

1993

Poland

Recommended Citation

Poland, 27 INT'L L. 228 (1993)

<https://scholar.smu.edu/til/vol27/iss1/15>

This Current Developments is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

the five-year professional experience requirement for admission as a foreign legal consultant. In general, however, the committee suggested that other U.S. jurisdictions use the New York rules as a model.

While the status of U.S. attorneys practicing in Germany remains unclear, the German bar chambers have taken a rather liberal position and tolerated the active presence of U.S. practitioners in Germany.

Poland*

The signing ceremony of the Europe Agreement (the Agreement) “[e]stablishing an association between the European Communities and their Member States . . . and the Republic of Poland” that took place in Brussels on December 16, 1991, marks an unprecedented milestone in the political and legal landscape of Poland. The significance of the Agreement was illustrated during the course of a tempestuous ratification debate in the Polish Parliament.¹ In addition to the numerous voices endorsing the provisions laid down in the Agreement, some contradictory opinions emerged. In particular, some members expressed concern over the decline of the notion of the traditional nation-state that would arise from the ratification of the Agreement. Opponents questioned the implications of Poland’s integration into the European Communities. This process requires compliance with the Brussels principles with regard to economic development, as well as the acceptance of the dominant political value system that prevails in the twelve countries, with no room for a unique Polish way of national advancement. However, the characteristic features of the dispute between the parliamentary majority supporting ratification of the Agreement and the parliamentary minority perceiving ratification as a threat to sovereignty and a reinforcement of liberal tendencies indicate that the conflict is purely political in nature, and does not center on the particular economic strategies. The economic provisions of the Agreement were largely excluded from the political dispute, and the latter provisions in the Agreement provisions seem to be generally acceptable.

*Prepared by Dr. Cezary Banasiński, Department of Law and Administration, Warsaw University.

1. Both the Polish Sejm (on June 4, 1992) and the Senate (on June 25, 1992) ratified the Europe Agreement. The Agreement was ratified by the President of the Republic of Poland, Lech Walesa, on August 13, 1992. See *Dziennik Ustaw [Dz.U.] [Journal of Laws] No. 60, item 302*. Having approved the Europe Agreement, the Sejm at the same time obligated the Polish Government to present before November 30, 1992, the program to adjust the national economy to the requirements arising from the economic provisions of the Agreement. Again, in the field of approximation of legislation, the Sejm obligated the government to present before January 30, 1993, a similar program for the harmonization of Polish laws to the European legislation.

The Association Agreement between the European Communities and Poland and analogous agreements between the Community and Hungary, as well as Czechoslovakia, belong to the category of so-called Europe Agreements. These Agreements represent the expression of policy that calls for widening the Community parallel to the process of European integration at large. Europe Agreements constitute a novelty in the treaty-making practice of the Communities. The respective agreements depart significantly, in their content, from the previous association agreements concluded with Greece (1961), Turkey (1963), Malta (1970), and Cyprus (1972).

The Agreement completed with Poland establishes an association between Poland and all of the three Communities: the European Economic Community (EEC), the European Atomic Energy Community, and the European Coal and Steel Community. Moreover, the Agreement supersedes preceding association agreements, specifically the provisions concerning political dialogue (arts. 2-5), approximation of laws (arts. 68-70), and cultural cooperation (arts. 94).

The substantive scope of the Agreement covers three groups of undertakings.

The first group refers to economic cooperation. Provisions cover the promotion of trade expansion and harmonious economic relations between the Contracting Parties as a means to foster dynamic sustainable economic development in Poland, and at the same time outline the Community's financial and technical assistance to Poland.² These provisions are typical for agreements establishing an association between third parties and the Community. Therefore, the substantive scope of the Agreement rests upon notions adopted in the Treaty of Rome. The latter applies, in particular, to principles of trade liberalization and movement of capital. The Agreement contains, *inter alia*, the principle of free movement of goods, capital, and services, as well as freedom of establishment for companies, their branches and agencies, on the grounds of national treatment. Moreover, the Agreement envisions harmonizing antitrust and antidumping laws, principles for awarding public contracts, as well as approximation of laws in the area of labor law and security systems for workers.

The Agreement does not enact a custom union, as was the case in the EEC's association agreements with Turkey or Greece, but does establish a free trade area, pursuant to the meaning of article 24 of GATT. Founding a custom union would lead towards abolishing tariffs between the Contracting Parties, as well as towards the establishment of a single tariff barrier in relations with third parties. However, in accordance with the premises of the free trade area, the Agreement restricts the possibility of a unilateral policy of Polish markets by means of protectionist administrative instruments. Once the ratification of the Agreement is

2. Due to the long ratification process of the Agreement, on December 16, 1991, the Contracting Parties concluded and signed the Interim Agreement covering economic aspects of the Association Agreement, which shall be binding on the parties until the Europe Agreement enters into force. The ratification process is expected to be concluded on the part of the Communities by January 1, 1993.

concluded, no new instruments, to the effect described above, shall be introduced except under extraordinary measures. As stipulated in the Agreement, these measures shall be only for a limited duration and shall take the form of increased custom duties that may only apply to infant industries, and certain sectors undergoing restructuring or facing serious difficulties producing negative social problems (such as high level of unemployment). The increased custom duties may not exceed the level of 25 percent of custom value of an imported commodity. However, the total value of imports of the products from the EEC, which are subject to the protectionist custom duties, may not exceed 15 percent of total imports of industrial products over the course of the preceding year. The application of these protectionist instruments may be exercised for a period not exceeding the first five years from the entry into force of the Agreement. Once this period is over, any applications of the respective safeguard measures may only be authorized by the Association Council.

The second group of undertakings of the Agreement is designed to provide the institutional framework for the political dialogue that will permit the development of close political relations between Poland and the Communities. It refers, in particular, to the Communities' capacity within the political domain, as defined in the Treaty of Rome, including its amendments provided by the Single European Act. The respective political domain represents, along with economic cooperation, another stage of European integration.

The objectives of the second group of undertakings reflect the general tendency towards increasing the significance of political cooperation within the Communities, constituting an important element of the European identity-building process. The incorporation of the objective of achieving "close political relations," as prescribed in the Agreement, goes far beyond the substantive scope of association agreements as defined by article 238 of the Treaty of Rome. According to the preamble to the Agreement, the respective political dialogue shall cover "bilateral and international issues of mutual interest" for the Contracting Parties. Such an approach explicitly indicates the correlation between the respective political dialogue and the foreign policy of both Poland and the Communities. In fact, it is precisely the realm of political dialogue that would serve as a platform for expressing Poland's political determination to integrate into the European Communities.

The third category of undertakings stipulated in the Agreement deals with the establishment of a legal framework to facilitate Poland's gradual integration into the Community. This objective is autonomous in nature. Poland declares as its ultimate goal of integration the status of a Member State of the Communities. The respective intent explicitly derives from the preamble to the Agreement: "[r]ecognizing that fact that the final objective of Poland is to become a member of the Community and that this association . . . will help to achieve this objective." No specially enumerated provisions of the Agreement relate to this objective. The establishment of an association and implementation of its objectives, in

particular the implementation of the provisions in the area of economic cooperation as envisioned in Title VI, serve to that effect. The Agreement applies, first of all, to the domain of industrial cooperation (art. 72), investment promotion and protection (art. 73), cooperation in science and technology (art. 74–78), as well as cooperation in the nuclear sector, environment (art. 79–80), transport (art. 81), telecommunications (art. 82), banking, insurance, and financial services and monetary policy (art. 83–84). Moreover, the problems of countering drug trafficking and money laundering have been incorporated into the area of economic cooperation.

Nevertheless, the harmonization of Polish legislation to that of the Community constitutes the most important platform of cooperation between the Contracting Parties. The harmonization aims to abolish all barriers related to economic relations between the Parties, and to the establishment of a cohesive set of principles to which the relations may evolve. These objectives are explicitly reflected in article 68 of the Agreement, according to which “[t]he Contracting Parties recognize that the major precondition for Poland’s economic integration into the Community is the harmonization of that country’s existing and future legislation with that of the Community.” However, article 68 does not compel the Polish legislature with respect to the priorities and the speed of the harmonization process. The requirement to use “best endeavor” in the area of harmonization, while providing some sense of urgency, does not command any actions taken by the Polish legislature in that respect. Furthermore, Poland is given the exclusive right to specify the course of events in respect to harmonization, the methods of its application, and most important, to determine the priorities in this process.

In accordance with the Legislation Council opinion assisting the Prime Minister, priority shall be given to those statutory areas of laws that are essential for transformation of the country’s economy.³ In particular, the Council refers to legislation regulating the legal status and operations of participants in the marketplace, as well as to legislation addressing the principles of economic relations, including those in the agriculture area. The transformation requires modifications of the general principles of Polish civil law, particularly with respect to the conclusion and the execution of agreements, including their default provisions. Furthermore, it shall be extended to the area of Polish private international law, addressing the principles of governing law for contracts, civil procedures, and international arbitration. The harmonization process should urgently cover some of the aspects of labor law, including protection of workers at the workplace, social security, the legal status of workers who are nationals of a Member State, as well as problems relevant to the protection of health and the environment. Subject to a variety of changes, the harmonization process shall reflect the objectives of the Contracting Parties during the subsequent stages of integration. Over

3. Unpublished opinion.

the course of the first stage of integration, harmonization shall reach the level of conforming Polish laws to the prescribed European standards, leaving, however, the choice of form and methods to the Polish authorities. The achievement of such a "unity in diversity" will satisfy, at the initial stage, the conduct of relatively harmonized cooperation with respect to legal relations. The harmonization of laws will be required at each stage of integration, in particular, in those sectors being implemented together by both parties.

Both the preamble and article I provide the general principles of the Agreement that are specified in the subsequent provisions therein. The respective general principles establish the construction *pacta de negotiando*, which impose on the part of the Communities an obligation to conduct in the future, and in the manner of good faith, negotiations with Poland for her admission to the Communities as a full Member State, provided that, in the process of implementation of the Agreement, Poland "work towards fulfilling the necessary conditions." At the same time, the Agreement shall establish the institutional premises in order to facilitate the feasibility of Poland's membership in the Communities.

Therefore, the aspiration to obtain the status of a Member State of the Communities presents the ultimate and sole Polish objective, but curiously does not correspond with the objectives of both parties. The latter was confirmed by the Commission of the EEC, which officially informed the European Parliament that the Europe Agreements should not be perceived as a pledge of future membership. As a direct implication of such an approach, the Agreement does not envision either a time framework for the accession of Poland to the Communities, nor the conditions of such an accession.

The Europe Agreement was concluded for an indefinite duration. At the same time, however, the gradual process of establishing a free trade area over the course of a transition period is envisioned. The transition period is designed for a maximum duration of ten years, implying a shorter duration. The transition period is divided into two successive stages, each in principle lasting five years. These time limits are nonbinding. The duration of each of the individual periods will depend upon the assessment of achievements Poland is expected to accomplish, both with respect to the reality of economic transformation and to the degree of integration into the Community. By virtue of the Agreement, the two-stage division does not apply to the provisions related to the free movement of goods (Title III).

The Europe Agreement institutionalizes the cooperation of the Contracting Parties, and therefore, founds the institutions serving the supervision of the application of the Agreement. Namely, an Association Council is set up. The Council has the power to make decisions in the cases provided for therein, to make appropriate recommendations, as well as to settle the disputes by means of a decision (arts. 101-105). Moreover, the Agreement envisions the establishment of both an Associated Council and an Association Parliamentary Committee (arts. 106-109).