Denver Journal of International Law & Policy

Volume 17
Number 3 *Spring*

Article 5

January 1989

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Recommended Citation
David M. Bost, The 1987 Soviet Joint Venture Law: New Possibilities for Cooperation and Growth in East - West Relations, 17 Denv. J. Int'l L. & Pol'y 581 (1989).

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Keywords

Joint Venture, Foreign Investment, Investment

This article is available in Denver Journal of International Law & Policy: https://digitalcommons.du.edu/djilp/vol17/iss3/5

LEONARD v.B. SUTTON AWARD PAPER*

The 1987 Soviet Joint Venture Law: New Possibilities for Cooperation and Growth in East - West Relations

DAVID M. BOST**

I. INTRODUCTION

In May of 1985 more than 400 American businesspeople attended meetings in Moscow with Soviet trade officials as part of a conference sponsored by the U.S. - U.S.S.R. Commercial Commission. The Soviets hoped to accomplish a double purpose by hosting these meetings: demonstrate to Western nations that it was willing to do business, and encourage Western governments to reciprocate by relaxing trade barriers.[1] One year later, Soviet trade officials met in New York with U.S. trade leaders to explore what forms would best facilitate Soviet-American business relationships. After expressions of interest by Monsanto, Occidental Petroleum, Singer Sewing Machine, and other companies,[2] Soviet officials announced a new Soviet Joint Venture Law in January of 1987.[3] Within

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* The Leonard v.B. Sutton Award is presented each year in recognition of excellence in international legal writing. The award is endowed by the Honorable Leonard v.B. Sutton. Judge Sutton is a former Chief Justice of the Colorado Supreme Court, the former Chairman of the Foreign Claims Settlement Commission of the United States, and an internationally renowned scholar and attorney.

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1. Rogers, *Glasnost and Perestroika: An Evaluation of the Gorbachev Revolution and Its Opportunities for the West*, 16 DEN. J. INT'L. L. & POL'Y 209, 211 (1988). The Soviet description of the Commission's goals is: to search for ways of improving cooperation between the Soviet Union and United States' economies through seminars, symposiums, marketing, joint scientific research, joint ventures and technology transfers. USSR TRADE SUPPLEMENT, J. of Comm., Dec. 8, 1986, at 10.

2. Aronson, *The New Soviet Joint Venture Law: Analysis, Issues, and Approaches for the American Investor*, 19 LAW & POL'Y. INT'L BUS. 851 (1987). Among other interested companies which have recently entered into negotiations with the Soviets are: RJR Nabisco, Mercator Corp., Chevron, Eastman Kodak and Johnson & Johnson. *See Breakthrough: a Journalist's Report From Moscow*, THE NEW YORKER, April 17, 1989, at 30.

3. ON THE PROCEDURE FOR THE CREATION ON THE TERRITORY OF THE

months the Soviets received over 200 proposals from interested Western businesspeople.[4]

Although there have been joint venture laws in the Eastern Bloc for some time,[5] this Western access to the Soviet economy is new and reflects a changing Soviet Union, in terms of *perestroika* and *glasnost* as well as the desire to integrate its economy with the more prosperous West. This change of attitude has spread throughout Soviet society and politics, and is confirmed by other recent events such as the relaxation of controls on information, the historic agreement between the U.S. and U.S.S.R. to eliminate intermediate range nuclear missiles,[6] and a number of domestic and foreign reforms.

Some observers and experts on Soviet affairs have remained skeptical of Soviet attempts to become involved with the free market, while holding reservations about Soviet intentions in the joint venture realm.[7] However, the new joint venture law conforms to the realities of *perestroika* and *glasnost*, and reveals remarkable flexibility by conforming to Western investors' needs.

The joint venture law can bring about more than the establishment of many small ties for profit. Partnerships based on common economic goals will allow communist and capitalist enterprises to encounter and assimilate each other. This interdependence will require the creation within a given venture of structures for developing shared interests and resolving conflicts, as well as harmonizing what may be considered a new communist - capitalist economic culture.

Because the joint venture law does not operate in a void, these many small ties will implicate numerous social, economic, and political realities. The venture's resolution of inevitable conflicts arising under the law due to differing ideologies, will be paramount to the partnership's viability. It is through this mutual resolution of problems that larger processes for conflict resolution are created: a process for resolving conflicts in the

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U.S.S.R. AND THE ACTIVITIES OF JOINT ENTERPRISES WITH THE PARTICIPATION OF SOVIET ORGANIZATIONS AND FIRMS OF THE CAPITALIST AND DEVELOPING COUNTRIES, 26 I.L.M. 750 (1987)[hereinafter JOINT VENTURE LAW].

4. Wall St. J., April 6, 1987 at 20 (the 200 proposals were counted as of April 1987).

5. There exist East-West joint ventures in Poland, Bulgaria, Hungary, Czechoslovakia, and Yugoslavia. *See* Scriven, *Co-operation in East-West Trade: the Equity Joint Venture*, 10 INT'L BUS. LAW. 105, 109 (1982).

6. Agreement was signed Dec. 9, 1987.

7. It is no secret that the Soviet Union desires to attain the same advantages given member states of the General Agreement on Tariffs and Trade (GATT). Consequently, it has been hinted that the Soviets believe their democratization of certain government powers through *Glasnost* may lead to admission to GATT. Rogers, *supra* note 1, at 227. Speculation operates in the idea that the new joint venture law stems from the Soviet desire to gain admission to GATT. One means of broadening the base of Soviet export earnings and a prominent role in world trade can be linked to joint ventures as the proving ground for more of the open free trade principles found in GATT. *See* Aronson, *supra* note 2, at 856-867. Arguably, the Soviet joint venture law may be a stepping stone for Soviet inclusion to GATT.

larger context of East-West relations.

II. BACKGROUND

It is apparent that the Soviet Union no longer represents a compelling ideal to the third world, or even to its own society. As one commentator recently observed, "[S]ince Communism is becoming an evident failure at home, it is increasingly difficult for the Soviets to sell it as the wave of the future to third world and other countries."[8] In an attempt to stabilize and modernize the Soviet economy, the U.S.S.R. has found it necessary to expand its role in the world market by implementing what looks remarkably similar to capitalist reform. If so, this would not be the first time the Soviets have found certain Western reform advantageous, since as far back as the 1920's Lenin implemented many free-market reforms in times of crisis.[9] In fact there is an economic crises in the U.S.S.R. today and, as one author has determined, the programs the Soviets are implementing to correct its problems "[a]rise from the new Soviet consciousness that its economic system is not working and that if it wishes to keep pace economically and culturally with the rest of the world, [it] must make 'significant changes.' "[10]

Before the enactment of one such change — the joint venture law — foreign investment in the Soviet Union was limited to Industrial Cooperation Agreements (ICA's),[11] which required a Western investor to furnish the Soviets with the capital, equipment, and technical expertise essential to make the *Soviet run operation* function. Without any real say in the operation of the ICA or in managing the operations, Western investors were left only with the hope they could recoup the cost of their original investment.[12] This conformed to the reality of the U.S.S.R.'s centrally planned economy, controlled and administered entirely by a rigid and entrenched bureaucracy bent solely on state ownership of all means of production, prohibiting the private use of hired labor, and private management: a virtual ban on private business for profit.

The joint venture law is a stark contradiction to past Soviet policies on foreign investment. Joint ventures are a creative form of business relationship, existing in many forms, and managed by their respective partners. A joint venture is simply, "[A]n economic entity comprised of two or more partners which combine their assets, and expertise, and agree to share the profits and losses resulting from their jointly managed enterprise."[13]

The desire to implement a joint venture law in the Soviet Union

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8. Rogers, *supra* note 1, at 211.

9. *Id.* at 239.

10. *Id.*

11. Dunn, *The New Soviet Joint Venture Regulations*, 12 N.C. J. OF INT'L & COMM. REGS. 171, 174 (1987).

12. *Id.* at 175.

13. Aronson, *supra* note 2, at 855.

came partly from the knowledge that joint ventures provide their host country with great opportunities in research and development. These benefits were made obvious by China's success with its joint venture law.[14] The Chinese experience, and the fact that joint ventures between capitalist countries have also been successful,[15] has improved the Soviets' receptivity to joint ventures.

III. THE JOINT VENTURE LAW - GENERAL PROVISIONS

A. *The Venture Proposal*

The first step for parties interested in creating a joint enterprise is to submit a proposal to the Soviet partner's local ministry. The proposal is to reflect an interested investor's tentative plans for a business activity with a Soviet partner. After being processed through the Soviet bureaucracy, the U.S.S.R. Council of Ministers decides whether to accept or deny the proposal.[16] The Council has wide discretion in making its decision. This discretion is limited only by such considerations as the Soviet Union's need for raw materials, foodstuffs, new technology and management techniques, a desire to enhance the value of the ruble, increase imports of foreign exchange, and expand the export base of the U.S.S.R..[17]

B. *Structure of the Joint Venture*

The structure of the joint venture is determined by a number of mandatory and permissive provisions in the joint venture law. In the original 1987 law, a Soviet partner was to own not less than fifty-one percent interest in the joint venture; however, the law has since been changed permitting Western partners *more* than fifty percent ownership.[18] The venture is to be considered an individual entity, self-financing and with its own balance sheet. That is, the enterprise must "sink or swim" on its own.[19]

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14. China has permitted an "open door policy" to Sino-Foreign partnerships in the form of joint ventures for 10 years. These have brought China over 6 billion dollars in foreign investment from over 7,000 foreign investors. *See* Yuquing, *Like Bamboo Shoots After a Rain: Exploiting the Chinese Law and New Regulations on Sino-Foreign Joint Ventures*, 8 N. W. J. INT'L L. & BUS. 59, 118 (1987).

15. Since 1978 a number of industrial nations focused on joint ventures as a progressive business. Most of those countries were high profit residence states such as the United Kingdom, United States, Japan, France, and West Germany. KAREN J. HLADIK, INTERNATIONAL JOINT VENTURES 6 (1985).

16. 16 JOINT VENTURE LAW, *supra* note 3, at 750, secs. 1 & 2.

17. *Id.* at 750-751, sec. 3.

18. Telephone interview with Harold E. Rogers, Jr., International Attorney and Author on U.S. - Soviet business transactions (April 10, 1989). For a view of the old forty-nine percent rule see *id.* at 751, sec. 5.

19. With a view of the past, this provision is startling to most observers because it allows soviet business to run itself for the first time, and allows joint ventures to set production limits and goals free from government control. *See* Dunn, *supra* note 11, at 174. What M.S. Gorbachev has stated as the key to the new Soviet economic and social reform is, "[t]o

The venture will conclude contracts on its own, acquire property, and have the right to sue and be sued.[20] Each venture is to have a board with Soviet citizens as the Chairman and General Director. Participants of the venture have the right, by mutual consent, to transfer their share of ownership to third persons. However, the Soviet partner has a first right of purchase and any transfer must be approved by the Council of Ministers.[21]

The joint venture must employ a labor force that is made up primarily of Soviet citizens,[22] thus the venture may enter into contracts with Soviet labor organizations. The venture must pay its workers wages, social security and pensions at a rate determined by Soviet law. All disputes between the partners, and between the venture and other businesses, may be settled either in the Soviet courts or by a Soviet arbitration tribunal.[23] Finally, the joint venture must create a charter and file it with the Council of Ministers. The contents of the Charter must include the purposes of the venture, its location, composition of ownership, the stated amount of each partner's capital contributions, and a statement of the Charter fund composition.

The composition of the charter fund includes a statement of the amount of foreign currency, as opposed to the rubles brought into the venture. The value of each partner's property (capital contribution) is to be determined by its conversion into rubles.[24] This valuation is the determining factor of ownership interest and profit allocation between the partners.

The duration of the venture may be perpetual; it is limited solely by the Charter.[25] The Charter may also include any other provisions which allow the partners to further define their duties and relationship to one another. Thus, having a Soviet Chairman and General Director does not necessarily eviscerate a foreign partner's voting and decisionmaking rights. Structures and rules for inter-venture decision making may be defined by agreement between the partners and incorporated into the ven-

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carefully prepare, within the year 1987, and to implement in the U.S.S.R. law on State Enterprises. To extend its action to all enterprises in 1988 and 1989, and make them completely self accounting and self financing." Pravda, June 27, 1987, col. 1.

20. JOINT VENTURE LAW, *supra* note 3, at 751, sec. 6.

21. *Id.* at 752, sec. 16.

22. *Soviet Council of Ministers Decision on Joint Ventures with Western Firms*, 4 INT'L TRADE REP. 358, 361 (BNA) (Mar. 11, 1987).

23. JOINT VENTURE LAW, *supra* note 3, at 753, sec. 20.

24. *Id.* at 752, secs. 11-12.

25. *Id.* at 751, sec. 8. This is a very positive provision because many communist nations limit their ventures' duration. Both Poland and Bulgaria place a 15-year maximum on the length of the venture. Other socialist countries have similar principles. One problem associated with limitations on joint venture duration is that foreign partners must accept the exploitation of their capital and technology by sacrificing their capital to the government when exiting the partnership. *See* Şcriven, *supra* note 5, at 109.

ture charter.[26] In many respects the charter operates in a manner similar to partnership agreements in the Western legal world.[27]

C. *Venture Operations*

For its operations the joint venture may create branch offices within the Soviet Union.[28] It may purchase raw materials from the Soviet Union;[29] however, all the venture's purchases and sales in the Soviet domestic markets must be transacted in rubles.[30] The venture's cash assets must be deposited in a Soviet State Bank, with foreign currency to be immediately converted at an exchange rate determined either by world money market rates or a procedure established by the State Bank.[31]

The venture may import and export goods as necessary, but it must do so through a Soviet Foreign Trade Organization (FTO).[32] Any foreign currency expenditures flowing from the venture must be transacted with the actual foreign currency brought in by the venture's export sales. The foreign partner's repatriation of profits is similarly limited to the currency brought in by the venture's net export receipts.[33]

IV. THE LAW'S INHERENT PROBLEMS AND POSSIBLE SOLUTIONS

The new joint venture law presents ample opportunities for profit, expanded trade, and improved foreign relations. Yet, because the law does not operate in a void, it also presents problems that must be resolved. Major difficulties exist in regard to the law's provisions on foreign exchange. There are, as well, the existing trade regulations promulgated by the Soviet Union and Western nations: these alone present significant obstacles. Finally, the absence of Soviet legal precedent in partnership and contract law may well be the most daunting problem for joint

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26. JOINT VENTURE LAW, *supra* note 3, at 753, sec. 21. Without a foreign partner having the ability to make major management and production decisions, the entire purpose of the Joint Venture law would be destroyed. The Soviets desire to learn Western decision processes and without flexibility in the charter agreements the Soviet partners could dominate the venture.

27. *Id.* at 751, sec. 7. This provision allows the partners to make specific contractual obligations between themselves, thus minimizing disputes in the future.

28. *Id.* at 753, sec. 19.

29. There exist a number of incentives making it less likely that the venture will contract for raw materials outside the country. Large tax breaks are given to ventures that purchase their materials within the country. Extra taxes can be levied on raw materials that are imported, even while available within the Soviet Union. For a more in depth review of the tax consequences to the Joint Venture, see UNION OF SOVIET SOCIALIST REPUBLICS: EDICT CONCERNING TAXATION OF JOINT ENTERPRISES IN THE SOVIET UNION AND DISPUTE RESOLUTION OF JANUARY 13, 1987, 26 I.L.M. 759 (1987)[hereinafter DISPUTE RES. LAW].

30. JOINT VENTURE LAW, *supra* note 3, at 754, secs. 25 & 26.

31. *Id.* at 754-755, sec. 29.

32. *Id.* at 754, sec. 24. This seems necessary because the Soviet's wish to prevent the importation of undesirable commodities.

33. *Id.* at 755, secs. 30-32.

venturers.

These problems can be solved and, in many cases, aspects of the law which appear to be obstacles are in fact opportunities in disguise. The process of problem solving is as important as the solutions to individual problems. The joint venture law provides the Soviet Union and Western nations with an opportunity to develop common approaches to problems in circumstances where shared goals are clearly defined.

A. Foreign Exchange and Currency Problems

Foreign currency reserves are critical both to nations and joint ventures. Using the foreign currency it has acquired, a nation can invest in activities and products from abroad and enhance the state's ability to compete in the world market. Not surprisingly, states are quite restrictive in controlling the foreign currency that enters and leaves their economies. International law also reflects this attitude: there is no bilateral treaty anywhere in the international business world that allows a venture to import or export domestic or foreign exchange freely.[34] A state's regulation of foreign exchange is explicitly recognized as an act of sovereignty.[35]

Some countries are less concerned with the acquisition of foreign currency than others. Its importance depends on a country's relative economic status in the world. Thus, "While the acquisition of foreign exchange may be a high priority of the investment policy of the Sudan, it is certainly not as important for Saudi Arabia, which seeks particularly to acquire new technology."[36] Without question, the Soviet Union wishes to acquire both foreign currency and new technology. In fact, the Soviet need for foreign currency reserves is as great as that of Sudan; Soviet currency has very little practical worth in the Western market.[37] In its trade with Western countries, the U.S.S.R. must use the currency of its trading partners. Foreign currency is so important to a joint venture's successful operation that it has been described as "the mother's milk of joint venturing abroad."[38]

The new Soviet joint venture law's foreign exchange provisions also present major difficulties for joint ventures. The law inhibits a joint venture's ability to obtain needed currency simply because the law is geared toward increasing the Soviet acquisition of foreign exchange. The Soviets have organized their joint venture law in a manner that makes joint ventures a conduit for bringing in foreign currency. The law inhibits the venture from sending foreign currency out of the country once it has received

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34. Salacuse, *Host Country Regulation of Joint Ventures*, in JOINT VENTURES ABROAD 103 (1985).

35. *Id.*

36. *Id.* at 106.

37. Aronson, *supra* note 2, at 863. Of course, the Soviets need foreign currency to trade with other countries and foreign businesses.

38. Salacuse, *supra* note 34, at 118.

it.[39] Provision 25 of the joint venture law limits the joint venture's use of foreign exchange to the currency it earns through its own exports.[40] The venture is also precluded from obtaining currency subsidies and from borrowing currency outside the U.S.S.R.[41] This forces joint ventures to concentrate their activities more in the area of exporting goods rather than selling in the Soviet domestic market where payment would be in rubles.[42]

The biggest risk a venture faces when dealing with these restrictions is that its exports might fail or fall short. It would then be unable to pay its foreign creditors and repatriate the profits for its foreign partner.[43] "In substance, the new law's express 'guarantee' of the right to take of profits in foreign exchange . . . will apparently apply only when the necessary foreign exchange has been earned."[44] Under Soviet law, if the venture's foreign currency runs out, it must make all its expenditures in rubles.[45] Many capitalists will be discouraged from entering joint ventures if the pot of gold they seek exists only in rubles.

B. Foreign Exchange Rate - The Ruble

The essential problem of foreign exchange is the valuation process of the ruble: all foreign currency and capital originally contributed or brought in through exports must be deposited in a Soviet State Bank and then converted to rubles.[46] The State Bank of the U.S.S.R. determines for itself the official exchange rate.[47] Such a one-sided determination of ex-

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39. Although seeming harsh, such is not unusual in Eastern Bloc states, nor in China. Yuquing, *supra* note 14, at 100.

40. JOINT VENTURE LAW, *supra* note 3, at 754, sec. 25.

41. *Id.* at 860-861.

42. As long as a joint venture decides to concentrate on selling its products exclusively within the Soviet domestic market there would be little concern over foreign exchange since the entire process can be accomplished in rubles. However, because foreign currency is required for making outside purchases and repatriating profits, a foreign partner benefits more by using its Soviet facilities to manufacture its products for export to its previously established Western markets. As witnesses in China's international joint venture law, foreign investors have geared toward primarily export oriented ventures, Yuquing, *supra* note 14, at 100. *See also*, Salacuse, *supra* note 34, at 106 (Soviet law has forced many to accept export as the *quid pro quo*). It may indeed be more beneficial to Western partners if they set up primarily export oriented joint ventures since it is likely the Soviets will go along with proposals which give the Soviets some competitive advantage in the manufacture or sale of a product. This is expecially true when the foreign partner lacks a great foreign marketing operation and could benefit from such activity. If a foreign partner does have an extensive marketing operation throughout the world, he receives little incentive to enter a Soviet joint venture because start-up costs override the low wages found in the U.S.S.R.

43. Aronson, *supra* note 2, at 863.

44. Smith, *U.S. - Soviet Joint Ventures: A New Opening in the East*, 43 INT'L BUS. LAW. 79, 84 (1987).

45. JOINT VENTURE LAW, *supra* note 3, at secs. 25-29.

46. Section 20 of the joint venture law dictates that the foreign currency acquired by the venture must be deposited in a Soviet Bank for conversion into rubles.

47. JOINT VENTURE LAW, *supra* note 3, at sec. 29.

change rates can result in an inflated valuation of the Soviet partner's initial contribution and, eventually, the share of profit that partner receives.[48] Thus, a partner's profits could vary at the whim of state policymakers.[49]

While this discussion may lead one to believe that the future for joint ventures is doubtful, it is still quite possible under the present law for ventures to resolve the foreign exchange problems and reap sufficient profits.[50] The establishment of a fair exchange rate is more likely than it seems. The Soviet Union has strong incentive to build up the international integrity of its currency:

> Gorbachev may represent the last chance of better integrating the Soviet Union into the world economy. There it would come under pressure to behave like a Western Country, competing for capital . . . lowering the barriers to foreign investment and even making its currency convertible.[51]

It is in the strong mutual interest of both Soviets and joint venture's to establish a fair exchange rate for the ruble.[52] Moreover, the joint venture can protect itself from unreasonable exchange rates by agreement within the venture charter. Both partners can agree as to the value of their respective contributions and ownership interests.[53]

The Soviets have recently reacted to this dilemma of poor ruble marketability by considering a new type of "special ruble" for international trade purposes. This limited edition ruble, if approved, will be available to Western partners, and backed by gold and hard currency reserves.[54] This type of consideration enforces the idea that the Soviets view the new law as both flexible and accommodating to Western needs.[55]

C. *Import Substitution*

Another way of relieving a venture's foreign exchange problems is through import substitution. If a venture is producing certain products which the Soviets need to import from abroad, it is much more economi-

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48. Aronson, *supra* note 2, at 864.

49. *Id.* at 866.

50. Smith, *supra* note 44, at 84.

51. TIME, July 27, 1987, at 11.

52. There exist a number of obvious and not so obvious reasons for enhancing the value of the ruble: 1) Since unfair rates will discourage foreign investors, the Soviets will be apt to set a rate which encourages entrance into joint ventures; 2) The more joint ventures that exist in the Soviet Union, the more the ruble is spread around the world community, and it follows that this alone may enhance the integrity of the ruble in the free market; 3) The more inflated the ruble becomes, the less likely it will ever be respected in the international market.

53. Smith, *supra* note 44, at 89.

54. *Soviet Union Considering Special Ruble to Lift Trade*, Wall St. J., April 4, 1989, at A17, col. 4.

55. Thus, we might consider this type of flexibility as a precursor to even greater Soviet receptability to Western investors' needs.

cal for the Soviets to trade with the venture and avoid the costs associated with importation, shipping, and excise taxes. If the Soviets pay the venture for its products in rubles, they need not touch their foreign exchange reserves; however, the venture will be left with an excessive surplus of unconvertible rubles.

Import substitution allows the venture to utilize a greater amount of foreign currency than it could if limited solely to the currency it acquired through its exports.[56] The amount of rubles the venture receives from the Soviets is valued at its worth in foreign currency, and the venture then receives the right to borrow or withdraw foreign currency from abroad — or even within the Soviet Union — up to the amount of the valuation. This allows a joint venture to utilize needed foreign currency above and beyond the limits of its export income, as well as repatriate profits and pay foreign creditors.

The benefits of import substitution are reciprocal. The venture receives a higher limit on its foreign currency transfers, and the Soviets reduce their foreign currency expenditures on goods from abroad.[57] The use of import substitution is only one example of how the Soviets and joint ventures can meet their needs by resolving problems in respect to their shared interests.

D. Countertrade

Countertrade offers further solutions to the joint venture law's limitations on foreign exchange. Countertrade is trade with an eye on avoiding the exchange of money. One form of countertrade especially useful to joint ventures is barter. Barter is the direct exchange of goods or commodities of equal or near equal value without the use of currency.[58]

Although barter encompasses only 4% of all countertrade transactions worldwide,[59] its practicality presents an obvious advantage for joint ventures and the Soviets. A joint venture can trade the goods it produces for the products of a foreign company. The goods received by the venture may be divided up among the venture's partners according to their percentage of ownership. A foreign partner can avoid the harshness of the Soviet controls on foreign exchange by having its share of the booty sent to an FTO outside the Soviet Union. Thus, the FTO can sell the Western partner's share of goods in exchange for convertible currency. The profits from such can be deposited into a foreign account, thus allowing the partner to repatriate its profits. Of course, the Soviet Union also profits in this transaction — it acquires the goods received by the Soviet partner, new trading partners in the free market, and increases exports of Soviet

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56. Yuqing, *supra* note 14, at 102.

57. Aronson, *supra* note 2, at 861.

58. Rowberg, *Countertrade as a Quid Pro Quo*, in JOINT VENTURES ABROAD 211, 213 (1985).

59. *Id.* at 211.

made goods.

Since it is often impossible to get immediate delivery of goods as payment for outgoing goods, another more widely used form of countertrade (counterpurchase) may be utilized. Counterpurchase, or "buy-back," is the exchange of goods for goods and is performed through reciprocal contracts. Each party pays for the other's goods in an escrow type account upon receiving delivery of the goods, while guaranteeing by promissory note that the other party will pay the same amount back into the account upon receiving a reciprical delivery of goods.[60] This avoids foreign exchange problems because the currency never really leaves the possession of the Joint Venture.[61]

The Soviets should be very receptive to countertrade because of its popularity and its benefits. Countertrade today encompasses over five percent of all world trade, while some sources put it as high as thirty percent.[62] At least 88 countries, including socialist, developing, and developed states, require some form of countertrade in certain transactions.[63] China has the same restrictions on foreign exchange as do the Soviets,[64] and for them countertrade has been a great success.[65] Even greater benefits have been realized in the Slavic Communist nations. Western joint venture partners in Yugoslavia have profited through countertrade, and Yugoslavia has been able to afford the import of previously unattainable goods from costly Western markets. Also, other Eastern Bloc countries have also experienced a greater influx of needed consumer goods, a noticeable rise in their exports, and a growth in their domestic industries.[66] The utility of countertrade strikes a balance between the needs of partners and the Soviet state. By recognizing the interests both desire from trade, the joint venture and Soviet Union can develop a dialogue conducive to their separate and shared interests, therefore, shaping both Soviet law and a future Soviet-Capitalist economic culture.

E. Review by Soviet Foreign Trade Organizations

Although the joint venture law gives the Soviet venture the right to import and sell goods in the domestic market,[67] a Soviet Foreign Trade Organization (FTO) must review and approve all transactions to deter-

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60. Park, *Countertrade Requirements in East - West Transactions*, 10 INT'L BUS. LAW. 122, 123 (1982).

61. The venture can use the same lump sum of currency in a number of successive transactions since only its presence in the account is important. For a more detailed description of countertrade transactions, see Atrisien & Buckley, *Joint Ventures in Yugoslavia: Comment*, 18 J. WORLD TRADE L. 163 (1984). *See also* Rowberg, *supra* note 58, at 211.

62. BARTON & FISHER, INTERNATIONAL TRADE AND INVESTMENT 80 (1986).

63. Rowberg, *supra* note 58, at 214.

64. Yuquing, *supra* note 14, at 100.

65. *Id.* at 96.

66. Atrisien & Buckley, *supra* note 61, at 166.

67. JOINT VENTURE LAW, *supra* note 3, at 754, sec. 24.

mine if the goods are appropriate for Soviet domestic consumption.[68] The venture is not free to deal directly with Soviet citizens until approval is granted. Therefore, if the Soviet FTO is motivated to promote exports over domestic sales, or to protect Soviet industry from competition, a joint venture oriented toward sales in the U.S.S.R. will seldom succeed.[69]

One of the most problematic aspects of the Soviet Union's desire to regenerate its ailing economy is the introduction of unplanned goods into their planned economy.[70] Because the Soviets fear an introduction of goods that are "too new too soon," they require a FTO to approve all joint venture goods designed for domestic sale.[71] Another potential problem exists. It is not entirely clear whether the Soviets will require foreign partners to bring the newest and most modern machinery and tools into the joint venture. Some Eastern Bloc countries and less developed countries require a foreign investor to supply its venture with the most up-to-date technology available.[72]

The potential for resolving conflicts associated with FTO's is promising. We must not forget the benefits host countries seek through their joint ventures: increased foreign exchange, increased employment, public revenue, the development of local resources, management experience, technology, and improved quality in domestic goods.[73] These benefits are not always realized by a host country, and there is a danger that a venture can backfire, causing greater harm than good.[74] Nonetheless, the Soviet desire for obtaining the resulting benefits from joint ventures may be motivation enough for allowing many previously unacceptable goods to be sold domestically.[75] It is important to note that although FTO's are legal entities, they are integral parts of the Soviet Ministry of Trade and, therefore, representative of Soviet policy.[76] Without the newest skills and technology, the Soviets could neither compete in the world market nor

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68. Smith, *supra* note 44, at 82.

69. *Id.* at 85. This situation might never arise if the joint venture states at the outset what types of goods it plans to bring into the country. If this plan is approved by the Council of Ministers, it seems unlikely an FTO could override Ministry approval.

70. Dunn, *supra* note 11, at 177.

71. Smith, *supra* note 44, at 85. There exists a possibility that if goods are designed primarily for export or destined for other communist nations, the FTO might be more willing to approve the venture's sale within Russia. Thus, a foreign partner should always seek ministry approval of domestic sales before manufacturing.

72. Salacuse, *supra* note 34, at 15. The requirement provides a host country numerous benefits, including: the examination of the newest technology around, modern equipment which is less likely to break down and, low cost replacement parts. Likewise, these contributions on the part of foreign investors demonstrate their intentions to remain and make a venture work.

73. *Id.* at 106.

74. These risks include foreign domination (both political and economic), as well as the destruction of local competition, negative impact on foreign exchange reserves and, in the communist world, adverse social effects from the introduction of undesirable consumer goods. *Id.* at 107.

75. This is another example of how ideology must often accommodate practical need.

76. Dunn, *supra* note 11, at 174.

improve their local industries.[77] From the Soviet perspective, joint ventures are the way these benefits can be obtained.[78] There are a number of steps joint ventures can take to prevent struggles with Soviet FTO's. FTO's have discretion in how they deal with parties. They do not necessarily have the same policies or negotiation techniques as their brother organizations.[79] Thus, foreign partners should learn as much as possible about the FTO they will work with. The investor should determine beforehand whether it wishes to sell its products in the Soviet domestic market and whether permission to do so can be obtained from the FTO.

F. Foreign Regulation of Technology Transfers

A determination as to what technology may be brought into the Soviet Union is not exclusive of the FTO's. Capitalist states have an even greater say in what types of products and technological know-how may enter the U.S.S.R. from the West. Technology transfers are heavily monitored and regulated by most of the industrialized nations through their membership in the Coordinating Committee on Multilateral Export Controls (COCOM).[80] COCOM is designed to prevent militarily useful technology from being transferred by capitalist businesses and governments to Communist nations. COCOM has the ability to prevent transfers through political and economic pressures, including threats, and embargoes.[81] COCOM often enforces its purpose by committing its member states to use their domestic law to punish those who export military technology to the Eastern Bloc. The states themselves may determine if a certain transfer fits the definition of "militarily useful." COCOM has effectively blocked a number of transfers, as well as applied sanctions against violators.[82]

The COCOM vision is to enable all capitalist nations to exchange important technology freely, without the fear of having important technological information fall into the wrong hands. Ironically, this vision is inherently self - defeating: this paranoia held by Capitalist nations blocks the flow of technology between industrialized nations.

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77. Aronson, *supra* note 2, at 856.

78. *Id.* at 856. The newest advancements from Japan and South Korea are also a necessity for Soviet competition. Asian countries may also enter Soviet joint ventures since the law is open to all "Capitalist Countries." JOINT VENTURE LAW, *supra* note 3, at 750, sec. 1.

79. Smith, *supra* note 44, at 86.

80. COCOM includes Japan and all the North Atlantic Treaty Organization countries, with the exception of Iceland.

81. Aronson, *supra* note 2, at 888.

82. Wall St. J., Jan. 27, 1988, at 17, col. 1. France arrested 4 people charged with selling electronic measuring and communications equipment. This was done under the authority of COCOM using French anti-espionage laws. N.Y. Times, Jan. 27, 1988, at 32, col. 5. Pressure was also exerted through sanctions against the Toshiba Corporation and Norway's Kongsberg Vaapenfabrikk for selling equipment to the Soviets which they could use to develop quiet submarine propeller systems. N.Y. Times, Jan. 24, 1988, at 26, col. 4.

Many Western businesspeople feel the inclusion of certain items on the COCOM embargo list is unwarranted. They feel that such inclusions not only inhibit trade, but harm political relations as well.[83] More Western businesses are entering the joint venture arena and the pressures they alone can exert on their governments may result in a relaxation of export controls.

Moreover, certain actions taken by states in the name of COCOM have been assailed. One such challenge is reflected in an ongoing debate within COCOM. On January 29, 1988, the European Committee (EC) protested the United States' attempts at passing a Senate Trade Bill that barred the importation of products from foreign corporations that the U.S. determined had violated COCOM's Export Controls List. The EC (which includes many COCOM members) complained that the legislation interfered with the purposes of COCOM and was nothing less than an "extraterritorial application of United States law."[84] These accusations, as well as other pressures from COCOM members, may cause COCOM to shorten the list of banned items.[85]

G. Domestic Policies of the Capitalist States

Further restrictions on technology transfers are made by the individual nations. The United States, for example, has export control laws which restrict transfers of high technology. The Jackson Vanick Amendment[86] limits the extension of most favored nation status to countries that have taken noticeable steps to improve human rights. The Soviet Union has been excluded from this status because of its restrictions on emigration.[87] Strategically, the Soviets have taken a number of positive steps in improving their emigration policies and the U.S. may soon act to lift the Soviet's restricted status.[88]

The United States' Export Administration Act of 1979 also restricts the export of goods and technology which *could* contribute to the military

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83. N.Y. Times, Jan. 24, 1988, at 26, col. 4.

84. N.Y. Times, Jan. 30, 1988, at 18, col. 5. Such protest by Western members of many international trade agreements and committees is pressure which enables export standards to be re-evaluated, and modified to the benefit of business.

85. *Id.*

86. 19 U.S.C. sec. 2432 (1982).

87. If the Soviets believe a most favored nation status would help improve its trade relations and economy, it may find it advantageous to change its domestic policies even more.

88. Charles A. Vanik, the co-author of the 1974 Jackson-Vanik Amendment, recently stated, "With the Soviet levels of immigration, and its dynamic effort to relax its regulations on religion and culture, why should the U.S.S.R. be denied most-favored nation under a Jackson Vanik waiver. . . ." *quoted in* T.L. Friedman, *U.S. Gets Appeal for Freer Trade With the Soviets*, N.Y. Times, May 5, 1989, at A5, col. 3. The statement was made in a speech before the American Committee on United States-Soviet relations. Secretary of State James A. Baker was present and hinted that a waivor might soon be issued to the Soviets as a method of testing the new thinking of the Soviets. *Id.*

potential of countries viewed as a threat to U.S. national security. The Act was invoked in 1982 after Western European governments and firms began exporting American pipeline technology and equipment to the Soviet Union in exchange for natural gas. Fearing that Western Europe might become overly dependent on the Soviet gas, President Reagan issued an executive order aimed at preventing further exports. The U.S. used political pressure and the threat of embargoes to persuade its allies that the venture was unacceptable.[89] To bolster its right to engage in these activities, the U.S. cited a provision of the act:

> No person in the United States or in a foreign country may export or re-export to the U.S.S.R. foreign products directly derived from United States technical data relating to machinery utilized for the exploration, [and] production . . . of natural gas. . . .[90]

The European Community protested that the U.S. actions were in contravention of "territoriality principles" accepted by all nations, including the U.S.[91]

As tensions mounted between Europe and the U.S., the incident was resolved, though not completely in favor of East-West trade.[92] The ultimate decision as to what actions will be taken under the act is within the discretion of the President.

Laws such as these place a great burden on the Soviets and their foreign partners: neither can be absolutely sure whether necessary capital and technology will be available to them. However, businesses that are interested in joint venturing, or that are already involved in a joint ventures, can exert pressure on their governments to ameliorate especially harsh restrictions.[93]

V. IRREGULARITIES IN SOVIET LAW - PECULIARITIES IN APPLICATION

An important aspect of joint venturing in the Soviet Union involves the venture's use of the Soviet court system.[94]

The joint venture law permits partners in the joint venture to con-

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89. The embargo list included oil and gas equipment as well as a general ban on certain licensing issuances. *See* 83 DEP'T. ST. BULL. 28 (1983).

90. Export Administration Act of 1979, 50 U.S.C. § 6(b) *as amended* by § 379.8 (1982).

91. *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891 (1982).

92. Through economic and political compromise, the U.S. agreed that all present contracts with the U.S.S.R. should be recognized. The Europeans agreed they would not continue the venture, and would instead seek alternate Western sources for their natural gas needs. *Resolution of the East-West Trade Regulations and the Soviet Pipeline Sanctions*, 83 DEP'T. ST. BULL. 28 (1982).

93. For a much more detailed look at U.S. tranfers of technology to the Soviet Union, see G. Armstrong Jr., *Transferring U.S. Technology to the Soviets: Some Practical Legal Problems*, 16 INT'L. LAW. 737 (1982).

94. DISPUTE RES. LAW, *supra* note 29, at 759 (allowing the venture access to the Soviet courts).

tract with each other and with outside entities.[95] Yet the Soviets have only now begun to deal significantly with joint ventures. There is very little applicable contract and partnership law in the Soviet Union.[96] Contract rights, until recently, were allocated to a small minority of government entities, even though the Soviet Constitution provides its citizens with such rights[97] Soviet legislation places some limitations on contractual freedom,[98] but there has been very limited litigation of contract rights in the Soviet Union.[99]

Not only is there a lack of substantive law in the areas of partnership and contracts, but the joint venture law itself is in its infancy. Most of its provisions still await an interpretation of law. As one author has suggested, the law is written broadly and resembles a "moving target."[100] Neither side can know exactly how the provisions will be applied in a given set of circumstances.

This "naked" law could lead one to believe that resolution of a joint venture's conflicts might be best achieved elsewhere. However, the dearth of applicable law should not be regarded as an obstacle, but viewed as providing a blank slate on which Western attorneys and Soviet lawmakers can write laws that will enable the ventures to prosper.

Because a joint venture is the mutual assimilation of each partner toward creation of a new entity, there will be a number of interests common to both partners as a unit. A venture strives to profit from its undertakings and both partners will want to test and change laws that inhibit the venture's ability to grow and profit. Simply stated, "[i]t is through the recognition of these goals by each partner that the necessary mutuality of interests is created."[101]

One area the joint venture will surely explore is the extent to which partners may determine their respective duties and powers. For example, the preliminary guidelines of the joint venture law do not specify how much control a foreign partner may have in selecting management and labor.[102] Thus, the venture's charter agreement is one means of testing,

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95. JOINT VENTURE LAW, *supra* note 3, at 751, sec. 6.

96. Salacuse, *supra* note 34, at 115. The Soviets use a wide range of legal entities which encompass their joint venture law. Their past use of agencies and ministries to monitor and determine the outcome of disputes in their domestic realm must give way to dispute resolution in their courts. It is this change of legal supervision which provides the West an opportunity to integrate necessary laws into the system.

97. *Id.* at 113.

98. Article 234 of the Russian Soviet Federated Socialist Republic Code provides that changes in the Soviet National Plan may lead to a cancellation of contracts. Dore, *Plan and Contract in the Domestic and Foreign Trade of the U.S.S.R.*, 8 SYR. J. INT'L. L. & COM. 29, 32 (1980)

99. Smith, *supra* note 44, at 82. *See also id.*

100. Rogers, *supra* note 1, at 853.

101. Scriven, *supra* note 5, at 106.

102. The termination of employees under current Soviet law can be accomplished only under the most extreme circumstances. Aronson, *supra* note 2, at 874. Yet because poor

defining, and developing the limits of newly enacted Soviet law.

Of course, there still exists the problem of what law should apply in a given conflict. That there is virtually no Soviet law to apply to joint ventures may well be the greatest benefit to the West. The U.S.S.R. has a number of incentives for absorbing western style contract principles and partnership law. First, the Soviets wish to acquire and integrate Western technology and management techniques into their industrial sector.[103] Adopting established and workable Western contract and partnership law will expedite this process. Second, the Soviets would benefit from adopting Western law simply because of the difficulty involved in adapting existing Soviet law to cover the disputes unique to joint ventures. Finally, Soviet receptivity to Western law will encourage greater Western investment.

Western attorneys will need to use creative legal argument to protect both partners' investment and define the boundries of newly established law. "This transitional period of reform provides an opportunity for U.S. lawyers to help shape the new Soviet legal and economic structure in a way which would make it most advantageous for Western investment."[104] This need for Western legal knowledge is already evident as one New York law firm has established an office in Moscow.[105]

The greatest obstacle to Soviet assimilation of Western law is the effect such developments might have on Soviet ideology and policy. After all, Western law comes replete with such democratic principles as voting rights, equality, and the right to profit. In theory, at least, the problems with ideology can be solved, since these problems are the subject of recent Soviet reforms. In fact, General Secretary Gorbachev has titled the reform process as "The Democratization of the Economy."[106] Though the Soviets will have to compromise some ideology to receive the benefits of joint ventures, this compromise would be minimal. Simply enacting a joint venture law was an enormous sacrifice of Marxist ideology: the Soviet Constitution has always prohibited the ownership of industrial enterprises by anyone but the government.[107] Before recent changes, the law permited a foreign partner to own only forty-nine percent of the venture. However, the Soviets have recently made a dramatic change in the law by allowing foreigns partner an unprecedented fifty percent or more of the

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labor performance will effect the quality of products and diminish a foreign partner's invesment interest in a venture, the Soviets might be persuaded to initiate change in the area of labor law.

103. HLADIK, *supra* note 15, at 40.

104. Aronson, *supra* note 2, at 853.

105. This is an annex of the New York firm Coudert Brothers. N.Y. Times, Jan. 16, 1988, at 32, col. 6.

106. ON THE PARTY'S TASKS IN FUNDAMENTALLY RESTRUCTURING MANAGEMENT OF THE ECONOMY, Report by General Secretary Mikhail Gorbachev at the June 25, 1987 Plenary Meeting of the CPSU Central Committee, *reprinted in* Moscow News (Supp.) No. 27, at 4 (1987)[hereinafter GORBACHEV ADDRESS].

107. KONST. SSSR art. II.

venture's ownership.[108] Furthermore, and for the first time in history, Soviet business (including the joint venture) may run itself with very limited government control.[109] If the Soviet Union was willing to sacrifice ideology in enacting the joint venture law, it might easily do the same to ensure their joint ventures retain that viability and attractiveness to the West. One author has remarked, "[h]aving identified the need to engage in joint ventures in order to advance, . . . the Soviet government will not be restrained by conflicting statutory provisions. Once again, ideology will be forced to accommodate practical need."[110] Thus, the Soviets may well sacrifice more Marxist doctrine in order to incorporate existing Western law. This ideological flexibility is a virtual precondition to Soviet attempts at reviving their domestic business sector with modern Western practices.[111]

VI. CONCLUSION

The benefits that flow from the new Soviet Joint Venture Law have yet to be fully realized. As joint ventures proliferate and mature, all parties will be able to take full advantage of the law's provisions. Those provisions allow expanded trade between communist and capitalist states. The Soviets will enjoy access to their Western partners' established business connections in the free market; likewise, Western partners will gain access to a vast Eastern Bloc market alliance.[112]

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108. Insiders originally acknowledged that the Soviet desire for knowledge, expertise, and technology possessed exclusively by some firms might give the Soviets a reason to allow these firms even equal or majority ownership of the venture. Aronson, *supra* note 2, at 872. Obviously their hypothesis has been fulfilled in a manner most surprising to even them. *See* Interview, *supra* note 18. It is the power of the Soviet Regime which allows it to do whatever it wishes with its own Constitution, and as the past has shown us, the Soviet Constitution is often compromised; for example, freedom of the press and freedom of speech are guaranteed in the Soviet Constitution. The fact that foreigners, can now own Soviet based businesses may be the Soviets' most capitalistic compromise.

109. Dunn, *supra* note 11, at 174. This is the first time that such has been permitted without government control. Combined with the fact Westerners may receive majority control over Soviet based property, the right to run the business end of the venture seems natural, yet incredible when realizing these rights are available to capitalists in the U.S.S.R.

110. *Id.* at 178.

111. Gorbachev has repeatedly emphasized the need to change existing management philosophy in the Soviet business strata to engender the efficiency of the West. As Gorbachev has stated: "The sum of the Nation's substance of the fundamental reshaping of the Nation's economy control is the switch over . . . from an excessively centralized system of management to democratic, promoting self-management." CONCLUDING SPEECH OF M.S. GORBACHEV TO THE CPSU CENTRAL COMMITTEE, June 25, 1987, *reprinted in* Moscow News (Supp.) No. 3276, at 4 (1987). The Soviets have always believed in a production enterprise operating under one-man management, with all responsibility for administration held by a single director. In contrast, capitalism frequently operates with co-equal decision making, done by a majority of ideas and votes. Aronson, *supra* note 2, at 874.

112. Section 24 of the Soviet Joint Venture law grants joint ventures the freedom to trade and transact business in the markets of COMECON member countries. JOINT VENTURE LAW, *supra* note 3, at sec. 24. The Council of Mutual Economic Assistance (COMECON) was established on Jan. 30, 1949 and includes the nations of the Soviet Union,

The joint venture law also presents other historic opportunities. Although there are problems that must be solved, the problems *can* be solved. In fact, the chance to resolve difficulties together in an atmosphere of mutual interest may be the greatest benefit of all.

> As these East-West trading relationships have evolved from simple once - off sales and purchases into the complicated transactions existing today, the partners . . . have had to pay more attention to the mutuality of interest which is inherent in any long-term commercial relationship.[113]

Resolving these problems will result in formal structures for problem solving. Structures such as an evolving Soviet commercial law, will lead to enhanced understanding and cooperation, as well as the establishment of a new Communist-Capitalist economic culture. More importantly, the structures will be a way of perpetuating this understanding and cooperation between nations. General Secretary Gorbachev recognized as much when stating,

> Comrades, not one state in the world of today can regard itself isolated from others in the economic respect. Our country is no exception. International commercial and financial relations of countries and the latest technological ideas invariably have an impact on our own economy. . . . In other words, restructuring of the Soviet economy will promote broad international cooperation and, hence, better world relations.[114]

Poland, Hungary, Czechoslovakia, East Germany, Bulgaria, North Korea, Vietnam, and Cuba. Its goals include the exchange of economic experience, technical aid, material assistance in foodstuffs, raw materials, machines, and technology. Scriven, *supra* note 5, at 105. COMECON began as an alliance between communist nations (under Soviet hegemony) to help war-torn Marxist regimes re-establish growth in their own economic systems and to encourage the sharing of modern technological information.

113. *Id.* at 106.

114. GORBACHEV ADDRESS, *supra* note 106, at 10.