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Joint Ventures in the USSR, Czechoslovakia and Poland

Georgios N. Boukaouris†*

I. INTRODUCTION

It is beyond doubt that international trade has undergone tremendous development. It now is a dominant factor in international economic cooperation regardless of the social and political systems of the countries involved. Until the end of the 1960s, international business transactions were primarily performed on the basis of bilateral industrial cooperation agreements. After a certain period this framework was no longer sufficient; consequently, the concept of joint ventures emerged as a necessity.

Creation of a joint venture offers something more than mere cooperation. It offers the primordial advantage of sharing between partners from different countries. This sharing involves common business undertakings, management activities, programming, goals and profits; and most of all common risks and responsibilities. All of these appear very tempting to businessmen.

This Article will focus on the legal framework for joint ventures in three major socialist countries: the USSR, Czechoslovakia and Poland.

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It will compare specific points of each country's legislation regarding the creation, operation and dissolution of the joint venture.

II. HISTORICAL OVERVIEW OF SOVIET, CZECHOSLOVAK AND POLISH FOREIGN TRADE

A. *Early Period: The Forgotten First Joint Ventures*

On April 22, 1918 the Council of the People's Commissars of the RSFSR issued a short Decree, entitled "Decree on the Nationalization of Foreign Trade."¹ Article 1 of the Decree declared that "all foreign trade is nationalized." The Decree further provided that any foreign trade activity would be carried out by state agencies under the control of the People's Commissariat of Trade and Industry.² After the USSR was formed in December 1922, the People's Commissariat of Foreign Trade became an all-union body and its powers were extended to cover the entire USSR by virtue of the Decree of July 13, 1923.³ Thus, the whole foreign trade sector became a state monopoly.

However, this monopoly did not continue. In the early twenties, under Lenin's New Economic Policy ("NEP"), the idea of decentralizing foreign trade and abolishing state monopoly emerged.⁴ The idea was supported at first sight by a number of Politburo members, such as Zinoviev, Kamenev, Bukharin, even Stalin, but not by Trotsky. This policy was "almost hysterical[ly]"⁵ rejected by Lenin himself. In this period of initial revolutionary enthusiasm, Lenin considered the state monopoly of foreign trade to be a weapon which would enable Russia to become an industrial power.⁶ Conversely, a Decree of March 13, 1922, entitled "On Foreign Trade," had already begun to depart from the principle of monopoly. First, the Decree allowed for direct importing and exporting by state enterprises, provincial executive committees and all-Russian cooperatives, provided that permission for each transaction was obtained from the People's Commissariat of Foreign Trade. Second, something nearly forgotten today, it allowed for the creation and organization of the

¹ The text of the Decree is translated into English by John Quigley and is included as Appendix B in J. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY: INSTITUTIONS AND LAWS* 202 (1974). Reference to the text of the Decree is made as well in W. E. BUTLER, *SOVIET LAW* 333 (1983), and in Dore, *Plan and Contract in the Domestic and Foreign Trade of the U.S.S.R.*, 8 SYRACUSE J. INT'L L. & COM. 29, 75 (1980).

² J. QUIGLEY, *supra* note 1, at 202. In June 1920, the People's Commissariat of Trade and Industry was renamed the People's Commissariat of Foreign Trade. *Id.* at 22.

³ W.E. BUTLER, *supra* note 1, at 333.

⁴ Hough, *Attack on Protectionism in the Soviet Union? A Comment*, 40 INT'L ORG. 495 (1986).

⁵ *Id.*

⁶ *Id.*

first Soviet joint ventures.⁷ These mixed enterprises could be formed with the participation of Narkomvneshtorg⁸ or its organs and foreign enterprises, either in the USSR or abroad. The joint ventures could undertake export-import operations as well as produce and supply export goods.⁹ This structuring proved to be very effective in practice. Thus, in 1924 the mixed companies accounted for 4.3% of Soviet exports, and 4.5% of Soviet imports.¹⁰ In 1925, there were 161 mixed enterprises, twelve of which involved the participation of foreign corporations. These twelve enterprises provided approximately 20% of the total capital, an amount equal to 3.4 million rubles.¹¹

Unbelievable as it might seem today, Stalin was not opposed to joint ventures in the early period following Lenin's death in 1924, when he ruled the USSR together with Rykov, Kamenev and Zinoviev. On August 17, 1927 a specific law on Joint Stock Companies, also regulating mixed companies in the USSR, came into force.¹² When Stalin was able to attain uncontested power in 1929,¹³ however, he started imposing harsh collectivization and centralization measures. As a result of his general economic policy during these times, the situation abruptly changed. In 1930, the Sixteenth Communist Party Congress ordered the liquidation of the joint stock and mixed companies.¹⁴ In February 1930,

⁷ Note that this Decree has not been repealed. See Loeber, *Capital Investment in Soviet Enterprises? Possibilities and Limits of East-West Trade*, 6 ADEL. L. REV. 337, 352 (1977-1978).

⁸ This is the Russian abbreviation of the words Narodnyi Kommissariat Vneshnei Torgovli (People's Commissariat of Foreign Trade).

⁹ Voznesenskaja, *Pravoye Formy Sovmestnogo Predprinimatel'stva i Praktika SSSR (Legal Forms of Joint Undertaking and the U.S.S.R. Practice)*, SOVETSKOE GOSUDARSTVO I PRAVO (SOVIET STATE AND LAW) 59, 64 (Mar. 1985) [hereinafter Voznesenskaja 1985]. See also J. QUIGLEY, *supra* note 1, at 27; Smirnov, *Joint Ventures in the U.S.S.R.*, FOREIGN TRADE No. 9, at 42 (1987) [hereinafter Smirnov 1987]. Smirnov points out that the joint ventures today "[are not], strictly speaking, an entirely new form coming into use, but, we might say, the reinvigoration of the known practice of undertaking joint ventures inside the U.S.S.R." The existence of joint ventures in the Soviet Union at that time is mentioned also in M. I. Goldman & M. Goldman, *Soviet and Chinese Economic Reform*, FOREIGN AFF. No. 66, at 551, 564 (1987).

¹⁰ Loeber, *supra* note 7, at 344.

¹¹ *Id.*; J. QUIGLEY, *supra* note 1, at 47.

¹² Loeber, *supra* note 7, at 345; Voznesenskaja 1985, *supra* note 9, at 64.

¹³ B. D. WOLFE, *THREE WHO MADE A REVOLUTION: A BIOGRAPHICAL HISTORY* 467 (1984).

¹⁴ It should be stressed at this point that the abolition of the first Soviet joint ventures in 1930 did not prevent Soviet state enterprises or agencies from getting involved in direct or indirect investment in developed or developing countries abroad. An elaborate study of the investment undertaken by Soviet and other Eastern European countries abroad is found in C. H. McMILLAN, *MULTINATIONALS FROM THE SECOND WORLD* (1987). See also *MNCs and Joint Ventures: Not All Are West-to-East*, XVI Business Eastern Europe (Business International S.A.) No. 26, at 205 (June 29, 1987). Two well-known examples of such investment are: the Armtorg Trading Corporation, New York; and the Moscow Narodny Bank Limited, established in 1919. Both of these companies are 100% Soviet-owned. ENCYCLOPEDIA OF SOVIET LAW 324 (2d ed. 1985); Pfeffer, *The Business Activities of State Trading Enterprises in Countries with Market Economies - The Reconciling of the Differing*

thirty export and import organizations with monopoly rights for determined categories of goods, called "all-union combines," replaced the abolished joint ventures, from which many of them were formed.¹⁵ As a result, Soviet foreign trade slowly but steadily became centralized again.¹⁶ It is worth noting, however, that the 1927 Law was not repealed until 1962, after the adoption of the Fundamental Principles of Civil Law in 1961.¹⁷

The fundamental axiom of state monopoly of foreign trade was maintained and reinforced by Stalin through its integration into the 1936 Soviet Constitution. Today the monopoly is still in force under article 73(10) of the 1977 Soviet Constitution.¹⁸

On August 24, 1953 the Ministry of Foreign Trade was created. The Ministry assumed responsibility for the overall coordination of Soviet foreign trade under the Gosplan.¹⁹ Although the Ministry was highly centralized at first, it gradually vested some of its powers in other agencies. The most significant of these were the State Committee for Foreign Economic Relations, created in 1957, and the State Committee for Science and Technology, created in 1965. In addition to the above committees, the Ministry of Foreign Trade also cooperated with the Ministry of Finance (Minfin), the State Bank (Gosbank), the Bank for Foreign Trade (Vneshtorgbank), the All-Union Chamber of Commerce (operating the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission) and the state agency for foreign insurance (Ingosstrakh).²⁰

The active responsibility for foreign trade transactions was conferred by the Soviet State on the Foreign Trade Organizations ("FTOs").²¹ The Soviet State, owner of the means of production, allo-

Economic Orders, Particularly with Regard to Competition Rules, 10 INT'L BUS. LAW. 124 (1982); Voznesenskaja 1985, *supra* note 9, at 64; Loeber, *supra* note 7, at 347.

¹⁵ J. QUIGLEY, *supra* note 1, at 62.

¹⁶ Loeber, *supra* note 7, at 346; Voznesenskaja 1985, *supra* note 9, at 64; J. QUIGLEY, *supra* note 1, at 62.

¹⁷ Loeber, *supra* note 7, at 346; Voznesenskaja 1985, *supra* note 9, at 64.

¹⁸ W.E. BUTLER, *supra* note 1, at 333.

¹⁹ This is the Russian abbreviation of the words Gosudarstvennyi Plan. This is the State Planning Committee of the USSR Council of Ministers which previously had absolute control over both foreign and domestic trade and over the Soviet economy as a whole. Today, under perestroika, its powers are greatly circumvented.

²⁰ Dore, *supra* note 1, at 76-78. Ingosstrakh, Intourist and the USSR Bank for Foreign Trade (Vneshtorgbank) were the only legal entities still organized as joint stock societies in 1983. Since the 1927 Law on Joint Stock Companies was repealed in 1962, as mentioned earlier, "their legal status [was thereafter] governed by the [1961 Fundamental Principles of Civil Law], union republic civil codes, and their respective charters." W.E. BUTLER, *supra* note 1, at 338-39.

²¹ Butler uses the terms "Organizations" or "Associations." W.E. BUTLER, *supra* note 1, at 336. Dore, Loeber and Quigley mainly prefer the term "Combines." Dore, *supra* note 1, at 83; Loeber, *supra* note 7, at 353; J. QUIGLEY, *supra* note 1, at 103-20. Hertzfeld uses the term "Corpo-

cates state property to the FTOs for their operational needs. The FTOs operate on the basis of their charters and accounts, under the *Khozraschet* system of independent economic accountability, and primarily under the guidance and supervision of the Ministry of Foreign Trade or any other competent ministry or state committee, depending on their field of commercial activity.²² This foreign trade mechanism was in place in the USSR when Mikhail S. Gorbachev became General Secretary of the CPSU in 1985.

After the end of the Second World War, the new communist governments of Czechoslovakia and Poland, as well as other Eastern European countries, generally followed the Soviet model in their efforts to transform the countries, including the foreign trade sectors. When the Communist Party, under the leadership of Klement Gottwald, came into power in Czechoslovakia in 1948, it immediately nationalized the means of production including those for the sector of foreign trade.

Czechoslovakia is a federal state, comprising the Czech Socialist Republic and the Slovak Socialist Republic. Consequently, a Federal Ministry of Foreign Trade was created by Act 119/1948 on State Organization of Foreign Trade and International Forwarding.²³ This Act regulated all foreign trade activities until adoption of Act 42/1980 on Economic Relations with Foreign Countries. The latter came into force on July 1, 1980 and repealed the former with the exception of the provisions concerning nationalization.²⁴

The Czechoslovak Federal Ministry of Foreign Trade assumes primary responsibility for the foreign trade policy of the country. The Ministry determines the country's general trade policy according to geographical areas of the world. Its operations are organized into three departments, namely the Department of Socialist Countries, the Department of Advanced Capitalist Countries and the Department of Developing Countries. The territorial pattern of Czechoslovak foreign trade is largely comprised of Comecon countries (78%), as compared with lower levels of activity with Western countries (16%) and Third World

rations." *ENCYCLOPEDIA OF SOVIET LAW*, *supra* note 14, at 325. All of the terms interpret the Russian word "objedinenija." J. QUIGLEY, *supra* note 1, at 109.

²² For instance, *Soveksportfilm*, which is responsible for the import and export of films, operates under the supervision of the Ministry of Culture. *Intourist*, which organizes the tourist activities of the country, operates under the guidance of the State Committee for Tourism. *Vneshtekhnika*, which deals with technology exchanges and coordination, is under the direction of the State Committee for Science and Technology. *Ingosstrakh* operates under the insurance division of the Ministry of Finance. *ENCYCLOPEDIA OF SOVIET LAW*, *supra* note 14, at 325; J. QUIGLEY, *supra* note 1, at 109-20.

²³ Klein, *Czechoslovakia*, 8 *INT'L BUS. SERIES* 59 (1986).

²⁴ *Id.* See also *CZECHOSLOVAK CHAMBER OF COMMERCE AND INDUSTRY, CZECHOSLOVAK ACT ON ECONOMIC RELATIONS WITH FOREIGN COUNTRIES* 5 (1982).

countries (6%).²⁵ Two other organs of foreign trade are the Czechoslovak Chamber of Commerce and Industry and the affiliated Arbitration Court.²⁶

The same route was followed in Poland by the Polish United Workers' Party under the Presidency of Boleslaw Bierut.²⁷ It is interesting to note that by special provision of article VI of the Law on Introductory Provisions of the Polish Civil Code of April 23, 1964, certain provisions of the repealed Commercial Code of June 27, 1934, adopted by the pre-war Republic of Poland, with respect to international trade transactions were retained.²⁸

In addition, the new communist regimes of Czechoslovakia and Poland did not forbid the existence of joint stock corporations within the sector of foreign trade in the early period. Both countries followed the Soviet model in force during the 1920s, as described above. As noted by John Quigley, the countries estimated that the model "provide[d] an effective channel for industry participation in foreign trade decisions."²⁹ It was only later that the foreign trade export-import combines were set up. In Poland, however, a few joint stock companies have remained. In Czechoslovakia, they were reinstated in the middle of the 1960s because their legal structure proved to be effective and flexible.³⁰

B. *Transition from a State-to-State Bilateral Approach to a General Joint Venture Legal Framework: The Effect of Perestroika*

In Eastern Europe, the establishment of joint ventures was envisaged in the middle of the 1960s. The pioneer was Yugoslavia in 1967, with Romania following in 1971, Hungary in 1972, Poland in 1976, Bulgaria in 1980, Czechoslovakia in 1985 and the Soviet Union in 1987.³¹

Joint ventures were considered necessary because the industrial cooperation agreements were no longer sufficient, since they could not cover the expanded fields of activity. A more complex cooperation framework was necessary in order to undertake joint production and

²⁵ A. Bruzek, *The Czechoslovak Economy and the New Economic Mechanism* (unpublished speech available from the Prague School of Economics and in author's files).

²⁶ Klein, *supra* note 23, at 80.

²⁷ This is the official title of the ruling party in Poland. Its creation was the outcome of a merger which took place in December 1948 between the Polish Worker's Party (Communist Party) and the Socialist Party, both parties of the pre-war Republic of Poland.

²⁸ Rajski & Wisniewski, *Poland*, 8 INT'L BUS. SERIES 205 (1986).

²⁹ J. QUIGLEY, *supra* note 1, at 186, 197.

³⁰ *Id.*

³¹ See generally C. H. McMILLAN & D. P. ST. CHARLES, *JOINT VENTURES IN EASTERN EUROPE: A THREE COUNTRY COMPARISON* (1974) (on early joint ventures of the modern era and conditions for joint ventures in Romania, Yugoslavia and Hungary); see also Buzescu, *Joint Ventures in Eastern Europe*, 32 AM. J. OF COMP. L. 407 (1984); Scriven, *Co-operation in East-West Trade: The Equity Joint Venture*, 10 INT'L BUS. LAW. 105, 106-9 (1982).

marketing, and to share risks and profits. In addition, this new framework gave the Western investors an opportunity to expand their activities into almost virgin markets, such as those of the CMEA member-countries.³² At the same time, it gave the host countries needed advanced technology, managing skills and expertise. For the reasons stated above, a great number of the established joint ventures were continuations and expansions of existing cooperation agreements.³³

In 1976, Poland was the first of the three countries to enact modern foreign direct investment legislation. This was done through a cautious general framework of regulations. The framework was rather blurred and it consisted of the following: 1) Regulation No. 63/February 6, 1976 of the Council of Ministers "Concerning Conditions, Procedure and Organs Competent to Grant Foreign Legal and Natural Persons Authorizations to Create Offices in Poland for Purpose of Carrying on Economic Activity," which came as a result of the substantial export business undertaken by foreign firms with Poland;³⁴ 2) Decree No. 123/May 14, 1976 of the Council of Ministers, which permitted wholly foreign-owned businesses in Poland, but contained no provision at all on joint ventures; and 3) Order Nos. 109 and 110 of the Minister of Finance/May 26, 1976 "Concerning Permits for Foreign Exchange Operations by Mixed Companies," which dealt not only with the financial aspect of mixed capital joint ventures but included regulation of their establishment, operation and dissolution.³⁵

The field of activities permitted under these three legislative acts was rather restrictive and narrow. It was limited mostly to small handicraft; small scale domestic trade; and hotel, catering and other services; in sum,

³² CMEA stands for Council for Mutual Economic Assistance, widely known as Comecon. It was founded on January 20, 1949 in order to promote and coordinate the mutual exchange of economic experience, technology, and raw materials between its members. Member states today are the Soviet Union, Czechoslovakia, Poland, Bulgaria, Romania, the German Democratic Republic, North Korea, Cuba, Vietnam and Mongolia.

³³ This point of view is supported with respect to Soviet joint ventures by the highly reliable weekly report *Business Eastern Europe*. More precisely, it is mentioned that "the majority of those JVs registered to date are very small or are based on existing cooperation agreements. EKE-Sadolin (Finland), Liyan (Liebherr/Switzerland), Igirima-Tairiky (Japan) and Est-Finn (Finland) were all set up on the basis of existing cooperation agreements." *Soviet Joint Ventures: The Problems Thus Far*, XVII Business Eastern Europe (Business International S.A.) No. 11, at 81-82 (Mar. 14, 1988). On the functioning of industrial cooperation agreements, see an early discussion in Pedersen, *Joint Ventures in the Soviet Union: A Legal and Economic Perspective*, 16 HARV. INT'L L.J. 390, 391 (1975).

³⁴ Rajski & Wisniewski, *supra* note 28, at 207; Scriven, *Joint Ventures in Poland: A Socialist Approach to Foreign Investment Legislation*, 14 J. WORLD TRADE L. 424, 426 (1980); Rajski, *Legal Aspects of Foreign Investment in Poland*, YEARBOOK ON SOCIALIST LEGAL SYSTEMS 159-60 (W. Butler ed. 1986) [hereinafter Rajski in YEARBOOK].

³⁵ Scriven, *supra* note 34, at 426.

to small scale production sectors of the company.³⁶ As John G. Scriven correctly remarked:

Although foreign legal persons were also permitted to make such investment, the thrust of the legislation was to attract individuals. The requirement of a Polish resident as proxy for the foreign investor, the provisions relating to inheritance of the assets invested and the use of the Polish Savings Bank (Bank Polska Kasa Opieki S.A.) rather than the Polish Foreign Trade Bank (Bank Handlowy) demonstrate this intention.³⁷

Moreover, although the above enactments gave the joint venture possibility a passing mention, joint ventures remained inoperative, since no working regulations were implemented to make them active.³⁸ This was due to theoretical controversies over the issue of whether foreign investment as such should be allowed. The view of the opponents on enhanced status of Western foreign investment prevailed at the time, enabling the Polish State to keep these new forms of activity out of the socialized sectors of the economy. This model made policing trade easier, because should it become necessary to eliminate market economy forces, elimination of small individual owners would be simpler than elimination of a branch of a multinational company.³⁹

The main goal of these legal enactments was to attract Polonian⁴⁰ private direct investment. Poland was the first socialist country to make explicit recourse to its expatriates living abroad, principally in the United States, Canada and countries of the European Community, in order to

³⁶ *Id.* at 429.

³⁷ *Id.* at 426-27.

³⁸ M. Arnoldi, *Western Investment in Poland (1976-1986)* 28 (Nov. 11, 1987) (unpublished thesis, available in Carleton University Library, Ottawa, Canada).

³⁹ It should be added at this point that domestic trade as well had been recently regulated by the Act of July 18, 1974 "Concerning Carrying on of Commerce and Some Other Kinds of Economic Activity by Units of Non-Socialized Economy." Rajski & Wisniewski, *supra* note 28, at 207. "This notion [of units of non-socialized economy] usually covers private national small industry and trade as well as foreign nationals and foreign legal persons." *Id.* The existence of an important private, non-socialized sector of the economy is a significant characteristic of post-war Poland; it is explicitly stated that "individual family farms . . . dominate agriculture." *National Economy*, in POLAND 1988: *GUIDEBOOK* 76-77 (1988); Fontaine, *Une question à Gorbachev et à quelques autres*, *Le Monde*, July 10, 1987, at 1.

⁴⁰ The term Polonian is interpreted by the Polish authorities as comprising "individuals of Polish origin who have maintained more or less their links to the Polish nation and culture . . . [and who have maintained] traditions rooted in their Polish origin reveal[ing] interest in Polish culture and show[ing] an understanding for the Polish national interests." Arnoldi, *supra* note 38, at 28. It is estimated that ten to eighteen million Poles live in countries outside Poland. Famous Poles include Zbigniew Brzezinski, National Security Advisor of U.S. President Carter and Michel Poniatowski, Minister of Internal Affairs of France during the seven-year Presidency of Valéry Giscard d'Estaing (1974-1981).

seek investment capital.⁴¹

In 1979, three years later, a second attempt to attract foreign investment was introduced in the form of Resolution No. 24/February 7, 1979 of the Council of Ministers "On Establishing Business Enterprises with Foreign Capital Participation in Poland and their Operation." This regulation of foreign direct investment was primarily concerned with the definition of the legal framework for operating joint ventures. Unfortunately, it appeared to be much more complicated, detailed and restrictive than the previous regulation.⁴²

The most problematic provisions of the combined 1976 and 1979 regulations were the limited life of the joint venture—up to fifteen years in total—and the complicated scheme of profit repatriation, both of which constituted stumbling blocks to foreign investment. "Even a Polish foreign trade official admitted that the old regulations . . . 'contained more injunctions and restrictions than they did incentives.'"⁴³

Because of these difficulties, "[t]he Law of July 6, 1982 On Principles of Conducting an Economic Activity in Small Industry by Foreign Corporate Bodies and Natural Persons in the Territory of the Polish People's Republic"⁴⁴ was enacted. The Law has a narrow scope. In particular, it is concerned with the increase of production and services for the domestic market and for export. In principle, it is aimed at attracting capital investment from Polonians, but in practice, it also attracts capital from other foreigners.⁴⁵ The Law sets no limit on the degree of foreign capital participation. Consequently, enterprises undertaken under its

⁴¹ "In 1972 the Polish government formed the 'Polonia' Society," and later the Polish-Polonian Chamber of Industry and Commerce, in order "to strengthen the cultural and commercial links of émigrés to the 'old country.'" See Arnoldi, *supra* note 38, at 29. It was estimated that their emotional attitude, arising out of common culture, language and religion, would render them sympathetic and adaptable to the peculiarities of Poland. This was proved earlier when expatriates helped Poland and Czechoslovakia in 1947. Both of those countries had rejected any form of American economic assistance under the Marshall Plan, as advised by Stalin, shortly before the creation of Comecon. See Tagliabue, *Poland Rejects Notion of Another "Marshall Plan"*, N.Y. Times, May 24, 1988, at A11, col. 1. Furthermore, Polish investors would help their country and "would be less likely to exploit members of their own nationality or criticize state policies." Arnoldi, *supra* note 38, at 29-30, 51. This appears to be the main reason why at a later stage the Law of July 6, 1982 was adopted.

⁴² Rajski in YEARBOOK, *supra* note 34, at 160.

⁴³ *Poland Eases JV Law, Invites Foreign Investment*, XI Business Eastern Europe (Business International S.A.) No. 24, at 197 (June 18, 1982).

⁴⁴ See the text of the Law as amended in 1983 and 1985: *The Law of July 6, 1982 on principles of conducting an economic activity in small industry by foreign corporate bodies and natural persons in the territory of the Polish People's Republic*, INTER-POLCOM (Polish Information Magazine), No. 4/39, at 15 [hereinafter 1982 Law].

⁴⁵ The Law creates the Polish-Polonian Chamber of Industry and Commerce to promote Polonian investment. See 1982 Law, *supra* note 44, art. 5, paras. 1 and 2; see also *supra* note 41; Buzescu, *supra* note 31, at 422.

provisions can be wholly foreign-owned.⁴⁶ The Law was amended in 1983 and 1985, and is still in force.

Finally, on April 23, 1986 the Law "On Companies with Foreign Capital Participation" was adopted.⁴⁷ This Law's scope covers every aspect of investment, except those covered by the 1982 Law. In other words, it covers large-scale industry and services, and is export-oriented.

Thus, Poland is a country which has two parallel legal frameworks with respect to international joint ventures, depending on the level and field of activity.⁴⁸ The following sections of this Article study and compare specific aspects of both frameworks.

A general process of decentralization and reduction of the size of the central administration is continuing in Poland, in response to the sentiment that too many ministries existed. Officially, the number of ministers, deputy ministers, secretaries and deputy secretaries of state was stated to be 194 in October 1987.⁴⁹ Consequently, a number of ministries had to be abolished or restructured so that the size of the central administration would be reduced and become more flexible. As a result of this reform, which took place at the end of 1987, the Ministry of Foreign Trade was abolished and the new Ministry of Foreign Economic Cooperation was created under Wladyslaw Gwiazda, effective as of January 1, 1988. The new Ministry was assigned the task of promoting joint ventures.⁵⁰

In Czechoslovakia, joint ventures have never been formally banned in the past. "[T]here are actually a few foreign companies which have survived since the pre-war years."⁵¹ Moreover, there is even a relevant

⁴⁶ 1982 Law, *supra* note 44, art. 1, para. 2.

⁴⁷ A. BURZYNSKI, A FOREIGN INVESTOR'S GUIDE TO THE LAW OF APRIL 23, 1986 ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION 13 (1986), reprinted in ECONOMIC COMMISSION FOR EUROPE, EAST-WEST JOINT VENTURES: ECONOMIC, BUSINESS, FINANCIAL AND LEGAL ASPECTS, at 162, U.N. Doc. ECE/Trade/162, U.N. Sales No. E.88.II.E.18 (1988) [hereinafter EAST-WEST JOINT VENTURES]. A general comment on the Law is to be found in J. Rajski, *La Nouvelle Loi Polonaise sur les Sociétés à Participation Etrangère*, 2 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 217 (1987).

⁴⁸ It was argued that the 1982 Law is not a true international joint venture law, since its target, in principle, is Poles. EAST-WEST JOINT VENTURES, *supra* note 47, at 25-26. Yet, the scope of this Law allows a wider acceptance of foreign investors than the initial Polish character of the 1976 regulations. See Arnoldi, *supra* note 38, at 50-51. Accordingly, a number of foreign non-Polish enterprises were permitted under the 1982 Law. For example, Arnoldi refers to the extreme case of an enterprise named Ilori involving Poles, a Soviet citizen and an Englishman. See *id.* at 66.

⁴⁹ *Pologne: un nombre considérable de bureaucrates devraient être licenciés*, Le Monde, Oct. 9, 1987, at 8, col. 1.

⁵⁰ W. Gwiazda, *Les joint ventures dans l'économie polonaise*, LA POLOGNE CONTEMPORAINE 1 (1988). Wladyslaw Gwiazda holds the position of Minister of Foreign Economic Cooperation.

⁵¹ Fedorov, *Joint Enterprises with Participation of Western Companies in Socialist Countries*, FOREIGN TRADE No. 2, at 15 (1987).

provision for mixed enterprises in the Czechoslovak International Trade Code of 1963.⁵² However, foreign partners were not given an opportunity to utilize this mechanism and, consequently, this form of activity was simply not used.

Bilateral industrial cooperation agreements prevailed until August 1985, when the "Principles Governing the Establishment of Joint Companies Consisting of Czechoslovak Corporations and Companies from Non-Socialist Countries" were enacted.⁵³ The Principles are a collection of provisions of individual rules of law dispersed in different Czechoslovak acts and decrees. Thus the legal framework is insufficient, constituting the weakest form of legal regulation, since the governmental decision enacting the Principles is not a generally binding legal instrument. Moreover, the use of existing rules of law, which were not enacted with the special purpose of enabling the creation of joint ventures is unsuitable. The advantage of this legal framework, however, is that it leaves a rather large margin in which the parties can negotiate and agree on the basic founding documents, based on the specific character of the venture.⁵⁴

The USSR started to envisage the enactment of legislation explicitly permitting joint ventures with capitalist countries rather late. Before implementation of the new legal framework, Ross B. Leckow accurately remarked, "[T]he crucial precondition for the introduction of joint ventures in the U.S.S.R. [is] a change in the Soviet leadership's world view, . . . which presently sees Western involvement as Western interference, [and] foreign participation as foreign domination."⁵⁵ Thus, major reforms were undertaken only after Mikhail S. Gorbachev became Secretary General of the CPSU and started implementing perestroika. Therefore, joint ventures should be understood as part of the general concept of perestroika.⁵⁶

⁵² Act 101/1963 on Legal Relations in International Commercial Relations. See CZECHOSLOVAK CHAMBER OF COMMERCE AND INDUSTRY, JOINT VENTURES IN CZECHOSLOVAKIA 3, 19 (1987) [hereinafter 1985 Principles]. Articles 2 and 625 of the Code provide that native and foreign persons can undertake to "unite their activity or assets to attain a certain economic purpose." See Loeber, *supra* note 7, at 349.

⁵³ 1985 Principles, *supra* note 52, at 13-18.

⁵⁴ *Id.* at 4-5; see also Address by Frantisek Fisera, Secretary General, Czechoslovak Chamber of Commerce and Industry on Joint Ventures in Czechoslovakia (unpublished speech given at Canadian conference).

⁵⁵ R. B. Leckow, *Doing Business with the Soviets: The Legal Structure of Canadian-Soviet Trade* 100 (1986) (unpublished LL.M. thesis on deposit at York University Library).

⁵⁶ In his book, Mikhail S. Gorbachev stresses "the need for a radical reform of the economic mechanism and for restructuring the entire system of economic management." Furthermore, he insists that "[t]he task now in hand is to bring the new machinery of economic management into full operation competently and without delay." M. GORBACHEV, *PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD* 83, 88 (1987). In fact, Gorbachev, who had been Andropov's protege, in reality continued and enhanced what Andropov himself had started by commissioning

As a result of the gradual loosening of administrative control and the implementation of decentralization of the economy, the first measures concerning joint ventures were adopted in 1986. They consisted of two Resolutions of the CPSU Central Committee and of the Council of Ministers of the USSR "On Measures to Improve the Management of Foreign Economic Relations" and "On Measures to Improve the Management of Economic, Scientific and Technical Cooperation with Socialist Countries."⁵⁷ The two Resolutions contained two provisions of utmost importance.

First, they created a new body at the ministerial level, the State Foreign Economic Commission of the USSR Council of Ministers.⁵⁸ This new body assumed the supervision and coordination of the work of all organizations involved in the sphere of foreign trade. Among them were the Ministry of Foreign Trade, the State Committee for Foreign Economic Relations, the State Committee for Foreign Tourism, the Bank for Foreign Trade of the USSR and the State Customs Administration of the USSR Council of Ministers.⁵⁹ Second, the Resolutions contained guidelines for the creation of joint ventures with capitalist countries. Vladimir M. Kamentsev, Deputy Chairman of the USSR Council of Ministers, was appointed Chairman of the new Commission. Ivan D. Ivanov, one of the Deputy Chairmen of the Commission, is the Soviet trade official identified as the architect of the new legal framework.⁶⁰

Another important decentralizing change effected by the Resolutions and implemented as of January 1, 1987 was the granting of foreign trade rights to twenty-three ministries and eighty leading associations and enterprises of the country.⁶¹ Although the total number of ministries, associations and enterprises was 103 out of 45,000, it was a beginning. Thus, the omnipotent monopoly of the Ministry of Foreign Trade was largely circumvented in order to put Soviet enterprises in direct con-

several studies looking at possible economic reform. Andropov's attempts were left unfinished due to his illness and subsequent death. Goldman & Goldman, *supra* note 9, at 559.

⁵⁷ See the complete text of the two resolutions in FOREIGN TRADE No. 5, at 2-5, 5-9 (Eng. ed. Supp. 1987). A Comment on the Resolutions is found in Dunn, *The New Soviet Joint Venture Regulations*, 12 N. C. J. INT'L L. & COM. REG. 172 (1987).

⁵⁸ *Two Years of Gorbachev: What's Ahead for Trade?*, XVI Business Eastern Europe (Business International S.A.) No. 20, at 153-54 (May 18, 1987).

⁵⁹ See FOREIGN TRADE, *supra* note 57, and accompanying text.

⁶⁰ Barringer, *To Russia, for Partners and Profits*, N.Y. Times, Apr. 10, 1988, § 3, at 1, col. 3, and § 3, at 13, col. 1. Ivan D. Ivanov is not only the uncontested father of the 1986 Resolutions, but the father of the three Decrees of January 13, 1987 as well. See also *No Rush Into Russia*, THE ECONOMIST, Feb. 7, 1987, at 65.

⁶¹ V. KAMENTSEV, ECONOMIC TIES, A PREREQUISITE OF LASTING PEACE, 6 (1988). See also *Soviet Trade Reform: Change, With Confusion*, XVI Business Eastern Europe (Business International S.A.) No. 8, at 57-58 (Feb. 23, 1987).

tact with Western markets.⁶² These 1986 Resolutions and their guidelines regulating joint ventures served as a kind of "trial barometer" to assess foreign businessmen's reactions in view of the decrees to come.⁶³

Three new decrees were enacted on January 13, 1987, retroactive as of January 1, 1987. The first was Decree No. 6362-XI of the Presidium of the USSR Supreme Soviet "On Questions Concerning the Establishment in the Territory of the U.S.S.R. and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies" ("Decree No. 6362").⁶⁴

This Decree regulates a number of general issues, such as lease of land, taxation and settlement of disputes. These issues are regulated by the Presidium of the USSR Supreme Soviet due to their constitutional character. The second enactment was Decree No. 48 of the USSR Council of Ministers "On the Establishment of the Territory of the U.S.S.R. and Operation of Joint Ventures, International Amalgamations and Organizations of the U.S.S.R. and other CMEA Member-Countries" ("Decree No. 48").⁶⁵ And the third was Decree No. 49 of the USSR Council of Ministers "On the Establishment in the Territory of the U.S.S.R. and

⁶² *Soviet Decentralization Makes More Work for Firms*, XVI Business Eastern Europe (Business International S.A.) No. 40, at 315 (Oct. 5, 1987). At this point it ought to be added that besides the organizations having direct foreign trade rights, a much larger number of them has hard currency retention rights, although they still operate through FTOs. This constitutes a factor of primordial interest for Western businessmen. See *Soviet Trade Reforms: Who Holds the Hard Currency?*, XVI Business Eastern Europe (Business International S.A.) No. 14, at 108 (Apr. 6, 1987).

⁶³ Carpenter & Smith, *U.S.-Soviet Joint Ventures: A New Opening in the East*, 43 BUS. LAW. 79, 80 (1987).

⁶⁴ Ved. Verkh. Sov. RSFSR, 1987, No. 2, art. 35, reprinted in *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*, FOREIGN TRADE No. 5, at 10 (Supp. Jan. 13, 1987) [hereinafter Decree No. 6362-XI], and in EAST-WEST JOINT VENTURES, *supra* note 47, at 182, and in UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC COOPERATION, *Background Documents of the High-Level Seminar Organized by the United Nations Centre on Transnational Corporations in Co-Operation with the State Foreign Economic Commission, and State Commission on Science and Technology of the Union of Soviet Socialist Republics, Moscow, 10 March 1988*, at 145, U.N. Doc. ST/CTC/93, U.N. Sales No. E.88.II.A.12 (1988) [hereinafter JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC COOPERATION]. See also *V Presidium Verkhovnogo Soveta SSSR*, Ekonomicheskaja Gazeta, Feb. 1987, No. 6, at 15.

⁶⁵ SP SSSR, 1987, No. 8, at 38, reprinted in *Decree of the USSR Council of Ministers: 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*, FOREIGN TRADE No. 5, at 10-15 (Eng. ed. Supp. Jan. 13, 1987) [hereinafter Decree No. 48]. The original Russian text of the Decree was published in *Ekonomicheskaja Gazeta. V Sovete Ministrov SSSR*, Ekonomicheskaja Gazeta, Feb. 1987, No. 6, at 15-18 (official version of the 1986 Resolutions).

Operation of Joint Ventures with the Participation of Soviet Organizations and Firms from Capitalist and Developing Countries" ("Decree No. 49").⁶⁶ Thus, the USSR became the first socialist country to opt for separate legal frameworks with respect to joint ventures, depending on the country involved. The subsequent sections of this Article compare the different approaches of the two Decrees as part of an analysis of specific points of joint ventures legislation in the three countries under examination.

It should be mentioned at this point that joint ventures with other CMEA member-countries had been operating since May 26, 1983.⁶⁷ That appears to be a reason for differentiating the legal frameworks in 1987. It should also be recalled that a number of specific measures and procedures have been already undertaken by CMEA member-countries, aiming at an intra-Comecon integration. The joint ventures in question are regulated and financed by special Comecon institutions, such as the International Bank for Economic Cooperation and the International Investment Bank.⁶⁸ Integration within Comecon itself is undertaken under the guidelines of the 15-year "Comprehensive Program of the CMEA Member-Countries' Specific and Technological Progress up to the year 2000," which was adopted in 1985.⁶⁹

⁶⁶ SP SSSR, 1987, No. 9, at 40, reprinted in *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*, FOREIGN TRADE No. 5, at 16-19 (Eng. ed. Supp. Jan. 13, 1987) [hereinafter Decree No. 49], and in *EAST-WEST JOINT VENTURES*, *supra* note 47, at 183, and in *JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC CO-OPERATION*, *supra* note 64, at 146. The original Russian text of the Decree was published in *Pravda*. *V Sovete Ministrov SSSR: O poriadke sozdaniya na territorij SSSR i deiatel'nosti sovnestnykh predpriyatij s uchastiem sovetskikh organizatsij i firm kapitalisticheskikh i razvivajushchikhsja stran*, *Pravda*, Jan. 27, 1987, at 2. See also *V Sovete Ministrov SSSR*, *Ekonomicheskaja Gazeta*, Feb. 1987, No. 6, at 17-18 (official text of Decree No. 49 of Jan. 13, 1987).

⁶⁷ Decree No. 48, *supra* note 65, paras. 3, 65. Paragraph 65 of Decree No. 48 annuls pre-existing Decree No. 464 of May 26, 1983 of the U.S.S.R. Council of Ministers "On the Revision Procedure for Proposals Regarding the Establishment of Joint Economic Ventures of the U.S.S.R. and other CMEA Member-Countries in the Territory of the U.S.S.R." Paragraph 3 of Decree No. 48 maintains in power the Decree of May 26, 1983 of the Presidium of the U.S.S.R. Supreme Soviet "On the Operation in the Territory of the U.S.S.R. of Joint Economic Organizations of the U.S.S.R. and other CMEA Member-Countries" on a level parallel to the new Decree.

⁶⁸ On cooperation inside Comecon, see Sychev, *CMEA: Radical Changes to the Cooperation Mechanism*, FOREIGN TRADE No. 2, at 2, 4 (Eng. ed. 1988); Kozhin & Kuvshinov, *Foreign Trade Aspects of Direct Ties Between Organizations of the CMEA Countries*, in FOREIGN TRADE No. 6, at 2-4 (1988); Durnev, *CMEA Countries' Joint Ventures*, FOREIGN TRADE No. 6, at 11-15 (Eng. ed. 1987); *Comecon Bank Will Support Major Investment Projects*, XVII Business Eastern Europe (Business International S.A.) No. 22, at 171-72 (May 30, 1988).

⁶⁹ On the 15-year "Comprehensive Programme of the CMEA Member-Countries' Scientific and Technological Progress up to the Year 2000" and its implementation, see Sychev, *supra* note 68, at 2; Kozhin & Kuvshinov, *supra* note 68, at 2; Durnev, *supra* note 68, at 11. See also *Comecon Cooperation: So What Else Is New?*, XV Business Eastern Europe (Business International S.A.) No.

The Decrees were given wide but insufficient publicity in the West. One of the first persons to translate them was William E. Butler. However, Butler translated only two of the three Decrees, Decree No. 6362 and Decree No. 49.⁷⁰ In his introductory note⁷¹ he does not refer to Decree No. 48 nor does he deal with it. Furthermore, in his translations, he uses terminology which is completely different from that of the official Soviet translations.

For instance, Butler uses the term "joint enterprise" instead of "joint venture," which is widely used in the West. He considers the term "joint venture" to be inaccurate. That is partly true. The literal translation of the original Russian term "sovmestnoe predpriiatie" is "joint enterprise" in English. However, it is believed that the term "joint venture" is accurately used in the official Soviet translation for the following two reasons. First, "venture" comes from a translation of the term "*riskovannoe predpriiatie*." In this case, the adjective "*riskovannoe*" ("risky") should be understood as implied, for joint ventures are enterprises where the notions of sharing both risk and capital are predominant for all parties involved. Second, the English term "joint venture" is even widely used in Russian in unchanged form: "*dzhoint venchur*."⁷²

In support of this view it is noteworthy that the United Nations Economic Commission for Europe in its recent book, *East-West Joint Ventures: Economic, Business, Financial and Legal Aspects*, which was published in April 1988, uses the official Soviet translation and not the one published in International Legal Materials.⁷³ For these reasons, the official Soviet translations will be used when referring to specific points of the Decrees in the remaining sections of this Article.

After the initial operating period of the first joint ventures, a number of problems occurred in practice, which will be addressed in subsequent

48, at 378 (Dec. 1, 1986); *Soviets Set Up Institutes to Coordinate EE Research*, XV Business Eastern Europe (Business International S.A.) No. 39, at 308 (Sept. 29, 1986).

⁷⁰ See William E. Butler's Translation of Decree No. 49 in *Union of Soviet Socialist Republics: Decree on Joint Enterprises with Western and Developing Countries* (Decree No. 49), 26 I.L.M. 749 (1987) [hereinafter *Decree on Joint Enterprises*]; *Union of Soviet Socialist Republics: Edict Concerning Taxation of Joint Enterprises in the Soviet Union and Dispute Settlement* (Decree No. 6362), 26 I.L.M. 759 (1987). Because of this translation, most of the American literature on Soviet joint ventures up to now has been studying only Decree No. 6362 and Decree No. 49, and not Decree No. 48. See, e.g., Carpenter & Smith, *supra* note 63; Ross, *Foreign Investment: New Soviet Joint Venture Law*, 28 HARV. INT'L L. J. 473 (1987); Cohen, *A China-Watcher's Impressions of the Soviet Joint Enterprise Legislation*, in *LAW AFTER REVOLUTION* 163, 167 (Butler, Maggs, & Quigley eds. 1988) and Mendes, *The Soviet Union: Open for Business?* 1 REV. OF INT'L BUS. L. 357. Cohen and Mendes even use the term "joint enterprise" preferred by Butler.

⁷¹ *Decree on Joint Enterprises*, *supra* note 70, at 749.

⁷² See, e.g., Voznesenskaja 1985, *supra* note 9, at 61, 63 and 65.

⁷³ EAST-WEST JOINT VENTURES, *supra* note 47, at 182-83, 188. It should be mentioned that, although the E.C.E.'s study examines Decree No. 48 and compares it with Decree No. 49, it does not include the text. *Id.* at 15.

sections. The Soviets reacted flexibly and in favor of adequate modifications.⁷⁴ Consequently, on September 17, 1987, a first step was made: the new Decree No. 1074 was adopted by the CPSU Central Committee and the USSR Council of Ministers "On Additional Measures to Improve the Country's External Economic Activity in the New Conditions of Economic Management" ("Decree No. 1074").⁷⁵

During a recent stage, another step towards reducing bureaucracy took place. Both the Ministry of Foreign Trade and the State Committee for Foreign Economic Relations were abolished. In their place the new All-Union Ministry of Foreign Economic Relations was created in January 1988.⁷⁶ Konstantin F. Katushev, previously head of the State Committee for Foreign Economic Relations, was appointed as the new Minister.⁷⁷ This restructuring was considered necessary because, as it was remarked, "the second wave of perestroika leaves no room for intermediate organizations and multiple layers of administration. The two-level' system now favored by the top Soviet leadership aims to make ministries and their enterprises directly responsible for their own results."⁷⁸

The general legal framework of foreign trade and joint ventures has evolved in this manner from the October Revolution until today in the three countries under study in the present Article. This Article next ex-

⁷⁴ Ivan D. Ivanov, Deputy Chairman of the State Foreign Economic Commission and architect of the new legislation, when addressing Western businessmen in early September 1987, welcomed their constructive criticism and comments. He recognized that problems do exist and assured that every suggestion or opinion is carefully examined. *Soviets Move to Counter Trade Reform Disruptions*, XVI Business Eastern Europe (Business International S.A.) No. 37, at 291 (Sept. 14, 1987).

⁷⁵ *Decree No. 1074 of the USSR Council of Ministers: On Additional Measures to Improve the Country's External Economic Activity in the New Conditions of Economic Management*, reprinted in UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, EAST-WEST JOINT VENTURES ECONOMIC, BUSINESS, FINANCIAL AND LEGAL ASPECTS 189 (1988) [hereinafter Decree No. 1074]. More extended excerpts of the Decree relevant to the establishing and operation of joint ventures were published in JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC CO-OPERATION, *supra* note 64, at 173. The original Russian text was published in *Ekonomicheskaja Gazeta*. *V Tsentralnom Komitete KBSS i Sovete Ministrov SSSR*, *Ekonomicheskaja Gazeta*, Oct. 1987, No. 41, at 18-19. The official English translation of the entire Decree was published in FOREIGN TRADE. *On Additional Measures to Improve the Country's External Economic Activity in the New Conditions of Economic Management: Decision of the CPSU Central Committee and the USSR Council of Ministers*, FOREIGN TRADE No. 12, at 2-6 (Eng. ed. Sept. 17, 1987). For the official announcement of the Decree, see *V Politburo TS.K KBSS*, *Pravda*, Sept. 18, 1987, at 1 and *V Politburo TS.K. KBSS*, *Izvestija*, Sept. 19, 1987, at 1. For a detailed Western comment of the Decree, see *Soviets Introduce Broad Changes to JV Regulations*, XVI Business Eastern Europe (Business International S.A.) No. 42, at 331 (Oct. 19, 1987).

⁷⁶ *V Presidium Verkhovnogo Sovete SSSR*, *Izvestija*, Jan. 17, 1988, at 1 (official announcement).

⁷⁷ *Id.*

⁷⁸ *Official: Soviets Drop Foreign Trade Ministry*, XVII Business Eastern Europe (Business International S.A.) No. 4, at 27 (Jan. 25, 1988); see also *Soviet Trade Reform: More Disruptions Ahead*, XVII Business Eastern Europe (Business International S.A.) No. 3, at 17-18 (Jan. 18, 1988).

amines specific approaches of current legislation regarding the creation, operation and dissolution of joint ventures.

III. CREATION OF THE JOINT VENTURE

A. *Fields of Activity: Undetermined, Limited or Restricted?*

A threshold question relates to the fields in which joint ventures may operate. In the three countries one may discern a general approach regarding "barriers to access," which is rather pragmatic, liberal, and based on economic factors.⁷⁹

Soviet legislation is the most liberal of the three countries. More specifically, Decree No. 49 does not define the activities which can be carried out by East-West joint ventures on Soviet soil. Consequently, proposals can be submitted in any field. However, the first paragraph of Decree No. 49 mentions, as a prerequisite, the authorization required for establishment, and it is obviously understood that the Soviet state thereby can ultimately control the proposed fields of operation through the device of withholding permission.⁸⁰

Decree No. 48 contains a slightly different provision. Its paragraph 2 contains a list of the fields of activity in which a CMEA joint venture may be engaged. These include "production, scientific production, scientific, technological and other economic activities in industry, science, agriculture, construction, trade, transportation and other fields of the national economy."⁸¹ This enumeration of common fields can be understood as an incarnation of the intra-Comecon integration aimed at by its Member-Countries,⁸² which does not appear to be exclusive, but rather indicative. The latter conclusion derives from the words "and other fields of the national economy,"⁸³ which confers discretion upon state authorities to accept any proposal considered beneficial and fruitful for all of the involved parties.

The Polish approach is more restrictive than the Soviet one. The scope of application of the 1982 Law is evidently narrow, as may be seen from its title. It concerns solely "small industry."

The Law does not define the term "small industry." Instead, it uses an indirect approach.

⁷⁹ Piontek, *The Legal Regime of Foreign Direct Investment in Socialist Countries*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 279, 329 (W. Butler ed. 1987).

⁸⁰ Decree No. 49, *supra* note 66, para. 1.

⁸¹ Decree No. 48, *supra* note 65, para. 2.

⁸² See Sychev, *supra* note 68; *Comecon Cooperation: So What Else is New?*, XV Business Eastern Europe (Business International S.A.) No. 48, at 377-78 (Dec. 1, 1986); *Soviets Set Up Institutes to Coordinate EE Research*, XV Business Eastern Europe (Business International S.A.) No. 39, at 308 (Sept. 29, 1986).

⁸³ Decree No. 48, *supra* note 65, para. 2.

Under Article 6, [w]henever the Law mentions: 1) Polish economic units, it means: a) small state industrial enterprises, b) social organizations entitled to conduct an economic activity on the grounds of other regulations, c) cooperatives, d) unions of producers and domestic enterprises active in small industry, e) persons entitled to conduct handicraft or other economic activity on the grounds of other regulations, [or] f) private persons undertaking economic activity jointly with foreign economic units.⁸⁴

Furthermore, under article 2 of the 1982 Law, "the economic activity in the sphere of small industry may consist [of]: 1) production of commodities or granting of services, 2) trade, or 3) export of own products or services or import for own use in production or service activity."⁸⁵ In addition to this provision, E. Piontek adds, "[t]he production scale of small industry may be considered, as may be employment. Of nearly 700 foreign enterprises operating in Poland under the (System of 1982), the majority have 100 to 300 employees."⁸⁶

The regulation of the 1986 Law is different. By virtue of article 41, its application is prohibited with respect to those companies which would normally be governed by the 1982 Law.⁸⁷ Therefore, its scope covers *a contrario* "large industry" in general. However, a number of fields of activity are explicitly excluded by this Law. No permit will be granted for the activities of "defense, rail transport, air transport, communications, insurance, publishing (excluding the printing industry), and foreign trade agency."⁸⁸ Still, the Minister of Foreign Economic Cooperation⁸⁹ has the power in particularly justifiable cases, after agreement with the Minister concerned, to deviate from this prohibition.⁹⁰ Thus, the Polish approach remains open, but is more restrictive than the approach of Soviet legislation.

The 1985 Czechoslovak Principles adopt the most restrictive approach using a different method. Instead of prohibiting certain fields, the Principles determine the specific fields of permissible activity. Bohuslav Klein points out

that originally the parties were allowed to establish common ventures only in the field of industrial production. There were many who

⁸⁴ 1982 Law, *supra* note 44, art. 6.

⁸⁵ *Id.* art. 2.

⁸⁶ Piontek, *supra* note 79, at 289; Rajski, *Le nouveau régime juridique des petits investissements étrangers en Pologne*, 2 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 217, 218 (1985) [hereinafter Rajski 1985].

⁸⁷ A. BURZYNSKI, *supra* note 47, art. 41, at 26.

⁸⁸ *Id.* art. 7, para. 1, at 15.

⁸⁹ See generally *id.* The Law of April 23, 1986 in the Burzynski guide uses the term "Minister of Foreign Trade," but henceforth in this article the name of the new Ministry as applicable since January 1, 1988 will be used.

⁹⁰ *Id.* art. 7, para. 2, at 15.

thought this restriction unwarranted, feeling that particularly the sphere of services (transport, touristic [sic] etc.) would need the same promotion as industrial production. Our government took these views into consideration and since February 1, 1987, allowed the Principles to be applied also, in the sphere of tourism.⁹¹

Taking into consideration the phrasing of chapter I, section 1 of the 1985 Principles - "only in the field of industrial production [of the Czechoslovak national economy] and in the sphere of tourism"⁹² - the conclusion can be drawn that the Czechoslovak approach is without doubt the most restrictive of the three countries with respect to permitted fields of activity of joint ventures.

B. Administrative Procedure for Authorization and Establishment

1. Issuing of Permits, Registration and Publications

After determining the fields of activity of joint ventures, the next issue is the procedure which must be followed in order to establish the joint venture as a distinct legal entity. The first step is the granting of an official authorization by the competent authorities of the host country. Subsequently, there must be registration of the formal existence of the new legal entity under a specific administrative procedure.

Every socialist country requires both application for a permit and registration in order to allow establishment of a joint venture. This is due to the prevailing notion that the joint venture constitutes an exceptional entity within the framework of the state planned economy and the state ownership of the means of production. Therefore, the State has the last word in approving given forms of investment participation by a foreign legal or natural person.

Initially, the USSR Council of Ministers could approve or reject a proposal at its discretion within the USSR. Now, by virtue of Decree No. 1074, this task falls to the ministries and departments of the USSR and the Councils of Ministers of the fifteen Union Republics.⁹³ This change came as a result of the decentralizing procedures gradually implemented in the country.

Apparently, the local partner no longer has the obligation to obtain the advice of the USSR State Planning Committee,⁹⁴ the USSR Ministry of Finance and other ministries and government agencies concerned.⁹⁵

⁹¹ 1985 Principles, *supra* note 52, at 5.

⁹² *Id.* para. I, at 13.

⁹³ See EAST-WEST JOINT VENTURES, *supra* note 47, at 189, Soviet Union Decree No. 1074.

⁹⁴ For a discussion of the Gosplan, see *supra* note 19.

⁹⁵ This opinion is maintained in *Voznesenskaja, Sovmestnye predprijatija s uchastiem firm kapitalisticheskikh i razvivajushchikhsja stran na territorij SSSR (Joint Ventures with the Participation of Firms from Capitalist and Developing Countries in the Territory of the U.S.S.R.) SOVETSKOE*

However, it has been stated that “[o]bviously the granting of this right to the above said governmental bodies does not relieve them of the need to coordinate their actions with other governmental agencies and (or) apply to the U.S.S.R. Council of Ministers whenever this or that particular question is within the latter’s competence.”⁹⁶

The procedure to be followed is practically the same under Decree Nos. 48 and 49 with respect to joint ventures. More specifically, under paragraph 4 of Decree No. 48 and paragraph 2 of Decree No. 49, the Soviet party submits the application, accompanied by a feasibility study, an establishment proposal and draft foundation documents.⁹⁷

As soon as the foundation documents are signed, the joint venture has to be registered with the Ministry of Finance. It is expressly stipulated that the joint venture “acquire[s] the rights of a legal entity [only] at the time of registration.”⁹⁸ This provision has created a number of interpretation issues with respect to the legal status of the joint venture at the time of signature of the final agreement and during the period between signature of the final agreement and registration with the Ministry of Finance. It is true that Instruction No. 34 of February 12, 1987 of the USSR Ministry of Finance, “On the Procedure for Registering Joint Ventures, International Amalgamations and Organizations Set Up on Soviet Territory with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies,” and the later-issued Regulation of the USSR Ministry of Finance No. 224 of November 24, 1987, “Concerning the Procedure of Registering Joint Ventures, International Amalgamations and Organizations Established in the Territory of the U.S.S.R. with the Participation of Soviet and Foreign Organizations, Firms, and Authorities,” in section I, paragraph 3, prohibit the joint venture from opening a bank account and/or undertaking any negotiations or entering into any transactions or concluding any contracts with Soviet organizations before its registration.⁹⁹ The Instruction and the Regulation confirm that the joint venture is not a legal entity before registration. However, as Ninel N. Voznesenskaia has pointed out, the wording of paragraph 9 of both Decree Nos. 48 and 49 appears confusing. How can

GOSUDARSTVO I PRAVO (SOVIET STATE AND LAW) 117, 120 (Jan. 1988) [hereinafter Voznesenskaja 1988]. The obligation to obtain preliminary advice was a mandatory requirement under the initial form of Decree Nos. 48 and 49. Decree No. 48, *supra* note 65, para. 4; Decree No. 49, *supra* note 66, para. 2.

⁹⁶ See Smirnov, *Joint Ventures on Soviet Territory: First Agreements and the Development of Legal Regulation*, FOREIGN TRADE No. 1, at 45-46 (Eng. ed. 1988) [hereinafter Smirnov 1988].

⁹⁷ Decree No. 48, *supra* note 65, para. 4; Decree No. 49, *supra* note 66, para. 2.

⁹⁸ Decree No. 48, *supra* note 65, para. 9; Decree No. 49, *supra* note 66, para. 9.

⁹⁹ Reference to Instruction No. 34 is made in Smirnov 1988, *supra* note 96, at 45; JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC CO-OPERATION, *supra* note 64, at 201; Voznesenskaja 1988, *supra* note 95, at 125; *Soviet Joint Ventures: Answers Coming Slowly*, XVII Business Eastern Europe (Business International S.A.) No. 41, at 321-22 (Oct. 12, 1987).

there be discussion about "the foundation documents [of the joint venture] com[ing] into force and about joint ventures established in the territory of the U.S.S.R." after signing, on the one hand, and about the joint venture "acquir[ing] the rights of a legal entity at the time of registration" on the other?¹⁰⁰ It is obvious that future amendments should reform the obscure and somehow contradictory phrasing of the paragraphs of the Soviet Decrees.

After registration, paragraphs 9 of Decree Nos. 48 and 49 require publication of a relevant notification in the press. It has been reported that this requirement creates confusion since the law does not define where notifications are to be published. Consequently, although "the first registration was carried in *Izvestija*, others got lost in small, local or regional papers."¹⁰¹ This point should also be dealt with specifically in future amendments.

The 1985 Czechoslovak Principles do not determine directly which state body is responsible for granting a permit. However, they indirectly provide that "Czechoslovak participants may not enter into a joint venture, unless a state permission by their central government body is granted."¹⁰² Besides, "[s]uch authority must secure in advance an approval by the State Planning Commission, Federal Ministry of Finance, Federal Ministry of Foreign Trade and Czechoslovak State Bank."¹⁰³ It is understood that the above procedure would more or less apply to the foreign party, too. It is clear that a cautious legislative approach was adopted by the 1985 Principles. The approval mechanism for the establishment of joint ventures requires coordination and approval by a large number of state bodies. These bodies have to approve the creation documents of the common company. In this country, such documents are called memoranda or articles of incorporation, depending on the legal structure of the common company.¹⁰⁴

With regard to registration procedures, the 1985 Principles provide that "[a] common organization will not become a legal entity until entered into the Register of Commerce [Companies Register]."¹⁰⁵ With this brief and concise regulation no legal interpretation questions seem to arise, as is the case under Soviet legislation. Any specific publication provision is missing from the Principles. It can be presumed that the Com-

¹⁰⁰ *Voznesenskaja* 1988, *supra* note 95, at 125.

¹⁰¹ *Soviet Joint Ventures: Answers Coming Slowly*, *supra* note 99, at 321-22.

¹⁰² 1985 Principles, *supra* note 52, para. I.5.1, at 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.* para. I.4(d), at 13. It should be noted at this point that, in contrast to Soviet legislation, the 1985 Czechoslovak Principles and the 1986 Polish Law provide for incorporation of the joint venture.

¹⁰⁵ *Id.* para. I.5.2, at 14.

panies Register is *per se* public and further official publication is deemed useless.

The Polish legal framework regarding procedure to obtain a permit differs under the 1982 Law from that prevailing under the 1986 Law. Yet, in spite of their differences, both procedures are detailed and complex.

First, under the 1982 Law an application for a permit to establish a so-called foreign economic unit is to be submitted jointly by the partners;¹⁰⁶ conversely, the application for a permit to establish a company with foreign capital participation under the 1986 Law is submitted by the Polish partner.¹⁰⁷ A possible reason for this differentiation could be the more personal and limited scope of the 1982 Law in contrast to the 1986 Law, which regulates larger economic units.

Second, under the 1982 Law the competent authority to grant a permit is the State local administrative authority at the voivodship (provincial) level;¹⁰⁸ conversely, under the 1986 Law the permit is granted at the central level by the Minister of Foreign Economic Cooperation "acting in agreement with the Minister of Finance and other authorities."¹⁰⁹ It seems that this mechanism "strengthens the uniformity and stability of [State] policy."¹¹⁰

Third, both laws specify what the application for a permit should contain. The most important requirements are basically the same: purpose of formation, kind and scope of economic activity, expected employment scale, value and proportion of capital invested and proposed location of the seat of the enterprise in Poland.¹¹¹ Other provisions stipulate possible legal structures of the new economic unit. Under the 1982 Law the firm can be wholly foreign-owned by a foreign natural or juridical person, or it can be formed with the participation of Polish economic units.¹¹² Conversely, under the 1986 Law the new company must be created through a merger between Polish state enterprises and other socialized units on the domestic side, and foreign enterprises or natural persons on the foreign side.¹¹³ Another difference is the requirement under the 1982 Law that the foreign investor pay a founding deposit. This deposit is a prerequisite for granting a permit and is released as soon as the new unit is fully operational.¹¹⁴ It seems that this requirement was

¹⁰⁶ 1982 Law, *supra* note 44, art. 11.

¹⁰⁷ A. BURZYNSKI, *supra* note 47, art. 5, para. 2, at 14.

¹⁰⁸ 1982 Law, *supra* note 44, art. 8, para. 2.

¹⁰⁹ A. BURZYNSKI, *supra* note 47, art. 5, para. 2, at 14; Piontek, *supra* note 79, at 328.

¹¹⁰ A. BURZYNSKI, *supra* note 47, art. 5, para. 2, at 14.

¹¹¹ 1982 Law, *supra* note 44, art. 10; A. BURZYNSKI, *supra* note 47, art. 9, at 15.

¹¹² 1982 Law, *supra* note 44, art. 1.

¹¹³ A. BURZYNSKI, *supra* note 47, art. 3, at 13.

¹¹⁴ 1982 Law, *supra* note 44, art. 16.

imposed by the 1982 Law in order to safeguard Polish State interests, because a number of foreign investors were interested in casual investment in Poland. The main purpose of these investors was to engage in unlawful speculation and misrepresentation in order to obtain the highest possible profit in a short period of time, and then disappear.¹¹⁵ This requirement was felt unnecessary under the 1986 Law, since the required feasibility study together with a certified document showing legal status and financial standing fulfills the same goal.¹¹⁶

Under the 1982 Law, as soon as the permit is granted, the enterprise is obliged to register in the Register of Foreign Enterprises. Entry in the Register is made by courts of law in accordance with regulations determined by the Minister of Justice.¹¹⁷ Under the 1986 Law the company is subject to registration in a court of register according to the rules of the Commercial Code on the Commercial Register. The permit is to be attached to the application for registration.¹¹⁸ In addition, within two weeks, the management board of the company is obliged to notify the Minister of Foreign Economic Cooperation, indicating the court in which the company has been registered.¹¹⁹

A comparison of the registration systems in the USSR, Czechoslovakia and Poland, reveals that the procedure required by the two latter countries involves courts of law and is similar to registration in civil law jurisdictions, such as West Germany and France. It should be remembered that in Poland, this is the applicable procedure still provided for by the Commercial Code of 1934. Conversely, in the USSR the procedure is purely administrative. In the three countries the permit and registration procedure fully satisfies the requirements of state supervision.

Finally, only one Eastern European country, Poland, sets a definite time limit for the final approval of the joint venture application. Under both the 1982 and the 1986 Laws the appropriate decision must be issued within three months from the day the application was submitted.¹²⁰ The 1982 Law mentions that this time period applies to complete applications. Such a provision should be understood as implied by the 1986

¹¹⁵ Arnoldi, *supra* note 38, at 33, 46 and 59.

¹¹⁶ A. BURZYNSKI, *supra* note 47, art. 9, para. 2, item 2, at 16. The certification of documents showing legal status and financial standing is carried out in practice by the territorially appropriate Office of the Commercial Counsellor of the Polish People's Republic. Piontek, *supra* note 79, at 311. The required feasibility study is usually conducted by the local consulting organization Invest-export. *Will Your Polish JV Work? Official Report Tells All*, XVII Business Eastern Europe (Business International S.A.) No. 1, at 3-4 (Jan. 4, 1988).

¹¹⁷ 1982 Law, *supra* note 44, art. 20, paras. 1, 3.

¹¹⁸ A. BURZYNSKI, *supra* note 47, art. 12, at 17.

¹¹⁹ *Id.* art. 13, at 17.

¹²⁰ 1982 Law, *supra* note 44, art. 13; A. BURZYNSKI, *supra* note 47, art. 9, para. 4, at 16.

Law also.¹²¹ It is believed that in every other country the decision would be made within a reasonable amount of time, because any unjustified delay would constitute a negative factor in welcoming foreign investment.

2. Appeal Against Refusal of the Host Countries to Grant a Permit

When a potential foreign investor expresses interest in forming a joint venture in a certain country, his motivation is to be understood as either the will to continue under a new form and expand an already existing industrial cooperation agreement,¹²² or as a favorable reaction to expressed manifestations of interest to form a joint venture by state enterprises or other potential partners of that country. It is difficult to think of a Western company, which intends to create a joint venture, starting with no positive indications from the host country. Following this train of thought, everything depends on the success of the undertaken negotiations. If the agreed terms satisfy both parties, submission of an application should be expected. If the negotiations do not satisfy the aims envisaged by the parties, no application will be submitted. Therefore, the need to file an appeal against a negative decision of the host country's authorities seems very unlikely.

In the legislation of the Soviet Union and Czechoslovakia, this issue is not mentioned at all. Both Soviet Decree Nos. 48 and 49 are silent on the matter. The same applies in the case of the Czechoslovak 1985 Principles. Only the Polish laws contain a relevant provision.

More precisely, article 19 of the 1982 Law stipulates that decisions concerning permits may constitute the object of an appeal before the administrative court according to the Code of Administrative Procedure. However, no appeal is permitted against decisions refusing to grant a permit for reasons of state security or protection of state secrets.¹²³ While, to a party proposing a joint venture, the utility of the Polish appeal provision is questionable, the Polish State has reportedly used the provision on state security infringement in order to control casual investment and to discourage the founding of unfavorable enterprises.¹²⁴ To the joint venturer, the appeal provision is probably null in practice.

On the contrary, article 6, paragraph 2 of the 1986 Law prohibits any appeal, explicitly stating that "the refusal to grant a permit may not be contested before an administrative court."¹²⁵ Thus, the Minister of

¹²¹ See *supra* note 120.

¹²² *Soviet Joint Ventures: The Problems Thus Far*, XVII Business Eastern Europe (Business International S.A.) No. 11, at 81 (Mar. 14, 1988); Pedersen, *supra* note 33, at 390.

¹²³ 1982 Law, *supra* note 44, art. 19.

¹²⁴ Arnoldi, *supra* note 38, at 58.

¹²⁵ A. BURZYNSKI, *supra* note 47, art. 6, para. 2, at 15.

Foreign Economic Cooperation can make a final decision not to grant a permit if he considers the economic activity to be undertaken inadvisable, based either on national economy interests or on state security.¹²⁶ Predominance of state policy is therefore consolidated.

3. The Need for a Special Foreign Trade Permit

Every new joint venture faces the question of whether it will be involved in foreign trade activities. In the past, legislation of socialist states usually treated this factor very narrowly since the state always has a monopoly on foreign trade.

This reality is the reason behind the Polish and Czechoslovak legal framework dealing with this issue. Under the 1982 Law in Poland, the mixed enterprise needs to acquire issuance of a special permit by the Minister of Foreign Economic Cooperation - not the State local administrative authority at the voivodship (provincial) level, which is the competent agency for granting the general permit - in order to carry out foreign trade operations. This derives from a combined interpretation of article 8, paragraph 6 and article 2, item 3.¹²⁷ Only exceptionally are Polonian joint enterprises involved in foreign trade, since their main focus is domestic trade and consumer goods. Nevertheless, a number of them began to get involved in foreign trade, especially after the new tax breaks introduced by the 1985 Decree.¹²⁸

The approach undertaken by the 1986 Law is almost equivalent. However, there is one major difference. The right to conduct foreign trade is granted by the original permit establishing the joint company rather than by a special permit, provided that such a request was filed with the initial application.¹²⁹

In Czechoslovak legislation, there is a special provision on separate foreign trade licenses.¹³⁰ Bohuslav Klein has remarked, "[t]he foreign would-be investors believe generally, that upon being granted the authorization to establish a common company, they are automatically granted the leave to engage in foreign trade. This is a mistake. The newly created joint venture company will have to apply formally for such a leave."¹³¹

The approach of the 1985 Principles differentiates depending on the currency. If the joint venture is granted a foreign trade permit, it can

¹²⁶ *Id.* art. 6, para. 1, at 15.

¹²⁷ 1982 Law, *supra* note 44, art. 8, para. 6 and art. 2, para. 3; Rajski 1985, *supra* note 86, at 220.

¹²⁸ Arnoldi, *supra* note 38, at 60.

¹²⁹ A. BURZYNSKI, *supra* note 47, art. 9, para. 1, item 8, at 16 and art. 10, para. 1, item 3, at 17.

¹³⁰ 1985 Principles, *supra* note 52, para. II.7, at 17.

¹³¹ *Id.* at 9.

lead exports and imports automatically, in freely convertible currencies regardless of the originating country. Consequently, should a convertible currency transaction take place even with another Comecon country, the joint company is automatically authorized to undertake this transaction autonomously. Conversely, for foreign trade activities led in non-convertible currencies, the use of a Czechoslovak FTO as a middleman is mandatory. The deal will be carried out at prices agreed between the joint venture and the FTO involved.¹³²

The most modern approach on foreign trade operations is that provided by the Soviet joint venture legal framework. Decree No. 49, paragraph 24 stipulates that "[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."¹³³

It is understood that no other permit is required. From its creation the joint venture can automatically be involved in foreign trade activities without restriction. It may also use the services of an FTO under contractual arrangements.¹³⁴

The situation is quite different under Decree No. 48. Due to lack of currency convertibility within Comecon, the joint venture is required to settle accounts in transferable rubles¹³⁵ or in foreign currencies through the USSR Bank for Foreign Economic Affairs¹³⁶ and the International Bank for Economic Cooperation.¹³⁷ Obviously, no special foreign trade authorization is required in this case either.

C. Legal Structures

Legal structures under which a joint venture may be created are an important issue for every country. The legislative approaches to this issue by the three countries differ.

The modern Polish legislature used a convenient and tested way to regulate the structure of joint ventures: the pre-war Polish legislation

¹³² *Id.* at 9-10.

¹³³ Decree No. 49, *supra* note 66, para. 24.

¹³⁴ *Id.*

¹³⁵ The transferable ruble is a monetary accounting unit in use for commercial transactions between the Soviet Union and other CMEA member-countries. See, e.g., Marrese, *CMEA: Effective but Cumbersome Political Economy* 40 INT'L ORG. 287 (1986); *Transferable Ruble - A Fiction, Soviets Admit*, XVI Business Eastern Europe (Business International S.A.) No. 24, at 189 (June 15, 1987).

¹³⁶ The USSR Bank for Foreign Economic Affairs (Vneshekonombank) is the new bank which replaced the former Bank for Foreign Trade. On restructuring of the Soviet banking system, see *infra* note 198 and relevant bibliographical references.

¹³⁷ Decree No. 48, *supra* note 65, para. 21. The International Bank for Economic Cooperation and the International Investment Bank are Comecon banks.

which belonged to the broad family of civil law. The 1934 Commercial Code recognized three forms of companies: 1) the limited liability company, which is similar to the West German Gesellschaft mit beschränkter Haftung or the French Société à responsabilité limitée; 2) the joint stock company, which is similar to the German Aktiengesellschaft or the French Société anonyme; and 3) the general partnership.

The international commercial transaction provisions of the 1934 Commercial Code have been retained by the 1964 Polish Civil Code.¹³⁸ Thus, when the 1982 law was enacted it was easy to refer to the 1934 Code and provide for use of any legal structure available at the parties' selection.¹³⁹ Of course the foreign investor may undertake activities as a natural person as well. Obviously, no company structure whatsoever is necessary in this case.¹⁴⁰

The 1986 Law is slightly different. First, only companies are allowed to undertake activities under this law; incorporation is therefore indispensable. Even the title of the Law reflects this emphasis: it regulates "companies with foreign capital participation."

Second, article 2 of the Law provides that the joint venture may only take the form of either a limited liability company or a joint stock company.¹⁴¹ Therefore, the general partnership, the third type of company provided by the 1934 Commercial Code, is excluded.

In Czechoslovakia, the 1985 Principles provide for two forms of common companies: a company limited by shares - i.e., a form of incorporated company, and an association.¹⁴² The limited company is regulated by the Limited Companies Act of 1949, while the association is governed by the respective provisions of the International Trade Code of 1963, namely articles 625 and following.¹⁴³ At last, the existing legal framework for the establishment of joint venture provided by the Czechoslovak International Trade Code of 1963, which was mentioned earlier in this Article,¹⁴⁴ is thus being activated in practice by the 1985 Principles.

The Soviet case is entirely different in this context. There is no provision for joint ventures to acquire concrete legal forms of a kind similar to those in force in Western or other socialist countries. The only specific structural provision is to be found in paragraph 8 of Decree No. 48 and paragraph 7 of Decree No. 49 regulating the contents of the joint venture

¹³⁸ For more on this Polish legal mechanism, see Rajski & Wisniewski, *supra* note 28, at 205.

¹³⁹ 1982 Law, *supra* note 44, art. 21; Piontek, *supra* note 79, at 297.

¹⁴⁰ 1982 Law, *supra* note 44, art. 1.

¹⁴¹ A. BURZYNSKI, *supra* note 47, art. 2, para. 1, at 13.

¹⁴² 1985 Principles, *supra* note 52, para. I.3, at 6.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

statute.¹⁴⁵

It can be argued that the lengthy absence of joint venture legislation resulted in a lack of experience in the field, since industrial cooperation agreements were predominant. Moreover, it seems that the Decrees are purposely vague in order to enable prospective partners to arrange their mutual relations at will. Thus, detailed experience would be gained in practice.

However, the legal status of Soviet joint ventures as it stands today has been largely criticized. Its concrete problematic features have been discussed. For instance, it has been pointed out that a joint venture resembles a joint stock company without shares for its equity capital, only participation certificates. Consequently, "there are no shareholders and thus no annual general meeting."¹⁴⁶

In this context the New York Times recently reported:

Soviet lawyers and bankers stressed how far they had come in 18 months in establishing the ground work for joint ventures. But they acknowledged that there were still no laws governing some crucial questions, such as how the new ventures can be organized as independent companies rather than partnerships. Even the basic joint-venture law has big loopholes. "You register with the Ministry of Finance and you have a joint venture, but it is a kind of fiction," said Ninel N. Vosnesenskaya, a leading Soviet expert on joint-venture law. "There is no requirement that the ventures be capitalized," she said.¹⁴⁷

Another problematic feature is the different status created by Decree No. 48 with respect to special types of common ventures which are possible only between CMEA member-countries. The special ventures are, according to the Decree, international amalgamations and organizations. They are legal entities under Soviet law¹⁴⁸ but do not possess common property.¹⁴⁹ They are set up to coordinate cooperation, co-production and joint economic activities in individual industries, technical development, foreign trade or other economic fields.¹⁵⁰ Yet, separate treatment of joint ventures by the two Decrees might easily cause difficulties for an eventual tripartite common company between a Soviet enterprise, an enterprise from another socialist country and a western firm.¹⁵¹

All reported legal vacuums and obscurities have led to a characterization of the actual legal framework as "uncertain" and "not providing

¹⁴⁵ Decree No. 48, *supra* note 65, para. 8; Decree No. 49, *supra* note 66, para. 7.

¹⁴⁶ *Finns or Japanese? First Soviet JV Signed*, XVI Business Eastern Europe (Business International S.A.) No. 26, at 201, 202 (June 29, 1987).

¹⁴⁷ Feder, *Soviet Joint Ventures Face Obstacles*, N.Y. Times, June 20, 1988, at D5, col. 1.

¹⁴⁸ See Decree No. 48, *supra* note 65, para. 7.

¹⁴⁹ *Id.* paras. 2, 51.

¹⁵⁰ *Id.*; see also Durnev, *supra* note 68, at 12.

¹⁵¹ Voznesenskaja 1988, *supra* note 95, at 120.

sufficient guarantees.”¹⁵² Thus, if the legal framework is not strengthened and specified, it will probably work as a disincentive in the long run.

IV. OWNERSHIP

A. *Partners and Equity Share of the Ownership: Actual and Anticipated Tendencies*

As shown above, all Eastern European countries consider joint ventures to be part of an exceptional legal framework which parallels that of the nationalized economy. The state is the owner of the means of production and exercises administrative supervision to every economic unit which operates within its boundaries.

Usually the local partners are state enterprises or other legal entities of the socialized sector of the economy. Their aim is to safeguard state interests of the host country against possible foreign exploitation during the course of their participation in the joint venture.

For this reason, a socialist country's equity participation is generally required to be at least fifty-one percent or more. There are exceptions, however. Recently, countries which have already acquired joint venture experience, such as Hungary, have gradually allowed a foreign majority equity share in specific sectors of the economy such as tourism, finance and services.¹⁵³ This is still largely not the case in the USSR, Poland or Czechoslovakia, although the Polish provisions are the most flexible of the three.

Soviet Decree No. 49 explicitly stipulates that “[t]he share of the Soviet side in the authorized fund of a joint venture shall be not less than 51 percent.”¹⁵⁴ The Decree provides no exception whatsoever under any circumstance. Conversely, the different legislative treatment reserved for other CMEA member-countries is also stipulated in the same respect. Decree No. 48 does not require a fifty-one percent Soviet majority. It only states that the equity shares of the partners in a CMEA joint venture are to be defined by the foundation documents.¹⁵⁵ Moreover, it provides that “[t]he property of a joint venture is the common socialist property of the USSR and of the CMEA member-country concerned.”¹⁵⁶

It is evident that the above provisions are aimed at greater intra-Comecon integration. This is expressly justified by the Preamble of Decree No. 48 where it is stated that the Decree was adopted “[f]or the purpose of intensification of the socialist economic integration, [and] con-

¹⁵² *Soviet Joint Venture: The Problems Thus Far*, XVII Business Eastern Europe (Business International S.A.) No. 11, at 81, (Mar. 14, 1988).

¹⁵³ A. BURZYNSKI, *supra* note 47, at 45.

¹⁵⁴ Decree No. 49, *supra* note 66, para. 5.

¹⁵⁵ Decree No. 48, *supra* note 65, para. 27.

¹⁵⁶ *Id.* para. 25.

solidation of the scientific, technological and industrial potentials of the member-countries of the socialist community."¹⁵⁷

The approach adopted by the Czechoslovak Principles corresponds to the classic model of a fifty-one percent host state majority share. Chapter I, section 4, item (a) of the Principles specifies that "a foreign participant cannot hold a share of more than forty-nine (49) percent in the corporate capital."¹⁵⁸ Again, no exception whatsoever is made.

The most important departure from the fifty-one percent rule is to be found in the Polish 1982 Law, which is unique in this respect. It allows for 100 percent foreign equity capital in the field of small industry.¹⁵⁹ This provision is noteworthy for an additional reason: when the Law was adopted in the early 1980s, such a departure could be characterized as provocative for a socialist country. Probably this departure was due to the intention of Polish authorities to grant permits only to Polonians. But this intention was superseded by the final granting of permits even to the most odd combination of foreign partner origins.¹⁶⁰ The Law, nevertheless, provides for a Polish equity share exceeding fifty percent in cases substantiated by economic or social reasons.¹⁶¹ Yet, it has been reported that this has never occurred in practice.¹⁶²

The 1986 Law follows the rule as well. Article 8, paragraph 1 declares that "the equity participation of Polish partners in company's capital shall be at least 51%."¹⁶³ However, paragraph 2 of the same article stipulates an important diversion. The Minister of Foreign Economic Cooperation is granted authority to depart from the rule of paragraph 1 provided that: 1) he acts in accordance with the Minister concerned; 2) the case is economically justified; and 3) state security considerations do not constitute an obstacle.¹⁶⁴ This legal provision is of utmost importance. This exceptional device practically unties the hands of the Minister. He can show more flexibility in the matter, since there is no legal barrier prohibiting him from accepting a foreign majority equity share. Later, it would be easy for the exception to become the rule. Accordingly, it was declared by Polish sources at the end of 1987 that "[a]t first the state insisted on securing 51 percent of shares in each venture for itself but beginning with 1988, however, it will accept minority

¹⁵⁷ *Id.* at preamble.

¹⁵⁸ 1985 Principles, *supra* note 52, para. I.4(a), at 13.

¹⁵⁹ 1982 Law, *supra* note 44, art. 1, paras. 1, 2.

¹⁶⁰ EAST-WEST JOINT VENTURES, *supra* note 47, at 25-26.

¹⁶¹ 1982 Law, *supra* note 44, art. 15.

¹⁶² Piontek, *supra* note 79, at 237; Rajski 1985, *supra* note 86, at 222; EAST-WEST JOINT VENTURES, *supra* note 47, at 45.

¹⁶³ A. BURZYNSKI, *supra* note 47, art. 8, para. 1, at 15.

¹⁶⁴ *Id.* art. 8, para. 2.

shares.”¹⁶⁵

Furthermore, the same Polish source remarked that “Western businessmen do not become owners of the joint ventures but act as partners in them. Moreover, the ventures have to operate under the regulations applicable in Poland. All in all, there is no danger of the economy being taken over by foreign capitalists.”¹⁶⁶

It is evident that the host countries can always find ways to keep foreign direct investment on their soil under control. The majority equity share owned by nationals of the country does not in itself constitute a specific guarantee. Equity share is just a way to divide investment and to share risks and profits accordingly. The fifty-one percent majority share owned by the host country is more a question of theoretical principle than a question of true substance.

It is unfortunate that no such exceptional legal provision exists in the Soviet Decree No. 49 and the Czechoslovak 1985 Principles. Soviet legislation is expected to change, though. Consequently, “the current requirement that Soviet partners control at least 51 percent of the equity under Decree No. 49 can be dropped.”¹⁶⁷

B. *The Problem of Capital Contribution Valuation*

Economies of socialist countries do not have market pricing, which would not be arbitrarily implemented by the state in order to fulfill state policy goals, but would reflect real market values in accordance with world market prices. It is therefore extremely problematic to value a socialist country's contributions to the joint venture's capital. In contrast, Western contributions into the new joint venture can be evaluated in world market prices, for their prices are governed by manufacturing costs or potential profitability.¹⁶⁸

Contribution can take the form of tangible or intangible assets such as equipment, machinery, technology, trademarks, patents and other industrial property rights, services, leases, and estate property, and of course, cash. An enumeration of possible contributions is undertaken by Soviet legislation in paragraph 27 of Decree No. 48 and in paragraph 11 of Decree No. 49. The enumeration is almost identical in the two Decrees and includes “buildings, structures, equipment and other assets, rights to use land, water and other natural resources, buildings, struc-

¹⁶⁵ *Foreign Capital in Poland*, 21 CONTEMP. POLAND No. 1, at 12 (1988).

¹⁶⁶ *Id.* at 13.

¹⁶⁷ Feder, *supra* note 147, at D5, col. 3.

¹⁶⁸ On the issue of valuation of capital contribution in practice, see *Handling Difficulties in Evaluating JV Inputs*, XVI Business Eastern Europe (Business International S.A.) No. 33, at 257-58 (Aug. 17, 1987); see also *JVs with the Soviets: More Problems Appear*, XVII Business Eastern Europe (Business International S.A.) No. 20, at 153-54 (May 16, 1988).

tures and equipment, as well as other proprietary rights [including rights to work inventions and to use expertise], [and] money assets."¹⁶⁹ The only difference lies in the monetary form of assets. Under both Decrees, monetary contributions can be in the currencies of the partners' countries and in freely convertible currency. Under Decree No. 48 they can also be in transferable rubles.¹⁷⁰

The Czechoslovak Principles list only the kind of foreign investment; they do not deal with Czechoslovak inputs. According to chapter I, section 4, item (c) of the 1985 Principles, "the foreign investment may consist of machinery and equipment, things material determined in kind, documentation, technological process, inventions, know-how, technical personnel [staff] or financial means."¹⁷¹ Foreign contributions are characterized as "practically everything having a property value."¹⁷² It has been noted that the participants are expected to agree on the value of the share contributed.¹⁷³ Consequently, regulation by the Principles is vague, since no pattern such as world market prices is provided. Everything depends on the parties involved.

The Polish 1982 Law enumerates possible capital inputs. Foreign contribution may consist of fixed capital assets, materials and industrial property rights.¹⁷⁴ The same regulation applies to Polish partners, provided of course, that the enterprise will be mixed.¹⁷⁵

The Law requires that minimum foreign investment contribution cannot be lower than the minimum founding deposit.¹⁷⁶ Interestingly, the 1982 Law establishes a minimum contribution but not the way of valuation of nonpecuniary contribution. Valuation of intangible assets is regulated by Order of the Minister of Finance of November 16, 1982 "Concerning the Detailed Principles for Establishing the Value of Investment Contributions of Foreign Economic Entities in Small Industry and the Surplus of Export Income Over Import Expenditures."¹⁷⁷

The 1986 Law defines contributions in a very simple way: they are either cash or in kind.¹⁷⁸ Polish partners contribute only in kind.¹⁷⁹ Among the types of contributions in kind, the possibility of leasing state-

¹⁶⁹ Decree No. 48, *supra* note 65, para. 27; Decree No. 49, *supra* note 66, para. 11.

¹⁷⁰ *Id.* On the transferable ruble, see *Transferable Ruble - A Fiction, Soviets Admit*, XVI Business Eastern Europe (Business International S.A.) No. 24, at 189 (June 15, 1987).

¹⁷¹ 1985 Principles, *supra* note 52, para. I.4(c), at 13.

¹⁷² *Id.* at 6.

¹⁷³ *Id.*

¹⁷⁴ 1982 Law, *supra* note 44, art. 12, paras. 1, 2.

¹⁷⁵ *Id.* art. 7, para. 1.

¹⁷⁶ *Id.* art. 12, para. 3. See *id.* art. 16; Arnoldi, *supra* note 38 (discussing the requirement of paying a founding deposit).

¹⁷⁷ Rajski in YEARBOOK, *supra* note 34, at 165.

¹⁷⁸ A. BURZYNSKI, *supra* note 47, art. 15, para. 1, at 18.

¹⁷⁹ *Id.* art. 15, para. 3, at 18.

owned real property to the joint venture is clearly contemplated.¹⁸⁰ Furthermore, the 1986 Law contains the provision that "the value and nature of contributions in kind are specified in contract or other founding documents of the company."¹⁸¹ It is thereby implied that this is a matter to be agreed upon by the prospective partners. But the state reserves the right to verify the value of inputs by independent experts before it grants the necessary permit.¹⁸²

All three pieces of legislation seem to turn upon the same issue: How can mutual agreement be achieved on setting a certain value and price for a contribution to the capital of the joint venture? The strategy used by the host country appears to be to overpricing its inputs, especially land and buildings. The foreign side seems to use the same tactic correspondingly, so that the level is adequate and equal in practice.¹⁸³

C. *Leasing of Immovable Property in the Territory of the Host Countries*

Estate property is a specific case of contribution in kind to the joint venture's capital. Since discussion is about establishment of a business on the host country's soil, this kind of contribution concerns the Eastern European partner.

In every socialist state, "land may not be available for private ownership, let alone for foreign private ownership."¹⁸⁴ Every arrangement involves a state concession. Therefore, the foreign investor can only use and not acquire any kind of estate property. That is why estate input usually constitutes the most common kind of contribution by the Eastern European party.

But in this case the issue of valuation reemerges because local investors tend to overvalue real property on the negotiating table.¹⁸⁵ In most cases this is not accepted by the Western side. Consequently, it was suggested that, "instead of capitalizing the property, the solution seems to be to let the Soviet [local] partner arrange for the land, but offering [sic] it to the JV on a rental basis."¹⁸⁶ Presumably, an arrangement can be reached more readily in the framework of a lease.

¹⁸⁰ On the issue of leasing of immoveable property, see the discussion in section IV(C) of this Article.

¹⁸¹ A. BURZYNSKI, *supra* note 47, art. 15, para. 4, at 18.

¹⁸² *Id.*

¹⁸³ See *Handling Difficulties in Evaluating JV Inputs*, *supra* note 168, at 257-58 (discussing overvaluation as both a solution and a dangerous device).

¹⁸⁴ Buxbaum, *Legal Issues Concerning the Financial Aspects of Joint Ventures with Nonmarket Economy Firms* 2 ICSID-FOREIGN INVESTMENT L. J. No. 1, at 66, 69 (1987).

¹⁸⁵ *JVs with the Soviets: More Problems Appear*, *supra* note 168, at 154; Buzescu, *supra* note 31, at 424.

¹⁸⁶ *JVs With the Soviets: More Problems Appear*, *supra* note 168, at 154.

Recently, Soviet lawyers have completed rules for valuating the land used by the joint venture.¹⁸⁷ It remains to be seen whether this new device will be accepted by prospective investors and how it will be practically implemented.

The problem of land contribution is addressed by the Soviet legislation. Jerome A. Cohen stresses the constitutional problems which might occur in this regard.¹⁸⁸ This author does not share this view. One of the reasons underlying the adoption of Decree No. 6362 at the high level of the Presidium of the USSR Supreme Soviet instead of the USSR Council of Ministers was to settle this issue.¹⁸⁹ More specifically, as the Decree stipulates, "[l]and, entrails of the earth, water resources, and forest may be made available for use to joint ventures as for payment as well as free of charge."¹⁹⁰ In a second stage Decree Nos. 48 and 49 include land and estate property on the list of possible contributions to the authorized fund of the joint venture as was discussed in the previous section.¹⁹¹

The Czechoslovak Principles remain silent on this issue. They do not deal with contributions by local partners. Therefore, this is a question to be agreed upon by the parties.¹⁹²

The Polish 1982 Law contains no special provision about land or other real estate except the general provision on contributions.¹⁹³ Conversely, the 1986 Law specifies that "[s]tate real property may be leased to the company upon the approval of a proper local administrative authority."¹⁹⁴ It is to be noted here that, according to the Law of April 29, 1985 "On Land Management and Expropriation of Realities," mere contribution of the right to use state-owned land by the Polish partner to a company — therefore also to a joint venture — is insufficient grounds for the company to use the real estate. An appropriate decision of the relevant local organ of state administration is essential.¹⁹⁵ In this manner, state control of this facet of means of production is satisfied through its appropriate agency. Consequently, no constitutional issue is raised through application of this device.

D. Granting of Bank Credits

It is true that no joint venture can engage in productive activity

¹⁸⁷ Feder, *supra* note 147.

¹⁸⁸ Cohen, *supra* note 70, at 169-70.

¹⁸⁹ On constitutional aspects which led to adoption of Decree No. 6362, see the discussion in section III(B) of this Article.

¹⁹⁰ Decree No. 6362-XI, *supra* note 64, para. 4.

¹⁹¹ Decree No. 48, *supra* note 65, para. 27; Decree No. 49, *supra* note 66, para. 11.

¹⁹² 1985 Principles, *supra* note 52, at 6 and para. 1.4(c), at 13.

¹⁹³ 1982 Law, *supra* note 44, art. 12, paras. 1, 2 and art. 7, para. 1.

¹⁹⁴ A. BURZYNSKI, *supra* note 47, art. 15, para. 3, at 18.

¹⁹⁵ Piontek, *supra* note 79, at 312.

without capital contributions. But in most cases initial inputs are not sufficient. Thus, the role of bank credits, which are to be granted to the joint venture at its creation or during subsequent operation, becomes crucial. All three legislative schemes under study provide for financing of the joint venture.

Under the Soviet system, Decree No. 48 stipulates that intra-Comecon joint ventures may be granted credits by the following banks. First, credits may be granted in rubles by the USSR State Bank and the USSR Bank for Industrial Construction.¹⁹⁶ The terms under which these credits can be granted should, "be at least as favorable to [sic] those given" to comparable Soviet state-owned organizations.¹⁹⁷ It is noteworthy that in this respect Comecon joint ventures are favorably treated, like similar Soviet state enterprises, under the principle of pursued intensification of intra-Comecon integration. Second, credits may be granted in transferable rubles or in foreign currencies by the USSR Bank for Foreign Economic Affairs (Vneshekonombank), the two Comecon banks (International Investment Bank and International Bank for Economic Cooperation), or by foreign banks or firms with the consent of Vneshekonombank.¹⁹⁸ In this case credits are granted on commercial terms.

The approach of Decree No. 49 is purely commercial. It simply states that a joint venture may use credits on commercial terms, if necessary. Credits are granted in this case: "in foreign currency — from the USSR Bank for Foreign Trade [Economic Affairs] or, with its consent from other foreign banks and firms;"¹⁹⁹ or "in rubles — from the USSR State Bank or the USSR Bank for Foreign Trade [Economic Affairs]."²⁰⁰

A few months after adoption of the Soviet joint venture legislation, Gosbank and Vneshtorgbank jointly adopted an Executive Order which regulates the procedures for granting credit to joint ventures and for settlement of accounts, as well as repayment of credits by the joint ven-

¹⁹⁶ The USSR Bank for Industrial Construction (Promstroibank) replaced in the second half of 1987 the USSR Bank for Construction. *U.S.S.R. at Midyear: Trade Down, Outlook Bleak*, XVI Business Eastern Europe (Business International S.A.) No. 35, at 273-74 (Aug. 31, 1987).

¹⁹⁷ Decree No. 48, *supra* note 65, para. 34.

¹⁹⁸ *Id.* During the second half of 1987, the Soviet banking system was reorganized on sectorial specialization principles. Five specialized banks were established: the USSR Bank for Foreign Economic Affairs (Vneshekonombank); the USSR Bank for Industrial Construction (Promstroibank); the USSR Bank for Wage, Savings and Population Credit; the USSR Agroindustrial Bank (Agroprombank); and the USSR Bank for Housing, Municipal and Social Development (Zhilsotsbank). The sixth bank, the USSR State Bank (Gosbank) heads the entire banking system. Rozhdov, *The U.S.S.R. Banking Reform*, FOREIGN TRADE No. 3, at 40 (Eng. ed. 1988); *U.S.S.R. at Midyear: Trade Down, Outlook Bleak*, *supra* note 196; Ivanov, *Vneshtorgbank of the U.S.S.R. and Restructuring of the Mechanism of Foreign Economic Activities*, FOREIGN TRADE No. 11, at 4, 5-6 (Eng. ed. 1987).

¹⁹⁹ Decree No. 49, *supra* note 66, para. 27. See generally Ivanov, *supra* note 198, at 8, 11 (stating that Vneshekonombank usually grants foreign currency credits for a period of four years).

²⁰⁰ Decree No. 49, *supra* note 66, para. 27.

tures.²⁰¹ On the issue of how Vneshekonombank or other Soviet banks are able to grant credits, especially in hard currency, the solution is relatively simple. Besides available Soviet state hard currency funds, Vneshekonombank borrows hard currency from Western banks.

In the beginning, the Western bank approach was cautious. But gradually, the interest in lending to joint ventures, especially in the USSR, picked up noticeably and overcame the risk factor.²⁰² In 1987, "Crédit Lyonnais (France) [was] in fact, one of several European banks having set up a joint task force with [the former] Vneshtorgbank and Gosbank to discuss the establishment of a JV bank in the USSR for possible lending to East-West JVs."²⁰³ "The agreement was signed in early March of 1988 between Crédit Lyonnais, leading a syndicate of Western banks,"²⁰⁴ and Vneshekonombank. The object of the agreement was an eight-year, one hundred fifty million-dollar (\$150,000,000 U.S.) loan.²⁰⁵

In this way, Vneshekonombank started granting credits to joint ventures established under the terms of Decree No. 49. The financing of the Italian FATA group was reported as a first case.²⁰⁶ Under the terms of the protocol each side would be required "to invest only 12 percent initially."²⁰⁷ The remaining seventy-six percent of the founding capital would be lent by Vneshekonombank to the new joint venture itself.²⁰⁸ This large-scale credit was finally granted to "Sovitalprod mash," the new joint venture, by both Vneshekonombank and Mediocredito, an Italian bank.²⁰⁹ Furthermore, in April of 1988 "Svenska Handelsbanken, Sweden's third largest commercial bank . . . signed an agreement with four Soviet banks aimed at developing and financing Swedish-Soviet joint venture projects."²¹⁰ The agreement was signed with Vneshekonombank,

²⁰¹ *Executive Order of the State Bank of the U.S.S.R. and the Bank for Foreign Trade of the U.S.S.R. of 22 September 1987 on the Procedure for Crediting to and Settlement of Accounts of Joint Ventures, International Amalgamations and Organizations of the U.S.S.R. and Other Member-Countries of CMEA and of Joint Ventures with the Participation of Soviet Organizations and Firms from Capitalist and Developing Countries*, reprinted in UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, JOINT VENTURES AS A FORM OF INTERNATIONAL ECONOMIC CO-OPERATION 177 (1988).

²⁰² *Financing JVs: Who Bears the Risk?*, XVI Business Eastern Europe (Business International S.A.) No. 29, at 229 (July 20, 1987).

²⁰³ *Id.*

²⁰⁴ *Focus on Financing: U.S.S.R.*, XVII Business Eastern Europe (Business International S.A.) No. 10, at 80 (Mar. 7, 1988).

²⁰⁵ *Id.*

²⁰⁶ Listed as joint venture number 29 in *Details of Joint Ventures in the Soviet Union*, XVII Business Eastern Europe (Business International S.A.) No. 18, at 137, 141 (May 2, 1988).

²⁰⁷ *Focus on Financing: U.S.S.R.*, *supra* note 204.

²⁰⁸ *Id.* See also EAST-WEST JOINT VENTURES, *supra* note 47, at 56.

²⁰⁹ I. IVANOV, JOINT VENTURES IN THE U.S.S.R.: LESSONS OF THE FIRST YEAR 2 (1988).

²¹⁰ Webb, *Bank Pact to Boost Joint Soviet-Swedish Ventures*, Fin. Times (London), Apr. 12, 1988, at 9.

Promstroibank, Agroprombank and Zhilsotsbank.²¹¹ As can be seen, a number of Soviet banks, besides Vneshekonombank, are interested in becoming involved in financing joint ventures.

In April 1988, another joint venture was created between British and Soviet companies to modernize two large petrochemical plants in the Soviet Union. The different element of this joint venture is the method of financing. "Virtually all the initial financing will be provided from outside the Soviet Union through [the banks] Morgan Grenfell and Moscow Narodny Bank Limited."²¹²

As demonstrated from the above examples, Western interest in financing is growing. Comecon's International Investment Bank is also offering financial assistance to a joint venture for the first time; benefited will be the Plovdiv-based Bulgarian-Soviet Avtoelektronika joint venture.²¹³ The Bank also envisages granting credits to East-West joint ventures, as reported by Business Eastern Europe in May 1988.²¹⁴

The Czechoslovak Principles determine conditions for credit granting in the Chapter on Foreign Currency Rules. They stipulate that the needs of the common company for foreign currencies will be covered by means of credits.²¹⁵ Yet, the company is not included in the country's foreign currency plan. The credits will be taken from Czechoslovak foreign currency banks, or from foreign companies under conditions currently granted to foreign applicants.²¹⁶ In this context, it is apparent that the joint venture is considered a Czechoslovak resident company,²¹⁷ yet at the same time, it is isolated and treated like a foreign company. The approach undertaken towards the company is cautious and reserved.

The credit grants will be governed by the applicable Czechoslovak rules. But, at the same time, the Czechoslovak State Bank is authorized to allow deviation from and exception to these rules,²¹⁸ which in itself is a sign of flexibility.

Credit regulation is defined in a specific chapter of the 1982 Polish Law.²¹⁹ Such treatment reflects the importance attributed to foreign enterprises at the time the Law was adopted. The Law stipulates that operating and investment credits are available to the enterprises from Polish

²¹¹ *Id.*; Ivanov, *supra* note 198.

²¹² Peel & Taylor, *U.K.-Soviet Deal Signed to Modernize Chemical Products*, Fin. Times (London), Apr. 16, 1988, at 2; Pfeffer, *supra* note 14.

²¹³ *Comecon Bank Will Support Major Investment Projects*, XVII Business Eastern Europe (Business International S.A.) No. 22, at 171 (May 30, 1988).

²¹⁴ *Id.* at 172.

²¹⁵ 1985 Principles, *supra* note 52, para. II.8.1(b), at 17.

²¹⁶ *Id.*

²¹⁷ *Id.* para. II.8.1(a), at 17.

²¹⁸ *Id.* para. II.9.1, at 17.

²¹⁹ 1982 Law, *supra* note 44, arts. 28-29.

or foreign banks.²²⁰ They are granted on the grounds of an agreement and according to principles determined by the Council of Ministers.²²¹ The significance of foreign enterprises is again shown, since the conditions for granting a credit are not set up by the State local authorities at the voivodship (provincial) level, but by the Council of Ministers itself. Under the 1986 Law the treatment is equally favorable. By virtue of paragraphs 2 and 4 of article 24, the terms under which credits are granted are equivalent to those applicable to state enterprises. They constitute the object of a contract finalized between the joint venture and the bank. Credits from foreign banks can be obtained with the permission of the bank in which the common company maintains its accounts.²²² It should be noted at this point, that with respect to credits, the treatment is more favorable than that provided for by Soviet legislation. The equivalent application of the relevant rules set for state enterprises is guaranteed regardless of the origin of the joint venture's partners and the currency in which credits are granted.

V. MANAGEMENT AND PERSONNEL

A. *Holding of Corporate Bodies' Key Positions by Host Countries' Nationals*

Appropriate management of the joint venture constitutes the core of success for its operating activities. "By and large the structure of the corporate organs is similar to that of Western corporations."²²³ Usually the structure of the joint venture is organized into a two-level scheme, comprising the highest control organ and the everyday business management.

One of the main preoccupations of Eastern European countries has always been that their nationals have substantial participation in the management bodies and, most importantly, that they hold key positions. This is understood as an expression of their preoccupation to substantially control the joint venture so that its activities do not contradict the interests of the socialist state. However, this approach does not constitute a general rule. For instance, Hungarian joint venture legislation "sets no nationality requirements for the members of the corporate bodies of the joint venture company."²²⁴

In the three jurisdictions examined in this Article, there is such a requirement. But there are exceptions. Soviet Decree No. 48 provides for two management bodies: the Board, at the highest governing level,

²²⁰ *Id.*

²²¹ *Id.*

²²² A. BURZYNSKI, *supra* note 47, art. 24, paras. 2, 4, at 19-20.

²²³ EAST-WEST JOINT VENTURES, *supra* note 47, at 63.

²²⁴ *Id.*

and the Management, for day-to-day operational activities. Both bodies are composed of nationals of the two CMEA member-countries. Yet, it is provided in the Decree that only the Director General should be a Soviet citizen.²²⁵ Therefore, the Chairman of the Board can be a citizen of the other CMEA member-country or countries taking part in the venture.

This is not the case under Decree No. 49. By stipulation of paragraph 21, this Decree specifies that both "[t]he Chairman of the Board and the Director-General [should] be citizens of the USSR."²²⁶

The Czechoslovak Principles follow a similar path, with a slight deviation. The Principles do not define the corporate bodies at all. They leave this issue to the decision of the parties involved. Chapter I, section 6 of the Principles, however, contains only one provision, "that the presiding members in such bodies [should] be only Czechoslovak nationals."²²⁷

The Czechoslovak side argued that this provision should not create unsurpassable difficulties in practice. Frantisek Fisera remarked:

Speaking openly, many foreign investors fear that their right to participate in the management of the company will be a formal right only. Once more, I think it fit to stress that it is up to the parties themselves to regulate not only by legal but also by factual means their relations.²²⁸

In other words, everything in the relationship is negotiable at this point since its implementation depends on the agreed terms of the founding contract.

Approaches undertaken by the Polish legislation are different in the 1982 and 1986 Laws. Under the 1982 Law, it is unnecessary to discuss Polish participation in managing the enterprise, since the enterprise may be entirely foreign-owned. But if a mixed enterprise is set up, its governance and management must be agreed on by the partners. The only mandatory provision is the applicability of the relevant regulatory framework in force in Poland.²²⁹ Here again, recourse is made to the provisions of the 1934 Commercial Code.

The 1986 Law approach is entirely different. Presumably, this is justified by its larger scope of application. More specifically, article 17 stipulates that the Company's Manager or, in the case of a Board of Management, its President, must be a Polish citizen, residing perma-

²²⁵ Decree No. 48, *supra* note 65, para. 16.

²²⁶ Decree No. 49, *supra* note 66, para. 21.

²²⁷ 1985 Principles, *supra* note 52, para. I.6, at 14.

²²⁸ Fisera, *supra* note 54, at 7.

²²⁹ 1982 Law, *supra* note 44, art. 21.

nently in Poland.²³⁰ For the rest, "matters of internal operation [are] to be left up to agreements between partners."²³¹

In every country, effectiveness and flexibility of the managing framework are key to a successful joint venture. In socialist countries, management and marketing skills are more than indispensable within a "cadre of managers, whose markets have always been guaranteed and whose leeway to manage was sharply circumscribed."²³² There is a two-fold remedy to this problem: establishment of Western marketing advisory firms in the host socialist country, and training of local managers in the West. In addition, legal services provided by Western or Eastern specialists in business law will be extremely helpful.

At least in the Soviet Union, all of the above remedies seem to be working already. First, the Soviets recognized that foreign advisory firms constitute "the fastest way to bring new ideas and broader experience into the trade structure."²³³ Consequently, these firms "are now welcome to set up offices in the USSR."²³⁴ Second, at the beginning of May 1988, a Russian delegation under Evgeni K. Smitnitsky, Rector of the Academy of National Economy in Moscow, visited some of the schools in the United States to examine on location how Americans are trained in management and marketing.²³⁵

In regard to legal services, the first foreign law firm was expected to open an office in Moscow in February 1988.²³⁶ The Moscow City Bar Association intends to send Soviet lawyers abroad to spend time in Western firms. Accordingly, the head of the MCBA declared in June 1988, that the possibility of establishing joint ventures between Soviet and foreign attorneys might soon be available.²³⁷

B. *Application of the Unanimity Principle in Decisions*

The next issue to be examined is the way in which foreign investors can play an influential role in the activities of joint ventures. Both Soviet Decree Nos. 48 and 49 require that the joint venture's statute specify "the decision-making procedure and the range of issues to be unani-

²³⁰ A. BURZYNSKI, *supra* note 47, art. 17, at 19.

²³¹ *Id.* art. 16, at 18; see also Arnoldi, *supra* note 38, at 116.

²³² Barringer, *Soviet Calls for U.S. Trade Treaty*, N.Y. Times, Apr. 12, 1988, at D8, col. 6.

²³³ *Soviets Seeking Advisors for Management Guidance*, XVI Business Eastern Europe (Business International S.A.) No. 47, at 371-72 (Nov. 23, 1987).

²³⁴ *Id.*

²³⁵ Daniels, *Now Russia Wants to Learn The Way U.S. Managers Do*, N.Y. Times, May 2, 1988, at D1, col. 1 and D12, col. 4.

²³⁶ Kaletsky, *New York Law Firm to Open Office in Moscow*, Fin. Times (London), Jan. 15, 1988, at 5.

²³⁷ Carr, *Soviet Lawyers Embrace Perestroika*, 7 INT'L FIN. L. REV. 6-8 (1988).

mously settled."²³⁸ This provision safeguards foreign investors' rights and interests. The principle of simple or enforced majority can, of course, be agreed upon for selected issues in the founding documents of the venture.

The Czechoslovak 1985 Principles provide "that the articles of incorporation of the joint venture company must ensure a reasonable participation of the foreign [participant] in the management, production and sale of the organization."²³⁹ This Czechoslovak provision is unique in its nature among CMEA member-countries' joint venture legislation.²⁴⁰ Remaining issues of organization are left to the parties to decide.

Polish legislation remains silent on the point. Presumably, the flexible approach of both Polish laws implies that organization is a matter of mutual agreement as well. This understanding applies when the subject is a common company — i.e., a mixed enterprise of the 1982 Law, or a joint venture of the 1986 Law. Obviously, it has no substantial value in a wholly foreign-owned Polonian enterprise.

The 1986 Law contains only one restriction. The parties cannot alter the proportion of their shares in the company and thereby affect the basis under which their profits are distributed.²⁴¹

Many practical ways have been suggested as to how the foreign investor can influence critical decisions and control the operation of the joint venture in an Eastern European country without holding a majority share.²⁴² Control can be secured through special terms in the joint venture's statute. The terms can include, among others: requiring unanimous voting for crucial issues such as adding partners, proportionally increasing the equity capital, or liquidating the company; and providing for issuance of two categories of shares with different voting rights which enable the foreign partner to select specific executives in key positions, as is the case occasionally in Western companies.²⁴³ However, the local national can usually find ways to facilitate the joint venture operation better than a foreigner can. Consequently, Western businessmen would have an interest in employing a local manager anyway, if they had the choice.²⁴⁴

The functionability of management schemes was characteristically underlined in January 1988 by Ivan D. Ivanov:

²³⁸ Decree No. 48, *supra* note 65, para. 8; Decree No. 49, *supra* note 66, para. 7.

²³⁹ EAST-WEST JOINT VENTURES, *supra* note 47, at 63. See also 1985 Principles, *supra* note 52, para. I.4(b), at 13.

²⁴⁰ EAST-WEST JOINT VENTURES, *supra* note 47, at 63.

²⁴¹ A. BURZYNSKI, *supra* note 47, art. 19, para. 5, at 19; Piontek, *supra* note 79, at 313.

²⁴² *Controlling the JV Without a Majority Share*, XVI Business Eastern Europe (Business International S.A.) No. 31, at 243 (Aug. 3, 1987); EAST-WEST JOINT VENTURES, *supra* note 47, at 46; Feder, *supra* note 147; Buzescu, *supra* note 31, at 428.

²⁴³ *Controlling the JV Without a Majority Share*, *supra* note 242, at 243.

²⁴⁴ *Id.*

The fears that 51 percent of the capital reserved for the Soviet side will lead to its "dictatorship in management" have proven to be groundless. In all joint ventures there are foreign members of the board of directors supervising quality inspection, efforts, technical policies and so forth.²⁴⁵

C. *Obligatory Applicability of Host Countries' Labor Laws*

Every potential foreign investor's primary objective in an Eastern European country is to utilize the local labor force to satisfy the personnel needs of the joint venture. Workers in these countries are relatively well-trained, although they receive lower pay than those in the West.²⁴⁶ Despite the fact that remuneration paid to local skilled workers is often higher than normally applicable to state enterprises, the cost is still low.

Employment is in accordance with host countries' policies with respect to adequate use of local workers. Utilization of foreign workers is considered exceptional and must be justified under the specific situation.

Regarding workers, Decree Nos. 48 and 49 differ slightly. Decree No. 48 stipulates that matters of pay, routine of work and recreation, social security, and social insurance will be governed by Soviet regulation, regardless of the employee's national origin. The sole exception provided by the Decree is any contrary provision by interstate or inter-governmental treaties to which the USSR is a party.²⁴⁷

Decree No. 49 adopts the same approach for the above matters but leaves matters of pay, leave, and pension of foreign employees to be regulated by the individually signed contracts with the employees in question.²⁴⁸ Furthermore, the Decree bears an express provision that "[t]he personnel of joint ventures shall consist mainly of Soviet citizens."²⁴⁹ "According to Soviet interpretation, this means that foreign employees can be used normally in highly qualified posts."²⁵⁰ This provision is not included in Decree No. 48. Within the spirit of this Decree Soviet citizens and citizens of other CMEA member-countries are treated equally.²⁵¹

The Czechoslovak Principles adopt a similar approach. The general applicability of Czechoslovak legislation is secured for persons employed by the joint ventures²⁵² with respect to wages and labor relations²⁵³ as

²⁴⁵ I. IVANOV, *supra* note 209, at 1.

²⁴⁶ Arnoldi, *supra* note 38, at 41, 99.

²⁴⁷ Decree No. 48, *supra* note 65, para. 57.

²⁴⁸ Decree No. 49, *supra* note 66, para. 48.

²⁴⁹ *Id.* para. 47.

²⁵⁰ EAST-WEST JOINT VENTURES, *supra* note 47, at 66.

²⁵¹ Decree No. 48, *supra* note 65, para. 57.

²⁵² 1985 Principles, *supra* note 52, para. II.10.1, at 18.

²⁵³ *Id.* para. II.10.2, at 18.

well as social security and pension retirement schemes.²⁵⁴ Necessary deviations therefrom will be allowed by the Federal Ministry of Labor and Social Matters.²⁵⁵ The reason underlying this provision is "to avoid some discrepancies in legal regulations of Czechoslovakia and the countries the nationals of which will take part in the activities of the joint venture."²⁵⁶ Therefore, the Principles demonstrate flexibility in this respect.

The Polish 1982 Law contains two rather general provisions. The first is that enterprises will utilize labor resources according to the principles laid down by the Council of Ministers,²⁵⁷ and the second is that regulation of the Polish Labor Code will apply to labor relations in enterprises.²⁵⁸ The latter is mandatory, and the wording of the former was left vague purposely to both facilitate negotiations and implement state policy depending on specific cases.

The approach of the 1986 Law is more detailed, and is explicitly restrictive like Soviet Decree No. 49. It stipulates that foreign citizens may be employed as justified by their special qualifications. But the Law uses wording different than that in Soviet Decree No. 49. The wording is conversed. Therefore, instead of stipulating the prevalence of local employees, it renders the utilization of foreign employees exceptional. Moreover, their utilization is subject to the consent of the State local administrative authority at the voivodship (provincial) level.²⁵⁹ The obligatory application of Polish Labor Law is also provided on a general basis.²⁶⁰

A final remark regarding the labor force is that only the Polish 1986 Law stipulates creation of a supervisory council in conformity with the West German model of the Aufsichtsrat (supervisory council).²⁶¹ Under this model, the company's employees elect one member of the council who may also be one of the company's employees.²⁶² This policy constitutes a concrete departure from articles 207 and 378 of the 1934 Commercial Code which clearly precluded "the possibility of [a] company[']s employees becoming members of the supervisory board."²⁶³ Thus, the posture of the company's employees is considerably enhanced.

²⁵⁴ *Id.* para. II.10.3, at 18.

²⁵⁵ *Id.* para. II.10.2, at 18.

²⁵⁶ *Id.* at 11.

²⁵⁷ 1982 Law, *supra* note 44, art. 22, para. 1.

²⁵⁸ *Id.* art. 22, para. 2.

²⁵⁹ A. BURZYNSKI, *supra* note 47, art. 32, para. 3, at 24.

²⁶⁰ *Id.* art. 32, para. 1, at 24.

²⁶¹ *Id.* art. 18, para. 1, at 19.

²⁶² *Id.* art. 18, para. 2, at 19.

²⁶³ Piontek, *supra* note 79, at 300.

VI. TAXATION AND CUSTOMS FRAMEWORK

A. *Exemption from Customs Duties and Taxes During the Initial Operating Period*

Financial regulation of the joint venture's activities is one of the most crucial matters, for no potential foreign investor undertakes such involvement without favorable terms in this area.

The first issue to be considered is the possibility of tax and customs duties exemption during the initial operating period of the company. It is normally expected that the new joint venture will be granted a tax holiday during the first years of its activities. A certain degree of exemption from paying customs duties during the initial period is also normally expected.

The legislation of each of the three countries treats this subject in a different way. The Soviet legislation grants tax relief to the joint ventures for their initial two years of operation. The legislative approach is identical in both Decree Nos. 48 and 49.²⁶⁴

A problem of discerning the beginning of the tax holiday occurred because a great deal of time could elapse between the time of a company's registration with the Ministry of Finance and its becoming fully operational. The Soviet authorities recognized this problem soon after enactment of the initial legislation. Decree No. 1074 was enacted, among other things, to modify the relevant provision. Now the tax exemption will be granted "during the first two years from the moment of showing declared profits."²⁶⁵

Besides this exemption, another important exemption is provided by Decree No. 49. Equipment, materials and other property imported into the country by the foreign partners as their contribution to the authorized capital of the joint venture are exempt from customs duties regardless of the time when these items are imported.²⁶⁶ An equivalent provision is not found in Decree No. 48, presumably because these types of relations are regulated between CMEA member-countries through bilateral or multilateral intra-Comecon agreements.

Obviously, the customs duties exemption is a major incentive for foreigners to import high-quality equipment and advanced-technology machinery for the operational needs of the joint venture. The approach of Soviet legislation in this respect is very flexible and motivating. The relevant provisions can be characterized as creating incentives.

The Polish approach is favorable enough in the context of tax exemption, but to a lesser extent than the Soviet approach. The 1982 Law

²⁶⁴ Decree No. 48, *supra* note 65, para. 43; Decree No. 49, *supra* note 66, para. 36.

²⁶⁵ Decree No. 1074, *supra* note 75, at 189; Smirnov 1988, *supra* note 96, at 47.

²⁶⁶ Decree No. 49, *supra* note 66, paras. 10, 13.

in its original form contained special rules on taxation and exemptions in articles 26-28. After the amendments introduced by the Tax Law of July 29, 1983, tax exemption is now granted for an initial operation period of three years. However, exemption is granted in the form of a tax refund, and is only granted if one third of the income earned during that period has been reinvested into the operations of the enterprise.²⁶⁷

The 1986 Law is more attractive in its provisions. All joint ventures are exempted from income tax during their first two years of activity.²⁶⁸ In comparison to the Soviet legislative provisions this scheme is less favorable. It resembles the form of Decree Nos. 48 and 49 before their amendment by Decree No. 1074. Therefore, after the two-year time period taxation will be applied regardless of whether profits actually accrue to the venture. With respect to customs duties, the 1986 Law's approach is slightly less favorable than the Soviet one. The Law specifies that imported contributions to the company's capital in kind, such as machinery, installations and equipment, and means of transportation, are not liable to customs duties.²⁶⁹ This provision extends to imported machinery, installations and equipment, and means of transportation, acquired during the first three years.²⁷⁰ Setting this time limit constitutes a less favorable treatment than that adopted by Soviet legislation, where any additional contribution to the authorized fund of the joint venture is exempted from customs duties at any time.²⁷¹

The approach undertaken by the Czechoslovak Principles is the most stringent one in the three jurisdictions. No tax incentive whatsoever is provided for joint ventures. Moreover, it is clearly stated that customs duties on imported goods will be collected in any case. The only relieving provision in this context is the possibility of applying for exemption of customs duties for a determined period of time. The application is to be submitted to the Federal Ministry of Foreign Trade which may grant it "if it thinks it fit."²⁷²

B. Taxation of Profits

Next a comparison can be made of the taxation framework in the three countries. The basic taxation provision in the Soviet legislation is to be found in Decree No. 6362. The Decree stipulates that joint ventures will pay tax on profit at the rate and in the order provided for by the USSR Council of Ministers.²⁷³ At the same time, it allows the Minis-

²⁶⁷ Piontek, *supra* note 79, at 323; Arnoldi, *supra* note 38, at 53.

²⁶⁸ A. BURZYNSKI, *supra* note 47, art. 30, para. 3, at 23.

²⁶⁹ *Id.* art. 31, para. 1, item 1, at 23.

²⁷⁰ *Id.* item 2, at 23.

²⁷¹ See *supra* note 267.

²⁷² 1985 Principles, *supra* note 52, para. II.11, at 18.

²⁷³ Decree No. 6362-XI, *supra* note 64, para. 1.

try of Finance to reduce the tax rate or to completely exempt from tax payment individual cases.²⁷⁴ Furthermore, the Decree specifies the procedure under which taxes are to be collected.²⁷⁵

By this authorization of Decree No. 6362, Decree Nos. 48 and 49 determine the tax rate at thirty percent. The tax is due on profits, after deductions paid to reserve and other funds.²⁷⁶ In addition to this tax, profits are taxed at an additional twenty percent rate if transferred abroad. The withholding tax is not collected if a bilateral treaty between the USSR and the respective foreign state provides otherwise.²⁷⁷

The Soviet joint venture tax rate is not extremely high in comparison with Western companies' standards. Only the additional twenty percent repatriation withholding tax has been criticized.²⁷⁸ Besides, the rate is flexible and negotiable, depending, probably, on the priority attributed to particular joint venture proposals by the host country.

The analogous framework in Poland is largely contradictory. The 1982 Law is today, after enactment of the 1983 Tax Law, almost prohibitive for foreign investors. The income tax rate is fixed by the Law at the base level of eighty-five percent.²⁷⁹ This income tax rate is the highest in the world.²⁸⁰ Besides the income tax, other taxes, such as the turnover tax, apply to Polonian enterprises.²⁸¹ It is true that a number of tax exemptions and reliefs somehow alleviate the burden.²⁸² Yet, the average tax rate is about seventy percent,²⁸³ which is still extremely high. Under these conditions, applications for permits to establish an enterprise were withdrawn and a bad general climate of distrust among Polonian enterprises has existed since 1983.²⁸⁴ Conversely, the 1986 Law establishes a legal framework full of incentives. Its basic tax rate is fixed at fifty percent.²⁸⁵ The rate is moderately high, but the Law provides a unique device for tax alleviation: "[t]he tax rate is decreased by 0.4 per cent [sic] for each 1 per cent [sic] of the value of production or services exported by

²⁷⁴ *Id.* para. 1.

²⁷⁵ *Id.* para. 2.

²⁷⁶ Decree No. 48, *supra* note 65, para. 43; Decree No. 49, *supra* note 66, para. 36.

²⁷⁷ Decree No. 48, *supra* note 65, para. 48; Decree No. 49, *supra* note 66, para. 41.

²⁷⁸ In the case of the joint venture Infa-otel, for example, the issue of the 20% withholding tax made concluding the agreement difficult. *Details of Joint Ventures in the Soviet Union*, XVII Business Eastern Europe (Business International S.A.) No. 17, at 131 (Apr. 25, 1988) (listed as joint venture number 9); *First Soviet JV: Now The Problems Appear*, XVI Business Eastern Europe (Business International S.A.) No. 17, at 129 (Apr. 27, 1987).

²⁷⁹ Piontek, *supra* note 79, at 323.

²⁸⁰ Arnoldi, *supra* note 38, at 54.

²⁸¹ Rajski 1985, *supra* note 86, at 225.

²⁸² Piontek, *supra* note 79, at 323-25.

²⁸³ *Id.* at 325.

²⁸⁴ *Id.*

²⁸⁵ A. BURZYNSKI, *supra* note 47, art. 30, para. 2, at 23.

the company.”²⁸⁶ In other words, if the entire production of the joint venture is exported, the tax rate goes down to only ten percent. This provision is unique among similar legislation of socialist countries and emphasizes the export-oriented character of the recent Polish joint venture law.

At the other end of the spectrum lies the Czechoslovak legislation. The 1985 Principles provide for a fifty percent basic tax rate.²⁸⁷ But they stipulate an additional withholding tax of twenty-five percent on dividends. This additional income taxation is cumulative; and, most important, the tax is due whether or not profits are transferred abroad, unless stipulated otherwise in an international treaty to which the country is a party.²⁸⁸ It is obvious that the Czechoslovak taxation framework is the most burdensome of the three countries.

C. Reserve and Other Funds

A feature common to all CMEA member-countries is the reserve (risk) fund.²⁸⁹ Under most Eastern European legislative frameworks, the joint venture is an autonomous legal entity, which remains more or less outside the nationalized sector of the economy. Thus, it is obligated to create a reserve fund, because the state will not cover any eventual losses. Besides the reserve fund, a number of other mandatory funds, such as cultural, scientific, etc., constitute a significant preoccupation of the legislation, and therefore a distinct element of the joint venture structure in Eastern European countries.²⁹⁰

Both Soviet Decrees regulate the issue of obligatory funds using identical phrasing.²⁹¹ They stipulate that agreed deductions from annual profits will create the capital of the reserve fund. The deductions will cease to be compulsory as soon as the capital of the reserve fund reaches twenty-five percent of the authorized fund of the joint venture. This is the only mandatory provision. Every other matter, like the amount of annual deductions and the formation and operation of other funds, will be agreed by the partners and included in the founding documents of the joint venture.²⁹²

Both Decrees provide for deduction of obligatory allocations to the

²⁸⁶ *Id.*

²⁸⁷ 1985 Principles, *supra* note 52, para. II.4.1, at 16.

²⁸⁸ *Id.* para. II.4.4.

²⁸⁹ EAST-WEST JOINT VENTURES, *supra* note 47, at 57; see also Buzescu, *supra* note 31, at 424.

²⁹⁰ On the various obligatory funds, see *Advice to JV Negotiators: Watch Accounting Rules*, XVI Business Eastern Europe (Business International S.A.) No. 30, at 236 (July 27, 1987).

²⁹¹ Decree No. 48, *supra* note 65, para. 38; Decree No. 49, *supra* note 66, para. 30.

²⁹² *Id.*

reserve and other funds before profits are taxed.²⁹³ This is important because it reduces the amount of tax to be finally paid and avoids double taxation of the joint venture.

The Polish 1982 Law provides for creation of the enterprise's social and housing funds.²⁹⁴ There is no provision for a reserve fund, though. Presumably, this is one of the goals covered by the requirement of paying an obligatory founding deposit.²⁹⁵

The 1986 Law is simpler in this respect. It stipulates the formation of only a reserve fund in order to cover possible losses. The annual required contribution to the fund is ten percent of net profits. Allocations to the fund may stop once the fund has reached four percent of annual operating costs.²⁹⁶

The Czechoslovak Principles still follow the pattern of a multiple fund structure equivalent to that of state enterprises. Thus, it is provided that the common company has to create corporate funds "such as [a] reserve fund, a cultural and social fund, remunerations fund," and certain other funds.²⁹⁷ The 1985 Principles do not indicate the sums which have to be contributed to the funds. It is understood that this is a matter to be agreed upon by the parties and included in the respective contract.²⁹⁸

VII. DURATION AND DISSOLUTION

A. *Duration: Limited or Unlimited in Time, With or Without Possibility of Extension?*

The issue of the duration of a joint venture should be considered to be a very delicate one within the context of a socialist economy. Traditionally, socialist states view joint ventures as exceptional devices. As such, they should also be of limited duration so that the national soil would not be ceded to foreign capital. Today, after perestroika, the above approach seems rather old-fashioned. However, it is still too early to speak about real integration of the joint venture concept into a state-controlled economy. Consequently, joint venture legislation still adopts a cautious approach.

The Soviet Decrees stipulate that joint venture duration is a subject to be specified by the prospective partners in the founding documents of

²⁹³ Decree No. 48, *supra* note 65, para. 43; Decree No. 49, *supra* note 66, para. 36; Cohen, *supra* note 70, at 177.

²⁹⁴ 1982 Law, *supra* note 44, art. 22, para. 3.

²⁹⁵ *Id.* art. 16.

²⁹⁶ A. BURZYNSKI, *supra* note 47, art. 19, para. 4, at 19.

²⁹⁷ 1985 Principles, *supra* note 52, para. II.1.2(b), at 15.

²⁹⁸ *Id.* at 8.

the company.²⁹⁹ Consequently, everything can be agreed to freely by the parties. Yet, it is noteworthy that the Decrees are silent on the issue of eventual extension of the operating period. Here lies the key to safeguarding the state's interests. Theoretically, the foreign partner can be forced out at expiration of the operating period. Regardless of the likelihood of this occurring, it is a question of policy to be determined by the state in the future. But, for the moment, the legal vacuum can lead to any interpretation. Jerome A. Cohen remarked, "Perhaps the USSR is being cautious, not wishing to give either its own people or foreign investors the idea that joint enterprises can be renewed until considerable experience with them has been obtained."³⁰⁰

The Polish approach under the 1982 Law is more liberal. The law provides for an operating period of up to twenty years, or forty if the depreciation period is longer. It also provides for issuance of a new permit after expiration of the previous one.³⁰¹ Most likely, this flexible approach is possible because the Polonian enterprises operate only within the framework of the nonsocialized sector of Polish economy, and their scope is limited to small industry activities.

Conversely, the approach followed by the 1986 Law is similar to that of the Soviet legislation. The expected duration of the company's activities should be included in the request to grant a permit for establishment of the company.³⁰² The Minister of Foreign Economic Cooperation may accept or reject the duration proposal of the parties, at his discretion. In any case, the issued permit should prescribe its period of validity. E. Piontek feels that issuing a permit for a prescribed period does not imply that it is not renewable. He maintains:

The Law does not introduce any restriction as to the duration of the permit. The intention of the legislator was that companies set up under the Law have a permanent character. After the expiry of the initial permit, "the partner may apply for an extension; providing the company continues to meet legal requirements, it can rely on a positive decision regarding the new application."³⁰³

This might be true. However, a legal vacuum still exists. Only time will tell how this device will work.

The Czechoslovak legislation is entirely silent on the matter. Presumably, the issue of duration is a specific issue which finds no place in a general set of principles such as the 1985 Principles.

²⁹⁹ Decree No. 48, *supra* note 65, para. 8; Decree No. 49, *supra* note 66, para. 8.

³⁰⁰ Cohen, *supra* note 70, at 183.

³⁰¹ 1982 Law, *supra* note 44, art. 17.

³⁰² A. BURZYNSKI, *supra* note 47, art. 9, para. 1, item 3, at 16.

³⁰³ Piontek, *supra* note 79, at 316.

B. Dissolution, Liquidation and Right of Preemption by Partners Representing the Host Countries

The issue of dissolution and liquidation is the last to be addressed with in this Article. Although the joint ventures are established with long term perspectives — at least from the point of view of the foreign investor — the issue of dissolution and the procedure of liquidation should concern the founding parties even during the negotiating period before the founding document is signed. Concluding an agreement on that point also safeguards both parties' interests.

In a number of jurisdictions the obligation to reach an agreement especially on liquidation procedure, is stipulated by the joint venture legislation. For instance, both Soviet Decrees require that the statute of the joint venture contain specific provisions about the liquidation procedure, as agreed by the partners.³⁰⁴ Furthermore, it is stipulated in the Decrees that a joint venture may be dissolved in accordance with provisions contained in its founding documents or by decision of the USSR Council of Ministers, if the venture has exceeded its scope.³⁰⁵ This author believes that for the same legal cause the decentralizing provisions established by Decree No. 1074 should also apply to dissolution in an analogous way.³⁰⁶ It would be the task of the ministries and departments of the USSR and the Councils of Ministers of the fifteen Union Republics to decide on dissolution of a joint venture if the latter exceeded its scope.

The Decrees provide, moreover, for a number of procedural mechanisms regarding dissolution and liquidation. These include publication of a relevant notification in the press, and registration of the dissolution with the Ministry of Finance.³⁰⁷ They also provide for fair distribution of the remaining assets of the company, after settlement of eventually existing obligations.³⁰⁸

The Polish 1982 Law refers to parties' agreements on dissolution and liquidation problems, and to relevant regulations of the Polish Civil and Commercial Code.³⁰⁹ Interestingly, the Law grants a preemption to rights and assets of the enterprise under liquidation after settlement with the creditors.³¹⁰

The regulation of the 1986 Law differs somewhat. It refers to withdrawal of the permit if the company is involved in illegal activities or activities beyond its scope. However, the organ which originally granted

³⁰⁴ Decree No. 48, *supra* note 65, para. 8; Decree No. 49, *supra* note 66, para. 7.

³⁰⁵ Decree No. 48, *supra* note 65, para. 61; Decree No. 49, *supra* note 66, para. 51.

³⁰⁶ Decree No. 1074, *supra* note 75.

³⁰⁷ Decree No. 48, *supra* note 65, paras. 61, 63; Decree No. 49, *supra* note 66, paras. 51, 53.

³⁰⁸ Decree No. 48, *supra* note 65, para. 62; Decree No. 49, *supra* note 66, para. 52.

³⁰⁹ 1982 Law, *supra* note 44, art. 37.

³¹⁰ *Id.* art. 38.

the permit specifies a definite period in which the company must cease such activities. If the company does not comply, the permit is withdrawn, and an application is submitted to the court for dissolution of the joint venture.³¹¹ The dissolution is pronounced by a court order.³¹² Also under the 1986 Law, the Polish partner enjoys the right of preemption in the event of liquidation, unless otherwise provided by the founding documents of the joint venture.³¹³

Under the Czechoslovak Principles, the liquidation issue is left to the discretion of the parties,³¹⁴ since Czechoslovak law makes no provision for dissolving a company.³¹⁵

VIII. CONCLUSION

It has become apparent through this comparison of key points of joint venture legislation in the Soviet Union, Czechoslovakia and Poland that current legal enactments in these nations are far from being technically perfect. Differences in legal constructions and in attitudes about specific issues reflect underlying reasoning and policies of the respective countries. Changes in existing legislation should assume bolder positions and comply with pragmatic approaches from the theoretical and practical points of view. The role of foreign direct investment should be clearly recognized as one of primordial importance within the framework of centrally planned state economies. Accordingly, the portion of joint ventures and general private investment in domestic economies should be left to grow larger through more attractive provisions and incentives. Joint ventures should no longer be considered as alien constructions operating parallel to existing nationalized economy structures; they should be accepted as important parts of the economies.

The legislation of each of the three countries needs specific improvements. These improvements appear to be coming slowly but steadily. For example, the Soviet legislation adopted an innovative, flexible and decentralizing attitude in the form of a positive response to foreign investors' reactions and criticisms. The new flexible attitude was concretized in the enactment of Decree No. 1074 which improved a number of

³¹¹ A. BURZYNSKI, *supra* note 47, art. 14, para. 1, at 17-18.

³¹² *Id.* art. 14, para. 2.

³¹³ *Id.* art. 37, at 26.

³¹⁴ 1985 Principles, *supra* note 52, at 4.

³¹⁵ *Key Provisions of Draft C.S.S.R. JV Law*, XVI Business Eastern Europe (Business International S.A.) No. 44, at 349 (Nov. 2, 1987). It is expected that all remaining unanswered or problematic issues under the 1985 Principles will be soon settled by the forthcoming Czechoslovak joint venture code. See also *New CSSR JV Code: Some Progress with Tough Issues*, XVI Business Eastern Europe (Business International S.A.) No. 44, at 348-49 (Nov. 2, 1987); *C.S.S.R. JV Update: Services Included*, XVII Business Eastern Europe (Business International S.A.) No. 18, at 137-38, (May 2, 1988).

points, as discussed earlier. However, Soviet joint ventures still require distinct legal structures and capitalization. Moreover, further coordination between Decree No. 48 and Decree No. 49 should be achieved.

The Polish legislation needs improvement in order to become more uniform. The 1982 and 1986 Laws should be merged, or if not, more unifying provisions should be adopted.

Finally, Czechoslovakia should adopt a distinct joint venture code, instead of the muddled combination of generally nebulous and non-binding guidelines for foreign investment, which the 1985 Principles contain.

All of the above changes seem to be imminent.³¹⁶ In addition, the three countries need:

1) free trade zones, following the Chinese or Hungarian models, which is likely to occur soon in the Soviet Union and Poland; and,³¹⁷

2) progressional establishment of convertible national currencies, at a later stage, in order to reflect real world market prices and values, and not just state policies.³¹⁸

These changes presuppose the success of the undertaken structural domestic economic reforms. Successful implementation of the joint venture legal framework requires further introduction of market economy forces and principles into the host countries' nationalized economies. Clearly, all three countries under discussion are currently going through a transitional stage, exemplified by recently triggered perestroika and the

³¹⁶ *New C.S.S.R. JV Code: Some Progress with Tough Issues*, XVI Business Eastern Europe (Business International S.A.) No. 44, at 349 (Nov. 2, 1987); see also *Polonian Rule Changes Likely to Delay JV Law*, XVII Business Eastern Europe (Business International S.A.) No. 13, at 99 (Mar. 28, 1988).

³¹⁷ The idea of exclusive economic zones in the U.S.S.R. is under discussion among Soviet leaders. This point was raised by Oleg Bogomolov, Director of the Institute of Economics of the World Socialist System. The Baltic Republics and the Soviet Far East are suggested as appropriate locations. Peel, *Soviet Call for Moves to Boost Joint Ventures*, Fin. Times (London), Apr. 21, 1988, at 3. The idea of free trade zones is under discussion also in Poland. Possible locations would be the Szczecin, Swinoujście and Gdynia port areas. *Polish Free Trade Zones? Probably, But Be Patient*, XVII Business Eastern Europe (Business International S.A.) No. 2, at 12 (Jan. 11, 1988); *Polish Free Trade Zones Now Closer to Reality*, XVII Business Eastern Europe (Business International S.A.) No. 18, at 139 (May 2, 1988).

³¹⁸ The currencies of the USSR, Czechoslovakia and Poland are not convertible even between the three countries, nor inside Comecon. Only recently, the USSR and Czechoslovakia signed an agreement on limited convertibility of their currencies. They were the first CMEA member-countries to take this step. See *Focus on Financing: Czechoslovakia/U.S.S.R.*, XVII Business Eastern Europe (Business International S.A.) No. 10, at 80 (Mar. 7, 1988); Colitt, *Moscow, Prague Agree Currency Convertibility*, Fin. Times (London), Feb. 29, 1988, at 3. Moreover, Ivan Ivanov, Deputy Chairman of the State Foreign Economic Commission was one of the Soviet officials to openly discuss the possibilities and problems involved in free convertibility for the ruble. See *Soviets Openly Discuss Ruble Convertibility*, XVII Business Eastern Europe (Business International S.A.) No. 27, at 212 (July 4, 1988). Convertibility of the ruble, together with establishment of a currency market, is openly discussed in recent Soviet literature. Vasiļev, *Byłli u nas Valjutnomu Rynku? (Will There be a Currency Market for Us?)*, Ekonomicheskaja Gazeta, June 1988, No. 26, at 21.

equivalent restructuring mechanisms in the other countries. It is hoped that nothing will impede the implementation of these important economic and political transformations.

It may be argued that extensive domestic reforms would produce economic disturbances, such as rising prices within the countries, and would provoke uncontrollable reactions on the part of ordinary citizens.³¹⁹ But it is hoped that in the long run, vigorous and dynamic economies will emerge as a result of the proposed changes.

It is clear that as a result of the new conceptions and implemented legal mechanisms, Eastern Europe now tends to be more open to foreign business than it ever used to be. Time is needed for the new measures to be implemented. A positive approach full of understanding is needed; for, whatever the evolution may be, Chernobyl has proved that it concerns and affects the entire world.

³¹⁹ As it is widely known, the Polish government lost the referendum of November 29, 1987 on accelerating economic and political reform. See, e.g., *Poland: Vote Lost, But Reform Should Continue*, XVII Business Eastern Europe (Business International S.A.) No. 23, at 385 (Dec. 7, 1987). Moreover, in October 1987, fears and rumors that a rise in prices could occur in the Soviet Union led to uncontrollable consumer reactions, such as the hoarding of food and other products. Keller, *Russians, Fearing Rise in Prices, Hoard Food*, N.Y. Times, Oct. 30, 1987, at A7, col. 1.

