TITLE: IN SEARCH OF THE LAW-GOVERNED STATE

Conference Paper #15 of 17

Soviet Civil Law and the Emergence of a Pravovoe Gosudarstvo: Do Foreigners figure in the Grant Scheme?

AUTHOR: William B. Simons

CONTRACTOR: Lehigh University

PRINCIPAL INVESTIGATOR: Donald D. Barry

COUNCIL CONTRACT NUMBER: 805-01

DATE: October 1991

The work leading to this report was supported by funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.
NCSEER NOTE

This paper is #15 in the series listed on the following page. The series is the product of a major conference entitled, In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev, which was summarized in a Council Report by that title authored by Donald D. Barry, and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim. This paper was written prior to the attempted coup of August 19, 1991.
1. GIANMARIA AJANI, "The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship."

2. EUGENE HUSKEY, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

3. LOUISE SHELLEY, "Legal Consciousness and the Pravovoe Gosudarstvo."

4. DIETRICH ANDRE LOEBER, "Regional and National Variations: The Baltic Factor."

5. JOHN HAZARD, "The Evolution of the Soviet Constitution."

6. FRANCES FOSTER-SIMONS, "The Soviet Legislature: Gorbachev’s School of Democracy."

7. GER VAN DEN BERG, "Executive Power and the Concept of Pravovoe Gosudarstvo."

8. HIROSHI ODA, "The Law-Based State and the CPSU."


10. ROBERT SHARLET, "The Fate of Individual Rights in the Age of Perestroika."

11. NICOLAI PETRO, "Informal Politics and the Rule of Law."


15. WILLIAM H. SIMONS, "Soviet Civil Law and the Emergence of a Pravovoe Gosudarstvo: Do Foreigners Figure in the Grant Scheme?"

16. KATHRYN HENDLEY, "The Ideals of the Pravovoe Gosudarstvo and the Soviet Workplace: A Case Study of Layoffs."

17. Commentary: The printed versions of conference remarks by participants BERMAN, SCHMIDT, MISHIN, EN'TIN, E. KURIS, P. KURIS, SAVITSKY, FEOPANOVA, and MOZOLIN
## TABLE OF CONTENTS

- Executive Summary .......................................................... i
- Introduction ................................................................. 1
- The Pre-perestroika Period ............................................... 3
- The Advent of Perestroika ............................................... 12
- Advanced Perestroika .................................................... 17
- Perestroika - The Future ................................................ 21
- Notes ................................................................. 29
Soviet Civil Law and the
Emergence of a Pravovoe Gosudarstvo:
Do Foreigners Figure in the Grand Scheme?
William B. Simons

Executive Summary

This paper examines current efforts in the USSR to move toward minimizing differing
treatment of foreigners--both natural and juridical persons--in Soviet civil law. During the pre-
perestroika period, published Soviet legislation and legal commentaries indicated that the position
of foreigners in civil law was not a particularly disadvantageous one. But several factors were
at work which made this nominal equality for foreigners more of an ideological or political
gesture than a grant of substantive rights and benefits.

On the surface, the situation has changed considerably since the advent of perestroika. But in the initial perestroika period, several countervailing policy considerations limited the
ability of foreigners to take advantage of the seemingly-changed conditions.

Soviet civil law is now moving into what has been termed "advanced perestroika," in
which a majority of the barriers previously existing are in the process of being dismantled.
While the groundwork for this development was laid with the adoption of the laws on lease,
land, and ownership, it was the promulgation of the federal decree on Joint Stock Companies
in June 1990, which provided a specific legal basis for the broad exercise of property rights and
obligations in the USSR. A series of other legal acts, including ones at the RSFSR level, have
followed.

Because these developments are so recent, however, there has been little opportunity to
test them in practice. A reasonable conclusion at this point, therefore, is that the present period
can be seen as marking the emergence of a pravovoe gosudarstvo vis-a-vis foreigners in the field
of Soviet civil law.
SOVIET CIVIL LAW AND THE
EMERGENCE OF A PRAVOVOE GOSUDARSTVO:
DO FOREIGNERS FIGURE IN THE GRAND SCHEME?

William B. Simons

Introduction

The question of whether meaningful changes have been introduced into Soviet law and practice to be able to speak of the emergence--let alone the existence--of a pravovoe gosudarstvo in easy one to answer. The task is rendered even more complex when the field of focus is expanded to encompass the provisions of Soviet civil law governing foreigners. This is in part due to the number of legitimate concerns that a sovereign state may have to differentiate between the protection and benefits which it accords to its own citizens and those it may choose to extend to foreigners. Such factors as national security, public health and public morals, etc. are areas in which restrictions of varying degrees are imposed upon foreigners in any number of western states. Assuming that these otherwise reasonable policy considerations are not implemented in a discriminatory fashion, a state could subject foreigners to restrictions in the exercise of civil law rights and still be viewed as a pravovoe gosudarstvo.

On the other hand, it would be difficult to refute the proposition that one goal of a pravovoe gosudarstvo should be to minimize if not eliminate differing treatment of its own citizens. And it could be further argued that a logical extension of this proposition would be to minimize differing treatment of foreigners vis-a-vis one’s own nationals. For certainly one criterion of a pravovoe gosudarstvo must be the degree to which it protects minorities--especially those with minimal recourse to the arenas of politics or law. And foreigners typically fall into this category in most countries.

As regards individuals, certain aspects of a pravovoe gosudarstvo in general can be seen
to involve the observance and enforcement of human rights. So, for example, mention can be made of international covenants in this field for terms of reference. However, these covenants are limited in their application to natural persons. Yet especially in industrialized societies, natural persons--either alone or in concert--often enjoy basic civil law rights in general and property rights in particular through the vehicle of legal entities (juridical persons). Therefore, a broader focus than that of concentrating on individuals per se is often appropriate. In this regard, the concept of a civil society--where individuals and their groupings on the one hand are posited against the state on the other--may provide a convenient framework within which the issue of a pravovoe gosudarstvo and foreigners--both natural and legal persons--may be considered. Rights that are accorded to natural persons but that are withheld from juridical persons may effectively deprive these same individuals of the opportunity to the use and enjoyment of their assets--both in a material and non-material sense. This is an approach that previously would probably have drawn criticism from Soviet legal scholars and practitioners since Soviet law generally grouped property rights into the troika of individual, collective and state property. However, Soviet practice--if not legal theory--tends more and more to group individual and collective property on the one hand and to contrast it to state property on the other.

It will be the focus of this paper to examine current efforts in the USSR to move towards minimizing differing treatment of foreigners--both natural and juridical persons--on the one hand and Soviet nationals on the other. In doing so, the primary focus will be on Soviet civil law as it relates to the establishment and exercise of property rights. Reference, however, may also be made to administrative law, which often moves in the same orbit as civil law. Our
examination will be divided into three periods: 1) that preceding perestroika; 2) the initial phase of perestroika extending into 1990; and 3) from the end of 1990 onwards.

The Pre-perestroika Period

Formal Soviet policy vis-a-vis foreign natural persons as enshrined in major legislative acts from the first RSFSR Constitution of 1918 to the last USSR Constitution of 1977 has been generally consistent in its overall basis—the grant of the national regime to foreign citizens. That is, the extension to foreigners of the same rights that a state accords to its own nationals. True, the 1918 RSFSR Constitution contained a provision—enacted perhaps in the euphoria of the struggle against class barriers and divisions—which went beyond the traditional understanding of the national regime and accorded the full political regime enjoyed by Russian citizens to a defined category of foreigners resident in the Russian Republic. There was no such analogous provision in the 1936 Stalin Constitution, and indeed no mention whatsoever of foreigners. While the subject of foreign natural persons was again raised to the constitutional level in the 1977 Fundamental Law, it was only by way of enshrining therein a general guarantee for foreign citizens of "the rights and freedoms as provided by law."

Nevertheless, those relatively few Soviet scholars who have dealt with this subject have consistently stressed in writings over the past thirty years that—in the area of civil law—the national regime has unswervingly been accorded to foreigners. So, for example, the first Rules on the entry to and exit from the RSFSR of 21 December 1917 applied equally to foreigners as well as to citizens of the Russian Republic. The 1922 RSFSR Civil Code has been interpreted by contemporary as well as present-day Soviet scholars as consistent with the national regime
Foreign citizens were inter alia specifically mentioned in Article 8 of the Civil Code's implementing legislation. From this language, Soviet authors have concluded that "foreigners enjoy civil rights under the same conditions as do Soviet citizens." While Article 8 envisaged that restrictions could be placed upon the exercise of civil law rights of foreigners by central state agencies, "these restrictions could not relate to all rights of foreigners but rather only those of freedom of movement, choice of profession, rights in rem to immoveable property and use rights to land plots." The official policy of extending the national regime to foreigners was also contained in the 1962 Principles of Civil Legislation of the USSR; a general clause, similar to that contained in Article 8 of the 1922 implementing legislation, provided that exceptions to this policy could only be made by federal law.

Further, formal definition of the penumbra of rights contained in the grant of the national regime for foreign natural persons was set forth in the 1981 Law on the Legal Status of Foreigners in the USSR. Previously there had been no legal guidance as to the degree to which the national regime extended into areas related to, but not strictly within the traditional gambit of, civil law such as labor law, housing, etc. At least one Soviet scholar---writing in 1970 when the 1936 Constitution was still in force--had asserted that since the 1936 Constitution had expanded the rights of Soviet citizens to include the rights to work, to leisure, education, social security, and to medical care, and since foreigners were accorded the national regime under existing legislation, ipso facto foreigners enjoyed these same rights despite any explicit legislative basis therefor. This assertion of a broad interpretation of the national regime was ultimately reflected in explicit legislative provisions in the 1981 law. In drafting the 1981 law, Soviet lawmakers returned to a distinction that had been used previously in Soviet practice and
one which also finds its formal equal in the law and policy of states that are commonly regarded as having a pravovoe gosudarstvo, i.e., the distinction between foreigners who are temporary residents and those who resident status is permanent. Foreigners regardless of resident status are now formally entitled to education, the use of cultural achievements, freedom of conscience, of marital and familial relations, and to the inviolability of the person and dwelling.\textsuperscript{21} Those foreigners permanently residing in the Soviet Union are, in addition, accorded the rights to employment, leisure, health care, social security and housing benefits under the 1981 law.\textsuperscript{22} A restriction on the national regime policy under the 1981 law is one which excludes all foreigners from voting or standing as candidates in elections in the USSR.\textsuperscript{23} Again, a restriction not uncommon in states considered to have a pravovoe gosudarstvo.\textsuperscript{24}

The general restrictions on the civil law rights of foreigners, to which reference was made in the 1922 Civil Code and in the 1962 Principles, have been characterized by Boguslavskii as falling into three general groups: 1) those designed to protect state economic interests; 2) those relating to national security; and 3) those established by way of retortion.\textsuperscript{25} It can be argued that in principle these types of general restrictions are not on their face inconsistent with a pravovoe gosudarstvo. They relate to those types of legitimate concerns that a state may seek to take into consideration when it provides for differing treatment of foreigners as compared to its own nationals. Such restrictions have been--and continue to be--invoked in the law and practice of many western states relating to aliens. Published Soviet legislation has contained a number of such exceptions to the national regime. These have related primarily to choice of profession and place of residence. The 1927 USSR Mining Regulations provided that foreigners could engage in mining in the USSR only on the basis of a special use permit issued
by the Government. The 1958 statute on the protection of fishery stocks contained a prohibition against foreign natural and legal persons engaging in fishing in the USSR. The 1960 statute on the protection of the state borders prohibited foreign vessels from engaging in fishing or hydrographic research or exploration in territorial or inland waters. Likewise, under a 1968 edict on the continental shelf, foreign natural and legal persons were forbidden from exploring or exploiting natural resources on the continental shelf. While Soviet natural and legal persons were declared to be the users of mineral resources under the 1975 Fundamental Principles of Mineral Resources, foreign natural and legal persons could exploit these resources only when specifically permitted by Soviet legislation or by relevant international treaty. In a 1976 Edict, foreign natural and legal persons were again forbidden from engaging in fishing or conduction research relating to maritime resources within the 200-mile exclusive economic zone proclaimed by the USSR. The only exception to this prohibition was in the event of specific permission under a relevant international treaty.

Cases of retortion have not been frequently reported in Soviet sources. The textbook examples are, for example, incidents in the 1930s. In one case, a series of restrictive measures were enacted under a governmental decree of 20 October 1930 against France, Canada, the UK and Italy. Another instance was that of a special decree of the Soviet government promulgated on 26 November 1937 under which the property (a dwelling or other structure) on Soviet territory belonging to a foreign citizen whose own government restricted the ownership rights of Soviet citizens, was subject to transfer to a local Soviet.

Those relatively few Soviet writers who have dealt with the subject of foreigners under Soviet law contended that limitations to the national regime were in any event the exception
rather than the rule.\textsuperscript{34} No restrictions in the national security area per se were ever cited.\textsuperscript{35} While this is an area of legitimate interest even for a pravovoe gosudarstvo, it is also one in which administrative discretion based on vaguely drafted legislation is frequently exercised by agencies of state security, etc. Given that in the USSR administrative discretion and powers have traditionally been wielded on a wide scale, the absence of references to published restrictions on rights granted to foreigners under the national regime policy for reasons of national security would suggest that either: a) the national regime contains sufficient safeguards to protect against threats posed by foreigners (e.g. the Criminal Codes of the republics, etc.), or b) special restrictions exist but are not published and/or not known to Soviet authors.

A final plane in which rules governing the status of foreigners can be found is that of international treaties and agreements. These in general are those relating to rules governing inheritance, consular representation, legal assistance or tax matters. Such treaties either reconfirm the extension of the national regime or extend most-favored-nation treatment.\textsuperscript{36}

The issue of whether the position of foreign legal persons under Soviet law was consistent with the norms and rules of a pravovoe gosudarstvo is a more complex one. This is due to at least two factors. First, when searching for norms by which to measure whether the legislation and practice of a sovereign state meet the indicia of a pravovoe gosudarstvo, reference is frequently made to the norms of international treaties and conventions in the field of human rights. Yet as mentioned above, these treaties do not directly apply to legal persons.\textsuperscript{37} Second, economic activity in the USSR in the era preceding perestroika was controlled by the state—either directly or indirectly. And in the area of foreign trade, the state had accorded itself a strict monopoly from the very early days of Soviet history.\textsuperscript{38}
As suggested above, the first issue might be addressed through reference to the framework of a civil society. The second issue, however, does not lend itself to a ready analytical solution. With economic activity concentrated in the hands of the state, it would be difficult if not by definition impossible for the USSR to grant a national regime to foreign legal persons. With the exception of the eastern-bloc people’s democracies established after World War II, the vast majority of foreign legal persons that might have conducted business in the Soviet Union were privately or publicly held; state-run or state-owned companies in foreign countries were in a distinct minority.

It was at least in part due to this consideration that the only regime granted to foreign legal persons in the USSR has traditionally been on the grounds of most-favored-nation status stemming from applicable international treaties. This, of course, has allowed for a greater degree of divergence in the treatment of domestic economic entities as compared with those from foreign countries. In theory, even greater discrepancies could be engineered for foreign legal persons from states not having an appropriate trade or other treaty with the USSR. The national regime was extended to foreign legal persons only in certain limited areas (e.g., access to judicial or arbitral fora, rights in maritime navigation). 39

In practice, the distinction between foreign legal persons enjoying treatment under a most-favored nation treaty clause and those without such benefit was minimal. Foreign legal persons wishing to enter into contracts relating to foreign trade (e.g., export or import sales or purchase agreements) or to the financing or insuring thereof could conclude them only with a restricted number of Soviet legal persons. These Soviet legal persons were a select group of state enterprises (primarily foreign trade organizations [FTOs]) specially-authorized to engage in such
activities with foreign legal persons. No foreign investment was allowed. Concessions had been granted to foreign legal persons in the early days of the NEP period, but these were gradually terminated as the five-year plans of the administrative-command economy came on stream in the 1930s. The only other basis for foreign legal persons to be present in the USSR was through so-called "representation offices," the purposes of which were limited to general support activities (assisting in the conclusion of contracts, after-sales services, technical assistance, etc.) rather than the generation of direct income. These representative offices could only be opened on the basis of a special permit, which could be denied (or revoked) administratively without any recourse for a foreign legal person to appeal denial of a permit (or the issuance of a closure order). 40

Nevertheless, on balance, the general impression derived at first glance from published Soviet legislation and commentaries on foreigners and civil law in the period preceding perestroika is that on paper its provisions were not dissimilar to those of a pravovoe gosudarstvo. Foreign natural persons were accorded the national regime, there were few published exceptions to this general rule, and those cited were not inconsistent with the type of reasonable restrictions that a pravovoe gosudarstvo could impose upon foreigners. Indeed, most Soviet commentators contended that foreigners often enjoyed more rights and benefits in the USSR by virtue of the extension of the national regime than they did in their home countries. Reference was usually made to de jure and de facto discrimination in foreign countries based on race, sex, religion, etc., whereas such discrimination was formally outlawed in the USSR. 41 Rights enjoyed by foreign legal persons were more limited, but at least formally this was not due to overt discrimination as much as it was to the nature of the Soviet economic system and its
incompatibility with private commercial activities.

However, one can point to at least three factors which made this nominal equality for foreigners more of an ideological or political gesture than a grant of substantive rights and benefits.

First, there were few specific opportunities for Soviet citizens to enjoy their civil law rights outside the structure of the administrative-command economy. Ownership of that single-most important item of personal property to citizens of most industrialized countries—a dwelling—was restricted by both Soviet law and practice. Soviet law also prohibited the individual (or private) ownership of the means of production. And the opportunities for the accumulation of wealth through one’s own labor were limited primarily to agricultural cooperatives (the kolkhoz) and artisan and handicraft activities within one’s own family. Since foreigners were not granted a privileged position but rather were accorded the national regime, they were not permitted to enjoy opportunities greater than those available to Soviet citizens. Thus, even though a foreigner might be able to own a business or be an investor in his or her own country, this was not permitted in the USSR.42 Granting equal rights to foreign natural persons in theory meant that in practice they had few opportunities to meaningfully exercise the same. The more limited rights enjoyed by foreign legal persons were channelled through the state economic plan and the agents of the state monopoly of foreign trade, so there was little if any opportunity for foreign legal persons to exercise their rights independently of Soviet state control and supervision.

Second, the whole exercise was largely academic. Given the state of relations that existed between the USSR and most foreign countries prior to perestroika, there were few foreigners who travelled to the USSR in general and even fewer who did so for reasons other than tourism.
Those who did travel and/or reside in the USSR for business purposes did so through the channel of the planned economy. The Soviet state enjoyed a monopoly of foreign trade activity, and in this manner it controlled the exercise of important civil law rights.

Third, and perhaps most important, was that--given the wide field of discretion afforded Soviet officialdom by the system of unpublished legislation and secret edicts and decrees--there was ample opportunity for the state at this level to restrict the activities of foreigners in the USSR. Unpublished departmental rules and regulations made a patchwork out of the otherwise seemingly equal treatment under the national regime. The rules and regulations governing the residence of foreigners in the Soviet Union are but one example of many that might be cited in this regard.  

A final phenomenon which complicated the formal picture derived from Soviet legislation and scholarly commentary was that of the division of foreigners into basic large groups: on the one hand, those from the socialist countries and, on the other hand, those from the non-socialist countries. While this division was not readily apparent in most legislation--except in applicable bilateral and multilateral treaties--it did exist in practice, especially in the administrative sphere. The result was that foreigners from the fraternal socialist states--both natural and legal persons--were often accorded treatment otherwise denied to their counterparts from the capitalist world.
The Advent of Perestroika

As in most other areas of Soviet law, the policies of glasnost and perestroika mark a turning point in Soviet civil law in general and with respect to foreigners in particular. As a result thereof, the first two factors—posited above as having made the grant of the national regime a gesture more political in import than a significant extension of substantive rights—are no longer substantial impediments to the enjoyment of the national regime by foreign natural persons. First, since the onset of perestroika Soviet citizens have increasingly been accorded more meaningful opportunities to use their existing civil law rights outside the strictures of the administrative command economy than was previously the case and have also been extended new rights to engage in activities hitherto excluded from the ambit of their civil law rights. This began with the loosening of restrictions relating to individual labor activity and culminated in the open door to economic activity set forth in the federal and republican companies legislation (of June and December 1990, respectively), as well as, for example, legislation on individual entrepreneurship of the Russian Republic of 1991. These changes have resulted in what appears to be a glimmer of a праvовoe государствe as regards the exercise of civil law (property) rights in the Soviet Union. Secondly, foreigners have also been travelling more frequently to, and are beginning in greater numbers to reside in, the Soviet Union. And lastly, the final dismemberment of the socialist commonwealth in 1991 has removed the doctrinal considerations that led to the distinction between foreigners from socialist and non-socialist states mentioned above; this is likely to result in a lessening of political and other distinctions among foreigners in the USSR.
One of the first major policy changes under perestroika in the general civil law field relating to foreigners, however, concerned foreign legal rather than natural persons. Beginning in January 1987, foreign legal persons were permitted to participate in establishing joint ventures (joint enterprises) with Soviet legal persons. But if there was a glimmer of an emerging pravovoe gosudarstvo as regards Soviet citizens in these initial changes by allowing them to exercise civil law rights (especially property rights) in an increasingly independent fashion, it did not translate into an instant grant of the national regime to foreign legal persons. Rather, the opening for foreign legal persons to the extended playing field of Soviet civil law was a narrow conduit—strictly supervised—not unlike that which foreign legal persons had previously experienced through FTOs.

The considerations behind this initial shift in policy were set forth in a joint Party-State decree of August 1986, in which, inter alia, the need to attract foreign technology and know-how to help invigorate a stagnating Soviet economy was finally recognized. However, the planned economy was still in full swing and Soviet entrepreneurs were limited to forming cooperatives or to other types of individual labor activity. There was still no compatible ideological or practical solution to the problem of how to provide for the interaction of legal persons from a market economy with those from an administrative-command system, or of how to lessen the discrimination against foreign legal persons that was inherent in a state-controlled economy.

The initial legislation on joint enterprises contained significant restrictions on the activity of foreign legal persons. If they were no longer limited to direct purchase and sales contracts through the FTOs or to sales or service activities through their representative offices, and could
now invest in the USSR and jointly own the means of production, it was only through a strictly-controlled minority position. The foreign investor could only be a legal person, could only hold a maximum of 49% of the venture capital, could not appoint foreign citizens to act as chairman of the board or as managing director, could only purchase and sell through the FTOs, and was limited in its activities primarily to export-related transactions. A complicated procedure for establishing joint enterprises was set up under which (first) the federal Council of Ministers (and later the USSR Ministry of Finance) was given broad and largely undefined and unregulated powers to scrutinize and approve applications to establish joint enterprises on a case-by-case merit review basis. As if to underscore the compartmentalized status of joint enterprises established with partners from capitalist counties and LDCs, a separate decree was promulgated governing joint enterprises established with investors from COMECON countries.49

While this may have represented a limited improvement in the commercial opportunities for foreign legal persons wishing to do business in the USSR, no parallel legislation was introduced to govern the overall position of foreign natural persons. Although formally foreign natural persons already enjoyed the national regime, it would nevertheless have in theory been possible to specifically expand their rights: (a) to include the new entrepreneurial activities that had opened up to Soviet citizens; and (b) to put foreign legal persons and foreign natural persons on an equal footing even if this meant that foreign natural persons would enjoy opportunities not yet available to domestic nationals. It is unclear why the former was left to be the subject of debate and discussion. As regards the latter, it appears clear that for several reasons, Soviet policymakers rejected the idea of engaging in any "reverse discrimination," for example, by allowing foreign natural persons to act in their own right as investors in joint enterprises
established on Soviet territory. Since Soviet citizens as natural persons were barred from becoming investors in joint enterprises, permitting foreign natural persons to do so would have been a potentially unpopular act of political if not necessarily economic discrimination against Soviet citizens.\textsuperscript{50}

In short, the changed circumstances of perestroika in the field of foreigners and Soviet civil law yielded results that were not totally expected. Based on past history as reflected in the statute books and in commentaries of Soviet scholars, the benign policy of non-discrimination against foreigners that apparently lay behind the grant of the national regime to foreign natural persons--said to occasionally offer more to foreigners than they enjoyed at home--should logically have resulted in the continuation of a level playing field for foreign natural persons vis-a-vis Soviet natural persons. However, as we have seen, foreign natural persons--regardless of whether they enjoyed temporary or permanent resident status in the USSR--were either de facto or de jure prohibited from investing as individuals in the USSR either through cooperatives or joint enterprises.\textsuperscript{51}

Applying the same professed policy of non-discrimination to foreign legal persons, one also might have expected that they would have been accorded the national regime in light of the opening of the administrative-command economy and the dismantling of the foreign trade monopoly. However, as has been illustrated above, foreign legal persons were initially only allowed a narrow and controlled conduit to invest and to acquire limited civil law (property) rights in the USSR.\textsuperscript{52}

The most likely explanation is that when pre-perestroika policy vis-a-vis foreigners—which had little effect in practice due to the several factors set forth above—was put to the test
afforded by the changed conditions of the initial period of perestroika, there were other, competing policy considerations which prevailed. Among these countervailing policy considerations—which include political, economic, and legal elements—one can cite:

1) the real or perceived need to protect the state and the infant non-state sector from the abuses of foreign investments and unscrupulous foreign investors;
2) the desire to limit the activity of joint enterprises to the export sector;
3) short-term profit motives of foreign investors versus long-term investment needs of the Soviet economy;
4) the need to scrutinize investment projects for financial feasibility inter alia due to the absence of a workable bankruptcy law and practice in the USSR;
5) credit and payments problems that might arise from the direct access to foreign markets and to vendors/customers of Soviet enterprises with little or no experience in international business transactions.

At least in the initial perestroika period, these countervailing policy considerations outweighed any intent that might have otherwise existed among Soviet decision-makers to avoid de jure or de facto discrimination against foreigners. The predominance of these countervailing factors meant that foreign natural persons were subject to discriminatory practices at that very moment when Soviet natural persons began to enjoy greater opportunities to exercise existing as well as to enjoy newly-proclaimed civil law opportunities at any time since the NEP, and that foreign legal persons continued to be subject to the same basic principle of state control over their activities—albeit now over a limited degree of direct investment—as was previously the case under the old-style administrative-command economy and the strict state monopoly of foreign
The interim conclusion is that as regards foreigners in the initial period of perestroika, the limitations on the exercise of civil law rights by foreigners in the USSR--where changing conditions in theory allowed for a lessening thereof--cannot be seen as being reflective of a pravovoe gosudarstvo assuming, as we have done above, that a pravovoe gosudarstvo would seek to minimize discriminatory treatment of foreigners as compared with its own nationals. In addition, even in the absence of evidence of the discriminatory treatment of foreigners in Soviet civil law, the last factor of mentioned above--of unpublished or secret legislation--would still have allowed administrative power (which was all-pervasive and to this day remain widespread) to be exercised in an arbitrary and potentially discriminatory fashion. Add to this the minimal relief, if any, that was to be had by appealing any such arbitrary and discriminatory exercise of power to an impartial judicial forum, and the conclusion would still be that it was premature to speak of the emergence of a pravovoe gosudarstvo as regards foreigners in the USSR during the initial period of perestroika.

Advanced Perestroika

There is no precise line of demarcation between the initial perestroika period--in which foreigners continued to be subject to de facto or de jure limits on their civil law rights--and what we have termed the period of "advanced perestroika" in which a majority of these barriers are in the process of being dismantled.53

Some of the restrictions of foreign legal persons were already relaxed in September 1987, when, inter alia, the exclusive rights of the FTOs to act as supply and purchasing agents of joint
enterprises were terminated. A further lifting of restrictions in December 1988 included abolishing the requirement that a Soviet citizens be the managing director of a joint enterprise and that the share of the foreign investor(s) be 49% or less.54

However, the most significant developments to date as regards foreigners in Soviet civil law occurred in 1990. These are:

1) the decision to further extend property rights in the civil law field to Soviet nationals; and
2) the complimentary extension of many of these rights to foreign natural and legal persons.

The groundwork was laid by three important pieces of federal legislation on lease, land and ownership.55 In the Fundamental Principles of the Lease, Soviet natural persons were specifically accorded the right to be lessees of property. Although foreign natural persons in theory would enjoy this right under the national regime, no doubt was left under a provision in the legislation which explicitly extended this right to foreigners. The right to act as a lessor was accorded to the owners of property. While no further mention was made of Soviet legal or natural persons in the legislation’s general provisions, explicit reference was again made to foreign natural persons as having the right to be lessors of their property.56 In USSR land legislation, ownership of land continued to be vested in the state (with local Soviets of People’s Deputies as the duly authorized lessors).57 As concerns the range of potential lessees of land, once again alongside reference to Soviet natural persons, foreign natural persons were also included.58 Under the USSR Law on Ownership, once more in theory foreign natural persons would be able to enjoy the ownership rights set forth in the law for Soviet natural persons under the existing national regime policy. Yet in a similar fashion to the legislation on the lease, specific reiteration of the effect of this principle was contained in a separate article which
provided that ownership rights for Soviet citizens applied equally to foreign natural persons.\textsuperscript{61}

No distinctions were made between temporary and permanent residents, so at least formally all foreign natural persons regardless of residence status could enter into lease transactions, including those involving land, and enjoyed the ownership rights of property proclaimed by the 1990 legislation.

As regards foreign legal persons, there was still no general declaration that granted them the national regime. The new legislation did make mention of the now-familiar joint enterprises as potential participants in lease transactions\textsuperscript{62} (including those in land)\textsuperscript{63} and as being the subject of ownership rights.\textsuperscript{64} Given the myopic focus on joint enterprises in certain Soviet circles since 1987, this was not unexpected. What was unexpected—given the previous reluctance to open the gates further to foreign commercial intercourse—was that foreign legal persons were specifically mentioned alongside joint enterprises as being entitled on an equal basis to enter into lease transactions\textsuperscript{65} and land leases.\textsuperscript{66} At least this represented an incremental reduction in the level of discriminatory treatment of foreign legal persons. By being able to enter into lease agreements, they were allowed yet another, albeit limited, form of property right and to engage in a type of commercial activity—in addition to participation in joint enterprises—that previously had been denied to them under the old system of the administrative-command economy and the state monopoly of foreign trade. Ownership rights of foreign legal persons were more of a declaration of intent suggesting that foreigners might no longer be limited to enjoying civil law rights through the medium of old-style state-controlled commercial activities or the limited channel of joint enterprises. This was because there was still no legal vehicle—other than joint enterprises or the institutions of lease or purchase and sale agreements, etc.—through which they
could exercise ownership rights in the Soviet Union.

It was arguably, however, only with the promulgation of the federal decree on Joint Stock Companies (No. 590) of June 1990 that a specific legal basis was made available for the broad exercise of property rights and obligations in the USSR. For despite the provisions of the legislation on lease, land and ownership, there had been no specific grant of the right to engage in the activities or transactions outside the limited circle of cooperatives or joint enterprises.

Under Decree No. 590, Soviet citizens as well as legal persons were henceforth entitled to form joint stock companies or companies with limited liability. Yet even at this significant juncture in Soviet civil law, there was an apparent hesitancy to confirm what should have otherwise been the automatic extension of these rights to foreign natural persons under national regime and to foreign legal persons under what otherwise appeared to be an advance towards extending them a de facto if not de jure national regime. The hesitancy was to be seen in Article 2 of Decree 590, according to which the particulars of participation of foreign natural persons and foreign legal persons in stock companies were to be set forth in applicable federal and republic legislation. As a result, questions arose as to whether foreigners were temporarily banned from being founders of these new corporate forms but might otherwise subsequently acquire shares therein or whether even the subsequent acquisition of an interest in a new Soviet corporate entity required further implementing legislation.

The answer was eventually forthcoming in October 1990 in the form of a Presidential edict. Therein, the policy was made clear that foreign investors (defined as both foreign natural persons and foreign legal persons) could both acquire stock in Soviet corporate entities as well as be founders of such entities established either jointly with Soviet legal or natural persons or
as 100% foreign-owned enterprises. To eliminate any lingering doubts, a further provision of
the edict extended the national regime to both foreign legal persons and foreign natural persons
engaging in such investments. This firmly established the principle of extending the national
regime to foreign legal persons, the evolution of which was seen in the legislation cited above.
A final reaffirmation of extending the national regime to foreign legal persons at the republican
level is to be found in the December 1990 RSFSR Council of Ministers decree (No.601) on
corporate entities in the RSFSR. In addition, the Russian Republic went a step further in
enacting the December 1990 Law on Enterprises and Entrepreneurship in which the Russian
parliament widened the civil law rights of citizens to individually engage in commercial activity--
something which previously had not been explicitly authorized by law--and affirmed the
extension of these rights to foreign natural persons. Under this legislation, both foreign legal
persons and foreign natural persons have already begun to exercise their broader rights by
becoming founders of new Soviet corporate entities.

Perestroika--The Future

With these developments in the fourth quarter of 1990, the gap that had arisen between
the proclaimed national regime for foreign natural persons and the practice in the initial phase
of perestroika that resulted in continued discrimination against foreign natural persons has been
bridged. Likewise, foreign legal persons are no longer restricted to the narrow range of pre-
perestroika commercial activities under the strict state monopoly of foreign trade and have now
also been accorded the national regime.

So at least formally, in the beginning of 1991 one can speak of the existence of a general
policy that regards foreign natural persons and foreign legal persons on an equal basis with Soviet natural and legal persons. In doing so, the USSR projects a policy that approximates that, for example, of the United States. The removal of the express or inherent barriers against the exercise by foreigners of civil law rights--especially that of possessing and enjoying property rights on the same basis as that available to domestic natural and legal persons--can be seen as marking the emergence of a pravovoe gosudarstvo vis-a-vis foreigners in the field of Soviet civil law. For as was stated in the introduction to this paper, one goal of a pravovoe gosudarstvo should be the minimization of differing treatment of foreigners on the one hand and its own nationals on the other.

It must be stressed, however, that the most favorable conclusion which can be drawn from these developments is that there is an emerging pravovoe gosudarstvo in the civil law field; it has yet to take firm root in the political or legal system. The primary reasons for this assessment are:

1) the continued presence of the third (and most important) factor mentioned above as an impediment to the meaningful exercise of civil law rights, i.e., secret legislation;
2) the time that will be required to bring about implementation of formal legal policies in practice;
3) the larger political issue of whether--having formally removed discriminatory barriers and granted foreigners access to a meaningful national regime--the voters and policymakers ultimately will be willing to accept an even playing field for foreigners and domestic nationals alike.

The first problem of unpublished legislation is part of a deep tradition of secrecy and
executive government which pre-dates the 1917 Bolshevik Revolution. The basic proposition regarding the publication and entry into force of Soviet legislation is contained in acts promulgated in the late 1950s and reissued (as amended) in 1980.\textsuperscript{76} They provide that laws, decrees and other decisions must be published within seven days of enactment except for those acts that are not of general significance or not of a normative character. The only requirement as regards the latter is that they be communicated to the agencies or persons concerned.

The idea that some legislative acts may not be publicly available—let alone that a portion thereof may be classified as secret—is certainly in conflict with the notion of a pravovoe gosudarstvo. In an administrative-command system, where most economic activity is controlled by the state and executed by state-owned entities, there may be a certain logic to informing only certain units in the chain of command on a "need to know" basis. Where authority and responsibility rest in the superior echelons of command, they in theory bear responsibility for any failure to inform the proper parties of acts that are not otherwise of a general or normative nature. However, when the administrative-command economy is being decentralized and deregulated and when authority and responsibility is being delegated to lower echelons or to those outside the command structure (such as the new, non-state-owned enterprises and companies, individual entrepreneurs, etc.), this line of reasoning loses any logical basis which it once may have had.

If those who are freed from immediate state control and supervision are to function in an efficient and effective manner, they will need to be able to independently determine and assess the rules of the game. To be sure, there has recently been some progress in this regard. For example, with the demonopolization of the media and relaxation of censorship, new sources
for the publication of (draft) legislation as well as departmental rules and regulations, commentaries, etc. have sprung up and are beginning to fill many of the gaps that previously existed. Of greater significance is an opinion of the USSR Committee of Constitutional Supervision of 29 November 1990. The Committee noted therein that the "plethora of...acts marked 'secret', 'not for publication', 'not for release', 'for official use only', etc., have made possible the arbitrary, unjustified and uncontrolled limitation of the rights and freedoms of citizens, ...the result of which is that citizens are deprived of the possibility to fully enjoy their constitutional and other rights and freedoms. ..." To remedy this situation, the Committee: (a) repealed several sections of the legislation on the publication and entry into force of laws, decrees, etc., as being in violation of the USSR Constitution and international conventions on human rights; and (b) proclaimed that all acts relating to rights, freedoms and duties of citizens must be published within three months of their adoption. Those not so published are declared by the Committee to be null and void. Yet first, the practical effect of this ruling remains to be seen, and second it is unclear whether the rights to the protection of property and to engage in commercial activities are within those rights and freedoms that are the focus of the Committee's ruling.

A second issue is the amount of time that will be required to implement and enforce in practice these new policies of non-discrimination against foreigners. For although there may now be a general policy to treat foreign legal and natural persons in the same manner as their Soviet counterparts, there is a long tradition of treating them differently. A good example is the 1947 edict on relations between Soviet institutions and officials and those of foreign governments. This provides that all such relations must be conducted through the offices of either the Ministry
of Foreign Affairs or Foreign Trade (now the Ministry for Foreign Economic Affairs). While its provisions do not explicitly apply to relations between Soviet institutions and officials on the one hand, and purely commercial non-official institutions from foreign states on the other, in practice the manner in which such commercial relations have been conducted in the past has not differed significantly from the requirements of the edict. Traditionally, all contacts with foreign natural and legal persons are handled by a department for foreign economic relations within a Soviet ministry or enterprise, and foreign visitors are normally received in a space that is segregated from the remainder of the particular ministry or enterprise and are denied access to the remainder of the facility. While access to Soviet officials and managers during the six years of perestroika has become more relaxed and less bureaucratic, there are still many Soviets who prefer, either out of force of habit or otherwise, to deal in the old style with foreigners. Business and other travel to the USSR is still cumbersome as single-entry/exit visas require a formal letter of support from a Soviet ministry or enterprise, and multiple entry visas are by and large still restricted in practice to accredited employees (and their families) of officially accredited representation offices or joint enterprises. And traditionally, foreigners have also been housed in isolated enclaves furnished by the Chief Administration for the Diplomatic Corps (UPDK) of the Foreign Affairs Ministry.81

With the reaffirmation and expansion of the national regime as reflected in the legislation of late 1990 and early 1991, these practices will need to be changed if there is to be an efficient and effective use and enjoyment of property rights and performance of commercial transactions with foreigners. In the beginning of 1991, some officials of the MFEA and OVIR (Department for Visas and Registration of local Soviets) still appear unsure as to how they should proceed
under the newly-proclaimed national regime, e.g., how to register new-style Soviet legal entities with foreign participation, especially with foreign natural persons, or how to issue multiple entry visas without complete and detailed instructions from Moscow.82

Even more problematic than overcoming such traditions is the mechanics for appealing acts of state officials and institutions that may infringe upon the civil law rights of foreign natural persons and foreign legal persons. While recent Soviet legislation has established a general right of recourse, it does not at present extend to legal persons, and under the law only Soviet citizens have standing to appeal allegedly unlawful acts of state agencies and officials.83 On the other hand, rights of Soviet legal persons to bring suit against either specific or general acts of Soviet officials and institutions have been enshrined in a number of recent pieces of legislation regarding, for example, cooperatives, enterprises and entrepreneurship.84 With the possible exception of the Law on Cooperatives, foreign legal persons and foreign natural persons clearly have standing to file suit under these laws. A complainant in such an action may also seek to recover damages that were not previously recognized in Soviet law or practice which can only help to ensure a fuller measure of protection for the property rights of foreign legal persons and foreign natural persons.85 Yet in practice, some time will be required to provide for effective enforcement of these procedures before the glimmer of a pravovoe gosudarstvo--as seen at the level of policy and legislation--can be translated into meaningful opportunities to defend and enforce property rights and interests of foreigners in the USSR.

Lastly, even if the assumptions set forth in this paper are correct and the conclusion is well founded that there is an emerging pravovoe gosudarstvo vis-a-vis foreigners in the Soviet union, there is still a final question as to the likelihood of such policies continuing to be
developed and refined. While on the whole there has to date been little if any noticeable opposition to equating foreign natural and legal persons to their Soviet counterparts, this may change if and when the potentially negative consequences of foreign investment for the Soviet economy are seen by policymakers and/or their constituents to outweigh the real or perceived benefits thereof. This might, for example, relate to specific areas of the economy, such as unemployment, inflation, failure to increase living standards, etc., or may encompass more general concerns such as foreign investment in or control over key sectors of the economy, e.g., high technology, banking, finance, the media, etc. It may even extend to a reconsideration of the broader issue of whether foreign investment in the USSR is a politically acceptable goal. As to the question of foreign investment vis-a-vis the national economy in the United States for example, recent legislation has been introduced in the House of Representatives which, if passed, would potentially negate a significant portion if not all of the current United States policy which affords equal treatment to foreign investors as compared with that given to domestic nationals. As a result, authority to block foreign investment in the United States may be widened to include any foreign investment that threatens general United States economic interests. Presently, foreign investment may be barred only if it is adverse to American national security interests. The latter would generally be consistent with the definition of a pravovoe gosudarstvo, but it is questionable whether the former would be in agreement with the pravovoe gosudarstvo concept.

Unless continued attention is paid to eliminating the phenomenon of unpublished legislation, to effectively implementing newly-established policies of granting and extending the national regime, and to helping to ensure that public opinion views the presence and activities of foreigners in the USSR as generally being in the interests of Soviet society and the economy,
the pravovoe gosudarstvo that is beginning to emerge in this field may be shortlived.
Notes

1. For example, the 1966 International Covenant on Civil and Political Rights permits certain exceptions to its principles which may be necessary in the "interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." (E.g., Article 12 re: right to liberty of movement and freedom to choose a residence; Article 22 re: right to freedom of association.) The texts and commentaries are reproduced in J.A. Joyce, Human Rights: International Documents, Alphen aan den Rijn, The Netherlands, 1978, Vol.I, 12ff.

2. For example, Article 26 of the International Covenant on Civil and Political Rights proclaims that all persons are equal before the law and prohibits discrimination on any ground "such as . . . national or social origin. . ." (emphasis added). Ibid.

3. Cf. Article 1 to Protocol I to the 1950 European Convention on Human Rights which provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions" (emphasis added). See Collected Texts, (Council of Europe), Strasbourg 1987, 3-21. However, the proposition that human rights may include property rights in general and those of legal persons in particular is one which has not yet met with universal recognition or acceptance.


5. See, e.g., the RSFSR legislation on joint stock companies, enterprises and entrepreneurship cited below.

6. For purposes of this Paper, consideration of civil law provisions will be limited to federal (all-union) and RSFSR legislative acts. Previously, this would have sufficed to provide a fairly representative picture of all the union republics. However, with the increasing political and legal, if not (yet) economic, autonomy of a number of the republics--especially the Baltic states and Moldova, Georgia, and Armenia--this proposition is becoming increasingly inapplicable to studies of "Soviet law." Nevertheless, at least at present the Russian Republic--due to its geo-political position--holds a central position as regards the interest and activity of foreign natural and legal persons within the USSR.


9. And for stateless persons. While most references herein will by and large also be applicable to stateless persons, no separate consideration of stateless persons per se will be made in this Paper.


12. SU SSSR 1922 No.71, item 904.


14. E.g., Boguslavskii, idem, 54. In addition, "they must exercise these rights just as the law requires of Soviet citizens."

15. Ibid., 55.


17. Article 122. A similar provision is to be found in the draft Principles (Article 144) as published in Izvestiia 19 January 1991, 5.


20. Mironov has, however, subsequently written that the 1981 Law was the first explicit and well-defined grant of the national regime in all its various aspects to foreigners in the USSR, "Pravovoe polozhenie inostrannykh grazhdan v SSSR," SGiP 1982 No.3, 100.


22. Articles 9-11.
23. Articles 22-23.


25. Boguslavskii, Rubanov, *op.cit.* note 6, (2nd rev.ed.), Moscow 1962, 57. See also Mironov, *op.cit.* note 10, who characterizes such restrictions as being within the letter and spirit of international conventions on civil and political rights, at 98. Presumably, he has in mind *inter alia* the 1966 International Covenant on Civil and Political Rights. As to whether protection of economic interests falls within the concept of a pravovoe gosudarstvo, see note 88 below.


27. *SP SSSR* 1958 No.16, item 127.


29. *Ved.SSSR* 1968 No.9, item 40.


32. "Ob ekonomicheskikh vzaimootnosheniakh so stranami ustanovlennymi osoboi ograniчитel'noi rezhim dlia torgovli s Soiuzom SSSR," *SZ SSSR* 1930 No.53, item 557. Where foreign states enacted discriminatory measures against (trading with) the USSR, this decree provided for: (a) the termination or reduction of orders or purchases from such foreign states, (b) the cessation of shipments by their merchant fleets, (c) the establishment of a special, restrictive regime for their goods in transit, and (d) the termination or reduced use of maritime ports in these states by Soviet enterprises and institutions.


35. Kisil’, *ibid.*, 71, quotes the 1958 fishing regulations as based on national security grounds whereas most other commentators are unanimous in referring to these
restrictions as based on the protection of economic interests of the USSR. Following the logic of Kisil’, one could treat all such exceptions as based on national security grounds.


40. Polozhenie o Poriadke Otkrytiia i Deiatel’nosti v SSSR Predstavitel’stv Inostrannykh Firm, Bankov i Organizatsiei, SP SSSR 1990 No.1, item 8.

41. Mironov, op.cit. note 12, 100; Kisil’, op.cit. note 24, 67-68.

42. A classic example cited, e.g., in Boguslavskii, op.cit. note 8, 53.

43. "Pravila prebyvaniia inostrantsev v SSSR," SP SSSR 1984 No.21, item 113 replaced rules and regulations that, for the 22 years in which they were in force, had never been made available to the general public. See Simons, op.cit. note 11. As to the issue of unpublished legislation in general, see D.A. Loeber, "Legal Rules ‘For Internal Use Only’," The International and Comparative Law Quarterly 1970, 70-98.


47. For an overview of the initial changes regarding foreign trade under perestroika, see W.B. Simons, "The Reform of Soviet Foreign Trade through Perestroika:


49. Decree No.48 of the USSR Council of Ministers, SP SSSR 1987 No.8, item 48. Although the only major distinction between the COMECON and non-COMECON legislation concerned the characterization of the property of a joint enterprise.

50. Although, interestingly enough, foreign legal persons that participated in Joint Enterprises were given at least one advantage not accorded to Soviet legal persons, i.e., a 2-year investment tax holiday, which is a form of "reverse discrimination" not uncommon to entice investors in certain areas to do business. See note 51 below.

51. As regards joint enterprises, it is explicitly set forth in Decree No.49 that the founders must be legal persons. The Law on Cooperatives only involves natural persons, and there is no explicit language limiting founders of cooperatives to Soviet citizenship. Indeed, one could argue that--since under the 1981 Law on the Legal Status of Foreigners in the USSR--foreigners who are permanent residents of the USSR "may join on the same bases as citizens of the USSR. . .cooperative organizations." at least those foreigners permanently resident in the USSR could in theory invest in a cooperative on an equal basis with Soviet natural persons. First, however, we argue that foreigners would still have been discriminated against by force of existing practice and custom. The limitation to permanent residents, while on its face a provision that would not necessarily be discriminatory in other states with a more liberal entry/exit policy, in effect discriminates against the vast majority of foreign natural persons. Unless as a foreigner one has married a Soviet spouse or, in the alternative unless one has some other independent right to permanent residence in the USSR, the chilling effect of the bureaucratic obstacles involved in obtaining a permanent residence permit for purposes of becoming a founding member of a coop would have been such as to amount to de facto discrimination. As previous practice had shown, a permanent residence permit even for a foreign spouse of a Soviet citizen was not an automatic procedure. In addition, Soviet citizens have also encountered bureaucratic roadblocks in attempting to exercise their rights to engage in cooperative activity as well as significant popular opposition to their perceived speculative profit levels, but under the national regime foreigners could necessarily not expect to be spared these problems. It is the extra layer of limitations on, and control over, foreigners that negates the national regime in practice. Second, while there is no
language in the Law on Cooperatives restricting founders to Soviet citizens, there is also no language permitting foreign natural persons to act in this capacity. The Law simply speaks of "citizens" as founders, op.cit. note 44, Article 1. Since Soviet lawmakers normally use the term "inostranye grazhdane" or "inostranye fizicheskie litsa" when they wish to refer to foreign natural persons, one could argue that the Law on Cooperatives did not allow foreign natural persons to become founders in coops and thereby was a special exception to the nominal national regime proclaimed in Soviet civil law in general and in the earlier Law on the Legal Status of Foreigners in the USSR in particular.

52. While it is our opinion that the limitation of foreign investment to joint enterprises and the degree of control thereover amounted to de jure discrimination against foreign legal persons (and foreign natural persons who were totally barred from direct participation therein), it should be kept in mind that there was at least one benefit formally accorded to joint enterprises alone to the exclusion of domestic Soviet enterprises, i.e. the two-year tax credit which originally ran from the day of registration and was later enhanced to begin running after the first year in which a joint enterprise declared profits, see note 54 below. There is no basis to argue that the existence of this single investment inducement allowed one to characterize contemporary Soviet policy as that of a pravovoe gosudarstvo.


60. Ibid., Article 7.

68. Roughly equivalent to the German AG and GmbH or the Dutch NV and BV, respectively.
72. *Ekonomika i Zhizn* January 1991 No.4, 16-18. Cooperatives had to have at least three founders and stock companies (under Decree 590) two.
73. Although, similar to the past legislative formula granting the national regime to foreign natural persons, there is language which will in theory allow limited restrictions to be made on the property rights granted to foreigners. If our conclusions are correct and a pravovoe gosudarstvo is emerging in the USSR for foreigners, these restrictions will presumably concern public policy, health, morals, etc. See below note.
74. See, e.g., reports in *Kommersant* February 1991 regarding enterprises established in the RSFSR under Republic legislation with participation of foreign capital as well as 100% foreign-owned. Confirmed in private conversations with officials of the Committee for Foreign Economic Relations of the Leningrad City Soviet of People's Deputies (Lensoviet), January-March 1991.
75. In the US, "...the general policy has been to admit and treat foreign capital on an equal basis with domestic capital. [Only a] few areas of investment are restricted, because they involve national defense, because they involve the exploitation of certain natural resources, or because they are considered vital to the U.S. economy." *Legal Environment for Foreign Direct Investment in the United States*, (R.S. Houck III, N.L. Caywood, eds.), 2nd ed., Washington, DC 1988, 227.
76. *Ved.SSSR* 1980 No.20, item 374, as amended; *SP SSSR* 1980 No.4, item 28, as


78. Idem, 1313-1314.

79. Idem, 1314-1315.


81. Even when, under the new 1990 federal and RSFSR corporate legislation allowing both foreign legal and natural persons to formally establish corporate entities on the same bases, in early 1991 the RSFSR Ministry of Finance (or bodies authorized thereby to register corporate entities, such as Lensoviet) still maintained separate departments to deal with the registration of purely Soviet entities on the one hand and those with foreign capital (or 100% foreign owned) on the other. Another practical example is the statement of one Lensoviet deputy that as concerns payments for the lease of land in Leningrad, one scale would be established for purely Soviet-owned lessees and a different (higher) scale for those with foreign capital (again, including 100% foreign owned); personal interview with Commission on Land Reform, January 1991.

82. Both the federal Ministry of Foreign Affairs and local OVIR agencies appear at present uncertain as to how to issue multiple-entry visas to those other than accredited representatives or Joint Enterprise founders (or their spouses), e.g., part-time consultants, owners of 601 or 590 companies, etc. Interviews with Mossoviet officials, January-March 1991. However, new rules on the residence of foreigners in the USSR have recently been enacted by the USSR Cabinet of Ministers in the spring of 1991 which may alleviate this problem. "Zhit' po Novym Pravilam," Delovoi Mir 7 June 1991, 2.

83. "O poriadke obzhalovaniia v sud nepravomernykh deistvii organov gosudarstvennykh upravleniiia i dolzhnostnykh lits, ushemliaiushchikh prav grazhdan," Ved.SSSR 1989 No.22, item 416. However, this legislation does not provide for a cause of action against acts of representative bodies, such as local Soviets, etc. See further, G.P. van den Berg, "Executive Power and the Soviet Concept of the Rule of Law" #7 in this series of papers.

84. In addition, see e.g., "Osnovy zakonodatel'stva ob investitsionnoi deiatel'nosti v SSSR," Izvestiia 16 December 1990, 2, Article 23(3); draft Polozhenie ob Arende Lesnykh
Resursov (appendix to the Principles of Legislation of the USSR on the Lease), Delovoi Mir 16 February 1991 Nos. 35/36, 1-2, Article 22; "Ob inostrannykh investitsiakh v Kazakhskoi SSR," Kazakhstanskaia Pravda 17 January 1991, 2, Article 28. This new legislation has generally provided for a recourse to Soviet courts, state arbitration or ad hoc arbitration.

85. E.g., lost profits (upushchennaia vygoda).

86. The "reverse discrimination" benefiting foreigners that has occasionally been evident even before perestroika--largely in the administrative arena--may also produce a backlash against foreigners in the advanced stage of perestroika. Classic examples from the past include boarding for foreign air travellers with Soviet passengers being forced to fight for the remaining seats or beriozka shops for foreigners only. A more recent example of a different sort is seen in the complaint lodged in the pages of Izvestiia concerning the (perceived) non-applicability of Soviet law to alleged foreign criminal offenders (from North Korea). B. Reznik, "Napadenie na Tamozhnii," Izvestiia 14 May 1991, 14.


88. See the Exon-Florio provision of the Omnibus Trade and Competitiveness Act of 1988 subjecting foreign investment in the US to a national security review with remedies provided for suspension, prohibition, or divestiture of any such investment found by an interagency Committee on Foreign Investment in the United States (CFIUS) to impair the national security. See a report on the first exercise of US Presidential authority under the Act involving investment by a PRC company in a US airplane parts manufacturer, J.R. Coogan, "US Takes New Approach to Regulation of Foreign Investment," The Business Lawyer Update July/August 1990, 3-4. While it is clear that discrimination against foreign national on grounds of national security would be consistent with the concept of a pravovoe gosudarstvo, it is an open issue as to whether this would be the case when general economic interests, such as maintaining a competitive advantage for domestic capital, are involved.

89. For example, one of the main goals of pre- and post-World War II British immigration law has been to protect the resident labor market from foreign competition and cheap labor and to restrict immigration privileges to those persons possessing special labor skills, senior executives and personnel, business people and those of independent means (and the spouses thereof). Additional factors attributable to British policy include minimizing social costs and limiting access to the welfare state. MacDonald, op.cit. note 24, 18-20. On the other hand, the Treaty of Rome allows limitations on the freedom of movement (but not as regards the ban on discrimination on the basis of nationality) and the right of establishment (for both legal and natural persons) in the interests of public policy (as well as public security and public health). Yet in an EEC Directive of 25 February 1964, member states may not invoke these limitations based on a public policy designed to serve purely "economic ends," such as protection of the domestic labor
market. Idem, 127, 152. Even as to business investors who wish to reside permanently in Britain to start or join a business, normally a select and desired group, the UK has tightened rules as to entry. Prior to 1980, there were no minimum levels of investment required. In 1980 however, a minimum level of investment has been introduced (presently 150,000 pounds) as have numerous other requirements that discriminate against foreigners. Idem, 204ff.