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"Free competition is worth more to society than it costs."
- Oliver Wendell Holmes[1]

## I. INTRODUCTION

Among the reformed East European countries now embracing democratic notions, Poland has been the most aggressive in the effort to reach full-fledged democracy. These efforts are reflected by Poland's recent amendments to its foreign investment law and, most recently, the signing of a treaty with the United States in hopes of attracting American investors. This article briefly examines the role and content of this treaty in the context of the overall United States treaty program and, more importantly, determines whether the Treaty has the potential to stimulate U.S. investment above and beyond the incentives now in place under the foreign investment law of Poland. While the Treaty covers many areas of investment, this discussion is limited to four areas which will most likely influence the U.S. investor; repatriation of profits, entry of investment, expropriation, and arbitration.

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1 Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896)(Holmes, J., dissenting).

## II. Background

The Communist Party was defeated in June 1989 in Poland's first semi-democratic elections. In August 1989, Poland established the first noncommunist-led government in the Warsaw Pact. In October 1989, the Solidarity Party-led government announced a reform package intended to make swift, positive adjustments in the economy. The nature of these reforms indicated a strong commitment to a free market system. In a mad dash to enter the free market system, Poland's reform program took full effect in January 1990. The reform program included changes in the areas of banking[2], foreign exchange[3], bankruptcy[4], and antitrust law[5]. Also included in the reform program was recently passed legislation providing for the privatization of state enterprises, and the dissolution of unprofitable state enterprises.[6]

Foreign governments have assisted Poland's transition.[7] For example, in November 1989, President Bush signed into law the Support for East European Democracy Act ("SEED").[8] This Act authorized $928 million in United States aid to both Poland and Hungary for structural adjustment, private sector development, implementing trade and investment programs, and establishing educational, cultural and scientific activities.[9]

2 Ustawa z dnia 31 stycznia 1989 r. Prawo bankowe (Banking Law), Dziennik Ustaw [Dz.U.] No. 4, item 21 (1989); *amended by* Dz.U. No. 54, item 320 (1989), Dz.U. No. 59, item 350 (1989), Dz.U. No. 74, item 439 (1989). Ustawa z dnia 31 stycznia 1989 o Narodowym Banku Polskim (Law on the Polish National Bank) Dz.U. No. 4, item 22 (1989); *amended by* Dz.U. No. 74, item 439 (1989).

3 Ustawa z dnia 15 lutego 1989 r. Prawo dewizowe (Foreign Exchange Law), Dz.U. No. 6, item 33 (1989); *amended by* Dz.U. No. 74, item 441 (1989).

4 Rozporzadzenie Prezydenta Rzeczypospolitej z dnia 24 pazdziernika 1934 r. Prawo upadlosciowe, Dz.U. No. 93, item 834 (1934) *as amended.*

5 Ustawa z dnia 24 lutego 1990 r. o przeciwdzialaniu praktykom monopolistycznym, Dz.U. No. 14, item 88 (1990)).

6 Ustawa o prywatyzacji przedsiebiorstw panstwowych (Law on Privatization of State Enterprises), Rzeczpospolita No. 168 (2603), (July 23, 1990). Under the law, the state would convert its holdings into joint stock companies, selling up to 25% of shares to workers at half the market price while offering the rest to investors. Workers would be free to buy shares at the preferential rate up to the amount of one year's pay. Foreigners would need government approval to acquire more than 10% of the stock in a privatized company, although the rule is seen as little more than a formality. For a more complete explanation of the law, *see* Lelyveld, *Polish Privatization Could Aid Business*, J. Comm. 5A (July 17, 1990); United States Department of Commerce, International Trade Administration, Poland's Privatization Act, (July 30, 1990).

7 The Federal Republic of Germany and other European Community members have provided several billion dollars of loans, grants, and credits to Poland.

8 22 U.S.C.A. § 5401 (West 1990).

9 22 U.S.C.A. § 5401(a). "The United States shall implement, beginning in fiscal year 1990, a concerted Program of Support for East European Democracy (which may also be referred to as the "SEED Program"). The SEED Program shall be comprised of diverse undertakings designed to

While the other East European countries are making only gradual economic transitions, Poland is moving from a planned economy to a free-market economy. This rapid change has caught the attention of foreign investors. Since the advent of this transition, investment in Poland has been regarded with both optimism and pessimism. Optimists believe that Poland's reforms will be successful and, as a result, they advocate investing in Poland. According to the optimists,the reform movement has advanced from the dark days of martial law and the suppression of Solidarity, to not only overthrow communist control, but also to undertake the plunge into market economics.[10] While in the rest of Eastern Europe political reformation runs only skin deep, optimists say that Poland is undergoing a genuine political revolution.[11]

Pessimists, on the other hand, argue that "a quick jump into free markets will lead to high expectations and disappointing results."[12] In other words, the Poles cannot break the inefficient work habits prevalent in a centrally planned economy.[13] "They pretend to pay us, and we pretend to work," is an old saying among Polish workers. Some of Poland's economic leaders have been the pessimists, declaring that Poland's fragile economy cannot endure the abrupt plunge into a market economy.[14] Some cite the lack of reliable communications and basic financial services as serious detriments to the country's transition from a centrally planned economy to a market economy.[15]

Regardless of the future success of reform in Poland, the Poles unquestionably have undertaken unambiguous and sincere efforts to attract foreign investment. The Polish Foreign Investment Agency reported that between the passage of the Foreign Investment Law of 1988 and July 15, 1990, the government had issued almost 1,500 approvals for foreign joint ventures.[16] These approvals represent $1 billion in investment last year and $200 million in equity.[17] It appears that because of abounding incentives for foreign investment, those who advocate a grim future

provide cost-effective assistance to those countries of Eastern Europe that have taken substantive steps toward institutionalizing political democracy and economic pluralism." *Id.*

10 House, *In East Europe, Only Poland Makes Hard Decisions*, Wall St. J., June 5, 1990, at A24, col. 3.

11 *Id.*

12 Etzioni, *Is Poland Getting Bad Advice?*, N.Y. Times (Forum), June 17, 1990, at 13, col. 2.

13 *Id.*

14 Madrick, *Poland's 'Big Bang': Too Much Too Fast?*, N.Y. Times (Forum), May 20, 1990, at 13, col. 3.

15 *Id.*

16 Lelyveld, *Shift to Free-Market Economy Tests Poles' Perseverance*, J. COMM., July 17, 1990, at 4A, col. 3. (Reported by Mr. Maslankiewicz of the Foreign Investment Agency).

17 Most of the 1,500 joint ventures have been limited to small deals based on the minimum investment of $50,000. Only about 30 have reached $1 million in equity. *Id.*

most likely will be ignored and an increasing number of American companies will set up shop in Poland.

Arguably, the most significant change towards a free-market economy in Poland's domestic laws has been the creation of the Polish Foreign Investment Law ("1990 PFIL").[18] The 1990 PFIL provides a plethora of incentives to foreign investors.[19] Among the many advantages granted to foreign investors have been tax breaks, relaxed foreign exchange standards, and improved operational provisions. Although Poland has encouraged foreign investment through favorable legislation since the 1970s, regulations for foreign businesses were not simplified until the passage of the foreign investment law of 1988.[20] The current 1990 PFIL contains many substantive improvements over the 1988 law, but still lacks clarity in some areas.[21] Although the PFIL has made significant advances toward attracting foreign investment, some expectations and demands of foreign investors have been overlooked.

The latest development affecting the interests of U.S. investors is the recently signed Polish-American Business and Economic Treaty.[22] The Treaty is the first United States investment agreement with Poland or any other East European country.[23] The purpose of the Treaty is to encourage and facilitate U.S. investment by providing internationally rec-

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18 Ustawa z dnia 23 grudnia 1988 r. o dzialalnosci gospodarczej z udzialem podmiotow zagranicznych (Law on Economic Activity with the Participation of Foreign Parties), Dz.U. No. 41, item 325 (1988), *amended by* Dz.U. No. 74, item 442 (1989)[hereinafter 1990 PFIL].

19 For a more in depth analysis of the law, *see* Gordon, *The Polish Foreign Investment Law of 1990*, 24 INT'L LAW. 335 (1990); Slupinski, *The New Polish Joint Venture Law*, 3 TRANSNAT'L LAW. 1 (1990)(discusses 1988 Joint Venture Law, the predecessor to the 1990 PFIL).

20 Dz.U. No. 41, item 325 (1988), *supra* note 18.

21 The foreign investment law of 1988 was amended in December of 1989 and became effective on January 1, 1990. The ambiguities may be illustrated by the language of the currency transfers provision. The expedited process of drafting the laws might be one reason for this ambiguous language.

22 Treaty With Poland Concerning Business and Economic Relations, March 21, 1990, S.T. DOC. No. 18, 101st Cong., 2d Sess. (1990) [hereinafter Treaty]. Although the Senate Foreign Relations Committee expected the Treaty to receive the advice and consent of the Senate by the end of September 1990, at the time of this writing the Treaty has not yet been ratified.

23 While this agreement is the first wholly economic agreement between the United States and an East European country, the United States has entered into several other agreements with Poland in the past. *See, e.g.*, Agreement Relating to Economic and Financial Cooperation, Apr. 24, 1946, 11 Bevans 286; Agreement Relating to Agricultural Commodities, Establishing a Procedure, Dec. 29, 1972-Feb. 5, 1973, 24 U.S.T. 424, T.I.A.S. No. 7557; Joint Statement on the Development of Agricultural Trade, 25 U.S.T. 2763, T.I.A.S. No. 7944; ; Convention for the Avoidance of Double Taxation, July 23, 1976, 28 U.S.T. 891; T.I.A.S. No. 8486; Agreement Relating to Limitation of Imports of Specialty Steel from Poland, Oct. 18, 1983, T.I.A.S. No. 10901; Arrangement Concerning Trade in Certain Steel Products, Expired by its terms September 30, 1989; Investment Guaranty Agreement Between Poland and the United States, Oct. 13, 1989, 28 I.L.M. 1393. Source: U.S. Laws and U.S. and EC Trade Agreements Relating to Nonmarket Economies, Vol. 1, Staff Research Study #16, USITC Pub. 2269, Office of General Counsel II-15 (1990).

ognized protections and standards.[24] The Treaty's key elements address issues of investment, expropriation, transfer of funds, dispute settlement, business rights, intellectual property rights, creation of an ombudsman office, tourism, and investment procedures.[25] Both countries view the substance of the Treaty as an effort to satisfy the shortcomings of the 1990 PFIL and to further enhance the attractiveness of the investment and business environment in Poland.

This article describes how the Treaty increases the incentives for U.S. investment beyond those provided in the 1990 PFIL. In other words, this article determines what added incentives for U.S. investment the Treaty provides for which are not found in the 1990 PFIL. Because of the unique nature of the Treaty, even among other bilateral investment treaties, the first portion of this article discusses the Treaty within the framework of other investment treaties.[26] The reader must keep in mind that the written word cannot keep up with the constant changes occurring in Poland. Therefore, the investor or practitioner would be well-advised to closely monitor future events in Poland.

## III. THE TREATY IN ITS SETTING

The Treaty was negotiated by the Office of the United States Trade Representative, the Department of Treasury, the Department of State, and the Department of Commerce pursuant to the provisions of the SEED Act of 1989.[27] Because the SEED Act and its legislative history specifically urged the President to seek "bilateral investment treaties" ("BITs") with Poland and Hungary,[28] the Treaty negotiators attempted to create a document featuring the structural components of the U.S. Model Bilateral Investment Treaty ("Prototype").[29] Past traditional BITs have assured the American investor that the host government would grant them national (i.e., non-discriminatory) treatment; the op-

24 WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, U.S.-POLISH BUSINESS AND ECONOMIC TREATY FACT SHEET, March 21, 1990.

25 *See* Treaty, *supra* note 22.

26 At the time of this writing, a thorough examination of this subject was being conducted for publication by Eleanor Roberts Lewis, Chief Counsel for International Commerce at the Department of Commerce.

27 These four United States government agencies negotiated the substantive provisions of the Treaty, while other agencies, in conjunction, participated in the negotiations.

28 SEED Act, *supra* note 8, at (c)(15). "[This Bill] 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." H.R. Rep. No. 278(II), 101st Cong. 2nd Sess. 12, *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 739, 755.

29 Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984, [hereinafter Prototype]. The Department of State has recently developed a new prototype. The changes from the Prototype appear to be few and insubstantial.

portunity to submit disputes to binding third-country arbitration; and the guarantee of fair market compensation for acts of expropriation. As will be discussed, the Treaty includes not only the traditional BIT provisions, but also provides additional guarantees such as profit repatriation and guarantees for entry of investment.

### A. A Member of the Bilateral Investment Treaty (BIT) Family

The BIT program[30] evolved from the Friendship, Commerce and Navigation ("FCN") treaty program.[31] The BIT program was initiated during the mid-1970s[32], after several incidents of expropriation of U.S. investments occurred in developing countries[33]. Using a skeletal framework of the FCN treaties, the drafters removed the provisions that did not pertain to investment protection. The remaining provisions were then expanded and fortified so as to be more effective than the FCN provisions.[34] The drafters also applied the basic principles set out by the successful European Bilateral Investment Protection Agreements ("BIPAs").[35]

The drafters involved in the BIT program wanted BITs to meet three objectives:

(1) to provide greater protection for United States investment in those countries with which the United States negotiated BITs,

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30 *See generally*, Recent Development, *Developing a Model Bilateral Investment Treaty*, 15 LAW & POL'Y. INT'L. BUS. 273 (1983); Comment, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931 (1984); Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L. L. & POL. 1 (1983); Pattison, *The United States-Egypt Bilateral Investment Treaty: A Prototype for Future Negotiations*, 16 CORNELL INT'L. L.J. 305 (1983).

31 *See* Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 109 (1986). According to the Department of State's records, FCN treaties are presently in force between the United States and nearly fifty countries. The FCN program was implemented to modernize U.S. commercial relationships with primary trading partners in the developed countries. *Id.*

32 *See* Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L. L.J. 201, 209, n. 73. In 1977, during the Carter Administration, the proposals for the BIT program took the form of memoranda circulated in the State Department. Under the Reagan Administration the State Department moved out of the drafting stage and became increasingly involved in negotiations. *Id.*

33 *See* Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L. L. 474, n. 2 (1977). There were 87 reports of expropriatory acts during a two year period in the early seventies. *Id.*

34 In contrast to the FCN program, which enhanced trade relationships with "developed" countries, the BIT program is designed to enhance United States relationships with "developing" countries. There are presently BITs in force between the United States and five countries, which include Bangladesh, Cameroon, Grenada, Turkey, and Zaire.

35 BIPAs were activated among European countries including, Switzerland, West Germany, and the Netherlands between 1962 and 1977. Vandevelde, *supra* note 32, at 208, n. 64.

(2) to reaffirm that the protection of United States foreign investment remained an important element of United States foreign policy, and
(3) to establish a body of practice to support the United States view of international law governing the protection of foreign investment.[36]

The resulting U.S. Model Bilateral Investment Treaty (the "Prototype") contains twelve substantive articles and a preamble. The twelve articles cover the following topics: definitions[37]; treatment of investments[38]; expropriation[39]; currency transfers[40]; settlement of disputes[41]; rights maintained by the parties[42]; measures not precluded by treaty[43]; taxation[44]; and date of treaty enforcement[45].

The Prototype's twelve articles are consistent with the three original objectives of the BIT program which focus on protecting pre-existing U.S. investment. However, the Prototype preamble expands upon these original objectives. The preamble states that the treaty concerns the "reciprocal protection" of investments, as well as, the "encouragement" of

36 Vandevelde, *supra* note 32, at 210 (1988).

37 Prototype, *supra* note 29, art. I. Defines: "company of a Party", "investment", "national", "return", and "associated activities".

38 *Id.*, art. II. Explains that "each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies." *Id.*

39 *Id.*, art. III. Binds the parties to internationally recognized standards for expropriation and permits expropriation only for a public purpose, which must include prompt payment at fair market value.

40 *Id.*, art. IV. Provides that all transfers related to investment are to be made freely and without delay in a freely convertible currency at prevailing market rate of exchange on date of transfer. This provision restricts the transfer of expropriation compensation and preserves the rights of each party to require reports of currency and impose income tax.

41 *Id.*, arts. V-VIII. Article V Requires prompt consultation of the parties to resolve disputes in connection with the treaty. Article VI requires consultation and negotiation of the parties with respect to an investment dispute. Moreover, it provides the dispute resolution procedures. Article VII explains the procedure for resolution of disputes concerning the interpretation and application of the treaty. Article VIII simply states that provisions of Articles VI and VII shall not apply to a dispute arising under export credit, guarantee or insurance programs.

42 *Id.*, art. IX. Preserves various rights, such as laws and regulations of either party, international legal obligations, and obligations assumed by either party.

43 *Id.*, art. X. Provides that the treaty does not preclude measures by either party to ensure public order and does not preclude special formalities connected with investment so long as the treaty is not impaired by such actions.

44 *Id.*, art. XI. Encourages both parties to seek fairness and equity in the tax treatment of investments. The provisions of the treaty apply to matters of taxation only with respect to expropriation, transfers, and investment agreements.

45 *Id.*, art. XII. Mandates that the treaty enter into force thirty days after the date of exchange of instruments of ratification and remain in force for at least ten years. More importantly, this provision permits application of the treaty to investments already existing at the time of entry into force, as well as, those made or acquired thereafter.

investments.[46] "Encouragement" of investment is not within the narrow scope of the three original objectives of the BIT program. Moreover, the Prototype preamble states that the treaty "will stimulate the flow of private capital and the economic development."[47] This was also not a part of the original BIT program. Rather, the original BIT program only sought to protect those investments already in place.[48]

## B. How The Treaty Differs From Other Bilateral Investment Treaties

Although the word "encouragement" does not appear in the text of the Treaty's preamble, the phrase "will stimulate the flow of private capital and the economic development" does appear.[49] Thus, the Treaty preamble emulates the Prototype by citing promotion of investment as one of the purposes of the Treaty. Unlike the Prototype articles, however, the substantive articles of the Treaty contain explicit provisions that are intended to encourage investment. In this respect the Treaty also differs from earlier enacted BITs because, like the Prototype, they lacked substantive provisions designed to encourage investment.[50] The nature of these earlier BITs demonstrates that they were designed primarily to protect investments made by each party in the territory of the other.

The enactment of the Treaty signifies a shift in the primary focus of the BIT program from the protection of investment to the encouragement of investment. Thus, the Treaty is a hybrid of the Prototype and its progeny. Perhaps the phrase "Business and Economic Relations" within

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46 *Id.*, Preamble. Specifically, it states that the two parties have "resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment."

47 *Id.*, Preamble. "Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties . . . ."

48 Gudgeon, *supra* note 31, at 111. According to Gudgeon:

> Although the titles and preambles to most of the BITs refer to the 'encouragement' as well as the 'protection' of investments, the BIT Model was not designed with an intent to catalyze investment decisions. Rather, the practical functions of the BIT program were conceived in more static, protective terms, in relation to stocks of investment already in place. In fact, the framers of the Model BIT were unaware of any proven relationship between the existence of FCN treaties or European BIT's and investment flows. Indeed, the developers of the Model BIT regarded the absence of evidence of a capital flow relationship as advantageous in rallying support for the BIT program, since evidence of a positive correlation between investment treaties and increased capital flow abroad could have spurred opposition by organized labor and regional economic groups within the United States. *Id.*

49 Treaty, *supra* note 22, at 1. Specifically the Treaty states: "Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties . . . ." *Id.*

50 The following countries have signed BITs with the United States which include the "treatment provision," "expropriation provision," "transfers provision," and the "disputes provision" as the four core provisions of the BIT: Egypt, Panama, Cameroon, Morocco, Zaire, Bangladesh, Haiti, Senegal, Turkey, and Grenada.

the title best describes the intent of the Treaty. According to the Letter of Submittal

> This treaty is expected to reinforce and to further the extraordinary recent political and economic developments in Poland. It will serve to stimulate growth of the private sector and of market institutions in Poland, consistent with the economic reform program adopted by that government. In addition, the treaty will encourage, facilitate and protect U.S. investment and business activity in Poland, which can act as an important stimulus to economic reform. Potential U.S. investors who otherwise might perceive uncertainties in the current business climate in Poland will find considerable assurance in the protections provided by this treaty.[51]

Without question, the Treaty's primary purpose is to promote American investments; the protection of those investments is ancillary.

The specific provisions that set the Treaty apart from the Prototype and other BITs include: the granting of non-discriminatory treatment for certain operational measures related to investments and commercial activities[52], the exchange of information relating to and affecting investments[53], a guarantee for intellectual property rights[54], the designation of an ombudsman office[55], and the guaranteed service of government-controlled tourism enterprises to U.S. investors[56]. In addition, there are some other modifications of the BIT-based provisions.[57] Therefore, although the final product does embody the core provisions proposed by the Prototype, it is clear that the drafters incorporated these additional provisions as a progressive effort toward enticing U.S. investors.

## IV. The Treaty's Investment Stimuli

U.S. businesses have been apprehensive about investing in Poland.

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51 Treaty, *supra* note 22, at v.

> "While it is U.S. policy to advise potential treaty partners that conclusion of an investment agreement with the United States does not in and of itself result in immediate increases in U.S. investment flows, the treaty with Poland nevertheless will become a key feature in strengthening the U.S.-Poland bilateral investment relationship."

*Id.*

52 *Id.*, art. III, at 2 (Business Facilitation and Business Rights).

53 *Id.*, art. VIII, at 8. (Exchange of Information and Transparency).

54 *Id.*, art. IV, at 6 (Protection of Intellectual Property).

55 *Id.* at 15 (Side Letter stating that the Polish Government designates a Deputy President of the Agency for Foreign Investments to serve as an "ombudsman" for U.S. investors).

56 *Id.* at 16 (Side Letter identifying relationship of the Treaty to the U.S.-Poland Agreement on the Development and Facilitation of Tourism).

57 *Id.*, Letter of Submittal, at xi. The provisions for entry of investment and repatriation of profits differ substantively from the Prototype provisions. Specifically, the Polish government is committed to phasing out the law prohibiting entry of foreign investment if the investment poses a threat to state economic interests. Additionally, with respect to the repatriation of profits, the protocol of the Treaty provides progressively relaxed restrictions on transfers and 100 percent transferability by 1995.

Perhaps the source of this apprehension was best described by a Department of State official who said [in reference to Eastern Europe in general]

> It is true that during the transitional phase ahead, foreign companies will face a difficult landscape. Laws and policies will be changing. New ideas will be clashing with old habits. Credit, banking, communications, and other facilities for doing business will be well below Western standards, at least in the beginning. The entrepreneurs you deal with are going to be inexperienced and often unrealistic in their expectations. And they will be constantly adjusting to change themselves.[58]

For those businesses preparing to invest in Poland's new democracy, many unanswered questions exist. Among other things, investors are concerned about the ability to get profits out of the country, the effect of an inefficient bureaucracy on the ability to gain entry for investment, the threat of expropriation by the Polish government, and the resolution of disputes with foreign parties. Most of these concerns are addressed by the 1990 PFIL and the Treaty.

### A. Transferring Profits Out of Poland

Prior to the 1990 PFIL, Poland's Foreign Investment Law, while imposing a few restrictions, permitted companies to freely distribute their profits in foreign currencies.[59] In an attempt to stabilize the economy, the Polish government has limited the investor's freedom for distributing profits in foreign currencies under the 1990 PFIL.

The 1990 PFIL grants the investor[60] the right to convert dividends into foreign currency, but not with the same liberty as before.[61] Specifically, the foreign currency must be purchased through an authorized foreign exchange bank.[62] The 1990 PFIL limits the amount exchanged through the bank to the earned export surplus of the investor.[63] The

58 Address by Deputy Secretary Eagleburger, "America's Opportunities in Eastern Europe", American Chamber of Commerce's International Forum, (Feb. 16, 1990)(available from United States Department of State, Bureau of Public Affairs, Current Policy No. 1250).

59 For an explanation of the 1988 law, *see* Piontek, *Polish Foreign Investment Law 1988*, 23 J. WORLD TRADE 5, (1989); Gordon, *supra* note 19, at 339.

60 The term "investor" will be used to refer to the U.S. investor. The 1990 PFIL uses the term "foreign partner." *See* 1990 PFIL, *supra* note 18.

61 1990 PFIL, *supra* note 18, art. 19 (1).

62 1990 Foreign Exchange Law, *supra* note 4, art. 24 (1). An authorized foreign exchange bank is one which has been awarded a permit. "The Governor of the national Bank of Poland in coordination with the Minister of Finance may empower specific banks to conduct the type of activities reserved under this Act for currency banks." *Id.*

63 1990 PFIL, *supra* note 18, art. 19 (1). This amount must be determined by an authorized auditor auditing the annual balance. American accounting firms are presently entering the market in Poland and, obviously, an American investor would be prudent to choose an American auditor for arriving at a more favorable annual balance. The formula for deriving the "export surplus" is the surplus of export proceeds over import outlays. *Id.*

statute further limits the amount available for exchange by the amount of foreign currency that the investor's foreign employees choose to purchase from their wages.[64]

In addition, the 1990 PFIL limits the investor to purchasing foreign currency only up to fifteen percent of the profit realized over the export surplus.[65] This provision limits the internal convertibility of Polish zlotys earned from internal sales. As a result, the above provision restricts hard currency outflows and protects the internal convertibility of Polish zlotys.[66] However, in economically substantiated cases, the Minister of Finance may, at the request of the investor, issue a currency permit that entitles the investor to exchange a greater amount of foreign currency than that provided by the law.[67] These permits may be issued prior to the issuance of the permit required for the establishment of the investor's company.[68]

The Treaty also bolsters the repatriation guarantees of the 1990 PFIL.[69] Article V of the Treaty provides that "[e]ach party shall permit all transfers related to an investment of commercial activity to be made freely and without delay into and out of its territory."[70] The term "transfers" is specifically limited to six types of transactions, although the six types cover nearly all conceivable types of transactions.[71] The

64 *Id.* at arts. 32(2), 32(3), 32(3a).

65 *Id.* at art. 19(2).

66 Slupinski, *supra* note 19, at 29, n. 150. "Polish efforts to introduce partial internal convertibility of the local currency resulted in the enactment of the [1990 PFIL]. The law is intended to eliminate the dual monetary system existing in Poland. At the same time, it is seen as the first step toward full convertibility of the Polish zloty in the near future." *Id.* Gordon, *supra* note 19, at 352, offers an illustration of how this law would operate in practice:

> assume that a Polish-American Joint Venture Company is 50 percent owned by a U.S. investor and 50 percent owned by a Polish investor. During 1990 (calendar and fiscal years coincide), the company earns $100,000 in profits. The audit confirms that 60 percent of the profits are export surplus (demonstrating, not coincidentally, the tremendous importance of the choice of auditors and auditing procedures). The U.S. investor is entitled to purchase $33,000 of hard currency without need of special authorization. That number is reached by adding the U.S. partner's half share of export surplus (50 percent of $60,000 = $30,000) plus 15 percent of its half share of "remaining" profits (15 percent of [50 percent of $40,000] = $3,000). From that maximum transferable amount of $33,000, the government will deduct from their pay in zlotys any hard currency purchased by the venture's foreign employees.

67 1990 PFIL, *supra* note 18, art. 19(4). This is the amount exceeding the amount allowed for the convertibility of external profits, as well as, internal profits. Or, as the law states: "The amount exceeding the amount mentioned under paragraphs 1 and 2 above." *Id.*

68 *Id.*

69 *See* Treaty, *supra* note 22, art. V, Transfers.

70 *Id.* at 6.

71 Transfers include: "(a) returns; (b) compensation pursuant to Article VII [Expropriation]; (c) payments arising out of an investment dispute or commercial dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment." *Id.*

language "without delay" reassures the investor that his or her money will not sit idly during the exchange process.[72]

However, the Treaty's Protocol provision places restraints on an investor's ability to transfer funds out of Poland under the transfer provisions of Article V.[73] Instead of allowing "*all* transfers . . . to be made freely,"[74] the Protocol, like the 1990 PFIL, allows only a percentage of the internal profits to be transferred[75]. Nonetheless, the Protocol allows a graduating percentage over the next five years and guarantees the one hundred percent transfer of profits by 1996.[76]

If Poland introduces full convertibility before 1996, the Protocol provides that transfers of profits will be unrestricted from the date that full conversion is introduced.[77] Furthermore, the Protocol guarantees that bank deposits held within Poland will receive a positive real rate of interest[78] and profits which cannot be transferred (according to the graduated scale) can be invested in a bank account that yields a positive real rate of interest[79]. Any problems that an American company might encounter with respect to the transferring of funds can be brought to Poland's Deputy President of the Agency for Foreign Investments.[80] Under the Treaty, the Deputy President acts as an ombudsman, and the

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72 Treaty, *supra* note 22, Protocol, par. 2, at 14. The Treaty's Protocol defines "without delay" to mean that "transfers should be made in accordance with normal banking and commercial practices." The Protocol further states that the parties understand "that normal banking and commercial practices in the Republic of Poland are generally governed by the National Bank of Poland." Moreover, it states that "[u]nder current provisions issued by the Bank, investment companies can obtain foreign exchange within three working days if such foreign exchange is obtained from a bank licensed to conduct foreign exchange transactions, and eight working days in all other instances in connection with payments for imported goods and related services." *Id.*

73 *Id.*

74 *Id.*, art. V, Transfers, at 6.

75 *Id.*, Protocol, par. 4, at 14.

76 *Id.* at 15. Specifically, the Protocol states:

> Notwithstanding the provisions of Article V, paragraph 1, with regard to the Republic of Poland the transfer of profits derived from an investment exceeding the amount transferrable under Article 19, paragraph 1, of the Law of December 23, 1988 on Economic Activity with the Participation of Foreign Parties shall be made according to the following schedule. As of 1st January 1992: 20 percent of the remaining profits gained in 1990-1991 and not previously transferred. As of 1st January 1993: 35 percent of the remaining profits gained in 1990-1992 and not previously transferred. As of 1st of January 1994: 50 percent of the remaining profits gained in 1990-1993 and not previously transferred. As of 1st of January 1995: 80 percent of the remaining profits gained in 1990-1994 and not previously transferred. As of 1st January 1996: 100 percent of the remaining profits gained in 1990-1995 and not previously transferred, and 100 percent of profits gained thereafter.

*Id.*

77 *Id.* at 14.

78 *Id.* para. 3, at 14.

79 *Id.* par. 5, at 15.

80 *Id.* Side Letter from Robert A. Mosbacher, U.S. Sec. of Commerce to Dariust Ledworowski, Polish Under-Sec. of State, Ministry of Foreign Economic Relations, at 15.

Deputy President's office is commanded to assist "investors experiencing difficulties in repatriating profits and obtaining foreign exchange."[81]

In comparison to the 1990 PFIL's transfers provisions, the most striking feature of the Treaty's transfers provision is the guarantee for one hundred percent profit transfers by 1996.[82] In addition, the commitment by Poland for limiting the period of exchange to a specific number of days is a step forward from the 1990 PFIL. The Treaty's guarantees provide more incentive to the American investor than that already provided by the 1990 PFIL, but the guarantees are not so substantial as to single-handedly draw an American investor into Poland. Rather, at the margin, the guarantees may tip the balance in favor of investing in Poland.

### B. Entry and Registration of Investments

The 1990 PFIL requires that an investor obtain a permit in order to establish a company.[83] An application for a permit should include the information specifically outlined by the 1990 PFIL.[84] While it is not a guarantee, the 1990 PFIL states that a decision on whether to issue the permit should be made within two months from the date of the filing of the application.[85] If a permit is granted, the Company must then apply for registration with the court in accordance with the regulations of the commercial register.[86]

The issuance of permits is the responsibility of the President of the Foreign Investment Agency.[87] A permit will be issued if the business

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81 *Id.* at 16.

82 *See supra* note 73 and accompanying text.

83 1990 PFIL, *supra* note 18, art. V (1). "The establishment of the Company shall require a permit. The issuance of the permit authorizes the commencement of business activity indicated herein."

84 *Id.*, art. 10 (1)&(2). These provisions state:

> An application for a permit should set forth: /1/ partners; /2/ subject and scope of the business activity of the Company, including export and imports activities; /3/ anticipated term of a Company; /4/ funds required by the Company to commence business, including equity; /5/ ratio between each Shareholder's contribution to the Company's equity and the form of contributions; /6/ seat of the Company and the location of its production facilities.

The application should also include the Company's founding act, which is required by the Commercial Code; documentary evidence of the legal status and financial condition of prospective shareholders; and a feasibility study of the proposed Company. All of this information can be either submitted in Polish, or in a foreign language, so long as a certified translation into Polish is provided. *Id.*

85 *Id.*, art.10 (4).

86 *Id.*, art. 12 (1).

87 *Id.* at art. 4 (1). This article provides:

> The Foreign Investment Agency, hereinafter referred to as 'the Agency', is hereby established as the bureau of the President of the Agency. The structure and operating principles of the Agency are outlined in its charter conferred by the Prime Minister. (2) The President of the Agency is the central administrative authority on foreign investment, responsible to the Prime

intends to ensure: (1) the introduction of modern technologies and management methods into the national economy; (2) the provision of goods and services for export; (3) the improvement in the supply of modern and high quality products and services to the domestic market; and (4) the protection of the environment.[88] Because these standards are imprecise, these restrictions will rarely deny a permit to a potential investor.

Another provision of the 1990 PFIL justifies the denial of a permit whenever the business poses a threat to Poland's economic interests; violates the environmental standards requirements; threatens Poland's security and defense interests; or threatens the protection of Poland's secrets.[89] If a permit is denied because the business threatens Poland's economic, security, or defense interests, or endangers Poland's secrets, an explanation for the denial is not required.[90] The investor may appeal a denial to the President of the Agency for re-examination, but may not appeal to the Supreme Administrative Court.[91] However, the appeal must occur within fourteen days from the date of the initial denial.[92]

The Treaty grants additional guarantees to U.S. investors which are not afforded by the 1990 PFIL. In the Treaty's Side Letter on the Entry of Investment, Poland promises to permit entry of United States investments automatically within sixty days from the application unless the investor is otherwise notified.[93] Under the Treaty, as under the 1990 PFIL, a permit will be denied "only if it presents a threat to state economic interests, to national security or to the environment."[94] With re-

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Minister. (3) The Prime Minister, on the advice of the Minister of Foreign Economic Relations appoints and dismisses the President of the Agency. (4) The responsibilities of the President of the Agency include: /1/ formulating the objectives and implementing the policy of the State on investment cooperation with foreign countries; /2/ stimulating and undertaking measures to increase the interest of foreign parties in pursuing economic activity in the Polish People's Republic in the areas, and within limits, corresponding with the interests of the national economy; /3/ supervising the compliance of the activities of entities, operating under this Law with its provisions and the conditions set forth in the permit for the establishment of a Company; /4/ performing other responsibilities as provided by in this Law. (5) The Foreign Investment Council shall constitute the advisory body of the President. The members of the Council are appointed and recalled by the Minister of Foreign Economic Relations on the advice of the President of the Agency.

88 *Id.*, art. 5(2).

89 *Id.*, art. 6 (1).

90 *Id.* at (2).

91 *Id.* at (3)&(4).

92 *Id.*

93 Treaty, *supra* note 22. Side letter from Carla A. Hills, U. S. Trade Rep. Executive Office of The President, Washington, DC, to Dariust Ledworowski, Polish Under/Sec. of State, Ministry of Foreign Economic Relations, at 22 [hereinafter Letter on Entry of Investment]. Specifically, the side letter states: "A permit for entry of United States investments shall be issued automatically within sixty days of submission of an application unless the U.S. investor is notified in writing of the denial and the grounds and reasons thereof within sixty days from the date of the submission." *Id.*

94 *Id.* The Treaty's Letter of Submittal states that "according to the Government of Poland, in

spect to environmental threats, the Letter on Entry of Investment states that "the standards used shall be those applied to domestic enterprises."[95] This provision may prove to be significant for potential investors, because no such standard presently exists under the 1990 PFIL. Neither the 1990 PFIL, nor the Treaty contains a standard for determining whether an investor poses a threat to Poland's economic interest. However, the Letter on Entry of Investment assures the investor that: "the criterion of 'threat to state economic interests' shall be used only in exceptional cases and not for the purpose of limiting competition."[96]

The most promising statement for investors in the Letter on Entry of Investment is the assurance that, within two years from the Treaty's entry of enforcement, the United States and Poland will consider narrowing the scope of the investment permit requirements and subsequently phase out such permits.[97] While this statement does little for the existing investor, the elimination of the permit process should certainly whet the potential investor's appetite. Similarly, the current provision providing for the automatic issuance of permits within sixty days of application should also appeal to the potential investor.

### C. The Threat of Expropriation

Within the provisions for regulating foreign companies' banking activities, the 1990 PFIL provides a guarantee against expropriation by the Polish Government.[98] In order to acquire such a guarantee, the investor must apply to the Minister of Finance requesting a guarantee of indemnification against nationalization or expropriation.[99] After the request is made, the Minister of Finance must grant the guarantee.[100] The guarantee is only valid if the expropriation has been applied uniformly to all foreign investors. In other words, if an investor has been singled out for expropriation, the guarantee is meaningless. Besides the 1990 PFIL, the Polish Constitution also addresses the issue of expropriation. The Constitution has recently been amended to provide that "The Polish State

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recent practice, this law has been applied to preclude investments only very rarely." Treaty, *supra* note 22, Letter of Submittal, at XI.

95 Letter on Entry of Investment, *supra* note 92.

96 *Id.*

97 *Id.*

98 *Id.*, art. 22 (6). "The Minister of Finance, upon the application of a foreign Shareholder, issues him with a compensation payment guarantee to the amount equal to the value of the Company's assets due him, in the event of a loss resulting from a decision of any State authorities in respect of nationalization, expropriation, or from measures having effect equivalent to nationalization or expropriation."

99 *Id.*

100 *Id.*

protects property and guarantees private property. Expropriation is permitted only for a public purpose and for just compensation."[101]

The Treaty contains numerous provisions which lessen the threat of expropriation. Article VIII of the Treaty provides numerous assurances to the U.S. investor that go beyond the guarantees in the 1990 PFIL.[102] These assurances are based on the general rule of international law that municipal law cannot prevail over the international obligations of the country.[103] Thus, Poland cannot invoke its municipal law, including its Constitution, as an international legal justification for failing to adhere to its obligations under a treaty.[104]

The Treaty states that investments may only be expropriated if done so for a public purpose and in a nondiscriminatory manner. The treaty further provides for prompt, adequate, and effective compensation in the event of such expropriation.[105] All measures which effectively deprive an investor of his interest and can be likened to expropriation are covered. Compensation must be equivalent to the "fair market value of the expropriated investment immediately before the expropriatory action was taken or became publicly known, whichever is earlier."[106] The compensation must "be paid without delay, include interest at a commercially reasonable rate . . . from the date of expropriation, be fully realizable, freely transferable, and calculated on the basis of the prevailing market rate of exchange for commercial transactions on the date of the expropriation."[107] An investor should observe that a specific valua-

101 Polish Constitution, art. VII, as amended by law #75, para. 444 (1989).

102 Treaty, *supra* note 22, art. VII, Compensation for Expropriation, at 7.

103 G. SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW, 39 (6th ed.1976).

> "[B]efore any international organ, municipal law cannot prevail over a State's international obligations, whether these are founded on international treaties, rules of international customary law or general principles of law recognized by civilized nations. On the international level a State is estopped from arguing that its own constitution or any of its own constitutional organs prevent it from complying with international law. Any international entity which has contracted international obligations must, if necessary, change its domestic law so as to be able to fulfil its international commitments. The fact that a State applies a measure which is contrary to international law to its own citizens is neither a justification nor an excuse for any breach of international law [citations omitted]."

*Id.*

104 *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 63 A.J.I.L. 875, art. 27.

105 Treaty, *supra* note 22, VII (1). "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II (6)." *Id.*

106 *Id.* at 7-8.

107 *Id.* at 8.

tion method for compensating such losses is not provided by the Treaty.

The right to "prompt review" of an act of expropriation and the ensuing compensation is granted by the Treaty.[108] The expropriation and any subsequent compensation will be examined by the appropriate judicial or administrative authorities to determine whether the procedures are in compliance with the principle of "prompt review."[109] The Treaty also extends nondiscriminatory treatment to investment losses due to war or other civil disturbances.[110]

In addition to the Treaty and the 1990 PFIL, the investor can rely on U.S. statutory provisions to discourage other countries from expropriating investment. Section 301 of the Trade Act of 1974 ("Section 301") authorizes the United States Trade Representative to take action against a foreign country that acts unjustifiably, unreasonably or discriminatorily to burden or restrict U.S. commerce.[111] The 1988 Omnibus Trade and Competitiveness Act enhances the Administration's power to retaliate against unfair traders with the new "super" 301. Under the new section 301 the United States Trade Representative has the authority to take retaliatory action against goods or services of a foreign country in an amount that is equivalent to the burden or restriction being imposed on United States commerce by that country.[112]

In addition to the protection against unfair trade practices afforded by Section 301, the investor also has the option to insure against expropriation through the Overseas Private Investment Corporation ("OPIC"). OPIC is responsible for administering the political risk insurance of the United States government. The investment guarantee agreement between the United States and Poland overcomes the obstacles of the Foreign Assistance Act of 1961,[113] and makes this investment insurance available in Poland.[114] Other options potentially available to inves-

108 *Id.*, para. 2, at 8.

109 *Id.*

110 *Id.*, par. 3, at 8. "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded nondiscriminatory treatment by such other Party as regards any measures it adopts in relation to such losses." *Id.*

111 19 U.S.C.A. § 2411 (West 1988). This statute defines "commerce" to include "foreign direct investment by United States persons with implications for trade in goods or services." *Id.* § 2411(d)(1)(B). "Unreasonable acts" include those that deny "fair and equitable (I) opportunities for the establishment of an enterprise, (II) provision of adequate and effective protection of intellectual property rights, or (III) market opportunities . . . ." *Id.* § 2411 (d)(3)(B)(i).

112 19 U.S.C. § 2411 (a)(3).

113 22 U.S.C.A. § 2370 (West 1988). This Act prohibits assistance to various foreign countries. Section f prohibits assistance to any Communist country, including Poland. *Id.* § 2370(f)(1).

114 Poland-United States: Investment Guaranty Agreement [Done at Warsaw, October 13, 1989], 28 I.L.M. 1393 (1989). This agreement does not come into effect until either Poland is added to 22

tors include political risk insurance from the World Bank's Multilateral Investment Guaranty Agency ("MIGA") and from insurers in the private sector.

The significance of the Treaty's expropriation provision rests upon the guarantee of compensation without delay and the guarantee of prompt review to determine if compensation is adequate. These guarantees are far more assuring to the investor than those provided by the 1990 PFIL, which only grants indemnification following application by the investor after being subjected to an across-the-board expropriation.

### D. Settling Investment Disputes

While the 1990 PFIL does not specifically address arbitration as an option for settling disputes, it clearly states that Polish law will apply in the case of a dispute involving the investment regardless of whether the dispute is settled by a Polish court or by a Polish arbitration tribunal.[115] However, investors would be wise to negotiate arbitration clauses which select third countries as the forum for arbitration and select a governing law that is satisfactory to both parties. When an agreement for governing law cannot be reached, the most popular neutral fora include Stockholm and Vienna since these countries tend to apply the traditions of the western legal culture.[116] As a member of the New York Convention, Poland is obligated to enforce judgments rendered by tribunals in other countries that are parties to the New York Convention.[117]

The Treaty provides that an investment dispute between a party and a national or company of the other party may be submitted for arbitration after six months.[118] The investor would not be forced to exhaust local remedies before proceeding with arbitration. Such disputes include those relating to rights granted under the Treaty and those dealing with the interpretation of an investment authorization.[119] Included among permissible arbitral fora are the International Centre for the Settlement of Investment Disputes ("ICSID")[120], the Additional Facility of the Cen-

U.S.C. § 2199(f) which allows assistance to Yugoslavia and the People's Republic of China, or President Bush waives Poland from the restrictions of the Foreign Assistance Act.

115 1990 PFIL, *supra* note 18, arts. 2 § 2, 31 § 1.

116 Slupinski, *supra* note 19, at 35-37.

117 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S., art. III, at 38.

118 Treaty, *supra* note 22, art. IX, par. 3(a), at 9.

119 *Id.*, par. 1, at 8.

120 *Id.*, par. 3(a), at 9. The Treaty provides that each Party "consents to the submission of an investment dispute for settlement by conciliation or binding arbitration to the Centre, in the event that the Republic of Poland becomes a party to the Convention on the Settlement of Investment

tre[121], and any other arbitral institution that is mutually selected[122]. As acknowledged by the Letter of Submittal, the Treaty specifies the availability of the Additional Facility or of ad hoc arbitration because Poland has not adhered to the ICSID Convention.[123] However, Poland has indicated its intent to become a member of ICSID in the near future.[124]

## V. CONCLUSION

Clearly, the Treaty provides incentives for U.S. investment in Poland which are well beyond the incentives currently embodied in Polish law. If the Treaty goes into effect, U.S. investors will most likely pay heed to these incentives and increase their activities in Poland. This is why both countries should seek ratification for the Treaty without further delay. However, even with all of the incentives and favoritism granted to the investor, risks are still inherent in any country such as Poland that lacks the adequate infrastructure for harboring an efficient market economy. Thus, for any potential investor, the rule of thumb is to act cautiously.

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Disputes Between States and Nationals of Other States done at Washington, March 18, 1965." *Id.*, par. 3(b)(i), at 9.

121 The Additional Facility of the Centre is a tribunal established under the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"). *See* ICSID Handbook for the Additional Facility, Introductory Notes. On September 27, 1978, the Administrative Council of the Centre authorized the Secretariat to administer at the request of the parties concerned certain proceedings between States and nationals of other States which fall outside the scope of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. They are (i) conciliation or arbitration proceedings for the settlement of investment disputes arising between parties one of which is not a Contracting State or a national of a Contracting State; (ii) conciliation or arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not directly arise out of an investment; and (iii) fact-finding proceedings. *Id.*

122 Treaty, *supra* note 22, art. IX, para. 3(a), at 9.

123 Treaty, *supra* note 22, Letter of Submittal, at IX.

124 *Id.*