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Foreign Investment in the Banking Sector and Emergence of the Financial Market in Poland

This article analyzes major aspects of Polish banking legislation concerning foreign investment. Newly amended laws on banking and foreign investment and already enacted privatization and securities laws have established a legal environment for the flow of foreign capital. Since banking is the last major area of the Polish economy to be opened to foreign investors, observing the development of banking law is especially interesting.

Historically, Poland has exhibited a reluctance to expose its economy to the potentially uncontrollable influences of foreign capital investment. In recent years, a general shift in attitude has occurred. Now, most Poles view private foreign investment in a positive light, with the hope that investment overtures will quickly generate Western capital and accelerate the transfer of needed development technology.

The adoption of new banking laws and the practice of Polish financial authorities illustrate Poland's recognition that foreign investment may be profitable for both the foreign investors and the host country alike and that companies (including banks) with foreign participation can operate in East European economies in the transition period. Without an efficient banking system, Poland, like other Eastern European countries, will not be able to absorb the capital flow that it desperately needs. This factor significantly affects new legislation and policy.

The bold economic reforms initiated in December 1989 and continued in 1990 manifest an increased commitment by the new non-Communist government to

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the creation of an open market economy and a more favorable climate for foreign capital investment.¹ The wider participation of Poland in the international financial system will positively contribute to a more open approach of Polish authorities toward foreign investors in the banking sector. By the end of 1990 there were almost 2,000 joint venture companies registered, but only a few were banking entities. Polish authorities expect that the year 1991 will bring a significant improvement in this regard.

For the purposes of this article, the term "foreign bank" is defined as a bank chartered in Poland wholly owned or with the participation of foreign capital. "Foreign companies" are defined as those enterprises established under joint venture law, which may take the form of a company wholly owned by a foreign investor or a joint venture company with at least 20 percent foreign capital contribution.

I. Historical Evolution of Polish Legislation

A. LEGISLATIVE HISTORY

To understand the evolution of the legal issues regarding banking and investment law one must examine the brief history of legislative developments in this area. As one examines this history, it is important to note that in the past the closed character of the Polish economy influenced the evolution of these regulations.

After World War II, all the banks were nationalized. Economic centralism, imposed on banking by the Communist government, caused an isolation of Polish banks from international banking centers. Prior to 1976, there was no foreign investment in Poland, including in banking.² Western investors were

1. See *National Economies: Poland Introduces Bold and Wide-ranging Economic Reforms*, IMF SURVEY, Feb. 19, 1990, at 57 [hereinafter *National Economies*]. The economic reform program was prepared by the Solidarity-led government and was passed by the Polish Parliament in December 1989. The program consists of new or radical amendments to laws in the following areas: (1) taxation; (2) credits; (3) labor wages; (4) employment law; (5) custom; (6) environmental protection; (7) foreign currency exchange; (8) banking; (9) foreign investment by small businesses; (10) joint ventures; (11) the National Bank of Poland; and (12) financial aspects of state enterprises. The reforms were continued this spring when the Polish Parliament passed new bills regarding: (13) antitrust law; (14) bankruptcy law; (15) State-owned enterprises; and (16) the Commercial Code. Presently the law on financial markets is in the drafting stage. Goals of the new government include a radical change in forms of ownership of State-owned enterprises and the creation of financial markets. The new law on privatization of State-owned enterprises is still pending in the Parliament.

2. For a discussion on the joint venture laws under the previous legislation, see generally A. BURZYŃSKI, A FOREIGN INVESTOR'S GUIDE TO THE LAW OF 23RD APRIL 1986 ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION (1986); *National Economies*, *supra* note 1; Piontek, *The Legal Regime of Foreign Direct Investment in Socialist Countries*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 1987, at 279 (W. Butler ed. 1988); Rajski, *Legal Aspects of Foreign Investment In Poland*, in Y.B. SOCIALIST L. 160 (1986) [hereinafter *Legal Aspects*]; Rajski, *Nowe prawo o spółkach z udziałem zagranicznym* (New Law on Joint Ventures), 11 PANSTWO I PRAWO 159, 159-68. For updated commentary of the Joint Venture Law of 1988 before the changes of Dec. 1989, see Conner,

allowed to operate in Poland based on the law of "mixed companies,"³ while a bank could open a branch or representative office based on the banking law of 1975.⁴ A separate law governing the establishment of foreign representative offices and branches specifically excluded banks from its operation.⁵ The increased interest in Polish investment at that time was manifested primarily by foreign citizens of Polish heritage wishing to invest in the country of their ancestors. Foreign investors were still required to operate within a centralized command economy, and investment regulations were restrictive and vaguely worded.⁶ The regulations that followed in 1979, while focusing exclusively on joint ventures were also complicated and were organized in a rather simple legal form that did not encourage stability.⁷ For the first eight years, the Polish law excluded banking from the sectors where it was possible to establish a joint venture. In 1982, the Polish authorities enacted the first separate law on foreign investment in the form of a parliamentary statute.⁸ Enacted soon after that, the banking laws provided the legal vehicle for establishing a joint venture bank.⁹ The banking law of 1982 confirmed that a representative office or a branch of a

Recent Developments in East European Laws on Investments by Foreign Firms, 4 ICSID REV.-FILJ 241 (1989); Rajski, *Nowe prawo o inwestycjach zagranicznych* (New Law on Foreign Investment), 3 PANSTWO I PRAWO 517 (1989); Tiefenbrun, *Joint Ventures in the USSR, Eastern Europe and the People's Republic of China as of December 1989*, 21 J. INT'L L. & POL. 667 (1989).

3. The law was an executive order of the Council of Ministers entitled *Rozporządzenie Rady Ministrów z dnia 14 maja 1976 r. w sprawie wydawania zagranicznym osobom prawnym i fizycznym zezwolen na prowadzenie niektórych rodzajów działalności gospodarczej* (Ordinance of the Council of Ministers of May 14, 1976, Concerning Permits for Foreign Juridical and Natural Persons for the Conduct of Special Economic Activity), *Dziennik Ustaw* (Journal of Laws) 1976 No. 19, § 123.

4. *Ustawa z dnia 12 czerwca 1975 r. Prawo bankowe* (Banking Law of 1975), Journal of Laws 1976 No. 20, item 108 [hereinafter Banking Law of 1975].

5. *Rozporządzenie Rady Ministrów z dnia 6 lutego 1976 r. w sprawie warunków, trybu i organów właściwych do wydawania zagranicznym osobom prawnym i fizycznym uprawnień do tworzenia przedstawicielstw na terytorium Polskiej Rzeczypospolitej Ludowej dla wykonywania działalności gospodarczej* (Regulation of the Council of Ministers of Feb. 6, 1976, on the Conditions, Procedure and Organs Competent to Grant Foreign Natural and Juridical Persons Permits to Establish Representation Offices on the Territory of the Polish People's Republic to Carry on Economic Activities), Journal of Laws 1976 No. 11, item 631, as amended in Journal of Laws 1984 No. 26, item 133, art. (17).

6. *Legal Aspects*, *supra* note 2, at 160; Slupinski, *The New Polish Joint Venture Law*, 3 TRANSNAT'L LAW. I (1990).

7. *Uchwała Rady Ministrów z dnia 7 lutego 1979 r. w sprawie tworzenia i działalności w kraju podmiotów z udziałem kapitału zagranicznego* (Resolution of the Council of Ministers of Feb. 7, 1979 on Establishing and Operating Business Companies with Foreign Capital Participation in Poland), *Monitor Polski* 1979 No. 4, § 36. No joint venture was established under this promulgation.

8. *Ustawa z 6 lipca 1982 r. o zasadach prowadzenia na terytorium Polskiej Rzeczypospolitej Ludowej działalności gospodarczej w zakresie drobnej wytwórczości przez zagraniczne osoby prawne i fizyczne* (Law on Principles of Carrying on Economic Activity in Small Industry by Foreign Corporate Bodies and Private Persons on the Territory of the Polish People's Republic), Journal of Laws 1982 No. 19, § 146; Journal of Laws 1985 No. 13, § 58; Journal of Laws 1988 No. 41, § 325; Journal of Laws 1989 No. 74, § 442 [hereinafter Law of 1982].

9. *Ustawa z dnia 26 lutego 1982 r.—Prawo bankowe* (Banking Law of 1982), Journal of Laws 1982 No. 7, item 56; Journal of Laws 1983 No. 71, item 318; Journal of Laws 1987 No. 33, item 181 [hereinafter Banking Law of 1982].

foreign bank could be established in Poland.¹⁰ This same law allowed the establishment of a joint venture bank with the participation of a foreign partner in the form of a joint stock corporation.¹¹ There was a requirement that 51 percent of the capital be controlled by a Polish partner.¹² As a result of this and other restrictions, not even one joint venture bank was registered. In 1986, a new law on foreign investment was passed.¹³ Unfortunately, the law on joint ventures was not well drafted and did not meet investors' expectations.¹⁴ As a result, foreign investors had no interest in setting up joint venture banking companies in Poland. During the entire period the banking law of 1982 was in effect not one joint venture bank was formed. Nevertheless, these unattractive rules stayed in force until 1989.

A new joint venture law was enacted in December 1988.¹⁵ One month later, on January 31, 1989, a new banking law¹⁶ and the law on the National Bank of Poland were enacted.¹⁷ Also, a new law on economic activities has brought a clear break with Poland's old attitudes toward the private sector and has eliminated barriers to starting a business of any size by Polish nationals.¹⁸ These

10. Banking Law of 1982, *supra* note 9, art. 62.

11. *Id.* art. 85, § 1.

12. In the exceptional cases Polish participation could be less than 51 percent. *Id.* art. 85, § 2.

13. *Ustawa z 23 kwietnia 1986 o spółkach z udziałem zagranicznym* (The Law on Companies with Foreign Participation), Journal of Laws 1986 No. 17, § 88; Journal of Laws 1987 No. 33, § 181 [hereinafter Law of 1986].

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

15. *Ustawa z dnia 23 grudnia 1988 r. o działalności gospodarczej z udziałem podmiotów zagranicznych* (Law on Economic Activity with Foreign Parties), Journal of Laws 1988 No. 41, § 325, as amended Dec. 28, 1989 in Journal of Laws 1987 No. 41, § 442 [hereinafter Joint Venture Law]. For the law-review-sized commentary on Polish foreign investment law including amendments of Dec. 1989 see Slupinski, *supra* note 6. For publications that do not include the Dec. 1989 amendments see *supra* note 2.

16. *Ustawa z dnia 31 stycznia 1989 r.—Prawo bankowe* (Banking Law of 1989), Journal of Laws 1989 No. 4, item 21; as amended in No. 54, item 320; No. 59, item 350; No. 74, item 439 [hereinafter Banking Law].

17. *Ustawa z dnia 31 stycznia 1989 r. o Narodowym Banku Polskim* (Law on the National Bank of Poland), Journal of Laws 1989 No. 4, item 22.

18. *Ustawa z dnia 23 grudnia 1988 r. o działalności gospodarczej* (The Law on Economic Activity), Journal of Laws 1988 No. 41, § 324. In article 1, this law declares that everyone may engage in business activities. All an entrepreneur must do is inform the relevant local government office of his intention to establish his business. In turn, the office is responsible for recording his act within two weeks. The law requires government permission to form a business in only a few categories including foreign trade, production of explosives, arms, pharmaceuticals, toxic substances, tobacco and alcoholic beverages, and the operation of pharmacies. *Id.* art. 11, item 1. The law takes a refreshingly progressive position regarding taxation, employment, and access to produc-

businesses may include privately owned banks established by Polish persons, both legal and natural.

The historical changes of 1989 in Poland were embodied in the formation of the first non-Communist government in Eastern Europe. As a result of the legislative work of both the new Parliament and the government, amendments to (1) the joint venture law,¹⁹ (2) the banking law and the law on the National Bank of Poland,²⁰ and (3) the foreign exchange law were made.²¹ The new investment framework is a part of a general reform program for the transformation of Poland's entire economic system and is likely to improve significantly the conditions for investing in banking in Poland. In the fall of 1989 the first foreign bank received permission to operate in Poland.²²

B. LEGAL FOUNDATIONS OF THE MARKET ECONOMY

It is important to view the banking and foreign investment legislation within the context of the current reform of Polish business law and as a part of the effort to introduce the most challenging economic reform program undertaken by any Eastern European nation.²³ In these reforms Poland has adopted new laws regarding bonds,²⁴ antitrust practices,²⁵ insurance, and privatization, and has amended the bankruptcy law.²⁶ A Polish law on securities and a capital market is under Parliament's consid-

tion supplies. Taxation of all enterprises, whether state, cooperative, or private, will be equal. Also, any enterprise may hire as many employees as it sees fit. See *Two New Laws to Spur Business with Poland*, BUS. E. EUR., Dec. 5, 1988, at 386. *Ustawa z dnia 23 grudnia 1988 r. o działalności gospodarczej* (The Law on Economic Activity), Journal of Laws 1988 No. 41, § 324.

19. *Ustawa z dnia 28 grudnia 1989 r. o zmianie ustawy o zasadach prowadzenia na terytorium Polskiej Rzeczypospolitej Ludowej działalności gospodarczej w zakresie drobnej wytwórczości przez zagraniczne osoby prawne i fizyczne oraz ustawy o działalności gospodarczej z udziałem podmiotów zagranicznych* (Amendments to Law on Principles of Carrying on Economic Activity in Small Industry by Foreign Juridical and Natural Entities on the Territory of the Polish People's Republic and on [amendments to] the Law on Economic Activity with Participation of Foreign Parties), Journal of Laws 1989 No. 74, § 442 [hereinafter 1989 Amendments to Law on Joint Ventures]. For a discussion & the 1989 Amendments to the Joint Venture Law, see Slupinski, *supra* note 6.

20. *Ustawa z dnia 28 grudnia 1989 r. o zmianie ustaw Prawo bankowe i o Narodowym Banku Polskim* (Law on Amendments to Banking Law and the Act on National Bank of Poland), Journal of Laws 1989 No. 74, item 439.

21. *Ustawa z dnia 28 grudnia 1989 r. o zmianie ustawy—Prawo dewizowe* (Amendments to Foreign Exchange Law), Journal of Laws 1989 No. 74, item 441.

22. Greenhouse, *Poland's Rush for Modern Banks*, N.Y. TIMES, Feb. 26, 1990, at D1, col. 3.

23. *Eastern Europe's Economies—What is to be Done?*, THE ECONOMIST, Jan. 13–19, 1990, at 21.

24. *Ustawa z dnia 27 września 1988 r. o obligacjach* (The Law on Bonds), Journal of Laws 1988 No. 34, item 254 [hereinafter Law on Bonds].

25. On Feb. 24, 1990, the Polish Parliament enacted the new antitrust law called *Ustawa z dnia 24 lutego 1990 r. o przeciwdziałaniu praktykom monopolistycznym* (Law on Counter-Acting Monopolistic Practices), Journal of Laws 1990 No. 14, item 88.

26. *Ustawa z 24 lutego 1990 r. o zmianie rozporządzenia Prezydenta Rzeczypospolitej—Prawo upadłościowe* (Amendments to the Bankruptcy Law), Journal of Laws 1990 No. 14, item 87. *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 24 października 1934 r. prawo upadłościowe* (Ordinance of the President of Polish Republic—Bankruptcy Law), Journal of Laws 1934 No. 93,

eration.²⁷ Also, the law on privatization of State-owned enterprises has been enacted by the Polish Parliament.²⁸ The establishment of Poland's stock exchange is planned for 1991.²⁹ Since the crucial precondition for attracting foreign investors is the creation of political stability, Poland is anxious to create a stable political atmosphere based upon a representative form of government. After the "Round Table Accord" of April 1989 and following the democratic national elections of June 1989 and local elections of May 1990, and first direct presidential elections in Eastern Europe, Poland is now engaged in developing its parliamentary democratic institutions.³⁰

II. Applicable Laws

Because of the complexity of the legal rules applicable to foreign investment in banking, this article discusses a number of laws. Poland has adopted a general joint venture law regulating foreign investment.³¹ Banking law regulates the establishment and activities of banks chartered in Poland.³² The banking law must be applied together with the law on the National Bank of Poland. The National Bank of Poland (NBP) and the Ministry of Finance are the two major

item 834; Journal of Laws 1935 No. 22, item 129; Journal of Laws 1946 No. 31, item 197; Journal of Laws 1949 No. 32, item 240; Journal of Laws 1954 No. 38, item 349; Journal of Laws 1990 No. 14, item 87.

27. *Zal ozenia projektu ustawy o publicznym obrocie papierami wartosciowymi* (Draft of Securities Law) (G. Domański, 1990).

28. Law on Privatization of State Enterprises, I.L.M. (Sept. 1990); see also *id.* ch. VI, § D (Privatization). For commentary, see Slupinski, *Summary of Joint Venture Legislation in Poland*, 18 INT'L BUS. LAW. 401, 403 (1990).

29. *Poland's Capital Market Gains Assets, Momentum*, BUS. E. EUR., Dec. 4, 1989, at 388.

30. According to provisions of the "Round Table Accord," later incorporated by constitutional amendment, political pluralism is legalized. See Journal of Laws 1989 No. 19. The main changes include: (1) restoration of the upper house (Senate) of the Parliament elected in a democratic election with participation of all political forces; (2) establishment of the post of President of the Republic elected by both houses for a six-year term; (3) elections in June 1989 for a two-house Parliament; (4) resignation of the Communist Party in law-making monopoly—38 percent seats in the lower chamber; and (5) opposition to get 35 percent of the lower house. On Dec. 29, 1989, the Polish Parliament adopted a constitutional amendment that changed the name of the country to its historical title, Polish Republic (*Rzeczpospolita Polska*), and eliminated the leading role of the Communist Party. The amendment emphasized that the Polish Republic is a "democratic State governed by law and principle of social justice." See *Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej* (Law on Constitutional Amendment), Journal of Laws 1989 No. 75, item 444. At the end of December 1989, and in the first months of 1990, Poland enacted legislation intended to be a ground for a democratic state based on the rule of law. Emphasis was given to the role of the independent courts and the judiciary. The legislation included laws relating to: (1) courts of general jurisdiction; (2) the Supreme Court; (3) the National Judicial Council; (4) the Supreme Administrative Court; (5) the Constitutional Tribunal; (6) a notary system; (7) military courts; (8) advocacy; (9) associations; (10) higher education, and (11) direct elections for President. Also, a Drafting Commission is preparing new codes on criminal law and criminal procedure. Poland plans to adopt a new constitution at the two hundredth anniversary of the Constitution of May 3, 1791, the second written constitution in the world.

31. Joint Venture Law, *supra* note 15.

32. Banking Law, *supra* note 16.

institutions in charge of policy toward foreign banks in Poland.³³ Banks created as joint stock companies are governed by the Commercial Code, a main body of Polish corporate law.³⁴ The process of opening branches and representative offices of foreign banks is also governed by banking law. The foreign exchange transactions of foreign banks are subject to the foreign exchange law.³⁵

There is considerable dispute as to whether the joint venture law is applicable to banks established in the form of joint stock companies having Polish and foreign partners. The dispute has arisen because of the unequal treatment of companies organized under the joint venture law and the banking law: the companies established under the joint venture law have in many areas a privileged position compared to foreign banks governed by the banking law. Thus, the outcome of this dispute will impact foreign banks in connection with the following issues, among others: tax holidays, wage-increase taxes, and investment guarantees.³⁶

The first interpretation of the relation between the two laws assumes that the banking law is *lex specialis*, while joint venture law is *lex generalis*. According to this analysis, joint venture law would be applicable to areas not regulated to the contrary by the banking law. This interpretation is more favorable for foreign investors in the banking sector. An argument can be made that past experience regarding joint ventures should be applied to the practice of foreign banks where it does not conflict with the banking law.

The second interpretation, presently accepted by Polish banking authorities, is that the banking law is the general law applicable to foreign banks. The joint venture law is applicable only if banking law specifically refers to it. Banking law provides such references regarding: (1) labor, (2) employment, and (3) social insurance of foreign employees in foreign banks. Only in these areas are rules regulating foreign banks the same as those applicable to joint ventures.³⁷ Polish authorities (including the President of the NBP) have taken the position that all

33. *Ustawa z dnia 31 stycznia 1989 r. o Narodowym Banku Polskim* (Law on National Bank of Poland), Journal of Laws 1989 No. 4, item 22, as amended in Journal of Laws 1989 No. 74, item 439 [hereinafter Law on NBP].

34. The Polish Commercial Code was introduced in 1934 (Ordinance of the President from June 27, 1934), Journal of Laws 1934 No. 57, § 502, and has been amended many times, Journal of Laws 1946 No. 57, item 321; Journal of Laws 1950 No. 34, item 312; Journal of Laws 1964 No. 16, item 94; Journal of Laws 1969 No. 13, item 95; Journal of Laws 1988 No. 41, item 326; Journal of Laws 1990 No. 17, item 98 & No. 51, item 298. For an English translation of the Commercial Code before the 1988 and 1990 amendments, see Rajski, *Poland: Legal Status of Polish Economic Units Authorized to Carry on International Economic Transactions*, in 4 COMMERCIAL, BUSINESS AND TRADE LAWS 35 (1985).

35. *Ustawa z dnia 15 lutego 1989 r.—Prawo dewizowe* (Foreign Exchange Law), Journal of Laws 1989 No. 6, item 33; No. 74, item 441 [hereinafter Foreign Exchange Law].

36. If the joint venture law applies, a foreign investor will receive three years (with a possible extension to up to six years) of tax holiday. Under the banking law, a foreign bank does not automatically receive a tax holiday.

37. Banking Law, *supra* note 16, art. 83, item 4.

foreign banks are subject to the same rules as the Polish banking community. The rationale behind the position of the Polish financial and banking authorities has been the need to establish a uniform legal framework applicable to all banks, foreign or Polish. The attempt to grant privileged treatment to foreign banks has come under strong attack from Polish banks. Many experts have argued that the same treatment of all banks has a constitutional, as well as economic, justification.

The prevailing interpretation subjecting all banks to the same legal treatment creates substantial problems for foreign investors, as well as for the President of the NBP and the Minister of Finance. First, it makes investment in banking much less attractive than in other sectors. Second, it creates many interpretational problems along the way. Many joint venture laws have been operating in Poland for at least fifteen years, and both the government, through the Agency for Foreign Investment, and private players have substantial practice in this respect. They have worked out how to fill the legal loopholes and how to find acceptable solutions for problems as they arise. Practice involving the banking law, as well as the legal framework for foreign banks, is underdeveloped. Before 1989, there were no foreign banks in Poland, nor were there any private Polish banks. Thus, legal and business experience based on banking law is very limited. Many legal uncertainties have to be solved in the process of negotiations. The President of the NBP has issued only one very general instruction regarding the establishment of foreign banks. The foreign department of the NBP is currently working on a general guide for foreign investors. Until more implementing rules are issued, foreign banking entities will operate in largely unregulated territory, subject to the broad authority of the President of the NBP and the Minister of Finance.

III. Banking System in Poland

A. BANKS AND BANKING ACTIVITIES

Poland has a number of different banking institutions. Aside from the NBP, there are also commercial banks, savings banks, and special banks. The main banks are for the most part based in Warsaw. Regional banks are based in the nine biggest cities in Poland. The NBP enjoys a special status. Although the number of private commercial banks is growing, the Polish banking system is still predominantly based on public law banks. Foreign banks may operate in Poland in the following business forms: (1) a representative office;³⁸ (2) a branch;³⁹ or (3) a bank in the form of a joint stock banking company.⁴⁰ Polish

38. *Id.* art. 86.

39. *Id.*

banks can operate as: (1) state banks (public law banks); (2) cooperative banks; (3) state-cooperative banks; or (4) private banks (joint stock banking companies).

Only the Council of Ministers is authorized to create a state bank.⁴¹ State banks created by the Council of Ministers can only be owned by the State Treasury on behalf of the Polish State. Polish private parties, juridical (three persons) or natural (ten persons), may establish a bank in the form of a joint stock corporation. It is important to distinguish between a state bank and a joint stock banking company wholly owned by the State Treasury or other state legal entities. The latter is subject to the same rules as are privately controlled banks. It is also possible to have a bank (only in the form of a joint stock company) jointly owned by state and private parties. Thus, two banks can be fully controlled by the State Treasury, but be subject to different rules. For the purpose of this article the term "state bank" will only be used to describe a bank created by the Council of Ministers as a state banking institution, not a joint stock banking company with a majority of its shares controlled by the State Treasury. State banks may, however, be transformed into joint stock banking companies according to the rules applicable to the creation of joint stock banking companies.⁴²

There is no separation between commercial and investment banking in Poland. The Polish banks are so-called universal banks. Their activities include a full range of commercial banking, merchant banking, and investment banking. Although Polish banks (state, cooperative, and private) have different business structures, legal organization, size, and fields of business activities, as a matter of principle, no fundamental separation of functions exists. Therefore, both private law and public law banks may conduct all customary banking activities. However, in their activities banks must follow the monetary and credit policies established by the Polish Parliament.⁴³

Polish business law defines banks as legal entities operating on a self-financing basis and are authorized to perform the following activities:⁴⁴

- (i) keeping bank accounts;
- (ii) granting and drawing credits and loans;
- (iii) making financial settlements;
- (iv) accepting savings and time deposits;

40. *Id.* art. 77 reads as follows: "A bank in the form of a joint stock company may be also established by foreign persons or with the participation of foreign capital."

41. *Id.* art. 58, item 1.

42. *Id.* art. 86 provides specifically that "within the scope which is not regulated otherwise in this Act (banking law) the procedure of establishment of a joint stock company as described by the provisions of the Commercial Code is applied when a state or state-cooperative bank is transformed into a bank in the form of a joint stock company."

43. *Id.* art. 5.

44. *Id.* art. 11, item 1.

- (v) performing check and bill operations;
- (vi) accepting and placing deposits in domestic and foreign banks;
- (vii) granting and accepting bank warranties and guaranties;
- (viii) undertaking dealings in foreign exchange assets and financial services of operations abroad;
- (ix) servicing state loans;
- (x) issuing securities and undertaking dealings in securities;
- (xi) performing commissioned activities in connection with the issuance of securities; and
- (xii) safe-keeping valuables and securities and providing safe deposit boxes.

The scope of activity of a particular bank is described in its statute.⁴⁵ Banking law provides that banks (foreign and domestic) may perform the above-mentioned activities by a variety of operations. In addition, banks chartered in Poland may:

- (i) create commercial and noncommercial partnerships and cooperatives;
- (ii) undertake economic ventures along with other entities and provide consultative and advisory services in financial issues;
- (iii) undertake within the scope specified in their statutes, economic activities that have not been provided for in the present act;
- (iv) create and liquidate branches and other offices abroad and be shareholders of foreign banks and enterprises acting within a country.⁴⁶

Banking law also provides specific rules regarding credit limits. For example, the total amount of credit granted to one borrower cannot exceed 15 percent of a bank's capital. Similarly, the amount of credit per one loan may not exceed 10 percent of a bank's capital. Banks also may not invest more than 25 percent of their assets in any legal entity.⁴⁷ Polish banks may operate abroad in the form of representative offices, branches, and joint ventures after receiving a permit from the Ministry of Finance.⁴⁸

In addition to the NBP and the universal commercial banks, a number of banking institutions specialize in specific financial operations such as foreign trade and export promotion.⁴⁹ Nine independent regional banks have been cre-

45. *Id.* at art. 11, item 2.

46. *Id.* art. 8.

47. *Id.* art. 35, item 1.

48. *Id.* art. 85. This also requires an opinion from the President of the NBP.

49. These national banks include:

- (1) Bank PKO (Powszechna Kasa Oszczednosci—Bank Panstwowy), which provides banking services (savings) in Polish currency.
- (2) Bank Polska Kasa Opieki, SA, which performs retail banking operations in foreign currencies and maintains individual foreign currency savings accounts. Bank branches are located in many major industrial Western countries.
- (3) Foreign Trade Bank (Bank Handlowy, SA), which is a joint stock corporation wholly controlled by the Minister of Finance on behalf of the State Treasury. The Bank Handlowy performs about 90 percent of the banking services for Poland's foreign

ated out of local branches of the NBP.⁵⁰ These banks were established in regional cities and are intended to be a source of financing for local companies and individuals.

B. NATIONAL BANK OF POLAND (*NARODOWY BANK POLSKI*)

The NBP is the central bank of the Polish State.⁵¹ The following operations are included in the scope of the NBP activity:⁵² (1) issuing legal tender of the Polish Republic, (2) granting refinancing credits to other banks, (3) accepting deposits, (4) carrying out monetary settlements, (5) organizing operations in foreign currencies, and (6) performing cash service of the state budget.

The second role of the central bank is the supervision of other banks in Poland. Article 44 of the law on NBP provides specifically that:

Activity of banks, branches and representative offices of foreign banks is subject to supervision of the National Bank of Poland in the scope and according to principles specified by the present act [banking law] and the Act on the Narodowy Bank Polski.⁵³

In the realization of this supervisory power, the NBP is authorized to:

- (1) make analysis of a bank's balance sheet;
- (2) check realization of the requirement to preserve liquidity by a bank;
- (3) check conformity of granted credits and loans with the rule preventing their excessive concentration;
- (4) check security and promote repayments of credits and loans;
- (5) examine interest rates on credits and loans and on savings and deposits; and

trade. Additionally, the Bank issues bonds and deals in both international monetary and capital markets. Bank branches are located in many major financial centers, including New York.

- (4) Bank for Food Economy (Bank Gospodarki Żywnościowej), which is a bank holding company serving the agricultural sector.
- (5) Export Development Bank (Bank Rozwoju Exportu, SA), which financially supports Polish companies undertaking projects for improving the Polish balance of payment. It is a joint stock corporation with major shareholders such as the State Treasury, the National Bank of Poland, the bank for Food Economy, Bank Handlowy, and the Bank Polska Kasa Opieki, S.A. In Dec. 1989 the International Financing Corporation of the World Bank Group Board approved the creation of a credit/quasi-entity facility of DM 50 million for the Export Development Bank. The financing will be used for credits (ranging from \$50,000 to \$4 million) to encourage development of the Polish private sector. See Int'l Finance Corporation: NEWS, Jan. 16, 1990, at 1-2.

50. The regional banking system is dominated by nine state commercial banks: (1) Deposit-Credit Bank in Lublin (Bank Depozytowo-Kredytowy); (2) Commercial Bank in Warsaw (Państwowy Bank Kredytowy); (3) Gdansk Bank (Bank Gdanski); (4) Pomerania Credit Bank in Szczecin (Pomorski Bank Kredytowy); (5) Silesian Bank in Katowice (Bank Śląski); (6) Wielkopolski Credit Bank in Poznan (Wielkopolski Bank Kredytowy); (7) Industrial-Commercial Bank in Cracow (Bank Przemysłowo Handlowy); (8) Western Bank in Wrocław (Bank Zachodni); and (9) Common Economic Bank in Łódź (Powszechny Bank Gospodarczy).

51. Law on the NBP, *supra* note 33, art. 1.

52. *Id.* art. 6, item 1.

53. *Id.* art. 44.

(6) examine the financial situation of the bank.⁵⁴

In the scope of its authority the NBP is empowered to demand other banks to: (1) undertake necessary steps to restore financial liquidity; (2) increase the reserve fund; (3) increase the amount of shares; (4) make changes in the structure of assets and reevaluate amounts due; (5) abandon certain kinds of advertisements.⁵⁵ In using its authority, the NBP controls banks' compliance with the law, but may not dictate their day-to-day administration and business policy.

The President of the NBP may suspend the management board on a joint stock banking company (in cases where the activity of the bank infringes upon the law or the statute of the bank). In such case the President of the NBP may appoint a temporary management board until the election of a new board by the general meeting of shareholders.⁵⁶ According to the amendment of December 28, 1989, this previously uncontrolled power may now be reviewed by the courts. A bank subject to the NBP's intervention may protest, and the dispute will be settled in the Supreme Administrative Court.

C. STATE BANKS

A characteristic feature of the banking system in Poland is the existence of public law banks (state banks). State banks are created by the Polish Government (the Council of Ministers) after consultation with the President of the NBP and are owned wholly by the Polish State Treasury. The Council of Ministers controls state banks by: (a) appointing the president; (b) specifying the name and seat; (c) regulating the bank's scope of activities; (d) contributing the initial capital; (e) contributing a statute to the bank. Because state banks are legal entities established under public law, rather than corporate bodies, they may not have foreign shareholders. A state bank may, however, be restructured into a joint stock company bank.⁵⁷ The shares of the newly created bank, initially wholly owned by the State Treasury, may be made available for private investors, both Polish and foreign.

D. COOPERATIVE BANKS

A cooperative bank⁵⁸ is organized under the cooperative law.⁵⁹ Three organs are involved in the establishment of a cooperative bank. In addition to the requirements provided for every cooperative, a cooperative bank must be established with the

54. Banking Law, *supra* note 16, art. 100, item 4.

55. *Id.* art. 101, § 1.

56. *Id.* at art. 78.

57. *Id.* art. 86.

58. *Id.* art. 63.

59. Banking Law, *supra* note 16, art. 64. The law on cooperatives has been amended many times since its enactment in 1982. See *Ustawa z dnia 16 września 1982 r.—Prawo Spółdzielcze* (Law on Cooperatives), Journal of Laws 1982 No. 30, item 210, as amended in Journal of Laws 1983 No. 39, item 176; Journal of Laws 1986 No. 39, item 192; Journal of Laws 1987 No. 33, item 181; Journal of Laws 1988 No. 41, item 324 & No. 3, item 12; Journal of Laws 1989 No. 6, item 33; Journal of Laws 1990 No. 6, items 36, 37; No. 14, item 87.

consent of the President of the NBP and with the consultation of the Minister of Finance. The cooperative banks mostly serve the agricultural industry. The legal structure of the banks is similar to that of other cooperative entities.

E. STATE-COOPERATIVE BANKS

A state-cooperative bank is created jointly by the government (the Council of Ministers) and cooperative organs.⁶⁰ The government must consult with the President of the NBP about any proposed regulation pertaining to establishing a bank.⁶¹ The initial capital of a state-cooperative bank comes from both state and cooperative resources.⁶² A bank must enter into a register of cooperatives. The organs of the bank are: (1) the congress of delegates, (2) the council of the bank, and (3) the board of management.⁶³ The bank is run by the board of management, which is headed by the president who is appointed by the Prime Minister upon motion of the council of the bank.⁶⁴

F. JOINT STOCK BANKING COMPANIES

For the last forty years, the Polish banking system has been dominated by state banks. Until recently, private banks were not permitted. Poland's economic reforms in 1990 have resulted in the opening of the commercial banking business to private banks. The continuation of economic reforms is not possible without a modern, efficient banking system based on private banks. Although at the present time the Polish financial scene is still dominated by state banks, this will change in the future since the number of private banks is growing quickly. To date, more than fifty private banks had received permits to operate. Because of the great need for an efficient banking institution on the local as well as on a national scale, changes are progressing rapidly.⁶⁵ The newly enacted regulations will be clarified through practice. Together with the trend toward privatization, state banks based on the legal mechanism provided in the law will be transformed into joint stock companies. Through this procedure shares may be transferred to Polish or to foreign private investors.⁶⁶

1. *Business Form*

Private banks (local and foreign) are organized in the form of joint stock companies. Corporate law and the banking law govern the establishment pro-

60. Banking Law, *supra* note 16, art. 66, § 1.

61. *Id.*

62. *Id.* art. 66, § 3.

63. *Id.* art. 69.

64. *Id.* art. 71, § 1.

65. The Foreign Department of the NBP provided this data.

66. Banking Law, *supra* note 16, art. 86 provides that state banks may be transformed into joint stock banking companies. The transformation may be made based on the resolution of the Council of Ministers on the motion of the Minister of Finance. Also, the President of the NBP must be consulted.

cess.⁶⁷ The structure of a private bank is similar to that of a joint stock company in other sectors of the Polish economy.⁶⁸ However, besides the general requirements necessary to establish a joint stock company, the specific rules of banking law will be applicable. These requirements are discussed in the following paragraphs.

2. *Establishment*

According to the Commercial Code, there must be at least three founders to establish a joint stock company.⁶⁹ However, to establish a joint stock banking company, the banking law has increased this requirement to a minimum of ten natural or three legal persons.⁷⁰ Only the State Treasury may be a sole founder of a joint stock banking company.⁷¹ Under the Commercial Code the initial capital of a joint stock company shall be not less than 250 million zlotys.⁷² The banking law, however, requires that this initial capital be proportional to the size of anticipated activity. The minimum initial capital has been set at the amount of six million dollars for a foreign partner and about ten billion zlotys for a Polish partner.

The founders of the joint stock banking company must obtain a permit from the President of NBP.⁷³ The application should include: (a) the name, seat, subject, and range of activity of the bank; (b) the names and addresses of the founders; (c) information about capital resources; (d) information about persons selected to the managerial positions;⁷⁴ and (e) the draft of the bank's statute (charter).⁷⁵ The President of the NBP issues the permit or rejects the application within one month after it is submitted or supplemented.⁷⁶ If the permit is rejected, the founders may appeal to the Supreme Administrative Court.⁷⁷ The permit determines the name and seat of the bank and the subject and scope of the bank's activity.

An analysis of the decision-making process seems to support the following thesis: if a would-be founder applies to open a bank and the application is rejected, then the applicant may appeal the refusal to the Supreme Administrative Court. However, article 83, section 1 of the Banking Law provides that the approval may not be appealed in regard to the scope of banking activities. Thus,

67. *Id.* art. 74.

68. Banking Law, *supra* note 16, arts. 73, 74; see Commercial Code, *supra* note 34.

69. Commercial Code, *supra* note 34, art. 308.

70. Banking Law, *supra* note 16, art. 57, item 1(1)–(2).

71. *Id.* art. 57, § 2.

72. Commercial Code, *supra* note 34, art. 311, § 1.

73. Banking Law, *supra* note 16, art. 73.

74. *Id.* art. 80, item 2 requires that managerial posts have been entrusted to persons who have appropriate education and professional experience.

75. *Id.* art. 81, § 2.

76. *Id.* art. 82.

77. *Id.* art. 84, § 2.

as long as the President of the NBP gives a permit, his decision may not be appealed. The general conclusion is that would-be founders of a joint stock banking company are in a position "to take it or leave it" regarding such permits.⁷⁸ The inclusion of scope-of-activity in the permit gives the President of the NBP substantial authority. In exercising this authority, however, the President of the NBP may not change the statute of the bank, which is prepared solely by the bank's organizers.

G. FOREIGN BANKS

Until the fall of 1989, no foreign banks in any form (except representative offices) were present in Poland. As Poland moves toward a market economy, it will require a well-organized banking system to allow Poland to participate in the sophisticated international financial network. Polish authorities have a variety of reasons to be interested in the development of foreign banks in Poland. Such banks will intensify financial relations with major international financial and trade centers. Foreign banks also will improve the qualifications of Polish banking staffs by introducing new management methods. Through these same channels Poland could acquire modern banking techniques. Polish authorities also hope that the entry of foreign banks into the Polish market will increase competition, resulting in the improvement of the entire banking system. Such improvement of the entire banking system is necessary and should be a goal of the highest priority. The present system and the banking infrastructure do not provide the necessary capacity to handle financial operations for the state and for private companies.

Foreign banks can operate in Poland in the following forms: (1) representative offices, (2) branch offices, and (3) joint stock banking companies. The banking law splits the burden of responsibility among Polish financial authorities between the Minister of Finance, who gives permits to open representative offices and branches, and the President of the NBP, who is in charge of joint stock banking companies.

1. *Representative Office*

The establishment of a representative office requires a permit from the Minister of Finance. The Minister of Finance issues such a permit in agreement with the President of the NBP.⁷⁹ The Polish representative office of a foreign bank may not engage in regular banking business (credits, savings, investment, etc.). The representative office's role is rather to "represent" and to perform informational services. The legal foundations of a representative office are set in the

78. *Id.* art. 83, § 1.

79. *Id.* art. 86 reads: "A branch or a representative office of a foreign bank may be opened on the territory of the Polish People's Republic only under a permission of the Minister of Finance in agreement with the President of the Narodowy Bank Polski (the National Bank of Poland)."

banking law, not in the Regulation of 1976.⁸⁰ There are a number of representative offices of foreign banks in Poland, the oldest of which were established in the mid-seventies. Some foreign banks have recently received licenses to open a representative office. These banks traditionally have had strong relations with Poland and have also been involved in the initiation of other legal forms of banking activities.⁸¹ These banks view the establishment of a representative office in Poland as the first step in later opening a branch or joint stock banking company.

2. *Branch*

The Polish branch of a foreign bank is a part of the parent bank, not a bank incorporated in Poland. Although branch offices of foreign banks have been permitted since 1975,⁸² there is little experience with the operations of branches in Poland. The present provisions of the Banking Law (except in specifying that the Minister of Finance is the organ issuing a permit⁸³) do not regulate in detail the legal aspects of operating the branch. As a general rule, unless otherwise specified in a particular law, a branch may perform the same activities as a bank established in Poland. The scope of a bank's activity and the rules regarding its status as a "foreign exchange bank" may be limited in the permit. The decision is made during the negotiation process with the Ministry of Finance. Because branches are not legal entities, they do not enjoy limited liability under Polish law. A number of foreign banks are negotiating the opening of branch offices in Poland. Some of these negotiations are close to being completed, but as of the end of November 1990 no foreign bank had received a permit to open a branch in Poland.

3. *Joint Stock Banking Company*

A bank may be established in the form of a joint stock company.⁸⁴ The establishment of such a bank requires a permit from the President of the NBP. The process is subject to the same rules (in the Commercial Code) as the establishment of Polish banks in the form of joint stock banking companies. There are, however, some

80. See Regulation of 1976, *supra* note 5, art. 17.

81. The following banks have opened representative offices in Poland:

- (1) Banca Commerciale Italiana (1974);
- (2) Banque Nationale de Paris (1974);
- (3) Société Generale (1975);
- (4) Centro Internazionale & Handelsbank A.G. (1985);
- (5) PEKAO Trading Corporation (1988);
- (6) Deutsche Bank (1989);
- (7) Dresdner Bank (1989);
- (8) Mitteleuropäische & Handelsbank, A.G. (1990);
- (9) Privatbanken A/S, representing a group of Scandinavian banks (1990.); and
- (10) Citibank (1990).

82. Banking Law of 1975, *supra* note 4, art. 61.

83. Banking Law, *supra* note 16, art. 86.

84. *Id.* art. 77 reads specifically: A bank in the form of a joint stock company may be also established by foreign persons or with the participation of foreign capital.

significant exceptions, such as: (a) the permit may restrict the scope of activity of a foreign bank compared to the general rules regarding the private Polish banking sector;⁸⁵ and (b) the permit may also restrict the transfer of profit by foreign banks.⁸⁶

a. Preparatory Step

Since Polish law requires that a number of conditions regarding a bank and its management be met, the first recommended step is an investigatory discussion with the Polish authorities (the President of the NBP) about capital, technical facilities, and management staff, who must "have appropriate education and professional experience."⁸⁷ At this stage the foreign party should ascertain the attitude of Polish banking authorities regarding possible investment.

b. Application Process

Assuming a positive initial discussion, a foreign investor should: (1) file an application with the President of the NBP; (2) assure its technical facilities; and (3) secure its initial minimum capital of at least \$6 million.

Application forms are provided by the President of the NBP. The forms require the following information:

- (1) the founders' names and residences (requirement of at least three legal, or ten natural, persons);
- (2) a resumé of past business relations with Poland;
- (3) the proposed name of the bank;
- (4) the bank's location;
- (5) the scope of the bank's activity;
- (6) the bank's capital, with enumeration of shareholders;
- (7) the proposed number of employees;
- (8) a proposed list of the members of the council of the bank (equivalent of the supervisory council), which should include a detailed resumé regarding their education and professional careers; and
- (9) a list of proposed members of the bank's board of management with appropriate curriculum vitae (the board may be elected after consultation with the President of the NBP).

A draft of the statute of the bank and a feasibility study should accompany an application.⁸⁸ The feasibility study must provide the anticipated balance sheet and profit and loss figures for the first year of activity. Founders of a bank are solely responsible for the preparation of the bank's statute. Decision upon an

85. *Id.* art. 83, item 1.

86. *Id.* art. 83, item 3 reads:

The President of the NBP, granting a permit to establish a bank by a foreign party or with foreign capital participation, is to determine the amount of profit which a foreign investor can transfer abroad without any special exchange permit. This amount cannot be lower than 15 percent of the dividends received by a foreign partner.

87. *Id.* art. 80, item 2.

88. A feasibility study must be prepared according to United Nations Development Organization (UNIDO) methodology.

application may be expected within one month. If the application is rejected, the parties may challenge the decision in the Supreme Administrative Court. Normally a permit issued by the President of the NBP will regulate the following issues: (i) transfer of profit;⁸⁹ (ii) scope of the bank's activity; (iii) location of the bank; and (iv) name of the bank.

c. Final Step

In order to be valid, the statute of a bank must be concluded in the form of a notarial deed.⁹⁰ Also, any changes in the statute must be notarized and must be accepted by the President of the NBP.⁹¹ The notarization process is performed by Notary Public offices and is governed by the notary law.⁹² The Notary Public requires that the following documents be submitted: (i) a draft of a bank's statute; (ii) a permit; (iii) the investors' affidavit confirming their legal status; and (iv) the decision of the foreign bank's corporate bodies authorized to conclude the decision leading to the establishment of a bank in Poland.

All documents presented must be originals. If the documents were issued by a foreign organ, they must be accompanied by a certified Polish translation. Natural persons must have proof of identification. The foreign partner's passport will satisfy this requirement. If the bank's statute is notarized, and the founders have secured the financial and technical means necessary, the bank may start operating. Banks are registered in the commercial register at the court, at which point they are recognized as legal entities.

d. Operations

Foreign banks conduct their operations as prescribed in a permit and in the individually prepared statute accepted by the President of the NBP. In addition to banking law, details of the bank's activities are determined in its statute or permit. Polish corporate law is applicable to corporate functions of a foreign bank regarding its organs, supervisory council, general meeting of shareholders, and management board.⁹³ Banking law may, and does, regulate particular issues regarding the corporate structure of a bank differently from the Commercial Code. It specifies that the supervisory organ of a bank (called council of the bank) is composed of at least five persons elected by the general meeting of shareholders.⁹⁴ The members of the management board are elected by the council of the

89. A foreign bank has the right to convert at least 15 percent of its domestic profits into hard currency. Banking Law, *supra* note 16, art. 83, item 3. See text section V.

90. Commercial Code, *supra* note 34, art. 163, § 1.

91. Banking Law, *supra* note 16, art. 83, item 2.

92. *Ustawa z dnia 24 maja 1989 r.—Prawo o notariacie* (Notary Law), Journal of Laws 1989 No. 33, item 176; No. 73, item 436.

93. Banking Law *supra* note 16, art. 73. Commercial Code, *supra* note 34. For the general description of Polish Corporate Law, see Z. SLUPINSKI, FOREIGN INVESTMENT LAW IN POLAND: COMMENTARY AND REGULATIONS (forthcoming, Spring 1991).

94. Banking Law, *supra* note 16, art. 75, § 1.

bank.⁹⁵ The president (chairman) of the management board is appointed after consultation with the President of the NBP.⁹⁶ A foreign bank is obliged to maintain foreign exchange reserves at the level determined by the President of the NBP. Also the reserves in zlotys are mandatorily kept at the level provided for domestic banks.

In 1989 the American Bank in Poland became the first bank with foreign participation to receive a permit to operate in Poland.⁹⁷ A number of projects are under negotiation pertaining to the establishment of joint stock banking companies with foreign capital. These projects include banks already established on the Polish financial market. There is also a project involving the International Finance Corporation and Western banks to establish a joint venture bank in Poland.

H. BANKING AND FOREIGN COMPANIES

Rules regarding the banking relations of a foreign company or a joint venture are basically subject to the same laws as are Polish legal entities. The monetary assets of such a company must be deposited with a Polish foreign exchange bank.⁹⁸ To open an account in a foreign bank, a joint venture must apply for a special permit.⁹⁹ A joint venture may freely obtain credit in hard currency from foreign banks.¹⁰⁰ Short-term, long-term, secured, and unsecured loans in zlotys and hard currencies are also available from Polish banks.

I. BANKS AND FOREIGN EXCHANGE RULES¹⁰¹

In December 1989, the Polish foreign exchange law¹⁰² introduced internal convertibility of the Polish zloty. It was the first step toward the goal of full convertibility of the Polish zloty. Polish financial authorities imposed the steeply devalued exchange rate of 9,500 zloty to the U.S. dollar. All foreign trade transactions are subject to this law. Under it, Polish companies involved in foreign trade may no longer retain any part of their hard currency in separate hard currency accounts. Also, foreign trade participants may only maintain a single account for zlotys. At the same time, all parties authorized to conduct foreign trade have unlimited access to hard currency. The NBP guarantees the availability of sufficient amounts of hard currency in order to realize customers' demand.

95. *Id.* art. 75, § 2.

96. *Id.* art. 75, § 3.

97. The American Bank in Poland became the first bank with foreign capital participation to receive a permit to operate in Poland in Dec. 1989. A number of banks are currently negotiating establishment of a joint venture bank.

98. Joint Venture Law, *supra* note 15, art. 22, §§ 1, 2.

99. *Id.* art. 22, § 3.

100. *Id.* art. 22, §§ 4, 5.

101. See generally Slupinski. *The Polish Foreign Exchange Law of January 1, 1990*, SOVIET & E. EUR. L. PARKER SCH. BULL. (Columbia University), Apr. 1990, at 7.

102. Foreign Exchange Law, *supra* note 35.

Private citizens and nonresidents may legally hold zloty, foreign currencies, gold bullion, stocks and bonds denominated in any currency, and other intangible assets. However, foreign currency *earnings* of resident enterprises, such as joint ventures, which are deposited in Polish commercial banks, are subject to immediate conversion to zlotys in Polish foreign exchange banks. Thus, earnings deposited by firms registered in Poland will always be denominated in zlotys.

Polish banks are responsible for carrying out the provisions of the Foreign Exchange Law under the supervision of the Central Bank. Foreign and Polish banks may or may not be classified as "foreign exchange banks." Only banks having this status may engage in foreign currency operations. The Minister of Finance grants to a foreign bank the status of "foreign exchange bank" upon proper application. The Minister of Finance will also decide whether a bank will be authorized to accept hard currency deposits from private citizens.

IV. Taxation

A. INTRODUCTION

In the past, the income of the Polish State Treasury was based more on mandatory "contributions" from state-controlled enterprises than on taxes. Therefore, tax law was not well developed, and it is still in a state of ongoing change. Introduction of a market economy means that taxes will soon become the largest source of state revenue. At the present time, Polish and foreign banks are required to pay many different taxes. This state of flux makes it hard for a foreign bank to predict the amount of taxes to be paid. An additional problem arises because of the different accounting principles used by Poland and other countries. There were two different sets of accounting rules for private and state-owned entities. New Regulations on Accounting Rules prepared by the Ministry of Finance will unify those principles. These factors make it very difficult to establish a long-term financial planning policy. A proposed tax reform would establish a value added tax (VAT) in 1991. Also, there are plans to introduce personal income tax. In general, the Polish authorities emphasize that the taxation system will be remodeled along the lines of tax systems in West European countries. Until such time, a foreign investor will have to keep track of many taxes in order to fulfill its obligation to the State Treasury.

According to banking law, all banks, whether foreign or Polish, are taxed according to general tax laws.¹⁰³ Presently, two major laws govern taxation: corporate tax law¹⁰⁴ and income tax law.¹⁰⁵

103. Banking Law, *supra* note 16, art. 97.

104. *Ustawa z dnia 31 stycznia 1989 r. o podatku dochodowym od osob prawnych* (Corporate Tax Law), Journal of Laws 1989 No. 3, item 12; No. 54, item 320, No. 74, item 443 [hereinafter Corporate Tax Law].

105. *Ustawa z dnia 16 grudnia 1972 r. o podatku dochodowym* (Income Tax Law), Journal of Laws 1989 No. 27, item 147, as amended in No. 74, item 443 [hereinafter Income Tax Law].

Poland employs both territorial and worldwide approaches in taxation. According to corporate income tax law, "the companies with the seat or place of business on Polish territory are subject to tax on the whole of their income no matter what its source."¹⁰⁶ The worldwide principle of taxation is applied to banks established in the form of joint stock companies and having their residence in Poland. The source principle is applicable to foreign persons without residence in Poland.¹⁰⁷ Therefore, the source principle would be applicable to the branches of foreign banks in Poland.

B. TAXATION OF FOREIGN BANKS ON POLISH SOURCE OF INCOME—BRANCH

Since branches of foreign banks are not legal persons, and their parent companies have no residence or business seat in Poland under article 3 of the corporate tax law,¹⁰⁸ they are taxed only on their investment income derived in Poland.¹⁰⁹ A branch is taxed at the corporate rate of 40 percent of the established taxable income.¹¹⁰

C. TAXATION OF BANKS WITH RESIDENCE IN POLAND

Foreign banks incorporated in Poland are Polish legal entities and are subject to Polish tax jurisdiction. A bank established in Polish territory will be taxed at the same rate as other Polish corporate entities regulated by corporate tax law.¹¹¹ Because such a bank has its seat or business operation in Poland, it will be taxed on its worldwide income.¹¹² The corporate tax of foreign as well as Polish banks is currently set at 40 percent.¹¹³

D. WITHHOLDING TAX

If foreign nationals or corporate persons do not have business seats in Polish territory, they are taxed only on their income sourced in Poland.¹¹⁴ Such foreign nationals (individuals) are subject to a withholding tax of 40 percent.¹¹⁵ Non-resident legal entities (shareholders in a bank) are also subject to 40 percent withholding tax.¹¹⁶ The 40 percent tax rate on repatriated profits of nonresident foreign shareholders in a bank is therefore higher than the rate provided by the

106. Corporate Tax Law, *supra* note 104, art. 2, item 1.

107. *Id.* art. 2, item 2.

108. *Id.* art. 3.

109. *Id.* art. 2 § 2.

110. *Id.* art. 17 § 1.

111. *Id.* art. 1.

112. *Id.* art. 2, § 1.

113. *Id.* art. 17, § 1.

114. *Id.* art. 2 § 2; Income Tax Law, *supra* note 105, art. 3.

115. Income Tax Law, *supra* note 105, art. 19, § 4.

116. Corporate Tax Law, *supra* note 104, art. 17, § 1.

joint venture law.¹¹⁷ Profit transferred abroad may be converted into hard currency according to general rules in banking law modified by the bank's permit.

E. TAXES OF FOREIGN EMPLOYEES

Foreign employees may fully convert their salary into hard currency and transfer it abroad. Payments to foreign employees, if transferred abroad, are subject to Polish taxes assessed at a rate of 40 percent.¹¹⁸ The rate may be different under agreements concluded by the Polish Government with other countries.

F. TAX HOLIDAYS

The discussion at the beginning of this article of whether the general joint venture law is applicable to the banking community has a significant practical impact on taxes. Tax holidays play an important role as investment incentives. According to the joint venture law, no taxes shall be levied during the first three years of a joint venture.¹¹⁹ The holiday commences on the date of the first invoice, not when the first profit is earned. Tax holidays may be extended for an additional three years if the joint venture is established in priority areas.¹²⁰ The banking law does not provide any specific tax provisions except for a guidance that "uniform rules and principles provided in separate regulations" will be applicable.¹²¹ Accepting the government's position, that joint venture law is not applicable to foreign banks, there will be no tax holidays unless negotiated with the Minister of Finance. Fortunately, the Minister of Finance does grant tax holidays on a case-by-case basis.

117. The tax on repatriated profits is fixed at the rate of 30% in a joint venture law. Joint Venture Law, *supra* note 15, art. 29.

118. Income Tax Law, *supra* note 105, art. 19, § 4. This rate will continue to apply unless international agreements concluded by Poland provide otherwise.

119. Joint Venture Law, *supra* note 15, art. 28, § 1.

120. *Id.* art. 28(2). The preferred sectors include: agricultural and food processing; the pharmaceutical and chemical industries; manufacturing of products and materials for the housing industry; protection of the natural environment; electronics and communications; production of scientific research appliances; printing machines, packages, and containers; and transportation and tourism. The list of preferred areas was published in the form of a Resolution of the Council of Ministers entitled *Uchwała nr 17 Rady Ministrów z dnia 16 lutego 1989 r. w sprawie określenia preferowanych dziedzin działalności gospodarczej dla spółek z udziałem podmiotów zagranicznych* (On the Description of the Preferred Areas of Business Activities for Joint Ventures) Monitor Polski 1989 No. 4, § 42.

Earlier joint ventures were able to get tax deductions on the basis of *Rozporządzenie Rady Ministrów z dnia 3 lutego 1989 r. w sprawie obniżki podatku dochodowego od dochodu zagranicznych podmiotów gospodarczych i przedsiębiorstw z udziałem zagranicznym* (The Resolution of the Council of Ministers on the Reduction of Corporate Tax of Foreign Companies and Joint Venture Companies), Monitor Polski 1989 No. 3, § 18.

121. Banking Law, *supra* note 16, art. 97.

G. OTHER TAXES

Like any other Polish enterprise, a bank, where applicable, must also pay an agricultural tax,¹²² a wage tax, a turnover tax,¹²³ a real estate tax, local taxes, stamp duties, and community fees.¹²⁴ Foreign banks are not exempt from taxes on wage increases during 1990.¹²⁵ This tax is set at 200 percent for salary increases of less than 3 percent above prescribed norms and 500 percent for salary increases more than 3 percent above prescribed norms.¹²⁶ This tax means that "foreign" banks are not completely free to create their own salary policies. This limitation is a significant disadvantage compared to companies operating under the joint venture law. Joint ventures in sectors other than banking may attract a highly qualified work force by offering more competitive salaries. Foreign representative offices, branches, and subsidiaries pay a fixed fee to the Polish Treasury for filing an application. Additionally, a foreign bank must pay a fee for the notarization of its statute (charter). During this process, fees are paid for Notary Public services, together with state treasury fees and stamp fee. Since the notary's fees are estimated on the basis of the initial capital, the bank's capital can be augmented subsequently without the payment of higher application fees. Banks are registered in the Commercial Registers at the state courts and a proper registration fee is required.

H. DOUBLE TAXATION TREATIES

Double taxation becomes an important issue in cases where profit is subject to more than one tax because it is presumptively within the tax jurisdictions of Poland and other countries. Generally, the tax systems are based on (1) various sources of income, (2) residence, (3) nationality, or (4) some combination of the first three. Poland has concluded agreements on the avoidance of double taxation with many countries under which the actual income tax on dividends of a foreign shareholder ranges from 5 to 15 percent.¹²⁷ For U.S. investors in Polish com-

122. *Ustawa z dnia 15 listopada 1984 r. o podatku rolnym* (The Agricultural Tax Law), Journal of Laws 1984 No. 52, § 268; Journal of Laws 1986 No. 46, § 225; Journal of Laws 1988 No. 1, § 1; Journal of Laws 1989 No. 7, § 45; No. 10, § 53; No. 35, § 192; No. 49, § 275; No. 74, § 443.

123. *Ustawa z dnia 16 grudnia 1972 r. o podatku obrotowym* (The Turnover Tax Law), Journal of Laws 1989 No. 27, § 147; No. 74, § 443.

124. *Ustawa z dnia 14 marca 1985 r. o podatkach i opłatach lokalnych* (Law on Local and Community Taxes), Journal of Laws 1988 No. 12, § 50; Journal of Laws 1989 No. 19, § 132; No. 74, § 443.

125. *Ustawa z dnia 27 grudnia 1989 r. o opodatkowaniu wzrostu wynagrodzeń w 1990 r.* (Law on Tax on Salaries Increases), Journal of Laws 1989 No. 74, item 438. According to article 1, section 2(7), the law is not applicable to companies operating under the law on foreign small businesses, *supra* note 8, and joint venture law, *supra* note 2. Since banks are not mentioned, the tax will be applicable to foreign banks and banks with foreign capital organized under the banking law.

126. Law on Tax on Salary Increases art. 8, §§ 1-2.

127. To eliminate the possibility of dual taxation Poland has signed a number of bilateral agreements with the following countries: Austria, Belgium, Denmark, Finland, France, the Federal Re-

panies in which the total U.S. investors' holdings are at least 10 percent of the outstanding shares of the voting stock, the tax on dividends is 5 percent; in all other cases, the tax rate is 15 percent.¹²⁸

V. Transfer of Profits

In the past, transfer of profits in hard currency proved to be a major obstacle in the development of sizable Western investments in Eastern European countries. Some foreign investments are made in hard currencies, as the investors expect to receive their profits in such currencies. In Poland and other Eastern European countries the local currencies were not fully convertible.¹²⁹ For the purpose of earning and transferring their profits in hard currency, joint venture companies were forced to maximize exports. Since banks are not in the business of exporting, the foreign banks' prospects for investing and operating in Poland were limited until the 1989 legislation. For this and other reasons, a major goal of the new Polish Government is the introduction of a convertible zloty. Reforms undertaken in December 1989 indicated the determination of Polish authorities to achieve convertibility. The internal convertibility, introduced on January 1, 1990, has been successfully implemented.

A. PROFIT DEFINED

According to the banking law, "[p]rofit as shown at the balance sheet of a bank diminished by services resulting from taxes on that profit, constitutes profit before distribution."¹³⁰

B. DISTRIBUTION OF PROFITS

The distribution of profits is determined by the bank's statute.¹³¹ Generally speaking, profit is distributed in the same proportion as the owners' respective contributions for shares. However, Polish law takes a liberal position regarding the alteration of distributable profits. Parties are free to stipulate in the statute of a bank the way in which the alteration of profits will be made.

C. HARD CURRENCY TRANSFER

Foreign banks have the right to transfer in hard currency at least 15 percent of their distributed earnings.

public of Germany, Italy, Japan, Malaysia, the Netherlands, Norway, Pakistan, Spain, Sweden, Thailand, the United Kingdom, the United States of America, and Yugoslavia.

128. Convention between the U.S. and the Government of the Polish People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Oct. 8, 1974, art. 11, 21(a)-(b), 28 U.S.T. 891, 907-08, T.I.A.S. No. 8486.

129. Only Yugoslavia possesses a fully convertible currency, the dinar.

130. Banking Law, *supra* note 16, art. 98, § 1.

131. *Id.* art. 98, § 2.

The President of the NBP, granting a permit to establish a bank by a foreign party or with foreign capital participation, is to determine the amount of profit which a foreign investor can transfer abroad without any special exchange permit. This amount cannot be lower than 15 percent of the dividends received by a foreign partner.¹³²

Two factors should be kept in mind, however. First, this minimum percentage may be increased by bilateral treaties. For example, according to the recently signed United States-Polish treaty concerning business and economic relations, the percentage will increase in 1992 to 20 percent of profits gained in 1990–1991, 35 percent in 1993, 50 percent in 1994, 80 percent in 1995, and 100 percent as of January 1, 1996.¹³³ Similar provisions are found in the Polish-West German treaty, along with some other treaties. Second, the 15 percent figure is only a minimum amount converted into hard currency, and individual banks may be able to negotiate a higher figure. The Polish Government is currently considering an amendment to the Joint Venture Law that would allow 100 percent repatriation of profits in hard currency.

VI. Ownership Problems

A. IN GENERAL

The old banking law insisted on a minimum 51 percent equity interest for the Polish partners-investors in banks with foreign capital participation.¹³⁴ The new law has no such requirement. This positive response to many western complaints was made in hopes of encouraging more foreign companies to participate. There is now no limit on the percentage of foreign ownership, which may thus be as high as 100 percent. Contrary to the joint venture law,¹³⁵ the banking law does not require a *minimum* ownership of 20 percent by the foreign investor.

A Polish legal entity that is a partner in a joint venture banking company and that contributes real property to the joint venture may contribute only the title to the land or other real property it legally possesses. Therefore, the first question is: Who is the owner of such property? Contributions of real property to a joint venture are treated differently according to whether the Polish partner is a state or private entity.

As a result, the Polish private partners—owners of the real property—may contribute such property to a joint venture. A joint venture acquires the ownership of such contributions. Additionally, an established joint venture may also

132. *Id.* art. 83, item 3.

133. Treaty Between the Republic of Poland and the United States of America Concerning Business and Economic Relations, Protocol No. 4, Mar. 21, 1990, [hereinafter Treaty] (pending official publication). The Treaty is subject to ratification. It will enter into force on the 30th day following the date of the exchange of instruments of ratification and shall remain in force for a period of ten years. *Id.* art. XIV. For commentary on the proposed treaty, see *In a Pact, Poland Opens Doors to U.S. Business*, N.Y. Times, Mar. 22, 1990, at A17, col. 1.

134. Banking Law of 1982, *supra* note 9.

135. Joint Venture Law, *supra* note 15, art. 2.

buy nonstate-owned real estate. If the foreign partner holds more than a 50 percent equity share in the joint venture, special permission from the Minister of Internal Affairs is required.¹³⁶

State-owned enterprises entering into joint venture agreements may not transfer property rights regarding their contributions made in the form of state real property. That is because they simply do not hold transferable property rights. However, state real property may be contributed in the form of a lease or a perpetual lease. According to the Polish Civil Code, unless otherwise agreed, the period of perpetual lease is set at forty to ninety-nine years.¹³⁷ The perpetual lease may be extended for the next ninety-nine years. In the case of a perpetual lease of state land, the state is obligated to buy back the buildings upon termination of the lease. These ownership rules create serious uncertainties for a foreign company¹³⁸ and will be subject to change as privatization continues.

B. FOREIGN CONTROLLED COMPANY (BANK) DEFINED

One of the important issues is to define "foreign controlled company" under the Polish law. The definition will have an impact on banks' abilities to acquire real property in Poland. Under Polish law, a "foreign controlled company" is a legal entity in which a foreign partner's equity share exceeds 50 percent.

C. CONTRIBUTIONS OF PARTNERS

The banking law does not specify the required percentage interests of each party (the value of each partner's contribution). The equity contribution of a Polish partner will be evaluated only in *zlotys* and other assets. General provisions about the nature of contributions should be included in the statute of the

136. *Ustawa z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców* (Law on Acquisition of Property by Foreigners), Journal of Laws 1983 No. 24, item 202; Journal of Laws 1988 No. 41, item 325 provides that "Foreigner according to that law is (1) natural person without Polish citizenship; (2) legal entity with the residence abroad; (3) legal person with the residence on the territory of Polish People's Republic controlled directly or indirectly by the persons mentioned in 1 & 2."

Article 46, sections 2(3) and 3 of the Joint Venture Law amended the Law on Acquisition of Property by Foreigners, states that a joint venture controlled by a foreign partner is treated as a foreign person in cases of property acquisition. Joint Venture Law, *supra* note 15, art. 46, §§ 2(3), 3.

137. *Ustawa z dnia 23 kwietnia 1964 r.—Kodeks Cywilny* (Civil Code), Journal of Laws 1964 No. 16, item 93, with later amendments art. 236, item 1.

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

bank. On the other hand, the Polish banking authorities require the minimum initial capital to be provided by foreign partners at the amount of at least \$6 million, and the minimum contribution of the Polish partners must be at least ten billion zlotys. These initial capital requirements will be adjusted by the Polish banking authorities according to inflation. Since its introduction on January 1, 1990, the exchange rate of the Polish zloty to the U.S. dollar has been stable. Indeed, the zloty has even gained in value compared to the dollar. The exchange rate is regulated by the CBP.¹³⁹ Other noncash contributions may be transferred from abroad or purchased for Polish currency obtained through exchange of hard currency at the same exchange rate as is used for cash contributions.

Great difficulty arises in attempting to put a market value on Polish contributions that are not frequently exchanged in the West, or that have no Western equivalents.¹⁴⁰ In order to avoid a situation where prospective partners may exploit the situation by way of their own evaluation of their contributions, it is advisable to submit such an evaluation for verification to a body of independent experts. There is a growing number of institutions and individuals with some experience in valuation of Polish assets.

D. PRIVATIZATION

The Polish banking law already provides a separate legal vehicle for changes in the ownership form of publicly owned banks. The state and state-cooperative banks can be transformed (by the decision of the Council of Ministers) into joint stock banking companies. The Minister of Finance is in charge of this process. A joint stock banking company formed in the place of a state bank may transfer its shares to private parties.¹⁴¹

The Polish economy is changing its structure with the introduction of the Law on Privatization of State-owned Enterprises, passed by Parliament after several months' debate. The privatization law, together with the Law on the Establishment of Ministry for Ownership Transformation, is intended to be a comprehensive privatization statute regarding state enterprises.

The privatization law provides the mechanism for nonbank enterprises to change their corporate form and structure. According to the authors of the new privatization law, the privatization process will be achieved in two steps. In the first step, state enterprises will take the form of wholly state-owned corporations with the State Treasury as the sole shareholder. In the second step, shares will be sold to private parties, domestic or foreign.

139. The fixed rate as established on Jan. 1, 1990 is \$1.00 to 9500 zlotys.

140. The problem of valuing contributions also has been a major problem in the USSR, China, and other Eastern European countries.

141. An example of a joint stock banking company is the Bank of Economic Initiatives (Bank Inicjatyw Gospodarczych). This banking institution came under private control by the transfer of shares to private shareholders.

The privatization path will be guided by all important branches of the government and the Parliament. Parliament is authorized to enact so-called "main directives" of privatization. The "main directives," which will be voted together with the state budget, will deal with the scope of the privatization and with the distribution of revenues collected from the sale of state enterprises. The Council of Ministers will prepare privatization plans before sending them to the Parliament for its acceptance. The Council of Ministers may list a special group of enterprises, subject to direct Council's permission for privatization. Although the list has not yet been prepared, this provision is intended to give the government the final say in the privatization of important public service enterprises (radio, TV, railroads, airlines, etc.), as well as those in the military sector.

The newly created Office of the Minister of Ownership Transformation will formulate privatization policy as well as administer the day-to-day privatization process. All decisions as to whether or not to privatize an enterprise (except those enterprises on the government's special list) must be approved by the Minister of Ownership Transformation. The Minister's authority may be assigned to selected individuals or firms. This provision may open the door for many Polish and foreign consultants to get involved in the privatization process. The Minister of Ownership Transformation (the Minister) replaces the Minister of Foreign Economic Cooperation as the supervisor of the Foreign Investment Agency, which is in charge of regulating foreign investment in Poland. In addition, the Council on Ownership Transformation attached to the Prime Minister's Office was established as a consultative body.

The privatization process may be introduced from the bottom (by the enterprise itself or its founding organ) or from the top (by compulsory transformation ordered by the Minister). Three bodies may initiate privatization of the state enterprise. First, the director of the state enterprise and the employees' council can file a joint application on behalf of the enterprise itself. Second, the founding organ of the enterprise can file an application with the consent of the director and employees' council. In both cases the decision on privatization is made by the Minister. If a particular state enterprise is on the government's restricted list, the Minister must obtain consent from the Council of Ministers. The Minister must reject a privatization plan outlined in an enterprise application within three months. Rejection must include an opinion stating conditions that, if fulfilled by the enterprise, would allow for the positive consideration of the privatization application in the future.

The privatization law also permits the Minister to initiate compulsory privatization. In such cases the Minister appeals directly to the Council of Ministers, which has the final authority to decide whether the enterprise should be privatized. The ministerial initiative does not require consent from the state enterprise that is to be privatized. The only requirement is a nonbinding opinion received from the director and the employees' council.

The Polish Government will depend on foreign investors for the successful completion of the privatization program.¹⁴² Up to ten percent of the shares of wholly state-owned corporations may be acquired by foreign investors without a special permit from the Foreign Investment Agency. Foreign investors may acquire more than ten percent of the initial offering with permission from the Foreign Investment Agency, subject to generally applicable rules. Once a stock exchange is established by the end of this year, shares of privatized companies may be freely acquired on the secondary market subject to the rules discussed above.

VII. Debt Conversion

The legal mechanism for debt conversion is discussed here because debt conversion is vital to the interests of many commercial banks and creditors of the Polish Government.¹⁴³ Debt conversion also influences the financial conditions of the Polish state, the rate of debt on the secondary market, and the general climate for foreign investment.

A. THE MECHANISM

Swaps transactions have been developed as a solution for both indebted countries and for banks. A special governmental agency called the Foreign Debt Service Fund has been created for this purpose.¹⁴⁴ Swaps may also allow foreign corporations to explore markets that would be otherwise excluded. At the same time, debt/equity swaps have become an attractive alternative to debt restructuring. Swaps allow creditors of large debtor nations to convert their debt holdings

142. The establishment of wholly state-owned corporations is intended to be only a temporary stage in the privatization process. Within a two-year period the Minister must offer the shares of state controlled corporations to the public. Only private investors may acquire shares. The Council of Ministers may postpone the two-year period in cases in which there is not sufficient public demand for the shares. Shares may be sold in the form of a subscription offer to the public, through special auctions organized by the Minister, and through direct negotiations with potential investors. Unsold shares may be transferred directly to banks for future distribution. In addition to banks, other financial institutions, such as holding companies and mutual funds, may be involved in the process of selling shares. Some British banks have been selected to assist in the privatization and valuation process. See Kawecki & Slupinski, *Emerging Stock Markets in Eastern Europe*, 23 INT'L FIN. L. REV. 23, 26 (1990).

143. Poland's debt amounts to over \$45 billion. Of this total, the Paris Club holds \$27 billion. The rest belongs to commercial banks, including \$350 million held by U.S. commercial banks. Poland has reached an agreement with its seventeen official creditor nations in the Paris Club to postpone \$9.5 billion of principal and interest payments over fourteen years, with an eight-year grace period. Polish debt is traded on secondary markets at a very low price (about 20 cents per one dollar of debt).

144. The Foreign Debt Service Fund (*Fundusz Obsługi Zadłużenie Zagranicznego*) is a governmental entity reporting to the Ministry of Finance (article 1 of the Statute) to deal with the Polish external debt. The Fund operates on the basis of its statute. It considers the swap proposals on a case-by-case basis.

into equity holdings (shares or equity in a company) in the debtor country. All swaps transactions must be approved by the Polish authorities.

In a direct swap the banks directly participate in swap transactions. A bank holding a large portfolio of Polish debt might apply to the Polish authorities for approval of the swap transaction. After the approval, the foreign bank is given the Polish currency at the discounted rate. The local currency might be used to purchase shares in a Polish company. The discounted rate given by the Polish Government would depend on the sector in which the investor is interested. Debt conversion transactions theoretically benefit all the parties. The bank retires a portion of its uncollectible foreign debt and can eventually decrease its loan-loss reserves. The investor obtains equity in the Polish entity that it otherwise would not be able to finance.

There are also costs imposed on all the partners for participating in such an operation. The mechanism may slightly reduce Poland's flexibility and may restrict the time period during which foreign investment may be liquidated and recouped. The same applies to the restrictions imposed on repatriation of capital and profits. The given amount of Polish currency forces the investor to make purchases in a local market that is not technologically advanced. At the same time, there are costs for the Polish nation. Conversion transactions may have a strong inflationary impact if the Polish Government prints additional currency for the redemption of the debt in a swap transaction. This impact is significant, since the major goal of the Polish economic program in the spring of 1990 was to bring inflation down. Swaps might accelerate the Polish Government's budgeted deficit.

B. LEGAL RULES FOR DEBT CONVERSION

The amendment to the joint venture law of December of 1989 responded to this increasingly popular alternative form to "restructuring debt." According to article 16, item 3 of the law, "the Minister of Finance, in agreement with the President of the Agency may permit a contribution of a foreign party made in Polish currency acquired under other titles . . . and in particular sale of the State's obligations to repay foreign credits."¹⁴⁵ Therefore, the contributions by a foreign partner might be made in Polish zlotys from the sale of the State's debt to repay foreign credits (debt-for-equity swaps). As stipulated in the law, these contributions can be arranged after receiving the appropriate permit from the Minister of Finance and the President of the Foreign Investment Agency.

C. PERSPECTIVES FOR SWAPS

Until now, the Polish Minister of Finance has not permitted any substantial debt-for-equity swap transactions. Although some small swaps have previously

¹⁴⁵ Joint Venture Law, *supra* note 15, art. 16, § 3.

taken place, according to Polish financial authorities no such deal has received the acceptance of the Minister of Finance in 1990. This is due to the macroeconomic policy of the Polish Government rather than legal restrictions. As emphasized by Polish authorities, the first task of the Polish state is debt reduction.

VIII. Creation of Policy Financial Markets

In order to create financial markets, the Polish Government has prepared a securities law.¹⁴⁶ Poland, in the past one year, has reformed the banking system and foreign investment and has adopted a privatization program. By doing so, Polish financial markets will become open to a wide range of potential new investors, domestic and foreign. This section presents an overview of the Polish financial market and recent reforms. The major aspect of the capital market rules are considered. The analysis is limited to one of law because of a lack of any substantial practice in the securities area at this point.

A. PRE-REFORM MARKETPLACE

Poland has had no financial market since World War II. Rules of corporate law governing the issuance of shares have been quite rigid and have not been used in practice. The rules have provided for the establishment of joint stock companies, the only corporate form allowed to issue stocks. The joint stock company is a legal vehicle for capitalization using a public subscription of shares. Until 1990, however, it was rarely used, as there were no stock exchanges or securities markets. In 1988, Poland issued its new law on bonds, which allowed companies to use debt as a means of capital increase. At the time, there were no financial institutions besides state controlled banks and insurance companies. As a result, there was no primary or secondary market.

B. THE RECENT REFORMS

The moving forces behind the recent reforms have been the political, monetary, and regulatory authorities. Market participants are just emerging. In order to achieve their goal of a new market, the Polish authorities have reformed several existing laws¹⁴⁷ and have created others.

C. CORPORATE REQUIREMENTS FOR SHARES AND BONDS

It is important to draw differences according to the class of securities issued. The issuance of shares by a joint stock company requires a resolution of the

146. *Ustawa o publicznym obrocie papierami wartosciowymi* (Securities Law), Journal of Laws 1990.

147. Banking Law, *supra* note 16; Corporate Tax Law, *supra* note 104; Joint Venture Law, *supra* note 15.

shareholders' meeting and compliance with the formalities and requirements provided in general terms for amendments to bylaws. Until passage of the securities law a corporation was not required to register in order to issue stocks. The only requirements were those listed in the Commercial Code. According to the securities law, however, registration with the Securities and Exchange Commission (KPW) will now be required. Shares must have a nominal value, which may not be less than 10,000 zlotys. Corporate law allows issuance of many categories of shares such as (1) bearer and registered; (2) paid-in-cash-and-in-kind; and (3) common and preferred. The statute of the corporation should determine the issue in question. A foreign company or a joint venture with a foreign partner may issue only registered shares.¹⁴⁸ Polish corporate law does not allow nonvoting shares to be issued.

The first attempts to incorporate bonds into the centrally controlled economy in 1985 and 1986 failed. According to regulations passed at that time, only state-owned enterprises were allowed to issue bonds. Adopted in 1988, the law on bonds¹⁴⁹ allowed all legal entities, social organizations, and city councils, as well as foundations conducting business activities, to issue bonds. When a company uses external financing to raise long-term funds, it frequently uses bonds and long-term notes to finance its requirements for fixed capital. From the viewpoint of both issuers and potential bond investors, areas of concern should include the maturity date, the income and asset claims, and possible voting privileges. A bond is a written promise to pay the holder a specific sum of money after a provided term following issuance. The Polish law on bonds defines a bond as:

commercial paper in which the issuer declares that it is the debtor of the bond owner (creditor) and promises to pay an amount of money and interest according to the conditions and terms specified in the bond.¹⁵⁰

Bonds are usually thought of as long-term credit instruments with maturities of five to fifteen years.¹⁵¹ A bond contains a promise to pay interest.¹⁵² In addition, issuers may promise to deliver to the holder payments in kind or by way of other services.¹⁵³ The latest provision was in response to the critical situation in the economy at the time the law was adopted where services or final products operated as better inducements than monetary compensation. The State Treasury bonds issued in 1989 may be used as payment against taxes. A corporation may issue either bearer bonds, which are payable to the bearer, or registered bonds, which are promises to pay to those names registered in the books of the corporation.¹⁵⁴ Like a stock certificate, a registered bond has the name of the owner

148. Joint Venture Law, *supra* note 15, art. 16, item 7.

149. Law on Bonds, *supra* note 24.

150. *Id.* art. 3.

151. *Id.* art. 12, § 1.

152. *Id.* art. 11, § 1.

153. *Id.* art. 4, § 1.

154. *Id.* art. 8.

on its face.¹⁵⁵ The value of a corporate bond with interest may not exceed 50 percent of the stated capital of the corporation (20 percent of the anticipated annual income of a city council).¹⁵⁶ However, corporations may issue bonds on the value exceeding their stated capital if a guarantee from banks and other financial institutions is assured for the amount of bonds exceeding the value of the stated capital. A resolution of a shareholders' meeting is required to issue corporate bonds. In addition, the required prospectus for a public offering must be submitted to the KPW. Public offerings are to be traded openly on the Warsaw Stock Exchange. The reforms that have taken place in connection with the bonds are intended to create an active bond market and are part of a general reform of the stock exchange.

D. STOCK EXCHANGE

One stock exchange is to be created in Warsaw. Other regional centers are to be created in the near future. Therefore, the Warsaw Stock Exchange will be a regional exchange for Warsaw area companies, as well as a national exchange for the largest Polish corporations. A Warsaw Stock Exchange is to be organized in the form of a wholly-owned State Treasury corporation. It will be a not-for-profit corporation. The stock exchange will be governed by a separate Stock Exchange Act and its charter. A joint stock corporation operating the stock exchange will be privatized, and shares will be sold to dealers. The stock exchange will issue rules detailing the operation of the stock exchange.

E. REGULATORY AUTHORITIES

Three agencies are involved with the regulation of transactions on securities: the Ministry of Finance; the Securities and Exchange Commission; and the Stockbrokers' Association.

1. *Ministry of Finance*

The Ministry of Finance is responsible for promulgation and implementation of the foreign exchange and banking control regulations. A separate office within the Ministry of Finance will be responsible for regulating financial markets, in particular, securities.

2. *The Securities and Exchange Commission* (Komisja Papierow Wartosciowych)

The Securities and Exchange Commission (KPW) is to be created by the securities law. The internal structure of the KPW is based on the statute granted by the Prime Minister. The Commissioner of the KPW will have the status of

155. *Id.* art. 13, § 1(5).

156. *Id.* art. 5, § 1(1).

central governmental agency. The Commissioner is appointed by the Prime Minister for a five-year period. A Council of Capital Markets and Securities (*Rada Rynku Papierów Wartościowych*) acts as a consultative body to the Commissioner. The KPW has the authority to (1) ensure the quality of information made available to owners of listed securities and to the general public; (2) supervise the proper functioning of securities exchanges and all players involved in trading securities; (3) provide regulatory rules regarding securities as authorized by the parliamentary statutes; (4) supervise other forms of investments offered to the general public; and (5) promote and educate concerning securities. The KPW may also submit to the Council of Ministers proposals for new regulations on financial markets. To ensure the fulfillment of the above-mentioned goals, the KPW is vested with the following powers:

- (i) the review of applications and the granting of permission to issue publicly traded securities;
- (ii) the licensing of stockbrokers;
- (iii) the investigation of all issues concerning violation of security rules; and
- (iv) the application of sanctions in order to enforce compliance with security rules.

The decisions of the KPW are subject to judicial review by the Supreme Administrative Court. It is expected that the KPW's decisions will be published in order to establish a commonly followed practice.

3. *The Stockbrokers' Association (Izba Handlowa Maklerów Papierów Wartościowych)*

The Stockbrokers' Association operates according to the Law on Chambers of Commerce.¹⁵⁷ In Poland, dealers, brokers, and investment advisors (*maklerzy papierów wartościowych*) are considered both as traders and as individuals invested by the State with a public office. For this reason they are licensed by the KPW. The KPW will issue separate rules regarding both professions. The professions will be strongly regulated with limited access, compulsory commission rates, and a major privilege, which will be reviewed later, namely, a monopoly of most transactions involving listed securities.

All Polish stockbrokers must be members of the Stockbrokers' Association, which appoints its delegate to the KPW. Together with the KPW and the Ministry of Finance, the Stockbrokers' Association is the third regulatory authority involved with securities exchanges. It supervises stockbrokers, whom it can sanction, and manages the profession's ethical rules. It is also vested with authority in respect to the organization of securities exchange markets. In particular, the Stockbrokers' Association:

¹⁵⁷ *Ustawa z dnia 30 maja 1989 r. o izbach gospodarczych* (Law on Chambers of Commerce), Journal of Laws 1989 No. 35, item 195.

- (1) makes recommendations to the KPW in respect of listing and delisting of securities on the stock exchanges and decides (without recourse to the KPW) on registrations of brokers;
- (2) initiates the motions to the KPW to suspend brokers who violate the rules of behavior;
- (3) determines whether a particular purchase should be viewed as resulting in a transfer of a controlling interest, in which case minority shareholders must be offered an opportunity to sell;
- (4) proposes the brokers' commissions; and
- (5) establishes the local stock exchanges.

Banks (Polish and foreign) may be brokers or dealers if they employ qualified personnel. They must establish a subsidiary, which may engage in securities trading. Foreign persons who act as dealers or advisors in securities transactions, including persons who deal as principals as well as agents, must be licensed by the KPW. In order to become licensed, dealers and advisors must comply with a variety of requirements directed to ensuring the probity and competence of the registrant, including tests as to minimum capitalization, residence, and training. No foreign securities dealer may trade in Poland without a license. Foreign licenses will be respected on a reciprocity basis. They must be registered with the KPW.

F. PUBLIC OFFERINGS OF SECURITIES

All forms of public trading (*obrót publiczny*) of securities are subject to securities rules. Pursuant to the Commercial Code these companies must be joint stock companies. They must make special announcements, particularly prior to shareholders' meetings, and must fall within the jurisdiction of the KPW. Any issuer must file reports with the KPW that contain financial statements, descriptions of the issuer's business activities, outstanding securities, and other information required by the KPW. Although clearly not as demanding as U.S. regulations, Polish statutory law and the KPW will intend over the years to develop extensive informational requirements imposed on certain companies deemed to have become public.

When the application to issue stock is made by the issuer, certain publications have to be made, and the issuer submits prospectuses thereof to the KPW. The role of the KPW is essentially to review prospectuses to assure that the disclosures comply with statutory requirements. Securities of governmental issuers, other than the government and the NBP, are not automatically guaranteed by the State Treasury. They are subject to the same disclosure requirements as private issuers.

In order to develop the securities market, establishment of a special, so-called secondary market (*rynek wtórny*) is planned. The secondary market will be aimed at companies tending towards a full listing. Contrary to alternatives available for the KPW, only the company itself will be able to ask to have its shares

traded on this market. Listing procedures will be regulated by the KPW. The issuer will have to file its latest annual report, its interim reports, and an offering statement with the KPW. The issuer will be given a certain time to meet accounting standards required of listed companies. The KPW will carefully review the quality of information given, the audit of accounts procedures, and the degree of diffusion of the security among the public, as well as the level of transactions. The secondary market is intended to be developed as the privatization of State-owned enterprises progresses.

G. LISTING PROCEDURE

The decision to list a particular security is vested in the KPW and calls for the following formalities. Companies have to submit a file to the KPW. The contents of the file to be submitted and of the proposed prospectus (*prospekty*) will probably give rise to various KPW instructions. An audit has to be carried out in accordance with special procedures defined by the Minister of Finance and the KPW. The audit is reviewed by the KPW, whose main concern is that the issuer should have reached an advanced stage in its own development and that its results and prospectus are good. The KPW examines the application and proposed prospectus and decides whether or not to list the securities in question. Poland hopes to coordinate these formalities with the EEC Council directives relating to listing requirements and the contents and diffusion of the prospectus.

The securities law does not deal directly with the matter of foreign issuers seeking to be listed on a stock exchange in Poland. It leaves it to the discretion of the KPW to determine the conditions. The basic requirement is that a foreign issuer must be of a certain minimum size.

H. INFORMATION REQUIREMENTS

All public offerings of securities, including listings, must be preceded by publication and diffusion of descriptive documents, which have to be approved by the KPW. The same is required in case of tender offers, both of the tender and of the target company. The required document is a detailed prospectus (*prospekty*) intended essentially for the financial market and sophisticated investors but presented in an easy-to-read manner and intended to give the general public essential information. Normally a prospectus must include, *inter alia*, information on the following:

- (1) the name and the place of the publication where the statute was promulgated;
- (2) the date, the number of the receipt, and the court with which the statute has been published;
- (3) the number of shares authorized to be issued, including information about the rights and preferences of such shares;
- (4) the nominal value and the initial price of the shares;

- (5) the place of subscription and the dates of its opening and closure;
- (6) the size, value, and dates of payments that should be made prior to the company's registration and the consequences of the failure to pay installments by definite deadlines;
- (7) the principles of allocating shares to the subscribers;
- (8) the deadline to which the subscriber shall be bound by its pledge, if by that deadline the company has not been entered for the registration; and
- (9) the persons announcing the subscription to shares. Additionally there must be information on:
- (10) contributions in kind and the propriety interests and the rights acquired prior to the company's registration, mentioning the contributing and selling person, the subject of the contribution and acquisition, and the kind and form of payment;
- (11) the different benefits derived from different shares; and
- (12) any mandatory services to the company except payment of amounts due for shares.

The KPW carefully reviews these documents and discusses them with the issuer's management board and auditors, under whose responsibility they are published. Naturally, approval of these documents by the KPW does not imply any judgment as to the merits of the investment; approval merely means that the information given appears adequate for a potential investor to reach an informed decision.

Apart from information required when a company makes a public offering, listed companies are required to bring to the attention of the public, through press releases, any event that may have an effect on the price of its securities as soon as confidentiality is no longer necessary to ensure the success of the underlying transaction or as soon as there is a risk that the information may be used by insiders. Whenever such facts have come to light, the KPW has used all its moral authority to have offenders prosecuted and sanctioned. For the time being, it is unclear if sanctions will be as high as the law authorizes, but it is likely that the trend will be towards greater severity, since almost everyone feels strongly that prohibition of insider trading is a prerequisite of an efficient market.

Another handicap lies in the existing regulations relating to foreign investments that become a major issue whenever a foreigner wishes to acquire over 20 percent of a Polish listed company. It is likely that, while these regulations will not be eliminated in the near future, they will be further adapted to the specific needs of listed securities. There is in any event little doubt that the present government is dedicated to continue liberalizing the economy and opening it up to the world in a manner worthy of a nation aspiring to be classified as a European industrial nation. One can therefore expect that the Polish securities markets will have an activity fully commensurate with the size of Polish industry.¹⁵⁸

158. Kawecki & Slupinski, *supra* note 142, at 27.

IX. Protection of Foreign Investors

Doing business in Poland has been a hazardous undertaking in the past. Now, in light of political, economic, and legal changes, it is a much safer activity. The strong commitment of the new Polish Government to reform the system towards an open-market economy is the best evidence of the political safety of foreign investments in Poland. Poland is dedicated to creating an hospitable environment for foreign investment. The problems are a result of the lack of cultural and business day-to-day experience in dealing with foreign investors, rather than a signal of premeditated maneuvers against foreign capital. In addition, legal protection of foreign investors is rapidly developing.

A. FOREIGN INVESTMENT LAW

Although the political situation and business climate have changed, it would be very useful to offer foreign investors even more guarantees than those provided by the joint venture law. The Minister of Finance, upon the application of a foreign shareholder, issues a compensation payment guaranteed to an amount equal to the value of the company's assets due it in the event of a loss resulting from a decision of any state authorities in respect to nationalization or expropriation or from other actions having a result similar to that of nationalization or expropriation.¹⁵⁹

The interpretation of this article and the procedures for making a claim against the Minister of Finance in a court seem to be unclear. However, in response to concerns regarding the protection of foreign investments, the Polish Government has now proposed an explicit guarantee to be included in the amended joint venture law that foreign investments will not be expropriated. Given the government interpretation regarding joint venture law versus banking law, this provision *will not* be applicable to banks. Foreign banks may, however, apply directly to the Minister of Finance for such guarantees during the negotiation of a permit.

B. CONSTITUTIONAL PROTECTION

The Polish Constitution includes no specific guarantees for foreign investors. A foreign investment in Poland, no matter whether in the form of a direct investment or a joint venture, is a Polish legal entity, established under Polish law. As such, the foreign bank is protected against expropriation of private property by the Polish Constitution. Specifically, a constitutional amendment passed on December 29, 1989, pronounces that the "Polish state protects prop-

159. Joint Venture Law, *supra* note 15, art. 22(6).

erty and guarantees full private property. Expropriation is permitted only for a public purpose and for just compensation."¹⁶⁰

C. OTHER POLITICAL INSURANCE PROGRAMS

It is commonly accepted practice in the international business community to insure investments in less developed countries or in countries with short histories of safe foreign investment environments. There are many possible sources of political risk insurance: (1) the national agencies (OPIC for U.S. investors); (2) the Multilateral Investment Guarantees Agency (MIGA) for investors from MIGA members States; and (3) private insurers. Also, bilateral investment protection agreements provide certain safeguards, but not insurance.

The SEED Act¹⁶¹ authorizes OPIC to support projects in Poland. On October 13, 1989, Poland signed an agreement¹⁶² with OPIC, and U.S. investors are now able to obtain insurance against "insurable" risks. At this point, OPIC has a number of projects under consideration.

MIGA is a member of the World Bank group and offers coverage against all major political risks for up to fifteen years in amounts of up to \$50 million per risk. MIGA began issuing coverage in December 1989. MIGA coverage is available to nationals of MIGA's member countries.¹⁶³ In 1989 Poland signed a MIGA Convention—a move made to enhance the confidence of foreign investors in the security of their Polish investments. Poland is in the process of paying a subscription fee.

Private insurers are not burdened with eligibility or project criteria. The leading U.S. insurers are AIG and CITI, a subsidiary of Citicorp. Lloyd's is the largest British insurer, and the Paris Pool of thirteen companies known as P.A.R.I.S. is the other major source.

Currently, Poland has bilateral agreements on protection and promotion of foreign investments with Austria, Belgium, China, Great Britain, France, Italy, the Federal Republic of Germany, Sweden, Switzerland, the Republic of Korea, and the United States. Poland's recently negotiated investment/commercial treaty with the United States provides national treatment, expropriation rules, dispute resolutions, market access, and investment proceedings.¹⁶⁴

160. CONSTITUTION OF POLISH REPUBLIC art. 7, amended by *Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej* (Law on Constitutional Amendment), *Journal of Laws* 1989 No. 75, § 444.

161. Support for East European Democracy (SEED) Act of 1989, 22 U.S.C. § 5401 (1989).

162. 28 I.L.M. 1393 Investment Guaranty Agreement, done Oct. 13, 1989, Poland-United States (1989).

163. Currently ninety States have signed the Convention Establishing the Multilateral Investment Guarantee Agency, done Oct. 11, 1985, 24 I.L.M. 1605 (1985).

164. See Treaty, *supra* note 133.

X. Conclusions

The climate for the operation of foreign banks has improved significantly in Poland. Growing confidence in the Polish Government and its economic reform program can be readily observed. During the last six months roughly thirty-five Polish private banks, one foreign bank, and some new representative offices of foreign banks have been formed. Although the numbers may look small compared to the more than 1,000 existing joint venture companies,¹⁶⁵ a new trend is clear. A number of projects regarding foreign banks, their branches, and representative offices are under negotiation. In general, Poland is opening up to international financial centers, and foreign banks may be an excellent vehicle to achieve this goal. Indications are that many major foreign banks are taking careful steps by first establishing representative offices and observing the development of the situation in Poland before they invest freely with larger amounts of capital.

Since many of the issues relating to the potential success of a foreign bank are not addressed by the law, foreign banks have leverage for tough bargaining in negotiations over a joint venture contract. In general, Poland is becoming more accommodating to Western banks' concerns. A number of business consulting agencies (local and foreign), accounting firms, and law firms are providing information for foreign banks that are potential investors. The use of these constantly growing resources is strongly encouraged. Based on the author's knowledge of these rapidly developing services, the choice should be made very carefully, favoring institutions with strong human resources and having Polish business consultants, accountants, or lawyers. It is inevitable that because of the lack of experience of Polish banking staffs and financial authorities there will be a continuing trial-and-error process with respect to foreign banks; however, the positive changes in the economy and the political processes should provide for continuing and stable improvements over time.

165. The data was taken from the Material on Doing Business in Poland (prepared by the Office of Eastern Europe and the Soviet Affairs, U.S. Dep't of Comm., for the Symposium on Doing Business in Eastern Europe and the Soviet Union on Apr. 1, 1990).