Chapter 2

Growing Use of Strategic Alliances in the Energy Industry

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Synopsis

§ 2.01. Introduction .................................................................................. 37
§ 2.02. Strategic Alliances Defined ......................................................... 37
§ 2.03. Reasons for the Proliferation of Strategic Alliances ................. 42
[1] — General......................................................................................42
[2] — Financial and Funding Considerations ..................................43
[3] — Validation of Technology.......................................................44
[8] — Elimination of Duplication ....................................................45
[9] — Risk Sharing ........................................................................45
[10] — Entry into New Product Markets .........................................46
[12] — Pooling of Complementary Resources ....................................47
[13] — Prelude to an Acquisition .....................................................47
§ 2.04. Disadvantages of Strategic Alliances ................................. 48
[1] — Surrender of Partial Control ....................................................48
[2] — High Administrative Costs .....................................................48
[3] — Less Flexibility ....................................................................48
[5] — Number of Participants ........................................................48
[6] — Compatibility Requirements .................................................48
[7] — Overdependence on Partner ................................................49
§ 2.05. Key Business Issues that Should Be Addressed
Before Forming a Strategic Alliance .............................................. 49
SYNOPSIS

§ 2.06. Critical Factors in the Initial Formation Stage of Strategic Alliances ................................................. 50

§ 2.07. Primary Types of Strategic Alliances Utilized in the Energy Industry .................................................. 53
[1] — General...............................................................................53
[2] — Research and Development ...............................................53
[4] — Hybrid Strategic Alliances.................................................54

§ 2.08. Key Issues in Structuring Strategic Alliances ......................... 54
[1] — General...............................................................................54
[a] — Legal Relationship of the Parties ......................................55
[3] — The Scope, Purpose and Exclusivity of a Strategic Alliance ................................................................. 56
[5] — Ownership, Control and Management...............................59
[a] — Ownership and Control Issues ..................................58
[b] — Management of the Strategic Alliance
   Venture .....................................................................59
[8] — Supply of Raw Materials ..................................................62
[9] — Marketing of Products .......................................................62
[10] — Licensing of Know-How and Confidentiality .................62
[11] — Service Agreements .........................................................63
[12] — Financial Policy, Accounting, Audits,
   Authorization Policy..........................................................63
[13] — Non-Competition ............................................................65
[14] — Duration and Termination ...............................................65
[15] — Transfer of Interests ........................................................68
[16] — Defaults and Remedies ..................................................69
[17] — Governing Law, Resolution of Disputes .........................70
[18] — The Approval Stage .........................................................70
[19] — Legal Concerns ...............................................................71
[20] — Guarantees, Warranties, Representations .......................71
[21] — Force Majeure ..................................................................72
[22] — Choice of Law and Forum ...............................................72
[23] — Dispute Resolution..........................................................74
[a] — Venue ........................................................................74
[b] — Choice of Law ................................................................74
§ 2.01. **Introduction.**

In the past decade, virtually all industries including the energy industry have been under great pressure to develop and implement new business strategies to survive and prosper in a rapidly changing and highly competitive global marketplace in which the pace of technological innovation has greatly accelerated. This has forced companies to focus on continuous improvement of their core businesses and to rely increasingly on other enterprises to provide thorough strategic alliances and joint ventures with a wide array of supporting products and services on a cost effective basis because of global demands on their technology and financial resources.\(^1\) This chapter discusses: (i) the definition of “strategic alliances;” (ii) the primary reasons for the proliferation of strategic alliances; (iii) the disadvantages of strategic alliances; (iv) the key business issues that parties should address before forming strategic alliances; (v) the critical factors in the initial formation stage of strategic alliances; (vi) the key factors impacting the success of strategic alliances; (vii) the different types of strategic alliances used in the energy industry;

and (viii) the most important issues that arise in drafting and implementing strategic alliance agreements (SACs).

Strategic alliances have become increasingly popular in the past 15 years. This is because strategic alliances are easier to accomplish than a merger or acquisition, involve less commitment on the part of the participants, and allow for much greater flexibility. Strategic alliances also avoid lengthy regulatory reviews and costly tax consequences that lessen the attractiveness of the merger and acquisition process. Like joint ventures, strategic alliances can help companies (i) access new markets; (ii) enhance their marketing, distribution and sales networks; (iii) access new technology; (iv) defend their market share; (v) access capital; (vi) diversify their business and product lines; (vii) limit their strategic risk; (viii) access economies of scale; (ix) access the best practices of their competitors; (x) access managerial talent and (xi) enhance their productivity and profits.

Strategic alliances – whether they are in the form of joint ventures, franchise arrangements, dealerships, distributorships, licensing arrangements, or “strategic investments” – are nothing new; they have existed for centuries. In recent years, though, strategic alliances have proliferated and their importance has mushroomed because of dramatic economic and technological changes in the global economy. Strategic alliances now “account for more than 20 percent of the average large company’s revenues.”

This growth is not surprising because most strategic alliances are profitable. We are witnessing not quite the birth but certainly the ascent of an entity (or, more precisely, a related group of entities) distinct from both traditional business entities

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2 See Steven I. Glover, “Negotiating and Structuring Joint Ventures: Lessons from Management Consultants,” M & A Lawyer, Mar. 1998, at 1, 4 (predicting this figure to be attained by the year 2000 and noting a 20 percent annual increase in the value of strategic alliances involving Fortune 1000 companies in recent years).

3 Id. at 4 (reporting that “the return on joint venture investments is 17 percent,” which is “higher than the rate of return on other corporate activities”); see also Su Han Chan et al., “Do Strategic Alliances Create Value?,” 46 J. Fin. Econ. 199, 209-13 (1997)(showing that stock prices of both partners usually rise following announcement of a strategic alliance).
(corporations and partnerships) and from newer entities like the limited liability company.\footnote{For a comprehensive discussion of the reasons why companies enter into a cooperative arrangement such as a strategic alliance or a joint venture, see generally John R. Harbison & Peter Pekar, Jr., “A Practical Guide to Alliances: Leapfrogging the Learning Curve – A perspective for U.S. Companies,” in Structuring, Negotiating & Implementing Strategic Alliances 9, 18 (Practicing Law Institute 1998) (a study of more than 700 alliances from 1988 to 1992); Kathryn Rudie Harrigan, Managing for Joint Venture Success (Lexington: Lexington Books, 1986) 16; Thomas F. Villeneuve et al., Corporate Partnering: Structuring & Negotiating Domestic & International Alliances (3rd ed., 1999) at 1-9.}

For the parties to have the best chance of realizing value from the creation of a strategic alliance, both in terms of upside realization and downside containment, each has to understand that the greatest benefit of a strategic alliance comes from the speed and flexibility it allows participants in realizing their business objectives when compared to the other choices available to them, something that neither could do without the other. To adopt a structure that causes the participants to become less mobile, less flexible, less capable of adapting, is to turn away from the core value of the strategic relationship model as being implemented today in the United States.

\§ 2.02. Strategic Alliances Defined.

“Strategic alliance” is a business term. Business lawyers use it by necessity, but it has no legal definition. It has been described as an arrangement “whereby two or more firms agree to pool their resources to pursue specific market opportunities.”\footnote{Ranjay Gulati, “Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances,” 38 Acad. Mgmt. J. 85 (1995); see also Alan S. Gutterman, Corporate Counsel’s Guide To Strategic Alliances 1.001 (1997) (referring to a “process of accessing” complementary assets and resources of two or more firms “in order to efficiently and rapidly implement the innovation process”).}

The archetypal strategic alliance is the joint venture. In law, a true joint venture is usually treated as a general partnership except that it generally connotes a single project rather than a broad, continuous business relationship. Unlike most partnerships, most joint ventures have business
associations rather than individuals as members. The joint venture is often incorporated, in which case it is called a joint venture corporation, and is legally a corporation, not a partnership. The legal status of strategic alliances other than joint ventures – including manufacturing and distribution arrangements, franchises, dealerships, license arrangements, and strategic investments – is often unclear and has been subject to debate.

Unlike corporations, strategic alliances are not government chartered; and unlike partnerships, they have no statutory definition, so the boundaries of the definition are hazy. When, for example, does an investment by one company in another become a “strategic investment” worthy to be called a strategic alliance? A major equity stake and close cooperation between the investor and the issuer are not enough; these features are common in venture capital investments that are not considered strategic alliances.

As the word “alliance” suggests, strategic alliances tend to involve closer cooperation and parties of more equal size. The goals of strategic alliances (like developing new technology or promoting a product in a foreign market) require inputs (like research or marketing skill) that are harder to define and to monitor than in more traditional relational contracts. Contracts are, therefore, harder to draft and breaches harder to detect and prove in strategic alliances.

Strategic alliances at times have been used to describe all of the following types of arrangements: (i) cross licensing; (ii) joint marketing, distribution and sales agreements; (iii) product research and development; (iv) joint ventures (including corporations, partnerships and limited liability companies as participants); (v) outsourcing of certain non-core business functions (e.g. such as information systems, payroll, credit cards, accounting, administration of pension plans, etc.) and (vi) combining business relationships with capital investment. Arguably, these type of arrangements might be more accurately called “collaborative arrangements.”

In the opinion of the author, many of these aforementioned types of business arrangements do not meet the definition of a true strategic alliance. In order for a business arrangement to technically qualify as a strategic alliance it must have all of the following characteristics: (i) participation by two or more companies acting together as partners and sharing ownership, a common strategic plan, a common set of goals, and having
substantial capital at risk in the relationship; (ii) all participating companies who partner with each other maintain their independence at some level and remain masters of their own destiny; and (iii) all companies participating in the strategic alliance operate as stand-alone businesses.

Based on these criteria, mere outsourcing arrangements between a customer and vendor do not meet the definition of a strategic alliance because in such an outsourcing arrangement there is no common strategic plan or set of goals. Likewise, mergers and acquisitions do not qualify as strategic alliances because only one party survives following the completion of such transactions. In addition, licensing agreements, joint marketing arrangements and distribution agreements do not strictly qualify as strategic alliances because they are primarily contractual arrangements, and do not involve the participants placing substantial capital at risk in a mutual venture for a common purpose.

The partners to a strategic alliance are free to continue to compete outside the scope of the strategic alliance, subject to some minimum collateral restraints. Indeed, it is such flexibility that makes strategic alliances so attractive to energy companies today. The strategic partners can maintain their independent existence and yet still obtain access in a timely, efficient and cost effective manner to critical resources and ideas of their competitors. The efficiencies created by strategic alliances are similar to those resulting from mergers and traditional joint ventures — risk sharing, economies of scale, access to complementary resources, and elimination of duplication and waste.

The combined forces of international trade, growth, rapid technology innovation, increased prominence of intellectual property law, higher costs of internal research and development, and global marketing have driven the increase in the number, size, and importance of strategic alliances. The number of strategic alliances in the United States has nearly doubled in each of the last 10 years and this trend may accelerate in the future. In the past two years, more than 20,000 strategic alliances have been formed worldwide.6

Successful strategic alliances are challenging to negotiate, draft and implement because the stakes for each participant are high and the cost of failure is great. Each participant must be very clear on its objectives in entering into the strategic alliance and must be willing to dedicate substantial time and resources to achieving it.

§ 2.03. Reasons for the Proliferation of Strategic Alliances.

1 — General.

Several factors have combined to cause a proliferation of strategic alliances in the past fifteen years. Extensive integration of companies has become less common, but the need has grown for greater coordination of production than market transactions can offer. Meanwhile, the ability to draft effective SACs to meet this need has improved. These developments warrant discussion.

During the 1960s, 1970s, and early 1980s many companies aggressively expanded, often through acquisitions. Three justifications were given for corporate growth. First, expanding a company’s existing lines of business generated economies of scale; many equated bigness with efficiency. Second, if a company added new lines of business that were related to the old, it could realize efficiencies through better coordination of the two lines than is possible in market transactions between separate firms. Third, even if the new lines were unrelated to the old (i.e., “conglomerate” growth), profits could be increased through improved management. Many claimed that managerial talent was unitary.

Large companies, however, make sense only when they control significant non-human assets, as in “smoke stack” industries. Large companies without significant non-human assets tend to be unstable. Tangible assets, like a mine or a factory, are usually difficult to share among several users. The knowledge and skill of an individual or a team can be shared by several users, though, so there is less need to put this asset under the control of a single user.

New technologies require less capital investment. The increasing importance of human capital, therefore, has led to the proliferation of smaller, more specialized companies. Economic globalization also aids this trend. The global market is large enough to support companies that are too specialized to survive in any national market. As a result there has
been movement in recent years away from industrial integration and towards more and more specialization in virtually every industry including the energy industry.

Trading human capital in spot markets is even more problematic. Humans cannot be bought and sold. They can be hired temporarily without becoming employees, but this solution does not work when a person’s services are needed for a long time. Further, many tasks are too complicated to be handled by one person and must be tackled by a team. Large team projects (like major building construction) can sometimes be achieved through ordinary contracts with firms. Many projects, though, are too complicated to be specified by ordinary contracts. In theory these trends lead to the virtual corporation: a company with no employees beyond a management team and no assets beyond what this team needs to function.

Strategic alliances have also grown because more innovative and sophisticated agreements are available, aided by the increasing experience of many lawyers, the publication of treatises on strategic alliances, and the creation of training programs for lawyers. The expansion of business fosters higher expertise through greater specialization among lawyers. Word processing, facsimile transmission, electronic mail, computer-assisted research, and faster and more sophisticated duplicating equipment have facilitated the drafting and negotiation of better, more effective SACs. These same forces also facilitate strategic alliances by improving the exchange of information and, thus, coordination between participants.7

The following are some of the other reasons strategic alliances are being so widely utilized in virtually every industry including the energy industry.

Energy companies need a lot of capital to fund research and development of new exploration and production processes and products,

and to fund the internal growth necessary to serve rapidly expanding markets for their products. Emerging companies can frequently obtain capital from larger, established strategic alliance partners on terms more favorable than is available in the capital markets (if it is available at all), both because the small company satisfies strategic, nonfinancial needs of the larger company, and because the larger company has a more thorough knowledge of the value of the smaller company’s technology than does the investing public.

For smaller energy companies to whom technology is important, a strategic alliance with a major industry partner can validate their technology and provide credibility for them in the capital markets.

A strategic alliance can provide an established energy company with cutting-edge technology that would otherwise be unavailable to it, either because the technology is protected by patents or other intellectual property rights or because it would be prohibitively expensive to reproduce internally. Established and emerging companies alike can use strategic alliances to fill in gaps in their intellectual property portfolios.

Strategic alliances can provide smaller energy companies with the benefits of the manufacturing or project management capabilities and the experience of a larger, better established strategic alliance partner, without their having to bear the cost in capital and management attention necessary to develop their own manufacturing capabilities. Likewise, established energy companies may rely upon strategic alliances with emerging companies for expertise in manufacturing and marketing specialized products outside of their general areas of expertise.

Strategic alliances can provide smaller energy companies with the opportunity to leverage and accelerate their growth by obtaining access
to the distribution channels of larger, better established energy companies. Emerging energy companies can also use strategic alliances to obtain access to secondary markets, expanding the reach of their products while continuing to focus on markets within their own core competency.

[7] — **Access to Regulatory Expertise.**

In the energy industry the regulatory climate demands specialized regulatory expertise and experience beyond that which is readily available to some small emerging growth companies. Allying with an established company that possesses extensive institutional experience with the regulatory framework affecting the industry and good government contacts can enable the emerging company to successfully manage and resolve regulatory issues that might otherwise be insurmountable.

[8] — **Elimination of Duplication.**

The integration of partners’ resources in a strategic alliance often eliminates wasteful redundancies. Competitors may, for example, be pursuing nearly identical paths for the development of a new exploration and production process, product or facility. By combining their research and development programs, two companies can avoid needless duplication of efforts. Strategic alliances are capable of saving a significant amount of costs by combining competitors’ duplicate facilities at any stage of the production process. Overlapping warehousing and purchasing functions, administrative services, production facilities, and sales organizations can all be eliminated through strategic alliances that integrate competitors’ previously separate operations. The need to eliminate duplication has prompted many current strategic alliances.

[9] — **Risk Sharing.**

Reduction or sharing of risk is one of the most significant advantages resulting from strategic alliances, particularly in a capital intensive industry like the energy industry. Strategic alliances allow small or undercapitalized firms to share with their competitors the costs of expensive research and development and new production facilities. Through a strategic alliance, companies can participate in new markets which they could not have afforded to enter on their own.
Nor are the risk-saving efficiencies of strategic alliances limited to small companies. Even relatively large companies have recently formed strategic alliances to share with their competitors substantial costs of developing and marketing certain products, or exploring for and producing oil and gas. For example, in the energy industry Shell Oil and Mobil a number of years ago entered into a strategic alliance and formed a separate joint venture company to produce and market heavy crude oil in California. Similarly, BP and Mobil entered into a strategic alliance to manufacture and market refined oil products in Europe. In addition, Shell Oil and Texaco entered into a strategic alliance and formed several joint venture companies to market gasoline and other refined products in the United States. Moreover, many petroleum companies have also entered into strategic alliances and joint ventures to build expensive and very high risk offshore deep/water production facilities, and participate in exploration and production programs in areas of mutual interest.

The risk-sharing that occurs in a well conceived strategic alliance encourages companies to invest in new processes and products. Companies are often deterred from risking their capital to develop a new technology out of fear that their competitors will be able to duplicate, at a much lower cost, any successful processes or products which result from such technology. Strategic alliances may eliminate the fear of such “free riding.”

The participants in a research and development strategic alliance can be assured that each partner will bear a fair share of the costs of developing a new product, process or business concept. If each partner participating in a strategic alliance is required to contribute its proportionate share, no participant will be able to copy the products or processes of the venture and market or exploit them at lower costs. Thus, when several energy companies in the relevant market participate in a research and development strategic alliance, individual companies should feel more confident that their investments in new technologies will not be misappropriated by their competitors.


Certain strategic alliances allow their partners to produce different types of products that would not have been available at all in the absence of the venture.
Strategic alliances allow smaller energy companies to achieve the types of economies of scale usually available only to larger companies. Such efficiencies ultimately may lead to lower prices for consumers. Small companies, for example, can pool their resources in joint purchasing organizations that give them the bargaining power to obtain quantity discounts and other concessions from large suppliers of goods and services. By forming strategic alliances, small companies can achieve efficiencies from scales of manufacturing comparable to those of their larger competitors. At the marketing stage, strategic alliances permit relatively small local firms to engage in advertising and promotion on a national scale.

In the modern global marketplace, energy companies, like many companies in other industries, have found it increasingly necessary to specialize within certain areas. Most energy companies do not have the resources to become experts in all of the areas required of an effective global competitor. Many companies also lack sufficient capital to acquire all the assets necessary to compete on a worldwide scale. In such a specialized marketplace, companies often must rely on their competitors to provide access to critical assets, technology, or areas of expertise. Strategic alliances allow companies to access resources outside their core businesses. One partner, for example, may possess significant production capabilities, while the other’s strength may be in marketing or government relations.

Entering into a strategic alliance is substantially less costly and thus less risky than a complete acquisition of a company or set of assets, and is sometimes used as a first step to a complete acquisition, with a partner having the right, but not the obligation, to purchase the remainder of the company or assets on terms that protect the interests of other equity holders in the venture. Such an arrangement allows the purchaser the flexibility to cut its losses if its investment proves less fruitful than anticipated or to
acquire the remainder of the company or relevant assets under certain circumstances if future results justify such an expenditure.

§ 2.04. Disadvantages of Strategic Alliances.
In a strategic alliance an energy company must give up some control of its own operations because of shared responsibility among two or more entities.

Sharing of managerial control requires large amounts of time, as management is consensual rather than hierarchical; significant possibility of deadlock increases the problem.

In addition, lack of flexibility in many strategic alliances may limit a company’s ability to respond to a new business opportunity.

The time it takes to harmonize objectives and smooth out cultural differences, in addition to the long-term objectives of most strategic alliances, often requires a long-term (5 years or more) commitment.

[5] — Number of Participants.
Most strategic alliances are feasible with only a small number of participants; where arrangements need to be concluded with many parties, contracts are generally preferable.

A strategic alliance will not work if the participants do not share common time horizons, profit objectives, levels of commitment and similar cultures; finding high quality partners to participate in a strategic alliance is not easy and requires a substantial commitment of resources.

There is also a risk that strategic partners can become overly dependent on each other.
§ 2.05. **Key Business Issues that Should Be Addressed Before Forming a Strategic Alliance.**

Although strategic alliances can minimize certain types of commitments, they still require careful planning. Those seeking to consider strategic alliances should carefully think through the answers to at least the following questions before undertaking serious discussions with potential strategic partners:

What type of strategic alliance is needed to lift your company to the next level of excellence?

What market forces make a strategic alliance necessary? Are they strong enough to last for a significant period? Do they create opportunities for higher margins, or greater market share?

What are the objectives of the strategic alliance and are they understood by each of the strategic partners and are the objectives compatible?

Is your company’s culture compatible with those of your possible strategic allies? Do the other preconditions for good working relationships with your partners exist?

Will the strategic alliance receive the strong support of upper and middle management in all affected departments of both companies?

What are the incentives for each company in entering into the strategic alliance?

Which employees from both companies will be involved at the beginning, middle and end of the relationship?

What assets will be contributed to the strategic alliance and what can be done with the assets?

Will the strategic allies compete in areas outside the scope of the strategic alliance? Should the strategic allies exclude certain customer relationships or contracts that would otherwise be within the scope of the strategic alliance?
What is the strategic alliance’s business plan?

What are the limits on rights, obligations and scope of activity?

How will the strategic alliance be capitalized, and what are its likely sources of capital?

How will profits of the strategic alliance be shared?

Who will control the accounting process for the strategic alliance?

Are material risks and their fallout understood? Are the consequences of possible failure sufficiently understood?

What are possible exit strategies for the strategic alliance and its members? Is the alliance likely to result in a sale of one of the allies to the other?

Would the strategic alliance create opportunities for higher margins, greater market share or significantly reduced competition?

Is there a strong management team picked out for the strategic alliance?

§ 2.06. Critical Factors in the Initial Formation Stage of Strategic Alliances.

Any participant in a strategic alliance should always conduct a thorough due diligence review of a prospective strategic partner and its technology and must recognize its own motivations for entering into the strategic partnership and how it fits into its overall business strategy.

Each party entering into a strategic partnership should closely examine and understand the motivations of its partner(s) for entering into the strategic partnership to ensure that the parties objectives are compatible and that incentives for both parties are adequate.

Potential strategic partners should start with a non-binding term sheet describing their fundamental business expectations. Before signing a letter of intent, which may be binding, all participants should seek legal review.
Some letters of intent contain standstills or restrictive covenants which can hamper a participant’s existing business.

It is very advantageous if the participants to a strategic alliance are largely or wholly non-substitutional.

If a strategic alliance is too restrictive, it can rob participants of critical flexibility by limiting their ability to pursue other opportunities. An energy company participating in a strategic alliance must exercise caution when considering rights of exclusivity or first refusal. Sometimes, the opportunity costs associated with a potential strategic alliance will outweigh its expected benefits. Any rights of exclusivity should be conditioned on the achievement of milestones, such as revenue targets, so that if specific milestones are not met, the exclusivity component of the strategic alliance will end.

It is critical that the participants in a strategic alliance carefully define ownership, participants, mission, objectives, operating principles, licensing, manufacturing and distribution rights.\(^8\) In doing so, it is essential for them to distinguish between core technology and the products or applications derived from core technology. If a company participating in a strategic alliance owns valuable core technology, it should restrict the licenses it grants to specific products or applications, while retaining maximum flexibility to exploit the core technology.

The participants must also define the mechanisms and consequences of terminating their strategic alliance. In some cases, certain license, production or distribution rights will survive termination. Before signing an agreement, each participant should build a consensus of support for the strategic alliance among its management and key employees. Without this commitment, neglected personnel may try to subvert the alliance.

Once sufficient business analysis has been completed with respect to a proposed strategic alliance transaction and the participants are proceeding towards implementation of the transaction, it is critical for an attorney to help his client identify where in the strategic alliance transaction real value creation will occur, and then to focus on how the structure and

\(^8\) See Attachments 1 and 2.
documentation of the strategic partnership will best assure the realization of that value by the client.

Value may arise in a strategic alliance from a quantum reduction in production costs; it may result from access to a market this year that would but for the strategic alliance be a next year objective, if ever; value may derive from access to key technology that contributes a significant competitive advantage. Whatever the value to be derived from the strategic alliance, all choices in structure, negotiation and documentation should be tested against the proposition that a direct consequence must be that the client’s assurance of realizing that value is enhanced. And this should be undertaken with a clear expectation that the participating company will need to survive and prosper after the strategic alliance relationship has run its course.

Any company entering into a strategic alliance should insist that ownership of key technology stays with the company, not the other party or the venture, if it belongs to that company going into the relationship, and that the company has access to all improvements resulting from the relationship on a reasonable basis. If key technology belongs to the other party going in, or will be created by the strategic alliance itself, a company should insist that the company’s right to use the technology will continue even if the relationship is terminated.

If the company is giving up a key business function to the strategic alliance it should require assistance in recreating it on the back end if the relationship terminates. If accessing a new market is the primary objective on the strategic alliance, the company should insist that the company’s personnel have as much access to the people who control the channel as possible, on whatever basis or pretext, so that personal relationships may salvage some access if the relationship with the intermediary fails.

If one energy company is smaller and more entrepreneurial than the other party, care should be taken in the structure to allow the company’s culture to persist while obtaining the benefits of the association with the larger company. If the result of the structure is that a cumbersome, large company decisional model or cost structure is introduced into a smaller innovative structure, the future of the smaller company will be threatened, which in turn will damage the value of the association to the larger company.

Strategic alliances can be classified by the various functions which may be performed by the enterprise. For example, a strategic alliance may be formed to conduct research and development work on new products or technical applications or processes, to manufacture or produce various products, to market and distribute products and services in a specified geographic area, or to perform some combination of the aforementioned functions. The function and scope of activities of the strategic alliance will be linked to the overall objectives of the parties and will dictate to a large extent the substantive terms of the strategic alliance. Some of the major functional types of strategic partnerships are discussed below.

A research and development (R&D) strategic alliance in the energy industry can be a useful structure for combining the creative resources and assets of two or more entities in order to facilitate technical exchange at the desired level and, it is hoped, reduce the amount of time that might otherwise have been required in order to complete the development work. R&D joint ventures usually involve technology licenses for one or both of the parties to the new enterprise, agreement regarding the scope and duration of the research plan, covenants from both parties regarding protection of the technology developed by the strategic alliance and, in most cases, some agreement regarding the use of the technology developed by the joint participation of the parties.

Marketing and distribution strategic alliances in the energy industry are used for the purpose of distributing the goods and services of one or both of the parties in a given geographic area. For example, if an energy company is seeking to enter a new foreign market with the assistance of a local partner with substantial expertise in that market, a new joint venture company might be created as a means of implementing a strategic alliance, and the company seeking the foreign market would contribute the products, as well as any trade secrets or trademarks, and the local partner would
provide the capital, facilities, and human resources required to fully exploit the products in the market. In addition, the local partner may be able to provide the strategic alliance with access to various marketing channels and scarce supplies and utilities.

[4] — Hybrid Strategic Alliances

Hybrid strategic alliances combine two or more of the basic product development and distribution functions which have been referred to above. A strategic alliance formed in this type of situation is usually intended to serve as an integrated business enterprise, owning or controlling all of the assets and resources which might be required in order to explore for, produce, develop and manufacture new products, and market and distribute such 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 strategic alliance’s business plan.

§ 2.08. Key Issues in Structuring Strategic Alliances.


Strategic alliances are a form of joint venture and may be carried on through numerous different business structures, including corporations, partnerships, trusts, contractual arrangements or any combination of such entities and arrangements. The choice of structure for a particular strategic partnership will depend upon the participants’ respective tax and accounting goals, business objectives, and financial needs, as well as their planned capital and other contributions to the venture. Irrespective of the structure chosen, however, certain terms discussed below are central to any strategic alliance, and should be considered in connection with structuring every joint venture.9

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9 See Attachment 3 for a summary chart describing the various types of business entities which might participate in a strategic alliance.

A key initial decision in forming a strategic alliance is the identity of the specific entities through which the joint venturers will participate in the venture. If the strategic alliance is structured as a partnership, special purpose subsidiaries will ordinarily be used in order to limit the participants’ liabilities. Often, special purpose subsidiaries will be used for other business reasons even through the strategic alliance is not structured as a partnership. The use of special purpose subsidiaries frequently creates a need for cross-guarantees by the parent companies of their respective subsidiaries’ obligations to each other and to the strategic alliance entity.

[a] — Legal Relationship of the Parties.

Participants in a strategic alliance are like joint venturers and as such owe each other the same fiduciary duties as partners do, except that duties concerning business opportunities and competition with the other party or participant may be somewhat narrower due to the narrower scope of strategic alliances. When a strategic alliance is incorporated as a joint venture corporation, the scope of fiduciary duties may be uncertain. In some states fiduciary duties in close corporations are the same as in partnerships; in others they are not. More litigation arises in strategic alliances over business opportunities and the scope of the alliance than any other issue. This fact reflects the difficulty of handling the issue by contract.

Participants in a strategic alliance can address this problem by defining their strategic alliance narrowly, but doing this may impair their cooperation and trust. A participant may withhold valuable information, for example, if it fears that the other party may use the information to pursue an opportunity on its own. A narrowly defined enterprise may be unable to adapt to changing markets and technology. For these reasons narrowly defined ventures tend not to succeed.

Alternatively, an agreement can authorize the parties separately to pursue opportunities in the same field as the strategic alliance or even to compete with each other. Such terms must be enforced with great care, though. It may be one thing for a party to pursue an opportunity that
comes to it independently and quite another to seize an opportunity brought to the strategic alliance by one of the participants.

Having strategic alliances with several firms brings beneficial diversification. It avoids the risks of putting all of a company’s eggs in one basket, including the risk that an exclusive partner will grow slack because it has no rivals, or will abuse its exclusive position by acting opportunistically. Moreover, one motive for entering a strategic alliance is to exploit some expertise of another entity. Neither participant in a strategic alliance will want the alliance to extend beyond the scope of the participants’ expertise. Thus, allies may want to preserve the freedom to deal with others.


A central element of every strategic alliance is the scope of the business to be carried on through any entity formed, both as to the types of products, services or technology which the entity will provide, and as to the geographic areas or markets in which they will be provided. Reaching agreement on these points may be very difficult, particularly where the business of the strategic alliance is similar to the existing business of one or both of the venturers.

Depending on the nature of the business of the strategic alliance and the objectives of the participants, it may benefit by utilizing a SAC so that the scope of the venture can be accurately described in either very narrow or very broad terms. For example, if the business of the strategic alliance is very similar to the business of one or both of its venturer participants, it will make sense to define the scope of the alliance narrowly, so as not to overlap with the business of the venturer(s). On the other hand, if the business of the venture of the strategic alliance partners is dissimilar to that of both of the alliance participants, it may be desirable to define the scope of the strategic alliance broadly to maximize flexibility.

A related issue is the extent of the exclusivity of the strategic alliance. Specifically, the SAC should provide the procedures to be followed if the strategic alliance does not have the funds to pursue particular prospects, projects or opportunities within its scope. Further, where the strategic alliance has its own managers, what will happen if the managers decide
not to pursue a particular project or market? A number of approaches may be chosen.

One approach is to make exclusivity absolute — that is to say, if the strategic alliance cannot or does not pursue a specific opportunity falling within its “scope,” all participants are barred from doing so. Another approach is to allow each participant separately to pursue opportunities which are within the “scope” of the strategic alliance and which the strategic partners participating in the joint venture decide not to pursue. As a variation on this approach, it may be provided that where one or more participants, but not the required number of participants, vote for a joint venture to fund and pursue a particular opportunity, only those participants which voted in favor of pursuing the opportunity may pursue it.

As a related matter, where the parent company or any affiliates of a participant have the ability to compete with the strategic alliance, it may be necessary to get the agreement of such companies not to compete with the venture.


Mechanisms must be clearly established for funding any strategic alliance’s activities. The SAC should provide for initial funding, as well as additional funding during the life of the strategic alliance. It should state the participants’ rights and obligations to make mandatory and optional cash contributions, as well as mandatory and optional loans to whatever joint venture entity is formed.

Typically, procedures will be put in place whereby the strategic alliance partner participants, either directly or through their representatives on the joint venture’s board of directors or board of control, agree upon an annual budget for each venture. Cash required from the participants to fund the joint venture’s operations under an agreed budget is then frequently provided on the call of the joint venture’s senior manager, based on an agreed schedule. An issue related to the cash funding of the strategic alliance venture is the contribution of services, technology, products, or other assets. To the extent that a participant will be making any such non-cash contributions, a procedure should be established at the outset of the strategic alliance for the valuation of such contributions.
The form of legal entity to be used for a particular strategic alliance is closely related to another basic issue, that of the financing of the strategic alliance. First, the strategic alliance participants must determine what percentage interest each of them will have in the equity of the venture or alliance. Will it be 50/50 or will one participant have a major or controlling interest? The answer to this question obviously varies with each project. A 50/50 joint venture is most likely when the strategic alliance is to be run independently of the strategic partners.

Once the percentage interest is determined, the debt equity ratio of the strategic alliance entity must be fixed by the strategic alliance partners. Many foreign investors, fearing the risk of expropriation or their lack of knowledge of the local environment, seek to reduce the shareholders’ capital to the minimum figure and to have the remainder of the strategic alliance’s capital requirements financed by local lenders. This desire of low capital contribution also exists in more developed countries where, often for reasons of cash flow, investors prefer to guarantee third party debt to their joint venture rather than put up their own money.

Obviously, the local partner and its government may have a different view, seeking certain inflows of foreign exchange through the foreign investor. In less developed countries, where the loan capital cannot be raised locally, the foreign investor is commonly required to guarantee the joint venture’s (or strategic alliance’s) repayment of foreign currency denominated debt.

This question of the sourcing of the strategic alliance’s funds usually extends to questions of availability of domestic government incentives – cash grants, subsidized loans and tax holidays being the most common – and utilization of export-credit guarantee facilities in the countries of equipment suppliers. The consequence of this is that, in effect, the government of the local partner itself becomes a participant in the strategic alliance. It can be that a strategic alliance venture fails because the government did not fulfill its commitments to the strategic alliance. Often, the parties, or at least the foreign investor, would want then to seek recourse against the government and cannot find the means to do so because the government is not directly a signatory to the SAC and hides behind the doctrine of sovereign immunity.

The control and management provisions are at the heart of the future functioning of all strategic alliance ventures. To a significant extent, the decision making surrounding these provisions will interact with the choice of entity – each are quite likely to affect the others.

[a] — Ownership and Control Issues.

Ownership issues relating to strategic alliances are extremely important as they impact distributions and the ability to affect managerial decision making. Further, there are still substantial limitations on foreign investment, ranging from total prohibition of private investment in certain sectors (energy, transportation, and communications being typical) or prohibition of foreign investment (but not local investment) to equity percentage limitations.

Fundamentally, however, the strategic alliance venture agreement should hold the structure for the governance of the company and the appointment of key personnel to oversee and manage the venture’s operations. Within this structure, the venture participants should include what matters they, as participants, can vote upon – as well as the requirements for a successful vote on particular matters. Other considerations include specifying the number of directors and appointment procedures, and the procedures by which decisions are to be made at the board of directors’ level.

[b] — Management of the Strategic Alliance Venture.

Agreements regarding the management of the strategic alliance venture must be crafted to meet the particular laws and business climate of the locale. In the handling of this, the venture participants’ hands may be somewhat tied by local law. Some countries require that certain positions in corporations be filled by local nationals, and ventures may also find that the presence of a local businessman is necessary for getting essential tasks completed. On a basic level, however, the strategic alliance venture agreement should provide for the officer positions needed and the means by which they will be filled.
On a business culture level, the styles of management among the venture participants may vary so much as to make the mixing of key personnel from each company impractical. This gap can sometimes be bridged by hiring outsiders to serve as liaisons or to manage the venture, but if particular knowledge or expertise are among the contributions of a venture participant, such a substitution may be unfeasible as well. Thus, it may make sense to allocate day-to-day management of the venture to one party or the other.

Other planning concerns arise as to the contribution of personnel to a venture. As a structural point, it has been noted for some time that key managers of the venture should not be kept on a venture parent’s payroll or remain as part of a parent company’s organization. Experience indicates that, in successful strategic alliance ventures, the managers’ loyalties must be with the venture – the complex calculus of a variety of economic and career issues (current advancement, future opportunities, and compensation) can prove problematic if not dealt with at an early stage. Provisions should be made, however, for eventual return of employees to their original employers, as well as for counting service with the venture toward a returning employee’s total employment period.

No strategic alliance will make money unless it is properly managed. The SAC, whether in the form of a shareholders agreement, partnership agreement or otherwise, should specify, in detail, the mechanics of the overall governance and the day-to-day management of the strategic alliance’s affairs. Usually, this will involve a board of directors or board of control of a strategic alliance/joint venture entity on which each of the strategic alliance partner participants will have either equal representation or representation more or less proportional to its percentage interest in the venture. Sometimes, provision is made for an independent member of the board, appointed by the agreement of the participants, in order to protect against board deadlock over operational issues.

Additionally, it is very common to provide that certain key decisions may be made only with the unanimous, or a super-majority, approval of the board members designated by each of the participants. Generally, such key decisions include the following matters: (i) capital expenditures in excess of specified amounts; (ii) incurring indebtedness; (iii) initiating or settling litigation; (iv) entering into contracts involving more than an
agreed sum; or (v) entering into contracts with a joint venture participant or any of its affiliates. Obviously, the longer the list of actions requiring unanimous or a super-majority approval, the greater the risk of management disagreement and deadlock.

As to the day-to-day management of the joint venture, the SAC should specify the types of officers and other managers who will conduct the day-to-day operations of the strategic alliance. The specific responsibilities and authorities to be delegated to these persons should be specified. Depending on the concerns of the participants, it may be more or less advantageous to grant the managers broad or narrow delegations of authority.


There is the practical question of how the strategic alliance will be staffed. Obviously, where one partner has the management responsibility – usually under a management contract with the strategic alliance/joint venture entity – the problem is not significant. But where the venture is to be free-standing and independent, the question of staffing is more relevant. Often, at least initially, key managers will be seconded to the venture by the partners. This solves initial problems with pensions, insurance, stock options and other employee benefits. Eventually the strategic partners will have to agree on issues of unionization, salary policy, pension funds and the like. Some provision for these matters should be made in the SAC. In particular, recharges for seconded personnel or the training of personnel for the strategic alliance/joint venture by one partner should be specified.


Clauses covering construction of facilities are at the heart of cooperation between participants in a strategic partnership. Time scales and schedules of construction are essential in determining financial needs and commitments. Failure to meet construction deadlines may be cause for withdrawal from the strategic alliance by a partner or may give grounds for delaying further investment. This aspect is particularly important where a project is made in a less-developed country under legislation designed to develop the country’s industrial base by attracting foreign investment.
If initial phases of the joint venture or strategic partnership do not go well, the foreign partner may be reluctant to invest more cash or know-how until the signs of profitability are clearer. The local government and partner may not be so concerned with profit and wish to push ahead with second and further phases. Similarly, where one strategic partner is responsible for organizing the plant construction, control and standards for the sub-contracting business should be established.

Where this is relevant, it is an important issue. Such supply may produce another source of profit for the supplying strategic partner and thus constitute an important motivation for its participation in the venture. The other partner will want to be sure that the terms of the supply contract are fair in order to keep the venture competitive. In such projects, the provisions of the SAC on supply of raw materials are usually supplemented by an annexed draft supply agreement for the joint venture entity to execute with the partner concerned upon its legal establishment.

Again, this issue depends on the nature of the venture. In less developed countries, the strategic alliance may sell its own oil and gas or power production domestically and the foreign investor, upon whose technology such production is based, may sell the export production through its own selling and marketing operations. In this case, provision must be made for transfer pricing, minimum offtake obligations and the like, often in principle in the SAC with an annexed draft sales and purchase agreement.

Contribution of know-how as part of the capitalization of the strategic alliance is usually done by means of a paid-up license. All this requires provisions in the SAC, together with an annexed draft license agreement. This will specify the precise terms of the grant, to what use the know-how may be put and provisions as to confidentiality. In fact, the negotiation of the SAC itself will normally be preceded by some form of confidentiality agreement since the know-how owner will have to reveal to its potential
partner some aspects of its technology, if only to convince the latter of its worth. This is usually achieved by means of individual confidentiality agreements signed by individuals of the partner to whom the know-how is revealed.

It is also possible that the strategic alliance will generate its own inventions. The licensing partner may seek exclusive rights to these. Or both partners may be entitled to benefit from such discoveries. Provision in the SAC must be made for this where appropriate.


Where the strategic alliance relies on the provision of services from one or more of its partners, the terms of these services should be spelled out in the SAC and supplemented by a service agreement executed by the strategic alliance/joint venture and the partner concerned. Such services can range from general management, technical assistance, research and development, sales and marketing services to the supply of utilities and contract manufacturing. Usually, such services are supplied on a cost plus basis.


Apart from the initial financial structure of the venture which was discussed previously, the SAC should deal with questions of subsequent financial policy. It is possible to leave this to the Board of Directors of the strategic alliance/joint venture to decide, but this may not always be an appropriate way out, given that most decisions in a joint venture require unanimity or the equivalent. This means, for example, that for the strategic alliance/joint venture entity to declare and pay a dividend, both partners’ directors must vote affirmatively; otherwise no decision will be made and the potential dividend will remain as part of the venture’s earned surplus. As such, it is subject to devaluation in the local currency or expropriation by the host government in applicable circumstances.

Not all strategic alliances make a profit; some, even after the start-up phases, suffer a loss. Provision also should be made for such circumstances. Continuous annual losses could constitute grounds for termination. But short of that, are the strategic partners to be required to inject new capital?
Or can the shortfall be raised by more borrowing? This is a sensitive issue. A foreign investor will be unwise to commit to further capital investment in the event of losses, unless required by the SAC. Its negotiating position with the local partner and the host government will be much stronger if there is no contractual obligation to do so and the threat of termination and withdrawal hangs over the resolution of the issue. Investors in a loss-making venture have to face the facts of life. If they do not inject more capital, the venture will fold, and they will have to write-off their investment.

It is also important that the parties to a strategic alliance agree on how the profits and/or losses of the strategic alliance/joint venture are to be determined. In other words, basic accounting standards may be necessary to be provided for in the SAC.

The SAC should also include an agreed-upon authorization policy governing the expenditure of capital and the incurrence of expenses. This controls the activity of the joint venture’s managers internally but, by delegation of authority, avoids the need for day-to-day management problems to be handled by the Board of Directors.

This issue is very important, not only in ventures in less-developed countries, but in oil and gas ventures where expenditures can be huge and capital equipment costly. In the event of an accident on a drilling platform, immediate decisions must be made which can total hundreds of thousands of dollars of expenditure. The platform manager cannot summon the Board of Directors or operating committee to authorize such expenditure when oil is leaking into the ocean. He needs an existing delegated authority. Consequently, authorization policies for oil consortia are usually complex and controversial in the negotiation.

Audit rights are particularly important to passive partners, e.g. the non-operating partner in an oil exploration consortium. Where possible, such partners’ internal auditors should have access to the records of the venture. This saves money, and they may be more experienced in the business. Otherwise, right of access by independent external auditors is necessary. Of course, where the partner is happy with the venture, it may not need to exercise its audit rights.

Finally, for its own tax and auditing purposes, each strategic alliance partner will want access to the joint venture’s records. These records would
include not only accounting records but also operational, e.g. seismic data in oil exploration, so that all partners can judge the viability of the strategic alliance’s business.


The SAC also must specify the strategic alliance/joint venture’s relationship with its strategic partner participants. Will the joint venture entity compete with one or more of the partners in the world’s markets? Will any of the partners compete with it in its local market? This is a very sensitive issue, both for less-developed countries and administrators of antitrust regulations as well as the partners themselves.


Parties entering into a SAC should clearly spell out the ways in which they will be permitted to terminate their SAC. Quite frequently, expensive ordeals endured by parties terminating a SAC could have been avoided had explicit provisions been included in the SAC for the winding down and termination of the joint venture arrangement covered by the SAC.

The creation and breakup of a strategic alliance/joint venture is often described in marriage-like terms and, similarly, the SAC functions much like a prenuptial agreement. Some strategic alliance participants have argued that termination provisions contained in a SAC promote the use of dissolution to deal with problems that could have been handled through constructive negotiation; accordingly some strategic alliance partners or joint venture participants, especially those with foreign government control or ownership, may flatly refuse to include them. Experience has shown, however, that strategic alliances function more smoothly if well thought out and coherent termination provisions are included in the SAC. Of course, for strategic alliance partners entering into a joint venture arrangement whose existence from the outset is limited to a specified period of time or until the occurrence of certain events, termination discussions should be in the forefront of negotiations.

When strategic alliance partners negotiate the termination provisions of a SAC, each will be concerned about their contributions to the joint venture covered by the SAC – capital, goods, inventory, technology and other intangibles, key employees, and maintenance of goodwill. Other
concerns commonly include the disposition of outstanding orders and back inventory, as well as the payment of outstanding loans. Moreover, the interests and potential concerns of state-run or state-controlled strategic alliance/joint venture partners tend to be broader, encompassing workers and other enterprises affected by the dissolution in addition to contribution concerns.

Termination provisions of a SAC will often specify a buyout period before the actual termination. A buyout is one of the easier ways for parties to withdraw from a strategic alliance/joint venture – provided that such a buyout is permitted under local law. Some assets, such as a foreign party’s expertise and local contacts, may not be transferable under applicable laws. Government approval may be required in some instances. Regardless, the accounting methods for determining the buyout price should be discussed in advance, as foreign accounting rules will often deviate significantly from the GAAP rules familiar to Americans.

One technique, sometimes called a “shoot out,” allows one strategic alliance partner participating in a strategic alliance/joint venture to offer to sell its interest in the joint venture at a price of its choosing – but if that price is refused, then the party offering to sell its interest in the joint venture has the right to turn the price around and buy out the other party at that same figure. Although such a method for termination seems fair and reasonable, where there is a great difference between the economic resources of the participating parties or where the strategic alliance/joint venture cannot operate without one of the parties, this solution does not work that well. This may especially be the case in developing markets, where a foreign partner may have much more invested in contacts and marketing skills than in capital.

Many disputes in strategic alliances concern the need for further financing. One motive for entering a strategic alliance is to utilize another’s financial resources, but a financial imbalance between the strategic alliance partners can be a problem when more capital is needed. This, too, is hard to handle in advance by contract – the decision of whether (or how much) to contribute further to a strategic alliance/joint venture involves too many subjective variables to be reduced to a rigid contractual formula. Without a contract term in the SAC, though, one party may exploit the need for more money to terminate opportunistically or to extract unfair concessions.
from the other party or parties. Even if the parties participating in the strategic alliance/joint venture agree that more capital is desirable, one or more strategic alliance partners may be unable to pay their share.

If strategic alliance partners share the gains (or losses) of their joint venture in the same proportions as their contributions, and if termination will lead to division of the surplus of the strategic alliance/joint venture and of related business opportunities in the same proportions, termination of the strategic alliance/joint venture by a participating partner should not be considered a breach of its fiduciary duty, but termination of the strategic alliance/joint venture often does not meet these criteria. Sometimes strategic alliance partners make contributions to a joint venture at different times so that at a given time their capital accounts differ. A SAC may also allocate more of the early gains (or losses) to one partner. Also, on termination of the strategic alliance/joint venture partners may not share the assets pro rata. For example, one partner may have a liquidation preference or be able to purchase the strategic alliance/joint venture’s assets at a bargain price. Finally, termination of a strategic alliance/joint venture may enable one strategic alliance partner to exploit opportunities that properly belong jointly to the strategic alliance partners.

Strategic alliance partners should also consider whether to include a “termination for convenience” provision in their SAC, under which any strategic alliance participant can force a termination of the strategic alliance/joint venture. Termination for convenience may be appropriate after a set period of time, such as five years. The SAC should also provide an affirmative obligation for each strategic alliance participant not to take any actions that would terminate the strategic alliance/joint venture in violation of the other provisions of the SAC.

Where the strategic alliance/joint venture is for an indefinite period, one of the strategic partners may wish to sell its interest in the joint venture to a third party or be unable to continue. If that partner sells to a third party, clearly the new partner must be acceptable to the remaining participant investors in the strategic alliance/joint venture. Often these other investor parties have a right of first refusal with respect to the departing party’s interest, so time limits for a party exercising such rights should be as limited as possible.
Termination of a SAC may, of course, occur even when the strategic alliance/joint venture is for an indefinite term. Obviously, breach of the SAC provisions by any strategic alliance partner may give the other non-breaching partners cause for terminating the joint venture. But, usually, the SAC also may be terminated where the strategic alliance/joint venture fails to live up to its expectations. For example, failure to make a profit for a certain period of years may be grounds for termination. Alternatively, the change of ownership or insolvency of a partner or his incapacity or death, in the case of a natural person, may be also be grounds for termination of the joint venture.

In cases where the introduction of a new strategic alliance partner into the joint venture may not be possible or desired, one partner may wish to continue the strategic alliance/joint venture rather than liquidate it. Some sort of formula valuation should be specified in the SAC to take care of such circumstances. An alternative is a valuation at the time of termination by an independent expert. This gives uncertainty to the partners at a difficult time and is an added complication to the termination of a venture which more often than not will result in legal proceedings or the threat thereof. A set formula in the SAC gives some better idea of what a buy-out price might be.


Regardless of the form of joint venture entity chosen by the strategic alliance partners to implement their strategic alliance, provision should be made with respect to the participants’ transfer of their joint venture interests and for the admission and withdrawal of strategic alliance participants to the joint venture. Typically, each participant will want to limit the other participant’s ability to transfer its interest. Frequently, however, each will be permitted to transfer freely its interest between itself and its wholly-owned subsidiaries, so long as no such transfer causes adverse tax consequences to the strategic alliance/joint venture or any of the other participants.

Third-party transfers ordinarily are more restricted. Sometimes such transfers are entirely prohibited, although such a provision may make it necessary for the strategic alliance participants to have the right unilaterally to unwind the joint venture. Alternatively, transfers to third parties may
be permitted only where the other participants have a right of first refusal to buy the interest to be transferred. A right of first refusal may apply either from the inception of the strategic alliance/joint venture or after a specified number of years during which no third-party transfers are permitted.

The ability to make transfers to third parties also is frequently limited by the establishment of specific objective criteria which a party must satisfy in order to qualify as an acceptable transferee. These criteria might include a required minimum net worth for a transferee, a requirement that the transferee not be a competitor of the non-transferring venturer, a requirement that the transferee not be owned or controlled by foreign persons (particularly if the venture has government contracts), or any number of other matters.

When preparing transfer restriction provisions, it is important always to consider indirect transfers, by virtue of a change in control of a participant. A change in control may be defined in many different ways and can include events such as a transfer of stock in a venturer by the ultimate parent corporation of the strategic alliance partner, or a change in management in the strategic alliance partner in which specified individuals cease to be in control.

[16] — Defaults and Remedies.

Although strategic alliance partners entering into a joint venture frequently do not think it is necessary to provide in advance for the consequences of a default of one of the strategic alliance/joint venture participants, the SAC should clearly specify each of the events constituting an event of default by a strategic alliance/joint venture participant, and the remedies of the other strategic alliance/joint venture participants upon a default. The participants’ obligations to each other and to the strategic alliance/joint venture will be many and various, and may extend beyond funding and non-competition to such things as the provision of goods, services or personnel to the joint venture. A default in any of these obligations may be deemed a default under the SAC.

The strategic alliance participants may desire to structure disincentives to default, such as liquidated damages or other “penalty” provisions. Moreover, it may be advantageous for the non-defaulting strategic alliance
participants to have the right to buy out the interest of a defaulting participant, or to cause the dissolution of the strategic alliance/joint venture entity, in addition to any damages resulting from the default. A purchase price for a buy-out provision of this type is frequently a specified discount from the fair market value of the interest. Fair market value may be determined by a pre-established formula, by agreement of the parties, or through a determination by a third party.


Normally, the SAC and the ancillary agreements associated with a strategic alliance should all be construed under the same set of legal rules. Often these are the laws of a country with which none of the strategic alliance partners or the alliance/joint venture has a connection, but has been chosen for reasons of neutrality, real or apparent.

[18] — The Approval Stage.

Before and around the time of execution of the SAC implementing a strategic alliance, a number of approvals and permits may be required. Certainly, the approval of the participating parties’ Boards of Directors or equivalent should have been obtained by that time. It is usual upon execution to include as an exhibit to the SAC a certified copy of a Board of Director’s resolution approving the transaction in general terms. This is the better way to proceed.

The alternative is to make execution of the SAC conditional upon approval by the Board of Directors of each of the participants. Where all of the parties to a strategic alliance/joint venture have acted in good faith this presents no problem, but it may be that a negotiator has failed to determine precisely the scope of his negotiating authority. Then the Board of Directors of one or more of the parties participating in the strategic alliance may wish to impose new terms on the other parties or be unwilling to accept concessions made by the negotiator representing such entity during the course of the negotiation, or the Board of Directors of one of the strategic alliance participants may simply be unable to resist having one more bite of the cherry and seek some further improvement in terms.
[19] — Legal Concerns.

There are a number of United States laws that will apply to any strategic alliance/joint venture arrangement involving a United States citizen even if the participants to a strategic alliance/joint venture designate another jurisdiction’s laws as controlling. The most likely to occur in the transnational joint venture context are the Foreign Corrupt Practices Act (FCPA), anti-boycott laws, and export control laws. Depending on the specific nature of the strategic alliance/joint venture, the parties may also need to be concerned with the antitrust, employment, environmental, and securities laws of the United States.


There will be a number of clauses in a SAC specific to that particular venture and no other. They may relate to actions the strategic alliance partners will carry-out, the performance of a partner’s know-how or equipment, the availability of local incentives or foreign exchange, the applicability of local laws or the happening of certain events, conditions precedent to the implementation of the venture or conditions subsequent to its implementation giving rise to grounds for termination or claims for damages. Such clauses are vitally important to the venture and its partners and must be drafted in as much detail as possible.

It may be appropriate in a SAC to provide for the limitation of liability of the strategic alliance partners or a partner. This is particularly true where one partner, for example, is responsible for the production aspects of the strategic alliance/joint venture. In such cases, the limitation-of-liability provisions should be repeated in the ancillary agreements.

Many “passive” investors who participate in strategic alliance/joint ventures resist limitations of liability by operators or the like. But all joint ventures including those involving a strategic alliance arrangement are benefit- and risk-sharing exercises. If the passive strategic alliance partner went into it alone, it would bear all the risk, including the risk of its own operatives’ negligence. Usually, the provision of mutual insurance coverage is sufficient to cover these kinds of situations, and a limitation of liability for a partner’s performance is, in fact, acceptable. Where the strategic alliance/joint venture is a corporation with limited liability, that is probably sufficient. But in a partnership, the partners are jointly and
severally liable so that provision for indemnities and the like also must be considered.


Force majeure provisions are usually included in a SAC to protect the strategic alliance/joint venture participants from claims related to a failure to perform on the agreement because of “acts of God” or other specified, uncontrollable forces such as political upheaval or other forms of insurrection.

The drafting of the force majeure clause should not be treated as routine and blanket language, or it may not provide the type of protection desired. For example, whether a standard force majeure clause would cover the imposition of U.S. trade sanctions is unclear. Another example where specific language may be necessary is in the context of labor stoppages. While it remains unclear whether or not labor strikes can be included in a force majeure clause, some success has been made where the phrase “work stoppages” has been used.


The parties participating in a strategic alliance/joint venture must decide on the law that will govern not only the strategic alliance venture itself but also any disputes that arise between the participants related to the venture. While the strategic alliance/joint venture entity will most likely have to be organized under local law, the parties may desire to have their SAC governed by the law of another country. The laws in some countries, especially civil law countries, differ significantly from the law of the United States and that of other common-law countries. In order to select the laws of a different country, the parties generally need only show some relationship between the SAC and the law selected.

In some countries, however, the parties to a strategic alliance/joint venture may be restricted to local law for all disputes. These restrictions are particularly common in, but certainly not limited to, Latin American countries. Local public policy may also override a choice of law clause in a SAC.

Some laws of the United States may also be mandatory regardless of any other law chosen by the parties. For example, all strategic alliance/
joint ventures will be subject to many export controls and sanctions imposed by the United States on some other countries as well as antiboycott rules, and the FCPA. The parties may also be subject to United States’ laws on antitrust, labor, the environment, and securities.

Even where the parties to a strategic alliance/joint venture have entered into an enforceable choice-of-law clause in their SAC, local law may continue to apply in certain areas. These include importation, especially the importation of technology and personnel; antitrust; and other rules specific to the transaction, i.e., agency or distribution contracts, franchises, technology transfers, and joint ventures. Although the parties may not be able to contract around these local rules completely, they may be able to lessen the impact of these local rules by carefully drafting clauses after consulting with local counsel.

The parties to a strategic alliance/joint venture will also want to establish the forum for resolving any disputes arising out of their SAC or related events and actions. Many companies are reluctant to go to court in a foreign jurisdiction, fearing that the other partner could be given a “home field” advantage. Therefore, parties to a strategic alliance/joint venture usually wish to have all of their disputes settled by arbitration or another alternative dispute resolution method. When drafting an arbitration clause, it is important to consider whether the issue is arbitrable (local law may require resolution by a court) and whether the prevailing party will be able to enforce the award. Although the parties will be able to select the substantive laws governing the arbitration and may even be able to establish some of the rules governing the arbitration hearing, local law will continue to govern the arbitration in general (i.e., whether the local court will issue interlocutory relief or review the award).

If one of the parties to a strategic alliance/joint venture is a government entity, the parties will need to consider the prospect that sovereign immunity might affect the nongovernmental party’s right to enforce the SAC. Rather than relying on exceptions to the sovereign immunity doctrine adopted in the U.S. Sovereign Immunity Act, the non-governmental

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10 28 U.S.C. § 1330 et seq.
party may want to seek an explicit waiver of immunity from the governmental party.

[23] — Dispute Resolution.

[a] — Venue.

In many cases, the parties to an international strategic alliance/joint venture will be extremely reluctant to submit to the jurisdiction of the courts of the country where the joint venture activities are located. This makes particular sense where the countries being invested in by the joint venture have commercial legal systems that remain at a low level of development. Because foreign court proceedings are conducted in the host-country’s language, there is also a risk of translation problems arising.

Some form of alternative dispute resolution is, therefore, common in strategic alliance/joint venture transactions, although some joint venture participants have also successfully specified use of the courts of third countries (countries of which no interested party is a national) that have developed commercial legal systems. Of course, it is far better to resolve these venue issues at the negotiation phase of a SAC – before any actionable disputes erupt.

[b] — Choice of Law.

Although it is hard to anticipate the precise nature of all of the future controversies which could arise under a SAC or strategic alliance/joint venture arrangement, the stability of legal and business planning is enhanced when an established body of commercial law is specified in the SAC. In the arbitration context, subject to some mandatory provisions of national arbitration law, participants to a strategic alliance/joint venture can generally choose the substantive law that will be applied.

While the relatively sophisticated body of United States commercial law is a natural preferred choice for U.S. companies participating in a strategic alliance, it is sometimes not feasible to get a foreign party to agree to this. The laws of Switzerland, Sweden, and Britain are popular alternative choices as governing laws for an international arbitration clause, and the gradual harmonization of many foreign commercial laws more and more means that similar legal conclusions can be reached on many issues.

Arbitration fits well into the needs of transnational strategic alliance/joint venture participants for a variety of reasons – the cost of litigation in the United States tends to intimidate foreign joint venture participants, huge court backlogs and undeveloped legal systems scare off Americans from using courts in many foreign countries, and both parties tend to fear a “home court” advantage going to some other party involved in the joint venture. Arbitration also provides a very useful neutral ground for handling disputes between strategic alliance/joint venture participants from different cultural backgrounds operating under different legal systems.

Efficiency, both in time and costs, is also promoted by the use of less-formal procedures using fewer restrictions on the discovery process and presentation of evidence. Privacy is also promoted, and this can be a key factor where none of the participants to a strategic alliance/joint venture wishes to have their dispute (or related facts) aired in public.

[a] — Scope of the Arbitration Clause.

Participants in a strategic alliance/joint venture may well not want all of their disputes to require formal arbitration, and as a practical matter, a functional strategic alliance relationship will require a degree of cooperation such that minor issues will be handled informally. Mediation can be used as a first step before arbitration, as this may be a way to smooth out wrinkles more amicably. Careful drafting elsewhere in the SAC can provide valuable guidance for the implementation of the strategic alliance. Generally, it can be dangerous to limit the scope of the arbitration; this can lead to enforcement problems because the losing party may claim the arbitrator overstepped his or her authority. Furthermore, a decision to go with arbitration should be entered into wholeheartedly – specifying the courts as a fallback method for resolving disputes could undermine the arbitration agreement.

The specific language used in the SAC will determine what types of disputes are covered and how appeals are handled. “Arising out of” will only cover contract disputes. “Connected with” or “related in any way to,” however, will cover most if not all claims, including torts and fraudulent inducement. “Exclusively and finally” in England prevents all court review; in the United States, however, courts would remain capable
of reviewing the decision on the grounds provided by the New York Convention or the Federal Arbitration Act as those defenses are limited and fundamental.

[b] — Applicable Arbitration Rules.

Parties should select rules of arbitration, and this can depend upon what country each strategic alliance/joint venture party is from. For example, it is easier to get Russian and Chinese parties to agree to arbitration under the Stockholm Chamber of Commerce (SCC) rules than to those of the American Arbitration Association (AAA). Other commonly used rules for international arbitration include those of the International Chamber of Commerce (ICC), the U.N. Commission on International Trade Law (UNCITRAL), or the London Court of International Arbitration (LCIA).

c] — Institutional or Ad Hoc Arbitration.

Institutional arbitration is that which is administered through a preexisting organization established specifically for that purpose, and the International Chamber of Commerce, headquartered in Paris, is a good example. Other institutions include the AAA in New York, the LCIA, and the SCC. Ad hoc arbitration is arbitration in which the parties agree to follow a chosen set of procedures which are not carried out under the administration of an arbitration organization. This decision will affect the selection of rules because institutions will generally want to apply their own rules. However, rules suitable for ad hoc arbitration, such as the UNCITRAL rules, have also been used by arbitral institutions. Note that although ad hoc arbitration may be cheaper to administer, parties unfamiliar with this form of arbitration may welcome the structure and guidance offered by an arbitral institution.

d] — Selection of Arbitrators.

The strategic alliance partners to a SAC can have any number of arbitrators, although a single arbitrator or a panel of three arbitrators is standard. The choice between a single arbitrator or panel often depends on the amount of money at stake. A “breaking point” can be established to determine the number of arbitrators in relation to the amount in
controversy, *i.e.*, if the amount is less than $1 million, there will be only one arbitrator, but if it is more, there will be three. This is designed to ensure that the amount of money spent is proportional to the amount at stake. The contract should also specify whether the parties will select the arbitrators and how – or if – they will be selected by an institution; *i.e.*, the AAA. A common way to fill a panel of arbitrators is to have each party select one arbitrator and those two then select a third, “neutral” arbitrator.

If there are more than two parties to an arbitration, it may not be possible for each party to select its own arbitrator for a panel. Courts previously refused to force multiple parties to pick a joint arbitrator. However, the AAA and ICC have now amended their rules to provide that multiple parties must agree upon an arbitrator and, if unable to do so, the organization will appoint someone.

[e] — Special Skills and Qualifications.

If there are special skills that the arbitrator will need in order to handle the issues that may arise in a particular strategic alliance/joint venture, such a requirement should be clearly stated in the arbitration clause contained in the SAC.

The general rules of the ICC and AAA require impartiality and independence. The parties to a SAC may want to obtain a statement from the arbitrators specifically agreeing to act impartially and independently. They may also want to adopt the International Bar Association’s rules of arbitrator ethics, which are not binding unless specifically adopted.

[f] — Language of the Arbitration.

Absent a designated language of arbitration, several rules of arbitration provide for the arbitrators to select the language. Generally, the language will be that of the country in which the arbitration is held. This can result in significant translation costs as well as fundamental communication problems.

[g] — Discovery.

Most international arbitration rules allow for little or no discovery. The International Bar Association rules provide only for the exchange of
(i) documents to be relied upon by the parties at the arbitral hearing, and
(ii) documents that can be identified with specificity that have been
exchanged with third parties. The parties may broaden the scope of
discovery, but must do so explicitly. Most foreign countries do not permit
discovery of documents by category, as is allowed in the United States.
Therefore, the parties must state that discovery will be allowed by category
if that right is desired. Also, most countries do not require that the
arbitrators respect the rules of privilege and this must also be spelled out
in the SAC.

[h] — Judicial Intervention.

Often, one party to the arbitration will want an injunction or some
other type of interim measure to prevent a continuing violation during the
dispute resolution process. The SAC should specify whether interim
measures will be allowed since most courts are split on the issue. The
SAC should state whether seeking interim measures will waive the right
to compel arbitration.

The parties should also consider whether an appeal of the arbitrators’
decision will be permitted. Appeals will generally be governed by the
law of the country where the arbitration hearing took place. The parties
can, however, broaden or narrow that review. A standard clause to broaden
review recites that the court will review “errors of law or fact by the
arbitrators.” U.S. courts are reluctant to allow the parties to preclude any
review; most will look for fundamental due process violations even if the
SAC provides for no review.


Confidentiality is imposed upon arbitrators by the rules of the various
arbitration administering organizations. None of the rules, however,
impose confidentiality obligations upon the parties. The contract should,
therefore, address this issue in their SAC as it relates to

• the fact that arbitration is occurring;
• the details of the award;
• historical documents; and
• documents prepared for the arbitration.
Because of the central role that intellectual property has in many strategic alliance/joint ventures, the protection of it also plays a central role in the creation of most strategic alliance/joint ventures. Many concerns about intellectual property arise if the strategic alliance/joint venture relationship breaks up. Parties who have contributed or licensed this sort of intangible property to the strategic alliance/joint venture will be concerned about its return. However, in research and development strategic alliance/joint ventures or other situations where a joint venture holds the rights to intellectual property, there may be problems with regards to the post-breakup ownership of intellectual property unless this is addressed clearly in the SAC. One approach is for parties to draft their SAC to permit termination upon a change in control of the licensee, upon failure to meet specific marketing or development goals, or upon certain changes within the laws of the licensee’s home country.

Although many countries have made great strides toward reaching international intellectual property norms through the implementation of the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), there are still many considerations that strategic alliance joint venture parties who are United States’ citizens should factor in when operating overseas. For example, even under TRIPS, intellectual property will only be protected if the person lawfully in charge of it has taken reasonable steps to keep it secret. In a strategic alliance/joint venture, this means that the licensor must obtain an agreement from the licensee to also keep the information secret. Licensees will most likely resist such a requirement on the ground that they will need to be able to release the information to their customers, or a government.

Furthermore, just because a country has intellectual property laws on the books does not mean that these laws are or can be effectively enforced. Market forces are such in many developing economies that it is extraordinarily lucrative to copy and sell cheaply an item that is prohibitively expensive within the marketplace. Even where a national government may try to enforce its laws, cooperation from provincial and local governments may not be forthcoming.
Despite the TRIPS agreement’s role in promoting some degree of uniformity, local counsel may play an important role in gaining protection for intellectual property involved in a strategic alliance/joint venture project. Note that unlike the U.S. system that gives rights to the “first to invent,” most countries give rights based on a “first to file” system. Some countries, such as France, grant a patent upon “registration” without investigating the patentability of the invention — validity of the patent is only looked into when infringement is alleged. This differs from the United States and some other countries that use “examination” systems by which the applicants must show their inventions are novel, useful, and nonobvious before a patent will be granted.

As always, confidentiality provisions are key during the relationship and the negotiation process. However, strategic alliance partners participating in joint ventures should also be concerned with proprietary information leaking out through departing venture employees. Some United States companies operating overseas have noted that noncompetition agreements with all joint venture employees are useful in industries where technology changes rapidly — after three or so years, the former employees’ knowledge may be useless to a competitor. However, because some countries do not enforce or recognize noncompetition agreements, other means may be necessary to protect the information.

§ 2.09. Conclusion.

The need for businesses to innovate continuously and rapidly in the new high-technology global economy has precipitated a proliferation of strategic alliances on a global basis. Strategic alliances fall into many categories — including joint ventures, franchises, dealerships, distributorships, licensing arrangements, and “strategic investments” — and by the remarkable variety of relationships within each of these categories. This development presents the law with what is in effect a new form of business entity. Although most partners in strategic alliance/joint ventures are themselves business firms and generally competent to defend their own interests, the complexity of strategic alliance/joint ventures makes it inevitable that the SACs by which they are created will exhibit large gaps. Because of these gaps, the parties participating in
strategic alliance/joint ventures must rely on trust and cooperation to succeed. Fear that one’s partner can act opportunistically without penalty undermines trust and cooperation.

Strategic alliances offer many benefits to both large and small companies alike. As many companies have learned, however, strategic alliances are subject to certain problems and if not properly established may prove more costly than beneficial. In order to avoid problems it is helpful to seek legal counsel beforehand rather than after a SAC is signed. With proper guidance and focus, strategic alliance/joint ventures are a tool companies can greatly benefit from to ensure growth and secure financial investment whatever the economic climate may be.
Attachment 1
Formation of a Strategic Alliance

To help a company identify the areas in which it can most benefit from a strategic partnership, a team of representatives from the company and its potential partner(s) should list and prioritize the core services each entity currently provides. Once these key services have been prioritized, the next step is for the Strategic Alliance Team to identify the qualifications of personnel needed for providing the core services. The company should then identify its personnel with the appropriate qualifications. For the services the Team determines will be provided by partner(s), partner(s) will compile a schedule of fees based on staff qualifications and the typical duration of the engagement, as determined by the company.
Attachment 2

This diagram shows the flow of the steps in developing, implementing and continuously improving an effective strategic alliance.

- Phase 6: Full Implementation of the Partnering Alliance to its fullest potential including possible equity participation
- Phase 1: Management of the strategic alliance
- Phase 2: Formation of a strategic alliance team
- Phase 3: Development of a strategic alliance team
- Phase 5: Monitoring the pilot project
- Phase 4: Piloting the strategic alliance

CUSTOMER SATISFACTION

#1 PLAN

#2 DO

#3 CHECK

#4 ACT
## Attachment 3
### Comparison of Different Types of Corporate Entities Commonly Used in Strategic Partnerships

<table>
<thead>
<tr>
<th>Entity</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
</table>
| Joint Venture/General Partnership | • pass-through taxation (most cases taxed to each venturer rather than at entry level)  
                                 | • special allocation of revenues and deductions permitted                     | • personal liability of each venturer for all debts and liabilities of venture  
<pre><code>                             | • no franchise taxes                                                         | • death or withdrawal of a venture usually dissolves the venture               | • venture may terminate (for tax purposes) if more than 50% of the interest in the venture is transferred within a 12-month period |
</code></pre>
<p>| Limited Partnership            | • pass-through taxation (most taxes taxed to each partner than at partnership level) | • typically managed only by general partner                                   | • personal liability of general partner                                       | • possible fiduciary duties owed by general partner to other partners and to the partnership |
|                                                                             | • partnership may terminate (for tax purposes) if more than 50% of interest in the partnership is transferred within a 12-month period | • death or withdrawal of a general partner usually dissolves partnership      |</p>
<table>
<thead>
<tr>
<th>Entity</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
</table>
| C Corporation | • shareholders usually not liable for the debts and liabilities of the corporation  
• centralized management (control and corporate governance through an elected board of directors)  
• generally no shareholder fiduciary duties  
• flexible exit strategy (merger, consolidation, tax-free reorganization, etc.) | • double taxation (corporation taxed on its taxable income and shareholders are taxed on dividends)  
• special allocations of revenues and deductions usually not permitted  
• subject to franchise taxes |
| S Corporation | • taxed like a partnership (pass-through taxation to shareholders)  
• shareholders not usually liable for debts and liabilities of the company  
• centralized management (control and corporate governance through an elected board of directors)  
• generally no shareholder fiduciary duties  
• flexible exit strategy (merger, consolidation, tax-free reorganization, etc.) | • only 35 shareholders permitted  
• usually only one class of stock permitted  
• shareholders must usually be individuals (residents), estates and certain trusts (no corporations or nonresident aliens)  
• must be a domestic corporation  
• cannot own 80% or more of an active subsidiary and cannot be a member of an affiliated group  
• special allocations of revenues and deductions usually not permitted  
• subject to franchise taxes |
<table>
<thead>
<tr>
<th>Entity</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited Liability</td>
<td>• taxed like a partnership (if not properly structured)</td>
<td>• if not structured accordingly, IRS may re-categorize entity as a corporation for tax purposes</td>
</tr>
<tr>
<td></td>
<td>• shareholders usually not liable for the debts and liabilities of the company</td>
<td>• may not be recognized as a limited liability company in states that have not adopted limited liability company statutes</td>
</tr>
<tr>
<td></td>
<td>• special allocation of revenues and deductions permitted</td>
<td>• may have termination (for tax purposes) of the company if more than 50% of interest in the partnership is transferred within a 12-month period</td>
</tr>
<tr>
<td></td>
<td>• flexible management (can be managed by members like a partnership or managed by managers like a corporation)</td>
<td>• may not have the tax-free reorganization exit strategies available to the same extent that a corporation would</td>
</tr>
<tr>
<td></td>
<td>• does not have many of the limitations of an S corporation (e.g., not limited to 35 owners, can own an 80% active subsidiary, can have different classes of owners, can have corporate members, etc.)</td>
<td>• may be subject to state taxes typically assessed against corporations (such as franchise taxes)</td>
</tr>
</tbody>
</table>
Attachment 4
Types of Business Combinations

**Merger (Full)** – complete legal joining together of two (or occasionally more) separate companies into a single unit; in legal terms only one entity survives.

**Merger (Partial)** – only certain units of one or both companies are involved in the merger. (For example, Chevron’s gas unit merges with NGC, Chevron ends up owning about 25 percent of NGC while NGC operates all of Chevron’s gas business.)

**Merger (Vertical)** – may be achieved by combining two companies in different areas of the gas industry or through the combination of two or more entities in the same industry.

**Merger (Horizontal)** – two similar entities merge to extend geographic coverage or increase market share: examples include combinations of pipelines or especially local distribution companies.

**Acquisition** – the purchase of one company by another, or the purchase only of certain assets of one company by another. Unlike a hostile takeover, an acquisition is agreeable to both parties. (At times, the term may be used synonymously with merger.)

**Hostile Takeover** – acquisition of one company by another despite the opposition of the target company.

**Divestiture** – involve the sale or trading of assets. Planned divestitures may be undertaken as a part of corporate reorganization, to reduce debt, to re-deploy capital, or to eliminate underperforming or noncore lines of business. Divestitures may also be required as the result of new or changing regulatory circumstances. Divestitures may also be required as a condition in a pending merger or other combination (for example, to mitigate market power).

**Active Salvage** – a company with serious financial problems forced to seek a merger, find a buyer, or declare bankruptcy. Selling of assets (perhaps even the entire company) with the aim of salvaging some value for the troubled company.
Joint Ventures and Alliances – combinations of two or more corporations to cooperate for specific purposes but falling short of a merger. Such arrangements may be rather informal and general or very specific even limited to a single project or purpose. Joint ventures may involve the formation of a separate company that in turn acquires others and develops new products and services on its own. Joint ventures may be open to others by selling shares (after the initial combination). Joint ventures have been used for decades, particularly in situations where high capital costs or risk are prevalent, such as pipeline construction and exploration and development of difficult fields such as offshore. Joint ventures have become common among nonregulated subsidiaries and affiliates with the formation of marketing companies, in telecommunications, software, and energy management.

Foreign Investment – may be in the form of acquisition, merger, or joint venture. Domestic companies may invest outside the United States to get into nonregulated business as markets privatize. Foreign companies also invest in the United States to gain entry into the large U.S. market and into a stable economic environment.
Attachment 5
Strategic Alliance Success Factors
An alliance strategy creates the context for the success of individual partnerships, as explained in this article. In addition, ten factors pertaining to the deal itself are critical.

- **Have a clear strategic purpose.**
  Alliances are never an end in themselves – they ought to be tools in service of business strategy.

- **Find a fitting partner.**
  This means a partner with compatible goals and complementary capabilities.

- **Specialize.**
  Allocate tasks and responsibilities in the alliances in a way that enables each party to do what it does best.

- **Create incentives for cooperation.**
  Working together never happens automatically, particularly not when partners were former rivals.

- **Minimize conflicts between partners.**
  The scope of the alliance and of partners’ roles should avoid pitting one against the other in the market.

- **Share information.**
  Continual communication develops trust and also keeps joint projects on target.

- **Exchange personnel.**
  Regardless of the form of the alliance, personal contact and site visits are essential for maintaining communication and trust.

- **Operate with long-term horizons.**
  Mutual forbearance in solving short-run conflicts is enhanced by the expectation of future gains.

- **Develop multiple joint projects.**
  Successful cooperation on one project can help partners weather the storm in less successful joint projects.

- **Be flexible.**
  Alliances are open-ended, dynamic relationships that need to evolve in pace with their environment and in pursuit of new opportunities.