

September 1990

United States-Poland Economic Treaty: A Blueprint for Intellectual Property Reform in Eastern Europe and the Developing World?

Scott P. Boylan

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

Recommended Citation

Boylan, Scott P. (1990) "United States-Poland Economic Treaty: A Blueprint for Intellectual Property Reform in Eastern Europe and the Developing World?," *Florida Journal of International Law*. Vol. 6: Iss. 1, Article 4.

Available at: <https://scholarship.law.ufl.edu/fjil/vol6/iss1/4>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

United States-Poland Economic Treaty: A Blueprint for Intellectual Property Reform in Eastern Europe and the Developing World?

Scott P. Boylan*

I. INTRODUCTION	101
II. INTELLECTUAL PROPERTY PROTECTION IN INTERNATIONAL TRADE	102
III. RECENT DEVELOPMENTS IN POLAND	105
IV. UNITED STATES-POLAND ECONOMIC TREATY	107
A. <i>Other East European Countries Have Not Been as Enthusiastic as Poland in the Revision of their Intellectual Property Laws</i>	111
B. <i>Poland's Relationship with the European Community</i>	112
V. POLAND ELECTS TO HEAD "NORTH"	113
VI. CONCLUSION	117

I. INTRODUCTION

In 1990, the United States and Poland entered into the Treaty Concerning Business and Economic Relations (Treaty) wherein the Poles agreed to substantially transform their intellectual property laws.¹ The Poles agreed with virtually every issue of concern raised by the United States and agreed to implement laws consistent with the United States' position as to what intellectual property protection should be available for computer programs, drugs, chemicals, and mask works. Moreover, the Poles agreed to quickly revise and augment their internal laws to a greater extent than any of the other emerging East European democracies, including the former Soviet Union, to provide broader protection for intellectual property rights and against unfair competition. The promised Polish law will be similar,

* Attorney, Washington, D.C. LL.M, 1991, Georgetown University Law Center (international and comparative law); J.D., 1985, Syracuse University College of Law; B.A., 1982, Franklin & Marshall College.

1. Treaty Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, Mar. 21, 1990, United States-Poland, ___ U.S.T. ___, reprinted in 29 I.L.M. 1194 (1990) [hereinafter Treaty].

law will be similar, in the degree of protection given intellectual property owners, to United States law.

The Poles also agreed to transform their intellectual property protection laws radically and quickly in the same fashion as they decided to make a speedy change from a non-market to a market economy. The process of changing to a market economy has been a slower and a more painful process than had originally been expected by the Polish Government. Some Poles, and others as well, have taken the position that the Treaty with the United States was too ambitious. They contend that more time will be needed to transform the intellectual property system of Poland to that contemplated by the Treaty.² This may very well be the case.

The United States must be patient and helpful to the Poles in transforming their legal system of intellectual property protection. The Poles agreed to implement a system of intellectual property protection virtually identical to what the United States has urged all its trading partners to adopt at the Uruguay Round. Regardless of whether the United States succeeds in the Uruguay Round on matters of intellectual property, it will still be very important to the United States that Poland succeed in this grand undertaking. Whether the United States' negotiators intended Poland to be an example or not, it is. If Poland follows through with the promised legal revisions of its intellectual property system and then fails in the transformation of its economy to an effective market system, blame will certainly fall in part on the Treaty. Therefore, it is imperative that Poland successfully implement the system of intellectual property protection contemplated by the Treaty if the United States is to have any credibility in espousing the adoption of similar intellectual property protection systems throughout the rest of the world, especially in the developing world.

II. INTELLECTUAL PROPERTY PROTECTION IN INTERNATIONAL TRADE

The protection of intellectual property in international trade is predominantly covered by two multilateral conventions: the Paris Convention for the Protection of Industrial Property (Paris Convention)³

2. See Stanislaw Soltysinski, *Polish Industrial Property Laws: An Evaluation of their Present Scope and Planned Reforms from the Domestic and the U.S. Perspectives* (available from author) [hereinafter *Polish Industrial Property*].

3. Mar. 20, 1883, 21 U.S.T. 1583, as revised at the Stockholm Revision Conference, July 14, 1967 [hereinafter *Paris Convention*].

and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).⁴ The Paris and Berne Conventions are administered by the World Intellectual Property Organization (WIPO) which was established in 1967 to administer various intellectual property conventions and treaties and assist in the development of laws for intellectual property protection in member domestic laws, as well as in conventions and treaties.⁵

The Paris Convention addresses patents, trademarks, and industrial designs. The primary principles of the Paris Convention are: 1) the nationals of signatory nations must be given the same rights under a signatory nation's domestic patent and trademark laws as are granted to the citizens of that country; and 2) a right of priority must be given to applicants from other signatory nations for patent, trademark, and design protection.⁶

The Paris Convention has been criticized on several fronts by proponents of increased intellectual property protection. The Paris Convention is perceived by some to be deficient because it fails 1) to properly address "new" technologies (e.g., computer chips), 2) to set a minimum patent term, 3) to expressly provide for full and adequate compensation for compulsory licenses, 4) to place restrictions on when a compulsory license can be issued, and 5) to establish adequate dispute resolution mechanisms for failure to provide national treatment under the convention.⁷

The Berne Convention is the most important international treaty concerning the protection of artistic and literary works by copyright. The Berne Convention principally provides for the national treatment

4. Sept. 1986, ____ U.S.T. ____, as revised at Paris 1971, reprinted in 3 WIPQ & UNESCO, *Copyright Laws and Treaties of the World*, Berne Conv. (Item H) (Supp. 1974) [hereinafter Berne Convention].

5. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749. See World Intellectual Property Organization General Information, WIPO Publication No. 401(E)(a) 14 n.1 (1988).

6. Paris Convention, *supra* note 3, at 1631-35, arts. 2, 4. The United States and Poland are both signatories to the Paris Convention.

7. Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 703 (1989), citing Kenneth W. Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 INT'L LAW. 627 (1987); U.S. Framework Proposal to GATT Concerning Intellectual Property Rights, 4 INT'L TRADE REP. (BNA) 1371 (Nov. 4, 1987); INTELLECTUAL PROPERTY COMMITTEE (U.S.A.), KEIDANSEN (Japan) & UNICE (Western Europe), BASIC FRAMEWORK OF GATT PROVISIONS ON INTELLECTUAL PROPERTY; STATEMENT OF THE VIEWS OF THE EUROPEAN, JAPANESE AND UNITED STATES BUSINESS COMMUNITIES 13 (1988).

of authors; a minimum copyright term consisting of the life of the author plus fifty years; a lack of formalities to obtain a copyright;⁸ and an author's "moral right"⁹ to protect the integrity of artistic works after the author has transferred or sold the title in the work.¹⁰ The Berne Convention is primarily thought to be deficient for its lack of an effective dispute resolution procedure.¹¹

Because of the perceived ineffectiveness of current intellectual property measures, primarily regarding new technologies and dispute resolutions, the United States and other industrialized nations have sought to include intellectual property measures within the auspices of the General Agreement on Tariffs and Trade (GATT) in the current Uruguay Round of negotiations.¹² In addition to the preferred multilat-

8. The lack of formalities requirement of the Berne Convention prevented the United States from acceding to the Convention for decades because of what can be termed as the "Library of Congress Lobby." Under United States law, there were several formalities that needed to be met by all persons seeking United States copyright protection. 17 U.S.C.A. §§ 401-412 (West Supp. 1990). One of these formalities was the provision of a gratuitous copy of the work to the Library of Congress. 17 U.S.C.A. § 407 (West Supp. 1990). As a compromise in the United States' effort to join the Berne Convention, the United States Copyright Law was amended so that the foreign author need not meet any formalities as required by the Berne Convention. *Id.* However, the law still requires United States nationals to comply with the formalities. *Id.* This amendment was possible as the Berne Convention requires that foreign authors be given no less protection or be required to jump through more "hoops" than a national. The Berne Convention does not, however, prevent signatory nations from placing greater duties or responsibilities upon their own citizens.

9. The most significant opposition to United States' accession to the Berne Convention came from those individuals and organizations who believed accession to the Convention would expand the protection of authors' "moral rights" in the United States. *Why the United States Should Join the Berne Convention*, NATIONAL COMMITTEE FOR THE BERNE CONVENTION 6 (July 2, 1987). This concern was alleviated by those individuals and organizations that pointed out that the Berne Convention was not "self-executing" and that United States law already complied with the minimum standards of Berne and, thus, no changes in United States law would be necessary for accession to the Convention. *Id.*

10. Berne Convention, *supra* note 4, arts. 5(1), 7(1), 6 bis(1).

11. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, U.S. GOVERNMENT TRADE POLICY: VIEWS OF THE COPYRIGHT INDUSTRIES 13-14 (1985).

12. Officials in the developed world, primarily the United States, Japan, and the European Community, seek inclusion of intellectual property rights under GATT because the GATT framework provides a better dispute resolution mechanism than under current multilateral conventions and treaties dealing with intellectual property. See Comment, *The Inclusion of a Trade Related Intellectual Property Code Under the General Agreement on Tariffs and Trade*, 30 SANTA CLARA L. REV. 265, 279 (1990); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GMT Connection*, 22 VAND. TRANSNATL L. 747, 754-61 (1989). The industrialized nations seek to implement at the Uruguay Round "a set of international minimum standards for the protection of inventions, trademarks, literary and artistic works, and related forms of intellectual creation . . . in a GATT Code of Conduct." *Id.* at 758. "The code envisioned by the industrial nations would require internal legal and administrative machin-

eral approach it is pursuing at the Uruguay Round, the United States has recently undertaken a program of bilateral negotiations on intellectual property issues of which the Treaty is a direct result.¹³

III. RECENT DEVELOPMENTS IN POLAND

The rise of the Solidarity movement in Poland in the late seventies marked the beginning of the end of communist and Soviet hegemony in Poland. In the last two years, the speed and completeness of the communist regime's collapse in Poland has been startling. The rise of a liberal democratic government in Poland has followed. That government has decided to forego a transitional period from a non-market to a market economy and, instead, make a quick and immediate transition to a market economy.¹⁴ In this process, the Poles have come across obstacles that have eroded their initial optimism, but they continue to dismantle the economic crutches and impediments of the past communist regime in a flight towards a full-fledged market economy.¹⁵

In January 1990, the Polish government allowed prices to be determined by competition, not government whim, and devalued the Polish currency, the zloty, so it could be exchanged against the United States dollar at rates akin to actual market value.¹⁶ Other factors have made and will make the transformation to a market economy more difficult for Poland. For example, beginning in 1991, Poland was required to pay hard currency, at world market prices, for Soviet oil that it pre-

ery, including border control measures, that would enforce the minimum standards in ways that no international conventions governing intellectual property currently requires." *Id.* at 759-60 (citations omitted); see also *United States Proposal for Negotiations on Trade Related Aspects of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/14 (Oct. 20, 1987), reprinted in 34 PAT. TRADEMARK & COPYRIGHT J. (BNA) 667 (Oct. 29, 1987).

13. S. Res. 17717, 101st Cong., 2d Sess., 136 CONG. REC. 150-3 (1990).

14. See David Lipton & Jeffery Sachs, *Creating a Market Economy in Eastern Europe: The Case of Poland*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 1990:1; Anthony Robinson, *World Economy; From Communism to Capitalism*, FINANCIAL TIMES, Sept. 24, 1990, at VI. Poland is "cutting price subsidies, preparing for privatization, creating new institutions to cope with unemployment and attempting to construct a legal framework which permits private ownership of land and resources and a framework for foreign investment." *Id.*

15. Poland "has done everything that the World Bank and the International Monetary Fund has asked" it to do. Hamisa McRae, *Polish Economy Reeling Amid Changes*, TORONTO STAR, Aug. 5, 1990, at H3. Poland has devalued the currency, cut public spending, started to privatize industry, and taken advice from scores of consultants, academics and bankers who have flocked into Warsaw to provide guidance and expertise. *Id.*; see also Martin Wolf, *Birth Pangs of a New Economy*, FINANCIAL TIMES, Aug. 1, 1990, at I-16.

16. *Capitalism With a Worried Face*, ECONOMIST, Nov. 17, 1990, at 59-60 [hereinafter *Capitalism*].

viously obtained at bargain rates.¹⁷ Poland should be affected less than its other East European neighbors because Poland's previous prices were closer to world market value and "its industrial production has already fallen by some 30% [in 1990], pushing down demand for oil."¹⁸

The former Soviet Union's economic woes also had a negative impact on Poland which relied on weakening Soviet markets for twenty-five percent of its exports as a legacy to the old COMECON System.¹⁹ If the economic chaos in Poland were not enough, the Middle East crisis caused additional problems.²⁰ Iraq, which is a large trading partner with Poland, or at least has been in the past, owes Poland 500 million dollars that will not be repaid while the current sanctions are in place.²¹ However, all is not bleak:

This year private-sector output has expanded by a quarter, and the current recession in state industry is starting to have the benign effect of sorting out efficient and inefficient producers. Polish industrial production next year is likely to recover from its present slump . . . although unemployment may reach . . . 12-15 [percent] of the labour force, as overmanned factories slim down further. In the first nine months of [1990,] hard-currency exports were up by 24 [percent] compared with the previous year and imports down by 25 [percent].²²

On July 13, 1990, the Polish Parliament enacted the Law on Privatization of State Enterprises whereby state-owned enterprises will be privatized through a two-step process.²³ First, state-owned enterprises will be reformed into commercial companies owned wholly by the Polish Treasury.²⁴ Thereafter, shares of the companies will be sold to private parties to complete the privatization of the enterprises.²⁵

17. *Id.*

18. *Id.* at 59.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The birth of a market economy in Poland has drawn bargain shoppers from Germany to Polish border town markets along the German-Polish border. See *Drang Nach Osten*, *ECONOMIST*, Oct 13, 1990, at 52.

23. Poland: Law on Privatization of State-Owned Enterprises, 29 I.L.M. 1226 (1990), enacted July 13, 1990; see Victor Keegan, *Poland's Painful Leap to Capitalism*, *MANCHESTER GUARDIAN WEEKLY*, Aug. 12, 1990, at 10. The Polish "privatization programme is being accelerated in an attempt to break up the state companies as quickly as possible." *Id.*

24. *Id.*

25. *Id.* There has been debate in Poland about whether Polish citizens should be given

The radical changes on the Polish political scene have apparently flowed over into the legal sphere, as well with similar radical revisions of Polish law being made on almost a daily basis. For that reason, it is not surprising that the Poles have agreed to radically revise and augment their domestic intellectual property laws to conform with what the United States government believes to be a necessary legal framework to ensure economic growth and vitality.

IV. UNITED STATES-POLAND ECONOMIC TREATY

The Treaty between the United States and Poland was signed in Washington on March 21, 1990.²⁶ The Senate gave its advice and consent to the ratification of the Treaty on October 27, 1990.²⁷ Senator Sarbanes stated that the ratification of the Treaty was important to the transformation of Poland from a non-market to a market economy.²⁸ The Senator also stated that the Treaty provided "extensive protections for intellectual property rights," which is a new area of effort by the United States in bilateral economic treaties.²⁹ The Treaty is still being debated in the Polish ratification process and has not yet been ratified by Poland.³⁰

With respect to the protection of intellectual property, Poland agreed in the Treaty to revise its domestic laws to extend 1) copyright protection to computer programs as literary works,³¹ 2) patent protec-

vouchers to enable them to buy for "free" a limited number of shares of privatized enterprises. *Everything Must Go*, ECONOMIST, Nov. 17, 1988, at 88. Lech Walesa supports this scheme. *Id.* *The Two Faces of Poland*, ECONOMIST, Oct. 27, 1990, at 51.

26. Treaty, *supra* note 1.

27. S. Res. 17717, 101st Cong., 2d Sess., 136 CONG. REC. 150-3 (1990).

28. *Id.*

29. *Id.*

30. See Polish Industrial Property, *supra* note 2.

31. United States law provides copyright protection, subject to certain limitations, for computer programs. 17 U.S.C. §§ 101, 106, 117 (1980). The future Polish law for the copyrightability of computer programs will likely be patterned on one of three alternatives: 1) The WIPO Model Law (1978); 2) French law which provides protection for 10 to 20 years, deposits, and work for hire provisions with a legal right to compensation to the employee who created programs by the employer; or 3) a proposed law by the Polish Society of Informatics providing for short-term exclusive rights in a computer program for 5 to 15 years. Stanislaw Soltysinski, *Protection of Computer Programs: Comparative and International Aspects*, 21 INT. REV. OF IND. PROP. & COPYRIGHT L. 1, 5-6 (1990). It has been asserted that copyright protection for software is not appropriate and that some *sui genesis* law should be formulated for software as was done for mask works. *Id.*

tion³² to pharmaceuticals and chemicals,³³ 3) protection for “mask works,”³⁴ and 4) protection against unfair competition.³⁵ Current Polish patent law specifically states that it does not provide protection for pharmaceuticals and chemicals as well as other areas commonly patentable in the United States and Western Europe.³⁶ A prewar unfair competition law remains in effect in Poland.³⁷ The Polish competition law provides protection for unregistered trademarks and trade secrets.³⁸

32. The United States Constitution provides for the use of patents “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. CONST., art. 1, § 8, cl. 8; 35 U.S.C. §§ 1-376 (1952).

33. The Treaty “provides for patenting of pharmaceutical and other chemical products for the first time in Poland.” *US Poland Economic Treaty Sets Role Model*, PHARMACEUTICAL BUS. NEWS, Mar. 30, 1990. Pharmaceuticals “have historically only been covered by process patents” in Poland. *Id.* United States law provides patent protection for pharmaceuticals and chemicals. 35 U.S.C. § 101. It is recognized that intellectual property protection is necessary for the pharmaceuticals industry to create new and needed drugs. See Thomas J. Field, Jr., *Pharmaceuticals and Intellectual Property: Meeting Needs Throughout the World*, 31 IDEA J.L. TECH. 3 (1990). Without intellectual property protection for pharmaceuticals, the private sector is adverse to committing the experience and resources needed to develop new drugs. *Id.* Indeed, the failure of a country to provide the necessary intellectual property protection for pharmaceuticals “may have effects which are detrimental to social welfare” by creating no incentive for creativity and innovation in this socially, as well as economically, important area. *Id.* at 25.

34. Mask works is a term frequently used to describe integrated circuit layout designs. Mask works are protected under United States law by the Semiconductor Chip Protection Act of 1984. 17 U.S.C. §§ 900-914 (1984).

35. See Treaty, *supra* note 1. Article IV of the Treaty states:

The Parties shall provide adequate and effective protection and enforcement of intellectual property rights. To establish such protection, each Party agrees, *inter alia*, to:

- extend copyright protection to computer programs as literary works;
- provide product as well as process patent protection for pharmaceuticals and chemicals for a term at least equivalent to that provided to other patentable subject matter;
- provide adequate and effective protection for integrated circuit layout designs (mask works);
- provide adequate and effective protection against unfair competition.

36. Polish Law on Inventive Activity, *as amended* by the Law of April 26, 1984, *published in Dziennik Ustaw* No. 33, item 177 (1984). Patents will not be granted under current Polish law for scientific discoveries, foodstuffs, and computer programs, to name a few. *Id.*

37. Polish Law on Unfair Competition of August 26, 1926, *published in Dziennik Ustaw* No. 56, item 467 (1930).

38. *Id.* Polish law allows for registration of trademarks but only gives exclusive rights for 10 years. Polish Statute on Trademarks of February 15, 1985, *published in Dziennik Ustaw* No. 5, Item 17 (1985).

In the Protocol, Side Letters, and Annexes to the Treaty, Poland agreed not only to enact domestic laws to protect intellectual property, but also to enact those laws within a relatively short time period. The Republic of Poland agreed to “adhere to the Paris and Berne Conventions . . . before January 1991” to 1) provide copyright protection for computer software under domestic Polish law by December 31, 1991; 2) provide 20 year patent protection with limited compulsory licenses by December 31, 1991; 3) provide patent protection for foodstuffs, drugs, and chemicals under domestic law by December 31, 1992; 4) provide mask work protection under domestic law by December 31, 1991; and 5) enact laws prohibiting unfair competition.³⁹ As is readily apparent, the Poles have agreed to a very, if not overly, ambitious reform and transformation of their domestic intellectual property law in a period of a little over two years.

The Poles agreed in the Treaty to limit the instances of “non-exclusive compulsory licenses” to instances where licenses are needed, such as adjudicated violations of competition laws or during a declared national emergency.⁴⁰ Polish law will also provide that the patent owner be compensated at full market value for any compulsory license issued and that any decision to issue a compulsory license be “subject to judicial review.”⁴¹ Governments of either party to the Treaty may use a patent on a non-exclusive basis “provided that such use does not substantially prejudice the legitimate economic interests of the patent owner.”⁴² Poland also agreed to provide transitional protection to patented products previously registered in other countries for the remainder of the term of the patent in the country of initial registration, providing that the product would otherwise be patentable under the promised Polish law.⁴³

The promised Polish law will protect “any original layout design incorporated in a semiconductor integrated circuit chip [mask work] in any manner the layout design is fixed or encoded.”⁴⁴ The new laws will permit registration “at least two years from first commercial exploitation of the layout design to apply for registration.”⁴⁵ Sensitive or confidential information need not be provided for registration of

39. Treaty, Protocol and Annexes 1-3. Poland already has an unfair competition law which remains in effect from prior to World War II. See *supra* note 37.

40. Treaty, *supra* note 1, Annex 1, ¶ 1.

41. *Id.*

42. *Id.* Annex 1, ¶ 2.

43. *Id.* Annex 1, ¶ 3.

44. *Id.* Annex 2, ¶ 1.

45. *Id.* Annex 2, ¶ 2.

mask works unless such information "is essential to allow identification of the layout design."⁴⁶ Protection for mask works shall extend for 10 years from the date of registration or first commercial use, whichever date is first in time.⁴⁷ Under the promised Polish law, the owner of a mask work will have the exclusive right to 1) reproduce the work,⁴⁸ 2) incorporate the work into "a semiconductor integrated circuit chip," and 3) import or distribute the work or products incorporating the work.⁴⁹

Compulsory licenses for the use and production of mask works may be issued but will be limited to the same parameters as compulsory licenses for patents under the promised Polish law.⁵⁰ "Reproduction of a layout design for purposes of teaching," importation and distribution of products containing a mask work originally sold with the consent of the work's owner, and importation and distribution of products containing a protected mask work without the knowledge of the purchasing party are exempted from liability under the promised Polish law.⁵¹ The exception in the latter scenario being that once a person is notified of their infringing use, they will be "liable for reasonable royalties."⁵²

Poland also agreed in the Treaty to provide protection for trade secrets providing that the secret information 1) has actual or potential commercial value from not being known to the relevant public, 2) is not readily accessible, and 3) has been subject to reasonable efforts, under the circumstances, by the rightful proprietor to maintain secrecy.⁵³ Moreover, the disclosure or use of a trade secret will be unlawful under the promised Polish law which will provide both civil and criminal remedies to deter unlawful use of trade secrets.⁵⁴ As long as the trade secret is maintained confidential by its owner, there will be no time limit on its lifespan.⁵⁵ The Polish government also agreed not to use a trade secret for governmental purposes without reasonable

46. *Id.*

47. *Id.* Annex 2, ¶ 3.

48. *Id.*

49. *Id.*

50. *Id.* Annex 2, ¶ 4.

51. *Id.* Annex 2, ¶ 7.

52. *Id.* Annex 2, ¶ 7(c).

53. *Id.* Annex 3, ¶ 1.

54. *Id.* Annex 3, ¶¶ 2 & 3. Adequate protection of trade secrets is viewed as a key part of a country's infrastructure that is needed for a country's economy to develop. See SHERWOOD, *infra* note 79.

55. Treaty, *supra* note 1, Annex 3, ¶ 2(b).

compensation.⁵⁶ Finally, the Poles agreed in an Annex to the Treaty to support the industrial countries' efforts in the Trade Related Intellectual Property talks at the Uruguay Round.⁵⁷

A. *Other East European Countries Have Not Been as Enthusiastic as Poland in the Revision of their Intellectual Property Laws*

The Treaty is apparently broad in its scope in dealing with intellectual property matters and goes well beyond that which other nations have been willing to agree. The United States has subsequently entered into economic treaties similar to the United States-Poland Treaty with the former Soviet Union⁵⁸ and Czechoslovakia.⁵⁹ In the Soviet Agreement, the Soviets agreed that the government will "*exert their best efforts to enact*" laws by 1991 to provide intellectual property protection for computer programs and trade secrets and to provide unfair competition protection.⁶⁰

The Soviets also agreed to consider, but made no commitments, to enact laws to provide protection for sound recordings and patents, with compulsory licenses to be given out on much more liberal terms than under the Treaty.⁶¹ The Soviets agreed to further discuss with the United States the possibility of implementing intellectual property laws in the Soviet Union that would provide protection, among other things, for mask design and compensation for Soviet government use of patentable inventions.⁶²

It is apparent that the Soviets have made no real commitment to reform their intellectual property laws in the Soviet Agreement. It waits to be seen if the new Baltic and Russian Republics will follow the Polish or Soviet lead. If they fail to follow the Polish lead, the countries comprising the former Soviet Union may be a great deal less attractive to foreign investment than Poland, particularly for high technology investors and businesses.

56. *Id.* Annex 3, ¶ 3.

57. *Id.* at Protocol. "The Republic of Poland will participate constructively in the Uruguay Round of Negotiations on the Trade-Related Aspects of Intellectual Property Protection." *Id.*

58. Agreement on Trade Relations, June 1, 1990, United States-Soviet Union, ___ U.S.T. ___, reprinted in 29 I.L.M. 946 (1990) [hereinafter Soviet Agreement].

59. Agreement on Trade Relations, April 12, 1990, United States-Czechoslovakia, ___ U.S.T. ___, reprinted in 29 I.L.M. 902 (1990) [hereinafter Czech Agreement].

60. Soviet Agreement, *supra* note 58, art. VIII, ¶ 2. (emphasis added).

61. Soviet Agreement, *supra* note 58, art. VIII. Exchange of Letters between Ambassadors Chumakov and Hills, dated June 1, 1990, 29 I.L.M. at 961-63.

62. See Czech Agreement, *supra* note 59.

In an economic treaty between the United States and Czechoslovakia, the Czechs also fall far short of the Poles to the extent that they would agree to reform their intellectual property laws. However, the Czechs have surpassed the Soviets by agreeing to submit legislation to the Czech Parliament that would provide intellectual property protection for computer programs, mask works, trade secrets, and patents.⁶³

Moreover, even Canada, the United States' largest trading partner, has not been as receptive as Poland to the United States' efforts on intellectual property matters. In the United States-Canada Free Trade Agreement, it was merely agreed that "the Parties shall cooperate in the Uruguay Round of multilateral trade negotiations and in other international forums to improve protection of intellectual property."⁶⁴

B. *Poland's Relationship With the European Community*

Poland has practiced its "we aim to please" attitude with Western Europe as well. At the Conference on Security and Cooperation in Europe (CSCE), Poland recognized "the importance of protecting industrial, commercial and intellectual property rights . . . and will ensure adequate and effective protection and enforcement of industrial, commercial and intellectual property rights"⁶⁵

Poland has sought to enter into the European Community (EC) as part of its ambitious reform program.⁶⁶ The Poles signed a commercial agreement with the EC with that goal in mind.⁶⁷ Special negotiations will soon begin with the EC that will have as a goal, Poland being admitted to the EC on the basis of an associate member.⁶⁸ The EC has already informed Poland that full membership for Poland or any other country will not be considered until after 1992.⁶⁹ However, this time limitation has not prevented the EC from recently opening a permanent office in Poland.⁷⁰ The EC has stated that it "especially

63. *Id.* at art. X.

64. Free Trade Agreement, Dec. 1987, United States-Canada, ___ U.S.T. ___, reprinted in 27 I.L.M. 281 (1988); see generally Stewart A. Baker & Shelly P. Battram, *The Canada-U.S. Free Trade Agreement*, 23 INT'L LAW 37 (1989).

65. Final Documents of the Bonn Conference on Economic Cooperation in Europe, 29 I.L.M. 1054 (Apr. 11, 1990).

66. *Too Early for the EEC*, WARSAW VOICE, Oct. 21, 1990.

67. *Id.*

68. *Id.*; see *The Makings of a New Constellation*, ECONOMIST, Aug. 4, 1990, at 41. If the conversion of Poland to a market economy and multi-party democracy succeeds, it should qualify for EC membership. *Id.* at 42.

69. *Id.*

70. *Id.*

want[s] to help Poland effect social and economic change.”⁷¹ In order for Poland to gain EC membership, Poland’s intellectual property protection system will have to be compatible with the laws of current EC members. The enactment of laws as agreed to in the Treaty is a positive move for Poland in the direction of EC membership.

V. POLAND ELECTS TO HEAD “NORTH”

In the past decade, it has been the stated goal of the United States’ foreign policy to enhance world-wide intellectual property protection. The United States has sought, to some degree of success, to include the protection of intellectual property within the framework of the GATT.⁷² The United States’ efforts have been resisted by a number of the developing countries of the world who have perceived the United States’ effort to be “an attempt to control the diffusion of new technologies or ‘as a weapon in the struggle of “haves” and “have nots.””⁷³ The North-South divergence on the subject of intellectual property protection is long-standing. The developing South believes that the intellectual property protection demands of the North are an attempt to shift wealth to an even greater extent than currently exists to the North.⁷⁴ The South believes instead that it should be permitted to “free-ride”⁷⁵ as has been permitted by industrial countries in the past.⁷⁶

71. *Id.* Unfortunately, recent events in the Middle East and the unification of Germany have drained resources that would have been available to assist Poland in transforming its economy. *Id.* Iraq owes Poland 500 million dollars. The repayment of which is prevented by trade sanctions imposed on Iraq. *Capitalism, supra* note 16. Energy prices will also increase for Poland because of the Soviet conversion to world market prices for oil in 1991. *Id.* The EC has provided hundreds of millions of ECU’s in assistance to Poland, primarily for agriculture. *Too Early for the EEC, supra* note 66.

72. Hans Peter Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, 22 VAND. J. TRANSNAT’L L. 265 (1989).

73. Carlos Alberto Primo-Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT’L L. 243, 252 (1989); see also *GATT: Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions*, 6 INTL TRADE REP. (BNA) 953 (July 19, 1989).

74. *Id.*

75. To “free-ride” is to copy, without compensation, the intellectual property owned by another.

76. See *Technology-Related Economic and Technological Environment*, TD/B/C. 6/146 (Aug. 8, 1988); UNCTAD Work Programme on the Development and Transfer of Technology and Proposals for Further Work, TD/B/C. 6/147/Add. 1 (Aug. 8, 1988); *The Dimensions, Direction and Nature of Technology Flows Particularly to Developing Countries*, In a Changing Work Economy, TD/B/C.6/145 (Aug. 18, 1988); *Report of Committee on Transfer of Technology on its Seventh Session* TD/B/1203, TD/B/C. 6/151 (Jan. 23-Feb 2, 1989).

Many developing countries believe that acceptance of the United States' position on intellectual property protection proposed at the present Uruguay Round of GATT negotiations would be detrimental to developing countries and the emerging market economies of the previously non-market East Bloc nations.⁷⁷

In the past and under present international intellectual property practice, developing countries have been afforded special concessions and treatment in order to facilitate their development.⁷⁸ Indeed, many of the so-called developing nations have had decades of preferential treatment within which to modernize their economies. Many of these countries have failed in their efforts despite the perceived benefits of these special treatments and concessions. The reason for this failure may be that intellectual property protection should not be thought of as a final stage in the development of a country's economy but as a "powerful development tool" for new and emerging market economies.⁷⁹

However, Poland could very well make an argument that it is indeed a "developing nation" and deserves special treatment and concessions concerning the degree of intellectual property protection it should have to provide under Polish law. Unlike other nations in the so-called developing world which have had decades of market economy production marketing and financing experience, such as India and Brazil, Poland is starting its journey to a modern market economy with rudimentary economic structures that remain from its past inefficient communist economy. Therefore, Poland should be a prime candidate for special treatment with regards to the minimal intellectual

77. See Abbott, *supra* note 7, at 695.

78. See Berne Convention, *supra* note 4, Appendix 28.

79. See ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* 191-9 (Westview, 1990).

If people seem to be more inventive in the United States or Europe or Japan, it is not an accident. It is not because of genes or schools or intelligence or fate. Implementation of the intellectual property system is critical because of the habit of mind which is fostered in the population. Human ingenuity and creativity are not dispersed unevenly across the globe. Those talents are present in every country. In some, unfortunately the enabling infrastructure of effective intellectual property protection is missing.

Id. at 197. See also Peter J. Richardson, *The Need for Adequate and Effective Protection of Intellectual Property*, printed in *PROSPECTS FOR MULTILATERAL AGREEMENTS ON SERVICES AND INTELLECTUAL PROPERTY* 30-31 (1990). "Without adequate and effective intellectual property, the technically-prepared work force either leaves the country or changes the focus of its activities from innovation to copying and imitation. Thus, the industrial, intellectual and artistic creativity found in countries without adequate and effective protection is left underutilized." *Id.*

property protection expected from other nations. However, Poland has not made a request for special treatment. This may be due to a recognition by the Poles that a modern intellectual property protection system is necessarily a part of developing a modern market economy. Therefore, Poland has agreed to implement laws which will provide nearly as high a level of intellectual property protection in Poland as anywhere else in the world.

By making such an election, the Poles have demonstrated their recognition that without an intellectual property protection regime that is compatible with those systems of the developed, industrial countries, Poland will never be able to join those countries as an equal. Failure to create a compatible system of protection would all but eliminate any opportunity that Poland may have to become a part of the EC. The Poles have, whether consciously or unconsciously, recognized that intellectual property protection is a necessary tool in the creation of a developed market economy.⁸⁰

The implementation of the promised intellectual property protection laws will provide several immediate benefits to the transformation of Poland to a market economy. Without a law protecting intellectual property, there is no intellectual property right, and naturally, "[i]f there is no protection, there is no intellectual property."⁸¹ Implementation of the laws as agreed in the Treaty will have the almost instantaneous effect of creating property and wealth in Poland where none previously existed. Ideas and creative fruits of Polish citizens and companies will be valuable property and available for profitable exploitation. Enactment and implementation of the promised laws will facilitate investment in Poland by creating assurances to foreign corporations that Poland will provide a "safe" environment for investment by protecting the use of valuable intellectual property within the borders of Poland.⁸² Such an environment might not otherwise have materialized because of previous, and likely legitimate, concerns by foreign investors of loss or theft of the intellectual property because of previously inadequate protection in Poland.⁸³ The promised laws should also have the effect of encouraging the development of investment capital firms in Poland itself, which in turn should result in the

80. See SHERWOOD, *supra* note 79, at 191.

81. *Id.* at 13. "When products of the mind are accorded public protection, the concept of intellectual property can be properly used. It is, in some sense, a misnomer to speak of failure to protect intellectual property. If there is no protection, there is no intellectual property." *Id.*

82. *State Department Official Urges Senate to Approve Poland, Panama Treaties*, 7 INTL TRADE REP. (BNA) 1489 (Sept. 26, 1990).

83. SHERWOOD, *supra* note 79, at 58, 67-100, 166-73.

growth of start-up businesses in Poland.⁸⁴ Local industry should be given a boost by creating incentive for funding private research.⁸⁵ Finally, the promised intellectual property regime in Poland should help to accelerate Poland's development of a market economy.⁸⁶

By persuading Poland to accept its demands, the United States has risked its prestige and credibility throughout the world regarding intellectual property issues by gambling on Poland's ability to succeed in the transference to a market economy. Should Poland fail in its efforts to reform its laws and economy, and should any blame for such a failure be placed upon the adoption of intellectual property laws as urged by the United States in the Treaty, it will be very difficult for the United States to negotiate either bilateral or multilateral treaties that favor its position on intellectual property law in the future. Therefore, it is imperative that the United States provide as much assistance to Poland in the creation of a new intellectual property protection system as is within the United States' power. The best methods by which the United States could assist Poland would be 1) to provide monies for investment, 2) to assist the Poles in the creation of the institutions needed to provide effective protection for intellectual property by providing the technical assistance and expertise the United States has available,⁸⁷ 3) to provide technical and monetary assistance to Poland to assist it in educating the Polish population about the existence and meaning of the new intellectual property laws in Poland, and 4) to recognize that more time will be needed to achieve the changes than were agreed to in the Treaty.⁸⁸

84. *Id.* at 126-30.

85. *Id.* at 192.

86. *Id.* at 168. The experience of Singapore which enacted a copyright statute in 1987 suggests that rapid acceleration of [economic growth] occurs after protection is installed." *Id.* at 155-6, 168.

87. This does not mean that the United States should encourage the Poles to adopt a system similar or identical to that employed in the United States. This would not be practical for two reasons: 1) The United States' system is the most costly to operate in the world and other less costly systems could be implemented that would provide adequate protection. See SHERWOOD, *supra* note 79, at 181-90; and 2) It would be wise, in light of Poland's desire to become a member of the EC, for Poland to adopt a system of intellectual property protection similar or identical to one or several of those employed by current EC members.

88. See SHERWOOD, *supra* note 79, at 193, 195-96, 199. A system for the protection of intellectual property will not be effective if the Polish population is not aware of its existence and how it can benefit each and every citizen. Because of years of communist rule and Marxist economics, Poles may need to be educated about the fundamentals of a market economy — for example, competition and how intellectual property protection can assist an individual or company in competing or entering the competitive market.

VI. CONCLUSION

Poland agreed in the Treaty to institute virtually all of the laws regarding intellectual property protection that the United States has sought to have enacted in the domestic law of all its trading partners. If Poland fails in its endeavor to create an effective market economy because of its implementation of a "developed economy" intellectual property system, the United States will likely not succeed in convincing other countries to adopt similar policies. However, should the Polish experiment succeed, the United States' policy regarding intellectual property law will be vindicated. The adoption of "United States style" intellectual property protection will have proven to promote foreign investment, ingenuity, and creative forces that are beneficial to Poland's economy (and supposedly would do the same for other countries who make the same choices). For this reason, the United States government and businesses should be patient, flexible, and encouraging as Poland marches toward a market economy.

