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COMMENTS

Joint Venture Law In the Soviet Union: The 1920s and the 1980s*

I. INTRODUCTION

Soviet law has only permitted the establishment of joint ventures within the Union of Soviet Socialist Republics (USSR) during two separate periods. Similar political and economic considerations were major catalysts for the enactment of both joint venture laws, as well as for the similar themes running through them, though the periods are separated by approximately sixty-five years. Examination of both situations, instead of merely the present one, not only will provide a broader perspective of how the Soviets view joint ventures themselves, but will illustrate how Soviet legislation itself has evolved in considering free-market economic principles.

II. THE HISTORICAL CONTEXT

The passage of the March 8, 1923, concession decree established a Chief Concessions Committee with which to negotiate and provided the legal structure for transferring property to foreign enterprises.¹ This legislation opened the door to direct foreign investment in the Soviet Union

* See M. BOGUSLAVSKY & P. SMIRNOV, *THE REORGANIZATION OF SOVIET FOREIGN TRADE* (1989). Note, *Glasnost: Joint Ventures Now Permitted in the Soviet Union*, 3 FLA. INT'L L.J. 125 (1987); Recent Development, *Foreign Investment: New Soviet Joint Venture Law*, 28 HARV. INT'L L.J. 473 (1987); Note, *The New Soviet Joint Venture Law: Analysis, Issues, and Approaches for the American Investor*, 19 LAW & POL'Y INT'L BUS. 851 (1987) for a similar discussion on the present joint venture decree.

¹ A. SUTTON, *WESTERN TECHNOLOGY AND SOVIET ECONOMIC DEVELOPMENT 1917 TO 1930* at 7 (1968). The concession decree was "replaced by the law of August 21, 1923 and amended in December 14, 1927, and supplemented by special ordinances of May 23, 1926 and April 27, 1928." *Id.*

the first successful opportunity presented to foreigners since the 1917 socialist revolution.

The new Soviet policy was the product of various economic and political conditions. By 1921, the Soviet economy had collapsed.² The previous socialist internal policies disrupted the pre-revolutionary structure without effectively organizing a new system to take its place. This led to economic decline.³ This process of economic self-destruction can be traced back to the December 21, 1917, instant demobilization decree issued by the Soviet Commissariats of Labor and War.⁴ To restore the decaying economy and to raise funds for fighting the civil war, drastic policies, called War Communism, were adopted.⁵ Constant policy improvisation and unrealistic expectations were coupled with the dominant administrative technique of terror to secure the obedience of the local authorities to Moscow, provide food for the starving cities, and spur industrial production.⁶ As a result of these failed policies, productivity declined, the market system collapsed, a goods shortage ensued, and inflation soared.⁷ In response to these dire problems of internal unrest, Lenin adopted a series of basic reforms, including scaling back nationalization and reintroducing work incentives, known as the New Economic Policy ("NEP").⁸ From its inception in March 1921, the NEP also permitted a partial restoration of foreign enterprise within the USSR.⁹ Thus, the Soviet Union desired concessions as one of the remedies encompassed within the NEP to end its economic depression and to bring in foreign currency and technology. Without foreign trade and expertise, the NEP would not be able to raise Soviet productivity or restore the

² McKay, *Foreign Enterprise in Russian and Soviet Industry: A Long Term Perspective*, 48 BUS. HIST. REV. 336, 350 (1974).

³ A. SUTTON, *supra* note 1, at 311-12.

⁴ The edict called for a halt to all military production and stipulated a return to peace time production within one month. While the Soviet authorities envisioned that this would end their participation in World War I, the decree gave insufficient time to restructure the domestic economy towards producing consumer goods. The ensuing disorganization forced skilled technicians, at least those who were left in the country after the revolution, into the countryside and thereby deprived the industrial structure of the "technical component" necessary to function adequately. *Id.*

⁵ These plans compounded the problem of the loss of the technocrats.

⁶ A. ULAM, *EXPANSION AND COEXISTENCE* 95 (2d. ed. 1974). The results of the policy were poor and when viewed with the attempts by some workers' committees to increase civilian output, only disorganization and financial difficulties remained. The succeeding centralization plan only led to conflicts among makeshift managements. A. SUTTON, *supra* note 1, at 312.

⁷ A. SUTTON, *supra* note 1, at 312.

⁸ A. ULAM, *supra* note 6, at 126-27

⁹ McKay, *supra* note 2, at 350. This is evidenced by Lenin's April 9th speech to a conference of party secretaries where he stated: "We are energetically seeking the conclusion of contracts with concessionaires." A. KRIMMER, *SOCIETES DE CAPITAUX EN RUSSIE IMPERIALE ET EN RUSSIE SOVIETIQUE* 394 (1934).

economy.¹⁰ The announcement of the NEP seemed to signal the return of economic normalization to the USSR and helped change the opinions of some United States businessmen who saw great opportunities for trade with the Soviet Union.¹¹ Financial and trade reporters encouraged investment in the Soviet Union.¹² In addition, the growing number of Soviet trade advocates in the United States pointed to heightened European interest in it.¹³

In short, in the era immediately prior to 1923, global investors rediscovered the Soviet Union. The convergence of international diplomacy, economic necessity, relative internal Soviet stability, and changed impressions abroad led Lenin to reemphasize foreign investment during this period. This time, the policy would meet with relative success.¹⁴

III. THE 1923 LAW ON CONCESSIONS

A. Conceptions of Concessions

The USSR invited foreign investment by enacting the 1923 Law on Concessions. The Soviet definition of "concession" proved to be a broad one. Initially there were two types of foreign participation, only one necessitating direct investment. The direct investment group was further divided into two subordinate classifications.¹⁵ The first type was the pure concession. This included a specific agreement between a foreign firm and the Soviet government "whereby the foreign firm was enabled to develop and exploit an opportunity within the USSR under the doctrine of

¹⁰ However, a potential international commercial boycott, as comprehensive as the diplomatic isolation the Soviets were experiencing after their victory in the civil war, threatened to forestall NEP. A. ULAM, *supra* note 6, at 148. The 1922 Genoa Conference of the major European powers—"called for the purpose of reconstructing the economy of Europe, a major means for this purpose being a reintegration of Russia into international trade"—was seen as a political coup in Moscow as the Bolshevik government was invited to sit in on the Conference as an equal. *Id.* at 149. Furthermore, emanating from this Conference was the April 16, 1922, Treaty of Rapallo, signed between Germany and the Soviet Union, which established normal and commercial relations between them. The Treaty signalled the USSR's acceptance into the world community and also illustrated their willingness to deal with capitalists and a market economic system. It also provided them with sufficient economic strength to renationalize all internal industry and confidence to allow foreign investment within their borders. *Id.*

¹¹ P. FILENE, *AMERICANS AND THE SOVIET EXPERIMENT 1917-1933* at 112 (1967).

¹² *Id.* Prime examples were the reporters sent to Moscow by *The Magazine of Wall Street* and *Railway Age*.

¹³ *Id.* As the Latvian correspondent of the *American Machinist* reported in 1922, unless United States investors wanted Soviet opportunities to be totally appropriated by others, they should invest immediately.

¹⁴ I V. GSOVSKI, *SOVIET CIVIL LAW* 22 n.69 (1948). The first concession decree of Nov. 23, 1920, produced no results and was deemed a failure.

¹⁵ Mckay, *supra* note 2, at 350-51.

usufruct, i.e. without acquiring property rights.”¹⁶ The Soviet government was entitled to royalty payments and the Western firm was obligated to invest a stipulated sum of capital and introduce the latest technology and equipment.¹⁷

The second type of direct investment participation was a mixed joint stock company in which the ratio of Soviet to foreign contribution was 50:50 (later changed to 51:49, giving the Soviets a majority share), with a Soviet citizen acting as Chairman of the Board and having the deciding vote in resolving partnership conflicts. Profits were to be evenly divided.¹⁸ While the Soviets provided the investment opportunity and locale, the foreigners supplied the capital and managerial skills.¹⁹

Finally, participation not requiring direct investment included technical assistance contracts, which the Soviets considered concessions even though they were not similarly considered in the West.²⁰ Under these contracts, the Soviets made payments to foreign firms to acquire patents, designs, and other technological advances. Since these arrangements did not involve foreign capital investment in the USSR, they will not be considered in this comment.²¹

Due to the very diverse nature of the concessions offered, no fixed rules were established to govern them.²² Given their individualistic nature, concessions were exempted from the Soviet legal order, and therefore, they generally contained deviations from the enacted legislation governing economic relations.²³ These deviations were tolerated by the Soviet government because the concession contract had the force and character of law.²⁴ Nevertheless, concessions had to operate within the Soviet centralized system.²⁵ The digressions from statutory norms were

¹⁶ A. SUTTON, *supra* note 1, at 8.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ McKay, *supra* note 2, at 351.

²⁰ A. SUTTON, *supra* note 1, at 8-9.

²¹ See e.g., Naleszkiewicz, *Technical Assistance of the American Enterprises to the Growth of the Soviet Union, 1929-1933*, 25 *RUSSIAN REV.* 54 (1966). The 1929 contract between Ford Motor Corporation and the Supreme Council of National Economy (V.S.N.H.) of the Union of Soviet Socialist Republic is a prime example of such an agreement.

²² Freund, *Economic Organization, Commercial Regulations and Concessions in the Soviet Union*, 22 *ILL. L. REV.* 852, 877 (1928).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* McKay, *supra* note 2, at 350. See 2 V. GSOVSKI, *SOVIET CIVIL LAW* (1948) at 68. Soviet jurists exempted concessions from the domestic legal order as follows:

For use a concession is a contract of the [S]oviet government with its class enemy—a foreign capitalist—made for the purpose of restoring the productive forces of the country. From the legal point of view, a concession implies an element of exemption from the general regime established by law. A concessionaire is granted rights with regard to the exploitation of the object of

an attempt to encourage Western businessmen into investing in the Soviet Union. While certain inducements were offered, the other basic theme that can be discerned in concession agreements is one of upholding and strengthening the Soviet centralized system.

The Soviet government always made certain that the concessions it granted would fit in properly with the general economic plan.²⁶ The purpose of the concessions apparently was not merely to attract foreign investment, but to attract external capital and resources to build up those industries needed for the domestic economy or those areas slated for an increase in export potential. By maintaining centralized planning and coordination over the granting of concessions, the Soviet economic planners could examine the risk of exposure and foreign dependence to which they were subjected by each joint enterprise.

B. Provisions of Concessions

Concession agreements gave the concessionaire the right of independent management in administrative, financial and technical relations.²⁷ The state thus accorded a certain amount of independence to the firm. However, the concessionaire was required to submit a minutely drafted production program to the state which would specify a defined annual quantity of production and sometimes went as far as attempting to provide a schedule for the entire period of the concession.²⁸ Failure to abide by the plan as fixed in the agreement, for production of output or for usage of the required amount of domestically produced inputs, could lead to the annulment of the contract with the concession being taken back with no indemnification.²⁹ Though the state realized that the concessionaire would not be willing to give up all control over production decisions, and would not reduce production voluntarily, it also noted that a production program would be most desirable given the needs and structure of a planned economy.³⁰ Thus, the apparent grant of independence, and its limitation by a state-imposed program, illustrates the themes of economic expediency and a desire to appease Western investors versus the overriding Soviet goal of centralized planning.

concession (in industries, concessions with regard to the industrial enterprise) which under general law are not granted to private business.

²⁶ Freund, *supra* note 22, at 879.

²⁷ I. BERNSTEIN, *OCHERK KONTSESSIONNOGO PRAVA SSSR* 37 (1929).

²⁸ The required production level was determined initially by contract provisions and, in later years of production, by market conditions, technological progress, and manufacturing capabilities. *Id.* See M. HWANG JEN, *LE REGIME DES CONCESSIONS EN RUSSIE SOVIETIQUE* 43 (1929).

²⁹ A. KRIMMER, *supra* note 9, at 406. Alternatively, the government could demand additional rent payments as a penalty.

³⁰ I. BERNSTEIN, *supra* note 27, at 37.

A dire need for foreign investment was revealed in the stringent capital provisions. The concessionaire was obligated to import a minimum amount of foreign currency which was exchanged for Soviet currency through the State Bank.³¹ In addition, operating capital was to be derived from abroad and not from sources within the USSR, and had to be fully amortized during the life of the concession.³² Thus, to improve its financial position, the USSR required the enterprise to draw on foreign capital and use it fully during the term of operations, and prohibited it from using Soviet resources.³³ Though the foreign partner usually provided the funds, and the Soviets, the business opportunity, the Soviet government occasionally participated in capital formation to encourage concessions, though usually using domestic currency to avoid draining foreign reserves.³⁴ Nevertheless, the Soviets were guaranteed a percentage of the stock of the firm regardless of their capital contribution.³⁵ The competing themes are again visible. Though capital conditions were strict, the mere fact that foreign businessmen were allowed to carry on activities in the USSR, which was otherwise forbidden, was by itself seen as a large grant.³⁶ However, this was balanced by guaranteed Soviet participation in profits having no relation to the capital contribution of the State.

The issue of property rights again echoes the dueling themes of financial attraction and concessionaire independence versus socialist legal precepts. Since land, forests, and water rights could not be privately owned, they were given to the concessionaire on a use-only basis.³⁷ The concessionaire did not have "complete ownership of the factories and buildings, but merely a so-called concession ownership which, however, exclude[d] the right of free disposal and mortgage."³⁸ Control over alienation, supplemented by a condition which forbade the concessionaire from assigning his property rights, remained vested in the state.³⁹ Furthermore, the concessionaire had the duty to install all necessary utilities and infrastructure.⁴⁰ Finally, the Soviets retained the right to collect

³¹ *Id.* at 38; see also M. HWANG JEN, *supra* 28, at 39.

³² Liubimov, *The Soviets and Foreign Concession*, 9 FOREIGN AFF. 95, 102 (Oct. 1930).

³³ *Id.* at 96, 102.

³⁴ A. KRIMMER, *supra* note 9, at 401. For example, the Soviets contributed 50% of the social capital to the Otto Wolf concession. *Id.*

³⁵ *Id.* at n.1. The Soviets justified this pursuant to the May 22, 1922, statute ratified by the Council of People's Commissars.

³⁶ Freund, *supra* note 22, at 877.

³⁷ *Id.* at 878.

³⁸ *Id.*

³⁹ A. KRIMMER, *supra* note 9, at 401.

⁴⁰ JEN, *supra* note 28, at 43.

rent on property, collect insurance benefits on policies paid for by the concessionaire, and regain possession of the buildings and other structures without paying any compensation. This was especially significant since the concessionaire was required to employ all possible technological improvements.⁴¹ While the concessionaire was given production and property rights not given to the ordinary Soviet citizen or other legal entities, these privileges were given only to ensure the most efficient operation of the firm. This guaranteed that the benefits of production, which the Soviets had already slated into their national economic plan, would accrue quickly. Most risk of loss was placed on the foreign partner with financial and technical rewards inuring to the State at the end of the concession.

Concession enterprises had to contend with the state monopoly of foreign trade. However, to facilitate the introduction of new machinery into the Soviet Union, the concessionaire's equipment could be imported duty-free for a limited period—*e.g.*, the Harriman manganese concession, one of the largest investment opportunities offered, received this privilege for four years.⁴² Similarly, concessionaires were permitted to circumvent the state system to import raw materials and semi-manufactured goods if they were unavailable on the Soviet market.⁴³ Furthermore, export-oriented concessions achieved additional exceptions to the trade regime. They were, for example, given greater freedom to sell their product abroad instead of directing their trade to Soviet state organs and industries.⁴⁴

Concessions that directed their production toward internal trade with Soviet industry were by and large subject to the same foreign trade barriers as Soviet citizens.⁴⁵ The Soviets gave more leeway to export-oriented firms because those enterprises earned hard currency. Apparently, the Soviets were more willing to ease their centralized trade structure, and ignore their stated legislation, when hard currency was being brought into the nation. However, by bifurcating concessions into those providing exports and helping their balance of trade and those devoted to clearly subordinate domestic needs, the Soviets were able to apply two sets of rules. This made it easier to achieve their goals of earning hard currency revenues and maintaining as great a degree of control over as many aspects of production as possible.

⁴¹ *Id.* See also A. KRIMMER, *supra* note 9, at 401.

⁴² I. BERNSHTEIN, *supra* note 27, at 42.

⁴³ Liubimov, *supra* note 32, at 97.

⁴⁴ I. BERNSHTEIN, *supra* note 27, at 40-41.

⁴⁵ *Id.* at 42.

C. Taxation Aspects

Provisions in the concession agreements covering taxation were not uniform.⁴⁶ Most accords required only that social security charges be paid.⁴⁷ However, the concessionaire was sometime given the special right to pay a specified sum, in lieu of taxes, which would cover all its annual fiscal obligations.⁴⁸

The tax rate for the profits agreed to in the concession contract varied from 15 to 25% depending upon the amount of imported capital involved.⁴⁹ The tax burden became more onerous when the concession earned excess profits, which were defined as those profits exceeding the amount provided for in the initial agreement.⁵⁰ Such profits were divided between the concessionaire and the Soviet government on an agreed-upon schedule. The Soviet's share increased as the excess profits grew, often exceeding 65%.⁵¹ Therefore, there was a dual tax system, moderate as long as prearranged guidelines were followed, and severe if the Soviets deemed profits exorbitant. This illustrates the desire not to impose an unreasonable fiscal burden on the foreign investor, while maintaining control over the entire price structure in the economy.⁵² Control over price through the excess profits tax was an important consideration in concession agreements.⁵³

D. Other Considerations

In addition to the factors discussed above, the Soviet Union used several other devices to attract foreign capital. One example was labor policy. Though concessionaires in principle had to follow Soviet labor legislation strictly and hire mostly Soviet personnel, exceptions were granted.⁵⁴ To facilitate production, some companies were permitted to hire a certain percentage of foreign specialists and workers despite the existing legislation.⁵⁵ Soviet legal commentators recognized these excep-

⁴⁶ Liubimov, *supra* note 32, at 98.

⁴⁷ A. KRIMMER, *supra* note 9, at 410. However, the Harriman concession did pay additional expenses related to postage, legal, and license taxes. *id.*

⁴⁸ Liubimov, *supra* note 32, at 98.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See I. BERNSHTEIN, *supra* note 27, at 40. Bernshtein discusses price considerations at length in his "Sale of Product" section. Krimmer gives the Otto Wolff concession as an example of a concession which agreed to adhere to the price set by the state. A. KRIMMER, *supra* note 9, at 407.

⁵⁴ See generally M. DEWAR, *LABOUR POLICY IN THE USSR 1917-1928* (1956); G. PRICE, *LABOR PROTECTION IN SOVIET RUSSIA* (1928).

⁵⁵ PRICE, *supra* note 54.

tions but stated that the concession agreements permitted only 15 to 20% of the firm's work force to be foreign.⁵⁶ However, the Lena Goldfields concession, arguably the largest and most important one granted, was allowed to bring up to 50% of its skilled workers and 15% of its unskilled labor from abroad.⁵⁷ More dramatically, the Harriman concession was allowed to circumvent the requirement of dealing through a trade union and, after a 1927 strike, to gain control over its employment until its liquidation.⁵⁸ Though the Soviets viewed the concession as a useful employment-creating device, they recognized the need to bring in specialists from other countries to facilitate production and to teach Soviet workers new techniques. The official pronouncements and the individual concession agreements again show the collision of economic necessity and early socialist theory.

The Soviet government also created a special form of dispute resolution for concessionaires. Ad hoc arbitration commissions rather than official state courts were used for dispute resolution.⁵⁹ Settlement of disagreements could be tailored to each enterprise, since the parties could pick arbitrators familiar with the firm, its operations, and its contract with the Soviet state. Furthermore, beginning in 1925, concessionaires gained the right to name foreign arbitrators if so stipulated in the original agreement.⁶⁰ These provisions eased foreigners' fears about being subjected to a new and unfamiliar court system and gave them a more active role in the process by allowing them to participate in arbiter selection.

Further easing foreigners' suspicions was that the USSR guaranteed that the properties of the enterprise would not be subjected to nationalization, requisition, or confiscation.⁶¹ Protection of property was important to concessionaires, but safeguarding its value was also in the Soviet government's interest as the firm reverted to the state at the end of the concession period, with no remuneration for the enterprise, concurrent with payments that had been deducted by the firm for depreciation.⁶²

IV. THE END OF CONCESSIONS

Despite taking these elaborate contract measures, by 1932 the period to negotiate concessions had closed.⁶³ According to both Marxist

⁵⁶ Liubimov, *supra* note 32, at 103.

⁵⁷ A. KRIMMER, *supra* note 9, at 409.

⁵⁸ *Id.* at 410.

⁵⁹ *Id.* at 412.

⁶⁰ *Id.*

⁶¹ S. BRON, *SOVIET ECONOMIC DEVELOPMENT AND AMERICAN BUSINESS* 139 (1930).

⁶² A. KRIMMER, *supra* note 9, at 414.

⁶³ V. GSOVSKI, *supra* note 25, at 68.

and non-Marxist writers, concessions were regarded as a negligible factor in early Soviet economic development.⁶⁴ There have been many suggestions about why the policy failed, including prohibitive currency provisions and the inefficiency of the concession as a vehicle for currency and technology transfer.⁶⁵ Other possibilities are the international effects of the Great Depression and the subsequent collapse of international trade and currency movements.⁶⁶ Similarly, Stalin's consolidation of power, and the ensuing purges and policy of autarky, should not be ignored.⁶⁷

The concession policy was viewed as an experiment in the international arena and apparently was used by the Soviets—not as a long-term policy, but as a gap-filling measure intended to insure the success of the new Soviet state by enlarging its capital flows. Soviet legislation was not amended to deal with the concessions; rather, it viewed them as a temporary anomaly.

V. THE CURRENT ECONOMIC SITUATION

Reconstructing the Soviet economy to achieve greater efficiency in production, to introduce new management strategies, and to increase the quality, quantity, and variety of offered goods has been Mikhail Gorbachev's main domestic policy objective.⁶⁸ The quality of industrial and consumer goods is not merely an internal problem but is also an issue in foreign trade. The USSR relies heavily on imports to obtain the high technology it is unable to produce domestically.⁶⁹ In an effort to obtain this modern equipment, improve its domestic economy, and make its exports more competitive on the world market, the Soviet Union recently passed legislation allowing joint ventures and direct foreign investment in the Soviet Union.⁷⁰

The desire to diversify exports stems from the Soviet Union's need for additional sources of hard currency. Traditionally, the USSR has relied on exporting raw materials to obtain currency, but recent events have proven this to be inefficient. For example, until recently the USSR obtained two-thirds of its foreign currency from oil exports.⁷¹ The de-

⁶⁴ A. SUTTON, *supra* note 1, at 11.

⁶⁵ *Id.* at 10-11.

⁶⁶ See Naleszkiewicz, *supra* note 21, at 72-73.

⁶⁷ *Id.*

⁶⁸ See M. GOLDMAN, GORBACHEV'S CHALLENGE (1987); N.Y. Times, July 19, 1987 (Magazine) at 28; Report by M.S. Gorbachev General Secretary of the Communist Party of the Soviet Union of the Plenary Session of the CPSU Central Committee on June 15, 1987, 39 CURRENT DIG. SOVIET PRESS, July 28, 1987, at 3.

⁶⁹ See M. GOLDMAN, *supra* note 68, at 118-47.

⁷⁰ Pravda, Jan. 27, 1987, at 1, col. 1 (Eng. ed.) [hereinafter Pravda].

⁷¹ *Venturing Jointly into the Russian Unknown*, ECONOMIST, June 6-12, 1987, at 67.

cline in oil prices, the diminishing Soviet oil supplies, and the fact that newer supplies are located in the remote, infrastructure-poor areas of Siberia⁷² have forced Soviet policymakers to try to increase the small share of manufactured goods in their hard currency exports.⁷³

VI. HISTORIC SIMILARITY OF THE NEP AND Perestroika

The economic liberalization, *perestroika*, presently occurring in the Soviet Union is strikingly similar to the policies of the New Economic Policy of the 1920s. Both encouraged decentralization, opened the USSR to greater market influences, and are the only two periods in Soviet history in which direct foreign investment in the USSR was permitted.⁷⁴

The similarities do not end with economic considerations. As with the USSR's reentry into the European-sponsored (free-market) economic community at Genoa in 1922, so today the Soviet Union has shown a greater willingness to cooperate with global market forces.⁷⁵ It has allowed its socialist allies to deal with West European created economic communities and has softened its own view toward the General Agreement on Tariffs and Trade ("GATT").⁷⁶ Greater trust toward Western market forces has thus been building over the past few years.

Similar economic needs and political considerations have preceded the introduction of legislation allowing direct foreign investment in the Soviet Union. In drafting the concession contracts of the 1920s and the present statute, the Soviet Union has sought to address analogous situa-

⁷² *Id.*

⁷³ Currently, the Soviet Union earns less than 4% of their hard currency through the export of manufactured goods. *Id.*

⁷⁴ See A. NOVE, AN ECONOMIC HISTORY OF THE USSR (1987); *Individual Enterprise: Opportunities and Obligations*, 39 CURRENT DIG. SOVIET PRESS, June 3, 1987, at 7 [hereinafter *Individual Enterprise*]; *In the USSR Council of Ministers*, 39 CURRENT DIG. SOVIET PRESS, Mar. 11, 1987, at 15; *So That Everyone Will Benefit*, 39 CURRENT DIG. SOVIET PRESS, Apr. 29, 1987, at 15 [hereinafter *Everyone Will Benefit*]. The NEP rescinded state ownership of all industries except those at the "commanding heights" of the economy; A ULAM, *supra* note 6, at 127; and *perestroika* has given individuals the right to go into business to manufacture certain types of consumer goods and perform certain specialized services. *Individual Enterprise, supra, Council of Ministers, supra.* Under-scoring this historical parallel, V.M. Kamentsev, Vice-Chairman of the USSR Council of Ministers, has noted that the present joint venture program is "consistent" with the concept of the commercial concessions of the 1920s. *Everyone Will Benefit, supra.*

⁷⁵ N.Y. Times, July 19, 1987, § 3, at 1, col. 2.

⁷⁶ See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]; Kennedy, *The Accession of the Soviet Union to GATT* 21 J. WORLD TRADE L. 23 (1987). The Soviets have applied for permission to participate in the latest round of international trade negotiations known as the Uruguay Round. Their membership was denied, largely due to reaction from the United States. N.Y. Times, Jan. 21, 1988, § 4, at 2, col. 3.

tions, and it is likely that the same themes that ran through the concession agreements will run through the 1987 "proposed" law. Since "[t]he stipulations of the concession agreement[s] were interpreted very strictly,"⁷⁷ and many provisions were problematic to foreign concerns, it would be useful to analyze the current legislation to identify ambiguities that could lead to contract failure with undesirable results for the foreign investor and, ultimately, the Soviet Union.

Two documents—entitled "On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies" and "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"—have put forth the legal framework for foreign joint ventures in the Soviet Union.⁷⁸ While these guidelines are not formal law in the Western sense, nonetheless they have been extensively cited and referred to in the Soviet press.⁷⁹ These general edicts include elements of a Soviet pragmatic approach to trade with capitalist societies along with traditional socialist themes and goals. Thus, in examining them, special attention should be given to underlying Soviet policies and areas of concern for the foreign participant.

VII. THE NEW SOVIET JOINT VENTURE GUIDELINES

A. The Edict's Introductory Remarks

Joint enterprises are to be designed to "more fully satisfy the country's demand for certain types of industrial goods . . . to bring advance foreign equipment and methods . . . and financial resources into the USSR economy, to develop the country's export base and to reduce inefficient imports."⁸⁰ From the introduction of the guidelines it is apparent that perhaps the greatest hurdle the future partners will have to overcome is that of divergent expectations. While capitalist firms no doubt seek access to the large, untapped Soviet market, the Soviets have articulated that their primary focus will be export diversification and the attraction of foreign capital and technology. In short, while Western firms seek to tie the USSR to the global system of exchange of goods and services, the Soviets view joint ventures as a means of ensuring more rapid

⁷⁷ Freund, *supra* note 22, at 877.

⁷⁸ Pravda, *supra* note 70; Legal Times, Mar. 2, 1987, at 12, col. 1.

⁷⁹ Legal Times, *supra* note 78; NEW TIMES, Dec. 22, 1986, at 15; NEW TIMES, Feb. 16, 1987, at 16.

⁸⁰ 1987 FOREIGN TRADE No. 5 (supplement) at 16 (Eng. ed.).

modernization and perhaps more stable self-sufficiency. It is against this background that the major provisions of the guidelines must be considered. Pragmatic considerations are included to attract Western investment, while other clauses are designed to uphold and strengthen the Soviet system.

B. Legal Status of Joint Ventures

The guidelines consider joint ventures to be legal entities under Soviet law. They can sue and be sued, acquire property rights, and enter contractual arrangements.⁸¹ The Soviet state and partners in the joint enterprise are not accountable for the obligations of these organizations.⁸² Conversely, the joint venture is not responsible for the obligations of the Soviet party. The enterprise operates as an independent economic entity and is completely self-financing.⁸³

C. Capital Formation and Valuation of Inputs

Funding the operations of the joint enterprise is then left to the partners alone—both Soviet and foreign. This is achieved by establishing a capital fund, the size of which is stated in the required state charter.⁸⁴ Contributions to the fund are not limited to currency alone and may include buildings, equipment, facilities, and other material assets as well as the rights to use land, water, and other natural resources and property rights (including inventions and technology).⁸⁵ These contributions are to be converted into rubles according to the rate set by the USSR State Bank and valued against world market prices for non-currency inputs, or set by agreement of the parties.

There are a number of valuation problems implicit in this financing section of the legal outline. Given that the joint enterprise is in Soviet territory, the Soviet partner will probably contribute mineral and property rights, while the Western party will probably contribute either currency or intellectual property. Often, neither party agreement nor world market prices are adequate mechanisms to value a plot of unique land in the Soviet Union. Foreign investors in East European joint ventures have noted a tendency to overvalue the real estate contributed by domestic parties, since an objective standard is difficult to ascertain.⁸⁶ There is

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Buzescu, *Joint Ventures in Eastern Europe*, 32 AM. J. COMP. L. 407, 424 (1984).

no reason to expect the situation in the Soviet Union will be different. Water and mineral rights may be susceptible to the same type of overvaluation because it is the domestic party, as in the real property context, who may argue about their unique qualities.

Perhaps most troublesome is the contribution of intellectual property where no standard for price analysis may exist. While there is a growing amount of trade involving intellectual property, there is inadequate protection of this key trade component.⁸⁷ Should the invention be valued on the basis of the amount of time and resources necessary to duplicate the effort in the non-contributing partner's economy? If high technology is involved, no price may be adequate, as no replication effort in the non-donating partner's economy is possible. Furthermore, if non-identical substitutes exist in the two countries, should their value be used as a basis of comparison? The Soviets have stated that party agreement is one method of evaluating inputs. The East Europeans (who have already been experimenting with joint ventures and whose socialist method of production provides for a useful analogy to the Soviet experiment) advocate either establishing strict evaluative criteria, basing valuation on the international market standard, or having standards established by an expert outsider. However, these methods have been deemed unsatisfactory.⁸⁸

Establishing meaningful criteria may lead to extensive and hotly contested negotiating and may destroy the joint venture agreement. The international market may be unable to value technology precisely. The accuracy of an outside expert's valuation will depend on the accuracy of the ruble-dollar exchange rate, since the valuation will most likely be based on the prices of the "good's" country of origin.⁸⁹ Lastly, the USSR has not enacted other legislation, such as new patent and copyright laws, illustrating that it may be unaware of or unconcerned about such difficulties.⁹⁰

⁸⁷ Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 INT'L LAW. 627 (Summer 1987).

⁸⁸ Buzescu, *supra* note 86, at 423-24.

⁸⁹ *Id.* at 424.

⁹⁰ Dam, *supra* note 87, at 635. For example, in response to similar problems, China has recently enacted a new patent law. Regulations for the Implementation of the Patent Law of the PRC (Regulation 850119), reprinted in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1987). See also Chang, *New Patent Law of the People's Republic of China*, 25 PAT. L. ANN. 3-1, 3-29 (1988). A new copyright law is also being considered. The Chinese government established a State Copyright Bureau in 1985, and said it would be "not long" before a copyright law would be formulated. Shoukang, *Some Opinions on Copyright in the People's Republic of China*, 1 J. OF CHINESE L. 63, (1987).

D. Property Rights, Insurance, and Assignment

Property rights sections of the guidelines echo the themes of attracting foreign capital and maintaining control over the economy. The property of the joint venture is protected in accordance with Soviet law, though additional assurance is given to the foreign partner that the assets of the enterprise are not subject to administrative requisition or confiscation.⁹¹ This reflects the Soviet desire to placate fears of nationalization. Insurance and assignment aspects reflect a more traditional Soviet desire to keep the joint venture integrated with the USSR's economic system. The assets of the joint enterprise must be insured by USSR insurance organizations.⁹² This serves two purposes. It enables the Soviets to earn additional hard currency by promoting joint ventures, and it provides additional liquidity in the internal Soviet insurance market.

Further tying the firm to the Soviet economy are the transfer rights of the partners.⁹³ Though each partner has the right to transfer all or part of his share to a third party upon mutual agreement, transfer can occur only with the permission of the state foreign commission of the USSR Council of Ministers—the highest state institution. Even after approval is obtained, the Soviet partner or partners have a preferential right to acquire the shares of the foreign participant.⁹⁴ The Soviet government thus has a preemptive right to approve and monitor new foreign investors or totally internalize the firm's operations. This is clearly a risk-management provision, as the Soviets desire to maintain as much supervision over the enterprise as possible.

E. Management

The original decree insuring the USSR's control of the firm is the provision that the Soviet side have a 51% share of the joint venture for the Soviet participant.⁹⁵ Recently, however, the restriction limiting foreign partners' contribution to 49% has been lifted by changes decreed in the joint venture law by the Council of Ministers. Presently, the two partners may decide on the level of participation between themselves.⁹⁶ The present move toward flexibility is not only limited to a foreign partner's participation level, but is noted in other sections of the legislation.

⁹¹ FOREIGN TRADE, *supra* note 80, at 17.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 16.

⁹⁶ *A Toast—or Roast—for Reform?*, TIME, Nov. 7, 1988, at 40; Chicago Tribune, Nov. 15, 1988, § 3, at 6, col. 5; *Russia's Hard Sell*, THE ECONOMIST, Dec. 24, 1988-Jan. 6, 1989, at 81; XVII BUS. E. EUR., Dec. 19, 1988, at 403.

As part of an overall restructuring of the economy and a move toward a more open society, the Soviet Union amended the guidelines to allow greater foreign participation in the economy, especially if economic efficiency results.

This new flexibility is further illustrated in the rules of management. Originally, although the administrative board, the governing body of the enterprise, was to consist of citizens of both participating countries, the chairman of the administrative board and the general director of the association were required to be citizens of the Soviet Union.⁹⁷ Since the board makes policy for the firm, the Western partner's role was not adequately safeguarded, as the Soviets provided for supervisory power in both management structures of the enterprise. Policy and daily business decisions might have reflected a Soviet bias, given the heads of management were Soviet nationals. When coupled with the original requirement that the Soviet partner maintain a 51% share in the operation, the Western partner was clearly a junior participant.⁹⁸

A recent amendment to the initial joint venture rules has improved the situation for Western investors. Where originally the control of the venture was to remain firmly in Soviet hands, now a foreigner may become the manager of the enterprise.⁹⁹ A Western partner may negotiate for a majority share of the enterprise, and may place a Western manager into the firm's administration. Together, this would make the operation a foreign-controlled entity. This is something the Soviet authorities may not have envisioned when they altered specific provisions of the original decree. Nevertheless, the Soviet authorities not only make specific concessions when they change a joint venture provision, but in fact seem to alter the entire joint venture regime. However, as one Western negotiator noted, even Soviet partners have never seen a complete copy of the relevant legislation.¹⁰⁰ Therefore, it is difficult to establish exactly where a "manager" fits into the administrative ladder of the joint venture, given that the original legislation provides only for a chairman and a general director.

F. Trade Matters

The competing themes of enterprise independence and Soviet con-

⁹⁷ The members of the administrative board are appointed by both the partners and the directorate. The directorate is the organ supervising the day-to-day functions of the firm and appointed by the board. XVII BUS. E. EVR., *supra* note 96, at 17.

⁹⁸ See text accompanying note 95.

⁹⁹ XVII BUS. E. EUR., *supra* note 96, at 403.

¹⁰⁰ XVII BUS. E. EUR., Aug. 15, 1988, at 257.

trol are apparent in the foreign trade field. A joint enterprise has the right independently to export and import items necessary for its "management operations."¹⁰¹ This is a concession by the Soviets, as Soviet firms must ordinarily operate through the Soviet bureaucracy to have access to the world market.¹⁰² However, this concession is limited because the proposed legislation provides that "import and export of goods and other assets of the joint enterprise is done on the basis of permission granted according to procedures established by USSR law."¹⁰³ The definition of "management operations" is not covered in the text. Therefore, it is difficult to determine when external trade is handled directly by the enterprise or through the state. No doubt each partner will have a different notion of how much trade independence actually exists since each will view "management operations" differently. The Soviet partner may have a vested interest in state controlled trade while the Western entrepreneur will strive for as much trade discretion as possible.

G. Supply and Transportation

Deliveries to the joint venture of "equipment, raw and other materials, components, fuel, energy and other produce shall be affected through Soviet trade organizations."¹⁰⁴ The delivery system upon which the trade organizations rest is fraught with delays, and merchandise is often of poor quality when delivered.¹⁰⁵ It will be difficult for a Western profit-seeking firm to adapt to this system given its different business norms and the assumption that the quality of inputs will be at world standards. Furthermore, the guidelines provide that these joint ventures have a priority in the distribution network.¹⁰⁶ Since the joint enterprises are not part of the national economic plan, as USSR state agencies do not give them obligatory planned quotas, how the supply system will handle orders placed by these new creations remains unexplained. Finally, shipments produced by the joint association are to be completed by the already overburdened Soviet transportation system.¹⁰⁷

¹⁰¹ Pravda, Jan. 27, 1987, at 2, col. 7 (Eng. ed.).

¹⁰² Hewett, *Foreign Economic Relations*, in *THE SOVIET ECONOMY: TOWARD THE YEAR 2000* at 269 (A. Bergson & H. Levine eds. 1983). Access to world markets is granted through the ministry, under which the joint ventures operate, and the ministry's foreign trade organization, which studies foreign markets and evaluates the firm's trade request.

¹⁰³ Pravda, *supra* note 101, at 2 col. 7.

¹⁰⁴ FOREIGN TRADE, *supra* note 80, at 17.

¹⁰⁵ *Reforming the Soviet Economy*, BUS. WEEK, Dec. 7, 1987, at 76, 78.

¹⁰⁶ Pravda, *supra* note 70, at 2, col. 3.

¹⁰⁷ See *SOVIET AND EAST EUROPEAN TRANSPORT PROBLEMS* (J. Ambler Denis, J. Shaw & L. Symons eds. 1985); H. HUNTER, *SOVIET TRANSPORT EXPERIENCE: ITS LESSONS FOR OTHER COUNTRIES* (1968).

H. Profits and Financial Affairs

Matters relating directly to profits, interest, and accounting most vividly demonstrate the divergent expectations of the parties. Profits are taxed at the rate of 30%.¹⁰⁸ Soviet law also provides that a reserve fund shall be set up with deductions from profits.¹⁰⁹ The fund continues to grow until it reaches an amount equal to 25% of the enterprise's capital fund. The required amount of annual payments is to be set out in the charter.¹¹⁰ Presumably, losses incurred will be deducted from the fund. The deductions are an important consideration when determining net income to tax since the guidelines do not state whether the firm's receipts will be taxed before or after the money is set aside, and this ultimately affects the amount of tax that will be paid.

A joint venture's assets are either put into a ruble or foreign currency account in the USSR State Bank or the USSR Foreign Trade Bank.¹¹¹ While the legislation appears to be specific as to interest rate provisions, closer examination shows that it is incomplete. Interest on foreign currency accounts will be paid according to the exchange rate on the world market and on ruble accounts according to USSR State Bank guidelines.¹¹² It seems that the Soviets are setting interest on a fixed schedule as they set the exchange rate to the ruble. As for ruble accounts, interest payments would be lower than a Western partner normally receives. Thus, the enterprise will not earn rates commensurate with Western banks, which may affect their profitability.

Foreign partners are explicitly guaranteed that their share of the profits will be converted into foreign currency at the border.¹¹³ This clause attempts to assure foreign participants that the Soviet government will not circumvent its promise not to requisition investments. However, the overriding need by the Soviets for foreign currency again is evident in the provision which subjects most repatriated profits to an additional 20% tax.¹¹⁴ It seems that a penalty is being levied against the foreign partner and this provision gives incentive to reinvest profits back in the Soviet Union—clearly in line with the introduction of the legislation “to develop the country's export base and economy.”¹¹⁵

While the Soviet government is using tax policy to prevent repatria-

¹⁰⁸ FOREIGN TRADE, *supra* note 80, at 18.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Pravda, *supra* note 101, at 2 col. 8.

¹¹² *Id.*

¹¹³ Pravda, Jan. 27, 1987, at 2, col. 1 (Eng. ed.).

¹¹⁴ FOREIGN TRADE, *supra* note 80, at 17.

¹¹⁵ *Id.* at 16.

tion of profits, it is also using tax incentives to encourage the initial Western investment. These incentives, having recently been amended, however, once again show that pragmatic concerns are being strengthened within the legislation on a piecemeal basis. When coupled with the other alterations in the decree, it appears that the original joint venture regime is being changed. Joint enterprises were exempt from taxes on their profits for the first two years of operation. Furthermore, the USSR Ministry of Finance could, at its discretion, reduce the tax rate or completely exempt individual payers from taxation in subsequent years.¹¹⁶ While encouraging on their face, these initial provisions did not compare favorably with other centrally planned economies offering joint venture opportunities. For example, China grants tax holidays for two years starting with the initial profit-making year (which may not be the same as the first year of production), followed by a 50% cut for the next three years.¹¹⁷ However, the East European states have had tax rates commensurate with the Soviet Union's original rules.¹¹⁸ China has recognized that the joint ventures in Eastern Europe have met with limited success and that tax incentives may be a way to stimulate Western interest and investment.¹¹⁹

Perhaps in response to the difficulties encountered by the East European experience and China's relative success, the October amendments in the USSR's legislation now permit the two-year tax holiday to begin from the time the joint venture shows a profit.¹²⁰ Additionally, joint ventures located in the Soviet Far East receive even more favorable treatment. Taxes are waived for the first three years after profits are achieved, and the Ministry of Finance is instructed to reduce the tax level to 10% once the initial grace period has expired.¹²¹

I. Other Considerations

The original guidelines provided that Soviet citizens are to comprise the bulk of personnel of a joint venture.¹²² In addition, the joint venture must pay state budget deductions for state social insurance for Soviet as

¹¹⁶ Pravda, *supra* note 113.

¹¹⁷ Legal Times, *supra* note 78, at 13 col.2.

¹¹⁸ Buzescu, *supra* note 86, at 432. Romania has a tax rate of 30 percent computed on the joint venture's profits before distribution. In Hungary there is a 40 percent tax on profit minus amounts paid for risk and incentive funds—but if the profits are reinvested within the country, the Ministry of Finance may approve partial disbursements.

¹¹⁹ *Id.* at 442.

¹²⁰ Note, *supra* note *, at 142.

¹²¹ XVII BUS. E. EUR. *supra* note 96, at 403.

¹²² FOREIGN TRADE, *supra* note 80, at 17.

well as foreign workers.¹²³ Soviet citizens will probably be the only beneficiaries of state social insurance, and no provision is made for repayment of these deductions should foreign workers not use them. Last, while the Soviet system benefits from new methods of production and worker training—at least worker training under a profit maximizing firm—the enterprise is required to reach agreement with a Soviet trade union. The union could prove to be difficult to contend with, since it will apply Soviet legislation—except for salary, holiday, and pension matters—to all workers, regardless of citizenry.¹²⁴ Liberalizing amendments to the joint venture regime have again been implemented. The joint venture is no longer obligated to consult with the trade union in matters of hiring, firing, and ruble incentive payments for local workers.¹²⁵ The implicit theme of attracting foreign capital appears to have gained strength.

The edict implies that joint enterprise partners are encouraged to solve disputes between themselves, and explicit mention of dispute proceedings is made in the edict. Any dispute involving the enterprise's operations is to be examined "according to the legislation of the USSR either by USSR courts or by common consent of both sides, by an arbitration tribunal."¹²⁶ Soviet law naturally embodies socialist principles, including socialist economic principles and the state ownership of production, and therefore is ill-suited for foreign partners whose frame of reference is free-market economics. For example, the price of deliveries of production materials from Soviet industries must be set with reference to world market prices, yet this may prove problematic given Soviet price theory.¹²⁷

Finally, procedures for liquidation are to be outlined in the charter documents.¹²⁸ Most problematic of any provision, though, is that the USSR Council of Ministers can force liquidation if the joint venture's operations are not in accord with the goals of the charter documents,¹²⁹ in effect granting the state with the ultimate power of determining whether, on the basis of subjective considerations, the joint enterprise will continue to function. A partner is entitled to a return of its contribution for the remaining value at the time of liquidation.¹³⁰ This could

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ XVII BUS. E. EUR. *supra* note 96, at 403.

¹²⁶ *Id.* at 17.

¹²⁷ *See id.* Soviet price theory does not account for opportunity cost and marketing clearing criteria. Kaser, *Economic Policy in SOVIET POLICY, FOR THE 1980s* at 196 (A. Brown & M. Kaser eds. 1982).

¹²⁸ Kaser, *supra* note 127, at 19.

¹²⁹ *Id.*

¹³⁰ *Id.*

encourage strategic behavior by the state should it be able to gain a wind-fall by the liquidation of a firm when, for example, the value of the enterprise will rise shortly after its operations are terminated—though given political and long-term economic pressures this is highly unlikely.

VIII. COMPARISON OF THE 1920S AND THE 1980S

Both the 1920s concession agreements and the current law reveal the same concerns of attracting foreign exchange and encouraging economic development while upholding socialist principles of centralization. Both the 1920s ad hoc principles and the current guidelines attempt to balance these concerns, although they often collide.

There are many similarities between the 1920s joint venture rules and the 1980s guidelines. The 1980s guidelines continue to incorporate not only the inducements proffered in the earlier period, but, more noticeably, the continuing (albeit reduced) desire to tie the joint venture to the Soviet centralized structure. Inducements were used to encourage entrepreneurial investment. Limited exceptions to the state monopolization of foreign trade have been offered under both regimes. Under the concession contracts, export-oriented concessions were permitted freer access to foreign purchasers, while the present guidelines allow circumvention of the system for imports related to the management operations of the firm.¹³¹ Similarly, customs duties—for imports of equipment and materials used by the foreign partner as contribution to the joint venture's authorized fund—were forgiven in both periods.¹³² Last, ad hoc arbitration of disputes was encouraged, allowing circumvention of the state court system.

Other similarities reflect the continuing Soviet theme of tying these enterprises to the state economic system. Management bodies of joint ventures, now as then, are largely headed by Soviet citizens, with only the recent amendments changing the requirement that the Soviet partner own a majority interest in the firm. In addition, clauses on labor policy in both situations require Soviet legislation to apply. Finally, and most dramatically, though administrative confiscation was expressly prohibited by the state in the 1920s, the same result of termination could be reached by forced liquidation if the concession failed to abide by its production schedule. Currently, the same result is assured by the Council of Minister's right to end the joint venture should the firm not follow the

¹³¹ See *supra* note 44 and 116 and accompanying text.

¹³² See *supra* notes 50-51 and 108 and accompanying text.

goals laid out in the state charter. The state has never conceded its ultimate power of review.

However, the differences between the Law of Concessions and the 1980s guidelines seem much more significant than their similarities. The most prominent difference between the two periods is the place of direct investment in Soviet law. Under the concession agreements, contracts had the character of legislation and were exempt from the general legal order. In effect, the concession operated outside the general economic system, though often subservient to it. The present legislation is part of an overall restructuring of the Soviet economic system and therefore operates within a new socialist legal order. This total restructuring seems to entail a sense of permanence that the earlier arrangements lacked. Furthermore, where each concession contract had varying terms, the present proposed legislation includes uniform standards and will lend coherency the earlier situation did not have. All investors will now theoretically be subject to the same rules. This new policy does not seem to be a gap-filling one.

While the new amendments to the joint venture decree have created some degree of change, they still differ fundamentally from the varying provisions of the concession contracts. The amendments will be uniformly applied to all joint ventures in the USSR or, in the case of certain tax incentives, to all enterprises in a particular region. However, it remains unclear whether joint ventures formed prior to the amendments will continue to be subject to the earlier provisions of the decree.¹³³ The Soviet authorities are not creating many rules to respond to the needs of particular firms as they appeared to do in the 1920s, but rather are changing the rules to meet the demands of their economy as a whole. While the amendments do sacrifice a degree of uniformity, the Soviets are still legislating prospectively.

Other differences perhaps reflect a better Soviet understanding of market economic principles. The Soviets now encourage joint ventures to be profit maximizers. While concession contracts imposed an increasingly stringent tax on greater-than-expected profits, the new decree does not hinder profits with restrictive tax provisions—providing a uniform rate for all profits (except for profits generated in regions, like the Soviet Far East, slated for expedited economic development).¹³⁴

In addition, the Soviet government protects the foreign partner's investment by returning its contribution for the residual value at liquidation, instead of merely confiscating all buildings and fixtures when a

¹³³ See *supra* notes 61-62 and 130 and accompanying text.

¹³⁴ See *supra* notes 50-52 and 120-21 and accompanying text.

concession ends. This acknowledges that joint production is not simply joint exploitation of an industrial opportunity whose effects end when the concession terminates. Rather, joint production leaves behind infrastructure or technology which will continue to benefit the Soviet economy even after the foreign partner leaves.¹³⁵ Thus, since foreign resources have continuing beneficial effects, these should be compensated. Lastly, some elements of inflexibility have been removed in the new law. Both a pre-arranged production schedule and a hard currency importation requirement are no longer required. This reflects better Soviet understanding of supply and demand pressures and the need to give concessionaires some financial independence.

The role of the joint venture amendments represents the different relative strengths of the competing themes within the concession decree and the present guidelines. Under the rules of the 1920s, control over the direction of the economy seemed more important to Soviet economic planners than attraction of foreign capital. This was most clearly expressed in the provision taxing excess profits strictly, which would allow Soviet authorities to regulate their internal price structure.¹³⁶ Presently, the continued liberalization of foreign investment rules indicates that the theme of attracting hard currency is strengthened. This may be explained by the fact that the present decree is but one portion of an overriding restructuring of Soviet economic and social life. The entire Soviet system is presently involved, while formerly the concession contracts were the exception to the established legislation and as such they attempted to comply with the existing structure without constantly coming into conflict with it. In short, the current joint venture amendments represent, on a small scale, the revolutionary changes occurring within the Soviet economy as a whole.

The same themes run through both eras with the same intended goals—providing enough firm independence to lure foreign investment, while assuring Soviet control over the enterprise with effective integration of it into the centralized Soviet economy. Today, however, the foreign partner has all the benefits previously given, combined with new elements of flexibility in the present edict and its amendments. Over a period of approximately sixty-five years, the USSR has become increasingly, yet cautiously, pragmatic.

¹³⁵ See *supra* notes 43-44 and 101-102 and accompanying text.

¹³⁶ See I. BERNSHTEIN, *supra* note 27; FOREIGN TRADE, *supra* note 80, at 17. The recent amendments to the joint venture decree have liberalized customs matters to an even greater degree. Products brought into the Soviet Union for the production needs of the joint venture enterprise will either receive custom-free duty treatment or have their duties eased. XVII BUS. E. EUROPE, Dec. 19, 1988, at 403.

IX. CONCLUSION

Initial response to the opportunity presented has been favorable. At the end of November 1988, 139 joint ventures had been registered with another 500 reported to be under negotiation.¹³⁷ The first United States industrial stake in the USSR, undertaken by Combustion Engineering Incorporated, has already been implemented.¹³⁸ Other United States companies—including Pepsico, Occidental Petroleum, Monsanto, SSMC, Honeywell, Dresser Industries, and Cummins Engine—are presently in the negotiations stage.¹³⁹ Additionally, Eastman Kodak, RJR Nabisco, Ford Motors, Archer Daniels Midland, Johnson & Johnson, Chevron, and the Mercator Corporation have formed the American Trade Consortium to strengthen the firms' negotiating positions.¹⁴⁰ However, creativity in adapting the Soviet provisions to Western needs seems to be the key to a successful agreement. For example, Combustion Engineering, which is to upgrade Soviet industrial plants, will receive payments mostly in gasoline and diesel fuel. This serves as an easy way to get dollar profits back home while avoiding the tax on hard currency profits taken abroad and escaping the Soviet conversion fee.¹⁴¹ This option is available since gasoline itself is highly convertible (a fungible good) and can be sold on the world market once outside the Soviet Union for hard currency.

As it did in the 1920s, the Soviet Union is struggling today to balance the need to attract Western investors with the need to maintain control over its planned economy. However, while there are still formidable barriers to investment in the USSR, the Soviets are being pragmatic. They have developed a system that is acceptable to them and which may be acceptable to those in the West who can understand what is expected from them and who can learn to operate under its terms.

The prospects for success may ultimately rely on the politics of economic reform within the Soviet Union. Should the reforms meet resistance from the industrial bureaucracy, joint ventures may be adversely affected.¹⁴² However, since the concept of joint ventures seems much more deeply ingrained in Soviet law today than it was in the 1920s, it is

¹³⁷ XVII BUS. E. EUR., Jan. 2, 1989, at 4.

¹³⁸ *The Twain are Meeting and Cutting Deals*, BUS. WEEK Dec. 7, 1987, at 88. However, the company has had difficulty in obtaining an adequate building for its headquarters. *Joint Misadventures*, TIME, Apr. 10, 1989, at 84.

¹³⁹ *Id.*

¹⁴⁰ XVII BUS. E. EUR., May 9, 1988, at 150.

¹⁴¹ *Id.*

¹⁴² *Meet the Press* (NBC television broadcast, Oct. 2, 1988).

much more probable that Western investors will find Soviet joint ventures beneficial.

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