. 28.

currency accounts either in the State Bank of the USSR or in the Foreign Trade Bank of the USSR.[274] Both accounts must be interest-bearing.[275] Any losses or gains resulting from the fluctuations in foreign currency exchange rates are debited or credited to the bank account of the joint venture.[276]

Article 30 requires the joint venture to establish a reserve fund as a backup for its operations.[277] Until this reserve fund reaches twenty-five percent of the joint venture's capitalization, the joint venture must assign a portion of its annual profits to this fund.[278] The actual amount of the annual profits assigned to this reserve fund is determined by the partners in their joint venture agreement.[279] The partners must also state in their agreement whether the joint venture seeks to establish other funds.[280]

The profit-sharing formula in article 31 mirrors the partners' share in the interests of the enterprise as agreed to under article 5.[281] A foreign partner is guaranteed the right to repatriate his foreign currency share of the enterprise profits under article 32.[282] Article 33 requires the joint venture to make amortization deductions for the joint venture in accordance with the prescription in force for Soviet state organizations.[283] The partners nevertheless may decide in their joint venture agreement to vary the amount to be set aside for this purpose.[284]

Article 34 allows the joint venture to design and erect construction projects if the operations of the enterprise so require.[285] The design for such projects must be submitted to the State Construction Committee of the USSR for its approval.[286] If a portion of the construction materials for the project is to come from Soviet construction or assembly organizations, article 34 promises that the joint venture will be given priority

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274. *Id.* art. 29.

275. *Id.* The interest rate of foreign currency accounts is pegged to the world market rate; the State Bank of the USSR determines the rate of interest for the ruble account.

276. *Id.*

277. *Id.* art. 30.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* art. 31.

282. *Id.* art. 32. This provision of article 32 seems to be predicated upon article 25's requirement that the foreign currency profit share must have been derived from the sale of the joint venture's products or services in a foreign market or inside the Soviet Union. *See supra* text accompanying note 263.

283. *Id.* art. 33.

284. *Id.*

285. *Id.* art. 34.

286. *Id.*

treatment.[287] Finally, article 35 provides that if the joint venture wishes to transport any of its goods within the USSR, it will have the same rights as any Soviet organization.[288] Under Soviet civil law, this includes the right to enter into a carriage of goods contract directly with a transport organization.[289] Any interpretation of article 35 denying the joint venture the right to enter into direct contracts with Soviet transport organizations to arrange the carriage of their goods would be inconsistent with the amended version of article 26, which allows joint ventures to transact directly with Soviet enterprises.[290]

E. *Taxation and Insurance (Articles 36-43, 14)*

Although articles 36-43 of the 1987 Joint Venture Law contain its tax provisions, the taxation of East-West joint ventures in the Soviet Union is regulated by a separate decree of the Presidium of the USSR Supreme Soviet (Joint Venture Decree), which was issued on January 13, 1987.[291] One must examine both sets of tax laws to determine the tax status of the joint venture.[292] This analysis begins with the Presidium's

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287. *Id.*

288. *Id.* art. 35.

289. *See* RSFSR Civil Code (1964), arts. 373-85, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 484-88 (law governing contracts for the carriage of goods). Article 373 specifically stipulates that the transport organization and the shipper of the goods must enter into a contract for the carriage of goods. *Id.* art. 373, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 484. The shipper in this case would be the joint venture.

290. *See supra* notes 267, 268 and accompanying text.

291. *See* 1987 Joint Venture Decree, *supra* note 4.

292. It is interesting to note that international joint ventures operating within Soviet territory are taxed neither as domestic enterprises nor as foreign businesses. Rather, they are placed in a separate tax regime. Prior to 1988 the Soviet Union had four income tax regimes with separate tax rates: (1) state and cooperative enterprises and social organizations; (2) individuals (Soviet citizens and foreigners alike); (3) foreign-owned enterprises; (4) and international joint ventures (both East-West and Soviet-COMECON joint ventures). Whereas the tax regime of international joint ventures is governed by the tax provisions of the 1987 Joint Venture Decree and the 1987 Joint Venture Law, the tax regime of foreign enterprises and foreign individuals in the Soviet Union is regulated under a separate law. *See* Decree on Taxation of Foreign Persons, *supra* note 85. By contrast, the income tax regime of Soviet state and cooperative enterprises as well as social organizations is embodied in a different tax law. *See* Decree of April 22, 1941. For a general discussion of the income tax regimes of Soviet state enterprises, cooperative enterprises, social organizations and individual citizens, see de Jong, *Taxation (Juristic Persons)*, in 2 ENCYCLOPEDIA OF SOVIET LAW 656-60 (F. Feldbrugge ed. 1973); de Jong, *Taxation (Natural Persons)*, in 2 ENCYCLOPEDIA OF SOVIET LAW 660-64 (F. Feldbrugge ed. 1973). In 1988 a new income tax regime was proposed for cooperatives

Joint Venture Decree because under Soviet law it holds a higher legal status[293] than the Joint Venture Law, which is only an act of the USSR Council of Ministers.

Article 1 of the Joint Venture Decree delegates authority to the USSR Council of Ministers to promulgate regulations regarding both tax rates and the procedure for their collection.[294] All proceeds from this tax are credited to the budget of the Soviet Government.[295] Article 1 exempts all international joint ventures from the payment of tax on their profits during the first two years of their operation.[296] Because this decree in its original form specifically spoke of "tax on profit" (*nalog na pribyl'*) instead of "income tax" (*podokhodnyi nalog*),[297] one might assume that if

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and private artisans—the so-called "*perestroika* entrepreneurs." According to this law, earnings of cooperatives and private artisans over 500 rubles a month are taxed at progressive rates of up to 90%, rather than the flat 13% rate applied to ordinary citizens. *See O nalogooblozhenii grazhdan, rabotaiushchikh v kooperativakh po proizvodstvu i realizatsii produktsii i okazaniiu uslug, a takzhe ob izmenenii poriadka vydachi patentov na zaniatie individual'noi trudovoi deiatel'nosti* [On The Taxation of Citizens who work in Cooperatives Concerned with the Production and Sale of Goods as well as in Providing Services, and on Amendments to the Procedure for Handing Out Licenses to Those Individuals Who Wish to Engage in Private Entrepreneurial Activity], 11 Ved. Verkh. Sov. SSSR Item 174 (1988) (Decree of the Presidium of the USSR Supreme Soviet).

In response to a vocal outcry from the "*perestroika* entrepreneurs," the Soviets are considering a new tax plan. Under the plan's progressive scheme, taxes would range from 15% for workers earning over 700 rubles per month to 50% for workers earning over 1500 rubles per month. Those earning less than 700 rubles per month would be taxed at the present rate of 13%. The average Soviet worker earns roughly 230 rubles per month. *See Moscow Importing, supra* note 111, at 4, col. 6.

293. Under Soviet constitutional law, acts passed by the legislature or divisions thereof are hierarchically superior to acts passed by organs within the executive branch of the Soviet Government. This means that acts emanating directly from the USSR Supreme Soviet (the federal legislature) or its Presidium are superior to acts passed by the USSR Council of Ministers, individual ministries of the USSR, or executive departments and agencies that are subordinated to the respective ministries. *See* KONST. SSSR (1977), arts. 108, 120, 121, 128-30. The amendments to the USSR Constitution introduced on December 1, 1988, did not alter this constitutional hierarchy. *See supra* note 41 (discussing December 1988 amendments).

294. 1987 Joint Venture Decree, *supra* note 4, art. 1.

295. *Id.*

296. *Id.*

297. Whenever a Soviet tax statute contemplates income tax it uses the term *podokhodnyi nalog* (tax on income). This is the case with the statutes governing both the taxation of foreign enterprises that do business inside the USSR and the taxation of foreign citizens who live and work inside the Soviet Union. *See* Decree on Taxation of Foreign Persons, *supra* note 85. Both decrees of the USSR Council of Ministers concerning the two forms of international joint ventures in the USSR, *see supra* note 4,

the joint venture does not have any profits after the first two years of its operation, it would owe no federal "tax on profit."[298] Given the conditions under which these joint ventures will operate, it is quite conceivable that many would not be in a position to make any profits during the first ten years of operation.[299] It is therefore critically important to determine when a joint venture would be expected legally to begin to pay any form of tax to the Soviet Government. While the original text of the Joint Venture Decree left some confusion about this matter, a subsequent clarification by Soviet authorities specifically grants such a "tax holiday."[300] Accordingly, the joint venture should not pay federal "tax on profit" if its operation remains in the red after the first two years of setting up its business.

The question of timing was conclusively laid to rest by a 1988 decree of the Presidium of the USSR Supreme Soviet, which interpreted the two-year tax holiday as commencing from the moment that the enterprise reports its first profits.[301] In addition, article 1 of the Joint Venture Decree grants the USSR Ministry of Finance authority either to reduce the tax rate or to exempt individual taxpayers from this tax obligation.[302] Thus, under the current operational rule, a joint venture is obligated to pay tax to the federal authorities two years after it first reports a profit from its operations, the USSR Ministry of Finance may extend the period of the tax holiday beyond two years from the time that

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deliberately refer to a different kind of tax, *nalog na pribyl'* (tax on profit). The Joint Venture Law, for example, defines as taxable "profit remaining after deductions to [the joint venture's] reserve and other funds intended for the development of production, science and technology." 1987 Joint Venture Law, *supra* note 4, art. 36(1).

298. This interpretation of article 36 of the 1987 Joint Venture Law is not totally inconsistent with the practice of other socialist joint venture statutes. China, for example, grants a two year tax holiday beginning with the first profit-making year, which is not necessarily the first year of operation. *See* Note, *supra* note 59, at 100. The Soviets were aware of this Chinese rule at the time they drafted article 36, but it is not clear whether they wanted to follow this Chinese tax incentive system or depart from it.

299. *See supra* note 116.

300. A 1988 amendment to the 1987 Joint Venture Decree specifically states that article 1 of that decree, which corresponds to article 36 of the 1987 Joint Venture Law, "is hereby amended to exempt the joint venture from the payment of profit tax during the first two years of its profitable operation." *O vnesenii izmenenii i dopolnenii v nekotorye zakonodatel'nye akty SSSR v sviazi s sovershenstvovaniem vneshneekonomicheskoi deiatel'nosti* [On the Incorporation of Changes and Additions to Certain Legislative Acts of the USSR In Connection with the Modernization of Foreign Economic Activities], 12 Ved. Verkh. Sov. SSSR Item 185 (1988) (Decree of the Presidium of the USSR Supreme Soviet).

301. *See id.*

302. 1987 Joint Venture Decree, *supra* note 4, art. 1.

it was deemed payable, and the USSR Council of Ministers may reduce the amount of tax due or totally exempt an individual taxpayer from such obligation.

Article 2 of the Joint Venture Decree establishes the procedure for collecting delinquent taxes from international joint ventures.[303] Under article 3, unless an international tax treaty to which the USSR is a party otherwise provides,[304] the portion of the profits to be repatriated by the foreign joint venture partner is subject to yet another Soviet tax.[305] Unlike the provision of article 1, which grants the USSR Ministry of Finance authority to reduce the partner's joint venture profit tax rate or to exempt it entirely from the payment of such tax, article 3 merely delegates to the Council of Ministers authority to determine the rate of tax to be imputed on the portion of a foreign partner's share of profits that he later wishes to repatriate. It does not authorize the Council of Ministers to exempt a foreign partner from the payment of repatriation tax on its share of profits. Finally, article 4 of the Joint Venture Decree gives Soviet authorities discretion to decide on a case-by-case basis whether the land and other natural resources that are transferred to the operational use of a joint venture will be subject to a user's fee.[306]

The USSR Council of Ministers adopted the tax provisions of the 1987 Joint Venture Law pursuant to the Joint Venture Decree outlined

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303. *Id.* art. 2. The procedure to be followed in such instance is set forth in the *Polozhenie o vzyskanii ne vnesennykh v srok nalogov i nenalogovykh platezhei* [Statute on the Procedure for Collecting Delinquent Taxes and Non-Tax Payments], 5 Ved. Verkh. Sov. SSSR Item 122 (1981) (confirmed by a decree of the Presidium of the USSR Supreme Soviet on January 26, 1981).

304. One such tax convention was entered into between the governments of the Soviet Union and the United Kingdom on July 31, 1985. *Konventsiia mezhdu Pravitel'stvom Soiuza Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stvom Soedinennogo Korolevstva Velikobritanii i Severnoi Irlandii ob ustranenii dvoinogo nalogooblozheniia v otnoshenii nalogov na dokhody i prirost stoimosti imushchestv* [Convention Between the Government of the USSR and the Government of the United Kingdom of Great Britain and Northern Ireland on the Elimination of Double Taxation in Relation to Tax on Income and Excess Valuation of Property], 7 Ved. Verkh. Sov. SSSR Item 127 (1986). The Convention applies to tax on income earned by individuals or corporations on the territory of either the USSR or the United Kingdom by persons or corporations who are resident or domiciled on the territory of either of the contracting parties. *See id.*, arts. 1, 2; *see also Soglashenie mezhdu Pravitel'stvom Soiuza Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stvom Frantsuzskoi Respubliki ob ustranenii dvoinogo nalogooblozheniia dokhodov* [Agreement Between the Governments of the USSR and France on the Elimination of Double Taxation of Income], 19 Ved. Verkh. Sov. SSSR Item 259 (1987).

305. 1987 Joint Venture Decree, *supra* note 4, art. 3.

306. *Id.* art. 4.

above. With this in mind, the analysis now returns to the tax guidelines found in articles 36-43 of the Joint Venture Law.

Article 36 of the 1987 Joint Venture Law establishes a thirty percent joint venture profit tax rate.[307] Consistent with article 1 of the 1987 Joint Venture Decree,[308] these taxes are credited to the budget of the federal government of the USSR.[309] Similarly, paragraphs 2 and 3 of article 36 should be read to mean that the joint venture is exempt from a "tax on profit" for the first two years of its profitable operations.[310] When the tax holiday period terminates, however, the USSR Ministry of Finance may reduce the tax rate, further extend the period of the tax holiday, or totally exempt a particular taxpayer altogether from the tax.[311]

Article 37 requires the joint venture to compute its own tax.[312] The estimated amount of the joint venture tax for the current year is based on the enterprise's financial plan for that year.[313] The amount of tax on profit that was actually received must be determined by the joint venture not later than March 15 of the following year.[314] Article 38 gives Soviet financial agencies[315] the authority to verify the accuracy of this tax computation.[316] If the joint venture pays any excess tax, it may elect to credit the excess against its tax liability for the following year or receive a refund.[317]

Article 39 includes a schedule for the payment of the tax on profit. Taxes must be paid quarterly, and the final installment is due not later

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307. This 30% rate is lower than that applied to enterprises operating within the USSR that are wholly owned by foreigners. The rate of profit tax for this latter type of businesses is 40%. *See* Decree on Taxation of Foreign Persons, *supra* note 85. This distinction is important because many of the concessions provided in the Joint Venture Decree would be negated by foreign tax credit systems in many Western countries. It is also important to note that the tax provisions of the Soviet joint venture program do not allow for "bad debt reserve."

308. *See supra* notes 294-96 and accompanying text.

309. 1987 Joint Venture Law, *supra* note 4, art. 26.

310. *Id.* art. 36.

311. *Id.*

312. *Id.* art. 37.

313. *Id.*

314. *Id.*

315. The "financial authorities" referred to in article 38(1) consist of the tax assessment and collection departments of the USSR Ministry of Finance.

316. 1987 Joint Venture Law, *supra* note 4, art. 38(1). These agencies naturally would need full access to the books of the joint venture to verify the tax computation.

317. *Id.*

than April 1 of the following year.[318] A late penalty of .05 percent of the amount due is imposed for each day the payment is overdue.[319] If a joint venture is dissatisfied with any aspect of the tax collection procedure it has the right, under article 40, to file an appeal against the actions of the offending financial agency.[320] The complaint must be filed with the financial agency itself; further appeal from the agency decision may be taken to the agency's supervisory agency within one month of the former's ruling.[321] Pursuant to article 40, the filing of a tax appeal does not suspend the payment of the tax in question.[322]

Following article 3 of the Presidium's Joint Venture Decree,[323] article 41 of the 1987 Joint Venture Law stipulates that unless an international tax treaty to which the USSR is a party provides otherwise, a foreign joint venture partner must pay a twenty percent tax if it repatriates its share of the joint venture profit.[324] The law does not state whether the twenty percent tax will be levied only on the foreign currency share of profits that the foreign partner sends abroad, or whether it also applies to any share of profit which the foreign partner wishes to repatriate, such as goods bought with its ruble share of profits. The phrase "the part of the profit due to a foreign partner,"[325] however, seems to suggest that the transfer tax will be levied on all profit shares, including those in foreign currency, regardless of how the foreign partner wishes to repatriate them. Yet, because this export tax is levied on a foreign partner's share of profits only if it removes them from the Soviet Union, the foreign partner may consume its profits or portions thereof within the Soviet Union without further tax liability.

Article 42 states the broad coverage of joint venture taxation. It applies the tax rate under article 36 and the procedures outlined in articles 37-50 to "all revenues obtained" by the joint venture and its branches, both from operations within the territory of the USSR and abroad.[326]

The final tax-related provision of the 1987 Joint Venture Law concerns insurance. Article 14 originally required the joint venture to insure all of its property with insurance agencies of the USSR.[327] A recent

318. *Id.* art. 39.
319. *Id.*
320. *Id.* art. 40.
321. *Id.*
322. *Id.*
323. *See supra* notes 304, 305 and accompanying text.
324. 1987 Joint Venture Law, *supra* note 4, art. 41.
325. *See id.*
326. *Id.* art. 42.
327. *Id.* art. 14.

amendment has modified this provision and joint ventures may now insure the enterprise with foreign insurers.[328] Compulsory insurance is the most widely practiced form of insurance in the Soviet Union.[329] By operation of law, certain types of property in the Soviet Union must be insured regardless of whether they are owned by state organizations, collective farms or other cooperative organizations, or individual citizens.[330]

F. *Bookkeeping and Auditing Procedures (Articles 44-46)*

To ensure that the joint venture participants properly monitor its activities, article 44 of the 1987 Joint Venture Law requires that all financial data of the joint venture be made available to its partners pursuant to a procedure to be agreed upon by the participants.[331] The joint venture may appoint an auditor to carry out periodic audits of its books, with the procedure and frequency of such audits stipulated in the joint venture's charter.[332] To avoid confusion as to which bookkeeping methods should be followed, article 45 originally required all joint ventures to follow the prevailing method used by the Soviet state enterprises.[333] Unfortunately, one could argue that there is no "prevailing" accounting method in the USSR: The Soviet accounting method is so antiquated and hopelessly rudimentary that a Western accountant would hardly describe it as a "method."[334] The Western partner thus is strongly urged to take advantage of the December 1988 amendment of article 45, which now allows partners to reach an agreement as to the accounting method used

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328. *See infra* text accompanying note 417.

329. *See* RSFSR Civil Code (1964), arts. 386-90, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 488-89. For a concise discussion of modern Soviet insurance law, see Rudden, *Insurance*, in 1 ENCYCLOPEDIA OF SOVIET LAW 323 (F. Feldbrugge lst ed. 1973).

330. Article 387 of the RSFSR Civil Code states that the following forms of socialist property are subject to compulsory insurance: the property of collective farms, state farms and other agricultural enterprises belonging to the state; buildings (including residential houses, summer cottages and garden homes), and farm animals (including cattle, horses and camels). RSFSR Civil Code (1964), art. 387, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 488-89. The only types of property subject to voluntary insurance are those belonging to cooperatives, other non-governmental organizations, and private individuals. *Id.* art. 388, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 489.

331. 1987 Joint Venture Law, *supra* note 4, art. 44(1).

332. *Id.* art. 44(2).

333. *Id.* art. 45.

334. The principles of the Soviet accounting system are embodied in *Polozhenie o bukhgalterskikh otchetakh i balansakh* [Statute on Accounts and Balances], 19 SP SSSR Item 121 (1979) (decree of the USSR Council of Ministers).

in the operation of the joint venture.[335] Preferably, Western accounting principles should be adopted until the Soviet Union can bring its accounting practices up to world standards.

Under article 45, the joint venture must complete the forms for its audit and submit them to the USSR Ministry of Finance and the Central Statistical Administration of the USSR for their approval.[336] Like any other Soviet business enterprise, the joint venture will be held liable under Soviet law for failure to conform with the established auditing procedure and for any inaccuracy in its financial reports.[337] In an apparent effort to stress the distinctly Soviet character of these joint ventures, article 45 categorically prohibits the joint venture from supplying any financial report or business information to instrumentalities, officials, or agents of foreign governments.[338]

Whenever a Soviet agency audits the books of a joint venture, it must charge a fee for its services pursuant to article 46.[339] Bookkeeping may be one area in which friction will likely arise between the Western partner and its Soviet counterpart simply because the Soviet Union and the West use different bookkeeping procedures and follow widely divergent auditing practices.[340] Nevertheless, these problems may be avoided easily if the partners reconcile their differences in the course of drafting the charter of their joint venture.

G. *Recruitment and Rights of Employees (Articles 47-50)*

In addition to the members of the joint venture's respective boards and its CEO, the joint venture must employ regular staff members to accomplish the purposes of the enterprise. Whenever a juridical person[341] hires employees, the question of employment rights arises automatically. The employment relationship between the joint venture and its employees is regulated not only by the joint venture agreement and the provisions of articles 47-50 of the 1987 Joint Venture Law, but also by the

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335. *See infra* text accompanying note 418.

336. 1987 Joint Venture Law, *supra* note 4, art. 45.

337. *Id.*

338. *Id.*

339. *Id.* art. 46.

340. Every knowledgeable Western commentator on this aspect of the 1987 Joint Venture Law has noted the differences between Soviet and Western accounting principles and practices. Because of this divergence, some writers have urged Western joint venture partners, in the course of negotiating the joint venture agreement to "seek agreement [with their Soviet partners] on rules based on generally accepted international accounting principles." Hober, *Soviet Joint Ventures, supra* note 58, at 17.

341. *See supra* note 92.

applicable provisions of Soviet labor law.[342] Neither the Joint Venture Law of 1987 nor the joint venture agreement between the partners should diminish the basic rights granted to Soviet employees by the Soviet constitution, the fundamental principles of federal and union republic labor legislation, and relevant social legislation.[343] Before exploring some of the inalienable rights that Soviet labor law grants to Soviet employees, this section first examines the relevant provisions of the 1987 Joint Venture Law.

Article 47 proclaims that the bulk of the employees of the joint venture must be Soviet citizens.[344] This policy precludes the joint venture from assigning only a handful of staff positions to local citizens and importing the rest of its staff from abroad. In addition, the procedure for the issuance of Soviet visas to foreigners could be manipulated by Soviet authorities to prevent any mass importation of foreign nationals to work for the joint venture.

To further protect the rights of Soviet employees, article 47 requires the joint venture to conclude collective bargaining agreements with the trade union organization, which must be formed by the workers of the enterprise.[345] In other words, the joint venture cannot shut unions out of its facilities. The procedure for the conclusion of these collective bargaining agreements, as well as the scope of their contents, is governed by applicable Soviet labor law.[346] Similarly, article 48 states that the salary, work conditions, vacation rights and social security bene-

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342. *See, e.g.*, RSFSR Labor Code (1964), *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 681.

343. Article 2 of the RSFSR Labor Code lists the following rights that an employer cannot deny to workers: the right to rest and leisure; the right to annual vacation; the right to form and participate in trade union organizations; the right to social security benefits; and the right to participate in the management of the enterprise where he works. *Id.* art. 2, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 686-87. Article 5 of the Labor Code states quite affirmatively that any provision of an employment contract that places an employee in a position that is worse than that arising by operation of law is null and void. *Id.* art. 5, *reprinted in* LAW IN EASTERN EUROPE, supra note 71, at 685-86.

A recent amendment to the 1987 Joint Venture Law apparently allows the joint venture to delineate all employer-employee issues in its founding document, without regard to other relevant provisions of Soviet law. *See infra* notes 435-40 and accompanying text. Western partners would avoid many potential problems, however, if they structured their employment practices to conform to these provisions.

344. 1987 Joint Venture Law, *supra* note 4, art. 47.

345. *Id.*

346. RSFSR Labor Code (1964), arts. 7-14, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 687-88.

fits of the Soviet employees of the joint venture are governed by the norms of Soviet law.[347] In these matters, the joint venture is free to grant its Soviet employees more rights than Soviet law mandates, but it may not grant them fewer rights.[348]

The 1987 Joint Venture Law also protects the welfare of the joint venture's foreign employees. Article 48 extends to foreign workers employed by the joint venture the same protections granted to Soviet workers, but allows the joint venture to conclude separate, individual agreements with respect to the foreign workers' salary, leave time, and pension security.[349] In these individual agreements, the joint venture probably can extend to its foreign employees less rights on these three issues than those contemplated under Soviet law for Soviet workers.[350]

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347. 1987 Joint Venture Law, *supra* note 4, art. 48.

348. In 1988, the USSR Supreme Soviet introduced new amendments to Soviet law that further restrict the joint venture's freedom to circumvent the provisions of Soviet labor law in its employment practices. *See O vnesenii v zakonodatel'stvo Soiuza SSR o trude izmenenii i dopolnenii, sviazannykh s perestroikoi upravleniia ekonomikoi* [On the Incorporation of Changes and Additions into the Labor Legislation of the USSR in Light of the Restructuring of the System of Administration of the Economy], 6 Ved. Verkh. Sov. SSSR Item 95 (1988) (Decree of the Presidium of the USSR Supreme Soviet). The amendment introduces important changes and additions to the Fundamental Principles of Soviet labor law. *See Osnovy Zakonodatelstva Soiuza SSSR i Soiuzynx respublik o Trude* [Fundamental Principles of Labor Legislation of the USSR and the Union Republics] (established by a Decree of the USSR Supreme Soviet on Nov. 30, 1970), *reprinted in* FUNDAMENTAL PRINCIPLES, *supra* note 14, at 301. For example, article 5(1) of the 1988 amendments states that if the employment contract between an employer (including a joint venture) and a Soviet citizen includes terms that are less favorable to the employee than those contemplated by a Soviet law, the former shall be deemed null and void. *Id.* art. 5(1). Article 5(2) allows the management of an enterprise, institution or organization, acting in conjunction with the labor collective or trade union committee of the enterprise, and at the expense of the employer, to grant its employees and labor collectives additional privileges beyond those granted to them by any relevant labor legislation. *Id.* art. 5(2). By implication from this rule, an employer may not grant less privileges to its employees than those contemplated by law. Finally, article 18 stipulates that an employee may not be discharged at the initiative of the administration of the enterprise without the consent of the trade union committee of the enterprise, except in those circumstances contemplated under law. *Id.* art. 18.

349. 1987 Joint Venture Law, *supra* note 4, art. 48(2).

350. The language used in the Soviet-COMECON Joint Venture Decree, *see supra* note 4, is less permissive of differential treatment for Soviet and foreign employees of the joint venture. A July 1987 amendment to article 57 of this decree reads as follows:

> The terms of payment, work regime and conditions under which holidays shall be granted to Soviet citizens who are employed by joint enterprises, international associations and organizations, as well as their social security and social insurance benefits shall be regulated by norms of Soviet law. These same norms shall apply to foreign nationals who are employed by joint enterprises, international associa-

In effect, the provision of paragraphs 2 and 3 of article 48 deviate substantially from the general rules stated in articles 5 and 9 of the RSFSR Labor Code: the former stipulates that a private contract between an employer and an employee is null and void if it diminishes any right granted to the worker under the Code;[351] the latter applies the provisions of a collective bargaining agreement to all employees of the enterprise regardless of whether they are members of the trade union that negotiated the contract.[352] Under Soviet law, if an act of the legislature (such as the Labor Code) conflicts with an act of the executive branch of government (such as the Joint Venture Law of 1987) the latter ordinarily would be rendered invalid.[353] Yet because the employees whose rights are diminished by the employer (the joint venture) pursuant to an act of the executive branch (the 1987 Joint Venture Law) are not Soviet citizens, they are not protected by the national regime of labor rights.[354]

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tions and organization, unless a contrary provision is contemplated by an international or inter-governmental agreement to which the USSR is a party. The constituent instrument of a joint venture may [however], stipulate that the terms of payment of its foreign employees shall be determined in their individual employment contracts.

Ob izmenenii punkta 57 postanovteniia Soveta Ministrov SSSR ot 13 ianvaria 1987 g. No. 79 O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii, mezhdunarodnykh ob'edinenii i organizatsii SSSR i drugikh stran-chlenov SEV [Regarding the Amendments of art. 57 of Decree No. 48 of the Council of Ministers of the USSR of January 13, 1987 On the Procedure for the Creation and Operation on the Territory of the USSR of Joint Enterprises, International Associations and Organization of the USSR and Member States of the COMECON], 41 SP SSSR Item 136 (1987) (Decree of the USSR Council of Ministers). Thus, article 57 of this law, as amended, permits variations in the treatment of Soviet and foreign employees of these Soviet-COMECON joint ventures only in one respect, the terms of payment; in all other respects their terms of employment must be uniformly consistent with requirement of Soviet law, absent an international agreement to the contrary.

351. RSFSR Labor Code (1964), art. 5, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 686-87.

352. *Id.* art. 9, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 688.

353. This conclusion flows from a cumulative reading of the provisions of articles 108, 128, 130, 133 of the USSR Constitution of 1977. *See infra* notes 424-32 and accompanying text (discussing constitutional issues arising out of the December 1988 amendments to the 1987 Joint Venture Law).

354. In its discussion of "the basic labor rights and obligations of manual and offical workers," article 2 of the Labor Code specifically refers to "citizens of the USSR" as the recipients of these rights. RSFSR Labor Code (1964), art. 2, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 685-86. The constitutional foundation for the rights that Soviet workers enjoy under the RSFSR Labor Code is Chapter 7 of the USSR Constitution of 1977, entitled "The Basic Rights, Freedoms and Obligations of Citizens of the USSR." KONST. SSSR (1977), arts. 39-69.

Therefore, the provisions of the second and third paragraphs of article 48 would be found valid.

Because foreign workers are not automatically covered under the Soviet social insurance program,[355] article 48 directs the State Committee of the USSR for Labor and Social Matters and the All-Union Central Trade Union Council to negotiate an ad hoc arrangement with the joint venture to extend the Soviet social security blanket to foreign workers.[356] Pursuant to Soviet law, the employer makes the necessary premium payments on the social insurance policy of the workers.[357] Accordingly, article 49 requires the joint venture to contribute to the budget of the USSR to cover both the Soviet and foreign employees of the enterprise at the same premium rate paid by Soviet state organizations.[358] Since foreign employees of the joint venture are not entitled to pension rights in the USSR,[359] article 49 further directs the joint venture to contribute toward the pension of those employees.[360] These payments are made to the governmental authorities of the employees' respective countries of permanent residence in the currency of the countries in question.[361]

In this connection an interesting question arises: If a joint venture has not earned foreign currency from its foreign or domestic operations, will it be permitted to send foreign currency payments to a foreign country in order to cover the pension security premiums for its foreign employee? The language of article 25 is quite specific on this point, stipulating that "All foreign currency expenditures of a joint venture . . . shall be covered by proceeds from sales of the joint venture's products on foreign mar-

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355. The provisions of the RSFSR Labor Code dealing with the state social insurance scheme, like all other provisions of the RSFSR Labor Code, apply exclusively to Soviet citizens. *See* RSFSR Labor Code (1964), arts. 236-43, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 686-87. This conclusion flows from a general principle of Soviet constitutional law according to which the rights and protections that are accorded by Soviet Law to workers and salaried employees in the Soviet Union are intended only for Soviet citizens unless otherwise stipulated. The language of the USSR Constitution of 1977 is quite specific on this point. *See, e.g.,* KONST. SSSR (1977), art. 39 ("Citizens of the USSR enjoy in full the socio-economic, political, and personal rights and freedoms proclaimed and guaranteed by the Constitution of the USSR and by Soviet laws.").

356. 1987 Joint Venture Law, *supra* note 4, art. 48.

357. RSFSR Labor Code (1964), art. 237, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 754.

358. 1987 Joint Venture Law, *supra* note 4, art. 49.

359. *See supra* note 355.

360. 1987 Joint Venture Law, *supra* note 4, art. 49.

361. *Id.*

kets."[362] In light of article 10,[363] article 49 may be construed to permit a joint venture to remit foreign currency to a foreign country only if it has earned this money from its foreign operations. This reading would render meaningless this particular pension right granted to the joint venture's foreign employees, at least until the joint venture accumulates sufficient foreign currency reserves to cover the payments.

Articles 47-50 of the 1987 Joint Venture Law impose substantial burdens on the joint venture. The extent of this burden may be fully appreciated when one considers that these stipulations are supported by the relevant provisions of the RSFSR Labor Code. This section provides a sample of the clauses in the Labor Code that may affect employer-employee relations for the joint venture.

Article 5 of the Labor Code states that any employer-employee agreement which diminishes the rights granted to the worker under that Code is null and void.[364] In an effort to bring these rights to the forefront of all employment relationships, article 7 requires an annual collective bargaining agreement between the employer and the trade union organization at the enterprise.[365] Article 8 lists matters that must be resolved in the collective bargaining agreement, including working conditions, salary, holidays, job security, housing, and cultural services for the workers.[366]

Under article 8, the collective bargaining agreement must include a clause in which the management agrees to involve the trade union in the production management of the enterprise and in setting the level of payment for workers.[367] Although the extent of this involvement is not clear, three interpretations exist. First, article 8 may require the joint venture to seek the input of the trade union organization before making major management decisions at the enterprise. Second, it may mean that the trade union organizations have the right to be advised in advance of any major management decisions that would have an impact on the employees' job security and working conditions. Third, article 8 may specify simply that the joint venture give advance notice to the trade union before instituting layoffs or seeking to dissolve the enterprise.

Pursuant to article 10 of the Labor Code, any disputes arising from

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362. *Id.* art. 25.

363. *See supra* notes 207-09 and accompanying text.

364. RSFSR Labor Code (1964), art. 5, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 686.

365. *Id.* art. 7, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 687.

366. *Id.* art. 8, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 687-88.

367. *Id.*

the interpretation or application of the collective bargaining agreement are submitted to compulsory arbitration before the higher organs of the trade union organization.[368] Article 15 exempts trade union organizations from any financial liability resulting from the collective bargaining agreement.[369] Article 29 lists the justifications for the termination of an employment contract,[370] while article 33 lists the grounds under which an employer can unilaterally terminate an employee's contract.[371] Furthermore, article 139 compels the employer to provide safe working conditions for its workers,[372] and article 165 requires the employer to provide maternity leave for female workers.[373] Workers on pre-natal (fifty-six calendar days) and post-natal (fifty-six calendar days) maternity leave receive full pay, and if the woman's childbirth is "complicated" or if she gives birth to more than one child, the post-natal maternity leave is increased to seventy calendar days.[374]

Under article 173, employers cannot hire persons below sixteen years of age; in exceptional circumstances and with the consent of the local trade union organization, however, employers may hire fifteen year-olds.[375] Articles 201-24 stipulate that any dispute between the employer and its individual employees must be settled by the special labor courts established by the trade union organizations.[376] Finally, under articles 236-38, all workers must be covered by the state-run social insurance program,[377] and the employer must make premium payments to this insurance scheme on behalf of its employees.[378]

In light of these extensive legal protections accorded Soviet workers, Western businessmen contemplating a Soviet joint venture should bear in mind that Soviet employees expect total job security. Therefore, prospective joint venturers should stipulate in the joint venture agreement all essential employment-related issues. Questions concerning proper

368. *Id.* art. 10, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 688.
369. *Id.* art. 14, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 688.
370. *Id.* art. 29, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 692.
371. *Id.* art. 33, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 693-94.
372. *Id.* art. 139, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 724.
373. *Id.* art. 165, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 730-31.
374. *Id.*
375. *Id.* art. 173, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 732.
376. *Id.* arts. 201-24, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 739-48. For a brief discussion of the Soviet procedure for settling of employer-employee disputes resulting from wrongful discharge, see COMPARATIVE LEGAL TRADITIONS, *supra* note 138, at 774-77.
377. RSFSR Labor Code (1964), arts. 236-38, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 753-54.
378. *Id.* art. 237, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 754.

grounds for discharge and authority to enter and terminate employment contracts are of particular importance in this regard.

H. *Dissolution (Articles 51-53)*

One of the primary goals of the joint venture is to make profits for its partners. From the Soviet standpoint, an equally important goal is to help the country fulfill some of the purposes set forth in its program of economic reform. Failure of the joint venture to meet either of these objectives may trigger a mechanism for its dissolution. Article 51 of the Joint Venture Law contemplates two types of liquidation—voluntary and involuntary. Dissolution is voluntary when it is contemplated by the joint venture charter itself upon the occurrence of specified events.[379] However, the joint venture may be dissolved without the consent of, or over the objection of, the partners. For example, the USSR Council of Ministers will order an involuntary dissolution if the activities of the joint venture do not correspond to the tasks and purposes set forth in its charter.[380]

Whenever a business enterprise is dissolved, various issues arise, including the payment of the enterprise's outstanding obligations and the distribution of the venture's capital assets to its partners. During the process of joint venture dissolution, notice of the action—first, to report the commencement of dissolution proceedings, and second, to report the completion of the act of dissolution—is published in the national press.[381] Upon dissolution, article 52 grants the foreign partner the right to receive its share of the capital contribution either in cash or in goods.[382] Because the foreign partner's initial contribution to the capitalization of the enterprise entered the country in the form of foreign currency or equipment, the law assumes that it will repatriate its share of assets in the form of foreign currency upon liquidation of the venture.[383] The amount returned to each partner is calculated only after all debts of the joint venture have been paid.[384] Soviet authorities deduct the amount needed to satisfy any outstanding claims asserted by the Soviet participants or by third parties from the amount due the foreign partner.[385] The final act in the process of dissolution of a joint enterprise is found in

379. 1987 Joint Venture Law, *supra* note 4, art. 51.
380. *Id.*
381. *Id.*
382. *Id.* art. 52.
383. *Id.*
384. *Id.*
385. *Id.*

article 53, which directs the participants to register the dissolution with the USSR Ministry of Finance.[386] Unfortunately, the language used in article 53 does not indicate whether a joint venture is deemed to be liquidated prior to the registration of the completed act of dissolution, or whether the enterprise is considered legally liquidated only upon this registration. Because the respective partners' liabilities may depend upon the timing of the legal dissolution, this ambiguity may pose great risks for the participants.

VI. THE DECEMBER 1988 AMENDMENTS TO THE JOINT VENTURE LAW OF 1987

Writing about an aspect of Soviet law is in many respects a form of art: it may be equated to composing a drama based on recently completed events, which may or may not tell the whole story. Like the playwright, the analyst of Soviet law knows that the promulgation of a major piece of Soviet legislation is not necessarily the end of the event. And like a dramatic composition, Soviet law generally has a primary theme which unravels, in measured phases, into a major plot and several secondary subplots. The scenes and backdrops change constantly as different actors take turns occupying center stage, moving the action to its inevitable conclusion. The joint venture decrees unveiled on January 13, 1987, thus represent merely the first act in a long drama, which the Soviet Government believes will culminate in a fantastic reality: a raised curtain that will lift the ideological barriers to foreign capital investment in the Soviet Union.

Throughout 1987, and for the first eleven months of 1988, the Soviet Government continually supplied insights into the developing subplots of this joint venture drama. Certain amendments to the 1987 Joint Venture Law clearly revealed that, by November 1988, the Presidium of the USSR Supreme Soviet had faded into the background, yielding its leading role to the USSR Ministry of Finance and the USSR Council of Ministers.[387] Nevertheless, the first two years of the Joint Venture Law of 1987 provided nothing less than a chorus of disharmony. As the protagonists of *perestroika* attempted to balance the need for foreign capital against their political and economic ideology, they found that they lacked an essential degree of sophistication in the international economic system. The resulting comedy of errors seriously undermined the prospects for successful utilization of the Joint Venture Law.

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386. *Id.* art. 53.

387. *See, e.g.*, September 1987 Decree, *supra* note 170.

The USSR Council of Ministers accordingly made the first concerted effort to repackage the law when it promulgated a new set of amendments to the 1987 Joint Venture Law.[388] This section briefly analyzes these amendments and their potential impact on the Soviet joint venture scheme. The section then discusses the constitutional problems associated with many of these amendments.

A. *General Provisions of the December 1988 Amendments*

On December 2, 1988, the Council of Ministers of the USSR, the highest organ of executive authority in the Soviet Union,[389] issued a long-range policy statement (December 1988 Decree) on Soviet foreign trade and foreign investments in the USSR. This decree expressed the Soviet Government's desire to establish the Soviet Union in the international economic system,[390] while also working toward the goal of transforming the present COMECON economies into one single common market.[391] In the decree's preamble, the Council of Ministers observes that "the foreign economic activity of state, cooperative, and other public enterprises, associations, and organizations is an inalienable part of their economic life,"[392] and bemoans the fact that despite the creation of the requisite institutional, legal and economic conditions, there still were no substantial achievements in the sphere of foreign economic activities of these enterprises, especially in the field of promoting exports.[393]

In addition to this rambling preamble, the decree contains forty-one sections, including a special chapter (sections 31-35) reviewing many of the problems that had arisen since the adoption of the Joint Venture Law of 1987. Article 31 impliedly laments the fact that the law did not

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388. *O dal'neishem razvitii vneshekonomicheskoi deiatel'nosti goshuarstvennykh, Kooperativnykh i Inykh Obshchestvennykh Predpriiatii, Ob'edinenii i Organizatsii* [On Further Development of the Foreign Economic Activities of State, Cooperative, and Other Public Enterprises, Associations, and Organizations], 2 SP SSSR Item 7 (1989) (Decree of the USSR Council of Ministers) [hereinafter December 1988 Decree]. Relevant provisions of the December 1988 Decree appear in Appendix C of this Article.

389. KONST. SSSR (1977), art. 128.

390. The decree particularly notes the Soviet intention to hold economic policy meetings with GATT and the EEC. *See* December 1988 Decree, *supra* note 388, art. 6.

391. *See id.* art. 1(2). Many of the countries within COMECON do not share the Soviet Union's enthusiasm about the feasibility of operating a "common market" out of their present arrangements. Mr. Peter Szonyi, head of Hungary's Government Office for International Economic Cooperation, recently referred to the idea of a "single socialist market" as a "pipe dream." *COMECON Puts Off Summit Meeting Because of Disagreements About Reform*, Financial Times (London), Feb. 28, 1989, at 2, col. 1.

392. December 1988 Decree, *supra* note 388, at preamble.

393. *Id.*

attract the amount of foreign investments the Soviet Government had hoped for. As if addressing those prospective Western investors still debating whether or not to invest in the Soviet Union, it affirmed the interest of the Soviet Government in "invigorating the establishment of joint ventures on Soviet territory with the participation of foreign organizations and firms."[394]

To attain these goals, article 31 of the December 1988 Decree introduced a series of substantial changes to the 1987 Joint Venture Law. First, the respective shares of Soviet and foreign partners in the equity of the joint venture may be determined on a case-by-case basis by agreement of the parties.[395] This amendment effectively modifies the provision of article 5 of the Joint Venture Law, according to which the share of the Soviet partner could not be less than fifty-one percent of the joint venture's equity.[396] Under this new rule, the equity share of the foreign partner could range from one to ninety-nine percent.

Second, the chairman of the board of directors or the chief executive officer of the joint venture may be a foreign national.[397] This amendment is critically important because it reverses the old policy in article 21 of the Joint Venture Law, which required both the chairman of the board of directors as well as the CEO to be Soviet nationals.[398] Under this new rule, the partners may decide to split the positions between a Soviet citizen and a foreign national or, if they prefer, to appoint foreign nationals to both offices.

Third, major questions relating to the daily operations of the joint venture shall be decided at the meetings of the board of directors on the basis of a unanimous vote of all board members.[399] This amendment merely tightens up the current provision of article 21 of the Joint Venture Law.[400] By requiring that decisions of the board of directors must be based on a unanimous vote of *all* members of the board, this amendment somewhat dilutes the awesome powers that would have been vested in the chairman of the board or the CEO. Since the decree does not define what would qualify as a "major question," any disagreement as to what questions are "major" will be subject to a unanimous vote of the board of directors. This provides substantial protection for the interests

394. *Id.* art. 31.
395. *Id.*
396. 1987 Joint Venture Law, *supra* note 4, art. 5.
397. December 1988 Decree, *supra* note 388, art. 31.
398. 1987 Joint Venture Law, *supra* note 4, art. 21(3).
399. December 1988 Decree, *supra* note 388, art. 31.
400. 1987 Joint Venture Law, *supra* note 4, art. 21(2).

of whichever partner happens to hold the minority share in the equity of the joint venture.

Fourth, all questions relating to hiring and firing, the forms and amount of compensation, as well as the form of material incentives to be paid in Soviet rubles to employees of the joint venture may be decided by the joint venture itself.[401] This amendment practically wipes out the present rules in article 48 of the Joint Venture Law. According to the latter, the working conditions of employees of the joint venture—including their pay, vacation, social security, and social insurance—were regulated by the norms of Soviet law.[402] The December 1988 amendment of article 48 virtually permits the joint venture to establish its own employment policy without regard to Soviet law. This new amendment apparently would allow the joint venture to shut out trade union organizations from its premises, discharge employees for whatever reason it deems fit, and pay less than Soviet minimum wages to its employees. In short, it offers the joint venture carte blanche authority to fashion its employment policy.

Fifth, the responsible Soviet Government authorities may determine on a case-by-case basis whether goods imported into the USSR by the joint venture for the needs of its production shall be subjected to a minimum tariff of import duties or exempted totally from the payment of such fees.[403] While article 13 of the Joint Venture Law exempted from customs duties property contributed by foreign partners to capitalize the joint venture,[404] it made no mention of imported goods to be used in joint venture productive operations.

Sixth, payment by foreign employees of the joint venture who are provided with housing and other services in the USSR shall be made in Soviet rubles, except in those instances in which the USSR Council of Ministers provides otherwise.[405]

In the interest of further stimulating the establishment of joint ventures in the Far Eastern economic region of the Soviet Union, the Council of Ministers exempted any joint enterprise from the payment of profit tax for a period of three years after the enterprise reports its first profitable operation.[406] Article 31 of this decree further directs the USSR Ministry of Finance to enact new rules for determining the taxable income of

401. December 1988 Decree, *supra* note 388, art. 31.
402. 1987 Joint Venture Law, *supra* note 4, art. 48.
403. December 1988 Decree, *supra* note 388, art. 31.
404. 1987 Joint Venture Law, *supra* note 4, art. 13.
405. December 1988 Decree, *supra* note 388, art. 31.
406. *Id.*

joint ventures,[407] and to gradually reduce the profit tax payable by joint ventures operating in the Far Eastern economic region of the USSR to ten percent.[408] These provisions are entirely new to the existing law.

In article 32, the USSR Council of Ministers delegates authority to the USSR Ministry of Finance to determine on a case-by-case basis whether to exempt from taxation for a specified period of time the portion of the share of profits payable to the foreign partner which the latter wishes to repatriate, or to reduce the amount of such tax if an agreement between the USSR and the relevant foreign government does not provide otherwise.[409] According to the decree, this authority shall be exercised especially with regard to those joint ventures that are engaged in the production of consumer goods, medical equipment and pharmaceuticals, and high-technology products, as well as those joint ventures that operate in the Far Eastern economic region of the USSR.[410]

Article 33 states that various issues—including transferability (assignability) of joint venture shares, insurance of the enterprise assets, and accounting and auditing procedures—shall be determined by agreement of the partners.[411] This provision effectively modifies three separate articles of the original Joint Venture Law: (1) article 16, which governs transferability of joint venture shares;[412] (2) article 14, which contains the relevant insurance provisions;[413] and (3) article 45, which concerns bookkeeping and auditing practices used by joint ventures.[414]

It is not exactly clear how this amendment affects article 16 of the 1987 law. The latter provides that the partners may transfer all or part of their shares to a third party by mutual consent; that whenever such transfer of shares takes place it must be submitted to the State Foreign Economic Commission (SFEC) of the USSR Council of Ministers for approval; and that the Soviet participant shall have a preferential right to acquire the shares of a foreign partner.[415] This amendment could mean that the consent of the SFEC of the USSR Council of Ministers is no longer required in order for a partner to transfer his shares to a third party, or that the Soviet partner no longer has a preferential right to

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407. These rules were to be enacted within three months following the issuance of the decree, or by March 1989.

408. December 1988 Decree, *supra* note 388, art. 31.

409. *Id.* art. 32.

410. *Id.*

411. *Id.* art. 33.

412. 1987 Joint Venture Law, *supra* note 4, art. 16.

413. *Id.* art. 14.

414. *Id.* art. 45.

415. *Id.* art. 16. *See supra* text accompanying note 221.

acquire the shares of a retiring foreign partner, if both partners reach an agreement on the transfer of the shares of a retiring partner.

By contrast, the December 1988 Decree modifies in a very substantial way the insurance clause in article 14 of the Joint Venture Law of 1987. Under that clause the property of the joint venture had to be insured, and only with an insurance agency of the USSR.[416] Under the December 1988 Decree, the parties may now agree to insure the property of the joint venture with a foreign insurance company.[417]

Finally, article 33 of the December 1988 Decree allows the partners to choose the auditing and bookkeeping method that they will use in their enterprise.[418] Under the old rule in article 45 of the 1987 Joint Venture Law, the partners had no choice in this matter—they were condemned to the Soviet auditing and bookkeeping method in monitoring the business affairs of their company.[419]

In what amounts to a policy directive, article 34 of the December 1988 Decree calls upon the USSR Customs Department, in conjunction with the USSR Ministry of Foreign Economic Relations and the USSR Ministry of Finance, to grant certain customs privileges to foreign personnel of joint ventures.[420] The decree, however, does not spell out the sort of privileges that are envisaged here. Joint venture participants must await further clarification of this policy guideline from the USSR Ministry of Finance. Furthermore, article 35 of the decree grants to state enterprises, international associations and organizations the right—with the prior consent of the administrative organ to which they are subordinated—to decide whether to form a joint venture with a foreign partner.[421]

In perhaps the strongest indication that the Soviet Government is seriously considering the difficult issue of ruble convertibility, article 38 of the December 1988 Decree directs the State Bank of the USSR, the Foreign Economic Bank of the USSR and the USSR Ministry of Finance to present "concrete proposals" for a gradual implementation of ruble conversion into foreign currency to the USSR Council of Ministers within the first quarter of 1989.[422] Article 41 of the decree further directs the USSR Ministry of Foreign Economic Relations and the USSR Ministry

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416. 1987 Joint Venture Law, *supra* note 4, art. 14. *See supra* text accompanying note 327.

417. December 1988 Decree, *supra* note 388, art. 33.

418. *Id.*

419. 1987 Joint Venture Law, *supra* note 4, art. 45. *See supra* notes 333, 334 and accompanying text.

420. December 1988 Decree, *supra* note 388, art. 34.

421. *Id.* art. 35.

422. *Id.* art. 38.

of Justice to submit proposals to the Council of Ministers of the USSR.[423]

Taken as a whole, these amendments clearly afford the joint venture participants more flexibility in defining and operating their enterprise. The December 1988 Decree also reflects the Soviet Government's desire to encourage international joint ventures on Soviet territory. Thus, as a sign that the Soviets will respond to the inadequacies of the Joint Venture Law, the December 1988 Decree should lead Western investors to seriously consider the Soviet joint venture option. Despite these amendments, however, the 1987 Joint Venture Law remains ripe for further modification and clarification. Part VII of this Article offers suggestions as to how this may be approached. Of more immediate concern for present purposes is the constitutionality of these amendments: If the changes outlined above cannot pass muster under the Soviet Constitution, they will naturally be of little use to prospective Western participants.

B. *Constitutional Issues Arising Out of the December 1988 Amendments*

Prior to the Soviet constitutional amendments of December 1, 1988,[424] the Supreme Soviet of the USSR was "the highest body of state authority,"[425] and the Council of Ministers of the USSR was "the highest executive and administrative body of state authority"[426] in the Soviet Government. While the constitutional amendments noted above modified the role of the Supreme Soviet,[427] they did not alter the basic relationship between the Supreme Soviet and the Council of Ministers. According to the USSR Constitution of 1977, the Council of Ministers is subordinate, responsible and accountable to the Supreme Soviet of the USSR,[428] and the authority of the Council of Ministers of the USSR is to issue decisions and ordinances "on the basis of, and in execution of, the laws of the USSR and other decisions of the Supreme Soviet of the USSR and its Presidium."[429] Under this constitutional framework, a decision of the Council of Ministers is inferior to, and must not be inconsistent with, a

423. *Id.* art. 41. Gosplan of the USSR, the State Bank of the USSR, the USSR Ministry of Finance, the Foreign Economic Bank of the USSR, and other interested ministries and departments will also participate in this task. *Id.*

424. *See supra* note 41.

425. KONST. SSSR (1977), art. 108 .

426. *Id.* art. 128.

427. *See supra* note 41.

428. KONST. SSSR (1977), art. 130 .

429. *Id.* art. 135.

statute issued by the Supreme Soviet. In other words, a decree of the Council of Ministers can only implement but must not contradict a law passed by the legislative branch of the Soviet federal government.

Under Soviet constitutional law, any provision of a decree of the USSR Council of Ministers that derogates from an unambiguous norm of statutory law is patently unconstitutional.[430] Any such decree is null and void unless and until it is subsequently ratified by or incorporated into statutory law by an act of the Soviet legislature.[431] Even if the purpose of the unconstitutional provisions of the executive decree is consistent with the discernible intent of statutory law, the constitutional infirmity that attaches to these provisions is not removed. Put quite simply, Soviet constitutional law grants the executive department of government the "necessary and proper" authority to implement and execute the laws of the USSR, but not to subvert, negate, vitiate or derogate from them.[432] This was clearly the intent of the framers of the USSR Constitution of 1977.

Pursuant to its constitutional authority, the Presidium of the Supreme Soviet promulgated the 1987 Joint Venture Decree, which gave the Council of Ministers a legislative mandate to establish rules governing joint ventures.[433] The 1987 Joint Venture Law was a direct result of this mandate.[434] Bearing in mind these constitutional principles and the history of this recent Soviet joint venture initiative, this section discusses the questionable nature of some of the amendments contained in the December 1988 Decree issued by the Council of Ministers.

As noted above, article 31 permits the joint venture to decide all questions relating to the hiring and firing of employees, the forms and amount of compensation to be paid to employees and the form of material incentives to be paid in rubles to employees of the joint venture.[435] Read literally, this amendment could mean that the joint venture is totally free—without regard to the limitations imposed by other components of Soviet labor law—to determine the terms of the hiring and firing as well as the form and amount of compensation that it may pay to its Soviet employees. Such an interpretation of this amendment would be incompatible with the following provisions of the Soviet Labor Code: (1)

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430. *Id.* art. 133 .

431. *See id.* (the Council of Ministers may issue decisions only "on the basis of, and in pursuance of, the laws of the USSR and other decisions of the Supreme Soviet of the USSR and its Presidum . . .").

432. *See id.*; *see also id.* art. 130.

433. *See supra* note 4.

434. *See id.*

435. December 1988 Decree, *supra* note 388, art. 31.

article 78, which stipulates that the monthly pay of a Soviet employee may not be lower than the minimum amount established by the state;[436] (2) article 75, which does not allow the joint venture to substitute monetary compensation for a leave to which a Soviet employee is entitled by law;[437] (3) article 66, which entitles all Soviet employees to an annual leave during which they must be paid their average wages;[438] (4) article 5, which states quite categorically that the terms of any employment contract placing a Soviet employee in a worse position than that guaranteed under Soviet law is null and void;[439] and (5) article 1, which leaves no doubt as to the applicability of the Code to Soviet employees of the joint ventures operating in the territory of the USSR.[440] To the extent that the December 1988 Decree allows a joint venture unrestrained discretion to decide these crucial matters, it constitutes an impermissible derogation from the peremptory norms of Soviet labor law and public policy. As such, the amendment is unconstitutional on its face.

Article 32 of the December 1988 Decree provides another example of an unconstitutional amendment to the 1987 Joint Venture Law. Article 32 allows the USSR Ministry of Finance to exempt a foreign joint venture partner from repatriation tax on its share of joint venture profits.[441] However, this clearly contradicts article 3 of the Supreme Soviet's 1987 Joint Venture Decree, which states: "Unless otherwise provided for by a treaty between the USSR and respective foreign state, the part of the profit due to a foreign partner in a joint venture *shall be taxed*, if transferred abroad, at the rate stipulated by the USSR Council of Ministers."[442] The clear legislative mandate in this provision of the Joint Venture Decree is that the share of the profits of a foreign partner in a joint venture shall be taxed if and when the foreign partner decides to repatriate it; this legislation merely delegated to the USSR Council of Ministers the authority to determine the *rate* of such tax. Perfectly consistent with this delegation of authority, the Council of Ministers established a tax

436. RSFSR Labor Code (1964), art. 78, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 705.

437. *Id.* art. 75, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 704.

438. *Id.* art. 66, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 702. Under this provision, for example, a joint venture cannot require workers to take overtime pay in lieu of a vacation.

439. *Id.* art. 5, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 686.

440. *Id.* art. 1, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 685. The Labor Code applies to *all* Soviet citizens who work within Soviet territory, whether employed by a joint venture or otherwise.

441. December 1988 Decree, *supra* note 388, art. 32.

442. 1987 Joint Venture Decree, *supra* note 4, art. 3 (emphasis added).

rate of twenty percent in article 41 of the Joint Venture Law.[443] By allowing the Ministry of Finance to exempt certain enterprises from the repatriation tax, the Council of Ministers was in effect amending its own enabling statute. Under the allocation of powers envisaged under the USSR Constitution of 1977, the Council of Ministers lacked the authority to promulgate this particular amendment to an otherwise perfectly constitutional act, the Joint Venture Law of 1987.

The Council of Ministers' decision to give the joint venture partners the option to arbitrate their disputes inter se in the Soviet Union or abroad is likewise unconstitutional.[444] Article 5 of the Presidum's 1987 Joint Venture Decree specifically stipulates that disputes between joint enterprises and Soviet state, cooperative or other non-governmental organizations, disputes between two or more joint ventures, as well as disputes between the partners in a joint venture, must be submitted to Soviet courts for adjudication or, if the parties agree, to arbitration before the Soviet arbitration court.[445] In those instances contemplated by the laws of the USSR, all disputes must be submitted to the state arbitration commission.[446] The clear policy in this provision of the Joint Venture Legislation was to subject all disputes involving a joint venture to resolution before a Soviet organ, whether a regular Soviet court, arbitration court or state arbitration commission. The lawmaker in this instance clearly chose not to permit any disputes involving a joint venture operating inside the Soviet Union to be removed to a foreign forum for resolution. Article 20 of the Joint Venture Law of 1987 was perfectly consistent with this legislation. However, the subsequent amendment of article 20 seems to be unconstitutional because it constitutes a substantial derogation from the legislative policy articulated by the Presidium of the USSR Supreme Soviet in its 1987 Joint Venture Decree.

Although the December 1988 Decree provides laudable and noteworthy amendments to the 1987 Joint Venture Law, some appear to be inherently unconstitutional under present Soviet law. The question thus arises as to how a Western observer should interpret these infirmities. Under the constitutional procedure outlined in article 121(4) of the USSR Constitution of 1977, the Presidium of the USSR Supreme Soviet must "ensure observance of the Constitution of the USSR and conformity of the Constitutions and laws of Union Republics to the Constitution

443. 1987 Joint Venture Law, *supra* note 4, art. 41.
444. *See supra* note 237.
445. 1987 Joint Venture Decree, *supra* note 4, art. 5.
446. *Id.*

and laws of the USSR."[447] Furthermore, article 121(7) states that the Presidium must "revoke decisions and ordinances of the Council of Ministers of the USSR and of the Councils of Ministers of Union Republics should they fail to conform to the law."[448] The Presidium of the USSR Supreme Soviet will probably not raise the question of the unconstitutionally of these acts of the Council of Ministers. Nor is a foreign partner in a joint venture that operates inside the Soviet Union likely to raise the issue. Nevertheless, it is psychologically discouraging to a prospective Western investor in the Soviet Union if he knows that his business in that country will be operating under a law that is demonstratably unconstitutional. Only the Soviet legislature can purge these amendments of their constitutional infirmity. Until that happens, every joint venture that is formed and operates under these well-meaning but unlawful amendments to the Joint Venture Law of 1987 should be put on notice that it is operating under an unconstitutional regime.

VII. LOOPHOLES IN THE JOINT VENTURE LAW OF 1987: HOW A WESTERN PARTNER CAN TAKE ADVANTAGE OF THEM

The Presidium of the USSR Supreme Soviet intended the Joint Venture Decree of 1987 as a brief statement of Soviet policy with regard to the formation and operation of international joint ventures on Soviet territory. Detailed regulation of the establishment and operation of such entities in the USSR was left to the Joint Venture Law of 1987—a subordinate act of the USSR Council of Ministers. Prospective Western investors were supposed to consult this latter provision to find answers to the complex problems associated with joint ventures. Unfortunately, various issues of great concern to the Western entrepreneur or venture capitalist contemplating a joint venture with a Soviet partner are not addressed specifically in the 1987 Joint Venture Law. Because article 1 of the law allows the partners to add "other provisions" to their joint venture agreement beyond those addressed in the law itself,[449] these loopholes should be plugged in the process of drafting the constituent instrument of the enterprise. This section analyzes the issues on which the decree is silent.

First, the law fails to define the term "joint venture." While the law loosely refers to "joint enterprises" as though that notion has fixed meaning in Soviet law, it does not. The partners thus must specify in

447. KONST. SSSR (1977), art. 121(4).
448. *Id.* art. 121(7).
449. 1987 Joint Venture Law, *supra* note 4, art. 1.

great detail the technical features of the entity that they are creating.

Second, the law does not distinguish between areas in which joint ventures are and are not permissible.[450] For example, the law does not indicate whether an international joint venture is permitted in areas such as banking, insurance, domestic and foreign trade, airline and railroad industries, legal services, and social services. It appears that an interested Western party can learn what is permissible only by presenting a proposal and waiting for any Soviet takers. Because the formation of any international joint venture involves a lengthy pre-formation process,[451] ventures proposed in prohibited areas would never be certified by Soviet

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450. Unlike the other *perestroika*-inspired laws authorizing private entrepreneurial activities in the USSR, *see Zakon Soiuza Sovetskikh Sotsialisticheskikh Respublik Ob individual'noi trudovoi, deiatel'nosti* [Law on Individual Labor Activity], 47 Ved. Verkh. Sov. SSSR Item 964 (1986); On Cooperatives in the USSR, *supra* note 15, the 1987 Joint Venture Law neither specifies areas in which joint ventures are permitted nor states areas in which such activities are prohibited. The Law on Individual Labor Activity specifically lists areas in which individual labor is not permitted, including: manufacture of any fur products; preparation of cosmetics, medical drugs and narcotic substances; the refinement of precious metals, stones or amber, as well as the manufacture of any finished products that require the use of these precious objects; manufacture of explosive devices; the manufacture or repair of any firearms; manufacture and operation of machines for the copying, reproduction or duplication of any sorts of materials (including xerox machines and machines for the copying of videotapes); operation of a printing press; operation of any gambling facilities, discotheques and public bath houses; practice of medicine; practice of any sort of profession whose skills are not taught within the approved syllabus of general secondary educational, professional, technical, educational, secondary specialized and higher educational institutions in the USSR; and operation of any facilities for public entertainment. *See* Law on Individual Labor Activity, *supra*, arts. 13, 16, 19.

On February 26, 1987, a set of procedural rules to guide the implementation of the law of 1986 was promulgated jointly by the the USSR State Committee on Labor, the USSR Ministry of Finance and the USSR Ministry of Justice. *Rekomendatsii o primenenii nekotorykh polozhenii Zakona SSSR "Ob individual'noi trudovoi deiatel'nosti"* [Recommendations on the Implementation of Certain Provisions of the "Law on Individual Labor Activity"], 7 BULL. NORM. AKT. MIN. & VED. SSSR 29-35 (1987). These procedural rules set forth in minute detail the procedures to be followed to obtain a license to engage in any particular form of individual labor activity. Moreover, the law on cooperatives states that cooperatives may be formed in the agricultural sector of the economy, in industry, in construction, in transportation, in wholesale and retail trade, in the operation of restaurants, for the provision of compensated services to the general public, and in other spheres of production and socio-cultural life. On Cooperatives in the USSR, *supra* note 15, art. 3, § 1, para. 2. The law further provides that "cooperatives have the right to engage in all types of activities with the exception of those that are prohibited by a legislation of the USSR and of the Union Republics." *Id.* art. 3, § 1, para. 3.

451. *See supra* notes 168-88 and accompanying text.

authorities.

Third, the 1987 Joint Venture Law does not resolve the question of the nationality of multiparty ventures. The law does not stipulate whether all foreign partners in a venture must be nationals of the same country. One might assume that, through its silence, the law impliedly permits the foreign participants in a joint venture to be of different nationalities. Indeed, one of the most recent joint ventures falls within this category.[452]

Fourth, the Joint Venture Law contains no formula to determine the composition of the joint venture's controlling organs, its boards of directors and administrators. It does not indicate, for example, whether this formula should correspond to the relative percentage of the parties' participation in the joint venture. This is one loophole that the foreign minority partner can exploit to produce a significant degree of managerial control. Using its own formula, the foreign partner could shift power from the CEO, who may or may not be a Soviet citizen, to the board of administrators, which oversees the enterprise's daily operations. By requiring a super-majority vote for board actions, a minority partner would be guaranteed a substantial voice in the management of the joint venture's affairs. Alternatively, the enterprise could create positions for two or three deputies to the CEO, make sure that one or two of them are designees of the foreign partner, and delegate to them much responsibility, especially in areas in which the expertise of a Western-trained manager is most needed.

Fifth, the law does not address certain issues concerning joint venture employees. For example, it fails to state which entity or partner has the power to hire and fire employees of the enterprise. This issue should be resolved in the joint venture agreement; it is far too important to be left for future resolution in the context of an actual controversy. In addition, the 1987 Joint Venture Law is surprisingly silent on the issue of whether the Soviet employees of the joint venture must be compensated in local currency or in hard currency. It is likely, however, that the Soviet authorities will follow the same rule that they use when they supply local employees to foreign embassies and diplomatic missions in the USSR. Under this arrangement, the foreign embassy pays the salary of its Soviet employees to the Soviet authorities in foreign currency and the Soviet Government in turn pays these employees a much smaller amount in rubles.[453] While the joint venture will likely rely on the "employment

452. *See supra* note 143 (discussing 1987 petrochemical plant joint venture involving foreign entities from the United States, Italy, and Japan).

453. Foreign embassies in Moscow that wish to hire local employees must channel

services" of the Soviet Government authorities to recruit employees, the joint venture agreement nonetheless should specify the form of payment for its employees—both domestic and foreign.

Sixth, the law fails to mention the living conditions of the foreign employees of the joint venture. This area involves numerous issues, including visa procurement procedures, travel privileges, education for dependents, and visitation procedures for relatives and friends. Again, the joint venture participant is well-advised to address these problems when it establishes the joint venture, because this is the time when Soviet authorities are more likely to grant "honeymoon privileges" to the joint venture by ruling favorably on their "ancillary" requests.

Seventh, the Joint Venture Law is silent on the critically important issue of pricing and marketing of goods produced by the joint venture. As noted above, article 24 of the law apparently allows the joint venture to set the prices for its goods and to determine for itself the formula it will use in setting those prices.[454] The decision whether to use international prices or Soviet domestic prices for the goods produced by the enterprise should be included in the joint venture agreement. A related question concerns where the goods will be marketed: in the Soviet Union, abroad, or both. Article 24 seems to leave this decision to the discretion of joint venture participants.[455]

Finally, the 1987 Joint Venture Law does not address many management aspects of the ventures. For example, the law deliberately allows the partners to decide the duration of the joint venture.[456] Moreover, the 1987 Joint Venture Law does not indicate whether or to what extent the directors of the joint venture will be held responsible to the participants of the venture, or any guidelines for the division of authorities between the shareholders and the board of directors. The law also neglects to provide a demarcation of authority between the powers of the board of directors and the board of administrators, or a provision for meetings of the joint venture shareholders. These are management issues which the partners must take up in their joint venture agreement. Perhaps most important, the 1987 Joint Venture Law does not specify a ceiling on annual profit transfers. The partners may thus decide what that ceiling

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their request to a special Soviet Government "employment agency" called UPDK (Department for Rendering Service to the Diplomatic Corps). This agency selects the employee and recommends the individual to the requesting foreign embassy. The embassy pays the employee's salary to UPDK, which in turn pays the employee's wages directly to the employee.

454. *See supra* notes 257-59 and accompanying text.

455. *See id.*

456. 1987 Joint Venture Law, *supra* note 4, art. 8.

should be and specify methods for the disposition of profits exceeding the maximum. They may, for example, decide to reinvest the funds in the joint venture, to distribute the capital to the partners prior to the termination of the joint venture, or to reinvest the funds in another joint venture in the Soviet Union.

VIII. CONCLUSION: SUGGESTIONS FOR FURTHER REFORM OF THE JOINT VENTURE LAW OF 1987

The Gorbachev administration obviously wants to do business with the West. This is evidenced by the fact that it has joined the United States Government,[457] as well as other Western governments,[458] in issuing various declarations of intent to increase economic relations between the respective countries. As part of this general strategy, the Soviet Government has sent its ablest managers to the West to learn the business practices of Western enterprises,[459] and Western law firms have invited

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457. The governments of the United States and the USSR reaffirmed their mutual desire to work to expand trade relations between their respective countries in a protocol signed by representatives of both governments in Moscow on April 14, 1988. *Protokol K Dolgosrochnomu soglasheniiu mezhdu Soiuzom Sovetskikh Sotsialisticheskikh Respublik i Soedinennymi Shtatami Ameriki o Sodeistvii ekonomicheskomu, promyshlennomu i tekhnicheskomu sotrudnichestvu ot 29 iiunia 1974 goda* [Protocol to the Long-term Agreement Between the USSR and the USA on the Promotion of Economic, Industrial and Technical Cooperation of June 29, 1974], *reprinted in* 9 SP SSSR, Part 2, Item 15 (1988). This protocol adds two new forms to the existing methods of economic cooperation between the two countries: United States-Soviet joint ventures and industrial cooperation between enterprises in both countries. *Id.* art. 1.

458. During his visit to Moscow in October 1988, West German Chancellor Helmut Kohl joined Mikhail Gorbachev in a joint declaration to increase economic relations between the two countries. *See German Cash*, *supra* note 68, at 8, col. 4.

459. The Soviet Government realizes that if the Soviet Union is to do business with the West it must modernize its banking system, conform its banking practices with those that prevail in the West, and teach its enterprise managers the rudimentary principles of Western business practice. To accomplish this, Soviet authorities have embarked upon a program of studying the banking institutions of the major Western countries. Pursuant to this plan, in October 1988 the Soviet Government sent a delegation consisting of its senior-level banking and financial officials to London to begin to learn the fundamentals. The delegation included the Deputy Finance Minister of the USSR and the Deputy Chairman of the State Bank of the USSR. *The Russians are Coming*, INT'L FIN. L. REV., Oct. 1988, at 4-5. In addition, about twenty Soviet managers will soon begin an intensive course at the London Business School. Among the things that they will reportedly study are British business methods, how to enter new markets, and company reorganization. *Capitalist Comrades Come for Grooming*, Sunday Times (London), Feb. 12, 1989, at D-1, col. 1.

Soviet lawyers to study the rudiments of Western business law.[460] Quite understandably, Soviet lawyers are also bracing themselves for the new wave of work that will flow from increased Western investments in the Soviet Union.[461] Unwilling to let their Soviet counterparts reap all of the benefits from the anticipated rise in Soviet demand for legal services, many United States law firms are devising long-range strategies for the Soviet market.[462]

Judging the early results, it appears that the Joint Venture Law has not lived up to the Soviet Government's expectations.[463] Yet, while the new law has not lured Western businesses into the Soviet Union in great numbers, the Soviet Government has indicated a willingness to modify the law to make the invitation more attractive.[464] Moreover, the Soviet

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460. As part of the general willingness of interested Western parties to give Soviet lawyers a free crash course on the basic features of Western law and legal practice, the American Bar Association (ABA) recently established a program that would place twelve Soviet lawyers in United States law firms, corporate legal departments and law schools for six months. The scheme will be administered by the ABA and funded by the Soros Foundation-Soviet Union, an American philanthropic organization. *Russians Up for Tender*, INT'L FIN. L. REV., Jan. 1989, at 2.

461. *See* Carr, *Soviet Lawyers Embrace Perestroika*, INT'L FIN. L. REV., July 1988, at 6.

462. Anticipating the new workload that the Joint Venture Law of 1987 will generate in the Soviet Union, and without waiting for the Soviet Government to pass a law expressly authorizing the establishment of foreign law offices in the Soviet Union, one American law firm (Coudert Brothers) has already jumped the gun by opening the first such "office" in Moscow. Carr, *One Steppe Ahead*, INT'L FIN. L. REV., Sept. 1988, at 15. Following the example of Coudert Brothers, APCO—the business consulting affiliate of the law firm of Arnold & Porter—entered into a joint venture with a group of Soviet economists and business specialists to advise American companies seeking business opportunities in the Soviet Union. The joint venture between APCO and INFEKS (a consulting cooperative affiliated with the Soviet Ministry of Foreign Economic Relations) will maintain an office in Moscow. *Arnold & Porter, Soviets to Advise U.S. Investors—D.C. Law Firm to Open Office in Moscow*, Wash. Post, Dec. 14, 1988, at F1, col. 1.

463. *See supra* notes 64, 65 and accompanying text.

464. Soviet authorities are apparently ready to listen to Western investors' grievances concerning the Joint Venture Law of 1987. In April 1987, for example, Soviet officials met with Western lawyers, economists and business representatives in Salzburg, Austria, to exchange information on tax developments in the Soviet Union and Eastern Europe. The conference explored ways to make Soviet tax laws more responsive to the interests of Western venture capitalists. *See* Davidson, *First East-West Conference May Open Soviet Bloc to Western Companies*, 35 TAX NOTES, Apr. 20, 1987, at 230-31. Moreover, during his December 1987 summit meetings in Washington, General Secretary Gorbachev took time out of his hectic schedule to meet with representatives of the American business sector to persuade them to help improve United States-Soviet economic ties. *See Business Leaders*, *supra* note 117, at A22, col. 1. Finally, in April 1988, the United States Secretary of Commerce, C. William Verity, and a group of about 500 American business

Government has encouraged Soviet scholars to collaborate with their Western counterparts in an effort to refine the 1987 law to suit the tastes of Western investors.[465] These actions suggest that, although the Soviet Government is unwilling to compromise any of the six key components of the Soviet economic ideology discussed above,[466] it is nonetheless ready and willing to listen to the voices of reason from the West. In the spirit of this continuing dialogue between Moscow and the West, this section offers specific suggestions for future reforms of both the 1987 Joint Venture Law and the combined legislative package underlying the Soviet foreign investment scheme.

First, the business entity envisaged in the Joint Venture Law of 1987 is too amorphous. Because the notion of an international joint venture is totally alien to Modern Soviet law, the resulting entity is treated interchangeably, in Western terms, as a corporation and as a limited partnership. Indeed, article 18 of the law treats the joint enterprise as if it were a corporation or a limited partnership for purposes of the partners' liability.[467] In the critically important area of tax status, however, article 36 treats the entity as if it were a limited partnership.[468] Given these inconsistencies, any further reform of this law should clearly define the term "joint venture," outline the joint venture's juridical status, and provide guidelines as to which sectors of the economy will accept joint ventures.

The Joint Venture Law refers to the joint venture as a juridical person, bringing it under the operation of the Civil Code's general provisions regarding juridical persons;[469] however, this does not illuminate the

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leaders met in Moscow with Gorbachev and other Soviet officials to explore means of expanding commercial relations between the United States and the Soviet Union. *See U.S. Ties*, *supra* note 152, at 29, col. 3. At this meeting, executives of seven American corporations announced the formation of a business consortium seeking to expand American participation in joint venture projects in the Soviet Union. *See id.*; *see also supra* note 109 (discussing consortium).

465. Because of the complexity and novelty of the many problems posed by the 1987 Joint Venture Law, one may anticipate many joint conferences and symposia between Soviet and Western lawyers in the future to flush out the true meaning of this law's ambiguous provisions. One such conference between Soviet and American legal experts was held in Washington, D.C., in June 1987. For an account of the issues discussed at this conference, *see* Klishin, *Pravovye aspekty sozdaniia i deiatel'nosti sovmestnykh predpriiatii v SSSR i SShA* [The Legal Aspects of the Formation and Operation of Joint Enterprises in the USSR and the US], 3 SOV. GOS. & PRAVO 140-42 (1988).

466. *See supra* text accompanying notes 32, 33.

467. *See supra* text accompanying note 226.

468. *See supra* text accompanying notes 308-11.

469. *See supra* text accompanying note 184.

legal status of the joint venture under Soviet law. Therefore, the status of the joint enterprise should be uniformly redefined to approximate a limited partnership rather than a corporation. This reform would serve as an enormous incentive by permitting United States investors to take losses from the joint venture through a partnership vehicle. The Soviets should also enact a general statute that would define precisely the internal format to be followed in forming a joint venture.[470] For example, there is no law stipulating minimum capitalization needed, the required number of partners, the relationship between partners' shares in the joint venture, and control over the affairs of the joint venture. The Soviet Union needs something akin to a corporation or partnership law that would define all of these critically important details. It is obviously unwise to leave these matters entirely to the joint venture partners to decide on an ad hoc basis. Although the 1987 Joint Venture Law should give the partners latitude to decide all of the affairs of the joint venture in their agreement, there is still a need for a law that would set forth in greater detail the format of the joint venture. This general law could delimit areas of corporate governance that are discretionary and those that are mandatory on the partners. The fact that article 7 of the 1987 Joint Venture Law lists topics on which the partners must agree[471] does not resolve this problem. Thus, if the partners fail to reach agreement on a particular point of law, they could fall back on this general corporation or partnership law.

Two further considerations reveal the need for a comprehensive Soviet corporation or partnership law: (1) the current joint venture program fails to spell out the law that would govern the joint venture contract itself, that is, the contract entered into by the partners in the joint venture; and (2) the present law is unclear as to the scope of the partners' liability. On the first point, it should be noted that the present Joint Venture Law does not stipulate the form which the joint venture contract must take in order to be valid, or even when the charter goes into effect. The general Soviet law of contracts, as embodied in article 160 of the RSFSR Civil Code, stipulates that "[a] contract is deemed to be concluded when agreement is reached between the parties on all essential terms and, in cases [where such requirement exists], embodied in [any special] form required by law."[472] Soviet law is silent both on the form

470. Alternatively, the existing Soviet Civil Code could be amended to include a separate chapter devoted exclusively to international joint ventures.

471. *See supra* note 198 and accompanying text.

472. RSFSR Civil Code (1964), art. 160, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 434-35 (brackets in original).

and the essential terms of the constituent instruments of joint ventures. It would be helpful, for example, to stipulate the time when the agreement goes into force and the legal consequences that may follow from the signing of the act, but prior to its registration with the proper authorities.[473]

To compound this problem, article 9 of the Joint Venture Law states: "As soon as the foundation documents come into force, joint ventures established in the territory of the USSR shall be registered with the USSR Ministry of Finance and acquire the rights of a legal entity at the time of registration."[474] Under Soviet law this provision is an absolute nonsense. This language does not explain how the joint venture can be created before it is registered with the USSR Ministry of Finance and before it acquires the rights of a juridical person. Under article 26 of the RSFSR Civil Code, an entity acquires the legal attributes of a juridical person upon its registration with the proper authorities; it is deemed to have been "formed" only at the time of such registration.[475] Prior to its legal existence, that is, prior to the time when it is deemed to have been properly formed, it exists merely as a de facto entity.[476] It is therefore impossible under Soviet law for a joint venture to be "formed" on the territory of the USSR before it is properly registered at the USSR Ministry of Finance and thus acquires its rights of a juridical person. Article 9 of the Joint Venture Law should be clarifed to resolve this blatant inconsistency.

On the second point, one should note that article 18 of the Joint Venture Law stipulates that the partners are not liable for the obligations of the joint venture and that the joint venture likewise is not liable for the obligations of the partners.[477] This law further states that the joint venture is liable for its own obligations.[478] However, the law does not establish a limit as to the liability of the partners. Reading together the provisions of articles 18 and 10, a glaring conflict arises: under article 10 a partner can contribute to the joint venture's funds in excess of his share in the partnership "if necessary."[479] What would prevent a partnership in the course of liquidation—which would qualify as a "case of necessity"—from requiring a foreign partner to make additional contribution to the assets of the partnership in excess of its equity share in the enter-

473. *See supra* notes 203-06 and accompanying text.

474. 1987 Joint Venture Law, *supra* note 4, art. 9.

475. RSFSR Civil Code (1964), art. 26, *reprinted in* LAW IN EASTERN EUROPE, *supra* note 71, at 399.

476. *See id.*

477. 1987 Joint Venture Law, *supra* note 4, art. 18.

478. *Id.*

479. *Id.* art. 10.

prise? Such an outrageous demand would not be illegal under the wording of article 10 of the Joint Venture Law.[480] One way to preserve the intent of article 18 is to tighten the loose ends in article 10.

A government agency should be designated to control the activities of the joint ventures in the USSR once they are formed and begin to operate. The present law fails to provide any governmental control over the activities of the respective joint ventures. It is not enough to require the joint ventures to engage in self-control; thus, it seems most reasonable to suggest that the task of overseeing the activities of the joint ventures operating in the Soviet Union should be assigned to the agency with which these entities are registered, the USSR Ministry of Finance.

Another useful modification of the Joint Venture Law relates to the procedure for the settlement of non-labor disputes arising from the operation of the joint venture. Although the practical results of this law have been modified with regard to certain United States corporations,[481] article 20 of the law does not give other Western partners the opportunity to submit such disputes to an international arbitration panel.[482] This choice should be extended legally to Western partners in all joint ventures operating inside the USSR. Even if the joint ventures declines this option, it would be an encouragement to them to know that the option exists.

The Soviet Government must also streamline its foreign trade bureaucracy if joint ventures are to succeed as a means of economic rejuvenation. At present, a vast maze of bureaucratic channels handles different facets of even the simplest foreign trade operation. Quite often the officials of these Soviet agencies are unschooled in the art of dealing with Western businessmen; this often results in confusion and frustration for the prospective Western venture capitalist or entrepreneur. Because the Soviets lack a central "clearinghouse" to which a prospective investor could turn to learn about business prospects in the Soviet Union, many of the Western businesses that have been established in the Soviet Union have come about mostly because the Western investor knew a "guardian angel" within the Soviet political hierarchy who helped to sponsor its proposal and channel it to the right persons within the Soviet bureaucracy. The Soviet Government should take three steps to alleviate these problems: (1) consolidate all the present foreign trade mini-departments and agencies into mega-departments with clearly defined jurisdictions; (2) train a special cadre of Soviet officials in the art of doing business in

480. *See supra* note 197 (discussing this particular problem in the context of a hypothetical situation that could arise in a joint venture liquidation).

481. *See supra* note 237.

482. *See supra* text accompanying notes 235, 236.

the West and assign them to help the prospective Western investors who plan to do business in the Soviet Union; and (3) create a central clearinghouse to entertain questions from prospective Western investors in the Soviet Union and advise them on how to go about implementing their ideas. This reform will generate more investments for the Soviet Union and leave existing Western customers satisfied and more willing to do business in the Soviet Union.[483]

The foregoing proposals are intended to cure defects in the mechanism of the Joint Venture Law of 1987. The next three proposals go beyond the framework of that law. First, the Soviets should promulgate an entirely new law that would permit the operation in the Soviet Union of wholly privatized international business joint ventures. Over the years the Soviet Union has involved the outside world in its economic development in one of three forms: (1) foreign trade, or the exchange of goods and services with the outside world; (2) concession arrangements that allow private enterprises to come into the Soviet Union, build a project from scratch, operate it for a short while, and pick up and leave at an agreed time; and (3) international joint ventures of the type discussed in this Article. The real challenge facing the Soviet Union in the 1990s is whether it is willing to take the next step and permit a consortium of Western industrialists to set up fully privatized international joint ventures in the Soviet Union. Transnational privatization, the policy of permitting the formation of wholly private transnational joint ventures, is an idea whose time has come, and the Soviet Union should consider adopting such a policy at this time.

The Soviet Government should also create an extensive free economic zone in which foreign companies could set up enterprises free of many of the bureaucratic and tax rules which currently affect joint ventures operating within the Soviet Union. In these zones enterprises would be released from normal government control, bureaucratic obstacles would be removed, and beneficial tax and customs duty regulations would facilitate the import of raw materials and the export of products abroad. The

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483. The Chinese experience in this regard may be helpful to the Soviets. Three new bureaucracies were established by Chinese authorities to implement the Joint Venture Law of 1979. The first is the China International Trust and Investment Corporation (CITIC), whose task is to drum up new international joint venture business for the country and coordinate initial contacts between foreigners and their Chinese partners. The second is the Foreign Investment Commission (FIC), which will screen and approve proposed joint venture agreements. The third is the General Administration for Industry and Commerce (GAIC), whose assignment is to serve as the central registry for all newly formed joint ventures. For a detailed description of the statutory roles of these three agencies, see Note, *supra* note 59, at 75.

Chinese experience in this matter demonstrates that the concept of a free economic zone would be quite beneficial to the Soviet economy;[484] therefore, it should complement the joint venture mechanism as an additional method of attracting foreign investors to the Soviet Union.[485]

Finally, having one set of rules for East-West joint ventures and a separate set of rules for Soviet-COMECON joint ventures is unsound and cumbersome. A close reading of the two laws indicates that the differences between them are quite minimal. The decision to create different but analogous legal regimes for these functionally similar types of business operations seems irrational.[486] The Soviet Government should seek to unify these two laws, with a view toward ultimately merging them into one omnibus Soviet law of corporations or partnerships. After all, the spirit of *perestroika* seems to suggest that the profit-making habits and motives of entrepreneurs in the Soviet Union—be they capitalist, developing country or socialist—should not be different. If that is so, then there is no compelling reason why two sets of laws should be used to regulate these separate but equal modes of joint venture operations in the Soviet Union.

One final point is worthy of consideration. Although the December 1988 Decree represents what promises to be the final modification of the 1987 Joint Venture Law for some time,[487] the manner in which the Soviets have introduced these amendments leaves much to be desired. Since the law's original promulgation in January 1987, the Soviets have issued a series of disjointed and incoherent amendments—some by the Presidium of the USSR Supreme Soviet, others by a joint decree of the Central

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484. *See* Wren, *supra* note 23, at 25.

485. Professor Ruslav Khazbulatov, a leading Soviet economist, has made a similar proposal, urging his country to emulate the Chinese by creating free economic zones in the southern part of European Russia and in the Soviet Far East. *See Chinese-style Free Economic Zones Urged for Soviet Union*, Financial Times (London), Nov. 4, 1988, at 2, col. 2.

486. Some Soviet commentators have also expressed dissatisfaction with the fact that Soviet law chose to segregate Soviet-COMECON country joint ventures from East-West joint ventures. In the opinion of Professor Voznesenskaia, for example, the adoption of two laws on the same form of foreign investment in the USSR is "counter productive, especially in light of the fact that both laws are founded on the same notion of a unified form of economic cooperation." Voznesenskaia, *supra* note 170, at 120. Professor Voznesenskaia goes on to note that the adoption of two laws on joint ventures will pose unnecessary difficulties for investors who may decide in the future to enter into a tripartite arrangement involving a Soviet, an Eastern European, and a Western partner. *Id.* Such an arrangement would be precluded under the present Soviet regulatory scheme.

487. In a recent conversation, an official of the USSR Ministry of Finance told the author that the Soviets do not plan to further amend the law for at least two years.

Committee of the CPSU and the USSR Council of Ministers, and still others by a decision of the USSR Ministry of Finance. Some of these modifications of the law of 1987 have even been applied to only some prospective Western partners.[488] This latter practice seems to violate a fundamental principle of international trade: all equally situated parties should be treated equally.

Furthermore, keeping track of all of these piecemeal amendments has become quite a burden for those lawyers who must keep abreast of the law to give their clients the most up-to-date advice at any given time. Setting aside this inconvenience for lawyers, and assuming that the Soviets will not further amend the Joint Venture Law in the foreseeable future, one still gets the impression that the process of updating the 1987 Law lacks a general strategy. If the Soviet Government truly wants this joint venture scheme to attract eager Western participants, it should adopt a general law on corporations or partnerships that would plug all the holes in the law affecting joint venture business in that country. Anything short of such a "codification" of the modern Soviet joint venture law would be unsatisfactory.

Only time will tell whether the Soviet joint venture program will yield the same bountiful harvest for her economy as the Chinese joint venture legislation did for China,[489] or whether it will sputter along and ultimately fail as did the Eastern European joint venture initiatives.[490] While this daring attempt may not attain all of its goals, it does stand more than a reasonable chance of success. The Soviet Union's willingness to adopt a joint venture program—and to amend it to suit Western needs—proves that it is capable of change. And though much still remains to be done in this and other areas of the Soviet economy, the winds of change embodied in the Soviet joint venture program should lead to further economic development.

488. *See supra* notes 109, 237 (discussing concessions granted to the American Trade Consortium).

489. *See supra* note 60.

490. *See supra* Part IV, B.

Appendix A*

DECREE OF THE PRESIDIUM OF THE USSR SUPREME SOVIET

On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies

(13 January 1987)

The Presidium of the USSR Supreme Soviet decrees:

1. Joint ventures established in the territory of the USSR with participation of Soviet and foreign organizations, firms and management bodies shall pay tax on profit at the rate and in the order provided for by the USSR Council of Ministers. Tax shall be appropriated to the USSR national budget.

Joint ventures shall be exempt from tax on profit on the two initial years of their operation.

The USSR Ministry of Finance shall be authorized to reduce the tax rate or to completely exempt from tax individual payers.

2. Collection of the sums of the tax not paid in time shall be carried out conformably to the procedure prescribed in regard of foreign legal persons by the Rules on Collection of Delayed Taxes and Non-tax Payments, endorsed by the Decree of the Presidium of the USSR Supreme Soviet of January 26, 1981 (Vedomosti Verkhovnogo Soveta SSSR, 1981, No. 5, Art. 122).

3. Unless otherwise provided for by a treaty between the USSR and respective foreign state, the part of the profit due to a foreign partner in a joint venture shall be taxed, if transferred abroad, at the rate stipulated by the USSR Council of Ministers.

4. Land, entrails of the earth, water resources, and forests may be made available for use to joint ventures as for payment as well as free of charge.

5. Disputes of joint ventures, international amalgamations and organizations with Soviet state-owned, cooperative and other public organizations, their disputes among themselves, as well as disputes among partners in a joint venture, international amalgamation or organization over matters related to their activity shall be considered by the USSR courts or, upon agreement of the parties, by an arbitration tribunal, and in

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* Official Soviet translation obtained from the Office of the USSR Trade Representative, Washington, D.C.

cases stipulated by the USSR legislation—by tribunals of state arbitration.

In this connection Article 9 of the USSR Law of November 30, 1979 "On State Arbitration in the USSR" (Vedomosti Verkhovnogo Soveta SSSR, 1979, No. 49, Art. 844) shall be amended to include after the words "and organizations" the words "joint ventures, international amalgamations and organizations of the USSR and other CMEA member-countries."

Appendix B*

DECREE OF THE USSR COUNCIL OF MINISTERS

On the Establishment in the Territory of the USSR and Operation of Joint Ventures with the Participation of Soviet Organizations and Firms from Capitalist and Developing Countries

(13 January 1987)

For the purpose of further development of trade, economic, scientific and technical cooperation with capitalist and developing countries on a stable and mutually beneficial basis, the USSR Council of Ministers hereby decrees:

I. GENERAL PROVISIONS

1. Joint ventures with the participation of Soviet organizations and firms of capitalist and developing countries (hereinafter "joint ventures") shall be established in the territory of the USSR with the authorization of the USSR Council of Ministers and on the basis of agreements concluded by partners therein.

Joint ventures shall be governed in their activities by the Decree of the Presidium of the USSR Supreme Soviet of January 13, 1987, "On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies," by this Decree and other legislative acts of the Union of Soviet Socialist Republics and Union Republics with exceptions provided for by interstate and intergovernmental agreements, which the USSR is a party to.

2. Proposals in respect of the establishment of joint ventures with feasibility studies and draft foundation documents annexed thereto shall be submitted by Soviet organizations concerned to Ministries and government agencies, under which they operate. Ministries and government agencies of the Union Republics shall submit such proposals to the Councils of Ministers of their Republics.

The aforesaid Ministries and government agencies of the USSR and the Councils of Ministers of Union Republics shall agree upon the proposals with the USSR State Planning Committee, the USSR Ministry of Finance and other Ministries and government agencies concerned.

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* Official Soviet translation obtained from the Office of the USSR Trade Representative, Washington, D.C.

The agreed proposals for the establishment of joint ventures shall be submitted to the USSR Council of Ministers.

3. Ministries and government agencies, within the system of which Soviet partners in joint ventures operate, shall set up joint ventures with the purpose to satisfy more fully domestic requirements for certain types of manufactured products, raw materials and foodstuffs, to attract advanced foreign equipment and technologies, management expertise, additional material and financial resources to the USSR national economy, to expand the national export sector and to reduce superfluous imports.

II. Partners in, Property and Rights of Joint Ventures

4. One or more Soviet enterprises (amalgamations and other organizations) which are legal entities, and one or more foreign firms (companies, corporations and other organizations) which are legal entities may be partners in a joint venture.

5. The share of the Soviet side in the authorized fund of a joint venture shall not be less than 51 per cent.

6. Joint ventures are legal entities under Soviet law. They may, in their own name, contract, acquire proprietary and non-proprietary personal rights, undertake obligations, sue and be sued in courts of justice and in arbitration tribunals. Joint ventures shall have independent balance and operate on the basis of full cost accounting, self-support and self-financing.

7. A joint venture shall have a statute approved by its partners. The statute shall specify the nature of the joint venture, the objectives of its operation, its legal address, the list of partners, the amount of the authorized fund, the shares of partners therein, the procedure for raising the authorized fund (including foreign currency contents), the structure, composition and competence of the venture's management bodies, the decision-making procedure, the range of issues to be unanimously settled, and the joint venture liquidation procedure. The statute may incorporate other provisions related to the specific character of joint venture's operations unless these are contrary to Soviet law.

8. The period of operation of a joint venture shall be specified by its partners in an agreement on the establishment thereof or in the joint venture's statute (hereinafter "foundation documents").

9. As soon as the foundation documents come into force, joint ventures established in the territory of the USSR shall be registered with the USSR Ministry of Finance and acquire the rights of a legal entity at the time of registration. A notification on the establishment of joint ventures shall be published in the press.

10. The authorized fund of a joint venture is formed from contribu-

tions made by the partners. It can be replenished by using profits derived from business operation of the joint venture and, if necessary, through additional contributions by the partners.

11. Contributions to the authorized fund of a joint venture may include buildings, structures, equipment and other assets, rights to use land, water and other natural resources, buildings, structures and equipment, as well as other proprietary rights (including those to work inventions and use know-how), money assets in the currencies of the partners' countries and in freely convertible currencies.

12. The contribution of the Soviet partner to the authorized fund of a joint venture is evaluated in rubles on the basis of agreed prices with due regard to world market prices. The contribution of the foreign partner is evaluated in the same manner, with the value of the contribution being converted to rubles at the official exchange rate of the USSR State Bank as of the date of signing the joint venture agreement or as of any other date agreed by the partners. In the absence of world market prices the value of contributed property is agreed by the partners.

13. Equipment, materials and other property imported into the USSR by foreign partners in a joint venture as their contribution to the authorized fund of the venture are exempt from custom duties.

14. The property of a joint venture is subject to compulsory insurance with USSR insurance agencies.

15. A joint venture is entitled under Soviet legislation to own, use and dispose of its property in accordance with the objectives of its activities and the purpose of the property. The property of a joint venture shall not be requisitioned or confiscated in the administrative order.

The property rights of a joint venture shall be protected under Soviet legislation protecting state-owned Soviet organizations. Execution can be applied to the property of a joint venture only by a decision of bodies empowered under USSR legislation to hear disputes involving joint ventures.

16. Partners in a joint venture shall have the right to assign, by common consent, their shares in the joint venture fully or partially to third parties. In each particular case the assignment is effected with an endorsement of the State Foreign Economic Commission of the USSR Council of Ministers. Soviet partners have the priority right to acquire shares of foreign partners.

If a joint venture is reorganized its rights and obligations shall pass to the assignees.

17. Industrial property rights, belonging to joint ventures are protected by the Soviet law, including protection in the form of patents. The procedure for the assignment of industrial property rights to a joint venture

by partners therein and by a joint venture to partners therein, as well as for commercial working of those rights and their protection abroad is defined by the foundation documents.

18. A joint venture shall be liable on its obligations in all of its property.

The Soviet State and the partners in a joint venture shall not be liable on its obligations, nor shall a joint venture be liable on the obligations of the Soviet State and of the partners in the venture.

Affiliates of joint venture established in the territory of the USSR, which are legal entities, shall not be liable on the obligations of joint ventures, nor shall joint ventures be liable on the obligations of such affiliates.

19. Joint ventures established in the territory of the USSR may set up affiliates and representation offices provided their foundation documents stipulate their right to do so.

Affiliates of joint ventures set up with the participation of Soviet organizations in other countries shall be established in the territory of the USSR in accordance with the rules which apply to the establishment of joint ventures.

20. Disputes between a joint venture and Soviet state-owned, cooperative and other public organizations, disputes among joint ventures, and disputes among partners in a joint venture over matters related to its activities shall be settled according to legislation of the USSR either by the USSR courts or, by common consent of both sides, by an arbitration tribunal.

III. Operation of Joint Ventures

21. The governing body of a joint venture is a Board consisting of persons appointed by the partners. Its decision-making procedure is defined by the foundation documents.

The operational activities of a joint venture are governed by a Management consisting of Soviet and foreign citizens.

The Chairman of the Board and the Director-General shall be citizens of the USSR.

22. A joint venture shall enter into relations with central state authorities of the USSR and of the Union Republics through authorities superior to the Soviet partner in the joint venture. Its contacts with local government authorities and other Soviet organizations shall be direct.

23. A joint venture is independent in developing and approving its business operation programmes. State bodies of the USSR shall not fix any mandatory plans for a joint venture nor shall they guarantee a market for its products.

24. A joint venture is entitled to transact independently in export and import operations necessary for its business activities, including export and import operations in the markets of CMEA member-countries.

The aforementioned export and import operations may also be effected through Soviet foreign trade organizations or marketing networks of foreign partners under contractual arrangements.

Shipping into and out of the USSR by a joint venture of goods and other property is effected under licenses issued according to legislation of the USSR.

A joint venture is entitled to maintain correspondence, as well as telegraph, teletype and telephone communications with organizations in other countries.

25. All foreign currency expenditures of a joint venture, including transfer of profits and other sums due to foreign partners and specialists shall be covered by proceeds from sales of the joint venture's products on foreign markets.

26. Sales of products of a joint venture on the Soviet market and supplies to the joint venture from this market of equipment, raw and other materials, components, fuel, energy and other produce shall be effected through respective Soviet foreign trade organizations and paid in rubles on the basis of contractual prices with due regard to world market prices.

27. If necessary, a joint venture may use credits on commercial terms:

in foreign currency—from the USSR Bank of Foreign Trade or, with its consent from foreign banks and firms;

in rubles—from the USSR State Bank or the USSR Bank for Foreign Trade.

28. The USSR State Bank or the USSR Bank for Foreign Trade shall be authorized to check if credits extended to a joint venture are used for specified purposes, are secured and repaid in due time.

29. Monetary assets of a joint venture shall be deposited on its ruble account or currency account with the USSR State Bank and the USSR Bank for Foreign Trade respectively and shall be used for the purposes of the joint venture's operations. The money on the accounts of the joint venture shall bear interest:

in foreign currency—depending on the world money market rates;

in rubles—on terms and according to the procedure specified by the USSR State Bank.

Exchange rates fluctuations regarding foreign currency accounts of joint ventures and their operations in foreign currencies shall be carried to their profit-and-loss accounts.

30. A joint venture shall form a reserve fund and other funds neces-

sary for its operation and for the social needs of its personnel.

Deductions from profits shall be added to the reserve fund until the latter totals 25 per cent of the authorized fund of the joint venture. The amount of annual deductions to the reserve fund shall be defined by the foundation documents.

The list of other funds and the way they are formed and used shall be specified by the foundation documents.

31. The profits of a joint venture, less the amounts to be appropriated by the USSR national budget and sums allocated to form and replenish the joint venture's funds shall be distributed among the partners in proportion to each partner's share in the authorized fund.

32. Foreign partners in a joint venture are guaranteed that amounts due to them as their share in distributed profits of the joint venture are transferable abroad in foreign currency.

33. Joint ventures shall make depreciation payments under regulations applying to state-owned Soviet organizations unless a different system is stipulated by the foundation documents. The sums thus accumulated shall remain at the joint venture's disposal.

34. The design and construction of joint venture's facilities, including those intended for social needs, shall be effected through contractual arrangements and paid for with the joint venture's own or loan money. Prior to approval, designs shall be agreed upon under the procedure established by the USSR State Building Committee. Orders from joint ventures shall receive priority both as regards limits on construction/assembly work to be carried out by Soviet construction/assembly organizations and as regards material resources required for the construction.

35. Cargoes of joint ventures shall be transported under the procedure established for Soviet organizations.

IV. Taxation of Joint Ventures

36. Joint ventures shall pay taxes at the rate of 30 per cent of their profit remaining after deductions to their reserve and other funds intended for the development of production, science and technology. Sums paid in taxes shall be appropriated to the USSR national budget.

Joint ventures shall be exempt from taxes on their profits during the two initial years of their operation.

The USSR Ministry of Finance shall be authorized to reduce the tax rate or to completely exempt from tax individual payers.

37. The assessment of the profit tax shall be effected by a joint venture.

The amounts of the advance tax payment for a current year shall be declared a joint venture on the basis of its financial plans for a current

year. The assessment of the final tax amount on the profits, actually made during the expired financial year, shall be effected by a joint venture not later than March 15 of the year, following the year under review.

38. Financial authorities are empowered to verify tax calculations prepared by joint ventures.

Overpaid taxes for the expired year can either be set off against current tax payments, or refunded to the payer at the latter's request.

39. The amount of the profit tax declared for the current year shall be transferred to the budget by equal installments not later than 15 days before the end of each quarter. The final amount shall be paid not later than April 1 of the year, following the year under review.

Delayed payments shall be charged at the rate of 0.05 per cent for every day of delay.

Collection of the sums of the tax not paid in time shall be carried out conformably to the procedure prescribed in regard of foreign legal persons by the Rules on Collection of Delayed Taxes and Non-tax Payments, endorsed by the Decree of the Presidium of the USSR Supreme Soviet of January 26, 1981 (Vedomosti Verkhovnogo Soveta SSSR, 1981, No. 5, Art. 122).

40. A joint venture has the right to appeal against actions of financial authorities in regard to tax collection. An appeal is lodged with the financial authority which verifies the tax calculation. Each case shall be decided within one month from the day the appeal is lodged.

A joint venture is entitled to appeal against this ruling before a superior financial authority within one month from the day of the ruling.

The lodging of an appeal does not stop paying the tax.

41. Unless otherwise provided for by a treaty between the USSR and the respective foreign state, the part of the profit due to a foreign partner in a joint venture shall be taxed, if transferred abroad, at the rate of 20 per cent.

42. The aforementioned taxation procedure is applied to income made by joint ventures established in the territory of the USSR and by located in the USSR affiliates of joint ventures set up with the participation of Soviet organizations in other countries, as a result of their operations both in the territory of the USSR, on its continental shelf, in the USSR economic zone, and in the territory of other countries.

43. Regulations regarding the taxation of joint ventures shall be issued by the USSR Ministry of Finance.

V. Supervision of Joint Ventures' Operations

44. In order to enable partners in a joint venture to exercise their supervision rights, the foundation documents shall stipulate a procedure for providing partners with information related to the operation of the joint venture, the state of its property, its profits and losses.

A joint venture may set up an auditing service to be formed in a manner defined by the foundation documents.

45. Joint ventures shall maintain business, bookkeeping and statistical accounting in accordance with the standards established in the USSR for state-owned Soviet enterprises. The forms of such accounting and bookkeeping shall be jointly specified by the USSR Ministry of Finance and the USSR Central Board of Statistics.

Joint ventures shall be held responsible under Soviet law for complying with the accounting and bookkeeping procedure and for the correction thereof.

Joint ventures shall not submit any accounting or business information to the state or other authorities of foreign countries.

46. The auditing of finance, business and commercial activities of joint ventures shall be carried out for a consideration by the Soviet auditing organization operating on a self-supporting basis.

VI. Personnel of Joint Ventures

47. The personnel of joint ventures shall consist mainly of Soviet citizens. The management of a joint venture shall conclude collective agreements with trade union organization formed at the enterprise. The contents of these agreements including provisions for the social needs of the personnel are defined by Soviet legislation and by the foundation documents.

48. The pay, routine of work and recreation, social security and social insurance of Soviet employees of joint ventures shall be regulated by Soviet legislation. This legislation shall also apply to foreign citizens employed at joint ventures, except for matters of pay, leaves, and pensions which are stipulated by a contract signed with each foreign employee.

The USSR State Committee for Labour and Social Affairs and the All-Union Central Council of Trade Unions shall be authorized to adopt special rules for the application of Soviet social insurance legislation to foreign employees of joint ventures.

49. The joint venture shall make contributions to the USSR national budget for state-sponsored social insurance of Soviet and foreign employees, as well as payments for pensions for Soviet employees in accordance with rates established for state-owned Soviet organizations. Contributions to cover foreign employees' pensions shall be transferred to respec-

tive funds in the countries of their permanent residence (in these countries' currencies).

50. The pay of foreign employees of a joint venture is subject to income tax at the rate and in accordance with the procedure set up by the Decree of the Presidium of the USSR Supreme Soviet of May 12, 1978 "On the Income Tax Levied on Foreign Legal and Physical Persons" (Vedomosti Verkhovnogo Soveta SSSR, 1978, No. 20, Art. 313). The unutilized portion of foreign employees' pay may be transferred abroad in foreign currency.

VII. Liquidation of Joint Ventures

51. A joint venture may be liquidated in cases and in the manner stipulated by the foundation documents, and also by a decision of the USSR Council of Ministers if the activities thereof are not consistent with the objectives defined by these documents. A notification of a liquidation of a joint venture shall be published in the press.

52. In the case of liquidation of a joint venture or upon withdrawal from it, the foreign partner shall have the right to return his contribution in money or in kind pro rata to the residual balance value of this contribution at the moment of liquidation of the joint venture, after discharging his obligations to the Soviet partners and third parties.

53. The liquidation of a joint venture shall be registered with the USSR Ministry of Finance.

Appendix C*

DECREE OF THE USSR COUNCIL OF MINISTERS

On Further Development of the Foreign Economic Activities of State, Cooperative, and Other Public Enterprises, Associations, and Organizations

(2 December 1988)

The USSR Council of Ministers proceeds from the proposition that the foreign economic activity of state, cooperative, and other public enterprises, associations, and organizations is an inalienable part of their economic life and an active component of work conducted in the country for radical economic reform, strengthening the country's economy and enhancing its international standing, and its emergence on the modern level in terms of equipment, technology, and organization of production.

The 19th All-Union CPSU Conference deemed it expedient to implement the restructuring of the system of foreign economic contacts within the framework of the present 5-year plan. This is called for by the fact that, despite the organizational-legal and economic conditions that have already been created, there have still been no substantial positive improvements in foreign economic activity, especially with respect to the development of exports and the rationalization of their structure. As previously, imports are largely used to resolve current tasks. The principle of hard currency cost recovery is not functioning adequately; ministries, departments, and union republic councils of minsters are still willing to solve their problems but are unwilling to apply their own funds for this purpose; economic leaders display an insufficient socialist spirit of enterprise; and the measures taken to stimulate foreign economic activity do not produce the proper effect.

With the aim of substantially expanding the sphere of foreign economic contacts; actively including enterprises, associations, production cooperatives, and other organizations in this work; further simplification of the current procedure for organizing foreign economic contacts; implementing them in the conditions of genuine foreign currency cost recovery; and making consistent utilization of commodity-currency relations, the USSR Council of Ministers resolves:

1. To consider that one of the most important tasks of union, republic, branch, and local bodies of management must be to apply all means to provide organizational and economic conditions for the active involve-

* Translated by Andrew Griffin, J.D., 1988; Ph.D. candidate, Slavic literature.

ment of enterprises, associations, production cooperatives, and other organizations in various forms of foreign economic activity on the principles of hard currency cost recovery and the development of a socialist spirit of enterprise.

While giving priority importance to the development of cooperation with socialist countries, it is necessary to consistently create the necessary conditions for the active participation of the USSR in the formation of a united market of CEMA countries on the basis of deepening integration, broad-based involvement of enterprises, associations, and organizations in foreign economic activity, expanding their independence in these matters; and utilizing commodity-currency relations and the interaction between national markets.

Organizational-Legal Questions of Foreign Economic Activity

2. To recognize the need for radical democratization of the procedure for granting rights for direct implementation of export-import operations (including the markets of capitalist and developing countries).

To establish that, as of 1 April 1989, all enterprises, associations, production cooperatives, and other organizations whose output (work, services) is competitive on the foreign market will have the right to directly implement export-import operations. These export-import operations will be implemented on the basis of hard currency cost recovery, and the results comprise an organic part of the end results of economic activity and influence the formation of economic stimulation funds and hard currency funds.

Enterprises, associations, production cooperatives, and other organizations can implement export-import operations directly, creating for this purpose, where necessary, economically accountable foreign trade firms, or implementing them on a contractual basis through other foreign economic organizations, as guided by the achievement of the best conditions for exports and imports, hard currency cost recovery, and self-financing, and proceeding from the proposition that the state is not responsible for their obligations. The normatives of hard currency deductions set for enterprises, associations, production cooperatives, and other organizations does not change regardless of the foreign economic organization through which the export of their output (work, services) is implemented.

The USSR Ministry of Foreign Economic Relations, the USSR Ministry of Finance, and the USSR Chamber of Trade and Industry are instructed within 1 month to formulate and present proposals to the USSR Council of Ministers for creating a system of registration for enterprises, associations, production cooperatives, and other organizations

implementing the export-import operations.

To grant the USSR Council of Ministers State Foreign Economic Commission the right, at the submission of the USSR Ministry of Foreign Economic Relations and union republic councils of ministers, to cease the implementation of export-import operations of enterprises, associations, production cooperatives, and other organizations in cases involving unfair competition or activities that injure the state's interests.

. . .

QUESTIONS OF THE ORGANIZATION AND ACTIVITY OF JOINT VENTURES, INTERNATIONAL ASSOCIATIONS, AND ORGANIZATIONS

31. For the purpose of invigorating the establishment of joint ventures on Soviet territory with the participation of foreign organizations and firms, it is established that:

The shares of Soviet and foreign participants in a joint venture's ownership capital are fixed by agreement between them;

A foreign citizen can be a chairman of the board or director general of a joint venture;

Fundamental issues related to the activities of a joint venture are decided at board meetings on the basis of unaminity of all board members;

Issues related to employment and dismissal, forms and amount of remuneration, as well as material incentives for joint venture personnel in Soviet rubles shall be decided by the joint venture;

Goods imported by a joint venture into the Soviet Union for production needs can be imposed minimal duties or be exempt from duties;

Foreign personnel of joint ventures pay for the housing and other services provided to them in Soviet rubles, except for cases envisaged by resolutions of the USSR Council of Ministers.

For the purpose of providing additional encouragement for the establishment of joint ventures in the Far Eastern Economic Region, it is deemed necessary to exempt these ventures from paying tax on profits during the 1st 3 years from the moment of receiving the declared profit.

The USSR Ministry of Finance must:

Within a 3-month period, work out and affirm rules for determining the taxable income of joint ventures, taking into consideration the practice of foreign states;

Reduce to 10 percent the tax on the profits of joint ventures created in the Far Eastern Economic Region.

32. It is deemed expedient to grant the USSR Ministry of Finance the right not to tax for a specified period that portion of profits due to the foreign participant in a joint venture upon its transfer abroad, or to re-

duce the rate of the aforementioned tax if no alternative is stipulated in a treaty between the USSR and the respective state. This right shall be applied mainly when joint ventures produce consumer goods, medical equipment and medicines, or high-technology output of great national economic significance, and also with respect to joint ventures located in the Far Eastern Economic Region.

33. To establish that the transfer of shares in a joint venture, insurance of the risks of a joint venture, as well as the auditing of its financial-economic activity is carried out by agreement of the parties.

34. The USSR Council of Ministers Main Directorship of State Customs Control, together with the USSR Ministry of Foreign Economic Relations and the USSR Ministry of Finance, must guarantee the granting of customs privileges to the foreign personnel of joint ventures.

35. To grant state enterprises, associations, and organizations the right to adopt resolutions on creating joint ventures or international associations and organizations with foreign organizations and firms with the agreement of the superior management body.

Production cooperatives create joint ventures or international associations and organizations with the participation of foreign organizations and firms with the agreement of the corresponding council of ministers of a union republic not divided into oblasts [provinces], the autonomous republic council of ministers, the krayispolkom [regional executive committee], the oblispolkom [provincial executive committee], the Moscow Gorispolkom [Moscow City executive committee], or the Leningrad Gorispolkom [Leningrad City executive committee] according to the location of the cooperative or with the agreement of the ministry (department) under whose enterprise (organization, institution) the cooperative has been formed.

New construction or large-scale reconstruction in the creation of joint ventures or international associations and organizations are carried out with the consent of the territorial management bodies.

In other cases, the Soviet participants in joint ventures or international associations and organizations provide relevant information to the territorial management bodies.

Direct production and scientific-technical contacts with enterprises and organizations from socialist countries, as well as coastal and border trade with the relevant countries, is carried out by production cooperatives with the permission and procedures determined by the council of ministers of a union republic not divided into oblasts, an autonomous republic council of ministers, a krayispolkom, an oblispolkom, the Moscow Gorispolkom, or the Leningrad Gorispolkom (according to the location of the cooperative) taking into account current statutes governing the procedure

for implementing such contacts.

The USSR Chamber of Trade and Industry, together with the USSR Foreign Ministry and the USSR Ministry of Foreign Economic Relations, within 3 months must submit, according to established practice, proposals for direct economic relations between enterprises, associations, production cooperatives, and other organizations in the Far Eastern Economic Region and firms and organizations from countries in the Asian-Pacific region.

Beginning in 1989, the USSR Chamber of Trade and Industry, with the participation of interested enterprises, associations, organizations, ministries, and departments must organize international fares for attracting, on a competitive basis, foreign organizations and firms as well as Soviet enterprises, associations, production cooperatives, and other organizations to participate in the creation of cooperative projects in the Far Eastern Economic Region.

Certain Questions on Foreign Economic Activity

36. The USSR Council of Ministers State Foreign Economic Commission, with the participation of the USSR State Planning Commission, the USSR State Committee for Science and Technology, and the USSR Academy of Sciences, must constantly analyze contemporary problems of the development of world economic contacts and their interaction with the USSR's economy, and the combination of the plan-based nature of the USSR national economy's development with the utilization of commodity-currency relations in the foreign economic sphere and the deepening of joint operations with firms, banks, and organizations of foreign countries in accordance with the strategy of development of the USSR's foreign economic contacts.

The USSR Academy of Sciences Far Eastern Department must implement an analysis of the realization of the Long-Term State Program for the Intensive Development of Productive Forces of the Far Eastern Economic Region, the Buriat ASSR, and Chita Oblast Through the Year 2000 in the area of development of export directions of national economic complexes of the Far Eastern and Transbaikal regions, and organize on a permanent basis and with participation by interested enterprises, associations, organizations, ministries, departments, and local ispolkoms [councils of people's deputies] the elaboration of problems concerning the development of these terrorities' foreign economic contacts.

37. During the 1st quarter of 1989, the USSR Ministry of Foreign Economic Relations, the USSR State Planning Commission, the USSR Ministry of Finance, the USSR Council of Ministers Main Directorship of State Customs Control, and the USSR Ministry of Justice must pre-

pare and submit, with the participation of interested USSR ministries and departments and the councils of ministers of the corresponding union republics, proposals to the USSR Council of Ministers for creating in the USSR, and primarily in the Far Eastern Economic Region, "joint enterprise zones" which will concentrate on joint ventures with foreign participants and on the possible status and location of such zones.

38. During the 1st quarter of 1989, the USSR State Bank, the USSR Bank for Foreign Economic Activity, and the USSR Ministry of Finance must work out and submit concrete proposals to the USSR Council of Ministers for a gradual development of the partial convertibility of the Soviet ruble into foreign currencies.

39. During the 1st quarter of 1989, the USSR State Planning Commission, the USSR Ministry of Finance, the USSR State Bank, and the USSR Bank for Foreign Economic Activity must submit proposals to the USSR Council of Ministers to enhance the structure of the combined hard currency plan (USSR balance of payments).

40. The provisions of the present resolution concerning production cooperatives also apply to all cooperatives implementing production activity and to their unions (associations).

41. USSR ministries and departments are to make changes to the corresponding departmental normative acts, instructions, and methodological instructions, taking into account the demands of the present resolution.

The USSR Ministry of Foreign Economic Relations and the USSR Ministry of Justice, with the participation of the USSR State Planning Commission, the USSR State Procurement Committee, the USSR Ministry of Finance, the USSR State Bank, the USSR Bank for Foreign Economic Activity, and other interested ministries and departments, must prepare and submit proposals to the USSR Council of Ministers within 2 months on making changes to existing legislation in accordance with this resolution.