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Joint Ventures Between Multinationals: Government Regulatory Aspects

by John D. Hushon*

I. Introduction

The negotiation and drafting of a joint venture agreement must be done in the context of government regulations applicable to multinational projects in general and, more particularly, to multinational joint ventures.1 Maximum utilization of government assistance and the adaptation of business realities and expectations require a thorough familiarity with the regulatory milieu into which the venture will be placed. For the most part, the joint venture agreement, whether it takes the form of a stockholders' agreement, partnership agreement, or joint venture agreement, is a businessman's document. Advice given by the attorney, therefore, must have a substantial business component. The average attorney might feel uncomfortable in such a situation unless his required advice is placed in the context of the traditional role of the attorney, negotiating and drafting a transactional document in light of government statutes and regulations.

Business aspects of the joint venture document generally fall into two broad categories. The first of these is the allocation of capitalization, management and marketing responsibilities, and benefits among the participants to the joint venture. In this respect, legal advice is limited to suggestions based upon experience with comparable transactions and knowledge of the "regulatory possible."2

The second area on which substantial business attention is focused includes the operating and profit reinvestment/distribution policies to be applied by the joint venture when it begins to function and ultimately earn profits, and the resulting need for techniques to achieve different


1 See generally W. Surrey & D. Wallace, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS (2d ed. 1977); H. Steiner & D. Vagts, TRANSNATIONAL LEGAL PROBLEMS (2d ed. 1976).

2 Attorneys are often asked to give an opinion on a joint venture document stating that such document is within the "regulatory possible." In other words, attorneys must state that to the best of their knowledge the parties can carry out their intentions without violation of existing laws and regulations.
but not inequitable treatment of partners with varying objectives. Participants in multinational joint ventures rarely have identical objectives. For example, there is often a split between parties on whether the joint venture is to be short-term or long-term in nature and whether the profits of the joint venture are to be reinvested for expansion or are to be distributed. Different tax objectives often exist. A great deal of effort goes into balancing the equitable scales among parties. This is usually done by allocating different aspects of the joint venture to each of them so that each partner will be convinced that it has received its appropriate share of the operating responsibilities and profit potential of the joint venture despite the superficial appearance of these non-identical allocations.

The greatest areas of legal impact upon the joint venture document and those which constitute the areas of primary responsibility for attorneys fall into three generally-described areas:

1. The structure of the joint venture to take maximum advantage of various government rules, especially the tax laws.

2. The provision of assurance to parties that their expressed or implied intent is permitted by government regulation; this is perhaps furthered by government assistance in the form of financial guarantees, loans or tax benefits, but certainly not prohibited by government policy or specific regulations or statutes. Throughout the drafting process, the attorney must keep in mind the necessity of clearing the plans for the joint venture and the joint venture document itself through the regulatory process whether the situs of the joint venture is the United States or most foreign countries.

3. The preparation and negotiation of boilerplate, that is, the decisions with respect to the law of the contract, a mechanism for dispute resolution, term and termination provisions, clauses dealing with competition, alienation restrictions, and buy-out formulas. All of these constitute potential areas of conflict with which the parties have almost no concern until and unless a problem arises. This article focuses on the second of these legal inputs: compliance by the joint venture with government regulation and the use of government regulation of the United States and some representative foreign countries.

Government regulation of the joint venture falls into several broad, arbitrary categories: regulations affecting ownership and capitalization (the endowment of the joint venture), regulations relating to management of the joint venture, and regulations restricting economic activities by non-nationals and general reporting requirements imposed by governments upon joint ventures which are designed to gather information as a basis for future restrictive or regulative policy. To some extent, joint venture transactions are the answer to the inability of a non-national to con-

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4 Some foreign countries still have no regulation at all in this area.
ceptualize and actualize a wholly-owned project through acquisition or new investment in certain governmental situations. The joint venture then is a creature of government regulation.

II. Endowment of the Joint Venture

Joint ventures are typically classified by type: foreign, mixed, or national. A common definition, employed in many situations, is that a joint venture is foreign if more than sixty percent of control of the joint venture rests ultimately in non-nationals. A mixed joint venture is one in which the national and non-national ownership and control patterns are in the forty to sixty percent range. In mixed joint ventures no one party, whether national or non-national, actually controls the joint venture. The parties must cooperate to make serious decisions and even to continue the life of the joint venture. Finally, joint ventures are classified as national if more than sixty percent of the ownership or control of the joint venture is held by nationals of the host government.

Different standards are applied to the classification formula. Control is normally defined as the power to direct operations of the joint venture and the distribution or retention of its income. However, it is possible that control may be separate and distinct from profit distribution or liquidation rights. Outside of the United States, where the definition of control varies for different subjects such as tax and antitrust, control is considered to be the power to direct the operations and income distribution of the joint venture. Although control of liquidation or profit distribution matters is not considered in classifying a joint venture, they are regulated nevertheless by other government policies, such as those relating to foreign exchange or transfer.

Classification of the joint venture has an important impact on the rights of the joint venture with respect to government regulation by the host country. Typically, in this author's experience, national joint ventures enjoy the greatest latitude of permitted activities, operating policy, and profit distribution ability. Often it is possible to meet nationality guidelines while nevertheless meeting the objectives of the partners, but

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5 U.S. statutes and regulations do not recognize the concept of a "mixed" joint venture. Citizenship for national ventures is usually measured as 51% or "more than 50%," although the tax code uses both a percentage and actual control tests, and certain government agencies (cf. Maritime Administration, U.S. Department of Transportation) impose stricter standards in some cases.

Foreign standards differ; for example, Andean Community (ANCOM) definitions describe a joint venture as foreign if less than 51% is controlled by nationals. To be called national within ANCOM definitions, a joint venture must be controlled by more than 80% nationals. Ventures controlled from 51 to 80% by non-nationals are termed mixed. Decision 24, highlighted in Heatley, Legal and Related Aspects of the Disposition of Foreign Equity by Local Laws, in Private Investors Abroad—Problems and Solutions in International Business In 1979, 331-32 (M. Landwehr ed. 1979). For further information on ANCOM definitions, see Price Waterhouse & Co., Information Guide, Doing Business in the Andean Common Markets (1974).
to do so, the parties contemplating the joint venture must consider every possible type of equity contribution or endowment.

A. Direct Finance

Direct financial infusions by the partners are usually the most important means of financing a joint venture. Joint venture finance may take the form of an equity contribution to a partnership or corporation, or of a loan or a guaranty made to the venture in the host country jurisdiction. The desirability of using each of these means of financing depends upon various tax, regulatory, and bank lender implications. Locally-generated debt is rarely available except in more developed nations; under such circumstances guarantees are out of the question.

B. Contingent Commitments

The partners will normally also wish to consider contingent commitments. A contingent commitment is generally considered to be a contractual obligation of a partner to make a financial contribution to the joint venture sometime in the future upon the happening of certain specified events. For example, if working capital falls below a certain pre-established level or upon the contribution by other partners of certain physical assets or other pre-arranged milestones, a contractual obligation might be triggered. This obligation may take the form of a comfort letter or full contingent commitment among the partners or from the partners to various lenders. A comfort letter is usually defined as an agreement among the partners or between the partners and the lenders in which the venturers promise that they are fully committed to the project and morally convinced of its inevitable success, that the partners will not dispose of their venture interests for a specified period, and that the general business reputation of the venturers is “on the line”—in short, everything less than a firm financial commitment.

The parties to a joint venture may also wish to consider the use of equity subscriptions—agreements for future equity contributions. These agreements frequently avoid the timing problems associated with initial “start-up” contributions, but create certain difficulties with respect to joint venture lenders because they will wish to have assurance that the funds they are putting into the joint venture are adequately covered by equity contributions from the partners themselves who are principally responsible for the success or failure of the venture.

In addition, the parties may consider the availability of governmental participation in long-term project financing and export credit. This credit is often available for foreign-source equipment purchases by the joint venture, such credit being for extended terms and at more reasonable rates of interest than might otherwise be available.

Having considered the possible range of solutions to the endowment problem, from direct immediate capitalization by each of the partners to
long-term loan and/or equity subscription arrangements, and the availability of guaranteed or government-assisted financing, it is important to consider the government regulatory and lender impact on the capitalization decision. Because this decision can rarely be made by the partners in a vacuum, potential partners must consider whether their plans for the joint venture are realistic in light of both governmental regulations and their intended banking situations.

### C. Local Equity Legislation

Local equity legislation has been adopted by the governments of most of the less developed countries (LDC's). Such legislation establishes standards for national participation in the capitalization of joint ventures. In fact, local equity legislation has resulted in a substantial increase in the number of joint ventures formed, particularly because mixed joint ventures are the only technique for the conduct of business operations in many of the more profitable commercial areas.6

Mexican local equity legislation is typical of what may be found in the Latin American countries. Under the Law to Promote Mexican Investment and to Regulate Foreign Investment, adopted by the Mexican legislature in 1973,7 a Mexican joint venture may not have foreign control of more than forty-nine percent, measured in terms of equity participation. Frequently, less control is mandated.8 The actual foreign control permitted depends upon the nature of the project.9 For example, in areas such as energy exploitation, mining exploration, communication, and natural resources, foreign equity participation is severely limited. A second general consideration imposed by the Mexican law relates to the "fit" of the proposed joint venture in the economic plan established by the Mexican government. It is important to ask whether the joint venture meets the geographic location, training and employment opportunity offer, industrial diversification, domestic technical development, foreign exchange impact and non-competition with existing industry policies of the government.10

ANCOM11 established local equity principles for joint ventures within the Latin American common market in its Decision 24.12

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6 For a general discussion of the problems faced by IBM as it coped with various local equity rules, see Heatley, supra note 5.
8 Id. at 34-35.
9 Id.
10 Id.
11 Andean Community, established by the Cartagena Agreement, May 26, 1969, in Bogota, Colombia; see Heatley, supra note 5, at 330.
12 PRICE WATERHOUSE & CO., INFORMATION GUIDE, DOING BUSINESS IN THE ANDEAN COMMON MARKET 14 (1979). For a discussion of Decision 24, see Heatley, supra note 5, at 331-35. See also Furnish, Foreign Investment and Transfer of Technology Laws and Regulations in the Andean
ria adopted local equity rules as far back as 1968.\textsuperscript{13} India’s Foreign Exchange Regulation Act of 1973, which is administered by the Indian Reserve Bank, also contains local equity rules.\textsuperscript{14} Both Indonesia and India require progressive shift control in joint ventures to nationals.\textsuperscript{15}

Local equity legislation has substantial impact upon the initial endowment of the joint venture. First, it severely restricts the ability of the parties to make independent business decisions outside of the government political context. Second, it often requires creativity on the part of the drafting and negotiating attorneys to achieve the minimum capitalization requirements of the joint venture while providing basic equity to the participants. This is especially true when one of those participants is severely restricted in his ability to make contributions as a practical matter and the other is prohibited from taking a reasonable return on his contribution as a legal matter. Finally, registration procedures under local equity legislation are essential. Such registration is normally a prerequisite to subsequent repatriation of capital and/or earnings by a non-national joint venture partner.

In most joint ventures in LDC’s, all forms of capitalization are needed in order to provide maximum flexibility for the partners in meeting basic equity needs among themselves, as well as meeting the minimum standards of government regulation.

\section*{D. \textit{Repatriation}}

Having established the basic mechanism for capitalizing the joint venture and ensuring that the procedure meets the minimum standards established by the joint venture lenders and the host government, the parties must also consider the likely legislative situation relating to the future repatriation of the capital or earnings of the joint venture by the non-national partner. The governments of the LDC’s are becoming increasingly sophisticated with respect to monitoring the various techniques for extracting profits or repatriating equity in the joint venture.\textsuperscript{16} Normally, one can expect to find dividend restrictions and loan interest


\textsuperscript{13} See Heatley, supra note 5, at 335-37, referring to Indonesian Law Number 6 of 1968. See generally D. Carr, \textit{Foreign Investment and Development in the Southwest Pacific} 148-51 (1978).

\textsuperscript{14} Price Waterhouse \& Co., \textit{Information Guide, Doing Business in India} 12-17 (1980); see Heatley, supra note 5, at 339-41.


\textsuperscript{16} A useful country-by-country summary of restrictions relating to the repatriation of capital and earnings, dividend restrictions, interest payment restrictions, transfer price controls, and restrictions on royalties and licensing fees is published annually by the International Monetary Fund. The annual survey of exchange restrictions is an extraordinarily useful starting point and primer for the attorney considering the formation of a joint venture outside the United States. See \textit{International Monetary Fund, Annual Report on Exchange Arrangements and Exchange Restrictions} 1980 (1980).
payment restrictions, thereby preventing avoidance of dividend repatriation formula by merely creating a loan and paying interest on it.

A second popular technique, which has become less available in recent years, is transfer pricing. This technique involves acquisition of raw materials from one of the partners or participation in a related company transaction on a non-economic basis, resulting in a substantial repatriation of capital earnings to the non-national partner. Today, most LDC's have procedures and principles relating to transfer pricing among related entities.

Royalties and license fees, paid to the non-national partner, have also been popular techniques for repatriation. As is indicated below, however, most of the governments of the LDC's have now adopted legislation restricting the payment of such royalties and license fees except within certain specified areas, at certain rates, and for certain specified periods of time, with full disclosure and registration.

Mexico, for example, has adopted a Law on the Transfer of Technology on the Use and Exploitation of Patents and Trademarks which substantially restricts payments made to non-nationals, whether or not they are participants in joint ventures, for technology transfer and/or management. The Mexican legislation requires the registration of any such agreement and regulates the pricing. It also prohibits tying the technology license with a product or component supply agreement, regulates the term of the royalty and management fee payments, and prohibits non-competition technology clauses and grantback arrangements. Finally, the Mexican rules require that the national or licensee be given ownership of the technology after a certain relatively short license period.

In considering the capitalization of the joint venture, therefore, the attorney must first consider local equity legislation which restricts the ability of the partners to agree among themselves as to how the joint venture will be capitalized. Then, the attorney must consider the impact of lender policy, because most joint ventures will want to have some debt financing. Having considered these items, the attorney must turn his attention to the repatriation desires of the partners. The attorney must examine the techniques which can be employed to ensure that the parties' expectations with respect to extracting the capital and enjoying the fruits of the joint venture's operation will be not frustrated. Finally, the attorney must consider the possible foreign exchange transfer approvals which are required for the contribution by the non-national partner to the joint venture. Very often, the joint venture is formed and the parties

17 D.O. Dec. 30, 1972; see Mackinney supra note 7, at 36.
18 Id. at 37.
19 Id. at 37-38.
20 Id.
21 Id.
commit themselves to its capitalization, only to discover that the non-national partner must secure his host government's approval for the transfer of funds from his home office to the joint venture. This can be a problem which is time-consuming and which can frustrate the basic agreement of the parties.

E. Government Assistance

Although government regulation of joint ventures has become increasingly stringent throughout the world, various governments also offer assistance programs for new projects. Such assistance programs can typically be used for financing the cost of planning the project prior to decision-making by the partners or for funding the cost of the basic infrastructure, such as provision of utilities, roads, employee education, employee housing, and other essential capital investment items which are not directly productive. These programs may also be helpful in the actual capitalization of the project itself through direct long-term, low-interest rate loans or guarantees of privately generated debt, resulting in longer terms and lower rates.

F. U.S. Government Programs for Projects in the U.S.

The U.S. Government operates or assists a number of programs designed to encourage investment in U.S. projects. Of these programs, the main ones are administered by the Economic Development Administration (EDA), the Farmers Home Administration (FmHA), and those provisions of the U.S. Internal Revenue Code relating to municipal bond financing, which enable the issuance of industrial development revenue bonds (IRB's) for the benefit of project owners and operators.

1. EDA

The EDA, under the U.S. Department of Commerce, provides business development loans and guarantees for approved projects. These projects may be newly established or expanding businesses which are located or which are planned to be located in certain geographic areas designated by EDA as development areas.

Development areas are generally those with high levels of unemployment or with other depressed economic attributes. Relocation projects are eligible for EDA assistance, provided relocation does not result in employment loss at the original site and that the relocation is the first for the project owner within a two-year period.

One important feature of the EDA program results from the fact that the current regulations and policies of the EDA do not restrict EDA

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assistance programs to U.S. citizens; assistance is available to foreign joint ventures. Projects owned and operated by non-U.S. nationals or those jointly owned and operated by U.S. and non-U.S. nationals are eligible for assistance.25

Applicants for EDA assistance must demonstrate that there is value to the EDA assistance. Applicants must show that the debt financing is not generally available to the project through private lending institutions or other federal agencies at reasonable rates and for reasonable terms.26 The applicant must also show that the project is not entering into an industry with U.S. domestic overcapacity27 and that the project is feasible, thereby at least reasonably assuring loan repayment.28 Those projects in which federal participation through direct loan or guaranty will exceed one million dollars, tourism and recreation projects, and those projects involving novel technological developments require independent economic feasibility studies.29

Three programs are currently open (although, as this article goes to press, EDA programs are under consideration for termination) to eligible business project applicants. The first program available is direct fixed asset loans. Direct loans are available from EDA for up to sixty-five percent of the total project asset costs. Of the remaining thirty-five percent of asset cost, at least fifteen percent must be equity and ten percent must be supplied by the borrower.30 Interest rates for this type of loan are determined by the cost of government borrowing at the time the commitment is made.31 Loans mature in twenty-five years or less,32 although the term tends to be substantially longer than that available from commercial sources. In previous years, it has been the author's experience that interest rates on these loans have averaged approximately two percent above comparably-termed U.S. Treasury obligations.

Guarantees are available for up to eighty-five percent of fixed asset costs of the borrower who provides fifteen percent of the fixed asset purchase price from equity capital. Interest rates are determined according to customary bank rates, taking into account the government guarantee.33

Direct working capital loans are another of EDA's programs. Working capital loans are available for the full amount required by the borrower in theory.34 In practice, however, business applicants are normally required to provide at least fifteen percent of their working capital re-

28 Id. § 306.9 (1980).
29 Id. § 306.24 (1980).
Working capital loans are of shorter maturity, being set at five years or less. Interest rates are set according to the cost of government borrowing for comparably termed obligations. As in the case of fixed asset loans, EDA is willing to participate in guaranteeing working capital loans in excess of that amount made available through a direct loan. EDA will guaranty up to ninety percent of the remaining eighty-five percent of the working capital required. The business applicant then provides fifteen percent of his working capital need and the private lender "risks" ten percent of eighty-five percent. Interest rates are comparable to those for guaranteed fixed asset obligations.

Lease guarantees are another option made available by EDA. In the event the business applicant desires to enter into a long-term lease for assets but is unable to provide sufficient economic security to the lessor to obtain such a lease, EDA will participate by guarantying the performance of the lessee in connection with leases with terms of five to twenty-five years for fixed assets. EDA's participation is ninety percent of the rental obligations of the lease after the lessee provides a minimum of fifteen percent of the value of the assets to be leased. EDA collects a small fee for its participation in the lease guarantee program.

In recent years, EDA has had minimal budgetary availability for direct loans. However, the guaranty program is relatively active. Loans of up to fifty million dollars for large industrial projects involving non-U.S. nationals have been guaranteed by EDA in recent years. Currently, EDA and the FmHA are exploring the possibility of extending joint guarantees for projects which meet the eligibility criteria of each agency. This will make possible the availability of U.S. Government guarantees for extremely large industrial projects in certain geographical areas.

2. Farmers Home Administration

Additional financing opportunities for projects are made available by the FmHA in the Department of Agriculture. FmHA provides developmental guaranteed and direct loans for projects in rural areas. Rural areas are broadly defined and most parts of the U.S. in which new industrial projects are being considered are eligible for FmHA guaranteed financing. At the current time, FmHA regulations and policy have imposed a citizenship requirement on borrowers. The owners of a project applying for FmHA financing are traced back to natural

35 Id. § 306.14(c) (1980).
36 Id. § 306.10(b) (1980).
37 Id. §§ 306.13(d), 306.14(c) (1980).
38 Id. § 306.10(c) (1980).
39 Id. §§ 306.13(c), 306.14(d) (1980).
persons and it must be determined that U.S. citizens own and control more than fifty percent of the project (i.e., a national joint venture) in order for it to meet the minimum citizenship requirements.\(^4\)

After citizenship and rural location, the most important criteria for the FmHA analyst is the creation of employment. In considering whether an FmHA guaranty should be sought, the borrower should calculate "jobs created per dollar guaranteed." The borrower must determine how much direct and indirect employment will be created by the project when compared with the size of the FmHA guaranty.

Individuals, corporations, and federally recognized Indian tribes are eligible for assistance to further business and industrial development, establish enterprises, and increase employment in rural areas. Rural areas are defined as areas beyond the outer boundaries of cities of at least 50,000 population or adjacent to urbanized areas with more than 100 persons per square mile in density.\(^4\) Joint venture partnerships, whether limited or general, have certain structural problems with respect to FmHA guarantees. Under such circumstances, it may be necessary for the FmHA to extend a guaranty in connection with a loan made to the individual partners themselves, rather than to the partnership itself.

Guarantees for loans are available with no dollar limit. However, loan guarantees in excess of five million dollars must be specifically reported to a congressional oversight committee by FmHA, and therefore applications for such large loans require special consideration at relatively high levels in the agency.\(^4\) Feasibility studies are required and loan repayment must be reasonably approved with "sufficient collateral" and pro-forma projections. The loan term extends for a maximum of thirty years on land, buildings, and permanent fixtures, fifteen years for machinery and equipment, seven years for working capital, and forty years for community facilities.\(^4\) Interest rates are determined by market rates but, because of the FmHA guaranty, tend to be approximately two to four percent below comparable-life private borrowings.\(^4\) In addition, FmHA loans typically extend for terms that are fifty to one hundred percent longer than those customarily available in the private banking sector. A local or regional bank must be found to sponsor and service the loan; the bank must become the applicant and provide or syndicate at least ten percent of the total loan on an unguaranteed basis.

Each year FmHA makes a state-by-state allocation of funds; therefore, local political support of the application is very helpful to demonstrate that the project will further the economic development program of

\(^4\) Some legislative activity in the citizenship area has occurred in the last two years to widen availability of FmHA funds to non-citizens. Such proposals have not been adopted and thus citizenship remains a requirement for eligibility.


\(^4\) Recent loans have been guaranteed in excess of $5 million.

\(^4\) 7 C.F.R. § 1980.424(b) (1980).

\(^4\) Id § 1980.423 (1980).
the local government. A substantial part of the annual appropriation, however, is left in a pool. This pool is supplemented with the state-by-state allocations which are underutilized by the state assignees. Previous experience suggests that applications received early in the federal fiscal year with local political support are handled on a priority basis, and larger projects which exceed the host state allocation are reviewed more favorably toward the end of the fiscal year when the agency has and desires to use its annual appropriation for guaranteed loans.

3. Industrial Development Revenue Bonds

In addition to the two principal federal assistance programs available to joint venture projects, a sponsor should also consider locally issued municipal bonds for developmental projects. Because of the tax-free interest feature of these bonds, interest rates are lower and project debt cost is substantially lower. Local development bond issues have become relatively popular in the U.S. and procedures for analyzing and handling such issues are becoming more and more stereotyped. It is important to keep three principal features of these issues in mind. First, because an IRB does not carry the full faith and credit of the municipality, the bond issue does not, per se, upgrade the borrower’s credit standing. Interest costs are reduced because of the tax-free status of the interest income to the holder of the bonds, not because of the improved credit rating of the bonds themselves as in the case of U.S. Government-guaranteed obligations. Second, the U.S. Internal Revenue Code imposes project size limitations for any potential user of this type of financing. Essentially, if the borrower has reason to expect that he will make capital investment in the host jurisdiction of substantially more than ten million dollars during the three-year period commencing on the date on which the bonds are issued, IRBs are not likely to be of substantial utility. Thus, these bonds are principally for relatively small projects. Third, local IRB financing legislation does not normally contain a citizenship requirement for any or all of the participants in the project. The purchaser of the bond, however, will obviously be concerned about the customary creditor/debtor matters related to credit standing and ability to follow up a default with a non-national borrower.

Thus, both the federal and state governments have provided a number of financing vehicles for projects located in the U.S. Except in the case of FmHA no distinction is made between foreign and national

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47 As a matter of political common sense, such a move is also advisable.
48 See generally TAX MGM'T PORTFOLIO 216-4th (BNA) on I.R.C. § 103(b).
49 I.R.C. § 103(b)(1)-(6).
50 While techniques exist for expanding the statutory $10 million limit, the cost and administrative burden is rarely worthwhile except with respect to unforeseen capital expenditures or relatively small capital spending overruns.
51 FmHA approximately one year ago published and withdrew a proposed rulemaking to ease citizenship requirements. Republication is not currently planned by FmHA.
borrowers. Direct loans, guarantees, and IRB bond sponsorship all result in substantially reduced cost to the project and may themselves create endowment for the joint venture.

G. U.S. Government Programs for Investments Outside the U.S.

Various federal government agencies and quasi-public corporations established by the U.S. Government are engaged in providing investment capital for projects located outside of the United States. The U.S. company considering an external investment either on a sole or joint venture basis should consider the availability of these government assistance programs, because all are designed to reduce the risk of the investment, lengthen the term for repayment, reduce the cost of investment capital, or make available capital which would not otherwise be offered to the project.

I. Overseas Private Investment Corporation (OPIC)

Pursuant to the Foreign Assistance Act of 1969, the Overseas Private Investment Corporation (OPIC) provides project financing through loans or loan guaranties and issues political risk insurance for investments by U.S. persons and corporations in certain countries which appear on the OPIC Country List.

Political risk insurance is provided to assure U.S. investors against the inconvertibility of their investment, against expropriation, nationalization, or confiscation by the host government or an agency thereof.

54 OPIC insurance and finance programs are currently available in the following countries: Afghanistan, Antigua, Argentina, Bangladesh, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Burundi, Cameroon, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cyprus, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Gabon, Gambia, Ghana, Greece, Granada, Guatemala, Guinea, Guyana, Haiti, Honduras, India, Indonesia, Israel, Ivory Coast, Jamaica, Jordan, Kenya, Korea, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Morocco, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Romania, Rwanda, St. Kitts-Nevis, St. Lucia, St. Vincent, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somali Republic, Sri Lanka, Sudan, Swaziland, Syria, Taiwan, Tanzania, Thailand, Togo, Trinidad-Tobago, Tunisia, Turkey, Uganda, Upper Volta, Venezuela, Western Samoa, Yemen Arab Republic, Yugoslavia, Zaire, and Zambia (Lebanon was added to the list in February, 1981). Overseas Private Investment Corporation Country and Area List, August, 1980. Note that this list is subject to change. The most recent information is readily available by contacting OPIC's Information Officer, Overseas Private Investment Corporation, Washington, D.C. 20527.
56 Id. at § 2194(a)(1)(B). This insurance guarantees that fair value will be given to the U.S. partner on a reasonably prompt schedule in the event that the host government decides to "take" the investment as part of a political or economic plan.
and against war and revolution in the host country.\textsuperscript{57} OPIC insurance is designed to give the business investor who is capable of assessing the internal business considerations of an investment, such as market feasibility, project cost, projected rates of returns, assurances with respect to the politics of the host government.

Political risk insurance is available for new investments by U.S. persons for up to ninety percent of any equity infused into the project.\textsuperscript{58} In order to obtain OPIC insurance, the local or host government is required to approve the project. Countries on the OPIC Country List which are eligible to receive such insured investments are mainly LDC's, including most of the Latin American, African, and East Asian countries. Investments in Western Europe, developed East Asia, and Communist countries are typically not eligible for this program.

An investor contemplating a joint venture project in the Third World would be wise to consult the OPIC Country List, even if he does not intend to purchase political risk insurance, because those countries which are eligible for such assistance have instituted legal procedures or are parties to treaties guaranteeing certain investor rights. The mere participation of a country in the OPIC program is a good preliminary indication to the businessman that his investment there will be secure.

OPIC political risk insurance is of modest cost. Rates for new projects range from one and one-half to two percent per annum of the annual insurance face amount. Standby commitments are given for a lesser premium for future projected investments.\textsuperscript{59}

OPIC also maintains a project financing program under which it extends loans and guaranties\textsuperscript{60} for projects located in those countries on the OPIC Country List. In order to obtain a loan or guaranty the project sponsor must have a proven track record and "significant financial risk in the project."\textsuperscript{61} Long term economic feasibility and pro forma project studies are required.\textsuperscript{62} The project must be approved by the host.\textsuperscript{63} A full line of investment projects is eligible for these loans which are not limited to manufacturing operations. The U.S. participant must have a "meaningful share," which is at least twenty-five percent ownership in the project.\textsuperscript{64}

Loans are granted in amounts from $200,000 to $3 million, while

\textsuperscript{57} Id. at § 2194(a)(1)(C).
\textsuperscript{58} Id. at § 2197(f) (Supp. III 1979).
\textsuperscript{59} Id. at § 2197(d). See T. Meron, Investment Insurance in International Law 565 (1976).
\textsuperscript{60} Id. § 2194(b)(C). Loans and guaranties are extended primarily on a "hard currency"-dollar basis.
\textsuperscript{62} 22 U.S.C. § 2199(i) (Supp. III 1979); see Meron, supra note 59, at 573-86.
\textsuperscript{63} The Overseas Private Investment Corporation, supra note 61, at 20-21.
\textsuperscript{64} This is a matter of OPIC policy. See OPIC, Investment Financing Handbook, at 7. (Handbook available from OPIC, Washington, D.C. 20527).
guarantees range from $200,000 to $50 million. The guaranty fee ranges up to three percent. Semi-annual repayment is required after an extended grace period for construction and startup.

2. Export-Import Bank

To the extent that U.S.-origin machinery and equipment is to be employed in a foreign project, the Export-Import Bank (EX-IM BANK) can provide below-market financing at a ten year term for a substantial portion of the price of such equipment. By the same token, joint venture projects in the United States which employ machinery and equipment originating outside of the United States should consider the utilization of export financing offered by most Western European and East Asian countries.

H. Other Assistance Programs

The various international banking institutions should definitely be considered when undertaking larger projects in specific geographic areas. These include the International Bank for Reconstruction and Development (the World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the International Finance Corporation. Each of these institutions has a complex program for development within their various subject matter areas. Long-term, low interest rate "soft currency" loans are frequently available for projects in those areas which fit the economic development plan. Although time consuming and expensive to pursue, a loan or grant from one of these institutions can provide a long-term, stable, inexpensive source of investment capital for one or all of the participants in joint venture projects. Frequently, it is discovered that a U.S. partner can arrange for the finance needed by its foreign partner in a project through one of these institutions. Detailed application procedures and eligibility criteria are beyond the scope of this paper but should nevertheless be of interest to the promoters of any substantial project.

I. Non-Cash Contributions

1. General Considerations

In addition to the various forms of capitalization of a joint venture, the partners must consider other types of endowment and attorneys must

65 Id at 9.
66 Id at 12.
68 Soft currency loans are loans denominated in a local currency which may be subject to rapid or erratic devaluation against the basket of worldwide hard currencies such as the Deutschemark, Swiss Franc, American Dollar, and British Pound. Distinction between soft and hard currencies has blurred in the last few years because some of the hard currencies have themselves experienced valuation changes.
be concerned with the regulatory aspects of these non-cash contributions. The most frequently encountered non-cash contribution is technology transfer which may take the form of the loan of technology or engineering personnel who teach the know-how to the project employees and managers. Documentary technology transfer normally occurs pursuant to a license agreement with respect to patentable and non-patentable inventions, trademarks, copyrights, computer software, and process know-how.

Frequently, one or both of the partners to a joint venture will be required to contribute entrepreneurship to the venture. Rarely are the partners capable of assembling a joint venture staff loyal to the venture in connection with new projects or substantially transferred existing ventures. More often each of the partners is required to "lend" or permanently transfer certain of its existing employees to manage the venture. Employee loans are particularly important in connection with joint venture partners who have engineering management capability related to the construction of the project, process engineers who will ensure the successful operation of the project after completion of construction, or marketing personnel with a working familiarity with the market possibilities for the joint venture's product. The detailing of personnel to the venture or even the provision of contract management services are normally the subject of a management agreement. To the extent that the consideration in the management agreement primarily reflects the costs associated with providing the management services, entrepreneurship itself must be considered an important intangible contribution of the partners to the venture.

Often it is discovered that one or more of the partners is capable of transferring tangible assets to the venture which result in accelerated production schedules, more reliable operation, or reduced cost to the venture. Such items might include second-hand equipment, existing production facilities, partially developed plant sites, computer software, contractual rights to acquire scarce equipment or raw materials, or proprietary products which are not generally available.

A final potential non-cash contribution is derived from the potential U.S. tax shelter value to a U.S. partner in the venture. If, for example, the partnership consists of a well-established U.S. company with existing and continuing expectation of earnings and profits and a non-U.S. company without existing U.S. operations, it may be possible to structure the venture so that the substantial U.S. tax advantages associated with project construction and "start-up" expenditures can be primarily utilized by the U.S. partner. Under these circumstances, the time value of the tax savings is a "contribution" by the foreign partner to the venture and may be a material element in the overall economic division of rights, responsibilities, and benefits.
2. **Regulatory Considerations to Non-Cash Contributions**

Technology transfer is regulated in connection with virtually all multinational joint ventures. Legislation comparable to the Mexican Law on Transfer of Technology and the Use and Exploitation of Patents and Trademarks\(^69\) is in existence in many host countries. Under such statutes, licenses must be negotiated within certain prescribed guidelines relating to royalty payments, term, ownership of the technology at the termination of the license, and frequently without tying clauses requiring the venture to acquire raw materials, components, or other non-licenseable technology from the licensor. Such licenses, under any circumstances, must be recorded with and occasionally approved by the host government. Taxation of royalty payments is normally high\(^70\) and withholding of taxes is normally required.

The U.S. partner in a foreign joint venture needs to be concerned with the Export Administration Act of 1979,\(^71\) which restricts the transfer of high technology products to certain countries, primarily Communist countries. If the products of the joint venture or the equipment required by the joint venture in its basic business relates to any product which could be related to security or defense, computers, transportation or other sensitive products, a review of the Export Administration Act is warranted. In addition, to the extent that the host government is considered by the Administration to have violated the human rights of its citizens, there may be extreme difficulty in obtaining export licenses.\(^72\)

### J. Customs Duties

As a general matter, most equipment and raw materials which are to be imported into the host country for the project construction and/or operation are subject to the payment of customs duties. In addition, documentation transferring technology, which include plans, specifications, photographs, and even sample products, are also subject to the payment of duties.

Several techniques are available to minimize the impact of customs on the transfer of goods and technology. First, outside of the United States and especially in the LDC's, it is frequently possible to enter into a formal agreement with the host government to exempt certain specific items from duties or substantially reduce duties that would otherwise be payable. Such an agreement may be made prior to the making of an irrevocable commitment to the project. Additionally, to the extent possi-

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\(^69\) D.O., supra note 17.

\(^70\) This is especially true in the absence of a tax treaty restricting the ability of the host country to impose such a tax.


\(^72\) This may be less of a problem under the current Administration.
ble, individuals with internalized know-how should be used to transfer technology rather than manuals and blueprints. Such items may be dutiable on an imputed value associated with the creation of the work product itself. To the maximum extent possible, studies, drawings, and plans should be closely associated with the transfer of a product, so that it can be demonstrated that the arms-length price for the product includes plans and specifications associated therewith. The final production of studies, such as market or economic feasibility studies, should be completed in the host country to ensure that the service fee paid for the entire study does not constitute the value of the study for customs purposes.73

K. Use of the Foreign Trade Zone (FTZ) in the United States

Projects which involve a truly multinational character, especially those where manufactured products will be re-exported or where imported components or raw materials are a substantive element in the production process and the cost of goods sold should consider the advantages of the FTZ.74 Pursuant to the Foreign Trade Zones Act of 1934, as amended in 1976,75 it is possible to set up a special geographic area near customs ports of entry (POE). FTZ’s permit the U.S. customs duty-free entrance of goods for transformation within zone and their subsequent duty-free re-export or, in the case of manufactured products destined for the United States, the deferral of duty until the actual entry occurs.

Within the FTZ the following activities are permitted: storing, destroying, assembling, repacking, distributing, sorting, grading, cleaning, manipulating, and manufacturing.76 The FTZ is regulated by the FTZ Board which consists of the Secretaries of Commerce, Treasury, and Army or their respective designees. Day-to-day regulations are handled by the staff of the Board which receives and reviews applications and schedules, conducts hearings, and recommends a course of action to the Board. FTZ’s have a variety of uses. They may be used to:

1. Defer payment of U.S. duty (e.g., spare parts) as in the case of bonded warehouses;
2. Insure lowest duty category possible is obtained where a finished or semi-finished product enters at a lower percentage Tariff Schedule of the United States (TSUS) duty (e.g., steel service center);
3. Avoid duty when re-export is likely, without cumbersome drawback procedures;

73 Completion of the study in the host country may subject the study contractor to income taxation on the theory that such income is derived from work done in the host country.
74 Foreign Trade Zones are also occasionally referred to as Free Trade Zones (apparently referring to the fact that goods enter the zone “free” of duty). See P. Feller, U.S. Customs and Int’l. Trade Guide §§ 10.01-10.05 (1980) (complete discussion of FTZs). See also Note, North Carolina Foreign-Trade Zones: Problems and Prospects, 5 N.C.J. Int’l L. & COM. REG. 521 (1980).
76 Id. § 81c.
4. Avoid foreign-origin making;\textsuperscript{77}
5. Hedge against expected changes in, reductions of, or increases in quota restrictions.

In order to establish an FTZ, an application is filed by a “grantee,” that is, the applicant-proposed operator, not by the zone users. The FTZ must be adjacent to or in a port of entry (POE)\textsuperscript{78} with limited exceptions for subzones which may be separated from the POE. After application and procedural review by the FTZ Board, notice of the application is filed in the Federal Record. Comments in writing are invited and a public hearing is scheduled.\textsuperscript{79} After the hearing and consideration of the evidence, the FTZ is routinely approved except in sensitive manufacturing areas where substantial adverse comment is adduced at the hearing.

The application consists of a cover letter from the applicant with a brief description of project to which the following exhibits are attached:

1. Full description of the geographic location with maps, etc.; proposed uses; expressions of interest by proposed users; facilities available (warehousing, transportation, etc.), expansion plans (if any), a legal description of the FTZ, and a statement concerning availability of the port of entry.

2. An exhibit describing how the property for the FTZ was acquired by applicant and applicant’s legal qualification to own the FTZ.

3. Financing prospectus containing financial statements of applicant.


5. Brief environmental impact statement.

6. Detailed description of the port, utility and transportation facilities.


8. Supporting legal documents as appropriate (charters, authorizing resolutions, etc.).\textsuperscript{80}

Until recently,\textsuperscript{81} activities within an FTZ and especially imports into an FTZ were not subject to anti-dumping actions or countervailing duties petitions, until the end-product entered the “duty area” of the United States.\textsuperscript{82} Even then, only the end-product was subject to these actions and petitions. Potential abuses of this condition have been spot-

\textsuperscript{77}Foreign Trade Zones do not, however, avoid the Buy American Act, infra note 118.


\textsuperscript{79}Foreign Trade Zones Board, 15 C.F.R. § 400.605 (1980).

\textsuperscript{80}Id. §§ 400.603, 400.604.

\textsuperscript{81}Recent Foreign Trade Zones granted have contained acceptances by grantees and principal users of the antidumping and countervailing duty regulations despite the existence of the zone.

\textsuperscript{82}Even under the ubiquitous “Trigger Price Mechanism” (TPM) it has been recognized that the FTZ is no panacea for unfair trade practices. Recently proposed regulations deprive FTZs of certain favorable TPM treatment. 46 Fed. Reg. 22,741 (1981).
lighted by U.S. competitive industries (most notably steel) at recent public hearings related to FTZ's. As a consequence, there is some indication that the FTZ Board may precondition further FTZ grants on the prior agreement of the applicant and users to subject FTZ imports to these trade regulations, thus reducing the utility of the FTZ use for some industries. However, the FTZ will remain an attractive opportunity for joint venturers with substantial reliance on imported components or with material re-export expectations and their attendant duty problems.

L. Bulk Sales Laws

Under Article 6 of the Uniform Commercial Code, the Uniform Bulk Sales Act, which has been adopted in various forms by virtually every U.S. state, if any partner to the joint venture transfers all or substantially all of the assets of an existing business to the joint venture, careful compliance with the Bulk Sales Act is required or the pre-existing liabilities of the transferor may follow the assets to the joint venture itself. The mere fact that the transferor maintains a substantial equity interest in the transferee does not exempt the transfer from the notice requirements of the Uniform Bulk Sales Act.

III. Management of Joint Venture

If the joint venture is to have its own management staff with a loyalty to the joint venture rather than to each of the partners who have respectively committed these individuals to the project, it is essential that the joint venture offer salary and benefits not unlike those enjoyed by the various officers prior to their assignment to the venture, and furthermore, these individuals must have a reasonable expectation that there is a future with the venture. Compensation is normally handled by the joint venture negotiators themselves. The negotiators are principally responsible for resolving the inevitable differences in compensation and benefit packages which are currently enjoyed by the future joint venture employees.

Any foreign managers, engineers, or technical employees of the joint venture will encounter immigration, naturalization, and even basic "work permit" (carte de travail, "green" card, etc.) problems. National governments typically have an interest in insuring high levels of employment for nationals. To the maximum extent possible, national policies are designed to require the training of nationals for future assumption of technical and management positions. Such policies often run counter to the desires of the joint venturers, who wish to share management responsibilities, and to the practical exigencies related to the availability of qualified personnel.

84 Id. §§ 6-104, 6-105, 6-107.
85 Id.
The United States has established a complex network of rules and regulations related to individuals who enter the U.S. to conduct business. Additionally, the U.S. has entered into a series of treaties of commerce and navigation with most developed countries which guarantee access to foreign joint ventures by the employees of the U.S. partner.

Several options exist under the U.S. immigration scheme. First, temporary visas for up to six months permitting multiple entrance to and exit from the United States are available to businessmen from outside the United States. Such visas, known as B-1 visas, are normally available and used by joint venture negotiators during the negotiating period to permit their presence in the United States to investigate joint venture possibilities, to negotiate the basic documentation, and ultimately to see to its execution. Such visas are not suitable generally for long-term joint venture employees, although foreign managers who occasionally visit the United States during the project construction and actualization periods or in an “inspector general” or “auditor” status would find such a visa useful.

Employees of the foreign partner who have been employed by that partner for a period of at least one year outside of the United States are eligible for another type of visa, an “L-1” visa. Such individuals are called intra-company transferees. The visa is granted for a period of up to three years and is renewable for up to three years. Further renewals are routinely granted for good cause.

Another possibility exists if the foreign partner has its principal place of business in a country which has entered into a treaty of commerce and navigation with the United States. If such a situation exists, aliens may enter the United States as “treaty traders” (E-1) or “treaty investors” (E-2). A treaty investor is one who is entering the United States to manage and develop an investment which the alien himself is making in the United States. Such investments must be in active businesses. An individual cannot enter the United States as a treaty investor to “manage” a passive real estate or securities investment. A treaty

87 See PRACTISING LAW INSTITUTE, ADVANCED IMMIGRATION, No. 119, 157-59 (1978). This publication gives the lists of countries with which the U.S.A. has treaty investor and treaty trader provisions in effect. ABA COMMERCIAL TREATY INDEX (1973). This publication discusses Friendship, Commerce, and Navigation treaties between the United States and nations of western Europe.
90 Id.; 22 C.F.R. § 41.67 (1980).
trader, on the other hand, may be entering the United States to manage and develop his own investment or that of a company in which he has a substantial personal interest outside the United States. In this sense, an individual who is both an officer/employee and who has a substantial stock ownership position in a foreign company may enter the United States as an L-1 intra-company transferee or an E-1 treaty trader. If given a choice, the L-1 visa is probably preferable for the individual who projects that he may later decide to seek immigrant status in the United States.\textsuperscript{94} Treaty alien visas are also granted for up to three years and are indefinitely renewable provided the underlying commercial objectives and investment of the foreign company remain in place.\textsuperscript{95}

Renewal of business visas, whether they be B-1s, L-1s, E-1s, or E-2s, is relatively routine. Adjustment of any one of these non-immigrant statuses to permanent residence or immigrant status, however, is most difficult.\textsuperscript{96}

The "people" of the joint venture who enter the United States during the year or who remain for less than an entire year subsequently, should categorically consider the impact of such presence in the United States on their tax status. In general, if the employee is physically present in the United States at the end of the tax year and anticipates remaining well into the next tax year, or if he spends more than one-half of the tax year in the United States, tax advisors should be consulted to minimize the impact of failing to meet the rather specific and technical exceptions and definitions of the relevant tax treaty between the United States and the foreign country from which the employee comes.\textsuperscript{97}

IV. General Reporting and Regulatory Requirements

A complex series of statutes and underlying regulations govern investments in the United States by foreign persons. The impact of these regulations is, in some instances, to void the agreement of the parties in the joint venture document, to require adjustment of basic negotiated positions, to delay the actualization of the joint venture itself or to frustrate completely the entire project. These reporting requirements should therefore be considered prior to the commencement of negotiations and certainly prior to the production of documentation leading up to the formation of the joint venture. Principal requirements which may need to be considered include reporting to the Departments of Commerce, Jus-
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tice, and Agriculture, and a possible need to comply with foreign exchange laws, the Foreign Corrupt Practices Act, and other federal statutes regulating certain industries.

A. Commerce Reporting

Pursuant to the International Investment Survey Act of 1976, the U.S. Department of Commerce requires that a report be filed with the Bureau of Economic Analysis (BEA) in connection with certain types of joint venture formations. Any person subject to the jurisdiction of the United States is required to file with the BEA if the joint venture involves the acquisition by a foreign person of ten percent or more equity interest in an existing U.S. company. Limited exemptions are available for passive personal real estate investments. These reports, which are filed on forms published by the BEA, are exhaustive in their requirements and must be filed within forty-five days after the conclusion of the acquisition. At the present time, there is no waiting period during which the acquisition cannot go forward; the BEA is conducted as a statistical gathering organization rather than as a regulatory operation, although penalties are imposed for failure to file. Techniques are available for the protection of the anonymity of the foreign investor if that is desired. In order to accomplish this anonymity it is important that arrangements be made prior to the initial disclosure to the BEA.

B. Justice Reporting

Pursuant to regulations adopted under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, one or more joint venture partners may be required to file with the Department of Justice and to "wait" before going forward with the joint venture. In general, a transaction or series of transactions will require disclosure if a person thereby acquires either fifteen million dollars in assets or an equity interest of at least fifteen percent which confers control of a company with sales or

102 Id. § 806.8.
103 Id. §§ 806.15(e)-15(g). Forms BE-605, 606, 606B or 607 are the applicable forms. They are available upon request from the Bureau of Economic Analysis, Washington, D.C.
104 The place and time for filing will be given on the form. 15 C.F.R. § 806.15(c) (1980). Forms BE-605, BE-606, and BE-606B are quarterly forms. 15 C.F.R. § 806.15(e) (1980). Form BE-607, which is required to be conducted once every five years by the Act, will be required in interim reports. 15 C.F.R. § 806.15(g) (1980).
total assets of at least twenty-five million dollars.\textsuperscript{108}

By its terms, this Act does not apply to the creation of partnership joint ventures. However, if either party creates a U.S. domestic corporation for the purpose of holding its partnership interest in the joint venture,\textsuperscript{109} the Hart-Scott-Rodino Act applies and pre-merger notification to the Department of Justice is required.\textsuperscript{110} Furthermore, if one of the parties to the joint venture has an existing corporation which is contributed to the joint venture the transaction also requires pre-merger notification to the Department of Justice. Contributions could also consist of the transfer of a substantial portion of the stock of that existing company to the other partners.\textsuperscript{111}

A large quantity of documentation is required to be filed with the Department of Justice in connection with the pre-merger notification. This includes detailed information related to other companies controlled by the acquiring person, other stock ownership of the acquiring person, any U.S. establishments or businesses founded or acquired since 1972, and all of the joint venture formation documentation.\textsuperscript{112} This latter requirement could create severe problems for the joint venture partner whose consultants and employees have produced business projection memoranda and studies designed to support the formation of the joint venture by painting an extremely attractive, perhaps unrealistic, view of the long-term market position of the joint venture, the profits to be enjoyed, and the business plan. These documents are types which would tend to demonstrate that either party to the joint venture could enter the market successfully without the assistance of the other and enjoy a substantially profitable marketing position in the future. All documents which could be classified as "puffing" documents, and specifically those related to the anti-competitive nature of the joint venture within the U.S. economy are suspect and must, in fact, be filed with the Department of Justice along with the pre-merger notification.\textsuperscript{113} Caution is therefore advised at the project's early phases to eliminate extended "explanations" at a subsequent time. Those drafting the joint venture agreement should be aware that any non-competition clauses contained in the document will, in fact, be reviewed by the Department of Justice, since the agreement itself will be filed.\textsuperscript{114}

Aside from the substantive problems produced for the partners by these pre-merger notification regulations, the impact of this series of requirements is to impose a cooling-off period during which neither party


\textsuperscript{109} This is a frequently used technique because of both the unlimited liability aspect of partnerships and the consolidation eligibility requirements of the U.S. Internal Revenue Code.

\textsuperscript{110} 15 U.S.C. §§ 18a(a)-18a(b) (1976); 16 C.F.R. § 801.40 (1980).

\textsuperscript{111} 16 C.F.R. §§ 801.4, 801.30 (1980).

\textsuperscript{112} Formation documentation includes all pre-negotiation and pre-actualization economic feasibility studies, marketing studies and pro forma financial projections.


\textsuperscript{114} 16 C.F.R. § 801.40 (1980).
may transfer assets or actively conduct the joint venture business. Because of the rights of the Department of Justice to extend the cooling-off period, it can generally be assumed that thirty to ninety days are required for pre-merger notification in the case of relatively clean joint venture acquisitions. More extended periods will be required for those with joint ventures in which partners are engaged in competitive businesses prior to the commencement of joint venture negotiations.

C. Foreign Exchange Approvals

In the event that the foreign partner is required to make capital contributions to the venture, it is quite likely that he will require the approval of the central bank or exchange control authority of his host government. Foreign exchange transfer approval may be time-consuming and prevent the foreign partner from clearing his obligations under the joint venture agreement. Moreover, foreign exchange transfer approval may be conditioned on the repatriation of a certain percentage of the profits of the joint venture regardless of the agreement of the parties in the joint venture agreement.

D. National Restrictions

Certain specific activities, if they are to be entered into by the joint venture, pose special reporting and regulatory problems. If the joint venture anticipates operating a corporate aircraft or, in fact, any air service, approval will be required for non-domestic licensing pursuant to the Federal Aviation Act of 1958. If the venture involves the operation of a communications network such as radio or television, the venture will need to be concerned with the Federal Communications Act, which restricts radio and television licenses to U.S. citizens. If the venture anticipates the production of material for the U.S. Department of Defense or the various military services, it will need to be concerned with the various security acts which restrict the availability of confidential material to foreign persons and the Buy American Act with respect to foreign source components. Similar provisions have been enacted in the common carrier field, the mining, transportation, and enrichment of nuclear energy field, maritime trade, banking, and insurance.

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119 See generally J. MARANS, P. WILLIAMS & A. MIRABITO, FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES (rev. ed. 1980), which contains an exhaustive summary of both national and state restrictions on the access of aliens to economic activity in the United States; see also H. STEINER & D. VAGTS, supra note 1.
E. Agriculture—Farmland Acquisition

Reporting requirements have recently been imposed with respect to the acquisition of an interest in farmland by foreign persons. Regulations adopted pursuant to the Agriculture Foreign Investment Disclosure Act of 1978 apply to joint ventures in which there is substantial foreign ownership. The real property on which the joint venture project is to be located may, in fact, be farmland; as a consequence, the acquisition may require a report with the Department of Agriculture. Substantial penalties are imposed for failure to report.

F. Foreign Corrupt Practices

Finally, in connection with joint ventures located outside of the United States, the U.S. partner needs to be concerned with the provisions of the Foreign Corrupt Practices Act of 1977, which prohibits or requires reporting of payments made to a foreign governmental official to influence an act or a decision. Many types of commissions, finders fees, and government charges are suspect payments and, even if such payments are made by or on behalf of the foreign partner, if the U.S. partner has knowledge of them and in fact shares in them by reason of the division of equity in the partnership, a technical violation of the Act may occur.

V. Conclusion

Government regulations impose substantial restrictions on the freedom of action of the joint venturers in negotiating, actualizing, and operating their project. A knowledge of these regulations is important prior to the production of any documentation and a broad familiarity is necessary throughout the negotiation period. Regulations have a significant impact upon all of the essential elements of the joint venture: endowment, management, and operations.

As a practical matter, regulations will result in a more complex joint venture agreement or even multiple agreements covering different aspects of the transaction. Regulations may also dictate an extended period after the actual negotiation and closing of the venture prior to the practical consequences during which the partners should avoid transfer of irretrievable technical and marketing information. But regulation is also facilitative because regulation may be designed to provide opportu-
nities for the venture, especially with respect to capital formation, man-
power training, and infrastructure provision, to make the host 
geographic location attractive to joint venture projects.

Joint ventures are complex, and creating and operating them re-
quires patience, skill, and a willingness to accept the fact that modifica-
tions of business strategy are essential to fit the project into an alien 
mi lieu—a milieu which provides not only problems but also opportuni-
ties. The multinational joint venture attorney can best serve his client by 
suggesting these opportunities while devising resolutions to the problems, 
being always mindful of the substantial cultural differences which make 
understanding and acceptance difficult for the client.

**Question and Answer Period**

**Question:** Can a small business, one with less than a million dollars in gross sales, afford the legal expense, costs and time elements of an overseas joint venture? Your remarks suggest that a joint venture should be considered only by big business, not small business.

**Mr. Hushon:** I would have a very difficult time imagining how a one million dollar gross sales company could get involved in a joint venture outside the United States. A business involved with about one million dollars in gross sales, if it’s seriously considering going abroad, should do so first with a commissioned agent outside the United States. Perhaps it could later develop a joint venture, either with this agent, or with others identified by the agent. Unless the business is one which could easily combine with others similarly situated, a business of this size probably could not afford an international venture without a substantial planned investment over a long period of time. Such an investment would require some time before it would pay off, maybe five or seven years.

I’ve found that businesses go by stages in international transactions and if you try to get ahead of the stage, you’ll go wrong every time. There’s a certain progression of your penetration of a foreign market—maybe you have an agent, then you have a distributor, next you go to a joint venture or a subsidiary. But if you try to jump one of those stages, it doesn’t work.