

简明商务英语系列教程 ⑥

A SHORT COURSE IN

INTERNATIONAL JOINT VENTURES

跨国合资企业

*How to Negotiate, Establish
and Manage an International
Joint Venture*



ALAN S. GUTTERMAN, MBA, JD, Ph.D.

导读 邢建玉

THE SHORT COURSE IN INTERNATIONAL TRADE SERIES

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How to Negotiate, Establish
and Manage an International Joint Venture

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出版前言

截至 2008 年,教育部已批准对外经济贸易大学、广东外语外贸大学和上海对外贸易学院三所高校设立商务英语本科专业。目前,全国已有近 700 所院校开设了商务英语专业方向或课程,商务英语教学内容由语言能力、跨文化交际、商科知识、人文素养四个课程群组成,如何建设和完善商务英语教材已成为办好商务英语专业的关键因素之一。

上海外语教育出版社经过精心策划,适时推出了商务英语知识群的教材——“简明商务英语系列教程”。这套原版商务英语专业知识阅读教材从美国世界贸易图书出版社最新引进,共 12 本,涉及商科知识的各个领域,包括国际经济学、国际贸易、管理学、营销学、国际商法、商务谈判、商业伦理、商业文化、商业合同、商业支付等。本系列教材的特点是:知识体系完整,内容简明扼要,语言文字流畅,理论联系实际。为了帮助读者更好地理解商务英语学习所必备的商务专业知识,本套教材组织了阵容强大的专家委员会,还特邀对外经济贸易大学商务英语的专家教授为本系列教材撰写导读,相信一定会对学习者大有裨益。

本系列教材可以作为大专院校商务英语、国际贸易、工商管理等专业学生的相关课程的教材,同时也可作为企业各类管理人员的培训教材或辅导资料,以及广大商务英语学习者的自学教程或阅读丛书。

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1 跨国合资企业的发展概况

1) 跨国合资企业的概念

跨国合资企业是国际直接投资中常见的一种方式,是指两个或两个以上的国家或地区的投资者在选定的国家或地区投资,并按照该投资国或地区的有关法律组织、建立起来的以独立企业的形式存在、以营利为目的的企业。跨国合资企业由投资人共同经营、共同管理,并按照股权投资比例共担风险、共负盈亏。

本地企业和外资企业可以通过建立跨国合资企业做到优势互补、优化组合。具体说来,合资各方可以利用合营对象的销售网络和销售手段进入特定地区的市场或国际市场,从而开发或扩大国外市场;合资各方可以在资本、技术、经营能力等方面相互补充,增强合资企业自身竞争能力。合资经营的外资方可以获得当地的重要资源和生产基地,获得税收减免利益或其他优惠,减少商业风险,克服差别待遇和法律障碍,缓解东道国的民族意识和企业文化差异。

跨国合资企业的不足之处主要表现在合资各方的理念、经营目标上可能存在差异,潜在的经营决策和管理方法上的不同可能会导致在经营决策和管理中产生摩擦,不同投资者的长短期利益可能难以统一等等。

2) 全球化与跨国合资企业的发展

经济全球化是当代世界经济的重要特征。20世纪80年代以后,特别是进入20世纪90年代以后,世界经济全球化的进程大大加快了。经济全球化,即贸易、投资、金融、生产等活动的全球化,其实质是各国追求国际生产的一体化,在全球范围内合理配置资源和生产要素,追求国际分工和比较利益的最佳效果,实现企业利润最大化。

近年来,跨国公司迅猛发展,跨国经营已经成为企业整体经营战略的一个重要组成部分。为应对经济全球化过程中的国际竞争,跨国公司积极进行跨国经营,凭借资本、技术、信息、营销战略等垄断优势,再加上内部优势和区

位优势,在全球范围内选择最佳投资地点,开展生产和销售活动,实现了资源的优化配置。在经济全球化的背景下,一个国家没有企业的跨国经营,便没有真正进入世界市场。而对于企业来说,不论规模大小,布局国外市场都是公司发展过程中的一个重要的里程碑。每个市场都具有自己独特的机会与风险,很多企业在进入新的市场时自然都会与一家或多家企业建立战略合作关系,一种最为常见的战略合作关系便是建立和经营合资企业。

改革开放以来的二十多年中,我国吸收了大量的外商直接投资。以2007年为例,全国非金融领域新设立外商投资企业37,871家,实际使用外资金额747.68亿美元。其中,新设中外合资企业7,649家,实际使用外资148.34亿美元;新设中外合作企业641家,实际使用外资14.16亿美元;新设外资企业29,543家,实际使用外资572.64亿美元。

伴随着经济的快速成长,近年来我国企业在海外的跨国经营活动也出现了较快的增长趋势。据统计,2002~2006年5年间,中国对外直接投资(非金融类)的年均增长速度高达60%。2006年中国对外直接投资净额211.6亿美元,是2002年的7.84倍。截至2006年底,我国累计批准设立非金融类境外企业已达10,675家。中资境外企业的经营领域已从贸易、航运和餐饮等,逐步拓展到生产加工、资源开发、农业合作、研究开发和咨询服务等众多领域,对外投资方式也发展到投资办厂、跨国并购、股权置换、境外上市、设立研发中心、创办工业园区和科技园区等多种形式。

但是,中国企业的国际化与其他国家相比仍然存在较大差距。截至2006年底,我国对外直接投资累计733亿美元,仅相当于一年中吸收的外资金额。2006年对外投资额与吸收外资额之比为0.23,大大低于发展中国家0.46的平均水平,更低于发达国家1.19的平均水平。2006年对外直接投资流量在全球排名第13。中国对外直接投资流出绩效数值比较低,在全球排名比较靠后。如何有效开展跨国经营活动,参与国际竞争,已成为中国企业的当务之急。因此,此书的引进对中国企业与读者显得尤为重要。

2 本书的特点

1) 作者介绍

本书的作者艾伦·S·古特曼(Alan Gutterman),拥有MBA学位、法学博士学位、哲学博士学位,有20多年的法律代表经验,为企业与投资方提供法律咨询服务,目前任职于加利福尼亚一家传媒服务公司,任公司运营总监(COO)和总顾问,出版过数本跨国交易、战略联盟及技术转移等方面的书籍,同时兼任任教于数所高校,包括加州大学伯克利分校(University of California, Berkeley)、金门大学(Golden Gate University)、圣塔克拉拉大学

(Santa Clara University)、旧金山大学(University of San Francisco)等,教授研究生课程,包括公司财务、风险资本、公司法、日本商业法、法律与经济发展等。

2) 本书特色

《跨国合资企业》一书涉及到建立和管理跨国合资企业的所有关键问题与步骤,针对各个方面进行了详细的分析,并进行了有意义的点评与建议。全书可以划分为五大部分。第一部分为国际合资企业概述;第二部分为国际合资企业建立前期的筹备工作,包括合资经营所涉及的法律法规问题、市场分析、合资方的角色与选择、影响合资企业成败的因素、保密协议、企业法人实体的选择等;第三部分为建立国际合资企业的实际步骤,包括合资企业条款的谈判、为合资企业制定商业计划书、获得政府的批准、融资与保险、合资企业的建立;第四部分为合资企业建立后的管控、运作、危机管理直至合资企业的终止;第五部分提供了一些有用的资料,包括合资方协议样本及点评、术语、参考书目等。

3) 使用对象

本书为读者提供了一个国际视角。书中内容适应所有商界人士的普遍需求。本书可供各类读者使用,包括全球的商界人士、企业家、商务英语师生、商学类相关专业教师和学生,以及广大社会读者。

3 本书主要内容

全书具体内容如下:

第一章 国际合资企业概述

本章介绍了合资企业的基本法律特点、合资企业的关系类型、合资企业的利弊、合资企业的结构、打入国外市场的其他途径。

第二章 合资经营所涉及的法律法规问题

合资各方需要考虑涉及合资企业业务的各种法律法规,具体涉及哪些法律法规要视合资企业驻在国以及合资企业本身的业务活动而定。通常情况下最需要关注的是涉及到企业、商业活动、财产所有权、外商投资、竞争、劳工、保健、环境、资本市场以及证券、消费者保护、争端解决、税法等领域的法律法规。了解并遵守这些法律法规有时需要耗费大量时间和金钱,因此,合资各方应该咨询对相关国家法律非常熟悉的有经验的专业法律人士为其指点迷津。

第三章 市场分析

合资企业的合作方来自不同国度,有着不同的文化背景和司法体系,这些因素都会对合作关系形成巨大的挑战。合作方往往关注业务和经济利益,关注这种合作关系的结果,但是,在着手建立跨境合作关系时,合作方还应该尊重不同的价值观。要成功建立合作关系,合资企业的外资方还应对合资企业驻在国进行认真的市场分析。市场分析包括能够影响合资企业成败的社会政治因素以及驻在国的国别状况。

第四章 合资方的角色

建立和经营国际合资企业会遇到很多挑战,这主要是因为一个典型的合资企业会涉及多个利益方。主要的利益方当然是合资企业的本地合资方和外资方,除此之外还有当地主管部门以及其他业务伙伴。每一个利益方都有自己的目标。一般来说,合资企业成功与否最终取决于合资企业的本地方和外资方之间的关系,但是,其他利益方也会在其中扮演重要的角色。例如,在许多新兴市场,最重要的利益方是当地政府,政府不仅监管合资企业,而且拥有合资企业的一部分。合资方聘用的顾问,尤其是律师和会计师,也会影响合资企业的走向。而且,在筹划阶段还应该考虑到当地经理人以及工会领导所关注的问题。

第五章 合资方的选择

正式建立合资企业之前,合资方应该进行一系列的先期活动以确保其目标在合资文件中得到充分体现。这些先期活动包括认真筛选可靠的合资伙伴,双方进行初步信息交流(即合作方企业状况调查)以确定是否存在合作的机会,以及对潜在合资经营伙伴进行评估以确定建立长期的合资经营关系是否可行。

第六章 影响合资企业成败的因素

合资企业常常陷入困境,但由于合资企业各不相同,很难找出共同的原因。而在问题出现的早期予以关注和及时的处理是非常重要的。合资企业经常遇到的问题包括合资企业建立前筹划不周、业绩低于预期、管理方面出现问题、企业战略存在问题、选择了不合适的合资形式、阶段性业绩设定欠妥、人力资源问题、目标冲突、价值观方面存在分歧、认为合资经营的对方投入不够、合资经营的一方出现财务困难、当地的业务及监管情况,以及政治因素等。

第七章 保密协议

确定潜在合资经营伙伴后,下一步就应该建立一个技术与商业信息交流的程序。有关拟议中的合资企业的任何信息,或者关于合资方目前业务运营方面的任何信息,必须由合资方现行达成保密协议后才能交流,以保护敏感的技

术或商业信息。保密及不泄露协议可以有多种形式，可以是一页纸的信函，也可以是详尽的文件。本章提供了一份样本协议，并针对协议条款进行了具体点评。

第八章 合资企业法人实体的选择

合资企业成功与否很大程度上取决于相关人员及资源的兼容程度，但是，我们还必须注意为合资关系选择合适的法人实体。一般来说，相关的公司法（有时也称为企业法或企业组织法）对于合资经营的组织形式都有具体的规定。公司法不仅规定了从事商业活动的法律实体或企业，而且也规定了企业的权利和义务、企业的管理程序以及经理人及企业产权所有人的权利和义务。公司法同时也对企业的建立、运营、终止做出了具体的规定。一个特定法律辖区内的商业企业法深受当地法律习惯的影响。投资者会发现，美国、英国、澳大利亚、非洲的英语国家等具有习惯法传统的国家中，其商业企业法中有某些共性的东西。但是，即使这些国家之间也存在明显的差异，例如，许多非洲英语国家的公司法是基于历史上而非目前的英国法，而有些国家，尤其是欧洲国家，其法律体系基于民法传统。尽管有这些基本差异，习惯法与民法基本都提供了两种合作方式，即合作伙伴型实体与公司型实体。本章分析了合作伙伴、（上市）公司、有限责任公司等实体类型的特点及利弊，选择法律实体的策略及需要考虑的因素。

第九章 合资企业条款的谈判

谈判建立合资企业的经济及法律条款是国际合资经营的重要一步。本章探讨了建立合资企业需要谈判的一些重要条款以及谈判完成后达成的意向书或谅解备忘录，对合资企业合同谈判从策略与具体层面上提出了建议。本章同时提供了一份样本合同（合资企业谅解备忘录），并针对每一部分及具体条款进行了分析。

第十章 为合资企业制定商业计划书

正式组建合资企业之前，合资方应该为合资企业制定一份初步的商业计划书。计划书应该比较详细地规定商业活动领域、产品及服务类型、地域范围等。计划书同时还应包括研发、生产、分销、许可证等方面的目标。

第十一章 获得政府的批准

一般情况下，合资方必须获得本国以及合资企业驻在国政府的批准方可成立。在获得政府批准的过程中，必须遵守相关的法律法规，例如外商投资管理条例、反垄断竞争法、技术转让条例、出口管制、关税法等。

第十二章 合资企业的融资与保险

同任何新的企业一样，合资企业也需要有充足的资金以保证企业的运营。一

般情况下,初期融资的首要渠道是合资方。实际上,组建合资企业的一个重要目的就是利用合资一方的资金。融资的另外一个途径是外部融资。在达成合资企业协议前,合资方就应该认真考虑外部融资的可行性。外部融资有多个渠道,包括商业贷款机构、出口信贷、多边贷款机构、针对性的国家发展贷款机构等,合资企业最为常见的外部融资渠道为商业银行贷款。合资企业的保险与其他企业相同,但是,对于外资方来说,可能需要考虑购买政治风险保险。世界银行(包括国际金融公司)、区域发展银行、外国政府政治风险保险机构等都提供此类保险业务。

第十三章 合资企业的建立

本章讨论了如何管理合资企业的组建程序、如何起草合资方协议、政府备案、辅助协议与文件、合资方出资安排、交换最终文件等。

第十四章 合资企业的管理与控制

本章讨论了合资企业中分配控制权需要考虑的因素、不同形式的控制权、董事会的规模与构成、董事会的控制、管理人员的选择等。

第十五章 合资企业的运作

在组建合资企业的谈判中,合资方通常把注意力集中在投资与管理等方面。但是,合资方必须清楚,合资企业最终会是一个独立的运营实体。因此,合资方应该确保合资企业组建文件涵盖合资企业的运营(包括功能活动,如许可安排、研发、生产与供应、营销等)、运作活动(服务协议)、人力资源、会计问题与财务报表(记账、独立公共会计师与法律顾问、财务信息)、合作伙伴的行为(竞争行为、未来商业机会)等方面。本章同时提供了样本合同中的行政服务、服务费用、项目开发、技术援助等条款。

第十六章 危机管理:挽救合资经营者间濒危的关系

合资企业要取得成功需要克服一些巨大的障碍。合资企业需要处理与其他新成立的公司一样的风险和不确定因素,同时还面临着如何整合不同的管理风格与商业文化的问题。本章介绍了解决合资方争端的一些策略,包括争端解决机制、调停程序、仲裁程序等。本章同时提供了样本合同中关于争端解决程序的条款以及优先购买的条款,并对争端解决程序条款以及优先购买条款进行了讨论及点评。

第十七章 合资企业的终止

有评论指出,50%的国际合资企业寿命不超过五年。有时候合资经营者在筹划阶段可能会考虑将合资企业的经营期限设定为五年,但最有可能发生的情况是合资企业提前解体,而合资方对此没有任何应对措施。组建合资企业时,合资方应该认真考虑合资企业终止程序,以便在双方关系恶化时有序终

止合资经营。合资企业的终止程序应该考虑以下情况：限制所有权转移、协议期终止前一方退出、终止合资企业运营、合资企业终止后的相关安排。

第十八章 合资经营者合同

本章提供了一份合资方协议样本，作者针对协议各部分以及具体的协议条款进行了点评。

第十九章 术语表

本章列出了本书中的重要术语并做出了解释。

第二十章 其他参考书目

本章提供了相关参考书目。

4 推荐参考书

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Introduction to International Joint Ventures

IS A JV THE BEST STRATEGY?

INTERNATIONAL OPERATIONS HAVE BECOME an important part of overall business strategy in recent years, and the commencement of activities in foreign markets has become a natural milestone for any growing business regardless of its size in terms of employees, products, or revenues. Each foreign market offers unique opportunities and risks, and many firms naturally look to strategic relationships with one or more partners for assistance in entering new markets.

One of the most popular forms of strategic relationship is a “joint venture,” referred to herein as a JV. A JV utilizes a separate business entity (e.g., corporation, limited liability company, or partnership) to allow two or more parties to collaborate in conducting specified business activities. By using a separate entity, parties can limit the liabilities associated with the relationship. They may also qualify for incentives and concessions under local foreign investment programs that are offered to businesses using JVs as the means for distributing products and services into the foreign market.

A JV is only one of several ways that a party might approach a given business opportunity. An understanding of the advantages and disadvantages of this type of structure in relation to your own business goals is therefore essential. For example, assume that a manufacturer desires to enter into a new foreign market. To achieve sales there, the manufacturer might use a series of contractual relationships, such as license and distribution agreements with local parties. These strategies might be an advantage because they limit the degree of integration between the parties, provide for compensation rather than a split of profits, and can usually be terminated on fairly short notice. However, if the manufacturer prefers a more dynamic relationship with the local party, it may form an equity JV in which the manufacturer contributes a license to make the products and the local party contributes the manufacturing and distribution facilities, capital, and personnel. The parties will then share the profits of the JV. Assessment of your business goals is the first step in deciding whether to use a JV, and your deliberations should include the following considerations.

General Legal Characteristics of JVs

In the broadest terms, a JV is simply a business arrangement between at least two individuals or legal entities (such as partnerships, corporations, limited liability companies, and so forth) that undertake together either (a) a single transaction or specific series of transactions for the gain of all parties or (b) a

specific commercial enterprise in which the parties all share mutually in the profits and losses. This broad definition encompasses a wide variety of cooperative business relationships, all of which might be characterized as a JV. Nevertheless, certain features of a JV can be identified. In most national laws, the following characteristics are the essential elements of a JV:

1. **CONTRACTUAL ARRANGEMENT** JVs are established by express or implied contracts that consist of one or more agreements involving two or more individuals or organizations and that are entered into for a specific business purpose.
2. **SPECIFIC LIMITED PURPOSE AND DURATION** JVs are formed for a specific and definable business objective and are established for a limited duration because (a) the complementary production activities involve a limited subset of the assets of the JV participants, (b) the complementary assets have only a limited service life, and/or (c) the complementary production activities will be of only limited efficacy.
3. **JOINT PROPERTY INTEREST** Each JV participant contributes its own property, cash, or other assets and organizational capital for the pursuit of a common and specific business purpose. Thus, a JV is not merely a contractual relationship, but rather the contributions are made to a newly-formed business enterprise, usually a corporation, limited liability company, or partnership. As such, the participants acquire a joint property interest in the assets and subject matter of the JV.
4. **COMMON FINANCIAL AND INTANGIBLE GOALS AND OBJECTIVES** The JV participants share a common expectation regarding the nature and amount of the expected financial and intangible goals and objectives of the JV. The goals and objectives of a JV tend to be narrowly focused, recognizing that the assets deployed by each participant represent only a portion of the overall resource base.
5. **SHARED PROFITS, LOSSES, MANAGEMENT, AND CONTROL** The JV participants share in the specific and identifiable financial and intangible profits and losses, as well as in certain elements of the management and control of the JV.

Functional Types of JV Relationships

While an understanding of the general characteristics of a JV is important, the significance and usefulness of a JV can be more clearly understood by examining the most common purposes for forming JVs. A JV can be classified by its primary function. For example, a JV may be formed to conduct research and development work on a new product or technical application, to manufacture or produce various products, to market and distribute products and services in a specified geographic area, or to perform a combination of these functions. The function of the JV will be linked to the overall objectives of the parties and will dictate to a large extent the substantive terms of the JV arrangement.

RESEARCH AND DEVELOPMENT JVS

A research and development JV is particularly useful for combining the creative resources and assets of two entities to facilitate technical exchange and, hopefully, to reduce the time that might otherwise have been required to complete the development work. "R&D" JVs usually involve technology licenses from one or both parties to the new enterprise, an agreement as to scope and duration of the research

plan, covenants from both parties to protect the technology developed and, in most cases, an agreement defining each party's use of that technology.

MANUFACTURING OR PRODUCTION JVS

A manufacturing and production JV is primarily dedicated to combining the resources of the parties to produce goods that would be available for use or sale by one or both of the parties. For example, a party may wish to license certain production technology and trade secrets to a new JV, while the other party would contribute facilities, equipment, and personnel to manufacture the products. The finished products could then be delivered to the licensor for sale or sold by the JV, perhaps under a distribution arrangement with the manufacturing party.

MARKETING AND DISTRIBUTION JVS

A marketing and distribution JV sells goods and services of the parties in a given geographic area. For example, if a company seeks to enter a new foreign market using the assistance of a local partner with substantial expertise in that market, a new JV might be created. The foreign party would contribute the products, as well as any trade secrets or trademarks, while the local partner would provide the capital, facilities, and human resources required to exploit fully the products in the market. In addition, the local partner may be able to provide the JV with access to various marketing channels and scarce supplies and utilities.

HYBRID JV RELATIONSHIPS

Hybrid JV relationships combine two or more of the basic product development and distribution functions described previously. A JV of this type usually serves as an integrated business enterprise, owning or controlling all of the assets and resources that might be required to develop and manufacture new products, plus marketing and distributing the products in specified markets. Each of the parties will contribute, either directly or through licensing or similar contractual arrangements, all the capital, technology, facilities, and human resources required to fulfill the objectives of the JV's original business plan.

Advantages and Disadvantages of JVs

A JV carries with it a number of advantages and disadvantages. On the one hand, it can provide a party with access to resources and skills that are unavailable to it at reasonable cost. On the other hand, use of a JV can be quite risky given the reliance that must be placed on the ability and willingness of the other party to perform its obligations during the term of the arrangement. When deciding whether a JV is the appropriate business strategy, the parties must always review the various generic advantages and disadvantages of joint venturing and consider how each might apply to the specific opportunity.

CAPITAL REQUIREMENTS

■ ADVANTAGE: FINANCIAL RESOURCES CAN BE SHARED.

One of the most commonly cited advantages of a new JV is the opportunity to reduce the amount of capital that one party must contribute to get involved in the specific business. For example, a party may be considering a project

that will require a substantial amount of investment in development work and product testing. The party may have sufficient intangible assets in the form of skilled professional labor and marketing networks, but its financial resources may be inadequate to take on this particular project alone. Such projects are good candidates for the JV structure. To undertake the project, the party may seek a JV partner to assist in sharing the financial burden and other risks of the project. A partner may even be located who is willing to provide most, if not all, of the funding in exchange for access to the other's intangible assets.

The reduction of capital requirements is usually an important factor when the parties stand on common ground with respect to their financial resources. However, this factor is likely to be more significant to a foreign party making an investment with a local partner in a developed country than in a less developed country. In either country, there will probably be costs for building a new manufacturing plant or substantially remodeling an existing one, plus expenses of assembling a trained work force and experienced management team. However, if the country is developing, as opposed to developed, the foreign party will usually assume that few local partners will be able to make a substantial financial investment, and therefore the decision to enter the market with a local partner will be based on factors other than the reduction of capital investment (e.g., relations with the local government). Accordingly, it is not surprising that partners with money are a hot commodity for projects in developed countries.

■ **DISADVANTAGE: JV PROFITS ARE SHARED.**

An obvious disadvantage of sharing capital obligations is the need to share profits generated from the actual operation of the JV. Issues can arise in this area not so much because of the cash contributed, but because of the fact that the parties will also be contributing intangible assets to the business, such as intellectual property rights and technical know-how. These assets are difficult, if not impossible, to value. The intangible contributions of one of the partners will quite possibly result in returns that are out of proportion to the profit-sharing ratio determined solely by reference to the cash made available to the JV. In fact, if one party comes to believe that the other is not carrying its weight with respect to operations, the JV is likely to end up in trouble.

REDUCTION OF BUSINESS RISKS

■ **ADVANTAGE: A JV ALLOWS FOR INVESTOR DIVERSIFICATION.**

Closely connected with capital saving as a motive for joint venturing is the reduction in business risk. By sinking less capital into a JV and diversifying investments among industries, areas, and countries, the investor obviously gains an element of protection. In turn, diversification allows the investor to enter into a market that has significant growth potential but is a little riskier than other markets that have already proved stable and profitable.

■ **ADVANTAGE: A JV REDUCES LOCAL FRICTION.**

The entrepreneurial skills and experience of local partners facilitate adaptation to the particular dangers of a new business environment with which the foreign investor may be relatively unfamiliar. The risk of doing business in a foreign land can be further reduced if collaboration with a local partner makes the entire project less subject to the danger of adverse action by the local government.