

1981

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Andrzej Burzynski

Julian C. Juergensmeyer

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Recommended Citation

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**POLAND'S NEW FOREIGN INVESTMENT
REGULATIONS: AN ADDED DIMENSION TO
EAST-WEST INDUSTRIAL COOPERATION**

*Andrzej Burzynski**
*Julian Conrad Juergensmeyer***

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* Master of Arts, 1961, Foreign Service College, Warsaw, Poland; Master of Law, 1963, Warsaw University Law School; Doctor of Law, 1971. Institute of State and Law of the Polish Academy of Sciences. Adjunct, Institute of State and Law of the Polish Academy of Sciences; formerly visiting Associate Professor of Law, University of Florida.

** A.B., 1959, Duke; J.D., 1963, Duke. Professor of Law, University of Florida and Director, Cambridge-Warsaw International Trade Law Program.

I. INTRODUCTION

Traditionally, foreign investors have not participated directly in the economic life of socialist countries. Beginning in 1967, Yugoslavia, Hungary, and Romania enacted general legislation allowing direct foreign investment in their territories under specified conditions.¹ In 1976, Poland followed. The Polish legislation differed from that of its socialist neighbors by allowing both one hundred percent foreign-owned investment and foreign investment through mixed companies.² After three years of experience with the new legislation, important and far-reaching changes were

1. Yugoslavia first passed legislation allowing foreign investments on July 19, 1967 — TEKST SLUZBENI LIST NO. 10 (1968). Since 1967 this legislation has been revised and modified. The most recent changes were introduced in 1978 by the *Law on Investment of Resources of Foreign Persons in Domestic (Yugoslav) Organizations of Associated Labor Sluzbeni List No. 40, (1978), 18 INT. LEGAL MAT. 229-47 (1979)*. See also Scriven, *Yugoslavia's New Foreign Investment Law, 1979 J. WORLD TRADE L. 95 (Mar.-Apr.)*. For complete list of Yugoslav Laws concerning foreign investment see CENTRE ON TRANSNATIONAL CORPORATIONS, NATIONAL LEGISLATION AND REGULATIONS RELATING TO TRANSNATIONAL CORPORATIONS, at 217 (United Nations, New York 1978).

In 1970 Hungary passed foreign investment legislation MAGYAR KÖZLÖNY NO. 66 (1970); TÖRVENYÉK ÉS RENDELETEK HIVATALOS GYUJTEMENYE 863 (1972). This legislation was revised in 1977 by the *Decree on Economic Associations with Foreign Participation MAGYAR KÖZLÖNY NO. 35 (1977), 17 INT'L LEGAL MAT. 1451 (1978)*. An explanatory decree was issued in 1979 to clarify accounting practices, taxation, profit transfers, and repatriation of capital. MAGYAR KÖZLÖNY NO. 5 (1979). See *Hungary: New Decree Breaks JV Deadlock, 8 BUS. E. EUROPE 290 (1979)*. See also G. LORINCZI & T. DORIAN, *U.S.-Hungarian Joint Ventures: Prospects and Problems, 10 L. & POL. INT. BUS. at 1219-31 (1978)*; Madl, *Economic Associations with Foreign Participation and Their Recent Regulations in Hungary, 15 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 193 (1973)*.

Since 1971 Romania has allowed foreign investments, BELUTINUL OFICIAL NO. 33 (1971), reprinted in 11 INT. LEGAL MAT. 161 (1972). See also PATRASCANU & RUCAREANU, REGIMUL JURIDICAL SOCIETATILOR MIXTE IN REPUBLICA SOCIALISTA ROMANIA, INSTITUTI DE DREPT COMERCIAL INTERNATIONAL 277 (1973); J. BURGESS, DIRECT FOREIGN INVESTMENT IN EASTERN EUROPE: PROBLEMS AND PROSPECTS OF ROMANIA'S JOINT VENTURE LEGISLATION (1976).

2. For a discussion of this legislation see A. BURZYNSKI & J. JAKUBOWSKI, LES GARANTIES ACCORDÉES AUX INVESTISSEURS ÉTRANGERS EN POLOGNE, RAPPORT POLONAIS PRÉSENTÉES AU DIXIÈME CONGRÈS INTERNATIONAL DE DROIT COMPARÉ (1978); Burzynski & Juergensmeyer, *East-West Industrial Co-operation: The Polish Example, 1978 LOY. L. ANG. INT. & COMP. L. ANN. 37*; Weralski, *Taxation of Foreign Companies Dealing in International Economic Cooperation under the Polish Law, in THE LAW IN POLAND 127 (W. SOKOLEWICZ ED. 1978)*.

made in 1978 and 1979. These changes were in response to concerns expressed over facilitating foreign investment in Poland and constitute a new dimension in the legal framework of socialist countries for the foreign investment aspects of East-West industrial cooperation.

In addition to general legal norms, the legal framework for foreign investment in Poland is now established by the regulations and decrees listed below:

- (1) the Regulation of the Council of Ministers of May 14, 1976, on Issuing Permits to Foreign Corporations and Individuals to Conduct Business in Specific Fields³ as amended by the Regulations of the Council of Ministers of December 1, 1978;⁴
- (2) the Decree of the Minister of Finance of March 28, 1979, on the Permission to Open and Maintain Bank Accounts by Foreign Corporations and Individuals Conducting Business Activities in the Peoples' Republic of Poland;⁵
- (3) the Decree of the Minister of Finance and of the Minister of Foreign Trade and Maritime Economy of March 28, 1979, on the Permission to Conduct Certain Foreign Trade Activities by Foreign Corporate Bodies and Individuals;⁶
- (4) the Resolution of the Council of Ministers of February 7, 1979, on Establishing Business Enterprises with Foreign Capital Participation in Poland and their Operation;⁷
- (5) the Decree of the Minister of Finance of June 18, 1979, concerning Financial Operations of Business Enterprises with Foreign Capital Participation and on Permits for Conducting Certain Foreign Exchange Operations;⁸
- (6) the Decree of the Minister of Labor, Wages, and Social Benefits of May 30, 1979, on Some Principles of Employment and Compensation of the Employees of Limited Liability Companies with

3. 40 J. LAWS, Item 123 (1976) [hereinafter cited as Regulation of 1976].

4. 13 J. LAWS, Item 135 (1978) [hereinafter cited as Regulation of 1978].

5. OFFICIAL J. "MONITOR POLSKI", Item 67, No. 10 (1979) [hereinafter cited as the Decree of the Minister of Finance of Mar. 28, 1979]. See *Polish JV Legislation Revised by New Decrees*, 8 BUS. E. EUROPE 137 (1979).

6. OFFICIAL J. "MONITOR POLSKI", Item 68, No. 10 (1979) [hereinafter cited as the Decree of the Ministers of Finance and Foreign Trade of Mar. 28, 1979]. See *Polish JV Legislation Revised by New Decrees*, 8 BUS. E. EUROPE 137 (1979).

7. OFFICIAL J. "MONITOR POLSKI", Item 36, No. 4 (1979) [hereinafter cited as the Resolution of the Council of Ministers of Feb. 7, 1979]. See *Poland Liberalizes Laws on Manufacturing JVs*, 8 BUS. E. EUROPE 81 (1979).

8. OFFICIAL J. "MONITOR POLSKI", Item 97, No. 16 (1979) [hereinafter cited as the Decree of the Minister of Finance of June 18, 1979].

Foreign Capital Participation.⁹

Under these items of legislation, the wholly-owned investment and joint venture company business forms established by the 1976 legislation are continued. They are, however, modified and extended in many significant ways.

II. WHOLLY-OWNED FOREIGN INVESTMENTS

A. *Scope of Activities*

The 1976 legislation, particularly the Regulation of the Council of Ministers of May 14, 1976, on Issuing Permits to Foreign Corporations and Individuals to Conduct Business in Specific Fields, hereinafter referred to as the Regulation of 1976, described the scope of economic activities that could be undertaken by foreigners in Poland to include: (1) crafts, (2) retail trade and catering, (3) hotels, and (4) other services. The Regulation of the Council of Ministers of December 1, 1978, hereinafter referred to as the Regulation of 1978, extended the scope of economic activities that may be undertaken by foreigners in Poland by rephrasing item (4) to read "all *manufacturing* and service activities," thus considerably expanding the scope of activities open to foreign investors.

B. *Parties*

The categories of foreign persons allowed to apply for permits to conduct economic activities in Poland were broadly defined under the 1976 legislation and are left unchanged. The definition includes legal persons incorporated abroad, natural persons with permanent residence abroad,¹⁰ natural persons who are foreign citizens but who have been granted cards of permanent residence in Poland,¹¹ associations without legal personality whose members

9. OFFICIAL J. "MONITOR POLSKI", Item 88, No. 15 (1979) [hereinafter cited as the Decree of the Minister of Labor of May 30, 1979].

10. This formulation stressing foreign residence rather than foreign nationality allows Polish nationals permanently living abroad to apply for permits.

11. A card of permanent residence permits a foreigner to become a permanent resident in Poland. The conditions for obtaining it are found in Decree of the Ministers of Internal Affairs and Foreign Affairs of Oct. 1, 1963 on Procedure and Rules Applicable to Foreigners and on Specimens of Documents for Foreigners, 43 J. LAWS, Item 242 (1963).

belong to the above-mentioned categories,¹² and associations and social organizations of people of Polish origin living abroad.¹³

C. *Permits*

Under the 1976 legislation, foreigners were required to obtain permits before undertaking investment activities. These permits were issued for a duration of ten years. Pursuant to the 1978 amendments, the permit can be granted for longer periods if justified by the nature of the economic activity, the value of the investment, and the projected investment return. As was the case under the 1976 legislation, a permit can be renewed once it has expired. Pursuant to the original 1976 legislation, permits for economic activities had to be obtained from the competent governmental unit, the *voivodship* organ of administration, within the territory in which the proposed economic activity was to be located.¹⁴ If the applicant was a foreign legal person or an association of Poles living abroad, the *voivodship* administrative organ was required to seek an opinion on the pending application from the Ministry of Foreign Trade and Maritime Economy. The revised regulations leave these requirements intact, but additionally require the *voivodship* administrative organ to seek an opinion from the Minister of Domestic Commerce and Services whenever an application is made to undertake an activity fitting into the new general category of manufacturing and service activities

12. Whether a particular association possesses legal personality varies in different jurisdictions. For instance, civil law partnerships enjoy legal personality in France but not in West Germany. R. HOUIN & R. RODIERE, *DROIT COMMERCIAL*, § 106 (1971).

Practitioners in private international law argue that the question of the legal status of unincorporated business organizations should be solved according to the law of the principal office of the organization. 2 E. RABEL, *THE CONFLICT OF LAWS* 113 (1947).

13. The inclusion of this category of organization seems to be of limited practical effect. These organizations are ordinarily set up as non-profit associations enjoying preferential tax treatment. If they engage in business activities, they will lose their special tax status. *E.g.* P. FRANCESCHINI & L. PELISSIER, *CONSTITUTION ET FONCTIONNEMENT DES UNIONS ET DES GROUPEMENTS D'ENTREPRISES INDUSTRIELLES ET COMMERCIALES*, 318 (1972).

14. Under the law of May 28, 1975, on the two-level administrative division of the state, 16 J. LAWS Item 91 (1975), Poland is divided into 49 *voivodships*. See also S. Zawadzki, *The Reform of Local Government in the Polish People's Republic in the Years 1972-1975*, in *THE LAW IN POLAND* 259 (W. Sokolewicz ed. 1978).

rather than into the original specific categories. This permit is the only administrative act required for foreign investment activities in Poland.

Prior to obtaining a permit, the foreign investor has to present a cost projection for the proposed investment, a commitment to cover the full cost of the investment in convertible currency, and a certificate from the authorized bank certifying that thirty percent of the estimated investment cost has been deposited in an investment account in convertible currency.¹⁵

D. *Forms of Business Operation*

In spite of the greater specificity found in the 1978 legislation, there is no specific provision of Polish legislation detailing what forms of business organizations are permissible for foreign investment. The foreign investor must establish in Poland a representative, which can be a Polish citizen permanently living in Poland, a foreigner with a permanent residence card,¹⁶ or the foreign trade company POLIMAR S.A.¹⁷ The law does not describe the extent of the power to be given to the representative. It does say, however, that it is to conduct economic activities. Consequently, one can assume that it is a general representative empowered to conduct regular business operations.¹⁸ The designation of a representative does not deprive the foreign investor of the right to conduct economic activities himself when he is present in Poland. His capacity to act in this respect will be determined by the Polish International Private Law of July 12, 1965,¹⁹ which subjects this capacity to the law of the country in which the seat (principle office) of the business enterprise is located.²⁰

15. Regulation of 1976, *supra* note 3, at § 10(1).

16. *See* note 11 *supra*.

17. The foreign trade company POLIMAR S.A. was set up in 1972 to render agency services for companies, especially those of Poles living abroad.

18. According to the provision contained in the POLISH CIVIL CODE § 98 (1964), a general representative has the power to undertake acts of ordinary administration. For acts exceeding those of ordinary administration, a special power is required. *See also* S. GRZYBOWSKI, SYSTEM PRAWA CYWILNEGO, CZEŠC OGÓLNA, §§ 605, 606 (1974).

19. 46 J. LAWS, Item 290 (1965).

20. Polish International Private Law § 9(1) provides that natural persons' capacity to undertake legal acts is governed by their national law (*lex patriae*). According to the provision contained in paragraph 3 of the same section, however, if a natural person (or legal person) undertakes a legal act in regard to his

Since neither the Regulation of 1976 or the Regulation of 1978 specifies the form in which wholly-owned business operations of foreign investors can be conducted, guidance must be found in other Polish legal acts, which, according to the former legislation, are to be applied. The relevant laws include the Law on Organization and Execution of Craftmanship²¹ and the Law on Conducting Commerce and Other Types of Activities by Non-Socialized Organizations.²² The Regulations of the Council of Ministers of 1928 and 1934 Concerning the Conditions for Allowing the Conducting of Activities within Poland of Foreign Corporations and Foreign Corporations and Foreign Limited Liability Companies²³ are also applicable in matters not expressly covered by the Regulation of the Council of Ministers of May 14, 1976, as amended, to foreign business entities which operate either as limited liability companies or as corporations.

Under the Law Regarding the Organization and Execution of Craftmanship and the Law on Conducting Commerce and other Types of Activities by Non-Socialized Organizations, the investor who is a natural person is not permitted to form a corporation having legal personality to operate in Poland. He can, however, form a civil law partnership, which under Polish law has no separate legal personality, in which case he will be²⁴ required to obtain a special permit.²⁵ The other partners must also obtain the permit. Operating as a single proprietor, the foreign investor cannot transact business under a commercial name and will be subjected to unlimited liability with regard to his assets in Poland and abroad. His assets in Poland will, of course, be subject to the claims of personal creditors abroad.²⁶

enterprise, his capacity to undertake this act is governed by the law of the country where this enterprise is located. See M. SOŚNIAK, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ POLONAIS, 95 (1976).

21. 23 J. LAWS, Item 164 (1972).

22. 27 J. LAWS, Item 158 (1974).

23. 103 J. LAWS, Item 919 (1928) and 31 J. LAWS, Item 281 (1934).

24. This type of partnership (*societe civil*) is regulated by the provisions contained in POLISH CIVIL CODE §§ 860-75 (1964). For a brief discussion of this provision, see Burzynski & Juergensmeyer, *supra* note 2, at 61.

25. Law on Organization and Execution of Craftmanship, *supra* note 21.

26. The situation would have been different under the Polish Code of 1934. It provided that all merchants could operate under a commercial name ("firma"). "Merchants included both natural persons conducting business for profit on their own behalf and commercial companies (general commercial partnerships, limited partnerships, limited liability companies, and corporations).

Under current Polish law only business entities formed as general commercial partnerships, limited liability companies, or corporations are entitled to bankruptcy proceedings.²⁷ When a sole proprietor becomes insolvent, those creditors who first file legal actions against him are entitled to priority with regard to existing assets. There is no procedure to sequester and administer all assets on behalf of creditors.²⁸

As already discussed foreign associations and partnerships are also allowed to conduct business operations in Poland under the Regulation of 1976. Their situation will be similar to that of sole proprietorships. Some difficulties may arise, however, concerning their professional capacity since the Polish Code of Civil Procedure²⁹ provides that *social organizations of working people* are the only entities without legal personality that can sue and be sued.³⁰ It is uncertain whether foreign associations and partnerships can and will be assimilated into this category.³¹

More complicated legal problems will arise when the foreign

Section VI of the *Introductory Law of the Polish Civil Code of 1964*, 16 J. LAWS, Item 97 (1964) left in force only those provisions of the Polish Code of 1934 that regulate general commercial partnerships, limited liability companies, and corporations. Moreover, the Polish Code provisions regulating commercial names, commercial representatives, and commercial registers of these companies remained in force.

27. Section 1 ¶ 1 *Bankruptcy Law* (Prawo upadłościowe). Presidential Decree of Oct. 24, 1934, 93 J. LAWS, Item 834 (1934) limits application of its provisions to merchants only.

28. If a debtor fails to satisfy a creditor after the creditor obtains a court judgment for payment, then 1964 Polish Code of Civil Procedure allows the creditor to petition for foreclosure of the debtor's personal property, wages, bank accounts, and immovable property. In case the money obtained from the foreclosure procedure or from the sale of foreclosed property is not sufficient to cover all claims, the following priority governs payment under CODE OF CIVIL PROCEDURE § 1025 ¶ 1:

- 1) cost of foreclosure procedure;
- 2) preferential creditors (wages, alimony, child support, damages for deaths and bodily injuries, taxes, and public charges);
- 3) charges owed to state for the perpetual use of state land and the use of state-owned buildings;
- 4) bank credits;
- 5) charges secured by mortgages and pledges (pawns); and
- 6) charges of the creditors who petitioned for foreclosure.

29. POLISH CODE OF CIVIL PROCEDURE § 1117 ¶ 1 (1964).

30. *Id.* § 64 ¶ 7.

31. See also Z. RESICH & W. SIEDLECKI, COMMENTARY TO THE CODE OF CIVIL PROCEDURE 1420 (1976).

investor is a foreign corporation. Its enterprise in Poland will be subjected to centralized management and control of its managerial bodies by Polish authorities. Their activities in Poland will also be subjected to control by administrative and tax authorities, banks, and other financial institutions of the country of incorporation. It is important that Polish administrative authorities as well as others who may become involved in financial and economic transactions with the foreign entity have access to information about the structure and economic activities of the foreign investor. Pertinent provisions are contained in the Regulations of the Council of Ministers of 1928 and 1934.³² Foreign corporations doing business in Poland must indicate the name of the corporation with its Polish translation, as well as the country in which it is incorporated and the type of corporate organization. Polish authorities must approve any and all increases or decreases in the portion of the capital of the corporation devoted to the Polish business activities. Approval will also be required for a change in the principal offices of the corporation's representative in Poland. Within sixty days after a shareholders' meeting, the corporation is required to submit to the Polish authorities a copy of the minutes of the shareholders' meetings, and a Polish translation, as well as a copy of its balance sheet and financial reports. It is also obliged to inform the Polish authorities of all changes in its by-laws or the identity of corporate agents. The corporation must give notice if it liquidates. Prior to starting business activities in Poland, it is required to give public notice of its name, the location of its corporate headquarters, the name and address of its representatives in Poland, the amount of its capital, the amount

32. Because these two acts are almost fifty years old, their application and force is unclear. The Regulation of 1976, *supra* note 3, in section 11 stated that these two acts will not be applied to matters already regulated by their provisions or other specified laws for subsidiary application. *E.g.*, *Law on Organization and Execution of Craftmanship of 1972-73*, J. LAWS, Item 164 (1972), and the *Law on Conducting Commerce and Other Types of Activities by Non-Socialized Organizations of 1974*, 27 J. LAWS, Item 158 (1974). A literal construction of section 11 supports the conclusion that both acts are in force and are applicable to matters not regulated in the Regulation of 1976. For example, the withdrawing and expiration of permits to conduct economic activities in Poland granted to foreign limited liability companies and corporations and the duties of corporations toward Polish authorities and courts in the course of their economic activities remains the same. Burzynski, *Bezpośrednia działalność gospodarcza w Polsce zagranicznych osób prawnych i fizycznych*, 6 PRZEGLĄD US-TAWODAWSTWA GOSPODARCZEGO 155 (1979).

of capital devoted to its Polish activities, and the object of its business activities in Poland. It must also register in the commercial registry kept by the local court of the jurisdictional unit.³³

Under Polish law, like the law of most other jurisdictions, a branch is not accorded separate legal status from its parent corporation. Consequently, all legal transactions in Poland will have to be conducted on behalf of the parent corporation. As with sole proprietorships, the business activities of the corporation within Poland are subjected to Polish law with regard to legal capacity. For obligations incurred in connection with these activities, the corporate assets of the entire corporate entity are subject to liability.

E. *Financial Problems of Business Operation*

The most important changes made in the 1976 law on wholly-owned foreign investments were made with respect to the financial problems of operation in Poland.³⁴ The pertinent provisions are contained in the Decree of the Minister of Finance of March 28, 1979, on the Permission to Open and Maintain Bank Accounts by Foreign Corporations and Individuals Conducting Business Activities in the Peoples' Republic of Poland,³⁵ hereinafter referred to as the Decree of the Minister of Finance of March 28, 1979. Because of the nonconvertibility of Polish currency, the *zloty*, the transfer of profits and repatriation of capital from Poland is most important for foreign investors undertaking business activities in Poland. According to the Decree of the Minister of Finance of March 28, 1979, foreign investors are required to open three accounts in the Bank Polska Kasa Opieki S.A.³⁶ Two of these are convertible currency accounts, and the remaining account is in Polish currency. The first account, called the F account, is used for financing investment activities. Only foreign

33. The Commercial Register is governed by the Decree of the Minister of Justice of July 1, 1934, on the Commercial Register, 59 J. LAWS, Item 51 (1934).

34. Compare the analysis of the 1976 law in Burzynski & Juergensmeyer, *supra* note 2, at 55.

35. OFFICIAL J. "MONITOR POLSKI," Item 67, No. 10 (1979).

36. The detailed scope of activities of the Bank Polska Kasa Opieki, S.A. is determined by the Decree of the Minister of Finance of May 18, 1974, OFFICIAL J. "MONITOR POLSKI" Item 131, No. 22 (1974). Activities include the opening and maintaining of bank accounts for foreigners, credit activities, and buying and selling of foreign currency.

currency coming from abroad can be deposited in this account. The foreign currency must be convertible currency. It is in this F account that thirty percent of the estimated investment cost must be deposited before the investor may obtain the permit to conduct a wholly-owned investment.

Withdrawals in convertible currencies from the F account can be made to finance the purchase of goods abroad through the Polish foreign trade organizations, to purchase goods in a domestic export transaction, and to make payments to Polish enterprises if they are authorized by regulations to sell their products and services in return for convertible currencies. The balance of the account can also be transferred abroad. After the foreign investor has expended fifty percent of the estimated investment cost, the required deposit can be withdrawn partially or totally for the uses discussed above or transferred abroad without special permission. The Decree of the Minister of Finance of March 28, 1979,³⁷ permits the appropriate organization of the *voivodship* to grant permission to use the required deposit funds prior to the time the foreign investor has expended fifty percent of the estimated investment cost when justified.

The second convertible currency account is the EI account from which payments in convertible currency are made for current operational expenses. Funds obtained from the export of commodities and services produced by the foreign investor are deposited in this account. All other deposits to this account must come from abroad. Purchases with money from the EI account may be made both in Poland and abroad, but they must be made through either the Polish foreign trade organization or Polish enterprises authorized to sell their products and services for convertible currencies.

The Decree of the Minister of Finance of March 28, 1979,³⁸ specifies that funds from the EI account may be used to purchase raw materials, semi-processed products, spare parts, and tools used in the production and supply of services. The Decree also permits convertible currency withdrawals from the EI account in order to pay charges made by the Polish foreign trade organizations for their assistance in export and import transactions, charges for services provided by Polish enterprises that are authorized to charge in convertible currencies, and travel expenses

37. Decree of the Minister of Finance of Mar. 28, 1979, *supra* note 5.

38. *Id.*

of Polish employees on business trips abroad when those trips are necessary for the operation of a foreign firm in Poland.

Pursuant to the Decrees of the Minister of Finance and of the Minister of Foreign Trade and Maritime Economy of March 28, 1979,³⁹ the export of goods and services by the foreign firm must be transacted exclusively through the offices of either the foreign trade company POLIMAR⁴⁰ or the foreign trade organization REMEX.⁴¹

The Decree of the Minister of Finance of March 28, 1979, specifies that the holder of an EI account has full discretion to use the interest earned on the account. The holder can also use those convertible currency funds in the account not received from the operation of the foreign investment firm. This implies that no such right of discretion exists with regard to the proceeds in convertible currency received from the operation of the foreign investment. The total of the proceeds from exports after deducting the expenditures on imports of raw materials, semi-processed products, spare parts and tools, charges made by the Polish trade organizations for their assistance in export and import transactions, charges for services provided by Polish enterprises, and travel expenses of Polish employees traveling abroad on firm business will be transferred from the EI account to the third account which is calculated in *zlotys*.

The third account, the *zloty* account, is to be opened in the Bank Polska Kasa Opieki S.A. so that the foreign investor can use that bank's services to deposit money, to finance its activities connected with the business operation and the modernization and reconstruction of investments, and to provide Polish currency to cover the private expenses of the firm's owners. The important modification introduced by the Decree is the possibility of using money deposited in the *zloty* account for reinvestment.⁴² The for-

39. See Decree of the Ministers of Finance and Foreign Trade of Mar. 28, 1979, *supra* note 6.

40. See note 17 and accompanying text *supra*.

41. The foreign trade enterprise REMEX is licensed by the Minister of Foreign Trade and Maritime Economy to carry out the export of goods produced by craftsmen and artisans as well as the import of primary materials needed for this production. See Decree of the Minister of Foreign Trade and Maritime Economy of Dec. 21, 1976, reprinted in 11 OFFICIAL J. MINISTRY FOREIGN TRADE & MAR. ECON. Item 67 (1976).

42. See Decree of the Minister of Finance of Mar. 28, 1979, *supra* note 5, at § 5.2.

eign investor must first obtain a permit required by the Regulation of 1976. His convertible currency input will in such case be limited to thirty percent of the investment cost.

Foreign investors can also make withdrawals in convertible currency from the *zloty* account. These withdrawals, however, cannot exceed fifty percent of the net turnover revenues in a given fiscal year nor can they exceed nine percent of the value of the investment contributions in convertible currencies. Pursuant to income tax regulations, net revenues are calculated by deducting taxes due and payable. The nine percent annual limitation is not applied if the officially certified sales in convertible currencies constitute any part of the firm's turnover, in which case fifty percent of the convertible currency earned by the firm can be withdrawn. The fifty percent of net turnover revenues limitation will apply even to the withdrawals of earned convertible currency. This constitutes a change from the preexisting rules established by the Decree of May 14, 1976, of the Minister of Finance. That Decree required that the nine percent limitation on payments in convertible currency does not apply if at least fifty percent of the turnover is documented by export sales against convertible currency.

Another important change made by the Decree of the Minister of Finance of March 28, 1979, is that it contains a definition of the value against which the nine percent limitation is calculated. The new order provides that this value is that of capital assets and indispensable producer commodities, such as raw materials, energy, and maintenance, used in a given year and purchased in convertible currencies or in Polish *zlotys* coming from documented currency exchanges.

The Decree of the Minister of Finance of March 28, 1979, reaffirms the preexisting situation regarding the sale by a foreign investor of his Polish business operation to another foreigner or to a Polish citizen. If the owner sells his firm to a foreigner from a convertible currency country, he is permitted to transfer abroad any portion of his proceeds from the sale after deducting the taxes due, provided that the following four requirements are met: (1) the sales contract must be in written form and notarized; (2) in case the entire firm or a part which constitutes a self-contained establishment is sold, the purchaser must possess a permit to operate the firm; (3) the proceeds from the sale must have been transferred to a Polish bank; and (4) the seller must have settled his tax obligations due on his investment and business operations.

If the owner sells his firm to a Polish citizen, he can transfer abroad the proceeds from the sale not exceeding the value of his convertible currency investment contribution plus fifty percent of the net proceeds from the sale. In addition, the sales contract must be in writing and notarized; the proceeds from the sale must have been transferred in Polish *zlotys* to the purchaser's account in a Polish bank; and the seller must have satisfied his tax obligations due on his investments and business operations.

The Decree of the Minister of Finance of March 28, 1979, also reaffirms the previous legal provisions relating to the passage of the firm's assets by inheritance. If the firm's assets pass by inheritance to persons who reside abroad, those persons will have the same rights to administer the assets as the testator. If Polish citizens are also among the inheritors, only foreign inheritors are entitled to transfer abroad their share of the firm's assets and profits.

F. *Taxation*

The tax treatment of foreigners and foreign business entities conducting business operations in Poland was established in 1977 at the time of the institution of the new foreign investment structure.⁴³ This treatment has remained unchanged.⁴⁴ Foreign investors are generally subject to the same income taxation as Polish citizens. The tax rate on most types of income consequently does not exceed thirty percent.⁴⁵ Income tax on dividends and other distributions of profit, however, may be reduced by the Minister of Finance at the request of the Minister of Foreign Trade and Shipping.⁴⁶ If taxable income cannot be determined according to regular accounting procedures, the following percentages are applied to establish taxable income: (1) ten percent of the gross annual receipts of construction and assembly projects; (2) five per-

43. Order of the Minister of Finance of May 23, 1977, in the Matter of Taxation of Foreign Natural and Legal Persons, *reprinted in* 18 J. LAWS, Item 21 (1977) [hereinafter cited as Taxation Order of May 23, 1977].

44. See generally Burzynski & Juergensmeyer, *supra* note 2, at 59-61; Weralski, *Polish People's Republic: New Joint Venture Legislation*, 17 EUROPEAN TAX. 114 (1977).

45. The maximum 30% rate applies to gains from the sale of real and personal property, payments received as a consideration for use of patents, trademarks, designs, models, copyrights, and interests and dividends. Taxation Order of May 23, 1977, *supra* note 43, art. 10.1.

46. *Id.* art. 10.2.

cent of the gross receipts from foreign trade activities; (3) sixty percent of gross receipts from commissions, and (4) twenty percent of the gross receipts of other commercial activities.⁴⁷ Income from construction or assembly projects of less than six months duration and from independent commercial activity carried on through Polish trade agencies is exempted from taxation.⁴⁸ Certain exemptions and reductions are also given to foreigners and foreign business entities with regard to the turnover tax to which Polish citizens and entities are subject. There is a complete exemption for construction and assembly operations and commercial activities conducted by independent agents in transactions with Polish socialized enterprises.⁴⁹ The exemption does not apply to persons who conduct construction or assembly operations on the basis of permits for executing craftsmanship in Poland.⁵⁰ The turnover tax on hotel services is reduced to eight percent for the first ten years.⁵¹ Other turnover tax rates vary from one percent to five percent.⁵² All tax rates are variable by international agreement. Foreigners who conduct hotel operations, domestic trade activities, catering, craftsmanship, and other services receive a tax holiday of varying length with regard to income taxes.⁵³

G. Customs

Decision Number 4 of the Minister of Foreign Trade and Maritime Economy of February 2, 1978, allows foreign investors having permits to conduct business activities in Poland to be exempted from customs duties on equipment imported for their business activities in Poland. In cases justified by national economic interests, exemptions from customs duties on materials needed for production and brought from abroad may be given by the Central Customs Office.⁵⁴ This is particularly true during the

47. *Id.* art. 7.1.

48. *Id.* arts. 2.1, 3.1.

49. *Id.* art. 9.2.

50. *Id.* art. 2.2.

51. *Id.* art. 6.3.

52. *Law on Turnover Tax of 16 December 1972*, 53 J. LAWS, Item 338 (1972).

53. Taxation Order of May 23, 1977, *supra* note 43, art. 6.1.

54. Collection of legal rules and information concerning foreign persons' economic activities on Polish territory, 36 [in Polish] (pamphlet published by Association of Cooperation with Poles Abroad, "Olonia," Warsaw, (1979)).

business enterprise's start-up period.

H. *Employment*

Labor relations between Polish workers and foreign enterprises are subject to Polish laws and regulations according to the Information of the Ministry of Labor, Wages and Social Benefits.⁵⁵ The observance of Polish laws and regulations by foreign employers is supervised by labor inspectors acting within the scope of trade union activities. Foreign investors have free choice in hiring Polish workers.

The employment and social benefits sections of territorial administrative units are required to extend assistance to foreign investors in hiring activities. The employees are entitled to the same social security benefits provided for employees of state-owned enterprises. The employer is required to pay specified fees for these benefits. The fee is computed as a percentage of the total payroll figure. In the case of craftsman operations, the percentage is twenty-two percent for enterprises rendering services to the general public and twenty-seven percent for all other foreign-owned enterprises. Part of the social benefit, amounting to four percent of the payroll, is transferred for social activities carried out by the trade unions. When the activity conducted is that of commerce, catering, transport, or hotels, the fee is thirty percent of the total payroll. In this instance the portion devoted to social activities of trade unions is six percent.

III. MIXED CAPITAL COMPANIES

The Decree of the Minister of Finance of May 26, 1976, Concerning Permits for Foreign Exchange Operations by Mixed Capital Companies established the possibility of creating mixed capital companies for foreign investment purposes in Poland.⁵⁶ This Decree has now been repealed, but its most important feature, that no special permission is required for foreign investors to establish mixed capital companies in Poland, has been reconfirmed in the Resolution of the Council of Ministers of February 7, 1979,

55. *Id.* at 37.

56. A mixed capital company is defined as one in which there is joint economic participation. Thus, this article will use the term "mixed company" interchangeably with the term "joint venture." See Burzynski & Juergensmeyer, *supra* note 2, at 57.

on Establishing Joint Ventures in Poland and Their Operation, hereinafter referred to as the Resolution on Joint Ventures.⁵⁷ This Resolution was followed by the Decree of the Minister of Finance of June 18, 1979, Concerning Financial Operations of Business Enterprises with Foreign Capital Participation and Permits for Conducting Certain Foreign Exchange Operations, hereinafter referred to as the Decree of the Minister of Finance of June 18, 1979.⁵⁸ This Decree, together with the Decree of the Minister of Labor, Wages and Social Benefits of May 30, 1979, on Some Principles of Employment and Compensation,⁵⁹ determines the legal form of enterprises with foreign investor participation, the parties and conditions of the agreements to establish those enterprises, the procedure for granting permission for the conclusion of such agreements by Polish entities, and the basic principles for the financial system of such enterprises, as well as their place in the system of Polish national economic administration.

A. *Permits*

Paragraph 1 of the Resolution on Joint Ventures authorizes state enterprises⁶⁰ and cooperatives⁶¹ to enter into contracts with foreign corporations and individuals for the establishment of limited liability companies. The Resolution specifies further that such joint ventures should have as their business the manufacture of goods for the Polish domestic market or for export. A provision contained in paragraph 5 of this Resolution establishes, however, an obligation that the Polish participants in the joint venture obtain a permit for each joint venture in which they desire to cooperate. The permit is granted on the basis of an application submitted by the managing director of a state enterprise or by the chairman of the cooperative's board of directors. The application should be accompanied by a statement from the relevant Polish

57. OFFICIAL J. "MONITOR POLSKI", Item 36, No. 4 (1979) [hereinafter cited as Resolution on Joint Ventures].

58. *Supra* note 8.

59. OFFICIAL J. "MONITOR POLSKI", Item 88, No. 15 (1979).

60. Establishment, structure, and administration of state enterprises in Poland is regulated by the Decree of Council of State of Oct. 26, 1950, as amended. Consolidated text in 18 J. LAWS, Item 3 (1960). See also 1 LASOK, POLISH CIVIL LAW, 47 (1973).

61. The basic legal act regulating the organization of cooperatives in Poland is the *Law of Feb. 17, 1961 on Cooperatives and their Federations*. 12 J. LAWS, Item 61 (1961).

foreign trade organization concerning the prospects for export of the joint venture's products to convertible currency markets if production for exports is considered as one of the activities of the joint venture. The permit is issued by the appropriate minister or the Board of Directors of the Central Federation of Cooperatives⁶² once it has the approval of the Chairman of the Committee for Domestic Markets.⁶³ The approval is granted in consultation with the Chairman of the State Planning Commission and the Minister of Finance. This procedure removes doubts that the state-owned enterprise has sufficient legal capacity to enter into joint ventures with foreign corporations. This concern existed because capacity of legal persons is limited under Polish law.⁶⁴

Neither the Resolution on Joint Ventures nor the Decree of the Minister of Finance of June 18, 1979, specifies whether the permission granted to state enterprises or cooperatives to enter into joint ventures releases these entities from the duty to obtain approval of the agreement as required by the Foreign Exchange Laws of March 28, 1952.⁶⁵ This approval is mandatory for all agreements entered into by organizations carrying out the national economic plan and having hard currency effects. Such approval may, however, be assumed since the organs which participate in granting the permit to enter into a joint venture agreement are the same as those empowered to approve contracts from the standpoint of hard currency foreign exchange laws.

B. *Scope of Activities*

The previously discussed provision found in paragraph 1, sections 1 and 2 of the Resolution on Joint Ventures provides that state-owned enterprises and cooperatives are allowed to enter into joint venture agreements establishing manufacturing enterprises

62. Cooperatives are grouped in federations (called Central Federations) according to the type of their activity. *Id.* The main function of these federations consists of coordination of the activity of its members. See S. GRZYBOWSKI, *PRAWO SPOLDZIELCZEW SYSTEMIE PORZADKU PRAWNEGO* 202 (1976).

63. The Committee for Domestic Markets was established by the Resolution of the Council of Ministers of Jan. 6, 1978. It is chaired by the Vice President of the Council of Ministers. *TRYBUNA LUDU* 1 (1978).

64. According to the provision contained in § 36 of the Civil Code of 1964, legal persons are limited in their capacity within the sphere determined by laws, its charter, and its scope of activities. 4 D. LASOK, *THE POLISH CIVIL CODE* 8 (1975).

65. 21 J. LAWS, Item 133 (1952).

which have a field of activity similar to that of Polish cooperatives and industrial enterprises under regional administration.⁶⁶ This language in the Resolution demonstrates the intent of the Polish legislature to limit the scope of activities of the prospective joint ventures, since traditionally those Polish industrial enterprises under regional administration have been involved in industrial production of a limited character. The same has been true of cooperatives. The law currently in force regulating the activities of industrial enterprises under regional administration does not specify, however, the exact activities permitted to such enterprises. Instead, it empowers them to conduct those industrial activities not performed by industrial enterprises under national or central administration, leaving quite imprecise the determination of exactly what activities are proper for enterprises under regional administration, cooperatives, and those industrial enterprises that are permitted to be conducted by joint ventures.⁶⁷

A more flexible, and yet at the same time, a more precise way of indicating the extent of activities permitted to joint ventures would be desirable. A new standard would also permit foreign investors to understand better the possibilities open for foreign investment in Poland. The Resolution limits prospective joint ventures in scope as well as in type of activities by permitting only manufacturing enterprises and leaving out service industries. These limitations automatically provoke the question whether or not joint ventures having a different scope or type of activity, like manufacturing on a national scale, hotels, or restaurants, can be established in Poland. The economic experience of other socialist European countries⁶⁸ does not justify interpreting the Resolution

66. The Decree of the Council of State on State Enterprises of 1950 provides for two types of state enterprises: enterprises set up by the appropriate minister (for given type of economic activities) in conjunction with the Minister of Finance and upon consultation with territorial administrative authority; and enterprises set up solely by the territorial administrative authority. See *Poland's Small Industries Given Impact, Coop Chances*, 8 BUS. E. EUROPE 161 (1979).

67. The law regulating industrial enterprises under regional administration is Resolution 62 of the Council of Ministers of March 27, 1971, concerning scope and direction of activities of small industries. OFFICIAL J. "MONITOR POLSKI", Item 171, No. 27.

68. Romanian Decree 424 on the Establishment, Organization, and Activities of Joint Companies in Romania of Nov. 2, 1972, provides in art. 1 that "joint companies may be formed in the fields of industry, agriculture, construction, tourism, transport, [and] scientific and technological research, with the object of producing and marketing goods, performing services or carrying out work."

of 1979 to totally exclude joint ventures other than those it explicitly regulates. Decisions on the establishment of joint ventures will be made on a case-by-case basis by the administrative officials or bodies charged with such responsibility. In such instances, the general principles, although not the limitations, established by the Resolution of 1979, might be applied by analogy.

The Resolution on Joint Ventures formulates two conditions of an economic nature concerning the extent or scope of the activities permissible which must be met. The foreign corporate entity or individual must introduce new technology and labor management systems. Polish raw materials, particularly waste recovered materials, should be utilized whenever possible.⁶⁹ Meeting the new technology and labor management systems condition may be difficult because of the limitation on the scope of the activities permitted to joint ventures. Those limitations would encourage only small and medium-sized foreign entities to be involved with joint ventures, which would, in turn, limit the availability of new technological and managerial systems.

C. *Guarantees to Foreign Investors*

Of great importance to foreign investors are the provisions of the Resolution on Joint Ventures found in section 2.1, which provides that the Polish authorities guarantee foreign corporate entities and individuals acting as partners in a joint venture that the requisite permits for remission of convertible currency will be issued.⁷⁰

BULETINUL OFICIAL No. 121. The Hungarian Decree of May 6, 1977, permits a broad scope of activities for economic associations with foreign participation by allowing them to be established for producing trading and servicing activities aimed at the economic development through applied technology. MAGYAR KÖZLÖNY No. 7 (1977).

Three foreign firms have already formed operating joint companies in Hungary: (1) Siemens AG of West Germany (servicing Siemens computers in Hungary); (2) Volvo of Sweden (manufacturing cross-country vehicles); and (3) Dow Chemical of the United States (a plastics raw materials plant). BUS. E. EUROPE 378 (1978).

69. These two conditions are found in Guidelines for the Establishment, Organization and Functioning of Limited Liability Joint Ventures in Poland. ANNEX TO RESOLUTION NUMBER 24 OF THE COUNCIL OF MINISTERS OF FEB. 7, 1979, Item 36.

70. This guarantee is formulated as follows: (1) Permission to transfer abroad the appropriate shares in the profits after deduction of taxes and after the fulfillment of all legal and contractual obligations; and (2) permission to

The provisions of the Resolution on Joint Ventures stress the self-sufficiency of the joint venture from the convertible currency point of view. Section 2.2 of the Resolution on Joint Ventures provides that the permission established by section 2.1 will be granted only within the limits of the convertible currency fund of the joint venture. When this fund will not be sufficient to cover the joint venture's foreign partner's share of profits from its activities, the Ministry or the Board of Directors of the Central Federation of Cooperatives, which issued the permission to the Polish partners to enter into the joint venture agreement, will be under an obligation to provide adequate amounts of convertible currency out of its own funds.⁷¹ The Resolution on Joint Ventures in Guideline 15 of the Annex specifies that the Polish foreign trade bank is not required to extend foreign currency credit or a guarantee to a joint venture. This is why the Resolution attaches such great importance to the joint venture's conducting export production activities which will produce convertible currency. In light of the provisions of the Resolution on Joint Ventures, Polish enterprises or cooperatives would be especially interested in establishing joint ventures to produce commodities which otherwise have to be imported from abroad and paid for in convertible currency or to produce commodities which can be exported abroad so as to earn convertible currency. Thus, Polish state enterprises and cooperatives can save part of their convertible currency allowances for other purposes. A second reason that Polish state enterprises and cooperatives would be interested in entering into joint venture arrangements is the possibility of undertaking production totally or in major part designed for export.

D. *Forms of Business Organization*

According to the provision in paragraph 1, section 1 of the Res-

transfer abroad the amount of money due on account of restitution of financial and material contributions upon the liquidation of a joint venture per the provisions of the agreement creating the joint venture.

71. Because there has been no legislation prohibiting foreigners from participating in mixed capital companies, joint ventures other than those specifically authorized by the Decree on Joint Ventures are permitted in Poland. The rationale is that special authorizing legislation is unnecessary, since nothing in Polish law prohibits the creation of such arrangements. Polish law instead presupposes the permissibility of mixed capital companies and does not require special permission for foreign investors to set up mixed capital companies in Poland. See A. BURZYNSKI, 7 PRZEGLĄD USTAWODAWSTWA GOSPODARCZEGO (1979).

olution on Joint Ventures, joint ventures are to be organized as limited liability companies under Polish law. The Polish Commercial Code of 1934⁷² provides for the following three forms of business organizations: the general commercial partnership, the limited liability company (roughly equivalent to the United States closed corporation), and the corporation. As noted above, the limited liability company is the only form of business organization permitted for joint ventures. Provisions of the Commercial Code of 1934 concerning limited liability companies are mandatory with respect to the company's formation, its activities, and its termination. The provisions are intended to protect third parties and minority shareholders. The remaining provisions, especially those which regulate the relationship among shareholders, have an optional character allowing parties to vary provisions through contractual agreement. This allows considerable flexibility in structuring the business entity. Taking advantage of the non-mandatory provision of the Commercial Code concerning relations between and among the shareholders, the Resolution on Joint Ventures establishes certain conditions for the Polish partner in the joint venture for the formulation of the agreement with the foreign partner, which, since they are prerequisites for obtaining permission to participate in the joint venture, are, in fact, mandatory for him.

Prior to promulgation of the Resolution on Joint Ventures, no provision of Polish law limited the equity of a foreign partner to a minority interest. Section 3.1 of the Resolution on Joint Ventures clearly specifies that the interest of a Polish state enterprise or Polish cooperative shall not be less than fifty-one percent of the initial capital.⁷³ One should note, however, that the provisions of

72. See note 26 *supra*.

73. The same conditions are contained in the Yugoslavian Law on Joint Ventures of Apr. 7, 1978. Yugoslavian law provides that the total value of resources which foreign persons invest in a given joint venture must be less than the resources of the Yugoslav partner. An exception is permitted, however, if the investment of the resources of foreigners is for the development of a particular branch of the economy and the interest is recognized by an act of the Federal Assembly. A requirement that the local partner hold at least 51% equity in joint ventures is also contained in Romanian Decree art. 4, No. 424 of Nov. 2, 1972. The Hungarian Decree of May 6, 1977, on Economic Associations with Foreign Participation changed Hungarian law in this respect by limiting foreign investor participation to 49%. The Minister of Finance may waive the limit, however, if the investment is in finance or services.

the Polish Commercial Code which establish the principle that the control rights of shareholders are dependent upon their capital contribution are non-mandatory and therefore subject to contractual control agreements between or among the shareholders.⁷⁴ This might lead to greater flexibility. Section 3.2 of the Resolution on Joint Ventures also provides that the agreement creating the joint venture must give the Polish partner a first option to purchase the interest of the foreign partner. Guideline 8 of the Annex to the Resolution on Joint Ventures provides that the member of the board of the joint venture that manages the activities of the entity must be a Polish citizen.⁷⁵ In addition, the Decree of the Minister of Finance of June 18, 1979, provides that the bookkeeper of the company must also be a Polish citizen. At the same time, guideline 9 of the Annex to the Resolution on Joint Ventures⁷⁶ specifies that the company bylaws should provide foreign shareholders the right to control the financial operation of the company and guarantee them the right to participate in the supervisory counsel, or in the absence of a supervisory counsel, in the auditing committee.

The Decree of the Minister of Finance of June 18, 1979,⁷⁷ provides that the company's capital cannot be less than five million *zlotys* and cannot be decreased during the life of the company. The capital of the company is divided into shares which are not transferable in limited liability companies or are only transferable with the permission of the parties. The value of one share cannot be less than 250,000 *zlotys*. The foreign investor has to have at least four shares in the company. The monetary contributions of the foreign partner have to be paid in *zlotys* coming from documented foreign exchange transactions. Apart from monetary contributions, the value of the share can also be covered in non-monetary contributions. The value of the monetary contributions of the foreign investor due under the agreement cannot be less than fifty percent of the investor's entire contribution, although this

74. The COMMERCIAL CODE § 191 ¶ 3 provides that "if nothing else is agreed, the profit to be distributed among shareholders is divided proportionally to their shares." Section 236 determines that decisions of the shareholders' meeting are taken by majority votes unless other provisions of the Commercial Code concerning limited liability companies or shareholders agreements provide otherwise.

75. Resolution on Joint Ventures, *supra* note 57.

76. *Id.*

77. Decree of the Minister of Finance of June 18, 1979, *supra* note 8.

rule can be modified in exceptional circumstances. The non-monetary contribution of the foreign partner will be appraised according to the cost of purchasing the objects in the country of origin. Like the foreign investor, the Polish partner can also make non-monetary capital contributions. They can include real property, equipment, or raw materials.

E. *Mixed Capital Companies in the System of National Economic Administration*

Apart from the conditions of the joint venture agreement, the above-discussed legal acts also regulate the basic aspects of the joint venture's place in the system of national economic administration. As the authors have stressed elsewhere,⁷⁸ these are the most important, and also the most difficult, problems which are posed when joint ventures are established in the territory of a socialist state with the participation of foreign investors. There is no doubt that participation of the foreign investor in a given enterprise makes it quite different from the state-owned enterprise or cooperative. This character should result in a differentiation in the legal situation of the joint venture in its relationship with the state administration organs responsible for the national economy. The foreign investor has to have the right and the ability to participate in managing the enterprise. The foreign investor also has to have the potential to achieve economic advantages comparable to those available on other markets. The foreign investor should not profit from the favorable conditions, economic or financial, created for particular groups of state-owned enterprises under the

78. The economic administrative system developed during the postwar period in socialist countries did not provide for any direct foreign participation in their respective economies. The vast majority of industrial, commercial, transportation and service enterprises, together with natural resources became state, or cooperative, owned.

Plans for the supply and distribution system, pricing, tax and financial controls were founded upon the premise that the socialized . . . enterprises were the only actors on the economic stage. . . . In brief, if foreign investment is to become part of the socialist state's economy, its place in the national plan, in the supply and distribution system, and in the accounting system, must be determined. Additional complications result from the fact that socialist currencies are not freely convertible into Western currencies.

Burzynski & Juergensemeyer, *supra* note 2, at 48.

system of national economic management.⁷⁹ On the other hand, creating special regulations for joint ventures with foreign participation considerably complicates the system of national economic management that, as previously mentioned,⁸⁰ was founded and developed upon the premise that state or cooperative-owned enterprises were the only actors on the economic scene.

The attempt to preserve the uniformity of the system of national economic management is the factor that greatly influenced the solutions adopted in the Resolution on Joint Ventures and the Decree of the Minister of Finance of June 18, 1979. The legal situation of joint ventures in the system of national economic management has generally been assimilated into that of the socialized enterprises. There are, however, important modifications. The modifications include the extent to which the joint venture is linked with the national economic plan. According to the Guidelines for the Establishment, Organization and Functioning of Limited Liability Joint Ventures in Poland that constitute an Annex to the Resolution on Joint Ventures, the business activities of a joint venture should be included in an independent section of the national economic plan outside the lists of targets for different branches of the national economy and goals for groups of state-owned enterprises.⁸¹ On application of the Polish partner or in accordance with the joint venture agreement, a joint venture may obtain an exemption from fulfilling certain requirements normally set by the economic plan. Among others, the requirements that may be exempted include the production growth index and the limitation of payroll funds.

As a result, the joint venture will be included, to a limited extent, in Poland's system of economic planning. The guidelines do not specify the extent of such inclusion or who is to decide this

79. In Poland and other socialist countries, domestic prices for goods and services do not follow those which prevail in the world markets, but are regulated and determined on the basis of economic and social considerations related to the national market. For instance, it has been a long-time practice that prices for investment goods and supplies are determined by planned production costs plus a moderate margin of profit. This assumes that the goods are to be bought by state-owned enterprises. M. WERALSKI, *FINANSE I PRAWO FINANSOWE* 348 (1978). Accordingly, extension of the same price privileges to the companies with foreign participation will certainly lead to the distortion of the economic evaluation of their activities.

80. Burzynski & Juergensmeyer, *supra* note 2, at 48-49.

81. Resolution on Joint Ventures No. 31, *supra* note 57.

extent. One would assume that the competent authority to decide both the extent of the inclusion and the competency of the planned targets will be the minister supervising the particular branch of the national economy. With regard to joint ventures in which cooperatives participate, the competent authority will probably be the appropriate federation of cooperatives that issued the permit allowing entry into the joint venture agreement. Supporting these presumptions is the fact that these organs are responsible for providing adequate foreign exchange sums to the joint venture in the event that it does not have its own foreign exchange for covering payments due to the foreign investor. Considering the vague language of the Resolution, one could postulate that the extent to which a joint venture is to be included in national economic plans should, in the future, be more precisely ascertained and regulated by the size of the joint venture.

The legal regime of the socialized enterprises is also applied to the joint venture's financial system. According to the provision contained in paragraph 3 of the Decree of the Minister of Finance of June 18, 1979, all financial operations of joint ventures on the domestic market are to be conducted in *zlotys* in accordance with provisions applied to sale contracts or other contracts between socialized enterprises. The same provisions are to be followed in the accounting practices of joint ventures.⁸² Furthermore, the provisions regulating foreign reporting by socialized enterprises are also to be followed by the joint ventures. The Decree also provides that a joint venture is to establish three specific funds. These funds are the amortization fund, the risk fund, and the reserve fund. The function of the amortization fund is to refund the use of the machinery or equipment during the joint venture production process. This money can then be used for investment. The fund is created from yearly contributions by the joint venture. These contributions are analogous to those made by socialized enterprises of the same character. The risk fund is created from the contribution made by the joint venture in the first year of its activity. This contribution amounts to twenty percent of the joint venture's before-tax profit. The fund is increased each year by twenty-five percent until it reaches at least ten percent of the value of the fixed assets and reserves of the joint venture. The purpose of the fund is to cover losses and guarantee payment of

82. Resolution on Joint Ventures, *supra* note 57, ¶ 4, §4.

the joint venture's debts. The reserve fund is also created from the joint venture's profit before taxes. According to the Decree, the joint venture agreement should provide for contributions to the reserve fund amounting to at least twenty percent of the profit before taxes. The purpose of the reserve fund is to cover losses of the joint venture if the amount in the risk fund is insufficient. The reserve fund can also be used to buy assets for the joint venture. Further, the reserve fund can be used to provide sick pay and other benefits to workers, provided that these benefits are connected with work-related accidents or occupational diseases covered by the joint venture. All these funds are to be set up in *zlotys*.

The joint venture is allowed to open a *zloty* account, as well as a foreign exchange account, in the Polish National Bank. Deposits of payments by foreign parties above the joint venture's prescribed capital and payments made by the Polish partner out of the foreign exchange amounts allowed to it are to be made to the current foreign exchange account. Apart from these payments, the current foreign exchange account can also be used for depositing fifty percent of the foreign exchange proceeds from the export of manufactured goods and services. The export must have been accomplished by an intermediary of the Polish foreign trade organizations or by sales to Polish socialized enterprises empowered to conduct domestic export transactions. The remaining fifty percent of the proceeds from these operations is to be transferred into *zlotys* and deposited in the current *zloty* account of the joint venture. There is no requirement or obligation to transfer the remaining fifty percent of the proceeds into *zlotys* if the joint venture uses these proceeds to buy goods and services for current business operations of the joint venture. In such cases, an amount equal to the required payments for the purchased commodities and services is to be transferred to the current foreign exchange account.

The sums deposited in the current foreign exchange account are to be used for buying goods and services connected with the current business operation of the joint venture. The purchases must be made through the Polish foreign trade organization and Polish socialized enterprises competent to conduct domestic export operations. Funds from the current foreign exchange account may also be used to cover the costs of international transportation of goods, insurance, and commissions to Polish foreign trade organizations for services rendered. Further, the funds may be

used to cover the joint venture's costs of participating in fairs and international exhibitions, marketing, and traveling abroad by members, managers, and employees of joint ventures on business-related trips.⁸³ The same provisions also provide that funds in the current foreign exchange account may be used to make payments to the foreign investor of the after-tax profits connected with their participation in the joint venture. The amounts collected or taken by him in *zlotys* may be deducted. Payments up to fifty percent of wages and salaries can be made to foreign personnel employed by the joint venture from the same account.

If the deposits in the current foreign exchange account of the joint venture are insufficient, the above profit and salary payments may be made from the foreign exchange allowances of the governmental organ that issued the permit to enter into the joint venture agreement, in which case this organ will have to make adequate amounts of foreign exchange available to the joint venture. A foreign investor can also withdraw money from the current *zloty* account for his personal needs while in Poland. These payments in *zlotys* should be off-set from the foreign exchange payments made to him because of his participation in joint venture profits. Upon termination of the joint venture, the balance which is left after all debts of the joint venture are satisfied is to be divided between Polish and foreign partners according to their participation in the joint venture capital.

It follows from provisions of the Resolution on Joint Ventures and the Decree of the Minister of Finance of June 18, 1979, that joint ventures should be substantially integrated with Poland's national economy. Thus, Poland has chosen to follow the integrated model with regard to the economic treatment and status of the joint venture vis-a-vis the national economy. This approach allows the joint venture, for most purposes, to conduct its activities on the same general principles as national business entities. Supplies used by the joint venture are bought at prices set for internal trade, and prices charged for the joint venture's products are determined by the same standards. The advantage to a socialist country of following this model is that it facilitates the inclusion of the joint venture in the host country's national economic plan.⁸⁴

83. Decree of the Minister of Finance of June 18, 1979, *supra* note 8, ¶ 19.

84. One should bear in mind that this is not, the only solution. In fact, two other possible models of joint ventures can be formulated: the economic and

F. Taxation

The net income of joint ventures will be dependent not only on the success of its business operation, but also on the principles of taxation applied to the operation. The legal acts discussed above do not contain specific provisions on the principles of taxation. The Guidelines for the Establishment, Organization, and Functioning of Limited Liability Joint Ventures in Poland that are annexed to the Resolution on Joint Ventures contains only general references to matters of joint venture taxation under Polish tax law. Therefore, the governing tax laws will be those which have been enacted prior to the discussed legal acts allowing for creation of joint ventures with foreign participation.

The Decree of the Minister of Finance of December 28, 1971, Concerning Specific Principles of Taxation and the Collection of Turnover Tax from Socialized Enterprises and Some Companies⁸⁵ provides that companies in which state-owned enterprises have an equity of no less than fifty percent are to pay a four percent turnover tax on turnovers in the selling of products and the rendering of construction services, as well as five percent for the rendering of services other than contracting services.⁸⁶ With regard to income tax, pertinent provisions are contained in Resolution Number 17 of the Council of Ministers of January 21, 1973, Concerning Taxation of Some Socialized Enterprises.⁸⁷ Provisions contained in this Resolution state that companies in which a socialized enterprise holds at least fifty percent of equity must pay

financial enclave model and the double appraisalment model. The economic and financial enclave model is based on the principle of having all financial transactions and operations of the joint venture conducted in convertible currencies. Only the salaries of nationals of the host state are paid in local currency, and this currency must be purchased for these purposes at official exchange rates. Under this approach, the joint venture is autonomous with regard to the plan, pricing system, and supply distribution system of the host state. The greatest difficulty in using this model is in valuing convertible currency when there is no established world market value for the local contributions and services.

The double appraisalment model involves calculating the joint venture's accounts in both local and convertible currencies. This requires a number of exchange rates as the relationship changes between local and world prices. This model also leaves open the relationship between the economic activities of the joint venture and the national economy of the host country. See Burzynski & Juergensmeyer, *supra* note 2, at 49-50.

85. OFFICIAL J. "MONITOR POLSKI" Item 18, No. 14 (1971).

86. *Id.* ¶ 76, § 1.

87. OFFICIAL J. "MONITOR POLSKI" Item 27, No. 4 (1973).

income tax amounting to sixty-five percent of profits.⁸⁸ The Minister of Finance can lower this tax, however, when economic circumstances justify a tax reduction.⁸⁹ The Guidelines annexed to the Resolution on Joint Ventures further provide that the Minister of Finance will establish the provisions for partial or total exemption of a joint venture from income tax for a period of up to three years from the date of its establishment or the start of its production.⁹⁰ The joint venture must pay local taxes, which are collected primarily on real estate.

Apart from the income tax paid by a joint venture on undivided profits, profits paid to foreign investors will also be subjected to an income tax. The tax is collected in the form of a lump sum amounting to thirty percent of the foreign investor's profit. This tax can be reduced, however, in particular cases on the application of the Minister of Foreign Trade and Maritime Economy.⁹¹

The ultimate effect of taxes levied by Poland on a joint venture's operations and profits will depend upon whether an agreement on avoidance of double taxation is applicable. Potential United States investors should note the existence and provisions of such an agreement between Poland and the United States.⁹² Pursuant to that agreement, the profits of an enterprise of one of the contracting states is taxable only in that state unless the enterprise is carrying on business in the other contracting state through a "permanent establishment."⁹³ In such a case, only the profits attributable to that "permanent establishment" are taxed.⁹⁴

Dividends paid by a company which is a resident of one con-

88. *Id.* ¶ 3, §§ 1, 2.

89. *Id.* ¶ 3, § 2.

90. Resolution on Joint Ventures, *supra* note 57, No. 31.

91. This income tax on profits due from the foreign investor is provided for in the Decree of the Minister of Finance of May 23, 1977, ¶ 10, §§ 1 & 2, concerning taxation of foreign natural persons as well as foreign legal persons. J. LAWS, Item 71, No. 18.

92. Convention Between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Oct. 8, 1974, 28 U.S.T. 891, T.I.A.S. No. 8486. *See generally* Burzynski & Juergensmeyer, *supra* note 2, at 40.

93. Agreement on Preventing Double Taxation, *supra* note 92, art. 8(1).

94. *Id.* art 8(1).

tracting state to a resident of the other contracting state may be taxed in both states. The tax levied in the state of the company's residence, however, must not exceed five percent if the recipient is a company directly holding at least ten percent of the voting shares of the company paying the dividends or fifteen percent of the gross amount of the dividends in all other cases.⁹⁵

G. *Principles of Employment of Polish Personnel*

Principles governing the employment of Polish personnel by joint ventures are provided for by the Decree of the Minister of Labor, Wages, and Social Benefits of May 30, 1979, Concerning Principles of Employment and Compensation of Employees of Limited Liability Companies with Foreign Capital Participation.⁹⁶ The Decree provides that Polish employees in the joint venture should be compensated and receive other benefits connected with their work according to principles followed by Polish socialized enterprises in the same branch of industry.⁹⁷ These principles should be specified in joint venture employment agreements. The category of enterprises that the joint venture should be included in and the compensation that should be paid to employees are two problems that must be resolved by the Minister or the Central Management of Cooperatives, which issued the permission for the Polish partner to enter into the joint venture agreement. This determination is to be made after consultation with the central management of the competent trade union. The Polish employees in the joint venture are to be provided with social security benefits for illness and maternity, retirement benefits, old age pensions, and other benefits due to work-related accidents and occupational diseases on the same basis as employees of the socialized enterprises. The same benefits apply to foreign personnel employed by the joint venture unless provisions of an intergovernmental agreement between Poland and the country of the foreign employee provide otherwise. Foreign personnel are exempted from taxes collected on salaries as well as contributions to retirement funds. The same principles that exempt employees of state or socialized enterprises apply to foreign personnel unless the foreign employee is a citizen of a country with which Poland

95. *Id.* art. 11(1), (2)(a)-(b).

96. OFFICIAL J. "MONITOR POLSKI" Item 88, No. 15 (1979).

97. *Id.*

does not have an avoidance of double taxation agreement. The Decree also requires that the joint venture agreement contain a list of foreign personnel, their professional qualifications, and expected period of employment. The personnel roster is to be submitted for approval to the territorial administration unit, the *voivodship* unit of the territory in which the joint venture is to be located.

IV. CONCLUSION

A list of foreign investment opportunities currently available in Poland was recently published. The list was compiled from proposals submitted by the *voivodship* councils to the division of the Polish Chamber of Commerce, which was established to coordinate the activities of domestic Polish organizations and organizations of Poles living abroad. The list includes the construction of nine automobile repair shops, two enterprises for the manufacture of automobile accessories, organizations for the construction of single-family dwellings, furniture manufacturing enterprises, a short-order restaurant with the capacity of serving one thousand meals per day, three catering complexes to be located on international highways within Poland, a rotating cafe to be located on a pier on the Baltic Sea, a small printing operation, a repair shop for color televisions and accounting machines, a bakery, a vegetable and fruit canning operation, an herb production firm, a firm for the manufacture of children's clothing and shoes, a firm for the manufacture of plastic products, a firm to produce motors and electronic devices for toys, a factory for the manufacture of food wraps, a firm to construct health spas, and twenty-three sea-side motels.⁹⁸

The activities included on this list are far from earth-shaking in terms of their potential impact on the world economy or even on Poland's economy. They are also far from the stereotype of public concepts of East-West trade activities, which are generally conceived of in terms of the multi-million dollar activities of large multi-nationals. The important point to be noted is that the departure from the stereotype in the list is intentional and a reflection of the significant new approach contained in Poland's new foreign investment regulations. Although the legal framework for

98. See Kapuscinski, *Ulatwienia i Zyczenia*, *Zycie Gospodarcze*, July 1, 1979, at 8.

direct foreign investment and joint ventures is designed to accommodate multinationals, considerable attention is paid to the problems and needs of small business enterprises and individual investors. A partial explanation for the aim of the legislation lies in the somewhat unique importance Poland attaches to its nationals and to those of Polish descent living abroad. Additionally, the focus of Polish legislation reflects the conclusion that the Polish economy can particularly profit from investments of relatively small economic value in which individuals or small groups of investors will participate,⁹⁹ thereby injecting a more personal and individualistic element to international trade in general and to East-West industrial cooperation in particular.

99. One of the most troublesome problems under the Polish legislation continues to be that of repatriation of profits. As one commentator has stated, "[O]n the key issue of profit repatriation the new law is as strict as its predecessor, despite some encouraging modifications." *Polish JV Legislation Revised by New Decrees*, 8 Bus. E. EUROPE 137 (1979). Perhaps one reason the matter is not more sympathetically handled is the contemplation that much of the profits will be used in Poland.

