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CHANGES IN U.S. TRADE AND ECONOMIC POLICY TOWARDS POST-NONMARKET ECONOMY COUNTRIES: AN EXAMPLE OF POLAND

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I. INTRODUCTION

THE recent changes in Central and Eastern Europe came as a surprise with regard to both their scope and the short period in which they occurred. It seemed that almost overnight the former ideology which had been officially praised for decades was replaced by ideals of Western democracy. Constitutional amendments, free elections, and multiparty systems were events and institutions which had not been expected in such a short time in this part of the world.

While — despite inevitable problems — the process of modification of the political systems of those countries has been relatively smooth, it is the transformation of their economies that constitutes the real challenge. This transformation has brought about changes both on the domestic and international level, significantly affecting European trade and economic relations. The dissolution of the Council for Mutual Economic Assistance (CMEA), in the past the main institution of economic cooperation in Central and Eastern Europe, marked a shift in interest towards integration with the remaining part of Europe. As early as September 1989, Poland signed an agreement with the European Community on Trade and Economic Cooperation,[1] followed by the execution on December 16, 1991, of an Association Agreement. The latter has not yet been fully implemented; however, its major provisions, including tariff regulations, became binding through an Interim Agreement,[2] which will be in effect until the main Agreement is ratified by all parties.

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1. 1990 DZIENNIK USTAW [JOURNAL OF LAWS], No. 38, item 214 (Polish text). DZIENNIK USTAW is the official journal of the Polish Government where laws passed by the Polish Parliament, treaties ratified by Poland, and governmental ordinances are published. A law usually becomes effective on the day it is published in the DZIENNIK USTAW.

2. 1992 Dziennik Ustaw JOURNAL OF LAWS, No. 17, item 69 (Polish text).

The success of reforms in these countries and of their efforts to become true partners in world trade relations depends to a large extent on the attitude adopted by their Western counterparts. This is so for several reasons.

First, all Central and Eastern European countries are heavily indebted to Western governments and banks. Huge debts hinder the development of economies and make governments dependent on their creditors. A prompt and satisfactory solution of the debt problem is therefore of crucial importance.

Second, even if the debt issue is resolved, there remains the problem of sources of funds for further changes. Since domestic resources are scarce, a significant infusion of foreign capital is required. The countries in question face the dilemma of protecting their internal market integrity while attracting foreign capital by enacting laws or accepting international agreements facilitating the entry of investments. Under these circumstances, the new governments often yield to pressure exerted by their Western partners.

Third, post-communist countries need to have the widest possible access to foreign markets. At present, with restrictions applicable to "nonmarket economy" or "communist" countries still in force, they may often lose when competing with more favored developing countries. Therefore, a reassessment of these former communist countries' status and revision of existing trade laws is necessary.

This Article surveys the basic problems and recent developments in trade and economic relations between "traditional" market economy countries and post-communist countries. The relationship between the United States and Poland has been selected as an example. The discussion focuses on the notion of a nonmarket economy in the light of recent economic changes in Eastern Europe, existing U.S. trade laws and their application to the countries in question, and changes in the general approach of the U.S. to an emerging market economy like Poland. A separate section discusses an actual bilateral investment treaty signed by the United States and Poland in 1990, enacted in 1992, which was the first agreement of this kind concluded by the United States with an Eastern European country.

II. THE NOTION OF A NONMARKET ECONOMY COUNTRY

In general, international trade law is oriented towards market economy countries. Indeed, it has been stated that "[m]any of the GATT rules make sense only in the context of . . . a market system."[3] How-

3. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1179 (1986). For a discussion of problems connected with nonmarket economy countries' membership in the General Agreement of Tariffs and Trade, see John H. Jackson, *State Trading and Nonmarket Economies*, 23 INT'L LAW. 891 (1989).

ever, countries within the communist block were not excluded from participation in foreign trade relations. This gave rise to special problems and specific solutions both in international and domestic laws.

It is not easy to provide an exact definition of a "nonmarket economy" (NME) country.[4] This notion has been used "to describe countries where goods and resources are allocated by government planning agencies rather than by prices freely set in a market."[5] Another distinguishing feature is that their external trade is administered through entities controlled by the government. All international trade must be channelled through these "state trading agencies" or "state trading monopolies."[6]

Although the term "NME country" is usually viewed as a synonym of "communist country," U.S. trade law makes a distinction between these two categories. For the purposes of market disruption determination pursuant to Section 406 of the Trade Act of 1974, a communist country is "any country dominated or controlled by communism."[7] According to the definition introduced in 1988 by the Omnibus Trade and Competitiveness Act (1988 Act), a NME is "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[8] Although this definition may not be completely clear,[9] the 1988 Act also lists factors which must be considered when making a determination as to the NME status of a country.[10]

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4. For example, in European Community law there is no such definition; for antidumping purposes, the countries are listed by name in two EC regulations. *See* Geoffrey D. Oliver & Erwin P. Eichmann, *European Community Restrictions on Imports from Central and Eastern Europe: The Impact on Western Investors*, 22 LAW & POL'Y INT'L BUS. 721, 742 n.136 (1991). The countries in question have also been referred to as "state-controlled" or "centrally planned economies." *See* Robert F. Hoyt, Comment, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647, 1648 n.7 (1988).

5. JACKSON & DAVEY, *supra* note 2, at 1174; *see also* William Mock, *Economic Advantage in East-West Trade: Abandoning Market Fictions in Trade with Nonmarket Economy Countries*, 14 N.C.J. INT'L L. & COM. REG. 55 n.2 (1989).

6. JACKSON & DAVEY, *supra* note 2, at 1175-79.

7. 19 U.S.C § 2436(e)(1) (1988). Although this Section concerns imports from "communist countries," it forms part of Title IV of the Trade Act of 1974 which concerns NME countries in general. This could mean that Section 406 has a narrower application. Mock, *supra* note 4, at 71.

8. 19 U.S.C § 1677(18)(A) (1988).

9. It has been described as a "semantically awkward definition." Charles Owen Verrill, Jr., *Nonmarket Economy Dumping: New Directions in Fair Value Analysis*, 1989 B.Y.U. L. REV. 449, 453.

10. The factors include the convertibility of currency, the extent to which wage rates are determined by free bargaining between labor and management, the extent to which joint ven-

The determination made by the Department of Commerce (administering authority)[11] remains effective until revoked by that authority, and is excluded from judicial review.[12] The decision is discretionary since it may be based on "such other factors" as the Department "considers appropriate."[13] Thus, once classified as a NME, the country in question has no other remedy but to wait until its status is reversed by U.S. authorities.

Through the application of the list of factors, NME status could be extended beyond the traditional scope of "communist" countries.[14] So far, however, only communist states have been involved. These states are covered by special reports of the International Trade Commission (ITC) prepared pursuant to Section 410 of the Trade Act of 1974[15] which requires monitoring of imports from and exports to NME countries. The only Central and Eastern European state excluded from this requirement since 1981 is Yugoslavia.[16] Recent changes in many of the remaining countries have not resulted in their automatic exclusion from the monitoring.

There is no definite answer as to when a country ceases to be a NME and becomes a market economy: "[o]ne cannot pinpoint exactly which factors make the difference, nor the relative strengths of any given factor."[17] When the U.S. Treasury Department decided against treating Yugoslavia as a NME in antidumping proceedings against a producer from that country, it relied mainly on Yugoslavia's currency convertibility, and the verifiability of information supplied by both its government and the producer in question.[18]

Many Central and Eastern European countries, especially Poland, are currently more advanced in their economic reforms than Yugosla-

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tures or other investments by firms of other foreign countries are permitted in the foreign country, the extent of government ownership or control of the means of production, the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and such other factors as the administering authority considers appropriate. 19 U.S.C § 1677(18)(B) (1988).

11. 19 U.S.C. § 1677(18)(C) (1988).

12. 19 U.S.C. § 1677(18)(D) (1988).

13. 19 U.S.C. § 1677(18)(B)(vi) (1988).

14. Verrill, *supra* note 8, at 453.

15. 19 U.S.C. § 2440 (1988).

16. *See, e.g., 65th Quarterly Report to the Congress and the Trade Policy Committee*, USITC Pub. 2375, at 2 (April 1991). Because of the reunification of Germany, this report was also the last to include East Germany.

17. Michael G. Egge, Note, *The Threat of United States Countervailing Duty Liability to the Newly Emerging Market Economies in Eastern Europe: A Snake in the Garden?*, 30 VA. J. INT'L L. 941, 963 (1990).

18. 42 Fed. Reg. 34,288 (1977); *see also* Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807 (1984).

via was at the time of the proceedings. However, they continue to be classified as NME countries, probably because the remaining state involvement in the economy is still so significant. One suggestion to accommodate this problem, advanced in 1987 by the Committee for Fair Trade with China, has been to create a special legal category of states, distinct from market and non-market economies.[19] However, from the perspective of post-NME countries, this seems to be an unattractive solution since it would probably result in a postponement of their gaining the status of market economies.

III. Application of U.S. Trade Laws to NME Countries

As previously illustrated, U.S. trade laws clearly distinguish between market economy countries and NME countries. Rules regulating trade with the latter countries are generally more stringent. The rationale has been to protect the U.S. economy against products from "politically alien" countries. For example, when justifying the discriminatory character of the market disruption clause of Section 406 of the Trade Act of 1974, one author noted that the "important political goal" in enacting this provision was "the prevention of U.S. dependence on communist countries for . . . [raw] materials."[20]

In general, U.S. trade laws are unfavorable to NME countries, and often they overstep the limits of discrimination. They have been described as "convoluted, intellectually unsatisfying and unresponsive to the realities of NME trade."[21] They may be divided, in hierarchy of significance, into three major areas: antidumping, market disruption, and countervailing duty laws.

A. Antidumping Laws

Under U.S. law, dumping occurs when imported goods are sold in the United States at "less than fair value" (LTFV) and an industry is materially injured or is threatened with material injury, or the establishment of an industry is materially retarded by reason of imports of

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19. According to this proposal, classification as a "Planned Market Economy Country" would involve a determination whether the country in question: (1) affords market access to U.S. goods and services, (2) provides patent and copyright protection, and (3) is moving toward fulfilling GATT principles. Grace M. Kang, Note, *Solving the Nonmarket Economy Dumping Dilemma*, 1987 Colum. Bus. L. Rev. 705, 726-28; *see also* Jeffrey S. Neeley, *Nonmarket Economy Import Regulation: From Bad to Worse*, 20 Law & Pol'y Int'l Bus. 529, 539-40 (1988).

20. Joseph A. Calabrese, *Market Disruption Caused by Imports from Communist Countries: Analysis of Section 406 of the Trade Act of 1974*, 14 Cornell Int'l L.J. 117, 132 (1981); *see also* Mock, *supra* note 4, at 72.

21. Mock, *supra* note 4, at 56. The treatment of NME countries has been recognized "almost universally as being unsatisfactory." Neeley, *supra* note 18, at 529.

that good or by reason of its sales.[22] The LTFV represents the difference between the U.S. price of the good and its foreign market value.[23]

The fair value is calculated pursuant to a specified "hierarchy" of methods. With respect to market economies, the exporter's home sale price of the same or similar merchandise has priority. If that is not available, the price of the same or similar product in a third country is taken into account. The final method involves a "constructed value," based on the cost of production, general, selling and administrative expenses, and profit.[24]

With respect to NME countries, the method preferred by the 1988 Act is that of constructed value. Several factors are taken into account,[25] and the value is calculated according to the prices of those factors in a surrogate country at "a level of economic development comparable to that of the nonmarket economy country."[26] If adequate information is unavailable, the fair value is determined on the basis of prices of comparable merchandise produced by market economy surrogate producers, including the United States.[27]

The "surrogate country" approach is not a perfect solution. It is extremely difficult to find the ideal surrogate, and more importantly, even if such a country is found, it may be reluctant to disclose information out of fear that the information will later be used against it.[28] If full cooperation is secured, the results could still be unfair since a specific sector in the surrogate country could be at a much higher level of economic development than the remaining industry. Additionally, there always are procedural obstacles and other uncertainties involved.[29]

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22. 19 U.S.C. § 1673 (1988).

23. 19 U.S.C. § 1677(a)-(b) (1988).

24. 19 U.S.C. § 1677b(a)(1)-(2) (1988).

25. 19 U.S.C. § 1677(b)(c)(3) (1988). The factors include hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation.

26. 19 U.S.C. § 1677b(c)(2)(B) (1988). For details of the procedure, see Mock, *supra* note 4, at 61-62.

27. Neeley supports the use of prices of NME sales to third countries. Neeley, *supra* note 18, at 532, 551-52. However, it is true that these prices may be influenced by factors other than those of a purely economic nature. *See* Comment, *Dumping by State-Controlled Economy Countries: The Polish Golf Cart Case, and the New Treasury Regulations* [hereinafter *The Polish Golf Cart*], 128 U. PA. L. REV. 217, 222 (1979).

28. The case of Finland was a precedent in this regard. *See* Mock, *supra* note 4, at 64 n.46. Problems connected with calculating fair value with respect to NME products and choosing a surrogate country are discussed by Horlick & Shuman, *supra* note 17, at 807.

29. Kang, *supra* note 18, at 713-14.

For a relatively long time, U.S. laws did not contain any special regulations concerning NME producers.[30] The Antidumping Act of 1921, which understandably did not refer to NME countries at all, provided that fair value determination could be made according to home market sales, sales to third countries, or constructed value. In practice, home market prices were not taken into account in proceedings involving NME producers.[31] The first regulation in this field dates back to the 1968 Customs Regulations, later incorporated in the Trade Act of 1974. The methodology adopted by the Act — determination according to the sale prices of a market economy producer in the home market or of sale to other countries — was far from satisfactory and has been criticized as "patently protectionist" and "effectively eliminat[ing] competition."[32]

A case which had a significant impact on U.S. antidumping laws regulating imports from NME countries was initiated in the first half of the 1970s. It concerned a Polish producer of golf carts and it is known as the "Polish Golf Cart case."[33] Here, a claim of "predatory pricing" was raised against a Polish exporter of golf carts, manufactured exclusively for the U.S. market.[34] The major issues involved were as follows: which test — the price test or the constructed value test — had priority,[35] whether a product subject to antidumping proceedings could be compared with a U.S. product,[36] and whether in calculating the fair value the administering authority could make ad-

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30. For a historical overview of U.S. antidumping laws and NME countries, see Donald L. Cuneo & Charles B. Manuel, Jr., *Roadblock to Trade: The State-Controlled Economy Issue in Antidumping Law Administration*, 5 FORDHAM INT'L L.J. 277, 282-95 (1981-82).

31. It was alleged that home market sales in NME countries did not satisfy the condition specified in the Antidumping Act of 1921 that they be "made in the ordinary course of trade." Portland Cement from Poland, 28 Fed. Reg. 6,600 (1963).

32. *The Polish Golf Cart*, *supra* note 26, at 226.

33. *See* Electric Golf Cars from Poland, 40 Fed. Reg. 25,497 (1975). Golf "car" and "cart" are used interchangeably in both the text of this Article and the sources cited herein.

34. For a detailed description of the case, see Robert L Meuser, Note, *Dumping from 'Controlled Economy' Countries: The Polish Golf Cart Case*, 11 LAW & POL'Y INT'L BUS. 777 (1979).

35. Although the Polish side was not in favor of any of the tests, it preferred the constructed value test over the price test, and invoked market economy provisions as more appropriate. Stanislaw Soltysinski, *Problem dumpingu z "krajow o gospodarce kontrolowanej przez panstwo" w ustawodawstwie Stanow Zjednoczonych Ameryki* [The Problem of Dumping from "State Controlled Economy Countries" in the Law of the United States], 43 Ruch Prawniczy, Ekonomiczny i Socjologiczny [R.P.S.E.] 101, 114, 116 (1980) (on file with the *Journal of Transnational Law & Policy*) [hereinafter *Soltysinski I*].

36. If U.S. prices were taken as a basis (and the Treasury chose prices offered directly from the producers), then because of packaging, shipping and insurance costs, the foreign market value would always have to be higher than the U.S. price. *Soltysinski I*, *supra* note 34, at 114; *see also* Stanislaw Soltysinski, *U.S. Antidumping Laws and State-Controlled Economies*, 15 J. WORLD TRADE L. 251, 259 (1981) [hereinafter *Soltysinski II*].

justments other than those which resulted from differences in sale on two similar markets.[37]

When a Canadian company — the only non-U.S. producer whose prices could serve as a basis for calculating the foreign market value — ceased manufacturing golf carts in 1974, a vacuum was created since existing laws did not envision such a situation. This resulted in an amendment to the Regulations of the Department of Commerce in 1978,[38] pursuant to which the fair value of goods from NME countries was to be constructed on the basis of prices or costs of such or similar products in a market economy at a comparable level of economic development with the exporting country. The inputs from the actual factors of production were to be reflected by the comparable market economy prices and costs. U.S. prices and costs were to be used as a last resort. The new test when applied to Polish golf carts showed that as of 1978, the products had been sold above the dumping margin.[39]

Although the changes introduced by the 1988 Act constituted a further improvement, the antidumping rules are still not fully satisfactory. This is so for several reasons: it is unclear what unfair trade practice is involved when dumping is found, fair value is still unpredictable, and the new law does not take into account comparative advantage of production.[40] Neeley is of the opinion that the regulation "is at least as unpredictable as the prior regime and does little to encourage market forces."[41] As Soltysinski has noted, "enterprises from centrally planned economies cannot easily ascertain the fair market value of their goods," nor may they "avoid dumping by simply raising their home market prices . . . [and] risk being punished for failing to observe prices which they cannot control."[42]

Senator John Heinz has advanced an "alternative proposal" of "artificial pricing" (or a "benchmark price"), pursuant to which a minimum allowable price for goods from each NME should be established.[43] Fortunately, the proposal has not been implemented because despite its positive aspects, it could result in discrimination, and it would make products from NME countries subject to closer scrutiny

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37. *Soltysinski I*, *supra* note 34, at 113-14.

38. 43 Fed. Reg. 35,263 (1978). These regulations were created to deal with Polish golf cars which otherwise would have been forced out of the U.S. market. Kang, *supra* note 18, at 709.

39. *Soltysinski I*, *supra* note 34, at 119.

40. Mock, *supra* note 4, at 63. The author notes that "[u]nder a constructed value analysis, the comparative advantage of the NME is rendered irrelevant"; what is reflected instead, is the surrogate country's comparative advantage. *Id.* at 65.

41. Neeley, *supra* note 18, at 530.

42. *Soltysinski II*, *supra* note 35, at 256; *see also Soltysinski I*, *supra* note 34, at 122-23.

43. *See* Mock, *supra* note 4, at 65-66; Kang, *supra* note 18, at 706; Neeley, *supra* note 18, at 537-39; Cuneo & Manuel, *supra* note 29, at 278-79.

than under existing U.S. laws. It seems that no matter what solution is adopted, NME producers risk being placed in an "obviously worse competitive position" than producers from other countries.[44]

If the status of the newly emerging market economies in Central and Eastern Europe is maintained, then at least a more frequent effort should be made to the existing provision allowing foreign market value of merchandise to be determined pursuant to market economy dumping rules.[45] As has been suggested, this should be done especially with respect to recently established joint ventures in cases where the surrogate approach may be inappropriate.[46] Also attractive, from the perspective of a country such as Poland, is the so-called sectoral approach providing for the determination of state control on the basis of the state's influence on a particular economic sector rather than on the economy as a whole.[47] Of course, the degree of state intervention in a given sector is likely to be the subject of disagreement.

It is difficult to predict how antidumping practices, with respect to Central and Eastern European states, will develop in the future. In a recently initiated case concerning ball bearings (*Ball Bearings* case), the ITC determined that there was no material injury or threat thereof to U.S. industry by the import of Polish products.[48] The calculation of fair value and Poland's classification as a NME was therefore not discussed. However, the preliminary determination of the ITC has been challenged, and should it be reversed, the *Ball Bearings* case could bring some interesting solutions.[49]

B. Market Disruption: Section 406

Section 406 of the Trade Act of 1974[50] obliges the ITC to make an investigation to determine if the import of an article which is a product from a communist country causes market disruption. Market dis-

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44. *Soltysinski I*, *supra* note 34, at 122.

45. 19 U.S.C. § 1677(b)(c)(1)(B) (1988).

46. Neeley, *supra* note 18, at 553.

47. *See* Cuneo & Manuel, *supra* note 29, at 278-79; Kang, *supra* note 18, at 711.

48. Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey, and Yugoslavia, 56 Fed. Reg. 14,534 (Int'l Trade Comm'n 1991) (preliminary determination).

49. *See* Torrington Co. v. United States, 1991 WL 180158, 13 ITRD 2069, (Ct. Int'l Trade, Sept. 9, 1991). Here, in an order dated September 9, 1991, the Court of International Trade granted the plaintiff's motion to strike the claims of, *inter alia*, Polish producers of ball bearings alleging that the plaintiff had lacked standing to bring the antidumping petition before the ITC. *See also* Torrington Co. v. United States, No. 92-49, 790 F. Supp. 1161 (Ct. Int'l Trade, Apr. 3, 1992).

50. 19 U.S.C. § 2436 (1988).

ruption is deemed to exist whenever imports of an article, similar to or directly competitive with an article produced by U.S. domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat to the U.S. domestic industry.[51] Upon receipt of the ITC report, the President, whose powers include "temporary emergency action" until the conclusion of the formal investigation, may take one or more of the following measures: impose or increase duties, impose tariff-rate quotas or quantitative restrictions, or support orderly marketing agreements.[52]

Poland was involved in one of the first Section 406 investigations in U.S. history. However, in this case — concerning the import of clothespins from several communist countries — the ITC concluded that the imports from Poland were not "increasing rapidly,"[53] and thus not subject to sanctions.

Unlike antidumping rules, this provision has been rarely invoked and "had no apparent impact on imports from nonmarket economy countries."[54] In Kang's opinion, this was due to a slower than anticipated rate of expansion of trade with NME countries, as well as the fact that most imports from those countries are raw materials which are not directly competitive with the U.S. domestic industry.[55] According to another author, in view of existing antidumping regulations, Section 406 has no true economic rationale, its only justification being the prevention of U.S. dependence on the supply of goods from communist states.[56]

C. *Countervailing Duty Laws*

The application of countervailing duty laws to NME countries is not explicitly provided for in U.S. trade laws. There have, however,

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51. *Id.* at § 2436(e)(2). This provision is a counterpart to Section 201 of the Trade Act of 1974. With respect to those countries, market disruption shall be recognized when goods are imported in such increased quantities as to be a substantial (as opposed to significant in the case of NME countries) cause of serious (as opposed to material) injury to a domestic industry. 19 U.S.C. § 2251 (1988). As can be seen, market economy countries are generally in a more favorable position, the only possible exception being the "increased quantities" test which — as one author notes — may be more difficult to satisfy. Calabrese, *supra*, note 19, at 123.

52. The President may either accept or reject the ITC's conclusions. It has been suggested that Section 406 would be more effective if the President's discretion was limited. *See, e.g.* Neeley, *supra* note 18, at 550-51.

53. *See* Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, 43 Fed. Reg. 35,757 (1978) (USITC Pub. No. 902). The ITC confirmed market disruption with respect to the People's Republic of China. For a discussion of these cases see John P. Erlick, *Relief from Imports from Communist Countries: The Trials and Tribulations of Section 406*, 13 LAW & POL'Y INT'L BUS. 617, 621-22, 631-33 (1981).

54. Kang, *supra* note 18, at 716.

55. *Id.*

56. Calabrese, *supra* note 19, at 132-33.

been attempts to apply existing general regulations to those countries.[57] Poland is one such case. In 1983, it was alleged that the use of preferential exchange rates[58] and tax exemptions by Poland and Czechoslovakia for the export of carbon steel wire rod constituted subsidies of exports of these products. However, the U.S. Department of Commerce, which was considering the petition of the U.S. producers, took the stand that because costs, prices, and profits in a NME country are subject to central planning, and they do not depend on market forces, it is impossible to determine what is a subsidy for the purpose of countervailing duty laws.[59] This view was challenged by the Court of International Trade[60] whose decision was in turn reversed by the Court of Appeals. The latter confirmed the Department of Commerce's finding that subsidies cannot be distinguished in a NME.[61]

Although it has been argued that procedures analogous to antidumping proceedings could be applied to cases of alleged subsidization by NME countries (in 1987, draft legislation was submitted to overturn the Georgetown ruling),[62] U.S. authorities have refrained from implementing those proposals. There is no doubt that in a NME country the state plays the role of the producer, and as such "an alleged act of subsidization is conceptually inseparable from the state's normal role of allocating resources."[63] Moreover, since subsidization and dumping cannot be distinguished in the case of NME countries, the availability of both laws would "duplicate" the protection of the U.S. market.[64] As Hoyt has remarked, "[p]arallel application of these laws would go beyond offsetting the unfair trade practices of nonmarket

57. The first attempt was made in 1983 and involved the People's Republic of China. For an outline of the history of countervailing duty laws and NME countries see Egge, *supra* note 16, at 953-55.

58. As any other NME country, Poland had official and commercial exchange rates. It was alleged that while the rate for transactions with socialist countries was approximately 30 zloty/dollar, the preferential rate applied to exports to the United States was approximately 80 zloty/dollar, which resulted in a significant difference in income from exports to the United States. The petitioners claimed that this difference constituted a subsidy. *See* Stuart S. Brown, *Nonmarket Economies, Multiple Exchange Rates and the Countervailing Duty Law: The Case of Polish and Czech Steel*, 21 J. WORLD TRADE L. 89, 93 (1987).

59. Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. 19,370 (Dep't Comm. 1984) (final determination); Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19,374 (Dep't Comm. 1984) (final determination). Commerce's arguments and counter-arguments are discussed by Alan F. Holmer & Judith Hippler Bello, *The Countervailing Duty Law's Applicability to Nonmarket Economies*, 20 INT'L LAW. 319 (1986).

60. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

61. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The decisions are extensively discussed by Egge, *supra* note 16, and by Brown, *supra* note 57.

62. *See* Hoyt, *supra* note 3, at 1649-50, 1665-66.

63. *Id.* at 1668.

64. *Id.* at 1666-67.

economy countries" and would "violate the free-trade efficiency goals of United States trade laws."[65] In addition, the injury test would not be applicable in most cases because only a few NME countries are parties to the GATT Subsidies Code.

The reasoning that stood behind the Georgetown ruling is now becoming more and more obsolete with regards to the countries in Central and Eastern Europe. Although the governments in those countries still participate, to a significant degree, in market relations, state control over prices and exchange rates has been lessened. In these circumstances, subsidies can now be readily identified, and the reasons for non-application of countervailing duty laws to those countries are becoming less convincing.[66] However, it should be borne in mind that the application of U.S. countervailing laws, in addition to the restrictive antidumping laws, could "damage U.S. economic and political relations in the region and economic recovery in Eastern Europe."[67]

The described tension is not limited to countervailing duty laws and is relevant in any case of application of U.S. unfair trade laws. The success of economic reforms in post-communist countries will largely depend on the ability of these countries to expand their trade relations. Any hindrance or pressure in this regard could have serious negative consequences for the countries in question. The only solution is the adoption of a flexible and tolerant approach by market economy countries, at least for an interim period necessary for the adjustment of those countries to the new conditions.

IV. Recent Developments in U.S. Economic Policy Towards Poland

The transformation of Central and Eastern European countries is accompanied by a number of negative factors: the collapse of the market in the former Soviet Union, very high costs of transformation in former East Germany which hinders assistance by Germany to other countries in this region, the restrictive policy of private banks which refuse to give further credits, and the economic consequences

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65. *Id.* at 1652; *see also* Egge, *supra* note 16, at 958-9.

66. Another interesting problem which may emerge in the future is that of government equity participation which according to U.S. laws can constitute a subsidy if "inconsistent with commercial considerations." *See* Egge, *supra* note 16, at 941-42, 967. However, the latter is believed to involve mainly situations of share purchases by the government. From the perspective of Poland, a challenge on this ground is not very likely since the government has been primarily interested in the sale of state-owned shares to private investors rather than the purchase of such shares.

67. *Id.* at 943, 960-61.

of the Gulf War.[68] Successful reforms in post-communist countries require substantial foreign aid. The following passage accurately reflects this need:

> Success in Poland's transition to a market economy will require financial support from Western governments during the period of transition, as well as the determination of the West to welcome Poland as a full partner in the political and economic institutions of the Western nations. If support from the West is timely and on an adequate scale, and if Poland remains steadfast in its efforts, the transition period will be brief, and so too will be the period [in] which financial aid is needed.[69]

A. U.S. and Financial Support to Poland

Poland has been receiving financial assistance from a variety of sources, including individual countries,[70] the European Community, the World Bank, and the International Monetary Fund (IMF). However, for a country in Poland's situation, the major form of financial aid is debt rescheduling.[71] At the end of 1989, as estimated in U.S. dollars, Poland owed $40.3 billion of which $27.7 billion was owed to seventeen Western governments (Paris Club), $9.2 billion to over 400 commercial banks (London Club), and $2.1 billion to other socialist countries.[72] Because of due interest payments, the total sum of the debt has been constantly increasing: in July 1991, it amounted to $45.964 billion.[73]

In April 1991, Paris Club creditors agreed to reduce Poland's long-term and medium-term debt (constituting over 60% of Poland's total debt) by at least 50%. The debt relief will be distributed over two stages, the second of which will depend on the implementation by Poland of an economic program approved by the IMF.[74] The United

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68. Jerzy Kleer, *Upadek wschodniego rynku* [The Fall of the Eastern Market], POLITYKA, No. 8, Aug. 8, 1991, at 18. Poland was one of the countries most severely affected by the hostilities in Iraq and its losses amount to millions of dollars.

69. Jeffrey Sachs & David Lipton, *Poland's Economic Reform*, 69 FOREIGN AFF., at 64 (1990).

70. From May 1990 until February 1991, the United States, Germany, Japan, Italy, France and the United Kingdom contributed about three-fourths of $8.5 billion in aid to Poland and Hungary. *Economic Assistance to Eastern Europe Examined by General Accounting Office*, 8 INT'L TRADE REP. (BNA) No. 9, 326 (Feb. 27, 1991).

71. Sachs & Lipton, *supra* note 68, at 58.

72. *Id.* It has been estimated that the annual interest on this debt — $3.6 billion — constitutes half of the Polish income from merchandise exports to the West. *Id.*

73. *Polskie zadluzenie* [*Polish Indebtedness*], RZECZPOSPOLITA, July 12-13, 1991, at 1. The debt owed to the United States constituted 11.44% of the Paris Club debt ($3.538 billion). *Id.*

74. *See* Iwona Antkowska-Bartosiewicz, *Poland Debt Reduction Agreement with Paris Club: Political Gains* [translation], ZYCIE GOSPODARCZE, July 21, 1991.

States supported a substantial reduction of the debt, in line with a recommendation contained in the Support for Eastern European Democracy Act (SEED Act).[75] The recommendation suggested that the President adopt and coordinate debt rescheduling programs for Poland and Hungary. The United States was the second country (the first being Austria) with which Poland signed, on July 17, 1991, a specific agreement on debt reduction.[76]

According to the agreement, the reduction will total 70% and is planned in two stages. As a first step, the debt will be reduced by 10% which will be used for environmental protection; the remaining 90% will be reduced by 46.67% within the framework of a program of immediate debt reduction. The second stage, set for 1994 and amounting to a further 20%, is contingent upon Poland's fulfillment of conditions set by the IMF.[77] In April 1992, one year after the Paris Club agreement was signed, the Polish debt (with interest) amounted to $41 billion.[78]

B. The SEED Act

The Support for Eastern Europe Democracy Act was adopted by the U.S. Congress in November 1989, and was initially designed to aid solely Poland and Hungary.[79] Its principal object was to support economic restructuring in those countries through various forms of assistance. The SEED Act has been described as

> a comprehensive aid package, including authorizations for balance-of-payments restructuring, assistance in building indigenous technologies, emergency food relief, environmental protection, facilitation of foreign investment, programs to promote advanced educational exchanges, funds to support democratic movements, and other actions aimed at preserving recent gains and promoting further human rights improvements.[80]

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75. The Support for East European Democracy Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298-1324.

76. The "general" agreement of April 21, 1991, is to be supplemented by separate agreements with each of the 17 states of the Paris Club. By March 1992, Poland had concluded bilateral executive agreements with 12 of those states.

77. *Dlug wobec USA mniejszy o 70 procent [Debt Owed to the U.S.A. Lower by 70%]*, RZECZPOSPOLITA, July 18, 1991, at 1.

78. *Redukcja polskiego dlugu. 50 procent w prezencie, [Reduction of Polish Debt: A Gift of 50 percent]*, 82 GAZETA WYBORCZA, Apr. 7, 1992, at 4.

79. In 1991, legislation was introduced extending the benefits of the SEED Act to Czechoslovakia, Bulgaria, and Romania. The term "Eligible East European Country" was designated as "any other country if the President so determines." 137 CONG. REC. S5,168, S5,204 (1991).

80. William C. Stone, *Poland and Hungary: The SEED Act as a United States Response to Democratic Reform*, 3 HARV. HUM. RTS. J. 167, 174 (1990).

The major package of aid amounted to $938 million of which Poland was to receive $200 million for a currency stabilization fund, $125 million for agricultural assistance, and $200 million in the form of a trade credit insurance program for Poland by the Agency for International Development (AID).

To further the SEED Act's aims, two private, non-profit organizations have been established: the Polish-American Enterprise Fund and its Hungarian counterpart, "[t]he most unique and potentially significant institutions created by the Act."[81] The members of the boards are appointed by the President and include business leaders from the respective countries, but the majority were from the United States. The object of the two funds is to contribute to the expansion and strengthening of private sectors through support for hard-currency loans or venture capital for development projects.

The SEED Act authorizes the AID to extend basic agricultural, commercial, entrepreneurial, financial, scientific, and technical skills to the citizens of Poland and Hungary. The SEED Act will fund AID an additional $10 million over the next three years to cover these expenses. It also allows the Overseas Private Investment Corporation (OPIC)[82] to extend its trade and credit assistance programs to Hungary and Poland. Prior to the enactment of the SEED Act, Yugoslavia had been the only eligible Eastern European country.[83]

Pursuant to the SEED Act, Poland and Hungary have been included in the operation of the Export-Import Bank (Eximbank). Eximbank is a federal agency offering insurance, guarantees, and loans to finance U.S. exports, which had been prohibited from operating in those countries prior to the SEED Act.[84] By May 1991, Eximbank, which started operation in Poland in March 1990, had given preliminary or final approval to financing worth $90 million in U.S. exports.[85] In April 1991, a one-year framework agreement was signed between Eximbank and the Polish Government, pursuant to which the

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81. Peter Swiecicki & Bruce C. Thelen, *Responding to Changes in Eastern Europe: The SEED Act and Investment in Poland and Hungary*, 69 MICH. B.J. 650, 651 (1990).

82. OPIC is an institution "charged with providing political-risk insurance, loans and guarantees to support U.S. investments in the underdeveloped world." Jonathan H. Hines, *Reforms in Eastern Europe Spur Dismantling of United States Trade Barriers*, 203 N.Y.L.J., Mar. 7, 1990, at 1.

83. Thus, the SEED Act is a "significant expansion of statutory authorization to encourage trade with Eastern Europe." Swiecicki & Thelen, *supra* note 80, at 651.

84. *See* Rob Garverick, *A Guide to Eximbank Programs*, 111 BUS. AM. No. 21, at 10 (1990).

85. *Polish Government to Guarantee Repayment of Eximbank Financing Under New Agreement*, 8 INT'L TRADE REP. (BNA) 648 (May 1, 1991).

latter will guarantee repayment of Eximbank financing.[86] Poland has also been granted the benefits of the Generalized System of Preferences (GSP), a system allowing preferential tariff treatment of products from selected countries.

The implementation of such a comprehensive act as the SEED Act cannot be free from practical problems.[87] For example, AID guarantees are available only for transactions involving the export of goods and services for the use of the private sector in Poland. Since most of the Polish economy is still state-owned, the resortment to these kinds of guarantees may be limited.[88] Moreover, financial assistance provided for by the Act "is minimal in comparison to the level of demand."[89] The extension of the benefits of the SEED Act to other post-NME countries will further diminish the comparative advantage of individual countries, as well as limit the amount of available U.S. aid.

C. *Other Developments*

Financial assistance is neither the exclusive nor the most important form of aid which may be provided by Western governments to the emerging democracies. Non-financial assistance is equally effective. For example, U.S. tariff reductions, in force since the beginning of 1990, led within twelve months to savings for Poland of $4 million.[90]

Access to modern technology is also significant. Formerly, strict controls of exports to communist countries were exercised by the Coordinating Committee on Multilateral Export Controls (COCOM), an association of NATO countries (with the exception of Iceland). In 1991, in the implementation of prior COCOM decisions, the United States proclaimed a "favorable consideration policy" towards some Central and Eastern European countries. Pursuant to the new policy, review of license applications for exports of eligible items will now be made "with a presumption of approval unless specific objections are raised to the proposed transactions."[91] It is expected that by the end

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86. The agreement concerns guarantees by five government-owned banks authorized to deal in foreign currency. *Id.*

87. Swiecicki & Thelen, *supra* note 80, at 651.

88. *Id. See also* Stone, *supra* note 79, at 175 (even the most enthusiastic supporters of the bill doubt its actual effectiveness).

89. Stone, *supra* note 79, at 175.

90. *Taryfa ulgowa* [*Preferential Duties*], RZECZPOSPOLITA, July 28, 1991, at I. However, Polish exports to the United States rose by only 4% in 1990 as compared with a 40% rise of exports to European Community countries. *Id.*

91. *U.S. Eases Government Controls on Exports to Poland, Hungary and Czechoslovakia*, 8 INT'L TRADE REP. (BNA) 648 (May 1, 1991).

of 1992, Poland, Hungary, and the Czech and Slovak Federal Republics will become eligible to import high technology products from designated U.S. manufacturers without the need to obtain individual export licenses from the Commerce Department.[92]

However, it must be noted that financial aid is resorted to most readily by the United States. Poland's debt reduction is owed almost exclusively to U.S. support of Poland's position. The SEED Act and other financial assistance programs have provoked the comment that "[o]ne clear lesson from the case of Poland is that the West should be preparing similar packages of lending and debt-service relief for other Eastern European countries."[93] Unfortunately, the United States is not always willing to adopt such a supportive stand in other aspects of its trade and economic relations with Poland. A most recent and symptomatic example is the Polish-U.S. Bilateral Investment Treaty, which will be presented below.

V. THE POLISH-U.S. BILATERAL INVESTMENT TREATY

Section 306 of the SEED Act explicitly encouraged the U.S. to sign a bilateral investment agreement with Poland: "Congress urges the President to seek bilateral investment treaties with Poland and Hungary in order to establish a more stable legal framework for United States investment in those countries."[94]

However, the initiative to conclude the agreement preceded the adoption of the SEED Act by Congress.[95] Poland reacted positively to the proposal. On March 21, 1990, during a visit to the United States, the Polish Prime Minister signed the Treaty Concerning Business and Economic Relations (Treaty).[96]

The Treaty is the first agreement of this kind entered into by the United States with an Eastern European country. Bilateral agreements

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92. *Hungary, Poland, C.S.F.R. To Be Made Eligible For Expedited Export Licenses*, 9 INT'L TRADE REP. (BNA) No. 7, 266 (Feb. 12, 1992).

93. Sachs & Lipton, *supra* note 68, at 64.

94. 135 CONG. REC. S15,845, S15,850 (1989).

95. The Treaty was first proposed to the Government of Poland by Secretary of Commerce Robert Mosbacher as early as September 1989. *See Poland and United States Sign Treaty on Business and Economic Relations*, 111 BUS. AM. No. 7, at 10 (1990); Marek Henzler, *Od misia Miszy do Wuja Sama [From Misha the Bear to Uncle Sam]*, POLITYKA No. 16, Apr. 20, 1991, at 7.

96. For the text of the Treaty and accompanying documents, see Treaty with Poland Concerning Business and Economic Relations, Message from the President. Treaty Doc. 101-18, 101st Cong., 2d Sess. (1990) [hereinafter U.S.-Poland Treaty]. For an overview of its provisions, see Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 885, 895-902 (1990) and Nancy J. 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 (1991).

concerning investments, business, and trade — generally known as "bilateral investment treaties" (BITs) — had to this date been limited to developing countries.[97] The Polish-U.S. Treaty "extends the reach and scope of U.S. investment policies from the developing world . . . into the different landscape of Eastern Europe."[98] While being in principle a standard BIT,[99] it "includes a number of significant provisions that have no counterpart in prior BIT practice," their collective purpose being "to resolve particular problems that U.S. business traditionally has faced in centrally-controlled, non-market Eastern European economies, and which may continue to be impediments to investment and commerce during the period of Poland's transition to a free-market system."[100]

A. *General Principles*

The scope of the Treaty is much broader than that of traditional BITs. Basically, its provisions fall within two categories: provisions concerning investments and business and economic relations (a repetition or modification of a standard BIT), and provisions forming a legal framework for relations involving intellectual property rights. The Treaty is not limited to its basic text, but has been expanded in a Protocol, Annex, and several "letters of understanding"[101] which

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97. On the history of BITs, see Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 INT'L L. & POL. 1 (1983); Patricia M. Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931 (1984).

98. Letter of Submittal from Lawrence Eagleburger, Secretary of State, to the President of the United States, (June 8, 1990), Treaty with Poland Concerning Business and Economic Relations, June 19, 1990, U.S.-Poland, S. TREATY DOC. No. 8, 101st Cong., 2d Sess. (1990) at v [hereinafter Letter of Submittal].

99. That is, one based on the U.S. Prototype. For the text of the first Prototype published on January 11, 1982, see Kathleen Kunzer, *Recent Development: Developing a Model Bilateral Investment Treaty*, 15 LAW & POL'Y INT'L BUS. 273 app. at A1-A14 (1983). A revised prototype was issued on February 24, 1984. For a general discussion of its provisions, see Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373, 373-441 (1985).

100. Letter of Submittal, *supra* note 97, at ix - x. The Treaty's particular provisions are discussed in Eleanor R. Lewis, *The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in the U.S. Bilateral Investment Treaty Program*, 22 LAW & POL'Y INT'L BUS. 527 (1991).

101. There are four "letters of understanding" attached to the Treaty: on the designation within the Agency for Foreign Investments of a Deputy President to assist U.S. nationals and companies in deriving full benefits of the Treaty; on tourism and travel-related services; on intellectual property; and on procedures and conditions in reviewing applications for entry of U.S. investments. The weight of the commitments in the letters differs, e.g., the letter concerning tourism refers to an Agreement on the Development and Facilitation of Tourism signed by the

form an integral part of it. Many detailed unilateral obligations on the part of Poland have been included in those documents.

In its "basic" part, the Treaty is designed to cover — either by setting out general guidelines or through more specific provisions — matters relating to investments, associated activities, and commercial activities. Commercial activities have been defined as activities carried on by nationals or companies of a Party related to the sale or purchase of goods and services, and the granting of franchises or rights under license which are not investments or associated activities.[102] Thus, the Treaty purports to cover practically all types of activities connected with investments, as well as trade in goods and services.

The standards of treatment for investments reiterate well-known concepts of national treatment (treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of that Party in like circumstances) and Most Favored Nation (MFN) treatment (treatment that is at least as favorable as that accorded by a Party to companies and nationals of third parties in like circumstances).[103] What is relatively new with respect to an Eastern European country is the standard of "nondiscriminatory treatment," that is, treatment that is at least as favorable as the better of national treatment or MFN treatment. Capital-exporting states are "particularly desirous of securing this combined standard because it assures them equality of treatment with both host country nationals and investors from third countries."[104]

Pursuant to the Treaty, each Party has an obligation to permit and treat investments and associated activities on a nondiscriminatory basis.[105] Moreover, investments shall at all times be accorded fair and

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United States and Poland on September 20, 1989, and simply states that relevant services shall be provided by each Party to nationals and companies of the other Party on a fair and equitable basis, while the letter relating to intellectual property rights envisages detailed obligations including changes in domestic law.

102. Letter of Submittal, *supra* note 97, at vii. This broad definition was "intended to ensure protection to, *e.g.*, representative offices of U.S. companies in pursuing sales in Poland without, however, conferring rights related to trade in goods (covered exclusively by the GATT)." *Id.*

103. The U.S. has always insisted on these categories of treatment for its investments, unlike other Western countries, e.g., the United Kingdom, which occasionally require only MFN treatment for its investments. Jeswald W. Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR L. & COM. 969, 999 (1985) [hereinafter *Treaty Framework*].

104. Salacuse, *supra* note 96, at 668.

105. The principle is subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to the Treaty. Although, due to the many fields in which the state still has monopoly rights, the list of Poland's exceptions is broader than that of the U.S.. Poland has expressed the intention to remove some of these sectors and matters from the list and has "taken note" of the U.S. investors' "particular interest" in the sectors of telecommunications, publishing and printing, banking and other financial services (including insurance). *See* U.S.-Poland Treaty, *supra* note 95, at Annex, para. 4.

equitable treatment, enjoy full protection and security, and in no case be accorded treatment less than required by international law.[106]

Exceptions to the above standards of treatment include the acquisition of interest in any governmentally-owned enterprise or organization undergoing privatization. In this case, nationals and companies of the United States can invoke only the MFN treatment standards. However, this should not be confused with preferential treatment of state-owned enterprises which was explicitly rejected by the Treaty. The enterprises are subject to the same treatment as any other company. This is important since, as has been emphasized above, those enterprises will probably play a major economic role in post-NME countries for a considerable time.

Alleged discriminatory treatment is subject to international arbitration.[107] It is not typical for an Eastern European country to generally consent to international arbitration in such cases. Formerly these disputes have been subject to resolution only by domestic courts.[108]

Poland has explicitly recognized the "prompt, adequate and effective" standard of compensation for expropriation. Expropriation may occur only for a public purpose, should be performed in a nondiscriminatory manner, be accompanied by payment in the above-mentioned way, and be in accordance with due process of law and the general principles applying to treatment of investments. Compensation must be equivalent to the fair market value of the expropriated investment.[109]

B. Intellectual Property

The definition of intellectual property (falling within the notion of investment) has been broadened by the Treaty as compared to formerly used definitions "in order to reflect new developments in the

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106. The United States relies on international law especially "to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts." Kenneth J. Vandervelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 222 (1988).

107. The Treaty also envisages the settlement of disputes through the International Center for the Settlement of Investment Disputes, provided that Poland becomes a party to the Convention dated March 18, 1965, on the Settlement of Investment Disputes Between States and Nationals of Other States. Treaty with Poland Concerning Business and Economic Relations, June 19, 1990, U.S.-Poland, S. TREATY DOC. No. 8, 101st Cong., 2d Sess. (1990) at IX.

108. *See* Letter of Submittal, *supra* note 97, at vi.

109. As Bergman notes, the determination of a fair market value may be difficult in NME countries because it presupposes the existence of a competitive market from which value can be determined. Bergman, *supra* note 96, at 40. This problem is no longer a serious one in a country like Poland where prices are no longer subject to direct governmental control.

field."[110] It now covers literary and artistic works (including sound recordings), patent rights, industrial designs, semiconductor mask works, trade secrets, trademarks, service marks, and trade names. The list is exemplary and not exhaustive.

Protection of intellectual property is a basic tenet of U.S. trade policy and provisions to that effect have traditionally been included in U.S. commercial treaties.[111] The United States continues to emphasize that this area is one of major importance for the development of U.S.-Polish trade relations.[112] By virtue of Section 301 of the Trade Act of 1974, trade sanctions can be applied in cases where there is no adequate and effective protection of U.S. property rights.

The most serious commitments for Poland follow not from the text of the Treaty itself, but from a letter accompanying it,[113] and three annexes thereto. Poland has agreed to take action in the field of intellectual property according to a strict time schedule. And so, by January 1, 1991, Poland was to ratify the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works.[114] By December 31, 1991, Poland agreed to introduce the following changes in its intellectual property laws: extend copyright protection to computer software to the extent equivalent to the protection for other literary works; provide a term of protection of twenty years for patents (currently ten years) and limit the scope of application of criteria of compulsory licenses; provide "adequate and effective" protection for integrated circuit layout designs; and provide "adequate and effective" protection against unfair competition. By December 31, 1992, Poland should provide patent protection for foodstuffs, pharmaceutical products, and chemical products. Present laws afford protection only for the method of production and not the products themselves. Finally, Poland has undertaken to participate "constructively" in the Uruguay Negotiations on Trade-Related Aspects of Intellectual Property Protection.

Not all of the above commitments will be advantageous for Poland, at least in the short run. The costs of adapting Polish law to the re-

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110. Letter of Submittal, *supra* note 97, at vii.

111. Salacuse, *supra* note 96, at 656.

112. According to Secretary of Commerce Robert Mosbacher, U.S. investors are mostly interested in adequate intellectual property laws, the enactment of a law on prior claims (reprivatization) and in a speed-up of privatization. *Weak Intellectual Property Laws Hinder Polish Business Climate*, 8 INT'L TRADE REP. (BNA) No. 42, at 1556 (Oct. 23, 1991).

113. Letter from Carla A. Hills, U.S. Trade Representative, to Dariusz Ledworowski, Undersecretary of State (Mar. 21, 1990).

114. Poland adhered to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works in 1990. 1990 DZIENNIK USTAW [JOURNAL OF LAWS], No. 82, items 474 and 475 (Polish text).

quirements of the Treaty have been estimated to be between $100 to 600 million.[115] The International Law Section of the Legislative Council, an advisory organ of the Prime Minister, has expressed the highly critical opinion that "[t]he structure of the Treaty, to which Polish negotiators have consented, justifies the sad assumption that they were not aware of all the legal and economic implications of this Treaty for Poland."[116] In particular, the authors of the opinion believe that potential benefits and costs of Poland's acceptance of the Treaty could be compared in a ratio of 1:100 or even 1:200.[117] For example, in the field of pharmaceutical and chemical products, Polish law protects only the method of production, not the product. In the past, this has allowed the creation of Western-like pharmaceuticals through utilization of different technologies. Extension of the protection also to the method will be very disadvantageous and costly to the Polish industry,[118] not a desirable effect for a country struggling to overcome an economic crisis. The implementation of the Treaty provisions could also leave Poland with laws different from those of the European Community, which could contravene Poland's efforts to establish close links with the EC.[119]

However, by failing to adhere to the provisions, Poland could find itself even more inconvenienced. In February 1991, the International Intellectual Property Alliance (IIPA) targeted Poland (and seven other countries) for placement on the USTR priority watch list as a country which "causes significant losses to the U.S. copyright industries."[120] The request was repeated by the IIPA in February 1992. Compliance with this request could mean economic sanctions for Poland, including a revocation of its MFN status.[121]

Although the Treaty was finally ratified[122] after complicated and lengthy parliamentary procedures, Poland has not yet adopted any of

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115. Andrzej Mozolowski, *Flaga do pol masztu* [*Flag at half-mast*?], POLITYKA No. 25, June 22, 1991, at 18.

116. Henzler, *supra* note 94, at 7.

117. *Id.*

118. *Na kleczkach przed Bialym Domem* [*On knees before the White House*] (Interview with Professor Soltysinski), TYGODNIK GDANSKI No.11, Mar. 17, 1991, at 9 [hereinafter *Interview with Professor Soltysinski*].

119. Professor Soltysinski has stated "if we are to use certain patterns of economic life, then in the case of conflict they should follow European solutions — not those of the United States." *Id.* at 1.

120. *International Intellectual Property Alliance Targets 22 Countries for 'Special 301' Lists*, 8 INT'L TRADE REP. (BNA), No. 8, at 274 (Feb. 20, 1991).

121. It has been estimated that piracy in Poland has cost the United States $140 million. *Sankcje za piractwo* [*Sanctions for Piracy*], GAZETA WYBORCZA, Feb. 26, 1992, at 7; *see also Taiwan, Poland and the Philippines Cited for Alleged Copyright Problems*, 9 INT'L TRADE REP. (BNA) No. 9, at 353 (Feb. 26, 1992).

122. *See infra* notes 124-28 and accompanying text.

the required legislation. Drafts of laws have, however, been prepared, including a special law directed against all types of piracy[123] which was presented to the Polish Parliament in April 1992.[124] Changes in Poland's copyright and patent laws have to take into account not only the U.S.-Poland Treaty, but also the European Community.

C. *Ratification of the Treaty*

The Treaty was promptly accepted by the United States: the Senate granted approval in August 1990, and it was signed by the President in December 1990. The action of the Polish government was not as efficient. Only on October 22, 1990, did the Council of Ministers adopt a favorable recommendation concerning the ratification of the Treaty.[125] It was submitted to the Parliament in March 1991, following which — due to serious criticism mentioned above[126] — a special 16-member parliamentary Commission was established to analyze the implications of the proposed ratification. On July 20, 1991, the Commission recommended the ratification of the agreement.[127] Pursuant to the Commission's suggestion, an interpretative resolution was adopted simultaneously with the acceptance of the Treaty on July 26, 1991.[128] The resolution obliged the Polish Government to undertake steps aimed at improving the situation of Polish exporters on the U.S. market, including an increase of U.S. import quotas and the application of market economy laws to Poland. The Parliament acknowledged that the Polish economy would bear substantial costs in implementing the new regulations on intellectual property, stating that such costs "are borne by every country which enters the global economic system and accepts world standards of use of protected goods." The Parliament also appealed to the U.S. not to treat the delay in enacting of new intellectual property legislation as a violation of the provisions of the Treaty.

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123. *Rzadowy raport o piractwie. Potrzebne dodatkowe paragrafy* [*Government Report on Piracy: Additional Paragraphs Needed*], GAZETA WYBORCZA, Feb. 27, 1992, at 7.

124. *Polish Premier Announces New Initiative to Bring U.S. Investment Treaty Into Force*, 9 INT'L TRADE REP. (BNA) No. 16, at 673 (Apr. 15, 1992).

125. Henzler, *supra* note 94, at 7.

126. The Treaty "provoked a storm of controversy for several months in Poland." *U.S. Treaty with Poland Expected to Widen Opportunities for Investors*, 8 INT'L TRADE REP. (BNA) No. 36, 1330 (Sept. 11, 1991).

127. *W Sejmie o ratyfikacji traktatu gospodarczego Polska - USA* [*The Parliament on the Ratification of the Polish-U.S. Economic Treaty*], RZECZPOSPOLITA, July 22, 1991.

128. *See* 1991 MONITOR POLSKI, No. 27, item 191 (Polish text). MONITOR POLSKI is, like the DZIENNIK USTAW [JOURNAL OF LAWS], an official journal of the Polish government where acts of a lower "rank" are published, including resolutions of the Council of Ministers, and decrees of individual Ministers. *See also* 1991 DZIENNIK USTAW, No. 77, item 336 (Polish text) (resolving the decision for ratification).

ADDENDUM A

Although both countries have now ratified the Treaty, it has not yet entered into force. The United States has been delaying the exchange of ratification documents, insisting that Poland first adopt the appropriate intellectual property laws.

It is unfortunate that the first BIT in U.S.-Eastern European relations has caused so many problems. Notwithstanding, the agreement should be viewed as a new and important element in those relations. In the history of the American BIT, a new kind of treaty is developing, which takes into account the most serious obstacles encountered by American investors in post-communist countries. Bilateral agreements may, at least in the near future, remain the most resorted to method of assuring protection of investments of capital-exporting countries.[129]

VI. CONCLUSION

An overview of recent developments in economic relations between Poland and the United States leaves one with the impression that the U.S. approach has been positive, but cautious. There are many problems awaiting NME or post-NME countries on their way to full market economies. Therefore, for every form of assistance — be it direct financial aid or indirect assistance — support on the fora of international institutions is very important. However, the most significant measures include the lessening of restrictions in domestic laws to allow former communist countries the full benefits of trade with market economies. Progress in this field has been relatively slow. As the example of the Polish-U.S. Treaty amply demonstrates, in an attempt to ensure the protection of their present and future interests, Western countries may be tempted to impose conditions which the emerging democracies will not be able to immediately fulfill, and thus they risk harmful economic sanctions. This gives the impression that market economies demand a lot while they are not prepared to give much in return. True partnership relations between market economies and former NME countries can only be achieved if a more flexible approach is adopted, and domestic laws of Western states are adjusted to accommodate the needs of the emerging market economies.

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129. Valerie H. Ruttenberg, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA J. INT'L BUS. L. 121, 134-37 (1987). Proposals have also been made to adopt a multilateral convention on foreign investments. *See* Salacuse, *supra* note 96, at 675.