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Promotion of U.S. Foreign Investment in Selected Eastern European Countries in the 1990’s. Comparative Analysis of Foreign Investment Laws in Poland, the Soviet Union, Yugoslavia, and Hungary and Possible Impact of the U.S. Law on Their Operation

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PROMOTION OF U.S. FOREIGN INVESTMENTS IN SELECTED
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COMPARATIVE ANALYSIS OF FOREIGN INVESTMENT
LAWS IN POLAND, THE SOVIET UNION, YUGOSLAVIA, AND
HUNGARY AND POSSIBLE IMPACT OF THE U.S. LAW ON THEIR
OPERATION

by

DOROTA SZEWYC
LL.M., University of Lodz, Poland, 1988

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I. INTRODUCTION.

The political and economic changes taking place in Eastern Europe are of historic importance. The changes in political system and its ideology underlined the introduction of economic reforms. Long before the recent introduction of perestroika, Poland, Hungary and Yugoslavia attempted to change their existing political and economic systems.¹ The first joint venture law was enacted in Yugoslavia in 1967.² The primary purpose of the Joint Venture Law of 1967 was to protect the Yugoslav partner against foreign investment or investors. The law provided that a foreign partner was allowed to obtain only a minority participation in the joint venture.³ The law limited foreign investment only to a contractual type of joint ventures.⁴ The foreign partners were very limited in their rights; They could not obtain property or ownership rights. Their influence on the operation of a joint enterprise and its control was minimal. Yugoslav

¹Yugoslavia was the first among East bloc countries to introduce more liberal and independent economic system and policy, while remaining under the Soviet regime. Followed by Hungary in 1968 and "Solidarity" in 1980 in Poland, those countries were waiting their chance. See, People of Eastern Europe Seeking Political, Economic Changes; Eastern Eur. Regional Brief. U.S.Dep't St. Bureau of Pub. Aff., Oct, 1, 1989.


⁴See description of contractual joint venture in part II point A of the thesis.

In 1968 Hungary enacted the New Economic Mechanism, a major reform which introduced market incentives and decentralization of central—planning system. In 1972 Hungary allowed foreigners to participate in the capital and management of joint ventures with a Hungarian partner; although the economic reform and creation of joint venture began in early 70's the law of 1972 did not provide enough incentives to attract foreign capital.6 The law was amended in 1988.7

Poland's initial experiment with a foreign investment law occurred in 1976. In 1979, 1982 and later in 1988, the government continued its effort to attract foreign capital through comprehensive legislation. The subsequent 1988 Polish Foreign Investment Law is a product of lessons learned from the past.8

The Soviet Union adopted the joint venture law in 1987 and amended it later in 1988.9 All socialist countries faced in the past a common problem in the application of their joint venture laws: the extent to which the foreign capital should be integrated into country's economic system.10 It was ideologically

7See Act VI 1988 on Economic Associations (Company Act) Hungaro Press, Hungarian Chamber of Commerce. See also Act XXIV of 1988 on Foreign Investment in Hungary, Hungaro Press, Hungarian Chamber of Commerce.
10There are two approaches to that problem. The first is so called "economic enclave" model, which exempts the joint venture with foreign participation from central planning. The second is so called "integrated economy" model, which views joint venture as a part of centrally—planned economy and subsequently
inconsistent to allow Western capital to operate freely in the national market. Today a new chapter of Eastern European history is being written. The decade of 1980's is known as a "peaceful democratic revolution". It is also seen as a tremendous opportunity for the expansion of East-West economic relations. Perestroika although introduced and known as a Soviet phenomenon should be seen as a characterization of new Eastern Europe as a whole.

In 1985 Michail Gorbachev came to power announcing the new program of political liberalization and economic restructuring called perestroika. The question which frequently arises is what perestroika is. There are many answers to that inquiry which have almost as many meanings as perestroika has in every single aspect of life. However, in his recent book Gorbachev described perestroika in the following terms: "Perestroika is a word with many meanings. But if we are to choose from its many possible synonyms, the key one which expresses its essence most accurately, then we can say this: perestroika is a revolution. A decisive acceleration of the socio-economic and cultural development of Soviet society, which involves radical changes on the way to a qualitatively new state is undoubtedly a revolutionary task. ..." 11

The directions of perestroika run from long term foreign policy considerations that will affect economic objectives and subsequent policies to short-term political and economic aspirations for the future. The objectives of perestroika arise from economic, social, and moral stagnation, as well as the loss of control subjects the joint venture to the state control. See Ch.Osakwe, the Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987, 22 Vand. J. Transnat'l L. 1, at 44 (1989).

and directions the East bloc countries were moving under the communist regime.12

The concept of modernization has intermediate objectives. The first and the most obvious is technological modernization. This means raising the level of technology to the developed world standards in all sectors of the economy. The second objective is the modernization of organizational structures and management methods. The third major objective is to eliminate a wasteful nature of socialist production and distribution activity. Finally, perestroika aims to modernize the structure of consumption in order to raise the standard of living and quality of life (e.g. housing problems, medical services).1314 Perestroika can be viewed from many angles but what is important for an individual is our conclusion, that perestroika is a new political as well as economical set of reforms, mainly characterized by its three components: 1) uskorenie (acceleration of economic growth), 2) demokratizatsia (democratization), and 3) glasnost (openness).15

1). Uskorenie.

Uskorenie, the policy of acceleration of economic growth, goes to the heart of the economic reform of the Soviet system. It involves two long-range projects:

1) the revitalization of the domestic economy, and 2) the integration of the Soviet Union into the world economic system. Uskorenie is clearly the most important and the most complex element of perestroika. It is also vital to the success of perestroika as a whole. It is possible only when the centrally planned, state-owned economy is transformed into a free market economy under a democratic government. Such a change was impossible a few years ago. All Eastern bloc countries shared the Marxist, communist ideology, which assumes ownership of the means of production (and like facilities which are of great importance to national economy) by the entire population. The main difference between a centrally planned economy and a market economy is that under a central planning system producers are told what to produce and how much to charge for it. Prices and quantities of manufacturing goods are fixed by the decree of appropriate Ministry (or like organ). Under free market competition principles the demand and supply on the market determine the production output and prices.

2). Demokratizatsia.

According to Gorbachev, democratization is the key to successful restructuring of the system within the present ideology of Marxism and Leninism. Revitalization cannot succeed without the massive support from citizens,

16"A factory is given production quotas and resources through the system of directive-like indices. Virtually all costs are covered and the marketing of products is effectively guaranteed...manufactures find it discouraging to...improve product quality and apply research innovation. Under such an economic mechanism the line between effective and systematic lagging, enterprises is virtually erased." Gorbachev's speech, Moscow News No 27, June 24, 1987 at 8.

17"I want to stress once again that our economic work, the reorganization in the national economy can be successful only if it attracts million of working people." Gorbachev, Moscow News, No. 27 at 7, June 24, 1987.
therefore the general democratization of society is required. Presently
democratization is occurring in all areas of life. It is seen in cultural revival,
science, literature and art, as well as learning about the country's history, present
problems, and future perspectives. The consequence of these positive changes is
a noticeable difference in the attitude of the people towards the welfare of the
country as a whole. People are more interested in industrial output, and their
attitude towards work is changing as well. Also political democratization is seen.
Poland has a new, non-communist government; moreover, the Communist Party
in Poland has been dissolved and replaced by a multi party system. Hungary is
soon to follow Polish experience. While in the Soviet Union and Yugoslavia, the
Communist Party holds a leading role, its power has decreased dramatically.
Party committees and state authorities in those three countries have to verify
their decisions with public opinion and democratic organs before they make one.

18Gorbachev decided to show the rest of the world the history as it is, without
strong censor and hiding so called "black pages". Gorbachev has laid the
foundation for a correction of Soviet history books, which have been tampered
with particularly during the Stalin era. Id.

19H.E.Rogers Jr., Glasnost and Perestroika: An Evaluation of the Gorbachev
Revolution and Its Opportunities for the West, 16 Den. J. Int'l L. & Pol'y, 209 at
221 (1988). See also the discussion by D.Valovoi of the Council of Ministries

20Gorbachev has made the announcement concerning the virtue of unfettered
debate in a democratic society and the need for changes in the Party control
mechanism. See also, Q.Peel, Perestroika May Run Out of Steam Says
Gorbachev, Financial Times (London) Feb. 17, 1989, at 1, col. 3.

21"The more profound the change we will to bring about, the more we must rouse
an interest in and intelligent attitude towards it and convince more millions and
tens of millions of people that it is necessary." Gorbachev quoted Lenin in his
speech to support his view that democracy appears as an involvement of the
masses in the decision making process. Moscow News, June 24, 1987 at 6. See also
Power to the People, U.S. News and World Report, Apr. 10, 1989, at 41. See also
Glasnost.

Regardless what perestroika means to the Soviet people and other Eastern European countries, it is also synonymous with business opportunities for Western European countries economies. Although there have been joint venture laws in the Eastern European countries for some time, perestroika opens a whole new opportunity for investing in a large, still untapped Soviet market. Moreover, it has brought a whole new area of thinking and decline of communist ideology. This change of attitude has spread throughout the Soviet society, affecting politicians, and reflects the reforming process in all Eastern European countries. It has been already confirmed in a number of reforms in foreign investment laws.

Perestroika, despite the obvious effect on the economic system in the Soviet Union, brought political relaxation and economic liberalization in all of Eastern Europe. The thesis provides a comparative analysis of the latest foreign investment laws in Poland, the Soviet Union, Hungary, and Yugoslavia. The second part describes in general the economic model in which a socialist enterprise

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22The survey among the U.S. companies doing business in and with the Soviet Union shows, that despite the poor state of Soviet economy, the USSR is ranked highly as an attractive place to invest "more than of American companies rated the Soviet Union in the top half of their clientele" and they said they wanted to continue doing business in and with the Soviet Union. See, C.H.Farnsworth, Soviet Trade is Rated High in U.S., N.Y.Times, May 16, 1988, at D–1, col.3.

23See also, B.Keller, Waiting for the New Soviet Economy, N.Y.Times, Mar.19, 1989, sec.4, at 1, col. 1. One of the powerful instruments of glasnost today is the Soviet newspaper Argumenti i Fakti (Arguments and Facts), which offers a wide criticism of the existing system, failure of uskorenie and serves as a forum for a Soviet middleman to express the opinions about Gorbachev’s reforms. See also, Q.Peel, The Soviet Newspaper That Feeds People Hungry for Arguments and Facts, Financial Times (London), March 3, 1989, at 2, col.1. See also, D.Richardson, Comment, Glasnost: Joint Ventures Now Permitted in the Soviet Union, 3 Fla. Int’l L. J. 125 (1987).

24Introduction described the motivation and content of perestroika, a new political and economical movement, which provided a suitable background for all the other changes to occure.
functions and its differentiation from market oriented economy. Subsequent subchapters analyze the foreign investment laws in the four countries by their main features of importance to the foreign investors. The third part of the thesis concentrates on possible effects of the United States laws on the operation of foreign investments in the countries, taking into consideration only two of them specifically: U.S. export control laws and antitrust laws. Finally, the fourth part summarizes the problems and provides my personal opinion towards issues raised and predictions for future.

A. Economic Model In Eastern European Countries. General Survey.

In the early post-war period, when the Communist party gained power, the economic and business institutions of the socialist countries of Eastern Europe were radically reorganized. The previously private enterprises were nationalized and subject to a system of centrally planned economies. This was consistent with Marxist philosophy which states, that the majority means of production and others assets of primary importance for the national economy must be owned by the entire population. This ideology underlied as a legal principle in the

25 This thesis will concentrate on joint ventures in the four countries being described, and different forms they are formed in. Foreign branch and subsidiaries are beyond the scope of the paper and will not be discussed with exception to banking and alike services. This part will provide a theoretical background for the analysis of joint ventures and then forms under which they exist in Poland, the Soviet Union, Hungary, and Yugoslavia.

26 All countries in Eastern Europe have established a central authority usually responsible to the Council of Ministers for economic and business planning. K. Sajko, Enterprise Organization Of East European Socialist Countries - A Creative Approach, 61 Tul. L. Rev. 1365, June 1987.

27 This means that, for example, the key industry cannot be owned by a private person. See also R. Spencer Oliver, Commercial Law & Practice Course Handbook Series. Legal Aspects of Doing Business with the Soviet Union, Congress And
constitutions, civil codes, and other statutes of those countries. The government state organ was empowered to create, reorganize, and terminate the enterprise and was its main management body. The centrally planned economy did not leave any room for extra economic activities not included in the plan and does not respond to the market demand. The purpose of the reforms introduced currently is to separate macro-economics from micro-economics and begin economic activity based on market relations and competition among enterprises.

Yugoslavia was the first among socialist countries of Eastern Europe to begin the process of market oriented economic reforms. Since the early 1950's the centrally planned economic system has been gradually abandoned. It has been replaced by a new socio-economic model based on and developed according to the principle of workers' (employees) self-management and social ownership of production, while still the Yugoslav Communist party maintains its leading role. The concept of workers' self-management and social ownership is unique to Yugoslavia. There are many theories concerning the social ownership concept. The common future of all of them is negation of ownership monopoly of any kind either private, state, or group ownership, over social property as a whole or its part. In Yugoslavia ownership is a system of relations, rights, and responsibilities. The workers of the company establish responsibilities among themselves and with other natural and legal persons. The core of the system is


29 The Official Memorandum from the Yugoslav Government sent to the International Monetary Fund: European Economic Commission and other International Organizations from November 1989 of last year in which it announced its political and economic reforms in Yugoslavia, Yugoslav Reforms:
that workers directly manage the means, conditions, output, and economic activity. They decide independently of the enterprise planning, management, and development. There are three types of enterprises in Yugoslavia: the Basic Organization of Associated Labor (BOAL), Work Organization, and Composite Organization of Associated Labor. They are all organized in an hierarchical structure in which Basic Organization of Associated Labor is the primary unit of organization. They are created in each branch of production or services, and exist as large entities. The management of such a large units is very difficult and proven inefficient.31

The Polish, Hungarian and Soviet economic systems are still primarily based on state owned enterprises. The state enterprise either acts in the competitive sphere in its economic activity, or exists in order to fulfill different public law functions and services. These functions and services are under direct state control and are managed centrally. Many of such enterprises are subordinate to different Ministries (e.g. Ministry of Defense, Ministry of Finance), and are regulated by special statutes.32 The decentralizing approach has two weak points and each of them alone is able to bring down the reforms. The first is a question of property relations. The second touches the issue of the enterprise's financial bases. In the

30Forexample, the Federation, republics, autonomous provinces, communes, or social community.


decentralized self–management model, workers and managers control the
enterprise and are personally interested in its output. However, they do not own
the enterprise. Some people argue that it is only an academic distinction, but
actually it carries the problem of short–termism. The owners of the enterprise
enjoy the freedom of selling their assets whenever they want, therefore they are
interested not only in the income which their assets generate, but also in their
market value. If they own shares in a business, their value will be partly reflected
by management’s plans to maintain or improve its principal capital. If the
management decides not to reinvest in the enterprise and instead expends the
capital in order to maximize short–term profit, the market price of the enterprise
will drop down. In socialist countries workers have no shares of the enterprise to
sell, so they do not have an interest in the value of the enterprise, but rather
focus on current income. At the same time, the interest in the current earning
increases, since workers may leave the firm (on retirement, illness or other
reasons) and they cannot cash in the value of their share of future profits. As a
rule a desire to keep the enterprise functioning well works out only if the workers
believe it can bring profits to themselves. In many cases the belief built under a
socialist philosophy is that some future restructuring in the best interest of
company itself might put them out of work. This fear is an indicator of stagnancy
and is one of the reasons workers are interested in current income. The centrally
planned system is proved to be ineffective, and it is commonly understood that
ownership is the key to real reform. However, in the interim the right step is to
reform of the self–management system that causes this sharp conflict of interests.33

The financial environment of all socialist enterprises is also faulty. It is based on a so-called "soft budget constraint". The budget constraint of any enterprise, socialist or capitalist, is the maximum amount that can be spent in a given period. It is the sum of income, savings, and external funds. In capitalistic economic system, enterprises have "hard" budget constraints. Their spendings are limited to their own sources plus borrowing on commercial terms. The socialist enterprise's budget can be softer in some ways: 1) First, the enterprise can obtain all different kinds of subsidies from the government. For example, in Poland explicit subsidies alone ran at the rate of 10% of GDP through the 1980's, almost as much as the profit after taxes of the entire state sector. 2) Secondly, in socialist countries enterprises which are in trouble may obtain favorable tax treatment to help them out. For example, the authorities can grant extraordinary exemption or postpone the payments. It is not a practice under the capitalistic model. 3) The credit system might also be soft, and is the reflection of the following practice: It is possible to obtain loans, which are not expected to be paid off; credit is extended without due regard to the enterprise's prospects. Those things qualify as a "soft" credits. 4) Socialist enterprise also uses increasing prices as a form of making up for a shortfall of income. Under the centrally planned economy, the manager of the enterprise can claim the need to introduce higher (or lower) output prices, in order to discharge the obligation to the plan, and the

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34"Without the market mechanism there is no objective measure of the firm's performance, hence no disinvestment and thus insufficient pressure to reduce costs and introduce technological and product innovation. The problem is made worse, paradoxically, by the natural ambitions of all production units to expand output, since they do not face market or financial barriers, 'the budget limit is soft' to use Hungarian economist Janos Kornai's phrase." at 227. See also J.Kornnai, "Hard" and "Soft" Budget Constraint, Acta Oeconomica, 25 (1980) at 3–4.

35At the same time socialist systems do not offer strong legal protection against unwilling creditor. Often it happens that enterprises refuse to pay its credits on time or at all.
appropriate authority will often oblige.38 Under the free market economy system, the prices are provided by the market demand. The additional fact which also allows socialist enterprises to dictate their prices is that many of them are monopolies or near monopolies.37 They often act as unions and concerns. In that environment, despite any changes in foreign investment laws, it will be very difficult for Western investors to function properly.38

B. Motivation To Enact Flexible And Liberal Foreign Investment Laws.

The poor performance of the socialist economic system was a primary reason for enacting flexible and liberal foreign investment laws in Eastern Europe.39 The economic model described briefly in the previous subchapter proved inefficient and resulted in economic stagnation, which became burdensome for the nationals of the four countries being described. The average standard of living dropped gradually through the years. Foreign debts grew to the point that each of the countries could pay only the upcoming interest in a normal conduct. High inflation, inconvertible currency, and poor production quality, made it very difficult for those countries to compete and maintain a strong position in the world market.40

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37According to the study in 37 out of 62 Hungarian industries, three firms produce more than half of the total output. Id.
40"We began to concede one position after another and the gap in production efficiency, output quality and in technology as compared with the most developed countries began to widen." Moscow News No 27, Gorbachev's speech, June 24,
Many factors motivated Eastern European countries in enacting foreign investment laws. However, those most commonly recognized are:

1) the desire to gain access to Western high technology. It is believed that Western investor having an interest in the venture's successful economic performance will bring and keep updated the latest technology necessary to the competitive development of the venture. \(^{41}\)

2) The belief that foreign investments, especially in a form of joint venture, will help to increase national export, which is necessary to obtain long-term economic improvement. \(^{42}\)

3) The third goal, import substitution, is closely related to the second. Import substitution is the reduction of imports and the production at home of products previously imported. \(^{43}\)

4) The desperate need to earn hard currency. All Eastern European countries have inconvertible currency, which is necessary for trade on the world market. In order to obtain it they have to depend on selling their natural resources. This type of conduct is not good for the national economy. That is why it is hoped foreign participation will help earn hard currency.

5) Finally, all of those countries hope that foreign investments will provide the

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1987 at 7. See also Gorbachev's speech printed in Pravda, June 27, 1987.

\(^{41}\)"...Experience has convinced us that monopoly for individual organizations is a serious drag on scientific and technological progress..." Gorbachev's speech, Moscow News No 27, June 24, 1987 at 8.

\(^{42}\)Besides offering incentives to attract production-oriented foreign investments to the Soviet economists and creators of *uskorenie* apparently realize that the flagging Soviet economic reform needs an increase in consumer goods. See, Q Peel, Top Soviet Backing for Consumer Imports, Financial Times (London), Nov. 3. 1988, at 2 col.6.

opportunity to learn the improved technical and managerial training for their nationals.44

II. FOREIGN INVESTMENTS LAW IN POLAND, THE SOVIET UNION, HUNGARY, AND YUGOSLAVIA. COMPARATIVE ANALYSIS.

A. Introduction.

In general, foreign investments have traditionally been classified as either direct investment or portfolio investment. Direct investment usually involves ownership or control by the individual of minimum of 10% of the voting securities of an incorporated enterprise, or an equivalent interest in an unincorporated business. The second type, portfolio investments, usually encompass a small interest which is not intended to allow the foreign investor to control or actively participate in the investment. Direct foreign investment exists in the form of a foreign branch, foreign subsidiary, or a foreign joint venture.

There are essentially two legal forms of international joint ventures, equity and non-equity joint ventures (known also as contractual joint ventures). The most common form is equity joint venture, in which the interests of the joint venture's participants are represented by equity, e.g. in partnership by the partnership's interests or shares of stocks. In non-equity joint ventures the interests of participants are represented by contractual rights and obligations. Under the contractual joint venture agreement the participant agree to cooperate

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45Foreign branch and subsidiaries are beyond the scope of the thesis and will not be discussed with exception to banking and like services.
with each other with respect to the common project or business activity and aim to share the results of such conduct.

The equity joint ventures represent a number of advantages over the non-equity joint ventures for most manufacturing and marketing purposes.

1. First of all, it eliminates the need for each of the participants of the venture to form its own corporation under the local jurisdiction, which otherwise in a normal course of business conduct would be taken in order to minimize tax and corporate liability or satisfy the requirements of the local law.

2. Secondly, joint venture form of investment often simplifies the rights and obligations of its participant. Usually it operates on an independent basis, and has its own facility, management, budget, and business plan. It preserves separate books and records and that fact allows the joint venture partner to determine the results of the operation, e.g. shares in the joint venture's profit through the portion of dividends or to cover losses through the additional capital contributions.

The joint venture participant's interest is simply represented by the equity and can be easily counted and transferred to the other party if desired.

3. Thirdly, it is a convenient form concerning the relationships among supplier, customer, and other parties. The separate identity often seems to be helpful in jurisdiction, while there might be some prejudices toward foreign companies.

The contractual joint ventures reflect the opposite disadvantages analogous to those described above.

The non-equity joint ventures has been used in a short term projects, particularly in high technology areas and extraction industries.47

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The law of foreign jurisdiction is very important. Often foreign investment laws limit foreign equity participation and control of local enterprises. It also dictates directly or indirectly the form of joint venture.

A number of jurisdictions, for example Poland and Hungary, have enacted special joint ventures laws in addition or as an alternative to foreign investment laws. For a long time the only possible form of joint venture between socialist countries and the West were contractual joint ventures. The reason for that was that the means of production have been owned exclusively by the state. Presently, in the light of the changes which occurred in the last decade, we observe the solid grounds for existence of equity joint ventures in Eastern Europe, according to Western standards.

B. Forms Of Foreign Investments.

In Yugoslavia and Hungary joint enterprises can occur in five forms:

1) limited partnerships,
2) public limited companies,
3) limited liability companies,
4) joint ventures,
5) unlimited joint and several limited liability companies and partnerships.

In addition to these the foreign partner can invest resources into: public

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49For an analysis of comparative advantages and disadvantages of the various socialist joint venture laws in existence prior to 1987 see generally G.Lorinczi, US-Hungarian Joint Ventures – 10 Int'l Bus. Law, 113 (1982). See also Ban, Csanach & Madl, Hungary in Legal Aspects of Doing Business in Eastern Europe and the Soviet Union at 175 (D.Campbell ed. 1986); See also Rajski & Wisniewski, Poland Id. at 207.
enterprise, private enterprise, and private store; contractual enterprise, bank or other financial organization. Yugoslavia also provides the possibility of investment in cooperative, and insurance company. It also allows other forms of cooperation and joint operations established and approved by federal law. The Yugoslav Law on Foreign Investment, 28 J.L.M. 1543 (1989) (YFIL). Hungary recognizes the union as a form of foreign investment supplementing to the list described above.51

Both countries, Hungary and Yugoslavia, have the most developed legal frameworks for foreign investments. The remaining two, Poland and the Soviet Union, still have the foreign investment law in the transient stage. The Soviet Union recognizes basically two forms of investment: joint venture and cooperatives. On the other hand, Poland provides only for a limited liability company and a joint stock company.

C. Subjects Entitled To Invest.

Polish Foreign Investment Law of 1988 makes a distinction between "foreign subjects" and "Polish subjects" among the persons eligible to invest in the country. Within the meaning of that Law, foreign subjects are:

1) corporate bodies having their residence abroad;
2) natural persons residing abroad;
3) unincorporated companies of those from points 2) and 3).

51Hungarian Foreign Investment Law of 1988, Hungarian Chamber of Commerce, HungaroPress.
53Art. 3 of the Polish Foreign Investment Law (PFIL).
Polish persons permanently residing abroad are also treated as foreign investors.

Within the meaning of the Law, Polish subjects are:

1) the state treasury; 2) other corporate bodies set up according to the laws of the Polish People's Republic; 3) natural persons permanently residing in Poland regardless of their citizenship or nationality, with the exception stated in Art. 46 of the Law. This Article refers to the Law of March 24, 1920 on purchasing real estate by foreigners and introduces amendments to that law. All entitled subjects can benefit from the Law, but it should be noted that the entitlements of the Polish subjects are derivative since they depend on the activity performed jointly with the foreign subjects, but at the same time entitlements of foreign subjects are primary and autonomous.

The Soviet Joint Ventures Law states that the domestic participant of joint enterprise may be: 1) one or several Soviet enterprises or associations and other organization, who are juridical persons. Foreign participants are 2) one or several foreign firms or companies, corporations, and other organizations, who are juridical persons in their country.

The Yugoslav participants in joint enterprise are:

1) work organizations known as:
   a. basic organizations of associated labor (BOALs),
   b. work organizations of associated labor (WOALs), and
   c. composite organizations of associated labor (COALs).

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54 The official name of the country has been changed on February 1989 and now is the Republic of Poland.
The law refers to them as domestic organizations of associated labor. The BOALs, WOALs, and COALs are the legal entities with a hierarchical structure, in which BOALs are the primary units of organization;\textsuperscript{57}

2) socio–political community;
3) bank and any other financial organization;
4) insurance organization; or
5) any domestic natural persons.

According to the Yugoslav law, a foreign investor means:

1) any foreign legal person, which has its principal place of business abroad;
2) any foreign natural person. For the purpose of the Law any Yugoslav citizen residing permanently abroad and any foreign persons owning an enterprise in the Socialistic Federal Republic of Yugoslavia is deemed a foreign investor.\textsuperscript{58}

According to the Hungarian Foreign Investment Law of 1988 (Article 7–8), the domestic subjects entitled to invest are:

1) the Hungarian State;
2) Hungarian Legal Persons;
3) Hungarian economic associations without legal personality;
4) Hungarian natural persons.

The foreign investors entitled to establish economic association or invest in already established one are:

1) foreign legal persons (corporations, firms, organization and like) established according to their domestic law, or if they are registered in register of firms or any other economic register;


\textsuperscript{58}Article 2 of the Law (YFIL).
2) foreign natural persons.

Any legal or natural person may be a shareholder of a public company limited by shares.\textsuperscript{59}

\section*{D. Foundation And Reorganization Of The Enterprise.}

Access to the Polish market is determined by obtaining a permit. The Polish Investment Law of 1988 formulates only general access criteria of a preferential character.\textsuperscript{60} The legislature did not require the objective criteria, but instead provided an appraisal of the usefulness of individual investment project and establishment of conditions which may attract a foreign investor. The decision to approve or reject an investment application and to determine the condition of implementation of introduced investment project belongs to the President of the Agency of Investments.\textsuperscript{61}

The establishment of a company with foreign participation in Poland always requires a permit, which indicates the commencement of the business activity. A Permit is issued upon the application of the interested parties to the President of Agency. The Law expressly provides the grounds for granting and denying a Permit. If the President of the Foreign Investment Agency denies the issuing of a

\textsuperscript{59}Hungarian Foreign Investment Law of 1988, Hungarian Chamber of Commerce, HungaroPress, at 2.

\textsuperscript{60}Art. 5 of the Law (PFIL). See also Art. 3 of the Law (PFIL).

\textsuperscript{61}The Agency is a singe organ of state administration subordinated to the Chairman of the Council of Ministries. The President of the Agency is equipped with the broad range of decision-making discrepancy, but with numerous limitations which would surface the implementation of application. This legal construction was introduced in order to serve maximum simplification in application process and aim elastically on negotiations with potential investors.
Permit, the parties have a right to appeal to him for re-examination of the case. However, such a decision may not be appealed to the Supreme Administrative Court.

Article 5 section 2 provides the criteria guideline upon which a Permit is issued and the other situations in which it is required. Article 6 section 1 of the Law provides an exhaustive list of reasons for denying a Permit. The President of the Foreign Investment Agency will refuse to grant a Permit "whenever the conduct of the business activity is unjustified due to:

1) the threat to State economic interests;
2) the requirement of environmental protection;
3) state security and defense interests or the protection of State secrets."

The legislators by using the word "unjustified" wanted to create grounds for permitting a flexible investment policy and to leave room for undertaking practical decisions upon each individual application in the light of complex circumstances. After the issuance of a Permit, the company has to register in the

62The parties have fourteen days for such an appeal from the delivery of the decision denying the permit; see Article 6 sec. 3 of the Law (PFIL).

63Id. Art. 6 sec. 4 at 1523.

64Article 5 section 3 states that "A permit is issued whenever the business activity ensures in particular:
1) introduction of modern technologies and management methods into the national economy;
2) provision of goods and services for export;
3) improvement in the supply of modern and high quality products and services to the domestic market;
4) protection of the environment."

Section 3 of the Article 5 provides the list of the activities undertaking of which requires a permit. See Art. 3 of the Law (PFIL) 28 I.L.M., 1522 (1989).

65Id. at 1523.

66That provision of Article 6 section 1 should be interpreted together with provisions of Article 8 section 1 and Article 11 section 1 point 3 of the Law, which provide the parties with flexibility in seeking positive solutions through negotiations before the issuing a Permit. This mechanism was set up by the
court in accordance with the regulations of the commercial register and begin its functioning.67

In the Soviet Union the first step for the parties interested in creating joint enterprise is to submit a proposal (called also letter of intent) with the technical and economic substantiation and draft articles of incorporation to ministries and departments under which they would operate. Republic ministries and departments submit these materials to the Council of Ministries of the respective union republic, to Gosplan, the central state planning committee, and to the Ministry of Finance.68 The proposal should reflect the intent of the potential investor and tentative plans for a business activity undertaking together with a Soviet partner.

The purpose of the letter of intent is to isolate preliminary problems which need to be solved, before parties can engage in substantial discussions.69 The foundation documents and the feasibility study are the only obligatory documents for application procedure. However, parties can prepare any other documents they feel are important or useful. Once the foundation documents are approved, the

legislator in order to attract the most useful foreign investment from the national point of view.


68Article 2 of the Decree On Joint Enterprises With Western And Developing Countries; 26 J.L.M. 749, 750 (1987). In the original decree the Soviet Council of Ministries also had to approve all joint ventures.

69Western firms complain that the current joint venture law in the Soviet Union contains a lot of unresolved problems which are the source of potential misunderstanding, e.g. it does not say anything about the relationship between the joint enterprise and the Soviet annual plan, does not provide guarantee of access to the market or supplies of materials. Under that circumstances Western firms argue that is not fair that Soviets expect the firm to make a serious effort in pushing into practice the stated intent. See R.Mirabito, Prospects For Western Investment: Comparison of Joint Venture Laws in the Soviet Union, Yugoslavia, and China, 12 Bost. Coll. Int'l & Comp. L. Rev. 103 at 111 (1989).
joint enterprise has to be registered and at that time acquires the status and the 
rights of a separate legal entity. 70

According to the Yugoslav Law of 1988 parties have to sign an investment 
agreement or an incorporation agreement. Such an agreement is aimed to regulate 
relations between investors. It has to be in writing in one of the Yugoslav 
languages 71 and translated into the foreign investors language. The next step is to 
submit all investment agreements to the Federal administrative agency 
responsible for an international economic relations, which will determine if such 
an agreement is in accordance with the provisions of the SERY Constitution and 
Federal law. 72 After the approval of the investment agreement, the contract has 
to be registered and the joint enterprise is valid from the date of contract’s 
formation.

The Hungarian system is the most developed and liberal in comparison with 
the other three countries. Hungarian Law does not view a permit as necessary for 
all investment undertakings but only for the establishment of an association 
which is fully or in majority owned by foreigners. 73 In that a case the joint 
permission of the Minister of Finance and the Minister of Commerce is required.

70 The USSR Ministry of Finance established regulations under Instruction 224 of 
November 24, 1987 on Registration of Joint Ventures in the USSR. See C. Xuereb, 
Guide to Joint Ventures in the USSR; Law, Regulations, Model Documents, And 

71 The Yugoslav languages are: Serbo–Croatian, Croato–Serbian, Slovene, and 
Macedonian.

72 Article 12 of the Yugoslav Foreign Investment Law. In the case the approval is 
denied, such a decision may be appealed to the Federal Executive Council within 
15 days from the delivery of decision. However, no more administrative 
proceeding can be undertaken against the decision of Federal Executive Council 
which is final; see Article 22 paragraph 4–5 of the Law (YFIL).

73 For the sample set of documents necessary to open a joint venture see Proposal 
For Joint Ventures, Hungarian Chamber of Commerce, G. Kovacs ed. Budapest, 
1989.
The joint decision on the application is issued by the Minister of Finance. Decision rejecting the application contains the application therefore. If a foreign investor in a joint enterprise has less than 50 percent of the equity, the permit for economic activity is not required.

E. Character Of Contributions And Issue Of Ownership.

According to the Article 16 of the Polish Law on Economic Activity with the Participation of Foreign Capital, the contribution to company’s equity by the foreign subject can be made: 1) in cash in Polish zloty obtained through a documented exchange of foreign currency in the foreign currency bank according to the rate of exchange announced by the National Bank of Poland; 2) in kind — either transferred from abroad or acquired Polish zloty obtained through documented exchange of foreign currency; 3) in rights.

Contributions of Polish subjects can be made: 1) in the domestic currency, or 2) in the non–monetary form. The non–monetary contributions made by Polish subjects can be contributed to the company to the extent allowed, and in accordance with the principles set forth in the regulations on the administration of the State Land.

74"...if the application for permission is not rejected within ninety days reckoned from the date of filing, the permission should be considered as granted." Article 9 sec. 2 of the Hungarian Foreign Investment Law of 1988. See also Article 9 sec. 1 and 2, and Article 11 sec. 1. See Hungarian Foreign Investment Law of 1988, Hungarian Chamber of Commerce, Hungaro Press at 3–4.

75One of the important factors in the change of environment in Hungary is clearly the delegation of responsibility to the Hungarian Chamber of Commerce to assist in the development of joint ventures. Other agencies have been created as well, but the Chamber of Commerce is the most active in the development, promotion and coordination of joint ventures. See Ch.Raffaele, The Recent Transformation of Hungarian Investment Regulation: The Legal Framework , The New Regulation of Direct and Financial Investment and The Dynamics of Reform, 12 MA. J. Int’l L. & Trade, 277 at 297 reference 122 (1988).

76"...the rights to the state owned real estate may be contributed to the company to the extent allowed, and in accordance with the principles set forth in the regulations on the administration of the State Land." Article 16 sec. 5 of the Law.
subjects should be specified in the company’s founding act as to the value and the type they are provided in. The character of the contributions is set in the agreement between the parties establishing the company independently, which means that the third parties, including the state organ cannot interfere with it.

Article 16 section 7 provides that only registered documents are issued for contributions to the company’s equity capital and shares are issued for the individual persons named. That restriction enables the President of the Agency to exercise his preliminary control and have an impact on the property relations in the company.

It is important to specify the meaning of the non–monetary contributions. In order to do so we have to keep in mind the interpretation of Articles 163 and 311 of the Polish Commercial Code. The following are considered to be non–monetary contributions:

1) real estate, machines equipment, and other material assets;
2) non–proprietary rights such as patents, licenses, copyrights and so on;
3) active debts.

Licensed know–how is also recognized as a form of non–monetary contribution, however, it still has not been interpreted clearly whether confidential business information may be considered a non–monetary contribution. The goods which

77 If requested by the organ issuing the permit for the company the value of the contributions may be verified by the independent experts. If such verification finds that the market value of the in kind contribution is lower that one given in the application for permit, the cost of verification will be borne by shareholder making that contribution. See Article 16 sec. 6 of the Law (PFIL). See also Art. 3. of the Law (PFIL).

78 Although it is proved to be justified from the point of view of the protection of economic state interests, it is inconsistent with fundamental principles of the operation of the market and the independent character of contributions made by the parties.
cannot be evaluated, such as clients, contacts, established position on the market, etc., are not included in that group.\textsuperscript{79}

As I have mentioned before, the only restriction of the full freedom of the economic activity in Poland is Art. 8 sec. 1. which provides the President of the Agency with the power to condition the issuing of a Permit upon a foreign party's undertaking business set up jointly with Polish subjects and to set a specified ratio between the shareholders' contributions to a Company's equity. Otherwise the Law clearly allows the projects with 100 percent of foreign capital invested, and therefore full foreign ownership.\textsuperscript{80} However, the Law provides that the total value of the foreign parties' contributions to the company's equity cannot be less than 25 million Polish zloty,\textsuperscript{81} or in the case of investments undertaken jointly with Polish subjects less than 20 percent of entire contribution to the joint company. That minimum has been imposed in order to serve a triple purpose: 1) to prevent foreign investors in Poland from undertaking economic activity with only the use of symbolic equity, which does not provide any benefits for the national economy and therefore would not be compatible with the intention mentioned in Art.5 cl. 2 of the Law;\textsuperscript{82} 2) to prevent the foreign subject from making decisions about operating the joint venture without contributing a significant equity at the same time; and 3) to prevent domestic subjects from contributing essentially to joint venture.


\textsuperscript{80}Art. 2 sec. 1 of the Law (PFIL).

\textsuperscript{81}That amount of 25 million zloty is adjusted accordingly to the changes in the rate of exchange of the Polish currency to the foreign currency in which contribution is being made, see Art. 16 sec. 4 of the Law (PFIL). See also Art. 3 of the Law (PFIL).

\textsuperscript{82}Id.
In the Soviet Union a foreign partner may contribute: 1) cash, 2) assets, or 3) a combination of both. Western contribution is usually made in cash, technology, and know-how. In the original decree the parties had assessed ruble contributions based on the agreed prices which reflected the world market price. The parties valuated the foreign parties’ investment according to the official exchange rate established by Gosbank of the Soviet Union. The effective rate was set the day the parties signed the contract or the one the parties chose later and agreed upon. That provision was amended in September 1987 and now the joint venture participants are permitted to assess the foreign contribution in rubles or in the foreign currency.83 The Soviets usually provide buildings, natural resources, basic equipment, and labor. The proportion of each partner’s contribution determines the proportion of ownership and the distribution of profit.84

Before the enactment of the joint venture law in USSR, foreign investments in the Soviet Union were limited to Industrial Cooperation agreements, which required a Western investor to provide the Soviet party with the capital, equipment, and technical experience essential to make the operation function.85 These kinds of agreements were not profitable for foreign investors.

The Joint Venture Law does not provide a minimum capital contribution for the company’s character fund. Joint companies are required to allocate resources to a number of funds which have to be established. The original Joint Venture Decree provided that the Soviet party had to have at least 51 percent ownership

83Article II of the Soviet Decree on Joint Enterprises With Western And Developing Countries 26 J.L.M. 749 (1987).
of the joint ventures's charter fund. The charter fund is similar to a capital account and determines the ownership by each partner which is proportional to the percentage of contribution. That initial requirement that the Soviets have to possess 51 percent ownership of the joint venture raised problems for a number of U.S. corporations, which did not want to consider the possibility of investment in which they would have a minority ownership. The Soviet's main purpose of having that requirement was to control certain segments of the economy.

However, in December 1988, the Joint Venture Law was. A very important change is that now the respective shares of foreign and Soviet partners in the equity of the joint venture may be determined on a case-by-case basis by agreement of the parties. Under this new rule, the equity share of the foreign partner could range from one to ninety-nine percent. The Soviet authorities would most likely not approve the joint enterprise in which they would have a minimal ownership interest, such as 20 percent or less. It is also doubtful if the Western investor would like to have 80 percent ownership, because that would require investing large sums of capital in the uncertain Soviet economy.

It is interesting to note that the Joint Venture Decree also requires the venture to contribute "a received fund and other funds needed for the social

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86See generally A. Gardner, Restructuring the Soviet Foreign Trade Sector, 23 Colum. J. World Bus. 7 (1988). The Soviet Union has indicated that it may enact legislation to eliminate number of the current limitations, e.g., 49 percent foreign ownership. N.Y. Times, Oct. 28, 1988, §1, at 1.


development of the collective." The contribution to those funds are not specified in the Decree but instead the parties have to specify and negotiate such contributions in the Foundation Documents.

The Yugoslav Foreign Investment Law allows foreigners to invest in cash, equipment, patents, industrial design, trademark rights, production techniques, and know-how. The foreign partner may also contribute equipment or raw materials if they are not available at the proper price in the Yugoslav market, or not in a sufficient quantity and quality to satisfy the venture’s requirements. Nowadays a foreign investor in Yugoslavia may establish a wholly-owned enterprise according to the procedures and under the conditions set forth for the establishment of private enterprise by domestic persons.

There are some exceptions to that freedom as to the areas of economic activity and territorial restriction. 1) Foreign investors cannot establish wholly owned enterprises in the following areas of economic activities: manufacturing and distribution of armaments and military equipment, and in the area of rail and air transportation, communication and telecommunication, insurance, publishing, and mass media. 2) Foreign parties cannot establish a wholly owned enterprise in any part of the Socialist Federal Republic of Yugoslavia which has been designated as a prohibited zone by Federal legislation in regard to the national defense.

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90 Article 30 of the Decree on Joint Enterprises With Western and Developing Countries 26 J.L.M. 749 (1987).
91 Id.
The foreign party has to obtain approval of the Federal Agency responsible for international economic relations authorizing that the conditions described above have been met and then can establish wholly-owned enterprise. 93

In Hungary a foreign investor may contribute to the joint enterprise: 1) in cash in a freely convertible currency unless there exists a treaty provision to the contrary, 2) in any negotiable asset with a real value, any intellectual property or right as an in kind contribution. 94 A person making a non-monetary contribution bears liability for five years from the date of contribution that the value of his contribution at the time of the deposit equals the value declared in the deed of association. 95

As regards foreign participation in Hungarian Economic Associations and proportional ownership, there are essentially three forms of participation:
1) the establishment of Hungarian companies with foreign participation,
2) foreign participation in existing Hungarian companies,
3) setting up 100 percent foreign-owned enterprise. 96 The important novum of the 1988 law is that it is possible now to establish companies entirely owned by a foreign partner. The only limitation to such an ownership is: a public company limited by shares which shares are fully held by foreigners or in which they have a majority of shares, may not acquire the controlling majority of shares in another Hungarian public company limited by shares. Another important modification is

95 Art. 22 sec. 3 of the Hungarian Foreign Investment Law, Act VI 1988 on Economic Associations (Company Act), Hungaro Press, Information Service of the Hungarian Chamber of Commerce.
96 See note 51 at I (Introduction to Act XXIV).
that now the Hungarian enterprise with foreign participation may own any real
estate property necessary to carry out its approved activities.\textsuperscript{97}

The Hungarian law provides a minimum of 20 percent of initial capital must
contributed by a foreign partner if the activity is undertaken jointly with
domestic partner.\textsuperscript{98}

F. Rights Of Foreign Investor And His Protection.

According to the Article 22 section 6 of Polish Investment Law, the Minister
of Finance, if asked by a foreign investor, offers a guarantee to that partner that
he will receive compensation up to the value of his share in the company's
property in case of a loss resulting from a decision of any State authorities due to
respect of nationalization, expropriation, or events with consequences equivalent
to those two mentioned.\textsuperscript{99}

Obtaining such a guarantee is optional and is subject to the individual's
motion, since the Minister of Finance responds only "upon motion" and "shall
offer" guarantees if requested by the partner. The guarantees mentioned in
Article 22 section 6 are general in character. They apply to all foreign investors
regardless of the country they come from. In addition to the guarantees
introduced in Article 22, Poland has signed bilateral investment protection
treaties with a number of countries. The investors from those countries enjoy

\textsuperscript{97}Id. at II.
\textsuperscript{98}Id.
\textsuperscript{99}Article 22 section 6 of the Polish Foreign Investment Law of 1988, see Art. 3 of
the Polish Foreign Investment Law (PFIL).
special guarantees of an objective character to which they are entitled by the Law regardless of whether they did or did not apply for them.\textsuperscript{100}

Poland guarantees to investors from countries with which Poland has a treaty, the equal treatment of the investment of the other party, combined with the most favorable treatment where investments from the other country enjoys the same favorable treatment. The most favorable treatment is not applicable to the privileges arising from the custom union or like agreements of preferential character or privileges derived from the agreements on avoiding double taxation. In the case of nationalization, expropriation or other events with like effect the treaties guarantee the payment of compensation in the amount of the actual value of investment.\textsuperscript{101} It should be stressed that beside the legal guarantees that Poland provides, there is no evidence and intention of Polish Government to nationalize or expropriate the property of foreigners. Poland now is in the transient stage of transforming state ownership to private ownership in many areas of economic activity. Poland has a great interest in winning the confidence of the foreign investors in that respect.\textsuperscript{102}

A great number of state enterprises transferred into companies with the participation of natural persons or corporate bodies which are not socialized

\textsuperscript{100}Countries with which Poland has signed the treaties namely are: Austria, Belgium, Luxembourg, China, France, Great Britain, Italy, and the United States. Negotiations with West Germany to conclude such a treaty are still in the transient stage.

\textsuperscript{101}For example the Polish – British treaty provides for payment of "prompt, adequate, and effective compensation". It represents so called "Hull clause", see E.Piontek, Polish Foreign Investment Law 1988, 23 Jour. of World Trade, 5 at 23 (1989).

\textsuperscript{102}In the preamble to the Polish Foreign Investment Law of December 23, 1988 we read: "With the aim of creating stable conditions for further development of mutually beneficial capital cooperation between domestic and foreign subjects as well as to guarantee protection of property and other rights of foreign investors it is enacted as follow." See Art. 3 of the PFIL.
sector entities. According to the Article 3 and 12 of the Law of December 24, 1989 on selected conditions of the national economy and amendments to some Laws. These regulations allow for turning over parts of state property to legal or natural persons to be used in the form stipulated by the civil law in a form of lease, etc., in return for economic activity. In a relatively short time those regulations have applied to many cases.\textsuperscript{103}

On October 13, 1989 Poland and the United States signed the Investment Guaranty Agreement.\textsuperscript{104} This agreement makes available in Poland the U.S. Government's political risk insurance, project finance, and other programs for encouragement of investment provided by the Overseas Private Investment Corporation. The agreement with Poland is substantially in a standard form of agreement, however, OPIC agreement are executive agreements, so the advice and consent of the Senate to ratification is not required under the U.S. law. The standard executive agreements assumed that the constitutional ratification process may be required by another government and entry into those is conditional upon notice from another government that all requirements have been met. In the case of Poland, each government will have to give notice.

The OPIC program could not come into force in Poland upon satisfaction only of Poland's internal requirements, because of the prohibition contained in Sec. 620(f) of the Foreign Assistance Act of 1961, as amended (FAA), 22 USC 2370 (1988) against assistance to communist countries.\textsuperscript{105} The changes are

\textsuperscript{103}E.Piontek, Polish Foreign Investment Law 1988, 23 Jour. of World Trade, 5 at 23 (1989).

\textsuperscript{104}Poland – United States: Investment Guaranty Agreement. 28 J.L.M.Nob. 1393 (1989).

\textsuperscript{105}In case of Yugoslavia this impediment to OPIC's operation was overcome by amendment of Title IV of the FAA, which constitutes OPIC's corporate charter, to permit operation in that country. See FAA Sec. 239(f), 22 USC 2199(f) (1988).
expected which would add Poland and Hungary to the countries named in Sec. 239(f) of the FAA. There are expectations that changes will occur upon a legislative amendments or a presidential waiver of the provisions imposed by Sec. 620(f) of the FAA.

Recently the United States and Poland also have signed the agreement to foster business transactions between themselves. The agreement includes also special protections and incentives for U.S. investors in Polish enterprises. Among the many provisions in the treaty worth mentioning are: 1) U.S. investors in Polish enterprises will be treated equally with Polish or other foreign investors, whichever is more favorable; 2) U.S. companies can export their earnings and Poland will phase out restrictions on repatriations of profits; 3) the U.S. and Poland will abide by international agreements on arbitration of disputes and intellectual property rights in areas of software copyrights and chemical patents; 4) U.S. companies have the right to market goods and services at the wholesale and retail level, and gain non-discriminatory access to raw materials at the market, and access to information to make market studies. Permits and the registration process will be simplified.

In the Soviet Union the joint venture law makes it clear that a joint enterprise is liable for its debts to the extent of the value of its property, but it is not liable for other debts of the Soviet state. Consequently, the Soviet Union is

\[106\text{The agreement has been signed on March 21, 1990 by President Bush and Polish Prime Minister T. Mazowiecki, The Wall Street Journal, Thursday, May 22, 1990 at A11.}\]

\[107\text{Id.}\]

\[108\text{Under the Soviet law the joint venture is liable for the debts of its subsidiaries. However, subsidiaries are not liable for the debts of joint venture. See also, The Soviet Union and International Cooperation in Legal Materials (book review), by G. Ginsburgs, 29 Va. J. Int'l L. 562 (1989).}\]
not responsible for the obligations of the joint enterprise. All disputes which arise between the joint enterprise and the Soviet Union, or between the participant in the joint enterprise are subject to the jurisdiction of the Soviet courts, or if both sides agrees to the arbitration. Joint enterprises outside or inside the Soviet Union can open their branch office under the provisions of existing law. The law also permits joint ventures to set up with Soviet enterprises in other countries to establish subsidiaries in the Soviet Union.

Although the Soviet Joint Venture law provides a foreign investor with the same treatment as a domestic subject, one of the greatest concerns is the access to the Soviet market as well as raw materials. While the first consideration can be overcome easily,109 the second remains troublesome. In a centrally planned economy distribution of raw materials is provided to the state enterprises and if there are surpluses, they can be distributed within private sector. Practically there are no raw materials left after distribution to state enterprises. Even if there are any left, the market demand among the Soviet private sector is so high that the access to raw materials is minimal or zero. It means that a foreign investor has to obtain the necessary subproducts and materials abroad, which makes the economic activity less profitable and burdensome. The Soviet Joint Venture law does not guarantee access to those materials.110

109In 1985 US Secretary Baldrige worked out with the Soviet Minister Patolichev the market access for the US companies in the Soviet Union. Soviet enterprises were instructed to cooperate with the American companies. Both parties signed the letters of intent to increase cooperation between countries. R.S.Oliver, Congress and US–Soviet Trade. Commercial Law & Prac. Course Handbook Series. Legal and Practical Aspects of Doing Business With the Soviet Union. 464 PLI/Comm 211 at 562.

The Soviet law also protects the foreign investor in the case of liquidation of the company.\textsuperscript{111} The foreign partner is able to obtain the remaining value of the investment at the time of liquidation after the obligation to the Soviet partners and other third parties have been met.\textsuperscript{112}

In Yugoslavia, the Foreign Investment Law primarily emphasizes the contractual relationship between the partners. Under the Yugoslav law, a written contract\textsuperscript{113} governs relations between the foreign partner and the Yugoslav subject. The law protects the integrity of the contractual agreement by stating that the rights of foreign investor specified by a contract are protected by the law and may not be abridged by the provisions of any other law or regulations.\textsuperscript{114} In addition to that the Yugoslav law contains a "savings clause", which protects the foreign investor in case Yugoslavia amends its foreign investment law or changes its economic policy and in any way that affects by it foreign partner. The law in Yugoslavia states that the law which is in effect on the date the partners sign the agreement will govern the relation. If there are any amendments of the law the new regulations may govern the relations if both parties agree and also if more favorable. However, it does not apply in two areas: 1) taxes and assessments the BOAL pays to the community; and 2) contributions to self-management communities. The contract for a joint enterprise must specify, according to the Yugoslav law, the following areas: the purpose and the term of investment in

\textsuperscript{111}The liquidation of the company may be a result of the procedures set forth in the articles of incorporation or by the Soviet Council of Ministries, if the enterprise does not follow the objectives and tasks of the articles of incorporation.

\textsuperscript{112}Oversees Private Investment Corporation in the United States does not provide political risk insurance for businesses within the Soviet Union. However, private political insurance is available. N.Y.Times, Mar.14, 1988 at D4, col.2.

\textsuperscript{113}The contract has to be approved by the federal government's agency. See also Yugoslav Law on Foreign Investment, 28 J.L.M. 1543 (1989).

\textsuperscript{114}Article 6 of Yugoslav Law on Foreign Investments, 28 J.L.M. 1543 (1989).
joint company; the amount invested and the share contributed by each side; the
terms of repayment of income; initial capitalization and the mutual obligations in
case the business fails. The contract also has to describe the composition and
power of the joint venture's board; the way to settle possible disputes; the means
to secure the foreign exchange. According to the Article 7, the enterprise with the
foreign investment has the same position, rights, and responsibilities in the
Yugoslav markets as domestic, public enterprise.115

In Hungary, according to the Article 1 of Foreign Investment Law of 1988,
the investments of foreign partners in Hungary enjoy full protection and security.
All losses born by a foreign investor, in case of nationalization, expropriation or
like events having equivalent effect on ownership rights, will be compensated at
real value without delay. The compensation will be made by the state
administrative organ and in the currency in which the investment took place.116
Hungary is the only socialist country, which also provides constitutional
guarantees. In October 1989 Hungary adopted the amendments to the
Constitution, which reaffirmed the protection of foreign investors given under the
foreign investment laws.117 This is a very important step, which ended the fear
among the foreign investors, that the Constitution as a supreme law of the
country could preempt the guarantees given under the foreign investment laws.

115R. Mirabito, Prospects For Western Investment: A Comparison of Joint Venture
Laws in the Soviet Union, Yugoslavia, and China, 12 Bost. Coll. Int'l & Comp. L.
Rev. 103 at 122 (1989).

116In the case of infringement of law, review of the action of the state administrative
organ's can be requested from the court. Article 1 of the Act XXIV of 1988 on
Foreign Investment in Hungary. See Hungarian Foreign Investment Law of 1988,
Hungarian Chamber of Commerce, Hungaro Press.

117"Expropriation of property shall be admissible only exceptionally and out of
public interest in cases and ways as provided by law and against full,
unconditional and immediate compensation". Chapter I, Sec. 13 of the Hungarian
Constitution.
G. Management And Control Of Joint Enterprise.

A foreign investor is primarily interested in managing economic activity of the company in his way. In the past foreign participants were not allowed to have a majority of ownership and control over the economic activity of the company, and were not able to control management efficiently. In many cases their role was reduced to the role of capital investors and passive observers. Presently situation looks different. All four countries: Poland, the Soviet Union, Yugoslavia, and Hungary, remain flexible in making a foreign partner's role active in economic life of the enterprise.

The Polish Foreign Investment Law provides for two obligatory organs in the joined enterprise with foreign participation: 1) the Board of Directors, and 2) the Assembly of Shareholders. In the contract of establishment the parties can provide for the appointment of the Supervisory Board or the Audit Commission, or both.118

Partners enjoy a lot of freedom as regards the determination of mutual obligation, internal relations, and any adopting resolutions.119 The Board of Directors controls current operation of the Company. The law does not provide for any restrictions regarding the nationality of the board's members. The board represents the company outside and this right cannot be restricted with legal effect for third parties. In the case of internal issues, the board is bound by the resolutions of the shareholders, according to the principles defined in the contract

118The Supervisory Board has to be appointed if the number of shareholders exceeds 50. See Article 3 of the Law (PFIL).

119Only resolutions concerning changes in the company's contract, character of company, mergers or dissolutions of the company, require a two-thirds majority of votes. Article 237 §1 of the Polish Commercial Code.
of establishment, and as appropriate to the provisions of the Polish Commercial Code.\footnote{Article 12 sec. 1 of the Law (PFIL) at 12–13.} These provisions allow a foreign partner to negotiate in the contract of establishment of the company his role in the control over the enterprise the way he sees it. This is very important approach, which minimizes the fear of foreign partner, that the company might be conducted in different manners that he would like.

Under the Soviet Joint Venture Decree the management of the joint enterprise is governed by two bodies: 1) Board of Directors, and 2) Directorate. Both parties delegate the members of the Board of Directors with Chairman, who may be a Soviet citizen.\footnote{The original decree provided that the chairman had to be a Soviet citizen; see note 68 at 753.} The responsibilities and scope of activity of the Board shall be stated in the Foundation Documents. The second body, the Directorate, is the management organ in charge of everyday operations of joint enterprise. The Directorate's Director General also may be a Soviet citizen.\footnote{The situation repeats as with the Chairman of the Board. Under the original Joint Enterprises Decree he had to be a Soviet citizen. Id.} The remaining part of management personnel will be composed of Soviet and foreign citizens. What is important for foreign investors is to maintain sufficient influence in management decisions. There are, however, ways the American partner can maintain sufficient portion of his management. The Joint Decree does not provide for the representation on the Board or Directorate to be in proportion according to the partner's shares. Partners may negotiate their representation on these bodies between themselves. The foreign partner may also, by providing in Foundation Documents, designate his own representatives to supervise specific areas of
venture operations. Another solution is that parties may agree in the venture's charter, that some non—fundamental questions regarding the activity undertaken by the venture requires unanimity for approval.

The 1988 amendment provides that major questions relating to the daily operations of the joint venture will be decided at the meetings of the board members. The requiring of the unanimous vote of all members of the board of directors somewhat dilutes the awesome powers that would otherwise depend upon the chairman of the board. The law does not provide definition of a "major question", so practically any disagreement might be subject to a unanimous vote of the board of directors. This provision gives substantial protection for the interests of whichever partner happens to hold the minority share in the equity of the joint enterprise.

In Yugoslavia the law permits the foreign partner and the Yugoslav organization to set up a joint board to decide matters by mutual agreements. The board decides all issues relevant to the joint enterprise's activity under the input

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123Foreign partner will be most willing to appoint his own quality control representative.

124Under the new resolution, fundamental questions of the activity of a joint venture are decided at board meetings on the basis of the unanimity of all board members. USSR Council of Ministries Resolution, On Further Developing the Foreign Economic Activity of State, Cooperative, and Other Public Enterprises, Associations and Organizations, printed in Ekonomicheskaya Gazeta, No. 51, Dec. 1988 at 67.

125Article 435 of the Soviet Civil Code stipulates that the partners in a joint venture may agree to assign the management of the enterprise to only one partner who will then be wholly responsible for the daily management of the joint venture to the complete exclusion of the other partner. See The Civil Code of the RSFSR (1964) reprinted in 23 Law in Eastern Europe: The Soviet Codes of Law 133 at 501. However, it is not obligatory. The Soviet Civil Code is a prerequisite to the formation of the joint venture. Article 434—38 of the Civil Code. Id at 501—02.

of the Yugoslav representatives of the organization of associated labor. The composition and voting process on the board and the issues requiring mutual agreement is to be determined by the parties in the initial contract. The foreign partner cannot have more representatives on the board than the Yugoslav organization. However, if the partner invests less than fifty percent of total resources he can have an equal number of representatives on the board as the domestic partner. This provision aimed to avoid the disadvantageous position in management and control of the company for the minority shareholders and to encourage the foreign investment.

According to the Hungarian law, the organ which controls the management of the company is Supervisory Board (the supreme body of the company). However, in the deed of economic association parties can provide, that the control of management be entrusted to an auditor instead of or in addition to the Supervisory Board. The executive officers are: in case of union and a joint enterprise – the director; in case of limited liability company – the managing directors; in case of company limited by shares – the members of the board of directors.

The Hungarian Law on Associations describes in detail the procedure and requirements, which have to be met before the appointment of an executive officer, auditor, or member of the Supervisory Board. However, it does not

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128 Art.39 sec.1 Act VI, Law on Economic Association of 1988, Hungarian Chamber of Commerce. In the case of company limited by shares, a one–man company, and in a limited liability company having a primary capital in excess of fifty million forints, the appointment of auditors, in addition to the Supervisory Board, is compulsory. Id. sec. 2. See also Art.22 sec. 3 of the Hungarian Foreign Investment Law, Act VI 1988 on Economic Associations (Company Act), Hungaro Press, Information Service of the Hungarian Chamber of Commerce.
distinguish the legitimacy on the basis of nationality. Foreigners have the same
rights as nationals to become the members of managing organs and accordingly to
their position of shares held, minority or majority votes. The meeting of the
Supervisory Board has a quorum if two-thirds of its members are present (but at
least three of them). All decisions are taken by simple majority of votes.129


Under the Polish Foreign Investment Law of 1988, the employment policy of
the company with foreign participation is subject to its independent decision.
However, such a company may employ persons who are not Polish citizens or
residents only upon the consensus of the local organ of state administration of the
voivod level, which has specific competence as regards employment. At the same
time, according to Article 31 section 3 of the Law, the persons without a Polish
citizenship or residency may work in the company without a job contract but
assigned to the company upon consent of the foreign partner.130 That provision is
of a great importance if the foreign partner wants to use his own specialists, for
example technical supervision, implementation of economic management
contracts in the company, and like activities. The principles of renumerating the
company's employees should be defined in its founding act or in resolutions of the
company's management.131 From the company's point of view it is better to follow

129Id. Art. 35 sec.3. See also Sajo & Csillag, Law Making as Administrative
Behavior: The Case of Investment Regulation in Hungary, 15 Int'l J. Sociology L.
130Article 31 section 3 of the Law. See Art. 3 of the Polish Foreign Investment Law
at 1535.
131Id. Article 32 of the Law (PFIL).
the second option and include the employment enumeration policy in its resolution, since it allows greater flexibility.

Polish employees can be paid only in the domestic currency. Foreign employees can obtain their payments in the foreign currency from the exchange resources of the company. The company is free to decide according to its possibilities, the amount of currency allocated in the foreign exchange resources.\textsuperscript{132}

If requested by a foreign employee the remuneration income obtained in foreign currency may be transferred by the company abroad without a separate foreign exchange permit. The relations between the employer and his employees are subject to the Polish Law (Article 31 of the Law), as well as the trade unions freedom.\textsuperscript{133}

In the Soviet Union the law differs and impacts more obligations on the foreign employer. The Soviet law provides that the enterprise primarily must employ Soviet citizens and residents, and bears obligations to its employees. The original Joint Venture Decree required the management of a joint enterprise to sign collective agreements with the trade union in the enterprise and provide for the social regulations for the workers, according to the Soviet law and formation documents. The basic principle was the concept of equal treatment of foreign and Soviet employees. Working conditions which apply to Soviet citizens were also applicable to foreign workers with some exceptions, primarily based on the differences between soft and hard currency inconvertibility problems, as well as citizenship. The December 1988 amendment of Article 48 virtually allows the

\textsuperscript{132}The Polish Foreign Investment Law of 1988 does not specify the size of that fund. The criteria the company uses to determine it are the volume of foreign exchange and its disposal.

\textsuperscript{133}Polish labor law is territorial in nature. See also, New Dimension of the Polish Labor Law (Nowe Wymiary Prawa Pracy w Polsce). Rzeczpospolita, Special Edition, Apr. 1990.
joint enterprise to establish its own employment policy without regard to Soviet law. The new provision apparently would allow the joint venture to fire or hire employees accordingly to its own rules, and pay less than Soviet minimum wages or more than in the domestic sector. In short, it offers the joint venture carte blanche authority to fashion its employment policy. Trade Unions rights have not been mentioned expressly, but we can conclude, the policy in that regard also remains flexible. 134 Different rules apply to foreigners in regard to compensation, pension benefits, and leave rights, which are determined through individual agreements with the joint enterprise. 135

The joint enterprise is required to contribute to the social insurance of Soviet and foreign employees and the pensions of Soviet employees through the payments to the Soviet state budget. The State Committee for Labor and Social Problems of the U.S.S.R. and the All-Union Central Council of Trade Unions are empowered to interpret Soviet law regarding social insurance for foreign citizens. 136

The Yugoslav law does not provide any conditions for a foreign investor regarding the labor law or employment policy. As usual, the domestic labor law (adopted on federal level) applies to working conditions, but the general policy is that a foreign employer can do anything what is not expressly prohibited by law. Employment policy, hiring, firing, wages, and benefits, are left to the discretion of the parties. If a foreign investor has a minority ownership in the joint enterprise,


135Id. See also, Yugoslavia: Law on Investment of Resources of Foreign Persons in Domestic Organization of Associated Labor, 24 I.L.M., 315 (1985).

the Yugoslav labor law applies, unless the proposals made by foreign employer are more favorable.

The labor law is territorial in nature and in all four countries governs the job relations. In Hungary, according to Article 28 section 1, the status of the Association's employees shall be governed by the Hungarian Labor Code, and by the Contract of Association and the Contract of Employment written within the legal framework of the Code. The issue of the liability of employees is governed by the Labor Code and the law of Economic Associations of 1988. Trade Union rights are governed by Hungarian Labor Code and other legal rules enacted on that basis.

The Hungarian law does not oblige foreign employers to participate in the national social security programs. The employer of an association with foreign participation shall pay social insurance only for those foreign employees who want to obenefit from Hungarian medical care and other social services free of charge.

I. Repatriation Of Profit And Hard Currency Problem.

A major concern of American businessmen interested in investing in the Eastern European countries is how to repatriate their profits back to the home country or any third country in hard currency. All of those countries have "soft

137 For the detailed discussion concerning labor law in Hungary, see Gayer, Some Questions on Labor Law in Connection With Joint Ventures in Hungary, 10 Int'l. Bus. Lawyer, 133–137 (1982).
138 Act VI of 1988 on Economic Associations, Hungarian Chamber of Commerce.
140 Id. Article 26 sec. 2. Hungarian Foreign Investment Law of 1988, Hungarian Chamber of Commerce, Hungaro Press.
currency"), which is inconvertible and its value is not reflected in the certain amount of gold unit. The value of "soft currency" is artificial and its circulation is limited. In many cases a problem of soft currency limits the possibilities of repatriating profit to countertrade agreement or bargaining. Each of the countries has its own rules applying to the repatriation of profits by foreign investors, but they all share the most troubling problem to attract foreign investment — the inconvertible currency.

According to the Soviet law on joint ventures, a foreign partner has the right to repatriate profits, which are distributed to each partner in relation to their proportional share in foreign exchange. However, it does not end American concerns about being able to repatriate profit in hard currency from the Soviet Union. The law states, that "all currency expeditions of a joint enterprise [venture], including the payment of profit and other amounts due to foreign participant and specialists, must be ensured by the joint enterprise from receipts from realization of its products on the foreign market". Since a joint venture is

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141 A freely convertible currency or so called "hard" currency is one that may be exchanged for a gold or other currency without any restrictions. Non-convertible currency or "soft" currency (the one which is in circulation in Poland, the Soviet Union, Yugoslavia, and Hungary) is one whose value is artificial and whose circulation is limited. N.Y. Times, Dec. 4, 1987, at A15, col.1.


not able to convert rubels to hard currency nor to earn hard currency by selling in
the domestic market, a joint venture has to obtain enough hard currency on its
own in order to cover its necessary hard currency expenses. The practical effect is
to push ventures to be export oriented. Secondly, the company which wants to
import a large amount of products has to make a lot of hard currency, because
such a goods have to be paid for from the earnings from the sales of the joint
venture's goods in the foreign market. However, the Soviet policy is to push the
joint ventures to export as much as possible abroad. It remains in conflict with
the primary motivation of the American investor, which is a huge and untapped
Soviet market. The American investor does not want the joint venture to be
export oriented for two reasons: 1) first, many companies already have the
established position in a foreign market and the products from the Soviet joint
venture would compete in those markets with their own products. 2) Secondly, as
with each new operation, there is a risk that it may not be profitable. For an
economic reason, the investor is more willing to start ventures by selling products
in the domestic market before expanding internationally.

The issue of repatriating hard currency remains unsolved. However, there are
some ways of avoiding or minimizing the problem: 1) As I indicated earlier, the
easiest solution is to invest in the joint venture which is able to earn enough hard
currency to cover its operations and to develop a strong export market to assure

Transactions by Soviet Research and Manufacturing Companies, Enterprises,
Organizations, and Co-operatives and of Participants in Collaborative Research
and Manufacturing Projects with Foreign Enterprises, Organizations, and Firms.
Approved by the USSR State Bank and USSR Vnesheconombank. Id at 7.

145 Id at 754.

146 G.D. Swindler, Joint Ventures in the Soviet Union. Problems Emerge. 13 U. Puge
Sound L. Rev. 165 at 184–185, 1989. See also, A. Roberts, Dealing with Soviets:
those earnings in order to meet its repatriation requirements. This solution many times will depend strongly on the type of products and services exported as well as different kinds of cost included in the product, e.g. labor costs.

2) Secondly, the joint venture may assure the earnings of hard currency by the consortium arrangement. In March 1989, six U.S. companies\textsuperscript{147} formed the American Trade Consortium. The major economic ministries were established as a Soviet counterpart. The expected result of the agreement is establishment of 25 joint ventures over the next 20 years, primarily in consumer and industrial goods. The purpose of such an agreement besides cooperation is mutual economical help for the members of ATC, who do not earn enough hard currency through foreign exchange to obtain it from other ATC members.\textsuperscript{148}

3) The third solution is the use of foreign exchange clearing procedures. These procedures may permit a venture, which has a shortage of hard currency, to balance its lack against surplus of hard currency, which may be obtained from the other enterprises within the same ministry.\textsuperscript{149}

The other possible approaches are countertrade arrangements, buy-back agreement, or import substitution. The first US–Soviet joint venture, Combustion

\textsuperscript{147}These six companies are: Eastman Kodak, RJR Nabisco, Johnson & Johnson, Archer Daniels Midland, Mercator Corporation, and Chevron. N. Y. Times, March 31, 1989 at D4, col.2.


\textsuperscript{149}The foreign exchange clearing procedures were promulgated in response to the foreign concerns about repatriation of profit abroad in hard currency. R.Dean, Updating Soviet Joint Venture, Law and Practice, 23 Colum. J. World Bus. 53 (1988).
Engineering Corporation, which will make investments for oil refineries, is using one of such methods. Instead of being paid in dollars or rubels, Combustion Engineering Company is paid in the refined products, which later can be sold for hard currency.\textsuperscript{150} Another American company, Pizza Hut, wants to set a joint venture company in the Soviet Union and take the Russian–grown mushrooms as a part of its profit.\textsuperscript{151} The issue of repatriation of the profit in hard currency continues to be a troublesome one and the Soviets realize its importance. Foreign partners are encouraged to create new solutions and to come up with the new approach to the problem of hard currency repatriation as long as their actions do not violate Soviet law.\textsuperscript{152} The Soviets are flexible on this issue in order to maintain their policy of creating an attractive, positive climate for foreign investment.

In Poland the situation remains the same as to the basic principles of national policy, although some solutions vary. Companies with foreign participation enjoy the right to disposal of profit as a fundamental economic freedom. According to Article 20 section 1 of the Law, the foreign partner may distribute profit in the foreign currency only from the surplus of export revenues over import expenditures\textsuperscript{153} without a separate foreign exchange permit. In economically


\textsuperscript{151}Dreyfus, Negotiating the Kremlin Maze, Bus. Month., Nov. 1988. The practical problem which occurs with this type of arrangements is the fact, that Soviets made goods are hard to sell anywhere outside the Soviet Bloc. One of the reasons is a poor quality of those products which does not meet the Western standards, different taste and that makes uncompetitive on the world market. Secondly, those products which are attractive are already exported for a hard currency, and those producers are not willing to cut out those resources of hard currency and replace it with the countertrade agreement.

\textsuperscript{152}26 Int’l Leg. Mat. 749 at 757 (1989).

\textsuperscript{153}Article 20 sec.1 of the Polish Foreign Investment Law 28 J.L.M. 1518, 1529 (1989).
justified cases the Minister of Finance may permit a foreign partner to transfer abroad the amount of profit exceeding the mentioned surplus quantity.\textsuperscript{154} It is inferred from the legislative discussion, that the legislature intended to allow the issuance of such permits in the cases where the company's economic activity is of a special importance to the national economy as a whole, but especially in "preferred areas" in the production of goods or rendering of services as specified by the Council of Ministries.\textsuperscript{155} This provision is the compromise between the unconditional right to transfer of all profits due to and still inconvertible currency and the state's payment difficulties. The restriction of the exclusive right to dividends in foreign currency paid from the surplus of export revenues over import expenditures, is a conventional allowance for exchanging the whole or a part of dividend due to the partner in local currency into foreign currency. The part of a dividend which is represented in foreign currency and to which partner is entitled according to the general rules of the law or special permit is free for a transfer abroad at any time and is not subject to any additional conditions.\textsuperscript{156}

The Yugoslav law also places some restrictions on the company's profit. The law allows foreign partner to obtain income only in proportion to the amount of his investment in the company. The foreign partner is able to transfer profit abroad in hard currency in accordance with Yugoslavia's law on foreign exchange.\textsuperscript{157} He may also reinvest his profits in the company, invest in a contract with another domestic organization, or associate labor, or use them to purchase

\textsuperscript{154} Id. Article 20 cl.4 at 1529–1530.
\textsuperscript{155} Such a consent may be a part of the permit for the establishment of the Company. Article 20 cl.4 of the Law.
\textsuperscript{156} E. Piontek, Polish Foreign Investment Law 1988, 23 Journal of World Trade 1989, 5 at 19.
\textsuperscript{157} Article 30 of the Yugoslav Joint Venture Law of 1988.
Yugoslav products. The Decree of 1988 also permits a foreign partner to transfer inconvertible dinars abroad, or to other foreign firms, and such firms would use dinars for local payments.

Hungary adopted probably the most simplified way to regulate the repatriation problem. According to the Article 32 of the Foreign Investment Law in Hungary of 1988 the amount due to the foreign party from an Association's profit can be freely transferred abroad in the currency of the investment on the instruction of the foreign party. The currency can be defined in the articles of the Deed of Association. If requested, The National Bank of the Hungary will issue a guaranty to that effect.


Article 27 of the Polish Foreign Investment Law provides an exhaustive list of taxes to be paid by the company with the participation of foreign investment. The most important to the foreign partner and from the economic point of view is the income tax. Allowances within the income tax are one of the most tempting incentives for investing in the country. The maximum rate has been set for 40 percent. The company will pay income tax of 40 percent only when all of its sales

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158Yugoslavia rarely permitted a foreign partner to purchase local products with Yugoslav dinars profit. The decree of 1986 diminished the restrictions in this area. It permits the partner to stipulate in the contract whether the company may use the foreigner's dinar profits to purchase products on the Yugoslav market and ship them to the foreign country.


go to the domestic market. The income tax rate is reduced by 0.4 percent each percent of turnover on export of products and services, in relation to the total amount of turnover on economic activity reduced by turnover tax. However, the total tax rebate cannot diminish the tax to the point lower than 10 percent of the basic amount. The tax deductions are: the expenses from the profit on investments in the meaning included in the resolution of the Council of Ministers and social donations up to 10 percent of the company's profit.

The company is exempt from the income tax for the first three years from the beginning of operation. The operation is considered to be commenced on the date the first invoice is drawn up and the period from the moment the company is registered.

This legal construction provides an additional tax-free period, from the moment the company is registered, (which is used for the instruments necessary for starting its commercial operation) to the moment of commencement of the operation. If the company is involved in the economic activity which is defined by the Council of Ministers as a preferred one, it may obtain the tax exemption period for longer than 3 years, but not exceeding six years. These additional tax exemptions can be granted to the company in advance while applying for a permit to establish the company or later during the initial period of tax exemption.

As regards the personal income tax the situation may differ and depends on whether the shareholders of the company and foreign employees reside or domicile in the country with which the country of investment has signed an agreement on avoiding double taxation. In Poland the foreign employees and shareholders of the company pay personal income tax in the amount of 5 to 15 percent if there was an

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161Article 27 section 1 point 3 of the Law (PFIL).
agreement signed between Poland and the country of person’s residency or domicile.\textsuperscript{162} If there is no such agreement the personal income tax for the subject mentioned above is 30 percent. Presently the Polish and U.S. governments are negotiating an agreement to avoid double taxation in regards to the enterprise’s income.

In the U.S.S.R. the situation varies. The initial tax holiday period is set up for 2 years and begins from the moment profits are first declared.\textsuperscript{163} However, a business year loss cannot be entered into the profit calculation of the next or previous year. Individual loss carry-over or carry-back solutions are not allowed under the Soviet law and cannot be conceived by the agreement between the parties. The tax holiday is extended to 3 years in "the Far Eastern Economic Region"\textsuperscript{164} and the tax on joint ventures profit in this region will be reduced to ten percent. The Ministry of Finance has a right to eliminate the venture’s tax, or reduce its rate, or extend the tax holiday period to certain joint ventures.


\textsuperscript{163} This is an innovation introduced by Decree No. 1074. Before the Joint Venture Decree provided the two years tax free period from the moment of operation. The practical reflection of that provision as an incentive for foreign investor was minimal. Most joint ventures would not have profits to exempt under this provision which made the exemption nullity.

recognized as those of high priority.\textsuperscript{165} The tax rate is 30 percent generally and partners should clarify their individual situation to see whether this norm could vary.\textsuperscript{166} The joint venture may repatriate its profit only after paying additional 20 percent withholding tax. Such a construction make the effective tax rate for repatriating profits 44 percent and a lot of people argue that it is too high to provide the effective incentive for a foreign investor. The American businessmen may be at a strong disadvantage, since the U.S.—Soviet tax treaty does not provide for reducing Soviet withholding taxes on dividends paid on a Soviet business to a U.S. investor.\textsuperscript{167} The U.S.S.R. has tax treaties with other countries that eliminate the 22 percent withholding tax.\textsuperscript{168} There are two possible types of deduction in determining the taxable profits of joint venture in the U.S.S.R.:

1) Joint venture can deduct from its income any transfer to the reserve funds or other funds, if they are made "for the development or production, science and technology." However, these deductions are allowed as long as the reserve fund is maintained above or at the 25 percent level of the charter fund.\textsuperscript{169}

2) The second type of available deduction is for other business expenses, which

\textsuperscript{165}Six of thirty joint ventures has been given this special treatment. Sherr, Briefing Paper, Socialist—Capitalist Joint Ventures in the USSR; Law and Practice 5 (1988).


\textsuperscript{167}M.Newcity, Taxation in the Soviet Union, Ch.6 (1986).

\textsuperscript{168}The US investor may be able to circumvent the law by investing in a joint venture through the third country which has a tax agreement with the USSR and that eliminates the twenty two per cent withholding tax, E.Theroux & A.George, Joint Ventures in the Soviet Union, Law And Practice (1988) (published by Baker & McKenzie, Washington, D.C.).

are determined by the accounting system the joint venture uses. The accounting system will have an essential effect on the amount of tax deductible expenses.\textsuperscript{170} Soviet accounting rules usually yield larger amount of taxable profits than American or Western rules, since Soviet accounting rules do not count many items, which are reflected as the expenses under Western business principles.\textsuperscript{171}

In Hungary the companies with the foreign participation are taxed on their income only and no other taxes are imposed. The general rate of the profit tax is 40 percent on the net taxable profit. However, it is unusual that the company pays the tax on the 40 percent rate. The Minister of Finance has a power to establish a more favorable rate than the legislative provision indicates for certain categories and levels of investments. For example, if the total amount of the association amounts to twenty five million forints or more, and the foreign participation is at least thirty percent, the association is entitled to enjoy sixty percent tax reduction on the calculated tax during the first five years, and a forty percent reduction from the sixth year on, calculated from the date of the commencement of the sale of product or service.\textsuperscript{172} Reinvestment of fifty percent of the profit if greater than five million forints provides a fifty percent

\textsuperscript{170}The Soviet accounting principles and objectives are quite different from American accounting principles and objectives. Soviet accounting principles are intended to provide Soviet central planners with statistical information that they require for state planning. Western accounting principles are designed to provide financial information and determine profits. An example of these differences is different depreciation rates which are usually longer in the Soviet Union than in Western countries, which creates tax disadvantages for the latter. G.D. Swindler, Comment: Joint Ventures in the Soviet Union: Problem Emerge, 13 Puget Sound L. Rev. 165 at 187 (1989). See also, K.W. Viehe, Joint Ventures in the Soviet Union Under the New Regime – Boom or Bust, 1 Transnt’l Law. 181, at 195–96 (1988).


\textsuperscript{172}Article 15 of the Hungarian Foreign Investment Law of 1988.
reimbursement of taxes paid, and 100 percent reinvestment, if greater than ten million, results in a seventy five percent tax reduction.\textsuperscript{173} In addition to the mentioned tax allowances, if the company is engaged in certain activities of outstanding importance to the Hungarian economy,\textsuperscript{174} it will be entitled to a 100 percent tax holiday for the first five years of its operation. The payment of this Hungarian corporate tax can be credited against local taxes in many countries including the United States. In 1979 the United States and Hungary signed the Income Tax treaty in order to avoid double taxation.\textsuperscript{175} The Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income is quite detailed. It categorizes certain individuals for taxation purposes and provides the rates of taxation to which they will be subject and the resulting payments to each country. There is a principle of non-discrimination in the application of taxes to citizens of each country.\textsuperscript{176} Article 7 of that Tax Treaty contains a provision, that only income attributable to a Hungarian "permanent establishment may be taxed in Hungary."\textsuperscript{177} The expenses of permanent establishment and reasonable allocation of different administrative expenses incurred by the U.S. head office in connection with its Hungarian permanent establishment may be deduced from the amount of income

\textsuperscript{173}See note 160 at 298.
\textsuperscript{174}See Annex to the Act XXIV of 1988 on Foreign Investment in Hungary, which provides the list of activities recognized by the Hungarian Government a those of outstanding importance to the Hungarian economy.
\textsuperscript{176}Id. Concerning the other treaties see also Doman, East–West Trade Treaties, 10 Int'l Bus. L. 193 (1982).
attributed. It is possible that based on the Tax Treaty formula the profit which is taxable will be substantially lower than counted according to the Hungarian general taxation rules described above.\textsuperscript{178}

The Yugoslav Foreign Investment Law of 1989 does not address the issue of taxes specifically. Foreign partners' tax payments are based on the tax schedule according to the republic or province in which the company with foreign participation exists.\textsuperscript{179} The republics and provinces have tacitly agreed to tax


\textsuperscript{179}P. F. R. Artisien & P. J. Buckley, Joint Ventures in Yugoslavia: Comment, 19 J. World Trade L. 163, 166 (1984). Yugoslav Prime Minister Ante Markovic proposed three stage tax reform: '...the federation would in the first stage be given a free hand in setting taxes on turnover and profit. It would also have the right to tax earnings, that which is most disputed in Slovenia. At the same time, the system of tax on turnover would be advanced, concessions and release from tax obligations would be determined and efficient tax services created. In the beginning, therefore, taxes would mostly cover consumption, with the taxing of profit as well. In the second stage, the present taxes and contributions would be united in the budgets. Only contributions for social security would remain. The idea is to force employers through collective agreements to pay half of this contribution, while the other half would be paid by employees. The taxing of earnings would at the same time be almost completely abandoned and replaced by the taxing of the annual income of the population. In principle, tax payers would include all those who have income, with the exception of those who live only on social aid. The biggest difference from the present system would come in the third stage. Tax on turnover would remain only for products used to supply the state treasury. These include tobacco, alcohol, petroleum and other articles whose taxing in used directly to maintain the administrative organs of the state. In all other cases, the so–called value added tax would be used. As a concept, this kind of taxation corresponds to the idea that the tax burden should fall primarily on production and not on turnover. The new value achieved in every stage of production is taxed—first the raw materials, then the semi–manufactures and finally the finished product. In most countries which have switched to this system, the value added tax is completely written off if the product is exported. This increases competitiveness on the international market.' The proposal will be possibly considered in the next year. See, Z.Logar, Major Changes In Yugoslavia. Closer to Developed Europe. Politika No 3, Belgrade, Apr. 7–13, 1990 at 3.
foreign partner profits at a rate of 10 percent, but at least one republic, Croatia, exercises the 30 percent tax rate, which is the highest in Yugoslavia.\textsuperscript{180}

**K. Settlement Of Disputes.**

There are no provisions in Polish Foreign Investment Law of 1988 which would require the settlement of disputes. The general rule is that the organs appropriate to settle the dispute are the courts of law in Poland.\textsuperscript{181} In addition to that general solution, such companies are entitled to appeal the decisions of the administrative organs at all levels, ending with the Supreme Administrative Court.\textsuperscript{182} The only exception is that foreign companies may not appeal the refusal to issue a permit and the contents of a permit for establishment of the company. However, before the company is established, in the preparation stage, the parties can remove the court's competence to settle their mutual disputes by including an arbitration clause. The arbitration clause has to be included in the preliminary agreement or a letter of intent. It has to be drawn up in the form of notarial deed, and remain valid till the company's registration when the company becomes the third party to the shareholders, who have concluded the same between themselves earlier. If the parties want the arbitration clause to be effective during the company's operation, it has to be reconfirmed by the board of the company after its registration. The arbitration clause can be included as well directly in the


\textsuperscript{181}The companies with the foreign participation enjoy the status of non-socialized sector entities.

\textsuperscript{182}The Supreme Administrative Court has been created in 1982 and is the highest authority in the administrative field and its judgments cannot be appealed.
company's agreement or statute even if it has not been in the other acts adopted by the partners before the registration of the company. However, it as to be clearly expressed.

The potential legal problems which are raised by foreign investors are Articles 687 and 1105 of the Polish Code of Civil Proceedings of 1961. These provisions restrict the possibility of the delegation to a court abroad the dispute in contractual relations. It is permissible only between socialized sector entities and foreign customers. Moreover, it should be remembered that Poland is a party to the New York Convention on the Recognition and Execution of Foreign Arbitration and 1961 European Convention on International Commercial Arbitration. Consequently, Poland has an international obligation to allow international arbitration abroad regardless of the subject status. The amendments to the Code of Civil Procedure are expected to eliminate two provisions mentioned above and provide equal legal treatment of all sectors, socialized and non-socialized. Besides the problems raised above, there is no obstacle according to Polish law, to bringing disputes to the Court of Arbitration at Polish Chamber of Foreign Trade in Warsaw. It is a Polish court which rules according to the UNCITRAL regulation of international commercial arbitration.

In the Soviet Union the Joint Venture Law governs the dispute between joint enterprise and the Soviet authorities, between joint enterprises, and between joint

184 Disputes concerning alimony and employment are excluded. Id. See also, Art. 1312 of the Polish Civil Code.
185 These amendments should be passed by Sejm (Polish Parliament) within year 1990. It would also eliminate the controversies raised as to the relation of obligations between international and domestic law.
enterprises participants themselves, on the issues related to economic operation. The parties may bring the dispute to the Soviet court or, upon the mutual agreement, to the arbitration tribunal for resolution in accordance to the Soviet domestic law. If the dispute involves the employment rights of a Soviet employee of the joint venture or arises between the joint venture and the trade union organization of workers at the joint venture, by operation of Soviet labor law these disputes have to be submitted to arbitration before the trade union arbitration tribunal for joint venture – employee disputes or before a higher organ of the trade union organization for joint ventures trade union organization disputes.\textsuperscript{186} If the joint venture decides to challenge the tax assessment determined by a financial institution of the Soviet Government, such a claim has to be lodged with the particular financial institution. Appeals from a decision of that agency are taken to the agency’s supervising authority.\textsuperscript{187} However, parties may agree in the Foundation Documents to use the law of another country in order to interpret


\textsuperscript{187} Article 40 and Art. 5 of the 1987 Joint Venture Law. Art. 5 also stipulates that certain disputes must be settled by the organs of state arbitration if required under Soviet law. Art. 5 "Disputes of joint ventures, international amalgamations and organizations with Soviet state–owned, cooperative and other public organizations, their disputes among themselves, as well as disputes among partners in a joint venture, internal amalgamation or organization over matters related to their activity shall be considered by the USSR courts or, upon agreement of the parties, by an arbitration tribunal.(...)". See O Vaprosakh, Sviazanykh s Sozdaniem na Territorii SSSR i Deiatel'nost'iu Sovmestnykh Predpriiatii, Mezhdunarodnykh Ob'edinenii i Organizatsii s Uchastiem Sovetskikh i Innostrannykh Organizatsii, Firm i Organov Upravleniia (On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms, and Management Bodies, 2 Vedomosti Verkhovnogo Soveta SSSR, Item 35 (1987). See also Ch.Osakwe Id at 109.
the Foundation Documents. It is very important for the foreign partner to provide specific and detail provisions in Foundation Documents in order to eliminate problems regarding the dispute resolution process.

In Yugoslavia, the Article 27 of the Law provides that any dispute among investors should be resolved by a competent Yugoslav court of law. The parties can agree in the investment agreement for disputes to be solved by arbitration by either the Yugoslav Chamber of Commerce or by other domestic or foreign arbitration.

In Hungary the Foreign Investment Law provides in the Article 44 that disputes of the legal character between the associations with foreign participation shall be resolved by a domestic or foreign court or by arbitration, if the latter was provided in writing by the founders or members of the Association as a means of dispute settlement.

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190 In the case the dispute is related to the performance or interpretation of any concession agreement or its documents, it shall be solved by Yugoslav court. If concession agreement provides for arbitration, the rules of Convention on the Settlement of Investment Disputes Between a State and National of Other States will apply. Article 27 of Yugoslav Foreign Investment Law; See Yugoslav Law on Foreign Investment, 28 I.L.M. at 1554 (1989).

191 Article 45 of the Hungarian Foreign Investment Law. See Hungarian Foreign
L. Dissolution Of The Enterprise.

Termination of the enterprise may occur in two types, voluntary or involuntary liquidation, and in the following forms: 1) the agreement between the parties providing for dissolution of the company; 2) expiration of the period for which enterprise has been established (and parties did not extend it);\(^{192}\) 3) it merges with another company, dissociates therefrom, or is transformed into another company form; 4) upon the action undertaken by appropriate organ in case of law infringement by the company. These situations are typical in Poland, the Soviet Union, Hungary, and Yugoslavia, although the provisions applying to them differs in some.

According to the Polish Law, in case of dissolution of the company some general rules apply. The legislature sought two major goals: favorable treatment for Polish shareholders, and assurance of protection of the obligations undertaken by the company. Article 34 provides that in the case of dissolution of the company, the Polish shareholder has a preemptive right to purchase the items and rights, which constitutes the company's assets, unless otherwise specified in the Founding Act.

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\(^{192}\) Poland and Bulgaria place a 15—year maximum period on the duration of the joint venture. The problem associated with limitations on the joint venture duration is that foreign partners must accept the exploitation of their capital and technology by leaving their capital to government (till recently the contractual form of joint venture was the only possible to conduct with East bloc countries) when exiting the partnership. Scriven, Co—operation In East—West Trade: The Equity Joint Venture, 10 Int'l Bus. Law. 105, 109 (1982).
If the company is liquidated within the period of income tax exemption or three years after the expiration of that period the company shall pay taxes for the exemption period. In such a case tax liability arises upon the notification of the dissolution of the company. Such a provision was passed by the legislature to discourage capital speculation by liquidating the company after enjoying the tax exemption period. The practical aspect of this provision might be different. Some of the companies might find themselves forced to liquidate the company within the tax holiday period due to the unpredictable difficulties, such as market slump or like factors. However, the provisions of Article 35 of the Law are obligatory and cannot be suspended regardless of circumstances. It is supposed to encourage companies to set up long-term economic activity and avoid liquidation of the company at least within the tax free period.

Worth mentioning also is Article 21 section 2 of the Law, which provides that after paying an appropriate tax, a foreign investor is able to transfer abroad without obtaining separate foreign exchange permit, the amount of money received from the sale of shares or stocks, and the sum of money due to him in connection with the company's liquidation. However, if the money is obtained in the Polish currency, it cannot be transferred abroad up to 10 years from the company's registration. Another provision of the Law which worries potential foreign investors is Article 15 which provides that in the case the company's activity is inconsistent with the conditions set forth in a Permit, the President of the Foreign Investment Agency will request the correction within given period of time and if not followed he may restrict the scope of activity or withdraw a

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193 Article 35 of the Law (PFIL).
194 Article 21 sec. 2-4 of the Law. In specially justified cases an earlier transfer of that amount of money is possible upon consensus of Minister of Finance.
Permit. Many people argue that it provides too much discrentional power in one person's hands. However, the President is not in the position to discourage the foreign investors. It is very unlikely such a situation would take place massively, but at the same time it empowers the appropriate organ to protect economic national interests and acts against business speculations.

Under the Soviet Union Law the joint enterprise may be dissolved in the instances and in the procedures provided for in the constitutive documents. However, it may be dissolved without the consent of the parties or against their objection. The U.S.S.R. Council of Ministries is empowered to dissolve the company if its activities do not correspond to the purposes and tasks provided for in the charter. The liquidation process of the joint venture, first notice of the action undertaken, then report of commencement of dissolution proceedings, and its completion is published in the national press.

Upon the dissolution of the company, according to the Article 52, the foreign partner receives his shares of the capital contribution, either in cash or in goods. The amount return to each partner is calculated after all debts of the enterprise have been paid, that is the obligations to Soviet participants and third parties. Such a calculation and necessary deduction are made by the appropriate Soviet authorities.

The last step in the process of dissolution of the joint enterprise is registration with the U.S.S.R. Ministry of Finance. However, the legal language of that provision does not indicate when the joint enterprise is considered to be legally

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196Id.
197The same rules apply when a foreign partner decides to withdraw his shares from the company.
liquidated, whether upon the completed act of dissolution, or only upon the registration. That ambiguity might be a source of potential disagreement between the parties.198

Yugoslav law in the matter of dissolution of the company is simple and clear. The investment contract and contract on establishment by themselves can be concluded as for a definite or indefinite period of time. If the contract is concluded for a definite period, automatic renewal of its validity may be stipulated for a further definite period of time. The Yugoslav Law does not specify the duration of the joint enterprise contract, although it does encourage long-term investments. Most foreign partners sign the contract for a period of 10 years.199 Contracting parties may also cancel the contract due to the reasons stipulated by the contract or Federal Law which governs the obligatory relations.200 It is understood that before final dissolution of the company can take place, all obligations of the enterprise have to be fulfilled. The expiration of the company shall be reported to the Federal administrative agency responsible to international economic relations.201

Hungarian Law provides expressly in its articles situations in which the company with foreign participation cease to exist. It also states point by point the procedural steps which have to be undertaken for the dissolution of the


201Id. Article 23.
company. In the case of dissolution of the company, a foreign partner, after the sale of goods and rights which compose the company's assets, can transfer abroad the amount of money due to him in the currency of the investment, according to the Foundation Act. The debts of the foreign partner shall be met prior to the transfer of the amount due to him.

M. Banking And Other Services.

Commercial banking is perhaps one of the most important international services. Large banks have their branches and subsidiaries all over the world. They are not only engaged in traditional banking services such as lending and borrowing money, taking deposits and so on, but nowadays banks provide global services in foreign currency management, trade and finance. They are a valuable source of financial, economic and other information, which are essential in a business decision-making process. Banking in the Socialist countries for a long time has been subject to the state monopoly. In the decade of 80's the changes in a whole economic system covered also the banking area. Now foreign and private banks are permitted with some limitations in Poland and Hungary. The Soviet Union is expected to enact a law permitting foreign or private banks in its territory. Yugoslavia permits foreign investments in the banking sector, but does not allow foreign banks to establish themselves in its territory.

In January 1989, Poland enacted two banking reforms: 1) the Act of 31 January, 1989, the Banking Law, and 2) the Act of 31 January, 1989 on the Narodowy Bank Polski (the National Bank of Poland — NBP). In addition to

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202 Articles 46–53 of the Hungarian Law on Economic Associations, Act VI of 1988; see also note 33 at 14–16.
these provisions banking activities are governed by the Polish Commercial Code of 1934\textsuperscript{203} and the Foreign Exchange Control Law of February 15, 1989.\textsuperscript{204} Those recent reforms created a dual banking system in Poland. On one side there is the NBP as the Government’s central bank, and on the other side primary savings and credits banks. It has been recognized, that the presence of foreign capital in the banking area is desirable and beneficial to the national economy. The Polish Banking Law introduced a conceptual private banking system, which provides for the chartering of joint stock company banks to be privately held and the process of authorization (licenses) for branches of the foreign banks. The NBP has the authority after taking into consideration the advice of Minister of Finance to approve the foundation of the joint stock company as a private domestic Polish bank. Accordingly, the Minister of Finance with the advice of the President of NBP is empowered to grant permission to establish a branch of foreign bank in Poland. The authority to direct the banking operations in Poland is centralized in the hands of the President of the NBP and the Minister of Finance. Although it has been not specified, it is understood that foreign banks and private investors in the Polish private banking section are not subject to the Polish Foreign Investment Law of December 23, 1988.

According to the Act, foreign banks and foreign individuals may enter the Polish banking market in three ways: 1) they may form joint stock bank company, under the law of Poland, 2) open a branch of the foreign bank in Poland under the Polish Banking Law of 1989,\textsuperscript{205} or 3) they may establish a representative

\textsuperscript{203}Dz. Ust. No 57 item 502 (in Polish, translated as Journal of Laws).
\textsuperscript{204}Dz. Ust. No 6, item 33 (in Polish, translated as Journal of Laws).
\textsuperscript{205}In April 1990, Dresdener Bank opened its branch in Warsaw, as a first foreign bank in Poland.
office of foreign bank under the laws of Poland. A representative office is not allowed to perform banking operations, which are reserved for the foreign bank branch offices or a joint stock bank companies. According to the Article 86 of the Act, a foreign branch can be opened in Poland only upon the permission of the Minister of Finance, and upon agreement with the President of the National Polish Bank.206

The Polish bank can be established by at least three legal persons or ten natural persons. In order to obtain the permission to create NBP the following conditions have to be met:

1) the Polish Bank has to have minimum of $6 million U.S. in a convertible currency as capital;
2) the Polish Bank has secured premiums and technical facilities necessary to carry out its banking activities;
3) at least one Polish citizen has to be named as a member of the Polish Bank’s board of management;
4) the manager of those in positions of president, vice president, and members of the board of management have been found by the NBP to have adequate professional background;

206 Many banks from Western European countries, the US and Far East have inquired the Polish Government about the possibilities of setting their branch in Poland. Up today none of the banks, as far as I know, have applied or been granted the approval to operate its branch in the Polish domestic banking system. However, the first steps have been taken in developing new banking relations. The World Bank is planning to open its office in Warsaw; French President Francois Mitterand has proposed the creation of an Eastern European Investment Bank sponsored by the European Community. In October 1989 Mrs. Barbara Piasecka – Johnson declared her intent during the presentation to the European Parliament to apply for setting up the first foreign – owned private bank in Poland. J.D. Whisenand and Joseph P. Sverchek; Poland’s Emerging Private Banking Market in the Light of the Two 1989 Banking Reform Measures. Int’l Fin. L. Rev. 1, at 20 – 22 Jan. 1990.
5) before the application is completed, the proper conference with the NBP by the founders has to take place;

6) the Polish Bank has to enter into agreement with the NBP, and

7) the application has to be approved by the NBP upon the consultation of the Council of Banks and upon the agreement with the Minister of Finance.207

Private banks in Poland are allowed to conduct the same banking activities as the state owned banks with the exceptions of the central bank functions exclusively reserved for NBP. According to the Article 102 and 103 of the Act, the NBP is empowered to inspect, to examine, and to report upon the operations of the Polish Bank.

If the Soviet system wants to respond quickly to the opportunities of a free market, they will need institutional investors capable of attracting savings from business and individuals in the private sector.208 For the time being, commercial banks in the Western sense are virtually nonexistent in the Soviet Union.209 In the

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207 Articles 80 - 85 of the Polish Banking Law.

208 However, the Soviet banking system is characterized by a strict centralization an administrative approach in its operation. Low efficiency and inadequacy of banking activity is commonly recognized. The first step to reform Soviet banking system has been undertaken on Jan. 1, 1988. "...to strengthen the role of banking activity on final results of the work of all the industries of national economy, the U.S.S.R. found it expedient to recognize the existing banks and, beginning Jan. 1, 1988, to set up new specialized banks with due regard for specific features in the activity of national economic complexes, having created a system of following banks: the State Bank of the U.S.S.R., Bank For Foreign Economic Activities of the U.S.S.R., Bank for Industrial Construction of the U.S.S.R., Agro-industrial Bank of the U.S.S.R., Bank of Housing, Municipal Services and Social Development of the U.S.S.R., and Savings and Credit Bank of the U.S.S.R...." Each of the banks has its specialized function. It is the beginning of reforms. Further evolution of the Soviet banking system especially concerning the participation of foreign capital in the Soviet banks, is necessary. See N.A. Domanov, Banks Becoming Self-sufficient. Banking System Plays Vital Role. Trade With the USSR, The J. Com. & Com., Dec. 18, 1989, at 14–15 and at 22.

process of creating new banking institutions, Soviets will rely most likely on Western training and patterns. Moreover, to regulate the money supply, the Soviet Union will have to replace Gosbank, which is a government bank with more independent central bank along the lines of the Western standards.210

In Yugoslavia the Law of Foreign Investment of 1989 provides in the Article 17, that foreign banks, other financial organizations, and foreign investors in the meaning of this law may 1) invest in banks and other financial organizations, or 2) jointly establish and invest in a mixed bank or financial organization. Such an investment is governed by the Federal Law.211 Yugoslavia also revised in 1989 the Law on Yugoslav Bank for International Economic Cooperation, but none of the critical changes occurred. Yugobanka is the main bank on the federal level established primarily to handle foreign economic relations, and presently also commercial activity. Besides a number of banks on federal level each republic has its own, independent banking system. The banking sector as a whole is still socialized and incapable of offering the necessary services, and is owned by the debtors. Changes in the banking system are essential to the success of the reforms and are expected in the near future. The existing banking system seems to be incapable either of modernizing or beginning work on a

210However, it is interesting to mention that the state's banking monopoly was broken by the first Soviet cooperative bank to be formed in the Soviet Union in the Central Asia (city of Chimkent). Soyuzbank is a bank registered with Gosbank (the Soviet State Bank) and is authorized to accept deposits (up to 20 million) from the enterprises and public. See W.G.Frenkel, Soviet Legislation on Cooperative Private Enterprises With a Non–market Economy, 2 Transnat’l Law. No 1, 25 at 37 reference 49 (1989). See also, Time (Magazine), May 7, 1990 at 86.

211Article 17 of Yugoslav Foreign Investment Law. 28 J.L.M. 1543 (1989).
commercial basis. They cannot be expected to help much in the process of privatizing the Yugoslav economy and in the operation of the capital markets.\footnote{212}

Hungary was the first among socialist countries of Eastern Europe, which understood that a banking system is a significant part of economic reforms and development of cooperation with foreign partners. In 1982 several technical, specialized banks were established. In 1987 the banking system was revamped into a two-tier structure for domestic and foreign activity. Five commercial banks have been established in addition to the National Bank of Hungary and The Trade Bank.\footnote{213} Many of the foreign banks opened their branches in Hungary, or invested in already existing banks and other financial institutions in Hungary. For example, Citibank has obtained onshore banking rights. Unicibank with the participation of the International Finance Corporation began operations in 1987 specifically with an interest in developing a joint venture. Fifty-five percent of that bank is shared by Germany (Deutsche Genossenschaftsbank) and Austria (Genossenschaftliche Zentral Bank).\footnote{214} The participation of foreign capital in Hungarian banking system is growing rapidly.\footnote{215} However, presently none of the fully foreign banks exists in Hungary, neither its branch or subsidiary.\footnote{216}

\footnote{212}It is interesting to notice that the U.S. "City Bank" will form a joint bank, together with "Jugobanka" (Yugoslav bank) with the head office in Yugoslavia. In April 1990 the protocol on forming a joint Yugoslav–French bank was signed. The bank has a head office in Belgrade. French opening capital is 70%. See Politika No.6. (Belgrade) Apr. 28–May 4, 1990 at 5.


\footnote{214}Id.


\footnote{216}Three banks with mixed property are currently active:
N. Recent Approaches In Economic Reforms.

Each of the described countries is in a stage of deep economic reform. However, the approaches and degree of advancement differ among them. In this subchapter I want to introduce some of the recent economic steps undertaken in Poland, the Soviet Union, Yugoslavia, and Hungary, in their process of transformation to market economy countries.

1. Introduction Of Stock Exchange In Yugoslavia.

The economists in Poland and Yugoslavia recognize that long term reform cannot be achieved if more far-reaching institutional changes are not implemented. It is obvious that no long term reforms can be gained if socialized property is not privatized. Therefore, the governments in both countries want to do three things: 1) develop a private sector, in the case of Poland, and deregulate

a. The oldest is the CIB (International Bank of Central Europe). Six foreign banks participated in the formation of this bank, each with an 11% capital share. The Hungarian participation is exactly 34%. The CIB executes only currency operations and cannot conduct business in Hungarian currency (forints). The partners of the CIB are foreign banks and enterprises (whether state or private). The CIB is authorized to extend foreign currency credit to Hungarian enterprises.

b. A Citibank was established in 1986. This bank is 80% owned by the American bank and Hungary's participation is 20%. In the course of 1987 it has continued to expand its activities and increasingly joins the financing of exports in convertible foreign currency.

c. In 1987 Unic Bank began operations. The bank is a product of the association of various national and foreign banks. Among the founders is the IFC, the World Bank affiliate for development. The greater part of the capital of this bank belongs to Hungary. Unic bank attributes great importance in its business policy to financing of small and medium enterprises. Unic Bank also favors the organizations of various mixed enterprise. Finally, note that negotiations are in progress with various important banks. There is considerable interest for the creation of banks with mixed property.

the existing private sector, in the case of Yugoslavia; 2) liberalize private investments, both domestic and foreign; 3) establish the possibility of social property to be sold to private persons

The third problem will be the subject of the following discussion. The Yugoslav government passed laws for creation of capital and money markets. The law on securities and the stock exchange was adopted on the federal level by the Federal Assembly at the end of 1989. The money markets have been opened as well as several stock exchanges. After 50 years, a stock exchange reopened in Ljubljana (Slovenia), and another stock exchange is planned for Zagreb (Croatia). The most important for the time being is the Belgrade Stock Exchange, created on the federal level and in which a great amount of capital was invested. The Belgrade stock exchange was founded by thirty-four Yugoslav banks. The banks now form brokerage organizations through which citizens and companies will be able to trade in stocks and bonds.

For the first time in the history of Yugoslavia foreign currency debenture bonds are issued. Debenture bonds can be purchased by foreign and domestic natural persons and by foreign legal persons. They are payable to the individual person or to the bearer. If the debenture bond is issued to the bearer it means, that the person who owns it can cash it, sell it, or give it to a third person without any formalities. The debenture bonds may be also transformed into ready cash at market value, even before it matures for payment. Debenture bonds are exchangeable for other stocks and like. Debenture bonds may also be used for

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218The stock exchange 50 years ago was allowed to issue debenture bonds only in domestic currency.
meeting obligations to creditor and guarantees. The stock exchange is still in infancy in Yugoslavia. However, there is no doubt that the development and success of the Belgrade Stock Exchange and the others will depend on the success of the economic reforms which are now being implemented in Yugoslavia.

2. Sales Of Stock In Poland.

The creation of the stock exchange in Poland is scheduled for the next year, while waiting for the government privatization bill which is expected to be passed in Polish Parliament at the beginning or mid–1991. However, many companies do not wait the enactment of privatization laws, and have already started selling shares. Here are some examples: B.I.G., a small bank, was the first to go private in February 1990, which offered 30,000 shares worth $315,000 and was oversubscribed by 50%. At the beginning of May, Universal S.A. company was the second to go private, and offered almost 10 million shares valued at above 10.4 million dollars.

Also, it has been announced that Gdansk shipyard will be transferred to private ownership by selling shares to employees and the public. The shares will be sold to the public for $1.05 each. Shipyard workers will be able to buy 20 percent of the shares at half the offering price before the end of 1990 and at half the market price after that.

By the end of 1990 Poland hopes to privatize about 100 of the nation's 7,600 state owned–companies, by selling shares to the employees and public. The foreign investors are expected to be given right to obtain shares in state–owned

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220Debenture bonds payment is guaranteed by Republic of Serbia. Id.
companies as well. However, even without the separate laws the possibility exists presently. After the shares of a state owned company are sold out to the private investors, foreign legal or natural person can undertake the economic activity with the new enterprise according to the foreign investment law.\textsuperscript{223}

3. Custom Free Zones In Yugoslavia And Hungary.

After several years of discussion, the Belgrade Free Zone has finally become reality. The Belgrade Free Zone is not entirely extraterritorial. It is a part of the customs and sovereign region of Yugoslavia. The business activity in the Free Zone is exempt from the prevailing domestic regime of business operations. There are no restrictions on the economic activities to be carried out in the Zone, goods can be manufactured, services supplied, business can engaged in foreign trade deals, hard currency retail and wholesale trade, banking and other financial operations. The only requirement for economic activity is that it is not a hazard to the environment.\textsuperscript{224} The free zone can be founded by Yugoslav or foreign enterprise.

Its founders can be Yugoslav or foreign enterprises or other legal entities (again Yugoslav or foreign). It can be used by domestic and foreign companies and private entities wishing to work in the Zone. Foreigners can organize their business in the Zone in a number of ways: by cooperating with a domestic


\textsuperscript{224}\textit{The Free Zone Already Operating}, Politika, The Int’l Weekly (Belgrade), March 31, 1990 at 9.
enterprise, by founding a mixed share-holding enterprise, by founding their own enterprise, their own bank, a joint mixed bank or other financial organization (in conformity with the Law on Banks).225

Companies operating in the Zone can freely import goods into the Zone for the purpose of manufacturing goods, providing services and selling goods for export. There is free export of goods and services from the Zone. The restrictions stipulated in Yugoslav foreign trade laws (quotas, contingents, regional and other approval, standards, etc.) do not apply to the exports from and imports into the Zone. Businesses in the Zone can engage in foreign trade. They can also temporarily take goods out of the Free Zone for testing, attestation, processing finishing, repairs and promotional purposes. This can all be done by using domestic facilities in any factory in Yugoslavia, and then returning the goods to the Zone and exporting them out of the country.

Foreigners working in the Zone, either as independent or mixed enterprises (together with a domestic partner), are entitled to open a special hard currency account with the bank conducting the Zone's affairs. They have complete freedom in using this hard currency. They are completely free to bring hard currency into the Zone, to bring in and take out profits.

The taxation policy will stimulate operations and work in the Zone. The republic of Serbia plans to exempt businesses using the Free Zone from all taxes in the first five years of operations and in the case of reinvestment. They are obliged to pay rent on ground space and workers' benefits (pensions, health care, welfare, etc., but no more than 33% of the net income).

225See also R.Radovonovic, Custom-Free Zone To Be Inaugurated, Politika No 3, (Belgrade), Apr. 7–13, 1990, at 7.
The Zone's ground space is state-owned and is not for sale. Foreigners can rent it on lease for up to 99 years (as in Hong Kong) and then can build structures that are their own property. There are no restrictions regarding the volume of investment in the Zone. The cost of the lease is very competitive compared to similar zones in the world.226

In 1982 economic associations were permitted to establish themselves in custom free zones. In general, the rules for foreign company operating in such a zone are more liberal than for the economic activity within the territory of Hungary. Purchases and sales of both imports and exports are regarded as free-currency transactions. The economic associations established within the zone are exempt from rules on enterprise income, wages, state and internal control, the management of finances. Capital stock, however, must be kept in a Hungarian bank and a risk fund must be established. In the other areas Hungarian laws on foreign investments apply.227


A Joint venture in the Soviet Union is a basic form of a company with foreign participation. Besides joint ventures another form in which the foreign investor can conduct his business are newly created Soviet cooperatives, which basically exist as partnerships. Under the legislation passed in 1987, Soviet citizens can


start cooperatives, which are private businesses created in order to provide goods and services, which the state-run enterprises cannot provide.228

The law on cooperatives primarily is addressed to the private business development by Soviet nationals, however, it is also of great interest to the foreign investors.

1) First of all, cooperatives have the right to exercise commercial transactions with foreign companies directly, without the intermediation of Soviet foreign trade organizations;

2) the cooperatives also have the power to be Soviet partners instead of Soviet governmental bodies, and state enterprises in joint ventures with the foreign companies.

3) They are a newly created novel alternative for foreign firms interested in doing business in the Soviet Union and the existence of the privately held cooperative enterprise is of great importance.229

The Soviet Law on Cooperatives does not vary significantly from the U.S. statutes on corporations or cooperative associations. The Soviet cooperative may own property, issue securities, maintain bank accounts, incur obligations, hold business transactions with other enterprises and individuals, market and distribute its products, has a right to sue and to be sued in the court.230

228The grow of cooperatives went far behind ones expectations. There are now approximately 100,000 cooperatives established in the Soviet Union, employing 2.9 million people. The forecast for year 1990 is to double the size of employment as well as the turnover in the amount of money.


As a positive fact it can be noted, that since April 1, 1989, Soviet cooperatives are allowed to hold foreign currency. It increased the ability of cooperatives and other Soviet enterprises to deal directly with the Western partners.\footnote{W.G.Frenkel, Soviet Legislation on Cooperatives: Private Enterprises Within a Non–market economy, 2 Transnat’l Law. No 1, 25 at 41–47 (1989). See also M.J.Bazylew, Making Profits from Perestroika: Soviet Economic Reform and New Trade Opportunities in the Gorbachev Era, 11 Whittier L. Rev. 323 at 330–31 (1989).}

As regards the limitations on cooperatives which could effect the foreign partners, there are two basic limitations:

1) Cooperatives cannot own land and natural resources, but must lease them from the state;

2) Members or the shareholders of cooperatives must actively participate in the business activities and cannot just remain passive shareholders.\footnote{Id.Frenkel. See also B.Keller, Private Entrepreneurs Under Fire, Try Closing Ranks, N.Y.Times, Nov, 14, 1988, at A1, col.3. See also Soviet Cooperatives, Risky Business, Fin. Times (London), Aug. 3 1988 at 2, col.1. See also, B.Keller, Soviet Foray Into Capitalism Begins to Show a Seamy Side, N.Y.Times, July 25, 1988, at A1, col.1.}

The cooperatives in the Soviet Union raise a number of questions, which mainly are based on:

1) the Government regulations imposed on cooperatives,

2) the business attitude problems of Soviet cooperatives' owners.

The Soviet Government has a "love–hate" relationship with the cooperatives. On the one hand cooperatives are the essential movements towards productivity, individual initiative and creation of new economic society. At the same time they are a part of the state run economical system and create a realistic threat to its success. That attitude resulted in the national legislation passed in October 1989 by the Soviet Supreme in order to regulate the economic activity of cooperatives.
The law imposes price control on cooperatives and it provides the Local Governments with the power to set up a maximum price for consumer’s product and services provided by the cooperatives. It also prohibits the cooperatives from selling the imported goods which are in shortage in the market for the price higher than one charged by the state enterprise for a like product. This legislation is a threat to the existence of cooperatives. If they cannot set their own prices and make the profit, they might be pushed to go out of the business or discouraged from opening certain types of businesses.

2) Another problem is the business attitude represented by the Soviet middle man willing to open his own business in the Soviet Union. The ordinary Soviet worker is afraid to become a wealthy and prosperous person. In the U.S. there is a tradition of competing and succeeding, not so in the U.S.S.R.. The Soviets’ attitude is to remain average and bring the others down to your level. Their

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233 Initially, these private businesses were allowed to charge whatever the market could bear their goods and services. After a very limited experiment with the free market, however, the Soviet Government realized that it had made a terrible mistake by allowing the private entrepreneurs to charge free market prices. In an effort to rectify this error in judgment, the Soviet authorities imposed a limit on the profits of the perestroika entrepreneurs. In August 1988, the USSR State Committee on Prices issued a Letter Ruling in which it imposed a ceiling on the prices that private entrepreneurs could charge their customers. Under these mandatory guidelines: (1) a cooperative must sell its produce to state enterprises at prices set by the state, so called "state market price"; but no more than 10 kopecks per bottle (if the goods are sold in bottles) or no more than 10% above the state market price (for all the other goods and services). O nekotorykh voprosakh tsenoobravaniia v sviazi s vvedeniem v deistvie Zaakona SSSR 'O kooperatsii v SSSR' [Decree On Certain Questions Concerning the System of Pricing in Connection with the Coming into Force of the USSR Law "On Cooperatives in the USSR"], 12 Bull. Norm. Akt. Min. & Ved. SSR 3–4 (1988) (Letter Ruling (Pismo) of the State Committee of the USSR on prices adopted on August 31, 1988. See also, Q.Peel, Moscow Plans New Prices Controls to Curb Inflation, Financial Times (London), Feb. 4, 1989 at 2, col.1.

234 In the past cooperatives were prohibited to engage in certain economic activities. Id.

attitude can be represented by the old Russian saying "The tallest sunflower gets cut down first". Despite these difficulties, the new business is growing. In the first half of 1989 the total number of cooperatives in the Soviet Union grew from 78,000 to 133,000.236

In light of practical and ideological difficulties facing Soviet cooperatives, their movement also is uncertain. Cooperatives are the first form of private economic sector in the Soviet Union and play a very important role in the whole economic restructuring plan.237 The success of cooperatives is a basis for introduction of further, more radical reforms tending toward a free market economy in the U.S.S.R..238 Without a profitable private sector in the Soviet Union ambitious macro-economic plans have little chance to be realized.239

(1989).

236See Appendix II of this thesis. See also The Economist, The Survey of Perestroika at 12, April 28, 1990.

237Many Soviet citizens still are very active in so called "secondary economy, underground economic sector, or black markets". They are reluctant to legalize their business status because of common distaste for a high taxation system and expensive business licenses. The law on unearned income passed in Summer 11986 specifically targeted this group of tax-dodgers. See Izvestia, Nov. 20, 1986, at 5. See also Butler, Soviet Law 241 (1988).

238The Soviet Government is also considering various reforms, that would establish perestroika as a keystone of economic and social changes. On October 15, 1988, the USSR Council of Ministries issued a decree authorizing Soviet enterprises to issue stocks for sale to workers of the issuing enterprise, so called "workers collective stocks" and to other enterprises and organizations so called "enterprise stocks". See O Vynuske Predpriiatiami I Organizatsiami Tsennykh Bumag (On the Issuance of Stocks by Enterprises and Organizations), 35 SP SSR Item 100, (1988).

239W.G.Frenkel, Soviet Legislation on Cooperatives. Private Enterprise Within Non-Market Economy, 2 Trans. Lawyer No 1, 25 at 46–47 (1989). In the Soviet Union there are proposed reforms which include a plan to set up an export credit agency, which task would be introduction of Western-style foreign trade regime and the creation of a stock market in Moscow. See, Q.Peel, Soviet Union May Set Up Export Credit Agency, Financial Times (London), Oct. 28, 1988, at 5, col.1. See also, Q.Peel, Moscow to Sell Shares in the State Bodies and Create Stock Market, Financial Times (London), Oct. 28, 1988, at 1, col.2.
THE IMPACT OF THE U.S. LAWS ON FOREIGN INVESTMENTS AND THEIR OPERATIONS.

A. Introduction.

The American businessman willing to invest abroad always has to keep in mind the possible effect of US laws on the operation of his activity abroad. This part of the thesis addresses only two U.S. laws which might come into play while operating a business abroad: U.S. export controls laws and antitrust laws. The first one is presently of the special consideration in regard to Eastern European countries, which despite the political reforms undertaken in last decade are still deemed as communist countries. The system, although outdated, remains in force and might be a big obstacle in East-West economic relations. The latter issue, antitrust law, does not have any effect yet, but there are good grounds to believe that within the next decade will be raised as an issue. For example those of U.S. investors who now undertake economic activity in those countries might occupy efficiently the whole domestic market and stop the other investors from coming into that market. Since such an activity has anticompetitive effect on U.S. commerce, American antitrust laws will apply. Besides these two sets of laws briefly described in the following chapter, other U.S. laws may apply to the operation of joint activity with foreign subject, for example antidumping,
countervailing laws and tax laws\textsuperscript{240} are not addressed since they are beyond the scope of this thesis.

**B. Issues Raised By American Antitrust Law.**

Antitrust is a set of laws created to promote market competition. Transnational economic activity has always raised a number of questions under American antitrust laws. For the purpose of analysis under US antitrust laws, the term transnational joint activity encompasses a variety of business forms including: international joint ventures, unions, contractual arrangements such as bidding and teaming, which involve non-equity transaction and like. However, regardless of the form of the business activity the only venture which falls under the consideration of U.S. antitrust laws is one which has an anti-competitive effect on U.S. foreign or interstate commerce. If the economic activity affects only the commerce of a foreign country, such a conduct is not within the subject matter jurisdiction of the U.S. antitrust laws. Antitrust law is territorial in nature, however, if the economic activity of transnational venture outside the

\textsuperscript{240}In general US company will be subject to local taxation on the income generated in a foreign country. US citizens are taxed on their income wherever they conduct economic activity at home or abroad. The United States has treaties with many countries on avoiding double taxation, but in the case such a treaty does not exist and foreign taxes paid by US company are not creditable against its US tax liability, double taxation of the income may occur! See T.F.Clasen, Foreign Trade and Investment. A Legal Guide, 1987 at 130.
United States has a substantial direct and foreseeable effect on U.S. exports or imports, the U.S. antitrust laws will apply.241

The first question in any analysis of joint venture from the antitrust aspect is what are the purposes of the partners in entering into the venture and why are they cooperating. For antitrust law, the most important is to determine whether those purposes are pro- or anti-cooperative. The first group may include situations such as: efficiency enhancing, for example, sharing risks and capital requirements, reducing costs, combining skills or achieving economies of scale. As usual joint venture helps to overcome a national restriction since there are many provisions which serve as the incentives to these kind of joint activity; help the development of international trade relationship; international integration and economic efficiency. In the second group the intent of the parties may be basically anti-cooperative when they aim through their venture to, for example, divide market or restrain competition. The use of the joint venture "label" will not prevent illegality in the latter situation. The next step in determining whether the created venture is lawful is to confirm if any kind of competitive restraints in the venture agreement are reasonable and practically necessary to facilitate the successful operation or if they are just creating a joint venture. If the answer, according to the rule of reason is no, it is a naked restriction which will be evaluated under antitrust standards governing agreement among unrelated firms. If the answer to the above is yes then the next step in the analysis is to determine whether existing restraint is as narrow as possible to achieve the lawful goals of joint venture and if not included would not otherwise constitute the economic reasonableness for going into joint agreement. The officials of Antitrust Division

Department of Justice have proposed the following three steps analysis in joint venture to determine its lawfulness:

1. **Pro competitive effects.**
   1. The first we should take into consideration is the effect of the joint venture on the competition in the "new" market created by the joint agreement. When the venture parents create a new offspring, they establish a new competitive entity in the marketplace. This entity increases productive economic activity and may foster competition where none previously existed.
   2. Secondly, we have to analyze the effect of the competition in the parent markets before the joint venture was created. The joint venture may result in economies of scale and thereby produce capacity that would have been unavailable if each participant performed the same function separately. The joint venture may enable the parents as well as the offspring to enter new markets which neither or only one could have entered individually. Thus, joint activity at one level may permit competition at another level.
   3. Next, we should look to see if there are any ancillary restrictive provisions and determine whether or not they are reasonable.242

4. Finally, the denial of access to the activity of joint venture or its fruits is of such an importance that it may be treated as an conceived refusal to deal.

The most popular and often cited example of that analysis is a joint venture agreement between General Motors and Toyota. The agreement was created for the purposes of production of subcompact automobiles in the United States. The Federal Trade Commission approved the existence of this joint venture reasoning

242Id.
that: 1). the joint venture was likely to increase the number of subcompact cars available in the U.S. and this allowing American consumers a greater choice at a lower price; 2). there would be reduced production costs and 3). the venture offers a valuable opportunity for General Motors to complete its learning of more efficient Japanese manufacturing and management methods.243

2. Anti-competitive effects.
1. One or both of the parents might have entered the field occupied by the offspring if the venture had not been formed. If so, the venture reduces potential competition and heightens barriers to market entry.
2. Because of the increased opportunity for collusion occasioned by the venture, the parents may become less willing and less able to behave as arm's-length competitors in other spheres of activity.
3. The parents may curb the full competitive potential of their offspring in order to protect their own existing markets and/or customers.
4. A firm involved in the joint venture may be foreclosed from entry into the market because of the strength of the joint ventures and/or their offspring or may be foreclosed from doing business with the offspring because the parents monopolize its capacity.
5. The joint venture itself may not produce any anti-competitive effects, but the parties involved may have entered into the venture as part of a larger restrictive agreement to, for example, fix prices or divide geographic markets.

It is also important to distinguish the research and development ventures. The Statute provides the opportunity for the companies to notify the Antitrust Division and the Federal Trade Commission of the creation of research joint venture. If the companies do so and later one company is held illegal, their liability is limited so only single damages apply and if they prevail on the antitrust claim they are entitled to attorney's fees.\(^{244}\)

Antitrust Law applicable to international joint ventures is composed of domestic law, foreign law, and international norms.

C. United States Export Controls.

The United States created a comprehensive legal system in order to regulate and control exports in so called "sensitive areas". That is based on the Export Administration Act of 1985\(^{245}\) (cited as EAA in the following text), and the Regulations of the Department of Commerce, as pursuant to EAA. In addition to export control laws of general applicability, the Treasury Department Office of Foreign Assets Control imposes the regulations pursuant to the Trading with the Enemy Act and the Emergency Economic Powers Act.

The export control laws are designed in order to:

1) further national security and foreign policy objectives;

2) protect the short supply of certain goods;


3) advance other policies, e.g., opposing cartels and other restrictive trade practices.246

Those regulations apply in dual use goods and technology with both civilian and military applications.

The Coordinating Committee on Multilateral Export Controls (CoCom) was formed in 1949 to coordinate the national security export control policies of its members and monitor sales of goods and technology to Eastern bloc countries.247 CoCom has the ability to stop those transfers through political and economical pressure. It also often commits its member states to use their domestic law to restrict those who export "sensitive" goods or technology to the Eastern Bloc.248 Before technologically advanced items can be exported, each country has to get approval from CoCom, which has to be unanimous. The items which create the most conflict are those on CoCom's Industrial – Commercial list: high technology goods with possible military application, since CoCom has great difficulty in defining goods of such a character. For example, in 1985 the United States control list covered 215 items versus 124 provided by the organization.249 Since CoCom requires unanimity on all decisions, many problems are left unsolved or lead to


247The Cocom members are namely: Belgium, Canada, Denmark, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, the United States, and West Germany. The only NATO member that does not participate in Cocom is Iceland. The formation of Cocom represented U.S. recognition that advanced technology could be beyond the reach of US jurisdiction and enforcement. E.L.Hirschhorn, I.Tasker Jr., Export Controls. Towards a Rational System For Everyone Except Toshiba with All Deliberate Speed. 20 Law & Polic. in Int'l Buss. No. 3 at 371 (1989).

248CoCom prescribed countries are: the Soviet Union, Poland, Hungary, Czechoslovakia, East Germany, Bulgaria, Romania, Albania, North Korea, Vietnam, Kampuchea, Mongolia, and China. Id.

249The trade legislation before Congress contains a proposal to reduce the U.S. export control list by forty percent. C.H.Farnsworth, West in Easing Policy on Sales to Soviet Bloc, N. Y. Times, Feb. 15, 1988, at A1, col.5.
lowest possible denominator of consensus. The recent EAA Amendments of 1985 represent an easing of U.S. export controls of goods and technology. The most significant modification is the removal of certain validated license requirements for items controlled for national security purposes. Prior to those amendments all controlled items required validated licenses for export from the United States to any country, including our close allies in CoCom – other than Canada.

In September 1985 the Department of Commerce established General License G–COM, which permits export of goods to CoCom destinations, and requires only notification to CoCom for export to the Warsaw Pact countries. In 1987 the Department of Commerce established General License (GFW) permitting export of specified items to almost all non–communist signers of nuclear non–proliferation treaties.250

The EAA Amendments provide that in most instances, U.S. export licenses no longer are required for:

1) shipments to CoCom and cooperating countries of goods that could be licensed for export to any communist country. For export in that category the Department of Commerce may require certain users to secure validated licenses and all exporters to notify the U.S. Government, but not in advance of the export;251

2) any shipments to the CoCom and cooperative countries if their export control systems have been found effective;

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3) shipments to other non-communist252 countries than those mentioned above of goods that could be licensed only through the notification to CoCom. The requirements from the first paragraph also may be required for export in that category.253

On February 23, 1989, the amendment to EAA provides for decontrol for export of the items to Warsaw Pact destination, for which only notification to CoCom is required, unless CoCom expressed the intent to continue the notification requirement.254 That provision also decontrolled all goods subject to unilateral U.S. controls with two exceptions: 1) when the Department of Commerce determined that such goods are not available from non—U.S. sources; or 2) for goods, so called "foreign available". Such a situation takes place when goods are available in other than CoCom and its cooperating countries, and the executive branch was pursuing negotiations to bring those items under multilateral control.

D. Re-Export Of U.S. Origin Items.

Originally re—export of U.S.—origin items generally required specific U.S. government authorization unless the items could have been exported from the U.S. directly under the general license to a new destination.255 Even the export of a

252Yugoslavia is considered to be a non—communist country and is concluded in Country Group V. See T.F.Clasen, Foreign Trade and Investment. A Legal Guide, 1987, Appendix 14 at 385.
255For the additional information about US export controls see Davis & Bialos, the Predictability Problem: Issues Under US Export Policy, Private Investors Abroad — Problems and Solutions in International Business in 1986 (1986). See also
foreign made items between the other countries required U.S. permission if the exported item contained U.S.-origin components and those components or the end product was controlled.\textsuperscript{256}

In November 1987 the Department of Commerce announced a new policy regarding foreign made products with U.S. origin components. The directive differed according to the plane of destination. If the final product was designed for a non-communist country and contains less than 25 percent of its value of controlled U.S. - origin components, no authorization is needed. If the product contains no more than 10 percent of product's value of US controlled components or their value is less than $10,000, no U.S. authorization is required.

The recent EAA amendments of 1988\textsuperscript{257} provide that the U.S. government authority is no longer required for the re-export of US-origin items controlled for national security in the following situations: 1) re-export to any CoCom country or cooperating with any CoCom country; 2) re-export to any other non-communist country, for which only notification to CoCom of export to communist destination is required; 3) re-export of any foreign made product to any communist or non-communist country, if the U.S. - origin components do not exceed 25 percent of the value of the whole product.\textsuperscript{258}

\textsuperscript{256}Wallace & Clarke, Comecon, Trade and The West, 155–157 (1986).
\textsuperscript{257}15 C.F.R. §376.12 (1988) (presently §776.12 (1989)).
\textsuperscript{258}Trade Act of 1988, §2415, 102 Stat. 1348.
\textsuperscript{258}E.L. Hirschhorn, I.Tasker Jr., export Controls. Towards a Rational System For Everyone Except Toshiba with All Deliberate Speed. 20 law & Polic. in Int'l Buss. No 3 at 391–392 (1989): "The Department of Commerce may make exceptions in the first category for supercomputers, sensitive nuclear end-uses, communications interception equipment, and specified end-uses."
E. The Toshiba/Kongsberg Incident.

The recent Toshiba/Kongsberg incident has shown the weakness in current technology export controls. Toshiba is one of the largest corporations in the world with 666 subsidiaries and affiliates worldwide. The company manufactures a wide variety of products such as electronics, computers, semiconductors, photocopiers, printers, telecommunication equipment, and like. Kongsberg, a state enterprise owned partly by Norwegian government is involved in a number of defense-related activities, for example, the supply of Penguin missiles to the U.S. Navy. The Toshiba subsidiary, Toshiba Machine Company, Ltd. (TMC) had supplied milling machines capable of simultaneous control of nine axes of contouring motion to the Soviet Union, and Kongsberg Trading Company (KTC) had supplied the numerical computer controls, that made the milling machines work properly. The advanced technology enabled Soviets to produce extremely quiet propellers and consequently submarines, difficult to detect and track underwater.259 Both nine-axis milling machines and the computers that provide their numerical control are subject to strict export controls in the United States, and were subject to the CoCom-based export control laws in both Japan and Norway. Nevertheless, the sales did not violate U.S. export control laws. None of the supplied technical data was of U.S. origin, nor did they contain U.S. components, which could be subject to U.S. law. The EAA 1985 amendment permitted the U.S. government to restrict or prohibit imports from firms that violated CoCom rules (not U.S. law), if the majority of CoCom's members concurred in or abstained from expressing a position regarding the imposition of

259Triplett, Crimes Against the Alliance – The Toshiba/Kongsberg Export Violation, 44 Pol'y Rev. 8, 10 (1988).
such penalties. Besides that exception, the only basis for sanctions against the
offenders was Japanese and Norwegian export control laws. The export control
authority did take some actions to punish both companies.\textsuperscript{260} However, the
reaction of U.S. authorities remained angry and dissatisfied. The U.S. Senate,
however, took by itself an action on the Toshiba/Kongsberg sanction issue.
Senator Richard Shelby proposed the Amendment to the EAA (known as Shelby
Amendment). The main feature of the Shelby Amendment was both the import
ban and the contracting ban which aimed primarily to punish Toshiba, all of its
subsidiaries and affiliates, and Kongsberg as well. The punishment proposed was
that no product manufactured by Toshiba or direct subsidiaries or affiliates of
Kongsberg could be imported into the United States, nor could the Secretary of
Defense enter into any contract or subcontract with subject mentioned above. A
transition rule would allow for products to be imported according to the contract,
which had been executed before April 30, 1987. The only exemption in the
proposed restriction would be import of spare parts or products for routine
serving and maintaining of products previously supplied.

Another proposal called the Garn Amendment (prepared by Senator Jake
Garn) offered changes in the Shelby Amendment. Both proposals provided for
similar key issues, that is both imposed penalties on the parent corporation as
well as on subsidiaries and affiliates, and called for import bans and government
contracting bans as penalties. However, the Garn Amendment provided some

\textsuperscript{260} Japanese government brought charges against TMC and some of its executives,
seized documents of TMC related to the incident, and began investigation.
President and Chairman of the parent company resigned in the demonstration of
showing the deep apology. The Norwegian government indicted an official of
Kongsberg Trade; See E.L.Hirschhorn, I.Tasker Jr., Export Controls. Towards a
Rational System For everyone Except Toshiba with All deliberate Speed. 20 Law
important differences. First of all, the President who was directed to impose
sanctions at the time was given power to terminate them during a period between
two to five years upon his discretion. Nevertheless, the Garn Amendment
required the parent company not to be excluded from any sanctions, unless they
had agreed to pay suitable compensation for losses which the U.S. national
security bore and as specified by the President.261

Secondly, the Garn Amendment established an important exception to the
import ban for goods supplied under contracts signed before May 1, 1987: spare
and component parts "essential to the United States production", "routine
serving and maintenance of products already supplied", and "information and
technology".262

The third major difference with Shelby's proposal was that the Garn
Amendment focused on future violations of CoCom export controls by foreign
companies. It provided for mandatory sanctions to be imposed if the foreign
companies were found involved in technology diversion, which would result in
increasing capabilities of Eastern Bloc countries "in submarine or antisubmarine
warfare, ballistic or antiballistic missile technology, strategic aircraft...,
communication and intelligence, or other critical technologies as determined by
the President". In addition, the President was empowered to impose sanctions on
the foreign firm within his discretion. When the CoCom national security controls

261This theory could not have a positive impact in practice on the sanctions once
imposed. For example, the Defense Department calculated that the development
of new technology, which would enable them to tract underwater the quiet Soviet
submarines, is $8 billion over 10 years. In reality, this is not a basis for
negotiations over compensation being paid under the Garn Amendment. See
E.L.Hirschhorn, I.Tasker Jr.,Export Controls. Towards a Rational System For
Everyone Except Toshiba with All Deliberate Speed. 20 Law & Polic. in Int'l

262Many in Congress preferred the Garn Amendment since it balanced "strong
mandatory sanctions with the recognition of US economic and military needs". Id.
had been violated, even if it did not have serious effect on strategic balance with the East Bloc, the President was also directed to improve the enforcement of export control laws by the CoCom members. The Senate adopted the Garn Amendment and the following one proposed by Senator Jesse Helms, which directs the Attorney General to bring a civil suit for damages against any person who had violated any national security export control regulation of the United States, or any other CoCom member, if such a violation resulted in the decrease of "military preparednesses" of the United States.²⁶³

F. Meeting Of The Coordinating Committee On Export Controls.

1. "Higher Fences Around a Smaller Yard".

On January 27–28 of 1988 the Members of the Coordinating Committee on Export Controls met in Versailles (France). The meeting was called at the request of the United States, being concerned about the appearance of "technobandit" sales of sensitive technology to Eastern bloc countries. Historically CoCom has had little success in enforcing controls on the flow of advanced technology to Eastern bloc countries (and proscribed). For many years the United States has viewed export controls as a tool of limiting Soviet development. On the other hand Japan and Western European countries see trade with the East bloc countries as enormously economically beneficial, and are willing to establish solid trading relations. These different views often resulted in little cooperation between the United States and other Cocom members.

²⁶³The damage owned be a "net loss to the national security of the United States".
Recently the United States have advocated more relaxed view on controls on high technology trade with Soviet Union. Many factors underline this shift in position. U.S. business has complained that U.S. export controls, especially the re-exporting restrictions, damage its competitiveness in the world market. The National Academy of Science estimated in its 1987 report that the export restrictions costs U.S. firms $11 billion annually. It is the cost of losses in high-technology exports which otherwise could be conducted. Also the areas of U.S. domination in high-technology in the world market shrinks.

At the January meeting the CoCom members agreed to undertake some steps in the direction of stricter enforcement within their own countries. They also committed themselves to applying more resources to their export controls and to CoCom itself, in order to strengthen weaker members.

The name given to this CoCom session was "Higher Fences Around a Smaller Yard", a term that includes the main policy of the meeting. The CoCom members agreed to reduce the list of controlled technologies and to liberalize trade conditions among allies. The United States provided for selling technology more freely to its allies capable of protecting it adequately. The "higher fences around a smaller yard" is a policy seeking more effective controls on truly sensitive technologies by reducing a number of goods subject to multilateral supervision. The January CoCom meeting brought some encouraging results. It will soon allow the export of powerful computers, medical equipment built with use of advanced

microprocessors, passenger jetliners, and advanced telecommunication equipment to East. The results have been already seen, for example the AT&T Company is bringing new communication facilities with advanced technology to Poland. Remaining are potential problems of enforcing the export controls. CoCom has no enforcement powers of its own and practically can regulate only a limited number of high-technology goods. The question arises how to effectively monitor and control the flow of technology from CoCom's and cooperating countries to the East bloc. Additional enforcement problems stem from the fact that a high proportion of advanced, useful military technology is available in commercial products. The research and development is no longer the government monopoly. Private sector often develops and utilizes a new technology before the government applies it. For example, it was the case with calculators composed of integrated circuits, which later provided useful for missiles' guiding systems. That is why the recent agreement to build "higher fence around a smaller yard" seems to be properly directed.

2. The US Isolated Attitude in CoCom.

The most recent high-level CoCom meeting was held in October 1989. It reflected the growing disagreement between CoCom's members and the United States and isolation of the latter in its view on technology transfer to the East bloc countries. European CoCom's members (particularly West Germany and

268 Recent cases of CoCom violations by Japanese companies:
May 1987 — Tomei Shoji Co. — export of integrated circuits to North Korea;
Dec. 1988 — Daikin Industries Ltd. — export of high density fluoride liquid to the Soviet Union;
July 1989 — Prometron Technics Corp. — export of materials for nuclear reactors to East Germany. See Y.Inoue, Japan Wary on High
Italy) called for immediate relaxation of export controls, which would allow Western firms to take part in present opportunities in growing trade relations with Eastern European countries. The CoCom members voted 16 to 1 to update controls on the export of machine tools (especially West Germany was displeased with it).269 European members also did not like the American refusal to the proposition of relaxing the export restrictions to Poland, Hungary, and the Soviet Union, as a constructive response to the changes taking place in those countries.270 The spokesman of the West German Embassy expressed disapproval of the U.S. policy by saying "In an age where via dialogue and cooperation we try to assist reform process in Poland, Hungary and the USSR, CoCom is outdated".271

G. The Outdated System Of US Export Controls, It's Practical Impact And The Need For Change.

The elaborate and outdated system of U.S. export controls has become untenable because of the enforcement problems as well as the negative impact on the U.S. economy. U.S. companies are placed at a disadvantageous position in the world market, because the United States pursues a more restrictive export-control policy than any other country. The U.S. provides a list of

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269 In the area of machine–tool export, West Germany has captured 45 percent of the Eastern European market, while the U.S. less than 2 percent. K.F.F. Quigley and W.J. Long, Export Controls: Moving Beyond Economic Containment; VII World Polic. Jour. No.1, Winter 1989–90, 165 at 172.


controlled items much wider than the CoCom list, and also maintains
independent foreign policy controls that require the authorization on reexport for
U.S. goods and technologies to destinations outside CoCom, and puts restrictions
on the exchange of information at international scientific conferences. The
governing regulations are very complex and the number of controlled products is
very vast to the extent that even the Department of Commerce itself cannot
provide a precise account and give a safe interpretation to a businessman.272 That
system results in disadvantageous position for U.S. firms.

A 1987 report of the National Academies of Science and Engineering
confirmed the high costs to U.S. business which is caused by the export control
laws. The survey of U.S. business people and academics outline some examples:
1) Eastern European countries are denied certain products by the United States
and it results in losses in sales for U.S. companies, since those products are
supplied from the other countries, which do not deny access to them for Eastern
European countries. For example, when the United States imposed the pipeline
sanctions in early 1980, the U.S. company Caterpillar was restricted from
exporting pipe layers to the Soviet Union (it had supplied a majority of pipe
laying equipment to the Soviet Union). Within the year the Japanese company
Komatsu took over 85 percent of supplies in pipe layers equipment to the Soviet
Union. The imposed sanctions also resulted in the loss of other U.S. sales to the

272The other CoCom member and US trading partners limit their controls to a
narrow interpretation of the CoCom list, and generally resist controls for foreign
policy purposes. For example, computer business in the United States is still
controlled to a large extend, while Japan manages to keep restricted only highly
sophisticated computers. Overall less than 10 percent of Japanese exports are
subject to controls. Id. at 176.
Soviet Union, since American companies have been deemed as unreliable contractors.\textsuperscript{273}

2) The average time to process an export license for the Eastern European countries is 52 to 58 day respectively, while in Japan the average licensing time is two weeks. the practical consequence of such a delay is a loss of sales.

3) The difficulties created by U.S. export controls causes buyers among the CoCom countries to shift to non–U.S. sellers of supply. This process is called deAmericanization. Thirty–eight percent of companies which have been questioned admitted, that their customers shift to other than U.S. sources of supply, in order to avoid potential problems with U.S. controls.\textsuperscript{274}

As we can see the cost of the U.S. export–control regime goes far beyond the lost trade between the U.S. and the Eastern European countries.\textsuperscript{275}If the United States continues its broader and more strict export–control regime that the other trading partners, it could find the U.S. firms in increasing discriminated position against and left out of the emerging pan–European economy with the capacity for technological development, innovation, and final success.

In today’s world, in a new era of expanding East–West relationships, to keep up the country has to designate flexible export–controls in order to encourage a large economic interaction, while running a safe individual and global policy.

\textsuperscript{273}For example, French company Crensot–Loire acquired the Armco contract to build a steel mill at Novolipetsk. See K.F. Quigley and W.J. Long, export controls: Moving Beyond Economic Containment; VII World Polic. Jour. No.1, Winter 1989–90, 165 at 177.

\textsuperscript{274}For example, in 1986 the British Aerospace Company instructed its subcontractors to avoid using US parts if only possible, in order to circumvent delays in licensing. Id.

Current changes in Eastern Europe and the Soviet Union are historical in character. However, many of the CoCom members still believe in need to restrict those countries in access to the Western advanced technology. On the other hand, the existing system of export controls fails to diminish the level of threat from the Eastern Europe and does not reflect changing distinction between economic and security interests in today's international environment. The United States need a simpler, more flexible export controls system, capable of responding to a different future international political and economic development. The main areas which need to be improved are:

1) Very important is the need to narrow the scope of export controls and limit it to only the most sensitive technologies. It would help the CoCom members to reach agreement easier and at the same time the United States would put itself in a better position to push for stronger enforcement of those controls. The less extensive regime would also diminish the damage done by outdated export controls to the U.S. progress in technology and world market competitiveness (described above). The system should be flexible enough to accommodate future decontrol as the international environment changes, or to modify treatment for Eastern European countries such as Poland or Hungary, which are on the path to reform and are becoming business partners, not a threat. In addition to the above proposals, it is very important to overcome the burocratic inertia that plagues the


277The CoCom control list is required every four years. However, the United States has not significantly reduced its own list in the past decade despite rapid changes in products and technologies. The exception was the reduction of controls on export to China. For example, the list of controlled machine-tool items has not been revised in 15 years. Id. at 179 – 184.
system and prevents changes. The licensing process is very time consuming and often discouraging enough to result in the loss of business.

2) It is essential for the United States to eliminate national-security controls for the countries which have reliable export control laws. If the U.S. eliminates the requirement for individual validated licenses for exports to Western countries, it would reduce the total number of licenses processed by more than 50 percent. This would minimize the inhibiting effect of export controls on East–West trade and increase the U.S. cooperation with the West in the area of advanced technology. The ideal goal would be the creation of a fully license–free area, which would cover all CoCom and EC members and other Western nations not currently members of multilateral export–control regime, but technically advanced enough to be encompassed into a system. The executive branch has been given by Congress the authority to initiate that reform. The Secretary of Commerce has a power to recognize the countries that have "an effective export control system" and lift up an licensing requirements for U.S. export of goods and technology to those countries. However, it did not bring any practical effects. In 1988 the Department of Commerce concluded, that any country has an export control system fully in accordance with an effective level of protection.278 There is no reason to believe those findings will change, at least in the present year. Instead of lifting the licensing requirements, U.S. administration calls for: a) the creation of a "substitute system" for licensing trade with CoCom countries. This system would eliminate validated license requirements for certain items in intra–CoCom trade, while the list of strategic goods would remain subject to U.S. licensing and relicensing; or b) setting a CoCom wide standard of effective

278Report to Congress was made by Secretary of Commerce William Verity, November 1988. Id. at 181.
protection for trade between CoCom members and non-members. The U.S. administration argues, that before the delicensing process within CoCom will become possible, there must be a creation of common external standard of protection in every CoCom country. Otherwise the control system would be as strong as its weakest link. The critical date to undertake any steps will be year 1992, when the European Community begins its existence.

3) The next step for the United States is to avoid forms of unilateralism in export controls. It means removing, or at least limiting, controls imposed for foreign policy purposes. In 1970's and 1980's Congress wrote into the Export Administration Act a set of determinations for the President which he was to make before imposing such controls. Congress also required the President to consult with affected industries and allies, when imposing the controls and to submit a detailed report of the President's findings to Congress.279

4) In the process of creating a viable export-control regime, the United States reformed presently inefficient system of domestic institutional structure. A Department of Defense is of special consideration, because of its role in formulating export-control policy. Since 1974, the Department of Defense has a power to review all export and reexports of goods and technical data subject to national security controls designated to the Eastern European (and proscribed) countries, and recently280 is empowered to review certain categories of exports and reexports to non-communist countries, which are believed of potential diversion.

It is commonly recognized that the Department of Defense plays too large a role

279During the Reagan administration instead EAA the International Economic Emergency Powers Act has been called upon to impose export controls. By using IEEPA the President is able to circumvent the requirements for foreign policy controls imposed by EAA. Id. at 183.

280During the Reagan administration the Department of Defense has been given that authority.
in formulating export policy in the United States. In the other countries, business people are more influential.\textsuperscript{281} The goal is to come up with the proper balance between the objectives of military security and economic vitality. The changes in the areas described above are unavoidable in the present international environment and historical changes taking place in the Eastern Europe. The path towards a more sensible export controls system is clearly marked and is waiting for its adjustments.\textsuperscript{282}

\textsuperscript{281}The exception may be France.

IV. CONCLUSIONS AND PREDICTIONS FOR FUTURE.

The thesis has described the main attributes of the foreign investment laws and should showed differences in approaches between Poland, the Soviet Union, Hungary, and Yugoslavia—the Eastern European countries which are the most advanced in the process of privatization and changing state-owned to market oriented economy. Many practical problems remain unsolved but undoubtedly the potential for the growth of cooperation between East and West exists. The political changes which are currently taking place in the Soviet Union provided a favorable climate for all Eastern European countries to open themselves for foreign investment and begin a process of privatization of their economies.

A. The Soviet Union.

The Gorbachev administration is willing to do business with the West and obviously is willing to compromise to work out the mutually profitable cooperation.283

When perestroika was first unveiled in 1985, it promised a comprehensive, revolutionary reform of entire socialist, political, and social system. For the time being the progress report today on the state of these reforms is not very optimistic.

The Soviet Union's recent enactment of joint venture legislation and decision to permit foreign participation in Soviet economy ends a long era of opposition to foreign investment in that country. The gradual process of dismantling some of the ideological barriers to such participation is taking place. Foreign investors can become co-owners with Soviet partners of capital means of production and distribution on the domestic Soviet market. This is evidence of a substantial erosion in Marxist ideology. Also the decision to exempt East—West commercial joint ventures from the centrally planned economy is a far-reaching and unprecedented element in economic system. Foreign joint enterprises are like capitalistic enclaves within a centrally planned socialist economy.284

Despite the defeat of Marxist philosophy the key components of Soviet economic ideology remain unchanged: 1) foreign partners in private entities are still denied ownership of the land. However, the Soviet citizens can buy, sell, and sublet land. 2) The Communist Party still has a great influence on national economy through, for example, central plans, control over distribution of goods. 3) The banking and insurance industries still operate as monopolies. 4) The important sectors of economy are state owned and controlled (e.g. besides military sector, air and ground transportation, distribution of goods, shipping industry). 5) The currency remains inconvertible.285


Although Gorbachev recognizes than more than cosmetic changes are required, he still believes that the solution to the peaceful reconstruction of the system is more socialism combined with greater democracy. So the poverty of perestroika lies in the fact that it admits the deviations in socialism rather than structural defects of Marxist communism philosophy. The Soviets plan to introduce forms of market socialism but it has to be realized, that successful market socialism has never existed. A market is not even feasible without clearly defined rights, the key issue of ownership, and essential characteristic of capitalism. Gorbachev made clear that the perestroika is neither anti-socialist nor anti-Leninist in its general orientations. "The essence of perestroika lies in the fact that it unites socialism with democracy and revives the Leninist concept of socialist construction both in theory and practice. ... We are conducting all our reforms in accordance with the socialist choice. We are looking within socialism rather than outside it for the answers to all the questions that arise."287

In the early stage of the economic reforms in the Soviet Union, Gorbachev tried to pursue efficiency through more rigorous forms of central planning. However, it quickly proved impossible and Soviets began the process of decentralization. In 1987 the government reduced the number of centrally planned targets and indicators and allowed the enterprises to engage in "wholesale trade"

286"the changes will bring out the immense potential of socialism and lend it the most modern forms." Moscow News, No 27 (1987) at 8.
287M. Gorbachev. Id. at 35–36.
with each other. Previously they have been tied in dealings almost exclusively with their Ministries.

Soviets have to privatize state enterprises and encourage the start-up of small businesses. Assets such as land, production, equipment, merchandise network, should be owned by individuals who have a personal economic interest in expanding the value of those assets. Large state-owned conglomerates should be divided into small manageable entities.

Once broken up, state owned enterprises should be converted into joint-stock companies. The state may retain the share and the remaining part should be sold off to employees, state pensions funds and foreign investors. One of the possible approaches is the creation of employee stock-ownership plans with their installment payments.

The Soviet Union, however, still prefers to talk of razgosudarstvenie (denationalization) rather than privatization. They insist that non-socialist ownership dose not always have to mean full private ownership and pursue more

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289 The law on co-operatives of 1988 aimed to foster the growth of a small-business sector, which would operate on a free market system (without the interference by the state). Since the majority of enterprises are still planned and controlled centrally, the co-operatives are having troubles with the access to the materials. Non-manufacturing co-operatives are at a great disadvantage since they have small chance of surviving (e.g. restaurants, hairdressers, and alike).

290 For example, a huge Khrunichev Machine Building Enterprise in Moscow produces everything from rockets to bicycles. Such an enterprise is very difficult to run efficiently. Time at 86.

291 Time, May 7 1990 at 86.
the forms of cooperatives, base hold arrangements, and like. Simple capitalism makes the Soviet leadership uncomfortable.292

The ownership rights as understood by Westerners are crucial to the transformation of socialist economy to a free market. The other problem is financial discipline and its problem of the soft budget constraint (described above).293

Overhauling the economy requires a legal system that would provide laws on corporation, conflict of interest and antitrust, and none of these exists now in the socialist countries. Previous system rejected the laws of economics, such as the influence of supply and demand on prices.

Gorbachev's approach to date has illustrated the danger of trying to see slowly through the Gordian knot rather than cutting it in one daring slash.

B. Yugoslavia.

Yugoslavia has made significant changes, both political and economical, in last twenty five years.294 Politically, decentralization has been accompanied by a greater liberalization in Yugoslavia. However, the country does remain firmly

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294"Presently the second stage of the process of constitutional changes has begun in the Federal Assembly. Among the proposed amendments are the establishment of a multiparty system (which already de facto exists), the abolition of articles which ensure the leading role of the Communist Party, equal treatment for all forms of property, the abolition of capital punishment, and the establishment of a taxation system similar to those found in Western Europe, which would enable the Federal Government to apply macroeconomic policies like governments in countries with a free market economy." Yugoslav Constitutional Changes. Only Certainty Is Uncertainty. Politika No 8,(Belgrade), May 12–18, 1990 at 1.
Marxist—Leninist under the control of the party. As regards economic reform substantial decentralization has occurred and worker participation increased. However, the economic reforms on establishment of a true market economy were not fully successful.

The main problem is the transformation of social property. There is wide-spread agreement that it should be privatized. Still, there are two conflicting ideas as to how to go about it.

Some think that property rights should be assigned to the employed, or to the citizens in general. They think that only then could markets be opened.

The others think that the only way to acquire property rights is to buy them. They rely on as great a use of market forces as possible.

One can easily recognize a standard conflict of equity and efficiency in these two views. It is worth mentioning that the government is leaning towards the view that efficiency is, at this point, more important than equity. So, it is to be expected that it will force the social enterprises to privatize, the banks to commercialize probably through privatization also, and it will stimulate domestic and foreign investments even further. It will do that through the revision of the banking sector and through accepting all that is necessary to attract foreign investors.

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296 It is interesting to note that practically none of the parties currently existing in Yugoslavia has any kind of economic or social program. Incredible as it may seem, the federal Government is prohibited by the Federal Constitution from formulating social programs. D.Bujosevic, Negative Inflation Ahead, Politika, The Int’l Weekly(belgrade), March 24, 1990, at 2.

However, the first step towards the transformation of social property was nevertheless made at the end of last year when the Law on Social Capital was passed. According to this law, the workers council, as a self-managing body in a socially owned firm, can decide to sell a part of a firm. If the whole firm is sold the money goes to funds for the development of republics and provinces.

The legal change to enable workers to decide to sell their firms has recently been criticized by many experts. Those who oppose this method of transforming social property into other types of ownership believe that property will often be sold at a discount. They claim that workers will not consider the price at all if, for example, a potential owner promises that no one will be made redundant. They believe it would be better if state agencies and banks were authorized to make such sales.

The creators of the Law on Social Capital refute these opinions, citing the regulation which empowers state bodies and the managers of funds of development to block any contract if they consider the price inappropriate. They claim that this regulation will stop socially owned property going for a song.

This method of sale is disputed in many firms as well, although such criticism is often of a sentimental nature. Workers suspect that the socialist accomplishment of which they have been a part is being treated as a failure. They also disapprove of the sales because they have invested a considerable amount of work in their companies and believe that no one should be allowed to buy it from them now. Surprisingly enough, the banks have not yet spoken up on the subject,

although they have a considerable capital interest in firms in the form of loans and have sustained large losses.298

Some firms have already been transformed into public enterprises. Their new status is often confused with that of the social enterprises. Firms can only be public, however, if the state buys at least 51% of the shares and thus gains a controlling interest. Of great importance in all this is the fact that no socially owned property can be given away. Not even the state is exempted from this rule it wants to be an owner it has to pay.

At first it is expected that shares will mainly be bought by the employees and, possibly, by the state. Reprivatisation on a larger scale could only be contemplated later. Foreign capital is also counted on.

Joint investments in the Yugoslav economy are no longer unusual nor is the fact that, in a large number of jointly-owned companies, the foreign investor has a majority of the shares or capital and what follows a larger role in a management or are wholly owned by foreigner.299

From 1968, when the investment of foreign capital in Yugoslavia was first allowed, right up to 1988 370 contracts were signed with foreign partners, worth a total of 380 million US dollars. But in 1989 570 new agreements were signed, worth a total of 33 million US dollars. Over 80% of these agreements were made

298Id. Gligorov. See also M.C.Coronna, Joint Ventures in Yugoslavia, 11 Kingstone L. Rev. 266 (1981) for an comparison of economic models of joint ventures in Yugoslavia in the past and remaining problems.

299See S.Stojiljkovic, Investments Increase, Polityka No 4. (Belgrade) Apr. 14–21, 1990 at 9. See also Z.Radisavljevic, Open Door to Foreign Capital, Politika No. 9 (Belgrade), May 19–25, 1990, at 8. See also, D.Matic, Investment Boom in Yugoslavia, Break With Prejudices, Politika No 10 (Belgrade), May 26 – June 1, 1990 at 10. See also N.Novakovic, No Country Like This Country. American Ambassador in Yugoslavia, Id. at 2.
in Serbia, Croatia, and Slovenia, with Serbia accounting for the largest share.\textsuperscript{300} From January to mid-March 1990, 450 contracts with foreign investors were signed.\textsuperscript{301}

The Yugoslav main problem is so called "black hole of socialism", or in other words, a chronic shortage of small and medium enterprises to fill the room between small workshops and huge enterprises.\textsuperscript{302} The government works to encourage the expedition of private capital, which will gradually levy out the existing enterprises.\textsuperscript{303} The foreign investment law in Yugoslavia is the most flexible among Eastern European countries, and very attractive for foreign investments. The issue of inconvertible currency remains unsolved.\textsuperscript{304}

C. Poland and Hungary.

Again, we are back to the crucial issue of ownership and implementation of principles of free market economy.\textsuperscript{305} In Poland and Hungary ownership remains

\textsuperscript{300}Z. Mihic, Foreign Investment Boom in Yugoslavia, Politika, The Int'l Weekly (Belgrade), March 24, 1990, at 5.

\textsuperscript{301}“Foreign interest in investing in Yugoslavia is increasing daily. From January 1989 until 15 March this year, over one thousand contracts covering foreign investments were signed. In only two-and-a-half months this year, the number rose to 450, which is 25% more than in last 22 years, when foreign investments first became legal in modern Yugoslavia...” Foreign Investments Up, Politika No 1, Belgrade, Mar. 24-25, 1990, at 9.

\textsuperscript{302}There are five to six times less small and medium size firms that in developed countries. Politika. The International Weekly (Belgrade). Apr. 14 1990 at 2.

\textsuperscript{303}Yugoslavians living abroad have an estimated 25–27 billion dollars in saving accounts alone. Politika. The Int'l Weekly (Belgrade). Apr 17, 1990 at 2.


\textsuperscript{305}To increase production, Poland needs to unite private business and encourage foreign investment. The government has done little to provide the low-tax, uncomplicated environment in which business can grow. Instead, it is playing around with such macroeconomic issues as the money supply and interest rates. As a result, half a year into reform, Poland has yet to produce items anyone would want to buy. None of Poland’s big, inefficient state enterprises—not even
overwhelmingly with the state despite the induced reforms. However, many new businesses responded to the changes. In Hungary so called the "secondary economy" of small private business and cooperative enterprises is growing fast. However, mainly it provides a part-time employment in, for example, construction industry and alike, where workers agree to a fixed fee. If we count agriculture industry, small private enterprises provide at least some income to two-thirds of the families in Hungary. In both Poland and Hungary, despite all reforms, the state retains its virtual monopoly over the capital stock. As the Lenin Shipyards—has gone bankrupt. ... Despite its vaunted free-market liberalism, the polish reform is still not radical enough. Rather than supporting the notion of "equality for all enterprises, private and state" — the stated goal of the last communist government—Poland needs to create conditions of inequality. Private enterprise should be actively favored, while state enterprise, with some exceptions, should be forced to fight for survival. Foreign competition should be encouraged at the expense of Polish monopolists. The solutions are not complicated. They include legal reform—making business easier to start and property easier to buy; tax reform that would give advantage to private enterprise with lower rates; bank lending policies that do the same; elimination of controls over foreign trade. The trouble is that 90% of Polish industrial production remains in state hands, while farms remain dependent on state institutions. This immense state sector continues to monopolize most resources in order to produce shoddy goods. Most people still depend on state in some way and resist change. Fast privatization of state enterprises, from food distribution to steel mills, is critical. Yet Poland's privatization program is on hold. It is on this issue that society's resistance to change, at least as reflected in its parliamentary representatives, is most obvious. when it was written, a bill that would allow the central government to enforce privatization was criticized as "too cautious." Now, even this bill is stuck in Parliament. Left wing deputies argue it would deprive workers of their "rights"—and their jobs. Right-leaning deputies claim assets would be valued too low, allowing foreigners—read Germans—to buy up Poland. Meantime, Poland faces the prospect of more recession." A. Applebaum, Only Half a Revolution in Poland. The Wall St. J. June 6, 1990, at A-16, col 3.

306 For a detailed discussion about economic and political changes in Poland as viewed from American point of view and proposed economic and political US assistance to Poland see How George Bush Can Help Lech Walesa Succeed, Backgrounder, the Heritage Foundation, Nov. 9, (1989), at 1–16.

307 For example in 1988 in Hungary, state controlled 72% of the gross fixed assets, employed 70% of work force and covered 57% of retail trade turnover. The Economist, The Survey of Perestroika at 11, April 28, 1990. For the detailed description of Hungarian economic system and proposed reforms see P. Marer, Economic System, (1988).
amended in 1989, Foreign Investment Law now allows establishment of wholly
owned foreign enterprise in Hungarian economy.308 The remaining problems are
inconvertible currency and the inadequacy of banking sector.

Poland, however, was able to introduce the process of privatization on a
larger scale than Hungary.309 Since 1982, small private businesses were founded in
almost all sectors of the economy. Recently the process of selling shares in
state-owned enterprises began (described in Chapter 7 of the thesis). Polish
government plans a new law on privatization. As a first step, the enterprises will
be nationalized, broken into small units, and then could be sold off to the
workers, public, as well as foreign investors.310 By now, the reformers in Eastern

308"The previous government's efforts at "privatization" were mishandled, causing
public scandal when it turned out that some enterprise managers used the process
to enrich themselves. So, the commission proposes as agency under the prime
minister to speed and guard the new privatization process and promote
competition. A more enforceable bankruptcy law is advocated to help flush out
those state enterprises with non-performing loans, especially those participating
in the notorious queuing gambit, wherein essentially broke outfits keep going by
means of chains of credit extended to one another. The commission also calls for
broad restoration of private agriculture and for bringing private competition to
life in banking, medicine, education, and even local garbage collection. Even with
programs it proposes to spark domestic savings, the commission makes clear that
Hungary must acquire much of its capital from foreign private investment.
Approval procedures, it says, should be simplified and an Invest Hungary agency
set up to help outside inventors get inside. B. Chapman, A Recipe for A

309See generally, J. Markoff, Digital Planning Sales Venture in Hungary, N.Y. Times,
Feb. 12, 1990 at C-12, col.1 See also, T. Carrington, Hungary Savoring Goulash
Capitalism. Liberalization Brings Flock of Western Investors, The Wall St. J.
Nov. 17, 1989 at A-10, col.1 See also, G.F. Seib, Bush Says U.S. to Grant
Hungary Most-Favored Status For Trade. The Wall St. J. Sep. 19, 1989 at A-10,
col.1 See also, S. Greenhouse, Talking Deals. Schwimm is Building Bikes. Th U.S.
also Foreign Investment in Hungary. Testing the Water. The Economist, Oct. 21,
1989 at 78.

310"...it may be difficult to find people willing to invest real money in Poland's 7,000
state enterprises. Moreover, the lack of financial institutions, from auditors to
banks to brokerage firms, will make privatization a slow process. ... Everywhere
in Eastern Europe, privatisation will be a leap in the dark, a change so sweeping
that some of its social, economic and political side-effects are as yet impossible to
Europe realize that getting ownership straight is a precondition for making markets work properly.311

D. Predictions For Future.

The solutions to the economic problems appear to be capitalistic in nature: 1) introduction of labor incentives coupled with an abandonment of socialist economic egalitarianism; 2) substantial relaxation and gradual abandonment of rigid central planning; 3) introduction of market mechanisms in pricing, income distribution, material sourcing, and distribution of goods; 4) engagement of enterprises in competitive domestic and world market.312

The economic transition from socialism is self-evident, as well as political reforms. The people of Poland, Yugoslavia, and Hungary, are convinced about their desire for capitalism, the Soviets are not so sure. We have to remember that capitalism is an alien to Eastern European countries as communism is to the West. It is very hard to reach definite conclusions about what can happen in the future. Nobody could possibly predict 6 years ago, that the second part of the decade of 1980's would bring the break down of Soviet regime, as well as economic revolution. Those few optimists who previously agreed, that communism could be peacefully overturned have been proved right. However, the hard part is still discern." Privatisation in Eastern Europe. Rediscovering the Wheel. The Economist, Apr. 14, 1990 at 19–21.


ahead. Economic difficulties such as increasing prices, inflation, low wages, falling standard of living, huge foreign debts and like phenomena, appear as a by-products of economic reforms. Besides the existing problems, majority of the people realize that economic reforms are necessary and believe in their success.\footnote{We can distinguish three groups of reactions to the restructuring of economic system. first group are those people who believe that reforms reflect the doom of socialism as it is presently practiced. Those people are interested in preventing status quo and do not want structural changes which could shake their positions. Second group are profit-seeking foreign investors who see the business opportunities in a huge, untapped Eastern European market. For these people perestroika is an impressive economic experience which should be more expanded in the future. The third group are domestic business people who view reforms as an opportunity to make profits for themselves by entering into private business.}

On the other hand, foreign investors, despite the fear of political unstability (especially in the Soviet Union and Yugoslavia) and economic uncertainty, are anxious to take advantage of a huge Eastern European market, as well as natural resources, and skilled, cheap labor. The boom of joint ventures in Eastern Europe noted through the last year, indicates the great interest of foreign investors and proves that reforms are going in the right direction. Changes which took place in Eastern European countries in the past five years are like a one way street and there is no backing up.
APPENDIX I

APPLICABLE FOREIGN INVESTMENT LAW AND REGULATIONS.

Here I would like to provide a list of laws applicable if investment takes place in one of the four countries: Poland, the Soviet Union, Yugoslavia, and Hungary.

In Poland the following laws apply:

1) The Law on Companies with Participation of Domestic and Foreign Capital of April 23, 1986;\textsuperscript{314}
2) The Law on Socio–Economic Planning of February 26, 1982, with Amendments\textsuperscript{315};
3) Law on Bankruptcy of Enterprises of 1983\textsuperscript{316};
4) The Law on Counteracting Monopolistic Practices in the National Economy of 1986;\textsuperscript{317}
5) The Banking Law of January 31, 1989;\textsuperscript{318}
7) The Law on Foreign Investments of December 23, 1989;\textsuperscript{319}
8) Economic activity pursued in Poland by a foreign investor is subject,

\textsuperscript{314}Dz.U. No. 17 item 88.
\textsuperscript{315}Dz.U. No. 4 item 26.
\textsuperscript{316}Dz.U. No. 36 of 1983 consolidated text Dz.U. No.8 of 1986, item 48.
\textsuperscript{317}Dz.U. No.3 of 1987 item 18.
\textsuperscript{318}Dz.U. No.6 of 1989 item 33.
\textsuperscript{319}Dz.U. No.41 of 1988 item 325.

In the Soviet Union the applicable laws are:

1) The USSR Supreme Soviet's Edict of January 13, 1987; Edict Concerning Taxation of Joint Enterprises in the Soviet Union and Dispute Settlement;\textsuperscript{320}

2) Council of Ministers' Decree of January 1987 — Decree on Joint Venture with Western and Developing Countries;\textsuperscript{321}

3) Supplemental Decree of the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers;

4) Council of Minister's Resolution of December 2, 1988, On Further Developing the Foreign Economic Activity of State, Cooperative, and Other Public Enterprises, Associations, and Organizations;\textsuperscript{322}

5) Union of Soviet Socialist Republic: Law on Cooperatives of June 1, 1988;\textsuperscript{323}

6) Fundamentals Civil Legislation of the USSR and Union Republics and the various codes of Union republics:

A. The Civil Code\textsuperscript{324} which defines the legal capacity of the joint venture, under the Soviet domestic law, governs a large number of contracts which the

\textsuperscript{320}26 I.L.M. 759 (1987).
\textsuperscript{321}26 I.L.M. 749 (1987).
\textsuperscript{323}28 I.L.M. 719 (1989).
\textsuperscript{324}The Civil Code of the RSFSR (1964) reprinted in 23 Law In Eastern Europe: The Soviet Codes of Law 133 at 387 (1980).
joint venture partners will enter into, and determines the legal status of the state property which may be transferred to a Soviet partner in joint venture operation.

B. The Code of Civil Procedure\textsuperscript{325} which governs all civil actions in the Soviet courts and regulates any conflict of law problems which can arise while operating joint ventures.

C. The Labor Code\textsuperscript{326} governs the employment rights of the employees of the joint venture.

D. The Land Code\textsuperscript{327} determines the legal status of the land that a Soviet partner may contribute to the capitalization of the joint venture.

E. The statutes of the respective state agencies and departments involved in foreign trade operation which usually determine the contracting authority of the respective bodies.

F. The statute of the arbitration Court attached to the USSR Chamber of Commerce.\textsuperscript{328}

G. The Statute of the State Arbitration Commission.\textsuperscript{329}

H. Banking and Foreign Currency Regulations.\textsuperscript{330}

\textsuperscript{325}Id. at 673.

\textsuperscript{326}Id at 881.

\textsuperscript{327}Id at 863.

\textsuperscript{328}Article 20 of the Joint Venture Law of January 1987.


\textsuperscript{330}See The Civil Code of the RSFSR (1964) reprinted in 23 Law In Eastern Europe: The Soviet Codes of Law, 133. For example violation of certain banking laws is a capital crime and the Soviet Criminal Code applies. Id at 189.
I. The Shipping Code.\textsuperscript{331}

J. Tax laws.\textsuperscript{332}

In Yugoslavia the applicable laws are:

1) Yugoslav Law on Foreign Investments of January 8, 1989;\textsuperscript{333}
2) Law on Investment of Resources of Foreign Persons in Domestic Organization of Associated Labor;\textsuperscript{334}
3) Yugoslav national laws such as: Labor Code, Civil Code, Constitution, and Tax Law and Banking Law.

In Hungary the applicable laws are:

1) Act XXIV of April 19, 1989 on Foreign Investment in Hungary;\textsuperscript{335}
2) Act VI, 1988, on Economic Associations (Company Act);\textsuperscript{336}
3) Hungarian domestic laws such as: Civil Code, Labor Code, Tax Law, Banking Law, and alike.

When we talk about the applicable law to the foreign investment, we have to outline and keep in mind three groups of relations in the context of setting up and operating such an investment:

1) relations between a foreign national and the domestic partner who is a legal person in the country of investment;
2) relation between the partners of the company with a foreign participation;

\textsuperscript{331}Id. at 1145.
\textsuperscript{333}28 I.L.M. 1543 (1989).
\textsuperscript{334}As amended see 24 Int'l L. Mat. 315 (1985).
\textsuperscript{335}HungaroPress, Hungarian Chamber of Commerce Information Department.
\textsuperscript{336}Id.
3) relations between the established company with foreign participation (or wholly owned) and domestic economic subjects.
JOINT VENTURES IN POLAND IN 1989

- **West Germany**: 41%
- **U.S.A.**: 8%
- **Austria**: 7%
- **Great Britain**: 5%
- **France**: 5%
- **Others (European)**: 18%
- **Others (non-European)**: 6%
- **Sweden**: 10%

*Source: Polish Agency of Foreign Investment*
DOOR TO PRIVATISATION
Joint ventures in Hungary

BY NATIONALITY OF PARTNER

- United States 6%
- Switzerland 7%
- Great Britain 5%
- Austria 30%
- Other 23%
- West Germany 29%

Source: The Economist, April 28, 1990
The new entrepreneurs
Russian co-operatives, by activity

JAN 1989 total: 78,000

Transport, trade & other activities 50%

Services 24%

Food production & restaurants 5%

Consumer goods manufacturing 19%

Raw material processing & manufacturing 2%

JULY 1989 total: 133,000

Source: The Economist, April 28, 1990