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# NOTES & COMMENTS

## POLAND, HUNGARY, AND THE CZECH AND SLOVAK FEDERAL REPUBLIC: AN EXAMINATION OF THE EVOLVING LEGAL FRAMEWORK FOR FOREIGN INVESTMENT

Charles M. Cole\*

### INTRODUCTION

Poland, Hungary, and the Czech and Slovak Federal Republic (CSFR) have emerged as the most promising Eastern European locations for foreign investment.<sup>1</sup> This is due, in part, to the countries' geographic advantages,<sup>2</sup> but a more important factor is the aggressive attitude of the people<sup>3</sup> and of their governments toward economic and political reform.<sup>4</sup> This resolve, despite high inflation<sup>5</sup> and escalating un-

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1. See *Investment In Eastern Europe; Less Talk, More Action Please*, THE ECONOMIST, Feb. 16, 1991, at 54 (identifying Poland, Hungary, and the Czech and Slovak Federal Republic (CSFR) as the recipients of the majority of investments in the region, due to their political stability and genuine commitment to economic reform).

2. See *Catalysts, Not Saviors, Business in Eastern Europe*, at 24, 25, in *A Survey of Business in Eastern Europe: Don't Give Up Now*, THE ECONOMIST, Sept. 21, 1991, at 64 [hereinafter *Catalysts*] (describing Eastern Europe's attractiveness as a gateway to the immense Soviet market).

3. See Wierzbowski, *Eastern Europe: Observations and Investment Strategies*, 24 VAND. J. TRANSNAT'L L. 385, 386 (1991) (contrasting the attitudes toward reform in these three countries with attitudes in other Eastern European countries, and citing overwhelming rejection of communists in free elections in Poland, Hungary, and the CSFR compared with freely-elected communist majorities in the other nations).

4. *Id.* at 385. There is a sharp distinction between the goals and methods of the reform process in these three nations from the goals and methods in the other Eastern European nations. *Id.* Poland, Hungary, and the CSFR seek to eliminate all vestiges of their communist systems, develop full-fledged market economies, and join the European Economic Community by the turn of the century, whereas the other Eastern European nations seek to introduce free market elements to their economies, and to attract some foreign investment, but appear unwilling to completely abandon their old ways. *Id.*



employment,<sup>6</sup> has provided enough social and political stability to attract the attention of foreign investors. Continued stability and enactment of ever more liberal investment laws are necessary to convert this attention into capital investments.<sup>7</sup>

Each of these countries has taken a different approach to the problem of transforming centrally-planned economies into free market systems by implementing laws intended to facilitate foreign investment in order to spur economic growth. These privatization and investment laws continue to evolve as these Eastern European states struggle to reform their economies.<sup>8</sup>

This Comment examines the current investment climate in the CSFR, Hungary, and Poland through an analysis of the elements and implications of their rapidly changing laws. Parts I, II, and III of this Comment focus on the CSFR, Hungary, and Poland, respectively. Each Part analyzes current laws governing the following areas: the formation of Foreign Joint Ventures (FJVs);<sup>9</sup> the multitude of license and permit requirements; the protection of the investments of foreigners; the complications arising from the conversion of currency; the repatriation of profits earned by foreigners; tax incentives and other related tax issues; and the conversion of State Owned Enterprises (SOEs) into private companies and private assets—a process which must occur before a foreign investor may purchase or invest in a company in these nations.<sup>10</sup> Part IV of this Comment identifies the most progressive posi-

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5. See *Tomorrow, Business In Eastern Europe*, at 3, 4, in *A Survey of Business in Eastern Europe: Don't Give Up Now*, THE ECONOMIST, Sept. 21, 1991, at 64 [hereinafter *Business in Eastern Europe*] (discussing the high inflation that continues to plague Eastern Europe).

6. *Id.* at 4.

7. See *Catalysts*, *supra* note 2, at 24-28 (describing the uncertainties and bureaucratic roadblocks which have created confusion and hesitancy among the throng of anxious but uncommitted foreign investors in Eastern Europe). Foreign investment is seen as a necessary catalyst to the transition to a market economy. *Id.* A recent study estimates that, in order for per capita income in the Eastern European nations to catch up to levels in EC countries, Eastern Europe will require investments equal to \$420 billion annually for a decade. *Id.* This represents two-thirds of current gross national product. *Id.*

8. See, e.g., *infra* notes 161, 169, 190 (citing three Polish foreign investment laws enacted in less than three years).

9. See BLACK'S LAW DICTIONARY 753 (5th ed. 1979) (defining the term "joint venture" as an association of persons jointly undertaking some commercial enterprise). In an international or foreign joint venture, at least one of the partners is from a country that is foreign to the country of the target market. Jesse, *International Joint Ventures*, C536 A.L.I.-A.B.A., July 9, 1990, at 403.

10. See *Business in Eastern Europe*, *supra* note 5, at 5 (discussing the importance and difficulties of converting state-owned enterprises into private companies). Although Eastern Europe is highly industrialized, economic growth will not be achieved without a massive move toward private ownership. *Id.* Western economists have produced many



tion taken in each of the areas discussed, which, in most cases, is that taken by Hungary in its foreign investment regime. The Comment concludes with a call for acceleration of the privatization of state-owned assets in these countries in order to release the force of private ownership in the process of reforming their economies.

## I. CZECHOSLOVAKIA

The CSFR has taken a slower approach to the transition to a market economy<sup>11</sup> than have Poland and Hungary.<sup>12</sup> Nevertheless, the CSFR is committed to a comprehensive free-market reform program which is well underway.<sup>13</sup>

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useful ideas, but they have also confirmed that there is no single route to privatization on such a large scale. *Id.* The current state-owned system does not adequately match the right people to the right jobs. *Id.* Employees and managers of state-owned companies have very little incentive to improve the efficiency of their companies. *Id.* at 10. They are assured of employment and obtain no benefits from improved profitability. *Id.*

11. See 1 BUSINESS VENTURES IN EASTERN EUROPE AND THE SOVIET UNION: THE EMERGING LEGAL FRAMEWORK FOR FOREIGN INVESTMENT (P-H) § 5.01 at 5-3 (1990) [hereinafter BUSINESS VENTURES] (commenting on the CSFR's unique path toward economic reform). The CSFR's communist government was more rigid and centralized than those of other Eastern European nations, and it fell more quickly. *Id.* As a result, there was no gradual loosening of economic control before the "velvet revolution," and no well-organized opposition ready to implement change. *Id.* In addition, socialist the CSFR had achieved tolerable living standards, so the desire to reform lacked the urgency of Poland's reform program. *Id.*

12. See Comment, *Perestroika in Eastern Europe: Four New Joint Venture Laws in 1989*, 20 LAW & POL'Y INT'L BUS. 1, 20 (discussing joint ventures in the CSFR). The CSFR's joint venture laws are not as far reaching as those of Poland and Hungary. *Id.* The principal reason for the CSFR's hesitancy is resistance by Czech officials to embrace the new reforms taking place in Eastern Europe. *Id.* *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND J. TRANSNAT'L L. 305, 306 (1991). The slow pace in the CSFR is due to the rapidity of political reform in 1989. BUSINESS VENTURES, *supra* note 11, § 5.01 at 5-3. Unlike neighboring nations which were experiencing devastating economic crises, the CSFR achieved political reforms without prolonged demonstrations. *Id.* Lacking the economic urgency of other Eastern European nations, the CSFR has chosen to pursue a path toward economic reform which is as smooth and painless as possible. *Id.* Unlike Poland and Hungary, the CSFR has not yet established a stock market. *Catch-22, Business in Eastern Europe*, 5, 9, in *A Survey of Business in Eastern Europe: Don't Give Up Now*, THE ECONOMIST, Sept. 21, 1991, at 64 [hereinafter *Catch-22*].

13. See BUSINESS VENTURES, *supra* note 11, § 5.01 at 5-4 to 5-5 (listing major steps toward economic reform, including price liberalization, commencement of a privatization program, and limited convertibility of the Czechoslovakian currency).



## A. PERMIT REQUIREMENTS FOR ESTABLISHING A FJV

The CSFR's Foreign Investment Act<sup>14</sup> states that, prior to formation, all FJVs must receive authorization from the Federal Ministry of Finance (FMOF),<sup>15</sup> which, in turn, consults with the Ministry of Finance, Prices, and Wages of the republic in which the state-owned enterprise is located.<sup>16</sup> The 1990 amendment to the Foreign Investment Act greatly simplified the process of obtaining approval.<sup>17</sup> Applications to establish a FJV, however, must still include the following information: (1) the name, seat, legal form and purpose of the proposed FJV;<sup>18</sup> (2) the name, seat, and occupation of investors;<sup>19</sup> and (3) the initial capitalization, share distribution, hard currency resources, and reserve fund deposit<sup>20</sup> of the proposed FJV. If more than one person participates in establishing the enterprise, a draft of the entity's bylaws and a memorandum of agreement must accompany the authorization application.<sup>21</sup>

Approval or denial of the application must occur within sixty days of submission.<sup>22</sup> Approvals are readily granted,<sup>23</sup> and serve to authorize activities which require licenses from the agencies which reviewed the

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14. The Enterprise With Foreign Property Participation Act of 1988, *as amended* by Collection of Laws, Act No. 112/1990 (Czech. 1990), *translated in* BUSINESS VENTURES, *supra* note 11, at app. C-1.1 [hereinafter Czech Foreign Investment Act].

15. *Id.* at art. 5.

16. *Id.* The Czech and Slovak Federative Republic consists of two separate republics which are analogous to our own states. All investors should be aware of the need to observe relevant republic laws in addition to federal laws. *See* BUSINESS VENTURES, *supra* note 11, § 5.02(b)(2)-(3) at 5-16 (describing the roles of the national and republic governments in the review and approval of privatization plans).

17. Klein, Holec and Henzlova, *Act on the Enterprise with Foreign Property Participation, Czechoslovak Chamber of Commerce and Industry*, art. 6 (revised version, 1990), *reprinted in* BUSINESS VENTURES, *supra* note 11, at app. C-1(1) [hereinafter *Investment Commentary*]. The amended act eliminated a burdensome requirement that applications for joint ventures include a feasibility study and permitted foreigners to make the applications directly, without going through a Czechoslovakian citizen. *Id.* at app. C-1(1), comments .12 -.13.

18. Czech Foreign Investment Act, *supra* note 14, at art. 6(1)(a).

19. *Id.* at art. 6(1)(b).

20. *See id.* at art. 12 (mandating the formation of a reserve fund equal to ten percent of the initial capitalization of all enterprises, and requiring annual contributions to the fund of at least five percent of after-tax profits until the reserve requirement is satisfied, with an unspecified portion of the fund consisting of hard currency).

21. *Id.* at art. 6(2).

22. *Id.* at art. 7(3).

23. *Id.* at art. 7(1). Because the Foreign Investment Act only requires that the proposed FJV have the *hope* of benefiting the Czechoslovakian economy, the government may only withhold approval when a proposed venture has no hope of benefiting the economy, (emphasis added). *Id.* Article 7(2) states that authorizations will not be granted for entities proposing to engage in industries vital to the security and defense of the CSFR. *Id.* at art. 7(2).



application.<sup>24</sup> Unlike the Polish investment law, governmental failure to act on an application within the statutory period will not result in automatic approval,<sup>25</sup> but the law does permit appeal of denials.<sup>26</sup>

## B. PROTECTION FROM EXPROPRIATION OF INVESTMENTS

The Foreign Investment Act states that FJVs may be expropriated<sup>27</sup> in accordance with Czechoslovakian law,<sup>28</sup> which prohibits expropriation unless it is necessary for serious public reasons, and when less restrictive alternatives do not exist.<sup>29</sup> If expropriation does occur, the owner is entitled to compensation for the actual value of the loss.<sup>30</sup> United States investors enjoy additional protections through a bilateral investment treaty<sup>31</sup> and a recent trade agreement between the United States and the CSFR.<sup>32</sup>

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24. Article 8 provides:

An authorization granted to the prospective enterprise under Article 5 hereof shall substitute all authorizations necessary for the respective type of economic activity under specific rules of law, provided the authorizations under Article 5 hereof is [sic] granted by an authority who has the power to grant such authorizations to engage in said economic activities and the authorized type of economic activity of the enterprise covers up [sic] such activities.

*Id.*

This provision eliminates the need to deal with the same agency more than once, and is indicative of the new law's broader goal of facilitating the investment process. *Investment Commentary*, *supra* note 17, at C-1(1).<sup>14</sup>

25. New Polish Investment Law, *infra* note 175, at art. 18.

26. See BUSINESS VENTURES, *supra* note 11, § 5.03(a), at 5-25 to 5-26 (discussing the effect of the appeal provision in art. 7(3) of the Czech Foreign Investment Act). Although the denial may be appealed, there is doubt as to the likelihood of relief given the vague guidelines for administrative and judicial review. *Id.*

27. Czech Foreign Investment Act, *supra* note 14, at art. 22(1). The communist governments of Eastern Europe originally obtained possession of companies and property by taking assets from foreign and domestic owners during the late 1940s and early 1950s. See BUSINESS VENTURES, *supra* note 11, at § 5.02 (describing the difficulty in determining ownership of property confiscated by the government forty years ago). Given this history of expropriation, it is important that the new democratic governments construct safeguards against the expropriation of new investments.

28. Czech Foreign Investment Act, *supra* note 14, at art. 22, § 1.

29. *Id.* See also *Investment Commentary*, *supra* note 17, at art. 22 (commenting on the Czech Foreign Investment Act).

30. Czech Foreign Investment Act, *supra* note 14, at art. 22, § 2. The law permits the voluntary conversion and repatriation of the proceeds from the expropriation settlement. *Id.* See *infra* notes 33-40 and accompanying text (noting that the CSFR has designated requirements for currency convertibility).

31. Investment Incentive Agreement, Oct. 18, 1990, United States-Czechoslovakia (entered into force upon signing in Prague, Oct. 18, 1990).

32. Agreement on Trade Relations, Apr. 12, 1990, United States-Czechoslovakia, art. V, § 12, reprinted in BUSINESS VENTURES, *supra* note 11, app. at C-12. The agreement provides protection from unreasonable impairment of property rights. *Id.*



### C. CURRENCY CONVERTIBILITY

The CSFR enacted a new law on currency convertibility in November 1990.<sup>33</sup> Prior to the new law, FJVs were required to sell thirty percent of all hard currency<sup>34</sup> earnings to the state.<sup>35</sup> The new law requires the conversion<sup>36</sup> of all hard currency earnings into Czechoslovakian korunas.<sup>37</sup> FJVs, however, may obtain permits which allow them to convert their korunas into hard currency in order to pay hard currency obligations.<sup>38</sup> The government determines the official rate of conversion.<sup>39</sup> The net cost of selling, then buying back hard currency is approximately two percent, based on the differential between the selling and purchasing rate.<sup>40</sup>

### D. REPATRIATION OF PROFITS AND WAGES

The CSFR no longer limits repatriation<sup>41</sup> of profits and gains from sale or liquidations to the amount of hard currency reserves that an

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33. Act on Foreign Exchange, Collection of Laws, Act No. 528/1990 (1990), reprinted in *BUSINESS VENTURES*, *supra* note 11 app. at C-6 [hereinafter Czech Foreign Exchange Act].

34. See R. FOLSOM, M. GORDON, J. SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS* 782 (2d ed. 1991) (discussing currency exchange controls). Hard currency is currency of a country which is traded openly in securities markets. Consequently, the exchange rates for hard currencies are based on supply and demand. This ensures that a holder of the hard currency will be able to easily trade it for the currency of another country. Thus, the holder of hard currency faces fewer risks from inflation and devaluation. The currencies of these Eastern European countries cannot be freely traded in security exchanges and, thus, are not hard currencies.

35. Arbess, *Czechoslovakia Opens for Business*, *FIN. TIMES*, Mar. 7, 1991, at 33 [hereinafter *Arbess*].

36. Czech Foreign Exchange Act, *supra* note 33, at art. 11.

37. *BUSINESS VENTURES*, *supra* note 11, at 5-1 n.1. Korunas are the Czechoslovakian unit of currency. *Id.*

38. Czech Foreign Exchange Act, *supra* note 33, at art. 13. The Act fails to specify the types of obligations that qualify for the conversion provision, but, most likely, purchases of component parts and manufacturing equipment would be included. Repatriation of profits are covered by the free conversion provision. See *infra* notes 42-43 and accompanying text (explaining that the CSFR allows repatriation of all profits under the Foreign Exchange Act).

39. Czech Foreign Exchange Act, *supra* note 33, at art. 13(2).

40. See *Arbess*, *supra* note 35, at 33 (finding that the rate in February 1991 was about two percent). Investors should be aware of this small additional cost, especially if their business would require frequent conversions from hard currency to korunas and back again.

41. *Catch-22*, *supra* note 12, at 5. Because the currencies of Eastern European countries are not fully convertible, the governments can monitor and control all transactions involving the conversion of their currency into a foreign or hard currency through state-owned banks. See *id.* (indicating that the currencies of Poland, the CSFR, and Hungary are not fully convertible). Governments use this control to build up their own supplies of hard currency in order to pay foreign debts and purchase foreign products. See *id.* (explaining that foreign debt and trade deficits deplete the



FJV maintains in separate foreign currency accounts.<sup>42</sup> Repatriation of profits qualifies as one of the "foreign currency obligations" under the terms of the Foreign Exchange Act, permitting investors to convert and repatriate all profits.<sup>43</sup> The Foreign Exchange Act requires foreign employees of FJVs to convert any hard currency holdings in excess of 5,000 korunas.<sup>44</sup> The Foreign Investment Act, however, assures free repatriation of after-tax wages, plus the cost of social insurance, if the employee does not wish to pay for Czechoslovakian social insurance programs.<sup>45</sup>

#### E. TAX ISSUES

Tax incentives and reduced tax rates encourage investment by providing a type of subsidy which serves to make foreign investment activity more profitable.<sup>46</sup> The domestic economy may benefit through increased investment, or may suffer under the cost of subsidizing marginal investments, depending upon the taxation strategy chosen.<sup>47</sup>

Critics contend that the Czechoslovakian tax system is both complex and exorbitant.<sup>48</sup> The annual tax rate for domestic companies starts at fifty-five percent and can reach ninety percent.<sup>49</sup> These rates also apply to FJVs with less than thirty percent foreign ownership.<sup>50</sup> Taxes on

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government's foreign-exchange reserves). Foreigners must convert their currency into korunas at a government-owned bank, prior to investing in a domestic company. Until recently, most Eastern European nations made it very difficult for foreign investors to convert their profits back into dollars in order to bring their profits back to the United States. *Id.*

42. Czech Foreign Investment Act, *supra* note 14, art. 20. The Czech Foreign Exchange Act supersedes article 20 of the Czech Foreign Investment Act, which required that the company's foreign exchange reserve provide the source for repatriation currency. *Id.*

43. Czech Foreign Exchange Act, *supra* note 33, at art. 13, § 1. See State Bank of Czechoslovakia Announcement No. 15 on Transfers of Income from Non Resident Investments in CSFR, Jan. 3, 1991, §§ 1-4 (demonstrating the Czech Foreign Exchange Act's impact upon repatriation). Previously, the CSFR permitted FJVs to hold seventy percent of their foreign currency earnings in separate hard currency accounts. See *Arbess*, *supra* note 35, at 33 (stating that the CSFR required FJVs to exchange thirty percent of their foreign currency earnings for korunas). FJVs were permitted to use these funds to repatriate profits or purchase foreign equipment. *Id.* Now, however, the FJVs can only maintain foreign currency reserves equal to their initial hard currency capital contributions. *Id.*

44. Czech Foreign Exchange Act, *supra* note 33, at art. 17(1).

45. Czech Foreign Investment Act, *supra* note 14, at art. 21(1)-(2).

46. B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 3.6 (1981).

47. *Id.*

48. BUSINESS VENTURES, *supra* note 11, at § 5.09.

49. *Id.*

50. *Id.* at § 5.09[a]. The CSFR imposed the thirty percent requirement in response to abuses of the FJV tax incentives. *Id.* Many domestic companies obtained nominal



FJVs with greater than thirty percent foreign ownership are twenty percent on the first 200,000 korunas and forty percent thereafter.<sup>51</sup> Both foreign and domestic investors are subject to a tax of fifty percent on net surplus after liquidation.<sup>52</sup> A foreign investor's distributed earnings are subject to a twenty-five percent withholding tax<sup>53</sup> which applies whether or not the investor repatriates the income.<sup>54</sup>

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foreign investment in order to qualify for the reduced rates applicable to FJVs, thus depriving the government of tax revenues while not proportionately increasing foreign investment in the CSFR. *Id.* at § 5.09.

51. *Id.*

52. *Id.*

53. *Id.* at § 5.09(d). The CSFR has not entered into a tax treaty with the United States, although one is sought. *Id.* Consequently, American investors are subject to double taxation on distributed profits. See Roin, *The Grand Illusion: A Neutral System for the Taxation of International Transactions*, 75 VA. L. REV. 919, 923 (1989) [hereinafter Roin] (outlining a neutral system for taxation of international transactions). The United States reserves the right to tax its resident and nonresident citizens on income earned in any foreign country. *Id.* Similarly, the CSFR has the right to tax profits earned by foreigners within the CSFR. *Id.* Double taxation has a stifling effect on international investment. *Id.* at 924. International investment would be less attractive than a similar domestic investment if both countries were to tax the same amount of income. *Id.* Under bilateral tax treaties, nations agree to reduce their respective tax rates on international income in order to ensure that the total tax bill to the individual is representative of the normal tax bills for domestic earnings. *The Organization for Economic Cooperation and Development Model Double Taxation Convention on Income and Capital*, [1 Tax Treaties] Fed. Taxes (P-H) ¶ 1017 (1977). Typically, this limits a host country's tax rate to five or fifteen percent of the income earned inside that country. *Id.* at art. 10, ¶ 2(a)(b). The nation of citizenship is free to tax income, but must deduct the taxes paid to the foreign nation. *Id.* at art. 11(2). Thus, the investor incurs the same tax liability that he would have in a domestic investment. *Id.*

The United States recognizes the benefits of encouraging residents to earn income abroad, namely increased income from overseas investments and increased employment through the sale of American goods abroad. Roin, 75 VA. L. REV. at 920. Though the United States should encourage overseas investment, there are drawbacks resulting from the expatriation of capital that accompany overseas investment. *Id.* at 920-21. When investors build factories in other nations, existing American factories lose access to capital and must contend with increased foreign competition. *Id.* This can catastrophically affect American industry and jobs. *Id.* The United States believes it should encourage American investors to make all investment decisions based on the underlying merits of each opportunity, rather than in anticipation of government subsidies. *Id.* This strategy allows investors to take advantage of truly profitable opportunities, and avoids the subsidization of otherwise unattractive investments in foreign ventures that compete with American companies and workers. *Id.* Such an objective is accomplished by a system of tax neutrality. *Id.* at 922. Tax neutrality seeks to equalize tax liabilities associated with foreign and domestic earnings. *Id.* The United States grants investors a tax credit for every dollar paid in taxes to foreign governments on income derived from foreign investment, up to the amount that the United States would tax on the same earnings. *Id.*

54. BUSINESS VENTURES, *supra* note 11, at § 5.09(d).



## F. PRIVATIZATION OF STATE-OWNED ENTERPRISES

The CSFR has taken a bifurcated approach to the privatization of its 125,000 state-owned enterprises (SOEs),<sup>55</sup> enacting two separate laws which segregate SOEs into "large" and "small" enterprises.<sup>56</sup> These laws provide very different mechanisms and procedures for the transformation of large and small companies.<sup>57</sup>

Under the terms of the Large Privatization Law, each company has the authority to initiate and develop its own privatization plan.<sup>58</sup> The plan must include a proposed schedule, specify all assets to be privatized,<sup>59</sup> and describe how the state acquired the assets.<sup>60</sup> The company must submit the plan listing all interested investors<sup>61</sup> to the State Property Agency (SPA).<sup>62</sup>

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55. See Glick & Richter, *Legal Framework for Privatization in Czechoslovakia*, 19 INT'L BUS. LAW. 353, 353 (1991) [hereinafter Glick & Richter] (detailing the institutional, administrative, and legal aspects of the Czechoslovakian privatization process).

56. Compare Act on the Conditions of Transfer of State Property to Other Persons, (Feb. 26, 1991), reprinted in Central & Eastern European Legal Texts (1991), as translated by the United States Dept. of Commerce, [hereinafter Czech Large Privatization Law] (leaving the identification of large companies to the government) with Law on Transfers of State Property with regard to Some Objects to Other Legal or Physical Persons, (Feb. 18, 1991), as translated by the United States Dept. of Commerce, reprinted in Central and Eastern European Legal Texts (1990) [hereinafter Czech Small Privatization Law].

57. *Id.*

58. See Czech Large Privatization Law, *supra* note 56, at art. 7, § 2 (contending that the state-owned enterprise should initiate most privatizations). In addition, article 7 permits the "founder" or the "person different from enterprise" to develop a plan, as long as he consults with the "enterprise." *Id.* The term "founder" refers to the recently-established State Property Agency, which acts as an impartial, business-oriented intermediary between the government and the SOEs. BUSINESS VENTURES, *supra* note 11, at § 5.02(b). The initiation of privatizations by "persons different from enterprise" appears to permit the hostile takeover of SOEs. See Czech Large Privatization Law, *supra* note 56, at art. 7, § 2 (discussing privatization).

59. Czech Large Privatization Law, *supra* note 56, at art. 6, § 1(a). See *id.* at art. 6(c) (requiring the specification of all nonperforming or useless assets).

60. See *id.* at art. 6, § 1(b) (requiring data regarding the state's acquisition of private property). This information is essential to the CSFR's comprehensive restitution program, which will return property confiscated by the government after February 25, 1948, to its former owners. Law on Extrajudicial Rehabilitation (Feb. 22, 1991), reprinted in National Technical Information Services of The United States Department of Commerce (1991) [hereinafter Law on Extrajudicial Rehabilitation]. The privatization plan must fully describe a method for settling all restitution claims. Czech Large Privatization Law, *supra* note 56, at art. 6, § 1.

61. See generally, Czech Large Privatization Law, *supra* note 56. Although, the term "interested investors" is not defined, this phrase appears intended to discourage managers from negotiating self-serving deals in the privatization process. *Id.*

62. See Czech Large Privatization Law, *supra* note 56, at art. 8, § 1 (discussing State Property Agency). The term "founder" was left without a precise definition in anticipation of legislation establishing a State Property Agency to act as an indepen-



The SPA evaluates the plan, makes recommendations, and submits the plan to the Federal Ministry of Finance,<sup>63</sup> or the appropriate republic agency, for approval and implementation of the privatization.<sup>64</sup> If the plan provides for the sale of the company without a public auction or competitive bidding, it is forwarded to the federal or republic government for final approval.<sup>65</sup> When final approval is granted, the government terminates<sup>66</sup> the SOE and transfers the designated assets to a state-owned holding "fund."<sup>67</sup> Three funds retain these assets on behalf of the federal and the republican governments.<sup>68</sup> Citizens may purchase shares of the funds through the use of vouchers, pursuant to the terms of the firm's privatization plan pertaining to the issuance of vouchers.<sup>69</sup>

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dent intermediary between the federal government and the SOE in the privatization process. *Id.* The term "founder" also refers to the equivalent agencies in the respective republics for privatizations under republic authority. *Id.*

63. *Id.* at art. 8, § 1(a).

64. *Id.* at art. 10, § 1. The law provides no basis from which to determine whether the federal or republic SPA has jurisdiction over a particular privatization. *Id.* Article 42, however, requires the division of the proceeds from the liquidation of a company's assets or from the sale of the company between the respective governments on a predetermined basis. *Id.* at art. 42, § 2. This division of proceeds demonstrates the deference shown to the republic governments by the federal government. *See id.* at art. 10 §§ (a), (b) (granting the appropriate republic authority the power of approval if the federal government lacks jurisdiction). Thus, if a jurisdictional question were to arise, the SPA of each government would most likely become involved. *Id.*

65. *Id.* at art. 10, § 3. While the SPA is a government agency, it acts as an independent intermediary. BUSINESS VENTURES, *supra* note 11, § 5.02(b)(3), at 5-17. This independent status allows for objectivity and, thus, serves to prevent delays by entrenched bureaucrats, and allows decisions to be made on the basis of sound business judgment, rather than on political considerations.

66. Czech Large Privatization Law, *supra* note 56, at art. 11, § 1. The "termination" of a company refers to its cessation of status as a separate entity.

67. *Id.* at art. 11, §§ 1, 2. These government-owned funds are a hybrid of a regulatory agency, an investment bank, and a municipal fund. *Id.* In some cases they simply oversee the process, in other cases they take control of shares or of the company itself. *Id.* at arts. 11-42.

68. *Id.* at art. 11.

69. *See generally* Glick & Richter, *supra* note 55, at 353 (describing the voucher system). Drafts of the Czech Large Privatization Law originally contemplated that all eligible citizens would receive the right to purchase vouchers for a nominal fee. *Id.* The vouchers allowed eligible citizens to purchase shares of the privatized companies. *Id.* This concept provided for the availability of forty to sixty percent of the shares of privatized companies through the use of these vouchers. *Id.* The state would apportion another twenty to thirty percent of the shares among individuals seeking to settle restitution claims of former owners. *Id.* The state would retain ten percent of the shares. *Id.* Due to the failure to reach a consensus on the specifics of the voucher system, the Act has left final resolution of the distribution of ownership up to the federal and republican governments. *Id.*



The federal and republic funds may sell the privatized property by contract or through public auctions.<sup>70</sup> Upon acceptance of the high bid, purchasers obtain ownership of the assets as well as all rights or obligations specified in the privatization plan.<sup>71</sup> A contract between the company and purchaser provides the only means by which to transfer intellectual property rights.<sup>72</sup>

While the Czechoslovakian government has announced its intent to privatize fifty large firms under the formal structure of the Large Privatization Law,<sup>73</sup> it is likely that the CSFR will continue to pursue additional privatizations through direct negotiations on an ad hoc basis.<sup>74</sup>

#### G. PRIVATIZATION OF SMALL FIRMS

The second prong of the CSFR's privatization program is the Small Privatization Law (SPL),<sup>75</sup> which provides the framework for the privatization of 120,000 of the CSFR's 125,000 SOEs.<sup>76</sup> Unlike the large privatization program, the SPL will not require small state-owned companies to undergo transformation before private owners take control; the government will not retain ownership in the privatized companies, nor issue vouchers to citizens.<sup>77</sup>

While the Large Privatization Law invites foreign investors to participate in the privatization and purchase of SOEs, the Small Privatiza-

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70. See Czech Large Privatization Law, *supra* note 56, at art. 14, § 1 (discussing how the funds accomplish the sale of private property).

71. *Id.* at art. 15, § 1.

72. *Id.* at art. 6. The purchase of company shares does not provide a shareholder with the right to personal use of intellectual property. *Id.* The development and protection of intellectual property law in Eastern Europe is vital to the attainment of advanced technologies.

73. Frankel, *Czechs Head West to Pitch Privatization of Industries: Officials Go to London in Search of Investors*, Wash. Post, June 14, 1991, at A23. This first wave of large privatizations is intended to raise \$1.5 billion in 1991, and another \$3 billion in 1992. *Id.* The following industries are among those targeted for privatization: chemical, construction equipment, paper, textile, electronics, and metals processing. *Id.*

74. See Glick & Richter, *supra* note 55, at 354 (noting ongoing individually-negotiated sales during and after the enactment of this law).

75. See Law on Transfers of State Property with Regard to Some Objects to Other Legal or Physical Persons (Oct. 25, 1990), reprinted in BUSINESS VENTURES, *supra* note 11, app. c-5 [hereinafter 1990 Czech Small Privatization Law] (discussing the Czechoslovakian law relating to the privatization process for small companies). The law does not explain how to determine what law applies to a given company. *Id.* The government of the respective republic designates the small companies and initiates the privatization process. *Id.* at art. 4, § 3.

76. Glick & Richter, *supra* note 55, at 353.

77. See 1990 Czech Small Privatization Law, *supra* note 75, arts. 4-12 (providing for the privatization of small companies by direct sale to investors at government held public auctions).



tion Law precludes foreign investors from any involvement in the initial purchase of small SOEs, unless no Czechoslovakian citizen is willing to pay an adequate price.<sup>78</sup> Under the SPL, the republics must publicly announce the sale of small firms at least thirty days in advance.<sup>79</sup> The sale must take place at an impartial public auction.<sup>80</sup> During the first auction of a small SOE, only Czechoslovakian citizens may bid.<sup>81</sup> If no Czechoslovakians purchase the SOE, it is auctioned a second time and open for bid from all interested buyers.<sup>82</sup>

In order to bid on a company, a prospective buyer must deposit the higher of 10,000 korunas<sup>83</sup> or ten percent of the opening price.<sup>84</sup> Losing bidders are refunded all but 1,000 korunas, which constitutes the bidding fee.<sup>85</sup> The winning bidder is deemed to take possession and control of the assets once the bid is accepted,<sup>86</sup> and is guaranteed continuation of existing leases for at least two years after purchase.<sup>87</sup> A Czechoslovakian who purchases a small SOE is not permitted to sell it to a foreign investor within two years of the sale.<sup>88</sup> Foreign investors are entitled to purchase the SOE after the expiration of the two year period, or if the firm was sold to a Czechoslovakian in its second appearance at

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78. 1990 Czech Small Privatization Law, *supra* note 75, at art. 13, §§ 1-3.

79. *Id.* at art. 4, § 6.

80. *Id.* at art. 6. *But see* art. 16 (granting the right of first refusal to persons who have operated existing small SOEs since October 1, 1990). The right of first refusal allows operators of existing state-owned companies to circumvent the bidding process and purchase their shops for the opening bid price, which is set at the estimated value of the company's assets. *Id.* at arts. 8, 16. Thus, if a company's true market value is higher than that of its assets due to its high earnings potential, operators who purchase for asset value will receive a windfall.

81. *See id.* at art. 3 (stating that only Czech or Slovak citizens, or persons who became Czech citizens after February 25, 1948, may own small companies).

82. *See id.* at art. 3 (precluding foreigners from gaining control of the small companies). *See also id.* at art. 13 (permitting foreigners to purchase a small company if no Czechoslovakians are willing to pay the value of the firm's assets at the initial auction).

83. 1990 Czech Small Privatization Law, *supra* note 75, at art. 5, § 1. This amount is equivalent to approximately \$330 at current exchange rates. *See Czechoslovakia - Country Marketing Plan, in National Trade Data Bank Market Reports*, ch. II(a)(4) (describing Czechoslovakia's monetary policy, and providing the current exchange rate).

84. 1990 Czech Small Privatization Law, *supra* note 75, at art. 5. An evaluation of the assets of the small SOE determines the starting bid price. *Id.* at art. 8.

85. *Id.* at art. 5.

86. *Id.* at art. 12, § 1.

87. *Id.* at art. 15. Conflicting claims of the ownership of property confiscated by the communist government has made both leases and property sales extremely difficult and risky to negotiate. Glick & Richter, *supra* note 55, at 355. The Czechoslovakian government hopes to establish clear title to all property within two years through its restitution program. *Id.* *See* Law on Extrajudicial Rehabilitation, *supra* note 60 (describing the restitution program).

88. 1990 Czech Small Privatization Law, *supra* note 75, at art. 17, § 1.



auction.<sup>89</sup> Money generated by the sale of these companies is deposited into accounts used to settle restitution claims of former owners of firms nationalized after 1948.<sup>90</sup>

The first auction of small SOEs took place in January 1991. Most considered the auction a success, as the small SOEs sold for ten times their starting bid price.<sup>91</sup> As the best shops are sold off, however, and available capital is consumed, sales of less-desirable assets may prove less profitable.<sup>92</sup>

The CSFR's implementation of this privatization and foreign investment regime has been slow.<sup>93</sup> Despite the privatization of more than 6,000 small shops, less than two percent of the GNP is produced by privately-owned businesses.<sup>94</sup> Furthermore, large firm privatization is not scheduled to begin until 1992.<sup>95</sup> The lack of an operating stock market is likely to discourage investments by many foreigners who prefer shorter-term investments.<sup>96</sup>

## II. HUNGARY

Due to its long experience with a mixture of communism and capitalism,<sup>97</sup> Hungary was a step ahead of its neighbors when reforms swept Eastern Europe in 1989.<sup>98</sup> While its reformist legislation parallels that of Poland and the CSFR, Hungary possesses more of the busi-

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89. *Id.*

90. *Id.* at art. 20, § 1-2.

91. See Glick & Richter, *supra* note 55, at 354 (asserting that Czechoslovakian officials did not expect the demand for small SOEs to exceed supply).

92. See *id.* (predicting that bids for small SOEs will decrease as capital for acquisitions is depleted).

93. See *Catch-22*, *supra* note 12, at 9 (anticipating a slow transformation to a free market).

94. See *id.* (stating that trade barriers remain in the form of high tariffs on imports that compete with Czech goods).

95. See Glick & Richter, *supra* note 55, at 354 (predicting the sale of large SOEs in 1991).

96. See *Catch-22*, *supra* note 12, at 9 (noting that the CSFR has not agreed to a stock market plan).

97. See BUSINESS VENTURES, *supra* note 11, at § 3.01 (observing that Hungary's blend of capitalism and communism became widely known as "Goulash communism"). Hungary has experimented with market-driven economic reforms since the late 1960s. See *id.* (concluding that Hungary intended to make a gradual move to a free market economy). Other reforms introduced in Hungary prior to 1989 include: the market pricing of goods; the elimination of central planning in many sectors of the economy; and the introduction of a system for autonomous self-management in state-owned companies. See *id.* (asserting that Hungary utilized diverse and extensive techniques to reform markets).

98. See *Catch-22*, *supra* note 12, at 9 (indicating that Hungary had always led the Soviet bloc in reformation efforts under communism).



ness framework necessary to support a market economy.<sup>99</sup> As a result, Hungary has attracted more direct foreign investment than either Poland or the CSFR.<sup>100</sup>

#### A. PERMIT REQUIREMENTS FOR ESTABLISHING A FJV

Hungary's FJV approval requirements are the most liberal in Eastern Europe.<sup>101</sup> The 1990 amendment to the Hungarian Investment Act of 1988<sup>102</sup> eliminated the need to obtain governmental approval to establish a FJV,<sup>103</sup> even when the JV is one hundred percent foreign owned.<sup>104</sup> The FJV must meet standard incorporation requirements,<sup>105</sup> however, and must register with the Court of Firms within thirty days of adoption of its articles of incorporation.<sup>106</sup> Promoters are also subject

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99. See *id.* at 9 (declaring that Hungary's longstanding leading position in economic reform is evinced by its well-established stock market and the fact that the private sector already generates one-third of GNP). Hungary began to decentralize the economic decision-making process in the early 1980s. As a result, Hungary has a small corps of managers with exposure to profit and efficiency considerations in the production and investment decision-making process. *Owners Are The Only Answer*, 10 in *A Survey of Business In Eastern Europe*, THE ECONOMIST, Sept. 21, 1991, at 64.

100. *Catch-22*, *supra* note 12, at 9. Hungary has attracted more than \$1 billion in investment to date. *Id.*

101. See BUSINESS VENTURES, *supra* note 11, at § 3.04 (providing an overview of Hungary's foreign investment regime, and concluding that, while concerns remain, Hungary's foreign investment climate is the most liberal in Eastern Europe). Compare Unified Text of Act XXIV of 1988 Regarding Investments by Non-Residents in Hungary With Subsequent Amendments and Supplements, *reprinted in Newsletter Hungary*, No. 1/1991 [hereinafter Hungarian Investment Act] (setting forth the Hungarian investment requirements) with Czech Foreign Investment Act, *supra* note 14, at arts. 5 & 6 (describing the CSFR's Foreign Investment Law, which simplified the process for obtaining permits for all FJVs) and New Polish Investment Law, *infra* note 175 (indicating that Polish law still requires permits for certain sectors).

102. Hungarian Investment Act, *supra* note 101.

103. R. JOHNSON, INVESTMENT GUIDE TO HUNGARY 12-13 (1991) [hereinafter JOHNSON]. Prior to the amendment, any company with majority foreign ownership was required to obtain a joint license from the Ministry of Finance and the Ministry of International Economic Relations. *Id.* The amendment does not require approval prior to the establishment of a company with foreign ownership. *Id.*

104. See Hungarian Investment Act, *supra* note 101, at § 3 (mandating the establishment of FJVs in accordance with the organizational provisions of Act VI of 1988 on Economic Associations). This Act applies to both domestic and foreign corporations in Hungary. *Id.*

105. Act VI of 1988 on Economic Associations, *reprinted in THE HUNGARY HANDBOOK* §§ 19-27 (Vencor Publishing Co. 1990) [hereinafter Company Act].

106. *Id.* at § 23(1). There is a registration fee equal to two percent of the FJV's capital, with a minimum charge of five thousand forints and a maximum charge of six thousand forints. See JOHNSON, *supra* note 103, at 13 (noting that there is also a ten thousand forint fee for listing the company in the official register).



to unlimited personal liability for any activities commenced prior to registration.<sup>107</sup>

#### B. PROTECTION AGAINST EXPROPRIATION OF INVESTMENTS

The Hungarian Investment Act provides "complete protection and security" for foreign investors in Hungary.<sup>108</sup> The Act requires full and immediate repayment of losses resulting from nationalization, expropriation, or any measure having similar consequences.<sup>109</sup> In addition to the protections contained in the Unified Foreign Investment Act, the bilateral investment treaty between Hungary and the United States protects American investors against impairment of contractual rights and other interests.<sup>110</sup> Investors should also note that Hungary has not expropriated any foreign assets since 1953; and, in 1973, Hungary settled all debts for American assets expropriated when communist rule began.<sup>111</sup>

#### C. REQUIREMENTS REGARDING THE SOURCES OF FOREIGN CAPITAL FOR INVESTMENT

The Hungarian Investment Act requires that a foreign investor's cash contributions to the capital of an FJV be in the form of hard currency,<sup>112</sup> unless the investor uses forints<sup>113</sup> obtained from an investment in another Hungarian FJV.<sup>114</sup> Foreign investors are permitted to make non-cash contributions, consisting of any tangible asset or intellectual property, toward the capital of an FJV.<sup>115</sup> Regardless of the sources of funds, foreign investors may only acquire registered shares in an FJV.<sup>116</sup>

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107. Company Act, *supra* note 105, at § 25(1). Thus, although the laws with respect to obtaining a permit and registering a foreign-owned company are liberal, adherence to the minimal requirements is essential in an effort to prevent liability.

108. Hungarian Investment Act *supra* note 101, at § 1(1). *But see* BUSINESS VENTURES, *supra* note 11, at § 3.06(a) (suggesting that the provisions of the Hungarian law fail to provide adequate protection for foreign investment, and opining that the exercise of judicial power by the now independent Hungarian courts will serve to remedy this situation).

109. Hungarian Investment Act, *supra* note 101, at § 1(2)-(4).

110. Agreement on Trade Relations, Mar. 17, 1978, United States-Hungary, 29 U.S.T. 2711, T.I.A.S. No. 8967.

111. *See* JOHNSON, *supra* note 103, at 10 (noting Hungary's exemplary expropriations record).

112. Hungarian Investment Act, *supra* note 101, at § 12(1).

113. JOHNSON, *supra* note 103, at 1. The forint is Hungary's form of currency. *Id.* One United States dollar equals approximately seventy-six forints. *Id.*

114. Hungarian Investment Act, *supra* note 101, at § 12(1). These funds include dividends or proceeds from the sale or liquidation of another FJV. *Id.*

115. *Id.* at § 12(2).

116. Hungarian Investment Act, *supra* note 101, at § 13(2).



## D. CONVERTIBILITY OF CURRENCY

Hungary plans to make the forint fully convertible within three years.<sup>117</sup> Until then, the Hungarian government will continue to control the conversion of currency. Hard currency contributions to capital may be maintained in a separate foreign currency account and may be used freely to import production equipment and durable goods,<sup>118</sup> and for hard currency expenses.<sup>119</sup> The conversion of hard currency earnings into forints<sup>120</sup> is at the rate set by the National Bank of Hungary pursuant to the Hungarian Investment Act.<sup>121</sup>

## E. REPATRIATION OF EARNINGS

The Hungarian Investment Act permits repatriation of a foreign investor's share of profits and of proceeds from the liquidation of an FJV.<sup>122</sup> A foreign investor, however, may not repatriate proceeds from the sale of an investment in an FJV, unless the investment is sold to the FJV itself.<sup>123</sup> Finally, foreign employees of FJVs may only repatriate a maximum of fifty percent of their wages.<sup>124</sup>

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117. JOHNSON, *supra* note 103, at 23.

118. Hungarian Investment Act, *supra* note 101, at § 31(3). The freedom to import also applies to purchases made with forint earnings. JOHNSON, *supra* note 103, at 19. In most cases, the company is free to convert forints into hard currency at its Hungarian bank, and then import the products. *Id.* If the company intends to import energy, fuel, agricultural products, metals, or minerals, however, it must obtain a license from the Ministry of International Economic Relations in order to convert forints into hard currency. *Id.*

119. Hungarian Investment Act, *supra* note 101, at § 31(3).

120. JOHNSON, *supra* note 103, at 24.

121. Hungarian Investment Act, *supra* note 101 at § 31(2). This official rate typically overvalues the forint by three to fifteen percent. JOHNSON, *supra* note 103, at 24. Consequently, the conversion process presents a significant cost to companies. *Id.* Furthermore, a company that opts to retain earnings in forints exposes itself to the risk that the Hungarian government will devalue its currency in response to high inflation. *Id.* Over the past three years, Hungary has devalued its currency by more than thirty percent. *Id.* Investors may choose to take advantage of hedging devices that can eliminate the risk of loss from such adjustments; but these entail some cost. *Id.*

122. Hungarian Investment Act, *supra* note 101, at § 32(1). The amount of repatriated profits is not limited to the amount of foreign currency the firm has retained. JOHNSON, *supra* note 103, at 23. The company is free to convert forints into hard currency in order to repatriate the foreign investor's share of distributed profits. *Id.* The company must file a financial statement with the Court of Firms, then submit a request to a Hungarian bank, which assesses a processing fee of approximately four percent before repatriation. *Id.*

123. JOHNSON, *supra* note 103, at 28.

124. Hungarian Investment Act, *supra* note 101, at § 33.



## F. TAX ISSUES

FJVs in Hungary are subject to two major taxes: the general turnover tax<sup>125</sup> and the business profit tax.<sup>126</sup> The general turnover tax is essentially a sales tax, which applies three different rates to sales transactions, depending upon the importance of the FJV's industry.

Food, energy, and basic services are exempt from the turnover tax.<sup>127</sup> Important services are taxed at a rate of fifteen percent, while the majority of goods and services are taxed at the rate of twenty-five percent.<sup>128</sup> The general turnover tax, moreover, does not apply to the purchase of operating equipment or investments.<sup>129</sup>

The business profit tax of forty percent applies to all business in Hungary including FJVs.<sup>130</sup> An amendment to the FJV law eliminated a reduction of twenty percent for FJVs with foreign capital contributions of at least five million forints or twenty percent foreign equity ownership.<sup>131</sup> The amended law, however, retains tax incentives for FJVs that construct and operate hotels or engage in manufacturing, provided that the FJVs have registered capital in excess of fifty million forints, and that foreign ownership is at least thirty percent.<sup>132</sup> In these cases, FJVs receive tax concessions of sixty percent during the first five years and concessions of forty percent for the next five years.<sup>133</sup> Moreover, if the FJV participates in particularly important activities, these concessions are one hundred percent for the first five years and sixty percent for the next five years.<sup>134</sup> If an investor or the FJV reinvests

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125. Law No. XL of 1989 on the General Turnover-Tax, *reprinted in* Nat'l Tech. Info. Services, Cent. & E. Eur. Legal Texts (Dec. 31, 1989) [hereinafter Turnover Tax Law].

126. Entrepreneurial Profit Tax Law IX of 1988 in Unified Structure with Law XLIV of 1989, *reprinted in* BUSINESS VENTURES, *supra* note 11, app. H-10.

127. JOHNSON, *supra* note 103, at 24-25.

128. *Id.*

129. Turnover Tax Law, *supra* note 125, at § 17. Imported capital equipment may enter Hungary dutyfree; however, if the FJV sells or leases the equipment within three years of its importation, the full duty becomes due. Hungarian Investment Act, *supra* note 101, at § 31(3).

130. JOHNSON, *supra* note 103, at 25.

131. *Id.* The perception that the incentives were ineffective and that domestic companies were obtaining nominal foreign investment to take advantage of the tax breaks may explain the elimination of this deduction.

132. Hungarian Investment Act, *supra* note 101, at § 15(2)(a). This ensures substantial foreign investment before tax benefits are claimed.

133. *Id.*

134. *Id.* at § 15(2)(b). Such activities include:

- (1) Electronics;
- (2) Manufacture of component parts for vehicles;
- (3) Production of machine tools;



profits or proceeds from liquidations in Hungary, the reinvested profits are exempt from the profits tax.<sup>135</sup>

### G. FREE TRADE ZONES

The Hungarian Investment Act provides for the establishment of FJVs in Free Trade Zones in an attempt to encourage FJVs that manufacture exports.<sup>136</sup> FJVs located in government-designated free trade zones are treated as if located in foreign countries for purposes of customs, currency exchange, excise taxes, and foreign trade.<sup>137</sup> This treatment is not available to trading companies.<sup>138</sup> FJVs operating in these zones are permitted the right to maintain foreign currency accounts in Hungary and abroad.<sup>139</sup> The Hungarian government requires that investors maintain funds used to pay wages, rent, taxes, and other operating expenses in forint accounts.<sup>140</sup> The firm's initial capitalization must be held in domestic banks.<sup>141</sup>

### H. PRIVATIZATION

Hungary's privatization program is based on its Amended Transformation Law,<sup>142</sup> which, unlike the Czechoslovakian law, applies to the

(4) Manufacture of agricultural, food processing and forestry machines and equipment;

(5) Production from machine parts and components;

(6) Production based on packing technology;

(7) Production of pharmaceutical products, plant protecting agents and intermediary products;

(8) Development of the Hungarian protein basis;

(9) Food production;

(10) Undertaking activities 1-9 in industrial commission work;

(11) Production of propagating and breeding material;

(12) Agricultural production;

(13) Tourism; and

(14) Public telecommunication services.

Law No. XLIV of 1989 Enclosure No. 5 (effective Jan. 1, 1990) (amending Hungarian Investment Act § 15(2)(c) *supra* note 101), *reprinted in Newsletter Hungary* 1/1991 at 8-11.

135. Hungarian Investment Act, *supra* note 101, at § 16(1).

136. *Id.* at § 37. These zones are established by the government. *Id.* at § 40. Investors who wish to take advantage of the duty free zones must submit an application verifying that the land on which the company will operate has been declared a customs free zone. *Id.* at § 40.

137. *Id.* at § 38.

138. *Id.* at § 37(1).

139. *Id.* at § 41(4)(a).

140. *Id.* at § 42(2).

141. *Id.* at § 41(4)(a).

142. Act XIII of 1989 on the Conversion of Economic Organizations and Business Associations, as amended by LXXII of 1990 [hereinafter Hungarian Transformation



privatization of large and small enterprises in equal measure.<sup>143</sup> The law permits three methods for initiating privatization: (1) spontaneous privatization;<sup>144</sup> (2) government-initiated privatization;<sup>145</sup> and (3) investor-initiated privatization.<sup>146</sup> In order for a company to initiate the privatization process, the director of the SOE must secure the support of a two-thirds majority of the company council which consists of employees.<sup>147</sup> The director of the SOE must then notify the State Property Management Organization (SPA).<sup>148</sup> The notification must contain: (1) an indication of the economic objectives of the transformed company; (2) a statement of the estimated registered capital of the new company; (3) a preliminary feasibility study; (4) a description of the transformed company's potential prospects for exports, investment, employment, and markets; (5) a list of possible outside investors; (6) the book value of the existing assets of the SOE; and (7) a copy of the current balance sheet.<sup>149</sup>

While the SPA is reviewing the notification, the enterprise may not enter into any binding legal commitments.<sup>150</sup> Upon the SPA's approval

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Law]. Unlike the CSFR's privatization laws, the Hungarian Transformation Law does not address the issue of restitution for confiscated property. JOHNSON, *supra* note 103, at 15. While proposed restitution legislation would provide a mechanism for compensating former owners, at the moment there is significant ambiguity as to the ownership of assets controlled by SOEs, thus making the privatization process risky. *Id.*

143. See Hungarian Transformation Law, *supra* note 142, at ¶ 2 (listing the types of enterprises encompassed by the Act). Compare with Czech Large Privatization Law, *supra* note 56, and accompanying text (discussing the CSFR's very different procedures for privatizing large and small companies); Czech Small Privatization Law, *supra* note 56, and accompanying text.

144. See JOHNSON, *supra* note 103, at 4 (describing the privatization options available to investors). In a spontaneous privatization, the managers and employees of the enterprise initiate and conduct the privatization independent of governmental oversight. *Id.* Once the parties agree to the sale, however, they must obtain SPA permission to complete the transaction. *Id.*

145. See Hungarian Transformation Law, *supra* note 142, at ¶ 16 (discussing the transformation of state-owned enterprises under government supervision). The government identifies candidates for privatization and oversees the process. JOHNSON, *supra* note 103, at 4.

146. See BUSINESS VENTURES, *supra* note 11, at § 3.02(a) (explaining that investor-initiated privatization affords foreign investors a wider choice of investment opportunities). Foreign investors often negotiate with the government in spite of the SOEs disapproval. *Id.* Potential investors can bid on a company not included in the SPA's privatization plans without prior negotiation with the company's managers. *Id.*

147. Hungarian Transformation Law, *supra* note 142, at ¶ 17(1).

148. *Id.*

149. *Id.* at ¶ 17(2).

150. *Id.* at ¶ 17(3). This is a byproduct of the skepticism surrounding the "spontaneous privatizations" that took place prior to the law's enactment. See *Privatization in Eastern Europe*, THE ECONOMIST, Nov. 17, 1990, at 88 (describing public reaction in Hungary to the surge of spontaneous privatizations). There was wide-spread perception among many Hungarians that self-serving or incompetent managers were privatizing



of the transformation, the director and council of the SOE must then formulate a transformation plan that is consistent with the notification it sent to the SPA, and incorporate any conditions set forth by the SPA.<sup>151</sup> The plan must also contain an estimate of the market value of the SOE.<sup>152</sup> If the SPA approves the transformation plan, it will publish an announcement containing all information pertinent to privatization.<sup>153</sup>

Upon transformation, the privatized company becomes the legal successor to the old SOE.<sup>154</sup> Thus, the transformed company retains all rights to utilize all patents,<sup>155</sup> licenses, and permits obtained prior to transformation.<sup>156</sup> The SPA, however, takes ownership of all shares of the transformed company, unless outside investors have purchased an interest in the company.<sup>157</sup> The SPA then distributes a predetermined number of shares of the company, free of charge, to local governments having jurisdiction over real estate owned by the company.<sup>158</sup> The SPA sells the remaining stock, delivering at least twenty percent of the pro-

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and selling their companies to foreign investors at prices far below market value. *Id.* This was largely due to the ad hoc nature of these privatizations, the lack of government involvement in any aspect of the negotiations, and the companies' failure to publicly solicit competitive bids. JOHNSON, *supra* note 103, at 4. Public mistrust of the process led to the Hungarian Supreme Court's nullification of the sale of Hungar Hotels to foreign investors on grounds that the bidding process was improper and the sale price was unacceptably low. *Id.*

151. Hungarian Transformation Law, *supra* note 142, at ¶ 17B(1)-(2). The plan must also specify the type of business association the SOE has chosen to adopt and include a draft of the articles of the new association. *Id.* at ¶ 6(c).

152. *See id.* at ¶ 17B(2) (noting that the state-owned enterprise must provide the SPA with the fair market value of business assets and property).

153. *Id.* at ¶ 7. SOE creditors must receive direct notification of the imminent transformation and are entitled to demand security for their outstanding claims. *Id.* at ¶ 9(2). Creditors can opt to take shares of the transformed company in satisfaction of the existing debt. *Id.* at ¶ 9(1).

154. *Id.* at ¶ 8(1).

155. *See* BUSINESS VENTURES, *supra* note 11, at § 3.09 (stating that joint ventures that include foreign investments are protected by Hungarian law). Hungary is a member of several international intellectual property conventions, and has various laws designed to protect intellectual property. *Id.* Foreign companies, however, have experienced insufficient protection of pharmaceutical and chemical patents. JOHNSON, *supra* note 103, at 16. In some cases, Hungarian firms have copied foreign patented products and sold them in other nations. *Id.*

156. Hungarian Transformation Law, *supra* note 142, at ¶ 8(1). The transformed company must immediately notify all appropriate licensing agencies in order to preserve these benefits. *Id.*

157. *Id.* at ¶ 22(1).

158. *Id.* at ¶ 21(2). The share value provided to the local governments must equal the market value of the property within the local government's jurisdiction. *Id.*



ceeds to the company,<sup>159</sup> while retaining up to eighty percent of the proceeds.<sup>160</sup>

Pursuant to provisions of the Transformation Law, the Hungarian government enacted the SPA Law,<sup>161</sup> creating the State Property Agency and providing a framework and mechanisms for the privatization of Hungarian SOEs.<sup>162</sup> This law empowered the SPA to act as the intermediary between the government and the transformed companies.<sup>163</sup> Spontaneous privatizations, which had been the primary vehicle for privatization, had incited public suspicion and charges of corruption.<sup>164</sup> Thus, the SPA was created in an effort to bring objectivity to the decision-making process.<sup>165</sup> This independently-chartered agency interacts with firms throughout the privatization process. Once it approves the privatization plan, the SPA invites competitive applications, through local advertising, for the purchase of the company's stock or assets.<sup>166</sup> The SPA then reviews and evaluates the merits of the bids<sup>167</sup> and negotiates appropriate contracts with the winning bidders.<sup>168</sup> Both foreign and domestic parties are permitted to bid on the transformed properties.<sup>169</sup>

Hungarian reform efforts have led to problems similar to those experienced in Poland and the CSFR.<sup>170</sup> Such problems include lower-

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159. See Company Act, *supra* note 105, at § 244 (detailing guidelines for "workers" shares). These funds increase the registered capital of the company, for which the company may issue an additional amount of stock to its employees free of charge, or at a reduced rate. *Id.*

160. Hungarian Transformation Law, *supra* note 142, at ¶ 21(1)-(2).

161. Law No. VII of 1990 on Foundation of State Property Agency with the Purpose of the Management and Utilization of Property Pertaining to This (Jan. 26, 1990), reprinted in BUSINESS VENTURES, *supra* note 11, app. H-3 [hereinafter SPA Law].

162. *Id.* at ¶ 15.

163. See Hungary Handbook, Aug., 1990, at 4 (noting that the SPA was formed to oversee privatizations, and to consider the immediate and long-term interests of the parties).

164. See *supra* note 150 (describing public perception to the privatization process).

165. *Id.*

166. SPA Law, *supra* note 161, at § 22(1). Competitive bidding is open to all, unless the SPA decides to limit the bidding pool. Paradoxically, interested parties may submit bids regardless of the desired pool size. *Id.*

167. See *id.* at § 22(3)-(4) (explaining that experts assess the value of the business and the SPA board of directors then evaluates the bids accordingly).

168. See *id.* at § 23(1) (noting that foreign applicants chosen to contract with the SPA must form an economic association under Hungarian law in order to validate the contract).

169. *Id.* at § 25(2). Compare with 1990 Czech Small Privatization Law, *supra* note 75, at arts. 3 & 13(2) (granting bidding rights to Czechoslovakian nationals, but limiting foreigners to bidding on properties rejected by Czechoslovakians).

170. See Catch-22, *supra* note 12, at 9 (summarizing the progress of the switch to market economies in Eastern European nations).



than-expected levels of foreign investment, and slow progress toward privatization.

### III. POLAND

Poland was the first Eastern European nation to begin the conversion to a democratic society.<sup>171</sup> Full implementation of desired reforms, however, was delayed by the extended time frame provided for the communists to relinquish power.<sup>172</sup> Reformers in nations that ousted socialist governments after Poland, were able to obtain control more quickly, and thus, enact more progressive legislation earlier.<sup>173</sup>

On June 14, 1991, the Polish Sejm,<sup>174</sup> the lower house of the Polish Parliament, passed a new foreign investment law,<sup>175</sup> considered by legal scholars to be the most liberal foreign investment law in Eastern Europe.<sup>176</sup> While it repeals the old law,<sup>177</sup> the new law specifies that permits for FJVs issued under the old law remain valid, and that conditions contained in the old permits must still be observed.<sup>178</sup>

This comprehensive foreign investment legislation remedies inadequacies of prior law that had discouraged foreign investment.<sup>179</sup> Although communist law permitted the formation of FJVs, it imposed burdensome requirements and empowered government with a great deal of discretionary control.<sup>180</sup> Newly enacted laws eliminate most of these impediments to foreign investment.<sup>181</sup>

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171. Gonson, *What I Did on My Summer Vacation*, 4 LAW & BUS. INSIGHTS 12, 21 (Dec. 1990).

172. *Id.*

173. *Id.*

174. J. F. BROWN, SURGE TO FREEDOM 335 (1991).

175. Law of the 14th of June, 1991 on Companies With Foreign Participation (1991) [hereinafter New Polish Investment Law].

176. *Poland*, International Reports, Jan. 25, 1991.

177. New Polish Investment Law, *supra* note 175, at art. 43, § 1 (repealing Law on Economic Activity with the Participation of Foreign Parties (Dec. 23, 1988)).

178. New Polish Investment Law, *supra* note 175, at arts. 19, § 1, 43, § 3.

179. Tokarczyk & Webb, *The New Polish Foreign Investment Law*, 5 LAW & BUS. INSIGHTS 9, 30 (Sept. 1991).

180. See Domanski, *New Foreign Investment Legislation*, Polish News Bulletin, July 12, 1991 (describing some of the impediments contained in the old law and assessing the benefits of the new law).

181. See *id.* (describing the legislative changes that facilitate foreign investment, such as elimination of the ban on foreign investment in certain sensitive industries, and abandonment of minimum capital requirements).



## A. PERMIT REQUIREMENTS

Under the repealed Foreign Investment Law, all FJVs were required to obtain a permit from the Foreign Investment Agency (FIA).<sup>182</sup> The FIA reserved the right to refuse permission to establish an FJV, if it believed the FJV would harm the economic, environmental, or security interests of the state.<sup>183</sup> Communist law did not require that the agency provide an explanation for its denial of a permit, nor did it allow the appeal of such a denial.<sup>184</sup> This permit requirement was manipulated by protectionists within the Foreign Investment Agency to delay and deny formation of FJVs.<sup>185</sup>

The New Foreign Investment Law dissolves the FIA<sup>186</sup> and eliminates the need for a permit for most FJVs.<sup>187</sup> Pursuant to newly enacted law, permits are required if an FJV: operates ports; engages in real estate transactions; conducts business in the defense industry; imports consumer goods; or provides legal services.<sup>188</sup> Permits for transferring assets are required if a state-owned company<sup>189</sup> contributes non-monetary capital in exchange for shares of stock in an FJV.<sup>190</sup> Similarly, permits are required for most transactions involving the purchase

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182. Law Governing Economic Activities With the Participation of Foreign Parties (Dec. 28, 1989) (as amended) arts. 4.1, 5.1, 5.4 [hereinafter Old Joint Venture Law]. To obtain a permit under prior law, investors were required to submit the following: a description of the partners; a recital of the object and scope of the venture; a statement of the period of operation; a description of financing arrangements and initial capitalization; the form of each investor's contribution; and the seat of the FJV and its place of business. *Id.* at arts. 10.1, 10.2, 11.1. In addition, investors were required to provide a feasibility study and documentation on the legal and financial status of each prospective investor. *Id.* at art. 10.2, §§ 2, 3.

183. *Id.* at art. 6.1.

184. *Id.* at arts. 6.2, 6.4.

185. *Poland Weighing Investment Law Changes to Correct Problems in Current Program*, 8 INT'L TRADE REP. (BNA) No. 8, at 283 (Feb. 20, 1991).

186. New Polish Investment Law, *supra* note 175, at art. 41, §§ 1-2. The New Polish Investment Law dissolves the office of the FIA president and the FIA itself, and transfers their powers to the Minister of Ownership Transformations. *Id.* This ministry was originally created to oversee the privatization of state-owned companies. *Id.* See also *id.* at art. 42, §§ 1-2 (establishing a State Foreign Investment Agency as a joint stock company for the purpose of organizing and inspiring foreign investment in Poland).

187. See *id.* at art. 4 (indicating when a permit to establish a company is required).

188. *Id.* at art. 4, § 1.

189. See Slupinski, *Summary of Joint Venture Legislation in Poland*, INT'L BUS. LAWYER, Oct. 1990, at 403 [hereinafter Slupinski] (explaining that the Law on Privatization of State Enterprises provides for a two step process: 1) state enterprises will take the form of wholly state-owned companies with all stock owned by the treasury of Poland; 2) shares will be sold to domestic or foreign private parties).

190. New Polish Investment Law, *supra* note 175, at art. 4, § 2. This permit requirement was, perhaps, designed to prevent sales of state-owned assets from being negotiated at inappropriate prices by incompetent or corrupt management. *Id.* at arts.



or lease of property owned by an SOE.<sup>191</sup> For those FJVs that still must obtain permits, the requirements are far more lenient, and feasibility studies are no longer required.<sup>192</sup>

Although the New Foreign Investment Law states that the old permits are still valid, it allows the Minister of Ownership Transformations to adjust conditions in the old permits to the more lenient provisions of the new law.<sup>193</sup>

## B. PROTECTION AGAINST EXPROPRIATION OF INVESTMENTS

While the New Foreign Investment Law does not altogether prevent the expropriation of foreign investments, it does provide an explicit guarantee of proportional compensation for actual damages suffered as a result of expropriation,<sup>194</sup> or for acts having the effect of expropriation.<sup>195</sup> The new law empowers the investor to convert and repatriate expropriation payments, provided that the investor's home country grants similar protection to Polish investors.<sup>196</sup>

## C. SOURCES OF FOREIGN INVESTMENT

Under the New Foreign Investment Law, a foreign party may only contribute to the capital of an FJV in Polish currency<sup>197</sup> obtained through the sale of hard currency to a foreign exchange bank at the official rate set by the National Bank of Poland.<sup>198</sup> Dividends derived from Polish investments, funds obtained from the sale of FJV shares, and funds acquired from the liquidation of an FJV, are all permissible

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4 § 2, 6 § 3, 12 § 2. The new law is rife with special licensing and permit requirements for FJVs which deal with state-owned companies in any way.

191. *Id.* at art. 6, § 1(3).

192. *See id.* at art. 16, § 2 (explaining that the Minister of Ownership Transformation can impose conditions on those obtaining permits for these FJVs, including mandating the distribution of shares and votes among investors via provisions in the corporate bylaws).

193. *Id.* at art. 43, § 2.

194. *Id.* at art. 22, § 1. Poland's guarantee falls short of ensuring against expropriation, as do those of the CSFR and Hungary. *Id.* *See* Czech Foreign Investment Act, *supra* note 14 (describing the Czechoslovakian guarantee for payment of actual damages); *supra* notes 27-32 and accompanying text (describing the same). *See also* Hungarian Investment Act, *supra* note 101 (describing Hungary's investment protection regime, featuring full and immediate repayment of damages); *supra* notes 108-09 and accompanying text (describing the same).

195. New Polish Investment Law, *supra* note 175, at art. 22, § 1.

196. *See id.* (stating that compensation provisions are based on the principle of reciprocity).

197. *Id.* at art. 10, § 1(1). The *zloty* is Poland's form of currency.

198. New Polish Investment Law, *supra* note 175, at art. 10, § 1(1).



sources of Polish currency for investment.<sup>199</sup> Non-monetary contributions to capital may include imported assets and assets obtained with Polish currency obtained through the sale of hard currency.<sup>200</sup> Alternatively, the Minister of Finance is empowered to issue special permits to allow the use of Polish currency obtained from other sources.<sup>201</sup>

The New Foreign Investment Law abandons the requirement that the foreign investor contribute at least twenty-five million zlotys to the initial capital of the company.<sup>202</sup> Consequently, there is no minimum or maximum level of capital contribution or of ownership percentage of the foreign partner. The new law eliminates an intriguing but rarely used alternative form of financing: debt-equity swaps.<sup>203</sup> The Polish government justified the elimination of this alternative based on the belief that printing new currency would increase the money supply and cause inflation.<sup>204</sup> A more likely explanation for the elimination of the debt-equity swaps is that the swaps create a demand for Polish debt, and create a corresponding market value for the debt at a time when Poland is actively lobbying for foreign banks to write-off eighty percent of its forty-six billion dollar foreign debt as uncollectible.<sup>205</sup> Banks will not write-off loans if the loans may be sold to investors who intend to swap the debt for Polish companies or for state-owned assets. Poland is placed in a far more advantageous position if it is able to sell its assets for cash and, at the same time, receive forgiveness of a large portion of its loans.<sup>206</sup>

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199. *Id.* at art. 10, § 2.

200. *Id.* at art. 10, § 1(2).

201. *Id.* at art. 10, § 3.

202. Old Joint Venture Law, *supra* note 182, at art. 16.4.

203. See Law on Economic Activity with the Participation of Foreign Parties (Dec. 28, 1989), reprinted in *BUSINESS VENTURES*, *supra* note 11, app. P-1 (defining debt-to-equity swaps as situations in which an investor acquires outstanding debts owed by the Polish government to a foreign lender). The debt is usually purchased at a steep discount. Comment, *International Debt-to-Equity Swaps*, 28 HARV. INT'L L.J. 507, 507 (1987). The investor then trades the debt for assets, or shares in a Polish-owned company. Maktouf, *Some Reflections on Debt-for-Equity Conversions*, 23 INT'L LAW 909, 909 (1989). The trade is for the face value of the debt. *Id.* Poland benefits by a reduction in outstanding debt and corresponding service payments in hard currency. *Id.* at 910. The investor benefits from the discounted cost of the debt. *Id.* at 914.

204. Slupinski, *supra* note 189, at 402. If the Polish government restricted the swaps to debt-for-equity, rather than debt-for-cash, then this argument would fail.

205. *Poland and the International Monetary Fund*, 8 INT'L TRADE REP. (BNA) No. 9, at 332 (Feb. 27, 1991).

206. See Slupinski, *supra* note 189, at 402. Poland secured loan agreements with the International Monetary Fund and the World Bank to support its economic restructuring program. *Id.* Debt-for-equity swaps were never permitted in any large investment cases, and were only rarely used in small investment cases. *Id.*



## D. CONVERTIBILITY AND REPATRIATION OF PROFITS

In accordance with the terms of the recently-ratified Bilateral Investment Treaty with the United States,<sup>207</sup> the New Foreign Investment Law permits full convertibility and repatriation of profits and investments.<sup>208</sup> In contrast, prior law only permitted full convertibility and repatriation of profits earned in foreign trade, and a partial repatriation of profits earned inside Poland.<sup>209</sup> Under the new law, in order to convert Polish profits into hard currency, an investor must obtain a certificate issued by the Minister of Finance verifying the investor's share of the company's profits.<sup>210</sup> No permit is required to repatriate the profits.<sup>211</sup> Polish currency obtained from the sale of shares or through the liquidation of an FJV may be converted to hard currency without the issuance of a certificate or permit.<sup>212</sup>

Foreign employees of FJVs are entitled to convert all wages into hard currency by presenting a company-issued certificate specifying the amount of wages earned.<sup>213</sup> The employees may then repatriate their wages without a permit.<sup>214</sup>

## E. TAX ISSUES

The Old Foreign Investment Law provided for a forty percent corporate tax rate<sup>215</sup> with a three-year tax holiday<sup>216</sup> for FJVs in certain preferred sectors. The New Foreign Investment Law, however, reduces the availability of the tax holiday.<sup>217</sup> Under the New Foreign Invest-

207. See The Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations, art. V, S. TREATY DOC. No. 18, 101st Cong., 2nd Sess. 6-7 (1990) [hereinafter *Polish BIT*].

208. New Polish Investment Law, *supra* note 175, at arts. 25-26.

209. See Slupinski, *supra* note 189, at 402.

210. New Polish Investment Law, *supra* note 175, at art. 25. The Minister of Finance issues the certificate upon review of an audit of the FJV's records. *Id.* at art. 25, ¶ 1.

211. *Id.* at art. 25, ¶ 2.

212. *Id.* at art. 26.

213. *Id.* at art. 28, ¶ 1.

214. *Id.* at art. 28, ¶ 2.

215. Slupinski, *supra* note 189, at 402.

216. Old Joint Venture Law, *supra* note 182, at art. 28.1. A tax holiday exempts a company from paying any income tax for a fixed term. M. GLAUTIER & F. BASSINGER, A REFERENCE GUIDE TO INTERNATIONAL TAXATION 160 (1987). These holidays are granted in order to make investments by foreigners more appealing. *Id.*

217. New Polish Investment Law, *supra* note 175, at art. 23. The government reduced the availability of the holiday because many Polish companies actively sought nominal foreign investment in order to qualify. Tokarczyk & Webb, *The New Polish Foreign Investment Law*, 5 LAW & BUSINESS INSIGHTS, (P-H) 9, 30 (Sept. 1991). Thus, Poland's goal of increasing foreign investment was only marginally served. *Id.*



ment Law, exemptions for preferred economic activities are no longer automatic.<sup>218</sup> To qualify for the tax holiday, foreign investors must contribute at least two million ECUs<sup>219</sup> to the FJV, and the FJV must either operate in an area with extremely high unemployment, obtain important new technologies, or export at least twenty percent of its production.<sup>220</sup> FJVs formed after December 31, 1993, are not entitled to the tax holiday.<sup>221</sup> The annual tax exemption from a tax holiday may not exceed the amount initially invested.<sup>222</sup> The Minister of Finance may require concessions in exchange for granting a tax holiday,<sup>223</sup> or may refuse the exemption for important economic reasons.<sup>224</sup> If the initial capitalization of a company is reduced, or if liquidation proceedings commence within two years after the expiration of the holiday, the full amount of exempted taxes become due immediately.<sup>225</sup>

Poland and the United States have a double-taxation treaty which protects international investors from paying full taxes on profits in both the country of investment and in the investor's home country.<sup>226</sup> Under the terms of this treaty, Poland taxes an American investor's earnings

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218. New Polish Investment Law, *supra* note 175, at art. 38. The limited tax exemptions retained in the New Foreign Investment Law are not available to already-formed companies. *Id.* at arts. 34, 38. These companies will continue to enjoy their existing holidays. *Id.* If a company chooses to reorganize for any reason, it will not be entitled to continue the tax holiday, unless it qualifies under the new provisions. *Id.* at art. 37, ¶ 3.

219. *Id.* at art. 23, ¶ 1(1). ECUs are the European Economic Community's form of currency. *Regulation of International Finance, Resolution of the European Council on the Establishment of the European Monetary System (EMS) and Related Matters*, Basic Documents Int'l Econ. L. (CCH) 457 (1990).

220. *Id.* at art. 23, ¶ 1(2).

221. *Id.* at art. 23, ¶ 3.

222. *Id.* at art. 23, ¶ 6.

223. *Id.* at art. 23, ¶ 2.

224. *Id.* The translator of the New Polish Investment Law contends that much of the language of the new law is purposely vague, in an effort to provide the Polish government with a high degree of flexibility in its application. *Id.* Such latitude permits the government to deny an exemption to an FJV that it suspects retained a foreign investor for the sole purpose of avoiding taxes, and to terminate the exemption program because of "important economic reasons." See Slupinski, *The New Polish Joint Venture Law*, 3 TRANSNAT'L L. 1, 16 (noting that subsequent legislation is expected to clarify and supplement the new law).

225. *Id.* at art. 24.

226. See Convention on the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Related Notes, Oct. 8, 1974, United States-Poland., art. 20, 28 U.S.T. 891, 919 [hereinafter Polish Tax Treaty] (providing profits from American investments in Poland with protection from double taxation). See also *supra* note 53 (discussing double taxation and tax neutrality).



at the rate of fifteen percent, unless the investor owns at least ten percent of an FJV, in which case the tax rate is five percent.<sup>227</sup>

#### F. PRIVATIZATION OF STATE OWNED ENTERPRISES

In July of 1990, the Polish Sjem passed the New Privatization Law,<sup>228</sup> which provides the legal foundation for the privatization of state-owned companies. Implementation of the privatization process was left to the executive branch of the Polish government,<sup>229</sup> which, like the CSFR,<sup>230</sup> adopted a plan dividing SOEs into large and small categories.<sup>231</sup> The Polish government is developing a list of approximately four hundred large companies that it intends to privatize.<sup>232</sup> The Minister of Transformations will distribute shares of these companies to employees, Polish citizens above the age of majority, and the Polish government.<sup>233</sup> Beginning in 1993, shares acquired by Poles will

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227. Polish Tax Treaty, *supra* note 226, at arts. 11, ¶ 2(a),(b). Under prior foreign investment law, all repatriated profits were taxed at a rate of thirty percent. Old Joint Venture Law, *supra* note 182, at art. 29. Due to tax treaty provisions, however, American investors were not subject to the thirty percent rate. See *supra* note 53 (discussing double taxation and tax neutrality).

228. The State Enterprise Privatization Act, Rzeczpospolita No. 169, (July 23, 1990) [hereinafter Polish Privatization Act].

229. *Id.* at art. 2.1, § 1.

230. See *supra* notes 55-92 and accompanying text (describing the CSFR's approach to privatization). Unlike the CSFR, Poland has not incorporated its property restitution program into its privatization program. *Poland's Reprivatization Initiative Designed to Pay For Communist Era Losses*, 8 INT'L TRADE REP. (BNA) No. 25, at 951 (June 19, 1991). This has hampered efforts to sell privatized companies to investors, who are unwilling to buy or lease assets without clear title. *Id.* The Polish government is working on legislation that would settle restitution claims within a year. *Id.*

231. See Polish Government Program for Privatization of Polish Economy, art. I, § 1 (NTIS Central & Eastern European Legal Texts) Dec. 1990 available in LEXIS, Europe Law Library, Law File [hereinafter Privatization Program] (describing the plan to categorize Polish firms as either large, small, or medium-size enterprises).

232. See *Mass Privatization Program*, POLISH NEWS BULLETIN, July 27, 1991, available in LEXIS, Nexis Library, Omni File (interview with Junusz Lewandowski, Minister of Ownership Transformations) [hereinafter Lewandowski] (reserving privatization for the best performing companies). Before shares are distributed, the State Treasury assumes ownership of each enterprise as the sole shareholder. *Id.*

233. *Id.* The current plan provides employees with approximately ten percent of the authorized shares, allows the government to retain thirty percent, and distributes sixty percent to all Polish citizens through "National Wealth Management Funds." *Id.* Each adult Polish citizen receives shares in the funds which operate like western-style mutual funds. *Id.* The funds maintain their own boards under the authority of the Polish government. *Id.* Polish citizens are not permitted to sell their shares in these funds until 1993. *Id.*

Given the wide distribution and low concentration of ownership in these funds, it is unlikely that Polish citizens or entrepreneurs will influence the decision-making process, either in the funds or in the companies. Barbara Blaszczyk & Marek Dabrowski, *Mass Privatization Programme: Step into Unknown*, POLISH NEWS BULLETIN, July 12, 1991, available in LEXIS, Nexis Library, Omni File, [hereinafter *Mass Privatization*]



be marketable on the Polish stock market, which began trading in April 1991.<sup>234</sup>

The Minister of Transformations and the director of the SOE are empowered to initiate the transformation of large SOEs.<sup>235</sup> The director of the SOE, however, must first obtain the approval of the employee council.<sup>236</sup> The Minister of Transformations is entitled to deny privatization requests in light of important state circumstances or if the company appears unlikely to survive.<sup>237</sup> If the proposed transformation is approved, the company initially becomes a commercial corporation with the Treasury of Poland as the sole shareholder.<sup>238</sup> The Minister of Transformations may then either sell the entire firm, sell shares of the firm, or liquidate the firm's assets.<sup>239</sup> The Privatization Law requires that a company give its employees the opportunity to purchase up to twenty percent of the firm, at half of the price charged to other Polish citizens,<sup>240</sup> within two months of privatization.<sup>241</sup> The program adopted by the government, however, entitles employees to receive ten percent of the stock at no cost.<sup>242</sup> The privatization program also allows direct sale of large companies to major Polish and foreign investors.<sup>243</sup>

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*Programme: Step into Unknown*]. Hence, this plan has been criticized as being a "mock privatization" which would result in a centrally-planned Polish economy. *Id.*

234. Lewandowski, *supra* note 232.

235. Polish Privatization Act, *supra* note 228, at art. 5.1. The privatization request should include the following: an economic assessment of the viability of the company; a draft of the articles of incorporation; and a description of preference programs for distributing shares to employees. *Id.* at art. 5.2.

236. *Id.*

237. *Id.* at art. 5.3. Denials are appealed in accordance with Polish law. *Id.* at art. 5.4.

238. *Id.* at art. 8.1.

239. *Id.* at art. 1. The sale of stock held by the Treasury must take place at a public auction, or through negotiations based on a publicly-announced offer. *Id.* at art. 23.1.

240. *Id.* at art. 24.4. If employees do not exercise their rights to purchase stock, the rights will terminate after one year. *Id.* at art. 24.3.

241. *Id.* at art. 24.2.

242. Privatization Program, *supra* note 231, at art. 2.1, § 4. The government reasoned that, giving employees ten percent of the company for free allows them the same benefit that they would enjoy if they purchased twenty percent of the company at half price. *Id.* While the government will receive the same amount of money as for the disposition of twenty percent of the company, the employees' control over the company is not as great as that required by the Privatization Law. If, however, employees are unable to pay for any stock, they are better off with the free shares.

243. *Id.* at art. 2.2. These privatizations would circumvent the "commercialization" and "stock distribution" phases required for privatization of other large companies. *Id.* at art. 2.2. In these direct sale cases, employees would not receive their distribution of stock.



Operators of small firms can elect to proceed through the same privatization process as that of large firms.<sup>244</sup> Alternatively, smaller firms may liquidate, and sell the company's assets.<sup>245</sup> The government's privatization program calls for decentralization in the oversight of the privatization of Poland's numerous state-owned companies.<sup>246</sup>

#### G. THE BILATERAL INVESTMENT TREATY

The United States Senate and the Polish Sejm have both ratified a bilateral investment treaty (BIT).<sup>247</sup> The BIT represents a significant departure from the Treaties of Friendship, Commerce and Navigation, which have dominated United States foreign relations for nearly two centuries.<sup>248</sup> The BIT deals exclusively with foreign investment and is, consequently, easier to negotiate than the more comprehensive Treaties of Friendship, Commerce and Navigation.<sup>249</sup> BITs between other nations have proven successful in facilitating trade and international investment.<sup>250</sup> The United States-Poland BIT sets a new standard for openness and favorable treatment of foreign investments.<sup>251</sup> The most striking provision of the BIT is that Poland affords foreign investment the better of Most Favored Nation or domestic treatment.<sup>252</sup> Investors from other nations will enjoy many of the same benefits granted to American investors in the BIT because Poland has incorporated many of the favorable provisions of the BIT into the new FJV law.<sup>253</sup> An-

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244. *Id.* at arts. 3.1, 3.2.

245. *Id.*

246. *Id.* at art. 3. The privatization program, however, calls for all privatizations to avoid inequitable management/employee takeovers which are not in the best interests of the state. *Id.* at art. 3.

247. Polish BIT, *supra* note 207. See generally Ewing, *The Treaty With Poland Concerning Business and Economic Relations: Does It Provide More Incentive to The American Investor?*, 11 NW. J. INT'L L. & BUS. 352 (1990) [hereinafter Ewing] (discussing the evolution of the BIT program and its relation to the Friendship, Commerce, and Navigation program).

248. Goodman, *International Trade: Poland Bilateral Investment Treaty - A Reflection of United States Efforts to Shape the Economic Development of Eastern Europe*, 32 HARV. INT'L L. J. 255, 255 n.2 (1991) [hereinafter Goodman]. See Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655-71 (1990) (describing the growing importance and use of BIT treaties).

249. See Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L. J. 201, 210-13 (1988) (discussing differences in negotiations between FCNs and BITs).

250. See Ewing, *supra* note 247, at 352.

251. See Goodman, *supra* note 248, at 255-57 (denoting the many opportunities made available to foreign investors through the United States-Poland BIT).

252. *Id.* at 256-57.

253. *Id.* These include: the provision for full and free convertibility and repatriation of profits; the limitation of Poland's screening of American investors through delay or



other important benefit of the BIT is that it requires the Polish government to publish and make available all laws and regulations affecting investors.<sup>254</sup>

Poland was the first Eastern European nation to overcome communist rule, and continues to lead in economic reform,<sup>255</sup> taking bold steps in freeing prices, allowing liberal conversion of its currency, and implementing a progressive foreign investment program.<sup>256</sup> While these measures have achieved some success,<sup>257</sup> actual economic improvement falls short of expectations.<sup>258</sup>

#### IV. RECOMMENDATIONS

##### A. PERMIT REQUIREMENTS FOR ESTABLISHING A FJV

Although Poland has liberalized its requirements for establishing FJVs,<sup>259</sup> Hungary's laws allowing the formation of FJVs without a permit are the most facilitating in Eastern Europe.<sup>260</sup> By contrast, the CSFR still requires all FJVs to obtain permits from the Federal Ministry of Finance.<sup>261</sup> While the CSFR readily grants these permits and in some cases automatically issues required licenses,<sup>262</sup> these impediments allow for discrimination in the issuance of permits, and may discourage or divert interested investors. Governments should nurture domestic entrepreneurs through assistance programs, but should not inhibit foreign investment through discriminatory organizational requirements.

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refusal of FJV permits; and more favorable terms for compensating investors in the case of the expropriation of property. *Id.*

254. Polish BIT, *supra* note 207, at art. VIII. It is essential that investors receive timely information regarding the substance and impact of new laws due to the ongoing change in Eastern European business law. *Id.*

255. *Catch-22*, *supra* note 12, 5-9.

256. *Id.*

257. *Id.* at 9. Poland's hyperinflation has been reduced to eighty percent, a stock market has been established, and private businesses are generating forty percent of gross domestic product. *Id.*

258. *Id.* Despite Poland's "big bang" approach to economic reform, it appears that additional liberalization is still needed. *Id.*

259. See *supra* notes 182-93 and accompanying text (describing Poland's recently-implemented permit requirements).

260. See *supra* notes 101-07 and accompanying text (discussing Hungarian requirements for establishing an FJV). Hungary requires that an FJV register and comply with the same standards for incorporation that apply to domestic Hungarian firms. *Id.*

261. See *supra* notes 14-26 and accompanying text (describing the requirements for obtaining a permit in the CSFR).

262. See *supra* notes 22-24 and accompanying text (evaluating the CSFR's policy for the granting of permits and licenses).



## B. PROTECTION OF INVESTMENTS

All three countries provide basic protections against expropriation of private property, and require full compensation for actual loss suffered as a result of expropriation.<sup>263</sup> Hungary, however, extends guarantees of payment to governmental actions with "similar effects" to expropriation in addition to physical takings of property.<sup>264</sup> Furthermore, Hungary has the best record for redressing losses incurred in the early years of communist rule, and actually settled all American claims in 1973.<sup>265</sup>

In addition to the protections against expropriation, each of these countries has entered into a BIT with the United States, further protecting American investors.<sup>266</sup> The BIT between Poland and the United States is the most progressive, granting American investors the better of national treatment or Most Favored Nation status.<sup>267</sup> This BIT also requires the Polish government to inform American investors proactively of changes in laws and of the resulting implications for business.<sup>268</sup> Given typical language and legal differences between an investor's home country and the host country, such provisions benefit foreign investors in any country. In light of the accelerated pace of the evolution of commercial law in these nations, such a stipulation by the host government seems indispensable. The CSFR and Hungary should provide similar services to investors.

## C. CURRENCY CONVERTIBILITY AND REPATRIATION

Each of these nations recognizes the beneficial impact that free convertibility of currency would have on trade and investment. The need to control inflation and to build sufficient hard currency reserves to support a freely-traded currency, however, requires governments to care-

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263. See *supra* notes 27-32 and accompanying text (discussing the CSFR's expropriation laws). See also *supra* notes 108-11 and accompanying text (describing Hungary's expropriation laws); *supra* notes 193-95 and accompanying text (evaluating Poland's expropriation laws).

264. Hungarian Investment Act, *supra* note 101 at §§ 1(2)-(4).

265. See JOHNSON, *supra* note 103, at 10 (discussing Hungary's policy for the settlement of American debts).

266. See *supra* note 31 and accompanying text (discussing the treaty with the CSFR). See also *supra* note 110 and accompanying text (analyzing the treaty with Hungary); *supra* notes 247-54 and accompanying text (discussing the treaty with Poland).

267. *Supra* notes 251-52 and accompanying text.

268. See *supra* note 254 and accompanying text (noting that the Polish government is required to inform foreign investors of changes in business laws).



fully phase-in free convertibility.<sup>269</sup> Poland has adopted the most liberal conversion and repatriation laws in Eastern Europe, allowing full convertibility and repatriation of profits, investments, and wages of foreign nationals.<sup>270</sup> The CSFR's laws are slightly more restrictive, requiring FJVs and their employees to convert all hard currency into the local currency, but allowing FJVs to obtain permits to convert local currency back into hard currency for most hard currency expenses, and allowing conversion and repatriation of all profits and proceeds from the sale or liquidation of investments.<sup>271</sup> Moreover, the CSFR allows employees to convert and repatriate all of their after-tax wages.<sup>272</sup> Hungary, however, limits the amount an employee may repatriate to fifty percent of wages, and prohibits repatriation of profits from the sale of an investment.<sup>273</sup> Hungary should take steps to liberalize conversion and repatriation rules, in order to keep pace with Poland and the CSFR.

#### D. TAX ISSUES

Initially all of these countries offered tax incentives to encourage investment.<sup>274</sup> Each, however, has moved to reduce or eliminate the availability of these tax breaks.<sup>275</sup> The United States' tax neutrality approach to taxation of profits from international investments eliminates most of the benefits of tax incentives to American investors.<sup>276</sup> Furthermore, the lower taxes represent a loss to the treasury of the host country, and a gain to the government of the investor's home country.

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269. See generally *Currency Reform*, THE ECONOMIST, Jan. 6, 1990 at 21-24 (detailing the importance of convertible currency and providing a history of currency conversion standards).

270. See *supra* notes 207-14 and accompanying text (discussing Poland's newly adopted conversion and repatriation rules).

271. See *supra* notes 33-45 and accompanying text (describing the CSFR's laws governing currency conversion and repatriation).

272. See *supra* note 45 and accompanying text (assessing conversion and repatriation laws as they relate to foreign employees of FJVs).

273. See *supra* notes 122-24 and accompanying text (discussing Hungary's limitations on the repatriation of currency).

274. See Tiefenbrun, *Joint Ventures in the USSR, Eastern Europe, and the People's Republic of China as of December 1989*, 21 N.Y.U. J. INT'L L. & POL. 667, 690 (1989) (describing the 1989 Hungarian FJV investment tax incentives). See also *id.* at 707 (describing Poland's 1989 FJV tax incentives).

275. See *supra* notes 46-54 and accompanying text (describing the CSFR's FJV tax). See also *supra* notes 131-35 and accompanying text (describing Hungary's recent FJV tax changes); *supra* notes 217-25 and accompanying text (describing Poland's recent FJV tax changes); *Hungary Proposes Plan to Abolish Tax Incentives for Foreign Investors*, 8 INT'L TRADE REP. (BNA) No. 45, 1651 (Nov. 13, 1991) (disclosing Hungary's plan to withdraw tax incentives and the International Monetary Fund's disapproval of the use of tax incentives to encourage foreign investment).

276. See *supra* note 53 (discussing the topic of tax neutrality).



Currently, the CSFR has the lowest tax rates for FJVs, with rates of between twenty and forty percent of income.<sup>277</sup> The CSFR's tax system, however, is extremely complicated, and, for companies lacking sufficient foreign capitalization, the rates can reach ninety percent. Moreover, the lack of a tax treaty with the United States subjects American investors to double taxation of profits earned in the CSFR.<sup>278</sup> Given the effects of tax neutrality, the CSFR's lower tax rates offer no advantage to foreign investors, and the complexity of its tax system serves as a competitive disadvantage in the race to attract foreign investors.

To encourage foreign investment, these nations should strive to simplify their tax structures and to avoid excessive tax rates. Given tax neutrality and double taxation treaties, tax incentives are only effective in stimulating investment by domestic citizens.

#### E. PRIVATIZATION

Rapid privatization of state-owned companies is essential to establishing a healthy market-driven economy. Hungary boasts the most successful record in its privatization efforts, with approximately fifty thousand newly-privatized companies,<sup>279</sup> producing one-third of gross domestic product.<sup>280</sup> Hungary's approach to the privatization process is the most practical in the region, avoiding the use of complex and time-consuming methods of distributing shares.<sup>281</sup> Instead, Hungary distributes shares to local governments,<sup>282</sup> and sells all remaining shares to the highest bidder.<sup>283</sup> Hungary has managed to overcome public suspicion and criticism of the privatization process by establishing an independent agency that enforces minimal, but effective, guidelines, designed to ensure that state assets are not "given away" by incompetent or corrupt management.<sup>284</sup>

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277. See *supra* notes 46-54 and accompanying text (describing the CSFR's taxation system).

278. *Id.*

279. *High Risks and Rewards Cited in Eastern and Central Europe*, 8 INT'L TRADE REP. (BNA) No. 39, 1447 (Oct. 2, 1991).

280. See *Catch 22*, *supra* note 12, at 5, 9 (assessing economic conditions in Hungary).

281. See *supra* notes 142-69 and accompanying text (outlining Hungary's privatization program).

282. See *supra* note 158 and accompanying text (describing the requirement for payment to local governments).

283. See *supra* notes 161-69 and accompanying text (describing procedures designed to ensure sale to the highest bidder).

284. *Id.*



In contrast, both Poland and the CSFR require the distribution of shares of newly-privatized companies to public citizens.<sup>285</sup> Although Poland and the CSFR have both adopted privatization programs featuring similar independent agencies, there is still widespread mistrust of the privatization process in these countries.<sup>286</sup> Such negative public perception is, perhaps, the result of more oppressive communist governments prior to 1989, and is indicative of the structural societal obstacles to reform in these countries.

### CONCLUSION

These Eastern European nations have demonstrated remarkable commitment to political and economic reform. They have taken decisive steps toward the conversion of inefficient centrally-directed economies into more efficient market-driven economies. Each step, however, displaces workers in inefficient industries. For this reason, many reform laws and initiatives refrain from allowing the free market to completely displace central government control. Such reluctance temporarily minimizes, but ultimately prolongs, the economic hardships accompanying reform. As a result, reform efforts have not produced the quick results desired. In fact, unemployment<sup>287</sup> and inflation are on an upsurge,<sup>288</sup> and GNP has fallen eight percent in each of the last two years.<sup>289</sup> Such disappointing results will tend to support calls for curtailing economic reforms. The benefits of a free market economy cannot be realized, however, until the economy is truly free and truly directed by market forces. At this point, each nation should accelerate the privatization process, permitting shareholders and shop owners to force managers and workers to become more efficient, unleashing the driving force these economies so urgently need.

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285. See *supra* note 69 and accompanying text (describing the CSFR's use of a voucher system to distribute ownership of companies to citizens). See also *supra* note 233 and accompanying text (describing Poland's plan to distribute shares in holding funds to Polish citizens).

286. See *Business in Eastern Europe*, *supra* note 5, at 3 (discussing the cynicism surrounding the change to a capitalistic market and the growing perceptions that privatization brings corruption).

287. *Id.* at 4.

288. *Id.*

289. *Id.*