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Zbigniew M. Slupinski,
Wilmer, Cutler & Pickering, Washington, D.C.

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The New Polish Joint Venture Law

Zbigniew M. Slupinski*

I. INTRODUCTION

Eastern European countries historically exhibited a reluctance to open their centrally planned economies to the potentially uncontrollable influences of foreign capital investment. Yet, a general shift in attitude has occurred in recent years, from outright hostility toward foreign investment, to a view of the foreign trading partner as a necessary evil, to the hope and illusion that investment overtures will quickly generate western capital and accelerate the transfer of needed development technology. While the general change in attitude reflects a growing acceptance of market driven economic development, the success of foreign capitalized enterprises in promoting economic development depends on numerous factors, including the relative commitment of investment partners, the underlying political climate,

* Zbigniew M. Slupinski is an associate with Wilmer, Cutler & Pickering, Washington, D.C., and counsel to a law firm in Cracow, Poland. He is a lawyer educated at Jagiellonian University Law School in Cracow, Boalt Hall School of Law at the University of California at Berkeley, and at Harvard Law School. Prior to joining Wilmer, Cutler & Pickering, the author was a visiting scholar at Columbia University. The paper upon which this Article is based was written in connection with an international law research seminar given by Professor Detlev Vagts at Harvard Law School in 1988-89. The author wishes to express his gratitude to Professor Detlev Vagts of Harvard Law School, John N. Hazard of Columbia Law School, and Melinda A. Rockwell of Pannell Kerr Forster for their encouragement and advice. Any errors, omissions or other imperfections are, of course, the author's own responsibility. Mr. Slupinski is the author of a handbook entitled *FOREIGN INVESTMENT LAW IN POLAND* to be published by Kluwer Academic Publishers in the Fall of 1990.

and the enactment of well-drafted foreign investment legislation.

Foreign investment first appeared in Poland's socialist economy in 1976. At that time, prospects for further economic development in the absence of foreign capital infusions were very limited due to the constraints of Poland's highly centralized command economy. The revolutionary political events of 1989, and those leading up to them, have since heralded an increasingly positive attitude in Poland toward private investment. Now, the bold economic reforms adopted in December 1989¹ manifest an increased commitment of the new government to the creation of an open market economy and a more favorable climate for foreign capital investment. This Article analyzes the major aspects of the new joint venture legislation in Poland. The analysis suggests that the Polish Joint Venture Law is likely to significantly improve the foreign investment climate in Poland.²

Like Poland, the economies of Hungary, the Soviet Union, the German Democratic Republic, and Czechoslovakia are undergoing some of the greatest changes since their modern foundations. Other countries such as Bulgaria and Romania are going through substantial political changes, and have expressed their intentions to introduce some market-oriented elements in their economies. While scholars and practitioners are still analyzing the concept of foreign investment in economies dominated by a public sector, one important feature of the recent political and economic changes in Eastern Europe is the increasing significance being attached to joint ventures organized with foreign capital.³ The legal regime of these joint ventures must

1. *National Economies: Poland Introduces Bold and Wide-Ranging Economic Reforms*, 19 I.M.F. SURV. 57-62 (Feb. 19, 1990). See also Greenhouse, *Polish Senate Approves Program to Introduce Market Forces to Economy*, N.Y. Times, Dec. 30, 1989, at A1, col. 1 [hereinafter Greenhouse, *Market Forces*]. The economic reform program was prepared by the Solidarity-led government and was passed by the Polish Parliament in December 1989. The program consists of new or radical amendments to laws in the following areas: (a) taxation; (b) credits; (c) labor wages; (d) labor dispute resolution; (e) employment; (f) customs; (g) environmental protection; (h) foreign currency exchange; (i) banking; (j) foreign investment by small businesses; (k) joint ventures; (l) Polish National Bank; and (m) financial aspects of state enterprises. *Id.*

One of the goals of the new government is a radical change in forms of ownership. The proposed version of the new law on privatization proposes mandatory restructuring of all enterprises into corporations, partnerships, and cooperatives. See Lloyd, *Warsaw Sends Privatisation Law to Parliament*, Fin. Times, Apr. 5, 1990, at 3, col. 1 [hereinafter Lloyd].

2. USTAWA O DZIAŁALNOŚCI GOSPODARCZEJ Z UDZIAŁEM PODMIOTÓW ZAGRANICZNYCH [LAW ON ECONOMIC ACTIVITY WITH FOREIGN PARTIES], DZIENNIK USTAW, No. 41, § 325 (1988), English translation published in 28 I.L.M. 1518 (Nov. 1989), amended Dec. 28, 1989, DZIENNIK USTAW, No. 74, § 442 [hereinafter JOINT VENTURE LAW].

3. The number of joint ventures registered in East European countries is growing very quickly. According to the Financial Times, there were about 3,300 joint ventures by the end of 1989. This number was also cited by the Geneva-Based United Nations Economic Commission

be integrated into "socialist" legal systems⁴ which are significantly different from their western counterparts.⁵ After the recent failure of socialist economic integration within the Council of Mutual Economic Assistance (CMEA),⁶ the CMEA countries adopted laws facilitating the activities of foreign companies organized as joint ventures.⁷ With the Soviet Union's recent adoption of joint venture legislation,⁸ the integration of western capital investment regimes into

for Europe. See McDermott, *Joint Ventures with East Europe Pass 3,300 in 1989*, Fin. Times, Jan. 19, 1990, at 6, col. 2. A careful observer of the this field must be cautious, however, to distinguish between the joint ventures registered and those which are in fact operating. For statistics on 1988 and 1989, see research papers sponsored by the United Nations Economic Commission for Europe entitled *East-West Joint Ventures: Economic, Business, Financial and Legal Aspects* (1988); and *East-West Joint Venture Contracts* (1989).

4. For an introduction to the law in socialist countries, see generally M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS, TEXT, MATERIAL AND CASES* 672-968 (1985) [hereinafter *COMPARATIVE LEGAL TRADITIONS*]; R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 143-285 (1985); K. ZWIEGERT & H. KÖTZ, 1 *AN INTRODUCTION TO COMPARATIVE LAW* (1977); J. HAZARD, *COMMUNISTS AND THEIR LAWS - A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES* (1969)[hereinafter *HAZARD*].

5. There is a discussion among American scholars on the meaning of the term *socialist law*. Two positions have been shown. The first is presented by Professor Hazard in *HAZARD, supra* note 4, who gives us a list of those elements which are characteristic of socialist law and which in fact make law *socialist law*. Professor Berman, in *What Makes "Socialist law" Socialist?*, *PROBLEMS OF COMMUNISM* (Sept.-Oct. 1971), emphasizes the religious aspect of socialist law. Christopher Osakwe provides a different view. He examines infrastructural, methodological, ideological, and theological aspects of socialist legal systems and finally classifies socialism as a part of western legal tradition. See *COMPARATIVE LEGAL TRADITIONS, supra* note 4. For a recent discussion of this topic, see *Symposium: An Examination of the Unity and Diversity within the Socialist Legal Family*, 61 *TUL. L. REV.* 1257 (1987); Quigley, *Socialist Law and the Civil Law Tradition*, 37 *AM. J. COMP. L.* 781 (1989).

6. At their meeting in Sofia on January 9-10, 1990, leaders of the Comecon member countries called for a renewal of the economic system within the Council for Mutual Economic Assistance. Since that time, most of COMECON's programs have been abolished and a number of steps taken toward dismantling the organization. See Colitt & Lloyd, *COMECON Takes First Steps to Dismantle Itself*, Fin. Times, Mar. 28, 1990, at 1. For a description of the previously established framework, see generally Piontek, *Common Economic Entities of COMECON Member Countries*, in *ANGLO-POLISH LEGAL ESSAYS* (W. Butler ed. 1982); CMEA - INTERNATIONAL SIGNIFICANCE OF SOCIALIST INTEGRATION (M. Mikulski ed. 1982). In the late 1970s, the CMEA countries enacted a number of specific foreign investment instruments, including the joint venture, on the basis of inter-governmental agreements. See generally Butler, *Socialist Transnational Entities Sui Generis*, J. Bus. L. 137 (1979).

7. See generally *LEGAL ASPECTS OF DOING BUSINESS IN EASTERN EUROPE AND THE SOVIET UNION* (D. Campbell ed. 1986); Buzescu, *Joint Ventures in Eastern Europe*, 23 *AM. J. COMP. L.* 407-48 (1984); Grzybowski, *Capitalist Investment in the Soviet Union, Past and Present*, *OSTEUROPA RECHT* 23, 23-34 (Mar. 1989); *JOINT VENTURES IN HUNGARY* (T. Sugar ed. 1986); V. TADJER, *JOINT VENTURES IN BULGARIA* (1981); Rajski, *Legal Aspects of Foreign Investment in Poland*, in *Y.B. SOCIALIST LEGAL SYSTEMS* 159-68 (W. Butler ed. 1986); Piontek, *The Legal Regime of Foreign Direct Investment in Socialist Countries*, in *Y.B. SOCIALIST LEGAL SYSTEMS* 279-331 (W. Butler ed. 1987); A. BURZYNSKI, *A FOREIGN INVESTOR'S GUIDE TO THE LAW OF 23RD APRIL 1986 ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION* (1986).

8. For recent reviews of Soviet joint venture developments, see Note, *The New Soviet Joint Venture Law: Analysis, Issues, and Approaches for the American Investor*, 19 *LAW & POL'Y INT'L*

the socialist system is almost complete.⁹

Investment by western companies in Eastern Europe¹⁰ began in Yugoslavia in 1967,¹¹ followed by Romania in 1971,¹² Hungary in

Bus. 851 (1987); Smith, *U.S. - Soviet Joint Ventures: A New Opening in the East*, 43 BUS. LAW. 79, 80 n.7 (1987); Dean, *Updating Soviet Joint Venture Law*, 23 COLUM. J. WORLD BUS. 53 (1988); E. THEROUX & A. GEORGE, JOINT VENTURES IN THE SOVIET UNION: LAW AND PRACTICE (1988) [hereinafter Theroux & George].

9. Although there were earlier attempts to reform the socialist system, the reform process has accelerated since the upheavals in Eastern Europe in 1989. For a comparative review of the reforms in Eastern European countries up to Summer 1989, see Izdebski, *Legal Aspects of Economic Reforms in Socialist Countries*, 37 AM. J. COMP. L. 703 (1989) [hereinafter Izdebski]. New joint venture legislation was introduced in 1988 in Czechoslovakia, Hungary, Poland, and Yugoslavia, and in the German Democratic Republic in 1990. See Forman, *East Bloc Legal Overhaul Lures Investors: Five Nations Lead Way to Warming Business Climate*, Wall St. J., Mar. 16, 1990, at 10, col. 3.

10. While this Article focuses on the recent foreign investment changes in Poland, it is important to put them in the context of related developments in other East European countries. In the same vein, it is appropriate to recognize the foreign investment reforms undertaken by the People's Republic of China. China enacted joint venture legislation in 1979 in an effort to reform its economy. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, adopted by the Second Session of the Fifth National People's Congress, July 1, 1979, promulgated July 8, 1979, reprinted and translated in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 507 (Practising Law Inst. 1986). Since the Chinese enacted joint venture legislation, western firms have established more than 7,000 joint enterprises with China. See Yuding, *Like Bamboo Shoots After a Rain: Exploiting the Chinese Law and New Regulations on Sino-foreign Joint Ventures*, 8 NW. J. INT'L L. & BUS. 59, 62 (1987).

11. The first foreign investment law in Yugoslavia was enacted in 1967. The law was systematically amended in 1971, 1973, 1974, and 1976. The new foreign investment act was passed in 1978, and its amendment in 1984 made Yugoslavia the first among socialist countries to allow foreign majority ownership. For commentary on the early foreign investment laws, see generally P. ARTISIEN, JOINT VENTURES IN YUGOSLAV INDUSTRY (1985); N. BAUWENS, N. BUENO DE MESQUITA, & M. JONES, INDUSTRIAL COOPERATION AND INVESTMENT IN YUGOSLAVIA (Comm'n Eur. Comm. 1986); E. LAMERS, JOINT VENTURES BETWEEN YUGOSLAV AND FOREIGN ENTERPRISES (1976); OECD, FOREIGN INVESTMENT IN YUGOSLAVIA (1982); OPIC, INVESTING IN YUGOSLAVIA WITH OPIC ASSISTANCE (1977); U.E.C. MAIN COMM. FOR ECON., FIN. & SOC. RES., FOREIGN INVESTMENTS IN YUGOSLAVIA (1975).

The new approach toward foreign investment in Yugoslavia was emphasized by constitutional amendments of 1988, followed soon thereafter by recent legislation entitled the Foreign Investment Act (FIA), published in OFFICIAL GAZETTE OF THE SFR YUGOSLAVIA, No. 77, Dec. 31, 1988, and The Enterprise Act, published in OFFICIAL GAZETTE OF THE SFR YUGOSLAVIA, No. 77, Dec. 31, 1988, supplemented by the Law on Changes and Supplement of the Enterprise Act, published in OFFICIAL GAZETTE OF THE SFR YUGOSLAVIA, No. 40, July 7, 1989. A number of recent publications have commented on the new law, including: M. BOWAN, A New Era of Foreign Investment in Yugoslavia: The Regulatory Reforms of 1988-89 (thesis presented at the Fletcher School of Law and Diplomacy)(copy on file at the offices of the author); FOR. TRADE RES. INST., NEW CONDITIONS FOR INVESTING IN YUGOSLAVIA (1989); J. PREGLED, FOREIGN INVESTMENT IN YUGOSLAVIA (1989); D. MILOSEVIC, FOREIGN INVESTMENTS IN YUGOSLAVIA: REGULATIONS, PRACTICES AND OPPORTUNITIES, GUIDEBOOK (1989).

12. Romania enacted a joint venture law in 1971, entitled the LAW OF 17 MARCH 1971 ON FOREIGN TRADE AND ECONOMIC AND TECHNICAL-SCIENTIFIC COOPERATION ACTIVITY IN THE SOCIALIST REPUBLIC OF ROMANIA, reprinted in 11 I.L.M. 16 (1972). In March, 1990, the Romanian Government passed a new decree on foreign investment. The decree No. 96 of March 14, 1990, entitled LAW ON MEASURES TO ENCOURAGE FOREIGN CAPITAL INVESTMENT TO ROMANIA, relaxed the rules of Decree No. 424 of 1972. English language translations of Decree No. 424 and Decree No. 96 are available from the U.S. Dept. of Commerce, Eastern Europe Business Information Center, Washington, D.C.

1972,¹³ Bulgaria in 1980,¹⁴ and Czechoslovakia in 1986.¹⁵ In 1987, in recognition of the potential for developing trade with western and other foreign countries, the Soviet Union enacted a decree permitting joint ventures with entities of capitalist and developing countries.¹⁶ In January 1990, the German Democratic Republic was the last East European country to adopt a joint venture law.¹⁷ Even Albania, the only East European country without joint venture legislation, may consider allowing foreign capital investment under special conditions.¹⁸ The adoption of joint venture legislation illustrates the increasing recognition that foreign investment in socialist countries may be profitable for foreign investors and host countries alike, and that companies with foreign participation can operate in a socialist economy.

13. The most recent foreign investment legislation was passed by the Hungarian Parliament in December 1988 in the form of the Act XXIV of 1988 on the Investments of Foreigners in Hungary (*lex specialis*), and was made a part of the Company Act (Act VI of 1988), which is a general law (*lex generalis*). See Gluck, *Hungary: Investing in Magyar Capitalism*, BLOC, at 21-23 (Feb.- Mar. 1990). See also 17 BUS. E. EUR. 337 (Oct. 24, 1988). Effective January 1, 1989, western firms involved in Hungarian joint ventures benefit from guaranteed state indemnification. *Id.*

14. The history of foreign investment in Bulgaria began in 1974 when the State Council encouraged foreign investment through the enactment of Decree 1196. Legislation subsequently passed in 1980 as Decree 535 stated that any juridical entity in Bulgaria could enter into a joint venture, although only 12 ventures were established by the end of 1987. On June 14, 1987, the Bulgarian authorities enacted Decree 2242, authorizing duty-free enterprises in certain parts of the country. At the same time, the rules of Decree 535 were gradually liberalized, and in January 1989, Decree 56 on Economic Activity was adopted. The decree represents a radical departure from the past, when Bulgaria followed a centrally-planned economic model with only a limited role for foreign investment.

15. The current joint venture law, entitled Act on Enterprises with Foreign Property Participation, Act No. 173 of 1988, was enacted on November 8, 1988. It was based on the law entitled "Principles," enacted by the Federal Parliament in 1985. The legal relations of a contract establishing a joint venture are governed by the Act on Companies Limited by Shares, Act No. 243 of November 17, 1949, and Act No. 101 of 1963 on Legal Relations Arising in International Business Transactions, INT'L TRADE CODE (Dec. 4, 1963).

16. The decree is entitled On the Procedure for the Creation and Functioning of Joint Ventures on Soviet Territory with the Participation of Soviet Organizations and Companies from Capitalist and Developing Countries, § 40, Decree of the USSR Council of Ministers, *adopted* Jan. 13, 1987, 49 SP SSSR, No. 9 (1987). For a compilation of these legal documents issued through 1987, see E. THEROUX, *LEGAL AND PRACTICAL ASPECTS OF DOING BUSINESS WITH THE SOVIET UNION* (1988) [hereinafter Theroux]. For a detailed commentary on Soviet joint venture law, see Osakwe, *The Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987*, 22 VAND. J. TRANSNAT'L L. 1 (1989). By the end of 1989, more than 1,000 joint ventures had been established. See McDermott, *supra* note 3.

17. Dadon, *East Germany Approves New Joint Venture Decree* 1 P.S.S.E.E.L. 3 (Feb. 1990). See also G.D.R.: *Direct Investment Cannot be Ruled Out, But*, 18 BUS. E. EUR. 393 (Dec. 11, 1989).

18. *Albania Half-Opens the Doors to Foreign Investors*, Fin. Times, Feb. 20, 1990, at 5, col. 1.

II. JOINT VENTURES AND LEGAL REFORM

In Poland, the 1988 law on joint ventures was enacted during the early reformist period, a period characterized by the collapse of the centrally-controlled economy and the rise of the trade union *Solidarity*.¹⁹ Subsequently, the revolutionary political events of 1989²⁰ significantly influenced the impact of the legislation, and it is expected that Poland's legal and economic transformation will continue to do so in the future.

Attempts between 1982 and 1988 to incorporate only certain market (or so-called "third way") elements into the Polish command economy failed.²¹ The new Polish goal is the creation of an open market economy. According to Mr. Balcerowicz, the Polish Minister of Finance, "What we must do is a quick transfer of the present economic system into a market system."²² These words reflect the program supported by the new Polish government headed by the non-communist prime minister Mr. Tadeusz Mazowiecki. Mr. Mazowiecki's plan favors a radical change rather than slow step-by-step reforms.²³

On December 17, 1989, the new Polish government proposed a dramatic economic reform program for the transformation of Poland's entire economic system.²⁴ The economic reform program consists of 11 new laws or amendments to existing laws, including the amended joint venture law,²⁵ aimed at reshaping the legal foundations

19. The most important economic factors which led to new legislation were: (a) the need for new technology; (b) the need to satisfy the domestic market; and (c) the need to expand exports. The most important political factor which contributed to the 1988 joint venture law was the more liberal approach of the government toward the presence of foreign capital in the Polish socialist economy.

20. The year's benchmark event occurred in September, with the election of a non-communist government headed by Prime Minister Tadeusz Mazowiecki.

21. *Eastern European Economies, What is to be Done?*, *ECONOMIST*, Jan. 13-19, 1990, at 21 [hereinafter *Eastern European Economies*].

22. *N.Y. Times*, Oct. 7, 1989, at A2, col. 3; see also *Wall St. J.*, Oct. 13, 1989, at 1, col. 3.

23. *Eastern European Economies*, *supra* note 21, at 21.

24. See *supra* note 1.

25. USTAWA Z DNIA 28 GRUDNIA 1989 R. O ZMIANIE USTAWY O ZASADACH PROWADZENIA NA TERYTORIUM POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ DZIAŁALNOŚCI GOSPODARCZEJ W ZAKRESIE DROBNEJ WYTWORCZOŚCI PRZEZ ZAGRANICZNE OSOBY PRAWNE I FIZYCZNE ORAZ USTAWY O DZIAŁALNOŚCI GOSPODARCZEJ Z UDZIAŁEM PODMIOTÓW ZAGRANICZNYCH [AMENDMENTS TO LAW ON PRINCIPLES OF CARRYING ON ECONOMIC ACTIVITY IN SMALL INDUSTRY BY FOREIGN JURIDICAL AND NATURAL ENTITIES ON THE TERRITORY OF THE POLISH PEOPLE'S REPUBLIC AND ON [AMENDMENTS TO] THE LAW ON ECONOMIC ACTIVITY WITH PARTICIPATION OF FOREIGN PARTIES], *DZIENNIK USTAW*, No. 74, § 442 (1989) [hereinafter 1989 AMENDMENTS TO JOINT VENTURE LAW].

of the socialist economic system. The objective of the reform program, which received favorable reviews by OECD economic experts,²⁶ is to dismantle the old socialist economic system founded on state control of the means of production. In fact, most of the proposed regulations come as close as possible to market goals such as freedom of economic activity, bankruptcy protection, free trade, deregulation, and subsidy removal.²⁷ The reforms focus primarily on changes toward: (1) the freedom to engage in any business activity; (2) a restructuring of the form of ownership; (3) demonopolization; and (4) the encouragement of foreign investment. The economic reform program represents the intention of the new government to create a modern state based on an open market economy incorporating private ownership. Most of the legal reforms were adopted by the Polish Parliament by the end of 1989, and have been in force since January 1, 1990.²⁸ Poland seems to be a pioneer in the introduction of comprehensive market-oriented reforms in Eastern Europe.²⁹

The law on economic activities, enacted in 1988, has already brought a clear break with Poland's old attitudes toward the private sector. According to the spirit of the law, all barriers to starting a private business in Poland will be removed. Most notably, any individual or group of individuals wishing to start a business of any size will no longer have to obtain express government permission to do so.³⁰ In addition, corporate and partnership laws are now regulated by the Commercial Code of 1934.³¹ The Code will be applicable to

26. Davidson, *OECD Says Poland Has Adopted the Right Policy*, Fin. Times, Jan. 19, 1990, at 2, col. 1.

27. *Eastern European Economies*, *supra* note 21, at 23.

28. *See supra* note 1.

29. *Eastern European Economies*, *supra* note 21, at 21.

30. All he will need is to inform the relevant local government office of his intention to establish his business: The office is responsible for recording his act within two weeks. The law will require government permission to form a business in only about 10 categories, among them, foreign trade, production of explosives, arms, pharmaceuticals, toxic substances, tobacco and alcoholic beverages, and the operation of pharmacies. The law takes a refreshingly progressive position regarding taxation, employment and access to production supplies. Taxation of all enterprises, whether state, cooperative, or private will be equal. Also, any enterprise may hire as many employees as it sees fit. *See Two New Laws to Spur Business with Poland*, 17 BUS. E. EUR. 386 (Dec. 5, 1988). The Law on Economic Activity was passed at the same time as the Joint Venture Law and is published in *DZIENNIK USTAW*, No. 41, § 324 (1988), and was amended on March 9, 1990 (*USTAWA Z DNIA 9 MARCA 1990 O ZMIANIE USTAWY O DZIAŁALNOŚCI GOSPODARCZEJ* [LAW ON ECONOMIC ACTIVITIES], *DZIENNIK USTAW*, No. 17, § 99 (1990)).

31. The Polish COMMERCIAL CODE was introduced in 1934 (Ordinance of the President from Apr. 27, 1934, *DZIENNIK USTAW*, No. 52, § 502), and was considered as a very modern and well drafted piece of legislation. The Code was amended in 1988 (*USTAWA Z 23 GRUDNIA 1988 O ZMIANIE KODEKSU HANDLOWEGO* [AMENDMENT TO COMMERCIAL CODE], *DZIENNIK USTAW*, No. 41,

all legal transactions and entities operating in Poland as the privatization of state enterprises continues. The application of the Commercial Code to previously state-controlled enterprises is intended to establish a legal regime for domestic partners more closely aligned with the commercial legal traditions of their western counterparts. Improving the mutual understanding, efficiency, and commercial attractiveness of venture partners appears to be at the heart of Poland's new commercial regulation.³²

In order to provide the financial infrastructure needed to support increased investment opportunities, the Polish banking system is in the midst of a major transition.³³ A new banking law has been introduced with the goal of creating a system based predominately on privately owned banks.³⁴ The program seeks to induce competitiveness and a new decentralized managerial style necessary for an open market economy.³⁵ The first of the privately owned banks began its operation in November 1989.³⁶ In addition, a jointly owned Polish-American bank has been established as a joint venture.³⁷ In the Fall of 1989, the Polish stock exchange began its operation in Warsaw.³⁸

§ 326 (1988)) and 1990 (USTAWA Z DNIA 24 LUTEGO 1990 O ZMIANIE ROZPORZĄDZENIA PREZYDENTA REPUBLIKI POLSKIEJ—KODEKS HANDLOWY [AMENDMENT TO COMMERCIAL CODE], *DZIENNIK USTAW*, No. 17, § 98 (1990)). For an English translation of the COMMERCIAL CODE, see Rajski, *Poland: Legal Status of Polish Economic Units Authorized to Carry on International Economic Transactions*, in 4 COMMERCIAL, BUSINESS & TRADE LAWS 35 (W. Butler & K. Simmonds eds. May 1985). According to the rules introducing the Polish CIVIL CODE of 1964, art. VI, § 1, the articles regarding partnerships in the Commercial Code are still in force. Although the Code was not abolished completely, it was a dead legislation, since the organization of the state enterprises was based on administrative regulations. In light of the present economic reform of state enterprises, the Code's regulations on partnerships and corporations seems to be useful again. As expressed by Wiszniewski, "Present reform changed the goal of state enterprises. The goal is maximization of profit." See Wiszniewski, *Problemy legislacyjne spółek handlowych* [Legislative Problems of Corporations], 5/6 PRZEGLĄD USTAWODAWSTWA GOSPODARCZEGO [PUG] 149 (1988).

There may be observed a renaissance of corporate law. For the systematic hornbook on Polish partnership and corporate law, see Grzybowski, *Spółki* [Partnerships Including Corporations], in 3 SYSTEM PRAWA CYWILNEGO [CIVIL LAW SYSTEM], pt. 2, at 801-93 (1976). For new law review comments, see Okolski, *W sprawie zmian w uregulowaniu spółek handlowych w Polsce* [On Changes in the Rules on Corporations in Poland], 8-9 PALESTRA 1 (1988).

32. Wosko, *Komentarz do ustawy z dnia 23 grudnia 1988 o działalności gospodarczej z udziałem podmiotów zagranicznych* [Commentary on the Joint Venture Law], in *HANDEL ZAGRANICZNY: PODMIOTY GOSPODARCZE, PRZEPISY, KOMENTARZ* [FOREIGN TRADE: ECONOMIC ENTITIES, RULES AND COMMENTARY] 8 (1989) [hereinafter Wosko].

33. Greenhouse, *Poland's Rush for Modern Banks*, N.Y. Times, Feb. 28, 1990, at D5, col. 1 [hereinafter Greenhouse, *Poland's Rush for Modern Banks*].

34. USTAWA Z 31 STYCZNIA 1989 - PRAWO BANKOWE [BANKING LAW], *DZIENNIK USTAW*, No. 4, § 21 (1989); *DZIENNIK USTAW*, No. 54, § 320 (1989); *DZIENNIK USTAW*, No. 74, § 439 (1989).

35. Greenhouse, *Poland's Rush for Modern Banks*, *supra* note 33, at D4.

36. *Id.* at D5.

37. *Id.* The bank was organized in December 1989 by U.S. investors of Polish background.

38. *Poland's Capital Market Gains Assets, Momentum*, 18 BUS. E. EUR. 388 (Dec. 4, 1989).

Poland has also adopted new laws regarding bonds³⁹ and antitrust practices.⁴⁰

Since the crucial condition to attracting foreign investors is the creation of political stability,⁴¹ Poland is anxious to create a stable political atmosphere based upon a representative form of government. After the "Round Table Accord" of April, 1989, and following the democratic elections of June, 1989, Poland is now engaged in developing its parliamentary democratic institutions.⁴² As a result of this historical shift, western governments have already exhibited strong faith and interest in supporting economic aid for and trade with Poland. Economic sanctions have been lifted,⁴³ and various aid programs are being implemented.⁴⁴ Both the Bush administration and the United States Congress strongly support economic aid for Poland.⁴⁵ The Federal Republic of Germany, France, Japan, Italy, and

39. PRAWO O OBLIGACJACH [THE LAW ON BONDS], *DZIENNIK USTAW*, No. 34, § 254 (1988).

40. On February 24, 1990, the Polish Parliament enacted the New Law on Counter-Acting Monopolistic Practices, *DZIENNIK USTAW*, No. 14, § 88 (1990). This law replaced the old legislation called *USTAWA O PRZECIWDZIAŁANIU PRAKTYKOM MONOPOLISTYCZNYM W GOSPODARCE NARODOWEJ* [LAW ON COMBATTING MONOPOLISTIC PRACTICES], *DZIENNIK USTAW*, No. 3, § 18 (1987).

41. Piontek, *Kuszenie Obcego kapitału* [Tempting Foreign Capital], *PRAWO I ŻYCIE*, Dec. 10, 1988, at 4 [hereinafter Piontek].

42. According to provisions of the "Round Table Accord," which was later incorporated by constitutional amendment, political pluralism is legalized (*DZIENNIK USTAW*, No. 19 (1989)). The main changes include: (1) restoration of upper house (Senate) of the Parliament elected in democratic election with participation of all political forces; (2) establishment of the post of President of the Republic elected by both houses for a six-year term; (3) elections in June 1989 for a two house Parliament; (4) resignation of the communist party in law-making monopoly - 38% seats in the lower chamber; (5) opposition to get 35% of lower house. *Id.*

On December 29, 1989, the Polish Parliament adopted a constitutional amendment which changed the name of the country to its historical title—Polish Republic (*Rzeczpospolita Polska*), and eliminated the leading role of the communist party. The amendment emphasized that the Polish Republic is a "democratic State governed by law and principle of social justice". See *USTAWA Z DNIA 29 GRUDNIA 1989 R. O ZMIANIE KONSTITUCJI POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ* [LAW ON CONSTITUTIONAL AMENDMENT], *DZIENNIK USTAW*, No. 75, § 444 (1989). At the end of December 1989, Poland enacted legislation which is intended to be a ground for a democratic state based on the rule of law. The legislation included new laws relating to: (1) courts of general jurisdiction; (2) Supreme Court; (3) National Judicial Council; (4) Supreme Administrative Court; (5) Constitutional Tribunal; (6) notary system; and (7) military courts. *DZIENNIK USTAW*, No. 73, §§ 435, 436 (1989).

43. Piontek, *supra* note 41, at 4.

44. See, e.g., Support for East European Democracy (SEED) Act of 1989, 22 U.S.C. § 5401 (1989).

45. In his speech at the annual meeting of the IMF and the World Bank, President Bush called for economic assistance for Poland. The President urged the IMF and the World Bank to work rapidly to help Warsaw's non-Communist government. *Wall St. J.*, Sept. 28, 1989, at A1, col. 3. See Support for East European Democracy (SEED) Act of 1989, 22 U.S.C. § 5401 (1989). The provisions of the SEED Act include economic stabilization loans, support for debt reduction and restructuring, Peace Corps authorization, various technical assistance, scientific and cultural exchange, OPIC and Export-Import Bank assistance, and a call for World Bank economic backing. A Polish-American Enterprise Fund is also specifically established to develop the Polish private

other West European countries are also extending substantial economic aid.⁴⁶ In similar fashion, international financial institutions like the International Monetary Fund (IMF), and the World Bank have responded positively to the changes taking place in Poland.⁴⁷ Financial assistance from the IMF and the World Bank may amount to approximately \$2.5 billion during the next three years.⁴⁸ The Poles have also been discussing separate credit programs with the European Community.⁴⁹ A particularly interesting development is the idea of a European Bank for Reconstruction and Development which would provide loans to East European countries.⁵⁰ Also, the Paris Club,⁵¹ which is a major source of loans for Poland, has agreed to reschedule most of the \$27 billion of official debt owed to western governments.⁵² An Agreement on Trade and Economic Co-operation between Poland and the European Community was signed in Warsaw in 1989.⁵³ There are plans for much closer association of Poland with the European

sector and to promote "Joint Ventures with United States and host country participants." *Id.* at § 5421. In addition, the U.S. House of Representatives foreign aid bill for 1990 provides \$532 million for Poland. H.R. 3743, 101st Cong., 1st Sess., 135 CONG. REC. H9067-95 (daily ed. Nov. 20, 1989).

46. Buchan, *EC Could Offer East Europe Ecu2bn Aid*, *Fin. Times*, Feb. 22, 1990, at 22, col. 1.

47. As a result, the letter of intent between the Polish government and the IMF was signed on December 22, 1989. Poland was an original member of the World Bank on January 1, 1946, withdrew on March 10, 1954, and rejoined on June 27, 1986. In December 1987, Poland joined the International Finance Corporation (IFC). As of April 1990, the IFC assisted in two Polish investment projects, including the establishment of Poland's Export Development Bank.

48. Bobinski, *World Bank Earmarks \$5bn Loans for Eastern Europe*, *Fin. Times*, Feb. 23, 1990, at 20, col. 5.

49. At the annual Economic Summit of the Industrialized Nations held in Paris July 14-16, 1989, the European Community Commission was put in charge of coordinating western aid efforts for Hungary and Poland. The "Group of 24" discussed the economic assistance program to Poland and Hungary on August 1, 1989, and on September 24, 1989. *See Declaration of the Group of 24 For Economic Assistance - Poland and Hungary*, *EUR. COMM. NEWS*, Sept. 27, 1989; *EC Action Plan for Concerted Aid to Poland and Hungary*, *EUR. COMM. NEWS*, Sept. 28, 1989.

50. The Bank would be modeled on the World Bank. *See Greenhouse, New Bank to Help East Bloc Revive its Economy*, *N.Y. Times*, Jan. 14, 1990, at A14, col 1. At its meeting in Paris on March 10 - 11, 1990, the OECD member countries and the delegations of East European countries discussed further the idea of the Bank's formation and composition. Issues discussed included: (1) starting capital of 10 billion *ecus* (\$12 billion); (2) lending to the Soviet Union; (3) the seat of the Bank; and (4) whether the Bank will be lending exclusively to the private sector. *See East European Development Bank: Kill that Berd*, *ECONOMIST*, Mar. 17, 1990, at 77; *The Berd Struggles to Leave the Egg*, *ECONOMIST*, Apr. 7, 1990, at 60.

51. The "Paris Club" began its activities in 1956. This quite informal body groups the creditors of public guaranteed debts. They meet from time to time in Paris discussing the debtor situation on a case by case basis.

52. *Greenhouse, Poland's Foreign Lenders Accept Unusual Extension of Payments*, *N.Y. Times*, Feb. 17, 1990, at A8, col. 1 [hereinafter *Greenhouse, Extension of Payments*].

53. *POLITYKA-EKSPORT-IMPORT*, Oct. 17, 1989, at 17.

Community.⁵⁴ The first economic program prepared in June 1989 sought \$10 billion of assistance through a variety of programs.⁵⁵ The success of these financial assistance plans will likely have a positive impact on the Polish economy generally, and on potential investors specifically, because of the economic and political stability such foreign assistance encourages.

III. POLISH FOREIGN TRADE

In all CMEA countries, foreign trade historically was controlled strictly through state monopoly.⁵⁶ States exercised their control through an elaborate policy framework and administrative structure.⁵⁷ Foreign trade was conducted by state-run Foreign Trade Organizations (FTOs).⁵⁸ FTOs represented domestic companies in the commercial and legal relations and in negotiations with foreign partners. Nor-

54. The first step is to put Poland on par with non-Community members such as Switzerland, Sweden and Austria. See *European Community Remolding Polish Ties*, N.Y. Times, Feb. 2, 1990, at A13, col. 1. See also *Pierwszy krok* [The First Step], POLITYKA-EKSPORT-IMPORT, Oct. 17, 1989, at 17 [hereinafter *Pierwszy krok*] (interview with F. Antriesen). Most of the quotas for Polish exports to the EC have already been removed. See Buchan, *East Europe Deals with EC Expected by May*, Fin. Times, Mar. 7, 1990, at 2, col. 7.

55. Stankiewicz, *Program Pomocy Polsce* [Aid Program for Poland], TYGODNIK SOLIDARNOSC, July 14, 1989, at 17.

56. State monopoly on foreign trade was introduced in 1918 in the Soviet Union by the Decree on the Nationalization of Foreign Trade of April 22(9), 1918. According to this law, foreign trade with foreign organizations and individuals had to be carried out by special agencies. This principle became a constitutional rule incorporated in USSR Constitution of 1936, and was confirmed by the USSR Constitution of 1977 which says, in its article 73(10): "Foreign trade and other types of foreign economic activity on the basis of the state monopoly." This canon was later conferred in the constitutions of other socialist countries: Bulgaria (art. (29)); the German Democratic Republic (art. 9[5]); Poland (art. 11[4]); and Romania (art. 8). Only the Hungarian and Czechoslovakian constitutions did not consider explicit the rule of the state monopoly in foreign trade.

57. Professor Butler gives us the following features on the meaning of the state monopoly, which include:

(1) the central planning of foreign trade and interrelations of the foreign trade plan with other components of the national economic plan; (2) the exclusive right of the State through a duly authorized organ to engage in foreign economic relations; (3) the exercise of the state monopoly through discrete entities which are apportioned a "piece" of the monopoly; (4) the orientation of most foreign trade to other members of the socialist family of legal systems and the concomitant creation of rules and institutions designed especially for trade under the conditions of "socialist economic integration"; (5) the imposition of mandatory signature or approval requirements as prerequisites for the validity of foreign trade contracts; (6) distinctive attitudes toward contract delivery provisions, guarantees, penalties, specific performance, price and payment issues, and dispute settlement, most of which are rooted in national legal practices and institutions.

Butler, *The State Monopoly of Foreign Trade and the Family of Socialist Legal Systems*, 2 CONN. J. INT'L L. 215, 221 (1987).

58. For a discussion on the state monopoly in foreign trade, see W. BUTLER, *THE SOVIET FOREIGN TRADE MONOPOLY: INSTITUTIONS AND LAWS* (1974); see also Piontek, *State Monopoly of Foreign Trade in Poland*, in Y.B. SOCIALIST LEGAL SYSTEMS (W. Butler ed. 1986).

mally, FTOs signed all trade contracts and took care of all legal problems involved in foreign trade initiatives. These features of the Soviet model, which were implemented in the remaining socialist countries after World War II, are currently being subjected to many modifications. Most East European countries have recently abandoned strict state monopoly and increasingly advocate free foreign trade.

Poland has jettisoned the old state monopoly framework. The reform of Poland's foreign trade relations is exemplified in two ways. First, the number of organizations allowed to conduct foreign trade has increased, and these organizations have introduced change in their forms and approach; administrative controls have given way to more profit oriented approaches based on limited liability partnerships or corporations. Secondly, since January 1, 1989, Polish enterprises generally no longer need special permission to conduct foreign trade.⁵⁹ Only a few exceptions relating to strategic and military products limit privately initiated foreign trade.⁶⁰ A review of foreign trade activity indicates, however, that Polish companies thus far have rarely used their right to conduct foreign trade. Most of them still use the services of the FTOs. Underlying this fact is the lack of well qualified specialists in international trade and law in individual enterprises. While the new freedom to conduct foreign trade remains a goal to be widely enjoyed,⁶¹ the liberalized trade reforms have created a climate for better relations between Poland and the western industrialized countries in general, and between Poland and the United States in particular.⁶²

Poland's participation in international trade relations positively influences Polish trade reforms. Poland is a member of the General

59. USTAWA O DZIAŁALNOŚCI GOSPODARCZEJ [LAW OF ECONOMIC ACTIVITY], DZIENNIK USTAW, No. 41, § 324 (1988), was passed by the Polish Parliament on December 23, 1988, and amended in March 1990, DZIENNIK USTAW, No. 17, § 99 (1990). Article 1 declares the freedom to engage in economic activity. At the same time, Article 11, § 9 of this law empowers the Minister of Foreign Economic Cooperation to specify the areas requiring a state permit. According to Mr D. Ledworowski, the Vice-Minister of Foreign Economic Cooperation, there are only 22 areas - mostly raw and food materials - which require such a permit. See *Gra sie zaczęła* [The Play Has Begun], POLITYKA-EKSPORT-IMPORT, Jan. 1990, at 18.

60. ROZPORZĄDZENIE MINISTRA WSPÓŁPRACY GOSPODARCZEJ Z ZAGRANICĄ W SPRAWIE WYKAZU TOWARÓW I USŁUG, KTÓRYMI OBROT Z ZAGRANICĄ WYMAGA KONCESJI [ORDINANCE OF THE MINISTER FOR THE FOREIGN ECONOMIC COOPERATION ON THE LIST OF MATERIALS AND SERVICES FOR WHICH A PERMIT FOR FOREIGN TRADE IS REQUIRED], DZIENNIK USTAW, No. 72 (1989).

61. See *Pierwszy krok*, *supra* note 54, at 18.

62. *What's Ahead for US-Polish Trade*, 18 BUS. E. EUR. 1 (Apr. 24, 1989). On March 21, 1990, the Polish Prime Minister and the U.S. President signed a Treaty Concerning Business and Economic Relations, discussed *infra* at note 152 and accompanying text.

Agreement on Tariffs and Trade (GATT), and as of January 1, 1989, finally agreed upon a tariff system based upon GATT principles. Poland has asked GATT to change the terms of its membership in the organization so as to secure the full benefits of multilateral trade.⁶³ In 1986, Poland regained its International Monetary Fund (IMF) membership.⁶⁴ These measures point toward the integration of Poland into the mainstream of international economic relations.

IV. HISTORICAL EVOLUTION OF POLISH LEGISLATION

Foreign investment in Poland was not present prior to 1976.⁶⁵ Western investors only began to appear in Poland after the first law on "mixed companies" was promulgated in 1976.⁶⁶ The increased interest in Polish investment at that time was manifested primarily by Polish emigrants wishing to invest in the country of their ancestors. Foreign investors were still required to operate within a centralized command economy, and investment regulations were rather restrictive and vaguely worded.⁶⁷ The regulations which followed in 1979, while focusing exclusively on joint ventures, were also complicated, and were organized in a rather simple legal form which did not encourage stability.⁶⁸ To the surprise of all observers, the experiment based on the 1976 law was very successful, and in 1982 the Polish authorities

63. Dullforce, *Warsaw Requests New Terms for Gatt Membership*, Fin. Times, Jan. 25, 1990, at 5, col. 1.

64. *The World Bank/IFC and Eastern Europe*, 9 WORLD BANK NEWS 1 (Feb. 1990).

65. Rajski, *Legal Aspects of Foreign Investment In Poland*, in Y.B. SOCIALIST LAW 160 (1986) [hereinafter Rajski]. For a discussion on the joint venture laws under the previous legislation, see generally *id.*; Rajski, *Nowe prawo o spółkach z udziałem zagranicznym* [New Law on Joint Ventures], 11 PANSTWO I PRAWO 159, 159-68 (W. Butler ed. 1986); Piontek, *The Legal Regime of Foreign Direct Investment in Socialist Countries*, in Y.B. SOCIALIST LEGAL SYSTEMS 279-331 (W. Butler ed. 1987); A. BURZYNSKI, A FOREIGN INVESTOR'S GUIDE TO THE LAW OF 23RD APRIL 1986 ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION (1986). For updated commentary in Polish, see Rajski, *Nowe prawo o inwestycjach zagranicznych* [New Law on Foreign Investment], 3 PANSTWO I PRAWO 517 (1989).

66. The law was an executive order of the Council of Ministers entitled ROZPORZADZENIE RADY MINISTROW Z DNIA 14 MAJA 1976 R. W SPRAWIE WYDAWANIA ZAGRANICZNYM OSOBOM PRAWNYM I FIZYCZNYM ZEZWOLEN NA PROWADZENIE NIEKTORYCH RODZAJOW DZIAŁALNOŚCI GOSPODARCZEJ [ORDINANCE OF THE COUNCIL OF MINISTERS OF MAY 14, 1976 CONCERNING PERMITS FOR FOREIGN JURIDICAL AND NATURAL PERSONS FOR THE CONDUCT OF SPECIAL ECONOMIC ACTIVITY], DZIENNIK USTAW, No. 19, § 123 (1976).

67. Rajski, *supra* note 65, at 160.

68. UCHWAŁA RADY MINISTROW Z DNIA 7 LUTEGO 1979 R. W SPRAWIE TWORZENIA I DZIAŁALNOŚCI W KRAJU PODMIOTÓW Z UDZIAŁEM KAPITAŁU ZAGRANICZNEGO [RESOLUTION OF THE COUNCIL OF MINISTERS OF FEB. 7, 1979 ON ESTABLISHING AND OPERATING BUSINESS COMPANIES WITH FOREIGN CAPITAL PARTICIPATION IN POLAND], MONITOR POLSKI, No. 4, § 36 (1979). The Resolution of the Council of Ministers is not a Statute of Parliament. No joint venture was established under this promulgation.

enacted the first separate law on foreign investment in the form of a parliamentary statute.⁶⁹ It was a complex act which regulated not only joint ventures, but also all forms of foreign investment in Poland.⁷⁰ The collapse of the Polish command economy in the early 1980s forced authorities to introduce more market elements into the centrally planned economy.⁷¹ The program of reforms included liberalization of economic activities undertaken by any natural or juridical persons, regardless of the form of ownership. The number of foreign enterprises grew steadily to about 660 in 1985.⁷² The growth in foreign investment focused attention on the role of joint ventures, and on increased efforts to prepare a single legislative framework to regulate joint ventures. Legislative work with that aim began in 1982 and became law in 1986.⁷³ Since that time, two legal regimes have existed in Poland: the regulations of 1982 on foreign direct investments, and the 1986 legislation on joint ventures.⁷⁴ Unfortunately, the law on joint ventures was not well drafted and did not meet expectations.⁷⁵

The ultimate success of the joint venture law, as with any legislation in general, depends upon the professional calibre of its drafters as well as the political forces supporting its formation. The fact that the first Polish joint venture law failed was the result of both factors.

69. USTAWA Z 6 LIPCA 1982 R. O ZASADACH PROWADZENIA NA TERYTORIUM POLSKIEJ RZECZPOSPOLITEJ LUDOWEJ DZIAŁALNOŚCI GOSPODARCZEJ W ZAKRESIE DROBNEJ WYTWORCZOŚCI PRZEZ ZAGRANICZNE OSOBY PRAWNE I FIZYCZNE [LAW ON PRINCIPLES OF CARRYING ON ECONOMIC ACTIVITY IN SMALL INDUSTRY BY FOREIGN CORPORATE BODIES AND PRIVATE PERSONS ON THE TERRITORY OF THE POLISH PEOPLE'S REPUBLIC [hereinafter LAW OF 1982], *DZIENNIK USTAW*, No. 19, § 146 (1982); *DZIENNIK USTAW*, No. 13, § 58 (1985); *DZIENNIK USTAW*, No. 41, § 325 (1988); *DZIENNIK USTAW*, No. 74, § 442 (1989).

70. Rajski, *supra* note 65.

71. Article 14 of The Law on State Enterprises allowed them to enter joint ventures with western partners. *DZIENNIK USTAW*, No. 24, § 127 (1983). Prior to that time, foreign investors were precluded from establishing a joint venture with a Polish state-owned enterprise.

72. Romanowski, *Legal Aspects of the Organization of Foreign Company in Small Business in Poland* (in Polish), 6 *NOWE PRAWO* 93 (1988).

73. USTAWA Z 23 KWIEŹNIA 1986 O SPÓLKACH Z UDZIAŁEM ZAGRANICZNYM [THE LAW ON COMPANIES WITH FOREIGN PARTICIPATION] [hereinafter LAW OF 1986], *DZIENNIK USTAW*, No. 17, § 88 (1986); *DZIENNIK USTAW*, No. 33, § 181 (1987).

74. Piontek, *The Legal Regime of Foreign Direct Investment in Socialist Countries*, in Y.B. *SOCIALIST LAW* 285 (1987).

75. During the first two and one-half years of the law's enactment, only 52 joint ventures received permits to operate. Moreover, from the time the law went into force in July 1986 until December 1987, only 13 joint ventures were established and only six began their operations. See *Changes in Polish JV Law to Spur Western Interest*, 16 *BUS. E. EUR.* 404 (Dec. 21, 1987). According to B. Bamber and W. Kiciński, during the whole two and one-half year period only 52 joint ventures received permits to operate and they invested \$40 million. Bamber & Kiciński, *Joint Ventures po roku: Mały Kapital - Duże Nadzieje* [Joint Ventures Year After - Small Capital - Big Hopes], *POLITYKA-EKSPORT-IMPORT*, Jan. 1990, at 17 [hereinafter Bamber & Kiciński].

Strict joint venture regulations, including requirements of a 49 percent minimum Polish ownership share and mandatory Polish citizenship of the joint venture presidency and CEO, as well as the absence of local currency convertibility and competitive market conditions, caused the ultimate failure of the legislation in practice. As a result, foreign investment in Poland decreased dramatically.⁷⁶ The dismal performance of the first joint venture law was even referred to as "a second set of economic sanctions,"⁷⁷ an allusion to the first set of sanctions imposed on the Polish government by the U.S. government soon after the declaration of martial law in Poland in 1981.⁷⁸ Poland was the only socialist country at the time which had increased restrictions on foreign investors while at the same time experiencing a severe economic crisis.⁷⁹ The political opponents of allowing foreign investment in the socialist economy triumphed. Although the need for a new joint venture law was clear to many from the beginning, the works of the established commission several months later did not give reason for optimism. After facing criticism at a UNIDO-sponsored conference held in Warsaw in October 1987,⁸⁰ the Polish authorities announced that changes in the law on joint ventures would be enacted with effect from June, 1988. Under the terms of the new pronouncement, joint companies were supposed to be organized in mandatory associations with and subject to administrative control.⁸¹ In response, western investors and Polish lawyers expressed reservations about the half-hearted changes and called for decisive reforms to encourage foreign investment.⁸²

The change of government in September, 1988, had a positive impact on the group of experts drafting joint venture legislation, resulting in the well-drafted law which was enacted in December 1988.⁸³ One year later, in December, 1989, on the initiative of the new non-communist government, the joint venture legislation was amended into its present form.⁸⁴

76. Piontek, *supra* note 41, at 3-4.

77. *Id.* at 3.

78. *Id.* at 5.

79. *Id.* at 3. Shortages of major goods and \$38 billion in foreign debt were only the most visible symptoms. *Id.*

80. POLITYKA-EKSPORT-IMPORT, June 1989, at 18.

81. Piontek, *supra* note 41, at 3.

82. *Id.*

83. *See supra* note 25.

84. JOINT VENTURE LAW, *supra* note 2. The December 28, 1989 amendments to the Joint Venture Law are part of the governmental economic reform program adopted by the Polish Parliament on December 29, 1989, which has been in force since January 1, 1989. *See Greenhouse, Market Forces, supra* note 1.

V. BASIC ELEMENTS OF THE NEW LAW

A. General Elements

The new joint venture law passed by the Polish Parliament in December 1988 is intended to be part of a broader effort to reform the economy. Its title, "Law on Economic Activities with Participation of Foreign Parties," suggests that it is also intended to unify the existing foreign investment regimes in Poland.⁸⁵

The new law sets forth the basic rules governing joint ventures, the underlying governmental objectives of the joint venture law, and the procedural requirements for the approval of joint venture agreements. In addition, the new law enumerates certain restrictions on the terms of joint ventures, including the application of duties and taxes, property rights and liabilities of the parties, operation and supervision requirements, personnel requirements, and terms of liquidation. Subsequent legislation is expected to clarify and supplement the new law.⁸⁶ In addition, other existing laws relevant to joint ventures include those concerning taxes, banking, economic activities, labor, foreign currency exchange, customs, employment, and the commercial code. Even a 70 year old law on acquisition of property by foreign citizens could have applications in the joint venture area.⁸⁷

The establishment of a joint venture provides the partners with long-term control over the management and earning potential of the venture. The other main advantages of establishing a joint venture include: (1) the possibility of entering into more risky projects without unlimited liability; (2) a division of labor between the partners; (3) the pooling together of their respective expertise and experience; and (4) benefitting from the host country's tax and other financial incentives. In the absence of such advantages, alternative contractual agreements may be pursued. The alternatives to a joint venture include the following international business arrangements: (1) direct foreign investment; (2) a contractual undertaking with a host country partner on a specific project or toward a one-time goal; (3) a

85. Banking joint ventures are subject to a separate banking law. Under that law, the process of issuing joint venture permits is controlled by the President of the Central Bank. See BANKING LAW, *supra* note 34, at art. 83, § 1.

86. See Wosko, *supra* note 32, at 8.

87. USTAWA z 24 MARCA 1920 R. O NABYWANIU NIERUCHOMOSCI PRZEZ CUDZOZIEMCOW [LAW ON ACQUISITION OF PROPERTY BY FOREIGNERS], *DZIENNIK USTAW*, No. 24, § 202 (1983).

consortium; and (4) a patent or technology agreement and licensing. Direct investment especially provides the owner of sophisticated technology with full control over its technology. For this reason and others, before entering into a joint venture, the western partner should consider all of the possible advantages and disadvantages of setting up a joint stock company.

B. Purpose of the Joint Venture

Before analyzing the rules governing Polish joint ventures, it is important to examine and understand what the Polish authorities seek to achieve through the introduction of joint venture legislation. The joint venture law was established with specific goals in mind as to how western businesses can help reverse the critical state of the Polish economy. It is reasonable to predict that joint ventures which address governmental objectives may be the most successful. This is especially true in the early stages, when the Polish authorities will set limits,⁸⁸ particularly on the transfer of profits.⁸⁹ Understanding the reasons for the Polish government's encouragement of joint ventures may also give potential trading partners insights into how strictly certain provisions of the law will be applied, and on what unwritten restrictions may exist.⁹⁰

The provisions of the joint venture law encourage foreign investors to initiate joint ventures which contribute to specific areas of the economy. These areas favor industries which strengthen the Polish economy by the:

- (a) introduction of new technologies and management methods into the national economy;
- (b) provision of goods and services for export;
- (c) improvement in the supply of modern and high quality products and services and production to the domestic market;
- (d) protection of the natural environment.⁹¹

88. Compare it with the JOINT VENTURE LAW, *supra* note 2, at art. 5, § 2 (4). In May of 1990, UNIDO prepared a list of approximately 250 Polish companies interested in forming joint ventures with western partners. See LIST OF PROJECTS 1 (1990), copies available from Polish Commercial Chancellor's Offices, Offices of Ernest & Young, as well as from UNIDO.

89. See JOINT VENTURE LAW, *supra* note 2, at art. 19, § 2.

90. This would include, for example, the policies regarding environmental protection and production classified as a threat to state economic interests. See *id.* at art. 6, § 1 (1).

91. *Id.* at art. 5, § 2. This article was added to the project having in mind the pollution of the environment. There are a number of very profitable companies producing environmental protection equipment which is in great demand.

Thus, broadly defined, the issuance of joint venture permits will be most readily ensured when the following basic governmental goals are promoted: developing export promotion, increasing the transfer of technology, improving domestic managerial expertise, introducing needed consumer products and services, or providing environmental safeguards.

Permission to establish a joint venture may be refused, however, if the activities of the venture are not deemed "in the state interest." A joint venture may be found to violate the "state interest" standard where the venture's operations potentially endanger: (a) state economic interests; (b) environmental quality; or (c) national security, state military, or national secrecy.⁹² A refusal to issue permits based on these provisions need not be explained by the Polish authorities.⁹³ This means that the Foreign Investment Agency need only cite the provisions of Article 6 of the new law without giving an explanation as to why, how, or which state interests are endangered.

The decision to reject a petition may be appealed to the President of the Foreign Investment Agency for reconsideration,⁹⁴ but not to the Supreme Administrative Court.⁹⁵ Considering the vagueness of the Agency President's authority to reject a petition, judicial review would likely provide better protection for foreign investors against an unduly discriminatory policy or practice of the Polish authorities. Therefore, in the future it should be suggested that the authority of the Agency should be appealable to the Supreme Administrative Court.

1. Export Promotion

Despite the proclaimed multi-faceted purpose of the new law, it is clear from its structure and application that the Polish authorities are concerned first and foremost with the promotion of exports to stimulate hard currency earnings needed for joint ventures.⁹⁶ This goal was stressed in all relevant joint venture legislation in Poland, as well as in other socialist countries.⁹⁷ As is often indicated, the

92. *Id.* at art. 6, § 1.

93. *Id.* at § 2.

94. JOINT VENTURE LAW, *supra* note 2, at art. 6, § 3.

95. It is worthy to note that direct foreign investment companies may appeal the rejection to issue the permit to the Supreme Administrative Court based on the 1982 Law. *See* LAW OF 1982, *supra* note 69, at art. 19, *as amended in* JOINT VENTURE LAW, *supra* note 2, at art. 49.

96. JOINT VENTURE LAW, *supra* note 2, at art. 5, § 2(2).

97. THEROUX & GEORGE, *supra* note 8, at 3.

Polish economy is burdened with a heavy reliance on the importation of manufactured consumer goods.⁹⁸ Due to the seriousness of its debt problem,⁹⁹ the Polish government seeks in particular to increase and diversify its export base, focusing primarily on manufactured goods.¹⁰⁰ Nonetheless, as established joint ventures already indicate, the Polish government seems to realize that such objectives will remain long-term goals; the improvement of manufacturing to an internationally competitive level will require the introduction, integration, and mastering of western managerial and technical skills. While this is possible through joint ventures in industries which promote exports, it does not necessarily aid in export diversification. On the whole, it appears that joint ventures in industries which can produce items immediately for export will be the most attractive to the Polish authorities.¹⁰¹

The most significant proof of the government's predominant interest in export promotion is that the joint venture law *requires* export operations in order for the western partner to receive its share of the joint venture's profits in the form of hard currency. Under the new law, the foreign partners can repatriate profits generated by foreign exchange, that is, *external* sales. Specifically, "The foreign partner has the right to purchase in authorized foreign currency in exchange for the profit paid to him by the company . . . and equal to the export surplus achieved by the company in convertible currency."¹⁰² Thus, the export thrust of the new joint venture law is absolutely clear. The introduction of limited convertibility¹⁰³ of the Polish *zloty* allows companies to exchange profits earned from internal sales into hard currency.

Prior to the enacted amendment, the only alternatives available to joint ventures selling their products exclusively in the domestic market

98. J. FEDOROWICZ, *POLAND: A GUIDE TO BUSINESS OPPORTUNITIES* 50 (1990) [hereinafter FEDOROWICZ].

99. Greenhouse, *Extension of Payments*, *supra* note 52, at A8, col. 1.

100. Fifty percent of Polish exports consist of machinery, equipment, and chemicals. FEDOROWICZ, *supra* note 98, at 50.

101. Until the 1989 AMENDMENTS TO JOINT VENTURE LAW, *supra* note 2, there were tax preferences for export companies. For example, tax was reduced by 0.45% for every 1% of export production.

102. JOINT VENTURE LAW, *supra* note 2, at art. 19, § 1.

103. This program was supported by industrialized countries which established a \$1 billion stabilization fund to assist Poland in efforts to make *zloty* partly convertible into dollars and other hard currencies. The limited convertibility might be similar to that in some European countries after World War II, before their currencies became fully convertible in the late 1950s. Farnsworth, *\$1 Billion Fund Set Up to Back Poland's Currency Program*, N.Y. Times, Jan. 3, 1990, at A13, col. 1.

were countertrade and consortium pooling arrangements. While the new law explicitly restricts profits to hard currency sales of the joint venture's products, in the past it was theoretically possible to negotiate repatriation of domestically generated profits via countertrade. In other words, the Polish authorities were previously willing to forego the pursuit of hard currency and allowed foreign companies to buy exportable goods with their *zloty* profits for resale abroad. This option does not seem to be present under the present law. A joint venture may also participate in a consortium that pools and shares hard currency revenues. The joint ventures may convert their *zloty* earnings into hard currency by tapping the hard currency (export) revenues of a fellow consortium member.

2. Technology Transfer

Another important objective of the Polish government is to acquire modern technology.¹⁰⁴ The authorities hope to use joint ventures to strengthen their technological capability to the level enjoyed by the rest of the developed world. Increased technology transfers are considered crucial if Poland is to develop domestic substitutes for cash-draining imports. Recognizing this need, the new government has already fostered stronger foreign economic ties—ties which must be strengthened for the ultimate success of the new joint venture legislation in particular, and for the country's economic expansion in general. The Preamble of the new law boldly proclaims:

Having in mind the creation of steady conditions for the continuation of international capital co-operation between national and foreign persons and the guarantee for the foreign partners protection of their property, income and other rights, the law is being established.¹⁰⁵

Technology can be the most important contribution of a western partner. As mentioned earlier, in the eyes of law, a joint venture is a separate legal entity with the limited possibility of its control by any of the partners. In the case of technology transfer from a partner to a joint venture, it is strongly recommend that a specific provision be included in the contract itself regulating this issue. Any joint venture needs the permission of the Foreign Investment Agency to operate. As a matter of policy, such permission generally will be

104. As noted by Business Eastern Europe, "The Polish definition of 'Technology' ranges from house appliances to high tech." 18 Bus. E. EUR. 108 (Apr. 3, 1989).

105. JOINT VENTURE LAW, *supra* note 2, at preamble.

issued, especially if the economic activity of the joint-venture will provide "application of modern technological and organizational options in the national economy."¹⁰⁶ In effect, the technology-intensive joint venture will be given a particularly warm welcome in Poland.

While joint ventures that bring technology are attractive to Polish authorities, technology transfers can confront U.S. and COCOM trade restrictions.¹⁰⁷ U.S. export controls on technology are tight, and firms planning joint ventures should verify the exportability of the technology in question with the U.S. Department of Commerce and the Bureau of Export Administration. It is expected that recent political changes in Eastern Europe will be reflected in the easing of U.S. restrictions on technology transfers, especially to Poland and Hungary.¹⁰⁸

106. *Id.* at art. 5, § 2(1).

107. The U.S. export is governed by the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. V 1987), which continued the prior Export Control Act of 1949 and the Export Administration Act of 1967. According to the 1979 Act, the President has authority to regulate the export of goods and technology. The Act is administered by the Office of Export Administration of the Department of Commerce. The Office of Export Administration issues a list of country categories. Poland and Hungary were classified separately from other communist countries, in the more liberal "W" category. The second relevant statute is the Arms Export Control Act of 1976, 22 U.S.C. §§ 2751-2779 (1982 & Supp. V 1987), which is administered by the Department of State.

Strategic commodities are controlled by the Coordinating Committee (COCOM). COCOM was set up on a voluntary basis in 1947 by the United States and certain NATO countries, and is a working committee of the multilateral Consultative Group established with the goal to control the policies of technology transfer to communist countries. COCOM maintains a list of commodities on which there is an embargo and which may not be exported to communist countries. Another list, a so-called "watch list," consists of goods whose export is monitored. For example, U.S. built factory equipment may be exportable, but the technology or know-how that accompanies it (as to how to make the product) may not. *Right Mix of Technology and Product is Key to Soviet Ventures*, WASH. TARIFF & TRADE LETTER, May 9, 1988, at 2. In the last meeting of COCOM in Paris in February 1990, the Committee eased some restrictions on exports to Eastern Europe including Poland, Hungary and Czechoslovakia. The United States position was a subject of strong controversy between the members of COCOM. The Committee reduced the time that it will take to review requests by western companies for permits to export to Eastern European countries. Riding, *17 Nations Plan to Relax Rules on Exports to East*, N.Y. Times, Feb. 17, 1990, at A9, col. 3.

108. The United States has traditionally taken the hardest position on technology export restrictions to communist countries. After the political changes in Eastern Europe, the United States declared that it was time to ease the restrictions, especially those on exports to Poland and Hungary. The initiative was taken by the State Department. For example, the United States will no longer require prior approval on export licenses for goods such as computers, which can be used either for military or civilian purposes. The list of 100,000 sections on which there are export restrictions should be significantly shortened. See *U.S. Said to Weigh New Export Rules for Eastern Bloc*, N.Y. Times, Dec. 17, 1989, at A1, col. 3.

On January 22, 1990, after the recommendation of a commission of the National Security Council, the U.S. government announced the proposal for the relaxation of curbs on export of technology to Eastern Europe. This will be the basis for the American position at the next

3. *Managerial Expertise*

The new Polish authorities consider poor export production and the ineffectiveness of state enterprises to be the result of poor management.¹⁰⁹ Despite the desire to adopt western management techniques,¹¹⁰ under the provisions of the old law, Poland was unwilling to relinquish primary control over any joint venture. The Polish authorities have since dropped their 51 percent domestic equity share requirement.¹¹¹ They also no longer require the chairman of the Board of Directors and the Director General of a joint venture to be Polish citizens.¹¹²

4. *Protection of the Natural Environment*

The newly-enacted joint venture legislation has also incorporated a strong preference for joint ventures that provide for "protection of the natural environment."¹¹³ The new regulation has tremendous social backing and pressure,¹¹⁴ and is in tune with the strong environmental protection movements in the various countries of Europe. Due to the extreme pollution problems in Poland,¹¹⁵ the authorities' preference for environmentally sound enterprises is extremely desirable. Promoting environmental objectives is clearly in the interest of potential joint venture partners since meeting such objectives is one area where joint venture permits will be issued expeditiously.

C. *Negotiating the Joint Venture Agreement*

The first and probably the most important step in the establishment of a joint venture is the selection of a partner. The selection process

COCOM meeting. According to this plan, Poland and Hungary would have the most privileged position among the CMEA countries. Farnsworth, *U.S. Set to Ease High-Tech Curb on Eastern Bloc*, N.Y. Times, Jan. 23, 1990, at D6, col. 5.

109. Piontek, *supra* note 41, at 4.

110. There is generally a very critical opinion of managers' skills in state enterprises. One Polish law professor gives them a very severe evaluation:

Our managers used to live quietly and many were satisfied with secured vegetation. 'Managers' in culture of state subsidies and fixed prices simple forms, budget contributions and whatever else are not psychologically and intellectually ready for profitable activities, competition and aggressive marketing. They used to wait.

Id. at 1.

111. JOINT VENTURE LAW, *supra* note 2, at art. 2.

112. *Id.* at art. 31.

113. *Id.* at art. 5, § 2(4).

114. Piontek, *supra* note 41, at 4.

115. Simons, *Pollution's Toll in Eastern Europe: Stumps Where Great Trees Once Grew*, N.Y. Times, Mar. 19, 1990, at A11, col. 1.

requires a preliminary search for and exchange of the basic technological, financial and business information. After obtaining this basic information, the foreign company may opt out of the proposal or continue subsequent negotiations.

The second advisable step is "the letter of intent." This is not a mandatory or legal requirement as is the joint venture contract. The letter of intent serves as proof of the partners' commitment to the joint venture and reflects the fact that the authorities support the proposed enterprise. Also, it gives an outline of the purpose and structure of the future joint venture. It is advisable to note principles which have been agreed upon as the negotiations progress.

The final step in the establishment of a joint venture is the drafting of a an agreement which will formally finalize the process. The document must address the major legal conditions for relations between the partners. Joint venture agreements which create an international technologically-intensive joint venture should be drafted very carefully with the highest legal skills.

D. Foreign Investment Agency

The new joint venture law established the Foreign Investment Agency. The Agency issues permits to establish a new joint venture. The real goal of this institution should be the realization of a consolidated policy toward foreign investors. Professionalism and knowledge of western business and investment principles by the staff members will help to build a mutual trust. In order to be successful, the Agency should pursue an intensive promotion campaign, especially in potential investors' home countries, to inform and attract foreign as well as domestic entrepreneurs. The President of the Agency can play a key role in this regard. He is appointed by the Prime Minister on the advice of the Minister of Foreign Economic Co-operation, and, therefore, provides visibility and initiative from the highest level.

E. Participants

The business organization formed pursuant to a joint venture agreement is a separate legal entity having the right to contract, acquire property, sue in court, arbitrate, and incur liability. The decision to enter into a joint venture with a Polish partner requires a choice of the business form. The law limits the forms of joint ventures to public joint stock corporations and limited liability companies (incorporated partnerships). Once the joint venture is regis-

tered, it is considered independently established and then it may start its activity.

Polish law permits any juridical person to establish a joint venture.¹¹⁶ Fortunately, there is no discrimination between state, cooperative, or private sectors.¹¹⁷ There is also no restriction regarding western partners establishing joint ventures. Foreign participants in joint ventures may be either foreign,¹¹⁸ juridical, or natural persons.¹¹⁹ All corporations are required to apply for permission from the Foreign Investment Agency to issue stocks. A foreign partner must invest a minimum of 20 percent of the equity in a joint venture,¹²⁰ but is not limited to any maximum amount of investment. The right of a foreign investor to establish a joint venture with a 100 percent equity share may be limited by the President of the Agency. According to Article 8, Section 1, of the new joint venture law, the issuance of such a permit may be conditional upon the inclusion of a Polish partner.¹²¹ The foreign partner's right to transfer her shares or ownership interests is subject to separate permission.¹²²

F. Documentation and Registration

The new joint venture law is only a few pages long, and it is designed to be the governing document of all joint ventures. Yet, its clarity signifies progress compared with previous regulations.¹²³

The major requirements of the law consist of several tenets concerning documentation, finance, operation, dispute resolution, and liquidation. The new joint venture law requires an application to provide the following information and documentation: description of partners, state of their bank accounts, location of the property and place of business operation, the object and scope of the economic

116. JOINT VENTURE LAW, *supra* note 2, at art. 3.

117. *Id.* at §§ 1, 2.

118. It is important to note that Polish law refers to place of location, not citizenship. *Id.* at § 2(1), (2).

119. *Id.* at § 2.

120. *Id.* at art. 2, § 1.

121. JOINT VENTURE LAW, *supra* note 2, at art. 8.

122. *Id.* at art. 5, § 3(1). This rule does not fit well in the modern economy with the capital market. Some Polish authors express the need for the abolition of this restriction. See Bamber & Kicinski, *supra* note 75, at 18.

123. Piontek, *supra* note 41, at 1. Legal uncertainty has been a major factor regarding the joint venture process, producing lengthy, detailed negotiations, and discouraging potential foreign partners. There are many crucial gaps still to be filled by negotiation, practice, amendments, other law, and unwritten bureaucratic procedure. In other words, in a time of general restructuring of the Polish economy, published law is just a starting point of what is quite complex and fluctuating on the whole.

activity of the joint venture, the period of the operation of the joint venture, the financing arrangements of the joint venture including the amount of initial capital, and the shares of the partners and the form of their contribution.¹²⁴ The following materials are also required to be filed with the joint venture application: the draft foundation document, feasibility studies, and documents on the legal and financial status of shareholders.¹²⁵ These documents must be submitted to a Foreign Investment Agency.¹²⁶ All of the above mentioned documents must be presented in Polish, or if a foreign document is involved, it must be accompanied by a Polish translation.¹²⁷

No other government organs are involved in the process which seems to be a very healthy attitude of the new government. According to the old law, some decisions were made by the minister of foreign trade, in many cases with consultations of other ministers which made the process more bureaucratic and increased the probability of rejection with each new institution involved. Such hazards are removed by the new arrangement. The joint venture foundation documents must be approved by both partners and are governed by the Commercial Code. The foundation act of a joint venture must be notarized by a state notary in the district where the venture is incorporated.¹²⁸ The Agency is required to give an answer within two months after receiving all documents.¹²⁹ The government organ issuing the permit may control the adherence of joint ventures to the goals and conditions stated in the permit through its administrative staff.¹³⁰ Lack of adherence to the permit may cause rejection, limitation, or termination of the permit, and, even cause its revocation.¹³¹ The Agency issues permits which are not perpetual, but are extended only for a certain period of time.¹³² This rule does not seem to promote

124. JOINT VENTURE LAW, *supra* note 2, at art. 10.

125. *Id.*

126. *Id.* at art. 5, § 4.

127. *Id.* at art. 10, § 3.

128. *Id.* at art. 10.

129. JOINT VENTURE LAW, *supra* note 2, at art. 10(4). Polish law does not address the question of what happens when the authorities are silent within this period, which was many times the case under the Law of 1986. It is interesting to look at the Hungarian Joint Venture law which says that "If no response to the application is received within 90 days, the western firm may assume that permission has been granted." See *New Hungarian Law Will Boost JV Appeal*, 18 BUS. E. EUR. 19 (Jan. 16, 1989).

130. JOINT VENTURE LAW, *supra* note 2, at art. 14.

131. *Id.* at art. 15.

132. *Id.* at art. 10, § 1(3).

long-term investments. It is well known that foreign investors require security in the host country. Permits regulate not only the "object" of business activity, but also "other requirements that a company should satisfy in the conduct of its business." This is a wide and undefined power in the hands of the President of the Agency. One may even question who is supposed to run the business, the investors or the Agency?

After receiving the permit from the Agency, the joint venture is registered by the court of general jurisdiction in the Commercial Register, a process which may take only a few days. A joint venture is recognized as a legal entity under Polish law from the date of registration. Obtaining the required permit and the registration process is important to western investors because a lengthy process delays the operation of a joint venture.

G. Finance

1. Ownership

The old joint venture law insisted on a minimum 51 percent equity interest for the Polish partner.¹³³ In the new law, however, there is no such requirement. This is a positive response to many western complaints in hopes of encouraging more foreign companies to participate; particularly those whose corporate charters or by-laws prohibit minority joint venture ownership. There is now no limit on foreign ownership, which may go as high as 100 percent. A minimum ownership of 20 percent by the foreign investor, however, has been prescribed as a pre-condition.¹³⁴

Land contributions to the joint venture are treated differently depending on the form of the Polish partner - state or private. Private partners may contribute real property to a joint venture. A joint venture acquires the ownership of such property contributions. An established joint venture may also buy non-state real estate. If the foreign partner holds more than a 50 percent equity share in the joint venture, special permission from the Minister of Internal Affairs is required.¹³⁵ State enterprises entering into joint venture agreements

133. LAW OF 1986, *supra* note 73.

134. JOINT VENTURE LAW, *supra* note 2, at art. 2.

135. Article 46, Sections 2(3) and 3 of the Joint Venture Law have amended the LAW ON ACQUISITION OF PROPERTY BY FOREIGNERS, *supra* note 87, and state that a joint venture controlled by a foreign partner is treated as a foreign person in cases of property acquisition. JOINT VENTURE LAW, *supra* note 2, at art. 46, §§ 2(3), 3.

may not contribute in the form of ownership of state real property. According to Polish law, state real property may be contributed to a joint venture in the form of a lease or a perpetual lease. Under certain conditions, state enterprises may also acquire an ownership of real property. This will change, however, with the introduction of a bill of privatization of state enterprises, which is pending in parliament.¹³⁶ The final outcome is still unclear.¹³⁷

This situation raises a number of problems for joint ventures. First, to consider a hypothetical case: a \$200,000 capital joint venture is established between X, a state enterprise, and Z, a foreign investor. Each partner has a 50 percent equity share of the joint venture. Z contributes \$100,000 in cash, and X contributes buildings valued at the same amount. In case of insolvency or liquidation of the joint venture, the debts must be paid before Z can retrieve her capital contribution. If the joint venture has outstanding debts of \$100,000, the creditors will be satisfied only from Z's capital contribution. The joint venture never acquired the ownership of X's property contribution, and such property may not be sold during the execution against joint venture assets.

2. Contributions of Partners

While the law does not specify who will determine the percentage interest of each party (*i.e.*, the value of each partner's contribution), it does provide some guidance. The equity contribution of a Polish partner will be evaluated only in *zlotys*, and other assets.¹³⁸ General provisions should be included in the charter. The minimum contribution for a foreign partner is \$50,000. The foreign partner contributes her share in Polish currency received from the selling of hard currency to a foreign currency exchange bank. Because of possible

136. According to the proposed law on privatization, the process will be achieved in two steps. In the first step, state companies will take the form of corporations with the State Treasury as the sole stockholder. In the second step, shares will be sold to private investors, domestic or foreign. The process will be supervised by specially established bodies: the Council of National Assets and the Agency for Ownership Transformation. Lloyd, *supra* note 1.

137. *Polish Confusions Over Privatization, Ownership*, 18 BUS. E. EUR. 395 (Dec. 11, 1989). See also Piontek, *Jak Prywatyzowac* [How to Privatize State Property], 49 PRAWO I ZYCIE 3, 4 (1989).

138. Contributions may include: buildings; structures; equipment and other assets; rights to use land, water and other natural resources, buildings, structures and equipment; other property rights (including those on work inventions and use know-how); or money assets.

inflation,¹³⁹ the exchange rate of *zlotys* with U.S. dollars or other major foreign currency should be kept in mind.¹⁴⁰

A foreign partner entering into a joint venture may contribute cash as well as other materials.¹⁴¹ Cash contributions may be realized only in Polish currency received from the exchange of hard currency in a foreign currency exchange bank on the exchange rate regulated by the Polish Central Bank.¹⁴² Other non-cash contributions may be transferred from abroad or purchased for Polish currency obtained through exchange of hard currency on the same exchange rate as is used for cash contributions.¹⁴³ There also can be contributions by a foreign partner made in Polish *zlotys* from the sale of the state's obligations to repay foreign credits (debt equity swaps).¹⁴⁴ These contributions must be arranged after receiving the appropriate agreement with the Minister of Finance and the President of the Foreign Investment Agency. This procedure was introduced on December 28, 1989, having in mind Polish foreign debt in the amount of \$38 billion.

Great difficulty arises in attempting to put a market value on Polish contributions that are not frequently exchanged in the West, or for which there are no western equivalents.¹⁴⁵ In order to avoid a situation where prospective partners may exploit the situation by way of their own evaluation of their contribution, it is advisable to submit their evaluation for verification to a body of independent experts.¹⁴⁶

If the foreign partner owns more than 50 percent of the equity, any purchase of land or real estate requires permission from the Minister of Internal Affairs.¹⁴⁷

139. *Eastern European Economies*, *supra* note 21, at 24.

140. See Grzybowski & Konieczny, *Wejscie w Ciemno; Czy spolka jest dobra dla cudzoziemca* [Entrance into the Darkness: Is a Joint Venture Good for a Foreigner?], 7 PRAWO I ZYCIE 4 (1990) [hereinafter Grzybowski & Konieczny].

141. JOINT VENTURE LAW, *supra* note 2, at art. 16, § 1.

142. *Id.* at § 2(1). The fixed rate, as established on January 1, 1990, is \$1-9500 *zlotys*. Grzybowski & Konieczny, *supra* note 140, at 4. See also 43 INT'L FIN. STATISTICS 443 (Apr. 1990) (regarding recent Polish financial statistics).

143. JOINT VENTURE LAW, *supra* note 2, at art. 16, § 2(2).

144. *Id.* at § 3.

145. World prices will also be of little assistance in valuing the "technology" and "know-how" provided by the foreign partner. The problem of valuing contributions was also a major problem in the USSR and in China.

146. JOINT VENTURE LAW, *supra* note 2, at art. 16, § 7.

147. Article 46 of the Joint Venture Law introduced an amendment to the law on acquisition of property by foreigners. Joint ventures with more than 50% of the equity are treated as foreign persons and a special permit is required. See LAW ON ACQUISITION OF PROPERTY BY FOREIGNERS, *supra* note 87; JOINT VENTURE LAW, *supra* note 2, at art. 46.

In summation, while the partners may negotiate and consider both Polish and foreign values in assessing their respective contributions, the agreed upon amount may be subject to the evaluation of independent experts on the Agency's initiative.

3. Transfer of Profits

As with any joint venture, profits are distributed according to the contribution of each partner.¹⁴⁸ The law guarantees joint ventures the unlimited right to transfer their after-tax profits earned from foreign trade in hard currency.¹⁴⁹ The introduction of limited internal convertibility of Polish *zlotys*¹⁵⁰ allows joint ventures to exchange some profits earned from internal sales. Thus, the foreign partner has the right to purchase foreign currency equal to 15 percent of profits from the previous fiscal year.¹⁵¹ The limit of 15 percent was introduced to limit hard currency outflows and to protect Polish internal convertibility. Two additional factors should be kept in mind, however. First, according to the recently signed United States-Polish treaty concerning business and economic relations, the percentage will increase in 1992 to 20 percent of profits gained in 1990-1991, 35 percent in 1993, 50 percent in 1994, 80 percent in 1995, and 100 percent as of January 1, 1996.¹⁵² Second, there is space for tough

148. JOINT VENTURE LAW, *supra* note 2, at art. 17.

149. *Id.* at art. 19, § 1.

150. Polish efforts to introduce partial internal convertibility of the local currency resulted in the enactment of the new FOREIGN EXCHANGE LAW of December 30, 1989. USTAWA Z DNIA 15 LUTEGO 1989 R. - PRAWO DEWIZOWE [FOREIGN EXCHANGE LAW], DZIENNIK USTAW, No. 6, § 33 (1989); DZIENNIK USTAW, No. 74, § 441 (1989). The law is intended to eliminate the dual monetary system existing in Poland. At the same time, it is seen as the first step toward full convertibility of the Polish *zloty* in the near future. All foreign trade transactions are subject to the new law, the most important aspects of which include the following features. All hard currency earnings from foreign trade are exchanged into Polish *zlotys* at the current exchange rate. The rate as of January 1, 1990, was 9,500 *zlotys* to the U.S. dollar. Companies involved in foreign trade may not maintain any portion of the hard currency earnings in separate accounts. Only a single account in Polish currency is available for all units involved in foreign trade. At the same time, all parties allowed to conduct foreign trade have unlimited access to the hard currency exchange system. Local commercial banks must accept import orders from Polish companies. *Zlotys* deposited on the company's *zloty* account are converted to cover the company's import needs. The Central Bank of Poland is responsible for ensuring that local commercial banks possess enough hard currency to meet the import needs of their local clients. *Id.*

151. JOINT VENTURE LAW, *supra* note 2, at art. 19, § 2.

152. Protocol No. 4 Concerning Business and Economic Relations, United States - Poland, Mar. 21, 1990, ____U.S.T. ____, T.I.A.S. No. ____, ____U.N.T.S. ____ (pending official publication). The Treaty is subject to ratification, shall enter into force on the 30th day following the date of the exchange of instruments of ratification, and shall remain in force for a period of 10 years. *Id.* at art. XIV. For commentary on the proposed treaty, see *In a Pact, Poland Opens Doors to U.S. Business*, N.Y. Times, Mar. 22, 1990, at A11, col. 1.

bargaining since individual joint ventures may be able to negotiate for more than 15 percent of profits to be converted into hard currency. According to the new joint venture law, in "economically substantiated cases, the Minister of Finance may, . . . issue a currency permit for purchase of foreign currency . . . in the amount exceeding [15 percent]."¹⁵³

4. *Taxation*

Before distribution, sums due to the reserve and other funds,¹⁵⁴ and sums due to the Polish treasury—most notably, taxes—must be deducted. Corporate income is taxed at a rate of 40 percent,¹⁵⁵ and is governed by the general tax law, not by the new joint venture law.¹⁵⁶ No taxes shall be levied during the first three years of a joint venture.¹⁵⁷ Tax holidays may be extended for an additional three years if the joint venture is established in areas of priorities.¹⁵⁸ Taxes on repatriated profits are fixed at the rate of 30 percent.¹⁵⁹ Poland has concluded agreements on the avoidance of double taxation with many countries, and the actual income tax on dividends of a foreign shareholder ranges from five to fifteen percent.¹⁶⁰ In companies where

153. JOINT VENTURE LAW, *supra* note 2, at art. 19, § 4.

154. *Id.* Other funds include those for research and development of production as stipulated in the charter. The joint venture is also required to make "depreciation payments" unless otherwise provided in the charter. The joint venture company may not contribute to the fund if it reached four percent of the company's operation costs. *Id.* at art. 17(4).

155. USTAWA Z DNIA 31 STYCZNIA 1989 R. O PODATKU DOCHODOWYM OD OSOB PRAWNYCH [CORPORATE TAX LAW], art. 17, § 1, DZIENNIK USTAW, No. 3, § 12 (1989). The rate was reduced from 50% in the LAW of 1986, *supra* note 73.

156. JOINT VENTURE LAW, *supra* note 2, at art. 27.

157. *Id.* at art. 28, § 1.

158. *Id.* at art. 28(2). Preferred sectors include: agricultural and food processing; the pharmaceutical and chemical industries; manufacturing of products and materials for the housing industry; protection of the natural environment; electronics and communications; production of scientific research appliances; printing machines, packages, and containers; and transportation and tourism. The list of preferred areas was published in the form of a Resolution of the Council of Ministers, entitled UCHWALA NR. 17 RADY MINISTROW Z DNIA 16 LUTEGO 1989 R. W SPRAWIE OKRESLENIA PREFEROWANYCH DZIEDZIN DZIAŁALNOŚCI GOSPODARCZEJ DLA SPŁEK Z UDZIAŁEN PODMIOTÓW ZAGRANICZNYCH [ON THE DESCRIPTION OF THE PREFERRED AREAS OF BUSINESS ACTIVITIES FOR JOINT VENTURES] MONITOR POLSKI, No. 4, § 42 (1989). Earlier joint ventures were able to get tax deductions on the basis of ROZPORZĄDZENIE RADY MINISTROW Z DNIA 3 LUTEGO 1989 R. W SPRAWIE OBNIŻKI PODATKU DOCHODOWEGO OD DOCHODU ZAGRANICZNYCH PODMIOTÓW GOSPODARCZYCH I PRZEDSIĘBIORSTW Z UDZIAŁEM ZAGRANICZNYM [THE RESOLUTION OF THE COUNCIL OF MINISTERS ON THE REDUCTION OF CORPORATE TAX OF FOREIGN COMPANIES AND JOINT VENTURE COMPANIES], MONITOR POLSKI, No. 3, § 18 (1989).

159. JOINT VENTURE LAW, *supra* note 2, at art. 29.

160. Poland has signed a number of bilateral agreements to eliminate the possibility of dual taxation with the following countries: Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Italy, Japan, Malaysia, the Netherlands, Norway, Pakistan, Spain, Sweden, Thailand, the United Kingdom, the United States, and Yugoslavia.

the U.S. partner's holdings are at least ten percent of the outstanding shares of the voting stock, the tax on dividends is five percent; in all other cases, the tax rate is fifteen percent.¹⁶¹

Joint ventures must pay three types of fees during the application process: (1) a fee to the agency issuing the joint venture permit; (2) a fee in the amount of 1.5 percent of the joint venture's initial capital for the notarizing of the foundation act; and (3) a fee at the rate of 2.5 percent of the initial capital to the state treasury for court registration. Since the application fees are estimated on the basis of initial capital, joint venture capital can be augmented subsequently without the payment of higher application fees. Like any other Polish enterprise, a joint venture, where applicable, must also pay an agricultural tax,¹⁶² a wage tax, a turnover tax,¹⁶³ a real estate tax, local taxes, stamp duties, and community fees.¹⁶⁴ Moreover, the payment to foreign employees is subject to Polish taxes assessed at a rate of 30 percent,¹⁶⁵ even though joint ventures are subject to the same tax privileges as non-socialized (private) Polish companies.¹⁶⁶

5. Banking and Accounting

Monetary assets must be deposited with a Polish foreign exchange bank.¹⁶⁷ To open an account in a foreign bank, a joint venture must apply for a special permit.¹⁶⁸ The law also requires the creation of a reserve fund to which the joint venture must contribute until it totals eight percent of the total contributions to the joint venture (*i.e.*, the authorized fund). In other words, each year the partners must deduct

161. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, art. 11, § 2 (a), (b), Oct. 8, 1974, *entered into force* July 22, 1976, 28 U.S.T. 891, T.I.A.S. No. 8486. Polish exports to the United States receive Most Favored Nation (MFN) treatment.

162. USTAWA Z DNIA 15 LISTOPADA 1984 R. O PODATKU ROLNYM [THE AGRICULTURAL TAX LAW], DZIENNIK USTAW, No. 52, § 268 (1984); DZIENNIK USTAW, No. 46, § 225 (1986); DZIENNIK USTAW, No. 1, § 1 (1988); DZIENNIK USTAW, No. 7, § 45 (1989); DZIENNIK USTAW, No. 10, § 53 (1989); DZIENNIK USTAW, No. 35, § 192 (1989); DZIENNIK USTAW, No. 49, § 275 (1989); DZIENNIK USTAW, No. 74, § 443 (1989).

163. USTAWA Z DNIA 16 GRUDNIA 1972 R. O PODATKU OBROTOWYM [THE TURNOVER TAX LAW], DZIENNIK USTAW, No. 27, § 147 (1989); DZIENNIK USTAW, No. 74, § 443 (1989).

164. USTAWA Z DNIA 14 MARCA 1985 R. O PODATKACH I OPLATACH LOKALNYCH [LAW ON LOCAL AND COMMUNITY TAXES], DZIENNIK USTAW, No. 12, § 50 (1988); DZIENNIK USTAW, No. 19, § 132 (1989); DZIENNIK USTAW, No. 74, § 443 (1989).

165. JOINT VENTURE LAW, *supra* note 2, at art. 32, § 4. This rate will continue to apply unless international agreements concluded by Poland provide otherwise.

166. *Id.* at art. 27.

167. *Id.* at art. 22, §§ 1, 2.

168. *Id.* at § 3.

from their profits the agreed-upon amounts to be deposited in the reserve fund, and they must continue to do so as long as that fund is below eight percent of the authorized fund.¹⁶⁹ Apparently, the fund must be maintained for the life of the joint venture. The purpose of the reserve fund is to guarantee payments of supplies and labor in case of bankruptcy. Upon termination, the reserve fund, like any asset, is returned to the partners pro rata, after setting off all debts.¹⁷⁰

A joint venture may obtain credit in hard currency from Polish or foreign banks.¹⁷¹ The *zloty* credit may be obtained through Polish banks. Short-term, long-term, secured and unsecured loans in *zlotys* and hard currencies are available.

Joint ventures are required to keep books and accounts according to the regulations of the Minister of Finance and also those of the Commercial Code. The accounting system used by Polish companies is different from generally accepted accounting procedures (GAAP) used by U.S. corporations.¹⁷²

H. Operations

Joint ventures are not directly subject to Polish state plans and thus are not assigned any production targets or quotas. Nevertheless, joint ventures will be affected indirectly through their interactions with Polish suppliers, customers, and other enterprises. Joint ventures are organized pursuant to their founding acts, which must not be contrary to the provisions of the Commercial Code,¹⁷³ and other relevant laws.¹⁷⁴

I. Transfer of Shares

If one partner of a joint venture wants to sell her share, the consent of all other partners is needed. The potential buyers must also be approved by the President of the Agency. The partners who oppose such a deal are obliged to recommend the names of other

169. *Id.* at art. 17, § 4.

170. JOINT VENTURE LAW, *supra* note 2, at art. 16, § 2.

171. *Id.* at art. 22, §§ 4, 5.

172. The accounting system used in the joint venture is different from generally accepted accounting procedures (GAAP) used in the United States. Polish enterprises use a different set of rules for evaluations, for depreciation of fixed assets, and for the treatment of uncollectible receivables. As a result, the net income of a Polish partner is different under Polish law than if calculated using GAAP. Therefore, the joint venture contract should clearly define how profits and losses will be treated.

173. See COMMERCIAL CODE OF 1934, *supra* note 31.

174. JOINT VENTURE LAW, *supra* note 2, at art. 9.

buyers within three months. Unresolved issues, if any, may be settled in the court of law.

J. Labor Issues

Generally, the Polish partner provides the labor, although the joint venture is free to advertise or to seek employees through employment offices. Since Poland is moving toward a market economy, the right of the employer to "hire and fire" has been recognized. Poland possesses a large skilled work force. Because of a very liberal travel policy adopted by the Polish government in the past, many potential employees have experience working in West European countries and are accustomed to the western model of employer-employee relations. The right to strike is a very sensitive issue. In the past, complicated strike laws provided that almost all strikes in Poland were illegal or contrary to the rules in force. In December 1989, a new employment law was enacted.¹⁷⁵ Generally speaking, the new regulations make it easier for the employer to lay-off useless employees. At the present time, labor related problems are subject to the applicable rules of the Polish Labor Code.¹⁷⁶

The joint ventures are free to adopt their own employment policies and may employ Polish nationals as well as foreigners.¹⁷⁷ The relations between a joint venture and its staff are regulated by the founding act.¹⁷⁸ Salaries to foreigners must be paid in Polish currency and are subject to 30 percent taxation.¹⁷⁹ The foreign employee may convert the full amount of her salary into foreign currency and freely transfer it abroad.¹⁸⁰ Unlike most Polish companies, joint ventures are excepted from taxation on employee salaries above certain prescribed amounts.¹⁸¹ This rule makes the position of joint ventures much better in attracting well qualified employees through high salaries.

K. Associations

The new law confirms that there will be a voluntary association of firms with foreign participation. The Chamber of Industry and

175. USTAWA Z DNIA 29 GRUDNIA 1989 R. O ZATRUDNIENIU [EMPLOYMENT LAW], *DZIENNIK USTAW*, No. 75, § 446 (1989).

176. JOINT VENTURE LAW, *supra* note 2, at art. 31, § 1.

177. *Id.* at § 2.

178. *Id.* at art. 32, § 1.

179. *Id.* at §§ 2, 4.

180. *Id.* at § 3.

181. USTAWA Z DNIA 27 GRUDNIA 1989 R. O OPODATKOWANIU WYNAGRODZEN W 1990 R. [LAW ON WAGE TAXES IN 1990], *DZIENNIK USTAW*, No. 74, § 438 (1989).

Commerce for Foreign Investors has replaced the Polish-Polonian Chamber of Industry and Commerce. This change expresses a broader sense of foreign investment.¹⁸² The bureaucratic attempt to smuggle into the legislation a provision on mandatory participation of all joint ventures in the new organized Chamber was finally rejected.¹⁸³ The Chamber is subject to the supervision of the President of the Agency, who may refuse to confirm its unlawful statute.

L. Protection of Foreign Investment

Doing business in Poland has been a hazardous task in the past. Now, in the light of political changes, it is a much safer activity. Although the political situation and business climate have changed, it would be very useful to offer foreign investors even more guarantees than those provided in Article 22 (6) of the new joint venture law.¹⁸⁴ The interpretation of this article, and the ability to make a claim against the Minister of Finance in a judicial course, seem to be unclear. A constitutional amendment passed on December 29, 1989, states that the "Polish State protects property and guarantees full private property. Expropriation is permitted only for a public purpose and for just compensation."¹⁸⁵ Currently, Poland has agreements in force with Great Britain, Austria, and China regarding the protection of foreign investments. Similar agreements were previously signed with Belgium, France, Italy, and the United States, but they still have not been ratified by Poland. The Polish Parliament should ratify these agreements and enter into similar agreements with other investor countries. In 1989, Poland signed a Multilateral Investment Guarantee Agency (MIGA) - a move made to enhance the confidence of foreign investors in the security of their Polish investments. MIGA insures against noncommercial risk, specifically: (a) currency transfer

182. The former Chamber, established in 1976, had many local chambers in many cities. Its professional and businesslike attitude gained it a very good reputation. The Chamber organizes meetings, symposia, trade fairs and general promotion of foreign investment. The former Chamber began lobbying for the foreign investors interests in what was a new development on the Polish political scene.

183. Piontek, *supra* note 41, at 1.

184. The Minister of Finance, upon the application of a foreign shareholder, issues a compensation payment guaranteed to the amount equal to the value of the Company's assets due him in the event of a loss resulting from a decision of any state authorities in respect to nationalization, expropriation, or from other actions having a result similar to that of nationalization or expropriation. JOINT VENTURE LAW, *supra* note 2, at art. 22(6).

185. CONSTITUTION OF POLISH REPUBLIC, art. 7, as amended by USTAWA Z DNIA 29 GRUDNIA 1989 R. O ZMIANIE KONSTYTUCJI POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ [LAW ON CONSTITUTIONAL AMENDMENT], DZIENNIK USTAW, No. 75, § 444 (1989).

risk; (b) risk of expropriation and similar measures; (c) breach of contract; (d) war and civil disturbances; and (e) other noncommercial risk other than devaluation and depreciation. On October 13, 1989, Poland signed an Agreement with the Overseas Private Investment Corporation (OPIC) on investment guarantees, which gives such protection to U.S. private investors. Another reasonable recommendation is for Poland to join the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.¹⁸⁶

M. Dispute Resolutions

A joint venture, as well as its partners, may have conflicts with foreign or Polish partners. Several possible types of disputes can be distinguished: (1) a joint venture and a Polish company (state-owned, private, or co-operative); (2) partners of a joint venture; (3) a joint venture and foreign companies; or (4) one of the partners of a joint venture and the joint venture itself. The composition of the particular parties to a dispute can be significant for reasons such as potential conflicts of law and location and terms of arbitration.

The advantages of international commercial arbitration are well-known.¹⁸⁷ The main idea behind arbitration is that the parties agree to abide by the award of an impartial arbitral tribunal.¹⁸⁸ At present, all disputes arising under the joint venture, as well as all aspects of its operation, are governed by Polish law, whether settled by Polish

186. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, *reprinted in* 4 I.L.M. 532 (1965). Pursuant to this Convention under the auspices of the International Bank for Reconstruction and Development (World Bank), the International Center for the Settlement of Investment Disputes (ICSID) has been established. According to Article 25 (1) of the Convention, the ICSID entertains claims from private as well as state parties. The conditions are: (1) that the disputants be "a Contracting State" and "a national of another Contracting State" *Id.*; (2) that they agree to the Center's jurisdiction in writing; and (3) that their dispute be a "legal dispute arising directly out of an investment." *Id.* Once formally given, neither party may unilaterally withdraw its consent to the Center's jurisdiction. At the same time, the home state of private claimant relinquishes its customary right of diplomatic protection. *Id.*

187. See generally R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* (1985); A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (1986); THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE (J. Wetter ed. 1979).

188. For a general discussion on international commercial arbitration in communist countries, see Berman, *The Legal Framework of Trade Between Planned and Market Economies, The Soviet-American Examples*, 24 LAW & CONTEMP. PROBS. 482 (1959); Pisar, *The Treatment of Communist Foreign Trade Arbitration in Western Courts*, in INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION 101 (M. Domke ed. 1958); Pisar, *The Communist System of Adjudication*, 72 HARV. L. REV. 1409 (1959); Slupinski, *Institutions of International Commercial Arbitration in CMEA Member States*, Boalt Hall School of Law, Univ. of California, Berkeley, 1988 (LL.M. thesis) (copy on file at the offices of the author and at Boalt Hall Law Library).

courts, or by a Polish arbitration tribunal agreed-upon by the parties.¹⁸⁹ The parties are free to arbitrate on issues regarding their non-labor disputes. They are also free to provide that future disputes shall be settled by arbitration in Poland or in any other foreign country. In Poland, such disputes may be solved by ad hoc bodies as well as by institutional arbitration.¹⁹⁰ If the place of arbitration is a third country, a number of traditional neutral locations are often considered, including Vienna and Stockholm.¹⁹¹ According to the agreement between the Polish Chambers of Foreign Trade and the American Arbitration Association, the Austrian Chamber of Commerce acts as an appointing authority in case of arbitration in Vienna. Arbitration under the auspices of the International Chamber of Commerce, the American Arbitration Association or the London Court of Arbitration might also be considered in cases where a larger investment is involved. Generally speaking, third country arbitration is the most widely practiced and successful form of dispute settlement in joint venture cases involving East European countries.¹⁹² Other alternatives, including the establishment of a Permanent Claims Tribunal, also have been suggested.¹⁹³

Without an arbitration clause arrangement, all disputes between the joint venture partners or between the joint venture and other state or private bodies are subject to the jurisdiction of Polish courts.¹⁹⁴ Experience shows two things: First, western companies have been suspicious of the degree of impartiality¹⁹⁵ of courts and arbitral

189. JOINT VENTURE LAW, *supra* note 2, at arts. 31, § 1, 2, § 2.

190. There are four permanent arbitration courts in Poland. The oldest one is the Court of Arbitration at the Polish Chamber of Foreign Trade. In the Court of Arbitration, there are two different rules of procedure. The first rule applies to proceedings where both parties are from CMEA-member countries. The second rule is applied to disputes where one of the parties is from a country other than a CMEA-member country. The reasonable alternative would be the establishment of a separate arbitration court under the auspices of the Chamber of Industry and Commerce for Foreign Investors.

191. The most common pattern followed by the businessperson is to provide for arbitration in a neutral country belonging to the western legal tradition.

192. Holtzman, *Five Ways the American Arbitration Association Can Assist in Resolving Disputes in Trade with the Soviet Union*, in THEROUX, *supra* note 16, at 710.

193. Such provisions were often negotiated between the Soviet and western partners. In the joint venture established by the American Trade Consortium in the Soviet Union, the American participants negotiated the submission of all applicable joint venture disputes to arbitration in Sweden, not at the Soviet Arbitration Court. The Special Claim Commission may also be an alternative to be used in the case of disputes. See Reisman, *For Permanent U.S. - Soviet Claims Commission*, 83 AM. J. INT'L L. 51, 56 (1989).

194. JOINT VENTURE LAW, *supra* note 2, at art. 2, § 2.

195. See Slupinski, *Independence and Impartiality of the Arbitrators in Poland and the Soviet Union: A Comparative Study*, Seminar paper written at Harvard Law School (copy on file at the offices of the author).

tribunals located in socialist countries.¹⁹⁶ Second, Polish courts generally still lack experience dealing with commercial issues involving international trade.

It is important to note in that Poland is a member of the New York Arbitration Convention,¹⁹⁷ and, as such, is bound to enforce arbitral awards rendered by tribunals of other Convention member states. Additionally, reforms undertaken in Poland to strengthen the independence of the judiciary have been introduced and may soon instill greater confidence in court decisions. While the situation may be improving, the foreign investor nevertheless remains exposed to many uncertainties and potential liabilities in undertaking a joint venture. In that light, it is indispensable that an arbitration clause be negotiated and included in the joint venture's foundation act.

N. Liquidation

If a joint venture is liquidated, a foreign partner has the right to retrieve the residual value of her "contribution," after discharging all debts, "in money or in kind". The liquidations must be registered with the Polish court and a notification must be published in the press. Liquidation may occur as stipulated in the charter or "by

196. Criticism of the independence of state judges in the socialist countries was attributed to the arbitrators. The most widely known case is *Jordan Investments, Ltd. v. Soiuzexport*, Soviet For. Trade Arb. Comm'n, Case No. 16 (1957), June 19, 1958. In that case, two Israeli companies entered into a contract with a Soviet state-trading agency, Soiuzexport, for the purchase of petroleum products, to be delivered F.O.B. Black Sea port. All the contracts were concluded in Moscow and all contained a clause providing for arbitration in Moscow. After Israeli troops entered the Sinai Peninsula, Soiuzexport advised the Israeli companies that the Ministry of Foreign Trade had withdrawn export contracts, relying on a *force majeure* clause excusing a nonfulfillment which rests on any circumstances that is beyond the control of the defaulting party. In October 1957, one of the Israeli companies, Jordan Investments Ltd., invoked arbitration in Moscow demanding damages. The Soviet arbitrators dismissed the Israeli company's claim. The Commission prevented the lawyers representing the Israeli company from submitting the essential proof and denied their request to obtain testimonies from the Soviet legal authorities. All these procedural aspects raised worldwide criticism. The question was whether arbitration tribunals of socialist countries are really impartial bodies. For details, see *The Times*, June 30, 1958, at 7; *Fin. Times*, June 27, 1958, at 8, col. 3; *N.Y. J. COM.*, July 3, 1958, at 6.

In *Antorg Trading Corp. v Camden Fibre Mills*, 304 N.Y. 519, 109 N.E.2d 606 (1952), the New York Court of Appeals upheld an agreement to arbitrate in socialist countries, and rejected public policy arguments that arbitration courts in socialist countries are automatically biased. A similar position has been taken by West European courts. Finally, the western legal doctrine accepted so-called "presumed impartiality." This term was used for the first time by Martin Domke in Domke, *Arbitration in State Trading Economies*, 24 *LAW & CONTEMP. PROBS.* 317 (1959).

197. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

decision of the Agency.”¹⁹⁸ This last provision has been a source of concern for westerners, since it means that a joint venture cannot risk straying too far from the strict provisions in its charter, and implementing certain business decisions may have to await appropriate approval. If the joint venture terminates its activity during the three year tax holiday, the tax must be paid retroactively for the period of the activity.

VI. CONCLUSION

The climate for foreign investments has improved significantly in Poland. Growing confidence in the Polish government and its joint venture program can be readily observed. The policy of non-intervention taken by the Soviet Union assures the continuation of the trend toward creation of a market economy in Poland. During the first year of the new joint venture law, about 1000 joint enterprises, 60 of which involved U.S. partners, received permission from the Agency.¹⁹⁹ This is a record number. It is important to note that most foreign investors invest only the required minimum of \$50,000.²⁰⁰ This indicates that many investors are still waiting, observing the development of the situation in Poland before they invest freely with larger amounts of capital.

Since many of the issues relating to the potential success of a joint venture are not addressed by the law, foreign investors have leverage for tough bargaining in negotiations over a joint venture contract. In general, Poland is becoming more accommodating to the western partner's concerns. A number of state institutions as well as business consulting agencies are providing information for potential foreign investors.

Although there will be a continuing trial and error process pertaining to joint ventures, the positive changes in the economy and political processes should provide for appropriate corrections in time.

198. According to Article 15, this may occur “If the Company engages in any activity incompatible with conditions set forth in the permit.” JOINT VENTURE LAW, *supra* note 2, at art 15.

199. The data were taken from the *Materials on Doing Business in Poland*, prepared by the Office of Eastern Europe and the Soviet Union, U.S. Dept. of Commerce, April 1990, for the *Symposium on Doing Business in Eastern Europe and the Soviet Union*, at 1.

200. Bamber & Kicinski, *supra* note 75, at 1.