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Socialist Economies Reform

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Romania's Evolving Legal Framework for Private Sector Development

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Romania started almost from scratch in 1990 to build a legal framework for a market economy and has made substantial progress. To bring that framework to life, institutions must enforce the laws and be able to resolve any disputes that arise, the public must accept that the laws are binding, and the laws must be filled in with detailed regulations and individual case practice. This takes time.

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This paper — a product of the Socialist Economies Reform Unit, Country Economics Department, and the Europe and Central Asia Division, Legal Department — is part of a larger effort in the Bank to understand the process of legal reform in transitional economies. Copies are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact CECSE, room N6-035, extension 37188 (March 1992, 27 pages).

As the economies of Central and Eastern Europe move from central planning and state ownership to market-driven development of private sector activity, they are undertaking comprehensive change in the "rules of the game" — the legal framework for economic activity.

At a minimum, markets require a system of property rights and rules for exchanging those rights. In practice, property rights in most countries are defined by the constitution and by-laws regulating the ownership and use of real, personal, and intangible property, as well as shares in going concerns. Company, foreign investment, and bankruptcy laws, among others, govern entry into and exit from productive activities. General rules of market exchange are laid out in contract and competition law, while more specific rules of market exchange in particular sectors may be governed by more detailed sector-specific laws and regulations.

Gray, Hanson, and Ianachkov analyze the evolving legal framework for private sector development in Romania. The Romanian government has worked intensively in the last two years to create a legal framework for a market economy. Many gaps remain in current laws, and problems still exist, but the effort has been impressive given the starting point. In some Central and Eastern European countries (including Hungary and Poland), private property and private markets were suppressed but not extinguished during 40 years of socialism. But Romania started virtually from scratch in 1990 to build a market economy and the legal framework required for it. It has adopted not only a new constitution but also extensive new legislation covering real and intellectual property, companies, and foreign investment. It has revived the pre-war civil code as a basis for contract law, and is moving to modernize its bankruptcy code. The only area surveyed in which little legal reform has occurred is antimonopoly law.

Challenges remain in both law and practice. The broad principles of private ownership, free market exchange, and equal treatment of public and private firms are well recognized and have been largely achieved, at least on paper. But a tendency toward centralized, bureaucratic control remains — for example, in excessive requirements for approval and uneconomic limits on certain activities. Moreover, implementation will clearly take a long time — probably considerably longer than in the other reforming countries — because there is little or no institutional framework for enforcement and dispute resolution.

By themselves, laws are merely paper: a legal framework comes to life only when legal and administrative institutions can enforce the laws and readily resolve the disputes they inevitably spur — and when the public accepts that the laws are binding. Moreover, the laws are by nature only frameworks. Their content must be filled in with detailed regulations and individual case practice. Developing a body of regulation and case practice takes time. Borrowing concepts from industrial market economies — helped by legal exchange programs and legal technical assistance from abroad — could speed the process.

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As the economies of Central and Eastern Europe move from central planning and state ownership to market-driven development of private sector activity, they are undertaking comprehensive changes in the "rules of the game"--i.e. the legal framework for economic activity. At a minimum markets require a set of property rights[1] and a system of rules for exchanging those rights. Thus at a minimum the legal framework in a market economy must:

(1) define the set of property rights in the system,

(2) set the rules for the entry and exit of actors into and out of productive activities, and

(3) establish rules for market exchange.

Each of these three functions typically involves numerous areas of law. In addition to basic principles laid down in the constitution, property rights are defined in practice in most market economies by a wide array of laws regulating the ownership and use of real, personal, and intangible property, as well as shares in going concerns. Company, foreign investment, and bankruptcy laws are among the subset of laws that govern entry and exit into and out of productive activities. General rules of market exchange are laid out in contract and competition law, while more specific rules of market exchange in particular sectors may be governed by more detailed sector-specific laws and regulations.

This paper analyzes the evolving legal framework for private sector development in Romania.[2] The Romanian government has worked intensively in the past two years to create a legal framework for a market economy. While problems exist with the current laws, and numerous remaining gaps remain, on the whole the effort has been impressive given the short time-span and the tightly-controlled centralization of the former regime. Unlike some other countries of Central and Eastern Europe (such as Poland

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[1] As used in this context, the term "property rights" includes rights to real, personal, and intellectual property.

[2] The paper does not address laws regarding corporatization and privatization of state-owned enterprises, areas where Romania has made significant progress in adopting a legal framework. Although very important to the development of a private market economy, these areas of law are regarded as transitional. This paper, and the larger project of which it is a part, is designed to focus on the legal framework needed for operation of a private market economy in the longer-run. Laws regarding corporatization and privatization are discussed in detail in numerous documents written by World Bank staff and other organizations.

and Hungary), where private property and private markets were suppressed but not entirely extinguished during 40 years of socialism, Romania started virtually from scratch in 1990 to construct a market economy and corresponding legal framework.

Challenges remain in both law and practice. The broad principles of private ownership, free market exchange, and equal treatment of public and private firms are well recognized and have been largely achieved, at least on paper. Yet there continues to be a trend toward centralized, bureaucratic control--as evidenced, for example, in excessive requirements for approvals to do many things, as well as uneconomic limitations on certain activities. Furthermore, implementation will clearly take a long time (probably considerably longer even than in the other reforming countries), because the institutional framework for enforcement and dispute resolution is weak or nonexistant. Developing expertise in the legal community through training and practice is crucial if the evolving legal framework is to become a guiding and binding force in everyday transactions.

Constitutional Law

The most fundamental law in any country defining the nature of its economy and the support to be given to public and private sectors is the constitution. A draft constitution was introduced in Parliament on July 9 and was approved on November 21, 1991 after approximately 2 months of debate. It had been prepared by a constitutional commission composed of members of the two chambers of the Parliament and outside constitutional experts.

The document is long, containing 152 articles organized into seven main sections (or "Titles")--(1) General Principles; (2) Fundamental Rights, Liberties, and Duties; (3) Public Authorities; (4) Economy and Public Finance; (5) The Constitutional Court; (6) Revising the Constitution; and (7) Final and Temporary Provisions. Title 1 is generally noncontroversial from an economic viewpoint, but it has aroused strong debate from minority groups and monarchists because of Article 1, which declares Romania a "national state, sovereign and independent, unitary and indivisible. The form of government of the Romanian state is the republic."

Title 2 contains many sections defining rights and duties of citizens. The list of rights contains those that are common and expected in democratic societies, including freedom of expression, assembly, religion, and movement, and freedom from arbitrary arrest and imprisonment. On the economic front, the draft guarantees private property rights and equal protection of all private property regardless of owner, and it forbids uncompensated expropriations (Article 41). However, an accompanying provision that "the contents and limitations of [this right] are established by law" leaves wide room for government to restrict private property rights. Foreigners are explicitly forbidden from owning land in Article 41(2), a provision which--though apparently deeply rooted in

history and culture--may nevertheless hinder foreign involvement in the economy.[3]

Some rights guaranteed in the Constitution could prove expensive for the government to fulfill. One is the right to free education granted in Article 32: "State education [including by implication higher education] is free by law." On economic grounds it would be preferable to put scarce public resources into free primary and secondary education, allowing some cost recovery in higher education.[4] Another potentially expensive guarantee is in Article 43: "The state is obligated to ensure a decent living standard for the citizenry through measures of economic development and social protection; Citizens are entitled to a pension, paid maternity leave, health care in state medical facilities, unemployment relief, and other forms of social assistance envisaged by law."

All of these rights are granted subject to Article 49, which provides that "the exercise of certain rights or freedoms may be restricted only by law and only if the restriction is required ... in order to defend national security, public order, health, or morals, and civic rights and freedoms ...." This rather open-ended provision could create some uncertainty by leaving a window open for arbitrary government interference in the free exercise of economic rights.

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[3] Among other things, it makes secured foreign lending difficult, because foreign lenders are not able to foreclose on secured property and take possession. Instead, they must depend on local auctions in a thin market to recover value from the security interest. In practice foreign lenders forego the security and instead require local bank guarantees, which often in turn require explicit or implicit public guarantees.

The rights of 100 percent foreign-owned companies incorporated in Romania are not clear with regard to land ownership. Some government officials claim that these companies are allowed to own land, because they are not technically "foreigners" but are instead Romanian legal persons. In such case, the prohibition would relate only to foreign individuals and would not affect foreign investment. Yet allowing foreigners to avoid this prohibition (and buy unlimited amounts of Romanian land) simply by incorporating in Romania would seem to undercut the rationale behind the prohibition. Another view holds that 100 percent foreign-owned firms can buy the land they need for their operations, but not other land. This view, however, does not flow naturally from any interpretation of the provision.

[4] This advice is typically given by the World Bank to developing countries, where the annual public cost of university students is on average 26 times that of primary school students, and where university students tend to be from higher-income households and are therefore more able to pay for the education. It also holds for industrialized countries, where university education is also more expensive than primary or secondary education. Romania should be careful to allocate its scarce public resources to the sectors with the greatest social returns, typically primary and secondary education; selective scholarships can be granted to university students unable to pay tuition themselves.

Title 3 lays out the structure of the public sector, with chapters on the Parliament, the President, the Government, the Public Administration, and the Judiciary. Although not strictly economic in character, these provisions lay the ground rules for economic policy making. The structure is designed to create a balance of power among the various branches. The executive branch ("government") designs and introduces most legislation, and both chambers of parliament must approve it and the President sign it for it to become law.[5] The President appoints the Prime Minister and cabinet with the approval of Parliament and can be impeached for wrongdoing by a majority vote of Parliament. Parliament is composed of two chambers, the Chamber of Deputies and the Senate.[6] Parliament supervises the government through its approval of initial ministerial appointments, its power to express no confidence or censure, and its right to request information and explanations of governmental activity.

With regard to the judiciary, there has been intensive debate regarding its powers in overseeing the constitutionality of Parliamentary acts. The Ministry of Justice favored ex-post judicial review by the Supreme Court, as existed prior to World War II.[7] The constitutional drafting committee, in contrast, favored broad powers of judicial review (both before and after a law is passed) by a separate Constitutional Court, and the Constitution provides for such a Court in Title 5. Under Article 144, the Court is empowered to review the constitutionality of laws before they are promulgated.[8] However, a ruling of unconstitutionality can be overriden if the law is again adopted in the same form by at least two-

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[5] The President may ask the parliament to reconsider the law but may not veto it.

[6] Romania had a bicameral parliament under its 1923 constitution, which was replaced by a unicameral system under Ceaucescu. Thus the current proposal is in some sense a return to pre-socialist traditions. Under the 1923 system the two chambers of parliament had different powers and different means of selecting members. While deputies were chosen by direct election, the senate had appointed as well as elected members in an effort to protect underrepresented interests. In contrast, under the current draft the two chambers have similar and equal powers; a law can be promulgated only after similarly-worded versions have been approved by both chambers. The draft does not specify how the members of each chamber are chosen. A proportional system was used in 1990, whereby each district's representation in each chamber was proportional to its share of the total population. Given the similarities between the two chambers, some observers question the justification for the current bicameral system (see Shafir, 1991).

[7] The right of judicial review over the consitutionality of laws was established in 1912 and included in the 1923 constitution.

[8] The Court is to review the constitutionality of laws if requested by the President, one of the presidents of the two chambers of government, the Supreme Court, or at least 50 deputies or 25 senators. This is a preferable solution to the mandatory review (at least of "organic" laws) contained in an earlier draft of the constitution.

thirds of the members of each chamber,[9] a provision that seriously weakens the power of judicial review over Parliamentary acts. The Court is also empowered to adjucate appeals brought before courts about the constitutionality of laws and ordinances, thus presumably eliminating the Supreme Court's jurisdiction over constitutional questions.

Title 4 deals with the economy and public finances. Article 134 defines Romania's economy as a market economy and orders the state to ensure free trade and protect competition. Under Article 135 the state protects property, whether public or private. Certain assets are reserved exclusively for public ownership and are "legally inalienable", including "underground resources of any kind, the means of communications, the air space, water resources that can produce power or can be used for public purposes, beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other assets envisaged by the law." While this article prohibits private ownership, the state can grant concessions for private sector involvement in the wide range of activities on such property, including mining and telecommunications.

Despite the provisions indicated above that may compromise individual rights or impose difficult financial burdens on the state, the Constitution is a major step forward for Romania. Overall it provides strong support for the fundamental principles of private property, free market exchange, and careful limitation of the powers of the state.

Rights to Real Property

Rights to real property have been in a state of extreme flux in Romania for the past year, and there will not be much certainty for private investors until the ownership of these rights becomes more settled and dependable. As discussed further below, extensive amounts of land are being returned to former owners or given to the owners of the buildings that occupy such land. Other land and buildings are being kept in municipal hands, with the possibility of lease[10] and the future possibility of restitution or sale. The disposition of apartment buildings and other housing now in state hands is being intensely debated. And apart from basic questions of ownership of real property, land registration

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[9] Article 145. This ability of the Parliament to override the decisions of the Constitutional Court is a major change from the initial draft, which made the Court's decisions mandatory in all cases.

[10] Under Government Decree 1228 of December, 1990, anything owned by the state can be leased, pursuant to the general framework for leasing in the Civil Code.

systems need to be revitalized,[11] and numerous regulatory issues remain unresolved, including land use zoning and building standards.

Land

The Land Law (No. 18), passed in February 1991, defines various categories of land and gives the broad outlines for their disposition. It is extremely bold and far-reaching; whether or not one agrees with the principle of restitution, it is clear that this is one area where Romania has moved decisively, ahead of land reforms in other Central and Eastern European countries and ahead of reforms in other areas of the Romanian economy.[12]

The bulk of the law deals with agricultural land in producer cooperatives. Prior to the 1990 revolution, about 60 percent of agricultural land was controlled by cooperatives, about 30 percent by state farms, and the rest by private farmers working small individual plots.[13] The land law provides that land of agricultural cooperatives is to be returned to the original owners or their heirs, with a maximum amount returned per household of 10 hectares.[14] A period of 30 days (later extended to 45) was set in the law for the filing of claims, and some 3000 local commissions were established to determine the distribution of property rights, resolve disputes, and issue property deeds. Over 6 million claimants filed claims for some 8-9 million hectares. Most of the local commissions reached initial decisions during the summer, but many disputes were reportedly still outstanding in October.

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[11] Prior to World War II, different parts of Romania had different systems of land registration. Transylvania followed the Austrian system of land registers classified by parcel of land, and these registers reportedly still exist. In other parts of Romania land was registered by owner, a less desirable system because of the difficulty of tracking the disposition of individual plots. A new land register is reportedly provided for in the new Law on Cadastre.

[12] Land restitution throughout Central and Eastern Europe is being driven far more by political forces than by economic ones. From an economic perspective, there is ongoing debate about the optimum size of land holdings and the wisdom of breaking up large farms into small private plots.

[13] Peasant households were allowed to maintain private plots no larger than 0.15 hectares. In addition to these private holdings, about 6 percent of cooperative land was individually cultivated.

[14] Landless families (Article 20), families with inferior mountain land (Article 39), and cooperative employees who contributed no land (Article 18) also have the right to claim up to 10 hectares of arable land, although they cannot sell it for ten years thereafter (Article 31). Unclaimed land becomes the property of the municipality and can be leased to private parties who want to farm it (Article 30).

Land formerly controlled by state farms is treated differently under the law (Article 36).[15] Rather than provide restitution-in-kind to former owners, the state farms are to be converted into joint stock companies, and former owners or their heirs are eligible to receive shares of these companies in proportion to their former holdings (not to exceed 10 hectares).

In addition to providing for restitution, the land law puts strict (and seemingly inconsistent) controls on the conversion of agricultural land to other uses. Any construction on some types of land--including land of "class I" and "class II" quality, land with "improvement facilities", and vineyards and orchards--is prohibited under Article 71. Yet the article also provides for the removal of land from agricultural or forestry use with the payment of steep taxes into a "Land Improvement Fund". Article 79 then appears to require that investors physically remove the topsoil to poor land (as indicated by agricultural authorities) before doing any construction. These artificial restrictions on the conversion of agricultural land are vestiges of control that could cause far more economic distortions in real property use than they prevent.

Finally, the law places two further important limitations on land ownership, both reflecting the strength of social and political concerns when in opposition to the tenets of a truly free market economy. First, Article 47 repeats the constitutional prohibition on the ownership of land by foreigners (but seems to be limited in this case to nonresident foreigners[16]). Second, Article 46 appears to provide that a family's total purchases (through "living deed") of land cannot exceed 100 hectares (approximately 250 acres) of arable land. Such a limit on land holdings is understandably intended to prevent the emergence of large landholdings and inequitable land distribution, but in the longer run it could also compromise efficiency and entrepreneurship in rural areas.

Disposition of urban land is also addressed in the law (primarily Article 35), but in much less detail. Land on which buildings sit is to be given to the owner of the building, whether private or municipal. Pursuant to another law presently being drafted, state-owned enterprises will be given full ownership rights to the land on which they are situated. Until now they have had only use rights, which allowed a full range of uses but did not allow lease or sale. Empty land is to be returned to its original owner if possible. A municipal commission is being set up in each town to oversee this process. As in the case of agricultural land, there are likely to be many disputes.

Buildings

Ownership of buildings is not covered by the land law. State-owned enterprises (and a few private enterprises) generally own the buildings

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[15] The difference in the treatment of cooperatives and state farms does not have an obvious rationale in terms of either economic rationale or economic impact.

[16] The rights of foreigners who are resident in Romania are not clear under this law.

they operate in. Municipalities own the rest of the commercial property within their borders (which makes up, by rough estimation, some 2/3 of the buildings in Bucharest, for example). The municipality is thus a major landlord for emerging private sector businesses and has strong market power over the rental of business premises, for which rents are considered to be high. When possible, businesses rent homes or apartments from private owners and turn them into offices in lieu of renting office space from the government. Privatization (probably through auction) of urban office buildings needs to be put on the government's agenda to support private sector development.

Housing, unlike office buildings, is being privatized by the state. Many individuals own their own homes or apartments; this was possible even in the communist period,[17] and it has been expanded through extensive sales at very low prices (one-fifth to one-tenth of "market value") under Decree-Law No. 61 of 1990. The sale of state-built housing to tenants at low cost is a generally accepted principle and is moving ahead rapidly.[18] However, the disposition of urban housing formerly expropriated without compensation by the state is a contentious issue because of the conflict between former owners and current tenants. One proposed draft law gives preference to current tenants (if resident since 1974), allowing them to buy the property and then giving the proceeds (probably far below would-be market value) to the former owners. This proposal has many critics, however, and the issue is likely to be intensively debated in Parliament.

Rights to Intellectual Property

Given its great need for western technology, as well as its desire to integrate itself into the western commercial community, Romania is moving to extend its legal protection of patents, trademarks, and copyrights. While many such protections exist in bilateral treaties with western countries, Romania is now in the process of unifying intellectual property protection within its domestic legal framework.

It is worth noting at the outset that the protection of intellectual property in developing economies is a controversial subject. Many of the same controversies apply also to countries in transition from socialism. On the positive side, intellectual property protection not only helps spur domestic invention and creation,[19] but it also helps to attract foreign

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[17] Law No. 4 of 1973 provided for the sale of state-owned housing to tenants, with the right of use of the underlying land (up to 100 square meters of land per household in towns or 200 square meters in villages). All land was the property of the state.

[18] About one-third of the housing in Romania is state-owned, and two-thirds is privately owned. In Bucharest slightly over one-half remains state-owned at present.

[19] In addition to spurring invention by eliminating the "free rider" problem and thus increasing the economic returns to basic research, another economic rationale for patent law is to prevent socially-wasteful over-investment in research.

investment, because an investor is more likely to invest in a country where property is protected. Foreign investment brings not only technology, but also employment, foreign exchange, and management talent--all urgently needed in Central and Eastern Europe.

Some observers argue, however, that intellectual property protection is essentially a one-way street--that it protects industrialized countries (where most inventions and creations originate) at the expense of countries who must import most technology. Granting monopoly rights to proprietary knowledge tends to raise the price of that knowledge by giving "owners" the sole right to use or license it, and thus it can slow technological and economic development in lesser-industrialized countries.[20] The most contentious areas tend to be patents for pharmaceuticals (where lives are often at stake) and copyrights for computer software and books. All three products are relatively easily copied and are crucial for economic development.

Despite the debate on intellectual property protection, many developing economies and many economies in transition from socialism--including Romania--are moving to adopt western-style intellectual property laws.[21]

Patents

Until late October, 1991, the Romanian Law on Inventions and Innovations (No. 62) of 1974 provided the basic framework for patent rights. In keeping with standard western patent law, Law 62 stated that holders of patents enjoy the exclusive right to exploit their inventions, unless they expressly permit others to do so. During the socialist period, however, patent law had little meaning in the domestic economy. State control over the economy was pervasive, and inventors worked within the state apparatus. Inventors were given credit for their inventions in the form of a "Certificate of Invention," which was a one-time cash award calculated generally as a percentage of the savings achieved by the design[22] or a percentage of the net return on the investment. Ownership rights to the invention, in the form of "Letters Patent," were granted in the name of the socialist organization upon whose behalf or within whose contractual relation the invention was created.[23] This left the exclusive right to

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[20] Only one percent of existing patents are held by nationals of developing countries. OECD, 1989.

[21] In some cases this is being done under threat of retaliatory practices from industrialized countries.

[22] This is in keeping with the definition of patent under Romanian law, namely that it is the technical solution to a social or economic problem. This includes a description of the problem and how the patent will solve it.

[23] This should not be confused with the "compulsory license" discussed below.

utilize the invention with the Romanian state.[24] As a result, there is no experience with the enforcement of private patents, which will be the challenge of Romania's new intellectual property regime.

Parliament passed a new patent law in late October, 1991. Generally, the law provides patent protection similar to that in industrialized countries. The above-mentioned restrictions have been removed, and the basic protections remain. The law retains two controversial provisions: 1) a compulsory license provision and 2) a provision that the state has the right to appropriate patents if deemed to be in the "national interest."

A compulsory license allows the state to issue rights of use to third parties (with compensation) if a patent registered in Romania has been unjustifiably unutilized or underutilized for four years.[25] The policy behind compulsory licensing is that countries granting monopoly rights in intellectual property deserve something in return, namely, use of those inventions. Practically speaking, however, compulsory licenses are often ineffective without the cooperation of the patentee, due to the necessary technological know-how in the possession of the patentee. Furthermore, in many cases there may be no third party interested in obtaining a license to the patent. Thus, the compulsory license provision may not significantly reduce the protection of patents registered in Romania. Rather, it provides the government with a tool to prod the holder of an unused patent when a potential license meets resistance to any efforts to negotiate a licencing arrangement.

More controversial (and less common elsewhere) is the appropriation provision, as this compromises the basic security of property rights. Compensation for expropriated patents is guaranteed by the patent law.[26] Despite this, however, such a provision creates uncertainty as to the value of patents (present and future), making sale and leasing arrangement risky. Furthermore, "national interest" is not defined. In light of Romania's far reaching need for western technology, "national interest" could indeed include all technical innovations in the country. Thus, this far-reaching power of the state could seriously encroach upon the integrity of the patent law's protections.

Romania is signatory to the Paris Convention for the Protection of Industrial Property (1883), which is the major international treaty protecting patents and trademarks. The two most important rights granted

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[24] Under the 1974 law, patents for Romanian inventions in certain industries--including nuclear materials, chemicals, pharmaceuticals, medical products, disinfectants, food, animal/plant breeding, and silk worms--could be issued only to state organizations, although the manufacturing processes for these products could be the subject of private patents.

[25] The concept of compulsory licenses is well-known throughout the world. The Paris Convention, discussed below, allows for the issuance of compulsory licenses (Art. 5 lit. A), and the patent laws of many countries provide for them.

[26] The Constitution also provides for compensation in the event of state expropriation.

by the treaty are national treatment of foreigners and right of priority in registration. The right to national treatment obligates countries to treat foreigners as they would their own nationals under their own laws. The right of priority gives the holder of a patent one year to file in other member countries without losing priority rights over other potential claimants to the invention. However, the criteria for patentability is still a question of domestic law. Thus, the Paris Convention would do little to protect patents without a Romanian law that provided reliable substantive patent rights.

All patents must be registered in the Romanian State Office for Inventions and Marks (OSIM) and are valid for 20 years.[27] OSIM's main responsibility in approving patent applications is to determine the novelty of the claimed invention. Decisions of OSIM may be reviewed by the OSIM Appeals Commission, and the Commission's decisions may be appealed to the Civil Division of the Municipal Court of Bucharest. Such appeals may only address whether the OSIM Appeals Commission's decision complied with Law No. 62, and not whether the commission properly assessed the novelty of the patent.

Foreign patents must be registered by the Bureau for Foreign Patents and Inventions (Rominvent) of the Romanian Chamber of Commerce to enjoy the protections set out in Romania's new law. In registering with Rominvent, the foreign patent holder also grants power-of-attorney to his or her Rominvent representative.[28] This is an area that could usefully be opened up to broader participation of Romanian lawyers.

Trademarks

Romanian trademarks are adequately protected (at least on paper) by Law No. 28 of 1967 on Brands, Trade & Service Marks (as amended in 1977). The law grants exclusive right of use and transfer. Trademarks are defined as distinctive signs used by enterprises for distinguishing their products, works or services from those of other enterprises.[29] Trademark protection lasts initially for 10 years and is renewable. Like patents, trademarks are protected upon registration at the State Office of Inventions and Marks (OSIM).[30]

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[27] Under the 1974 law, this period was only 15 years, which could be extended. No such extension is possible under the new law.

[28] Granting power-of-attorney to local counsel is normal when registering patents in other countries, as local counsel are usually the only ones authorized to register patents. The extent of the power-of-attorney is usually spelled out in the contract of services between the patent holder and local counsel.

[29] Examples include words, letters, graphics and numbers, in combination with certain colors, as well as wrappings and sound recordings. Signs must have a distinctive character to become trademarks.

[30] As in the case of patents, foreign trademarks must be registered through Rominvent.

The Paris Convention, discussed above, grants national treatment and right of priority to trademark owners. Right of priority lasts six months for trademarks, as opposed to one year for patents. The Paris Convention does, however, provide a bit more substantive protection for trademarks than for patents by automatically protecting well-known marks, apparently without requiring that the mark be registered in other member countries.[31]

Romania is also signatory to the most current text of the Madrid Agreement Concerning the International Registration of Marks (Stockholm, 1967). The Madrid Agreement protects both trademarks and service marks by allowing members of signatory countries to register their trademarks with the International Bureau of the World Intellectual Property Organization (WIPO) in Geneva. The mark must first be registered in the country of origin, whose administration applies for registration with WIPO. The effect of WIPO is that the trademark is protected in all signatory countries. Upon notification of the registration of a trademark, national administrations may still be authorized by national law to declare that certain trademark protection cannot be granted in that territory. Thus, like the Paris Convention, the Madrid Agreement depends ultimately on domestic law in protecting substantive rights.

Copyright

The primary source of Romania's domestic copyright law is Decree No. 321 of June 21, 1956 (as amended in 1957 and 1968). This decree deals primarily with literary works, but it has wide potential application to the commercial sphere, particularly computer software. It grants the holder rights of public recognition as the author of a work, exclusive exploitation of the work, and alienation of exploitation rights. The protection of these rights exist for the life of the author and the spouse, plus 50 years for direct descendants and 15 years for other heirs.[32]

On the international front, Romania is a signatory to the Berne Convention (Rome text of 1928), which protects literary, scientific, and artistic works. The most recent revision of the Berne Convention is the Paris text of 1971, which extends the period of protection from 25 to 50 years. The convention traditionally includes computer software, which is the most controversial subject of international copyright protection.[33] Under Berne, no formalities are required to protect a work in other member countries. Whereas in the country of origin protection may depend on registration, no central registration exists for international protection; upon creation, works are protected.

A new copyright law is presently before Parliament but is expected to be subject to long debate, due in particular to the conflict over computer

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[31] Art. 6bis.

[32] This discrepancy in duration depending on the nature of the relation is peculiar to Romanian law.

[33] It is worth noting, however, that Berne allows countries to deny protection of certain works through domestic legislation, even if they are covered by Berne.

software. Under the Berne convention, retroactive protection of copyrights (e.g. for software) is possible, meaning infringers of protected works may incur liability for past illegal use. However, it is also worth noting that Berne has no enforcement mechanism. Claimants may bring infringement cases before the International Court of Justice, but instances of this are rare.

Enforcement capacity is an issue in all of the areas of intellectual property law discussed above. Although a registration procedure exists, can a holder of intellectual property rights actually protect these rights if another person infringes them? In the socialist state this was not much of an issue, because almost all rights were held by the state. However, enforcement will emerge as a critical issue as the private sector and foreign investment grow. Giving true meaning to these rights will require institutional strengthening in the registration agencies and the courts to insure that infringements can be identified, halted, and punished as appropriate.

Company Law

Romania has made much progress in the area of company law, moving from zero recognition of private business to a market-oriented company law in about 12 months. The first law that allowed individual private initiative was Decree-Law No. 54 of 1990. This law provided for 4 types of organizations--small enterprises, business partnerships,[34] family associations, and sole proprietorships. While a very important development in the transition, the law was outside the normal western framework and quite restrictive,[35] and it gave the government broad powers of control over private activities.

Law 54 was largely supplanted[36] in November, 1990 by Law 31, the Companies Act, which provides for all the types of company organization typical of continental legal systems. These include the general partnership, the limited partnership, the limited partnership by shares,

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[34] The direct translation of this form is "lucrative association".

[35] For example, a small enterprise could employ no more than 20 wage-earners, and a business partnership could have no more than 10 partners. Sole proprietorships were intended primarily to cover individuals conducting trade or services. Each firm had to obtain a licence from the mayor's office, and was obligated to submit its budget to "local financial bodies" and to publish its balance sheet twice a year in the Official Gazette "after being checked by the financial authorities." In order to obtain inputs of raw materials and energy, firms had to work with state authorities to gain access to central allocation mechanisms.

[36] The new law requires that small enterprises and "lucrative associations" set up under Decree-Law 54 reorganize themselves into one of the new company forms within six months. Decree-Law 54 is still in force with respect to the other two types of firms, family associations and sole proprietorships.

the limited liability company, and the joint stock company.[37] However, the law is quite disorganized and ambiguous, and it has numerous problematic provisions, as discussed below.

Characteristics of a Joint Stock Company

The Romanian joint stock company resembles the French S.A. (Societe Anonyme), the German AG (Aktiengesellschaft), and the Anglo-American public corporation. Extensive information and procedural requirements are imposed on this form of company in order to protect large numbers of anonymous investors. The joint stock company is an important company form in all mature market economies and is likely to become important in Romania in the future, as state-owned enterprises are privatized and as small private firms grow. At present, however, the form is hardly used, and almost all companies to date have been established as partnerships or limited liability companies.

Minimum requirements. Under the Romanian law, at least 5 founders are necessary to establish a joint stock company.[38] They can be residents or non-residents, and legal or natural persons. Minimum capital of one million lei (approximately US$4000) is required. This may include the value of in-kind contributions, which are to be evaluated by experts appointed by the founding meeting. Both registered and bearer shares are allowed, with bearer shares to be paid in full. Registered capital cannot be increased before all shares issued previously are paid in full. Not all capital must be paid up front, but at least 30 percent of subscribed capital must be deposited upon founding of the company. A prospectus is required if stock is to be offered for public sale.

The law requires that the subject of activity of every company, as well as every shareholder, be listed in the founding Contract. The requirement that subjects of activity be listed could be problematic if the categorization of possible subjects were narrow, because it would restrict firms' ability to diversify in response to market signals. The Romanian system is not severely restrictive. It provides 5 broad subject areas to choose from; firms can choose one or more (with each entailing an extra registration fee, as discussed below). Listing every shareholder may not be difficult now, given that most private companies are still very small, but it will become difficult if shares become widely held and traded through the process of privatization or private sector growth. Some Romanian lawyers interpret this requirement to mean that only founding members need be listed.

The Contract and the Statutes (the bylaws) for establishing the company must be approved at the first general meeting of shareholders. Voting rules in this meeting depart from the normal pattern in which voting rights are proportionate to share ownership. At the first general meeting every

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[37] The prewar Romanian company law closely followed the Italian law of 1881 and other continental models.

[38] Although not clearly stated, it appears from Article 212 that the State may be a single shareholder.

listed shareholder[39] has one vote no matter how many shares held, with a quorum of 50 percent of the subscribers (rather than the shares) and a simple majority voting rule. Because that meeting appoints experts to evaluate in-kind contributions, investors making in-kind contributions are not allowed to vote at that meeting on issues concerning such contributions. These voting rules appear to give minority shareholders disproportionate (and highly unusual) influence in setting the general rules for operation of the company. Many important policies are set at the first meeting, and such a system of one person-one vote dilutes the incentive of shareholders to invest enough to acquire a majority stake in a company.

Corporate governance. With regard to corporate governance, the law provides for a sole administrator or a board of administration to be chosen by the general meeting of shareholders.[40] The board may delegate some of its powers to a managing committee, thus creating a two-tier structure of governance. The president of the board of administration is required also to be director of the managing committee. This requirement is problematic in that it focuses so much power (essentially the roles of Board Chairman and CEO) in one person. While this focus of power may be reasonable in some cases, it is not necessarily the best solution in all.

Regular oversight over company operations is to be provided by three or more auditors elected at the general meeting. One must be an accountant, and the majority must be Romanian citizens.

Voting rights. The law (Article 67) establishes a general one share-one vote rule (except at the first general meeting, as discussed above). However, the company's contract or statute can limit the number of votes of shareholders owning more than one share, and thus voting rights can be weighted in specific cases in favor of certain shareholders.[41] Furthermore, a supramajority can be required for decisionmaking at the general meeting (Article 74). The possibility for weighted voting rights and supramajority voting rules is likely to be particularly important for foreign investors in the medium- to longer-term, because it allows majority

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[39] This presumably does not include the holders of bearer shares unless they are specifically listed. It also does not include shareholders who fail to deposit their shares 5 days before the meeting in the place specified by the statutes--a very cumbersome procedure indeed.

[40] The sole administrator or the president and at least half the members of the board of administrators must be Romanian citizens, unless the company contract or statutes provide otherwise. The Foreign Investment law provides that foreigners can be employed by a company only in such positions or as experts.

[41] This is a rather inefficient means of giving more voting power to certain shareholders, because it ties voting rights to the specific shareholder rather than to the share. In this way a share's voting rights can change merely through transfer to another shareholder. A preferable way, possible in the company laws of many other jurisdictions, is to allow some shares to have more than one vote.

Romanian ownership to be combined with foreign control (or at least veto-power) over key corporate policies.

Characteristics of a Limited Liability Company

The Romanian limited liability company follows the form used throughout continental Europe, for example, that of the French S.A.R.L. (societe a responsibilite limitee) or the German GmbH (Gesellschaft mit beschrankter Haftung). It combines some of the benefits of the joint stock company with the relatively simpler procedural requirements of the general partnership, and is particularly well-suited to small and medium-sized firms with only a few owners. This form has been the most used to date and will probably continue to be the favored form for most domestic and foreign investment.

The limited liability company differs from the joint stock company in several ways. A limited liability company can be owned by only one person (or "associate") and can have at most 50 associates. Minimum required capital is only 100,000 lei (about US$400). Because of the more personal nature of the expected interrelationships among owners, no prospectus is required to set up the company (as it is for joint stock companies that offer shares to the public), and a limited liability company cannot issue bonds (which are generally offerred to the public and, in the case of the joint stock company, also require a prospectus). All associates must have access to the books of the company at any time, and they may perform the duties of auditors if no auditors are appointed by the General Meeting.[42] Shares of individual associates cannot be transferred to persons outside the company unless approved by associates representing at least three-quarters of the registered capital. Although most decisions at the general meeting require only an absolute majority of the associates and of the registered shares, unanimity is required to alter the company contract or statute. A one share-one vote rule is mandated (Article 141), in contrast to the more flexible voting rules of the joint stock company.

With regard to corporate governance, a limited liability company is to be managed by one or more administrators appointed by the company contract (in the case of the first administrator) or by the general meeting of associates. Neither a board of directors nor a two-tiered structure of corporate governance (i.e. a supervisory board) is required.

Characteristics of the Three Partnership Forms

The law provides for three partnership forms--the general partnership, the "sleeping" (or "limited") partnership, and the sleeping partnership limited by shares.[43] In the general partnership all partners have unlimited joint and several liability with regard to the partnership's obligations, and all are entitled to participate in the management of the business, unless provided otherwise in the partnership's contract. This form is most suitable for small enterprises with a few active participants.

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[42] An auditor is required only if there are more than 15 associates.

[43] There is also a civil partnership form, governed by the Civil Code, which is intended to cover simple initiatives among a few equally-involved individuals.

In the sleeping partnerships, in contrast, only the active partners (who serve as the administrators) have unlimited liability, while the liability of the sleeping partners is limited to their capital contribution. These forms are more suitable for larger undertakings where a few active participants are seeking capital from passive investors. The sleeping partnership limited by shares most closely resembles the joint stock company in its formal requirements, including minimim capital, prospectus requirements for public subscription of shares or bonds, founding and general meeting requirements, procedures for valuation of in-kind capital, auditing requirements, and recordkeeping. Because of this formality, the form appears unlikely to be used much in practice.

Procedures for Setting up a Company

The procedures required to set up a company, whether in a joint stock or a limited liability form, appear somewhat cumbersome to the outside observer. Seven basic steps are required:

(1) Foreign joint ventures must first get approval from the Romanian Agency for Development (see discussion under "Foreign Investment" below). Romanian companies skip this step.

(2) The public notary must approve the contract and statute. Although the official cost is low (1000 lei), this takes time, because the number of notaries is limited and they are not prepared for this work.[44]

(3) The company must apply to the district court for a judicial decision granting authorization to set up the company. This appears to be a formality--of some 15,000 applicants, all have been approved. Yet it can take up to 3 weeks to get the decision from the court.

(4) Meanwhile, the court requires consultative advice from the Chamber of Commerce, which checks for any criminal record and passes judgment on the "moral character" of the applicant. This is at best another formality that requires several days (and another small outlay of money--200 lei for Romanians, $20 for foreigners); at worst it could become an outlet for unjustified discretionary refusals of applications.

(5) After receiving court approval, the judicial decision must be published in the Official Gazette, which takes yet more time.

(6) The new company must then be officially registered with the registry of companies. While this costs only 1000-2000 lei for Romanian companies, foreign investors are charged $500 plus $100 for each extra activity (up to $900 total). This step confers legal personality.

(7) The new company must register with fiscal authorities.

This procedure may not put much burden on large investors, Romanian or foreign, who can hire Romanians at low wages to stand in line and run back and forth from office to office filling out forms and seeking signatures of

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[44] Notaries are still all state-employees, although pursuant to a new law private notaries will be allowed soon.

approval. Furthermore, large firms are not bothered by the "gifts" that (although perhaps not necessary) reportedly speed up the process. They may not mind the 1-2 month wait that these procedures entail. Small entrepreneurs, however, undoubtedly find these procedures daunting and expensive. To promote local private sector development, Romania would do well to streamline the process. Steps 6 and 7 would appear to be the only truly necessary steps.[45]

Foreign Investment

A new Law 35 on Foreign Investments was adopted in April 1991. It replaced Decree-Law No. 96, which was issued in March 90 as a first effort to provide a framework for foreign participation in the economy.[46] Unlike Decree No. 96, which provided for individual negotiation of the terms of each joint venture, the new law establishes clear procedures, requirements, and incentives that apply across-the-board to all foreign investors. Although still problematic in certain areas, as discussed below, the law does appear to be perceived favorably by foreigners, and thus it generally sends the right signal--that private investment with foreign participation is desired and welcome.

Form and Ownership

The law applies very broadly to virtually any participation by a foreigner in the Romanian economy. Foreigners are allowed to set up branches or wholly-owned subsidiaries, as well as joint ventures with Romanian partners. These types of foreign investments are subject to the general rules and corporate forms set out in the Company Law, as discussed above. Article 1 extends the law to cover licensing, management contracts, and even acquisition of property by a foreigner in Romania. Portfolio investment appears also to be included, even if it is merely the purchase of one share of stock by a foreigner.

The Approval Process

Foreign investment in Romania requires approval from the Romanian Development Agency. If not notified within 30 days, the request for investment is deemed to be granted. It is not clear what purpose the mandatory screening process serves, aside from facilitating data collection on foreign involvement in the economy.[47] Article 20 provides that RDA

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[45] Step 2, approval by the public notary, is potentially useful as a check to insure that the law has been followed in setting up the company. However, in practice notaries are not always well-trained, and the approval requirement can become one more time-consuming bureaucratic bottleneck. Notaries can even have a negative impact if they insist that companies follow certain narrow rules they happen to be familiar with.

[46] The first recognition of foreign joint ventures was in Decree 424 of 1972, although this decree was virtually unused in practice.

[47] Both Poland and Hungary, for example, recently abolished their mandatory approval requirements.

screens "the investor's character, the field and way in which the investment is to be made, and the amount of capital to be invested." Yet the law does not specify any closed sectors, minimum capital requirements, or other criteria--other that what is provided in the Company Law--to bring objectivity to the screening process. Furthermore, given the broad coverage of the law as described above, by the strict letter of the law approval would be required for even a very small purchase of property or shares by a foreigner. Both the broad coverage and the lack of objective criteria could lead the screening to become either cursory (and thus unnecessary) or arbitrary.

The experience of foreign investors to date suggests that the approval process is rapid and that this step does not now impose a major burden on investors. After some time the government may want to review again the role of the RDA and the efficacy of mandatory screening as opposed to more targeted intervention.

Profit Repatriation

Although profits in convertible currency could always be repatriated without limit, the law limits the repatriation of lei profits in any one year to at most 15 percent of registered capital (in convertible currency or in kind) contributed by the foreign partner. And to be repatriated, lei profits until recently had to be exchanged for foreign currency at the auction rate of exchange, although initial capital was valued at the official rate (which was much lower). These two rates varied until recently because of the offical dual exchange rate system. The government recently unified the exchange rate, making the conversion of lei profits less costly to the investor.

Unfortunately, at the same time the government unified the exchange rate it also tightened access of the private sector to foreign exchange by requiring that all foreign exchange (other than a firm's equity participation) be surrendered to the government at the official exchange rate.[48] Foreign currency bank accounts appear to be no longer permitted, except in specially-approved cases or as needed to hold equity contributions. Thus, not only do foreign investors face limits on the repatriation of lei profits, but they could also face some difficulty holding on to their foreign currency earnings under these new regulations.[49] Furthermore, the regulation also appears to interfere with foreign lending, if companies are not able to hold onto and use the amounts borrowed, much less readily to gain access to foreign exchange to pay back the debts.

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[48] Government Decree 763 of November 19, 1991. The official rate is still managed and remains somewhat lower than the parallel ("black market") rate. Although the lei was supposedly made convertible with the exchange rate unification, foreign exchange continues to be rationed in the official exchange market through enforced waiting periods.

[49] Because of their newness, the actual impact of these new rules is still unclear.

These limits on profit remittance and on foreign currency accounts are the most restrictive in Central and Eastern Europe,[50] and are difficult to enforce in practice given the vagaries of capital valuation and transfer pricing. Given the potential benefits foreign involvement can bring the economy and the difficulty of enforcing such limits in practice, Romania would be wise to rethink these policies.

Tax Incentives

Law 35 grants very generous customs and tax incentives to foreign investment. In the customs area, foreign investors are exempt from payment of customs duties on all imported capital equipment, and are exempt from duties on raw materials for two years. Not only do these exemptions open room for abuse (through the importation of non-essential goods for resale), but they are unfairly discriminatory against domestic entrepreneurs if not matched by similar exemptions for domestic firms. As an alternative, Romania could lower its tariffs on certain capital goods and raw materials for all investors, or it could adopt a duty-drawback system specifically for exports.[51]

In addition to customs exemptions, the law offers tax holidays of 2-5 years, depending on the sector of activity.[52] After the holiday period expires, taxes are reduced by 50 percent if the profits are reinvested in Romania, or by 25 percent if the firm meets certain criteria as to import, export, research and development, domestic procurement, or job creation. Although the current domestic tax situation is clearly in need of reform,[53] granting tax holidays for foreign investment only makes it more difficult to develop a reasonable and productive revenue system. A

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[50] Poland and Bulgaria, for example, have recently eliminated limits on profit repatriation.

[51] The latter option, however, may be too difficult to administer for some time.

[52] Five year tax holidays are available for investments in industry, agriculture, and construction. Tax holidays are three year for investments in exploration and exploitation of natural resources, communications, and transportation, and two years for investments in trade, tourism, banking, and insurance.

[53] The entire Romanian tax regime is in flux. A tax on profits passed in 1991 imposed steeply progressive tax rates on business profits (up to a top marginal rate of 77% on profits over 1 billion lei). However, domestic firms received tax holidays under this law that were only slightly less generous than the holidays given foreign investors under the foreign investment law. Therefore, it is unlikely that many domestic private firms paid any tax at all. A new company income tax with a far lower general rate of 45 percent (or 30 percent on profits up to 1 million lei) was just approved, and further tax reforms are planned for 1992. In any case, it is unlikely that the government's administrative machinery has the capacity to enforce and collect taxes on the newly-emerging private sector. Extensive technical assistance (and time and experience) will be needed.

preferable approach, increasingly followed around the world, would be to adopt a broad-based tax system that applies reasonable rates equally to foreign and domestic investors. If incentives are to be given, investment credits are generally considered to be more targeted and less subject to abuse than tax holidays.

Contracts

The legal framework for private contracts is contained primarily in the Romanian Civil Code, which dates from 1864 and was amended in 1913 and 1920. The Civil Code is modeled closely on the French Napoleonic Code. As such, it provides a reasonable basic framework for property rights and private contracts. Unlike most of its neighbors (including, for example, Poland and Hungary), Romania never amended its Civil Code after World War II to incorporate socialist conceptions of property and give primacy to state contracts; thus it was not necessary to re-amend the Code after the 1990 revolution to remove those conceptions and once again give full recognition to private property.

The Civil Code is supplemented by the provisions of the Commercial Code still in force,[54] including some specific provisions on commercial obligations. Two other laws in the commercial area include the Law on Promissory Notes (which follows the model of the Geneva Convention in this area) and the Law on Bills of Exchange, both adopted in 1935. These laws were never abolished and thus can still be used. However, Romanians have little practical experience working with decentralized private business transactions, and there is not a body of judicial interpretation to answer the many questions that arise in everyday commerce. These will require time to develop.

Bankruptcy

In all likelihood many Romanian firms will fail and have to be closed as the economy moves toward a free market. A well-functioning system of bankruptcy law and practice is therefore a critical part of the legal framework.[55]

The only bankruptcy procedure existing in Romania to date is that contained in the Commercial Code of 1887. The Code follows the pattern of

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[54] Most of the commercial code--the provisions dealing with company forms--has been replaced by Law No. 31, the Company Law.

[55] Bankruptcy law works best in private sector cases, when there is a true conflict of interest between debtors and creditors. It does not work as well for the closure of state-owned firms, particularly with regard to debts from state-owned banks, because a true conflict of interest is often lacking. It is our belief that bankruptcy law should be designed primarily with the newly-emerging private sector in mind, both to regulate forced closures of firms and to structure relations between debtors and creditors more generally. Perhaps other reorganization and liquidation procedures should be used for public sector firms.

other commercial codes of that period, especially that of France and Italy. When adopted, it was considered to be state-of-the-art, and it was subsequently used as a model for bankruptcy legislation in several neighboring countries. The Code's bankruptcy procedure was widely used before World War II. Although not applied during the socialist period from 1945 to 1989, it was never formally abrogated.

The Code provides for liquidation proceedings under the direct administration of a judge. Romania's scheme is unique in appointing judges directly to administer the bankruptcy (Article 730) rather than private receivers. This solution seems problematic, because it ties up judges in long cases and prevents the emergence of a specialized profession of receivers. Because judges' renumeration is not related to the size of the company's assets (as is typical in the case of receivers), the rule also tends to lessen the administrator's incentive to preserve the company's assets and speedily resolve the bankruptcy case.[56]

Under the law, bankruptcy cases can be brought by debtors, creditors, or the court. As an alternative to bankruptcy, the law also provides a "mutual agreement" procedure (typical in European laws of this period) through which debtors and creditors can agree to restructure the debt obligations and thus keep the debtor in business. The procedure can be initiated only by the debtor, and any agreement must be accepted by creditors representing at least three-quarters of outstanding debt and approved by the court.

The government has prepared a new, modern Bankruptcy Law to supplant these provisions of the old Commercial Code.[57] The new draft is comprehensive and well-organized. It covers not only bankruptcy per se, but also reorganization under bankruptcy protection[58] as well as the mutual agreement procedure.[59] While similar to modern bankruptcy laws in other European jurisdictions, it retains the Romanian concept of judge-receiver. The new law is expected to be in place in 1992.

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[56] This may be one reason why the percentage of assets actually recovered in pre-war bankruptcies in Romania was typically lower than that in neighboring countries.

[57] As with the old Commercial Code, the new draft applies only to commercial companies, essentially those covered by the new company law.

[58] Bankruptcy cases can be initiated by the debtor, the creditor, or the court. (Only creditors can initiate bankruptcy in the case of state-owned enterprises.) Upon initiation of a case, the management of the company is turned over to an administrator appointed by the court. The judge-receiver and administrator then work together to decide whether reorganization or closure is preferable.

[59] Only the debtor can initiate a mutual agreement procedure, and any proposed agreement to reduce indebtedness must be approved by the court and must satisfy at least 50 percent of the creditors' claims.

Antimonopoly Law

The Romanian Parliament has not yet adopted an antimonopoly law, although the government recognizes the importance of such a law and plans to introduce a draft law in the near future. General principles of competition are contained in Law No. 15 on the Restructuring of State Economic Units (1990),[60] and in Law No. 13 on Unfair Competition (1991). These laws do not, however, provide an in-depth definition of anticompetitive monopoly behavior, nor do they specify the sanctions to be applied or establish specialized administrative machinery for enforcement. In the Eastern European environment, where few people are familiar with markets and where the general court system has little experience with commercial matters, it is unlikely that antimonopoly legislation will have much impact unless specialized enforcement machinery is established (as has been done in most other Central and Eastern European countries).

The government's slow approach to antimonopoly legislation (compared to other areas of legal reform) appears to be due in part to a fear of overcontrol--a fear that administrative officials would use any such law to impede private sector development rather than facilitate it. This is an understandable fear in this environment; even industrial countries continually debate the proper scope for administrative intervention, and many western economists believe that traditional antitrust enforcement has been detrimental to competition. Technical assistance from industrialized market economies could be useful in training Romanian officals in methods of antitrust analysis and enforcement.[61]

Judicial Institutions

As can be expected, no judicial institutions in Romania--whether courts, arbitration panels, lawyers, or law schools--are fully prepared to take on the challenges inherent in their roles in a market economy. Large-scale efforts at institutional development are needed. This is one area where foreign technical assistance, if properly designed, can have a large positive impact.

Courts

Under the socialist system, courts were not involved in commercial areas. All commercial legal work was done under the old regime by lawyers

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[60] Law No. 15 provides some basic protections against monopoly behavior. Specifically, Article 36 forbids agreements among companies to set prices or unfair contract terms; to limit production, sales, technological development, or investment; to allocate input or sales markets; to discriminate among purchasers, or to impose unrelated conditions on contracting partners. It also generally forbids monopoly behavior of firms with a dominant position. Article 37 provides that regular courts are competent to decide cases brought under Article 36.

[61] Numerous sources of expertise--including the U.S. Federal Trade Commission, the U.S. Department of Justice, the OECD, and the European Community--are available and are giving such technical assistance to other Central and Eastern European countries.

within state-owned enterprises, and disputes were worked out in specialized arbitration institutions established for that purpose. As Romania continues to move towards a market economy, courts will soon be expected to handle a multitude of new responsibilities in commercial areas--including contract disputes, bankruptcies, real property disputes, intellectual property issues, and so forth.

A draft law recently introduced in Parliament proposes a new court system composed of four types of courts--local, district, appeals, and the Supreme Court.[62] Each (except for local courts) would have four sections--civil, criminal, administrative, and commercial. The draft law attempts to increase the independence of the judiciary by granting life tenure for all judges (after a transition period),[63] and it subordinates public prosecutors to the Ministry of Justice rather than maintaining their separate and independent status (subordinate only to the Communist Party) in the previous regime. Massive training and assistance will be needed to equip the courts to handle the expanded responsibilities in a professional and reasonably predictable manner.[64] Without competence and experience in the court system, private commerce is unlikely to thrive.

Arbitration

Arbitration is a useful alternative to court litigation and is sanctioned by the Code of Civil Procedure.[65] The Romanian Chamber of Commerce has long sponsored a service to arbitrate questions arising from foreign trade. Recently this arbitration service has expanded its area of

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[62] Small cases would begin at the local courts and larger matters at the district courts, with two levels of appeal for each. The first level of appeal could reconsider issues of both fact and law, while the second level of appeal would concern only matters of law. Military courts would, under draft amendments to the Criminal Procedures law, be restricted to cases involving military staff and military rules, rather than also having competence to decide criminal cases against state security allegedly committed by civilians. This draft may have to reconciled with the draft constitution, which disallows special courts except in special circumstances, such as times of war.

[63] Lay judges--common in socialist legal systems--were eliminated from the panels of judges in July, 1991.

[64] The Romanian Ministry of Justice has already begun to organize a program of judicial training. Romanian experts--those formerly involved in international commercial law or inter-enterprise disputes--have been called upon to teach commercial law to judges and lawyers, as well as staff of the Ministry of Justice. The Ministry has sponsored regional conferences and training seminars that incorporate both economic theory and case studies of foreign and Romanian commercial disputes. Finally, foreign professors are being invited to lecture at law faculties and participate in workshops with Romanian lawyers and judges. Expanded efforts in all of these areas are needed.

[65] This type of arbitration should be differentiated from the old system of state arbitration of disputes among state-owned enterprises, which has been abolished.

responsibility to include domestic commerce. With support, assistance, and publicity, this and other arbitration panels have the potential to develop into viable and important alternative to the more cumbersome court system. Arbitration in foreign locations under foreign law is also allowed (French law being favored because of its similar tradition), unlike in some neighboring countries.

Lawyers

Although there are several thousand lawyers in Romania, very few are trained in commercial matters, and their profession is still centrally controlled. The profession is divided into two branches--"private" lawyers ("advocats") and legal advisors within state enterprises ("jurisconsults"). All private lawyers, though nominally independent professionals under a new law passed in 1990, are still required to belong to the Lawyers Union. Their clients pay the bar the legal fees (pursuant to a preset schedule), and the union withholds its own fees and taxes and then pays the remainder to the lawyer concerned. Lawyers are not yet permitted to open up private law firms. This is a clear case of cartelization (led by the lawyers union) that cannot help but inhibit private entrepreneurship and limit the availability of legal services critical to private sector development. The legal profession should be opened up to independent practitioners immediately so that a cadre of independent legal advisors can develop.

Legal Education

The basic principles of contract law (as found in the Civil Code) have always been taught in Romanian law schools, and market-oriented commercial transactions have generally been taught in the context of international trade. Thus, a base exists on which to reorient the legal curriculum to a market economy. Although traditionally lasting 4 years, an extra year was recently added to the legal curriculum on a temporary basis to allow for the teaching of Romania's new commercial legislation, including the company, foreign investment, and tax laws.

The law school at the University of Bucharest has exchange programs with a number of universities in western Europe, including the Universities of London, Hamburg, and Florence. These programs should help to supplement the education of both students and professors during this period of transition. However, in order to launch this new educational program successfully at home, supplies such as documentation, books, and perhaps computers are needed.

A number of private law schools are now appearing in Romania. They cost much more than state education (approximately 30,000 - 50,000 lei per year, compared with 1000 lei at the University of Bucharest) and are not officially "recognized" by the government. However, they expand educational opportunities and may improve the overall quality of education by increasing competition.

Conclusion

As is evident from the discussion throughout this paper, the Romanian government has worked hard over the past two years to develop a legal

framework in which the private sector can develop. Many new laws have been passed by the Parliament, and many more are being drafted and debated. However, both the administrative and judicial machinery for implementing those laws and the publicity apparatus for educating the public about them is lagging behind, as is true in other transforming socialist economies (and in many developing countries as well). Laws by themselves are only paper; the legal framework will "come to life" only when the legal and administrative institutions can enforce the laws and readily resolve the disputes that they inevitably spur, and when the public accepts that the laws are indeed binding. Furthermore, the laws are by necessity general frameworks only. Their content needs to be filled in by more detailed regulations and practice in individual cases. Developing this body of regulation and practice inevitably takes time. "Borrowing" concepts from industrialized market economies (assisted by legal exchange programs and legal technical assistance from abroad) could help to speed up the process.

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