

NOTES

INVESTING IN DEMOCRACY: JOINT VENTURE OPPORTUNITIES IN THE CZECH AND SLOVAK FEDERAL REPUBLIC*

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I. INTRODUCTION

The recent emancipation of the Czech and Slovak Federal Republic (C.S.F.R.) from the rigid control of the communist regime has left President Václav Havel with the monumental task of revamping an entire socio-political and economic system. A major part of this momentous undertaking involves his government's decision to pursue a new economic order based on the free market. As the C.S.F.R. transforms its economy to capitalism, the government has marked its

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progress by instituting new legal measures. These measures are designed to bring the C.S.F.R.'s moribund economy to a state of stability and efficiency where market forces reign.¹ Specifically, recent amendments to the Czechoslovak Act on the Enterprise with Foreign Property Participation² (the Act) reflect this economic transition and provides foreign investors with greater access to the C.S.F.R.'s markets.

Whereas the Western Europeans have already secured market positions in other Eastern European countries such as Poland and Hungary, the C.S.F.R. has not experienced the same level of foreign business presence.³ Joint venture activity in the C.S.F.R. before May of 1989 was minimal, especially as compared to the number of ventures established in Hungary and Poland within the same time frame.⁴ Yet, the C.S.F.R.'s relatively low level of foreign debt combined with a well developed infrastructure make for a more secure economic environment when compared to other Eastern European countries.⁵ Historically, the C.S.F.R. has promoted strong industrial growth and developed an efficient transportation system.⁶ These factors make the C.S.F.R. a good target market for U.S. investors⁷ who want to establish a business presence in this relatively untapped market and to potentially bolster their competitive position in the world marketplace.

The purpose of this Note is to assess the potential for successful business ventures in the C.S.F.R. in relation to the 1990 amendments to the Act. This Note will first discuss the needs and concerns of U.S.

1. See Remarks on the Amended Enterprise with Foreign Property Participation Act, *cited in* Acts on Economic Relations with Foreign Countries, on the Enterprise with Foreign Participation and on the Joint-Stock Companies 35 (1990) (released by the Czechoslovak Chamber of Commerce and Industry) [hereinafter Remarks].

2. Act on the Enterprise with Foreign Property Participation *as amended* by Act of April 19, 1990, Act No. 173 of 1988 Collection of Laws and Decrees (1990) [hereinafter the Act]. It should be pointed out that the law applies to both republics, Czech and Slovak, even though the law is entitled the "Czechoslovak Act."

3. See *Changes in the Czech and Slovak Federal Republic's Legislation Affecting Foreign Investment*, East-West Joint Ventures (U.N. Economic Commission for Europe, Geneva Switz.), No. 5, July 1990, at 4 [hereinafter East-West].

4. See *id.* Whereas the Polish and Hungarian governments listed the establishment of more than 1,200 joint ventures by May of 1990, the C.S.F.R. government's promulgation of a new joint venture law in November of 1988, discussed in text at part II.C., engendered a disappointingly low number of 60 by May 1990 of joint ventures in the Republic. *Id.*

5. See *CIA Study Predicts Further Economic Decline Even if Government Reform is Well Received*, 7 Int'l Trade Rep. (BNA) No. 21, at 742 (May 23, 1990).

6. See George Glos, *Czechoslovakia: Law on Joint Ventures*, 17 INT'L J. LEGAL INFO. 1, 2 (1989).

7. This Note focuses in part on U.S. law in relation to foreign investment and is intended to aid U.S. business persons investing abroad. However, the information pertaining to investing in the C.S.F.R. applies to investors from western Europe as well as the U.S.

business persons who, until now, have been hesitant to join their Western European counterparts in establishing a business presence in the Eastern European marketplace. It will then analyze the Act and determine whether the 1990 amendments sufficiently remove traditional legal barriers to foreign equity investment in the C.S.F.R. Finally, this Note concludes that there are numerous economic and political measures, embodied in both U.S. and international institutions and legislation, which provide the prudent investor with sufficient security to initiate joint venture activity in the C.S.F.R.

II. BACKGROUND TO FOREIGN INVESTMENT IN EASTERN EUROPE

A. *Political and Economic Perspectives*

Economists of varied political perspectives recognize that centrally-planned economies have proven unsuccessful throughout the latter half of the twentieth century.⁸ Most economists would agree that decentralized economic policy-making is the best means of restructuring the defunct command economies in Eastern European countries that hope to increase their standard of living to levels equal with the West.⁹ Although political democratization is not synonymous with free market economics, Eastern European countries in general, and the C.S.F.R. in particular, have specifically chosen to replace the previous non-market economic organization with a free market system.¹⁰

The recent trend towards economic decentralization prevalent throughout Eastern Europe has led many of the former communist countries to adopt foreign investment legislation which avoids full-scale governmental interference and regulation.¹¹ The hope is that by

8. See Peter Passell, *Where Communist Economies Fell Short*, N.Y. TIMES, Dec. 17, 1989, at D3.

9. *Id.*

10. See Remarks, *supra* note 1, at 35. See also Remarks on the Amended Act on Economic Relations with Foreign Countries, cited in Acts on Economic Relations With Foreign Countries, on the Enterprise with Foreign Participation and on the Joint-Stock Companies 3 (1990)(released by the Czechoslovak Chamber of Commerce and Industry)(specifically stating the C.S.F.R.'s goal of remaking the economy into a market system).

11. See Maciej Lebkowski & Jan Monkiewicz, *Western Direct Investment in Centrally Planned Economies*, 20 J. WORLD TRADE L. 624, 627, 634 (1986) [hereinafter Monkiewicz]. Foreign investment activity in a non-market economy dates back to 1920 when the U.S.S.R. issued a concessionary investment decree that permitted foreign direct investment in certain areas, particularly large industrial projects such as oil extraction or mining. *Id.* at 624. These early projects were strictly limited to specific industries, required sizable capital outlays and mandated profit return to be made in the form of products rather than hard currency. *Id.* In the early 1970s, Romania and Hungary promulgated legislation that formally instituted legal

enacting more liberal investment rules, the respective countries will be able to attract western capital to their markets.¹² Enacting these legal measures will enable the governments to lift their sagging economies out of a serious depression.¹³

In the C.S.F.R., the 1990 amendments to the joint venture legislation may be viewed as evidence of President Havel's commitment to opening the doors of his country to western investment.¹⁴ Equity investment is the C.S.F.R.'s favored means for attracting foreign capital.¹⁵ Although foreign investment may be pursued in a variety of forms, joint ventures are considered the most practical means of achieving a successful business presence in Eastern European countries.¹⁶ Economists have determined that the presence of foreign equity joint ventures would aid any socialist state in its economic reform efforts.¹⁷

While other options exist for a U.S. business interested in entering foreign markets, equity investment is the best means to establish a long-term business presence and distribute the risk among the participants.¹⁸ For example, choosing contractual agreements as a means of entering foreign markets, such as licensing the transfer of technology or transferring the right to engage in the distribution of a company's goods or services through a franchise agreement, do not allow U.S. businesses to become an active participant in the targeted foreign

regimes to govern foreign investment activity in their respective countries. *See id.* Hungary's subsequent legislative amendments have increasingly liberalized its foreign investment regime, succeeding in attracting foreign investors to participate in joint ventures. *See id.* at 627, 628.

12. *See* Glos, *supra* note 6, at 1 - 3. *See also* Susan Tiefenbrun, *Joint Ventures in the U.S.S.R., Eastern Europe, and the People's Republic of China as of December 1989*, 21 INT'L L. & POL. 667, 671 (1989). An influx of western capital would bolster the countries' prospects of expanding trade operations with other capitalist countries, acquiring hard currency, improving the quality of imported goods, and promoting exports. *See id.*

13. *See* Tiefenbrun, *supra* note 12, at 668, 669.

14. Premier Marian Calfa listed the following industries as priority areas to be developed with the aid of western capital: nuclear energy, pollution control equipment, glass and textile manufacturing, aviation, automotive, and electronics. *East-West Trade: Czechoslovakia's Economic Reform Package Based on Free Price Regime, Currency Reform*, 7 Int'l Trade Rep. (BNA) No. 23, at 803 (June 6, 1990).

15. *See* Remarks, *supra* note 1, at 39.

16. *See id.*

17. Erwin Eichmann, *Joint Ventures in Hungary: A Model for Socialist States?*, 20 LAW & POL'Y INT'L BUS. 257, 259 (1988).

18. *See* Michael Berwind, *Strategies for Entering Foreign Markets*, 7 HASTINGS INT'L & COMP. L. REV. 293, 298 (1984). Risk spreading is a principal feature of the joint venture vehicle. *See* Dennis Unkovic, *Joint Ventures and the Export Trading Company Act*, 5 J.L. & COM. 373, 374 - 75 (1984). The agreement between two or more companies to form a corporate joint venture allows the respective participants to apportion responsibility in such areas as technology, labor, and capital contributions. *See id.* at 374.

market.¹⁹ Furthermore, while contractual arrangements require less of a capital commitment than do equity investments, they tend to limit the investor's potential economic return.²⁰ Thus, equity investment would allow the western investor to establish a long-term presence in the C.S.F.R. with a greater degree of control and it would also allow her to work to expand her market share in Eastern Europe as a whole.

B. Traditional Western Reluctance to Investing in Eastern Europe: Relevant Factors

The Act, as amended, substantially differs from the previous foreign investment legislation in the C.S.F.R. This is especially true in areas of paramount concern to the potential foreign investor.²¹ While a number of the changes will be well received by the interested western participant, the Act also leaves in place pre-existing restrictions, or incorporates new conditions that may act as disincentives to the investor.²² Consequently, when evaluating the Act and its potential for attracting western investment in the C.S.F.R., it is useful to examine the factors which generally attract western investors to the eastern marketplace, and what barriers traditionally cause these potential market participants to venture elsewhere.

A western investor will venture into a socialist economy when the political and economic climate of the country indicates that she will "get a positive return on investment."²³ A foreign investor is typically attracted to the idea of establishing a business presence in new or unexplored markets and is often lured East by the existence of a well-educated, yet inexpensive labor supply.²⁴ By utilizing the joint venture to invest in an Eastern European country, the investor successfully avails herself of choice sources of raw materials and energy. By establishing a business presence in the C.S.F.R., the investor also gains the advantage of being in close proximity to customers in the C.S.F.R. as well as potential customers in neighboring central and eastern Europe.²⁵

19. See Berwind, *supra* note 18, at 294 - 95.

20. See *id.* at 298.

21. See the Act, *supra* note 2.

22. See East-West, *supra* note 3, at 4.

23. Eichmann, *supra* note 17, at 258.

24. See Roxanne Jansen, *Western Investment in State-Controlled Economies: Establishment of Joint Ventures in Eastern European Countries*, 5 N.C. J. INT'L L. & COM. REG. 507, 508 (1980). See also Walter Kolvenbach, *General Factors Influencing a European Businessman When Deciding to Invest Abroad*, 17 INT'L BUS. LAW. 313, 314 - 15 (1989).

25. See Jansen, *supra* note 24, at 508.

In addition, the joint venture participant is in a better position than a licensor or franchise partner to react swiftly to market opportunities and changing market conditions.²⁶ Yet, the risk of investing will often outweigh these benefits in the mind of the investor when the target country's government strictly controls foreign equity investment.²⁷ When a foreign investor is deciding whether or not to invest in a socialist state, she will conduct a cost-benefit analysis.²⁸ If the investor determines that sufficient legal and economic reforms have been instituted to insure a profitable return on the investment, then she is in a better position to proceed with the proposed venture.²⁹

C. *Evolution of the C.S.F.R.'s Foreign Equity Investment Legislation*

Even before the democratic wave swept away the communist governments of Eastern Europe in 1989, the region's leaders recognized that the then existing economic system of state planning was failing. The government of the C.S.F.R. acknowledged this fact in its 1985 decision to implement certain "Principles" that would allow limited foreign investment in the country.³⁰ However, the Principles embodied strict legal rules that effectively discouraged almost any foreign investment interest in the C.S.F.R.³¹ Most significantly, the legal regime limited foreign participation in a joint venture to forty-nine percent ownership.³²

26. *See id.*

27. *See id.* *See also* 6 Int'l Trade Rep. (BNA)(Nov. 16, 1989). Factors of major concern include governmental regulation of the authorization and internal managerial structure, restricted ownership percentage, permissible levels of foreign currency exchange and possibility of profit repatriation for the proposed joint venture. The political atmosphere, limited access to certain markets, lack of a convertible currency and development of distribution systems in the host country also factor into the decision of whether to embark on a joint venture in an eastern European country. For example, whereas the C.S.F.R. has a well-developed infrastructure, Poland suffers from systemic distribution defects which effect economic activity at all levels.

28. *See* Eichmann, *supra* note 17, at 259.

29. *See id.* "[E]conomic reforms reduce the microeconomic inefficiencies of a socialist economy, legal reforms promote predictability and reduce the uncertainty of entry into a different political and economic climate, and tax incentives strive to overcome any remaining economic inefficiencies." *Id.*

30. *See* Principle No. 187 of 1985 Collection of Laws and Decrees (1985). *See also* Glos, *supra* note 6, at 2.

31. *See Foreign Majority Shareholders Allowed in New Czechoslovakia Joint Venture Law*, 6 Int'l Trade Rep. (BNA) No. 3, at 74 (January 18, 1989). The Principles severely curtailed a foreign investor's ability to negotiate the aspects of the proposed venture. Twenty-four acts and decrees promulgated in the postwar era contained legal precepts that dictated the narrow scope of acceptable joint ventures in the Republic.

32. *See* Glos, *supra* note 6, at 1 - 2. Another major obstacle to foreign investment was the

The Principles were amended in 1987 by relaxing slightly the dictates governing acceptable foreign investment, but still retained basic strictures of comprehensive governmental oversight controlling the authorization, management, and permissible scope of activity in a proposed venture.³³ By 1988, it was abundantly clear that the C.S.F.R.'s state-planning was not providing promised economic justice or stability. Forty years of command-economy control, prescribing heavy industry expansion and armament production at the expense of light industry and consumer goods, left the C.S.F.R. bereft of its resources and with a substantially reduced national standard of living.³⁴

On November 8, 1988, the C.S.F.R. moved to restore the faltering economy with the aid of western capital, by promulgating liberalized joint venture legislation³⁵ that government officials touted as "the most advanced of those in eastern Europe."³⁶ The legislation entered into force in January 1989, and permitted foreign participation in any area of the national economy except those that fell under the heading of national defense.³⁷ Little more than one year later, the newly formed democratic government of the C.S.F.R. recognized the necessity of increasing the flexibility of its foreign investment regime if it hoped to achieve substantial growth through the joint venture vehicle.³⁸ Thus, the amendments to the Act were adopted on April 19, 1990, and entered into force less than two weeks later.³⁹

III. ASSESSMENT OF THE POTENTIAL FOR SUCCESSFUL JOINT VENTURE ACTIVITY IN THE C.S.F.R.

A. Current Joint Venture Legislation

In brief, the Act's most significant amendments reform a number

lack of any specified dispute resolution mechanism. *See id.* at 2. Thus, in case of a legal dispute, the investor was forced to litigate under C.S.F.R. law. *Id.*

33. *See id.*

34. *See id.*

35. Act on the Enterprise with Foreign Property Participation, Act No. 173 of 1988 Collection of Laws and Decrees (1988).

36. *See East-West, supra* note 3, at 4. *See also* J. Connor, *Czechoslovakia: Foreign Property Participation Act, As Amended*, 29 I.L.M. 1047 (1990). Although the law was a vast improvement over the rigid Principles of 1985 and 1987, the lingering provisions for governmental interference effectively discouraged all but a handful of western companies from pursuing venture opportunities in the C.S.F.R.

37. *See Foreign Majority Shareholdings Allowed in New Czechoslovakia Joint Venture Law*, 6 Int'l Trade Rep. (BNA) No. 3, at 74 (Jan. 18, 1989).

38. *See Connor, supra* note 36.

39. *See East-West, supra* note 3, at 4. The amendments entered into force on May 1, 1990.

of areas of concern to the western investor. Specifically, the joint venture legislation amended restrictions on foreign participation and majority share, application and authorization requirements for the national, i.e. C.S.F.R., partner and the western investor and widens the scope of permissible areas in which a westerner may invest.⁴⁰

The Act substantially altered the C.S.F.R.'s previously restrictive foreign investment regime. A principal change is the provision that allows citizens of the C.S.F.R., as well as juridical persons (i.e. corporations) to engage in an enterprise with foreign participation.⁴¹ In contrast, the previous joint venture law restricted Czech participation to juridical persons only (i.e. corporate bodies such as foreign trade organizations and state enterprises).⁴² Additionally, the government repealed the 1988 restriction on foreign participation, which allowed foreigners to be majority shareholders, but limited total ownership to ninety-nine percent, and now permits 100% foreign interest.⁴³

The Act provides that it "shall apply also to cases where the enterprise is established exclusively by a foreign participant or where such a participant participates exclusively in its trading."⁴⁴ The government has further proposed that foreign investors be exempted entirely from licensing procedures. This provision applies where the proposed venture does not include a local equity participation.⁴⁵ Thus, it grants the investor freedom to structure the proposed venture virtually devoid of governmental interference and bureaucratic regulation.⁴⁶

40. See Remarks, *supra* note 1, at 36 - 39.

41. See the Act, *supra* note 2, art. 2(2). See also East-West, *supra* note 3, at 4.

42. See *id.*

43. The Act, *supra* note 2, art. 2(4). See also *Economic Assistance to Eastern Europe Examined by General Accounting Office*, 8 Int'l Trade Rep. (BNA) No. 9, at 326 (Feb. 27, 1991). This one percentage point difference effectively allows the investor to operate her business enterprise completely devoid of C.S.F.R. participation. Similar liberal provisions in the Hungarian foreign investment laws successfully attracted more U.S. companies to invest in that Eastern European country than in any other in 1990.

44. The Act, *supra* note 2, art. 2(4).

45. See *Czechoslovakia Government Proposes Easing Regulations on Foreign Investment Licensing*, 8 Int'l Trade Rep. (BNA) No. 3, at 92 (Jan. 16, 1991)[hereinafter *Easing Regulations*]. From May to December of 1990, 20% of C.S.F.R. licensed joint ventures were wholly western owned enterprises.

46. See *Dow Chairman Sees Bright Prospects for U.S. Business in Eastern Europe*, 7 Int'l Trade Rep. (BNA) No. 21, at 742 (May 23, 1990). At a symposium sponsored by the Committee for Economic Development held on May 17, 1990, the President of Dow Chemical Company, Paul F. Orrefice, noted that the major political impediment to doing business in Eastern Europe is not fear of political upheaval, but rather adversity to extensive bureaucratic oversight. Orrefice maintained that the solution to this problem could be found in granting western investors full ownership of East European facilities. However, the investor must be wary of

Additionally, articles 5 through 7 significantly streamline the previously complex application and authorization procedures.⁴⁷ The Act substantially reduces the information disclosure requirements previously required for venture applications.⁴⁸ Except for banking ventures, which remain entrusted to the authority of the State Bank of the C.S.F.R., the authorization process has been taken out of the hands of the various ministries previously involved in venture approval, and placed wholly in the purview of the office of the Federal Ministry of Finance.⁴⁹ The Ministry is currently required to either approve or reject the application within two months, as opposed to the previous three month allowance.⁵⁰ Finally, for the investor who would rather enter into a venture with a pre-existing company than start up a new business, the Act now provides the possibility for foreign investors to purchase a stake in an established enterprise.⁵¹

B. Incentives to Foreign Equity Investment

One of the most critical characteristics of an attractive investment scheme is the ability of the foreign investor to realize a return in the form of hard currency.⁵² The Act's regressive foreign exchange regime and profit repatriation provisions⁵³ have been tempered by the government's decision to permit foreign companies to open foreign

further legal, e.g. currency restrictions, and extra-legal restraints that would impede her freedom in spite of the removal of administrative obstacles. See text *infra* part III.C.

47. See Remarks, *supra* note 1, at 36.

48. See East-West, *supra* note 3, at 4. The new law significantly shortens the list of information required to be provided by the Czech and Slovak partner(s) in the joint venture application. While the basic information, such as the name, location, business and financing of the enterprise must still be provided, it is no longer necessary to provide detailed information concerning the western participants or express purposes for the enterprise. The onerous burden of conducting and submitting a feasibility study on the proposed business has also been abolished.

49. See *id.* at 5.

50. See *id.* at 37.

51. See the Act, *supra* note 2, art. 2(1). See also Remarks, *supra* note 1, at 36. Under the original version of the law, a foreign joint venture had to be a newly created enterprise. This development is a marked improvement for the investor who is unwilling to assume the risks involved in launching a start-up business.

52. See *supra* notes 27 - 29.

53. See the Act, *supra* note 2, arts. 15 - 18. See also East-West, *supra* note 3, at 5. The Act requires the enterprise to receive prior approval from a C.S.F.R. bank before opening a foreign currency account with a foreign bank, and mandates that the joint venture sell a portion of its foreign currencies to the State Foreign Exchange Bank. At the time the Act was enacted, paragraph 12 of the Federal Republic Foreign Exchange Law No. 474 stated that 30% of an enterprise's foreign exchange had to be sold to the State Bank. Interested investors are advised to remain abreast of further revisions in the Act and related legislation regarding foreign exchange restrictions.

currency accounts with banks in the C.S.F.R.⁵⁴ The government of the C.S.F.R. moved to allay remaining concerns about the Act's strict foreign currency regulations by enacting a new foreign exchange law, which went into effect January 2, 1991.⁵⁵ The foreign exchange law was conceived in accordance with the government's efforts to attract western investment.⁵⁶ The new law is designed to work in conjunction with the C.S.F.R.'s privatization efforts⁵⁷ and its September 1990 decision to make the crown a convertible currency.⁵⁸

As previously noted, the Act's incentives also include the progressive provisions concerning participation and ownership rights⁵⁹ and relaxed requirements governing application and authorization procedures.⁶⁰ In addition, the Act provides for increased autonomy in structuring the enterprise.⁶¹ Furthermore, foreign banks, previously prohibited from investment opportunities in the C.S.F.R., may take advantage of the joint venture legislation and have presently done so.⁶² The Act also furnishes a supplementary investment incentive by revising the dispute resolution system. Parties are now allowed to contractually agree to resolve commercial disputes in a

54. See *Czechoslovakia Fears Banking System Chaos as it Implements New Foreign Exchange Law*, 7 Int'l Trade Rep. (BNA) No. 43, at 1646 (Oct. 31, 1990). Fearing that companies would opt to open accounts abroad rather than comply with the Act's prohibitive exchange requirements, the government opted to eliminate the provision forbidding foreign currency accounts.

55. See *Czechoslovakia Fears Banking System Chaos as it Implements New Foreign Exchange Law*, 8 Int'l Trade Rep. (BNA) No. 2, at 52 (Jan. 9, 1991). See also *supra* notes 27 - 29. However, the increased autonomy available to the parties in structuring joint ventures does not adequately compensate the investor for difficulties in repatriating profits.

56. See *id.*

57. See *Czechoslovakia Auctions Stores to Private Buyers*, N.Y. TIMES, Jan. 27, 1991, at A10. See also Steve Prokesch, *Czechs Plan Big Sale of State Companies*, N.Y. TIMES, June 14, 1991, at D2. The C.S.F.R. has formulated a complex scheme whereby smaller enterprises are auctioned off to private C.S.F.R. investors, and 50 larger state-owned enterprises will be denationalized by sale to foreign investors. The specified state companies will be converted into private concerns by means of foreign sales and/or through a detailed voucher system, whereby citizens of the C.S.F.R. may exchange vouchers, bought from the state at a nominal price, for shares in a specific enterprise. Regarding details of the original voucher design, see *Creating the Invisible Hand*, THE ECONOMIST, May 11, 1991, at 63.

58. See *Czechoslovakia Plans to Levy Import Surtax on Consumer Goods to Save Foreign Exchange*, 7 Int'l Trade Rep. (BNA) No. 49, 1894 (Dec. 12, 1990). To date, this decision is still in the planning stage.

59. See *supra* notes 42 - 46 and accompanying text.

60. See *supra* note 47 and accompanying text.

61. See *infra* note 68 regarding the removal of the requirement to establish three distinct funds.

62. See *id.* Société Generale contracted itself a 75% stake in a joint venture agreement struck with a C.S.F.R. bank.

manner that is mutually acceptable.⁶³

A final catalyst to western investment is found not in the legislation, but in the general attitude of trust and respect that the citizens of the C.S.F.R. have for U.S. investors. United States' companies have a reputation for their technological development and management techniques.⁶⁴ President Havel promotes the C.S.F.R.'s wealth of cheap but educated labor, the opportunity to develop new markets, and a relatively stable political atmosphere as further inducements for U.S. investors to pursue investment opportunities in the C.S.F.R.⁶⁵

More importantly, because of Germany's history of dominating the Eastern Europeans in general and the subjugation the C.S.F.R. suffered under the Third Reich, these countries are wary of substantial German investment.⁶⁶ Nonetheless, the citizens of the C.S.F.R. are a pragmatic people who recognize the urgent need for an influx of capital to achieve successful market reform. Consequently, where U.S. interest is lacking and German businesses move to propose concrete investments, the citizens of the C.S.F.R. may put aside their historical fears and establish joint ventures with German parties.⁶⁷

63. See *Czechoslovakia Eases Joint Venture Law as it Embarks on Major Economic Reform*, 7 Int'l Trade Rep. (BNA) No. 12, at 591 (Apr. 25, 1990). The Act does away with the previous requisite that any business dispute be submitted to C.S.F.R. arbitration. The Act currently authorizes joint venture participants to draft a choice of law clause into the contract if they so desire. However, the Act is silent in regard to choice of forum clauses. Thus, the investor must be aware that despite the possibility of choosing what law will govern the dispute, without the availability of a neutral forum she may still be deprived of objective dispute resolution. See Remarks, *supra* note 1, at 37.

64. See *Eagleburger Urges U.S. Companies Not to Give up on Eastern Germany*, 7 Int'l Trade Rep. (BNA) No. 40, at 1553 (Oct. 10, 1990). Deputy Secretary of State Lawrence S. Eagleburger asserted that these qualities would prove advantageous to U.S. companies competing against European and Japanese firms for investment opportunities in Eastern Europe.

65. See *Czechoslovakia's Economic Reform Package Based on Free Price Regime, Currency Reform*, 7 Int'l Trade Rep. (BNA) No. 23, at 803 (June 6, 1990). The government is also emphasizing the abundance of manufacturing facilities in its bid to attract western capital.

66. See *Investment Funds Termed Better Alternative to Privatize Industries than Joint Ventures*, 7 Int'l Trade Rep. (BNA) No. 31, at 1204 (Aug. 11, 1990). The East Europeans are especially uneasy about German investors acquiring large stakes along their border areas. The Czech and Slovak people are particularly concerned with the possibility of a unified Germany expanding its borders into C.S.F.R. territory. This fear of expansionism is based on memories of the control exerted by the Germans during the reign of the Third Reich when Nazi Germany occupied the C.S.F.R.

67. See *Eastern Europe Wrestles With Public Reaction to Economic Change*, N.Y. TIMES, July 7, 1991, at A1, A8. Volkswagen A.G. has successfully negotiated a majority stake in the C.S.F.R. automobile concern Skoda, committing itself to an investment totalling more than five billion dollars.

C. *Barriers to Foreign Equity Investment*

Although the Act has significantly improved upon the legislative framework governing joint venture activities in the past two years, from the foreign investor's point of view, the C.S.F.R. continues to place formidable obstacles to substantial foreign investment. The overarching problem is the country's continued refusal to, in fact, relinquish control over an enterprise's activities and finances. For example, notwithstanding the modification to the requirement that an enterprise create three specific funds out of its capital,⁶⁸ the Act now requires the entity to create a reserve fund to which a minimum of ten percent of its capital must be contributed.⁶⁹

The government is similarly unwilling to yield full authority in the authorization process. Article 7(1) of the Act stipulates that enterprise authorization be conditioned upon the venture's propensity to "contribute to the increase of fruitful participation of the C.S.F.R. economy in the international division of labor and whether during its economic activity it will be able to create sufficient financial resources both in Czechoslovak as well as in foreign currencies."⁷⁰ However, if the venture is a wholly-owned western enterprise, these bureaucratic impediments may be avoided.⁷¹

Furthermore, the Act does not proffer per se tax incentives to the potential investor⁷² similar to those offered by other Eastern European countries.⁷³ Despite the option to apply for a two-year tax exemption or reduction (by reason of a still operative provision of the

68. See *Remarks, supra* note 1, at 37. The law previously stipulated that three specific funds designated for reserve, cultural and social needs, and remunerations were to be created out of foreign investment capital. These requirements are similar to those stipulated in previous Soviet foreign investment regulations. Under the former Soviet regime, remunerations were set aside for the purpose of establishing a bonus fund. Based on the Soviet model, one may interpret remuneration here to mean a bonus fund, although it is not defined in the Act or the Remarks. These requirements were basically a bureaucratic measure to ensure that a set amount of currency would be given to the C.S.F.R. in exchange for the its authorization to conduct business. While the Act reduces this requirement to the establishment of a reserve fund only, it introduces the 10% asset contribution, a portion of which must be held in convertible currency. Thus, the Act, although simplifying procedural requirements, still retains a substantive capital outlay requirement.

69. See *id.*

70. The Act, *supra* note 2, art. 7(1).

71. See *Easing Regulations, supra* note 45.

72. See *Remarks, supra* note 1, at 38. Technically, enterprises should be taxed in accordance with the C.S.F.R.'s tax law, which is the Act No. 157 of 1989, Collection on Laws and Decrees. The maximum tax rate is 40%. Tax on dividends is set at 25%.

73. See *East-West, supra* note 3, at 10. In their bid to attract western capital, offers are sweetened with the extension of a three year tax holiday to the first-time investors in Poland, or an exemption from any profit tax for the first two years of a joint venture in Romania.

original 1988 version of the law⁷⁴), potential tax liabilities⁷⁵ act as disincentives to western investment. In deference to western concern over the lack of tax concessions, the government has offered to negotiate tax provisions on a case-by-case basis.⁷⁶ The government's offer of potential negotiations only adds to the list of undesirable uncertainties surrounding contract negotiations that will leave the investor wary of doing business in the C.S.F.R.

Additional legal and non-legal concerns may affect an investor's decision. If the new enterprise will be exporting products to the U.S., then it must consider whether those exports affect U.S. trade which may subject it to potential antitrust violations under U.S. law.⁷⁷ Under the U.S. Justice Department's policy of enforcing antitrust laws against foreign joint venture activity, U.S. courts will retain jurisdiction over activity that impacts U.S. import trade regardless of the location of the activity or the nationality of the participant.⁷⁸

Competition restraints within the C.S.F.R. itself must also be weighed. President Havel's governmental representative Jan Vrba stated in a news telecast that foreign investors may be exempted from

74. See Act on the Enterprise with Foreign Proprietary Participation, Act No. 173 of 1988 Collection of Laws and Decrees, art. 11 (1988). See also East-West, *supra* note 3, at 10.

75. See Berwind, *supra* note 18, at 295. The investor must be aware of tax consequences in the host country. To date, the U.S. does not have a tax treaty with the C.S.F.R. Consequently, U.S. investors are not only subject to C.S.F.R. tax laws, but without a tax treaty, they will not be afforded any tax credit under U.S. tax law.

76. See *Czechs Target 50 State Companies as Models to Lure Western Capital*, 8 INT'L Trade Rep. 950 (BNA) No. 25, at 950 (June 19, 1991). For example, the C.S.F.R. agreed to relieve Volkswagen and Skoda of numerous tariff and import duties and to accord the new enterprise a tax holiday for its first two years. The C.S.F.R. was willing to forego these taxes in this case due to the magnitude of this particular investment. For smaller businesses contemplating a joint venture, the C.S.F.R. presumably will not be so quick to waive such tax revenue.

77. See Joseph Brodley, *Analyzing Joint Ventures with Foreign Partners*, 53 ANTITRUST L.J. 73 (1984). U.S. antitrust laws may prohibit anti-competitive corporate agreements. For instance, where a joint venture would combine two competing companies into a single business enterprise, the possibility of anti-competitive effect will give rise to an antitrust inquiry. The basic test utilized to determine facial risk of antitrust activity under U.S. law is premised on the evaluation of objective market criteria. If facial risk is clearly established, the inquiry will proceed to a secondary or subjective test that considers all relevant factors. The determinative question is whether, under the particular circumstances, the existence of facial anti-competitiveness or "concentration" is so detrimental to the market that governmental interference in the private enterprise is warranted. If products exported to the U.S. by foreign ventures do not undercut competition in the U.S. marketplace, then the enterprise will not be subject to charges of antitrust violation. For a more detailed analysis of antitrust implications for foreign joint ventures, see Joseph Griffin & Michael Calabrese, *U.S. Antitrust Policies on Transnational Joint Ventures*, 17 INT'L BUS. LAW. 319 (1989).

78. See Robert Shimp, *A Critical Review of the Justice Department's 1988 Antitrust Guidelines for International Operations*, 14 N.C. J. INT'L & COM. REG. 287 (1989).

the purview of the C.S.F.R.'s antitrust laws in certain instances.⁷⁹ Investors must also be wary that joint venture activity does not impinge on U.S. antidumping legislation.⁸⁰

Finally, the nationalistic clamorings of the Slovakian people have raised the question of a possible breakup of the country into two independent republics.⁸¹ The political risk of doing business in the C.S.F.R. is born more out of frustration and resentment presented by economic austerity,⁸² than out of a general consensus on independence.⁸³ The governmental effort at economic reform includes radically reduced weapons production, but because the core of the armament production facilities are located within Slovakia and because implementing such a plan would necessarily result in widespread job layoffs, the C.S.F.R. has been threatened by Slovakia with secession.⁸⁴

Consequently, President Havel conceded to the demands of the defense industry to retain production standards,⁸⁵ thereby quelling the calls for an independent Slovakia and stabilizing the political cli-

79. See *id.* at 311.

80. See *Czechs Target 50 State Companies as Models to Lure Western Capital*, 8 Int'l Trade Rep. 950 (BNA) No. 25, at 950 (June 19, 1991). In an effort to launch the sale of 50 of the state's largest enterprises to foreign investors, Vrba offered to relieve participating investors from regulation by the C.S.F.R.'s antitrust laws. However, an investor must still be concerned with the application of U.S. antidumping laws to joint venture products that are imported to the U.S. U.S. antidumping law prohibits sales of imported goods at less than fair market value which cause injury to a U.S. industry. See Antidumping Act § 201(a), 19 U.S.C. § 160(a). If the U.S. International Trade Commission (I.T.C.) determines that a domestic industry has been injured, then duties will be imposed on the imported goods. The I.T.C. has found injury to U.S. markets even where products are produced and imported from a non-market economy country. See *Electric Golf Cars from Poland*, 40 Fed. Reg. 53,383 (1975) (final affirmative antidumping determination). See also *Electric Golf Cars from Poland*, 45 Fed. Reg. 39,581, 19 C.F.R. 353 (1980) (revocation of antidumping order); *Electric Golf Cars from Poland*, 57 Fed. Reg. 10334-02 (1992) (final results of antidumping duty administrative review). See generally Note, *Dumping from "Controlled Economy" Countries: The Polish Golf Car Case*, 11 LAW & POL'Y INT'L BUS. 777 (1979).

81. See *Czechoslovakia: Compare and Contrast*, THE ECONOMIST, July 13, 1991, at 53.

82. See *Economic Assistance to Eastern Europe Examined by General Accounting Office*, 8 Int'l Trade Rep. (BNA) No. 9, at 326 (Feb. 27, 1991). Like its Eastern European neighbors, it is predicted that the C.S.F.R. will experience initial economic deterioration in its conversion from a non-market to market economy. In particular, the former communist countries will experience a drop in gross national product and suffer from the lack of subsidized trade with the Soviet Union that was heavily relied upon by the countries of the region.

83. See *Czechoslovakia: Compare and Contrast*, *supra* note 81.

84. See John Togliabue, *Scrap the Tanks? For Slovaks Its a Call to Arms*, N.Y. TIMES, April 3, 1991, at A4.

85. See John Togliabue, *For Eastern Europe, Security Means More Than Tanks and Guns*, N.Y. TIMES, June 23, 1991, Sec. 4, at 2.

mate.⁸⁶ However, with the advent of further economic austerity, political instability will remain a continued danger. Incontrovertibly, western initiative will be restrained due to the legal and political factors that continue to act as deterrents on foreign investment. Nonetheless, with the aid of public and private risk guarantors, the investor may exercise moderate restraint and still structure a lucrative business venture in the C.S.F.R.

IV. ALTERNATIVE SOURCES OF INVESTMENT GUARANTEES AND INCENTIVES

A. U.S. Aids to Investment

Numerous sources of insurance and financial incentives are available to the western investor. These sources may provide the desired guarantees still lacking in the C.S.F.R.'s legislation and create the necessary incentive for one to pursue joint venture opportunities in the C.S.F.R. The U.S. government is concerned with promoting successful private business ventures in the C.S.F.R. on a geopolitical level, i.e. ensuring that this emerging democracy will be supplied with the western capital its economy needs to grow into a true free-market economy.⁸⁷

The U.S. government is also interested on a commercial level, i.e. protecting the reputation of U.S. companies in the international marketplace.⁸⁸ It believes that by providing insurance and other financial incentives, private investors will invest their capital in the C.S.F.R. Thus, the U.S. government's promotion of private investment in the C.S.F.R. achieves the dual purpose of assisting a fledgling democracy to develop a free-market system, while simultaneously bolstering the U.S. position in world trade.

86. See *Czechoslovakia: Compare and Contrast*, *supra* note 81. The Slovak call for economic autonomy is based on a fear of economic collapse in that region should the federal government close down the defense industry. As arms production is a major component of the Slovak economy, the result of a shut down would be widespread unemployment. The separatists constitute only a minority of the Slovak population and have no cohesive strategy or platform for outright independence. Presumably, concessions such as that granted by the federal government to Slovakia regarding armament production levels will be sufficient to appease the demands for increased sovereignty over Slovakian economic affairs.

87. See Fred Kaplan, *24 Nations OK Plan to Aid Eastern Europe*, BOSTON GLOBE, July 5, 1990, (Nat'l/Foreign), at 1. See also 135 CONG. REC. S11384 - 02 (Sept. 19, 1989)(statement of Sen. Cranston). In commenting on the Support for East European Democracy Program (S.E.E.D.), Senator Cranston contended that the United States has a compelling national interest to see through the democratic transition in Eastern Europe.

88. See *New Bill Would Revamp U.S. Foreign Aid Program by Tying Assistance to Exports*, Daily Rep. for Executives (BNA) No. 104, at A-2 (May 30, 1990).

An U.S. investor can obtain insurance on her investment at the domestic level through the Overseas Private Investment Corporation (O.P.I.C.).⁸⁹ O.P.I.C. extends political risk insurance to companies venturing into the Eastern European marketplace.⁹⁰ For example, in January of 1990, O.P.I.C. announced its commitment to insure General Electric Company against political risk in its investment activities in Hungary.⁹¹ Opportunities for investment aid in the C.S.F.R. may also be available through the Support for Eastern European Democracy Act (S.E.E.D.).⁹² S.E.E.D. provides funds to aid private investment in Eastern European countries through equity investments, technical assistance and training as well as loans and grants.⁹³ Although S.E.E.D. funds were originally established as stabilization funds for Hungary and Poland specifically, the U.S. Congress is considering legislation that would make S.E.E.D. funds available for general use in the C.S.F.R.⁹⁴

The U.S. government proved its firm commitment to increasing the C.S.F.R.'s trading position, making it more attractive to foreign investors, by concluding a bilateral trade agreement with the C.S.F.R. which granted it Most Favored Nation (MFN) status.⁹⁵ A significant

89. See *OPIC to Provide Political Risk Insurance for \$150 Million GE Investment in Hungary*, 7 Int'l Trade Rep. (BNA) No. 3, at 77 (Jan. 17, 1990). See also U.S. DEP'T COM. EASTERN EUROPE BUSINESS BULLETIN 4 (May 1990) [hereinafter BULLETIN].

90. See BULLETIN, *supra* note 89, at 4. To achieve its goal of promoting economic growth in developing countries, O.P.I.C. has devised various programs to stimulate private investment in those countries. One program offers political risk insurance to American investors. Another practical program is the Opportunity Bank. It assimilates relevant data on western and eastern firms that are interested in finding a compatible match for investment purposes.

91. See *OPIC to Provide Political Risk Insurance for \$150 Million GE Investment in Hungary*, 7 Int'l Trade Rep. (BNA) No. 3, at 77 (Jan. 17, 1990).

92. See *Commerce's Willkie Discusses Administration Efforts to Assist Reform in Eastern Europe*, 7 Int'l Trade Rep. (BNA) No. 34, at 1308 (Aug. 22, 1990) [hereinafter *Reform Efforts*].

93. See *id.* See also BULLETIN, *supra* note 89, at 2. In the Polish and Hungarian experience, boards of directors have been established to administer the allotted funds. The boards are comprised of U.S.-Polish and U.S.-Hungarian managers who are responsible for allocating the funds to appropriate activities. Examples of activities eligible for funding include: joint venture financing for proposed U.S.-Polish or U.S.-Hungarian ventures; financing of local small businesses; or other financial strategies that will aid in the development of the private sector.

94. See *Reform Efforts*, *supra* note 92.

95. See *U.S., Czechoslovakia Agree on Terms of Trade Pact, Paving Way for MFN Status*, 7 Int'l Trade Rep. (BNA) No. 15, at 498 (Apr. 11, 1990). The agreement was concluded in April of 1990. The bill was subsequently held up due to Congressional haggling over a mini trade bill (H.R. 1594). The mini-trade bill was signed into law on August 20, 1990, effectively updating the guidelines governing U.S. trade with Eastern Europe and opening the door to passage of the U.S.-Czechoslovakian trade agreement. See *President Bush Transmits U.S.-*

consequence of the trade agreement is the U.S. decision to pursue a bilateral investment treaty (B.I.T.) with the government of the C.S.F.R.⁹⁶ The U.S. objective in negotiating a B.I.T. is to establish explicit legal norms and effective enforcement measures to protect investment activities of U.S. individuals in a foreign state.⁹⁷

A B.I.T. will ultimately work in conjunction with the bilateral trade agreement to give the private investor maximum protection in the areas of currency transfer and exchange, political risk (making provision for the possibility of due compensation for expropriation by the host country), and governmental non-interference in business operations.⁹⁸ A notable incentive to western investment in the B.I.T. is a provision that gives U.S. companies unlimited profit repatriation rights.⁹⁹

Another consequence of the U.S.-Czechoslovakian trade agreement is recent adoption of a new patent code by the C.S.F.R.'s Parliament.¹⁰⁰ This law, which went into effect on January 1, 1991, amends the 1972 Patent Act, grants protection of patents for 20 years, and protects registered industrial designs for an initial five year period that is then extendable for another ten years upon application.¹⁰¹ Finally, in conjunction with U.S. involvement in talks to streamline the Coordinating Committee for Multilateral Export Control's (C.O.C.O.M.)

Czechoslovak Trade Pact to Congress, Urges Quick Action, 7 Int'l Trade Rep. (BNA) No. 36, at 1355 (Sept. 12, 1990).

The central element of the agreement is the conferral of MFN status on the C.S.F.R. MFN status is the basis of normalized trade relations, allowing countries to trade freely without the burden of higher tariff rates imposed on the goods of those countries that do not qualify for MFN status. Jan Skvara, the C.S.F.R. Foreign Trade Ministry's expert on U.S. trade, hailed the agreement as the means to increased C.S.F.R. presence in U.S. markets. *See id.*

From a U.S. perspective, the agreement is viewed as a time-saving measure that will "clearly improve the access that our [U.S.] companies will have to the C.S.F.R. market, and help them regain some of the ground that they may have lost to their European and Japanese competitors." *Senate Approves MFN Trade Status for Czechoslovakia by Unanimous Consent*, 7 Int'l Trade Rep. (BNA) No. 43, at 1645 (Oct. 31, 1990).

96. *See U.S.-Czechoslovakian Trade Pact Approved by House Ways and Means*, 7 Int'l Trade Rep. (BNA) No. 38, at 1485 (Sept. 26, 1990). For a detailed description of the evolution of U.S. policy toward bilateral investment treaties, *see Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990) [hereinafter Salacuse].

97. *See Salacuse, supra* note 96, at 657.

98. *See id.*

99. *See Czechoslovakia Set to Grant U.S. Businesses Broad Investment Incentives and Safeguards*, 8 Int'l Trade Rep. (BNA) No. 1, at 22 (Jan. 2, 1991).

100. *See Czechoslovakia Revises Patent Law to Comply with U.S. Conditions for Extending MFN Status*, Int'l Trade Daily (BNA) 22 (Jan. 23, 1991).

101. *See id.*

list of restricted exports, the U.S. Department of Commerce and the Bush Administration are working to limit the number of items restricted from export to Eastern Europe under U.S. export regulations.¹⁰² By lifting export controls, potential investors will be assured that they will be able to import necessary production materials into the host country.¹⁰³

B. International Aids to Investment

United States governmental and private funding efforts work to provide sources of insurance and financial incentives to direct investment in the C.S.F.R. Various multilateral efforts of interest to the potential investor are also being employed to encourage economic growth in Eastern Europe. Of paramount importance to the potential investor is the fact that C.O.C.O.M. is diligently working to substantially reduce restrictions on exportable items to the Eastern Europe countries.¹⁰⁴

For the C.S.F.R., and parties interested in its economic stability, the proposed relaxed restrictions are significant in two respects. First, the general liberalization of constraints on the export of manufacturing materials and machine tools to Eastern Europe will enable the C.S.F.R. to easily avail itself of basic items necessary to the efficient operation of a multitude of industrial enterprises.¹⁰⁵ Second, the spe-

102. *Reform Efforts*, *supra* note 92, at 1308. See also Edward L. Rubinoff, Restraints on Trading with Eastern Europe: COCOM and U.S. Export Controls, Address Before the A.B.A. Section of International Trade Committee (June 21, 1990) [hereinafter Rubinoff]. The Bureau of Export Administration maintains a list of restricted goods (the Commodity Control List) similar to C.O.C.O.M.'s International List.

103. See *U.S. Chamber Urges Administration to Liberalize Exports to East Bloc*, 7 Int'l Trade Rep. (BNA) No. 6, at 180 (Feb. 7, 1990). See also *Sen Kerry Planning to Introduce Bill on Revising Export Administration Act*, 7 Int'l Trade Rep. (BNA) No. 21, at 723 (May 23, 1990).

104. See Rubinoff, *supra* note 102. C.O.C.O.M. maintains three lists, the purpose of which is to "restrict the access of countries which pose threats to the national security of the C.O.C.O.M. allies to goods and technology which could significantly contribute to their military capabilities." *Id.* See also *Export Controls: Commerce Official Foresees More Liberal Trade Rules for Parts of Eastern Europe*, 8 Int'l Trade Rep. (BNA) No. 12, at 1700 (Nov. 20, 1991).

In light of the democratic changes sweeping these targeted countries, C.O.C.O.M. is in the midst of reducing the restricted items on the respective lists to only those that may still wield a viable threat (e.g. export of military weapons or parts) to the national security of the concerned countries.

105. See *European Community to Lift Import Quotas Now Imposed on Bulgaria and Czechoslovakia*, 7 Int'l Trade Rep. (BNA) No. 29, at 1119 (July 18, 1990). Export-oriented joint ventures would benefit from further relaxation of export controls currently imposed by the European Community (EC) on exports coming from Eastern European countries. On July 11, 1990, the Commission of the EC proposed that all quantitative restrictions covering the

cific procedures C.O.C.O.M. proposes for the C.S.F.R., as well as Hungary and Poland, will provide it with substantially increased access to contemporary telecommunications equipment.¹⁰⁶ Such increased access opens up the possibility of lucrative U.S. joint venture activity in the C.S.F.R.¹⁰⁷

Other incentives are provided by the International Monetary Fund (IMF) and the World Bank and its affiliates. The IMF and World Bank are working to meet the capital needs of Eastern European countries by providing loans and financial aid and offering various political and other non-business risk insurance packages to interested investors.¹⁰⁸ For example, the Multilateral Investment Guarantee Agency (M.I.G.A.) is an affiliate of the World Bank that provides insurance against political upheaval and other non-economic risks incurred by companies investing in the newly democratized countries of Eastern Europe.¹⁰⁹ Accordingly, M.I.G.A. offers contracts to foreign investors that guarantee against losses generated by non-business risks.¹¹⁰ M.I.G.A. does, however, require that both the investor's country and the targeted country be members of the agency, which is open to all World Bank members.¹¹¹

Another source of investment aid open to the potential investor is the International Finance Corporation (I.F.C.).¹¹² The I.F.C. is described as the "largest source of direct project financing for private investment in the developing world".¹¹³ It reports that the automo-

export of industrial and agricultural products from the C.S.F.R. and Bulgaria be removed. The proposal requires approval by the EC's Council to become effective. Should the proposal be adopted, exports such as men's shoes and hunting ammunition to the Benelux countries, semiconductors, toys and pottery to France, and chemical products to Spain would be freed from long-standing limitations on the number of these products allowed into the respective EC states.

106. See COCOM High Level Meeting: Fact Sheet at 4.

107. See *Bell Atlantic, US West Win Contract for Cellular Phones in Czechoslovakia*, 7 Int'l Trade Rep. (BNA) No. 47, at 1810 (Nov. 28, 1990). On November 16, 1990, Bell Telephone and U.S. West signed a joint venture contract with the C.S.F.R. Post and Telecommunications Administration to "build and operate cellular mobile telephone and packet data networks." *Id.*

108. See *World Bank Investment Promotion Agency Set to Guarantee 10 Projects This Year*, 7 Int'l Trade Rep. (BNA) No. 36, at 1376 (Sept. 12, 1990).

109. See *id.*

110. See *id.*

111. See *id.*

112. See *World Bank's IFC Will Aid Poland's Program for Privatization and Help Establish Bank*, 7 Int'l Trade Rep. (BNA) No. 36, at 1379 (Sept. 12, 1990).

113. *Id.* The I.F.C., a World Bank affiliate, is not only involved in financing western joint ventures in Eastern Europe. It is also aiding these countries in their privatization efforts. For example, the I.F.C. is currently active in Polish privatization efforts, helping the government to create a wholly private bank (the first of its kind in Poland), and an agency that will "help

tive industry is one potentially lucrative area for investment in a "developing country."¹¹⁴ In the traditional developing countries such as the Latin American or sub-Saharan nations, whose economies are crumbling under the immense pressure of the growing debt crisis, foreign investment has dramatically decreased. These nations were initially areas of high levels of foreign investment. However, these developing countries generated independence agendas in the 1970s, and moved away from agreements and concessions which they deemed exploitative. This movement resulted in a shift away from dependence on investment capital to financing.¹¹⁵

Although the C.S.F.R. and its Eastern European neighbors are not "developing countries" per se,¹¹⁶ these former communist countries may be accorded special dispensation as quasi-developing countries. Considering their need for capital assistance to successfully move from a state-controlled to a free-market economy, Eastern Eu-

small businesses raise money and undertake financial planning." *Id.* The I.F.C.'s executive vice-president asserts that the C.S.F.R. will soon join the agency. *See id.*

114. *See Automotive Industry*, Int'l Trade Daily (BNA) 26 (Oct. 11, 1990). The I.F.C. points to the automotive industry as a profitable focal area because it is linked to numerous other industries. For example, automobile manufacturing is tied to various service sectors, including marketing, shipping, insurance, service and mining. However, when devising an investment strategy, the investor must take into account import regulations, import quotas and voluntary restraint agreements that may restrict the potential for selling her product in such markets as the U.S. or the E.C. Regarding foreign investment in the developing world, *see* Kevin J. McGinty, *Opening the Courts to Protect Interests Abroad*, 10 B.C. THIRD WORLD L.J. 63 (1990) [hereinafter McGinty]. *See also* Carsten.T. Ebenroth, *The Changing Legal Perspective for Resolving the Debt Crisis: A European's Perspective*, 23 INT'L LAW. 629 (1989) [hereinafter Ebenroth].

115. *See* McGinty, *supra* note 114, at 3 - 7. *See also* Ebenroth, *supra* note 114, at 20. These countries also displayed their disapproval of equity investment by passing strict foreign investment laws. These laws prohibited investment in many industrial areas, and arbitrarily allotted expropriation rights to the governing authorities over foreign interests. These factors combined to effectively discourage any substantial investment in these regions.

To date, a number of these countries have relaxed their attitudes toward foreign investment, recognizing a dire need for capital to bolster their faltering economies. However, unlike the Eastern European changes in statutory law, much of the developing countries' modifications have been administrative only. *See* Carla A. Hills, *Testimony of Ambassador Carla A. Hills, United States Trade Representative, Before the Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives, June 14, 1990*, 22 ST. MARY'S L.J. 583 (1991). Consequently, investors will be more attracted to those countries that have effectuated a pro-investment legal regime.

116. *See* WORLD BANK, WORLD DEVELOPMENT REPORT 1989 at X (1989) [hereinafter DEVELOPMENT REPORT]. The World Bank classifies countries into various groupings. The mode of classification will depend on the purpose of the categorization. For example a "developing country" listing is based on a country's per capita GNP for purposes of statistical analysis. Because of the size of GNP in the countries of Eastern Europe, those countries consequently fall outside of the "developing country" index for statistical analysis purposes. *Id.*

ropean countries may be viewed in the same category as per se developing countries¹¹⁷ for purposes of determining eligibility for aid.¹¹⁸

Funds are also available from the newly founded European Bank for Reconstruction and Development (E.B.R.D.), which plans to utilize a variety of fiscal tools to assist in the Eastern European economic transformation.¹¹⁹ Notably, the bank's charter mandates that a minimum of sixty percent of its yearly lending totals be directed towards the private sector.¹²⁰

C. Evidence of Successful Investment in Eastern Europe

The potential U.S. investor might also look to the other Eastern European countries for assurances that westerners can and do overcome the various obstacles to successfully establishing business enterprises in these emerging free-market systems.¹²¹ Hungary is a prime example. Hungary's desire for western investment has led the government to adopt increasingly flexible revisions to its original joint venture legislation.¹²² Hungary's flexibility has attracted western capital in the form of joint venture enterprises with successful businesses such as Suzuki Motors of Japan, Adidas of Germany, Société Generale of France, Volvo of Sweden, Jolt of Canada and General Electric and General Motors of the U.S.¹²³ These companies were drawn to the Hungarian marketplace as a result of the Hungarian government's de-

117. See *id.* at X, XI. Traditional classification of developing countries includes those nations whose economies fall into a low or middle bracket in terms of gross national product, e.g. Latin American, Sub-Saharan, and Middle Eastern countries. Contrast classification for statistical analysis, whereby GNP measures of Eastern European countries precludes those countries from developing status for that particular purpose. *Id.* at 158-61.

118. See *id.* at XI. While the term "developing country" is conveniently employed by the international community, it does not necessarily reflect a country's development status based on any set criteria, nor does it imply that all such countries are at similar levels of development. See also *World Bank Investment Promotion Agency*, *supra* note 108.

119. See *East European Bank Will Create Foreign Investment Opportunities*, *Official Says*, 7 Int'l Trade Rep. (BNA) No. 37, at 1449 (Sept. 19, 1990). The United States has committed itself to a ten percent share of the bank's capital. A French financial minister stated that the E.B.R.D. will be actively involved in joint venture activities and that a wealth of foreign investment opportunities will soon be available. *Id.*

120. See *id.*

121. See *U.S. Manufacturing Firm's Investments Abroad Rise by 10 Percent in First Half of Year*, 7 Int'l Trade Rep. (BNA) No. 40, at 1557 (Oct. 10, 1990). The Multinational Register produces data and analyses on U.S. foreign investment.

The U.N. Economic Commission for Europe (E.C.E.) also issues its own publication concerning relevant information on investment in Eastern European countries.

122. U.N. ECON. COMMISSION FOR EUR. EAST-WEST JOINT VENTURES at 148, U.N. Doc. ECE/Trade/162, U.N. Sales No. E.88.II.E.18 (1988). See also Eichmann, *supra* note 17, at 257.

123. See Eichmann, *supra* note 17, at 258.

cision to relax controls on foreign investment, including the easing of registration requirements and allowing for majority foreign ownership.¹²⁴

Hungary's move towards a decentralized economy made it easier for foreigners to do business because the bureaucratic trials of negotiating with a multitude of state-planning agencies were obviated. As the economies of Eastern European countries become increasingly divorced from state control, the pricing mechanism will be based on economic forces such as supply and demand rather than bureaucratic demands.¹²⁵ The Hungarian success story may be repeated in the C.S.F.R.¹²⁶

The government of the C.S.F.R. is striving towards a free market economy, and working to dismantle the restrictions previously placed on foreign investment by the communist regime.¹²⁷ The new government's goal in amending its economic laws is "to help open the Czechoslovak economy to the rest of the world."¹²⁸ Whereas numerous European and Asian investors have moved in and reaped the benefits of the liberal Hungarian investment laws, the C.S.F.R.'s recent legislative enactments encouraging joint venture participation have yet to be taken advantage of by U.S. investors.¹²⁹

V. CONCLUSION

In conclusion, U.S. companies are encouraged to act quickly, but prudently with respect to investment in the C.S.F.R.¹³⁰ Investors are

124. See *id.* at 262.

125. See *id.* at 269.

126. See *Prospective Investors Advised to Establish New Businesses Rather Than Buy Existing Ones*, 7 Int'l Trade Rep. (BNA) No. 38, at 1486 (Sept. 26, 1990). Laszlo Bonnay, a representative of Price Waterhouse's Budapest office, declares that successful ventures in Hungary include the start-up business efforts of Levi Strauss, McDonald's restaurant and DHL Overnight Delivery Company.

Hungarian investment interest has been encouraged by the availability of loans through the American-Hungarian Enterprise Fund which announced the approval of \$1.1 million in loans to various proposed joint ventures. For example, a loan of \$500,000 has been approved for a computer retailing joint venture between the U.S. company Donosphere and two Hungarian computer retailers to sell computers and related products in newly established Hungarian retail outlets.

127. See Remarks, *supra* note 1, at 35.

128. CZECHOSLOVAK CHAMBER OF COMMERCE AND INDUSTRY, REMARKS ON THE AMENDED ACT ON ECONOMIC RELATIONS WITH FOREIGN COUNTRIES 3 (1990).

129. See East-West, *supra* note 3, at 4.

130. See *President Signs Landmark Legislation Extending MFN Status to Czechoslovakia*, 7 Int'l Trade Rep. (BNA) No. 45, at 1735 (Nov. 14, 1990). Speakers at the 1990 U.S.-Czechoslovak Economic Council annual meeting advised U.S. investors considering potential joint venture partners, that it would be necessary to negotiate such legal and business issues as

advised to monitor the C.S.F.R.'s reform efforts, specifically its accomplishment of the currency convertibility plan, privatization program, further modification of application and authorization procedures and ratification of a B.I.T. that includes profit repatriation rights. Where ambiguities exist in the C.S.F.R.'s legislation, western investors should exercise caution and delineate precisely the details of the proposed venture in the particular contract. Smaller business concerns, with less capital and management resources available for investment than their larger corporate and multinational corporation counterparts, should proceed with particular caution. As noted above, the C.S.F.R. is feeling the loss of economic support it depended on in subsidized trade and energy imports from the Soviet Union. The investor must also bear in mind the fact that the C.S.F.R. relied heavily on its Eastern European neighbors for raw materials, which are currently in short supply. Finally, while making progress in its market reforms, legislation will need to undergo further revision, specifically in the areas of profit repatriation and tax concessions, before the C.S.F.R. will be able to offer a truly attractive investment regime.

Bearing in mind these warnings, U.S. companies willing and able to commit to equitable investment agreements with partners from the C.S.F.R. have the opportunity to capture a share in a potentially lucrative market.¹³¹ In agreeing to a publishing joint venture with a C.S.F.R. partner, a U.S. professional noted that "[t]he new freedom in the East has resulted in the same criterion of a book's value that holds in the West: sales potential, and the harder the currency, the better the book."¹³² Such deals will aid the fledgling democracy on its road

foreign currency reserves, managerial training and technical assistance. It was also noted that western investors should be sensitive to C.S.F.R. labor and environmental concerns. For example, investors need to work with the C.S.F.R. to counter the drastic pollution problems it is experiencing. Investors should work with their counterparts in the C.S.F.R. to enact industrial pollution regulations. Investors could also assist their partners by offering management training and marketing seminars. This type of training might include visits to U.S. plants showing how business strategies are put into the market. *Id.*

131. See Herbert Mitgang, *Publishing for Love & Money in Kafka's Land*, N.Y. TIMES, Dec. 23, 1990, § 4, at 6. The C.S.F.R.'s traditional emphasis on literary production has made the C.S.F.R. a publishing nation. In the wake of the internal political upheaval, the state publishing agency is no longer in control of the C.S.F.R.'s publishing industry.

Charles University and the University of Nebraska Press have taken advantage of the new political and economic freedom by entering into a publishing cooperative. The marketing manager of Nebraska Press, Diane Wanek, took affirmative steps to launch the venture. She appealed to Apple Computer-Europe to contribute to the reform of the publishing industry by donating three Macintosh II Computers that would help establish the new venture. Ms. Wanek then traveled to Prague to train the Czech staff in desktop publishing. *Id.*

132. *Id.*

to reform while simultaneously effecting a profitable return for the individual enterprises involved. Although not exhaustive, the foregoing list of investment programs and risk guarantors evidences that the potential foreign investor also has a wealth of tools available to alleviate concerns regarding inadequate safeguards in the C.S.F.R.'s investment legislation.

Thus, for those investors with adequate resource and initiative, the C.S.F.R.'s historically solid economic base, developed infrastructure and governmental commitment to market reform make it a more attractive forum for venturing into the Eastern European marketplace than some of its more debt-strapped neighbors. For example, with its low debt record, the C.S.F.R. may qualify for loans and credit more readily than a country with large debt obligations. Positive market reform measures include wholesale and retail price liberalization, tightened monetary policy, a legislatively approved privatization program and maintenance of a fixed exchange rate.¹³³ Lifting of the C.O.C.O.M. restrictions will allow western countries to export necessary raw materials into the C.S.F.R., alleviating hardship caused by the loss of subsidized trade with the Soviet Union and other Eastern European neighbors. Furthermore, the government of the C.S.F.R. has announced its desire for western investment in general, and U.S. involvement in particular. In the final analysis, while the investor would be wise to exercise routine caution in examining joint venture prospects in the C.S.F.R., the legal, economic and political support for western investment in the C.S.F.R. should ultimately sway the decision of the enterprising investor in favor of taking a chance, and investing in democracy.

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133. See *In the News*, 8 Int'l Trade Rep. (BNA) No. 4, at 130 (Jan. 23, 1991).