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New Foreign Investment Regimes of Russia and other Republics of the Former U.S.S.R.: A Legislative Analysis and Historical Perspective†

William G. Frenkel,*
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I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma.

Sir Winston Churchill
Radio broadcast, October 1, 1939

INTRODUCTION

For most of its existence, the Soviet Union operated in a closed economy with relatively few economic ties to the outside world. The Soviet command economy was built on the Marxist-Leninist principles of central planning and state ownership of property and, as such, could not accommodate foreign investment from free market economies. After a brief flirtation with limited foreign investment and private enterprise in the early twenties, during the so-called New Economic Policy or NEP,¹ no direct foreign investment² in the

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¹ NEP is thought to have lasted from 1921 to 1928 and encompassed, inter alia, the practice of granting concessions for mining and manufacturing to foreign companies, establishing mixed-ownership joint stock companies and a partial restoration of foreign enterprise within the Soviet Russia as a temporary means to reverse the economic crisis of the time. In 1925 about 160 mixed-ownership companies existed, in 12 of which foreign companies were involved as participants, providing approximately 20 percent of the companies' capital. See Kaj Hober, Joint Ventures in the Soviet Union § IV.A(1) (1989). For an economist's analysis of NEP, see generally V.N. Bandera, The New Economic Policy (NEP) as an Economic System, 71 J. of Pol. Economy (1963) and Alec Nove, An Economic History of the USSR (1969). A sociological survey of NEP is vividly presented in Alan M. Ball, NEP's Second Wind: The New Trade Practice, in 37 Soviet Studies 371–85 (1985).
U.S.S.R. was legally possible until 1987. The demise of NEP signified an end to foreign equity investment in Russia, although other methods of East-West economic cooperation continued to arise from time to time.4

The Soviet economic and legal system also created a formidable obstacle to foreign investors from capitalist countries. In the Soviet version of a command economy, private ownership of property was limited to personal property, and business enterprises could only exist in the form of state-owned companies. Thus, investment in the U.S.S.R. before the late 1980s was highly unattractive to western business.

The vastness of the former Soviet Union's territory and its formidable natural resources insured that the needs of Soviet manufacturing, construction, and energy-producing industries were largely met by domestic suppliers and the Soviet Union's Council for Mutual Economic Assistance (COMECON or CMEA) partners. The Soviet economy, however, with its emphasis on heavy industries and military production, produced too few consumer goods to meet the domestic demands, let alone to export its products abroad. Furthermore, the inferior quality of Soviet manufacturing substantially restricted the market for Soviet exports. Thus, the Soviet Union was primarily limited to exports of energy and fuels, raw materials, natural resources, and crude industrial output to the West, and military hardware, heavy machinery, and aerospace products to its

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2 Direct foreign investment is commonly defined as a transaction in which an enterprise creates or acquires its own establishment—a subsidiary or a branch—in a foreign jurisdiction. See Thomas F. Clasen, Foreign Trade and Investment: A Legal Guide 191 (2d ed. 1990).

3 For the first time since the late 1920s, the Soviet government passed the enactment authorizing the creation and operation of joint ventures among western and Soviet firms in January of 1987. See Decree No. 49 of the U.S.S.R. Council of Ministers On the Establishment in the Territory of the U.S.S.R. and the Operation of Joint Enterprises with the Participation of Soviet Organizations and Firms from Capitalist and Developing Countries, SP SSSR, No. 49, Jan. 13, 1987, translated in Hober, supra note 1, § A.3(3) [hereinafter Decree No. 49].


client states in the Third World. This limited export capacity, together with occasional imports of grain and other agricultural commodities, industrial equipment, technology, and some consumer goods, defined the boundaries of commercial interaction between the Soviet Union and the outside world.

The Soviet economy was closed to international commerce primarily for political reasons. Marxist economic principles were placed in competition with the methods of capitalism. A popular slogan over the years was "to catch and overtake," meaning to bypass the United States in industrial might. Frequently, favorable comparisons between Soviet and U.S. industrial output indicators—such as production of steel and cement—appeared in the Soviet press largely for purposes of propaganda. These statistics were highly misleading or simply inaccurate and served to distract the Soviet consumer from the hardships of daily life, which included shortages of essential items and the shoddy quality of available goods.

In the cold war atmosphere of economic and political rivalry, international trade, investment, and economic cooperation with the U.S.S.R. were primarily reserved for other countries of the Communist block. Rather unexpectedly, several major breakthroughs drastically altered this condition. With the advent of "perestroika" under Mikhail Gorbachev in the mid-eighties, the end of the Cold War, and the dissolution of the Warsaw Pact and COMECON, global international economic cooperation became the order of the day.

Soviet leaders came to realize and accept that the interests of their country would be served by greater involvement of the Soviet Union in the growing globalization of the world economy. Foreign participation in the Soviet economy was seen as an essential element in the country's revitalization and the transition from a centrally planned economy to a market economy. Western companies, which had long seen lucrative opportunities in entering a commercially

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6 These included, among many others, Cuba, Vietnam, and North Korea and were often made for the reasons of political strategy rather than commercial considerations. See Marshal I. Goldman, Changing Role of Raw Materials Exports and Soviet Foreign Trade, in U.S. Congress, Joint Economic Committee, 1 Soviet Economy in a Time of Change 263–99 (1979).

unexplored market the size of the Soviet Union, displayed great interest in the new opening of the Soviet economy.

Unfortunately, the first phase of the foreign investment reform, from 1987 to 1990, resulted in a disappointingly low level of new western investment.\(^8\) Despite the authorization of joint ventures with western partners in January of 1987,\(^9\) the joint ventures had a slow start due to the turtle-like pace of dismantling the state enterprise apparatus and state planning system. Government bureaucracy and corruption appeared to be staggering; joint ventures' employees and suppliers were unmanageable; and legal regulation of the joint ventures' management and operations was too restrictive.\(^10\) Operations in the traditional Soviet economy proved to be a tactical nightmare for most of the western companies. The few successful western companies either had special relationships with the Soviet foreign trade apparatus dating to the 1960s or masterfully exploited the inefficiencies of the Soviet foreign trade apparatus to their advantage. In contrast, many relative newcomers looked at their presence in the Soviet Union as an on-going long-term investment.\(^11\) Many other U.S., Canadian, and western European companies, large and small, had failed in their trade and investment overtures to the Soviets in the past; however, a record of their fiascos barely exists.

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8 One commentator reported that during this period, approximately 2,300 joint ventures with foreign companies were registered by the Soviet authorities; however, less than 20 percent of these joint ventures were actually operating and a very small percentage of these ventures were profitable. See Brian L. Zimbler, Soviet Foreign Investment Laws and Practices, 1987–1990: A Practitioner's Perspective, 4 Transnat'l Law. 85, 90 (1991).

9 See Decree No. 49, supra note 3.


11 Such companies as PepsiCo, Occidental Petroleum, and Archer Daniels Midland probably present an exception to this rule in that they have succeeded in forging strong and profitable ties with the Soviet government due to their previous efforts to establish trade ties cultivated over a period of several decades. Up until the 1980s, these multinationals derived substantial revenue from the Soviet operations, though their transactions did not qualify as direct foreign investment, but rather were trade, countertrade, and transfer of technology transactions. See Terry L. Heyns, American and Soviet Relations Since Detente 226 (1987). One commentator suggested that large multinational companies generally have a reason to be present in the new Soviet (Russian) market if for no other reason than to await a gradual coming of a gigantic consumer and industrial markets for their products despite the lack of short-term opportunities for profitable investments. See Lee Smith, Can You Make Any Money in Russia?, Fortune, Jan. 1, 1990, at 104. As this commentator noted, "I came home persuaded that the conventional wisdom about the Soviet Union is right. This is mainly a market for big companies with deep pockets and distant vision." Id. at 107. Most old "corporate hands" in the Soviet Union also relied on various unorthodox business techniques in dealing with the Russians to overcome a myriad of operational difficulties. Id.
and was not widely published.\textsuperscript{12} While some of the problems of the Soviet market from the point of view of the western investor have been inherited by the Russian Federation and other former Soviet republics, in the inherently unstable political and economic conditions of the Soviet Union in the late 1980's, the obstacles in the way of U.S. investment were virtually insurmountable. This explains the "wait and see" attitude then adopted by most U.S. companies toward the Soviet market.\textsuperscript{13}

The second phase of foreign investment reform occurred from 1990 to mid-1991. The Union republics increasingly began to assert political sovereignty and economic independence. The old system, exemplified by the monopolistic all-Union ministries, state committees, and the hegemony of the Communist party, began to lose its grip over economic matters. Liberalization of prices, authorization for new forms of private enterprise, and the establishment of markets for goods, commodities, and securities across the country facilitated the transition toward a market economy. As the Soviet Union turned itself around and followed the path taken by the Central European countries in repudiating Marxist economic theory, western scholars and observers found the changes promising.

The Soviet central government, however, was not willing to adopt swift and radical measures to prepare for market-oriented economic relations nor to stabilize its rapidly disintegrating economy.\textsuperscript{14} During 1990, conservative elements in the central government repeatedly sought to sabotage the pace of economic and political reforms. They resisted the pressure from the more reform-minded economists, as well as from republican and municipal leaders, to start the privatization process. For much of 1991, a chaotic political stalemate existed between the Union republics and the central government. The struggle among the Communist ideologues, uprooted "apparatchiks" (government, party, and industrial bureaucrats), and the


\textsuperscript{14} These measures were thought by many economists to be essential for the successful transition to market economics. See, e.g., Investment Dollars Unlikely to Flow to USSR, Republics, Economists Say, Daily Rep. Execs. (BNA) (Sept. 3, 1991), available in LEXIS, Nexis Library, Drexec File; Craig Forman, Soviet Economy Holds Potential Disaster as the Union Weakens, WALL ST. J., Sept. 4, 1991, at A1.
western-minded reformers also continued to escalate. This "war of laws" between the various republics and the central government, including fighting for the right to have a priority in legislative and regulatory matters, effectively prevented additional foreign investment. The conflict also eroded a world-wide confidence that the U.S.S.R. was sufficiently stable for foreign investment. Foreign investors, although hopeful of the forthcoming reform, were paralyzed by the political instability caused by the disruption in the chain of political and economic command in the central and republican governments.

The political stalemate was resolved by the end of 1991, when the all-Union government collapsed after failing to persuade its former constituent republics to form a confederation or a new union on the basis of the so-called Union Treaty. The Soviet central government ran out of money and lost the trust of its citizenry. In an unprecedented peaceful transition of power, the Russian Federation took over the budget, banking system, political institutions, and foreign diplomatic missions from the former U.S.S.R. The hammer and sickle flag signifying the Communist rule of Moscow was taken down and replaced with the national tri-color Russian flag. The Russian republican government now has sole authority to legislate and regulate within the territory of the Russian Federation. Governments of the other former Soviet republics have similar unilateral authority within their respective territories. Several republics, however, have agreed to form a loose commonwealth structure (Commonwealth of Independent States or C.I.S.) and have entered into bilateral and multilateral economic cooperation treaties.


16 See Paul B. Stephan III, Soviet Law and Foreign Investment: Perestroika's Gordian Knot, 25 Int'l. Law. 741, 751–53. "The larger problem in Soviet law today is the contest over the legitimacy of the various branches of the Soviet state . . . [which] reflects deeply felt hostility between the Union and many of the republics based on ideological and cultural conflicts as well as powerful historical grievances." Id.


19 The Slavic states of Russia, Byelorussia (now known as Belarus), and Ukraine were the original founders of the Commonwealth of Independent States on December 11, 1991. See Goodbye USSR, Hello C.I.S., supra note 17, at A14. Eight European and Central-Asian republics of the former U.S.S.R.—Moldavia, Armenia, Azerbaijan, Kazakhstan, Tajikistan, Turkmenia, Uzbekistan, and Kirgizia—signed the Articles of the Commonwealth as co-founders on De-
In this, the third phase, the major remaining obstacles hindering foreign investment in the Russian and other former-Soviet republics are practical and logistic. No adequate infrastructure presently exists to provide the foreign investor with communications, transportation, supplies of raw materials, and parts and distribution of manufactured products. Some foreign companies already operating in Russia and other C.I.S. republics have found ways to compensate for the critical shortcomings of the fledgling post-Soviet commercial environment. Others failed to adapt and withdrew from active participation in the C.I.S. market for three primary reasons: (1) the weak, paralyzed economy; (2) the lack of mature commercial culture, institutions, and infrastructure necessary for a viable market economy and; (3) middle- and low-level bureaucratic obstructionism. Pessimism over the potential for a full economic turnaround is perhaps the principal stumbling block to foreign companies’ investment plans in the Commonwealth. In fact, predictions of food and fuel shortages in Russia last winter prompted western humanitarian agencies to donate food, medical supplies, and other essential items in an unprecedented joint NATO-Soviet supply airlift. It hence remains to be seen whether Russia and other former Soviet republics will achieve the same degree of success in adopting market economies as the countries of eastern and central Europe.

Nonetheless, looking beyond the immediate problems and assuming some economic stabilization and limited economic recovery in...
the next two years, the long-term prospects for dramatically increased foreign investment in Russia and former Soviet republics are favorable. Changes in economic policy have removed most political and ideological obstacles to direct foreign investment, such as prohibitions on private ownership of property and means of production. Russia has expressly authorized foreign ownership of various assets, excluding land and natural resources. The legal environment now: (1) allows all forms of foreign investment—whether in the form of wholly-owned subsidiaries, entity or contract joint ventures, or branch and representative offices; (2) provides foreign investors with strong guarantees against state expropriation or nationalization; (3) imposes a relatively simple and streamlined registration regime for foreign investment with little government interference in business operations; and (4) permits profit repatriation in foreign currencies and reinvestment of ruble profits in Russia. In light of these developments, some favorable comparisons can be made to the eastern European foreign investment regimes, which underwent similar metamorphoses earlier.

Furthermore, Russia has extensively modified the domestic legal environment to provide the foreign investor with a body of corporate and commercial law conceptually akin to western European commercial codes. The Russian legal system appears to be headed toward the western model in order to support the Russian version of the free market, or capitalist, system. To that end, Russia has enacted laws regarding joint-stock companies, taxation, monopolies, property, pledges, banking, insurance, bankruptcy, and privatiza-

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22 For an analysis of how Russia and other C.I.S. states could benefit from the experience of other eastern European governments in bridging the gap between a centrally planned and market economy, see, e.g., Economic Shock Therapy: Lessons for Russia from Eastern Europe, Heritage Foundation Report, Dec. 13, 1991, available in LEXIS, Nexis Library, Hfrpts File. The Russian economic recovery may take various forms, perhaps evolving in a manner analogous to the Polish economic experiment with market economics. See Barry Newman, Troubling Omen: Poland's Shaky Transformation to a Free Market Carries Warning for Soviets, WALL ST. J., Sept. 13, 1991, at A10. Of course, there is no assurance that economic recovery will in fact come to Russia and other C.I.S. republics in this decade. See Steven Greenhouse, The Soviet Fallback for Economic Reform: Hope for a Miracle, N.Y. TIMES, Oct. 27, 1991, at E3 (describing the Russian economy as "half Dostoyevskian gloom and half Kafkaesque absurdity" and yet observing "a genuine desire on the part of the Russian people for a change leading to a more stable and rational economy"); see also The Business Outlook II: Russia, BUSINESS EASTERN EUROPE, Aug. 31, 1992, at 426, available in LEXIS, Europe Library, Bueeu File (forecasting that in 1992 western sales will decrease to $18 billion, GNP will decline by 20 percent and unemployment will reach almost 6 million people).

This new legal infrastructure should adequately protect foreign investments and facilitate trade and investment transactions. Despite increasing similarities with western legal systems, however, the post-Communist legal systems in the C.I.S. are likely to remain distinct from western European or American jurisprudence due to the unique historical, political, and economic traditions of Russia and its former possessions.

Although foreign investment statistics on Russian and other C.I.S. states are still sketchy and tentative in contrast to the previous Soviet foreign investment regime, they do indicate a pattern of serious interest on the part of foreign investors in the emerging markets of the former Soviet Union. The total dollar amount of capital and property contributed to C.I.S. business ventures by western investors has significantly increased in 1991 and 1992, and analysts predict massive inflows of additional foreign investment into C.I.S. economies by the end of this decade, provided the C.I.S. states attain political and economic stability. In the meantime, available statistics support this article’s premise that the new C.I.S. foreign investment regimes have encouraged and reassured western investors.

This article examines the development of legal regulation of foreign investment in Russia and other republics of the former Soviet Union. Part I describes the relations between the Russian Federation and other newly independent republics and the new Commonwealth in order to provide a description of the new framework in which business regulation is taking place in the C.I.S. Additionally, this Part considers possible legal repercussions of the evolving economic and political relationship between the Russian Federation and the emerging Commonwealth, which has replaced the former Soviet Union. Part II outlines how foreign investment was regulated in the U.S.S.R. prior to major reform efforts in 1987. Part III additionally analyzes the three major stages of reform in the regulation of foreign investment of the former Soviet Union. In particular, it analyzes the new foreign investment law of the Russian Federation of 1991, which continues to govern foreign investment in Russia, and examines legal aspects of business operations of foreign-owned companies in the Russian Federation. Part III also examines some of the additional Russian and former Soviet legislation affecting foreign investment in the Russian Federation, the largest of the

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24 See, e.g., Russia and the Republics' Legal Materials, COLUM. PARKER SCH. SOV. & EUR. L. BULL. (1992) (containing the unofficial English translations of many recent Russian legislative enactments) (source on file with the authors).
former Soviet republics in territory and population. Finally, Part IV outlines and compares the principal provisions of the foreign investment laws of Ukraine, Kazakhstan, and Belarus (formerly Byelorussia), the three largest republics after Russia of the former U.S.S.R.

I. Relations Between the Russian Federation and Other Sovereign Republics Under the Old Union and the New Commonwealth

In order to understand the new “playing field” for foreign investors in the newly independent republics of the Commonwealth and the sources of legal regulation of foreign investment in their respective territories, it is essential to examine some recent historic developments leading to the establishment of the C.I.S. and dissolution of the Soviet Union. As this part explains, each C.I.S. republic has enacted its own foreign investment legislation which exclusively governs the rights and obligations of foreign legal entities and citizens. Regulation on the all-Union level ceased to have legal effect following the independence of the various republics and the withering away of the central all-Union authority. Historical reasons, however, demand an analysis of the political, socio-economic, and legal relations among the C.I.S. republics in the context of the former Union in order to obtain a more complete insight into the inter-republican relations and the republic’s domestic legal regimes.

The centralized federal state which was known until recently as the Union of Soviet Socialist Republics (U.S.S.R. or Union) was formed in late 1922 by the republics of Russia, Ukraine, Byelorussia, and Transcaucasian Federation, which later came to be the republics of Georgia, Armenia and Azerbaijan.\(^{25}\) In early 1924, the Second Congress of Soviets adopted the first constitution of the U.S.S.R. (First Soviet Constitution) on the basis of the 1922 Treaty of Union, which had established the federal structure of the new Union state.\(^{26}\) The First Soviet Constitution created the all-Union Congress of


\(^{26}\) See Butler, supra note 25, at 145, 153. The First Constitution of the U.S.S.R. was preceded and heavily influenced by the Constitution of the Russian Soviet Federated Socialist Republic or Soviet Russia (R.S.F.S.R.) (R.S.F.S.R. Constitution), which was first drafted and put into effect in 1918, before the Soviet Union was formally created and the Soviet brand of federalism introduced into its legal system. See id. at 153. For the English translations of the R.S.F.S.R. Constitution and the First Constitution of the U.S.S.R., see U.S.S.R.: Sixty Years of the Union, supra note 25, at 69.
Soviets and a bicameral Central Executive Committee.27 This political structure, resulting from constitutional debate which gave rise to the Treaty of the Union, was arguably the high point of Soviet federalism before the Gorbachev reforms.28 While the First Soviet Constitution provided for a wide range of democratic rights in equal measure to citizens of all republics, it also disenfranchised a large part of the population, deemed "class enemies."29 "Class enemies" included wealthy peasants, trade people, many professionals and religious leaders.30 The political freedoms granted under this constitution to both individuals and political bodies generally proved to be illusory as the dictatorship of the proletariat did not tolerate any ideological dissent.31 The Communist Party, created by the Bolsheviks, was the real power broker in the Soviet Union. The Party exercised authority through the central committee and through

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29 The R.S.F.S.R. Constitution explicitly declared that "[t]he basic task of the Constitution ... of the present transitional moment is the establishment of the dictatorship of the city and village proletariat and the poorest peasantry in the form of a powerful All-Russian state authority for the purpose of complete suppression of the bourgeoisie ... ." HAROLD J. BERMAN, JUSTICE IN THE USSR—AN INTERPRETATION OF SOVIET LAW 30 (1963). The First Constitution of the Soviet Union continued this trend of "revolutionary legal consciousness," by allowing overt discrimination against any and all persons of nonproletarian origin despite its guarantees to the proletarian constituency of a representative government. Id. at 35. The early Soviet policies of nationalization, expropriation, and mass destruction of human lives rationalized through the teachings of Karl Marx and Vladimir Lenin demonstrate well the effect of the bloody beginnings of this totalitarian regime on many of its citizens. See Gennady M. Danilenko, Soviet Constitutional Reforms and International Human Rights Standards in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, bk. 2, 226 (1992).

30 During the period of so-called war communism in Russia, which continued well into the 1920s, "class enemies" of the communist state were defined in an arbitrary and the broadest imaginable way to include anyone who may potentially be a threat to the communist dictatorship. See Danilenko, supra note 29, at 226. Private business owners, in particular, despite a brief reprieve during NEP, were targeted for disenfranchisement of civil rights and subsequent extermination in Soviet Russia behind the official facade of a democratic government. See id. The R.S.F.S.R. Constitution granted civil and political rights only to "working and exploited people" and "guided by the interest of the working class as a whole," deprived the Russian citizens unable to meet the above requirements of such civil rights "as may be utilized by them to the detriment of the socialist revolution." Id.

republican and local branches. The Party was not subject to any external control. By the time it adopted its second constitution in December 1936, the Union included 11 republics. The major change involved the universal right to vote a secret ballot. In reality, most political rights granted to individuals in the Soviet single-party state were a fiction.

The rapid industrialization and modernization of the economy under Stalin brought about the centralization of the state machinery. The central authority in Moscow effectively dictated political, economic, and social policy to the constituent republics. The constitutions of the Soviet republics, substantially modeled after the all-Union constitution, theoretically allowed the republics their own policy-making institutions and political organizations. In practice, however, the republics had no substantial independence from the all-Union government dominated by Russians.

The annexation of Moldavia and the three Baltic republics by the Soviet Union in 1939 brought the number of Union republics to fifteen, where it remained until the late 1980s when the Union crumbled. The third, and final, constitution of the U.S.S.R. was

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33 See BUTLER, supra note 25, at 145.
34 See Gleason, supra note 28, at 29. The Soviet government, largely unburdened by the western democratic traditions of judicial review, separation of powers, and freely elected representative government, continued to be a mere tool for implementation of the monolithic communist party's will, whose politburo (the highest decision-making body) was invariably enjoying complete supremacy. See BERMAN, supra note 29, at 52.
35 For instance, freedom of speech, freedom of press, freedom of assembly, and freedom of street processions and demonstrations were granted only in conformity with the interests of the working people and in order to strengthen the socialist system. See Constitution of U.S.S.R., Dec. 5, 1936, as amended Oct. 1, 1968, art. 125, translated in HAROLD J. BERMAN & JOHN B. QUIGLEY, BASIC LAWS ON THE STRUCTURE OF THE SOVIET STATE 3–28 (1969). Although class-oriented general restrictions were removed, the conditional nature of the basic human rights remained only to be carried over into the Third Constitution. See Danilenko, supra note 29, at 226–27; see also Peter H. Juveler, Guaranteeing Human Rights in the Soviet Context, 28 COLUM. J. TRANSNAT'L L. 133, 140–41 (1990).
36 See Gleason, supra note 28, at 29; BERMAN, supra note 29, at 52.
37 BERMAN, supra note 29, at 52. The post-World War II Soviet anthem—replacing “the International”—was quite revealing of the role Russia was to play in the Union. Its lyrics were, in part, as follows: “Unbreakable union of free republics joined together by the great Russia...”
38 See supra notes 35–37. The colonial pretensions of the Soviet Russia became even more obvious during the period of the Cold War when it established a communist alliance with its eastern European neighbors and continued to expand its control and influence far outside the traditional boundaries of the Russian empire. See generally R. JUDSON MITCHELL, IDEOLOGY OF A SUPERPOWER: CONTEMPORARY SOVIET DOCTRINE ON INTERNATIONAL RELATIONS (1982).
adopted in 1977 (Third Soviet Constitution). It fully reflected the centrist attitude of the Brezhnev government, and it failed to make any substantive changes in the relationship between the central government and the republics.39

The policies of glasnost and perestroika under Mikhail Gorbachev brought ethnic tensions and seemingly dormant feelings of nationalism to the forefront.40 The Baltic republics, whose less than voluntary joinder with the Union perhaps had the least legitimacy, took the lead in declaring independence from the Soviet Union.41 By August 1991, when a group of Communist hardliners attempted a coup to gain control of the Soviet government, all of the constituent republics had proclaimed their independence.42 The coup accelerated the devolution of power to the republics, giving them greater authority and political autonomy.43

The contemporary Russian policy in the republics of the Soviet Union has left a profound effect on its relations with the former Soviet republics today and may explain some of the animosity these newly independent republics feel toward Russia in the post-Soviet period. See generally Thomas J. Samuelian, Cultural Ecology and Gorbachev's Restructured Union, 32 HARY. INT'L L.J. 159, 168 (1991). The Baltic states would probably serve as the best example of deteriorated diplomatic relations between Russia and other former Soviet republics after the break-up of the U.S.S.R. For the history of the forceful inclusion of the Baltic states into the Soviet Union, see, e.g., William J.H. Hough III, The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, 6 N.Y.L. SCH. J. INT'L & COMP. L. 301 (1985).

39 See Gleason, supra note 28, at 30–31. For a general discussion of the status of the all-Union constitution in the Soviet legal system of the 1970s and republics’ rights in the Union of that period, see generally Christopher Osakwe, The Theories and Realities of Modern Soviet Constitutional Law, 127 U. PA. L. REV. 1350 (1979). It also should be noted that the Third Constitution was amended one last time under President Gorbachev to provide for a somewhat expanded definition of individual property rights and minor changes in the federal structure of the union. See U.S.S.R. Law on the Amendments and Additions to the Constitution of the U.S.S.R., 49 Ved. Verkh. Sov. SSSR Item 727 (1988)(source on file with the authors).


41 The first Union republic which declared independence was Lithuania. See Act on the Restoration of the Lithuanian State, Vet. Lit. SSR, No. 9 (1990), item 222 (source on file with the authors). The Congress of People’s Deputies of the U.S.S.R. invalidated this act by a special decree. See Ved. SSSR, No. 12 (1990), item 194 (source on file with the authors); Experts See Business Opportunities in Baltics, But Insist Enormous Challenges Remain, E. Eur. Rep. (BNA) 40–44 (Oct. 28, 1991), available in LEXIS, BNA Library, EERPT File.


In a final attempt to preserve the Union, Gorbachev negotiated the Treaty on Economic Union (Economic Treaty), signed by eight republics on October 18, 1991. The final version of the treaty provided for coordinated economic policy in the areas of currency, banking, transportation, and energy. Under the agreement, each republic of the economic community formerly constituting the U.S.S.R. became an equal legal entity. The members of the community stipulated that they would preserve the ruble as the single unit of currency, create a unified banking system, and pursue coordinated budget and taxation policies. Member-states also agreed to assume the foreign obligations of the U.S.S.R., and proposed to establish a bank to handle international transactions as a legal successor to the U.S.S.R. Vnesheconombank.

This economic union, however, never enjoyed the full support of all of the republican leaders. In fact, it was never joined by the Ukraine, the second largest republic. Instead, on December 8, 1991, the leaders of Russia, Ukraine, and Byelorussia came together to

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45 See Economic Treaty, supra note 44, art. 5; see also Cullen, Pact Leaves Many Unanswered Questions, 3 East/West Bus. Rep., Nov. 1991, at 1 (source on file with the authors).


47 See Economic Treaty, supra note 44, arts. IV, V.

form the new Commonwealth of Independent States (Commonwealth or C.I.S.), declaring it the successor to the former Soviet Union.49 Eight other republics joined the Commonwealth in late December of 1991.50 Thus, with the exception of the Baltic states, which have pursued the path of self-sufficiency and independence, and Georgia, which was prevented from participation in the Union by internal political turmoil, all of the republics which previously constituted the Soviet Union now form the Commonwealth. It should be noted, that although the former Soviet republics have attained full political independence, the Russian Federation is the economically superior power. As a result of its previous domination of the Soviet industrial apparatus, ministries, and fiscal and planning agencies, the Russian Federation exerts a disproportionally greater influence on the economies of the other republics.51

The members of the new Commonwealth reached agreement on certain political issues: the recognition of the independence of the republics and their current borders; the succession of Russia to the U.S.S.R.’s seat on the United Nations Security Council; and the transfer of all nuclear weapons to the control of the Russian Federation.52 The matters of defense and military command, however, remain subjects of controversy.53 The demise of the Soviet Union left its successor republics with a number of unresolved basic issues. These issues include division of the previously highly-integrated Soviet economy, financing of the new republican, regional, and


53 Id.
municipal governments, and creation of agencies to facilitate inter-republican trade, customs procedures, and currency exchange mechanisms.54

Certain republics, however, have established bilateral economic cooperation treaties which attempt to coordinate economic matters.55 Such vital economic sectors as banking, insurance, and securities brokerage lack interrepublic integration, underscoring the need for better interrepublic coordination on such issues. Policy making and promulgation of new rules by republican regulators also lack sufficient coordination. The isolationist policy pursued by many newly independent states of the C.I.S. has predictably created havoc in the previously highly-interconnected Soviet economy. For example, the current monetary policies of the C.I.S. republics reflect this lack of political and economic maturity. Until recently, all republics of the Commonwealth—and even the Baltic states—continued to use the old Soviet ruble.56 Understandably, an action by the central bank of one republic immediately affects the other republics. When the Russian Federation commenced its pricing liberalization, many other Commonwealth republics had to do the same because of the common currency and heavy dependence on interrepublican trade.57 The introduction of new units of currency, including a new Russian ruble, is the only practical solution to the economic discord among the republics of the C.I.S., short of complete coordination of fiscal matters which is an unlikely political alternative.58

Although the aborted economic union treaty may provide some guidance in these matters,59 it is more beneficial to consider the laws and regulations promulgated by each republic’s legislative and ad-


56 See The Ruble Zone: Rubleless and Rudderless, KOMMERSANT, June 30, 1992 (source on file with the authors) (Baltic states introduce new currencies).


59 The provisions of the Economic Treaty, though politically unacceptable to some C.I.S. republics, did mandate a much closer cooperation and coordination between the individual republics of the former Soviet Union than those of the C.I.S. Accords. See Compromise Agreement with Republics May Change How Business is Done in the USSR, SOVIET BUS. L. REP., May 1991, at 3–4, 10, available in LEXIS, Nexis Library, RCBLR File.
ministrative bodies. There is presently no comprehensive multilateral network of inter-republican treaties. Some former Soviet republics, however, have taken steps to reaffirm international treaties previously entered into by the Soviet Union.60

Certain laws of the former Soviet Union, particularly those enacted recently, remain important to foreign investors for two reasons. First, some republics are adopting, with minor modifications, former Soviet laws, such as the foreign investment and the company laws.61 Second, certain areas of substantive private civil law, such as protection of intellectual property and contractual relations, are covered only by former Soviet law in many C.I.S. republics. These former Soviet laws may remain in effect in the territory of the republics except where explicitly repudiated by the republican governments.62 Nevertheless, national laws and regulations of individual C.I.S. republics, particularly those on foreign investment, predominate the legislative landscape and should be given utmost attention due to their "preemptive" effect. It should be noted that significant differences do exist among the laws of Russia and other former Soviet republics resulting in many variations on the Soviet and Russian foreign investment models analyzed in this article.63

II. FOREIGN INVESTMENT IN THE U.S.S.R. BEFORE 1987

Foreign investment in the U.S.S.R. prior to 1987 had been confined to industrial cooperation agreements comprising co-production, licensing, subcontracting, and turnkey agreements.64 Despite the lack of laws authorizing direct foreign investment in the Soviet territory, foreign trade with the West has been significant. In fact, at times it has reached one-third of the total foreign trade volume, a substantial figure compared to the internal COMECON


61 See discussion infra part IV.


63 See discussion infra part IV for the discussion of foreign investment laws of three representative C.I.S. republics: Belarus, Ukraine and Kazakhstan.

64 See Pedersen, supra note 4, at 392-93; Stephan, supra note 16, at 742.
foreign trade.\footnote{See Joan P. Zoeter, USSR: Hard Currency Trade and Payments, U.S. Congress, Joint Economic Commission, in Soviet Economy in the 1980s 294 (1982); see also Stephan, supra note 16, at 742; see generally} The essential elements of the Soviet economic structure were state ownership of all means of production and distribution, as well as central planning of all economic activity by the various U.S.S.R. ministries.\footnote{In particular, Article 17 of the 1977 Constitution of the U.S.S.R. provided that private economic activity in the Soviet Union is possible only if “based exclusively on the individual labor of citizens and members of their families,” essentially banning enterprises using hired labor. Article 11 of the 1977 Constitution reserved the ownership of basic means of production in industry and agriculture to the state. See U.S.S.R. Constitution of 1977, supra note 46.}

Consequently, direct foreign investment, which required equity participation by foreign entities, was an utter impossibility. Joint ventures physically located outside the Soviet Union and formed under non-Soviet law, however, were encouraged by the Soviet government. Representative offices of foreign companies and banks were permitted to act as agents for their head offices, to negotiate trade and industrial agreements with authorized Soviet organizations, and to achieve certain other objectives.\footnote{In fact, some Soviet state enterprises and organizations have been actively involved in direct investment abroad, in socialist and capitalist developed and developing countries, since the 1930s. See MNCs and Joint Ventures: Not All Are West-to-East, 26 Business Eastern Europe, June 29, 1987, at 205, available in LEXIS, Europe Library, Bueuer File (describing Soviet joint venture banks and trading companies created in western Europe and North America as examples of pre-1987 joint ventures abroad); see generally Carl H. McMullan, Multinationals From the Second World: Growth of Foreign Investment by Soviet and Eastern Europe Enterprises (1987).} These representative offices served a primarily facilitative role, rather than serving as vehicles for foreign investment.\footnote{Under the Regulations governing the establishment and operations of representative offices of foreign firms, such representative offices were highly restricted in their business operations and could only facilitate the realization of agreements on cooperation with Soviet counterparts in trade, finance and other spheres, investigate opportunities for such cooperation, exchange information and assist in the execution of transactions. See U.S.S.R. Council of Ministers Decree No. 1074 of November 30, 1989 On Approval of the Regulations of the Procedure for the Opening and Activity in the U.S.S.R. of Representative Offices of Foreign Firms, Banks and Organizations, Sobr. Ux. SSSR, No. 1, art. 5, Item 8 (1990)[hereinafter Decree No. 1074]; see also John F. Sheedy & Richard N. Dean, Gaining a Foothold in the Soviet Market: How to Establish a Representative Office, 25 Int’l Law. 103, 109–10 (1991); see generally Pyotr S. Rabinovich, The Procedure for Signing Transactions with Soviet Foreign Trade Organizations, 22 Int’l Law. 143 (1988); Ramzaitsev, The Application of Private International Law in Soviet Foreign Trade Practice, 1961 J. Bus. L. 344.}

\footnote{See generally East West Trade (Price Waterhouse, 1976) (source on file with the authors).}
III. Three Stages Of Reform


As part of its policy of "perestroika" and in an effort to revitalize the stagnating Soviet economy, the Soviet leadership in late 1986 began taking steps to encourage foreign investment in the U.S.S.R.71 The Decree on Joint Enterprises adopted by the Presidium of the U.S.S.R. Supreme Soviet on January 13, 1987 (Joint Venture Decree) authorized joint ventures for the first time since the 1930s.72 The joint enterprise, as a product of the Joint Venture Decree, was a novel form of organization without precedent in Soviet jurisprudence. It combined elements of both a partnership and a corporation.73 This form of business organization was needed because the Soviet legal system did not then include a body of law devoted to private business entities suitable for foreign investment.74

Between 1987 and 1991, the joint enterprise constituted the single essential vehicle for direct foreign investment in the U.S.S.R. Its initial organizational aspects were fairly rigid.75 Although the Joint Venture Decree was amended several times during the first four years76 to offer foreign investors additional flexibility, in the broader perspective of Soviet law, which was fully applicable to all activities of joint ventures, the regulatory structure for joint enterprises was still quite restrictive.77 For instance, the Joint Venture Decree initially

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72 Decree On Questions Concerning the Establishment in the Territory of the U.S.S.R. and Operations of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies, Vedomosti Verkhovnovo Soveta SSSR (1987) No. 2, item 35 (source on file with the authors); see generally The Soviet Joint Enterprise Decree: Law and Structure (Kelley & Saul, eds., Russian Research Center, Harvard University, 1989) (source on file with the authors).
75 See Hober, supra note 1, § IV.B(4).
76 See infra notes 86–92 and accompanying text.
77 A leading commentator on the Soviet joint venture legislation has described the false expectations of western investors with respect to the Joint Venture Law, specifically the erroneous assumption that the Joint Venture Law would allow them to escape the obstructionism of Soviet bureaucracy and antiquated Soviet law ill-conceived to regulate private business entities: The single major disadvantage of this device is the fact that it is regulated at every step of the way by Soviet domestic law. Many Western investors choose to set up a
required that at least one of the top executives of the joint venture be a Soviet citizen, that the Soviet party have a preemptive right to buy the ownership share proposed to be transferred by the foreign participant, and that the Soviet participant maintain a majority ownership of the enterprise. As a result of the amendments to the Joint Venture Decree, some of these restrictions were subsequently eliminated; however, the rules governing valuation of participants' capital contributions, currency conversion, accounting, and other operational aspects of the joint enterprise's formation and business activities remained intact. Nevertheless, western businesses eager for new untapped markets for their products and services reacted enthusiastically to the Soviet joint enterprise format of doing business. By late 1989, western business signed in excess of eleven hundred agreements to conclude joint ventures with Soviet partners in the joint enterprise form. As of 1989, about five hundred joint enterprises commenced legal existence, with three hundred capitalized and starting operations. By early 1990, some fifteen hundred joint enterprises had been registered in the U.S.S.R.

In addition to the original decree of January 13, 1987, which authorized the establishment of joint enterprises and set forth general guidelines for their establishment and operations, two other


78 See Decree No. 49, supra note 3, art. 16.
79 See supra notes 71–76 and accompanying text.
fundamental legislative acts (collectively called the Joint Venture Law) governed joint ventures in Russia and the Soviet Union until the 1990 reforms.\(^8^5\) The first was Decree No. 1074 of the U.S.S.R. Council of Ministers of September 17, 1987 (Decree No. 1074),\(^8^6\) which supplemented and modified the Joint Venture Decree in certain respects. The second act (not specifically issued with respect to joint ventures but applying to them as well) by the Soviet central government was Decree No. 1405 of the U.S.S.R. Council of Ministers Decree of December 2, 1988 (Decree No. 1405),\(^8^7\) which addressed a host of problems associated with the earlier legislation and significantly liberalized a number of major provisions of the Joint Venture Law.\(^8^8\) Soviet ministries and state committees also issued a host of regulations and instructions to complement the Joint Venture Law and to provide further guidance in special situations.\(^8^9\) In 1990, many commentators believed that the Joint Venture Law needed further revisions to stimulate any sizable level of foreign investment.\(^9^0\) Soviet government advisors circulated a draft law in Soviet ministries which consolidated the previous enactments and improved the conditions for the foreign investor in the joint enterprises.\(^9^1\) The proposed law, however, never was enacted due to the radical overhaul of the Soviet foreign investment regime, which rendered the joint enterprise structure superfluous.\(^9^2\)

\(^{8^5}\) See Christopher Osakwe, Joint Ventures with the Soviet Union: Law and Practice 52 (1990).


\(^{8^8}\) For instance, the decree significantly liberalized the foreign trade regime to which joint enterprises were subjected and streamlined registration procedures for engaging in foreign trade. See S. Gerald Saliman, An Analysis of the Changing Legal Environment in the USSR For Foreign Investment, 22 Law & Pol’y Int’l Bus. 1, 7-9 (1991); see generally Hober, supra note 1, § V.


\(^{9^1}\) Id.

\(^{9^2}\) See discussion infra part III.B.
Under the Joint Venture Law, as it existed before 1991, the joint enterprise, as a juridical (corporate) entity, enjoyed limited liability similar to that of U.S. corporations. The foreign participant in the joint enterprise received some protection for its capital and assets contributed to the authorized statutory fund of the enterprise against administrative requisition or expropriation by the Soviet government. Initially, the western participant's share of ownership, determined by the equity participation in the statutory fund, was limited to 49 percent. Subsequently, this restriction was removed, thereby allowing foreign participants to hold up to 99 percent equity ownership in the joint enterprise. Contributions to the statutory fund could be made in cash or in tangible or intangible assets. The western participant frequently made its contribution in convertible currency and technology, while the Soviet partner contributed structures and equipment. The Joint Venture Law required that the personnel of a joint enterprise be mostly Soviet citizens. The original requirement that the Chairman of the Board and the Director General be Soviet citizens was later removed.

The joint enterprise format of business organization involved extensive supervision by Soviet administrative authorities, including registration and reporting requirements. Registration of a joint enterprise required preparation of a set of legal documents—commonly called the foundation documents which included a feasibility study, a joint venture agreement, and a charter. The parties would submit the foundation documents for approval to the administrative authority overseeing the Soviet partner and then to the Ministry of

93 See Decree No. 49, supra note 3, art. 9.
94 See id. art. 15.
95 See id.
96 See id. art. 5.
97 See Decree No. 1405, supra note 87, art. 31.
98 See Decree No. 49, supra note 3, art. 11.
99 See Arbess, supra note 80, at 416–19 (discussing operational aspects of capitalizing joint enterprises).
100 See Decree No. 49, supra note 3, art. 47.
101 See Decree No. 1405, supra note 87, art. 31.
102 See Decree No. 49, supra note 3, arts. 2, 9, 44–46.
103 See id. arts. 2, 8, 9. A feasibility study served as the basis upon which the parties demonstrated the economic feasibility of the proposed venture to the Soviet authorities. See id. art. 2. The joint venture agreement specified the areas of cooperation between partners in a joint venture and set forth a description of its business objectives and plans. See id. art. 7. The charter functioned as a certificate of incorporation and corporate by-laws, providing the rules for management and other internal matters of the joint enterprise. Id.
Finance.\textsuperscript{104} Upon approval, the Ministry of Finance recorded the joint enterprise in a registration ledger, and issued a certificate of registration.\textsuperscript{105} Soviet standards required joint enterprises to maintain accounting and statistical records in accordance with the Soviet methods.\textsuperscript{106} A Soviet auditing organization could audit the enterprise.\textsuperscript{107} A government body could also summarily dissolve a joint enterprise.\textsuperscript{108}

The Joint Venture Law theoretically afforded joint enterprises considerable freedom in controlling their economic activities within the territory of the U.S.S.R. Unlike most Soviet enterprises, joint enterprises theoretically were not subject to the central planning agencies and a myriad of other Soviet administrative agencies and ministries which unilaterally controlled virtually every detail of production, distribution, and sale of goods, commodities, and services within the country.\textsuperscript{109} The Ministry of Finance and Ministry for External Economic Affairs (the two ministries with primary jurisdiction over joint ventures with foreign participants), however, had the authority to exercise, and in certain instances did exercise, significant control over many business activities of joint ventures, occasionally demanding compliance with Soviet economic and administrative law applying to state enterprises.\textsuperscript{110}

Occasional demands to observe Soviet economic legislation designed exclusively for state enterprises functioning in a non-market economy notwithstanding, most East-West joint enterprises in the Soviet Union existed in a legal vacuum. Because joint enterprises generally operated largely outside the regulatory control of Soviet central planning organizations, they could freely negotiate prices for their products and services and sell them to whomever they wished.\textsuperscript{111} Joint enterprises, however, were left on their own to obtain

\textsuperscript{104} See id. art. 9.
\textsuperscript{105} Id.
\textsuperscript{106} See Hober, supra note 1, § IX.E(8)–(9).
\textsuperscript{107} See Decree No. 49, supra note 3, art. 45.
\textsuperscript{108} See id. art. 51.
\textsuperscript{109} See id. art. 23. Article 23 proclaims that no binding planning tasks will be issued to joint ventures and that joint ventures will plan their economic activities independently: "A joint enterprise shall independently work out and confirm the program for its economic activities. State agencies of the U.S.S.R. shall not establish binding planning tasks for a joint enterprise, and the sale of its products shall not be guaranteed." Id.
\textsuperscript{111} See, e.g., Decree No. 49, supra note 3, art. 24.
raw materials and supplies, and often had to purchase supplies in foreign markets using their convertible currency reserves. In practice, many joint ventures were at the mercy of the planners and regulators in the central and republican industrial ministries, which, if persuaded, could provide joint enterprises with locally produced supplies for payment in rubles. More importantly, domestic distribution and marketing of products and services produced or offered by these joint enterprises was complicated by the fact that most other Soviet producers and consumers were acting pursuant to a predetermined central plan which did not account for joint ventures with foreign firms and had no authority to deal directly with such joint ventures.

The Joint Venture Law also endowed joint enterprises with all the features and rights of legal entities under Soviet law, including rights to do the following in the joint enterprise’s own name: (i) conclude agreements; (ii) acquire property; (iii) incur debts and obligations; and (iv) appear as plaintiff or defendant in the courts of law or arbitration. This was significant for several reasons. First, because the joint enterprise form was unknown to Soviet jurisprudence heretofore, it was not clear whether it possessed the rights of an independent and self-sufficient quasi-private legal entity. Second, Soviet law placed a great emphasis on the legal capacity of entities to enter into valid contractual relationships in order to ensure that only “approved” state enterprises be permitted to engage in business transactions. Third, property rights of legal persons under Soviet law were similarly unclear as a result of Marxist ideological influences of the Marxist doctrine, and the joint enterprise’s explicit grant of property rights was thus essential.

Joint enterprises enjoyed preferential treatment with respect to taxation and customs duties. Generally, Joint Venture Law subjected a joint enterprise to a 30 percent tax rate applicable to its profits,

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112 See id. art. 23.
113 See HOBER, supra note 1, § VI.A(2).
114 See Decree No. 49, supra note 3, art. 6.
115 See OLIPIAD S. IOFFE, SOVIET CIVIL LAW 55 (1988)(discussing the inapplicability of absolute rights as applied to the legal capacity of a Soviet entity to enter into a contract and the consequent use of relative rights in Soviet civil law resulting in a peculiar approach to contract law under which “legal relations are possible exclusively between certain subjects,” as selectively recognized by the state).
116 See generally Giuliani, Joint Ventures in the USSR: Legal Personality, Enterprise and Ownership, 1 INT’L CO. & COM. L. REV. 16 (1990)(source on file with the authors).
Joint Venture Law, however, imposed no tax on the joint enterprise during the first two years it declared profits. Furthermore, the U.S.S.R. Ministry of Finance could lower the tax rate and extend the tax holiday. A further 20 percent repatriation or withholding tax applied to after-tax profits of the western participant that were repatriated abroad.

Joint Venture Law allowed equipment, materials, and other property to be imported into the Soviet Union as part of the foreign participant's contribution to the statutory fund, without customs duties and import permits. Subsequent shipment of goods and property into and out of the Soviet Union required import/export permits. The amendments to the Joint Venture Decree, however, imposed little or no duty on the import of equipment and supplies necessary for the operation of a joint enterprise. Joint enterprises could freely engage in foreign trade transactions subject to the export and import licensing regime and did not require special authorization then necessary for state enterprises.

Perhaps the most significant barrier to joint venture operations in the U.S.S.R. of that period was the difficulty in repatriation of profits by the western participant. This difficulty arose from the fact that Soviet currency was not freely convertible on the world's capital markets and foreign investors had no access to any official exchange facilities which would have permitted them to convert ruble earnings into foreign currencies. The law stipulated that the foreign partners may transfer their distributed profits abroad in foreign currency; yet, in practice, such transfer was possible only if the joint enterprise generated convertible currency profits because the

117 See Decree No. 49, supra note 3, art. 36.
118 Id.
119 Id.
120 Id. art. 41.
121 See id. art. 13.
122 See id. art. 24.
123 See Decree No. 1405, supra note 87, art. 6.
124 See Hober, supra note 1, § VI.E(1).
125 See id. § III.D(2)–(3). Because the Soviet ruble was not a freely convertible currency, and did not have a determined market value until 1991, most Soviet foreign trade occurred either in standard commodities, such as oil and natural gas, or on the principle of bilateral balance. Id.
126 See Decree No. 49, supra note 3, art. 32. "The transfer abroad in foreign currency of the amounts due to foreign participants as a result of the distribution of profits from enterprise activities shall be guaranteed to such foreign participants." Id.
Soviet ruble could not be freely converted into foreign currency. 127 Thus, joint enterprises faced the choice between generating convertible currency revenues through exports or convertible currency sales within the U.S.S.R. and engaging in generally inefficient counter-trade, compensation, and currency-pooling arrangements. Under the Joint Venture Law, profits had to be distributed to the participants in the joint enterprise in proportion to their ownership shares in the statutory charter fund. 128

As noted above, the principal shortcoming of the Joint Venture Law was that joint enterprises were artificial legal entities created specifically for foreign investment. Such entities were unprecedented in Soviet law and were not easily reconciled with other particularly ideological provisions of old Soviet law which remained on the books prior to the 1990–91 reforms. 129 The practical aspects of integrating essentially private, market-oriented entities with partial foreign ownership into the traditional Soviet economy posed managerial difficulties for foreign participants inexperienced in conducting business operations in a centrally planned economy. 130

Other problems of the Joint Venture Law related to the following bureaucratic obstacles imposed on joint enterprises which required:

127 See Hober, supra note 1, § IX.G(1)-(2). A limited number of alternatives were thus available to foreign participants in Soviet joint enterprises in transferring their share of profits abroad, all dependent on the capability to generate convertible currency either in domestic Soviet markets or by selling abroad. Id. In addition, Article 25 of Decree No. 49 explicitly provided that "all currency expenditures of a joint enterprise, including the payment of profit and other amounts due foreign participants and specialists, must be ensured by the joint enterprise from receipts from the sale of its products on the foreign market." See generally Susan W. Tiefenbrun, Joint Ventures in the U.S.S.R., Eastern Europe, and the People's Republic of China as of December 1989, 21 N.Y.U. J. INT'L L. & POL. 667 (1989).

128 See Decree No. 49, supra note 3, art. 31.

129 Article 6 of Decree No. 49 stated that "joint enterprises shall be juridical persons according to Soviet legislation." Id. art. 6. Moreover, Article 15 of Decree No. 49 expressly subjected the property of joint enterprises to Soviet property law: "A joint enterprise shall exercise, in accordance with Soviet legislation, the possession, use, and disposition of its property. . . ." Id. art. 15. The principal ideological obstacles of Soviet law from the perspective of a foreign participant in a joint enterprise related to property rights (such as ownership of land, personal property, and major means of production) of Soviet persons (which included joint enterprises) and could be found in the Soviet constitution and other laws regulating property relations in a socialist, centrally-planned economy. See Hober, supra note 1, § IV.C(11)-(12). Under the U.S.S.R. Constitution, the primary category of ownership was socialist ownership—which in turn consisted of state ownership, collective farm and cooperative ownership, and trade union and other social organization ownership. See id. § V.C(1)-(15). Although personal ownership also existed, it was limited to things not encompassing business assets. Id. The ownership rights of joint enterprises under Soviet law were consequently very unclear. Id.

130 See Hober, supra note 1, § VI.D(1)-(2).
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1) approval of a Soviet partner; 2) a feasibility study;131 3) a long and
arduous registration process with bureaucrats in Moscow; and 4) hiring of Russian nationals for certain management positions and
as the principal labor force.132 Furthermore, foreign trade regulations required export and import licensing for joint enterprises’
operations outside the Soviet Union. In addition, currency and exchange controls effectively prevented a repatriation of profits in
hard currency unless the joint enterprise was self-sufficient through
export revenue.133 The necessity of barter and other forms of coun­
tertrade often made the profit margins negligible.134

Finally, the Joint Venture Law itself offered the foreign investor
neither clear guidelines for permissibility of certain business opera­
tions under Soviet law nor significant investment guarantees.135 Most
importantly, joint enterprises did not offer the foreign investor the
flexibility needed to acquire different types of property in the
U.S.S.R., independently of Soviet organizations.136 Foreign investors
were not given the right to act in their own name in the Soviet
economy and could invest in Soviet property or engage in business
only through joint enterprises with local partners.

B. Changes in the Soviet Foreign Investment Regime in 1990

In 1990, the Soviets were determined to radically overhaul the
legal scheme for foreign investment in an effort to replace the Joint
Venture Law. The “Shatalin Plan,”137 which called for a complete
overhaul of the Soviet legal system in preparation for a free-fall into

131 Decree No. 49, supra note 3, art. 2.
132 Id. art. 47.
133 See Tiefenbrun, supra note 127, at 682.
134 Barter and countertrade transactions tend to be expensive because the goods received
in trade require resale, and their value is diminished by commissions. See Bartering with the
135 The Joint Venture Law could not provide a substitute for a well-developed, comprehen­
sive domestic legal system considered desirable for a successful investment abroad. See infra
notes 213–14 and accompanying text.
136 Under the Joint Venture Law, investments could only be made in the form of proprietary
interests in joint enterprises rather than securities or assets directly and required making such
investments in conjunction with a Soviet partner, which had to maintain at least some minimal
ownership interest in the investment.
137 Transition to the Market, A Working Group formed by a joint decision of M.S. Gorbachev
and B.N. Yeltsin, translated and printed by the Cultural Initiative Foundation (1990)(source
on file with the authors); see Richard N. Dean, Considering Business Opportunities in the Soviet
Union in the 1990s, 24 VAND. J. TRANSNAT’L L. 325, 327–39 (1990)(discussing various eco­
nomic reform plans circulating in the late 1980s in the Soviet government, including the
earlier Ryzhkov Plan, the Shatalin Plan and the resultant Gorbachev Plan).
market economics, however, was not adopted in its entirety. Its main tenets nonetheless gained considerable acceptance in the more liberal corners of the Soviet government. Some Soviet policymakers recognized that in order to accommodate foreign investors, the Soviet Union would need to replace the "economic" legislation applicable to state enterprises with domestic commercial laws capable of regulating a market-oriented economy. Throughout 1990, more than twenty pieces of legislation concerning companies, privatization, property, currency, and pricing were passed. Accordingly, the need for the Joint Venture Law diminished, and the Soviets were prepared to enact a general foreign investment regime akin to those in effect in most other jurisdictions with developing economies. Rather than restricting the choice of an organizational vehicle for foreign investment to joint enterprises, the new Soviet foreign investment regime, as established in 1990, permitted investment in the U.S.S.R. in any form allowed by domestic law. This regime provided the general framework for making various types of invest-


140 Most developing nations possess foreign investment regimes which do not purport to regulate all activities of companies with foreign investment but rather refer foreign investors with respect to most questions of their business operations to their domestic laws. See Clasen, supra note 2, at 199–204. Their domestic jurisprudence generally accommodates private ownership of property and contains at least some rudimentary rules for the conduct of commercial transactions while their foreign investment laws, if any, generally address only the issues of the structure and permissibility of foreign investment in various sectors of their domestic economies. Id. The Soviet Union at the time, however, did not recognize private ownership and private enterprise unequivocally and had very little in the way of legal regulation of private business transactions. See generally David Winter, Commerce and Commercial Law, in 1 Encyclopedia of Soviet Law 132 (F.J.M. Feldbrugge ed., 1985). "Commercial law . . . does not exist as such and indeed commercial law does not exist as an independent branch of law in the system of Soviet law unlike the position under certain civil law systems." Id. at 134.

141 Although the authorization for foreign investment in the form of wholly-owned subsidiaries of foreign companies, branches, security acquisitions, purchases of assets, and various contractual activities in addition to joint ventures may have been purely theoretical in early
ments, governed the rights and liabilities of a foreign investor, and provided certain measures of investment protection. 142

The foreign investment regime in 1990 consisted of three laws: the Presidential Decree on Foreign Investment of October 26, 1990 (Presidential Foreign Investment Decree); 143 the Fundamentals of Law on Investment Activity in the U.S.S.R. of December 10, 1990 (Fundamentals); 144 and the Draft U.S.S.R. Law on Foreign Investment in the Soviet Union of October 17, 1990 (Draft Foreign Investment Law). 145 The Presidential Foreign Investment Decree proclaimed for the first time that foreign capital was welcome on Soviet soil in forms other than the joint enterprise—namely, wholly-owned foreign subsidiaries and mixed ownership companies. 146 While revolutionary in its scope, the Presidential Foreign Investment Decree could not be used by foreign investors in actual projects due to its brevity, broad language, and lack of implementation. The enactment on the Fundamentals of Law on Investment Activity in the U.S.S.R. 147 and the federal and republican versions of the Foreign Investment Law provided the needed specificity. 148

1. The Fundamentals

The Fundamentals, which became effective on January 1, 1991, were a comprehensive investment code that addressed the rights and abilities of both Soviet nationals and foreigners to invest in the Soviet Union. 149 The Fundamentals focused on paving the way for privatization of the Soviet economy, rather than installing a legal regime to govern foreign investments. These investment laws af-

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1990 because of the lack of enabling legislation for companies, securities, and commercial transactions, the possibility for making such investments in the future signified a turning point in the history of Soviet foreign investment law. See Osakwe, supra note 77, at 1.31.0–1.33.

142 See discussion infra parts III.B.1, III.B.2.


146 See Foreign Investment Decree, supra note 143, art. 2.

147 See supra note 144 and accompanying text.

148 See infra notes 220–21 and accompanying text.

149 See Fundamentals, supra note 144, art. 4.
forded legal recognition to ownership interests in investments made in the Soviet Union\textsuperscript{150} and guaranteed protection of foreign investment.\textsuperscript{151} The Fundamentals, however, suffered from the vague draftsmanship typical of all Soviet law-making, and thus failed to clarify many significant issues. To fill its gaps, the Fundamentals had to be considered in conjunction with, \textit{inter alia}, the Joint Venture Law,\textsuperscript{152} the U.S.S.R. Law on Enterprises (Soviet Enterprise Law),\textsuperscript{153} the Regulations on Joint Stock Companies and Limited Liability Companies (Soviet Company Law),\textsuperscript{154} the U.S.S.R. Law on Ownership (Property Law or Soviet Property Law),\textsuperscript{155} the U.S.S.R. Law on Currency Regulation,\textsuperscript{156} and the U.S.S.R. Law on the Taxation of Enterprises, Associations, and Organizations.\textsuperscript{157} Read together, these laws provided the foreign investor with more specificity regarding domestic commercial operations.

The Fundamentals granted foreign nationals the right to invest in all sectors of the Soviet economy.\textsuperscript{158} There were two types of permitted investments: passive investments and active investments.\textsuperscript{159} Passive investments included monetary funds, bank accounts, securities, leases, personal and intellectual property, and real property.\textsuperscript{160} Active or capital investments included capital contributions to busi-

\textsuperscript{150}\textit{Id.} art. 1.
\textsuperscript{151}\textit{Id.} art. 20.
\textsuperscript{152}See supra notes 72–136 and accompanying text.
\textsuperscript{157}U.S.S.R. Law on the Taxation of Enterprises, Associations, and Organizations, June 14, 1990, \textit{in} Hober, supra note 1, § A.37.1.
\textsuperscript{158}See Fundamentals, supra note 144, art. 1. Restrictions on investments in certain areas were not enumerated in the Fundamentals but instead were provided in other laws. Cf. R.S.F.S.R. Law on Foreign Investments in the R.S.F.S.R., art. 4, July 4, 1991, \textit{translated in} 31 I.L.M. 397 (1992) [hereinafter Russian Foreign Investment Law]; see also infra note 396.
\textsuperscript{159}Fundamentals, supra note 144, art. 1.
\textsuperscript{160}The ownership of personal and real property under former Soviet law excluded land and natural resources, and was restricted to private entities at the all-Union level. See U.S.S.R. Constitution of 1977, supra note 46, art. 11 (declaring that all land in the U.S.S.R. territory is in the exclusive ownership of the state and extends to all bounties of the earth, including mineral resources, bodies of water, and forests. Consequently, most forms of commercial
ness entities.\textsuperscript{161} No provisions existed for the registration of companies with foreign ownership; other Soviet and republican laws subsequently addressed this issue. These early laws, though not fully developed, constituted liberal regulation of foreign investment.\textsuperscript{162}

An important aspect of the Fundamentals for foreign investors was the protection they provided for investments on the basis of national treatment.\textsuperscript{163} Foreign investors were thus granted the same rights as Soviet nationals with respect to ownership, control, and disposition of their investments. If state agencies violated an investor's legal rights, a court of law or arbitration board had to grant compensation.\textsuperscript{164} If the state body was unable to pay the awarded damages, the Supreme Soviet with jurisdiction over the particular agency was responsible for such payment.\textsuperscript{165} Similarly, investments could not be nationalized or expropriated by the Soviet government without reimbursement payable to the foreign investor for the value of the investment it lost through such nationalization or expropriation.\textsuperscript{166} The law also allowed for the voluntary insuring of investments.\textsuperscript{167}

The Fundamentals enhanced and clarified in some detail rights granted by the Presidential Decree, which confirmed the right of foreign investors to purchase securities issued by Soviet companies and to lease land and other natural resources.\textsuperscript{168} Under the Presidential Decree, foreign investment could comprise 100 percent of an existing Soviet company’s equity, and foreign companies could form wholly-owned subsidiaries.\textsuperscript{169} Direct foreign investment could be made by both individuals and legal entities.\textsuperscript{170} No regulations

\textsuperscript{161} U.S.S.R. Constitution of 1977, \textit{supra} note 46, art. 11.

\textsuperscript{162} Provisions relating to tax and regulatory schemes imposed on foreign investors in the U.S.S.R. were relatively benign in relation to other host countries where tax and regulatory burdens were considerably heavier. \textit{See} Fundamentals, \textit{supra} note 144, art. 11.

\textsuperscript{163} \textit{See} id. art. 23.

\textsuperscript{164} \textit{See} id. art. 20.

\textsuperscript{165} \textit{Id}.

\textsuperscript{166} \textit{See} id. art. 23.

\textsuperscript{167} \textit{Id}.


\textsuperscript{169} \textit{See} id. art. 2.

\textsuperscript{170} \textit{Id}.
existed at that time, however, to implement the Decree's provisions on wholly-owned foreign companies and branches.

2. Draft Foreign Investment Law

The Draft Foreign Investment Law\textsuperscript{171} applied specifically to foreign investors, whereas the Fundamentals governed all investments within the U.S.S.R. territory regardless of the investor's nationality.\textsuperscript{172} Unlike the Joint Venture Law, the Draft Foreign Investment Law expressly permitted foreign individuals—as opposed to legal entities—to participate in joint enterprises.\textsuperscript{173} With regard to the objects of foreign investment, the Draft Foreign Investment Law provided for investment in industrial and other enterprises, including banks, buildings, securities, various property rights, and rights to the use of natural resources.\textsuperscript{174} This explicit authorization to invest in the financial service industry was particularly important because under prior law, it was unclear whether foreigners could invest in Soviet banking, securities, and insurance organizations.

Some of the more important provisions of the Draft Foreign Investment Law vary somewhat from the provisions of the final law as passed in 1991.\textsuperscript{175} Foreign investors were permitted to invest through the following: 1) the acquisition of shares in Soviet enterprises; 2) the creation of wholly foreign-owned new enterprises or branches; and 3) the acquisition of property, land-use rights, and Soviet securities.\textsuperscript{176} In a departure from the Joint Venture Law, the Draft Foreign Investment Law permitted the creation of joint ventures with foreign investors in any form of business organization allowed by domestic law, including stock companies and limited liability associations.\textsuperscript{177} Any type of business investment activity was allowed, except activities prohibited by law.\textsuperscript{178} Engaging in restricted activities, as defined in the applicable laws, required a special license.\textsuperscript{179}

\begin{footnotesize}
\begin{enumerate}
\item[173] Draft Law, supra note 171, art. 1.
\item[174] Id. art. 2.
\item[175] See discussion infra part III.C.
\item[176] Draft Law, supra note 171, art. 3.
\item[177] Id. art. 4.
\item[178] Id. art. 7.
\item[179] Id. (such as banking).
\end{enumerate}
\end{footnotesize}
Registration of entities with foreign investment was subject to the law of the republic in which the investment was made.\textsuperscript{180} This recognition of republican sovereignty also differed from the provisions of the Joint Venture Law, which initially required all-Union registration with the U.S.S.R. Ministry of Finance.\textsuperscript{181} The U.S.S.R. Ministry of Finance, however, still maintained a register of such companies.

Mixed-ownership companies with foreign participation of less than 50 percent could not invest in other Soviet companies.\textsuperscript{182} In addition, the percentage share of mixed-ownership joint enterprises in other Soviet entities could not exceed 50 percent of that entity’s charter fund.\textsuperscript{183} If a mixed-ownership company had less than 50 percent foreign equity participation, that company could not have subsidiaries.\textsuperscript{184} These provisions did not survive in the enacted bill.

As under the Joint Venture Law, mixed-ownership companies had to attain hard currency self-sufficiency.\textsuperscript{185} Consortia, on the other hand, had the ability to distribute ruble-earned dividends in hard currency.\textsuperscript{186} Mixed-ownership companies, however, had an otherwise unrestricted right to repatriate earnings by transferring dividends abroad.\textsuperscript{187} Foreign investors were given the right to reinvest their profits in the Soviet Union.\textsuperscript{188} Moreover, foreign investors could open and maintain Soviet bank accounts, but they could not transfer rubles abroad.\textsuperscript{189} Foreign investors were also given the right to buy convertible currency at currency auctions.\textsuperscript{190}

The Draft Foreign Investment Law recognized mixed-ownership companies’ freedom to hire labor subject to U.S.S.R. labor law.\textsuperscript{191} Individual employment contracts were enforceable consistent with Soviet labor codes.\textsuperscript{192} Mixed-ownership companies were also given freedom to set their own prices for production and were not re-

\textsuperscript{180} Id. art. 8.
\textsuperscript{181} Decree No. 49, supra note 3, art. 9.
\textsuperscript{182} Draft Law, supra note 171, art. 9.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id. art. 11. Practically, this meant that such companies could not distribute a dividend to its participants or shareholders in hard currency if it was earned in rubles. Orientation toward export sales was thus important for the foreign investor in the Soviet Union who was not content with the reinvestment of rubles and desired immediate repatriation of profits in convertible currency.
\textsuperscript{186} Id.
\textsuperscript{187} Id. art. 12.
\textsuperscript{188} Id. art. 13.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id. art. 15.
\textsuperscript{192} Id. art. 15.
quired to comply with the pricing directives of the Soviet central planning agencies.\footnote{Id. art. 17.}

The Draft Foreign Investment Law included provisions governing certain import and export transactions.\footnote{Id. arts. 18–19.} No license was required to import materials for a mixed-ownership company’s own needs, or for the export of a mixed-ownership company’s own production.\footnote{Id. art. 18.} No customs duties were imposed on the import of property brought into the U.S.S.R. as a company’s initial capital.\footnote{Id. art. 19.}

Disputes involving mixed-ownership companies were governed by Soviet courts and the Gosarbitrazh, the state arbitration body.\footnote{Id. art. 25.} The leasing of property by foreign investors or mixed-ownership companies had to conform to both U.S.S.R. and republican leasing law.\footnote{Id. art. 29.} If a foreign investor or mixed-ownership company wished to lease property valued at R100,000,000 or more, special permission was needed from the state ministry with jurisdiction over the property.\footnote{Id. art. 32.}

The Draft Foreign Investment Law also provided a new definition of joint enterprise. Any juridical entity, regardless of its corporate form, created under Soviet law, and in which Soviet and foreign partners participated, was considered a joint enterprise.\footnote{Id. art. 33.} If a joint enterprise had capitalization exceeding R100,000,000, it could only be created by the Soviet party with the permission of the republican or U.S.S.R. Council of Ministers.\footnote{Law on Enterprises in the U.S.S.R., June 4, 1990, art. 2, translated in BUTLER, supra note 42, at 303–21 [hereinafter Enterprise Law]; Law on the General Principles of Entrepreneurship of Citizens in the U.S.S.R., Apr. 11, 1991, translated in W.E. BUTLER, BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 225–32 (1992).}

The specific organizational structure of mixed-ownership companies was governed by the relevant provisions of the Enterprise Law and the Company Law.\footnote{Draft Law, supra note 171, art. 39.} The Draft Foreign Investment Law defined a “foreign enterprise” as an entity in which foreign participation constitutes 100 percent of the company’s equity.\footnote{Draft Law, supra note 171, art. 39.}

The 1990 foreign investment regime introduced several improvements over the old Soviet joint venture regime. First and foremost,
foreign investors had much greater flexibility in structuring their investment in the Soviet Union. Instead of a cumbersome and unorthodox form of the joint enterprise, foreign investors could choose various organizational forms of doing business in the U.S.S.R., including a public corporation, a private company, or a general or limited partnership. The new Soviet rules no longer limited maximum percentage of foreign ownership. Foreign investors could establish or acquire wholly-owned companies as subsidiaries or branches.204 Rather than being limited to joint enterprises,205 foreign nationals wishing to establish joint ventures in the U.S.S.R. could invest through purchasing a partial interest in any domestic Soviet business entity allowed by law or establish a new joint venture company.206

Second, the new regime was generally more permissive and, like foreign investment regimes of many other capital-importing jurisdictions,207 only addressed issues which were not otherwise covered by domestic legislation.208 All questions of business organization and operations were left for the domestic company laws that applied equally to Soviet and non-Soviet shareholders or partners.209 This new spirit of permissiveness translated into the removal of several restrictions imposed on joint ventures. One such restriction was the requirement of special government approval for the Soviet participant to enter into a joint enterprise with western participation.210

Third, by reanimating the traditional forms of business organization, most of which clearly had been derived from pre-revolutionary Russian and western law, the new foreign investment regime exerted a stabilizing influence on the legal status of foreign investment in the U.S.S.R. As noted above, the concept of a joint enterprise was

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204 Limits on foreign ownership of joint enterprises under the original Joint Venture Law was 49 percent, later amended to reach as much as 99 percent. See supra notes 72-73 and accompanying text. The ability to form wholly-owned subsidiaries and branches was of significance because many Russian enterprises were primarily interested in forming joint enterprises with foreign companies and looked disfavorably on contractual joint venture or cooperation arrangements due to certain benefits they derived from the provisions of the Soviet Joint Venture Law. See Hober, supra note 1, § IV.B(2)-(3).

205 Joint enterprises were then still technically possible to form but were no longer actively encouraged by the Soviet government.

206 Draft Law, supra note 171, art. 32.

207 See, e.g., William H. Barringer, Legal Aspects of Foreign Investment in Developing Countries, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 372 (Part IV) (2d ed.).

208 See supra note 110 and accompanying text.

209 See supra note 158 and accompanying text.

210 See Decree No. 1405, supra note 87, art. 35.
quite alien and artificial in both Soviet and Russian law. Consequently, joint enterprises in general, and especially those with foreign participation, did not neatly fit into previously-defined categories. To add to the confusion, all Soviet laws prior to the Joint Venture Law and some laws following its enactment did not specifically reference the joint enterprise. Thus, a guessing game arose whether a particular joint enterprise was to be included among "Soviet enterprises and organizations," the standard phrase appearing in legislation of that time.

The foreign investment regime of this period also suffered from many legislative and structural shortcomings. Although the organizational forms for foreign investment were substantially expanded and perfected in comparison with the preceding regimes, the Soviet foreign investment regime still exhibited many inconsistencies, ambiguities, and a lack of implementing regulations. The new reformist legislation was specifically enacted to stimulate domestic and foreign investment, largely overriding the ideological obstacles to private property and private enterprise. The old laws, however, constituting the majority of Soviet private civil law, were not completely harmonized with the new legislation. As a result, uncertainty surrounding the status of foreign investment in the yet unreformed Soviet economy was prevalent. Moreover, the promise of economic

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212 See, e.g., Arbess, supra note 80, at 413.


214 Id. One principal effort of Soviet legislators to integrate and codify civil private law was in fact partially successful. This was the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics of May 31, 1991. See Fundamentals, supra note 144. Although it was scheduled to enter into force in 1992, it never did because of the general repeal by the Russian Federation of all Soviet legislation in its territory. See George W. Carey, Five Years Later: Evaluating Foreign Investment Experience in the Former USSR, in LEGAL AND PRACTICAL ASPECTS OF DOING BUSINESS IN THE SOVIET REPUBLICS, at 57-58 (PLI Handbook Series No. 604, 1992). Subsequently, the Russian parliament temporarily brought the Fundamentals of Civil Legislation back into force in Russia until the Russian Civil Code was amended. See Vratislav Pechota, Russian Federation Reaches Back to 1991 USSR Fundamentals of Civil Law, 3 COLUM. PARKER SCH. SOV. & E. EUR. L. BULL. 5-6 (Aug./Sept. 1992).
reforms initiated half-heartedly by Gorbachev's administration was never fulfilled, failing to provide the essential requirement of an adequate infrastructure for foreign investment.215 It becomes clear that while Gorbachev's administration propagated some of the milder versions of market reform, neither he nor his government was fully prepared to follow up with further reforms.216 For example, legislative reforms in industry and agriculture, although hotly debated in the press, were minimally implemented.217 Gorbachev's insistence on retaining the authority of the central government and monopoly of the Communist party made such reforms impossible. Gorbachev's tacit resistance through political maneuvering between the conservative and liberal elements in the government neither prevented him from losing power in late 1991 nor prevented the abolishment of the central Soviet domination of the republics constituting the Union.218

It should be noted that the U.S.S.R. Foreign Investment Law was enacted in its final form on July 4, 1991. Subsequently, the Russian Federation promulgated its own version of the law on foreign investment.219 The U.S.S.R. Foreign Investment Law, however, provided an additional layer of regulation on foreign investments in the territory of the Russian Soviet Federal Socialist Republic (R.S.F.S.R. and, after 1991, the Russian Federation) and other Soviet republics until the break-up of the Union.220 The Russian Foreign Investment Law then became the sole source of legal regulation of foreign investment in the Russian Federation.221

215 See, e.g., The Soviet Economy: The Hard Road from Communism to Capitalism, ECONOMIST, Nov. 18, 1989, at 22.
219 See supra note 158 and accompanying text.
220 The name Russian Soviet Federal Socialist Republic is no longer used due to the dissolution of the Soviet Union. It is now referred to as the "Russian Federation," the "Russian Republic," or "Russia." This article will make occasional references to R.S.F.S.R., as the term appears in the text of the Russian Foreign Investment Law and other legislation and regulations drafted during the existence of the Soviet Union. For further discussion of the relations between the republics vis-à-vis the old Union and the new Commonwealth, see discussion supra part III.A.
C. Russian Foreign Investment Law of 1991

In order to attract foreign capital, technology, and know-how, the R.S.F.S.R. Supreme Soviet enacted the Law on Foreign Investments on July 4, 1991, following the enactment of a similar law on the all-Union level.222 The law establishes a comprehensive regime within which foreign investors can operate in the territory of the Russian Federation with relative ease and unprecedented flexibility. The law suffers, however, from many legislative drafting ills because it is couched in the typically imprecise and occasionally ambiguous language of former Soviet lawmakers.223 Interested parties, therefore, must read the law in conjunction with other Russian legislation on taxation, banking, stock companies and enterprises, pledges, personal property, land and natural resources regulation, and labor and other recent enactments in the area of commercial law.224 Former Soviet legislation generally has lost its force in the territory of Russia; however, certain former Soviet laws and regulations may still be relevant to the Russian foreign investment regime insofar as Russian domestic law presently lacks such substantive laws and the former Soviet law does not conflict with any existing Russian law. Thus, the former Soviet law and jurisprudence should be considered

222Russian Foreign Investment Law, supra note 158, art. 4. Provisions of the U.S.S.R. Fundamentals of Legislation on Foreign Investments are very similar to the Russian Foreign Investment Law. U.S.S.R. Fundamentals of Legislation on Foreign Investments, July 5, 1991, translated in FBIS-SU, Aug. 2, 1991 at 15 [hereinafter Soviet Foreign Investment Law]. Whenever relevant to the analysis, the provisions of the Soviet Foreign Investment Law will be referred to because of its significance in former Soviet republics other than the Russian Federation, some of which have adopted the Soviet Foreign Investment Law with little or no change as their own foreign investment law. The need for foreign capital in Russia is indeed drastic, and the statistical comparison with the previous Soviet foreign investment regime does not yet yield material improvement in the capital inflow. See Russia: Foreign Investment Levels Still Relatively Low, Reuter Textline, Oct. 14, 1992, available in LEXIS, Nexis Library, Reuter File (reporting that the Russian Vice President Shokhin announced that the annual inflow of foreign investment into the Russian economy was around $800 million). During the first six months of 1992, sixty to seventy fully owned subsidiaries and joint venture companies were registered every month, most of which represented relatively small investments which sometimes barely exceeded the low statutory capitalization requirements. See Business Outlook: Russia, BUSINESS EASTERN EUROPE, Aug. 31, 1992, at 426, available in LEXIS, Europe Library, Bueuer File. By the end of 1991, about 3,000 joint ventures with foreign capital were registered, representing over $2 billion of foreign investment. See Russia: Joint Ventures—92 Report, Reuter Textline, Apr. 19, 1992, available in LEXIS, Nexis Library, Reuter File.

223 See, e.g., John J. Stephan, U.S. Perspective on the Legal Environment for Foreign Investment in Russia, in LEGAL AND PRACTICAL ASPECTS OF DOING BUSINESS IN THE SOVIET REPUBLICS, at 31 (PLI Handbook Series No. 604, 1992) (pointing out certain examples of outright inconsistency in the Russian legislation) [hereinafter U.S. Perspective].

224Russian Foreign Investment Law, supra note 158, art. 5.
as purely transitional until such time as the Russian government has enacted its own laws in those areas. 225

Provisions of the Russian Foreign Investment Law, in contrast to the Soviet Foreign Investment Law, generally do not require specific implementation through decrees and regulations on either the republican or local level. 226 Despite some potential difficulties with interpretation and enforcement, the Law on Foreign Investments in the R.S.F.S.R. is the first such legislation addressing itself specifically to foreign investment in Russia. Therefore, as a self-implementing statute, the law should provide the necessary fundamentals for the Russian foreign investment regime.

1. Definition and Types of Foreign Investment

The law defines foreign investment as all types of property contributed by foreign investors into entrepreneurial and other activities for the purpose of deriving profit. 227 The definition of an eligible investor has been expanded in the final version of the law. 228 Foreign investors in Russia now include legal entities of any kind with the power to make investments under domestic law, physical persons registered to do business in their domicile, and states and international organizations. 229 Foreign investors may participate in any objects of investment not prohibited by law, including capital and operational funds of enterprises, securities, special purpose money deposits, scientific-technical production, rights to intellectual property, and all other property rights. 230 This terminology appears to manifest the legislative intent to be as liberal as possible in order to accommodate various forms of foreign investment.

Foreign investment may be carried out through any of the following methods: (i) ownership of shares of stock or other equity interests in Russian enterprises; (ii) ownership of Russian enterprises or subsidiaries wholly owned by foreign investors and Russian branches

225 See U.S. Perspective, supra note 223, at 30–32.
226 Id.
227 See Russian Foreign Investment Law, supra note 158, art. 2. Significantly, the law regulates both enterprises with foreign investment and foreign investors—participants in such enterprises or direct actors in the Russian economy without the use of any organizational vehicles formed under Russian law. See id. art. 1.
228 By way of comparison, the Soviet Foreign Investment Law allowed investment in the U.S.S.R. by foreign corporations, citizens, associations, states, and international organizations. See Soviet Foreign Investment Law, supra note 222, art. 2.
229 Id. art. 1.
230 Id. art. 4.
and agencies of foreign legal entities; (iii) acquisition of assets of enterprises, buildings, facilities, securities, and other property; (iv) acquisition of lease and use rights to land and natural resources in Russia; and (v) any other activity not prohibited by Russian law, including lending, deposit-taking, and leasing activities.\(^{231}\) Thus, the law appears to contemplate all basic types of asset and stock-based purchase transactions within the range of permissible investment activities.\(^{232}\) If anything, the law is somewhat overbroad because it includes commercial lending activity, which western law would not typically categorize as capital investment activity \textit{per se}.

2. Property Rights

The Russian Foreign Investment Law reaffirms a broad range of property rights which can be possessed by an enterprise with foreign investment. For example, it specifically provides for the right to use or to lease land and natural resources which is already granted by Russian land, property, and leasing laws.\(^{233}\) The Russian Foreign Investment Law also adds certain approval and regulatory requirements related to ownership or possession of certain property. Any lease of state property of the Russian Federation valued at over R100 million will need the consent of the supervisory state agency.\(^{234}\) Moreover, concessions to develop, explore, and exploit natural re-

\(^{231}\) \textit{Id.} art. 3. A plethora of other Russian laws affect Russian companies, with and without foreign participation, directly and indirectly. Among them are: the tax laws (the U.S.S.R. Enterprise Tax Law as modified by relevant R.S.F.S.R. tax legislation), anti-monopoly law, labor law, banking law, bankruptcy law, securities regulations laws, pledge law, commercial paper law, privatization law, and land and property laws. The Fundamentals, supra note 144, essentially the Soviet Civil Code, were extensively amended recently and may provide a useful reference resource until the Russian Republic amends its own civil code, the R.S.F.S.R. Civil Code. A complete list of relevant Russian laws, decrees and resolutions is difficult to procure because bills are passed rapidly without timely publication or disbursement to western libraries.

\(^{233}\) The Soviet version of the law, by contrast, stated that certain territorial limitations may be placed on the activities of foreign investors in the interests of national security. Such restrictions could be placed by the laws of the U.S.S.R. and the republics. \textit{See} Soviet Foreign Investment Law, supra note 222, art. 7.


\(^{234}\) \textit{See} Russian Foreign Investment Law, supra note 158, art. 39.
sources may be granted by foreign investors pursuant to a variety of newly drafted laws.\textsuperscript{235} Protection and utilization of intellectual property rights of enterprises with foreign investment is to be carried out in accordance with Russian law.\textsuperscript{236} In fact, a wide spectrum of property rights held by enterprises with foreign investment require special regulatory or administrative permissions and consents.\textsuperscript{237}

Nevertheless, the Russian Foreign Investment Law firmly establishes the presumption that foreign investors are entitled to ownership of a wide range of property rights in Russia, which they can exercise in compliance with all applicable Russian legislation. This is a significant accomplishment for Russian jurisprudence because under the Soviet regime, the status of foreign persons, particularly with respect to their property rights in the U.S.S.R., never was made clear.\textsuperscript{238} In addition, the concept of private property, as it applies both to Russian and foreign persons, has finally become ingrained in the Russian law of property by the removal from Russian law of Marxist-Leninist ideological impediments to private ownership of the means of production.\textsuperscript{239}

3. Creation and Forms of Foreign Investment Vehicles

Enterprises with foreign investment may be created and may exist in the territory of the Russian Republic in the form of stock associations and other business associations and partnerships provided for

\textsuperscript{235} See id. art. 40.

\textsuperscript{236} See id. art. 32. Some of the new legislative developments in the copyright, trademark and patent laws, however, have taken place on the former all-Union level only and have not yet been adopted in Russia. For discussion of the current state of Soviet intellectual property law and protection, see generally William G. Frenkel & Jeffrey Sperber, \textit{From Borscht to Bits: Transfers of Technology and Industrial Property to the Soviet Union}, 4 DePaul Bus. L.J. 3 (1991).

\textsuperscript{237} One example of the necessity to comply with additional regulatory regimes will be real estate development, which requires approval of municipal authorities and compliance with the R.S.F.S.R. Land Code and local zoning regulations.


\textsuperscript{239} The Russian Law on Property of December 24, 1990 unequivocally recognizes the right of persons to own any and all types of property, including land. See Law on Ownership in the R.S.F.S.R., Dec. 24, 1990, \textit{translated in} W.E. Butler, \textit{Collected Legislation of Russia} III.1-2, 3-19 [hereinafter Russian Property Law]. Similarly, it recognizes property rights of legal entities, including enterprises with foreign investment or joint enterprises. See id. arts. 14-16. Furthermore, it guarantees state protection of private property and permits owners, at their own discretion, to possess, use, and dispose of their property. See id. art. 2; see generally Osakwe, \textit{supra} note 77, at 11-35.
by Russian legislation. The Russian Law on Enterprises specifies the forms of business enterprises which may be created under Russian law, including stock associations, general and limited partnerships, and sole proprietorships.

The following three generic types of foreign investment vehicles are permitted under Russian law: (1) joint venture or mixed ownership companies; (2) wholly foreign-owned foreign companies; and (3) branches of foreign legal entities. Such enterprises may be created through the formation of a new entity, through the acquisition by a foreign investor of an equity share in an existing Russian enterprise, or through the acquisition of a Russian enterprise in its entirety. New entities are to be formed in accordance with the Russian Law on Enterprises, the Russian Company Law and Russian partnership law, which still awaits enactment through the revision of the Civil Code. Specific procedures and regulations for the issuance and acquisition of certain types of enterprises and their securities by foreign investors are expected to be issued under the Russian Foreign Investment Law.

A joint venture in the Russian Federation may be established in any legal form permissible under Russian law; the choice of the form of business organization is left to the founders of the joint venture. The founders, therefore, may choose a contractual joint venture or an entity (equity) joint venture in the form of a mixed-ownership stock association or partnership. Although the joint enterprise

241 See Russian Enterprise Law, supra note 240, arts. 9-10.
242 Russian Foreign Investment Law, supra note 158, art. 3. The Soviet Foreign Investment Law also anticipated all the major organizational vehicles of investment, such as formation of joint enterprises, creation of wholly-owned subsidiaries, acquisition of shares in existing enterprises, purchase of rights to the use of the land and other natural resources, and other forms of investment determined by contractual agreements. See Soviet Foreign Investment Law, supra note 222, art. 3.
243 See Russian Foreign Investment Law, supra note 158, art. 3; see generally Birenbaum & Racklin, supra note 213, § 2.04.
244 See supra note 240.
245 See infra note 252.
246 Unlike stock associations, Russian partnerships have been authorized only in principle without any enabling law.
247 See Russian Foreign Investment Law, supra note 158.
248 See Carey, supra note 214, at 60. "The Russian Federation does not have a joint venture law; it treats the joint venture arrangement as an agreement among the business partners that creates one of the specific business forms authorized by law." Id.
could still be formed under the former Soviet law in other former Soviet republics,\textsuperscript{250} it clearly cannot be formed under Russian law because the form of a joint enterprise is not recognized by the Russian Enterprise Law.\textsuperscript{251} A subsidiary wholly owned by foreign shareholders may also be formed as a Russian stock association under the Russian Company Law.\textsuperscript{252} A Russian branch of a foreign company does not require the creation of any entity under Russian law and, at present, it is not regulated by any enabling Russian law other than the Russian Foreign Investment Law.\textsuperscript{253}

\textbf{a. Stock Companies}

For many legal and practical reasons, the stock company form is popular with foreign as well as domestic investors. Joint enterprises, however, are rarely formed in the former Soviet republics and can no longer be legally formed in the Russian Republic.\textsuperscript{254} The requirements for formation, registration, and operations of a stock company in the Russian Republic are primarily governed by its company law—whether the stock company exists solely with Russian shareholders, foreign shareholders, or a combination of both.\textsuperscript{255} The rights and obligations of foreign shareholders, however, are additionally governed by the Russian Foreign Investment Law.\textsuperscript{256}

Under former Soviet law, pursuant to the U.S.S.R. Regulations on Joint Stock Associations and Limited Liability Associations (Soviet Company Law),\textsuperscript{257} which later gave rise to the Russian Company Law, natural persons and legal entities could organize business companies in the form of joint stock associations (\textit{aktzionernye obschestva})

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{250} See Soviet Enterprise Law, \textit{supra} note 153, art. 2.
  \item \textsuperscript{253} See Russian Foreign Investment Law, \textit{supra} note 158, art. 12.
  \item \textsuperscript{254} This is primarily because the Russian Enterprise Law does not contemplate the organizational form of the joint enterprise as the Soviet law formerly did, and the status of already existing joint enterprises registered under former Soviet law is somewhat precarious in today’s Russia. See Holland & Langer, \textit{Ways to do Business in the Soviet Union, 2 SOVIET LAW: THE BOTTOM LINE} (Summer 1991) (source on file with the authors).
  \item \textsuperscript{255} See Russian Company Law, \textit{supra} note 252, art. 1.
  \item \textsuperscript{256} Specifics of forming Russian joint venture companies with foreign shareholders and Russian subsidiaries wholly-owned by foreign shareholders are discussed below in part C.3.b.
\end{itemize}
\end{footnotesize}
and limited liability associations (obserstva s ogranichennoi otvetstvenostyu).\textsuperscript{258} The Soviet Company Law stated clearly that individuals may be participants or shareholders and contribute their capital to the company's charter fund.\textsuperscript{259} Foreign investors were not dealt with specifically in the Soviet Company Law but instead were regulated by legislation on foreign investments.\textsuperscript{260} The Russian Foreign Investment Law, as well as its all-Union counterpart, explicitly permits foreigners to own shares in Russian companies and to be their founders.\textsuperscript{261}

With the demise of the Soviet Union, the Soviet Company Law is inapplicable to Russian companies, and the Russian Law on Stock Associations (Russian Company Law)\textsuperscript{262} governs the creation of a stock company, the rights and obligations of its shareholders, its capital and management structure, and other matters of operation and dissolution of stock companies.\textsuperscript{263} This law is functionally similar to the western European company laws and, to a greater extent than the Soviet Company Law, to the U.S. state corporation laws. The Russian Company Law is of primary importance to the western investor in all legal and operational questions of making investments through Russian stock companies.

A stock association is defined by the Russian Company Law as "a company created on the basis of a voluntary agreement by legal entities and physical persons (including foreign ones) who have combined their assets through the issue of shares of stock for the purpose of satisfying common requirements and realizing profit."\textsuperscript{264} A Russian company may carry out any type of business activity not prohibited by R.S.F.S.R. legislation, except activities involving defense-related industries, rare and precious metals, raw materials, and timber and furs.\textsuperscript{265} The permission of the R.S.F.S.R. Council of Ministers is required to carry out their business activities.\textsuperscript{266} A Russian company must maintain an official company name, a registered trademark, and a company seal bearing such company's name and trademark.\textsuperscript{267}

\textsuperscript{258} See Soviet Company Law, supra note 154, art. 1.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} See Russian Foreign Investment Law, supra note 158, art. 3.
\textsuperscript{262} Russian Company Law, supra note 252.
\textsuperscript{264} Russian Company Law, supra note 252, art. 1.
\textsuperscript{265} See id. art. 2.
\textsuperscript{266} Id.
\textsuperscript{267} Id. art. 4.
The Russian Company Law states that "a company shall enjoy full business independence in determining the form of its management, and shall make its own decisions with respect to operations, marketing, pricing, employee compensation, and distribution of net profits." In contrast to Soviet law, however, the Russian Company Law appears to repudiate the traditional Soviet *ultra vires* doctrine. Thus, company transactions not specified in the company charter or exceeding its scope may still be valid, if not prohibited by current legislation.

The Russian Company Law, in contrast to Soviet Company Law, does not differentiate between stock associations and limited liability associations. The only corporate business form under Russian law is the "stock company." All advantages of the corporate form, including limited liability, are granted to the shareholders in Russian companies. Shareholders are liable for the company’s debts and obligations only within the limit of their respective contributions to its share capital. Russian law, however, does distinguish between "open" and "closed" stock associations. An open stock association is essentially a public company or a publicly held corporation, where no shareholder consent is necessary to transfer stock. A closed stock association is a privately held company or a closely-held corporation, where the consent of a majority of its shareholders is generally needed to effectuate a valid stock transfer.

b. **Joint Venture and Wholly-Foreign-Owned Companies**

As creatures of Russian law, joint venture companies and wholly-owned subsidiaries of foreign companies, termed "enterprises with foreign investments" in the Russian Foreign Investment Law, must be formed by executing certain foundation documents among the participants or shareholders. The statutorily required foundation document is a charter of the entity which must be ratified by the
founding shareholders. The charter may be ratified by a resolution or memorandum of the founding shareholders or participants authorizing the creation of the company and other organizational matters. Under the former Soviet Joint Venture Law, a joint enterprise agreement in addition to a charter was also mandatory. This agreement was analogous to the western joint venture agreement or a shareholders' agreement. Such a joint venture or shareholders' agreement is optional for Russian stock associations and may be executed essentially for the same reason as is given in the United States—protection of shareholders' rights.

Enterprises with foreign investment and foreign shareholders are also subject to a number of special requirements under the Russian Foreign Investment Law. The Russian Foreign Investment Law prescribes certain minimum requirements for the content of foundation documents of Russian stock companies. The following provisions must be included: (1) the purposes and business objectives of the enterprise; (2) a list of participants; (3) the amount and procedures for the creation of the charter fund; (4) the percentage of each shareholder’s or participant’s share ownership; (5) the structure, composition, and authority (competence) of the management bodies; (6) the procedures for decision-making; (7) a list of issues requiring unanimous approval; and (8) procedures for liquidation. The Russian Company Law adds the requirement of listing the categories of issued stock and their nominal (par) values.

c. Registration of Stock Companies

The Russian Company Law provides a number of registration rules for stock associations formed under Russian law. Russian

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277 Id. art. 19.
278 Id. art. 25.
279 See East-West Joint Ventures, supra note 238, at 442. Notably, the Russian Company Law did not require the submission of a feasibility study to register a stock association with or without foreign investment.
280 Id.
281 See Russian Company Law, supra note 252, art. 14.
282 See Russian Foreign Investment Law, supra note 158, arts. 13–16.
283 See id. art. 13.
284 See Russian Company Law, supra note 252, art. 20.
285 Under the Soviet Company Law, a joint-stock association or a limited liability company also became a separate legal entity upon its registration. Registration was accomplished by filing an application form, minutes and resolution of the founding assembly, and notarized copies of the charter or articles of association with the executive committee of the local Soviet of People’s Deputies (the “local authority”) in the district or region where the company was formed.
stock associations originally were required to register with the 
R.S.F.S.R. Ministry of Finance. Later, this requirement was con-
formed to the R.S.F.S.R. Law on Enterprises and Soviet Company 
Law. Registration on the local level is now required in the Russian 
Republic,286 with a subsequent informational filing with the 
maintains the centralized roster of all Russian companies, with or 
without foreign capital participation.288 Joint stock banking and in-
surance companies and other credit and financial institutions must 
register with the R.S.F.S.R. Central Bank.289 In addition, certain mu-
icipalities, such as the City of Moscow, now require that all compa-
nies register with their municipal agencies and impose their own 
registration and franchise tax requirements.290

Prior to registration, a Russian company must hold its founders’ 
meeting, which must be attended by all of the founding sharehold-
ers of the company.291 The primary purpose of this meeting is to 
approve the charter of the company and to elect the company’s 
management by a three-fourths majority vote.292 All other decisions 
at that meeting, including the decision to form a stock association, 
must be adopted unanimously.293 The application for registration 
must be prepared by the founding shareholders in accordance with 
the law and submitted to the local authority within thirty days after 
the founders’ meeting.294 The application must identify the Com-
pany’s name, address, business objective, principal activities, the size 
of its charter capital and the shareholders’ obligations to capitalize 
it, the founders’ names, addresses, citizenship, and the numbers of

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286 See Russian Enterprise Law, supra note 240, art. 34; Russian Company Law, supra note 
252, art. 25; see also Patterson, Putting the Laws into Practice, 2 COLUM. PARKER SCH. 
SOV. & 
E. EUR. L. BULL. (Mar. 1991) (source on file with the authors).
287 Russian Company Law, supra note 252, art. 29.
288 Id.
289 Id. art. 30.
290 See Moscow City Council Regulations on the Registration Procedure of Enterprises in 
the City of Moscow, July 29, 1991 (source on file with the authors).
291 Russian Company Law, supra note 252, art. 22.
292 Id. art. 24.
293 Id. art. 22.
294 Id. art. 15.
shares of stock they hold. The application must be signed by all of the founding shareholders and notarized. Once completed, the application is deemed a formal contract among the founding shareholders. The local authority must notify the founders as to the availability of the company name for registration within ten days of the application date. No business activity may be conducted prior to the completion of official registration.

Registration requires the submission of the application for registration, the charter, and the minutes of the founders' meeting to the local authority. Review must be completed by the local authority within thirty days after the submission of these documents, and registration may be denied only for reasons of non-compliance with the Russian Company Law. If registration is denied, it may be immediately appealed to a Russian court of law. A temporary registration certificate is issued upon approval of the registration. If the company submits a confirmation of its payment of 50 percent of its charter capital within thirty days of the submission of documents, the local authority will issue an official certificate replacing the temporary registration certificate. All changes in the company's charter must be filed with the registering authority within fifteen days after such changes are adopted. Upon registration, a Russian company acquires the legal rights to own various types of property, to enter into contracts, to incur obligations, and to sue and be sued. One company may be a shareholder in another company, and conversely, may own subsidiaries and representative offices in the Russian Republic and abroad.

The formation of joint venture companies or enterprises with foreign investment requires special governmental approvals prescribed by the Russian Foreign Investment Law. Most importantly,

\[\text{Id. art. 16.}\]
\[\text{Id. art. 17.}\]
\[\text{Id.}\]
\[\text{Id. art. 18.}\]
\[\text{Id. art. 18.}\]
\[\text{Id. art. 25.}\]
\[\text{Id. art. 32.}\]
\[\text{Id. art. 33.}\]
\[\text{Id. art. 34.}\]
\[\text{Id. art. 4.}\]
\[\text{See id. art. 6.}\]
\[\text{See, e.g., Russian Foreign Investment Law, supra note 158, arts. 14, 16. The requirements mandated by the Russian Foreign Investment Law are generally in addition to the standard registration procedures applicable to Russian enterprises without foreign capital.}\]
an enterprise with foreign investment must also register with the
R.S.F.S.R. Ministry of Finance.\footnote{See id. art. 16; Russian Company Law, supra note 252, art. 31.} The registration requirements un­
der the old Soviet Joint Venture Law no longer apply to new joint
venture companies formed under Russian law.\footnote{The Soviet Joint Venture Law has lost the legal effect in the Russian Federation, see infra

Registration with the Russian Ministry of Finance is the principal
registration requirement for all foreign investment vehicles.\footnote{See infra note 317 and accompanying text.} Certain
organizations and companies, however, may require additional
approvals. For instance, large construction or renovation projects
require a state-conducted expert evaluation.\footnote{Russian Foreign Investment Law, supra note 158, art. 31.} Furthermore, some
enterprises require ecological and sanitary/epidemiological approv­
als.\footnote{Id. art. 14.}

As mentioned, all enterprises with foreign investment are re­
quired to undergo "state registration."\footnote{Id. art. 16.} In addition, any amend­
ments to the original documentation must also be registered.\footnote{Id. art. 34.} All
newly formed Russian entities with foreign ownership require regis­
tration with the R.S.F.S.R. Ministry of Finance or any other duly
authorized state body or agency.\footnote{Id. art. 16.} Enterprises which receive more
than one hundred million rubles in foreign investment must register
with the Ministry of Finance.\footnote{Id.} The R.S.F.S.R. Council of Ministers
must consent to this type of registration within two months of the
application date.\footnote{In order to register, the following documentation is required to be submitted for joint
venture companies:}

\begin{itemize}
  \item a) founders' registration application;
  \item b) duly notarized foundation documents;
  \item c) conclusions of an expert evaluation (if required);
  \item d) for Russian participants, certain documents certifying their status and the right
to contribute property;
  \item e) certificate of good credit standing for the Western participants; and
  \item f) proof of the foreign entities' status in accordance with its domestic law.
\end{itemize}

\textit{Id.}
Any registration rejection must be based either on non-compliance with Russian law or on an absence of required documentation. The founders of the proposed company must be notified of the reasons for the rejection of its application, and a rejection may be appealed to a court of law.

Once registered, an enterprise with foreign investment receives a certificate of registration and acquires the status of a legal entity. Local authorities receive the registration information, and a notice of registration is published in the Russian press.

d. **Capital Contributions, Assets, and Securities**

Contributions into the share capital, or the statutory charter fund, of a stock company may be valued by the company’s founders on the basis of world market prices or by contract. Foreign investors may make cash contributions in either rubles or in foreign currencies. Previously, under the Russian Foreign Investment Law and former Soviet law, all contributions made or expressed in foreign currencies had to use the Gosbank’s exchange rate applicable to foreign trade operations. Now that the Gosbank exchange rate structure is abolished, a fluctuating, market-based exchange rate quoted by the Central Bank of Russia is in force.

Under Russian Company Law, one founding shareholder is sufficient to form a stock association. The minimum capitalization
requirements are as follows: R100,000 for an open stock association and R10,000 for a closed stock association.\(^\text{329}\) Fifty percent of the stock price must be paid by the founding shareholders within thirty days of registration; the balance of the stock price must be paid within one year from the date of registration.\(^\text{330}\) The minimum par value for one common share is R10.\(^\text{331}\)

Under Russian law, certificates of shares are securities (*tzennye bumagi*).\(^\text{332}\) Russian pronouncements on securities set forth the formal requirements for registration and transfer of securities in the initial private or public offering and in the secondary markets.\(^\text{333}\) Under former Soviet law, shares could be issued either in bearer form or in drawer form (registered),\(^\text{334}\) although individuals were allowed to hold only the registered drawer shares.\(^\text{335}\) By contrast, the Russian Company Law provides for registered stock only.\(^\text{336}\)

A Russian stock association may issue both common and preferred shares.\(^\text{337}\) Preferred shares (*priveligirovannye aktzii*)\(^\text{338}\) normally carry no voting rights unless the company charter makes them voting stock.\(^\text{339}\) Preferences may exist for the distribution of divi-

\(^{329}\) Russian Company Law, *supra* note 252, art. 36.

\(^{330}\) Id. art. 38.

\(^{331}\) See id. art. 44.


\(^{334}\) See U.S.S.R. Regulations on Securities, approved by the U.S.S.R. Council of Ministers Resolution No. 590, June 19, 1990, art. 5.

\(^{335}\) See Soviet Company Law, *supra* note 154, art. 34.

\(^{336}\) Russian Company Law, *supra* note 252, art. 46. "[S]hareholders shall be listed in a special stock register maintained by the company." *Id.*

\(^{337}\) Id. art. 47. Soviet limited liability companies did not issue stock. Instead, they had a charter fund divided into equity shares which were not represented by certificates of stock. Such shares were not deemed securities or negotiable instruments. At registration, not less than 30 percent of the authorized charter fund had to be paid in by every participant. The remainder had to be paid in within one year following registration of the company. Transfer or sale of shares was possible only after they were fully paid in and all restrictions on transferability were satisfied. The transferee acquired all rights and obligations of the transferor. The company could reserve the right of first refusal. See Frenkel, *supra* note 257, at 155.

\(^{338}\) Under Soviet Company Law, the preferred stock could not be issued for an amount exceeding 10 percent of the authorized share capital. See Soviet Company Law, *supra* note 154, art. 35.

\(^{339}\) Russian Company Law, *supra* note 252, art. 49.
dends or the distribution of the company’s assets upon its liquidation.340

Under the Russian Company Law, shares are freely transferable and their sale or transfer does not require the company’s approval, unless the company charter states otherwise.341 The ownership of shares is recorded on the company’s stock ledger.342 The Russian Company Law also authorizes a stock association to issue debt securities (obligatziyi)343 in either bearer or registered form344 to either legal entities or individuals.345 Bonds are freely transferable.346

In addition to the statutory charter fund, a company must also establish a reserve fund.347 Annual transfers are to be made to the reserve fund until the fund reaches at least 10 percent of the share capital.348 The company’s charter may require a higher percentage.349 The charter may also regulate the size and frequency of the annual transfers as well as the proportion of share capital.350

e. Organization and Governance

The management structure of an enterprise with foreign investment depends on its organization as a legal entity. The governance of stock associations is facilitated by a time-proven management structure, traditional in U.S. corporation law and embodied in the

340 Id.
341 Id. art. 7.
342 “Transfer of the certificate from one person to another constitutes the completion of the transaction and the transfer of rights of ownership to the stock only if the operation is recorded in accordance with established procedure.” Id. art. 57.
343 Id. art. 59. The Soviet Company Law also authorizes a joint-stock association to issue debt securities (obligatziyi) in either bearer or registered form to either legal entities or individuals. Such bonds may only be issued in an amount not exceeding 25 percent of the company’s authorized share capital and only after full payment for all issued shares has been received. Bonds are freely transferrable. See Frenkel, supra note 257, at 155.
344 Under Soviet Company Law, such bonds could only be issued in an amount not exceeding 25 percent of the company’s authorized share capital and only after full payment for all issued shares has been received. See Soviet Company Law, supra note 154, art. 36.
345 Russian Company Law, supra note 252, art. 61.
346 Id.
347 Id. art. 81.
348 Id.
349 Id. art. 81.
350 Id. Under the Soviet Company law, annual transfers were to be made to the reserve fund until it reached at least 15 percent of the share capital. See Soviet Company Law, supra note 154, art. 19. The company’s charter may determine a higher percentage and also the size of the annual transfers (as well as the proportion of share capital), but the annual transfers may not be less than 5 percent of the company’s annual profits. See id.
Russian Company Law. Other entities are governed in accordance with the charter or other foundation document chosen by the participants unless a statutorily mandated management structure exists. The Soviet Joint Venture Law originally restricted the nationality of individuals managing foreign investment enterprises. This law is no longer in effect, and thus, members of the Board of Directors and the General Manager or President of a joint venture company may now be foreign nationals.351

The general assembly of shareholders (General Assembly) constitutes the supreme governing body of a Russian stock association.352 The chair of the General Assembly must also serve as the chair of the Board of Directors.353 Annual meetings of the General Assembly must take place not more than fifteen months apart.354 Special meetings may be called by the Board of Directors, the Audit Commission, or at least 10 percent of the shareholders.355 At the meetings of the General Assembly, shareholders elect members of the Board of Directors and approve the company’s annual reports.356 Also within the exclusive competence of the General Assembly are charter amendments, charter fund decreases or increases, creation and liquidation of subsidiaries and branches of the company, and liquidation of the company.357

Between the meetings of its General Assembly of Shareholders, the Board of Directors (Board) is the supreme governing body of a

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351 The former Soviet Joint Venture Law required in article 21 that the chairman of the board be a Soviet citizen. The Joint Venture Decree, art. 21, SP SSSR, Jan. 13, 1987, No. 9, Item 40, translated in KAI HÖBER, JOINT VENTURES IN THE SOVIET UNION app. 3 (1992) [hereinafter Soviet Joint Venture Law]. Again, the references to Soviet law may be useful because some republics other than the Russian republic have adopted the all-Union version of company law with little change.

352 Article 91 of the Russian Company Law provides:

The supreme governing body of the tovarishchestvo [stock association] is the general stockholders’ meeting, which has exclusive jurisdiction over changes in the charter and the charter capital, election of directors, approval of annual operating results, creation and liquidation of daughter companies [subsidiaries] or branches, and reorganization and liquidation of the [company].

Russian Company Law, supra note 252, art. 91. For a comparison to the U.S. corporate governance model, see generally Melvin A. Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking, 57 CAL. L. REV. 1 (1969).

353 Russian Company Law, supra note 252, art. 100.

354 Id. art. 92.

355 Id. arts. 93–94.

356 Id. art. 98.

357 Id. art. 91.
stock association. It exercises general governance powers of a corporate board of directors except for those powers granted exclusively to the shareholders. The members of the Board are elected for two-year terms, and the Board must convene for regular meetings at least once every month. The General Assembly appoints a General Manager, or President, of the stock association from among the members of the Board. The Board, in turn, appoints other management officers to implement its policies and decisions.

f. Control

Western investors now can achieve control of Russian stock associations in the same way as with U.S. corporations. Investors can gain control directly through beneficial ownership of stock, and indirectly by electing members of the Board. This is a major advancement over the previous non-stock approach of Soviet joint enterprises, which could not accommodate institutional investors or other passive investors not interested in active management of the joint enterprise. The flexibility of transferring control through a stock purchase also has many benefits over the archaic Soviet system of transferring generic ownership rights or "joint enterprise interests" in the joint enterprise to a third party.

g. Termination

Under Russian Company Law, termination of the stock association’s legal existence may be affected either by reorganization—in

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358 Id. art. 108.
359 Id. art. 116.
360 Id. art. 111.
361 Id. art. 121.
362 Id. art. 124.
363 Id. arts. 125–26.
364 See Frenkel, supra note 263, at 152–53.
367 Under Soviet Company law, stock associations could terminate their legal existence after dissolution and liquidation or following reorganization by means of mergers, acquisitions, consolidation, etc. See Soviet Company Law, supra note 154, art. 25. Liquidation was conducted by a liquidation commission formed by the company or, in the event of judicial (involuntary)
the form of a merger, spin-off, or consolidation—or by liquidation. 368
Under the Russian Foreign Investment Law, an enterprise with foreign investment must be liquidated in accordance with procedures provided by Russian law for that entity’s organizational form. 369 In the case of voluntary liquidation, the general assembly appoints a liquidation commission to wind down the business and present a liquidation balance sheet to the general assembly for its approval. 370
Any assets remaining after salaries, taxes, and payments to creditors will be distributed among the shareholders generally in proportion to their shareholdings, or as otherwise stipulated in the charter. 371 A corporate reorganization effects a transfer of the reorganized company’s rights and liabilities to its legal successors. 372

4. Operations and Regulatory Regime

a. Economic and Administrative Decentralization Trends and Effects

In the transitional period from a command economy to full economic independence and market relations, President of the Russian Republic Boris Yeltsin has issued a number of interim decrees directly affecting foreign businesses operating in Russia. In the wake of the break-up of the Soviet Union as a political entity and general annulment of the Soviet federal private civil law, these decrees are extremely important. The interim decrees, as well as recent laws and regulations of various republics formerly constituting the U.S.S.R. become extremely important and must be analyzed against the skeletal framework of the Russian Foreign Investment Law. The

liquidation, by the competent court or arbitrator. Id. art. 26. The liquidation commission wound up the affairs of the company, paid off remaining liabilities, and distributed the company’s remaining assets to its shareholders. Liquidation took legal effect upon the appropriate entry in the register of companies. Id.
A stock company could be dissolved once it had accomplished its purpose, when a stipulated period of time had elapsed, by a decision of the shareholders’ meeting, or for other reasons enumerated in its charter. Id. art. 24. Article 24 of the Soviet Company Law also stipulated that a joint stock company may be dissolved “on the basis of a decision of State Arbitrazh or a court in the event of the insolvency of the society. . . .” Id. The language seems broad enough to include bankruptcy as a ground of dissolving a joint stock company. Currently, however, there is no bankruptcy legislation applicable to private enterprises on the books in the Russian Federation.

368 See Russian Company Law, supra note 252, art. 142.
369 See Russian Foreign Investment law, supra note 158, art. 19.
371 Id. arts. 139–39.
372 Id. art. 144.
decrees also display Mr. Yeltsin’s determination to carry through with the economic reforms in order to create a market economy in Russia. The principal decree, entitled On Liberalizing Foreign Economic Activity on the Territory of the R.S.F.S.R. of November 15, 1991 (Decree on Liberalization),373 purports to relax some of the more stringent restrictions on foreign trade and investment in Russia and effectively eliminates the all-Union (central) legal regime and regulation within its borders.374 The decree went into effect on January 1, 1992.375

The regulatory structure affecting business operations in the Russian territory has been changed significantly. Since the demise of the central Soviet authorities in late 1991, all of the all-Union institutions have either been disbanded or absorbed into the Russian republican government structure, and the all-Union laws have been declared null and void in the territory of the Russian Republic and other republics formerly constituting the Union.376 For instance, in the Russian Republic, the powerful U.S.S.R. Ministry for External Economic Relations and the U.S.S.R. Ministry of Finance have been abolished, and their functions have been transferred to the Russian Ministry of Foreign Trade and Russian Ministry of Finance respectively.377 Other republics are in the process of establishing their own republican ministries responsible for foreign trade and investment. The ministries also serve as independent regulators in their respective territories.378

Despite potential long-term benefits inherent in both the liberation of former Soviet republics from the communist yoke and regulatory and economic decentralization, many short-term effects on trade and commerce within Russia have been disruptive and have resulted in chaos. The sudden withdrawal of the state from eco-

375 Id.
377 Yeltsin Solidifies Control, supra note 376, at 6.
nomic planning functions paralyzed some old distribution and supply networks on which state enterprises traditionally relied. Market forces, widely expected to alleviate disastrous effects of this collapse in the state administrative control over trade, have so far been unsuccessful in replacing the old system. With the absence of both rational markets for goods and commodities and an established infrastructure for the Russian market economy, achieving a high degree of operational self-sufficiency remains one of the principal problems. Management of these deficiencies is also the key to a successful investment strategy for the enterprise with foreign investment looking for local distributors, agents and franchisees, and suppliers.

The deregulation of prices for most consumer and industrial goods which began in January 1992 laid the foundation for a free market. These goods, with the exception of some essential food items and medicine, are no longer subject to any government price controls and will be set freely by their producers. The social security net to assist the Russians with adapting to market pricing and to provide minimum subsistence guarantees is not in place yet, thereby causing serious social problems. Although not commensurate with price increases, the eventual rise in government salaries and pensions should help the population deal with the price increases and the resulting hyperinflation. Some of the price increases were in the 1000 percent range.

The legal framework for the economic relations between the former Soviet republics, now members of the Commonwealth of Independent States, is just beginning to evolve through treaties and intergovernmental agreements. It is clear, however, that no central authority will be created to impose its decisions on the member republics as the old Union did through institutions such as the U.S.S.R. Council of Ministers and the U.S.S.R. Supreme Soviet.

379 See Ericson, Economics, in After the Soviet Union: From Empire to Nations 64–70 (Levgold & Colton eds., 1992)(source on file with the authors).
381 See Jeffrey M. Hertzfeld, Joint Ventures: Saving the Soviets from Perestroika, HARV. BUS. REV. 80, 81 (Jan-Feb. 1991).
383 Id.
384 See Ericson, supra note 379, at 64.
385 See id. at 78.
Most bureaucrats employed by these central authorities will not find new positions open to them in the republican Russian government and, consequently, western business interests in Russia will have to develop new ties with the Russian republican lawmakers and regulators for their lobbying activities.387

While the Russian law, which began to gain prominence in 1990, is by far the most comprehensive of all former Soviet republics, it is not yet sufficient to govern private commercial activity in the conditions of a free market.388 To that end, President Yeltsin signed several dozen new laws and decrees throughout 1992.389 Moreover, foreign investors in Russia can also rely on such earlier Russian legislative enactments essential to the foreign investor as Law on Foreign Investment Activities390, Law on Enterprise,391 Regulations on Stock Associations,392 Law on Property,393 and Law on Privatization394, which have become the backbone of the Russian foreign investment regime in structuring their investments. Other republics of the former Union, however, need much greater legislative reform. Soviet jurisprudence, although influential to the new republican laws, is bound to wither away in a matter of years once the transitional period for the republican legal structure is over and the C.I.S. republics' legal systems become firmly entrenched in the principles of free market economics and open societies.

b. Status in the Russian Economy

Generally, an enterprise with foreign investment may conduct any business activity in accordance with the "business purposes" enumer-
ated in its charter, except as prohibited by Russian law. For example, all banking, insurance, and securities brokerage activities require licensing by the Russian Central Bank or other regulatory bodies. The R.S.F.S.R. Council of Ministers may determine additional activities of enterprises with foreign investment that may be subject to licensing. The Russian Company Law also lists certain business activities in which stock associations, with or without foreign investment, may not engage altogether. Thus, for all practical purposes, an enterprise with foreign investment or a joint venture company engaging in most industrial, trade, and service activities, is not treated differently from a domestic company with regard to its legal status in doing business in Russia.

c. Supplies

Joint ventures with foreign partners and other foreign-owned ventures no longer enjoy any special benefits with respect to the provision and sourcing of supplies from state ministries and enterprises. All supplies must be contractually procured from domestic

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395 Russian Foreign Investment Law, *supra* note 158, art. 20. This provision essentially allows the Russian government to enact protectionist legislation favoring its domestic industry at the expense of foreign investors. Bilateral investment treaties, however, typically impose limits on such restrictions, and the law recognizes all international obligations of the Russian Federation with respect to the protection of foreign investors' rights. See *id.* art. 6; *infra* note 557. For instance, the U.S.-Russia Investment Treaty provides that the Russian government may impose restrictions on foreign investment only in certain specified industries and only to a certain extent. See U.S.-Russia Investment Treaty, *RUSSIA & COMMONWEALTH BUS. L. REP.*, Aug. 10, 1992, art. 2, *available in* LEXIS, Nexis Library, RCBLR File.


397 Russian Foreign Investment Law, *supra* note 222, art. 20.

398 See Russian Company Law, *supra* note 252, art. 2. Article 2 of the Russian Company Law provides that activities of stock associations in the defense, mining of precious and rare metals, minerals, raw materials, forestry, and fur trade sectors may only be conducted with the permission of the R.S.F.S.R. Council of Ministers. *Id.*

399 In the past, integration of joint ventures with western partners into the Soviet economy and gaining access to supplies and raw materials largely depended upon access to the Soviet bureaucracy which wielded absolute control over the centrally controlled distribution system. See Surrey & Lechtman, *New Soviet Joint Venture Law: A Political Curiosity or a Real Investment Opportunity?*, *PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1988* 6–1, 6–9 (1989) (source on file with the authors). Those joint ventures that were successful in obtaining special benefits granted on a case-by-case basis by the Soviet industrial ministries could improve their otherwise poor chances for regular and reliable supplies of raw materials and parts provided as part of the infamously inefficient central planning distribution system. See Felker, *supra* note 10, at 224.
or foreign sources, and the government plays little role in the allocation and distribution of raw materials, parts, and other supplies. Joint enterprises may resort to countertrade with the appropriate permissions from the relevant republican Ministry of Foreign Trade. It must be emphasized, however, that in the new post-Soviet environment, the economic decentralization reforms have not yet achieved the objective of facilitating vertical integration of Russian industrial entities. Instead of easing the task of procuring essential materials for the manufacturing needs of enterprises with foreign investment, the reforms appear to have compounded it. Consequently, dealing with the problem of misallocated resources, shortages of raw materials, and diversion of goods to black markets frequently requires foreign-owned Russian companies to look elsewhere for supplies—ordinarily having to purchase and import them into Russia from the West for convertible currency.

d. Sales

Domestic distribution in Russian markets of products and services of an enterprise with foreign investment may be accomplished on a contractual basis in Russian currency or, with certain restrictions, foreign currency. Essentially, all central planning and control features of the Russian Republic's economy are now abolished for most domestic and all joint venture companies and other enterprises with foreign investment. Thus, joint venture and wholly-owned foreign

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401 While the Russian Federation abolished the requirement of licensing so-called "intermediary activity," certain barter and countertrade transactions in other C.I.S. republics are still subjected to licensing requirements.
402 See Felker, supra note 10, at 224.
403 See Russian Foreign Investment Law, supra note 158, art. 22.
404 Id. at 5.; see also Decree on the Freedom of Trade, Feb. 1, 1992; Decree on Measures to Liberalize Prices, Dec. 6, 1991 (source on file with the authors); Decree on Measures to Liberalize Prices, Dec. 16, 1991 (source on file with the authors); see generally Stephan, supra note 159, at 48–59. Although as of 1991, 80 percent of production in the Soviet economy remained under central planning, due to the radical measures hastily implemented by the Russian government throughout 1992 to restructure domestic economic relations, central planning to a large extent ceased to be the pervasive feature of the state administrative control over economic matters. See Stephan, supra note 159, at 97. As privatization proceeds, gradually diminishing the state ownership and control over the industry, agriculture, and trade, and as state ministries relinquish administrative responsibility over those few state-owned enterprises remaining, foreign investors are unlikely to be affected significantly by the remnants of the central planning policies exercised by the state.
companies are free to sell their goods and services directly to the public or through Russian wholesalers and retailers.

The principal benefit of the economic decentralization for foreign investors is that the Russian enterprises they control or with whom they contract are no longer subject to general price controls. Until 1991, the Soviet central planning authorities utilized a comprehensive system of administrative regulations that fixed prices from production to retail levels. Even though enterprises with foreign investment had been free from price controls due to the express provision of the Russian Foreign Investment Law, and joint enterprises under the Soviet Joint Venture Law had been similarly exempted from Soviet price controls, administratively set prices tended to interfere with the conduct of business operations because they distorted market information and inhibited the formation of organized markets. The Russian government has removed most of the price controls and, for the most part, has allowed market forces to regulate the price formation for most industrial and consumer goods. State imposed prices for goods and services priced in rubles no longer apply to the products and services of private companies, including those produced by joint venture companies.

e. Export-Import Operations

Most enterprises with foreign investment have the same foreign trade rights and privileges as Russian enterprises. Under the Russian Foreign Investment law, wholly-owned subsidiaries of foreign companies and joint enterprises with more than 30 percent foreign ownership—15 percent under Soviet law—may export their own production without obtaining an export license. These entities may also import goods for their own needs without foreign trade

405 See Margie Lindsay, *International Business in Gorbachev’s Soviet Union* 102–03 (1989); Zwass, *Monetary Cooperation Between East and West* 4, 16 (1975). In 1991, Soviet law still imposed certain price controls on various goods considered vital to national economic recovery.

406 Russian Foreign Investment Law, *supra* note 158, art. 22.


408 Felker, *supra* note 10, at 228.

409 The legal foundation for the movement to have pricing freed from government regulation in Russia, which resulted in many prices being decontrolled and many price subsidies eliminated, can be found in several of the first of Yeltsin’s decrees following the independence of the Russian Federation. See Decree on Measures to Liberalize Prices, Dec. 6, 1991; Decree on Measures to Liberalize Prices, Dec. 1991.

410 Russian Foreign Investment Law, *supra* note 158, art. 25.
licenses.\footnote{Id.} Otherwise, an export or import license may be required, although the Russian legislation on foreign trade has reduced the list of goods and services subject to licenses and quotas.\footnote{See Decree No. 90 on Licensing and Imposing Quotes for Exported and Imported Goods in the Territory of the Russian Federation, Dec. 31, 1991 (source on file with the authors); Decree on Introduction of Export Tariffs on Certain Goods Exported from the Territory of the Russian Federation, Dec. 31, 1991 (source on file with the authors); see generally Youry Petchenkine, New Foreign Trade Procedures, Licenses and Quotas, East/West Exec. Guide, Feb. 1992, at 25–27 (source on file with the authors).}

Until 1992, the Soviet export/import licensing regime for foreign trade prevailed, requiring registration with the U.S.S.R. Ministry for Foreign Economic Relations and requiring licenses for certain goods, commodities, and services.\footnote{See Decree of the U.S.S.R. Council of Ministers for Regulation of Foreign Economic Activities, S.P. S.S.S.R., Mar. 7, 1989, Decree No. 203, \textit{translated in HOBER, supra} note 1, app. 22 [hereinafter Decree on Measures for Foreign Economic Activities]; see generally Stephan, \textit{supra} note 139, at 90–91.} Although most Soviet entities were given the right to engage in foreign trade transactions, the export/import regime was complicated and cumbersome, requiring Soviet entities other than joint ventures with foreign participants to obtain special registration.\footnote{See Decree of the U.S.S.R. Council of Ministers on the Further Development of Foreign Economic Activities of State, Cooperative and Other Public Enterprises, Associations, and Organizations, art. 2, S.P. S.S.S.R., Dec. 2, 1988, \textit{translated in HOBER, supra} note 1, app. 5; Decree on Measures for Regulation of Foreign Economic Activities, \textit{supra} note 413, art. 2; Regulations for Licensing of Foreign Economic Operations in the U.S.S.R. of March 20, 1989, \textit{translated in USSR Legal Materials} (source on file with the authors).} By late 1991, the Russian Ministry for Foreign Trade assumed the export/import licensing responsibility and generally liberalized the licensing regime.\footnote{See Decree of the President of the Russian Federation on the Liberalization of Foreign Trade Activity, Nov. 30, 1991, \textit{translated in HOBER, supra} note 1, at app. 57 [hereinafter Liberalization Decree]; Decree No. 90 on Licensing and Imposing Quotes for Exported and Imported Goods in the Territory of the Russian Federation, Dec. 31, 1991 (source on file with the authors); Decree on the Basic Principles for Effectuating Foreign Economic Activities on the Territory of the R.S.F.S.R., S.D. R.S.F.S.R., July 14, 1990, \textit{translated in W.E. BUTLER, BASIC DOCUMENTS OF THE RUSSIAN FEDERATION} 249 (1991).} In particular, foreign trade registration was no longer required for Russian enterprises engaging in export/import operations,\footnote{Foreign trade registration was not required unless so-called "strategic" raw materials, technology, or equipment are being exported, in which case registration with the Ministry of External Economic Relations is necessary and a special licensing and quota system must be followed. See Liberalization Decree, \textit{supra} note 415, art. 2; see also Mikhail Berger, \textit{Freedom of Foreign Trade Will Come Together with Free Prices}, \textit{Russian Press Digest}, Jan. 2, 1992, \textit{available in LEXIS, World Library, SPD File}. Foreign trade licenses, formerly required of any entity} and no special permission was required for intermediary (brokerage) activities.\footnote{See Decree on Measures for Regulation of Foreign Economic Activities, \textit{supra} note 413, art. 2; see also Mikhail Berger, \textit{Freedom of Foreign Trade Will Come Together with Free Prices}, \textit{Russian Press Digest}, Jan. 2, 1992, \textit{available in LEXIS, World Library, SPD File}. Foreign trade licenses, formerly required of any entity}
Russian laws now exclusively govern all foreign trade barter operations.\textsuperscript{418} Export and import licenses are still required for certain products and commodities, but the Russian government has issued new lists of products and commodities which should be subject to more liberal licensing provisions, quotas, or prohibitions.\textsuperscript{419} New Russian laws also eliminated foreign trade organizations, which had previously completely monopolized Soviet foreign trade by acting as official middlemen between producers and purchasers.\textsuperscript{420} In addition, the Russian government presently envisages a competitive or auctioned sale of export licenses.\textsuperscript{421}

With respect to certain raw materials and goods which have traditionally earned the Soviet Union highly needed foreign exchange, however, the licensing requirements applicable to exporting procedures have been strengthened with the view of retaining state monopoly over the foreign trade in energy and natural resources. Oil and oil products and derivatives, along with other fuels and exportable commodities, are subject to quotas and high export tariffs.\textsuperscript{422} New controls for so-called "strategic" items have been introduced to monitor and regulate the export of defense-oriented items.\textsuperscript{423} Organized under Soviet law in order to conduct export/import operations, are no longer required.

\textsuperscript{418} Liberalization Decree, \textit{supra} note 415, art. 2.

\textsuperscript{419} Such new lists of products subject to licenses and quotas have been issued and are continually being updated. \textit{See Russian Export and Import Licensing Regulations}, BBC Summary of World Broadcasts and Monitoring Reports, Jan. 17, 1992, \textit{available in} LEXIS, Nexis Library, BBCSWB File; \textit{Russia Intends to Reduce Regulatory Restraints on Trade}, 9 Int'l Trade Rep. (BNA) No. 9, at 357 (1992), \textit{available in} LEXIS, BNA Library, Intrad File.

\textsuperscript{420} \textit{See Russia Eliminates Foreign Trade Organizations As Official Middlemen}, 9 Int'l Trade Rep. (BNA) No. 8, at 299 (Feb. 19, 1992), \textit{available in} LEXIS, BNA Library, Intrad File.

\textsuperscript{421} \textit{See Liberalization Decree, \textit{supra} note 415, art. 2.}


\textsuperscript{423} \textit{See Presidential Decree No. 388 on Measures to Create a System of Export Control in Russia, Apr. 11, 1992} (source on file with the authors); Decree of the Russian Government No. 469, July 5, 1992 (source on file with the authors). It should be noted that the lists of commodities under Decree No. 469 is quite long and includes many general categories of raw materials, natural resources, and products directly unrelated to defense production; export licenses for these items must be obtained from the Russian Commission on Export Control. These "dual-use" articles include pharmaceuticals, non-ferrous metals, and plastics. Export of defense-related materials is specifically addressed in the Presidential Decree No. 312 of March 27, 1992 on Control of the Export of Nuclear materials, Equipment and Technologies (source on file with the authors). \textit{See also} Hartnett, \textit{New Controls for Strategic Items}, East/West Exec. Guide, Oct. 1992, at 27 (source on file with the authors).
Strategic items are not limited to military hardware and extend to many raw materials and energy products. Joint ventures and other enterprises with foreign investment proposing to engage in export transactions involving strategic commodities should apply to the Ministry of External Economic Relations which auctions off quotas and grants export licenses.

Under Russian law, all property imported into Russia as a capital contribution to a charter fund is exempt from customs duties and import taxes. If the enterprise entails foreign investment and the contribution is to be used in the enterprise’s manufacturing operations. Other items purchased from foreign suppliers and contractors can be imported into Russia subject to payment of applicable import duties implemented pursuant to the new Russian regulations. The Russian Customs Committee is drafting a comprehen-

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424 Strategic raw materials include crude oil, petroleum products, natural gas, electricity, coal, timber and lumber, nonferrous metals, rolled iron and steel, mineral fertilizers, grain, furs, and inorganic acids. See Regulations of the Ministry of External Economic Relations on the Registration of Enterprises and Organizations Which Have the Right to Export Strategically Important Raw Materials of July 1992 (source on file with the authors); see also Youry Petchenkine, Regulation of External Economic Activities, East/West Exec. Guide, Nov. 1992, at 27–29 (source on file with the authors).

425 For the most recent overview of the export licensing process, see Guzel Anulova, Russia: Export Licensing Procedures Revised, BUSINESS EASTERN EUROPE, Dec. 14, 1992, at 607, available in LEXIS, Europe Library, Bueeur File.

426 Russian Foreign Investment Law, supra note 158, art. 24. Exemption from customs duties and import taxes is only effective, however, if the goods are imported into Russia within the time period stated in the charter of the importing enterprise. See id.; see also Decree on the States Customs Committee of the Russian Federation, Dec. 26, 1991 (source on file with the authors); Decree on Customs Duties on Imported Goods, Jan. 15, 1992 (source on file with the authors); Regulations of the Russian Federation State Customs Committee on Customs Duties on Imported Goods, Jan. 22, 1992 (source on file with the authors).

427 See Temporary Regulations on the Import of Foreign Goods into the Russian Federation, Mar. 4, 1992 (source on file with the author). Reportedly, imports from other C.I.S. republics into Russia will not be dutiable under the provisions of the Transit Agreement signed by nine C.I.S. countries. New Russian provisional import duties became effective July 1, 1992 and are in force until the enactment of the Customs Code and import duty tariff regulations. For most items, the duty is 5 percent, but for certain consumer items, such as electronic appliances, automobiles, and liquors, duties range as high as 25 percent. The tariff schedule is based on the country of origin having most-favored-nation (MFN) status with Russia, and the United States has obtained such status under the Trade Agreement with Russia. Goods exported from the countries lacking the MFN status are subject to import duties double the normal rates. Imports of certain commodities, including agricultural products and food from developing countries, are exempted from import duties. In addition, certain goods are completely exempt from customs duties regardless of their country of origin. See Russia Increases Customs Burden on Imports, BUSINESS EASTERN EUROPE, Aug. 24, 1992, at 414, available in LEXIS, Europe Library, Bueeur File. The above import regulations were revised once again in August 1992 when new customs regulations were introduced as of September pursuant to the Presidential
sive customs code and tariffs, and the U.S.S.R. Customs Tariff has been repealed. As the other republics establish their own customs departments, their rules and regulations will supersede the old all-Union customs code, and will probably incorporate the provisions of the Russian customs regulations.

f. Banking and Credit

By 1991, the Russian banking system, as well as the banking systems of other republics, was theoretically distinct and separate from the central Soviet banking system. The U.S.S.R. Law on Banks and Banking Activities and its Russian counterpart, the Law on Banks and Banking Activities in the R.S.F.S.R., governed most banking matters. In practice, though, the Russian and all-Union Soviet fiscal affairs were closely intertwined. After bad loan management and illiquidity forced Soviet state-owned banks such as Vnesheconombank to close their doors, Russian President Boris Yeltsin took responsibility for the all-Union budget and banking...

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system. Vnesheconombank and its foreign subsidiaries continued to function in a limited manner and continued to service their old loans to foreign investors in the U.S.S.R. until 1992, at which time they were reorganized.

The question of establishing a centralized legal framework for monetary matters in the Commonwealth, however, is now entirely moot until some consensus on a system of central banks is reached between the principal republics. The Russian Federation has already taken the first steps in that direction by reorganizing the former all-Union central bank, Gosbank, through consolidation with the Russian Central Bank. Russian banking laws and regulations now exclusively govern banking transactions of companies organized under Russian law or those operating in Russia, including enterprises with foreign investment, the foreign bank branches’ creation and operations, and joint venture banking organizations.

Shortage of outside financing for Russian and other C.I.S. ventures has plagued western investors since the inception of direct foreign investment in the former U.S.S.R. in 1987. In light of the instability inherent in the Soviet foreign investment regime and the troubled Soviet—and now Russian—economy, western lenders have been cautious. In the past, western commercial banks extended credit to joint ventures in the former U.S.S.R. on the strength of sovereign guarantees, but as the Soviet government’s credit rating sunk in the last years of its existence, sovereign guaranty lending

434 See Peter Pringle, Russia Takes Over Soviet Banks to Shore Up Rouble, THE INDEPENDENT, Nov. 23, 1991, at 14, available in LEXIS, Nexis Library, Omni File. The Soviet attempt to establish a western-style banking system met with trouble before the disintegration of the Union government for a number of profound causes inherent in the structure of the Soviet economy in transition as it existed in 1991 and continued to plague the Russian Federation as it has inherited the collapsed Soviet economy. See Brady, In the Red, EUROMONEY, July 1991, at 19–22 (source on file with the authors).


436 Decree on the U.S.S.R. Bank for Foreign Economic Activity, Jan. 13, 1992 (source on file with the authors); Decree on the Financial Credit Guarantee of Economic Reform and on the Reorganization of the Russian Banking System, Nov. 22, 1991 (source on file with the authors); Presidential Instruction No. 27 on Regulation of the Activity of Financial Organs and Banks in the Territory of the R.S.F.S.R. (source on file with the authors); see Melanie L. Fein, The Emerging Banking System: An Overview, 3 East/West Exec. Guide, No. 1, at 24 (Jan. 1993) (source on file with the authors).

437 See Frenkel, supra note 432, at 7–8.


439 Id.
transactions became almost non-existent. The difficulty of financing the initial investment in Russia and other former Soviet republics, and in particular obtaining so-called "seed money" or "venture capital," is compounded by the poor performance of the Russian economy, which suffers from hyperinflation and is burdened by the inconvertibility of the Soviet ruble. Project financing is also difficult to arrange for established and profitably operating ventures because the Russian system of secured lending is so poorly developed. Finally, even trade finance is suffering because of the unpredictable political and economic environment and the ever-increasing frequency of defaults of both private and public Russian entities. Due to the unstable condition of the Russian economy, often the only alternative to internal financing is financing arranged through national and international development banks and export credit government agencies.

Although enterprises with foreign investment and their foreign participants rarely rely on Russian banks for raising funds in foreign currency, providing credit facility in convertible currency, or for performing international documentary transactions, they often use services of Russian banks for domestic banking transactions. Presently, over 1,600 private commercial banks are operating in Russia.


441 See Brady, supra note 440, at 24-26. For an excellent discussion of international lending principles as they apply to the newly independent states of the former U.S.S.R., see McPherson, A Guide to the Banking for the Commonwealth, Business in the Ex-USSR, Feb. 1992, at 66-67 (source on file with the authors).

442 See generally Meriam & Schwartz, Project Finance in Russia, Project Finance Supplement to Corporate Finance, July 1992, at 27-33 (source on file with the authors).


444 See Weisenfeld, Specialized Sources of Financing and Political Risk Insurance for Trade and Investment Abroad, in ALI-ABA Resource Materials: International Trade for the Nonspecialist (3d ed. 1989) (source on file with the authors); Holland, Techniques for Financing Projects and Investments in the Soviet Union, in ABA Section of International Law and Practice, Apr. 27, 1990 (source on file with the authors).

445 As Russian entities, enterprises with foreign investment, particularly those with extensive internal Russian operations, need the services of Russian banking organizations for executing purely domestic transactions with other Russian entities. The environment of Russian banking
and about 1,000 more operate in other former Soviet republics which complement the state-owned commercial banks, most of which offer some rudimentary banking services. For complex financial transactions, however, the Russian enterprise with foreign investment must turn to the branches and subsidiaries of western banks in Russia. It is unclear whether the old Joint Venture Law’s borrowing restriction requiring foreign banks to obtain Vneshekonombank’s consent to borrow is still in effect. It is expected that foreign investors and their investment vehicles, such as joint ventures, will be free to secure financing in convertible currency to the extent it may be available. Foreign investors may obtain this currency from Russian and other republican banks, state-owned banks, privately-held commercial banks, or foreign banks. Loans in both rubles and foreign currencies may now be obtained from the variety of newly licensed Russian credit institutions, including private commercial banks duly authorized by the republican central banks to handle foreign currencies.

g. Currency Regime

The importance of a currency regime that is attractive to foreign investors can be seen from two principal perspectives: (i) the freedom to transact business operations in both local and foreign currencies in the host country’s domestic economy and foreign trade, and (ii) the freedom to repatriate the profits earned in the host country to the country of the foreign investor’s domicile and to reinvest them in the host country. Many countries, because of their today, however, leaves much to be desired even in the sphere of simple financial operations, such as settlements in domestic currency. See Louis Uchitelle, The Roulette of Russian Banking, N.Y. TIMES, Feb. 29, 1992, at 37.

446 See Melanie L. Fein, Emerging Russian Banking System is Unique; But Changes To Law May Adopt Western Standards, RUSSIA & COMMONWEALTH BUS. L. REP., Jan. 1, 1993, at 3, available in LEXIS, Nexis Library, RCBLR File. The Russian banking system lacks many conventional banking services taken for granted in western countries, such as checking accounts, credit cards, and bank transfers, and what it does offer in the way of financial services is usually grossly inefficient, even at privately-held commercial banks. See S. Jan Vukovich, Comment, East-West Joint Ventures: Lessons from Past Soviet-Western Joint Ventures and Projections for Future Deals with the C.I.S., 20 DENV. J. INT’L & POL’Y 439, 465 (1992) (source on file with the authors).


448 See Soviet Joint Venture Law, supra note 351, art. 27.

449 See Fein, supra note 436, at 25.
foreign exchange controls and other currency regulation legislation restricting certain currency transactions, do not permit foreign investors absolute freedom to engage in those investment activities. This is certainly the case in the Russian Federation, where a number of limitations on internal and external currency transactions exist. In addition, the inconvertibility of the Russian ruble has traditionally presented a major obstacle to transferring profits and dividends abroad.

Although not free from ambiguity, the legal and economic developments in the Russian Republic in 1992 indicate that the Russian currency regulation regime is being substantially liberalized. In contrast to the restrictive former all-Union currency regime, many of the former Soviet foreign currency ownership and transactional restrictions will be lifted. The basis for such assumptions could be found in the draft of the Russian Law on Currency Regulation as prepared by the Russian parliament and in several decrees issued by President Yeltsin. In particular, several different exchange rates for the ruble, which had been set by Vnesheconombank under Soviet law, are consolidated in the Russian Republic into a single exchange rate determined by the R.S.F.S.R. Central Bank on the basis of the prevailing currency market conditions. This change reflects the Russian Republic’s determination to proceed with speedy economic reforms toward a convertible Russian currency.

Certain restrictions on foreign currency operations, however, are likely to be retained. For example, the Russian Republic will probably retain the restrictions recently announced by the Russian gov-


454 See *Decree on Liberalization of External Economic Activity in the R.S.F.S.R. Territory*, Nov. 15, 1991, art. 8 [hereinafter Nov. 15 Decree]. Although this prohibition on domestic transactions in foreign currency was supposed to go into effect on July 1, 1992, certain foreign currency transactions within Russia were still reportedly tolerated and not expressly prohibited in Russia as of late 1992. Eventually, though, the use of foreign currency in internal transactions in Russia should subside as the foreign exchange markets become self-sufficient and the value of the ruble against hard currencies stabilizes. See Youry Petchenkine, *New Currency Regulations*, East/West Exec. Guide, Sept. 1992, at 25–27 (source on file with the authors).
ernment concerning internal payment and settlement in foreign currencies to combat the “dollarization” of the Russian economy.\textsuperscript{455} This is seen as an essential measure to protect the ruble against devaluation and to move toward internal convertibility of the ruble. There are some exceptions to prohibition on payment in foreign currency in domestic transactions, such as payment of wages and salaries within the Russian republic and duly licensed retail trade.\textsuperscript{456} Although it is unclear at this time, the repatriation of foreign investors’ profits should not be affected by this measure directly, especially if access to foreign currency exchange is improved.\textsuperscript{457}

Although sales within the former Soviet Union generally may still be made for both rubles and foreign currency, the regulations first issued under the U.S.S.R. Law on Currency Regulation\textsuperscript{458} substantially curtailed the internal circulation of foreign currency.\textsuperscript{459} Russian regulation of internal currency transactions that began in 1991, however, is undergoing broad liberalization vis-à-vis the previous Soviet currency regime.\textsuperscript{460} Russian citizens and legal entities are no longer restricted in their purchases and sales of foreign currencies

\textsuperscript{455} See Yeltsin Bans Hard Currency Transactions, East/West Business Report, Jan. 31, 1992, at 25, 26 (source on file with the authors).

\textsuperscript{456} Id.

\textsuperscript{457} For the analysis of foreign investors’ right to remit abroad profits, dividends, and other payments associated with doing business in Russia, see discussion infra part I.


\textsuperscript{459} See U.S.S.R. Law on Currency Regulation, supra note 458.

through authorized banks and are permitted to earn, hold, and dispose of foreign currency lawfully obtained in Russia or abroad.\textsuperscript{461} To protect the value of the ruble during its transformation toward full convertibility on international capital markets, however, most internal settlements and payments, except salaries, will only be paid in domestic currency.\textsuperscript{462} Foreign trade transactions may still be carried out in any foreign currency.\textsuperscript{463} The exchange rates for foreign currencies are no longer arbitrarily fixed by the Gosbank, now absorbed into the Russian Central Bank. Rather, they are determined by supply and demand factors prevailing on the Russian inter-bank currency market, which includes auctions, stock exchanges, and commercial banks.\textsuperscript{464} The Central Bank of Russia is now in charge of indirectly regulating the exchange rates through various market and regulatory mechanisms.\textsuperscript{465}

Under the Russian Foreign Investment Law, most of the revenue in hard currency from export sales may be retained by the enterprise with foreign investment.\textsuperscript{466} In general, under the literal reading of the Russian Foreign Investment Law, enterprises with at least 30 percent foreign participation were not subject to the mandatory buy-back of convertible currency provisions of the former Soviet law.\textsuperscript{467} These buy-back provisions substantially depleted the hard currency reserves of domestic enterprises and frustrated the efforts of enterprises with foreign investment to transfer profits and dividends abroad. A number of new Russian currency enactments now contain provisions for deductions to the Russian convertible currency fund to be made by all Russian enterprises and organiza-

\textsuperscript{461} Liberalization Decree, \textit{supra} note 415, art. 5.

\textsuperscript{462} \textit{See} id. art. 8; \textit{see also} Shepherd, \textit{Russian Government Bows to Reality, OKs Foreign Currency Wages}, Associated Press, July 14, 1992 (source on file with the authors); Gerald Nadler, \textit{Yeltsin Looks To Stop Russia's 'Dollarization'}, \textit{WASH. TIMES}, Oct. 7, 1992, at A7.

\textsuperscript{463} \textit{See New Currency Law, Other Legal Acts Regulate Use of Foreign Currency in Russia, RUSSIA & COMMONWEALTH BUS. L. REP., Nov. 30, 1992, at 7, available in LEXIS, Nexis Library, RCBLR File.}

\textsuperscript{464} Nov. 15 Decree, \textit{supra} note 454, art. 5; \textit{see also Single Rouble Takes Effect}, Doing Business in Eastern Europe, July 21, 1992, at 137 (source on file with the authors).


\textsuperscript{466} \textit{See Russian Foreign Investment Law, supra} note 158, art. 25. But see \textit{infra} note 470 and accompanying text for latest developments in the exemption of an enterprise with foreign investment from mandatory exchange of foreign currency earned through its export sales.

\textsuperscript{467} \textit{See Article 15(2) of the U.S.S.R. Currency Regulation Law. Indeed, Soviet currency laws and regulations, which governed foreign currency transactions in Russia until late 1992, were consistent with this provision of the Russian Foreign Investment Law.}
tions.468 No exemption for enterprises with foreign investment are provided in these decrees, in contravention of the Russian Foreign Investment Law.469 New Russian currency enactments470 also effectively removed exemptions for foreign investors from the mandatory buy-back of convertible currency, which directly contradicted provisions of the Russian Foreign Investment Law.471 Under the new regulations, enterprises with foreign investment, either partially or wholly foreign-owned, are required to sell 50 percent of their convertible currency revenue to the state for rubles.472 The exchange

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468 See Decree No. 335 of the President of the Russian Federation of December 30, 1991 Concerning the Formation of the Republican Currency Reserve of the Russian Federation in 1992. The Decree provides for a compulsory sale of 40 percent of receipts in hard currency to the Republican Currency Reserve at the special commercial exchange rate (50 percent of auction rate). See id. at 1. Further, the decree provides for the sale of an additional 10 percent of hard currency receipts to the Central Bank of the Russian Federation at the market exchange rate. See id. at 5. The latter provision apparently applies to foreign owned entities as well as those owned exclusively by Russian citizens. Id. Furthermore, January 22, 1992 Instruction of the Russian Central Bank established an exemption from the mandatory 40 percent currency sale for foreign owned companies and joint ventures with greater than 30 percent foreign ownership. No such exemption exists from the 10 percent compulsory sale applicable to all entities registered in Russia. The Russian government has also created a new agency to deal specifically with the problems of foreign currency shortage, Russian balance of payments, credit guarantees, settlement of foreign debt, and foreign investment. See Decree on the Establishment of the Currency and Economic Council of the Russian Federation, Nov. 28, 1991. One of the Council's primary responsibilities, however, is to distribute and control the funds in convertible currencies received by the Russian currency reserve fund. See On the Currency and Economic Council of the Russian Federation, SOVDATA Dialine-BizEkon News, Dec. 10, 1991, available in LEXIS, Nexis Library, Omni File.


470 Decree No. 629 on a Partial Change in the Policy on Mandatory Sale of Part of Foreign Currency Revenue and Imposition of Export Duties, June 14, 1992 (source on file with the authors); Instruction No. 5 of the Central Bank of Russia on Mandatory Sales of Convertible Currency Export Revenue.

471 See, e.g., Russian Foreign Investment Law, supra note 158, at 26.

472 Similar to the former Soviet Currency Regulation Law, the Russian law originally entitled enterprises with foreign investment to certain exemptions. See Russian Regulations, supra note 465, at 3; Russian Central Bank Modifies Currency Regulations to Expand Exemptions, Russia & Commonwealth Bus. L. Rep., Apr. 20, 1992, at 5, available in LEXIS, Nexis Library, RCBLR File. The Russian law originally changed the amounts to be contributed to the fund: foreign investment enterprises must sell 40 percent of the gross receipts from the export sales to the fund at the commercial exchange rate, and must sell 10 percent of the gross receipts in convertible currency to the Russian Central Bank at the commercial exchange rate. Id.; see Hard Currency Regulations Remove Exemptions for Foreign Investors, Russia & Commonwealth Bus. L. Rep., Aug. 24, 1992, at 3, available in LEXIS, Nexis Library, RCBLR File [hereinafter Hard Currency].
rate to be applied to this mandatory buy-back, however, will be the market rate, rather than the previous special commercial rate. The Russian Currency fund will be instrumental in paying an estimated $80 billion Soviet foreign debt, 80 percent of which the Russian Republic assumed.

By the end of 1992, Russian currency law had undergone additional changes and refinements. First, a new law on currency regulation was adopted, replacing the Soviet Law on Currency Regulation and Control, although the Central Bank of Russia has not yet issued regulations implementing its broad provisions. As noted, the artificially low commercial exchange rate has been eliminated, various exchange rates were consolidated into a single market-determined rate, and the ruble has been allowed to float. While in theory foreign investors may exchange all of their ruble revenue into foreign currency in domestic Russian currency markets for repatriation, in reality, demand for convertible currency far exceeds its supply. This imbalance will continue to obstruct the repatriation of funds until the ruble becomes stronger.

The Russian Foreign Investment Law also provides a special ad-

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473 *Hard Currency*, supra note 472.
475 At numerous occasions, the Russian government made announcements of its intention to introduce special exchange rates, such as the one for privatization buyouts by foreign investors, which has never been adopted. Some analysts truly wonder whether this new single market exchange rate will last. Although the various exchange rates established by the Gosbank for different transactions are no longer valid in Russia and are consolidated into one unified exchange rate, there is still a possibility that for certain investment transactions and compulsory sales of convertible currency foreign investors will be forced to employ the so-called commercial rate of exchange. See *supra* notes 463-465 and accompanying text; *Higher Foreign Investment Rate Considered*, Russia & Commonwealth Bus. L. Rep., May 15, 1992, available in LEXIS, Nexis Library, RCBLR File. Furthermore, officials of the Central Bank of Russia under Chairman Geraschenko intimated that the Central Bank may reintroduce a fixed-rate exchange system for the ruble sometime in 1993, which would not be pegged directly to the results of the bi-weekly currency exchange operations at the Moscow Interbank Exchange, as is done now. See *New Exchange Regime for Rouble*, *Business Eastern Europe*, Dec. 21, 1992, at 636, available in LEXIS, Europe Library, Bueeur File.
vantage for enterprises with foreign investment turning out "import substituting products of high importance to the national economy."478 Such enterprises need not acquire foreign currency at the market (auction) rates—which tends to make purchases of foreign currency for rubles considerably more costly.479 Instead, these enterprises may use a "mutually coordinated rate" for the purpose of transferring ruble profits abroad, drawing on the R.S.F.S.R. Currency Fund.480 While the major policies behind the Russian currency regime are likely to be enforced in other republics in order to pursue the stabilization of the ruble, the terms and conditions for the mandatory buy-back regime, the foreign currency auctions, and the interbank markets still vary.481 Moreover, foreign investors may now participate in the Russian currency market to exchange their profits and dividends from rubles to convertible currencies.482 Russian legal entities may convert rubles into foreign currencies only for the purpose of importing goods and services.483 The market exchange rate of the ruble recently plummeted to nearly R700 per $1.484 The Russian Law on Currency Regulation also regulates currency transactions denominated in rubles.485

h. Taxation

Taxation of foreign investors' business operations, profits, and dividends is undoubtedly one of the primary criteria in assessing the attractiveness of the host country. The legal regime regulating taxation in Russia recently underwent major changes and remains one of the most volatile areas of Russian law. At first glance, foreign investors fared no better under the new Russian regime than they

478 See Russian Foreign Investment Law, supra note 158, art. 11.
480 Id. The author is not aware of any specific instance where foreign investors were in fact allowed to utilize this special foreign exchange arrangement and in light of the new currency policy of the Russian government reflected in the consolidation of multiple exchange rates into a single, market driven exchange rate for the rouble, it is probably no longer available. See generally Foreign Exchange Rules in the Former USSR, BUSINESS EASTERN EUROPE, July 20, 1992, at 350–51, available in LEXIS, Europe Library, Bueur File.
484 Id.
485 Id.
did under the previous Soviet regime. This view, however, although justified from the point of view of various tax exemptions and holidays previously granted to the foreign investor in the heyday of the Soviet perestroika, would be fully misleading and overly simplistic in view of the complexity of the present Russian tax regime. This is especially true, when one considers the transnational implications of deriving Russian-source income under the applicable double-taxation treaties.

Until 1992, taxation of enterprises with foreign investments in the Russian Federation was made on the basis of the Law on Application of the U.S.S.R. Law on Taxes on Enterprises, Associations, and Organizations (Russian 1991 Enterprise Tax Law), which largely incorporated the U.S.S.R. Law on the Taxation of Enterprises, Associations, and Organizations (Soviet Enterprise Tax Law), with the amended tax rate schedules. In other republics of the Commonwealth, either their own tax laws are in effect or the all-Union tax law still prevails.

With respect to all Russian legal entities, including enterprises

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486 For the discussion of the Soviet tax holidays and incentives, which have been repealed from the Russian tax law, see E.H. Lieberman et al., *New Soviet Tax Laws Attract Foreign Investors*, J. Int’l. Taxation 278, 281 (Jan./Feb. 1991).


491 See Newcity, *supra* note 488, at 3.
with foreign capital or joint venture companies, the Russian 1991 Enterprise Tax Law imposed six different income-based and non-income based taxes: (1) profits tax; (2) turnover tax; (3) export/import tax; (4) consumption tax; (5) investment income tax; and (6) entertainment tax.492 These were largely similar to and based on the Soviet all-Union taxes previously imposed by the central tax authorities.493

Under the Russian 1991 Enterprise Tax Law, joint venture companies were still entitled to special tax benefits.494 For example, if the foreign ownership of a joint venture exceeded 30 percent, that enterprise was eligible for a lower profits tax rate: 30 percent instead of the 45 percent applicable to domestic enterprises.495 Under the Russian 1991 Enterprise Tax Law, the applicable tax rate was 35 percent for domestic enterprises, 32 percent for joint stock associations, 25 percent for wholly owned foreign stock associations, and 25 percent for joint ventures with more than 30 percent foreign ownership.496 The joint ventures above the 30 percent ownership threshold also qualified for special deductions and loss carryforwards, as well as a two-year tax holiday.497 Both the Soviet and Russian tax laws provided a 15 percent withholding rate on all profits repatriated abroad.498

In order to streamline the tax legislation, the Russian parliament recently adopted a new Russian tax code.499 Three new laws were enacted as part of the new tax code: the Law on Value-Added Tax (establishing a 28 percent tax rate),500 the Law on the Taxation of Profits of Enterprises and Organizations (Russian Profits Tax Law)
and the Law on the Taxation of Incomes of Enterprises (Russian Income Tax Law). The Russian Profits Tax Law went into effect on January 1, 1992, but was supposed to be superseded during 1992 by the Russian Income Tax Law. The change, if effected in 1992, will lower the statutory tax rate, as well as alter the tax base. Until that change takes effect, the effective tax rate on profits of most Russian companies, including enterprises with foreign investment and foreign companies, is 32 percent. Intermediary and trading companies are taxed at the

501 See Law of the Russian Federation On the Tax on Profit of Enterprises and Organizations, No. 2116-1, and implementing decree, Dec. 27, 1991 (source on file with the authors); see also Pekowsky & Hagler, supra note 500, at 94.


503 See Steven J. Leider, Russian Profits Tax Law Emerges As Start of New Tax Regime in Russia, Russia & Commonwealth Bus. L. Rep., Apr. 20, 1992, at 3, available in LEXIS, Nexis Library, RCBLR File. Although the Russian Income Tax Law was supposed to take effect on May 1, as of late 1992, this has not happened, and the Russian Profits Tax Law continues to govern.

504 Under the Russian Profits Tax Law, the tax rate is 32 percent, the tax base consists of the taxpayer’s profits and wages, and other employee costs are deductible; under the Russian Income Tax Law, the tax rate will be 18 percent, the base will consist of the taxpayer’s income and wages, and employee costs will not be deductible. Under the Russian Income Tax Law, taxable income is defined as gross income (income from business operations minus the amount of value added tax and excise tax payable on such operations) less certain expenses, a list of deductions is to be approved by the Russian Supreme Soviet. Certain interest paid on bank loans, property taxes, land taxes, and other miscellaneous taxes may also be deducted. See Mannick, Tax Environment Substantially Changed With New Legislation, East/West Exec. Guide, Feb. 1991, at 24 (source on file with the authors).


506 Id.
45 percent profits rate.\textsuperscript{507} After the transitions to the income tax system, the general tax rate will be set at 18 percent of gross income for most business activities.\textsuperscript{508} Dividend income received by foreign legal entities from their Russian investments will be taxed at 15 percent.\textsuperscript{509} If a foreign company is found to be "doing business" in Russia, whether through direct operations or through a joint venture company, subsidiary, branch, or representative office, its profits may become subject to the current 32 percent tax rate.\textsuperscript{510} Thus, unlike the Soviet Joint Venture Law and early Russian tax legislation,\textsuperscript{511} the new Russian tax laws offer no special tax benefits to joint ventures or other enterprises with foreign investment.\textsuperscript{512}

\textsuperscript{507}Id.

\textsuperscript{508}Gross income is defined in the law as total gains from the sale of goods or services less the value-added tax, property tax, and any applicable excise duties. See id.

\textsuperscript{509}Id.

\textsuperscript{510}"Doing business" is generally defined in international tax law through the concept of a "permanent establishment" as operating in the host country through a permanent office or a local agent. See Jon E. Bischoel & Robert Feinschreiber, Fundamentals of International Taxation 261–62 (1985). Relief from double taxation (that is, taxation by both the host country and by the investor's home country) may be sought by foreign companies operating in the Russian Federation in the bilateral tax treaties which reduce or eliminate the withholding tax rate on dividends and other Russian source income and provide for creditability of certain foreign taxes paid by the local investor. The Russian Federation has concluded such a tax treaty with the United States on June 17, 1992, the Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital (Tax Treaty), which will replace the 1973 U.S.-U.S.S.R. Tax Treaty upon ratification by the U.S. Congress and which closely mirrors the O.E.C.D. Model Treaty. See Tax Treaties: Russia/U.S., World Tax Report, Aug. 1992, available in LEXIS, World Library, WLDTax File. The Tax Treaty provides the definition of a "resident of a Contracting State," which refers to domestic tax law of the host country. See Tax Treaty, supra, art. 4. The Tax Treaty also provides the definition of a "permanent establishment" which employs the conventional formula traditionally utilized by the U.S. Treasury Department in negotiating tax treaties with other countries. See id. art. 5. The Tax Treaty generally reduces the Russian withholding tax on repatriated dividends or profits to 5 percent from the standard 15 percent. See id. art. 10. Interest and royalty income is completely exempt from Russian income tax. See id. art. 11. The Tax Treaty also governs important questions of creditability of Russian income taxes paid by a U.S. investor in the United States and provides some limited relief from double taxation by allowing such U.S. investor to deduct income tax paid in Russia from its U.S. income tax liability. See id. art. 22 and Protocol to the Tax Treaty. For a more comprehensive analysis of the Tax Treaty and its ramifications for the U.S. investor in Russia, see Newcity, supra note 487, at 7.

\textsuperscript{511}Various tax holidays and incentives, such as exemption from profits tax and lower tax rates, were available under the Joint Venture Law and Law on the Procedure for Applying the Law of the U.S.S.R. Concerning Taxes on Enterprises, Associations, and Organizations in the R.S.F.S.R. in 1991, see supra notes 117–19, which have been completely eliminated from the new Russian tax law.

\textsuperscript{512}Joint ventures with foreign capital engaged in the manufacturing activities which were registered prior to January 1, 1992, however, will continue to enjoy the tax benefits accorded joint enterprises under the former Soviet law. See Material Production Joint Ventures in Russia
If the 1992 state budget is approved, the following rates of tax on income of enterprises subject to the Russian law will apply: 18 percent general rate for all types of enterprises (including representative offices of foreign firms); 15 percent rate for enterprises with foreign investment and foreign legal entities with dividend, interest, royalty, and other income from Russian sources; 25 percent rate for enterprises engaged in auditing and consulting activities; 45 percent rate for enterprises engaged in brokerage, trading, and investment services, as well as public entertainment; and 70 percent for auctions, casinos, video rental shops, and gambling operations. As of the end of 1992, nonetheless, Russian tax law has not stabilized and the current rate structure remains unclear.

i. Labor Relations

Labor relations, including hiring/firing, work and leisure regime, and compensation of Russian nationals employed by enterprises with foreign investment are generally regulated by the collective labor agreement and individual employment contracts. Employment agreements, however, are also subject to Russian labor legislation. Under the Russian Foreign Investment Law, terms of such agreements may not provide for lesser protection of the workers than the Russian labor law. Although this appears to allow enterprises with foreign investment to fashion their own compensation...
packages to Russian employees and reward them with salaries, bonuses, and corporate perquisites subject to no legal restrictions in the way state-owned enterprises cannot, disciplining Russian employees is fraught with difficulties.\textsuperscript{518} Employment and termination of Russian nationals, is regulated by the arcane provisions of the R.S.F.S.R. Labor Code\textsuperscript{519} and may present serious difficulties for the employer.\textsuperscript{520} Furthermore, the activity of labor unions and the applicability of collective labor agreements are regulated by the relevant Russian law.\textsuperscript{521}

All enterprises created under Russian law must also make withholdings/payments toward the state social security fund.\textsuperscript{522} In particular, the Russian Law on Employment and Social Protection of Citizens of the R.S.F.S.R. outlines the duties of employers to provide employment on the basis of certain local or regional quotas, to provide training and retraining, to pay the minimum wage, to give advance notice of termination or a layoff, and to pay workers compensation for work-related injuries.\textsuperscript{523} Foreign workers may be employed on such terms as they and the company may agree and are not covered by the Russian social security funds.\textsuperscript{524}

\textbf{j. Acquisition of Existing Russian Enterprises—Securities, Antitrust, and Privatization Regimes}

In addition to founding new Russian enterprises with foreign investment, foreign investors may also be interested in acquiring existing Russian enterprises. An enterprise with foreign investment is one in which the foreign investor has either paid for its ownership interest with foreign currency, or paid in rubles but has more than a 50 percent ownership share.\textsuperscript{525} Foreign investors may acquire a participation share, an ownership interest, shares of stock, and other


\textsuperscript{522} Russian Foreign Investment Law, \textit{supra} note 158, art. 34.

\textsuperscript{523} The Russian law was enacted following the U.S.S.R. Fundamentals of Legislation on Employment of January 15, 1991.

\textsuperscript{524} See Russian Foreign Investment Law, \textit{supra} note 158, art. 34.

\textsuperscript{525} Id. art. 35.
securities of enterprises within the Russian Federation.\textsuperscript{526} Such securities may be purchased either with rubles, earned as profit in the Russian Federation, or foreign currency.\textsuperscript{527} Only the official exchange rate, however, may be utilized for purchases of stock or capital assets with foreign currency.\textsuperscript{528} Acquisitions of securities and assets by foreign entities and Russian enterprises with foreign investment are governed, \textit{inter alia}, by the Russian Law on Currency Regulation\textsuperscript{529} and currency regulations issued by the Russian Ministry of Finance and the Russian Central Bank.\textsuperscript{530} Private security acquisitions are subject to registration with the Russian Ministry of Finance,\textsuperscript{531} whereas public security acquisitions at the Russian stock exchanges are subject to the Russian Regulations on the Issuance and Distribution of Securities and Stock Exchanges.\textsuperscript{532}

The Russian Company Law does not impose any specific transfer restrictions on the stock of open stock associations. For closed stock associations, however, article 7 of the Russian Company Law provides that the majority of shareholders must consent to the transfer unless the company’s charter waives or modifies that requirement contractually. In addition, article 147 of the Russian Company Law contains special anti-trust restrictions on certain stock acquisitions: a market purchase of more than 15 percent of the outstanding shares of a stock association by one legal entity or natural person requires the consent of the Ministry of Finance; and a purchase of a controlling interest (more than 50 percent of the outstanding shares) in a stock association requires the consent of both the Ministry of Finance and the newly established R.S.F.S.R. Committee on Antimonopoly Policy and Support of New Economic Structures. Furthermore, in addition to the Russian Company Law, the R.S.F.S.R. Law on Competition and Restricting the Monopolistic Activity on Goods and Commodity Markets of March 22, 1991 contains specific guidelines, procedures, and policies on the matters of unfair competition affecting stock and asset acquisitions of Russian companies by foreign interests.

In light of the fact that the majority of Russian enterprises are still

\textsuperscript{526} Id. art. 3.
\textsuperscript{527} Id. art. 35.
\textsuperscript{528} Id. Presently, the official exchange rate is a market-determined rate. \textit{See supra} notes 452–453 and accompanying text.
\textsuperscript{529} \textit{See supra} text accompanying note 474.
\textsuperscript{530} \textit{See supra} notes 460–464 and accompanying text.
\textsuperscript{531} Russian Foreign Investment Law, \textit{supra} note 158, art. 35.
\textsuperscript{532} \textit{See Decree No. 78 on Regulations on the Issuance and Distribution of Securities and Stock Exchanges, Dec. 28, 1991} (source on file with the authors).
state-owned, purchasing equity interests, whether securities or assets, in such state enterprises requires that foreign investors comply with the complex requirements of the Russian privatization regime.\textsuperscript{533} Foreign firms are generally eligible to participate in the privatization of state and municipal enterprises by purchasing ownership interests in such enterprises in Russian currency subject to the regulations discussed above.\textsuperscript{534} The extent to which foreign investors may make security and asset acquisitions of the state-owned property is governed by the R.S.F.S.R. Law On Privatization of State-Run and Municipal Enterprises of July 5, 1991 (Russian Privatization Law),\textsuperscript{535} which has been supplemented by local and municipal legislation in all major Russian cities.\textsuperscript{536} Despite efforts to solicit the participation

\textsuperscript{533}It should be noted, however, that the private sector of the Russian economy is already significant. According to the official statistics, 15 percent of Russian GNP is produced by private business entities, which employ 20 million people. \textit{See The Wild East, ECONOMIST, Jan. 4, 1992, at 40.}

\textsuperscript{534}Russian Foreign Investment Law, \textit{supra} note 158, art. 37.

\textsuperscript{535}\textit{See generally, Russian Privatization Law, \textit{supra} note 394; see also Russian Supreme Soviet Adopts Privatization Laws, Foreign Broadcast Information System, Foreign Broadcasts International Service-Soviet Union (FBIS-SOV), July 5, 1991, at 74 (source on file with the authors). The Russian law was adopted subsequent to the U.S.S.R. Law on Guidelines on Deregulation and Privatization of Enterprises.}

of foreigners in its privatization program, Russia has failed to attract significant foreign investment. This failure is due to the slow pace, cumbersome procedures, and inadequate infrastructure with which Russia has approached the task of transforming state enterprises into market-driven, self-sufficient business entities.

The Russian Privatization Law supplanted the pre-existing U.S.S.R. Law on Guidelines on Deregulation and Privatization of Enterprises (Soviet Privatization Law).537 Both acts agree on the following points: (1) they provide for an auction-like sale supervised by the local branches of the State Committee of Property on the basis of bids from the investors; (2) they allow the employees of the auctioned state companies to purchase their stock at a 30 percent discount; and (3) they prohibit legal entities from owning property or shares of state or municipal enterprises and organizations in excess of 25 percent of their charter capital.538 The Soviet Privatization Law provided for special priority rights to the workforce of the privatized companies and Soviet citizens, while the Russian Privatization Law accords all investors a more consistent treatment.539 The Soviet law also contemplated a buy-out privatization scenario, while the Russian law envisions a free transfer of certain state property to its citizens through monetary subsidies which may only be used to purchase privatized state property.540

Under former Soviet law, state-owned enterprises and organizations could convert themselves into the corporate form which brought special advantages and freed them from the limitations of the Law on State Enterprise.541 Similarly, Soviet cooperatives could reorganize as limited liability companies to avoid the application of the Law on Cooperatives, which severely restricted the activities permitted to private cooperatives.542 A state enterprise could form a

542 Id.
joint-stock association only with the approval of both its work collective and the state agency responsible for overseeing the privatization process of such an enterprise.\textsuperscript{543} Shares would then be issued corresponding to the full value of the property of the state enterprise, with proceeds of the issue credited to the state budget.\textsuperscript{544} In the event of an undersubscribed stock issue, ownership of the state enterprise's shares would vest in the U.S.S.R. State Property Fund.\textsuperscript{545} This new state agency, charged with the privatization of state-owned companies and other state assets, was similar in function to the State Property Agency in Hungary or Treuhand in East Germany.\textsuperscript{546}

Among former Soviet republics, the privatization process has been most advanced in the Russian Federation, where the R.S.F.S.R. State Committee to Manage State Property and the Russian Republican Property Fund, created under corresponding legislation, have begun operations.\textsuperscript{547} These laws contain general provisions dealing with the registration of new companies which evolved from previously state-owned enterprises, and the conversion of such enterprises into stock associations.\textsuperscript{548} Larger cities, such as Moscow and St. Petersburg, have also announced their own, even more ambitious plans to privatize their municipal property.\textsuperscript{549}

On December 29, 1991, President Yeltsin issued another executive decree ordering a large-scale privatization of formerly state-owned enterprises in the light industrial and service sectors of the Russian economy.\textsuperscript{550} Certain other businesses, such as pharmaceutical plants, tobacco and alcohol factories, certain construction companies, and educational organizations will be privatized specifically by decree.\textsuperscript{551} In addition, municipal property, including power companies, communications, and mass transit, will be privatized directly by the cities.\textsuperscript{552} The state will relinquish ownership of up to 70 percent of

\textsuperscript{543} Id.
\textsuperscript{544} Id.
\textsuperscript{545} Id.
\textsuperscript{546} Id.
\textsuperscript{548} See March & Pistor Legal Aspects of privatization in Russia (private memorandum issued by the law firm of Cole, Corette & Abrutyn, Washington, D.C.), at 5 (source on file with the authors).
\textsuperscript{549} Id.
\textsuperscript{550} See Major Industries to Privatize Light Industry, Services Begins, 2 E. Eur. Rep. (BNA) No. 1 (source on file with the authors).
\textsuperscript{551} See Russian Privatization Plan Divides Industries by Degree of Approval Required, SOVIET BUS. L. REP., Jan. 27, 1992, at 7, available in LEXIS, Nexis Library, RCBLR File.
\textsuperscript{552} Id.
all enterprises in those sectors (estimated at R92 billion or about $1 billion at the present exchange rate). Foreign investors will be invited to participate in the privatization process and will be given the buy-out rights along with Russian companies, organizations, and individuals. Yet another Yeltsin decree abolished collective farming and allowed private farming and private ownership of farm lands.553

Enactment of a number of new laws and regulations have further solidified and advanced Russian privatization efforts throughout 1992, although most of the actual sales of state-owned enterprises and property have not taken place in 1992 and are expected to take place between 1993 and 1995.554

k. Investment Protection and Guarantees

Foreign investors in the Russian Federation enjoy full and absolute legal protection and national treatment.555 Thus, opportunities for foreign investment should be comparable to those opportunities afforded to Russian investors.556 Indeed, judging by standards of international law, the Russian law, as well as the former Soviet Foreign Investment Law, contains rather strong investor protection language.557 Foreign investors are also guaranteed that their invest-


555 Russian Foreign Investment Law, supra note 158, art. 6. In addition, the Russian Federation has entered into a bilateral investment protection agreement with the United States, the Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, signed by Presidents Bush and Yeltsin on June 17, 1992. See U.S.-Russia Investment Treaty, supra note 395, at 9, available in LEXIS, Nexis Library, RCBLR File. The treaty was ratified by the U.S. Senate and Russian Parliament and has entered into effect for the term of ten years. The treaty provides a number of intergovernmental and private civil remedies and guarantees for the protection of U.S. investment in Russia. See U.S.-Russia Investment Treaty Moves Forward; Progress Seen on Ruble, Profits Repatriation Issue, RUSSIA & COMMONWEALTH BUS. L. REP., Aug. 10, 1992, at 4, available in LEXIS, Nexis Library, RCBLR File.

556 Russian investors, however, may be granted some special privileges under the Russian Foreign Investment Law. See Russian Foreign Investment Law, supra note 158, art. 6. The Russian Foreign Investment Law and the U.S.-Russia Investment Treaty specifically reserve the right for the Russian government to exclude foreign investors from certain sectors of the Russian economy. See William G. Frenkel, Republics of the C.I.S. Join the U.S. Trade and Investment Treaty Program, 3 COLUM. PARKER SCH. SOV. & E. EUR. L. BULL. 6–7 (Aug./Sept. 1992) (source on file with the authors).

557 The Soviet version additionally contained a grandfather clause that protected any enterprise with foreign investment from worsened foreign investment legal conditions for ten years (during which period Soviet and republican law as of the time of creation of the enterprise
ments will not be nationalized, requisitioned (expropriated), or confiscated except as required in special circumstances to promote public interest. In the case of such public taking, the foreign investor must be quickly and adequately compensated. Any unlawful official action against a foreign investor may be appealed to the Russian courts, and the foreign investor may seek consequential and/or special damages. Moreover, compensation for losses to foreign investors must be paid in the currency in which the investment was made, and in the amount of loss suffered on the date the nationalization decision was officially announced. Until such compensation is made, interest will accrue at the interest rate prevailing in the Russian Republic.

1. Repatriation and Reinvestment of Profits

Foreign investors are guaranteed the right to transfer abroad all amounts legally received in foreign currency in Russia, including profit derived from investments, contractual amounts due to them, amounts generated through liquidation of investments, and compensation amounts. Foreign investors must make required tax and other withholdings before transferring the funds. The above amounts may also be reinvested in Russia in accordance with Russian law. For repatriation purposes, foreign investors may purchase foreign currency on the internal currency market pursuant to the Russian currency regulations at the prevailing official exchange rate, which is currently market-based. In addition, under the Russian Foreign Investment Law, a special arrangement is possible

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558 Russian Foreign Investment Law, supra note 158, art. 7.
559 Id. art. 8.
560 See id.
561 Id.
562 Id. art. 8.
563 Id. art. 10; see also U.S.-Russia Investment Treaty, supra note 395, art. IV (addressing guarantees of U.S. investors’ transfers of funds from Russia).
564 Russian Foreign Investment Law, supra note 158, art. 10.
565 Id. art. 11.
566 See Foreign Investors in Russia to Change Dollars at Market Rate, 58 Banking Rep. (BNA) No. 19, at 851 (May 11, 1992) (source on file with the authors).
567 Russian Foreign Investment Law, supra note 158, art. 11.
whereby foreign investors with special permission of the R.S.F.S.R. Ministry for Foreign Economic Relations may use a mutually set exchange rate no higher than the official rate to repatriate their ruble profits abroad in convertible currency.\textsuperscript{568} This special arrangement exists for entities with foreign investment which manufacture products of vital national significance with import-substitution purposes, as confirmed by the R.S.F.S.R. Ministry for External Economic Affairs.\textsuperscript{569}

Foreign investors should be cognizant, however, of the requirement under the Russian Foreign Investment Law that all expenditures in foreign currency, including transfer of dividends abroad, be made from the funds in foreign currency earned by the enterprise or legally obtained in the Soviet Union.\textsuperscript{570} The precise scope of this provision is not clear but it should be interpreted to mean that a foreign investor must be able to prove that the funds in convertible currency to be repatriated have been obtained in the ordinary course of its business activity in Russia and in full compliance with Russian law, including currency exchange controls. Interestingly, this convertible currency self-sufficiency rule was conspicuously absent from the all-Union laws on foreign investment, whereas the hard currency self-sufficiency rule was a fundamental principle under the old Joint Venture Law.\textsuperscript{571} Previously, for repatriation purposes, foreign investors who earned Soviet currency from their U.S.S.R. operations could also purchase foreign currency on the internal currency market at the prevailing exchange rate pursuant to the U.S.S.R. Law on Currency Regulation and regulations promulgated thereunder.\textsuperscript{572} This single most important change in the Soviet currency regime was expected to allow joint ventures which did not produce for export and consequently lacked foreign currency revenue, to repatriate funds in convertible currency to their

\textsuperscript{568} Id.

\textsuperscript{569} Id.

\textsuperscript{570} See id. art. 26.

\textsuperscript{571} Id. cf. Decree No. 49, supra note 3, art. 25 ("All currency expenditures of a joint enterprise, including the payment of profit and other amounts due foreign participants and specialists, must be ensured by the joint enterprise from receipts from the realization of its products on the foreign market.").

foreign investors.\textsuperscript{573} In practice, though, the availability of hard currencies at such auctions has been severely limited.\textsuperscript{574} The Soviet interbank currency market was never fully implemented and funded so that banks could begin exchanging currencies without substantial limitations.\textsuperscript{575} In 1991, the Soviet hard currency reserves had been depleted to the extent that the country was having difficulties repaying its foreign debts.\textsuperscript{576}

The situation in 1992 was not very different in the Russian Federation where the hard currency deficit continued to be acute.\textsuperscript{577} Thus, as in the past, export orientation has been crucial to the feasibility of most joint ventures and other foreign-owned companies operating in the U.S.S.R. and remains very important to foreign investors in Russia and other former Soviet republics today. Following the major tenets of the former Soviet Law on Currency Regulation, the new Russian currency regime emphasizes the need to ration convertible currency for transfers abroad and to limit the right to repatriate profits to enterprises with foreign investment.\textsuperscript{578} The internal hard currency market in Russia, however, is operating and is relatively accessible to enterprises with foreign investment wishing to convert limited amounts of their ruble earnings into foreign currencies at the unfavorable (for the party selling rubles) market rate.\textsuperscript{579}

\textsuperscript{574} See Felker, supra note 10, at 237-39. Apart from hard currency auctions, the other methods for generating convertible currency for the purposes of repatriating profits made in the Soviet Union included export sales, sales to Soviet entities for hard currency, import substitution techniques, countertrade, and compensation transactions. \textit{Id.} at 222-23.
\textsuperscript{576} See Wertman, The International Reserve Position of the Former Soviet Republics: Is the "Cupboard" Bare?, in Congressional Research Service (CRS) Report for U.S. Congress, Apr. 10, 1992 (source on file with the authors); see also Rouble Trouble: Stepping Out, ECONOMIST, Jan. 14, 1989, at 62.
\textsuperscript{577} See Goldman, Post-Soviet Transformation, Congressional Research Service Issue Brief, Mar. 17, 1992, at CRS-7 (source on file with the authors).
\textsuperscript{578} One way the new Russian currency regime limits access to the interbank currency exchange is by only allowing resident companies to convert rubles into convertible currencies. There are also logistical limitations on the amounts of rubles that can be converted and availability of funds in foreign currency at the participating Russian banks. See Frenkel, supra note 474, at 5.
\textsuperscript{579} See Ernst & Young, EAST EUROPEAN COUNTRY PROFILES: RUSSIA 5 (May 1992).
m. **Dispute Resolution**

Parties to disputes concerning foreign investment in the Russian Federation must submit their claims to the Russian Supreme Court or the Russian Supreme Court of Arbitration, unless an international treaty in force on the Russian territory provides for a different arbitration forum. The appropriate Russian court or administrative agency must hear disputes between individual foreign investors, enterprises with foreign investment, other Russian enterprises, and Russian governmental bodies. If the parties agree, such disputes may also be heard by various arbitral bodies, both domestic and foreign.

n. **Free Economic Zones**

The law contemplates the creation of special “free economic” trade zones which accommodate foreign investment on more beneficial terms. These terms may include simplified registration procedures, tax breaks, low-rent, long-term leases of land and natural resources, special customs exemptions, and a simplified visa regime. The RSFSR Council of Ministers must determine, and the RSFSR Supreme Soviet must approve, the benefits to be accorded enterprises with foreign investment.

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580 Russian Foreign Investment Law, supra note 158, art. 9. The U.S.-Russia Bilateral Investment Protection Treaty also provides a number of special arbitration provisions available to a U.S. investor in the Russian Federation. See U.S.-Russia Investment Treaty, supra note 395, arts. V-VIII.

581 Russian Foreign Investment Law, supra note 158, art. 9.

582 Id. This provision permits parties to an investment agreement to select a forum and procedure for arbitral proceedings different from the ones suggested by the Russian Foreign Investment Law. The choice of institutional or ad hoc arbitration outside Russia is wide and extends to various international centers of arbitration in western Europe and the United States. See generally Jonathan H. Hines, Dispute Resolution and Choice of Law in U.S.-Soviet Trade, in A NEW LOOK AT DOING BUSINESS WITH THE SOVIET UNION 1989 125 (Eugene Theroux ed., 1989).

583 Russian Foreign Investment Law, supra note 158, art. 41.

584 See id. art. 42.

IV. FOREIGN INVESTMENT LAWS OF OTHER FORMERLY SOVIET REPUBLICS

Following the Russian Republic's lead, most other former Soviet republics have enacted their own foreign investment legislation. Throughout 1991, Ukraine, Belarus and Kazakhstan (constituting the three largest C.I.S. republics after Russia) and the Baltic states of Lithuania, Latvia, and Estonia passed such laws. Moldova, Armenia, Azerbaijan, and the Central Asian republics of Uzbekistan, Tajikistan, and Kirghizstan have also recently adopted foreign investment laws, but their domestic legal systems have not yet matured to the point of other C.I.S. republics. Overall, because these laws have been modeled on the Russian and Soviet versions, many similarities may be noted. For instance, all of the above laws contain provisions on national treatment of foreign investors, guarantees against expropriation, registration of enterprises with foreign investment, repatriation of profits, special tax and customs incentives, and international arbitration. Certain differences summarized below, however, make the laws of these republics less amenable to a critical legal analysis and reliance. Generally, these laws are shorter and less detailed than the Russian law and arguably offer less certainty in the legal protection of foreign investment. This is, of course, a reflection of these republics' lesser developed legal systems, in which the transition of private civil law to market relations and freedom of contract has not been as rapid and systematic as in Russia. Generally, a sophisticated and comprehensive foreign investment regime, without major investment incentives, would probably be considered more attractive to many western investors than a less sophisticated and stable regime with generous investment incentives.

On the other hand, all of the former Soviet republics recognize the importance of western capital and technology and have begun to compete against each other for foreign investment. Consequently, a more simplistic drafting characteristic of most of the republican laws and some of their loopholes may be successfully

586 See Russia Scores High; Armenia, Moldova Flunk, USA TODAY, Aug. 17, 1992, at 3B (containing results of a survey conducted by the Geonomics Institute of Middlebury, VT, grading each of the fifteen former Soviet republics on their business potential for U.S. investors and companies). In the Geonomics Report, Russia received the highest score overall of "A-" along with Estonia and Latvia while Belarus and Ukraine received "B+" and Kazakhstan received "B." Id.
exploited to the foreign investor's advantage. Moreover, some of
these republics offer substantial advantages to the foreign investor
in the areas of tax incentives, foreign exchange, and other sig
significant legal and operational benefits. These advantages should
be considered in the comparative analysis of the foreign investment
regimes of the former Soviet republics.

A. Ukraine

Ukraine, the second largest republic of the former U.S.S.R. with
important industrial and agricultural interests, has, until recently,
lacked a comprehensive foreign investment law. Ukraine first
authorized direct foreign investment by decree. On September 10,
1991, the Ukrainian government adopted the Law on Protection of
Foreign Investments. This law guarantees foreign investors the
right to repatriate profits in rubles or in foreign currencies, or to
reinvest such profits in the Ukraine. The law also prohibits expro-
priation of foreign investments and provides for compensation in
cases of public takings. Furthermore, the law requires the govern-
ment to promulgate a list of foreign investment activities that will
require licensing and licensing procedures.

Subsequently, the Ukrainian parliament adopted the Law on For-

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Investments), which complements the prior Law on Foreign Economic Activity and the Law on Investment Activities and supplies the previously missing detail. The new law entered into force on April 1, 1992 and offers foreign investors substantial incentives and investment protection guarantees. It also provides the regulatory framework for registering and implementing investments in the Ukrainian economy by foreign companies and individuals. Compared to the foreign investment laws of other ex-Soviet republics, the Ukrainian Foreign Investment Law certainly appears to provide one of the most generous packages of incentives and a relatively stable legal environment for foreign investors. This law can be favorably compared to the Russian Foreign Investment Law. Significant disadvantages for foreign investors in Ukraine, however, pertain to the slow pace of privatization, the uncertainty surrounding the introduction and stability of the Ukrainian national currency, the hryvnia, and the implementation of further legal reforms in Ukrainian private civil law.

The above enactments comprise a fairly cohesive legal structure for encouraging and regulating foreign investment in Ukraine. The overall investment climate in Ukraine, however, remains somewhat unclear. The Ukrainian private civil law, which is still in developmental stages, is generally inadequate. For example, there is a lack of clarity with respect to issues of land ownership, and there are unresolved questions of whether and on what terms the Ukrainian national currency will be introduced later this year.

Similar to the Russian foreign investment law on which it appears to be modeled, the new Ukrainian Foreign Investment Law specifically permits all forms of foreign investment in its domestic economy, such as: (i) forming new companies or enterprises; (ii) acquiring stock of existing Ukrainian enterprises and companies; (iii) acquiring various personal and real property, property rights, and securities; and (iv) all other forms of investment not otherwise
forbidden by Ukrainian law. Thus, the foreign investor in Ukraine interested in making a capital or active investment has the choice of creating wholly-owned subsidiaries or joint venture companies with Ukrainian partners, or acquiring full or partial stock ownership of Ukrainian companies. Furthermore, passive investments in Ukrainian assets and property are allowed. The law provides that foreign investors will be allowed to participate in the privatization of state and municipal enterprises and property pursuant to privatization legislation forthcoming.

The law also contains a definition of an "enterprise with foreign investment," which includes any entity which has foreign ownership on average during the calendar year of either: (a) 20 percent of its authorized charter fund, or (b) an equity interest of at least $100,000. Identical standards apply to passive investments. Ruble investments, including cash denominated in the former Soviet rubles, ruble payment documents and securities, and in-kind contributions by the nationals of the former U.S.S.R. made by persons from other states, including the republics of the C.I.S., generally are not deemed foreign investments and are governed by a different enactment, the Law on Investment Activity.

A relatively simple and streamlined procedure exists for registering enterprises with foreign investments in the Ukraine. The enterprise should submit a completed application form to the Ministry of Finance, which is supposed to act on it in three working days. The Ministry may deny registration solely on the grounds of non-compliance with legal requirements, and the enterprise may appeal the denial to a court of law. Furthermore, enterprises proposing to conduct insurance and financial intermediary activities must obtain permission from the Ministry of Finance, and those enterprises proposing to engage in banking activities must obtain a license from the National Bank of Ukraine.

599 Ukrainian Foreign Investment Law, supra note 595, art. 4.
600 See id. arts. 39-41; see also Ukraine’s Foreign Investment Law Contains Important New Rules, Doing Business in Eastern Europe (CCH) 1–2 (May 1992).
601 See Ukrainian Foreign Investment Law, supra note 595, arts. 3–4.
602 Id. art. 41.
603 Ukrainian Foreign Investment Law, supra note 595, arts. 1, 2.
604 Id.
605 See Ukrainian Foreign Investment Law, supra note 595, arts. 15–19.
606 Id. arts. 15–16.
607 Id. art. 17.
608 Id. art. 24.
Enterprises with foreign investment are exempted from export/import licensing requirements with respect to their own production and imports for their own needs. Subject to certain limitations, capital contributions of foreign investors, other property imported for investment, and property of foreign employees are exempt from customs duties and import taxes. Yet finished goods, raw materials and certain other items imported by enterprises with foreign investment for their own needs are exempted from import taxes only.

The revenue of enterprises with foreign investment in convertible currency may be retained by such enterprises and is not subject to any withholding or forced exchange. The valuation of a foreign investor’s capital contributions may be carried out, at its discretion, in foreign currency or in Ukrainian currency. Moreover, in-kind contributions are to be valued by the parties on the basis of world market prices. The exchange rate for cash contributions may be negotiated contractually but may not be lower than the official exchange rate set by the National Bank of Ukraine.

Foreign investors are permitted to securitize their property through pledges and mortgages. No specific Ukrainian law on secured transactions existed until recently, however, to address the procedures for registering and enforcing security interests. The Ukrainian foreign investment law also provides for the development, extraction, and exploitation of natural resources on the basis of long-term concession agreements. The term of such concession agreements may not exceed 99 years. The law also purports to allow foreign ownership of rights in land and natural resources. The scope of such ownership rights is unclear and is expected to be clarified by the Ukrainian Land Code soon to be passed. Furthermore, the law contains provisions on intellectual property governing

609 Ukrainian Foreign Investment Law, supra note 595, art. 29.
610 Id. art. 28.
611 Id.
612 Id. art. 29.
613 Ukrainian Foreign Investment Law, supra note 595, art. 5.
614 Id.
615 Id.
616 Id. art. 34.
617 Ukrainian Foreign Investment Law, supra note 595, arts. 42, 44.
618 Id. art. 44.
619 See id. art. 42.
the relations between enterprises with foreign investment and their employees. With regard to labor relations, the law establishes a general principle that employees of enterprises with foreign investment may not be subject to a contractual regime which is less favorable than the Ukrainian labor legislation. These enterprises, therefore, may be required to enter into collective bargaining agreements with the local labor unions. Foreign employees are not subject to Ukrainian labor law.

The law also provides special tax incentives to joint venture companies with local and foreign participants, which amount to perhaps the most generous tax regime for foreign investors in the C.I.S.. Foreign investors in Ukrainian joint ventures qualify for a five-year tax holiday and a subsequent 50 percent reduction in the tax rate. There is no minimum share ownership requirement for the Ukrainian partner in the joint venture. The term of this tax holiday for wholesale and retail trade enterprises is three years, and that for enterprises engaged in intermediary activities is two years. After the expiration of the initial term of the tax holiday, such enterprises pay taxes in the amount of 70 percent of the regular rates. Furthermore, their goods and services are exempt from the value-added tax for five years.

Wholly foreign owned entities, on the other hand, are only entitled to deductions of capital investment expenditures from their gross taxable income. Enterprises with foreign investments may also deduct from their taxable income any amounts reinvested in the Ukrainian economy. Moreover, profits and dividends repatriated by enterprises with foreign investment abroad are subject to the 15 percent withholding tax.

Additionally, the Ukrainian Foreign Investment Law grants for-

621 Ukrainian Foreign Investment Law, supra note 595, art. 35.
622 Id. art. 36.
623 See id.
625 Ukrainian Foreign Investment Law, supra note 595, art. 32.
626 See id.
627 Id.
628 Id.
629 Id.
630 Id.
631 Id.
632 Id.
eign investors a host of investment guarantees. These guarantees include the following: a guarantee against adverse legislative changes in the foreign investment regime for a period of 10 years after the registration date; a guarantee of national treatment (with some reservations); a guarantee against expropriation or nationalization without adequate, effective, and prompt compensation to the foreign investor; a guarantee of the right to transfer abroad income, profits and dividends, and the principal amount or proceeds of any terminated or aborted foreign investment in the Ukraine; and the guaranty, subject to certain conditions, of the right of foreign investors to use Ukrainian currency to acquire convertible currency or to purchase products on the Ukrainian market for subsequent export.

B. Belarus

The republic of Belarus (formerly Byelorussia), the third Slavic ex-Soviet republic bordering Russia and Ukraine, enacted its own foreign investment law on November 5, 1991 (Belarussian Foreign Investment Law). The law is similar to the former all-Union Soviet Foreign Investment Law and allows foreign interests to acquire up to 100 percent of Belarus enterprises and property, including real estate. Foreign investment in Belarus can take a number of structural forms, including joint venture companies, wholly-owned subsidiaries, or the acquisition of assets, securities, or intangible property rights. Although similar to the Ukrainian law which contemplates investment in land, the law specifically authorizes investment in Belarussian real estate and land ownership by private entities. Both domestic and foreign land ownership, however, is still fraught with uncertainty. Special benefits are afforded entities

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633 See, e.g., Id. art. 8.
634 Id. arts. 8–14.
636 See supra note 222 and accompanying text.
637 Belarussian Foreign Investment Law, supra note 635, arts. 2, 6.
638 Id. art. 4.
639 Id.
640 Id. art. 27; see also Foreign Investment Differences in Ex-USSR, BUSINESS EASTERN EUROPE, July 6, 1992, at 322, available in LEXIS, Europe Library, Bueeur File.
with at least 30 percent foreign capital.\textsuperscript{641} For example, these entities are exempt from licenses required of Belarussian entities to conduct foreign trade, from mandatory buy-back of foreign currency earned from exports, and are granted a three-year tax holiday, with a possible additional three-year 50 percent exemption upon authorization of the Council of Ministers.\textsuperscript{642} Joint venture companies with a foreign capital share exceeding 30 percent are exempt from the forced buy-back of foreign currency proceeds generated from export sales of their own products.\textsuperscript{643} Under a retention quota system, however, Belarussian enterprises with foreign capital are obligated to pay hard-currency tax on their export earnings amounting to 30 to 75 percent.\textsuperscript{644}

The law also requires a discretionary administrative approval from the Council of Ministers for an entity with foreign participation exceeding R30 million.\textsuperscript{645} Otherwise, the local Soviets of People’s Deputies reviews the application for the creation of an enterprise with foreign investment and the supporting documentation submitted by the entity’s founders.\textsuperscript{646} In order to maintain effective registration, the foreign participant in the Belarussian enterprise must contribute at least 50 percent of its subscription to the authorized charter capital within one year from the date of registration.\textsuperscript{647} Belarussian law permits only domestic enterprises to engage in certain business activities; the law permits enterprises with foreign investment to engage in other activities only upon receipt of a license.\textsuperscript{648} A grandfather clause protects foreign investors from an adverse change in Belarussian law for five years after the change, provided the company has registered prior to such legislative change.\textsuperscript{649}

C. Kazakhstan

Kazakhstan is an important ex-Soviet Central Asian republic which shares a common border with the Russian Federation and is rich in

\textsuperscript{641} See Belarussian Foreign Investment Law, \textit{supra} note 635, arts. 15–31.
\textsuperscript{642} Id. arts. 15, 17, 22, 30–31.
\textsuperscript{643} Id. art. 17.
\textsuperscript{645} Belarussian Foreign Investment Law, \textit{supra} note 635, art. 7.
\textsuperscript{646} Id. art. 9.
\textsuperscript{647} Id. art. 14.
\textsuperscript{648} Id. arts. 5, 12.
\textsuperscript{649} Id. art 34.
significant natural and subsurface resources. The Kazakhstan foreign investment legal regime consists of two laws: the Law on Foreign Investments in the Kazakh SSR (Kazakh Foreign Investment Law)651 and the Fundamentals of Foreign Investment.652 These two laws provide a more detailed legal structure for making investments in Kazakhstan than laws in other Central Asian republics, but the laws lack sophistication and specificity in comparison to the Russian law.

The Kazakh law allows foreign investment in all areas of its domestic economy, except in the manufacture of products with direct military application.653 While the Kazakh law generally allows foreign investors to make the same types of investment as in Russia, it does not differentiate among stock or asset purchases of existing Kazakh companies and creation of new companies with foreign capital, whether partially or wholly owned by foreign entities.654 It also lacks in-depth provisions for registration, except for a 30-day period within which the Kazakh Ministry for Foreign Economic Relations must approve or deny the registration.655 Unlike the Russian law, Kazakh law does not require the investor to make capital contributions to the new company within a set period of time; the law, however, does require the enterprise to commence operations within one year from the issuance of the registration.656 Makers of small investments must register in Kazakhstan with the local Councils of People’s Deputies, while larger enterprises must register with the Ministry of External Economic Relations.657

Unlike the Ukrainian and Belarussian laws, Kazakh law does not permit outright ownership of land by foreign entities.658 Instead, as

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653 Kazakh Foreign Investment Law, supra note 651, art. 7.
654 Id. arts. 1–4, 18.
655 Id. art. 7.
656 Id.
657 Id.; see also Foreign Investment Differences in Ex-USSR, Business Eastern Europe, July 6, 1992, at 322, available in LEXIS, Europe Library, Bueuer File.
658 Article 3 of the Kazakh Foreign Investment Law does not explicitly provide for foreign ownership of land or natural and subsurface resources. See Kazakh Foreign Investment Law,
is the case in the Russian Federation, long-term leases of land and concessions for the use of natural and subsurface resources are available to enterprises with foreign investment. Unlike the Russian law, the Kazakh law also fails to describe the method in which profits will be repatriated, particularly profits denominated in domestic currency such as rubles, and the exchange rates to be used. A foreign exchange tax was recently introduced, which ranged from 30 percent to 60 percent payable by exporters of specified products and commodities. No explicit foreign exchange preferences to enterprises with foreign investment, however, are set forth in the law. Tax benefits in Kazakhstan are exclusively dependent on the particular sector of the economy in which the foreign investment is made, rather than particular geographic regions. For Kazakh enterprises with more than 30 percent foreign capital, a full tax holiday is offered for five years followed by another five-year period at one-half of the regular tax rate. Property contributed to the charter fund of the Kazakh enterprise with foreign investment is to be duty free. Unlike the Russian duty exemption, the Kazakh exemption does not set any time limits on the importation of such property. Similarly, the Kazakh law lacks a provision which determines the origin of goods, necessary under the Russian law, to qualify the enterprise with more than 30 percent of foreign capital to export such goods duty-free. Similar to the Russian Foreign Investment Law, the Kazakh law grants the foreign investor consid-

supra note 651, art. 3. Furthermore, Article 19 of the Law on Property in the Kazakh SSR of December 1990, clearly states that land and natural resources remain in exclusive ownership of the state.

659 Id. art. 3; see also Law on Concessions in the Republic of Kazakhstan, Dec. 1991 (source on file with the authors).

660 See Kazakh Foreign Investment Law, supra note 651, art. 2.

661 See Anulova, supra note 644, at 350.

662 Id.

663 Kazakh Foreign Investment Law, supra note 651, art. 21 & annex; see also Foreign Investors’ Tax Preferences in Ex-USSR, BUSINESS EASTERN EUROPE, July 13, 1992, at 338, available in LEXIS, Europe Library, Bueeur File.

664 Kazakh Foreign Investment Law, supra note 651, art. 21.

665 Id. art. 20. A separate legislative act, Law on Free Economic Zones in the Kazakh SSR, provides additional advantages for foreign investors establishing enterprises with foreign investment in the specified free economic zones, such as tax holidays from two to five years, tax exemptions for reinvested profits or for profits on goods sold within the republic, other tax benefits, a simplified registration procedure, and customs clearance. See Excerpts of Kazakh Law on Free Economic Zones, translated in Kazakhstan Continues Building Legal Regime for Foreign Investment, SOVIET BUS. L. REP., available in, LEXIS, Nexis Library, RCBLR File.

666 Kazakh Foreign Investment Law, supra note 651, art. 16.

667 Compare id. with Russian Foreign Investment Law, supra note 158, art. 24.

668 See Russian Foreign Investment Law, supra note 158, art. 25.
erable flexibility in the area of labor relations, including the possibility of using its own employment agreements. 669 Furthermore, as with the Russian law, the Kazakh law provides that the terms of such employment contracts may not be less advantageous to Kazakh employees than those mandated by Kazakh labor laws. 670 The law states that questions of hiring, firing, compensation, and other terms are regulated by collective bargaining agreements or individual contracts, and also requires the foreign investor to provide training for local employees in any new technology such foreign investor introduces in the republic. 671

**CONCLUSION**

In 1992, a foreign investor in the republics formerly constituting the U.S.S.R. was greeted with even more uncertainty than in previous years of Soviet reform. Ironically, together with the political progress toward democracy and economic liberalization, the instability inherent in the Soviet Union’s break-up, the chaos resulting from the profound political changes within the newly independent republics of the fragile Commonwealth, and the utter failure of the economies of the C.I.S. republics severed by the disintegration of orderly inter-republican commerce and trade make the “big picture” of the forthcoming foreign investment environment a big blur. It is even more ironic that some western firms, while officially supporting economic and political reforms in the former Soviet Union, felt more comfortable dealing with the former, economically backward and reactionary political regime which offered a degree of certainty and stability than they are today dealing with a nation struggling toward democracy and market economics. It is completely understandable, nonetheless, that western business entities ordinarily exercise caution with respect to the fledgling Russian market economy which lacks the essential institutions and traditions of a developed capitalist society.

Along with the risks present in this type of transitional environment, there are rewards for the shrewd and well-informed investor. With regard to the long-term effects of legal regulation of foreign investment, there exists a promising resolution of the legal conflicts and inconsistencies of the old Soviet federalist system. As previously

669 Kazakh Foreign Investment Law, supra note 651, art. 12.
670 Id.
671 Id.
discussed, the new republican codes of foreign investment and their accompanying domestic commercial legislation, particularly in the Russian Federation, are more in line with the legislation in market-oriented countries. Developed western countries generally do not have specific legislation on foreign investment, although the rights of foreign investors may be regulated by other domestic laws. Clearly, progress has been made to accommodate the foreign investor and to grant it various assurances and guarantees that its investment will not be arbitrarily and adversely affected by government regulation or action. Some progress has also been made, particularly in the Russian Federation, toward enacting a comprehensive legal structure for regulating various commercial transactions, although inconsistencies, ambiguities, and conflicts still permeate Russian domestic law. The biggest obstacle to the western investor, because of the complexity of regulation, instability of the substantive law and, most of all, the undying national tradition of xenophobia, is undoubtedly the Russian bureaucracy, whose hostile attitude toward private business and especially foreign business, has remained intact through centuries of various incarnations of the Russian empire.

Although the regional infighting may continue, its effect will no longer be as paralyzing as that of the “war of laws” during the centralized Union, when the foreign investor had to deal with and to satisfy the all-Union, the individual republican, and one or several local levels of authority and regulators. From now on, Republican laws will govern investment in the C.I.S. republics and will be the supreme law on the subject. Furthermore, foreign investment laws across the former Soviet Union appear fairly uniform, with only a few fundamental distinctions existing in the treatment of foreign investors which relate to aspects of business operations. This uniformity also can be expected to exist to a greater extent in the former U.S.S.R. than in eastern Europe, where despite several decades of Soviet domination and repression, different economic and cultural backgrounds of the eastern European nations resulted in greater differences.

In spite of the newly-found political independence, most republics of the former U.S.S.R. will be bound closely together in economic and perhaps political matters. Even in the absence of strong cooperation provisions in the commonwealth treaty and in multilateral treaties between such republics, these new independent states have very strong historical, cultural, and economic ties. Consequently, even those investors with operations in one C.I.S. republic need to be aware of the legal, economic, and political developments in the
whole territory of the Commonwealth due to the close interdependence of former Soviet republics.

This discussion would not be complete without the following qualification: purely legislative analysis of the Russian foreign investment regime as seen solely through the literal reading of the laws enacted by the newly formed populist Russian government may be rather deceptive and misleading to a western investor. It must be emphasized that the Russian commercial environment, being distinctly unique from that of western Europe and North America, additionally requires some rudimentary understanding of the Russian cultural milieu—in particular, the manner in which Russian leaders have traditionally adopted western influences.

The new economic and legal systems emerging in Russia on the ruins of communism were clearly inspired by western notions of democracy and free market, and their survival may be dependent on western capital and technology. It is important to recognize, however, that similar imports of western political and economic ideology on the wholesale scale have occurred in Russian history before with mixed results. The previous rulers of Russia, from Peter the Great to Catherine the Second, have all made tremendous progress in transforming their country literally overnight in spite of the strong internal opposition to their ideas. The changes were invariably undone by the successor’s regime or so materially modified during the reign of the initiator as to resemble nothing of the original western influence that inspired the previous reform-minded ruler.

It is thus critical for western investors in the former Soviet Union to exercise caution and to maintain vigilance in undertaking business ventures purely on reliance of the texts of the new legislative acts governing their rights and obligations. While the significance of the new foreign investment legislation should not be underestimated, one must be mindful of the enormous undertaking inherent in the radical conversion to an open and free market economy. Although the sincerity and resolve of the post-Soviet leaders of Russia and other C.I.S. republics in carrying out economic reforms should not be questioned, the feasibility of market economic relations in the short term and the shortcomings of the transitional economic system should be taken into account in every investment plan.

While history does not necessarily repeat itself, the macroeconomic and socio-political dimensions of western investment in Russia should be carefully examined in light of current historical
trends. The end result of the present reform carried out by the Russian and other C.I.S. governments in the traditional “from the top down” Russian approach is that the establishment of new market economic structures is meeting with great resistance from low-level and mid-level government bureaucrats, labor force, and apparatchiks operating in the former shadow “black market” underground economy. For purely economic—not ideological—reasons these groups thrived in the former Soviet version of market socialism, and they fully intend to protect their interests in the new economic conditions of the market-oriented system. The effect of this internal struggle on the western investor is two-fold. First, the western investor should be aware that while the old Soviet economic system has been destroyed, its vestiges remain firmly ingrained in the mentality of post-Soviet citizens. More importantly, new institutions and infrastructure suitable for a market economy have not been established. Secondly, the implementation of new economic programs and enforcement of new laws enacted to regulate commercial relations in a market economy is chaotic, arbitrary, and sometimes contrary to the clear purposes of such programs and laws. This unquestioningly calls for something other than a literal reading of the new foreign investment and supporting commercial laws of the post-Soviet republics of the Commonwealth on the part of the western investor.

Although any individual investor has little, if any, control over such factors, the economic and political environment, should be given adequate consideration in order to make an intelligent investment decision. The authors of this article have not addressed these broad strategic issues. With respect to the legal foundations of the C.I.S. republics’ foreign investment regimes, however, this article has attempted to provide investors and their counsel with the essential statutory and historical background needed to prepare and negotiate investment contracts relating to capital and property located in the republics of the former U.S.S.R.