Ownership and Investment in Poland

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INTRODUCTION

Several East European countries have enacted legislation author-
izing joint ventures\textsuperscript{1} during the past decades. Yugoslavia first enacted such legislation in 1967,\textsuperscript{2} followed by Hungary, Romania, Poland, and Bulgaria.\textsuperscript{3} Each nation has adopted its own approach to the problem of incorporating the equity interests of outside investors. The Polish approach to investment regulation is the most complex, imaginative, and liberal of the East European systems. Poland, by authorizing joint ventures, wholly-owned foreign companies, and foreign-dominated small business enterprises, has become the first East European country to incorporate a substantial degree of foreign-controlled capital in its economy.\textsuperscript{4}

This article explores foreign investment in Poland from the investor's perspective, focusing on the legal protection of the investor's stake in a joint venture. Section I addresses the investor's understanding of ownership and the historical development of the protection of individual and foreign ownership in Poland. Section II explores cooperative activities in which investors and East European nations have engaged in the past and probes the objectives of each party to a cooperation agreement. Section III outlines Polish investment regulations. Section IV provides an overview of other East European nations' approach to foreign equity holding. Finally, Section V reviews the types of cooperative agreements and joint ventures entered into during past decades and analyzes the factors leading businessmen to choose these investment forms.

\textsuperscript{1} A joint venture is an association by two or more business partners for some restricted purpose. That is, it is something less than a full merger or combination of the firms. Although there are a variety of definitions that can be applied to the term "joint venture," an operable definition is as follows: A joint venture is an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the enterprise; (3) the enterprise exists as a business entity separate from its parents; (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.


\textsuperscript{3} See infra text accompanying notes 57, 162, 173, 188.

\textsuperscript{4} See infra Section IV.
I. THE CONCEPT OF OWNERSHIP

This inquiry into Polish foreign investment regulation focuses on the extent to which Poland protects an investor's ownership rights. The analysis begins by examining the benefits of ownership as understood by investors in market economies. In market economies, the perceived benefits flowing from capital arise from the investor's equity position. In controlled economies such as Poland's, however, the perceived benefits reside with the state.

A. THE WESTERN PERSPECTIVE

An investor can control his investment by exercising power over six aspects of business activity: corporate form; market participation; management; organization and mobility of capital; operations; and transfer of ownership or liquidation. In a pure laissez-faire system, investors would enjoy full discretion in the exercise of the rights of ownership. In reality, however, market economies restrict this discretion. Ownership does not guarantee unlimited economic freedom.

5. Antitrust and other principles of fair competition, for example, limit parties' ability to choose business partners and industries. See generally The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-17 (1982). There are a limited number of corporate forms which an investment may assume: sole proprietorship, partnership, or corporation. See H. HENN & J. ALEXANDER, LAW OF CORPORATIONS § 16 (3d ed. 1983). Henn and Alexander further subdivide these three general groupings from both tax and nontax perspectives. Id. Investors may be restricted from entering certain industries, or required to qualify for special licenses to engage in those activities. The National Security Agency, for example, forbids the sale of cryptographs. Note, Public Cryptography, Arms Export Controls, and the First Amendment: A Need for Legislation, 17 CORNELL INT'L L.J. 197 (1984). Also, the Nuclear Regulatory Commission requires prior certification of nuclear power facilities. 44 C.F.R. § 350 (1984).

States and the federal government likewise limit the extent of foreign investment in the United States economy. Foreign firms are therefore restricted from participating in certain industries, including broadcasting, satellite communication, mining on federal property, and commercial air traffic. See generally Vagts, United States of America's Treatment of Foreign Investment, 17 RUTGERS L. REV. 374 (1963); Roth, Foreign Investment Regulation in the United States, 4 CORP. L. REV. 178 (1981). Investors' control in domestic corporations is also restricted. State statutes regulate conduct at company meetings, ensure minimum shareholder voting rights, and outlaw corporate decisions that disproportionately harm minority interests. See, e.g., DEL. CODE ANN. tit. 8, §§ 141, 211, 212 (1983); see also Valente v. Pepsico, Inc., 454 F. Supp. 1228 (D. Del. 1978) (providing for disclosure of relevant data to minority shareholders); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947) (creating a fiduciary duty to minority stockholders). General organizational requirements are minimal; companies only need to file a charter or articles of incorporation before initiating operations. See, e.g., DEL. CODE ANN. tit. 8, §§ 101-07 (1983); see generally H. HENN & J. ALEXANDER, supra, §§ 116-18 (setting forth the incorporation procedures in more general terms).

Economic regulation significantly affects corporate operations. Zoning ordinances restrict the location of investment facilities. Generally Accepted Accounting Principles and Internal Revenue Service regulations dictate corporate accounting procedures. H. HENN & J. ALEXANDER, supra, § 319. Numerous statutes establish minimum conditions under which a workforce must be hired and maintained. For example, the Occupational Safety and Health Act, the Fair Labor Standards Act, the Employee Retirement Income
Instead, investors are permitted to exercise limited economic rights that are consistent with the state's interest in maintaining an orderly economy.

Market economies offer no guarantees that laws affecting an investor's discretion will not change, although investors' expectations may be to the contrary. In the United States, for example, a governmental action may reduce the value of an investment without constituting a compensable taking of property.  

B. THE POLISH PERSPECTIVE

The principle of state ownership and administration of all major aspects of the economy pervades Polish economic regulation. The Polish Constitution describes the economic system as founded on the principles of state ownership of productive assets and a socialized system of production. The state is responsible for ensuring the economic and social welfare of its citizens by means of a national economic plan. The state also enjoys a monopoly over foreign trade. The state, in order to maintain a planned economy, oversees product distribution, manufacturing, and the pricing of domestic goods and services.

Security Act, and Title VII to the Civil Rights Act all establish guidelines regarding the workforce. Proposed state and federal plant-closing legislation attempt to minimize the economic disruption resulting from factory shutdowns, while Food and Drug Administration regulations, Federal Aviation Administration pronouncements and product testing requirements ensure that products conform to minimum safety levels. Finally, federal and state taxes are assessed on investment proceeds. Investors wishing to transfer property to another party may be subject to taxes on capital appreciation, gift, or estate values, and may face antitrust restrictions with respect to transactions with certain partners.

6. Hadachek v. Sebastian, 239 U.S. 394 (1915). For example, a community may reroute a major thoroughfare away from an existing production facility; the Food and Drug Administration may ban the sale of a previously approved product; Congress may raise taxes or impose wage and price controls; a community may ban the sale or manufacture of certain products, such as pornographic materials, drug paraphernalia, or even nuclear research.


The hierarchy of Polish legal pronouncements begins with a Law (Ustawa), which is enacted by the Polish Parliament, the Sejm. A Decree of the Council of Ministers (Uchwała) also establishes a new legal position in Poland. A Resolution of the Council of Ministers (Rozporządzenie) addresses a given legal framework. An Order of a Minister (Zarządzenie) provides executive guidelines for implementation of a resolution or decree, and an Explanation (Oświadczenie) details the application of an existing law or regulation in a given setting. P. MARER & E. TABACZYNSKI, POLISH-U.S. INDUSTRIAL COOPERATION IN THE 1980s 349 (1981).

Hereinafter, laws will be fully cited in the first instance, with only titles appearing in subsequent references.

The Polish approach to private ownership will be analyzed from two perspectives: personal ownership of real and productive assets, and foreign participation in national economic development. The Constitution expressly protects limited rights to own and inherit land, buildings, and productive assets related to crafts and trades.\(^9\) Regulations have defined property subject to personal ownership to include any means of production that are not the object of exclusive state ownership.\(^{10}\)

Foreign persons in Poland enjoy similar rights. Laws enacted in the 1920s and 1930s permit foreigners residing in Poland, and corporations doing business there, to purchase real property upon approval by the Minister of Internal Affairs.\(^{11}\) Foreign nationals and corporations may also negotiate a perpetual lease for real property.\(^{12}\) A perpetual lease runs for ninety-nine years\(^{13}\) and is renewable for a period of forty to ninety-nine years. Fees applicable to the sale or lease of real property vary according to its type and location, within guidelines established by regulations of the Ministry.\(^ {14}\) Provisions authorizing foreign ownership of real property have been widely publicized by Inter-Polcom, the Polish-Polonian Chamber of Commerce, in its attempt to encourage foreign investment.\(^{15}\)

Laws enacted in the 1920s and 1930s also allowed foreign equity participation. Under the Industrial Law of 1927, foreigners enjoyed equal investment status with Polish citizens, provided that Poles were accorded reciprocal rights in the investor's state.\(^{16}\) Foreign individuals and corporations were permitted to request a license to establish a joint stock company or a limited liability company.\(^ {17}\)

The approach to foreign investment remained unchanged until 1972, when the Industrial Law of 1927\(^ {18}\) was replaced by the Law on

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9. Id., art. XVII.
13. Id.
15. No data regarding the scope of such real estate holdings have been reported.
Conduct and Organization of Handicraft and Small Business\textsuperscript{19} and the Law on Conduct of Commerce and Other Activity by Non-Socialist Entities.\textsuperscript{20} These acts established procedural guidelines under which the Council of Ministers could permit foreign individuals and corporations to invest in Poland.\textsuperscript{21} Based on the powers delegated under these acts, the Ministers issued regulations governing the operation of foreign-owned companies and joint ventures in Poland.\textsuperscript{22} Polish ministers enjoy the power to authorize a wide range of foreign investment, although the influx of foreign equity into the economy began only after the express statutory authorization of wholly foreign-owned companies.\textsuperscript{23}

Statutory treatment of private ownership and foreign investment has remained substantially unchanged since the 1920s, despite the institution of the Communist regime in 1952. Poland's private investment by foreigners clearly violates Marxist-Leninist tenets of state ownership of property and the means of production. The Soviet Union, by comparison, has adopted the strictest approach to foreign investment of any COMECON (Council for Mutual Economic Assistance) nation. It prohibits all foreign equity holdings.\textsuperscript{24}

Polish commentators have avoided discussion of the ideological inconsistency between Marxist-Leninist teaching and Polish practices with respect to foreign investment. Indeed, their candid statements about the benefits of foreign investment imply a disregard for orthodox ideology. For example, one author quoted the Deputy Minister of Trade as saying that "[n]othing stands in the way of joint ventures. We are ready to consider every proposition which is technologically and economically beneficial. But we have yet to receive such an offer from a Western economy."\textsuperscript{25} In what appear to be subtle attempts to justify Poland's unorthodox practices concerning foreign investment, some authors have pointed out that other COMECON nations have similar practices.\textsuperscript{26} Others have simply detailed Poland's long history

\textsuperscript{19} Law on Conduct and Organization of Handicraft and Small Business of 8 June 1972, \textit{Dz. U.} No. 23, it. 164 (1972).
\textsuperscript{21} Poland's POLIMEX-CEKOP trading agency was recruiting American companies to invest in Polish joint ventures as early as 1972. \textit{Poland Signs Up with U.S. Business}, Business Week, Nov. 11, 1972, at 51-52.
\textsuperscript{22} See infra text accompanying notes 54-80.
\textsuperscript{23} See infra Section V.
\textsuperscript{24} See infra pp. 93-94.
\textsuperscript{25} Schwartz, \textit{7 Form kooperacji z krajami socjalistycznymi}, 21 \textit{HANDEL ZAGRANICZNY}, No. 10 1976, at 19 (author's translation).
\textsuperscript{26} Bukowski, \textit{Z problemow tworzenia i funkcjonowania joint ventures}, 27 \textit{HANDEL ZAGRANICZNY}, No. 3 1981, at 15; Zagorski, \textit{Kooperacja przemyslowa i transfer technologii miedzy wschodem a zachodem}, 22 \textit{HANDEL ZAGRANICZNY}, No. 4 1977, at 17-18; Serek, \textit{O koncepcii wspolnych przedsiwiazec a przemyslem w krajach kapitalistycznych},
of permitting foreign investment.\textsuperscript{27}

Western commentators have taken ideology more seriously than have their Polish counterparts. In 1972, Kretschmar and Foor noted that “Marxist-Leninist ideology . . . will probably never stretch far enough to allow foreign capitalists to own a share in the means of production of a socialist state; therefore, if a businessman persists in demanding true ownership, joint ventures in Eastern Europe will be impossible.”\textsuperscript{28} Likewise, Iancu Spigler commented in 1975 that “[p]olitical, economic, and ideological constrictions prevent East European Governments from agreeing to direct Western investment as fully-owned Western business enterprises.”\textsuperscript{29}

Poland has tempered ideology with the pragmatic realization that foreign capital is needed for Poland’s economic development. Foreign equity participation is rationalized as serving societal goals of increasing the level of technology, the quality of management skills, and the supply of consumer goods.\textsuperscript{30}

This Polish concept of ownership diverges from that of market economies because Poles view ownership rights as residing with the state, not the investor. Only the state may grant limited equity interests to foreign investors as part of its plan for the development of the domestic economy. Nevertheless, economic cooperation between Western investors and East European nations has proved mutually beneficial. Despite ideological differences, their cooperative activities have developed through the years in conformity with their respective goals.

\section*{II. ECONOMIC COOPERATION BETWEEN EAST AND WEST: FORM AND MOTIVATION}

Polish law, as discussed in Section I, has permitted foreign equity investment since the 1920s. Considerable foreign investment took place in those early years. Poland, however, became disenchanted

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{21} HANDEL ZAGRANICZNY, No. 2 1976, at 17-18; Sadowska, Problemy dzia³alności przedsiêbiarstw międzynarodowych w gospodarce socjalistycznej, 20 HANDEL ZAGRANICZNY, No. 9 1972, at 320.
\item \textsuperscript{27} Burzynski, Bezposrednia dzialalnosc gospodarcza w Polsce zagranicznych osob prawnych i fizycznych (I), 32 PRZEGLAD USTAWODAWSTWA GOSPODARCZEGO, No. 6 1979, at 198; Chyla, Aspekty prawne powo³ywania przedstawici³stw firm obcych w Polsce podejmuj¹cych kooperacje z polskimi organizacjami przemys³owymi i handlowymi, 23 HANDEL ZAGRANICZNY, No. 3 1978, at 45.
\item \textsuperscript{28} R. KRETSCHMAR & R. FOOR, THE POTENTIAL FOR JOINT VENTURE IN EASTERN EUROPE 3 (1972).
\item \textsuperscript{29} I. SPIGLER, DIRECT WESTERN INVESTMENT IN EAST EUROPE 69 (1975); see also Gordon, THE DEVELOPING LAW OF JOINT VENTURES IN EASTERN EUROPE, 9 TEX. INT’L L.J. 281, 290-01 (1974).
\item \textsuperscript{30} See infra text accompanying notes 44-53 (analysis of parties’ motivations for entering into cooperation agreements and joint ventures).
\end{enumerate}
\end{footnotesize}
with foreign capital in the period between World War I and World War II.\textsuperscript{31} Foreign corporations transferred the majority of their profits abroad, leaving no funds for the rebuilding of the Polish economy after the wars.\textsuperscript{32} The initial reluctance of the socialist regime to permit foreign investment is thought to have stemmed from this experience.\textsuperscript{33} By the 1970s, however, hard currency\textsuperscript{34} shortages and high demand for technology prompted the government to encourage foreign operations on Polish soil.

Cooperation between a foreign investor and a socialist host nation can take various forms, ranging from the licensing of technology to joint ventures. This section will consider the cooperative options available to East European nations and Western investors in structuring transactions. It will also explore parties' motivations for engaging in cooperative arrangements and reasons why each may favor joint venture-direct involvement by the investor in the socialist economy.

\section{A. Levels of East-West Economic Cooperation}

Commentators have not agreed on a consistent method for analyzing the myriad economic relationships between Western investors and their East European partners. One useful framework classifies agreements into four levels: short-term, arms-length relationships; longer-term agreements; joint ventures; and wholly foreign-owned ventures.\textsuperscript{35}

"Level I" cooperation consists of basic contractual-type arrangements. These include trade, licensing of technology, and sale of turnkey facilities.\textsuperscript{36} Goods and services are supplied for cash or unrelated products. At this level of agreement each party retains complete autonomy over its part of the transaction and deals strictly on an arms-length basis with its partner.

"Level II" arrangements span a wide variety of agreements in which payment for goods, services, licenses, or technology is linked to the production, marketing, or sale of those products.\textsuperscript{37} Included in

\textsuperscript{31} Burzynski & Juergensmeyer, supra note 10, at 46.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Hard currency is currency that is freely exchangeable in world markets and has a comparatively stable value, for example, the dollar or the pound. W. Davis, The Language of Money 114-15 (1973). Soft currency can be defined as "the funds of a country that are controlled by exchange procedures, thereby having limited convertibility into gold and other currencies." J. Rosenberg, Dictionary of Banking and Finance 465 (1982).
\textsuperscript{35} See, e.g., C. McMillan & D. St. Charles, Joint Ventures in Eastern Europe: A Three Country Comparison 9-16 (1973) (delineating the first three relationships).
\textsuperscript{36} Id. at 10.
\textsuperscript{37} Id.
this category are licensing contracts with payment in products or components; supply of turnkey plants in exchange for a portion of the production; co-production agreements with different parties supplying components, technology, and management skills; and the subcontracting of production to East European firms in exchange for the manufacturer's free use of design, technology, and know-how involved in production. Under these arrangements each party retains control over its part of the bargain. Returns, however, are linked to the overall success of the enterprise.

"Level III" cooperation consists of joint ventures. In a joint venture, each party owns a share of equity in an independent organization, and the parties share ownership, control, and decision-making responsibility for the enterprise.

"Level IV" arrangements are 100% foreign-owned ventures operating on East European soil. In such a venture, all decision-making power resides with the foreign investor.

Each level of industrial cooperation involves an increasing degree of interdependence among the parties, the venture, and its returns. The arrangements also conflict with socialist ideology to varying degrees. Level I agreements, or contractual forms of cooperation, resemble trade agreements that can be easily assimilated into socialist ideology. Level II agreements, which require a certain degree of dependence between the partners, are also favored by the East Europeans. The Soviet Union, for example, defines Level II agreements as the ideological limit of Western cooperation with Soviet economic entities. Other nations, including Yugoslavia, Hungary, Romania, Poland, and Bulgaria are experimenting with Level III and Level IV agreements, the joint venture and the wholly foreign-owned enterprise. These levels of interdependence clearly threaten communist ideology.


40. Id.

41. Id. at 11-16.

42. Dr. Dzherman Gvishiani, Deputy Chairman of the State Committee for Science and Technology, stated that Soviet law would not evolve to permit Western firms to hold an equity interest in joint ventures. He stated that the benefits of ownership could largely be achieved through negotiation of more traditional cooperative arrangements, such as leasing capital and technology, supply of turnkey plants, and joint research and development efforts. Gvishiani: Prospects and Limits in Cooperation Deals, 8 Bus. E. Eur. 89 (1979).

43. For further discussion of these nations' approaches toward joint ventures, see infra text accompanying notes 147-99.
because they entail foreign ownership of productive assets otherwise subject exclusively to state ownership.

The socialist nations have proceeded through the various levels of economic interdependence with the goal of maximizing economic benefits. It is, therefore, instructive to examine the motivations for developing and sustaining such close economic ties.

B. THE BENEFITS OF COOPERATION

Cooperative arrangements with East European countries offer the foreign investor several potential advantages: access to markets, low-cost production, stable social and economic relations, stable labor conditions, financial leverage, and new technology.44

The benefit of access to new markets is a significant impetus for business interest in cooperation agreements.45 The East European market has remained largely untapped by Western firms. Cooperative agreements offer the opportunity to gain a market share in one country and to use that foothold to gain a share across the entire region. Close economic relationships among COMECON states may facilitate access to these markets, provide preferential tariff treatment for the products of East European joint ventures, and result in favorable foreign currency conversion rights granted to companies that market joint venture products.46

Cooperation agreements also allow Western firms to benefit from the availability of raw materials and resources, low-cost inputs including labor and production facilities, and the reduced cost of transportation involved in product distribution. Longer-term cooperation arrangements, such as co-production and joint ventures, allow firms to take advantage of stable social and economic conditions for the duration of the agreement. The passivity of the East European workforce is another factor. The workers are generally well-trained, their wages are low, and they are indisposed to the frequent walkouts over pay and conditions that occur in Western countries.47

An especially attractive area of cooperation for Western firms is the supply of technology. Cooperation arrangements providing that the Western firm will supply technology for co-production or joint

ventures permit the Western firm to capitalize on past research and development expenditure without additional cash commitment. The East European party receiving the technology, moreover, may be required to share the cost of improvements that occur while using the new technology.\textsuperscript{48}

East European partners also expect significant benefits from joint East-West agreements. Polish and Western writers focus on the following benefits: access to new technology, development of managerial skills, access to Western markets, new sources for industrial components and supplies, increased supply of goods, new sources of financing, and inflow of hard currency.\textsuperscript{49}

For Poland, the primary benefits of industrial cooperation with the West are new technology, enhanced management skills, and increased supply of goods for internal consumption. In 1974, the Deputy Minister of Trade declared that Poland's main interests in cooperation arrangements are development of the nation's technological and organizational skills and optimization of the country's productive potential.\textsuperscript{50} This interest in technology and management, echoed by many Polish commentators,\textsuperscript{51} has been cited as a significant factor motivating East European nations to accept the concept of joint ventures.\textsuperscript{52} An equity interest gives an investor an incentive to provide the ultra-modern technology and production methods necessary to ensure the profitability of the enterprise.

Soviet bloc nations gain more than technological and managerial skill from cooperative ventures. Many arrangements involve the production of goods in the East European country for sale in the West. Such agreements open new outlets for East European products. Contracts may also stipulate that the investor will supply needed parts and equipment for production, thus opening new sources of supply for industrial inputs. Some of the finished products may also be chan-

\textsuperscript{48} Western companies may also benefit from technology developed by East European enterprises. Kiser, \textit{Tapping Eastern Bloc Technology}, HARV. BUS. REV., Mar.-Apr. 1982, at 85.

\textsuperscript{49} See generally C. McMILLAN & D. ST. CHARLES, supra note 35, at 19-20.

\textsuperscript{50} Interview with Stanislaw Dlugosz, Deputy Minister of Trade, \textit{Wektory}, (May, 1973), \textit{quoted in} Wierolowski, \textit{Kooperacja przemysłowa z zagranica w polityce umiedzynarodowienia procesów produkcyjnych w Polsce}, 19 \textit{HANDEL ZAGRANICZNY}, No. 8/9 1974, at 329.


neled to the East European market, increasing the supply of goods to consumers as well as easing production backlogs.

Cooperation agreements provide two major financial advantages for the socialist partner. They provide new forms of industrial financing and offer relief from chronic balance-of-trade pressures. Western firms engaging in cooperation ventures may contribute technology, know-how, designs, and product specifications to the European partner in exchange for a portion of the goods produced. Western companies may also contribute hard currency for the development of joint facilities and equipment. Such arrangements for payment in kind in the future enable the East European partner to maximize the use of internal resources and save hard currency. Furthermore, sales of products in Western markets promise a flow of hard currency during the course of the venture.

Cooperation ventures clearly benefit both Eastern and Western partners. As experience with the various contractual forms broadens, each side becomes more willing to enter into joint ventures. Western firms want the ownership and control rights flowing from the equity position. Socialist nations, on the other hand, believe that equity will enhance the Western party's long-term commitment to the enterprise and ensure a continual supply of the newest technology and management systems. Poland, along with many of its East European neighbors, has progressed beyond Level I cooperation to allow foreign equity holdings. Polish efforts, based on a fifty-year history of foreign-equity regulation, have gone beyond the mere authorization of foreign equity in Polish joint ventures. Current regulations permit 100% foreign-owned companies to operate in Poland, and allow foreign equity share in Polish joint ventures to exceed 50%. Section III explores the scope of these regulations after providing an overview of the historical development of Polish foreign investment legislation.

III. POLISH FOREIGN INVESTMENT REGULATIONS

In the late 1960s and early 1970s, when Yugoslavia, Hungary, and Romania enacted legislation permitting joint ventures, businessmen and academics engaged in considerable discussion regarding the possibility of allowing joint ventures in Poland. A consensus emerged that mixed companies would be treated as Polish corporations and that each proposal for foreign investment would be consid-

This approach, however, did not allay the concerns of Western companies, who wanted Poland to commit itself to a clear position on the status of foreign investment and to set out this position in the form of general rules.

Between 1976 and 1982, the Sejm (legislature) and the ministries enacted regulations defining the permissible scope of foreign investment in Poland. Companies with foreign equity participation were divided into three groups: 100% foreign-owned ("Polonia") companies, small business ventures without limitations on foreign participation, and joint ventures in which foreign participation was limited to 49% of total equity. According to the first set of regulations, which the Council of Ministers issued in 1976, foreign companies managed from or residing abroad, and "Polonia" organizations formed and operated abroad, could establish wholly-owned ventures in fields such as crafts, domestic trade, food service and hospitality. Administrative organs licensed these operations, issuing permits valid for a maximum of ten years. Polish administrative authorities, however, enjoyed significant discretion to deny these licenses. Investors could withdraw profits up to an amount representing 9% of the hard currency invested, subject to a maximum of 50% of corporate net income. The Ministry of Finance relaxed the limit for firms generating more than 50% of their sales in hard currency.

Two orders from the Minister of Finance in 1976 established

55. Foreign Trade Research Institute (Warsaw), East-West Economic Relations (1973), cited in S. Paliwoda, Joint East-West Marketing and Production Ventures 143 (1981); M. Schnitzer, supra note 44, at 70; Burzynski, Regulacja prawna działalności gospodarczej cudzoziemców, 28 Handel Zagraniczny, No. 5 1983, at 26; Burzynski, Bezposrednia dzialalnoic gospodarcza w Polsce zagranicznych osob prawnych i fizycznych (II), 32 Przegląd Ustawodawstwa Gospodarczego, No. 7 1979, at 197-98; Sadowska, supra note 26, at 6.
56. "Polonia" is a Polish term describing expatriates who retain close emotional and social ties to their homeland. One of the objectives of the 1976 regulations was to encourage these individuals to return and invest their capital in Poland. Although later regulations dropped the requirement of "Polonia" status for investors in wholly foreign-owned enterprises, the term "Polonia" companies has persisted and will be used in this paper to refer to wholly-owned foreign companies operating in Poland.
58. Id. at § 1. The permissible fields of investment were expanded in 1978 to include all other service and manufacturing operations. Resolution of the Council of Ministers of 1 Dec. 1978, Dz. U. No. 31, it. 135, § 1(1) (1978).
60. Id.
63. Id.
guidelines for the operation of "mixed capital companies" (joint ventures). These orders were not premised on any explicit decree or resolution validating joint venture investment. The disregard of these provisions by businessmen prompted the government, in 1979, to replace the orders with Decree No. 24 of the Council of Ministers, which carefully detailed the status of, and rules applicable to, joint ventures. Under Decree No. 24, the foreign equity share could not exceed 49%, and company operations were limited to areas under regional administration. Because only small and medium companies operate under regional supervision, the regulations removed joint ventures from the scope and requirements of the economic plan. The Decree also specified licensing procedures, accounting standards, and various operating requirements such as currency regulations and the right to contract with state agencies. Foreign investors were permitted to repatriate a proportionate share of net proceeds, subject to the company's supply of hard currency, to fund the transaction.

A two-tiered investment policy prevailed in Poland by the 1980s. One set of regulations applied to wholly-owned Polonia companies, and another to joint Western-Polish enterprises. The Law of 6 July 1982 revised investment regulations again. This legislation, applicable both to Polonia companies and newly-authorized "small business ventures," expanded the scope of foreign participation in the Polish economy. Foreign parties are now permitted to invest in small manufacturing, shipping and trade, and export production industries, either as wholly-owned companies or as joint ventures with an unlimited foreign share of equity. Companies may obtain twenty-year operating permits and remit 10% of initial capital, subject to a limit of 50% net hard-currency exports. Except for these limitations, companies can conclude agreements, sell products, lease property for corporate operations, and operate freely within the economy.

64. Id. at it. 109, § 6 and it. 110.
66. Id. at § 3(1).
67. Id. at § 2.
68. Id. at § 5(2).
70. Annex to Decree No. 24 of the Council of Ministers of 7 Feb. 1979, M.P. No. 4, it. 36 (1976) [hereinafter cited as Annex].
73. Id. at §§ 2, 14.
74. Id. at § 16.
75. Id. at § 33.
76. Id. at §§ 24, 25, 38.
Polish scholars have criticized the 1982 provisions. They argue that the relationship between the 1982 provisions regulating small businesses and the 1979 regulations concerning joint ventures has not been clearly established. The 1982 law neither defines "small business" nor provides criteria for determining the proper scope of such investments. Administrators could conclude that a "small business" is any economic activity outside major governmental undertakings. This definition would be unworkable, however, because the 1982 statute would collide with 1979 regulations. The failure to define "small business" leaves two questions unanswered. First, it is unclear when a small business becomes large enough to qualify as a joint venture. Second, it is unclear whether the government's ability to require a minimum of 51% Polish equity holding in small business ventures qualifies them as joint ventures, subjecting them to the less favorable 1979 provisions. Despite these areas of uncertainty, it is clear that what began in the 1970s as a case-by-case approach to evaluating investment proposals has evolved into a normative structure with explicit provisions assuring investors of the status of operations in Poland. Polish scholars have welcomed this approach as a pragmatic attempt to encourage the flow of foreign capital into the Polish economy.

The rest of this section analyzes the Polish foreign investment regulations from the perspective of a Western investor who seeks control over market participation, management, organization and mobility of capital, operations, transfer of ownership, or liquidation. This section also compares the rights of investors in Western economies with the rights of foreign investors in Polonia companies, small business ventures, and joint ventures.

A. FORMATION OF THE ENTERPRISE

Every state requires some form of registration for companies operating within its boundaries. These requirements can range from merely filing articles of incorporation to acquiring a permit to operate in a limited territory. In market economies, although a firm may be required to comply with general registration provisions, decisions concerning expansion, employment, types of products manufactured, and similar issues remain fully within the investor's discretion. The Polish economy is based on different principles. Foreign investors do not

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77. See, e.g., Wisniewski, Tworzenie przedsiębiorstw, 28 HANDEL ZAGRANICZNY, No. 5 (1983).
78. Id. There are other regulations which provide examples of small businesses but likewise offer no general standards. Id.
79. See infra text accompanying notes 107-09.
80. See, e.g., Burzynski, Regulacja prawna działalności, supra note 55, at 27.
enjoy a right to operate in Poland. Rather, they are invited to apply to administrative bodies for permission to conduct limited economic activity in a specified territory. Corporate activities that stray outside the limits specified in the permit are not allowed. Changes in products marketed, employment, location, and number of offices established require further ministerial approval.

In market economies, ownership establishes the right to create corporations and to deploy capital at will, subject only to minimal regulatory requirements. However, countries with market economies are with increasing frequency regulating investment and requiring companies to act responsibly within the community. Many now require advance notice of plant closings, contributions to social welfare funds, and severance payments to dismissed workers. The rights of investors to implement corporate strategies remain secondary to the state's interest in providing an orderly functioning economy.

Poland regards investment as a state-controlled right. This right can be extended to foreign investors who present proposals complementary to the state's plans for economic development. Investment rights, therefore, reside with the state. They are not a concomitant of ownership. Thus, each time a firm wishes to open a new manufacturing or distribution outlet in Poland, the firm must seek a new permit. A firm wishing to expand operations in order to encompass a larger number of products, employ more workers, or transfer operations to a different location, may find its actions restricted by the state. The question is whether, and to what extent, such restriction on the organization and mobility of capital negates the ownership interests that Westerners associate with equity position.

Poland and the other planned economies have chosen to exercise a greater degree of control over both domestic and foreign concerns than do market economies. That investors are permitted to invest in Poland at all and redeploy assets subject to regulations reflects basic recognition of these attributes of ownership. Western businessmen may prefer greater economic certainty and flexibility with respect to such decisions, but companies cannot realistically argue that a state's exercise of economic control necessarily denies basic ownership rights.

Before establishing wholly-owned companies or small business ventures, investors must apply for a permit with the voivodship (regional administrative body) in the district in which the company will be located. If investors plan to propose import and export activities, they must also apply with the Minister of Foreign Trade. The application is subject to a deposit of 800,000 to four-million zloty

82. Id. at § 7.
(approximately $5,000 to $25,000), depending on the type of business involved. Investors must indicate the type of activity contemplated, the location of the business, the number of employees, the form of financing, and the name of the appointed legal representative. Investors must attach a copy of the company's by-laws. The permit issued will indicate the maximum number of persons that may be employed, as well as the duration of the venture. Permits may be issued for twenty years and may be renewed in appropriate circumstances.

Regulations governing joint ventures require the state enterprise or cooperative involved to submit an application for permission to conduct a joint venture in Poland. The application must be approved by the Chairman of the Committee on Domestic Markets, the Chairman of the State Planning Committee, the Minister of Finance, and the Minister overseeing the state enterprise or cooperative involved in the venture. Foreign investors must agree to install the newest available technology in the operations. Any equipment contributed by the foreign party must be valued by Polish experts in zloty. The resulting permit may be issued for a maximum of fifteen years and is renewable if circumstances warrant.

B. CORPORATE FORM

Investors in Western economies face a variety of choices when planning a venture. An individual or enterprise has broad latitude to select an investment partner, subject to antitrust limitations, and to decide whether the undertaking will be a sole proprietorship, a partnership, or a corporation.

Poland sets numerous limitations on the parties it permits to participate in its economy. This is particularly true regarding domestic companies authorized to form joint ventures. Polonia companies and small business ventures may be formed by foreign nationals residing in Poland who have obtained a permanent residence permit, by foreign enterprises managed from abroad, or by persons residing abroad. Polish participants in small business ventures may be state entities and

83. Id. at § 15.
84. Id. at § 9.
85. Id.
86. Id. at § 16.
88. Annex, supra note 70, at art. I, § 3.
89. Id. at art. IV, § 16.
cooperatives involved in small manufacture, socialized units engaged in economic activity, unions of small producers, companies and individuals conducting small businesses in Poland, or other economic organizations in economic activity with foreign parties.92 Polonia companies and small business ventures are not required to have minimum capitalization and are not restricted with regard to economic form. The law expressly allows investors to choose any legal form permissible in Poland,93 merely requiring them to operate in accordance with civil and commercial codes.94

Joint ventures with foreign and Polish equity participation are restricted as to participants and corporate form. Foreign participation may include enterprises and persons managed from or residing abroad that have legal capacity to engage in such transactions.95 Polish participation is limited to socialist entities and cooperatives96 and administrative bodies97 such as voivodships. The minimum level of capitalization for a joint venture is five-million zloty (approximately $30,000).98 Additionally, the firm must assume the form of a limited liability company.99 These regulations enable Poland to maintain joint venture activity at manageable levels with participation by socialist enterprises.

By limiting an investor’s choice of partners and corporate form, Poland substantially restricts an investor’s freedom to structure transactions. Polish statutes may therefore be viewed as a usurpation of ownership rights in that they limit an owner’s freedom to invest capital to the extent and in the form he desires. Although these restrictions are greater than the restrictions imposed in market economies, foreign investors in Poland retain significant freedom.

92. Id.
93. There are four types of companies permitted in Poland: civil law partnerships, commercial partnerships, limited liability companies, and joint stock companies. For a discussion of some of the implications of various organizational forms, see Burzynski & Juergensmeyer, Poland’s New Foreign Investment Regulations: An Added Dimension to East-West Industrial Co-operation, 14 VAND. J. TRANSNAT’L L. 17, 23-26 (1981).
95. Decree No. 24 of the Council of Ministers of 7 Feb. 1979, M.P. No. 4, it. 36, § 1(4) (superceding Order of the Minister of Finance of 26 May 1976, M.P. No. 25, it. 109, § 1 (1976)).
C. Scope of Activity

In market economies, investors determine not only the legal form of the undertaking but the type of markets in which the enterprise will compete. This freedom is not available in Poland. The Constitution requires that socialized units of production conduct economic activity under the directives of the economic plan. Foreign investors wishing to enter this strictly controlled market require the express consent of the government.

Foreign investment in Poland is permitted in limited segments of the economy. The 1976 legislation establishing Polonia companies restricted their activity to crafts, domestic trade, food services, hospitality and other services. In 1978, the Council of Ministers expanded this list to include all manufacturing and service activities. The 1982 legislation allows Polonia companies and small business ventures to engage in small manufacture, trade in services and goods, and import-export operations. Joint ventures, however, are permitted only in activities that are under regional administration and activities in which cooperatives participate. Because regional administrative bodies oversee local production that is not incorporated in the economic plan, this restriction ensures that foreign investments are limited in nature. Furthermore, regulations limit joint ventures to manufacturing activities; they cannot engage in trade of goods or services.

The Polish restrictions on spheres of investment reduce the scope of available investment benefits, but the restrictions preserve, within limits, an owner’s right to choose the direction of the investment. Some type of restriction on investment activity is unavoidable in a centrally planned economy. Poland has incorporated foreign companies into the mainstream of economic activity, but has restricted the fields of investment to activities outside the economic plan.

D. Management

The Western investor who seeks to control his investment may want the power to make operating and financial decisions, to choose a workforce, to invest the company’s capital, and to prepare corporate
strategy. If ownership of a given percentage of shares translates into a proportionate voice on the board of directors, a limitation on foreign ownership to 49% restricts the investor’s control over his capital.

The Polish Commercial Code recognizes the validity of shareholder agreements that establish specific voting and profit distribution rights. In the absence of such an agreement, shareholder control will be proportionate to capital contributions. Because the Commercial Code leaves control and distribution issues open to negotiation, however, statutory limitations on the percentage of foreign equity holdings do not necessarily relegate foreign investors to minority control status.

The 1982 regulations governing Polonia companies and small business ventures permit unlimited shares of foreign equity. Polonia companies are by definition 100% wholly-owned foreign investments. The Polish administrative body may require Polish equity in small business ventures to exceed 50%. This minimum equity requirement was apparently enacted in order to limit operations that had the potential to affect sectors of the economy covered by the national economic plan. Polish law further requires a wholly-owned or majority-owned foreign firm to name a Polish citizen or entity as its legal representative in Poland. This representative is empowered to transact business during the investor’s absence from the country. In all other respects, control issues are left to agreement among the investors.

Joint ventures established pursuant to the 1979 regulations face more substantial restrictions on control. First, foreign equity participation may not exceed 49%. The fact that investors can apportion control without regard to the restriction does not signal lack of Polish control. In addition to equity limits, regulations require that the foreign hard currency contribution represent at least half of the foreigner’s investment in the venture. The minimum investment is four shares valued at 250,000 zloty (approximately $1,500) each. The law also requires that both the general manager and the bookkeeper be Polish citizens. The foreign investor, however, is permitted to oversee financial operations and to participate in the supervisory or audit

108. Id. at § 8.
111. Order of the Minister of Finance of 18 June 1979, Dz. U. No. 16, it. 97, §§ 5, 6 (1979).
112. Annex, supra note 70 at art. II, § 8; see also id. at § 4(2).
Investors' control interests are better protected in Polonia companies and small business ventures. Regulations guarantee foreign investors a voice in the financing and auditing of joint ventures. Investors can also seek greater participation in decisions in areas such as quality control, production, and employment. Joint ventures are, however, subject to legal restrictions on foreign equity participation, and statutes require that Polish citizens control management. Foreign ownership rights are, therefore, relegated to minority status. Joint venture agreements can give investors additional control rights, but socialist entities empowered to engage in such ventures may withhold their assent.

E. OPERATIONS

The ability to control an investment on a direct and continuing basis is another significant attribute of ownership. Western firms are required to comply with various regulatory standards, such as accounting procedures, occupational safety, and product safety standards. They remain free to operate in domestic markets and to withdraw profits from the corporation in the form of salary and dividends. Poland treats foreign companies and state enterprises equally. From the perspective of Western firms, however, this treatment is considerably more intrusive than the treatment they receive from Western governments.

1. Foreign-Owned Firms

Foreign companies are given broad latitude in conducting business in Poland. The principal restriction concerns the withdrawal of profits from the venture. The lack of convertibility of local currency necessitates that the government guarantee foreign exchange rights for investors remitting funds abroad. These rights, however, are restricted so that only a fraction of the profits can actually be received in convertible currency.

Foreign-owned firms generally enjoy equal footing with state owned companies in operating matters. They may conclude contracts with state industries, sell imported goods and services through appropriate agencies, obtain credit from Polish banks, and lease real property. Foreign companies are also subject to the internal

114. Id. at § 24.
115. Id. at § 25.
116. Id. at § 32.
117. Id. at § 38.
regulations applicable to domestic companies. These include regulations concerning labor and social conditions, product pricing, and the placement of import-export orders through the foreign trade enterprises.\footnote{118} Firms established pursuant to the 1982 legislation enjoy a three-year tax holiday\footnote{119} and are thereafter subject to general tax provisions applicable to foreign investors. The maximum tax which can be assessed on these companies is 50%\footnote{120}. Foreign investors are permitted to remit annually 10% of initial hard currency invested, as long as the remittance does not exceed 50% of hard currency exports or 50% of net corporate income.\footnote{121}

2. Joint Ventures

Joint ventures involving Polish and foreign participation also enjoy broad operating rights under the regulatory framework. Joint ventures may conclude co-production agreements with state enterprises,\footnote{122} purchase supplies and component parts on internal markets,\footnote{123} invite competitive bids for delivery of intermediate goods from Polish and foreign suppliers,\footnote{124} and negotiate consignment agreements with domestic and foreign companies.\footnote{125} Corporate accounts must be maintained in zloty,\footnote{126} although the venture may engage in transactions with socialist entities in either zloty or convertible currency.\footnote{127} Joint venture operations are covered by the economic plan.\footnote{128} Companies may apply for exemption from most planning requirements, however, including growth rates, limitations on wage funds, and limits on assets and general inventories.\footnote{129}

Joint ventures are subject to financial restrictions pursuant to regulations issued by the Minister of Finance in 1979. Firms must invest 25% of their annual gross profit\footnote{130} into a “risk fund.” This fund is established to cover operating losses and to satisfy creditors in the

\footnotetext{118}{See generally Inter-Polcom, supra note 14.}
\footnotetext{119}{Law of 6 July 1982, Dz. U. No. 19, it. 146, § 27 (1982).}
\footnotetext{120}{Id. at §§ 26-30.}
\footnotetext{121}{Id. at § 33(1).}
\footnotetext{122}{Annex, supra note 70, at art. XI, § 38.}
\footnotetext{123}{Id. at art. IX, § 32.}
\footnotetext{124}{Id. at § 33.}
\footnotetext{125}{Id. at § 34.}
\footnotetext{126}{Order of the Minister of Finance of 18 June 1979, Dz. U. No. 16, it. 97, § 34 (1979).}
\footnotetext{127}{Annex, supra note 70, at art. III, § 12.}
\footnotetext{128}{Decree No. 24 of the Council of Ministers of 7 Feb. 1979, M.P. No. 4, it. 36, § 6 (1979).}
\footnotetext{129}{Annex, supra note 70, at art. X, § 35.}
\footnotetext{130}{The initial contribution is 20% of first year gross profits. Order of the Minister of Finance of 18 June 1979, Dz. U. No. 16, it. 97, § 12 (1979). Gross profits are defined as revenue less operating expenses, prior to distribution to required joint venture funds. Annex, supra note 70, at art. VI, § 22.}
event of default.\textsuperscript{131} This fund must maintain a balance of 10\% of the total joint venture capital.\textsuperscript{132} The company must also contribute 20\% of its gross profit to a "reserve fund."\textsuperscript{133} The fund is used to cover losses exceeding the risk fund, finance investment expenditures, provide working capital, and cover social welfare liabilities chargeable against corporate resources.\textsuperscript{134}

Joint ventures are subject to the same tax liabilities applicable to socialist entities. These include turnover tax, payroll tax, income tax, and urban property tax.\textsuperscript{135} From the joint venture’s convertible currency account, the foreign investor is guaranteed a proportionate share of profits for deposit or remittance abroad.\textsuperscript{136} The amount actually distributed is limited, however, to the company’s convertible currency reserves and, in the event of shortfall in the account, to resources secured in accordance with currency exchange regulations.\textsuperscript{137}

Polish regulations, therefore, set foreign companies on equal footing with their socialist counterparts regarding ownership interests. Limits on profit remittance, however, restrict firms which wish to withdraw their share of profits annually. Of course, guaranteed remittance of all domestic and hard currency earnings is not a realistic expectation for companies operating in soft currency countries. Firms must also impute value to the ability to enter the East European market and to transact business in local currency. Profits can be withdrawn to the extent that the investment generates hard currency reserves. Investors are, in this respect, able to realize benefits commensurate with corporate performance. Net export earnings determine the maximum remittable balance. This leaves the remainder available for reinvestment in the enterprise or for other use within the country.

F. TRANSFER OF OWNERSHIP AND LIQUIDATION

The value of an investment is reflected in the returns generated during its operation and in the accrual of accounts and goodwill. The accrual is realized upon the sale or liquidation of the assets. An investor must, therefore, be able to transfer his interest and withdraw the

\begin{thebibliography}{99}
\bibitem{131} Order of the Minister of Finance of 18 June 1979, \textit{Dz. U.} No. 16, it. 97, § 12 (1979).
\bibitem{132} \textit{Id.}
\bibitem{133} \textit{Id.} at § 13.
\bibitem{134} \textit{Id.}
\bibitem{136} Order of the Minister of Finance of 18 June 1979, \textit{Dz. U.} No. 16, it. 97, §§ 19, 20 (1979).
\bibitem{137} Decree No. 24 of the Council of Ministers of 7 Feb. 1979, \textit{M.P.} No. 4, it. 36, § 2 (1979); see also \textit{id.} at § 20.
\end{thebibliography}
proceeds in convertible currency in order to enjoy the value of the investment.

Poland's approach to transfer and liquidation of investments generally mirrors its treatment of profit remittance. That is, foreign investors are entitled to recoup their investments in convertible currency to the extent of the venture's hard currency earnings or the reserves generated upon sale or liquidation.

Foreign owners of Polonia companies and small business ventures may sell their interests to a buyer who has obtained a permit to buy the operation. The purchaser must deposit the purchase price in convertible currency in a Polish bank. The corporate bylaws, in conjunction with Poland's civil and commercial codes, govern liquidation. When a small business is dissolved, the Polish partner has priority in purchasing the assets of the liquidated company.

In contrast, joint venture rights are deemed personal and not transferable without the consent of all of the parties to the transaction. The transfer is also subject to the Polish partner's right of first refusal. If the sale price is paid in convertible currency to the foreign partner, the full amount can be remitted. If the business is liquidated, the foreign party is entitled to a proportionate share of the net proceeds. Part of the proceeds may be remitted without a separate foreign currency permit. Foreign currency permits are guaranteed to the extent of the corporation's hard currency resources. Thereafter, the permits are subject to rights granted by the ministry that licensed the venture, although the amount must be within the scope of that ministry's overall currency exchange limitation.

G. SUMMARY

The Polish investment regulations reflect a pragmatic approach to controlling capital investment. Following an integrated model of capital investment, Poland permits wholly foreign-owned companies and joint ventures to operate on equal terms with socialist entities in negotiating contracts, procuring supplies, and selling products on the domestic market. Foreign investment is permitted only in areas that are outside the economic plan and under regional administration. The
removal of foreign investment from the economic plan ensures against capitalist influence in key state industries.\textsuperscript{146} In addition, foreign firms are restricted from expanding or diversifying operations at will, and from remitting an unlimited share of profits in convertible currencies.

Poland imposes some restrictions on each of the six aspects of ownership that are considered in this section. Section IV shows that these restrictions are less severe than the restrictions that Poland's East European neighbors impose. Section V shows that restrictions in Poland have not discouraged foreign investors from forming highly profitable wholly-owned operations there.

IV. OTHER EAST EUROPEAN APPROACHES TO FOREIGN INVESTMENT REGULATION

Other East European nations restrict foreign ownership more severely than Poland. Yugoslavia permits domestic enterprises to enter into contractual joint ventures with investors. Romania has created a financial enclave in which joint companies operate. Hungary has integrated joint ventures into its economy. Bulgaria has embraced a "double appraisal" system of regulation. The Soviet Union has refused to permit any foreign equity holding in domestic enterprises. This section outlines the various East European models of joint ventures and compares these with the Polish foreign investment system.

A. YUGOSLAVIA

In Yugoslavia, society, rather than the state, owns the means of production, while workers manage the enterprises.\textsuperscript{147} The Constitution guarantees the right of worker self-management.\textsuperscript{148} Firms operate as independent economic units without significant government intervention. National economic plans are merely advisory and not binding on the enterprises.\textsuperscript{149} They place minimal restrictions on workers' managerial discretion.

Yugoslavia adopted a novel approach to foreign investment to complement its unique social and economic system. The new legisla-

\textsuperscript{146} See Burzynski & Juergensmeyer, \textit{supra} note 93, at 40-44; Scriven, \textit{Joint Ventures in Poland}, 14 J. WORLD TRADE L. 424, 429-30 (1980).


\textsuperscript{148} Glickman & Sukijasovic, \textit{supra} note 147, at 260-61.

\textsuperscript{149} Connor, \textit{supra} note 147, at 46; Note, \textit{supra} note 2, at 274-75.
tion authorized 49% foreign participation in existing domestic enterprises. Because society owns the means of production, the foreign company’s role had to be specified by contract between the investor and the Yugoslav entity. Technically, the investor possessed contractual rights, not an equity interest, in the venture. Joint projects could be undertaken to improve the country’s productivity, exports, and technology. Foreign investment was not permitted, however, in banking, insurance, commerce, or utilities. An investor had the right to representation on the board of directors. Representation could exceed the investor’s relative equity position. A proportionate share of the venture’s annual hard currency earnings could be remitted abroad, subject to a limit of one-third of the venture’s net foreign exchange earnings.

Changes in the legislative framework in 1973, 1976, and 1978 resulted in a more lenient approach to foreign equity participation. Joint ventures are expected to be long-term arrangements, and foreigners can invest in existing enterprises or create new ones. Investors can remit up to half of their annual net hard currency earnings. They are also guaranteed return of their capital investment once the objectives of the venture have been realized. Foreigners can obtain representation of up to 50% on the management board. The management board must have the approval of the workers’ council for decisions involving income distribution, salary allocation, debt, and investment planning.

The laws exhibit a progressive, decentralized approach in that they allow Yugoslav enterprises to contract directly with foreign investors. In addition, the authority of Yugoslav enterprises to decide

150. Glickman & Sukijasovic, supra note 147, at 286.
152. Glickman & Sukijasovic, supra note 147, at 286.
153. Id.; see also Connor, supra note 147, at 47.
154. Glickman & Sukijasovic, supra note 147, at 295; Connor, supra note 147, at 51.
155. Note, supra note 2, at 281.
157. The current law continues to limit foreign participation to 49%, and investment is forbidden in insurance, public administration, and domestic and foreign trade. BUSINESS INTERNATIONAL, DOING BUSINESS IN EASTERN EUROPE II-3 (1980); see also Scriven, supra note 156, at 103.
159. Id. at II-6.
160. Id. at II-8.
161. Id. at II-9; Scriven, supra note 156, at 101.
matters of pricing, sales, distribution, and investment, in contrast to the tight governmental control of Polish companies, enhances the economic freedom of foreign participants in Yugoslav enterprises. The Yugoslav laws, however, are conservative with respect to ownership. Consistent with the socialist concept of state ownership, they mandate a contractual joint venture relationship and exclude foreign investors from formal equity rights. Moreover, Yugoslavia relegates foreign investors to a minority position, unlike Poland, which allows wholly foreign-owned companies.

On balance, it is impossible to generalize and determine whether Poland or Yugoslavia grants foreign investors more freedom. Nevertheless, Yugoslavia's approach is important in that it has provided a benchmark for the other East European countries that have subsequently opened their doors to foreign investment.

B. ROMANIA

Romania has allowed mixed-capital companies since 1971. Foreigners who propose to invest in Romanian companies are required to consult with various planning committees and ministries and need the approval of the Council of Ministers. Joint ventures must take the form of joint stock or limited liability companies in which the foreign investors' share does not exceed 49%. Foreign investment is permitted in the areas of industry, agriculture, construction, tourism, and scientific and technical cooperation, provided that the investment will benefit the national economy by improving technology or increasing productivity or exports.

Joint ventures are managed by a board of directors or a commit-

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162. See generally Kuiper, Organization, Operation and Taxation of Joint Companies: Taxation of Income Obtained by Non-Resident Individuals and Corporations, 16 EUR. TAX'N 190 (1976); Morse & Goekjian, Joint Investment Opportunities with the Socialist Republic of Romania, 29 BUS. LAW. 133 (1973); Schonfeld, Rumaniens 'gemischte Gesellschaften'—Paradebeispiel industrieller Ost-West-Kooperation?, 4 OSTEUROPA WIRTSCHAFT No. 4 (1977), at 301, translated in 13 SOV. & E. EUR. FOR. TRADE No. 4 (1978), at 25; M. SCHNITZER, supra note 44, at 113-14; Note, Joint Ventures in East Europe, 9 J. WORLD TRADE L. 427 (1975).

163. Kuiper, supra note 162, at 191; C. McMillan & D. St. Charles, supra note 35, at 29-30; Morse & Goekjian, supra note 162, at 138-39; Business International, supra note 156, at IV-6.


165. Morse & Goekjian, supra note 162, at 138; Business International, supra note 157, at IV-3.
The foreign investor has the right to participate in these management bodies and may negotiate to require unanimous consent for major decisions such as distribution of profits, appointment of management, and approval of financial statements. Joint ventures are not subject to the requirements of the national economic plan. They must, however, submit one-year and five-year plans to the authorities in order to facilitate government planning.

Romanian joint ventures operate in a financial and economic enclave outside the mainstream of the state economy. They must keep their books in convertible currencies. Contracts between a joint venture and a Romanian or other East European party must, therefore, be negotiated in hard currency. The foreign investor is entitled to withdraw its share of the profits, after taxes.

The special status of Romanian joint ventures creates significant problems. The requirement that contracts be undertaken in convertible currency makes it difficult to export goods to other East European nations, which prefer to save hard currency for transactions with Western suppliers. Mixed companies also have difficulties in procuring supplies needed for production, because state companies have priority under the economic plan. Overall, the isolation of mixed companies from the remainder of the economy produces more problems than benefits.

C. Hungary

In 1972, Hungary enacted legislation permitting joint ventures in nonproductive activities such as trade, service, and research and development. Joint ventures were expected to increase Hungary's tech-

166. Morse & Goekjian, supra note 162, at 140; Business International, supra note 157, at IV-5.
168. Morse & Goekjian, supra note 162, at 139; Business International, supra note 157, at IV-7.
169. C. McMillan & D. St. Charles, supra note 35, at 28; Kuiper, supra note 162, at 192; Business International, supra note 157, at IV-5; Schonfeld, supra note 162, at 39.
170. Morse & Goekjian, supra note 162, at 140; C. McMillan & D. St. Charles, supra note 35, at 29; Business International, supra note 157, at IV-5.
171. M. Schnitzer, supra note 44, at 121.
nological capabilities. However, only three companies were formed under the 1972 legislation. These companies did nothing more than direct the production of the contracting Hungarian enterprise. The limited success of the program led to revisions of legislation in 1977, 1979, and 1982. These revisions allowed a broader role for foreign investment.

Mixed companies may now, subject to approval from the Minister of Finance, engage in manufacturing, trade, services, and research and development. Foreign equity in joint ventures is generally limited to 49%, but it is unlimited in banking, finance, and service companies. In addition, the government may permit greater participation at its discretion. Investors are entitled to representation on the board of directors in the proportion stipulated in the joint venture agreement. Moreover, the agreement may provide that certain board decisions require unanimous consent, ensuring the minority shareholder a veto power over corporate actions.

Hungary has adopted an integrated approach to foreign investment regulation, treating joint ventures as if they were state enterprises. Thus, joint ventures must hold bank accounts in Hungarian forints and convert these into hard currency at government exchange rates. Joint companies must also maintain a “risk fund” equivalent to 10% of invested capital in order to cover the firm’s potential losses.

Joint venture transactions are subject to taxes on profits and cus-
toms duties on imported products.¹⁸² New profits from the venture may be distributed to investors in proportion to their initial capital contribution. The Hungarian National Bank guarantees hard currency remittance as stipulated in the joint contract.¹⁸³ The foreign partner receives his share of proceeds upon liquidation. In this situation, the Hungarian National Bank guarantees any losses suffered as a result of subsequent government actions or rulings.¹⁸⁴

In 1982, Hungary authorized a special type of joint venture that can be established in specified “duty free zones.” These companies are considered foreign legal entities and are exempt from Hungarian customs levies on imported machinery and components.¹⁸⁵ Western parties can hold a majority position in banking and service companies, and wage levels can exceed state wage guidelines to provide incentives for employees.¹⁸⁶ The companies' books are to be maintained in hard currency, with risk funds set aside to fund investment losses.¹⁸⁷

By permitting two types of joint ventures, Hungary is attempting to maximize investment opportunities for foreign capital. Although this approach provides significant latitude for the investor, its effect on increasing the inflow of currency and technology remains to be seen.

D. BULGARIA

In March, 1980, Bulgaria became the fifth East European nation to authorize foreign equity investment.¹⁸⁸ Bulgaria’s approach is liberal. It does not limit investors’ equity share in joint enterprises, nor does it restrict the portion of annual profits that can be remitted abroad.¹⁸⁹ Joint ventures can be established in industry, science and technology, engineering, agriculture, construction, transportation, and tourism.¹⁹⁰ Joint venture agreements must be approved by the Coun-

¹⁸². Decree No. 7 of the Minister of Finance of 6 May 1977, supra note 175, at § 7; Hungary Offers Offshore Status to JVs, 11 Bus. E. EUR. 409 (1982).
¹⁸³. Decree No. 7 of the Minister of Finance of 6 May 1977, supra note 175, at § 11(1); Hungary: New Decree, supra note 174, at 291; Lorinczi & Dorian, supra note 173, at 1224; Business International, supra note 157, at III-4.
¹⁸⁴. Decree No. 7 of the Minister of Finance of 6 May 1977, supra note 175, at §§ 11, 13; Hungary: New Decree, supra note 174, at 291; Lorinczi & Dorian, supra note 173, at 1227; Business International, supra note 157, at III-5.
¹⁸⁶. Id.
¹⁸⁷. Id. at 409-10.
¹⁸⁹. Decree No. 535 of the Bulgarian State Council, supra note 188, at §§ 9(3), 19; Kuiper, supra note 188, at 296; Bulgaria Issues First JV Decree, supra note 188, at 129.
¹⁹⁰. Decree No. 535 of the Bulgarian State Council, supra note 188, at § 2(1); Kuiper, supra note 188, at 293.
The joint venture agreement must specify the management structure of the enterprise. Parties may establish an administrative council and a board of directors, although the chairmen of both organs must be Bulgarian citizens. Board decisions require the consent of all of the represented parties.

A joint enterprise is free to choose the most favorable currency accounting method available, although the finances of the enterprise must be handled by the Bulgarian partner. Permissible methods include a dual-appraisal approach under which the firm maintains ledgers in convertible currency and in Bulgarian leva. By utilizing this method, the joint venture can trade in Bulgarian leva with soft-currency countries that are reluctant to forfeit scarce hard currency reserves and still permit the investor to remit its share of the profits in hard currency. Joint companies are subject to a profits tax of up to 30%, to some customs duties, and to municipal taxes and fees. Although the Bulgarian foreign investment legislation is quite liberal, few companies have established joint ventures. Perhaps Bulgaria's image as the Soviet Union's most loyal East European satellite causes Western investors to suspect that Bulgaria will renege on its liberal legislation or apply it conservatively.

E. SOVIET UNION

The Soviet Union has the most conservative view of the proper role of foreign equity in a socialist economy. The Soviet Union has a long tradition of trade and cooperation with Western societies. For example, merchants in the Middle Ages traded Russian furs for textiles and silver; Ivan the Great hired foreign architects to construct the Kremlin; and Peter the Great created a civil service comprised of

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191. Decree No. 535 of the Bulgarian State Council, supra note 188, at §§ 5, 8. Section 8 of Decree No. 535 allows for an extension beyond the 15 years on request of the parties and approval of the Council of Ministers. The ventures can, however, only be formed for a maximum of 15 years. See also Bulgaria Issues First JV Decree, supra note 188, at 129; Kuiper, supra note 188, at 294.

192. Decree No. 535 of the Bulgarian State Council, supra note 188, at § 10; Bulgaria Issues First JV Decree, supra note 188, at 130; Kuiper, supra note 188, at 294-95.

193. Decree No. 535 of the Bulgarian State Council, supra note 188, at § 12; Bulgaria Issues First JV Decree, supra note 188, at 130.

194. Decree No. 535 of the Bulgarian State Council, supra note 188, at § 13; Kuiper, supra note 188, at 295.

195. Kuiper, supra note 188, at 295.

196. Business International, supra note 157, at VI-8; Kuiper, supra note 188, at 295; Bulgaria Issues First JV Decree, supra note 188, at 130.

197. Kuiper, supra note 188, at 295; Bulgaria Issues First JV Decree, supra note 188, at 130; Business International, supra note 157, at VI-8.

198. Decree No. 535 of the Bulgarian State Council, supra note 188, at §§ 36, 37.

199. Kuiper, supra note 188, at 297.
Swiss and German citizens. Nevertheless, current leaders are unwilling to move beyond cooperative exchanges to permit foreign equity in Soviet enterprises.

Although the Soviet Union does not permit direct equity investment in Soviet enterprises, this policy does not eliminate profitable cooperative arrangements between Soviet and Western parties. The Soviets have participated in a broad range of cooperative agreements, including the Kama River industrial complex and joint ventures with Western firms in third countries. Because of the range of accommodations which may be achieved through contractual arrangements, Soviet leaders and prominent Western commentators agree that non-equity arrangements may net the same benefits for investors as would equity ventures in other East European economies.

F. POLISH REGULATIONS IN CONTEXT

Permissible foreign investment in Poland differs significantly from that of the five other countries discussed above. Poland has moved beyond limited joint ventures such as those permitted in Hungary, Romania, and Bulgaria, and has authorized wholly foreign-owned companies or foreign-dominated joint ventures. In this regard, Polish investment regulations are far more liberal than those of the other countries. However, all four nations have placed varying degrees of limitations on basic operational issues involved with these ventures. These include limitations on the permissible fields of investment, the percent of remittable earnings, the proportion of funds available for distribution, and the composition of the controlling board.

201. One Soviet official stated in 1979 that there would be no changes in policy that would permit foreign shareholding in Soviet joint ventures. He indicated that any benefits desired by foreign investors could be secured through contracts. Gvishiani: Prospects and Limits, supra note 42, at 89.
202. See Loeber, supra note 151, at 337.
204. See generally Berman, Joint Ventures Between United States Firms and Soviet Economic Organizations, 1 INT'L TRADE L.J. 139 (1976); Pisar, The Changing Economic and Legal Environment for East-West Investment, 10 INT'L LAW. 3 (1976); Gvishiani, Prospects and Limits, supra note 42. Foreign investors' profits may be derived in the form of licensing fees or as a percentage of production. Bank guarantees can protect the initial capital invested, and product inspection rights can safeguard the quality of goods produced. See generally Berman, supra; Pisar, supra; Friedman, supra note 151, at 62.
Foreign investment through joint ventures is maintained within the context of each country's social and economic framework. Joint companies are therefore subject to regulations involving labor issues, pricing and product distribution, and customs and tariff levels. Finally, and perhaps most significantly, although full managerial control in such strictly regulated economies as these may be of limited value, Poland is still the only country that has authorized wholly foreign-owned companies to operate in the context of a socialist economy.

Even greater restrictions are imposed by Yugoslavia and the Soviet Union. These nations permit only the more limited contractual agreements, in which investors' rights are specified in the joint venture agreement. It is difficult to compare rights accorded investors under such a system with the rights granted to wholly foreign-owned companies in Poland. The Soviets argue that all equity interests can be effectively assured through contract, and foreign investors in Yugoslavia have apparently concurred with this view. Polish regulations reach beyond contractual interests because investors retain sole operating control over the enterprise without sharing that power with the state. The investor's decision-making capacity to maneuver within this system is thereby preserved, even though the firm's ability to operate is constrained by the restrictions enumerated above. In this manner the Polish regulations offer more flexibility than either the Yugoslav or the Soviet contractual agreements, which do not appear to permit such autonomy at all.

V. OWNERSHIP IN CONTEXT

The enactment of laws allowing joint investment in Yugoslavia, Romania, Hungary, Bulgaria, and Poland has not resulted in a rush of Western capital into East Europe. In fact, only Yugoslavia has enjoyed a significant inflow of technology and investment in joint venture form. In 1983, of the 211 equity joint ventures created in the five countries enumerated above, 200 were established in Yugoslavia and none were created in Poland. Although investors have been reluctant to join state companies as investment partners, many have flocked to the more autonomous forms of East European equity participation.

Poland's disappointing experience with joint ventures can be contrasted with the stunning success of the Polonia companies. These wholly foreign-owned enterprises have experienced explosive growth, increasing from a total of 100 in 1982 to approximately 500 in 1983.

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In June, 1982, wholly foreign-owned companies employed 3,000 workers and had sales of $38 million, $2 million of which was from exports.\textsuperscript{207} One journal reported that the 251 companies surveyed in 1982 had turnover of $181 million, including $8.4 million in exports.\textsuperscript{208} The Polish government, apparently embarrassed by the financial success of the foreign-owned enterprises, is reportedly preparing legislation to reduce their profitability.\textsuperscript{209}

Insofar as ownership connotes control and the freedom to manage operations without state interference, investors’ preference for Yugoslav and Polish operations is understandable. Although there are some restrictions on investments and profits, the freedom provided by Yugoslav and Polonia companies more closely approximates the managerial autonomy available in market economies than does traditional joint venture autonomy tempered with significant state participation. Investors are unwilling to share decision-making power over the daily operations of a company with a state bureaucracy. Firms that have attempted larger joint ventures have encountered difficulties. These include protracted negotiations, poor-quality products, delays in obtaining supplies, and difficulty in selling hard-currency-priced products in soft-currency countries.

Although, in 1980, enthusiasm and legislation concerning joint ventures was growing, the number of cooperation agreements continued to increase.\textsuperscript{210} Various reports place the number of agreements in force between Western investors and East European and Yugoslav enterprises during the 1970s at between 480 and 2,000.\textsuperscript{211} Investors’ preference for cooperation agreements over joint equity arrangements becomes apparent when these data are compared with statistics regarding joint ventures in Eastern Europe.

The variety of objectives sought by Western investors from expansion into East European markets makes their lack of a uniform investment strategy unsurprising. An investor will choose the most advantageous option available for the transaction, whether this

\textit{ing JVs and Foreign Businesses}, 23 EUR. TAX’N 144 (1983). It is significant that investors in both Yugoslav joint ventures and Polonia companies have considerable discretion to make business decisions without interference by the state bureaucracy.

\textsuperscript{207} \textit{Poland Eases JV Law}, supra note 206.

\textsuperscript{208} 12 BUS. E. EUR. 226 (1983).

\textsuperscript{209} 12 BUS. E. EUR. 74 (1983).

\textsuperscript{210} \textit{Revival of JV Trend, supra} note 151, at 203.

involves joint venture-equity status or more traditional contractual cooperation. In Poland, only the promise of 100% equity has sparked investor interest in corporate ownership. Investment in larger-scale equity joint ventures with Polish state entities has not materialized. Investors’ enthusiastic response to investment forms that bypass shared control with the state reflects the perceived value of control in the foreign investment setting. When sharing control with state enterprises is required, investors have chosen the cooperation-contractual form of East European operation. When substantial investor control can be exercised at the enterprise level, as in Yugoslavia and Poland, businessmen have taken the added risk of direct capital investment in the economy. Polish lawmakers are gambling that Western firms will continue to take this risk.