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# East-West Industrial Co-operation: The Polish Example

Andrzej Burzynski\*  
Julian Conrad Juergensmeyer\*\*

Business notions seldom excite international public opinion which is pre-occupied with more dramatic events of contemporary political life. However, in only ten years industrial co-operation became one of the most widely discussed international issues of the 1970's. During this comparatively short period of time, the area of industrial co-operation became a part of the practice of international economic relations and inspired numerous economic and legal publications.<sup>1</sup> The importance of international industrial co-operation was also acknowledged by the Act of the Conference of Security and Co-operation in Europe.<sup>2</sup> In fact, the attention given to it in that document places industrial co-operation among the most crucial problems of our times.

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1. The Economic Commission for Europe of the United Nations has played an important role in the popularization of the international industrial co-operation concept. See, in particular, the following reports of the Commission: *INDUSTRIAL CO-OPERATION BETWEEN WESTERN INVESTORS AND EASTERN EUROPEAN ENTERPRISES*, E/ECE/730 Add. 1 (1969) and *ANALYTICAL REPORT ON INDUSTRIAL CO-OPERATION AMONG ECE COUNTRIES*, E/ECE/8444-Rev. 1 (1973) [hereinafter cited as *ANALYTICAL REPORT*]. "In earlier American publications the term 'industrial co-operation' was often replaced by the term 'joint venture' understood as 'any form of association which implies collaboration for more than a very transitory period.' W.G. FRIEDMANN & G. KALMANOFF, *JOINT INTERNATIONAL BUSINESS VENTURES* 6 (1961). Recently, however, there has been a tendency in international economic relations to restrict the use of the term "joint venture" to co-operation agreements involving co-management, co-ownership of capital and sharing of profits and risks. See *ANALYTICAL REPORT*, *supra*. See also Starzyk, *Economic Cooperation Among Countries with Differing Social and Political Systems*, 1 *POLISH FOREIGN TRADE* 7 (188) (Jan. 1978); Dtugosz, *Industrial Cooperation with Developed Free Market Economy Countries*, 6 *POLISH FOREIGN TRADE* 2 (169) (June 1976); Tabaczynski, *The Role of Industrial Cooperation in Changing the Structure of Trade Relations Between East and West*, 4 *POLISH FOREIGN TRADE* 7 (167) (April 1976); Kaczmarek, *Industrial Cooperation with Firms of Market Economy Countries*, 10 *POLISH FOREIGN TRADE* 13 (161) (Oct. 1975); Zabielski, *Financial and Other Aspects of East-West Cooperation*, 7 *POLISH FOREIGN TRADE* 7 (182) (July 1977).

2. Act of the Conference of Security and Co-operation in Europe (The Helsinki Accord) 73 DEP'T STATE BULL. 323 (1975); 14 I.L.M. 129 (1975). See Russell, *The Helsinki Declaration*, 70 AM. J. INT'L L. 242 (1976); Dobroczynski, *CSCE Sets Ground for a New Stage in East-West Cooperation*, 9 *POLISH FOREIGN TRADE* 2 (172) (Sept. 1976); Deugosz, *How Poland Is Substantiating the Helsinki Final Act in Dealing with Economic Issues*, 3 *POLISH FOREIGN TRADE* 2 (190) (Mar. 1978).

## I. THE CONCEPT OF INDUSTRIAL CO-OPERATION

As a relatively new and, to some extent, fashionable concept, "industrial co-operation" very often has different connotations and is consequently quite difficult to define. The broadest definition and therefore the one most acceptable to both academicians and practitioners appears in the Analytical Report on Industrial Co-operation Among EEC Countries,<sup>3</sup> to wit:

Industrial co-operation in an East-West context denotes the economic relationships and activities arising from (a) contracts extending over a number of years between partners belonging to different economic systems which go beyond the straightforward sale or purchase of goods and services to include a set of complementary or reciprocally matching operations (in production, in the development and transfer of technology, in marketing, etc.); and from (b) contracts between such partners which have been identified as 'industrial co-operation contracts' by Governments in bilateral or multilateral agreements.

Before examining legal aspects of industrial co-operation and its implications in East-West relations, factors which brought the concept into popularity must be discussed. Since prominent statesmen have expressed great concern for industrial co-operation, and in light of media coverage of this concern, the international political arena may well reflect the origin and *raison d'être* of the concept. In particular, the concept has been viewed as an appendage of the policy of detente, simply representing a favor granted by industrially developed countries to their partners in this policy.

Although the current world political situation impacts upon all international economic relations, including industrial co-operation, industrial co-operation is more than a merely transitory political phenomenon. Industrialization necessarily led to the internationalization of production processes, particularly in aircraft, automotive, electronic and pharmaceutical industries. Since these industries demand enormous research outlays, maintaining the profitability of production renders it necessary to enlarge these industries far beyond the demand existing in any particular region or country. Resources derived from scientific research, lower production costs and unsatisfied demand on the market of other countries render transfer of manufacturing processes abroad and the joining of complementary inputs of partners from different countries a necessity of

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3. See ANALYTICAL REPORT, *supra* note 1.

4. *Id.* at 30-31.

our time. This necessity, which is as pressing on developed capitalist countries as on socialist and developing countries, produced the demand for a new form of transfer capital, technology and goods in international economic relations. This was, therefore, the true impetus for the advent of industrial co-operation.

The EEC Analytical Report previously mentioned includes the following forms of international industrial co-operation: licensing with payment in resultant products; supply of complete plants or production lines with payments in resultant products; co-production and specialization; sub-contracting; joint ventures; and joint tendering or joint construction or similar projects.<sup>5</sup> As the above list indicates, international industrial co-operation does not predetermine the choice of the specific legal form suitable for a relationship of this type. Indeed, goals of industrial co-operation may be achieved through a large variety of legal arrangements or contracts.

In accordance with traditional civil law classification, these contracts can be divided into two groups, depending upon the nature of the economic goals of the parties. The first group includes contracts which serve the realization of economic objectives, different for each party. These contracts are frequently labeled co-operation contracts *sensu stricto*. A typical example is provided by an agreement under which goods are exchanged for goods or services.<sup>6</sup> The second group consists of contracts entered into by parties pooling both capital and assets to achieve a common goal such as joint production, research and/or commercial activity. These agreements are usually referred to as "joint venture contracts".<sup>7</sup> The second group of arrangements, "joint venture contracts", is quite a new phenomenon in East-West relations. The operation of joint ventures, generally involving the co-operation of privately owned corporations and socialist or state-owned enterprises, creates a number of fascinating problems in the East-West context. However, it is also feasible for socialist state-owned enterprises to form wholly owned operations abroad; recent developments in Polish law create the same possibility for foreign investors in Poland.<sup>8</sup>

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5. *Id.*

6. Also included in this category are licensing agreements with payment in resultant products and the supply of complete plans or production lines with payment in resultant products.

7. Joint venture, in this sense, implies community of interests of the parties and joint activity towards their regulation and participation in profits and losses thereof.

8. See notes 59-61 *infra* and accompanying text.

## II. POLISH-AMERICAN INTERGOVERNMENTAL RELATIONS

Although industrial co-operation in East-West trade is based upon private legal agreements, the respective governments play a very important role in accelerating and facilitating its development. Through international agreements or appropriate domestic legislative measures, particularly in the areas of tax law, customs duties and import-export formalities, these governments can create an atmosphere encouraging the respective enterprises to enter into co-operative agreements and facilitate their proper execution. The existing intergovernmental framework for co-operation of this type between Poland and the United States is illustrative of such a situation.

During the last few years, there has been considerable progress in Polish-American relations.<sup>9</sup> Both governments are obligated<sup>10</sup> to facilitate co-operation between Polish and American firms, including long term agreements between them concerning production and construction of new industrial equipment and facilities, as well as development and modernization of existing ones, technological and research co-operation together with exchange of "know-how" and licenses, and training and exchange of technical personnel. This obligation is to be performed in conformity with each country's legislation.<sup>11</sup> Moreover, both governments have confirmed a readiness to favorably examine new forms and methods of industrial co-operation proposed by interested firms and enterprises. It was further decided to examine, within the existing legal framework of both

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9. In August, 1972, the Polish-U.S. Mixed Committee of Trade was created. The Joint American-Polish Trade Commission was established June 1, 1972. The first meeting in Warsaw was August 1-3, 1972. Agreement on the Establishment of the Joint America-Polish Trade Commission, U.S. Dep't of Commerce; Bureau of East-West Trade, Feb. 1972, p. 1 in *WEEKLY COMP. OF PRES. DOCS.*, at 974-75, June 5, 1972. In October, 1974, during the visit of the First Secretary of the Polish United Workers Party's Central Committee, Edward Gierek, to the United States, a number of agreements between both States were concluded, of which the most important are the Joint Statement on the Development of Economic Industrial and Technological Co-operation between the Polish People's Republic and the United States of America. 71 DEP'T STATE BULL. 604 (1974) [hereinafter cited as Joint Statement] and the Agreement between the Government of the Polish People's Republic and the Government of the U.S. on Preventing Double Taxation and Ensuring that Firms on Both Sides Will Not Try to Avoid Paying Income Tax, Oct. 8, 1974, U.S.-Polish People's Republic, 28 U.S.T. 891, T.I.A.S. No. 8486 (Effective as of July 23, 1976, by Senate Ratification) [hereinafter cited as Double Taxation Agreement]. At the same time the Polish Chamber of Foreign Trade and the Chamber of Commerce of the United States signed an agreement on mutual cooperation. 71 DEP'T STATE BULL., at 606.

10. This obligation is based upon mutual agreements contained in the Joint Statement, *supra* note 9.

11. *Id.*

countries, the possibility of giving special treatment with respect to tax and customs duties to goods covered by industrial co-operation contracts.<sup>12</sup>

Thus, on the intergovernmental level a very favorable atmosphere for initiating contracts between firms and enterprises of both countries has been created. An institutional framework for facilitating such contracts has been developed through the establishment of the Polish-American Economic Council, a non-governmental body of producers and exporters of both countries whose task, among other things, is to develop concrete programs and forms of co-operation.<sup>13</sup> This Council might also become a convenient forum for solving problems involving market organization, establishment of sales agencies and representatives, and the creation of joint ventures.

An important achievement of both governments which will undoubtedly stimulate the growth of industrial co-operation was the removal, by special agreement, of obstacles surrounding double taxation. These taxation problems had hindered development of economic relations between firms and enterprises of the two countries. Under current agreement, the profits of an enterprise of a contracting State shall be taxable only in that State, unless the enterprise carries on business in the other contracting State through a "permanent establishment" situated therein.<sup>14</sup> The term "permanent establishment" includes, in particular, a place of management or a branch, office, factory, workshop, mine, building site or construction project which exists for more than eighteen months.<sup>15</sup> The profits of the enterprise in such cases may be taxed in the other State, but only as much as is attributable to that "permanent establishment."<sup>16</sup>

Dividends paid by a company which is a "resident" of one State to a resident of another contracting State may be taxed in both States. The tax levied in the State in which the company is a resident shall not exceed 5% of the gross amount of the dividends if the

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12. Joint Statement, *supra* note 9, at 605. The interests of both governments in encouraging industrial cooperation was confirmed once again on July 28, 1975, in the Joint Statement signed during the visit of President Ford to Warsaw. 73 DEP'T STATE BULL. 299 (1975).

13. This group was established by the agreement between the Chambers of Trade in Poland and the United States. The composition of this group is somewhat unique in "Western terms" in that American industry is represented by a private body and Polish industry is, of course, represented by a public law entity.

14. Double Taxation Agreement, *supra* note 9, art. 8 (1).

15. *Id.* art. 6 (2) (a)-(f).

16. *Id.* art. 8 (2).

recipient is a company holding directly at least 10% of the voting shares of the company paying the dividends and 15% of the gross amount of the dividends in all other cases.<sup>17</sup> The Agreement does not cover the taxation of the company in respect to profits from which dividends are paid. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the contracting State in which the enterprise has its residence.<sup>18</sup> Royalties may be taxed both in the State in which they arose and in the State in which the recipient has his residence.<sup>19</sup> However, the tax levied in the first State shall not exceed 10% of the total amount.<sup>20</sup>

Salaries, wages and similar remunerations derived by a resident of one contracting country with respect to employment or income obtained from professional services of such resident in another contracting country, are exempted from tax in that country, providing the employment does not exceed 183 days in a fiscal year.<sup>21</sup> If the agreement allows taxation of income or wages in the source State, this tax shall be deducted from the income tax due in the other contracting State.<sup>22</sup>

A satisfactory situation in the area of industrial co-operation also exists with respect to tariffs. In 1963, the U.S. reinstated Poland to "most-favored nation" treatment with significantly reduced levies imposed on imports from Poland.<sup>23</sup> In Poland, after World War II, customs duties existed only in tourist and mail exchanges.<sup>24</sup> Commodities imported by state enterprises were duty-free. This situation, however, was substantially changed in December, 1975, when tariffs were introduced with respect to all imports.<sup>25</sup> Tariffs are lev-

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

18. *Id.* art. 9 (1), (2).

19. *Id.* art. 13.

20. *Id.* art. 13 (2).

21. *Id.* art. 16.

22. *Id.* art. 20 (1), (2).

23. Both Poland and the United States are members of GATT. GATT Agreement, June 30, 1967, 609 U.N.T.S. 236, 19 U.S.T. 4331, T.I.A.S. No. 6430, (entered into force Oct. 18, 1967); GATT Agreement, Oct. 30, 1947, 61 Stat. (5), (6), T.I.A.S. No. 1700, 4 Bevans 639 (entered into force Jan. 1, 1948).

"[I]n 1960 the United States granted Poland most-favored nation status in trade between the two countries, status that was withdrawn by the United States Congress in 1962 and restored in 1963." E. KEEFE, D. BERNIER, L. BRENNEMAN, W. GELOANE, J. MOORE, JR. AND N. WALPOLE, AREA HANDBOOK FOR POLAND 185 (1973).

24. WASCHKO, SYSTEMY CELNE 186-90 (1971).

25. Order of the Council of Ministers of December 6, 1975, Concerning Tariffs in Commercial Turnover with Foreign Countries, 40 J. OF LAWS OF THE REPUBLIC OF POLAND, Item 210 (1975) [The Journal of Laws of the Republic of Poland will hereinafter be cited as J. OF LAWS].

ied on the basis of two schedules. One schedule applies to imports from those countries which have granted Poland "most-favored nation" status.<sup>26</sup> The second schedule contains considerably higher rates of customs duties and applies to imports from other countries.<sup>27</sup> Polish customs legislation also provides special tariff treatment for imported commodities which, after processing in Poland, are again transported across the border.<sup>28</sup> These commodities are subject to conditional customs clearance and, if exported within a specified time, are exempted from customs duties. This provision is aimed specifically at encouraging industrial co-operation.

Unfortunately, this framework, created by the United States and Poland to encourage the development of industrial co-operation, has been burdened by U.S. export restrictions.<sup>29</sup> Although fewer commodities are denied for export to socialist countries in the course of time,<sup>30</sup> the special procedure requirements surrounding export transactions with a socialist enterprise by no means encourage American business people to sell to these markets. U.S. export controls, by including control of technology transfers, have particularly harmful effects on the development of industrial co-operation.<sup>31</sup>

### III. SOCIALIST INVESTMENT THROUGH MIXED CAPITAL COMPANIES IN CAPITALIST COUNTRIES

The nature and scope of legal problems surrounding joint economic activity between socialist enterprises and capitalist firms depend upon the place where this activity is undertaken. In particular, two different situations should be distinguished: activity localized in the territory of the State of the capitalist partner as opposed

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26. *Id.* § 3.1.1.

27. *Id.* § 1.2.

28. Law on Custom Duties of March 26, 1975, 10 J. OF LAWS, Item 56, art. 37 (1975).

29. Export Control Act of 1949, 50 APPX. U.S.C. §§ 2021-32 (expired 1969); Export Administration Act of 1969, 50 APPX. U.S.C. §§ 2401-13 (1970 and Supp. V 1975), as amended by Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235-48 and Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1629 §§ 301 (a) and (b).

30. See generally INT'L COOPERATION ADMIN. No. 9, THE STRATEGIC TRADE CONTROL SYSTEM (1948-56); MUTUAL DEFENSE ASSISTANCE CONTROL ACT OF 1951, 17-20 (1957). Cf. U.S. DEP'T OF COMMERCE, ADMIN. REGS., COMMODITIES CONTROL LIST "A" (1951) with U.S. DEP'T OF COMMERCE, ADMIN. REGS., COMMODITIES CONTROL LIST "A" (1977).

31. The effect of these restrictions upon Polish-American economic and commercial relations is analyzed in Fabijanski, *Fresh Elements in Polish-American Economic and Commercial Relations*, 1 POLISH FOREIGN TRADE 10 (188) (Jan. 1978). It should be noted that many American manufacturers and other business interests are in opposition to this policy. See *New Basis Proposed for U.S. Export Controls*, 6 BUS. EASTERN EUROPE 37, 290 (1977).



to activity carried on within the State of the socialist enterprise.<sup>32</sup>

Direct economic activity of socialist enterprises in capitalist economies has recently become quite common. For example, Polish enterprises presently participate in more than 100 foreign-based companies,<sup>33</sup> in some of which they hold 100% of the shares.<sup>34</sup> Generally, however, capital of such companies derives from at least two countries. The development of this form of co-operation clearly reflects a dynamic growth tendency. In 1971, there were only twenty-six such foreign companies with Polish participation, and at the present time in some capitalist countries these companies now handle a major portion of the Polish exports to those nations.<sup>35</sup>

A similar situation exists in the foreign trade of other socialist states. For example, in 1975, two-thirds of Bulgaria's exported machinery and equipment sold in capitalist markets was channeled through mixed capital companies abroad.<sup>36</sup> The rapid growth of this particular type of co-operation is explained by the advantages flowing from collaboration between a socialist exporter and a buyer from a capitalist country within the framework of one enterprise. In East-West trade, circulation of goods is traditionally from a socialist exporter to an agent, to an importer and then to the wholesaler. In a mixed capital company, since the retailer is considerably closer to

32. The joint activity can also be conducted in the territory of a third state. This legal situation, however, will be similar to one of the two discussed in the text, depending upon the economic system of the state in question.

33. Jung, *Spochi Mieszane*, 11 HANDEL ZAGANIEZHY (1975). The Polish daily newspaper "Trybuna Ludu" of March 22, 1978, reported that of the 100 joint companies with Polish capital in foreign countries, 71 conduct typical commercial (purchase and sale) activities; 16 operate in shipping; 4 operate in fishing and 9 conduct both manufacturing and commercial activities.

THE DIRECTORY OF SOVIET AND EASTERN EUROPEAN COMPANIES (WHOLLY AND JOINTLY OWNED) IN THE INDUSTRIALIZED WESTERN ECONOMIES, Institute of Soviet & East European Studies, Carleton University, (Jan. 1, 1977), listed 283 companies with Soviet or Eastern European participation located in 16 Western Industrial countries. The most popular location for such companies is the Federal Republic of Germany followed by the United Kingdom, France and the United States. The December, 1977 supplement reports 312 Eastern European companies in the West. See generally *Don't Overlook EE's Joint Ventures in the West*, 7 BUS. EASTERN EUROPE 12, 89 (1978).

The "working paper" accompanying the directory reports that the typical organizational form of socialist enterprises in capitalist countries is the joint stock company established pursuant to the law of the host country. The majority of such firms are jointly owned with local partners. In most cases the Western holding is a minority and usually minimal. McMillan, *Direct Soviet and East European Investment in the Industrialized Western Economies*, DIRECTORY OF SOVIET AND EASTERN EUROPEAN COMPANIES (WHOLLY AND JOINTLY) OWNED IN THE INDUSTRIALIZED WESTERN COUNTRIES (1977).

34. RUX, HANDEL WSCHOD-ZACHOD 153 (1975).

35. *Id.*

36. *Id.*

the direct producer, the producer will enjoy increased profit from the entire transaction.

A mixed company is also a particularly convenient form for trade in industrial consumer goods.<sup>37</sup> Such an arrangement creates conditions for better market analysis, servicing of products sold, assembly and supply of spare parts.<sup>38</sup>

The participation of Polish enterprises in foreign companies requires, as a rule, the transfer abroad of foreign exchange. It will, therefore, be subjected to foreign exchange controls provided by Polish legislation.<sup>39</sup> In accordance with this legislation, all agreements concluded by socialized enterprises necessitating the transfer abroad of foreign exchange must be submitted for approval by a competent State organ.<sup>40</sup> A special permit must also be obtained for the transfer of foreign exchange.<sup>41</sup> All enterprises licensed to carry out foreign trade operations are entitled to participate in foreign companies.<sup>42</sup> In addition to the company's by-laws, submission for approval is required for any agreement which results in the increase or decrease of company capital. Other questions connected with the establishment and activities of a foreign company are governed by local law and shareholder agreements.

In short, as the above discussion indicates, some legal problems have arisen from the joint activity undertaken by socialist enterprises and capitalist firms in a capitalist country. However, they are

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37. Industrial consumer goods share in the socialist countries' increasing volume of export.

38. One relatively new phenomenon in East-West trade is the small but growing number of joint companies in the West whose first aim is either to assemble EE-designed products or to buy in Western markets.

Hungary is increasingly active in manufacturing abroad. . . and Poland appears to be taking the lead in setting up purchasing organizations in the West.

*Don't Overlook EE's Joint Ventures in the West*, 7 BUS. EASTERN EUROPE, *supra* note 33, at 90.

Apart from mixed capital companies engaged in commercial activities, companies conducting production operations, transport and forwarding, sea transport, fishing and consulting are being established.

39. Law on Foreign Currencies of March 28, 1952, 21 J. OF LAWS, Item 133 (1952).

40. *Id.* art. 15, §1.

41. *Id.* art. 16 §1. With regard to the participation of Polish enterprises in foreign companies, the Minister of Foreign Trade and Shipping has the authority, upon the basis of legislation currently in force, to approve agreements and issue permits for the transfer of foreign exchange. *Id.* art. 16 §1.1. His Order of 1973 determines Polish policy rules in this respect. It settled two important matters: (a) it determined which enterprises are entitled to participate in foreign companies and (b) it listed types of agreements requiring approval in connection with this participation. Decree No. 34 of the Minister of Foreign Trade and Shipping, June 13, 1973.

42. The Order does not provide for any restrictions on the number of Polish partners in one foreign company. See Decree No. 34, *supra* note 41.

not, in principle, different from those usually connected with activity undertaken by capitalist firms alone.

#### IV. CAPITALIST INVESTMENT IN SOCIALIST COUNTRIES

Direct economic activity of capitalist enterprises within the territory of a socialist state is a completely new phenomenon in international economic relations. Traditionally, foreign investors have not participated directly in the economic life of socialist countries. This is explained by many factors, among the most important of which were largely negative experiences of foreign capital investments suffered by socialist countries between World War I and World War II.<sup>43</sup> During the period of economic reconstruction in Poland, there was, therefore, great reservation toward direct activities of foreign investors.

In light of the continued economic development of socialist countries, the traditional view has recently been questioned. Another view has been advanced with increasing frequency that, under certain circumstances, direct economic activities by foreign enterprises should be permitted within socialist territories. Advocates of this position emphasize that joint activity with foreign investors in the territory of socialist countries provides an opportunity for the concentration of complimentary input availabilities such as capital, productive capacities, technology and the managerial expertise of the producers from different countries. This renders possible the completion of projects far beyond the individual potential of each partner.

Taking this into account, the COMECON Council<sup>44</sup> has re-

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43. The Polish experience with foreign capital in the period between World War I and World War II was particularly unsatisfactory. In fact, during that time period, foreign capital had an extremely negative impact on the economic life in Poland. Having no confidence in the stability of the Polish state, it tended to transfer abroad the greatest part of the profits obtained in Poland. . . . Thus, the economy of the country was deprived of the means for the development of industry, intensification of agriculture production and low-interest credit. The foreign enterprises exported from Poland the vast portion of national income that, otherwise, would have been used for investments.

I. KOSTROWICKA, Z. LANDAU & J. TOMASZEWSKI, *HISTORIA GOSPODARCA POLSKI* 377 (Warszawa 1975). [Translation by authors of this article].

The mismanagement of a British firm between 1924-1929 was so disastrous to Poland's Bialowieza Forest that the exploitation agreement was unilaterally cancelled by the Polish Government. SOKOLOWSKI, *BIALOWIEZA* 10 (1976).

44. COMECON Council refers to the Council for Mutual Economic Assistance. An English translation of the Charter of the Council for Mutual Economic Assistance of December 14, 1959, as amended in June and December of 1962 and in June of 1974, is reproduced at D.A. LOEBER, *I EAST-WEST TRADE* 19, Item 1.000 (1976) [hereinafter cited as LOEBER]. Per-

cently initiated a number of practical measures aimed at facilitating the development of this form of co-operation between member countries.<sup>45</sup> The proposals urge uniformity of law governing the status and internal structure of joint enterprises established within the territory of the member countries. Furthermore, each country is encouraged to enact special legislation on joint enterprises to facilitate such operations.<sup>46</sup> In some socialist countries, such legislation has been in force for several years.<sup>47</sup>

Until recently, no specific legislation concerning direct foreign investment existed in Poland. The opinion prevailed, however, that currently existing legal provisions provided sufficient basis for resolving at least the principal problems of economic activity with foreign investors.<sup>48</sup> In 1976, however, important legislation became effective which, together with already existing laws, created the legal framework for foreign investments in Poland.<sup>49</sup>

Direct foreign investment in socialist countries poses problems common to all foreign investment, including those surrounding relations between a State or sovereign power and a foreigner wishing to undertake economic activity within that territory, as well as the choice of a form of business organization. More importantly, however, unique problems arise in connection with direct foreign investment in socialist countries, specifically complexities confronting foreign investors because of the need to "inject" their investment into

haps the best analysis and discussion of the organization and operation of the CMEA is Ustor, *Decision-Making in CMEA*, ACADEMIE DE DROIT INTERNATIONAL, 134 RECUEIL DES COURS 163-296 III (1971).

45. Specific steps in this respect were outlined in the Complex Program of Integration of CMEA adopted by the Session of the Council in July 1971 in Bucharest, Rumania. See Comprehensive Programme for the Further Extension and Improvement of Co-operation and Development of Socialist Economic Integration by the CMEA Member Countries [hereinafter cited as Comprehensive Program]. See also Walteson, *Economic Cooperation and Separate Legal Systems*, 2 EASTERN BUS. MAGAZINE 56 (1977). The text of the Comprehensive Program is published in English in 7 SOVIET AND EASTERN EUROPEAN FOREIGN TRADE 187-305 (1972).

46. See Comprehensive Program, *supra* note 45, chs. 15.2 and 15.7.

47. These include Yugoslavia, Hungary and Rumania. Legislation has existed in Yugoslavia since 1967, in Hungary since 1970 and in Rumania since 1971. See generally Rybak, *Role of Mixed Companies in Promoting Exports*, 9 POLISH FOREIGN TRADE 32 (172) (Sept. 1976).

48. Rybak, *Joint Ventures-wspolne przedsiwzięcia i wspólne ryzyko*, 10 HANDEL ZAGRANICZNY 18 (1973); Ciamaga, *Znaczenie kooperacji przemysłowej z zagranicą w dyndmizacji polskiego handlu zagranicznego*, 7 HANDEL ZAGRANICZNY 19 (1974); Tabaczynski, *Rozwoj kooperacji przemysłowej z krajami Zachodu - ważne zadanie najbliższej pięciolatki*, 11 HANDEL ZAGRANICZNY 20 (1975).

49. See notes 59-68 *infra* and accompanying text.

the administrative system of the national economy of the socialist country.

A. *Injecting Foreign Investment into the Existing System of National Economic Administration*

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 co-operative, owned. In this context of State and co-operative ownership, the economic, legal and administrative framework was formulated.

Plans for the supply and distribution system, pricing, tax and financial controls were founded upon the premise that the socialized (either State or co-operative owned) enterprises were the only actors on the economic stage. Because of the formulation of this premise, problems of injecting foreign investment into a socialist economy have become very complex. Attaining a practical solution in Poland presented formidable difficulties for both foreign and Polish enterprises and consequently the task was not frequently undertaken, although pre-World War II legislation allowing such investment was in full force and effect.<sup>50</sup> 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. Moreover, the pricing system in socialist countries is quite autonomous and does not follow world prices. This renders any calculation of production costs or estimation of profits and losses very difficult. A model joint venture would avoid all of these problems.<sup>51</sup> Under such a model, a capitalist investor provides a Polish enterprise with capital assets in the form of machinery, equipment or cash as well as technical information, assistance and know-how. Based upon this contribution, its own capital assets, working capital, technological expertise and labor, the socialist enterprise undertakes productive activities. The foreign investor has the right to participate in decision-making with regard to a number of specified issues. Such issues include the nature of goods produced, the direction of future development, technology of production, marketing policies, choice of markets,

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50. See notes 61-65 *infra* and accompanying text.

51. Such is the case in the specific form of organic co-operation sometimes discussed in Polish publications. See, e.g., TABACZYNSKI, KOOPERACJA PRZEMYSŁOWA Z ZAGANICA 102 (1976).

production costs and pricing. Some decisions regarding the specific character of the national economic administration system in socialist countries are, however, reserved for the socialist enterprise. These include, for example, aspects of enterprise activity governed by the national economic plans, wages, social policy and decisions reserved for workers' self-government under the law in force.

Profits from the investment might be realized in one of two ways. First, products manufactured under a co-operation agreement may be exported and sold abroad to the joint venture company set up by the partners of the co-operation agreement. Product prices approximate production costs. The joint venture company will market the products and distribute the profits according to mutually acceptable principles. Alternatively, the foreign investor might also receive a share of profits from the joint venture in the form of manufactured products at mutually acceptable prices. The same form could be used for repatriation of capital.<sup>52</sup>

Elimination of the difficulties posed by the specifics of running the socialist system's national economy is far more complicated whenever a business enterprise is established in the form of an independent entity endowed with a legal identity. In light of the practice existing thus far, three possible models of joint ventures can be distinguished: the economic and financial enclave model, the double appraisalment model and an integrated model.

The economic and financial enclave model is based upon the principle that all transactions, financial operations and accounting of the joint venture are conducted in convertible hard currencies, not in the currency of the host State, rendering possible a valuation of joint venture property. Supplies originating from the country where the joint venture operates are considered exports, while products sold in that country by the joint venture are imports. The joint venture is commissioned to independently carry on transactions in foreign-trade markets. Only wages and salaries of the nationals of the host State are paid in local currency; the joint venture must buy this currency at the official rate of exchange. In effect, the joint venture is autonomous with regard to the national plan, pricing system and supply procedure of the State within whose territory it operates. Thus, the foreign investor conducts activity in an environ-

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52. In light of the Polish legal system, joint activity based upon such a pattern may be conducted in the form of a contractual association (*societe civile*) as provided in the Polish Civil Code. POLISH CIVIL CODE, arts. 860-75 (1964).

ment similar to a free market. The most difficult problem in applying this model is the valuation, in convertible currency, of the inputs for which there is no comparable world price. This difficulty intensifies as the productive processes become more complex.<sup>53</sup> By separating the joint venture from the economic life of the State, this model significantly reduces potential advantages of the joint venture, including infusion of advanced technology and management into the host State's economy.<sup>54</sup>

The double appraisalment model involves conducting the joint venture account in internal and convertible currencies. All of the fixed assets and current financial operations must be assessed in two currencies or converted from one into another. A number of exchange rates must be employed in the conversion as the relationship between internal and world prices in the socialist State changes. In each case, when the world price is not available, the valuation must be based upon an agreement between the partners. This model leaves open the question of the relationship between the joint venture and the host State's economy. The joint venture might be either completely separated from, or totally integrated into, this economy. Accounting procedures, however, pose such difficulties that application of this model may be feasible only when production is simple, such as in production of raw materials.<sup>55</sup>

An integrated model implies full inclusion of the joint venture into the monetary and economic system of the host country. The joint venture conducts its activity on the same principles as a national enterprise. All supplies necessary for the operation of the joint venture are bought at prices set for internal trade. Prices on the products of the joint venture are determined by the same standards. The integrated model affords the host State many advantages. It facilitates inclusion of joint venture activity into the national plan and allows full adjustment of this activity in accordance with the interests and objectives of the national economy. If this model is to be applied, however, the official rate of exchange of local currency must be established and used as a basis for computing prices of imported supplies and final products.<sup>56</sup>

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53. The need of the partners for the assistance of experts will considerably lengthen the negotiations period.

54. See Grabowski & Tabaczynski, *East-West International Investment and Production Ventures*, 19 HANDEL ZAGRANICZNY 8 (1974). English Translation in LOEBER, *supra* note 44, at 332, §5.618.

55. *Id.* at 323.

56. *Id.* at 320.

*B. Rights and Obligations of Foreign Investors Under Polish Law*

Legal provisions affecting foreign investment in Poland are not found in any single statute or codification.<sup>57</sup> Legal provisions more specifically designed to regulate foreign investment are contained in recently promulgated legal acts. The Order of the Council of Ministers of May 14, 1976,<sup>58</sup> concerns the issuance of permits to foreign legal and natural persons for conducting various types of economic activity. The Order of the Minister of Finance of May 26, 1976,<sup>59</sup> allows the opening and use of bank accounts for those persons conducting economic activity in Poland who are treated as foreigners for currency control purposes. The Order of the Ministry of Finance of May 26, 1976,<sup>60</sup> concerns permits for foreign exchange operations by mixed capital companies. Provisions in these three Orders supplement and, in some cases, modify general principles concerning economic activity in Poland, thus creating, together with the above principles, the basic guarantees and rights of the participants in these activities. The following is a summary of the major principles established by these basic legal documents and the specific Orders.

The basic ownership form of the means of production in Poland is social ownership (State and co-operative), but in the country's economic life, particularly in agriculture, individual ownership of land, buildings and craftshops plays an important role. This type of ownership as well as the right to inherit the ownership of this means of production are recognized and protected by law.<sup>61</sup> Land, buildings and other means of production which do not constitute the exclusive object of social ownership may be, on the basis and in the limits set by law, the object of ownership by natural persons.<sup>62</sup> Foreigners in Poland have the same rights and obligations as Polish citizens, unless the law specifies to the contrary.<sup>63</sup>

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57. Certain principles established in such basic legal documents as the Polish Constitution of 1952, the Statute on International Private Law, the Civil Code of 1964 and the Commercial Code of 1934 are relevant to foreign investment. 19 J. OF LAWS, Item 123 (1976).

58. Official Journal "Monitor Polski", No. 25 Item 109 [hereinafter cited as Decree 109]. See generally *Poland Broadens Field for Foreign Investment*, 5 BUS. EASTERN EUROPE 282 (1976).

59. Official Journal "Monitor Polski", No. 25, Item 110 [hereinafter cited as Decree 110]. See generally *Poland Broadens Field for Foreign Investment*, 5 BUS. EASTERN EUROPE 282 (1976).

60. Decree 110, *supra* note 59.

61. CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC OF 1952, annotated consolidated text, §17, 7 J. OF LAWS, Item 36 (1976).

62. POLISH CIVIL CODE § 130 (1964), 16 J. OF LAWS, Item 93 (1964).

63. These above provisions as well as the others apply to foreigners and their property



### 1. Direct Foreign Investment

Changes in the Polish legal system after World War II resulting from a new socio-economic system did not affect the pre-War legal rules regulating direct economic activity undertaken or conducted by foreigners in Poland.<sup>64</sup> According to pre-War legal acts, foreigners, like Polish citizens, were required to obtain appropriate licenses before undertaking economic activities. Before licenses could be granted to certain types of foreign corporations, these corporations had to receive permission to conduct business activities within Polish territory. This permission required that the applicant meet several formalities as well as a general condition of reciprocity, specifically that Polish enterprises be permitted to do business in the territory of the country in which the foreign applicant was located. However, the law did not require that Polish authorities grant permission to the foreign applicant. Such action was still discretionary unless Poland and the applicant's country had concluded internal agreements regarding the matter.

In 1972, the Industrial Law of 1927,<sup>65</sup> which gave foreigners equal rights to obtain a license for conducting a trade on a reciprocal basis with Polish nationals, was repealed and replaced by the Law on Organization and Execution of Craftsmanship<sup>66</sup> and the Law on Conducting of Commerce and Other Types of Activities by Non-Social Organizations.<sup>67</sup> These new laws provided for the issuance of rules and regulations establishing conditions governing foreigners who wish to conduct direct economic activity in Poland.

The principle promulgation of such rules and regulations is contained in the Order of the Council of Ministers of May 14, 1976.<sup>68</sup> This Order specifies types of economic activities which may be independently conducted in Poland by foreign natural and legal persons and determines categories of persons which may be permitted to conduct such activities as well as the conditions upon which permis-

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in Poland under the Law of November 12, 1965, on International Private Law, § 8, 46 J. OF LAWS, Item 290 (1965).

64. See Order of the Council of Ministers of 1928, 103 J. OF LAWS, Item 919 (1928) and Order of the Council of Ministers of 1934, 31 J. OF LAWS, Item 281 (1934) concerning conditions of admission of foreign companies. See also the Decree of the President, concerning the Industrial Law of 1927, 53 J. OF LAWS, Item 468 (1927); COMMERCIAL CODE OF 1934, 57 J. OF LAWS, Item 502 (1934).

65. 53 J. OF LAWS, Item 468 (1927).

66. Law on Organization and Execution of Craftsmanship of 8 June 1972, as amended, 23 J. OF LAWS, Item 164 (1972).

67. Law on Conducting of Commerce and Other Types of Activities by Non-Social Organizations of July 18, 1974, 27 J. OF LAWS, Item 158 (1974).

68. See Decree 109, *supra* note 58.

sion can be obtained. The Order of May 14, 1976,<sup>69</sup> subjects foreigners to the same legal conditions in force and effect for Polish citizens. It also simultaneously introduces a number of exceptions to rules generally in effect, with the object of benefitting foreigners.<sup>70</sup> The Order of May 14, 1976, describes the scope of economic activities which may be undertaken by foreigners in Poland to include crafts, retail trade, hotels, restaurants and other services.<sup>71</sup> A special explanation is needed concerning the type of activities constituting "crafts" under the law. Under the 1972 law,<sup>72</sup> "crafts" are defined as the "conducting of manufacturing and service activities by natural persons on their own behalf."<sup>73</sup> In 1976, however, the official list of "crafts" enumerated over 200 types, simultaneously specifying minimum professional qualifications governing applicants seeking permits to conduct particular crafts.<sup>74</sup>

However, a number of important exceptions to the rules generally applicable to Polish citizens exist for foreign investors.<sup>75</sup> In particular, "craft" activities may be conducted not only by foreign natural persons, but by other categories of subjects including legal persons.<sup>76</sup> Moreover, foreign natural persons and representatives of other categories of foreign investors are not required to meet professional qualifications.<sup>77</sup> Foreigners are further exempted from compulsory membership requirements in guilds or associations of private merchants.<sup>78</sup>

Equally widely defined is the classification of foreign persons who may apply for permits to conduct economic activities in Poland. Included are legal persons which have their seat abroad and natural persons with permanent residence abroad;<sup>79</sup> natural persons who are foreign citizens, but who have been granted cards of permanent residence in Poland;<sup>80</sup> and associations without legal personality whose members belong to the above-mentioned categories.<sup>81</sup>

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69. *Id.* The Industrial Law of 1927 contained the same provision. See note 65 *supra*.

70. See text accompanying notes 73-78, *infra*.

71. See Decree 109, *supra* note 58.

72. Law of Organization and Execution of Craftsmanship of 1972, art. 1, §1, *supra* note 66.

73. *Id.*

74. The official list constitutes an appendix to the Order of the Ministry of Domestic Trade and Services of February 16, 1976, 8 J. OF LAWS, Item 41 (1976).

75. See Decree 109, *supra* note 58.

76. Decree 109, *supra* note 58 § 2.

77. These qualifications are specified in the Law of 1972. Decree 109, *supra* note 58 § 7.

78. *Id.* § 8.

79. *Id.* §§ 2.1 and 3.

80. *Id.* § 2.4.

81. *Id.* § 2.5. This final category is specifically designed to include associations of Poles

The competent governmental unit to issue permits for economic activity is the "vovoidship organ of administration" within the territory where the proposed economic activity will be located.<sup>82</sup> However, when the applicant is a foreign legal person or an association of Poles living abroad, the vovoidship administrative organ must seek an opinion on the pending application from the Ministry of Foreign Trade and Maritime Economy.<sup>83</sup> An application for a permit may be presented directly through an agent appointed for that purpose or through the services of a Polish diplomatic or consular mission abroad.<sup>84</sup>

Another important pre-condition for the issuance of a permit is that the applicant possess the capacity to perform legal acts. According to Polish law,<sup>85</sup> the capacity of natural persons to perform legal acts is governed by the law of the State of which the person is a citizen, that is, by the *lex patria*. If it is impossible to establish a person's nationality, legal capacity is governed by the law of the State where the person has permanent residence.<sup>86</sup> In the case of a legal person, legal capacity is governed by the law of the place where the legal person has its seat.<sup>87</sup> It may be assumed that the same principle might apply to associations and institutions lacking legal capacity.

One exception exists to the above Polish "capacity" principles. When a legal or natural person performs legal acts regarding its enterprise, its legal identity is then governed by the law of the seat, *i. e.*, principal office, of the enterprise.<sup>88</sup> For example, if the principal office of a legal person is in the United States, but the legal person sets up an enterprise in Poland, legal capacity to perform legal acts in Poland is governed by Polish law. This principle has particular importance with regard to a foreign investor's economic activities in Poland. This is true because the investor's legal capacity is determined by Polish law whenever a legal act is undertaken in connection with business operations in Poland.

Before a permit may be issued, the foreign investor must present an estimated cost of the proposed investment,<sup>89</sup> a commitment

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living abroad. *Id.* § 2.2. See generally, Atler, *The Poles Abroad as Economic Partners*, 11 POLISH FOREIGN TRADE 26 (186) (Nov. 1977).

82. Decree 109, *supra* note 58 § 3.

83. *Id.* § 4.2.

84. *Id.* § 4.1.

85. Polish Int'l Private Law of 12 November 1965, art. 9, § 1.

86. *Id.* art. 3.

87. *Id.* art. 9, § 2.

88. *Id.* art. 9, § 3.

89. *Id.* § 10.1.1.

to cover the full cost of the investment in convertible currency,<sup>90</sup> and a certificate from the authorized bank<sup>91</sup> that 30% of the estimated investment cost has been deposited in an investment account in convertible currency.<sup>92</sup> A permit is then issued for ten years, after which time it may be renewed.<sup>93</sup> The governmental organ issuing the permit also determines the maximum number of employees allowed to be employed during the course of the proposed economic activity.<sup>94</sup> Foreign investors with permanent residence or principal office abroad must appoint an agent to perform acts necessary to obtain a permit and, once a permit is issued, to conduct the economic activity. The agent must be a Polish citizen who is a permanent resident of Poland or a foreigner who has obtained a card of permanent residence in Poland or in the Polish Association of Foreign Trade (POLIMAR). Special Polish enterprises are set up to render such services to foreign residents.<sup>95</sup>

Additional currency matters are regulated by The Order of May 14, 1976, which permits aliens to open and maintain bank accounts in Poland for business purposes.<sup>96</sup> Money deposited in these accounts may be used to obtain or buy materials, commodities and immovables through PEWEX (State Enterprises of Internal Export) in an internal export transaction.<sup>97</sup> Furthermore, the money may be used to buy materials and equipment from abroad through the intermediary of the Polish Foreign Trade Organizations.<sup>98</sup> Finally, deposits may cover payments in convertible currency to other Polish enterprises if other legal provisions allow these enterprises to render services in exchange for foreign currency.<sup>99</sup> These three pre-authorized dispositions of sums of money from the investment account do not necessitate special foreign exchange permits.<sup>100</sup>

Foreign investors in Poland also have the right to open Polish currency accounts in the Bank PKO and to use such accounts for

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90. *Id.* § 10.1.2.

91. Bank Polska Kasa Opicki, S.A.

92. Decree 109, *supra* note 58, § 10.1.3.

93. *Id.* § 4.3.

94. *Id.* § 9.

95. *Id.* §§ 6.1 and 6.2.

96. Decree 109, *supra* note 58. Under this Order, foreign investors are permitted to open foreign currency accounts in the bank PKO for the purpose of financing their investment activities in Poland. In a collateral move, Poland's state PKO Bank has authorized and encouraged Western individuals and institutions to open long-term savings accounts. *Polish Bank to Encourage Western Savings Accounts*, 4 BUS. EASTERN EUROPE 347 (1977).

97. Decree 109, *supra* note 58, at § 3.1.

98. *Id.* § 3.2.

99. *Id.* § 3.3.

100. *Id.* § 3.2.

the receipts and disbursements connected with business operations and for personal expenses.<sup>101</sup> Most importantly, the Bank PKO may execute payments from these Polish currency accounts in convertible currency on behalf of the owners of the business operations. These payments may constitute up to 50% of the net income obtained in a fiscal year as a result of economic and profit making activity. However, payments may not exceed 9% of the value of the investment.<sup>102</sup> The 9% limitation on payment in convertible currency is not applicable to enterprises in which at least 50% of the turnover is documented by export sales against convertible currency. In such a case, however, a 50% limitation still applies.<sup>103</sup> This special provision applies to the exchange of zlotys into convertible currency by non-Polish nationals who decide, after starting business operations, to become permanent residents of Poland and who will otherwise be treated as nationals.<sup>104</sup> Since the basis for computing the amount which may be converted into convertible currency is "net income", this indicates the significance of tax obligations applicable to foreign investors.<sup>105</sup>

A foreign investor may sell a business operation to another foreigner or to a Polish citizen.<sup>106</sup> In either case, the contract of sale must meet Notarial Act formalities specified by the Polish Civil Code.<sup>107</sup> In addition, if the business operation is sold to a foreigner, prior to entering into the contract of sale the buyer must obtain permission to conduct the business operation in Poland.<sup>108</sup> Sale proceeds are to be deposited in convertible currency to the seller's account in the Bank PKO. After these conditions are met and all tax obligations are satisfied, the Bank PKO is then authorized to transfer to the seller the total amount of the sale proceeds less all income tax due.<sup>109</sup>

If the business operation is to be purchased by a Pole, the sale price must be deposited in Polish zlotys into the seller's account and

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101. *Id.* § 4.

102. *Id.* § 6.1. It seems unclear whether this last restriction relates to the initial investment deposit or to the book value of the investment. Which of the two is intended could make quite a difference, given capital appreciation and/or inflation.

103. *Id.* § 6.2.

104. *Id.* § 6.4.

105. This matter is regulated by the Order of the Minister of Finance of May 23, 1977, in the Matter of Taxation of Foreign Natural and Legal Persons, 18 J. OF LAWS, Item 71 (1977) [hereinafter cited as May 23, 1977 Order].

106. Decree 109, *supra* note 58, § 7.

107. *Id.* § 7.1.

108. *Id.* § 7.2.

109. *Id.* § 7.

then transferred abroad in convertible currency in an amount not exceeding the seller's foreign currency investment increased by 50% of the net income obtained from the sale.<sup>110</sup>

If a foreigner's business investment in Poland passes upon the investor's death by virtue of testate or intestate succession to heirs or legatees having permanent residence abroad, the foreign heirs have the same rights of disposition and retention as did the deceased.<sup>111</sup> If, in addition to heirs living abroad, some heirs are Polish nationals, the assets and profits of the business enterprise are transferable abroad only in the amount due the foreign heirs.<sup>112</sup>

## 2. *Mixed Capital Companies*

Unlike the situation involving 100% owned foreign investments, no special legislation authorizes foreigners to participate in mixed capital companies established in Poland.<sup>113</sup> Such legislation has been considered unnecessary because nothing in existing Polish law prohibits the creation of such arrangements.<sup>114</sup> Polish law<sup>115</sup> accordingly presupposes the permissibility of mixed capital companies and does not require special permission for foreign investors to set up mixed capital companies in Poland. To set up a mixed capital company in Poland, legal persons with principal offices abroad, associations of Poles living abroad or social organizations of such groups located abroad must enter into an agreement with Polish social enterprises<sup>116</sup> or social organizations possessing legal capacity and authorized to conduct business activities. Natural persons granted the card of permanent residence may also be foreign partners in mixed capital companies.<sup>117</sup>

The contract creating a mixed capital company, however, must be approved with regard to provisions concerning the exchange of goods and services in foreign exchange.<sup>118</sup>

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110. *Id.* art. 8.2. The exchange rate applicable is the tourist rate. *Id.* art. 11.

111. *Id.* art. 10.1.

112. *Id.* art. 10.2.

113. A mixed capital company is one in which there is joint participation of a Polish enterprise.

114. Specific foreign exchange matters and financial problems connected with the activity of mixed capital companies are regulated by the recent Order of the Minister of Finance of May 26, 1976, Decree 110, *supra* note 59. See generally Weralski, *Polish People's Republic: New Joint Venture Legislation*, 17 *EUROPEAN TAXATION* 114 (1977).

115. Decree 110, *supra* note 59, arts. 1.1 & 2.

116. Polish social enterprises include both State and Cooperative enterprises.

117. Decree 110, *supra* note 59, art. 2.2.

118. Approval must come from both the Minister of Foreign Trade and Shipping and from the competent Minister in conjunction with the Minister of Finance. This approval is

Contracts creating mixed capital companies must contain certain provisions. The capital contribution of the foreign participant must be in Polish currency obtained from a documented exchange of convertible currency. If part of the foreign participant's capital contribution is of a non-pecuniary nature, it may be subtracted from the total amount of the participant's capital contribution. The pecuniary contribution, however, must not be less than 50% of the total capital contributions.<sup>119</sup> Any distribution of net income by the mixed capital company must provide that 20% of net income be earmarked for a capital reserve fund of the company. The remainder of net income is to be distributed among the partners. Laws relating to income tax and limited liability companies define "net profit" to mean profit after income tax is deducted.<sup>120</sup> Polish law does not restrict the equity of the foreign partner to a minority interest.

The Bank Handlowy and the Bank PKO are authorized to execute payments benefitting foreign partners. These payments are made in convertible currencies and represent amounts due the partners as a part of net income of the mixed capital company. Payments are made after deduction of income and other taxes together with amounts in zlotys withdrawn during the tax year. However, the payment in foreign currencies may not exceed 9% of the value of the capital<sup>121</sup> contributed by the foreign partner.<sup>122</sup>

The previously discussed limitation on payment of profits to the foreign partner in convertible currency to 9% of the value of the capital contributed by the foreign partner does not apply to companies deriving 50% or more of their turnover from the sale of commodities and/or rendering of services in export transactions in foreign currencies.<sup>123</sup> The right to obtain payments of net income due in convertible currency expires after ten years.<sup>124</sup>

If a foreign partner withdraws from a mixed capital company, the Banks<sup>125</sup> may transfer abroad the value of the partner's pecuniary and non-pecuniary contribution and such proportionate part of the company's net worth remaining after the contributions of all

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required by Decree 110, *supra* note 59, art. 2.1.1.

119. *Id.* art. 2.1.2.

120. *Id.* art. 3. Mixed capital companies are allowed to make payments in Polish currency (zlotys) from amounts owned by foreign partners as their share of net income of companies for their personal need during their stay in Poland. *Id.* art. 4.1.

121. The capital may be either pecuniary or non-pecuniary.

122. Decree 110, *supra* note 59, art. 4.2.

123. *Id.* art. 4.5.

124. *Id.* art. 5.1.1.

125. The "Banks" refer to the Bank Handlowy and the Bank PKO.

other partners have been subtracted. Distribution of remaining sums must be proportionate to the relation in which the partner participated in the distribution of net income.<sup>126</sup> Upon dissolution or liquidation, both Banks may transfer abroad the value of pecuniary and non-pecuniary contributions of foreign partners from the corporate assets remaining after all corporate debts have been paid together with such part of the surplus value of the corporate assets in relation to which partners share in distribution of the income.<sup>127</sup>

If the foreign partner's capital contribution passes by testate or intestate succession to persons having permanent residence abroad, the heirs or legatees have the same right, as did the deceased, to manage and dispose of the contribution and profits. If those heirs live in Poland, the money may be transferred abroad.

The lack of existing extensive provisions governing foreign investment in socialist countries renders difficult any choice among the possible models for injecting foreign investment into socialist economies. However, most socialist countries have been more inspired by the third, or integrated model, which their legislation is designed to facilitate.

### C. *Taxation*

In accordance with Polish tax laws,<sup>128</sup> foreigners and foreign legal persons carrying on business in Poland or obtaining profits in Poland are subject to taxation with regard to income tax, wages and salaries tax, and, in some cases, turnover tax.<sup>129</sup> They are also liable for property tax, tenant tax and road tax. There is no taxation of capital in Poland.

Income tax is levied, with one exception, according to general schedules also applicable to Polish citizens. The tax rate cannot exceed 30% in regard to gains from the sale of immovable and movable property, payments of any kind received as a consideration for use of or the right to use any patent, trademark, design or model, or any copyright including cinematographic films, interest from money lent or dividends.<sup>130</sup> Income tax from dividends and other distributions of profits from legal persons might be lowered to shareholders on the action of the Minister of Foreign Trade and Ship-

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126. Decree 110, *supra* note 59, art. 5.1.2.

127. *Id.* art. 8.

128. May 23, 1977 Order, *supra* note 105.

129. *Id.*

130. *Id.* art. 10.1.



ping.<sup>131</sup> The tax rate on other income obtained by foreign natural and legal persons cannot exceed 50% of earned income.<sup>132</sup>

If, for any reason, taxable income cannot be determined according to regular accounting procedures, it is established according to the following rules: 10% of the gross annual receipts in the case of construction or assembly projects, 5% of the gross receipts from foreign trade activity, 60% of gross commissions, and 20% of the gross receipts for all other commercial activities are considered taxable income.<sup>133</sup>

Persons having permanent residence or a seat abroad are not taxed on income from interest on loans extended to Polish socialized enterprises, provided that the same principle is applied in the territory of the interested persons in regard to Polish socialized enterprises.<sup>134</sup> Polish tax legislation also provides for unconditional exemption for income from construction or assembly projects of less than six months' duration, as well as income from independent commercial activity carried on through Polish trade agencies.<sup>135</sup>

A tax holiday is given from income taxes to foreigners who conduct certain designated activities in Poland. This tax holiday applies to the first three years of operation in regard to hotels and related services and to the first two years in regard to domestic trade, catering craftsmanship and other services.<sup>136</sup>

Turnover tax from foreigners<sup>137</sup> is collected, with few exceptions, under general principles applicable to Polish citizens. Foreigners and foreign legal persons enjoy full exemption from turnover tax with respect to construction and assembly operations, as well as commercial activity, carried on by an agent of independent status in dealings with socialized enterprises in Poland.<sup>138</sup> Exemption from turnover tax is granted, on the principle of reciprocity, to foreign shipping and air transportation enterprises.<sup>139</sup> This exemption, however, does not apply to persons undertaking construction or assembly operations on the basis of permits for executing craftsmanship in Poland.<sup>140</sup> Turnover tax on turnover from hotel services is reduced

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131. *Id.* art. 10.2.

132. *Id.* art. 6.2. In the case of Polish citizens, the tax can reach 65% if the income exceeds 360,000 zlotys.

133. *Id.* art. 7.1.

134. *Id.* art. 5.

135. *Id.* arts. 2.1 and 3.1.

136. *Id.* art. 6.1.

137. Foreigners include those persons with a permanent residence or seat abroad.

138. May 23, 1977 Order, *supra* note 105, art. 3.1.

139. *Id.* art. 9.2.

140. *Id.* art. 2.2.

to 8% in the first ten years of activity.<sup>141</sup> In other cases, the turnover tax ranges, with some exceptions, from 1%-5% of turnover, depending upon the type of operation.<sup>142</sup>

#### D. Legal Forms and Organizational Patterns

Far less complicated, in comparison with the problems previously discussed, are legal questions involved in selection of a suitable form of business organization for the foreign investment. Apart from operation through a branch, apparently the principal solution for 100% investments, foreign investors have a choice among three forms of business operations: a civil law partnership, a general commercial partnership or a limited liability company. A fourth form,<sup>143</sup> the stock corporation, seems to be excluded from foreign investments.<sup>144</sup>

A partnership under civil law<sup>145</sup> is analogous in several respects to the joint venture gradually developed by American courts as a *sui generis* type of association. Partnership under the civil law has no legal identity. Associates have the duty to cooperate in pursuing the mutual objectives in this contract and, to this end, they must make contributions either in property, services or other rights.<sup>146</sup> The civil law partnership has property distinct from the property of the associates.<sup>147</sup> Each associate has the right and duty to participate in conducting association affairs.<sup>148</sup> They may, however, agree upon the delegation of authority to represent the association to one of its members.<sup>149</sup> The relationship between associates is a fiduciary one. Profits can be divided among the associates in any agreed proportion. The associates' liability for debts resulting from operation of the association is joint and several.<sup>150</sup>

A general commercial partnership,<sup>151</sup> like the general partner-

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141. *Id.* art. 6.3.

142. Law on Turnover Tax of 16 Dec. 1972, 53 J. OF LAWS, Item 338 (1972). All of the discussed tax rules in regard to foreigners are variable by international agreement.

143. The stock form exists under the Commercial Code of 1934, 57 J. OF LAWS, Item 502 (1934).

144. Decree 110, *supra* note 59.

145. Partnership under civil law is regulated by Articles 860-75 of the Polish Civil Code of 1964, *as amended*, 16 J. OF LAWS, Item 93 (1964).

146. *Id.* art. 861(1).

147. *Id.* art. 862.

148. *Id.* art. 865.

149. *Id.* art. 866.

150. *Id.*

151. Polish Commercial Code of 1934, art. 864, 57 J. OF LAWS, Item 502 (1934). The general commercial partnership is regulated by the Polish Commercial Code of 1934, which

ship under civil law, has no legal identity but can acquire rights, incur obligations, sue and be sued.<sup>152</sup> This provision gives rise in Polish legal writings to much discussion as to the real legal nature of this type of partnership. However, there are no other basic differences between civil and commercial partnerships as far as payment of contributions is concerned, with the exception of the presumption contained in the Commercial Code<sup>153</sup> that the assets which a partner has undertaken to contribute must become partnership property. There also is no difference between both types of partnership with regard to obligations and rights of the partners in conducting partnership affairs. A partner may not be limited in exercising his rights for personal accounting in regard to partnership books and affairs.<sup>154</sup>

The partnership agreement<sup>155</sup> must be in writing and may not entrust to third persons responsibility for conducting partnership affairs to the exclusion of the partners.<sup>156</sup> Partners have a fiduciary duty in regard to the partnership. In particular, they may not undertake any activity in competition with the partnership or participate in a competitive company.<sup>157</sup>

A limited liability company<sup>158</sup> may be established only by agreement.<sup>159</sup> All capital contributions must be paid, all organs of the company established and entry in the commercial register executed. Upon registration, the company acquires legal identity. Such an agreement must be concluded in notarized form and may be limited in content.<sup>160</sup> The contract must delineate the name, principal office, business purpose, period of existence (if not perpetual), amount of capital,<sup>161</sup> distribution of shares among shareholders, non-pecuniary contributions and amount and number of shares allotted to shareholders.

Shares in the limited liability company may be sold only pur-

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was left in force by Article VI of the Introductory Law of the Polish Civil Code of 1964, 16 J. OF LAWS, Item 97, art. 5 (1964).

152. Polish Commercial Code of 1934, art. 81, 57 J. OF LAWS, Item 502 (1934).

153. *Id.* art. 102, ¶ 3.

154. *Id.* art. 91, ¶ 2.

155. *Id.* art. 77.

156. *Id.* art. 9. A general partnership must be registered in the commercial register and the entry in the register should include name, principal office, business purpose, names of partners and names of the persons empowered to represent the partnership and the limits of their powers of representation.

157. *Id.* art. 110(1)-(2).

158. The Limited Liability Company is regulated by Articles 158-306 of the Commercial Code of 1934, 57 J. OF LAWS, Item 502 (1934).

159. *Id.* art. 160.

160. *Id.* art. 162(1).

161. *Id.* art. 162(2).

suant to a written contract.<sup>162</sup> Participants may undertake obligations to limit the transferability of shares,<sup>163</sup> however, such an agreement may not totally eliminate the right to alienate shares.<sup>164</sup>

Shareholders are not liable for obligations incurred by a company liable with its own assets. However, the company agreement may<sup>165</sup> provide for assessment of shareholders to raise additional capital.<sup>166</sup> Company business is to be conducted by a board composed of one or more members. Board members may also be non-shareholders, although they are chosen by shareholders.<sup>167</sup> Each shareholder has the individual right to control company affairs,<sup>168</sup> but the company agreement may provide for establishment of a supervisory board.<sup>169</sup> This type of company is generally understood as the organizational framework for the cooperation of a small number of shareholders remaining in a close relationship with each other. Such a formation is simpler than a *société anonyme*, the impact of the shareholders is stronger, and the structure is simpler.

## V. CONCLUSION

Industrial cooperation arose as a result of political and social changes in the modern world. The basic objective of this policy is to render possible the transfer of technology, capital and goods among countries of differing political systems and levels of economic and social development. These national differences constitute an essential element of the situation within which co-operation agreements can be concluded. They also predetermine the legal and organizational framework in which co-operation may be undertaken. These are inevitable factors which must be understood by foreign investors contemplating business operations in socialist countries.<sup>170</sup>

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162. *Id.* art. 180.

163. *Id.* art. 181(2).

164. *Id.* art. 159(3).

165. *Id.* art. 128, ¶ 1.

166. *Id.* art. 171(1).

167. *Id.* art. 195(1).

168. *Id.* art. 205.

169. *Id.* art. 206(1). This is mandatory whenever capital exceeds 250,000 zlotys and the number of partners is more than 50. *Id.* art. 206(2).

170. Naturally, a number of problems arise when foreign capital investments are allowed in Poland, a socialist country, from countries which have different economic and social systems.

Circumspection from both sides is understandable in this situation. If Poland, from its side, were to allow within its territory the uncontrolled development of capitalistic enterprises financed only with Western capital, this would conflict with the basic assumptions underlying its socialist system. Nonetheless, Poland is inter-

Polish legislative measures aimed at facilitating foreign investments<sup>171</sup> demonstrate, however, a great amount of desire on the part of socialist countries to create, to the extent possible given socialist legal systems possibilities for foreign investors to participate in their economic life. Shadows of negative pre-war experience, years of conducting relatively closed economic systems, and the consequent lack of experience in dealing with foreign investment do not greatly enhance the explicitness of the legislative acts regulating foreign investment. Hopefully, this will develop in the future.

The present practice reflects, however, that clarification of the legal situation of joint economic activities undertaken within socialist countries does not necessarily result in rapid development of this form of industrial co-operation.<sup>172</sup> As a closer form of collaboration, joint ventures usually attract the attention of those partners who have already had positive experiences in mutual relations based upon previously concluded co-operation contracts. They have gained confidence in one another and are seeking new ways of intensifying established links.<sup>173</sup>

In light of the present level of East-West industrial co-operation, one must be realistic regarding the chances of sudden growth of joint ventures between socialist enterprises and capitalist

ested in attracting foreign capital investments in order to develop its national economy.

Weralski, *supra* note 114, at 114.

171. These are fourth in time sequence after Yugoslavia, Hungary and Romania. See generally *Comprehensive Program*, *supra* note 45.

For a discussion of recent trade law developments in Yugoslavia, see *Yugoslavia Implementing Foreign Trade Laws*, 7 BUS. EASTERN EUROPE 11 (1978); *Green Light for More Yugoslav Joint Ventures*, 7 BUS. EASTERN EUROPE 121 (1978).

For a discussion of recent developments in Hungarian joint venture law, see *Joint Ventures: Hungary Clears the Way for Joint Production*, 6 BUS. EASTERN EUROPE 169 (1977); *Hungary's Joint Venture Law - The Most Liberal in EE*, 6 BUS. EASTERN EUROPE 209 (1977).

For a discussion of recent developments in Romanian joint venture law, see *Joint Ventures in Comecon (2): Experiences in Romania*, 5 BUS. EASTERN EUROPE 145 (1976); Kiuper, *Socialist Republic of Romania, Organization, Operation and Taxation of Joint Companies - Taxation of Income Obtained by Non-Resident Individuals and Corporations*, 16 EUROPEAN TAXATION 190 (1976).

172. In Yugoslavia, seven years after new legislation on joint ventures was passed, the number of the joint venture agreements has now exceeded 100 with the total value of 150 million U.S. dollars. *Yugoslavia: The Less Developed Republics Want JV's Too*, 7 BUS. EASTERN EUROPE 67 (1978); *Green Light for More Yugoslav Joint Ventures*, 7 BUS. EASTERN EUROPE 121 (1978). The average shareholding of foreign investors in Yugoslavian joint ventures is assessed at 17%. *Id.* The reasons for that situation are believed to be closely related to the general level of industrial cooperation between socialist enterprises and capitalist companies and the development of joint ventures.

173. See generally *Industrial JV's Not Imminent, Despite Recent Polish Deals*, 6 BUS. EASTERN EUROPE 377 (1977).

firms. Gradual progress in this respect, however, seems inevitable, particularly in view of the flexible approach currently adopted by socialist countries.

