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Rona R. Mears

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JOINT VENTURES IN MEXICO: A CURRENT PERSPECTIVE

RONA R. MEARS*

* Partner, International Section; Haynes and Boone, Dallas, Texas; B.S. University of Minnesota; M.B.A., J.D., Southern Methodist University. This article has been adapted in part from "Experiences in Industrial Investment and Joint Ventures of Mid-Sized Companies," prepared by the author and Steven A. Waters, Partner-in-Charge, Haynes and Boone, San Antonio office, for Cuatro Caminos Conference, Monterrey, Mexico, February, 1991. The author gratefully acknowledges the contributions of Mr. Waters in preparation of the original paper.

I. INTRODUCTION

Opportunities unmatched in Mexico's history are now available for foreign investors and traders doing business in our neighboring country to the south. In response to recent economic initiatives by President Carlos Salinas de Gortari, Mexico's trade barriers have diminished and regulations of foreign investment have been significantly relaxed.[1] The doors to the Mexican market are open—for the most part—and businesses from all over the world are invited to come

1. *See* PRESIDENCIA DE LA REPUBLICA, THE MEXICAN AGENDA 29-40 (11th ed. Apr. 1991); Carlos Salinas de Gortari, Second State of the Nation Report (Nov. 1, 1990).

into Mexico to compete on a relatively equal basis with domestic businesses.[2] Enterprises wholly-owned by foreigners now are allowed to operate in most Mexican sectors without prior approval, thereby removing many of the historic regulatory incentives for foreign investors to joint venture in Mexico with a Mexican partner. Why then does joint venturing in Mexico remain a popular way for foreign businesses to operate in Mexico?

A. *Why Joint Venturing Now*

Despite the disappearance of certain historic restrictions in Mexico that made joint venturing with a Mexican partner a virtual necessity, the traditional advantages of the joint venture with a local partner remain viable. The unique contributions of a Mexican partner steeped in the culture, business customs, and markets of Mexico, as well as the synergy created by two or more venturers bringing differing strengths to the new enterprise, remain as important now in Mexico as they have ever been in the international business community. As a result, U.S. investors—as well as those from other parts of the world—continue to view joint venturing in Mexico with a Mexican partner as an important option for structuring their operations there. Joint venturing in Mexico is not entirely a thing of the past. On the contrary, in the new business climate of Mexico, foreign investors and Mexican counterparts who are no longer forced into partnering are now looking at joint venturing opportunities for good business reasons.

B. *Overview*

This article will begin by presenting an historical perspective on joint venturing in Mexico and then contrasting that background with an examination of the current uses of joint ventures in Mexico, particularly highlighting the traditional advantages of strategic business alliances.

Following is a detailed review of structuring the Mexican joint venture including planning and partnering, negotiations, organizational alternatives, the venture agreements, corollary documentation, and key legal and operational issues involved in the start-up of a Mexican

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2. PRESIDENCIA DE LA REPUBLICA, THE MEXICAN AGENDA 29-40 (11th ed. Apr. 1991).

joint venture. In connection with this discussion of structuring the venture, appendices to the article provide supplementary materials: a multinational joint venture checklist, a summary of Mexican business organizations including a comparison with U.S. business organizations, and descriptions of two case studies of U.S.-Mexico joint ventures to be used as an exercise in identifying and prioritizing key legal and business issues raised by the case study proposals.

Finally, the article identifies strategies for dealing with practical issues that arise in Mexican joint ventures, examines common pitfalls, and provides advice on how to avoid them by careful planning techniques. The summary and conclusion of the article is preceded by a brief discussion of the North American Free Trade Agreement and its potential impact on Mexican joint ventures.

The article is intended to go beyond legal issues, to address the core practical considerations in forging successful U.S.-Mexico joint ventures. Comments in certain sections such as those on the process of partnership and the development of shared business strategies arise out of the author's own experiences in counseling clients engaged in joint ventures in Mexico and elsewhere, and from sharing such experiences with professional colleagues in Mexico and throughout the world. The combination of legal and business issues addressed here reflects the increasing need for attorneys who are "counselors-at-law," able to assist in educating their clients to the nuances of international business as well as law.

II. An Historical Perspective on Joint Venturing in Mexico

Joint venturing in Mexico between foreign businesses and Mexican partners historically has played an important role in the country's economic development.[3] Although its origins can be traced back to the 1870s, more recently the joint venture has been used by foreign investors in response to specific regulatory regimes for controlling the investments made by foreigners in Mexico.[4] During the most recent such period, ending only in 1989, Mexico severely limited the role of

3. *See* Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 173-203; Reginald Davis, *Joint-Venture Subsidiaries, in* DOING BUSINESS IN MEXICO pt. V, at 2-1 (Michael W. Gordon ed., 1991).

4. *See* Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 174 (extending joint venture use).

foreign investors in its business and economic life. Joint venturing with a Mexican partner was for many enterprises the only avenue by which to enter the Mexican market.[5] One author commented in the early 1980s, "The contemporary joint venture is thus not a voluntary institution created by foreign investors; rather it is a part of the overall regulatory scheme for controlling foreign direct investment."[6] Although such controls have been exercised to various degrees and under different regulatory schemes since as early as the late nineteenth century,[7] the review of foreign investment restrictions hereinafter focuses on the more recent period of 1973 through 1989, and to some extent, on the preceding two decades that set the stage.

A. *Foreign Investment Restrictions*

The most recent and far-reaching Mexican regulatory regime that provided for joint ventures of foreign investors and Mexican partners as the primary means of economic development[8] was The Law To Promote Mexican Investment and To Regulate Foreign Investment (foreign investment law) enacted in 1973.[9] In combination with the 1972 Law on the Transfer of Technology and the Use and Exploitation of Patents and Trademarks (technology transfer law),[10] which was applicable to all foreign investments, the process of Mexicanization already underway was accelerated and the role of the joint venture became more central to the foreign investment regime.[11] In particular, the foreign investment law codified, and made more predictable, multiple regulations and practices that had been evolving

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5. *Id.* at 173. *See generally* Michael W. Gordon, *The 1973 Mexican Foreign Investment Law, in* DOING BUSINESS IN MEXICO (Michael W. Gordon ed., 1991).

6. *See generally id.*

7. *See* Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 173-203 (promoting joint venture for economic development).

8. *Id.* at 173.

9. Ley Para Promover la Inversión Mexicana y Regular Inversión Extranjera 1973, D.O., Mar. 9, 1973, *reprinted and translated in* DOING BUSINESS IN MEXICO, pt. IX, apps. 1, 2 (Michael W. Gordon ed., 1991). The foreign investment law remains in effect, but has been substantially modified in its impact on foreign investors by new regulations issued in 1991.

10. Ley Sobre el Registro de la Transferencia de Technologîa y el Uso y Explotaciôn de Patentes y Marcas, D.O., Dec. 28, 1972 *reprinted and translated in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET § B.26 at 1 (Michael W. Gordon & Kenneth R. Simmonds eds., 1982).

11. Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 174.

since the late 1950s and early 1960s and that had created a somewhat arbitrary and unpredictable regime for foreign investment.[12]

At the time of its enactment and up until recent regulatory changes, the foreign investment law effectively required foreign investors to use joint ventures, providing that enterprises must be Mexican majority owned in those sectors not reserved for 100 percent state or private Mexican ownership. Specifically Article 5 of the foreign investment law provides:

> In cases where legal provisions or regulations do not specify a given percentage, foreign investment may hold no more than 49 percent of the capital of business enterprises, provided it is not empowered, by any title, to determine the management of the business enterprise. . . . The participation of foreign investment in the administration of the business enterprise may not exceed its participation in the capital.[13]

Although provisions existed for the National Commission on Foreign Investment to allow an increase or decrease in the percentage held by a foreign investor under certain circumstances,[14] the practical effect of the foreign investment law was to require joint venturing by virtually all inbound foreign investors with Mexican partners who held majority ownership and control of the enterprise.

At no time in Mexico's prior economic history had the imperative for joint ventures by foreign investors been so clear. The "forced marriages" of joint venturing in Mexico during this period arose not out of business considerations or because of the advantages of international strategic business alliances, but because it was required as it was the only avenue for investing in Mexico.

B. *Historic Difficulties and Exceptions*

Quite aside from the specific regulatory hurdles encountered by foreign investors during the period when the foreign investment law was fully enforced (1973 through 1989), and during the preceding 1950s and 1960s when the regime was evolving, there were additional difficulties for joint ventures established in Mexico during this entire pe-

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12. *Id.* at 174, 197-98.

13. Ley Para Promover la Inversión Mexicana y Regular Inversión Extranjera 1973, D.O., Mar. 9, 1973, art. 5, *reprinted and translated in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET § B.2 at 1, 3 (Michael W. Gordon & Kenneth R. Simmonds eds., 1982).

14. *Id.*

riod.[15] Many of these additional problems were related directly to the forced nature of the choice made by foreign investors to use the joint venture entity. When faced with the provisions of the foreign investment law, most foreign investors had no alternative but to seek a Mexican partner and to devise a joint venture arrangement, often ignoring business danger signs or making unwise compromises in reaching a venture agreement.

Of all the methods of organizing a business enterprise, perhaps none requires a greater degree of commitment and voluntary choice than the joint venture between business partners from different countries. Like a marriage, such a business relationship requires a long courtship, shared goals, and carefully negotiated roles plus a heavy dose of mutual respect and a well-thought-out agreement determining who is in charge or at least how decisions will be reached. The "shotgun marriages" of foreign and Mexican partners in ventures prior to 1989 led many into a series of difficulties, only a few of which will be addressed here.

Venturers in Mexico from as early as the 1950s through the 1980s often found themselves mismatched with inadequately shared strategic goals and little knowledge of one another's potential contributions to the enterprise. Ventures of foreign investors with Mexican government-owned enterprises were perhaps the most dramatic example of such mismatches; the purposes as well as the business strategies of partners in such combinations were frequently at odds.[16] An additional hurdle often arising in such partnering was the agreement to concessions or unwise compromises concerning the business enterprise that undercut its prospects of success from the beginning. Such concessions were prevalent, particularly in ventures in which the Mexican government or its wholly-owned enterprises played a role.[17]

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15. Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L.J. 173, 173-203.

16. *See, e.g.*, *Case Studies of Joint International Business Ventures, in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET §§ B.13-B.32 at 1-5 (Michael W. Gordon & Kenneth R. Simmonds eds. 1982) (joint venture Fabrica Nacional de Maquinaría Textil Toyoda de Mexico (Toyoda Automatic Loom Works Limited of Japan), a venture of Toyoda de México and Nacional Financiera, as an example of difficulties with government-owned enterprises).

17. *Id.* at § B.20 at 51-64; (discussion about Heinz Alimentos, S.A., a venture of H.J. Heinz Company, Sociedad Mexicana de Crédito Industrial, S.A., Banco National de Crédito Agrîcola). Although Heinz withdrew in 1973, it was not entirely due to the impact of the foreign investment law. The problems of the venture may be traced back to Heinz' concession

Struggles related to control also jeopardized some joint ventures, particularly when capital investment and operational know-how were contributed by one partner while the other had majority ownership and administrative control. To forestall control and decision-making dilemmas, innovative approaches were developed. An example of such an approach was the appointment of very high level executives from the minority foreign venturer to its few board positions, dispersion of the Mexican ownership interest by a public offering of shares in Mexico on the stock exchange, indirect participation of the foreign partner in selection of Mexican board members, and often lengthy processes of orientation for Mexican officers and directors so that strategic goals were shared and conflicts minimized.[18]

Although the problems described above as well as a lack of persistence and commitment have undermined the success of many joint ventures during the past, it is significant to note the number of successful joint ventures—both involuntary and, in a few cases, voluntary—that have overcome these difficulties. Because of extraordinary efforts, some joint ventures have not only succeeded but thrived in a Mexican market that often was not hospitable.[19] It should be noted also that there have been numerous exceptions to the general regime requiring Mexican majority ownership, attributable both to the non-retroactive effect of the foreign investment law and the discretionary powers in the foreign investment law to allow exceptions.[20] Such exceptions and success stories notwithstanding, the joint ventures formed during these restrictive regimes suffered numerous detriments

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to the acquisition of unprofitable and obsolete food processing facilities in Mexico. *Id.* at 51-60.

18. *See Case Studies of Joint International Business Ventures, in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET § B.26 at 139 (Michael W. Gordon & Kenneth R. Simmonds eds., 1982). All of these methods were employed with considerable success by Kimberly-Clark Corporation in its venture Kimberly-Clark de Mexico. *See Comparative Observations of Case Studies, in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET § B.33 at 43-46 (Michael W. Gordon & Kenneth R. Simmonds eds., 1982).

19. *See Case Studies of Joint International Business Ventures, in* MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET §§ B.13-B.32 at 1-123 (Michael W. Gordon & Kenneth R. Simmonds eds., 1982) (descriptions of a series of twenty case studies of joint ventures in Mexico largely established and operating during the 1950s-1970s, with an analysis of the problems and successes of selected joint ventures in Mexico before 1989).

20. *Id.*

and barriers that resulted from the regulatory climate and the compulsory element in the choice made by partners to joint venture in Mexico.

III. CURRENT USES OF JOINT VENTURES IN MEXICO

Cooperative arrangements between enterprises from different countries to undertake new businesses have a long history of success in international economic development.[21] At least one recent study indicates that cross-border business alliances have a higher overall success rate than those between companies located in the same geographic market.[22] The past decade in particular has shown a rapid increase in the incidence of international strategic alliances.[23]

The transnational strategic business alliance may be defined most simply as a transnational cooperative arrangement to attain common business goals. In a very broad sense of this term, there are many varieties of transnational business alliances that may range from simple sales representations, distributorship agreements, franchising or licensing arrangements, project management, to far more complex ventures that include partial mergers, long-term corporate equity ventures, collaborative research and development projects, vertical sup-

21. For background on multinational joint ventures, *see generally* DAVID W. DETJEN, ESTABLISHING A UNITED STATES JOINT VENTURE WITH A FOREIGN PARTNER (1990); INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); TERRENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS—JOINT VENTURES (1987) (good general reference but note Part II—"Mexico" outdated); MULTINATIONAL CORPORATIONS LAW: MEXICO, CENTRAL AMERICA, PANAMA AND THE CENTRAL AMERICAN COMMON MARKET (Michael W. Gordon & Kenneth R. Simmonds eds., 1982) (some portions on Mexican statutory regime are outdated); WILLIAM P. STRENG AND JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING; LAW AND TAXATION (UNITED STATES) §§ 19.07-.08 (1991); PAUL H. VISHNY, GUIDE TO INTERNATIONAL COMMERCE LAW §§ 7.01-7.36 (1990); James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-1 (1991); Allen R. Grogan, Address at the Seminar of International Joint Ventures (Sept. 16-17, 1987) (transcript on file with *St. Mary's Law Journal*). For a more informal business-oriented approach, *see generally* JACK ENEN, JR., VENTURING ABROAD—INTERNATIONAL BUSINESS EXPANSION VIA JOINT VENTURES (1991).

22. Guy de Jonquieres, *Corporate Alliances: Equal Partnerships Stand a Better Chance of Success*, FIN. TIMES, May 15, 1991, at 11 (study of 150 large U.S., European, and Japanese company cross-border alliances in effect between 1981 and 1987 by McKinsey & Company, management consultants).

23. *Id.*; *see also Cross Border Alliances Become Favorite to Crack New Markets*, WALL ST. J., Mar. 26, 1990, at A1.

ply alliances, or any combination of these arrangements. Most often the term "international joint venture" is used more narrowly to indicate those complex, long-lasting agreements between two or more businesses to establish a new business enterprise that will accomplish certain shared business goals of the partners.

Defined more specifically, such an arrangement is

> an agreement or a series of agreements involving two or more partners from two or more countries, involving some combination of property, other assets or know-how in a . . . business to be operated for a specific purpose. Usually, but not always, the parties share the profits or other results of the enterprise and control on some basis.[24]

The "other results" to be shared indicate the usual sharing of losses and liabilities. In the United States, the term "joint venture" may be used even more narrowly to indicate a general partnership (under U.S. law) formed for a specific endeavor or with a limited purpose.

A. *Traditional Advantages of Strategic Business Alliances*

The combined efforts of well-matched joint venturers are truly complementary, with each providing to the enterprise particular skills or other contributions—capital, services, patents, technological know-how, supply sources, distribution networks, management expertise—that complement the other party's contributions.[25] By combining their respective strengths, the venturers have better prospects for success and for a stronger, more viable business enterprise than either would have alone. The synergistic energy that results from such alliances often creates a dynamic enterprise.[26]

Joint business associations are especially useful for a business seek-

24. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investments Abroad (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*). For variations on this definition, see INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD vii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-4 through 1-5 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

25. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-5 through 1-6 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

26. INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD vii-viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

ing to expand for the first time into another country. Often the principal reason to take on another party as a co-venturer is to obtain the use of that party's knowledge and experience in the country where the venture's operations will be located.[27] Knowing how to deal with the governmental authorities, how to recruit local capital and management personnel, and how to assess the local market are all significant contributions that may be made by the partner in the country hosting the joint venture. The participation of a local venturer may also enhance perceptions that the enterprise is a local operation, thus encouraging good relations with local consumers, suppliers, and government.[28] If the two venturers' contributions are otherwise complementary, the knowledge and position of one local partner in the host country may be the key component producing an exceptional enterprise. At the least it provides a much diminished learning curve in the new jurisdiction for the foreign investor.

In addition to shared contributions, the partners in a joint venture also share obligations and risks. The reduced pressures and liabilities that result for each of the partners may create the necessary formula that will allow each of the businesses to undertake the new venture, whereas neither would be willing or able to undertake the entire risk or obligation to do so alone.[29] Most importantly, the risks and obligations borne by each of the partners may be carefully matched to the particular talents and contributions in such a way as to dramatically diminish the burden of the risks and obligations, even to the partner who has assumed the responsibility.

Notwithstanding the many advantages of strategic alliances, even well-matched venturers must overcome potential problems of liability, management control, and dispute resolution that may occur during the life of the venture. One commentator cautions, "[A] joint venture should not be undertaken lightly. Joint venture only if you have a real need to do so and there would be a predictable, reliable benefit from having done so."[30] Proper planning and careful negotiations, however, along with flexibility, a willingness to compromise, and the

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27. Allen R. Grogan, Address at the Seminar of International Joint Ventures (Sept. 16-17, 1987) (transcript on file with the *St. Mary's Law Journal*).

28. *Id.*

29. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-5 through 1-6 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

30. INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH

assistance of experienced business and legal advisers, can alleviate many of these potential problems.

The success of a well-planned joint venture has been described as "symbiotic" when the new enterprise is independent of the partners—and thus not parasitic—and when the interests and contributions of each partner are carefully balanced with the control and ownership of each in the new venture.[31]

B. *Adapting Joint Ventures to the Emerging Mexican Economy*

Many of the traditional advantages of strategic business alliances are applicable to Mexico now just as they have been throughout the world since their inception. There are, in addition, some particular advantages to the strategic business alliance in Mexico today. Now that they are without the compulsion to enter into joint ventures with Mexican partners, foreign investors are balancing the advantages and disadvantages of joint venturing with other alternatives such as the establishment of wholly-owned subsidiaries, assuming that their business is in a sector where one hundred percent foreign ownership is permitted.[32] Although arguably the complete control of a wholly-owned subsidiary is very attractive to many foreign investors, nevertheless there are good reasons that many are choosing ventures with Mexican partners.

Generally, the opportunities in Mexico are long-term; an increasingly affluent market is expected to develop in Mexico as North American trade increases, as foreign companies enter the Mexican market for production and sales, and as Mexican enterprises become competitive. Thus, the gradual development of a sound relationship with a Mexican partner which is essential to a viable joint venture,

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FOREIGN INVESTORS IN THE U.S. AND ABROAD vii-viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

31. *Id.* at viii.

32. For example, an announcement reported that Mattel, Inc., a U.S. toy manufacturer has acquired recently all of the shares of Auritel, S.A., in which Mattel formerly owned a 40% interest. Auritel, a joint venture established by Mattel and the Auritel Group in 1981, has a dominant share of the toy and games market in Mexico. Mattel plans to operate Auritel as a wholly-owned Mexican subsidiary of Mattel primarily for marketing and distribution. *See Commerce*, MEXICO BUS. MONTHLY, Aug. 1991, at 6. Similarly it has been reported that Woolworth Corp. purchased the remaining fifty-one percent of the stock of Woolworth Mexicana, S.A. de C.V. from its Mexican venture partner, Corporacion Industrial San Luis, S.A. de C.V., bringing its ownership interest to one hundred percent. *See Commerce*, MEXICO BUS. MONTHLY, July 1991, at 7.

and the often time-consuming process of planning and preparation is not only feasible but makes good sense in the developing Mexican market.[33]

Secondly, the Mexican culture, its business customs, and market are dramatically different from the United States. Many would say the Mexican culture is far more different from the United States than that of Europe and other parts of the world.[34] Thus, the contributions of a Mexican partner who is steeped in Mexican culture, who knows the business customs of the country, and who has experience in marketing there may be of even greater importance to a foreign investor than such contributions would be in other jurisdictions. Even well-established and highly successful U.S. businesses are seeking Mexican partners to gain the benefit of experience in the local market. Just one example is the recently-announced joint venture between Wal-Mart Stores, Incorporated and Cifra, S.A., each reputedly the largest retailer respectively in the United States and Mexico. The United States retail enterprise is associating with an experienced Mexican retailer who will provide a foundation of Mexican retail experience for the five wholesale "club stores" to be opened in Mexico City by the joint venture.[35] The Mexican enterprise is Wal-Mart's first international expansion; it is no surprise that they are venturing with a seasoned Mexican partner.

Other more specific reasons for joint venturing have emerged in certain sectors in Mexico. For example, it remains true in certain sectors that Mexican companies, as a practical matter, have better access to government entities to obtain commitments for servicing contracts. Thus, United States companies wanting to provide services for the Mexican government or for government-owned enterprises such as Petroleos Mexicanos (PEMEX), may joint venture with Mexican counterparts who have the needed contacts, information, and procedural experience to bring executed contracts for services to the new venture as a significant start-up contribution.

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33. *See generally* U.S.-MEXICAN INDUSTRIAL INTEGRATION: THE ROAD TO FREE TRADE (Sydney Weintraub with Louis Rubio F. & Alan D. Jones eds., 1991) (general review of evolving integration of U.S. and Mexican industries and prospects for development of Mexican market).

34. Carlos Fuentes, Review Comments on ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS (1984), reprinted on Riding book jacket, hard cover edition; *see also* ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS xi (1984).

35. Reported in *Commerce*, MEXICO BUS. MONTHLY, Aug. 1991, at 6.

In another example of special reasons for joint venturing today, Vitro, S.A. (Vitro), reportedly Mexico's largest industrial enterprise, recently entered into a massive joint venture cross-agreement with a United States counterpart, Corning, Incorporated (Corning).[36] The cross-venture will create two new enterprises: Vitro Corning, a Mexican entity owned fifty-one percent by Vitro and forty-nine percent by Corning; and a United States venture named Corning Vitro, owned fifty-one percent by Corning and forty-nine percent by Vitro. The two enterprises will engage in consumer housewares production and marketing in each of their respective countries. The strategy of these two successful market-leaders in the United States and Mexico is designed to create economies of scale, to swap technology, and to strengthen market leadership in both jurisdictions while simultaneously providing a hedge against each other as potential competitors.[37]

IV. STRUCTURING THE MEXICAN JOINT VENTURE

A. *Planning and Partnering*

One of the distinguishing characteristics of joint ventures is the lengthy planning and partnering phase that precedes even the initial organizational negotiations.[38] Partners who are pursuing a joint venture relationship must build into their timetable a period of months during which they will seek a co-venturer, become acquainted and establish a relationship with the prospective partner, and share sufficient information about strategic business goals to ready themselves for the actual venture negotiations. The preliminary process is not

36. *Vitro Heads Mexico's US Drive*, FIN. TIMES, Aug. 10-11, 1991, at 10.

37. *Id.*

38. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*); Memorandum of Speech by Bernard L. Greer, Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*); *see also* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD vii-viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective*, *in* INTERNATIONAL JOINT VENTURES 1-7 through 1-8 (James A. Dobkin & Jeffrey A. Burt eds., 1991). For information regarding the cultural context of business in Mexico, *see generally* Eva Kras, *Cultural Awareness Pays in Mexican Workplace*, BUS. MEXICO, Aug. 1986, at 36-43; *Business Familiarization Program* (Inservco, Dallas, Tx.), June 15, 1991, at 17-23, 31; Jean Frisbee, A Culture Guide to Mexico, May 1990 (on file with the *St. Mary's Law Journal*).

only time-consuming, it is also expensive. Plans for joint venturing should include a sufficient budget allocation to cover numerous personal visits to the jurisdiction where the venture will be operated and the home offices of the venture partner.

Nowhere are these preliminaries more important than in Mexico. The planning and partnering phase of joint venturing includes many facets. Among the most important are establishing the relationship, performing due diligence, and agreeing on a business plan.

1. Establishing the Relationship

Virtually the entire context of the Mexican business culture is one based on relationships and, as a result, the preliminary foundation on which a relationship is built is often at the core of any successful business enterprise in Mexico.[39] Specifically, the traditional importance of personal relationships, face-to-face meetings, and social occasions as precursors of doing business lend an additional urgency to the partnering process in a venture with a Mexican partner.[40] The cultural context within which business relationships are established in Mexico is a particularly complex one, and venturers are well-advised to study the history, politics, economics, and culture of Mexico as a part of the planning phase of a Mexican venture.[41] Although such preparation is always an important phase of international joint venturing, it is even more significant in preparing for negotiation of a joint venture with a Mexican partner than it is in preparing for the negotiation of joint ventures in other jurisdictions.

Personal relationships must be established with key individuals in the Mexican partner's organization. The foundation of trust and confidence between the partners is not one that flows between the organizations or business entities themselves, but rather between the key individuals who are establishing the venture relationship. It is essential that the foreign investor identify a small group of individuals

39. *See generally* Eva Kras, *Cultural Awareness Pays in Mexican Workplace*, BUS. MEXICO, Aug. 1986, at 36-43; *Business Familiarization Program* (Inservco, Dallas, Tx.), June 15, 1991; Jean Frisbee, A Culture Guide To Mexico, May 1990 (on file with the *St. Mary's Law Journal*).

40. *Business Familiarization Program* (Inservco, Dallas, Tx.), June 15, 1991, at 17-23, 31.

41. *See generally* OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE: LIFE AND THOUGHT IN MEXICO (1972); DICK J. REAVIS, CONVERSATIONS WITH MONTEZUMA—ANCIENT SHADOWS OVER MODERN LIFE IN MEXICO (1990); ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS (1984).

(often no more than two or three) who will participate in the initial planning phases, the negotiation, and ultimately, the operation of the joint venture. Individuals on both sides must get to know one another as individuals and establish a lasting relationship that will help them work through the various problems that will arise from time to time in the partnership.

2. Due Diligence

Alongside the establishment of personal relationships, due diligence must be performed by each of the partners with regard to the other concerning the nature of the prospective partner's business, its viability and stature, as well as the validity of the particular contributions that each partner is bringing to the negotiating table.[42] The exhaustive approach to due diligence often used by United States businesses may not be appropriate if used in a very direct and confrontative manner. However, the information customarily sought in a conventional United States due diligence survey should be obtained, either directly or indirectly, during the period of planning and partnering for the venture.

3. Formulating a Business Plan

Current business strategies of the two partners must be shared very openly in order to assess how the proposed joint venture will fit within the overall strategies of the venturers. The greatest ongoing commitment to joint venturing always arises out of the self-interest of the partners, especially when the joint venturer meets a particular need that is otherwise unfulfilled in each of the partner's respective strategic plans. Such needs may include enhancing the core business of the partner, expanding non-core activities, filling functional gaps, or simply enhancing financial return.[43]

Together, the partners must also devise a new business plan and shared strategy for the proposed venture.[44] The goals of the prospec-

42. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective*, *in* INTERNATIONAL JOINT VENTURES 1-7 through 1-9 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

43. Guy de Jonquires, *Corporate Alliances: Equal Partnerships Stand a Better Chance of Success*, FIN. TIMES, May 15, 1991, at 11.

44. *See* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990). Hypothetical examples of proposed joint ventures created by

tive partners must overlap to some extent to create the "zone of mutuality" or shared benefit that will energize the new venture.[45] No two partners will ever entirely share this zone of mutual benefit; goals will at most only partially overlap and will evolve and change over time.[46]

The complex joint venture, designed to operate over a lengthy period, also necessarily will change and evolve with its own success and with a changing market context. Planning for change over time is one of the critical elements of both the initial phases of partnering and the later organizational negotiations. In addition, business goals of the two partners will not remain static. As a result, the zone of mutuality initially shared by the two partners will continue to change and must, at least to some extent, be re-identified periodically throughout the life of the joint venture.[47]

Cultural differences and variances in business customs, management styles, and organizational habits must also be examined by both partners. The business environment of Mexico will be the dominant factor in determining the day-to-day operational style of the joint venture. However, the extent to which the United States or other foreign investor participates in control and management will have an impact on how the venture operates in the Mexican business community. Partners must ensure that they both understand the necessary compromises that will be made in business procedures, management

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authors for discussion purposes often provide a sample outline of the joint venture business plan. *See, e.g.*, James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-7 through 1-9 (James A. Dobkin & Jeffrey A. Burt eds., 1991); David N. Goldsweig, *Hypothetical Joint Venture: Ruritanian Refrigerator Company, Ltd., in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 3-4 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990). *See also* Appendix "C" for two case studies of proposed Mexican joint ventures based on real business strategy formulations.

45. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*); Memorandum of Speech by Bernard L. Greer, Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

46. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

47. *Id.*; Memorandum of Speech by Bernard L. Greer, Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

styles, and company culture to create a mix that will be workable for both partners and yet fit well within the Mexican context where the venture will be operating.[48]

Many of the preliminary matters that must be explored and settled between prospective partners relate to balancing the tension that exists on both sides between trust, on the one hand, and self-interest, on the other.[49] It is a delicate balance to initiate and nurture a trusting relationship while at the same time protecting self-interests in ensuring that no unwise compromises are made.

Only after a relationship is established, due diligence is completed, and a business plan is formulated are the partners genuinely ready to commence negotiations of the joint venture agreement. Nevertheless, decisions that are reached during the preliminary periods will often provide the foundation for key points in the joint venture agreement and will, in many respects, shorten the actual organizational negotiating process.

B. *Start-Up Negotiations*

Following the initial planning and partnering phase of the venture, it is time for the venturers to identify with more specificity what it is that each is willing to contribute to the proposed venture and to determine whether their respective strengths are truly complementary. Venturers also should explore in much greater detail whether they have a similar vision of the venture business and whether the proposed operations are feasible, in both practical and legal terms. A series of questions and related issues should be examined and negotiated:[50]

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48. Eva Kras, *Cultural Awareness Pays in Mexican Workplace*, BUS. MEXICO, Aug. 1986, at 42-43.

49. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*); Memorandum of Speech by Bernard L. Greer, Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

50. The listing of questions for the initial phase of negotiations is compiled and adapted from the author's experiences and from numerous sources, including in particular, James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-7 through 1-9 (James A. Dobkin & Jeffrey A. Burt eds., 1991); INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD viii-ix

1. What *exactly* is to be the business and scope of the venture and how will it operate? What are to be the venture's specific strategic goals? Which of these goals are short, medium, and long-term? To what extent are these goals shared by the venturers?
2. What are the core businesses of the partners and how will the new venture strengthen those core businesses? Or will the venture be used to expand non-core activities? To what extend will partners be allowed to do business outside the new venture?
3. What is the overall assessment of the feasibility of the business venture? Will it work in the Mexican market?
4. What will be the location of business operations?
5. What barriers or problems exist in Mexico for the particular type of venture to be undertaken: economic, political, legal, other? Are any of them insurmountable?
6. What can each partner contribute to the venture: initially at start-up of the venture and later during its business life cycle?
7. How will each of the venturer's contributions to the venture be valued? Are these values comparable to the proportions of ownership and control desired for each party? If not, how is the disproportion of contributions to ownership/control to be handled?
8. What will be the exact ownership percentages for each venturer?
9. How will investment costs, initial capitalization and ongoing financing needs be shared?
10. Will outside financing be used? Where will it be obtained?
11. How will risks and liabilities be allocated, and to what degree are losses to be shared?
12. What return on investment is sought by each party? Are these expectations realistic? Are the desires of the parties for financial return compatible?
13. How will profit or other compensation be shared?
14. How will the venture be managed? Who will control daily business operations, and to what extent will each of the parties have a role in making major decisions?
15. How long is the venture to operate? How will it be terminated and what consequences will result from termination? Do either of the partners plan to be the buyer or seller of the venture when the partners disengage from their relationship?
16. How will disputes between the partners be resolved?

(David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); Rona R. Mears, International Law Conference: Forms of International Business (March 23, 1990) (unpublished manuscript, on file with the *St. Mary's Law Journal*).

17. Are any of the business issues, economic and political risks, or legal restrictions fundamentally incompatible with the plan for the venture?

After most of these issues have been sufficiently resolved to produce an initial outline of the venture plan, the legal issue of how the venture will be organized legally should be addressed.

C. *Organizational Alternatives*

The fundamental choice that confronts cross-border joint venturers is whether to organize as a contractual joint venture or an equity joint venture. In Mexico, equity joint ventures are by far the more commonly used method of joint venturing by foreign investors. Contractual joint ventures are recognized, however, and are used from time to time.

1. Contractual Joint Ventures

A "contractual" joint venture is usually a relatively short to medium length arrangement between two parties to accomplish a particular business undertaking or project, often in a specified period of time. Such arrangements are based solely on a contractual agreement between the two parties that defines the undertaking to be accomplished, states the mutual obligations and contributions of each venturer, and specifies how the enterprise's profits and losses will be shared.[51] Contractual joint ventures do not create a separate legal entity and are used most frequently in business undertakings such as real estate construction projects, government contracts or procurement arrangements, service agreements, or research-and-development projects.[52]

A contractual joint venture is sometimes referred to as a "teaming arrangement," particularly if the venturers will be matched to perform under a single services agreement, or as a "consortium" if it is a research-and-development undertaking. However, both teaming agreements and consortia are usually short-term agreements, for such limited purposes, that they do not rise to the level of a true contrac-

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51. WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING LAW AND TAXATION (UNITED STATES) § 19.07 (1991); PAUL H. VISHNY, GUIDE TO INTERNATIONAL COMMERCE LAW §§ 17.01-.02 (1990).

52. WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING LAW AND TAXATION (UNITED STATES) § 19.07 (1991); PAUL H. VISHNY, GUIDE TO INTERNATIONAL COMMERCE LAW §§ 17.01-.02 (1990).

tual joint venture because of both narrow scope and short duration.[53]

The true contractual joint venture is one that has a somewhat longer time frame and a broader scope of operation (perhaps, for instance, a series of services contracts) but which nevertheless has an understood duration and is based solely on a contract between the venturers.

In Mexico the contractual joint venture is known as the *asociación en participación* (*A. en P.*). Existing under the General Law of Mercantile Organizations (mexican mercantile law),[54] the *A. en P.* is a joint venture agreement whereby one party grants contractually to one or more partners who provide property or services, a participation in the profits and losses of the new venture to be undertaken. The contract does not have a separate legal status or juridical personality in its own right under Mexican law. The Mexican managing joint venturer (the *asociante*) operates the venture under its own entity name and alone is fully liable to third parties. The silent partner, usually the foreign investor (the *asociado*), is the contributor of capital, property, or services for which a percentage of profits is earned.[55]

For income tax purposes, income earned under the joint venture contract is deemed to be earned by the individual venturers in proportion to their contract interest and the income tax liabilities are deemed to be those of the individual venturers. However, the Mexican managing venturer pays taxes on behalf of itself and the silent foreign venturer to Mexican tax authorities.[56] Losses of the silent foreign venturers may not exceed the amount of contribution made by them to the joint venture unless they agree contractually to assume liability

53. *See* James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-4 through 1-5 (James A. Dobkin & Jeffrey A. Burt eds., 1991) (authors indirectly indicate that most—perhaps all—contractual joint ventures are teaming arrangements or consortia); Stephen P. H. Johnson, Address at the ABA National Institute on Negotiating and Structuring International Commercial Contract: Legal Analysis with Sample Agreements (Nov. 8-9, 1990) (transcript on file with the *St. Mary's Law Journal*) (example of teaming agreement that is drafted not to be a contractual joint venture).

54. Ley General de Sociedades Mercantiles, D.O., Aug. 4, 1934, as amended Aug. 28, 1934.

55. *See generally Business Operations in Mexico*, 972 Tax Mgmt. (BNA) 136-4th (1990); WALTER H. DIAMOND & DOROTHY B. DIAMOND, CAPITAL FORMATION AND INVESTMENT INCENTIVES AROUND THE WORLD (1991).

56. Conversations of the author's partner, Richard M. Fijolek, with representatives of KPMG Mexico, Mexico City.

for a greater percentage of the losses.[57]

A valid joint venture contract for an *A. en P.* may be drafted very simply including (i) identity of the venturers; (ii) the amount of contributions and obligations of each venturer; (iii) purpose and life duration of the contract; and (iv) method for distribution of profits and payment of losses.[58] Management of the venture is solely the responsibility of the Mexican managing venturer. In certain circumstances, when the foreign investor is contributing particular technological or management know-how, there may be involvement of the foreign silent venturer in ongoing operations. Nevertheless, even in such cases, the Mexican managing venturer plays a very significant role in operations and management decisions.

No registration is required for the joint venture contract, and approval or notice to the National Commission on Foreign Investment is controlled by the percentage of interest of the foreign investor venturer and the nature of the sector in which the joint venture contract is operating.[59]

As a practical matter, although the arrangement exists in theory for foreign investors, very few *A. en P.* contracts have been undertaken in Mexico with foreign investors.[60] Although the reasons for its lack of popularity are a matter of speculation, it is likely that partners find the organizational structure of a corporate or partnership legal entity under the framework of an equity joint venture more helpful in determining the operational structure of the venture. Partners are left more on their own to structure the relationship in the *A. en P.* and arguably may find doing so too burdensome.

2. Equity Joint Ventures

An "equity" joint venture is a more frequently-used association between two parties established to engage in business activity of a broader scope and over a longer period of time. A new legal entity—typically a corporation or partnership—is established by the venturers to conduct the venture business. The new entity is owned and man-

57. *See generally* WALTER H. DIAMOND & DOROTHY B. DIAMOND, CAPITAL FORMATION AND INVESTMENT INCENTIVES AROUND THE WORLD (1991).

58. *Id.*

59. *See generally Business Operations in Mexico*, 972 Tax Mgmt. (BNA) 136-4th (1990).

60. Letter from James E. Ritch, Jr., Ritch, Heather y Mueller, to Rona R. Mears, Haynes and Boone (Oct. 3, 1991) (on file with the *St. Mary's Law Journal*).

aged jointly by the venturers. Each venturer contributes certain capital, property, or services to the new venture entity in exchange for an ownership interest in the corporation or partnership, and each venturer shares in profits, usually to the extent of its venture interest. Liability for losses depends on the type of legal entity used for the venture business and on the parties' agreement as to how losses will be shared and risks allocated.[61]

On occasion, venturers may decide that the best way to engage in an international business alliance is for one venturer to buy an ownership interest in the other or to merge the existing companies of the proposed partners or engage in some other business combination. In the broadest sense of the term, these combinations are equity joint ventures too.[62] Such approaches are unusual, however, because most venturers want to maintain the independence of their existing business separate from that of the new venture.[63] An equity joint venture that triggers the creation of a new corporation or partnership entity provides such independence for the new undertaking; it is a business entity with a legal identity separate from the original business enterprises of any of the venturers.

Selecting the best form of business organization for the new venture entity depends on many factors that should be analyzed from both the individual and joint perspectives of the venturers, with the help of professional legal, tax, and business advisers. These factors include: the goals and expectations of the parties, their tax objectives, their concerns regarding risk and liability, requirements for management and control, and special legal or business considerations in the particular sector where the venture will do business.[64]

The Mexican mercantile law provides for several types of corporations and partnership entities, many of which are to some extent com-

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61. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-5 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

62. Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad 1-2 (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

63. INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

64. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-17 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

parable to U.S. business entities.[65] In the U.S. and in many other jurisdictions, a wide range of options exists for the selection of the new venture entity; it may be any one of several types of corporate or partnership entities. In Mexico, however, although a largely comparable range of business entities exists, in practice only one type of corporate entity—the *sociedad de capital variable* (*S.A. de C.V.*)—is virtually always used for joint ventures involving a foreign investor venturer.[66] Such has not always been the case, for historically the *sociedad anomina* (*S.A.*) frequently was used because it allowed for the issuance of bearer shares, often a desirable feature for the foreign investor.[67] Since 1983 the power to issue bearer shares no longer exists in the *S.A.* thus eliminating a major advantage of this form of corporation.[68]

Both the *S.A.* and the *S.A. de C.V.* have characteristics more or less comparable to the corporation in the United States. The most significant difference is that the capital of the *S.A. de C.V.* may be varied without amending the articles of incorporation or notification to the Foreign Ministry. The *S.A. de C.V.* articles of incorporation may set out the procedure for increasing or decreasing capital, often providing that such changes may be decided by resolution of the board of directors. The power to change capital easily is a significant advantage to the rapidly developing corporation.[69]

One additional corporate entity in Mexico, the *sociedad de responsabilidad limitada* (*S. de R.L.*), or limited liability company, shares the features of both the corporation and partnership and may be used by small enterprises with few owners. It is rarely used by foreign investors, however, since it is difficult to structure without local (Mexican) subscriptions for participation interests.[70] It is allowed to

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65. For details on the forms of business organizations in Mexico, their names and characteristics, and a comparison with United States business organizations, *see* Appendix "B," "Business Organizations in Mexico: A Summary and Comparison with U.S. Business Organizations."

66. Letter from James E. Ritch, Jr., Ritch, Heather y Mueller, to Rona R. Mears, Haynes and Boone (Oct. 3, 1991) (on file with the *St. Mary's Law Journal*); Author's conversations with Goodrich, Riquelme y Asociados, Mexico City.

67. Letter from James E. Ritch, Jr., Ritch, Heather y Mueller, to Rona R. Mears, Haynes and Boone (Oct. 3, 1991) (on file with the *St. Mary's Law Journal*).

68. *See Business Operations in Mexico*, 972 Tax Mgmt. (BNA) 136-4th, at A-7 (1990).

69. *Id.* at A-9.

70. WALTER H. DIAMOND & DOROTHY B. DIAMOND, CAPITAL FORMATION AND INVESTMENT INCENTIVES AROUND THE WORLD, at Mexico-4 (1991).

operate in some sectors not otherwise open to corporations, such as agriculture and lumber, and has been used on rare occasions for joint ventures with foreign investors when title to rural property was involved.[71]

Although frequently used for equity joint ventures in other jurisdictions such as the United States, partnership entities have seldom been used by foreign investors for joint ventures in Mexico.[72] The three types of partnerships existing under Mexican law are: the *sociedad en nombre colectivo* (general partnership), the *sociedad en comandita simple* (*S. en C.*; limited partnership) and the *sociedad en comandita por acciones* (the limited partnership with shares). There seems to be no clear consensus as to why partnerships have been traditionally unattractive to foreign investors for joint ventures, or whether relaxed regulations regarding foreign investments in Mexico might make these types of entities more feasible or attractive for joint ventures including foreigners.

Recent changes enacted in the Mexican income tax laws provide that all mercantile organizations, including partnerships as well as corporations and limited liability companies, are to be taxed in Mexico as separate business entities.[73] Thus, some of the traditional advantages of the partnership attributable to its distinctive tax treatment in jurisdictions such as the United States are not available in Mexico. Further, the treatment of partnerships in Mexico as separate taxable entities may jeopardize desirable U.S. tax treatment of the Mexican partnerships. Venturers wanting to explore the possibilities of using any of the partnership entities or the limited liability company are cautioned to consult very early in the planning process with professional advisors, in particular legal counsel and accountants in Mexico, with regard to the viability of using any of these entities for joint ventures in Mexico.

D. *The Venture Agreements*

Joint ventures usually involve exhaustive and lengthy documentation; at least that is the case in the United States and many other jurisdictions. In Mexico, extensive legal documentation is still unu-

71. Letter from James E. Ritch, Jr., Ritch, Heather y Mueller, to Rona R. Mears, Haynes and Boone (Oct. 3, 1991) (on file with the *St. Mary's Law Journal*).

72. *Id.*

73. *See generally Business Operations in Mexico*, 972 Tax Mgmt. (BNA) 136-4th (1990).

sual, especially for the contractual joint venture, but exceptions do occur. Complex joint ventures involving numerous operations and multi-faceted relationships between partners may require all—or nearly all—of the documents described here.

In documenting a joint venture with a Mexican partner, one of the greatest challenges for U.S. and Mexican counsel is to negotiate the extent and length of documentation that will be used. U.S. business persons, and their lawyers, are accustomed to detailed and lengthy legal documents, particularly for a complicated contractual arrangement. Mexican business persons and their legal counsel are more likely to use concise documentation, with more provisions left to be settled at a later time or to evolve as the business develops. Striking a balance between these two approaches and helping all parties and their legal counsel feel relatively comfortable with the documents that are finally produced is at times difficult to accomplish.

A satisfactory resolution to the questions of how much documentation is necessary, and what documents will be used, often depends on the foundational period of planning and partnering that has occurred. A well-established relationship and a satisfactory balance between trust and self-interest on the part of the partners will make the decisions about documentation easier. In general, U.S. venturers and their lawyers will be required to get along with substantially fewer, shorter, and less specific documents than they would like. Often in Mexico, as throughout much of the rest of the world, partners will not tolerate what they consider excessive documentation requiring the U.S. partner to go more than half way to reach a compromise. This fact makes partnering and the exchange of information especially significant.

1. Information Exchange and Confidentiality Agreement

During the start-up negotiations, venturers will be expected to exchange a significant amount of information in order to answer initial questions concerning their current businesses and their strategies for the new venture. In addition, they may each be asked to provide confidential information in response to the other partner's due diligence requests. Often in connection with such exchanges the partners enter into their first formal agreement, an "information exchange and confidentiality agreement."[74] Each party agrees to reveal a limited amount of business and technological information to determine whether the joint venture is feasible and each promises to keep the information revealed confidential. Such agreements may either be relatively brief and simply include covenants to provide information and preserve confidentiality or they may take the form of extended questionnaires to be completed by the parties. In the latter case, parties negotiate and agree in advance on the information to be solicited and use the agreement itself as a planning and due diligence tool.

2. Memorandum of Understanding

Once the plans for the joint venture begin to coalesce, a "memorandum of understanding" (or perhaps a "letter of intent") may be drafted to cover basic agreements between the parties about the relationship and to provide a framework for more detailed and serious negotiations of a final agreement.[75] The venturers should realize that the memorandum of understanding may be binding unless they specifically provide otherwise.

The essential elements of the memorandum of understanding are:

1. Identity of the parties;
2. Brief description of the purpose, scope, and location of the venture business;
3. Contributions of each venturer;
4. Ownership percentages of each venturer;
5. Sharing of profits, losses, and liabilities;
6. Brief summary of management and control structure;
7. How and when the final agreement will be reached and documented.[76]

There are planning opportunities and also potential pitfalls in using such a memorandum of understanding. The opportunities include a chance to identify areas of disagreement—often obvious only when set

74. James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective*, *in* INTERNATIONAL JOINT VENTURES 1-8 through 1-9 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

75. *Id.* at 1-9; *see also* Bernard L. Greer, Jr., Remarks at the Southwestern Legal Foundation International and Comparative Law Center Symposium on Private Investment Abroad (June 18, 1991) (transcript on file with the *St. Mary's Law Journal*).

76. *See, e.g.*, James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective*, *in* INTERNATIONAL JOINT VENTURES 1-8 through 1-9 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

down in writing—that then may be resolved before drafting the final agreement. Mutual confidence and a sound working relationship may be more quickly established by the use of a memoranda of understanding, and thus provide an added incentive to work out final solutions. Pitfalls may include too much reliance on details of the preliminary arrangement, stultifying later negotiations, and chilling the creativity of both parties as the business concept develops during subsequent negotiations.

3. The Preliminary Joint Venture Agreement

In less complicated arrangements, and particularly when an equity joint venture is contemplated, the parties may immediately draft a "preliminary joint venture agreement" that sets out most of the basic principles of the relationship and how it will be legally structured.[77] Frequently, in such instances, no memorandum of understanding is used; however, to do so may be a useful step in negotiating a complex venture. Usually the parties agree in the preliminary joint venture agreement that after it is signed, they will organize a venture corporation or partnership entity and settle further details of how the business operations of the venture will be handled in the process of organizing and establishing the new venture entity.[78] It is wise, however, for the parties to make as many key decisions as possible at the time of drafting the preliminary joint venture agreement, so as to avoid later misunderstandings and disagreements. Frequently a well-drafted preliminary joint venture agreement will include draft corporate articles, bylaws, and shareholder's agreement, or if applicable, a draft general partnership agreement and corollary agreements as appendices.[79]

For the equity joint venture, a preliminary joint venture agreement

77. For two examples of preliminary joint venture agreements, *see* WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING LAW AND TAXATION (UNITED STATES) Appendix 19A (1991); David N. Goldsweig, *Hypothetical Joint Venture: Ruritanian Refrigerator Company, in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 5-11 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

78. *See* David N. Goldsweig, *Hypothetical Joint Venture: Ruritanian Refrigerator Company, in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 5-11 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

79. *Id.* at 5-103 (an excellent example of a preliminary joint venture agreement with nine detailed forms of agreements and organizational documents attached).

plus the basic corporate or partnership documents together comprise the basic joint venture documentation. There is no need, in such instances, for a "final" joint venture agreement. It is the corporate or partnership organizational documents themselves that complete the final details of the joint venture arrangement.[80] The definitive joint venture agreement discussed below in section D4—The Final Joint Venture Agreement—is most frequently used for the contractual joint venture in which no corporate or partnership organizational documents exist. In certain unusual circumstances where the joint venture will be extremely complex, there may be both a preliminary joint venture agreement and a final joint venture agreement.

The preliminary joint venture agreement covers in greater detail the same elements listed above for the memorandum of understanding, plus the following additional items:

1. Rights to compel future contributions of partners, or to adjust ownership percentages in certain circumstances;
2. Formulae for allocations of losses and liabilities;
3. Taxation status of the joint venture and the partners;
4. Agreements as to when and how profits are to be distributed;
5. Specific allocation of management and control and provision for any disparities between control and ownership;
6. Licensing, transfer of technology, and intellectual property rights;
7. Corollary agreements, as for services or licensing, to be entered into between partners, or partners and the venture;
8. Duration of joint venture;
9. Dispute resolution;
10. Compliance with host country and partner home country laws and regulations;
11. Representations and warranties of venturers as to organization, standing, authority, consents, absence of conflicts, and restrictions;
12. Events of joint venture termination and consequences of termination;
13. Methods for renegotiating and modifying the agreement.[81]

4. The Final Joint Venture Agreement

The final joint venture agreement (sometimes referred to as the de-

80. *Id.*

81. *Id.*; *see also* James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective*, *in* INTERNATIONAL JOINT VENTURES 1-10 through 1-17 (James A. Dobkin & Jeffrey A. Burt eds., 1991).

finitive joint venture agreement) is used in most jurisdictions for contractual joint ventures and for very complex ventures that require multiple phases of negotiation and greater detail in documentation than most ventures. In Mexico, however, as discussed previously, contractual joint ventures have seldom been used by foreign investors, and, when one is used in Mexico, the final agreement is likely to be simpler and more concise than that described here. Nevertheless, the final joint venture agreement may be used very effectively in Mexico as the last step in joint venture negotiations for larger, more complex equity joint ventures.

The final joint venture agreement includes more detailed and specific provisions regarding all of the issues that are listed above in the sections on the memorandum of understanding and the preliminary joint venture agreement.[82] Specifically, complex ventures often require more particulars regarding the intent of the parties (i) for organization of the new venture entity including management and (ii) for corollary agreements. To insure maximal clarity, draft forms of corollary agreements, as well as the draft corporate or partnership documents for an equity joint venture, may be attached as addenda to the final joint venture agreement.

In addition to more detail in the substantive provisions of the final joint venture agreement, certain basic contract provisions will be included and take on added significance because of their long-term importance to the effective enforcement of the agreement.

Although not exhaustive, the following final joint venture agreement provisions merit special attention during the negotiating and drafting processes:[83]

1. Governing language: when the agreement has been translated into two or more languages for the convenience of the venturers during negotiations, it is essential to include a choice of governing language pro-

82. For two examples of final joint venture agreements drafted for complex equity joint ventures, *see* WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING LAW AND TAXATION (UNITED STATES) Appendix 19B (1991); TERRENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS—JOINT VENTURES § 2.04[2][a] (1987).

83. *See generally* TERRENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS—JOINT VENTURES § 3.03 (1987); M. K. Gavin, Comment, *Protecting the Entrepreneur; Special Drafting Concerns for International Joint Venture Contracts*, 14 U.C. DAVIS L. REV. 1001, 1001-04 (1981).

vision in the contract to determine which version is controlling;[84]
2. Governing law: generally the choice of the parties will be upheld, but consider the interrelationships of choice of law, choice of forum, and the method by which disputes will be settled;[85]
3. Choice of forum: generally the choice is also upheld, based upon reasonableness of the connection among the forum, the venturers, the site of the venture, and the particular issue in dispute;[86]
4. Interim dispute resolution: use of non-binding negotiation or mediation for less-serious or operational disputes;[87] and
5. Dispute resolution: use of arbitration or litigation; arbitration is becoming a common choice in U.S.-Mexico contractual agreements, including joint venture agreements.[88]

5. Entity Organizational Documents

In addition to the joint venture agreements, documents must be drafted to organize the business entity for equity joint ventures. For the corporation, this includes standard corporate documents such as: articles of incorporation and bylaws; organizational consent or meeting minutes of directors and/or shareholders; empowering resolutions for start-up of the venture; and, perhaps, a shareholders' agreement.[89]

Among the provisions that may be considered for the corporate bylaws or the shareholders' agreement are: restrictions on transfer of shares, special control and management arrangements such as allocation of powers to select directors, managers or other officers, supermajority or unanimous votes required for certain decisions, and any other matters set out in the preliminary or final joint venture agreements that must be effected through operation of the corporate en-

84. TERRENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS—JOINT VENTURES § 3.02 (1987).

85. *Id.*

86. *Id.*

87. Although interim dispute resolution is a relatively rare provision in U.S. contracts, it has become increasingly common in international joint venture agreements. For an example *see generally* TERRENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS—JOINT VENTURES (1987).

88. *See* Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717, 746-47 (1991) (arbitration cost effective when establishing and dissolving joint ventures).

89. If a partnership is used as the equity joint venture entity, the partnership agreement will be the primary organizational document and include all entity provisions.

tity.[90] In Mexico, shareholders' agreements restricting the voting of shareholders may not be enforceable in case of a controversy; nonetheless, venturers sometimes execute such agreements to document their understandings. Shareholders' agreements should be supplemented with carefully drafted bylaw provisions to control management.[91]

One of the unique aspects of Mexican corporations is the requirement for *comisariados* (auditors)—independent third parties who are vested with responsibility for general supervision of the business and activities of the company.[92] Among auditors' duties are the overview of directors' and shareholders' meetings to ensure that their actions comply with the corporate bylaws and applicable statutes. Auditors, who have access to all corporate books and records and attend all board and shareholders meetings, provide significant protection for minority shareholders, as do other statutory provisions under the Mexican mercantile law.[93]

Another level of entity organizational documents may be required if one or more of the venturers choose to set up their own wholly-owned new corporate entities that are to serve as special purpose entities to participate in the venture on behalf of the true partner. Such arrangements offer an additional level of limited liability and further separate the activities of the venturers from their existing businesses. In such case, a set of organizational corporate documents must be created for each of the venturers who are undertaking such a special purpose entity.

6. Corollary Agreements

Often the joint venturers enter into one or more corollary agreements that arise out of the relationships existing between the partners and also between each of the partners and the new venture.[94] For

90. *See* Reginald Davis, *Joint Venture Subsidiaries, in* DOING BUSINESS IN MEXICO (Michael W. Gordon ed., 1991).

91. *Id.* at § 15C-25 through 15C-23.

92. *Id.* at § 15C.03[4].

93. *Id.* at § 15C.02.

94. *See generally* David N. Goldsweig, *Hypothetical Joint Venture: Ruritanian Refrigerator Co., in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); James A. Dobkin & Jeffrey A. Burt, *A Legal and Practical Overview of International Joint Ventures—The United States Perspective, in* INTERNATIONAL JOINT VENTURES 1-11 through 1-12 (James A. Dobkin & Jeffrey A. Burt eds., 1991); TER-

instance, one venturer may provide special technical or management services to the new venture entity in return for compensation that is paid directly to the venturer for these services. This arrangement may be set forth in a technical/management services agreement between the new venture entity and the partner who is performing the services. Likewise, one partner may grant permission to the new entity for the use of a valuable trademark, a patent, or technological know-how in return for compensation in the form of royalties. This arrangement may be documented by a separate licensing agreement between the new venture entity and the partner contributing the intellectual property. Supply contracts, distributorship agreements, training agreements, or product maintenance/servicing agreements are all additional examples of corollary arrangements between one or more venturers and the venture entity that may be documented separately from the joint venture agreement.[95]

Although such arrangements may be set forth within the text of a joint venture agreement, often it is preferable to carve out such arrangements by documenting them separately in order to clearly provide for compensation for services rendered and to distinguish it from allocations of profits for tax reasons.

E. *Methods for Monitoring Key Operational and Legal Issues*

One of the most essential roles played by counsel to the foreign investor undertaking a joint venture in Mexico with a Mexican partner is to monitor key operational and legal issues during the entire period of planning, partnering, and negotiating preliminary and final joint venture documentation. Partners themselves are likely to become preoccupied with one or another facet of the venture or negotiations and, therefore, lose sight of many other issues that are equally important and that require resolution.

RENCE F. MACLAREN & WALTER G. MARPLE, JR., LICENSING IN FOREIGN AND DOMESTIC OPERATIONS § 2.04 (1987).

95. *See generally* David N. Goldsweig, *Hypothetical Joint Venture: Ruritanian Refrigerator Co., in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990) (description of a complex venture including forms of general assistance agreement, supply agreement, agreement for purchase of machinery and equipment, technical assistance and license agreement, and trademark license agreement).

1. Use of a Comprehensive Joint Venture Checklist

From the beginning of any joint venture undertaking, counsel should prepare a checklist of issues to constantly use as a set of guidelines against which to measure progress in making decisions, reaching agreements, or resolving potential barriers to the venture plan. Appendix "A" provides an example of such a joint venture checklist that is drafted specifically for use in a multinational alliance.[96] The checklist may be tailored for particular joint ventures by deleting inapplicable sections and by adding special sections relevant to the particular sector or business in which the venture will be operating in Mexico.

The brief discussion that appears below regarding key operational and legal issues should be reviewed in the broader context of the multinational joint venture checklist. Issues highlighted in this section are not more significant *per se* than others included in the checklist, but rather, historically they have caused the most problems for joint venturers and therefore deserve special attention during the planning and negotiating process.

The division between operational and legal issues is necessarily somewhat arbitrary. Nearly all operational issues have a legal aspect requiring a review of applicable regulations and careful handling in the joint venture documents. Nonetheless, operational issues are those that address more directly the concerns of the parties with how they will function as business partners and how their personal interests will be served or jeopardized. Because self-interest plays an important role in the operational issues, feelings run high and disagreements occur more frequently regarding these questions. Legal issues do not as directly or obviously impact the business operations or relations of the partners, but are more the province of legal counsel. Often legal issues are potential barriers that must be overcome or managed to make the venture viable, or they address eventualities that will arise only in case the venture fails.

96. *See* Appendix "A." Note that the checklist was not specifically drafted for U.S. and Mexican partners doing business in Mexico, but rather was drafted generally to be used for any multinational joint venture regardless of the jurisdictions of the partners. The author recommends beginning from such a generic checklist; it serves as a reminder of the broadest range of multinational joint venture issues as they cut across all jurisdictions and provides an all-inclusive context for monitoring the progress of venture negotiations and development.

2. Operational Issues

Certain operational issues are more likely than others to produce disagreements between the venturers in the process of negotiating a joint venture agreement. They include:

1. Scope of the venture business;
2. Exact contributions to be made each partner, and how they are to be valued for purposes of ownership percentages;
3. Management of day to day operations, policy making authority, voting control in routine and significant actions, and breaking deadlocks;
4. Protection (or not) of minority venturers;
5. Restrictions on transfer of a venturer's interest to other parties (rights of first refusal; obligations of the venture entity to buy; procedural restrictions);
6. Transfers (or licensing) of patents, technology and trademarks, and protecting ownership rights;
7. Rights of venturers to compete with the new venture entity and each other;
8. Ownership of jointly developed assets;
9. Sharing rights to future projects or new business lines;
10. Resolution of disputes (litigation; arbitration);
11. Termination of the joint venture and its results for venturers.

Because these issues lie at the heart of the business relationship, they must be resolved unequivocally as early in the negotiation process as possible. In addition, partners must be reminded that as the venture matures and as their own individual business strategies evolve, it may be necessary to reconsider and even renegotiate some of the decisions made initially about these operational issues. Methods for assessing and handling change and for venture modification will be important in managing these issues.

3. Legal Issues

In some jurisdictions the legal framework for joint ventures is set out in a separate statutory scheme, often called simply a "joint venture law." However, in Mexico there is no such special statute. The very limited recognition of the *asociación en participación* as a contractual joint venture relationship exists under the Mexican mercantile law. The equity joint venture derives its legal framework similarly from the Mexican mercantile law insofar as it sets forth the legal status, requirements, and privileges of the various business entities. Once operational, the Mexican equity company, albeit owned by a foreign investor and a Mexican partner, must conform to the local regulations applicable to similar Mexican business entities plus whatever additional requirements may be imposed under the foreign investment law if the foreigner has a dominant interest.[97]

Among the legal issues to consider in Mexico,[98] as the country that will be the site of the joint venture operations, there are certain areas that require more careful attention because of their central role in the potential success—or failure—of the venture:[99]

1. Foreign investment laws: restrictions on percentage of foreign ownership (if any) and requirements for approval, notice, or registration;
2. Periodic maintenance: reporting, disclosure, fees, or other regulations;
3. Local laws regarding the location of the business operations: real property ownership or leasing, zoning, environmental compliance, or permits;
4. Labor regulations: special taxes or benefits, union relations, termination restrictions, and if applicable, immigration issues;
5. Trade regulation: import/export requirements, duties, quotas, other non-tariff barriers, and transportation and shipping restrictions;
6. Special regulations related to sector products or services: e.g., for the cosmetics sector, health or sanitary control regulations, import permits, and labeling requirements;
7. Protection of intellectual property: patents, trademarks, trade names, or technological know-how;
8. Taxation laws: local taxation of the venture profits and business ac-

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97. *See generally* Reginald Davis, *Joint Venture Subsidiaries, in* DOING BUSINESS IN MEXICO (Michael W. Gordon ed., 1991) (although discussion of the foreign investment law outdated by new regulations as of 1991, this reference portrays interaction of foreign investment law requirements and provisions of Mexican mercantile law regarding regulation of company).

98. An excellent compilation of recent primary and secondary sources in English on Mexican law is Robert Prevost, *Mexican Law: Primary and Secondary Sources in English, 1986-1990*, 26 TEX. INT'L L.J. 389, 389-414 (1991).

99. For lists and discussions of legal issues for joint ventures in host countries and in home countries of venturers, *see generally* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD vii-viii (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); Jean-Francois Carreras, *Joint Ventures in High Risk Countries, in* 3 INTERNATIONAL QUARTERLY 157 (1991); Allen R. Grogan, Address at the Seminar of International Joint Ventures 1 (Sept. 16-17, 1987) (transcript on file with the *St. Mary's Law Journal*); Stephen P. H. Johnson, Address at the ABA National Institute on Negotiating and Structuring International Commercial Contracts: Legal Analysis with Sample Agreements (Nov. 8-9, 1990) (transcript on file with the *St. Mary's Law Journal*).

tivity, the venture's impact on its foreign venturer's tax situation in its home jurisdiction, and special taxes such as value-added tax;
9. Anti-trust and other competition law regulation;
10. Contractual provisions: governing law, choice of forum, governing language and other provisions in the joint venture agreement and corollary agreements;
11. Methods of dispute resolution: use of courts and availability of mediation and arbitration;
12. Enforceability of agreements, judgments or arbitral awards, and availability of remedies.

Although all of the issues listed deserve careful attention, four legal issues for the joint venture in Mexico warrant review with Mexican counsel very early in the planning process because each has the potential to become a threshold issue for the viability of the venture: foreign investment regulation, labor laws, protection of intellectual property, and trade issues.

The foreign investment law is triggered only when the foreign venturer has a controlling ownership interest, either in the equity joint venture company or the contractual joint venture.[100] New regulations adopted in 1989 have greatly reduced the number of sectors in which a controlling foreign interest necessitates prior approval of the National Commission on Foreign Investment (the commission);[101] the foreign investment law remains in effect, however, and even in the so-called unrestricted sectors, foreign-controlled ventures must comply with notice and other restrictions.[102] In such circumstances the new Mexican entity must give notice to the commission as an article 5 company, and must formulate a plan to comply generally with the requirements of article 5.[103] Perhaps the most troublesome article 5

100. Ley Para Promover la Inversión Mexicana y Regular Inversión Extranjera 1973, D.O., Mar. 9, 1973, art. 5, *reprinted in* DOING BUSINESS IN MEXICO, pt. IX, apps. 1, 2 (Michael W. Gordon ed., 1991).

101. *See* Claus von Wobeser & Kathleen Burguete, *New Mexican Foreign Investment Regulations*, INTERNATIONAL BUS. LAW., Dec. 1989, at 519-23; David H. Brill, Practical Aspects of Investing and Trading in Mexico 5-8 (July 22, 23, 25, 1989) (unpublished manuscript on file with the *St. Mary's Law Journal*); Memorandum from Gonzalez Cavillo y Asociados, New Foreign Investments Law Regulation in Mexico (May 19, 1989) (on file with the *St. Mary's Law Journal*); Memorandum from Camil y Rojas, New Foreign Investment Regulations of Mexico (Sept. 25, 1989) (on file with the *St. Mary's Law Journal*).

102. *See* Claus von Wobeser & Kathleen Burguete, *New Mexican Foreign Investment Regulations*, INTERNATIONAL BUS. LAW, Dec. 1989, at 519-23.

103. *See, e.g.*, David H. Brill, Practical Aspects of Investing and Trading in Mexico 6-8 (July 25, 1991) (unpublished manuscript on file with the *St. Mary's Law Journal*); Memoran-

requirement is that of maintaining a balance of foreign currency inflows and outflows during the first three years of the new Mexican company's existence; creative planning may be necessary to fulfill this obligation.[104]

Labor regulation is far more onerous and complex in Mexico than it is in the United States and the jurisdictions of many other foreign investors as well. The financial and administrative impact of labor laws in Mexico must be calculated at the earliest moment for the venture's business plan. Low direct labor costs in Mexico should be viewed cautiously in relation to the indirect costs such regulation imposes.[105]

Protection of intellectual property in Mexico, although still a matter of special concern, has been somewhat improved by the adoption of the New Law for the Promotion and Protection of Industrial Property (intellectual property law)[106] enacted in 1991. The law provides for basic protections, extends the periods for patent and trademark registration, and, most importantly, abrogates the technology transfer law. Parties may now contract freely to license technology and intellectual property without either the restrictions of the former technology transfer law, or the need to register the agreement. The only remaining issue is the extent to which the intellectual property law will be enforced effectively.

Trade in goods requires a prompt review of duties, quotas, and other non-tariff barriers, transportation restrictions, and regulations relating to specialized goods. The diminishing trade restrictions in Mexico and the potential advent of the North American Free Trade Agreement may simplify these issues in the long term. However, if the business strategy of the new Mexican joint venture enterprise in-

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dum from Camil y Rojas, New Foreign Investment Regulations of Mexico (Sept. 25, 1989) (on file with the *St. Mary's Law Journal*).

104. Among the plans that have been proposed or used to alleviate problems with the foreign currency balance requirement are: commitment to leaving capital and profits in Mexico for three years; use of Mexican trading companies to purchase imports of goods or raw materials for the venture company; purchase of unrelated goods in Mexico for export and resale outside the country; manufacture of products in Mexico for export to other countries; provision of services outside Mexico by the venture company to earn foreign currency; loan arrangements to bring foreign currency into the Mexican venture company.

105. *See* KPMG INVESTMENT IN MEXICO 13-20 (1991).

106. Ley de Fomento y Proteccion de la Propiedad Industrial, D.O., June 27, 1991; *see* Memorandum from Gonzalez, Cavillo y Forastieri, New Law for the Promotion and Protection of the Industrial Property (July 1, 1991) (on file with the *St. Mary's Law Journal*).

cludes the import or export of goods, it would be unfortunate to discover well into the planning process that import duties are too high to allow competitive pricing, that limited quotas hinder the import of adequate raw materials or goods, or that trucking the goods is unworkable because of transportation restrictions.

In addition to the legal issues centered in Mexico, as the host country of the joint venture, there are significant legal issues that may arise in the home country of each of the foreign investors who participate in the venture. These issues will, of course, vary depending on the countries of the foreign venturers, but legal issues arising from the laws of the United States provide an example of issues that may be encountered. The primary U.S. legal issues for an international joint venture are:[107] antitrust law,[108] taxation,[109] trade laws,[110] the Foreign Corrupt Practices Act,[111] and anti-boycott legislation.[112] The extraterritorial reach of U.S. laws in these areas requires U.S. counsel to diligently pursue review of their impact on the venture at the same time as Mexican legal counsel are reviewing the host country legal issues.

107. *See generally* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); Stephen P. H. Johnson, Address at the ABA National Institute on Negotiating and Structuring International Commercial Contracts: Legal Analysis with Sample Agreements (Nov. 8-9, 1990) (transcript on file with the *St. Mary's Law Journal*).

108. *See* JAY M. VOGELSON, WITH JEANNE CRANDALL & BRUCE K. THOMAS, COMPLYING WITH INTERNATIONAL ANTITRUST REGULATIONS §§ 3.01-3.15 (1989); Joseph P. Griffin & Michael R. Calabrese, *U.S. Antitrust Considerations of Transactional Joint Ventures, in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings, eds., 2d ed. 1990).

109. As noted previously, taxation generally is beyond the scope of this article; however, the impact of U.S. tax laws on the U.S. venturer will have importance for tax planning, structuring the venture, formulating a business plan, and later operations of the venture.

110. *See generally* HARVEY KAYE, ET. AL., INTERNATIONAL TRADE PRACTICE (1987).

111. *See* Jay M. Vogelson, *United States Foreign Corrupt Practices and Anti-Boycott Legislation, in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 339-67 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990).

112. *Id.* at 353-66.

V. Practical Issues and Pitfalls in Mexican Business Alliances

A. *Dealing with Practical Issues*

The process of dealing with practical issues starts very early in the venture—often before a partner is found. Usually ventures come about when one partner has conceptualized a business plan, set out criteria for a partner, and then searched for and found the partner. As a solution to many of the practical issues of business planning and building a strong partner relationship, there may be none more important than a dominant business vision coupled with well-matched partners.

Although some partners acquire existing businesses or one partner acquires part interest in the other, conventional advice is to "start fresh," with a totally new enterprise and to allow the new venture to be independent by separating it from the existing business of the partners. Confusions of scope and the proper business activity for the new venture are more likely to arise if it is not a new, independent business.[113]

One consultant has advised that dealing with the practical issues in establishing a joint venture depends on the three "Cs": compatibility, capability, and commitment.[114] It is critical for partners to ensure that their counterparts will get along well with them, will have the ability and resources to make the contributions promised, and will have the dedication to a long-term commitment that will give the venture enough time for a fair trial in the market place.

Finally, the practical issues will be easier to handle if partners have rigorously examined their business goals and have identified and agreed on the "zone of mutuality" in which their self-interests intersect and where both want to succeed. In addition, they must acknowledge, before the venture is in place, that changes in the business environment, the life cycle of the new venture, and their own strategic business goals, make it essential that they agree to reexamine the relationship and the venture from time to time on a pre-arranged sched-

113. *See generally* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD (David N. Goldsweig & Roger H. Cummings, eds., 2d ed. 1990).

114. Conversation of author with W. L. Pendergrass, Jr., TPG Int'l, Dallas, July 26, 1991.

ule to modify the joint venture agreement in accord with the changes that have occurred.

B. *Venture Pitfalls and Planning to Avoid Them*

Pitfalls for unwary venturers are many, and often their detrimental consequences cannot be avoided with even the best foresight and planning.[115] However, perhaps the best planning tool of all is simply knowing the most common pitfalls for multinational joint ventures generally and then monitoring the new venture to ensure that they are avoided. These are the practical "hot spots" of joint venture partnering and negotiations:[116]

1. "Surprises" arising from lack of information about partners, markets, or cultures;
2. Flawed or insufficient strategic business planning;
3. Incompatibility of partners;
4. Control struggles and decision-making disputes;
5. Deadlocks or delays in decision-making that paralyze the venture;
6. Differences in cultural and management styles;
7. Compromise decisions that dilute decisive or innovative action;
8. Loss of technology control;
9. Lack of communication and the failure to establish a workable relationship between venture partners;
10. Unexpected political or economic risks in the country where the venture business or a venturer is located, or unexpected changes in the applicable local laws and regulations;
11. Creation of a competitor (the venture) and competition with it by the individual venturers;
12. Apprehension about lack of recovery or ultimate control of contributed property on termination of the venture;
13. Failure to take into account changes over time in the venture, its context, or its partners.

Avoiding these common pitfalls of joint venturing depends largely on the partners engaging in a lengthy planning and partnering phase of the venture, establishing a sound relationship, and confronting is-

115. *See generally* Marjorie A. Lyles, *Common Mistakes of Joint Venture Experienced Firms*, COLUM. J. OF WORLD BUS. 79-85 (Summer 1987); Guy de Jonquieres, *Corporate Alliances: Equal Partnerships Stand a Better Chance of Success*, FIN. TIMES, May 15, 1991, at 11.

116. This listing of pitfalls has been compiled from the author's experiences and numerous references, including, Marjorie A. Lyles, *Common Mistakes of Joint Venture Experienced Firms*, COLUM. J. OF WORLD BUS. (1987); Guy de Jonquieres, *Corporate Alliances: Equal Partnerships Stand A Better Chance of Success*, FIN. TIMES, May 15, 1991, at 11.

sues with unrelenting honesty. The experienced international legal counsel may play an effective role in this process by warning partners that lengthy preliminaries and often costly planning and preparation are the best routes to a successful venture.

A recent study of cross-border strategic business alliances by a management consulting firm resulted in the following tips for avoiding common pitfalls of joint ventures:

> 1. Strive for nearly equal ownership (50/50) as it reflects mutual strength and commitment—unequal ventures are more likely to fail.
> 2. Be prepared for disputes, failed communications, and other troubles during the first two years. Do not assume from these early difficulties that the venture will fail, for this is part of a maturing partnership.
> 3. Involve partners' high executives and the key individuals who negotiated the venture and established the relationship, especially to settle disputes and misunderstandings.
> 4. Even if ownership is 50/50, be sure one partner has ultimate management control; 50/50 deadlocks are often terminal.[117]

But by far the most dangerous pitfall that awaits the U.S. investor venturing in Mexico is the dramatic differences in culture, business customs, and attitudes that exist in Mexico. Careful study, cross-cultural training, and frequent travels to Mexico should be a routine part of the preparation for venturing there. Beyond understanding the differences in culture, there must be a willingness to accept and work within certain fundamental parameters of the Mexican culture and to convey a message of respect and trust in dealings with partners, customers, and other business associates in Mexico.

There are legal "hot spots" in joint venturing as well; many have been highlighted in the earlier discussion of monitoring legal issues. For U.S. legal counsel, the best way to avoid legal pitfalls in the joint venture is to monitor progress carefully, to be as fully involved as feasible in negotiations, and to associate Mexican legal counsel for the project early in the process. No matter how well informed U.S. counsel is concerning Mexican law issues, it is essential to have access to the detailed knowledge of foreign counsel and the experience with regulatory interpretations and authorities that Mexican counsel can offer. The early establishment of open communication and a sound working relationship with Mexican counsel is one of the key contribu-

117. Guy de Jonquieres, *Corporate Alliances: Equal Partnerships Stand a Better Chance of Success*, FIN. TIMES, May 15, 1991, at 11.

tions U.S. counsel can make to the joint venturing transaction.[118]

VI. NAFTA AND THE FUTURE OF JOINT VENTURES IN MEXICO

The proposed North American Free Trade Agreement (NAFTA), if adopted and enacted in a format somewhat similar to the U.S.-Canada Free Trade Agreement, will open further the border between the northern countries of the hemisphere and Mexico. Restrictions on trade in goods and services and on foreign investment in Mexico will diminish further and industrial integration will be accelerated.

In such an economic climate, businesses will be freer to make sound choices about doing business based on the right reasons and sound strategic business planning. Thus, when it appears wise to do so, U.S. companies will be able to go into Mexico alone—at least in most sectors—by establishing wholly-owned subsidiaries.

But likewise, when strategic reasons dictate it, there will remain the option to joint venture with a Mexican partner. Particularly during the initial years of the North American Free Trade Agreement, there will be many advantages to partnering with a local Mexican business as U.S. businesses lacking experience in the Mexican market plan to enter it for the first time. Unlike joint ventures of the past, however, the joint ventures of the future in Mexico will be genuinely voluntary and, assuming that proper planning has occurred, they will have an enhanced chance of success as a result.

VII. SUMMARY AND CONCLUSION

Although historically the joint venture has been used in Mexico by foreign investors to partner with Mexican businesses in an effort to comply with ownership restrictions on foreign investment, those historic reasons have nearly disappeared. Nevertheless there are traditional advantages to the multinational joint venture that remain as valid now in Mexico as they have been elsewhere in the world for decades.

Joint ventures require careful planning and partnering built on a strong relationship as well as careful operational and legal structuring. Pitfalls for the cross-border venture abound, but likewise the

118. *See generally* Rona R. Mears, *Ethics and Due Diligence: A Lawyer's Perspective on Doing Business With Mexico*, 22 ST. MARY'S L.J. 605 (1991).

synergies of a good match can produce business success unattainable by either partner alone.

These fundamental principles of multinational joint venturing make joint ventures in Mexico today between foreign investors and Mexican partners an important business option for businesses that make the choice voluntarily based on a long-term commitment. With the advent of a North American Free Trade Agreement, further opening of the Mexican market will occur and continue to enhance the opportunities for joint venturing in Mexico during the years ahead.

APPENDIX A

MULTINATIONAL JOINT VENTURE CHECKLIST*

A. STRUCTURING AND FINANCING A JOINT VENTURE

1. *Name*
   a. Availability in country where joint venture operations located ("host country")
   b. Protection of name
2. *Legal Structure and Choice of Venture Entity*
   a. Contractual joint venture (no separate legal entity)
   b. Equity joint venture (separate legal entity)
      (1) Corporation (what type, e.g., variable capital, limited liability company)
      (2) Partnership (general or limited)
   c. Special issues
      (1) U.S. "S" corporation venturers
      (2) Limited liability (relative importance)
3. *Ownership Percentages*
   a. 50-50
   b. 49-51
   c. Other, e.g. 33-1/3, 33-1/3, 33-1/3; 60-40.
   d. Varying or shifting percentages: for vote, profits, and losses.
4. *Legal Form of Venturers*
   a. Corporations; partnerships; other
   b. Jurisdiction of venturers' organization
   c. New or existing entity
   d. Special issues for U.S. "S" corporation venturers
5. *Capital Sources*
   a. From parent companies (or venturers)
      (1) Equity
      (2) Debt
      (3) Property (real estate, personal property, technology, other) and/or services
   b. Bank financing
      (1) Local currency loans
      (2) Foreign (non-local) currency loans
      (3) Eurodollar loans
   c. Non-Bank institutional financing

* The Multinational Joint Venture Checklist addresses the establishment of joint ventures between parties from any two or more countries; it may be used as a comprehensive list of issues for joint ventures located in Mexico, or in any other jurisdiction. Although substantially modified, the checklist is adapted in part from materials entitled "Representative Joint Venture Checklist," by Henry W. West, Jr., partner, Fenwick, Davis & West, Palo Alto, California, distributed at "International Joint Ventures," a seminar held September 16-17, 1987, San Francisco, California, sponsored by The World Trade Institute, New York, New York.

d. Host country government
  (1) Grants
    (a) Cash
    (b) Land, building
    (c) Materials
  (2) Government financing
    (a) Loans (low interest rates and/or deferred payments)
    (b) Interest subsidies on private loans
  (3) Tax consequences
    (a) Income tax reductions or holidays
    (b) Investment credits
    (c) Special allowances, such as accelerated or excess depreciation
    (d) Sales tax relief
  (4) Other investment incentives
    (a) Bargain leaseholds
    (b) Roads and utilities
    (c) Freight subsidies
    (d) Employee training
    (e) Import duty relief
      (1) Production equipment
      (2) Materials and components
    (f) Export subsidies
  (5) U.S. government
    (a) A.I.D.
    (b) Export-Import Bank
e. Choosing capital sources—host country regulations
  (1) Withholding on interest payments
  (2) Foreign investment restrictions, e.g., balance of monetary inflow and outflow required by host country

6. *Investment Timing*
  a. In stages, according to funding schedule
  b. Required or optional subsequent equity investment or loans by venturers

7. *Tax Considerations*
  a. United States
    (1) Transfer of appreciated property
    (2) Gain from sale of patents to foreign corporations
    (3) Foreign personal holding companies
    (4) Foreign tax credits
    (5) Income from sources within U.S. possessions
    (6) Controlled foreign corporations subpart F income
    (7) Withholding taxes on distributions to partners
  b. Local taxes (at site of joint venture operations)
    (1) Income
    (2) Sales taxes
    (3) Capital taxes
    (4) Value-added-tax

(5) Miscellaneous: stamp, registration, license taxes
(6) Customs duties

c. Structure of existing unilateral and treaty relief from double taxation
(1) Situs for holding company
(2) Dividends versus interest, royalties, and other alternatives for holding or operating companies

d. Special reporting requirements

8. *Exchange Controls*
a. Inward remittance of investment
(1) Equity
(2) Debt
(3) Registration requirements

b. Dividends, interest, and royalties
c. Principal repayments on debt
d. Sale or liquidation of equity investment

9. *Antitrust Considerations*
a. Host country of joint venture
b. Home countries of venturers

10. *Export-Import Controls on Raw Materials, Finished Goods And Technology*
a. Local (at site of joint venture)
(1) Local content
(2) Required exports
(3) Quotas

b. U.S.
(1) Technology
(2) Goods

c. Tariffs, other non-tariff barriers

B. LEGAL STRUCTURE OF JOINT VENTURE VEHICLE AND RELATED CONSIDERATIONS

1. *Forms of Business Association Available for Joint Venture*
a. Contractual joint venture
b. Equity joint venture
(1) Various corporate forms (e.g., stock corporation, limited liability company)
(2) Various partnership forms (e.g., general partnership, limited partnership, limited partnership with shares)

2. *Corporate Capitalization*
a. Statutory requirements (including number of shareholders, minimum capitalization)
b. Registered (or bearer) shares
c. Authorized and issued shares

3. *Corporate Control Devices*
a. Preemptive rights
b. Classification of shares
(1) Voting and nonvoting

(2) Preferred, common, other

c. Voting rules

d. Contractual agreements for selection of directors, officers, statutory auditors, and independent public accountants, and for other control matters

e. Minimum requirements on quorums and voting for specified shareholder and/or director actions

f. Restrictions on transfer of shares

(1) By corporate documentation

(2) By agreement

4. *Special Partnership Issues*

a. Liability

b. Contribution to capitalize partnership

c. Control devices

d. Management structure

5. *Permits or Government Approvals for Venture (Other Than Exchange Control)*

a. Prior permission for foreign investment or registration with automatic approval, or a combination

b. Integrated with exchange control approvals, or independent

c. Subject matter

(1) Investment itself

(2) Collateral matters

(a) Importation of production equipment or materials and components

(b) Approval of license agreements, export agreements, local distributor agreements

(c) Licenses to do business, either generally or for specific activities

(d) Corporate registrations

(e) Special product licenses: health registrations, import permits, food and drug clearances

(3) Doing business with venturers

(a) Forms of transactions

(b) Documentation

d. Reporting and disclosure requirements

(1) Initial

(2) Ongoing

C. ESTABLISHMENT OF JOINT VENTURE FACILITY AND INTERIM OPERATIONS

1. *Joint Venture Facility*

a. Location

b. Target dates for construction start/completion

c. Architectural and engineering firms

2. *Temporary Facilities for Interim Business Operations*

3. *Startup Management Group*

a. Composition

(1) From home country of venturers: visas, work permits
(2) From local country of venture
b. Compensation
c. Duties
(1) Establish business plan
(2) Obtain necessary third-party licenses
(3) Recruit permanent staff for joint venture
d. Training
4. *Property and Location*
a. Own, lease; local restrictions
b. Zoning
c. Environmental compliance
d. Infrastructure, utilities
e. Transportation
5. *Miscellaneous*
a. Insurance coverage on property
b. Bank account arrangements and limitations
c. Powers of attorney

D. MANAGEMENT AND CONTROL
1. *Role of Parent Companies or Venturers*
a. Joint venture actions requiring approval of parents
b. Technical services support to/from joint venture
c. Product planning input
2. *Board of Directors*
a. Total number
b. Number representing each parent
c. Compensation
d. Benefits
e. Reimbursements
f. Removal
g. Meetings
h. Quorum
i. Actions requiring Board approval and/or super majority vote
(1) Capital investment decisions
(2) Issuance of new shares
(3) Admittance of new shareholders
(4) Major research decisions in new areas of technology
(5) Introduction of new products
(6) Approval of marketing plans
(7) Acquisition of land, plant, and facilities
(8) Distribution of profits
(9) Amendment of articles or bylaws or other organizational documents of the joint venture company
(10) Budget
(11) Other matters that may be identified at the start of the joint venture, or at any time by a certain number of directors, as of special significance

j. Procedure in event of deadlock
k. Board committees
(1) Composition
(2) Purposes/powers
(3) Life
(4) Periodic reports to board

3. *Officers*
a. Total number
b. Number representing each venturer
c. Powers, duties
d. Compensation
e. Benefits
f. Reimbursements
g. Reimbursement to venturer if officer of joint venture still receiving compensation from venturer
h. "Vote" required for actions
i. Procedure in event of deadlock
j. Periodic reports to board

4. *If Partnership, Alternative Management/Control Structures*
5. *Dividend/Profit Distribution Policies*
6. *Control of Appointment of Contractors and Agents, Including Auditors, Accountants and Counsel*
7. *Participation of Labor in Management*

E. OPERATIONAL ISSUES

1. *Joint Venture Plant Operating Schedule*
2. *Production or Sales Targets*
3. *Quality Targets*
4. *Products to Produce*
a. Current product line
b. Modification

5. *Trade*
a. Import/export restrictions, costs, barriers
b. Trade in products or raw materials
c. Transportation; customs brokering

6. *Target for Return on Investment*
7. *Pricing Policy*
a. How established
b. Modification
c. Review

8. *Allocation of Plant Capacity*
a. Calls on capacity
b. Unused capacity
c. Consequences of capacity under utilization

9. *Ancillary Agreements With Venturers*
a. Management services
b. Training
c. Other consulting services

d. Licenses

10. *Labor and Employment Problems*
    a. Entry visas and work permits
    b. Labor participation and management
    c. Mandatory fringe benefits
    d. Mandatory termination benefits
    e. Extension of group insurance programs, pension and profit-sharing plans, FICA, or equivalent

F. MARKETING OF JOINT VENTURE PRODUCTS

1. *Rights of Venturers to Sell in Competition With Joint Venture*
    a. Area restrictions
    b. Product restrictions
    c. Validity of restrictions under foreign law
    d. Antitrust issues
2. *Use of Distributors, Other Non-Venture Parties for Marketing*
    a. Distribution Agreements
    b. Sales representatives
    c. Trading companies

G. PROPRIETARY MATERIAL

1. *Protection of trademarks/names, patents or other know-how in host country*
2. *License Agreements From Venturers to Joint Venture*
    a. Compensation, royalties
    b. Additional protection for minority shareholder
    c. Tax considerations
3. *Confidentiality Agreements Among Venturers and Joint Venture*
4. *Customer Confidential Information*
5. *Licensing of Venturers' Patents to Third Parties*
6. *Use and Ownership of Trademarks, Tradenames of Venturers*

H. "CLOSING" FOR JOINT VENTURE

1. *Timing*
2. *Location*
3. *Contingencies for Obligation to Close:*
    a. Necessary governmental approvals
    b. Completion of all agreements
    c. Delivery of favorable opinions from counsel
    d. Approval of joint venture agreement by venturers' directors or comparable authorization

I. TERMINATION OF JOINT VENTURE AGREEMENT

1. *Before Closing*
    a. Mutual agreement
    b. Breach of joint venture agreement before closing
    c. Failure to obtain insurance
    d. Failure to obtain required governmental approvals
2. *Effect of Termination*
    a. Survival of claims for breach

b. Survival of certain provisions of joint venture agreement
c. Allocation of costs

J. DISSOLUTION OF THE JOINT VENTURE
1. *Events Causing Dissolution or Giving Parent Right to Require Dissolution*
a. Unprofitability of joint venture
b. Changes in laws of U.S. or foreign country
c. Breach by other partner
d. Bankruptcy or insolvency of either partner
e. Excessive time delay due to export of technology laws/controls
2. *Rights to Cause Dissolution*
a. Equal or unequal
b. Protection for minority shareholders
3. *Procedure Upon Dissolution*
a. Liquidation and division of assets
b. Availability of buyout rights
(1) Book value
(2) Multiple of net earnings
(3) Combination
4. *Ownership of Proprietary Material Upon Dissolution*
a. Protection for minority shareholders
b. Copyrights
c. Mask work protection
d. Trade secrets
e. Trademarks

K. DISPUTE RESOLUTION
1. *Mediation*
a. When required or available
b. Interim disputes and operational disagreements
c. Structure and rules
2. *Arbitration*
a. When required or available
b. Institutional or ad hoc
c. Governing rules
(1) International Chamber of Commerce (ICC)
(2) U.N. Commission on International Trade Law (UNCITRAL)
(3) Other
d. Forum
e. Language
f. Allocation of costs
g. Enforcement of arbitrial awards; access to assets
3. *Litigation*
a. Submission to jurisdiction and appointment of agents
b. Waiver of objections to venue
c. Recognition and enforcement of judgments; access to assets
4. *Integrating Selected Form of Dispute Resolution Into Key Agreements*

L. MISCELLANEOUS

1. *Governing Law*
2. *Rights of Venturers to Inspect Books*
3. *Appointment of Auditors*
4. *Assignment of Joint Venture Agreement*
   a. To any third party
   b. To affiliates
5. *Currency Provisions*
   a. Mandatory deposits
   b. Exchange fluctuations
6. *Rights of Venturers to do Business With Joint Venture*
7. *Rights of Venturers to Compete With Joint Venture and Other Venturers*

M. DOCUMENTATION

1. *Primary*
   a. Information exchange and confidentiality agreement
   b. Memorandum of understanding (or letter of intent)
   c. Preliminary joint venture agreement
   d. Final (or definitive) joint venture agreement
   e. Authorizations by each venturer (to form joint venture and enter into all related transactions)
   f. If joint venture is a corporation:
      (1) Articles of incorporation
      (2) Bylaws
      (3) Organizational consent or meeting minutes
      (4) Shareholders' agreement
   g. If joint venture is a partnership:
      (1) Partnership agreement
   h. If each venturer sets up separate entity to enter into venture:
      (1) Authorization to set up subsidiary
      (2) Appropriate organizational documents
2. *Ancillary*
   a. Business plan
   b. Investment schedule
   c. Licenses covering patents, trademarks, know-how, and technology
   d. Agreements to furnish management, administrative, technical, or other services
   e. Distribution agreements
   f. Employment agreements
   g. Export agreements
   h. Site agreements
   i. Sales of goods agreements
   j. Supply agreements
   k. Host jurisdiction requirements: e.g., specific reports, applications, or other documents

APPENDIX B

BUSINESS ORGANIZATIONS IN MEXICO: A SUMMARY AND COMPARISON WITH U.S. BUSINESS ORGANIZATIONS

MEXICO	UNITED STATES	CHARACTERISTICS
Sociedad Anonima (or S.A.)	Corporation	*In Mexico and U.S.*; liability limited to extent of consideration paid for shares of stock; indefinite life; privately or publicly owned; S.A. most closely equivalent to U.S. corporation; S.A. domicile is where management located; corporation domicile is state of incorporation; *available and widely used in both countries; used by foreign investors, but not as popular in Mexico as S.A. de C.V. (below).*
Sociedad Anonima de Capital Variable (or S.A. de C.V.)	(Corporation with Variable Capital)*	*In Mexico only*; generally same as S.A., except shares issued for variable capital in any amount desired (after minimum capital of 25,000 pesos met); variable capital may be increased or decreased by board resolution; *frequently used by foreign investors, flexible capital very desirable.*
Sociedad de Responsabilidad Limitada (or S.R.L.)	(Limited Liability Company)*	*In Mexico only*; having features of both the corporation and partnership; for small enterprises with few owners (non-public); limited liability; participation interest not represented by shares or stock certificate, but company record shows names of participants and amount of capital contribution; allowed to operate in some sectors not open to corporations (agriculture, lumber); difficult to use without local subscriptions for participation; *rarely used by foreign investors.*

* Translation of Mexican name in English; not a separate form of business organization under U.S. law.

MEXICO	UNITED STATES	CHARACTERISTICS
(Sociedad Anonima Controlada por Unos Pocos Individuos)**	Close Corporation	*In some U.S. states only* (including Texas), organized under special close corporation statutes; structured for a small number of owners and providing flexible management options. The term "close corporation" also is used in the U.S. as a generic term for any corporation with a small number of shareholders, whether it is organized under a special close corporation statute, or the usual corporation statute. *In U.S. sometimes used by foreign investors.*
Sociedad en Nombre Colectivo	General Partnership	*In Mexico and U.S.*; partners jointly and severally liable for partnership debts; interest of partners not transferable without consent of all partners; death of any partner results in dissolution of partnership; partnership may transact business and take action in own name; in Mexico, articles of partnership executed before Notary and inscribed in Public Registry; in U.S. no public filing or registration required; *in Mexico, seldom used by foreign investors; in U.S., sometimes used by foreign investors.*
Sociedad en Comandita Simple (or S. en C.)	Limited Partnership	*In Mexico and U.S.*; consists of at least one general partner with unlimited liability and one or more limited partners with liability limited to amount of capital contribution; *in U.S.*, some limits on the role of limited partners in management and administration of partnership; *in Mexico*, limited partner may not administer partnership. *In*

** Translation of U.S. name in Spanish; not a separate form of business organization under Mexican law.

MEXICO	UNITED STATES	CHARACTERISTICS
		Mexico, seldom used by foreign investors; in U.S., sometimes used by foreign investors.
Sociedad en Comandita por Acciones	(Limited Partnership with Shares)*	*In Mexico only,* similar to limited partnership, but limited partner's interests represented by readily transferable shares; *seldom used by foreign investors.*
Asociacion en Participacion	Joint Venture (or A. en P.)	*In Mexico and U.S.*, a contractual relationship whereby two or more venturers contribute capital, property or services, and agree to share in management, profits and losses of the venture; often used for a specific business venture or relatively short-term project; *in Mexico*, a joint venture has no separate status as a legal entity and cannot transact business in its own name (the Mexican company venturer is the participation of its silent foreign venturer, the *asociado*); *in U.S.*, deemed to be a general partnership and laws applicable to general partnerships apply; *in Mexico*, limited provision exists for tax treatment, so special written confirmation of tax liability from authorities should be obtained; percent of profits allocated to foreign venturer in Mexican joint venture determines percent of foreign ownership for foreign investment regulatory purposes. *In U.S., sometimes used by foreign investors; in Mexico, seldom used by foreign investors.*
Sucursal de Sociedad Extranjera	Branch	*In Mexico and U.S.*, an affiliated office without status as a legal entity apart from the foreign company; *in Mexico*, approval and

* Translation of Mexican name in English; not a separate form of business organization under U.S. law.

MEXICO	UNITED STATES	CHARACTERISTICS
		registration is required; *in U.S.*, a certificate of authority to do business is required; *in Mexico, rarely used by foreign investors; in U.S. sometimes used by foreign investors*.
Empresa Individual or Empresa de Persona Fiscal	Sole Proprietorship	*In Mexico and U.S.*, no separate legal existence apart from individual owner of business; individual is personally liable for debts of business; *in Mexico*, notice to authorities and membership in the appropriate Chamber is required; *in U.S.*, certain formalities such as assumed name filing and tax employer identification number required; normally used for small business operations only; *seldom used by foreign investors in Mexico or U.S.*

APPENDIX C

TWO CASE STUDIES: U.S.-MEXICO JOINT VENTURES*

Case Study #1: "ChemiCo"

1. *Background*

USCo is a Texas corporation that produces, sells and distributes chemical products, including surface treatment agents for metals. USCo possesses expertise, know-how, patents and other technology regarding the production of metal surface treatment agents, and has valuable contacts with GermCo, a raw materials supplier.

GermCo is a company organized and operating in the Federal Republic of Germany, that is a producer and supplier of chemicals, additives and other raw materials and supplies used in various chemical processes, including the production of metal surface treatment agents.

USCo has identified a large potential market for the metal surface treatment agents in Mexico and, ultimately, throughout Latin America. USCo wants to use its know-how and technology, and the raw materials of GermCo, to penetrate the market south of the U.S. border, but does not know the Mexican market. Further, USCo does not have the capacity to produce sufficient product in the U.S. to expand its market and does not want to make the capital investments necessary to expand its factory in San Antonio, Texas.

MexiCorp is a Mexican company that produces various chemicals at its production plants located in several Mexican cities. It has an established distribution network for marketing and selling industrial chemicals, and has an effective management team, labor pool and sales force but does not have the expertise, technology, equipment, or raw materials to produce metal surface treatment agents.

USCo and MexiCorp want "to do business," producing and marketing metal surface treatment agents in Mexico, and later in other locations in Latin America. GermCo is a willing supplier, but does not want to be at risk if the venture in Mexico does not succeed. All parties are eager to get the project, which they have named "ChemiCo," underway immediately.

2. *Issues for Consideration*

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* The two hypothetical joint ventures described here are included to heighten the reader's awareness of the varieties of strategic business alliances that may be proposed for doing business in Mexico, and to provide examples of key issues in organizing alliances. Although based on real business proposals, all names have been changed to preserve anonymity and some facts have been altered to highlight certain legal issues and related business considerations.

(a) How should the proposed venture be structured? Should it be a joint venture in Mexico between USCo and MexiCorp? Should GermCo be a venturer? Should a separate joint venture entity, such as a new corporation, be set up in Mexico? Would it be preferable for USCo to purchase an ownership interest in MexiCorp? Should each company set up a limited liability subsidiary to serve as its venturer?

(b) How can USCo learn more about MexiCorp as a potential business partner? Should visits be made to MexiCorp's existing operations? What can be learned in advance by USCo regarding the market in Mexico for metal surface treatment agents?

(c) How can the venture ensure adequate and timely delivery of raw materials? What kind of agreement should be proposed with GermCo? What problems of transportation, importation, or customs duties exist for bringing in raw materials from Germany to Mexico? Are there any European community ("EC") issues involved in this proposal?

(d) How can USCo protect its know-how and technology, yet make it available to the joint venture? Will USCo use its trademark and name for the metal surface treatment agents? Will there be any permanent technology transfers?

(e) How will USCo train the MexiCorp manager, laborers and sales force to produce metal surface treatment agents, and at whose expense?

(f) How will the ChemiCo venture be capitalized? What will venturers contribute and in what percentages will they share profits and losses? What Mexican regulations apply to the proposed percentage of foreign ownership of ChemiCo and what approvals or notices are required? If USCo holds a majority interest are any special approvals needed or requirements imposed?

(g) Are there any foreign exchange control regulations applicable to the ChemiCo project? Must investments be registered? Are there any anticipated difficulties in repatriating to the U.S. either dividends or capital?

(h) How can USCo's special equipment be supplied to the venture? Is leasing preferable to sale and purchase? What customs duties and export regulations apply?

(i) Consider the consequences of the way the venture is organized in case USCo decides to import some of the products produced in Mexico into the U.S. for sale. What issues arise if a market develops in the EC for the products?

(j) What environmental laws apply to the production in Mexico of the metal surface treatment agents? What environmental laws apply to the transportation of the metal surface treatment agents?

(k) What tax consequences result for the venturers? How might the structure be altered for better tax results? Are the interests of the ventures disparate?

(l) What potential exists for manufacturing products in Mexico and exporting to Latin America countries? What restrictions might apply? What countries are the best targets based on the fewest legal restrictions?

CASE STUDY #2: "MAQUILEQUIP"

1. *Background*

EquipCo, a Mexican company, distributes protective goggles and masks used by factory workers engaged in certain manufacturing or assembling processes that create dangerous fumes or emit small particles into the air that could harm workers' eyes or respiratory tracts. EquipCo purchases the products from AmeriCo, an Illinois corporation, and imports them into Mexico for resale to Mexican end-users. EquipCo has determined that there is a large market for the products in maquiladora plants operated along the U.S.-Mexico border, and in U.S. businesses located throughout the southwestern United States. There may also be a developing market in the interior of Mexico where U.S. companies are now establishing manufacturing operations as a result of new, more relaxed, foreign investment laws.

Purchases for maquiladoras could be made on the U.S. side of the border, with the products then being exported by the U.S. maquiladora plant owners into Mexico for use in their maquiladora operations. Alternatively, the sales could be made on the Mexican side of the border. Purchasing agents for the maquiladoras are local managers with whom EquipCo has established a strong local reputation based on its distribution in Mexico of other well-known products. Similarly, EquipCo has good marketing contacts in the Southwestern U.S. where it has marketed other products.

EquipCo and AmeriCo want to immediately begin a significant venture to market and sell the products to the U.S.-owned maquiladoras, and throughout the southwestern U.S. market. EquipCo's only current business operations are located in southern Mexico, far from the northern border with the U.S. where most maquiladoras are located and it does not have access to the necessary capital to build or lease warehouse space or to build an adequate inventory for the undertaking.

2. *Issues for Consideration*

(a) What is the best site for the sales of the products to the maquiladoras owned by U.S. companies? Is the answer the same with regard to contract in-bond operations owned by Mexican companies? Consider matters of customs duties and export/import issues, tax consequences, and related concerns.

(b) Where should the center for distribution be located? Southern Texas? Northern Mexico? Who should finance and control the distribution center?

(c) How should the business enterprise be structured? Should EquipCo and AmeriCo enter into sales of goods agreements? Should a joint venture enterprise, MaquilEquip, be formed between EquipCo and AmeriCo? If so, in what jurisdiction?

(d) If a joint venture is established, should a new corporate entity be set up as the joint venture vehicle? Would a partnership be preferable? Should each of the venturers set up new subsidiaries to own the joint venture?

(e) If a joint venture is established, how will the parties make initial contributions and how will profits and losses be shared?

(f) What will the duties of each venturer be in conducting the business? Should ancillary agreements exist with regard to sales of goods, marketing or management services?

(g) Will AmeriCo's tradename and mark for the product be used? Should a licensing agreement be entered into with the joint venture to allow that use?

(h) Are there issues of products liability and warranties that should be considered in structuring the joint venture and in determining the site of the sales and of the distribution center?

(i) What are the tax considerations, exchange controls, trade regulations, health regulations and other legal issues that should be addressed?

(j) Are there benefits from using a free/foreign trade zone for the location of the distribution center? Will there be sufficient labor requirements for repackaging, labeling and other distribution processing so that the use of less expensive labor in Mexico would be beneficial?

(k) What impact will the enactment of the North American Free Trade Agreement, and lowering of tariffs and non-tariff barriers, have on the business plan? Does this prospect change the way the business should be structured or where it should be located?