

11-1993

Trade, Intellectual Property, and the Development of Central and Eastern Europe: Filling the GATT Gap

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Anne D. Waters, Trade, Intellectual Property, and the Development of Central and Eastern Europe: Filling the GATT Gap, 26 *Vanderbilt Law Review* 927 (2021)

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Trade, Intellectual Property, and the Development of Central and Eastern Europe: Filling the GATT Gap

ABSTRACT

A major obstacle encountered by the formerly Communist states of Central and Eastern Europe as they convert to market economies is the lack of necessary capital. To raise that capital, these states are largely dependent on foreign investors. Inadequate protection of intellectual property in the formerly Communist states, however, may deter foreign investment. This Note examines Central and Eastern Europe's need for capital and the effect that the quality of intellectual property protection may have on its ability to obtain capital. The Author concludes that, in order for the new economies to survive, not only must the states of Central and Eastern Europe continue to reform their intellectual property laws, but Western investors must be willing to commit resources now to encourage and assist the development of Central and Eastern Europe.

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I. INTRODUCTION

From the first muffled sounds of Poland's Solidarity movement in 1980¹ to the startling collapse of the Soviet Union over ten years later,² the world witnessed the wide spread rejection of communism throughout Central and Eastern Europe.³ Poland, Hungary, Russia, and other formerly-communist nations not only must make radical revisions to their political structures,⁴ but must overhaul entire economic systems.⁵ These European nations face the unprecedented task of changing from a centralized economy to a free market system⁶ without the luxury of decades

1. J. French Hill, *Rebirth of a Nation: The Difficulties of Transition in Eastern and Central Europe*, 24 VAND. J. TRANSNAT'L L. 345, 346 (1991).

2. John-Thor Dahlburg, *Republics Can Go: Gorbachev*, L.A. TIMES, Aug. 27, 1991, at A1.

3. For a general discussion of the history of communism and the reasons communism failed in the former Soviet Union and in Central Europe, see FRANK L. WILSON, *THE FAILURE OF WEST EUROPEAN COMMUNISM* (1993).

Webster's Dictionary defines communism as:

a social and political doctrine or movement based upon revolutionary Marxian socialism that interprets history as a relentless class war eventually to result everywhere in the victory of the proletariat and the social ownership of the means of production with relative social and economic equality for all and ultimately to lead to a classless society.

WEBSTER'S DICTIONARY 460 (3d ed. 1981). In the late 1980s, Russians reportedly defined communism as "the longest and most painful route from capitalism to capitalism." WILSON, *supra*, at 2 (quoting N.Y. TIMES, Jan. 22, 1989, at 1).

4. See generally Walden Country Reports: Hungary (Walden Pub. Ltd.) (see Political Structure) (Feb. 17, 1993) (discussing the political changes in Hungary); Walden Country Reports: Poland (Walden Pub. Ltd.) (see Political Structure) (Jan. 25, 1993) (discussing the political changes in Poland).

5. For a general discussion of the difficulty in converting to a market economy using East Germany as an example, see Horst Siebert et al., *The Transformation of a Socialist Economy: Lessons of German Unification*, in CENTRAL AND EASTERN EUROPE ROADS TO GROWTH 62 (Georg Winckler moderator, 1992).

6. See generally Paul Marer, *Transformation of a Centrally-Directed Economy:*

or centuries to allow their new economies to evolve slowly.⁷ One primary task essential for successful conversion to a free market is to attract foreign capital and investment.⁸ The national infrastructures, including banking systems and telecommunications, require drastic updating if Central and Eastern European states are to become competitive in the global economy.⁹

A critical factor to many outside investors deciding where to invest funds and develop new markets is the protection of their intellectual property.¹⁰ If a corporation knows that its products protected by patents, copyrights, and trademarks will appear quickly on the black market in pirated form, its financial incentive for moving into the new market is reduced drastically.¹¹ Central and Eastern European governments are

Ownership and Privatization in Hungary During 1990, in *PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES* 173 (Bruno Dallago et al. eds., 1992) (analyzing the difficulties encountered by Hungary).

7. See generally Richard M. Phillips & Marian G. Dent, *Privatizing Eastern Europe: A Challenge for the Nineties*, in *JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE* 445 (PLI Com. L. & Practice Course Handbook Series No. 575, 1991). Phillips and Dent note that the United Kingdom needed 10 years to privatize only 5% of its state-run industry. Eastern Europe would need more than a century under the same timetable to privatize all of its state monopolies. *Id.* (citing Denton, *Privatization Program Under Pressure*, *FIN. TIMES*, Sept. 17, 1990, at V).

8. See generally Martin S. Thaler & Robert C. Odle, Jr., *Enterprise Funds: An Enterprising Vehicle for Investors*, in *JOINT VENTURES AND OTHER FINANCING TECHNIQUES IN POLAND, HUNGARY, CZECHOSLOVAKIA, AND ROMANIA* 9 (PLI Com. L. & Practice Course Handbook Series No. 613, 1992) [hereinafter 1992 PLI] (discussing the need for foreign capital and the creation of Enterprise Funds to assist Central Europe). See also Tyler Marshall, *Old East Bloc Must Act to Lure Investment*, *West Says*, *L.A. TIMES*, May 9, 1992, at A33.

9. See Thaler & Odle, *supra* note 8, at 12. Using Poland as an example, the authors, one of the whom is a practicing lawyer in Central Europe, note that "[w]ithout a solid financial infrastructure integrated with the Western financial system, Poland's economy will not flourish." *Id.* See also *infra* part III.

10. For example, Jack Valenti, President of the Motion Picture Association of America, specifically emphasized that United States entertainment companies would not invest in Poland if video and cassette piracy were not controlled. Stephen Engelberg, *Polish Pirates' Booty: Bootleg Tapes*, *N.Y. TIMES*, Oct. 12, 1991, at 41.

11. Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in *INTELLECTUAL PROPERTY RIGHTS GLOBAL CONSENSUS, GLOBAL CONFLICT?* 89, 106 (R. Michael Gadbaw & Timothy J. Richards eds., 1988). Lotus Development Corporation invested in Eastern Europe and grossed approximately 8 to 10 million dollars in 1992, but Lotus constantly faces piracy problems. Paul M. Sherer, *It's Sure Not Business as Usual in the Old U.S.S.R.; US Firms Seeking Long-Term Investments in Eastern Europe*, *P.C. WEEK*, Nov. 23, 1992, at 22. One Polish pirate offered a Polish version of Lotus' Ami Pro word processor in a street bazaar for 15 dollars (10 dollars if the purchaser provided the disks for copying) before Lotus released the product for sale in Po-

aware of this relationship and either have passed intellectual property laws or are in the development stages of providing intellectual property protection.¹² Even with laws in place, however, many corporations report excessive losses from pirated products in Central and Eastern Europe.¹³

This Note discusses in Parts II and III the drastic changes in the political and economic environment in Central and Eastern Europe and the need for foreign capital and investment to establish new democracies. Part IV discusses the relationship between foreign trade and intellectual property protection. Part V addresses recent efforts to include intellectual property issues under GATT and other measures taken by Western nations to encourage the new European governments to establish strong intellectual property laws. The current intellectual property laws of Poland, Hungary, Russia, and the Czech and Slovak Republics are addressed in Part VI. This Note concludes that the enforcement of intellectual property laws in Central and Eastern Europe may significantly influence the amount of foreign capital brought into formerly Communist states, which could affect the survival of the unstable economies of those states.

II. POLITICAL AND ECONOMIC CHANGES IN CENTRAL AND EASTERN EUROPE

In Poland it took ten years, in Hungary ten months, in East Germany ten weeks: perhaps in Czechoslovakia it will take ten days!¹⁴

Central and Eastern Europe captured the world's attention during the

land. *Id.* In Russia, a street vendor sold a pirated Warner Brothers videocassette three months before the videocassette was available for sale to the public in the United States. *Rampant Pirating of Software, Movies in Russia is Costing Western Companies Millions*, GAZETTE (Montreal), Nov. 16, 1992, at E8.

12. See discussion and notes *infra* part VI.

13. Western corporations estimate that they have lost 50 million dollars in profits to pirates in Poland. *Polish Copyright Law Dies With Dissolution of Parliament*, Pat. Trademark & Copyright L. Daily (BNA) (July 14, 1993); "[T]ens of millions of dollars" in pharmaceutical sales alone were lost to pirates in Hungary. *Intellectual Property: U.S., Hungary Initial Agreement on Intellectual Property*, USTR Says, Int'l Trade Rep. (BNA) No. 10, at 1275 (Aug. 4, 1993), available in Westlaw, BNA-ITR databases. In Russia, there were estimated annual losses of 200 million dollars from counterfeiting. 7 World Intell. Prop. Rep. (BNA) 68 (Mar. 1993).

14. Hill, *supra* note 1, at 346 (quoting former Czechoslovakian President Vaclav Havel prior to the overturn of Communism in that country). Hill reports that Havel's projection missed by only 14 days: Czechoslovakia obtained freedom just 24 days after the first clandestine meetings to discuss independence. *Id.*

late eighties and early nineties as country after country struggled for democracy and a free market economy.¹⁵ Poland began the Central European move for independence from communism in 1980.¹⁶ In June 1989, the Polish Solidarity party emerged victorious in national elections.¹⁷ In November of 1989, one-half of Czechoslovakia waged a work strike against the ruling Communist Party, and a new democratic government was elected in June 1990.¹⁸ The fall of the Berlin Wall in November 1989, and the subsequent reunification of East and West Germany, was especially memorable because of its strong visual impact.¹⁹ Romania followed, although at a great price, in December 1989, when its people revolted against communism and many protesters were brutally murdered by the Communist President's security police.²⁰ Hungary formally rejected communism in its general elections in March and April 1990, but began reforming its economy as early as the 1960s.²¹ Bulgarians forced a change in power away from communism in their June 1990

15. Central Europe in this Note refers to Poland, Hungary, Romania, Bulgaria, the Czech Republic, and the Slovak Republic. This terminology is consistent with that used by other writers in this field. See generally ROMAN FRYDMAN ET AL., *THE PRIVATIZATION PROCESS IN CENTRAL EUROPE* (1993). One source noted: "In the past, the term 'Eastern Europe' has been a reference to those European countries subject to Soviet hegemony. Now that Poland, Hungary and the Czech and Slovak Federal Republic have broken free from the Soviet Union, they prefer to be thought of as located in 'Central Europe.'" Thaler & Odle, *supra* note 8, at 14 n.1 (The authors' comments were written prior to the dissolution of the Soviet Union and prior to the creation of two distinct republics in the former Czechoslovakia).

16. Hill, *supra* note 1, at 346-47.

17. Walden Country Reports: Poland, *supra* note 4 (see Political Structure). In the September 1993 national elections, however, left wing parties with ex-communist leaders returned to power, which concerns Poland's Democratic Union Leaders and United States officials. John Pomfret, *Poland's Ex-Communists Say West Aided Win*, WASH. POST, Sept. 26, 1993, at A44.

18. The Communist President resigned on December 10, 1989, and the new President was inaugurated "without promising loyalty to the cause of socialism." RICHARD KROOTH & BORIS VLADIMIROVITZ, *QUEST FOR FREEDOM* 182 (1990). Interestingly, the reverse side of the cover page of this book states that "'Boris Vladimirovitz' is the pseudonym of a former member of the Supreme Soviet, USSR". *Id.* at cover page.

19. See WILSON, *supra* note 3, at vii. Wilson writes that "[the Wall's] collapse symbolized the bankruptcy of the political, social and economic views of the Communist movement that had ordered its erection." *Id.*

20. KROOTH & VLADIMIROVITZ, *supra* note 18, at 250-59. After this bloody revolt, the communists returned to power, but the faltering economy required Romania's leaders to make serious political and economic reforms. *Id.* at 261-67.

21. Paul Hare, *Hungary*, in *INDUSTRIAL REFORM IN SOCIALIST COUNTRIES* 145, 145-46 (Ian Jeffries ed., 1992). Hungary's first reforms included the creation of enterprise trusts for greater efficiency and the use of performance incentives. *Id.* at 146.

elections, and the newly elected opposition in the Grand National Assembly mandated a conversion to a market based system.²² The dissolution of the Soviet Union in 1991 into fifteen independent republics was perhaps the most significant and unexpected transformation of a formerly Communist empire.²³

Along with massive political upheaval came the need to restructure huge economic systems on the brink of collapse. The socialist²⁴ economic systems in the previously Communist states generated huge inefficiencies and shortages in all sectors of the economy, resulting in a lack of goods, inadequate advances in technology, and unstable currencies.²⁵ To address some of these weaknesses, Central and Eastern European states developed underground "second economies" to meet the demand for commodity goods.²⁶ These second economics prospered in response to the shortage problems, and the underground markets still function in the changing economic environments.²⁷ To some scholars and Central Europeans, the underground markets provide a framework for other entrepreneurs to follow in moving Central Europe toward free enterprise.²⁸ To others, these systems hinder the development of a fair and legal free economy.²⁹ The critics fear that only former Communist Party officials

22. KRÓOTH & VLADIMIROVITZ, *supra* note 18, at 241-42. One of the motivating factors prompting the overturn of communism in Bulgaria was the release of information that Soviet leaders intentionally withheld critical information during the 1986 Chernobyl nuclear plant crisis. *Id.* at 241.

23. See Ian Bremmer, *Reassessing Soviet Nationalities Theory*, in *NATIONS & POLITICS IN THE SOVIET SUCCESSOR STATES* 3, 18-22 (Ian Bremmer & Ray Taras eds., 1993).

24. Webster's Dictionary defines socialism as:

any of various theories or social and political movements advocating or aiming at collective or governmental ownership and administration of the means of production and control of the distribution of goods.

WEBSTER'S DICTIONARY 2162 (3d ed. 1981).

25. For a detailed discussion of the shortage economy in Communist states, see Horst Brezinski, *The Autonomous Sector in a Society of Shortage*, in *PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES*, *supra* note 6, at 31. An agricultural experiment in the 1960's in Hungary proved that a profit motive could increase output and reduce the shortage problem. Terez Laky, *The Reality and Potential of Autonomous Entrepreneurship*, in *PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES*, *supra* note 6, at 162.

26. See generally Maria Los, *From Underground to Legitimacy: The Normative Dilemmas of Post-Communist Marketization*, in *PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES*, *supra* note 6, at 111.

27. *Id.*

28. *Id.* at 131-35

29. *Id.*

and members of the underground mafia possess sufficient resources to profit from the privatization of state-owned entities.³⁰

Efforts to privatize state-owned industries in Poland, Hungary, the Czech and Slovak Republics, and Russia also have raised much controversy.³¹ Obvious problems include determining ownership of the property³² and finding qualified managers to operate the enterprises and begin generating profits.³³ Scholars, economists, and statesmen are developing numerous proposals to turn state-run businesses into private ventures.³⁴ Bulgaria and the Czech and Slovak Republics returned property to those who owned it before the Communist government appropriated it.³⁵ The property became eligible for privatization to third parties only if the original owners did not file restitution claims.³⁶ In Poland, the state-owned businesses are being converted into limited liability or joint stock companies.³⁷ Polish citizens receive free vouchers that may be used to obtain shares in these companies, and citizens and foreigners may purchase additional shares.³⁸ Russia has adopted a similar voucher system.³⁹ National debates center around how much foreign investment

30. *Id.* at 119-131.

31. See, e.g., Francis A. Gabor, *The Quest for Transformation to a Market Economy: Privatization and Foreign Investment in Hungary*, 24 VAND. J. TRANSNAT'L L. 269 (1991); Vratislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND. J. TRANSNAT'L L. 305 (1991).

32. *Id.*

33. See Richard Sumann, *Investing In Czechoslovakia*, 24 VAND. J. TRANSNAT'L L. 377 (1991). Sumann, the Executive Director of the Federal Foreign Investment Agency of the former Czech and Slovak Federal Republic, noted that his country needed experienced management to help the economy. *Id.*

34. See FRYDMAN, ET AL., *supra* note 15, for a discussion of the various privatization methods in use in Central Europe.

35. See *id.* at 33-34 for a discussion of Bulgaria's restitution program and Pechota, *supra* note 31, at 308-12, for a discussion of the Czech and Slovak program.

36. Bulgarian property owners had one year from the program's effective date to file a claim. FRYDMAN ET AL., *supra* note 15, at 34. Under the First Restitution Act of 1990 and the Second Restitution Act of 1991, owners of property in the former Czechoslovakia had six months to file a claim from the effective date of each Act. Pechota, *supra* note 31, at 311-12.

37. Zbigniew M. Slupinski, *Foreign Investment and Ownership Problems in Poland*, in JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE, *supra* note 7, at 538. The author notes that rightful owners of property expropriated by the Communist Party in Poland are bringing civil actions to retrieve their property. *Id.* at 539.

38. *Id.* at 540-41. See generally Robert L. Drake, *Legal Aspects of Financing in Czechoslovakia, Hungary, and Poland*, 26 INT'L LAW. 505 (1992).

39. President Boris Yeltsin announced a voucher system for Russia in August 1992. Fred Kaplan, *Yeltsin Gives Russia a Privatization Plan; On Coup Date, He Offers Vouchers to All*, BOSTON GLOBE, Aug. 20, 1992, at 1.

to allow when privatizing previously state-owned companies.⁴⁰ Although foreigners can provide the management expertise and sorely needed capital to upgrade the facilities, selling to foreigners decreases the opportunities for nationals.⁴¹

Creating new economic systems requires educating entire nations on the internal workings of a free market economy. After decades of socialist policies, many Eastern Europeans cannot envision a market controlled by supply and demand factors rather than by a government entity.⁴² Eastern Europe is attempting not only to overcome forty years of socialist thinking, but to embrace political and economic structures that took centuries for some Western countries to develop.⁴³ Consequently, much trial and error may be required to create the systems best suited for each of the formerly Communist states, and change may not come as quickly as many post-socialists and Westerners desire.⁴⁴

40. See Marek Wierzbowski, *Foreign Investment in Eastern Europe-an Insider's View*, 4 TRANSNAT'L LAW. 623, 643-44 (1991).

41. See *id.*

42. See generally Hill, *supra* note 1. In March 1991, Hill, the United States Deputy Assistant Secretary of the Treasury, recounted the following stories of the difficult transition away from a socialist mindset:

Despite no doubt countless hours of reading or studying comparable economics, one Finance Ministry official requested a meeting with the appropriate U.S. official responsible for the setting of commodity prices.

Another official asked which U.S. government agency determined credit quality for corporate bonds to be issued.

Id. at 348-49.

43. One group of authors described the process as "compressing a millennium's economic evolution toward a market economy into a decade or less." Henry W. Lavine et al., *Czech and Slovak Privatization: Issues and Approaches for Western Investors*, in 1992 PLI, *supra* note 8, at 65; see also Christopher Clague, *Introduction: The Journey to a Market Economy*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE 1, 5-6 (Christopher Clague & Gordon C. Rausser eds., 1992). Clague notes that one of the difficulties of converting to a democracy is learning to make decisions that were previously dictated by a central governing body. *Id.* at 6.

44. See Gianmaria Ajani et al., *Introduction*, in PRIVATIZATION AND ENTREPRENEURSHIP IN POST-SOCIALIST COUNTRIES, *supra* note 6, at 22. The president of the European Bank for Reconstruction and Development noted, "you cannot build a market economy and a democracy as quickly as you can destroy the Berlin Wall." *EBRD President Cites Potential for Investments in Central, Eastern Europe*, INT'L BUS. & FIN. DAILY (BNA) (Feb. 11, 1993).

III. CENTRAL AND EASTERN EUROPE'S NEED FOR FOREIGN INVESTMENT AND CAPITAL

Central and Eastern Europe needs capital to move effectively toward market economies. The Communist governments did not contribute sufficient resources to develop the national infrastructures, such as telecommunications, and financial institutions.⁴⁵ Central Europe needs funding to upgrade these systems because they are necessary components of a globally competitive economy.⁴⁶ During the last twenty years, the East German government upgraded only fifty percent of its national services.⁴⁷ Telecommunications, for example, are especially inadequate because the Communists considered effective communication between the people a threat to government control.⁴⁸

Industrial equipment also needs drastic updating. When Germany unified, twenty-one percent of all East German equipment was more than twenty years old and seventy-five percent was over five years old.⁴⁹ Czechoslovakia's industry under the Communist Party consisted primarily of coal, steel, industrial chemicals, and heavy machinery, with very little production of electronic goods or sophisticated equipment.⁵⁰ In 1989, the year of Czechoslovakia's revolution, machinery and equipment in developed states was fifteen years ahead technologically.⁵¹ No significant replacement of capital occurred during the last forty years in the industrial sector, the national infrastructure, or private housing.⁵² The Romanian government initiated a drastic debt reduction program in the 1980s.⁵³ Romania virtually ceased importing advanced machinery and

45. See Clague, *supra* note 43, at 6.

46. One study in 1990 indicated that foreigners were reluctant to invest in Poland because of inadequate infrastructures, including financial institutions and telecommunications. See George Blazyca, *Poland*, in *INDUSTRIAL REFORM IN SOCIALIST COUNTRIES*, *supra* note 21, at 193.

47. See Siebert et al., *supra* note 5, at 70.

48. Sheety & Vineeta, *Telecoms Rebirth for Eastern Europe's States*, 19 *COMM. INT'L* 4 (1992). Annual revenues for telephone services averaged 30 dollars per person in Central and Eastern Europe, while the Western average was 340 dollars per person. *Id.*

49. Siebert et al., *supra* note 5, at 71.

50. KROOTH & VLADIMIROVITZ, *supra* note 18, at 187.

51. *Id.*

52. See Vladimir Jindra, *Comments*, in *CENTRAL AND EASTERN EUROPE ROADS TO GROWTH*, *supra* note 5, at 146-47.

53. Alan H. Smith, *The Romanian Enterprise*, in *INDUSTRIAL REFORM IN SOCIALIST COUNTRIES*, *supra* note 21, at 204-05. One source noted that the repayment efforts were so draconian that the government chose to repay its debts prematurely rather than increase the people's living standard. John S. Earle & Dana Sapatoru, *Privatization in a Hypercentralized Economy: The Case of Romania*, in *PRIVATIZATION IN THE TRAN-*

equipment and now much of its industrial equipment is obsolete.⁵⁴

Central and Eastern European states also need capital to revitalize the business sectors of their economies. The post-socialist governments are passing laws to encourage the formation of new ventures, to privatize state-run monopolies, and to promote infusions of capital into these failing industries, but these goals require extensive capital.⁵⁵ The governments must develop programs to privatize billions of dollars of state-controlled assets when private savings are vastly inadequate to purchase these state-run companies.⁵⁶ Privatizing businesses is only the first step, however, in resolving the problem of deteriorating machinery, equipment, and national infrastructures. These states need much additional capital to make the difficult transition to a free market system.⁵⁷

The necessary capital to privatize businesses, update facilities, and educate the work force can come from domestic savings, exports, or foreign investment. Because of the shortage of capital in Eastern European countries, domestic capital constitutes only a small percentage of the funds needed.⁵⁸ In addition, the currencies of socialist states lacked value outside their national borders,⁵⁹ and most Central European currencies remain unstable.⁶⁰ Although a few currencies, including the Polish zloty and the Hungarian forint, can now be converted into hard foreign currencies,⁶¹ convertible foreign currencies continue to carry more purchasing power in most post-socialist states.⁶²

Foreign currency is available with varying social and economic costs

SITION TO A MARKET ECONOMY 147, 153 (John S. Earle et al. eds., 1993).

54. See Smith, *supra* note 53, at 204-05.

55. See discussion *infra* notes 75-92 and accompanying text.

56. See Pechota, *supra* note 31, at 315. In Czechoslovakia, for example, the value of state-owned businesses as of 1991 was estimated to be over 100 billion dollars, while savings equaled only a few billion dollars. *Id.* See also Ajani et al., *supra* note 44, at 17.

57. Some experts predict that Russia will need 5 billion dollars of foreign investment per year for the next 10 years. *Russia: Foreign Investment Needs Put at \$5BN per Year for Next Decade*, REUTER TEXTLINE NOVECON, Feb. 16, 1993.

58. See *supra* note 56; see also Laky, *supra* note 25, at 163. In Poland, disposable income is estimated to be 10% of the value of state-owned assets. Phillips & Dent, *supra* note 7, at 457.

59. Brezinski, *supra* note 25, at 34.

60. See Hill, *supra* note 1, at 351.

61. *Id.* See also Hare, *supra* note 21, at 151 (noting that Hungarians began paying for imports with Hungarian forints in January 1991).

62. See Wierzbowski, *supra* note 40, at 643 (noting that early investors in Poland had significant buying power with foreign currencies). See Brezinski, *supra* note 25, at 35-36, for an explanation of why foreign convertible currencies are in demand in shortage economies.

from several sources. First, a large amount of international aid is available from the International Monetary Fund, the World Bank, and other groups, such as the international affiliation of twenty-four industrial nations (G-24).⁶³ The aid is earmarked for specific purposes, including stabilizing currencies,⁶⁴ updating national infrastructures,⁶⁵ and assisting the private sector through enterprise funds and student and job training.⁶⁶ Easy access to foreign funds, however, increases the already high debt burdens that these countries accumulated during their socialist years. For example, Hungary owed more than twenty-one billion dollars by 1991,⁶⁷ Poland's debt was forty-seven billion dollars at the end of the 1980s,⁶⁸ and the former Soviet Union's national debt was eighty billion dollars in 1991.⁶⁹

To avoid over-reliance on foreign aid, one alternative is to attract foreign currency by producing goods for export. Central European companies can immediately reinvest hard currency from exports into operations

63. See Michel Camdessus, *Opening Address, in CENTRAL AND EASTERN EUROPE ROADS TO GROWTH*, *supra* note 5, at 18. The United States and the European Community are members of the G-24, which provided more than 20 billion dollars in international assistance through 1991. See Hill, *supra* note 1, at 356.

64. Poland stabilized its currency through a drastic shock treatment which resulted in serious inflation: over 1000% in 1989. Phillips & Dent, *supra* note 7, at 488-89. By 1991, inflation was "down" to 70%, but the Polish zloty was convertible. *Id.* Polish economic figures for 1992 reported that inflation had decreased to 43%. Jerzy Baczynski & Jacek Mojkowski, *Celebrating Near-Zero Growth*, POLISH NEWS BULL., Feb. 11, 1993. Poland accomplished this significant task without accessing the one billion dollar international fund provided to help stabilize their currency. See Marek Kulczycki, *Trade and Business Opportunities in Poland*, 24 VAND. J. TRANSN'T'L L. 364 (1991).

65. See generally Walden Country Reports: Poland, *supra* note 4 and Walden Country Reports: Hungary, *supra* note 4 (discussing grants from the World Bank for improvements to railways, telecommunications, banking, and other infrastructures).

66. See Catherine A. Novelli, *Trade Law and Agreements Involving Eastern Europe, in JOINT VENTURES AND PRIVATIZATION IN EASTERN EUROPE*, *supra* note 7, at 204. The United States program is entitled SEED (The Support for East European Democracy Act). *Id.* Congress enacted the program in November 1989. *Id.* The United States gave 418 million dollars in 1990, 369 million dollars in 1991, and budgeted 400 million dollars for 1992. Hill, *supra* note 1, at 356.

67. Francis A. Gabor, *The Quest for Transformation to a Market Economy: Privatization and Foreign Investment in Hungary*, 24 VAND. J. TRANSNAT'L L. 271 (1991).

68. Clague, *supra* note 43, at 13.

69. EBRD *President Cites Potential for Investments in Central, Eastern Europe*, *supra* note 44. Romania, however, had outstanding national debt of only 100 million dollars as of 1989, resulting from severe repayment plans by the former Communist government. FRYDMAN ET AL., *supra* note 15, at 218. Another source reported that Romania fully eliminated its hard currency debt in 1989. Smith, *supra* note 53, at 204.

by importing updated and advanced machinery and equipment.⁷⁰ Unfortunately, many Central European products are not competitive in foreign markets because of the decline in production quality that occurred during the socialist years.⁷¹ In addition, trade barriers from the West reportedly are restricting export growth in Central and Eastern Europe.⁷² Although Poland showed a positive trade balance in 1992 and Hungary also increased exports to the West in the early 1990s,⁷³ Central and Eastern Europe needs greater amounts of capital to stabilize the faltering economies.⁷⁴

The primary remaining source of capital is foreign investment. Government leaders recognized the value of foreign investment to their economies even prior to the socialist dissolution.⁷⁵ Yugoslavia initiated the trend by allowing foreign joint ventures in 1967.⁷⁶ Other socialist nations soon opened their borders to foreign ventures as well.⁷⁷ With the demise of socialism, these countries are re-evaluating their past laws and creating even greater incentives for foreign investment.⁷⁸

Poland has already begun the process. Poland first allowed foreign investment in 1976.⁷⁹ It expanded investment possibilities in 1988 by permitting complete foreign ownership under The Law on Economic

70. See Hare, *supra* note 21, at 151. The author noted that improved trade with Western nations allows the import of updated technology. *Id.*

71. See Mark Allen, *IMF-Supported Adjustment Programs in Central and Eastern Europe*, in CENTRAL AND EASTERN EUROPE ROADS TO GROWTH, *supra* note 5, at 30-32; see also Siebert et al., *supra* note 5, at 83.

72. See Pomfret, *supra* note 17, at A44. The newly elected leftist leaders in Poland contribute their resurging popularity among the Polish people to closed Western markets. *Id.*

73. Poland's trade balance improved from a 258 million dollar deficit in 1991 to a trade surplus of 385 million dollars in 1992. FRYDMAN ET AL., *supra* note 15, at 158. In 1991, Hungary's exports to Western nations increased by 1.9 billion dollars. *Id.* at 106.

74. Romania's exports to Western countries decreased by over 20% in 1991. *Id.* at 219. In Bulgaria, convertible currency exports decreased 24% in 1991. *Id.* at 11.

75. See Wierzbowski, *supra* note 40, at 625.

76. See Ian Jeffries, *Industrial Reform in Historical Perspective*, in INDUSTRIAL REFORM IN SOCIALIST COUNTRIES, *supra* note 21, at 42.

77. See Wierzbowski, *supra* note 40, at 625. "Hungary and Romania [allowed foreign investment] in 1972, Poland in 1976, Bulgaria in 1980, Czechoslovakia in 1985, and the Soviet Union in 1987." *Id.*; see also Jeffries, *supra* note 76, at 23, 30, 28, 10, 16, and 33. Jeffries contends that Romania allowed limited foreign ownership in 1971, not 1972. *Id.* at 30.

78. See discussion *infra* notes 79-89 and accompanying text.

79. Jeffries, *supra* note 76, at 28. The first foreign investment permitted was by former Polish citizens only and the ventures were called Polonia companies. *Id.*

Activity with Foreign Parties.⁸⁰ Poland recently improved its foreign investment climate by passing the Companies with Foreign Participation law in June 1991.⁸¹ The Act eliminated minimum investment requirements⁸² and prior government approval for most joint ventures.⁸³ The Act also allows full repatriation of profits for all foreigners without foreign exchange permits.⁸⁴ Corporations may also avoid Polish corporate income tax by exceeding certain levels of foreign investment, exporting more than twenty percent of production, bringing new technology into Poland, or providing jobs in high unemployment regions.⁸⁵

Act XXIV of 1988 on Investment of Foreigners in Hungary also created a favorable environment for foreign investors.⁸⁶ Foreigners may wholly own Hungarian businesses without special government permission.⁸⁷ Foreign investors can also repatriate their share of profits from the enterprise into hard currencies.⁸⁸ Income tax advantages exist for companies in defined industries if the company is at least thirty percent foreign owned and has foreign investment of at least fifty million forints.⁸⁹

80. See Slupinski, *supra* note 37, at 513-14. Slupinski evaluates the 1988 version of Poland's joint venture laws. *Id.* at 513-16.

81. See Robert B. Shanks, *Protecting Against Political Risk, Including Currency Convertibility and Repatriation of Profits in Eastern Europe*, in 1992 PLI, *supra* note 8, at 31.

82. *Id.* The former law required a minimum foreign investment of 20% of a company's equity. Slupinski, *supra* note 37, at 513.

83. See Wierzbowski, *supra* note 40, at 643. Permits are required for investments in certain defined industries, such as insurance, banking, defense, real estate and shipping harbors. *Id.* at 643 n.30.

84. Shanks, *supra* note 81, at 31. Foreigners must obtain a certificate from the Minister of Finance, however, that verifies the percentage of profits earned by the foreigner. *Id.*

85. FRYDMAN ET AL., *supra* note 15, at 167-68. To obtain the tax benefits, the Ministry of Finance must approve a company's participation by the end of 1993. *Id.* Poland reportedly had over 5,000 registered companies with foreign investments by late 1991. *Id.* at 175-76.

86. See Shanks, *supra* note 81, at 33. The Act was amended in 1990 and 1991. *Id.*

87. *Id.* Companies with foreign ownership must register, however, with the Central Court of Firms. *Id.* Financial institutions are an exception to the general rule that no government approval is needed. See FRYDMAN ET AL., *supra* note 15, at 114. The Ministry of Finance must give approval before a foreigner can purchase an interest. *Id.*

88. Shanks, *supra* note 81, at 33. Foreign investors may still encounter repatriation problems, however, because the Hungarian currency is not yet fully convertible. *Id.*

89. FRYDMAN ET AL., *supra* note 15, at 114. Qualifying industries include high-tech production, hotel construction, and manufacturing of transportation vehicles. If the company complies with the various provisions, it can reduce its taxes by 40% to 100% for up to 10 years. *Id.*

Poland's and Hungary's foresight in enacting favorable foreign investment policies resulted in the highest levels of foreign investment in Central Europe in 1992.⁹⁰ Investments in Hungary, Poland, Russia, and the Czech and Slovak Republics⁹¹ indicate that Westerners are interested in bringing capital into Central and Eastern Europe if the governments create a favorable investment climate.⁹²

IV. INTELLECTUAL PROPERTY PROTECTION AND TRADE

A growing concern for many Western companies is the failure of developing nations, including those in Central and Eastern Europe, to protect intellectual property.⁹³ Western companies fear that unauthorized

90. Information on actual capital contributions is conflicting. Through the middle of 1992, according to one source, foreign investment in Hungary and Poland totalled approximately 4 billion dollars and 800 million dollars respectively. *Id.* at 120, 175. Another source reported lower figures for both Hungary, 1.5 billion dollars, and Poland, 4 billion dollars. Baczynski & Mojkowski, *supra* note 64.

91. See *EC: Report on Investment in Central and Eastern Europe*, REUTER TEXTLINE AGENCE EUR., Jan. 21, 1993. Estimates of Romanian investments vary from 504 million dollars in October 1992, *id.*, to 323 million United States dollars in March 1992. FRYDMAN ET AL., *supra* note 15, at 235. Foreigners contributed approximately 607 million dollars to Czechoslovakia in 1991. *Id.* at 70. Estimates of foreign investment in Bulgaria in 1991 range from 50 million to 80 million dollars. *Id.* at 23.

92. Foreign investment is a two-edged sword in the eyes of many Central Europeans, however. The clear benefit is that necessary capital infusions allow industrial growth. See Tyler Marshall & Carol J. Williams, *Regional Outlook/ Eastern Europe*, L.A. TIMES, Jan. 26, 1993. Negative consequences of transforming into a free market, however, are that living standards decrease and that unemployment increases during the initial stages. See Ian Traynor, *Eastern Europe: The Worst May Well Be Over for Former Communist States in Transition*, REUTER TEXTLINE GUARDIAN, Jan. 9, 1993. Consequently, the rapid privatization of previously state-owned industries, frequently into the hands of foreigners, is causing Eastern Europeans to fear that only foreigners will benefit from the changes. See Traynor, *supra* (discussing Hungarian views); see also Wierzbowski, *supra* note 40, at 643-44 (discussing Polish fears).

93. The International Intellectual Property Alliance (IIPA) voiced strong concern over ineffective intellectual property laws throughout Eastern Europe. *U.S. Industry Calls on Eastern Europe to Improve Copyright Laws*, 41 Pat. Trademark & Copyright J. (BNA) No. 1009, at 130 (Dec. 6, 1990). The IIPA consists of over 1,600 United States businesses with gross revenues over 270 billion dollars per year. *Id.* Its members include the Business Software Alliance, (representing Lotus, Aldus, Ashton-Tate, Autodesk, Digital Research, Microsoft, WordPerfect, and XTree), the Computer Software and Services Industry Association, the American Film Marketing Association, the Association of American Publishers, the Computer and Business Equipment Manufacturers Association, the Motion Picture Association of America, the National Music Publishers' Association, and the Recording Industry Association of America. *Id.* The European Committee for the Defense of Intellectual Property (CEDPI) is also troubled

pirating and counterfeiting of their products in foreign nations will result in lost profits and lost jobs in their own countries.⁹⁴ Some companies have restricted access to their products in Central Europe in attempts to curb piracy.⁹⁵ Central and Eastern Europe's commitment to adopting and enforcing effective intellectual property laws will affect its ability to trade and compete in foreign markets. Recent United States policies are illustrative of a trend in Western nations to increase tariffs on imports from nations which fail to protect intellectual property.⁹⁶ These trade policies could destroy Central Europe's economy because many experts predict that open trade with Western nations is the key to survival for the struggling young free-market systems.⁹⁷

A. Pirated Products

Industrialized nations lose an estimated sixty to eighty billion dollars a year as a result of intellectual property violations.⁹⁸ Many of these losses

over the high levels of piracy and counterfeiting in Eastern Europe, and recently requested the European Community to enhance border controls to restrict the entrance of counterfeit goods into the European Community. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, Int'l Trade Daily (BNA) (June 29, 1992). CEDPI has 108 European corporate members, including Adida, Alfred Dunhill, Apple Computer, Bennetton Group, Calvin Klein, Chrysler, Ford, Givenchy, Microsoft, Porsche, Reebok, and WordPerfect. *Id.*

94. The CEDPI reported in 1992 that the volume of counterfeit goods in the global economy has increased more than 10 times since 1982. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, *supra* note 93. See *infra* notes 124-32 and accompanying text for a discussion of the impact of piracy on profits and jobs.

95. Pharmaceutical manufacturers are restricting the distribution of new drugs to Hungary because of Hungary's rampant violation of foreign patent rights. *Hungary Has the Best and Worst*, PHARMACEUTICAL BUS. NEWS, Nov. 9, 1992.

96. The United States removed tariff preferences for pharmaceuticals imported from India because of blatant patent violations. *India, Taiwan and Thailand Named as Priority IP Offenders*, 43 Pat. Trademark & Copyright J. (BNA) No. 1079, at 569 (Apr. 30, 1992). See *infra* part V.F. for a discussion of United States actions under Special 301.

97. See *EBRD President Cites Potential for Investments in Central, Eastern Europe*, *supra* note 44, for comments from Jacques Attali, the president of the European Bank for Reconstruction and Development, regarding Eastern Europe's need for free trade.

98. The United States International Trade Commission performed a detailed study of intellectual property violations and estimated that worldwide losses were roughly 43 to 61 billion dollars based on 1986 sales. U.S. INT'L TRADE COMM'N, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE, INVESTIGATION NO. 332-245, H-3 (Jan. 1988) [hereinafter Trade Report]. The European Committee for the Defense of Intellectual Property (CEDPI) stated in 1992 that the loss had risen to 80 billion dollars per year. *European Industry Coalition Urges*

occur when members of developing nations with unsophisticated intellectual property laws appropriate the creative works of foreign authors, composers, inventors, and trademark owners without proper compensation.⁹⁹ Patents, trademarks, and copyrights are all subject to varying forms of piracy.¹⁰⁰ The sheer breadth of possible abuse underscores the potential for loss in industrialized countries, where a growing portion of all products contains some element of intellectual property.¹⁰¹ Lack of protection of intellectual property especially affects developed nations because increasing labor and manufacturing costs make them less competitive in the world market.¹⁰² Their ability to maintain a share of the global market increasingly depends on developing new technology.¹⁰³ In-

More EC Controls on Counterfeit Goods, supra note 93.

99. J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 754-56 (1989). Reichman writes that "[a]rguably, operations on the parallel market [which sells counterfeit and pirated goods] exact a form of private foreign aid from investors in [developed] countries who defray the underlying costs of innovation." *Id.* at 756.

100. One author notes:

In the field of protected processes, products or designs, pirating may include: unauthorized use of a patented process to manufacture one's own products; unauthorized production and sale of a patented product under one's own brand name; unauthorized use of a protected successful design to improve production and/or sales of one's own products; and unauthorized use of technology protected by trade secrecy.

In the field of protected literary and artistic works, piracy may involve the unauthorized and uncompensated reproduction and/or sale of someone else's literary or musical work, performances, broadcasts, photographs, motion pictures, paintings and drawings, three-dimensional objects (sculptures, architectural works, etc.), software, and works of applied art (wallpapers, etc.) under the name of the original author; or, alternatively, the unauthorized use of such literary or artistic work or parts of it in recordings, publications or performances under the name of the pirate. Piracy also occurs in the field of protected trademarks and service marks. This involves the unauthorized and uncompensated production and/or sale of goods or services that imitate someone else's brand-name product or service to the last detail, including the name and logo of the originator ("counterfeiting").

Frank Emmert, *Intellectual Property in the Uruguay Round—Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1320 (1990).

101. See R. Michael Gadbaw & Timothy J. Richards, *Introduction, in INTELLECTUAL PROPERTY RIGHTS GLOBAL CONSENSUS, GLOBAL CONFLICT?*, *supra* note 11, at 3-4. In the United States, exports of chemicals, books, electronics, and computers increased from approximately 10% of total exports in 1947 to nearly 28% of total exports in 1986. *Id.* at 4.

102. See Emmert, *supra* note 100, at 1336. Developed nations' advantages of strong infrastructures, available capital, and skilled labor increase costs of production. *Id.*

103. Reichman, *supra* note 99, at 754. Western nations continue to produce advanced goods that developing countries cannot create on their own. *Id.*

lectual property pirates bypass this expensive research and development process, produce counterfeit goods, and appropriate the profits,¹⁰⁴ to the detriment of the intellectual property owner and the industrialized nation's economy.¹⁰⁵

B. *The Loss to Intellectual Property Owners and Industrialized Nations*

Piracy causes losses to the intellectual property owner on several different levels.¹⁰⁶ First, the patent, trademark, or copyright holder loses revenues from the unauthorized sale of imitations.¹⁰⁷ The owner either directly loses sales to the unauthorized competitors, who often undercut the legitimate product price,¹⁰⁸ or loses royalties that an authorized licensee would be required to pay.¹⁰⁹ Intellectual property holders also suffer indirectly when unknowing consumers purchase the counterfeits and receive inferior products, harming the intellectual property owner's goodwill.¹¹⁰ Damage to the authentic product's reputation and image can reduce future sales.¹¹¹

The failure to protect intellectual property also results in losses to the economies of industrialized nations and to society as a whole.¹¹² Previous losses from piracy may seriously hinder intellectual property owners' in-

104. *Id.* at 761-63. The developing countries argue that they have no financial incentive to protect Western ideas and that intellectual property should be "the common heritage of all mankind." *Id.* at 764.

105. See *infra* part IV.B. for a description of the losses incurred.

106. "Piracy . . . [i]n the broadest sense . . . can signify any unauthorized and uncompensated reproduction or simulation of a creative intellectual product that deprives the originator of the economic or moral benefits accruing from his or her creative undertaking." Reichman, *supra* note 99, at 775.

107. See Trade Report, *supra* note 98, at 4-1. The authors noted that the owner will lose revenues only if the counterfeit is a fairly adequate substitute for the genuine good. *Id.*

108. See Gadbow & Richards, *supra* note 101, at 5. The counterfeiter may still gain some market share even if the product price is not lower and ostensibly earn a greater profit than the owner. *Id.*

109. See Emmert, *supra* note 100, at 1320-21.

110. *Id.* Simon Critchell, president and CEO of Cartier Inc., discussed the impact of counterfeits on corporate goodwill: "[I]n the long run, it associates the Cartier name with low-class, cheap and inferior merchandise. That's the problem." Trish Donnally, *Counterfeiters Cost Companies Jobs, Revenue; Consumer Has Little Recourse*, STAR TRIB., June 3, 1992, at 1E. Cartier's efforts to reduce piracy of Cartier products cost the company 10 million dollars annually. *Id.*

111. Donnally, *supra* note 110, at 1E.

112. See Trade Report, *supra* note 98, at 4-1, for an overview of the various types of losses from piracy.

centives to develop new products.¹¹³ For example, a United States pharmaceutical manufacturer spends an average 231 million dollars in research and development to create one new drug.¹¹⁴ The company often must wait five to ten years to obtain authorization from the Federal Food and Drug Administration to market the drug.¹¹⁵ Foreign competitors then copy the drug using a different process at a significant cost reduction because they did not incur the high research costs of the developer.¹¹⁶ Industrialized nations are concerned that lower sales opportunities resulting from piracy will decrease an inventor's rate of return so significantly that many new products will never be developed, resulting in a world-wide social loss.¹¹⁷

Global piracy causes significant losses to intellectual property owners and industrialized nations. The Counterfeiting Intelligence Bureau, an international intellectual property intelligence bureau,¹¹⁸ estimated that pirated products constitute eight percent of total world trade.¹¹⁹ The European Committee for the Defense of Intellectual Property (CEDPI), a European business coalition, reported that pirates avert eighty billion dollars per year from the global economy.¹²⁰ Estimates from the International Chamber of Commerce suggest that approximately five billion dollars of annual pharmaceutical sales, five percent of the one hundred billion dollar industry, comes from counterfeit drugs.¹²¹

Piracy also reduces demand for the authentic item, which affects production levels in Western nations.¹²² The European Parliament esti-

113. Gadbow & Richards, *supra* note 101, at 3 (reaching the same conclusions as in the Trade Report).

114. *Hungary Has the Best and Worst*, *supra* note 95.

115. *Id.*

116. *Id.* One patent attorney noted that pharmaceutical companies are revising procedures and creating methods to restrict access in Eastern Europe to developmental drugs. *Id.*

117. Trade Report, *supra* note 98, at 4-1. The Report concludes that decreased incentives will result in a decline in creation of original and updated goods. *Id.*

118. This bureau was created by the International Chamber of Commerce to investigate international intellectual property violations. See *Intellectual Property: GATT Counterfeiting Code Would Be Improvement*, U.S. Trade Official Says, INT'L TRADE REP. (BNA) (May 14, 1986).

119. Robert Rice, *The Real Fight in a Phoney War*, FIN. TIMES, Oct. 2, 1992, at 18.

120. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, *supra* note 93.

121. Rice, *supra* note 119, at 18.

122. See Trade Report, *supra* note 98, at 4-13, for a brief overview of the impact on United States employment.

mates that the European Community (EC) lost 100,000 jobs per year from 1988 to 1992 because imported counterfeit goods reduced demand for genuine products produced by local manufacturers.¹²³ The Business Software Alliance reported that an additional 17,400 jobs would be created in the software industry in the EC, more than double the total currently employed in the industry, if piracy were not destroying the demand for authorized software.¹²⁴ The United States loses an estimated 210,000 jobs annually because pirates erode a portion of international demand for protected products.¹²⁵ For example, Levi Strauss & Co. confiscated almost two million pairs of counterfeit jeans in China during 1991 and 1992 that were earmarked for export to Eastern Europe.¹²⁶

C. Central and Eastern Europe's Involvement in Pirating Goods

Central and Eastern Europe is quickly becoming a global center for piracy.¹²⁷ Poland is noted frequently for allowing excessive infringements of Western copyrights.¹²⁸ "Pirate Kings" illegally broadcast movies and British music videos without Polish licenses and without payment of royalties to the copyright owners.¹²⁹ In the last two years, sources in Poland found that pirated copies constituted approximately sixty percent of videocassette rentals,¹³⁰ pirated computer software sold for roughly two percent of the cost of authorized versions,¹³¹ and pirated music threatened the future of Polish bands.¹³² Hungary has a thriving

123. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, *supra* note 93.

124. *Id.*

125. Donnally, *supra* note 110. This estimate was provided by the executive director of the International Anti-Counterfeiting Coalition. *Id.*

126. *Id.* Dave Saenz, special counsel for Levi Strauss, commented on the impact of such counterfeits: "We've lost the business, our people lose jobs, the consumer loses because he gets an inferior product, and China's image is blackened in the international business community." *Id.*

127. See *EE Intellectual Property Protection Still Inadequate*, BUS. INT'L; BUS. E. EUR., May 4, 1992.

128. *Id.* A United States copyright protection group alleged in 1992 that Poland's copyright violations result in losses of 140 million dollars annually to United States copyright holders. *Id.*

129. Roger Cohen, *Freed, Eastern Europe Meets Obstacles to Free Expression*, N.Y. TIMES, Dec. 27, 1992, at 1.

130. Blaine Harden, *Polish Copyright Pirates Peril U.S. Trade Ties*, WASH. POST, Oct. 21, 1991, at A1. Seventy percent of the audio cassettes are reportedly counterfeit. See *EE Intellectual Property Protection Still Inadequate*, *supra* note 127.

131. Harden, *supra* note 130, at A1.

132. Aleksandra Waldoch, *Copyright Infringement in Poland: The Music Pirates*,

pharmaceutical industry that counterfeits patented drugs and then exports the generic pharmaceuticals.¹³³ The International Intellectual Property Alliance estimated that, in 1992, piracy of copyrighted products in the former Soviet Union, including computer software, music recordings, videocassettes, and books, was "virtually 100 per cent."¹³⁴ Software piracy was so rampant that many stores could not keep blank computer disks in stock.¹³⁵ In the remote Ural Mountains of Russia, "Jurassic Park" was telecast on the local television station before Universal Pictures released the videocassette in the United States.¹³⁶

The large sums of money at stake also increase the risk of industrial espionage in Western nations. In a 1990 sting operation, the FBI apprehended a United States biochemist attempting to sell pharmaceutical trade secrets to a fictitious Pole for ten million dollars.¹³⁷ The patent holder's gross annual sales for the drug at risk were 800 million dollars.¹³⁸ The FBI also received notice from sources in the former Soviet Union that Eastern Europe poses a threat to American trade secrets.¹³⁹ Experts estimate that during the cold war the former Soviet Union saved between twelve and fifteen billion dollars in research and development by appropriating Western technology through industrial espionage.¹⁴⁰ The Eastern European nations' need for currency causes some State Department, CIA, and FBI agents to question the wisdom of recent joint research ventures between United States businesses and Russian scien-

WARSAW VOICE, Oct. 22, 1992. The counterfeiters copy Polish and foreign music alike. *Id.* Polish artists receive such a small royalty from legitimate cassette sales that even the most popular recording artists struggle to continue performing. *Id.* At a recent Polish music festival featuring local artists the official slogan was "Pirates Kill Music." *Id.*

133. See *USTR Releases Sixth Annual Trade Report on Restrictions in 36 Nations, Two Regions*, Int'l Trade Rep. (BNA) (Apr. 3, 1991).

134. Jeff Berliner, *Russia Acts to Stop Copyright Pirates*, UPI, Nov. 13, 1992.

135. See *Rampant Pirating of Software, Movies in Russia is Costing Western Companies Millions*, *supra* note 11, at E8.

136. *Pirated Version of "Jurassic Park" Shown on Ural Mountains TV*, UPI, Aug. 24, 1993. The counterfeit copy reportedly was illegally recorded by a patron in a Western movie theater using a camcorder. *Id.* Noises from the audience were included on the audible portion, and the tape showed a person leaving his seat during the film. *Id.*

137. Bill Gertz, *Model FBI Sting Operation Catches Trade-Secret Spy*, WASH. TIMES, Feb. 9, 1992, at A6. The biochemist was a former employee of the manufacturer, Merck & Co. *Id.*

138. *Id.* The drug was ivermectin, used to treat cattle and dogs for parasites and heartworms. *Id.*

139. *Weak Links—For Corporate Spies, Low-Tech Communications are Easy Marks*, INFO. WK., Aug. 10, 1992, at 26.

140. *Spies Posing as Scientists Said to Pose Commercial Espionage Threat*, COMMON CARRIER WK., June 22, 1992.

tists and defense researchers.¹⁴¹ Experts on the former Soviet Union express concern that Russians will appropriate United States technology and generate counterfeit products to obtain quick access to needed capital.¹⁴²

V. WESTERNERS' EFFORTS TO RESTRICT PIRACY

A. GATT

International attention turned to the General Agreement on Tariffs and Trade (GATT)¹⁴³ in 1986 as a focal point for developing global intellectual property norms.¹⁴⁴ The original parties intended GATT to govern global trade.¹⁴⁵ Intellectual property issues were identified as "General Exceptions" to the GATT.¹⁴⁶ Intellectual property owners in the United States began lobbying for specific inclusion of intellectual property rights within the GATT arena, however, in the 1980s.¹⁴⁷ The

141. *See id.* Bell Labs, Corning, and Sun Microsystems have entered joint ventures using Russian scientists and defense researchers, some from the Russian Academy of Sciences, which was known to have KGB agents in its service under the former Soviet Union. *Id.*

142. *See id.*; see also *supra* part III (discussing Central and Eastern Europe's need for capital).

143. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

144. In September 1986, the Uruguay Round convened to address international trade issues. A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57, 57 (1987). Primary points of discussion included intellectual property rights, investment measures, dispute settlement, and agriculture. *Id.* at 57-58 n.3. For the text of the Uruguay Round Ministerial Declaration, see *Ministerial Declaration on the Uruguay Round*, 33 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19 (1987).

145. GATT is an international organization originally created through a temporary agreement to address international trade disputes until the establishment of a formal International Trade Organization (ITO). *See* Julia Christine Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31, 33-35. The ITO was never created, however, and since 1947 GATT has become the primary forum for resolving international trade issues. *See id.*

146. GATT, *supra* note 143 art. XX. Intellectual property rights are specifically addressed as one of the general exceptions. *Id.* art. XX(d). *See* Reichman, *supra* note 99, at 829-36, for a detailed analysis of the impact of these provisions. Reichman concludes that "the drafters of the GATT . . . decided to place the traditional institutions of the world's intellectual property system beyond the GATT altogether in order to avoid potential conflicts or overlap between the GATT and the International Unions already regulating intellectual property." *Id.* at 832-33.

147. Robert W. Kastenmeier & David Beier, *International Trade and Intellectual*

United States, Japan, and the EC assisted in bringing trade-related aspects of intellectual property rights (TRIPs) to the forefront of the Uruguay Round.¹⁴⁸ Negotiations on TRIPs are not yet concluded in the Uruguay Round, but Western nations are making a strong statement that they intend to press for intellectual property inclusion under GATT.¹⁴⁹

Western nations want GATT to include intellectual property protections to gain access to effective trade enforcement mechanisms not available under the numerous international intellectual property conventions.¹⁵⁰ The narrow focus of the existing treaties has precluded successful enforcement of intellectual property rights.¹⁵¹ For example, the Paris Convention for the Protection of Industrial Property¹⁵² and the

Property: Promise, Risks, and Reality, 22 VAND. J. TRANSNAT'L L. 285, 287-90 (1989).

148. See *id.* at 290-92. Canada and Switzerland also joined in early efforts to incorporate intellectual property rights into the Uruguay Round. *Id.* at 291 n.7.

149. See *GATT Agreement on Agriculture Not Expected By July, Officials Say*, Int'l Trade Daily (BNA) June 11, 1993. In the Punta del Este Declaration, one of the goals in the TRIPs was "to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods." Kastenmeier & Beier, *supra* note 147, at 290-91 (citing the Punta del Este Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept., 1986, at 7-8).

150. See R. Michael Gadbow & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?, *supra* note 11, at 38, 40. The Paris Convention for the Protection of Industrial Property, enacted in 1883, protects patents and other industrial property. Paris Convention for the Protection of Industrial Property, March 20, 1883, *as revised* at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. The 1886 Berne Convention for the Protection of Literary and Artistic Works safeguards copyrights. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* at Paris, July 24, 1971, 102 Stat. 2853, 828 U.N.T.S. 221 (implemented by the United States in H.R. Doc. No. 609, 100th Cong., 2d Sess. (1988)) [hereinafter Berne Convention]. Other significant intellectual property treaties include the Universal Copyright Convention of 1952 and the Madrid Agreement Concerning the International Registration of Marks. Universal Copyright Convention, *done* Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, *as last revised* July 24, 1971, 25 U.S.T. 1341 [hereinafter UCC]; Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, *as revised* at Stockholm on July 14, 1967, 23 U.S.T. 1353, 828 U.N.T.S. 389, 201 W.I.P.O. 1983. The World Intellectual Property Organization (WIPO), established in 1963, administers many of the international intellectual property treaties, including the Berne Convention and the Paris Convention. R. Michael Gadbow, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 225 n.5 (1989).

151. See Emmert, *supra* note 100, at 1339-44.

152. Paris Convention, *supra* note 150.

Berne Convention for the Protection of Literary and Artistic Works¹⁵³ both provide only that convention signers agree to treat foreign intellectual property owners equivalently to nationals¹⁵⁴ and to comply with certain minimum standards related to specific forms of intellectual property.¹⁵⁵ If a country chooses not to give any rights to its nationals, it is under no obligation to protect the rights of foreigners.¹⁵⁶ In addition, governments retain immense flexibility in designing their intellectual property laws.¹⁵⁷ One scholar noted that a country could craft its laws to provide short-term protection for areas in which foreigners maintain technological superiority, while enacting long-term protection for areas in which its nationals have expertise.¹⁵⁸

Another frequent complaint is that the conventions fail to provide sufficient enforcement mechanisms or dispute resolution procedures.¹⁵⁹ Their terms are so narrow that efforts to revise the treaties frequently evolve into stalemates between Western nations which want complete protection and developing nations which want greater flexibility and minimal requirements.¹⁶⁰ Consequently, Westerners look to GATT to provide a more favorable forum for advancing intellectual property protection.¹⁶¹ GATT provides effective enforcement mechanisms and trade incentives not present in the current environment which can be used to

153. Berne Convention, *supra* note 150.

154. See Paul Katzenberger, *General Principles of the Berne and the Universal Copyright Conventions*, in GATT OR WIPO?, 43, 45-6 (Friedrich-Karl Beier and Gerhard Schrickler eds. 1989); Hans Peter Kunz-Hallstein, *The U.S. Proposal for a GATT-Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, in GATT OR WIPO, *supra*, at 75, 87.

155. Minimum copyright standards include protection for 50 years and exclusive rights of reproduction and translation. Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 78-79. For a detailed discussion of the Berne Convention, see *id.* at 71-119. Member countries cannot allow forfeiture of patents and must recognize patents based on a priority system. Kunz-Hallstein, *supra* note 154, at 87.

156. Emmert, *supra* note 100, at 1341.

157. *Id.* at 1340-41. Countries can exclude certain fields from protection and protect only production processes rather than completed products. *Id.*

158. *Id.* at 1341 (citing R. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS 28, 30 (1987)). In Costa Rica, patents are granted for only one year on pharmaceuticals and chemicals. *Id.*

159. 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, 703-05 (1989).

160. See Gadbar & Gwynn, *supra* note 11, at 49-52. .

161. See Ulrich Joos & Rainer Moufang, *Report on the Second Ringberg-Symposium*, in GATT OR WIPO?, *supra* note 154, at 135.

obtain compromises.¹⁶² Yet, while awaiting successful TRIPs negotiations to include intellectual property rights under GATT, Western nations are resorting to other mechanisms to fill the void.

B. Embargoes

Westerners are taking varying approaches to counter the rampant counterfeiting of products in Eastern Europe. The Motion Picture Export Association of America, including Warner Brothers and Twentieth Century Fox, had an embargo on the distribution of films and videocassettes to the former Soviet Union,¹⁶³ which reportedly ended only recently.¹⁶⁴ Recording groups, such as U2 and Dire Straits, have withheld recent releases and refuse to give live performances in Poland.¹⁶⁵ Pharmaceutical producers have stopped sending experimental drugs to the medical community in Central Europe for clinical testing because they frequently made their way into local pharmaceutical labs for counterfeiting.¹⁶⁶ These efforts, however, have not reduced piracy as evidenced by copies of first-run Warner Brothers' movies in Russian kiosks¹⁶⁷ and pirated audio cassettes in Polish street bazaars.¹⁶⁸

C. Lobbying Efforts

Intellectual property owners in the United States and the European Community are organizing and putting pressure on Central and Eastern European governments¹⁶⁹ and on their own governments¹⁷⁰ to ensure that the new democracies develop and enforce adequate intellectual property laws. Directors of Western intellectual property groups, representing 1,500 Western companies, met directly with Russian officials in No-

162. *Id.* See also Gadbow & Gwynn, *supra* note 150, at 40-46.

163. *EE Intellectual Property Protection Still Inadequate*, *supra* note 127.

164. Anna Tatarinova, *Best U.S. Movies on Moscow Screens*, TASS, Aug. 31, 1993. TASS reported that movies such as "The Scent of a Woman" and "Jurassic Park" will be shown throughout Russia during the latter part of 1993. *Id.* Ironically, the first movie legally shown was "Patriot Games," the screen version of Tom Clancy's novel. *Id.*

165. Waldoch, *supra* note 132.

166. *Hungary has the Best and Worst*, *supra* note 95.

167. Berliner, *supra* note 134. The piracy in Russia reportedly extends to all copyright areas, including audio cassettes, novels, and computer software. *Id.*

168. Waldoch, *supra* note 132. One cassette seller argued "I haven't stolen anything from anybody. . . . I just take cassettes from a wholesaler and sell them. He's not a thief either. If he was a thief he would be in prison, wouldn't he?" *Id.*

169. See Berliner, *supra* note 134.

170. *Industry Calls For Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, 44 Pat Trademark & Copyright J. (BNA) No. 1099, at 585 (Oct. 1, 1992).

vember 1992 to develop an approach for reducing piracy in Russia.¹⁷¹ The International Intellectual Property Alliance (IIPA), the International Anti-Counterfeiting Coalition (IACC), and the Intellectual Property Owners (IPO) meet periodically with the United States Senate Subcommittee on Patents, Copyrights and Trademarks for oversight hearings on the status of global intellectual property protection.¹⁷² Representatives from each group recently emphasized the need for adequate enforcement of foreign intellectual property laws.¹⁷³ These groups consistently lobby Congress and the administration to pressure foreign governments to protect their intellectual property rights.¹⁷⁴ CEDPI lobbies the EC to enhance border controls and increase customs officials' authority to seize counterfeit goods coming into the EC.¹⁷⁵

D. Border Controls

The United States and the EC are responding to intellectual property owners' demands by establishing more effective border controls to identify counterfeit products.¹⁷⁶ Counsel for the International Federations of the Photographic Industry noted that strong German border controls effectively deterred Polish counterfeit cassettes from entering Germany.¹⁷⁷ One CEDPI board member predicts that the EC will become even more vulnerable to Central and Eastern European counterfeits as free trade agreements are reached with formerly Communist countries.¹⁷⁸

171. Berliner, *supra* note 134. This team meeting resulted from a bilateral trade agreement between Russia and the United States. *Russian-U.S. Task Force Pledges Support for New Russian Copyright Law by Year-End*, Pat. Trademark & Copyright L. Daily (BNA) (Nov. 16, 1992). Russian participants included the Russian Intellectual Property Agency, the Science and New Technology Committee, the National Education and Legislation Committee, and the Commissions on Cultural and Natural Heritage of the Working Group of the Supreme Soviet. *Id.*

172. *Industry Calls For Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, *supra* note 170, at 585.

173. *Id.* The IACC representative noted that even "the most carefully crafted international agreement of domestic IP law is of little help without disciplined enforcement." *Id.*

174. *Id.*

175. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, *supra* note 93.

176. See *infra* notes 179-85 and accompanying text for discussion of EC controls. See *infra* notes 186-95 and accompanying text for discussion of United States border measures.

177. *European Industry Coalition Urges More EC Controls on Counterfeit Goods*, *supra* note 93.

178. *Id.*

The European Community Commission presented a proposed customs regulation in July 1993 to modify the 1986 EC regulation on border measures.¹⁷⁹ The proposal may take effect as early as 1994 if the EC Council of Ministers approves it.¹⁸⁰ The current regulation allows customs officials to seize only goods with counterfeit trademarks.¹⁸¹ The new proposal would expand this regulation to allow officials to confiscate counterfeit packaging, component parts, logos, and devices for producing counterfeit trademarks, as well as counterfeits of copyright protected goods.¹⁸² The proposal expands customs officials authority, permitting seizures of counterfeit goods in transit or on export, not just imported goods.¹⁸³ The proposed modification also allows an intellectual property owner to file a legal complaint within ten days after the seizure, and the court can order that the goods be destroyed.¹⁸⁴ To enhance the effectiveness of these proposed measures and the existing border controls, customs officials are receiving specialized training to identify counterfeit goods.¹⁸⁵

The United States also uses customs controls to restrict incoming pirated goods. Imported counterfeit goods are subject to seizure and forfeiture at United States borders.¹⁸⁶ The trademark law applies to goods with counterfeit trademarks on the "merchandise, . . . label, sign, print,

179. *EC Proposes Tougher Controls by Customs on Counterfeit Goods*, Int'l Trade Daily (BNA) (July 16, 1993). The Commission approved the draft proposal on July 13, 1993. *Id.*

180. If the council approves the regulation at the beginning of 1994, it could become effective before 1995, according to the Customs Commissioner. *Id.* The Commissioner "timed the reinforcement move 'so that the EC would have the necessary instruments before the rise in counterfeit trade [from East European and Asian countries] became a flood of imports.'" *Id.*

181. According to the Commissioner, the 1986 regulation only applies to simple trademarks on counterfeit goods. *Id.*

182. *See id.* Devices would include "tools, molds or similar materials specifically intended for the manufacturer of counterfeit labels or products." *Id.* Patented goods are not included because a visual inspection cannot clearly identify goods produced through patent violations. *Id.*

183. *Id.*

184. The regulation allows intellectual property owners to file applications with customs, signifying legal ownership of the rights, and customs can then seize infringing goods. *Id.*

185. The EC planned to train customs officials to identify counterfeit textiles in October 1993. *Id.*

186. For provisions concerning registered trademarks owned by United States citizens and companies, see 19 U.S.C. § 1526 (1988). For copyright provisions on importation violations and seizure of counterfeit goods, see 17 U.S.C. §§ 601-3 (1988).

package, wrapper, or receptacle."¹⁸⁷ If the imported goods are not accompanied by written consent from the trademark owner, customs officials can seize the goods and destroy the counterfeit mark.¹⁸⁸ The importer forfeits all rights to the seized products.¹⁸⁹ Customs officials also notify the trademark owner of the seizure and the quantity of goods involved.¹⁹⁰ On August 23, 1993, the Treasury Department proposed modifying this procedure to allow customs officials to provide the owner with a sample of the counterfeit goods and the "names and addresses of the importer, exporter, and the manufacturer."¹⁹¹

For copyright violations, if customs officials suspect the goods are counterfeit, they will detain the goods at the border and notify the copyright owner.¹⁹² If the copyright owner provides evidence that the copyrighted goods were copied without approval, then the goods are seized, forfeited, and destroyed.¹⁹³ In its August 23, 1993, proposal, the Treasury Department advocated enhancing rights for copyright owners by allowing officials to notify the owner of the suspected manufacturer's, importer's, and exporter's identities.¹⁹⁴ Customs officials efforts are indeed curbing piracy at the United States border. Eighty-nine million dollars worth of counterfeit goods were stopped and seized in 1991.¹⁹⁵

E. *Bilateral Investment Treaties*

The United States also includes intellectual property protection provisions in its bilateral investment agreements with Central and Eastern European countries.¹⁹⁶ On March 21, 1990, Poland and the United

187. 19 U.S.C. § 1526(a).

188. *Id.* § 1526(a), (e).

189. *Id.* § 1526(e).

190. Copyright/Trademark/Trade Name Protection; Disclosure of Information, 58 Fed. Reg. 44,476 (1993) (to be codified at 19 C.F.R. pt. 133) (proposed Aug. 23, 1993).

191. *Id.*

192. 19 CFR § 133.43(b) (1993).

193. 17 U.S.C. § 603(c).

194. *See* Copyright/Trademark/Trade Name Protection; Disclosure of Information, *supra* note 190.

195. *Industry Calls For Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, *supra* note 170, at 585. The International Anti-Counterfeiting Coalition is requesting that the United States establish a "special intellectual property rights Customs Service SWAT team" whose sole function would be to identify and seize counterfeit goods as they cross the border. *Id.*

196. Some authors speculate whether investment treaties actually affect foreign investment at all or whether they are designed to promote and announce United States policy in certain key areas. *See* Nancy J. Goodman, Recent Development, *International Trade: Poland Bilateral Investment Treaty—A Reflection of United States Efforts to*

States signed the Treaty Concerning Business and Economic Relations,¹⁹⁷ the first bilateral investment treaty between the United States and one of the new Central European democracies.¹⁹⁸ The inclusion of specific intellectual property provisions emphasized the United States concern for protecting intellectual property.¹⁹⁹ In a side letter to the treaty, Poland agreed to revise its current intellectual property laws by 1992 and to adhere to the Berne Convention for the Protection of Literary and Artistic Works.²⁰⁰ The treaty has not taken effect yet, primarily because of Poland's failure to provide the intellectual property protection agreed to under the treaty.²⁰¹ In response, the United States has threatened to remove Poland's most-favored-nation trade status.²⁰² The Polish Parliament was expected to approve a new copyright law in May 1993,²⁰³ but President Walesa disbanded the Parliament in late May, halting progress until 1994 at the earliest.²⁰⁴

The United States has entered or is currently negotiating similar trade

Shape the Economic Development of Eastern Europe, 32 HARV. INT'L L.J. 255, 262-63 (1991). In 1990, the U.S.T.R.'s office acknowledged that one purpose of the Central and Eastern European treaties is to encourage change in those developing economies and to promote international investment norms that favor United States objectives. *Id.* at nn.49-52 and accompanying text.

197. Treaty Concerning Businesses and Economic Relations, Mar. 21, 1990, U.S.-Pol., 29 I.L.M. 1194 [hereinafter Polish Investment Treaty].

198. Goodman, *supra* note 196, at 255.

199. In the Letter of Submittal from Lawrence Eagleburger to the President, Eagleburger notes that the Polish treaty contains intellectual property rights not usually provided for in United States investment treaties. Polish Investment Treaty, *supra* note 197, at 1197, 1200.

200. For the text of this side letter from the U.S.T.R. to the Polish Under Secretary of State, see *id.* at 1209-10.

201. See *Polish I.P. Initiative Could Bring U.S. Investment Treaty into Force*, 6 World Intl. Prop. Rep. (BNA) 129 (May 1992). See *infra* part VI.A. for a discussion of Poland's current intellectual property laws. Although Poland passed a new integrated circuits law and amended its patent law at the end of 1992, copyright protection continues to be unsatisfactory. *Id.*

202. *Draft Copyright Law Said Ready for Parliamentary Submission*, Pat. Trademark & Copyright L. Daily (BNA) (June 11, 1993). The chairman of the Polish parliamentary commission responsible for drafting the new copyright law stated that "[t]he adoption of this bill is a must because of the international context and the U.S. threat to lift Poland's most-favored-nation [trade] status." *Id.*

203. The parliamentary commission worked on the draft copyright law for over a year. *Id.* For an insider's look at the political debates concerning the passage of this law, see Stanislaw Soltysinski, *The Uneasy Development of Intellectual Property Law in Poland*, J. PROPRIETARY RTS., May 1992, at 2, 6-7.

204. *Polish Copyright Law Dies With Dissolution of Parliament*, Pat. Trademark & Copyright L. Daily (BNA) (July 14, 1993).

agreements with many Central and Eastern European countries. Trade agreements are in force with the two new republics of the former Czechoslovakia.²⁰⁵ The United States and Czechoslovakia entered a bilateral trade agreement in 1990 that provided strong protection for intellectual property owners.²⁰⁶ This agreement remains in effect between the United States and the two new republics.²⁰⁷

Trade agreements are also in effect with eight republics of the former Soviet Union, including Russia. Former Soviet President Mikhail Gorbachev signed a trade agreement between the United States and the Soviet Union in 1990, but the Soviet Parliament never ratified it.²⁰⁸ After the dissolution of the Soviet Union, Russia and the United States enacted the agreement in June 1992.²⁰⁹ United States officials noted that the agreement ensures 'strong protection for intellectual property rights.'²¹⁰ Russia agreed to adhere to the Paris Convention, the Universal Copyright Convention, and the Berne Convention, in addition to enhancing copyright, patent, and trade secret protection.²¹¹ The trade agreements in effect with seven other former Soviet republics contain similar intellectual property provisions that ensure protection for intellectual property owners.²¹²

Failure to reach a consensus on intellectual property provisions has kept a United States-Hungary investment treaty in negotiations since October 1990.²¹³ The dispute centers primarily around changes to patent

205. The United States Trade Representative's director for Eastern Europe and the former Soviet Union noted that the 1990 agreement between the United States and Czechoslovakia remains in force with respect to the two independent republics. *Former Soviet Bloc: Assistance is Expected to Continue*, 10 Int'l Trade Rep. (BNA) No. 138 (Jan. 27, 1993).

206. See U.S., *Czechoslovakia Agree on Terms of Trade Pact Paving Way for MFN Status*, Int'l Trade Rep. (BNA) (Apr. 11, 1990). For a brief discussion of the intellectual property terms, see *infra* part VI.D.

207. See *supra* note 205.

208. *Russian Parliament Seen Approving Trade Pact with U.S. Within Weeks*, Int'l Trade Rep. (BNA) (March 18, 1992).

209. *United States and Russia Announce Cooperation on Wide Range of Trade and Economic Issues*, Bus. AM., June 29, 1992, at 14.

210. *Id.*

211. *Id.* See *infra* part VI.C. for further discussion of Russia's intellectual property laws.

212. The seven republics are Ukraine, Kazakhstan, Belarus, Moldova, Armenia, Kyrgyzstan, and Georgia. *East-West Trade: U.S., Georgia Exchange Notes, Bringing Trade Pact Into Force*, 10 Int'l Trade Rep. (BNA) No. 1471 (Sept. 1, 1993).

213. *U.S.-Hungary Investment Treaty Stalled on Intellectual Property, National Treatment*, Int'l Trade Rep. (BNA) (April 29, 1992).

laws that would affect Hungary's generic pharmaceutical industry.²¹⁴ A resolution may come soon, however, based on a July 28, 1993 intellectual property agreement signed by both countries.²¹⁵ Terms of the agreement are discussed in part VI below.²¹⁶

F. *Special 301*

To encourage developing countries to protect intellectual property, the United States Congress crafted a legal tool for the United States Trade Representative (USTR) by adding Special 301 to the Omnibus Trade and Competitiveness Act of 1988.²¹⁷ Special 301 allows the USTR to apply economic trade pressure on foreign nations that fail to protect the interests of intellectual property owners.²¹⁸ It requires the USTR to identify annually all foreign countries which inhibit the rights of intellectual property owners.²¹⁹ If a nation's actions are "onerous or egregious" violations against intellectual property holders, the USTR lists the country as a "priority foreign country."²²⁰ The USTR must then begin a formal investigation within thirty days into the nation's "act, policy, or practice" responsible for the egregious infringement.²²¹ If the investigation reveals that the country is violating a trade agreement or adversely affecting United States commerce,²²² the USTR, under the di-

214. *Id.* See *infra* part VI.B. for further explanation.

215. *Intellectual Property: U.S., Hungary Initial Agreement on Intellectual Property, USTR Says, supra* note 13, at 1275.

216. See *infra* part VI.B.

217. Theodore H. Davis, Jr., *Combatting Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT'L L. 505, 509 (1991) (citing Pub. L. No. 100-418, 102 Stat. 1181). The Omnibus Trade and Competitiveness Act amended the Trade Act of 1974. 19 U.S.C. §§ 2101-2495 (1988).

218. Davis, *supra* note 217, at 517-18 (citing 19 U.S.C. § 2242(d)(2) (1988)); see also 19 U.S.C. §§ 2242(a)(2), 2411(c), 2412(b)(2)(A), 2414(a)(1).

219. 19 U.S.C. at § 2242(a). The USTR performs the evaluation 30 days after presenting the National Trade Estimate report to the President on March 31 of each year. *Id.*; see also § 2241(b)(1).

220. Davis, *supra* note 217, at 518 (citing 19 U.S.C. § 2242(b)(1)(A) (1988)); see also 19 U.S.C. § 2242(a)(2).

221. 19 U.S.C. §§ 2242(a)(2), 2412(b)(2).

222. See 19 U.S.C. §§ 2414(a)(1), 2411(a)(1)(B), 2411(b)(1). Special 301 allows the USTR to take action if "(A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States, under any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce." 19 U.S.C. § 2411(a)(1).

rection of the President, may initiate various trade sanctions against the country.²²³ Possible sanctions include withholding trade concessions and imposing import duties on all products from the offending nation.²²⁴

In 1992, for example, the USTR identified India, Thailand, and Taiwan as priority foreign countries.²²⁵ The USTR identified India as a priority foreign country because it failed to require its sixty million dollar pharmaceutical and chemical industry to recognize foreign patents.²²⁶ The USTR consequently revoked India's tariff exemptions on pharmaceutical products.²²⁷ Taiwan and Thailand were both named primarily for copyright violations that cost United States copyright holders approximately three hundred seventy million dollars and eighty-five million dollars, respectively, in 1991.²²⁸ The USTR targeted these three nations because of the significant size of their counterfeiting industries and their governments' refusals to enact and enforce effective intellectual property laws.²²⁹

In addition to the priority foreign country category, the USTR established a modified approach to comply with Special 301 through use of priority and secondary watch lists.²³⁰ The priority and the secondary watch lists identify offenders whose actions are not yet severe enough to qualify as a priority foreign countries, but which are under observation by the USTR for insufficient intellectual property protection or enforcement.²³¹ The second level countries often have smaller counterfeiting industries. Their governments are frequently working to develop more effective intellectual property protection but simply have not completed those efforts at the time of the USTR's review.²³² Poland and Hungary

223. 19 U.S.C. § 2411(a)(1).

224. 19 U.S.C. § 2411(c). The USTR may impose the possible sanctions against all products from the offending country, not only the specific products involved in the violation. 19 U.S.C. § 2411(c)(3).

225. *India, Taiwan and Thailand Named as Priority IP Offenders*, *supra* note 96, at 569.

226. *Id.*

227. At the time, the USTR stated, "It does not seem appropriate to give duty free entry to products that are benefiting from the theft of our patents." *Id.*

228. *Id.*

229. *USTR Cites India, Taiwan, Thailand as Worst Intellectual Property Offenders*, Int'l Trade Rep. (BNA) (May 6, 1992).

230. For a discussion questioning the statutory authority for the "watch lists", see Davis, *supra* note 217, at 531-33.

231. M. Jean Anderson et al., *Intellectual Property Protection in the Americas*, J. PROPRIETARY RTS., Apr. 1992, at 2, 5-6.

232. See Davis, *supra* note 217, at 523-26.

were named as two of nine targets on the 1992 priority watch list.²³³ Hungary was identified for poor patent laws, but Hungary and the United States had been in active negotiations for the prior two years, laboring to develop an agreement that would reflect the needs of both nations.²³⁴

The Clinton Administration recently expressed its support for Special 301 and further defined the Special 301 procedures.²³⁵ The USTR announced that it would add "immediate action plans" and "out-of-cycle reviews" to its Special 301 arsenal.²³⁶ Immediate action plans consist of specific requirements and deadlines which the USTR will use to monitor a country's on-going progress on intellectual property issues.²³⁷ Out-of-cycle reviews simply provide periodic reviews of a nation's progress rather than focusing on these issues only once a year.²³⁸ The USTR listed India, Thailand, and Brazil as priority foreign countries for 1993.²³⁹ Each country continued to be subject to sanctions under Special 301.²⁴⁰ Hungary and Taiwan were on the Clinton Administration's priority watch list.²⁴¹ The USTR indicated that the two countries would be subject to immediate action plans requiring specific improvements under a defined timeline or face possible trade sanctions.²⁴² Poland, Argentina, Turkey, Egypt, and Korea were also named to the priority watch list.²⁴³ The USTR announced that these five countries would receive out-of-cycle reviews during the year to determine if their status should be escalated under Special 301 for failure to improve intellectual property laws

233. *Hungarian and US Views on Product Patent Issue*, MTI ECONNEWS, Apr. 30, 1992. USTR representatives projected that the former Soviet republics would appear on future lists as well. *Id.*

234. *See id.*

235. *See U.S.T.R. Fact Sheet on Special 301 Released April 30, 1993*, 10 Int'l Trade Rep. (BNA) No. 761 (May 5, 1993).

236. *Id.*

237. *Id.*

238. The USTR noted that these measures were developed to prevent the "annual spring-time flurry of enforcement actions" taken by foreign countries to avoid appearing on the list. *Id.*

239. *Id.* Brazil was on the priority watch list for four years. India and Thailand were priority foreign countries in 1991 and 1992. *Id.*

240. *Id.* Brazilian products are subject to tariffs. India was denied 80 million dollars of trade preferences in 1992 and may be subject to further actions by the USTR. Thailand has not received trade preferences from the United States since 1989. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

and intellectual property law enforcement.²⁴⁴

Special 301 has served as an effective tool for the United States in enhancing global protection for its intellectual property owners. The United States reached significant agreements in 1992 with China²⁴⁵ and Taiwan²⁴⁶ after these countries were named priority foreign countries and Section 301 investigations initiated.²⁴⁷ China and the United States resolved their intellectual property dispute on January 17, 1992, the night before the United States was to begin applying import tariffs on Chinese products.²⁴⁸ China provided guarantees that it would protect copyrighted works, including computer software, for fifty years, extend patent protection from fifteen to twenty years, provide product patents for chemicals and pharmaceuticals, and join several international intellectual property conventions.²⁴⁹ The United States and Taiwan reached an agreement on June 5, 1992, seven days after the USTR began its Special 301 investigation.²⁵⁰ Taiwan agreed to modify its intellectual property laws, enact criminal penalties for violations of those laws, and target violators in the specific areas of semiconductors, compact discs, computer software, video games, cable television, videocassettes, and laser discs.²⁵¹ Special 301 is clearly causing significant change on the international intellectual property front.

Special 301 has not been well received by other nations, even industrialized nations, and intellectual property scholars, however, primarily because it is perceived as a threat to successful intellectual property negotiations under multilateral agreements, such as GATT.²⁵² Complaints come from countries such as China, India, and Brazil that responded negatively to Special 301 after the USTR named them as priority for-

244. *Id.*

245. *See U.S., China Agreement on Intellectual Property Ends Retaliatory Duties Threat*, 43 Pat. Trademark & Copyright J. (BNA) No. 1065, at 238 (Jan. 23, 1992).

246. *See U.S. and Taiwan Reach IP Agreement, Ending § 301 Unfair Trade Investigation*, 44 Pat. Trademark & Copyright J. (BNA) No. 1085, at 129 (June 11, 1992).

247. China was a priority foreign country in 1991. *See supra* note 245.

248. *See id.*

249. *See id.* China joined the Berne Convention and the Universal Copyright Convention in July 1992. *See China: Berne, UCC Accessions Approved: Revisions to Patent Law Expected*, 6 World Intell. Prop. Rep. (BNA) 210 (Aug. 1992).

250. *U.S. and Taiwan Reach IP Agreement, supra* note 246, at 129.

251. *Id.*

252. *See Davis, supra* note 217, at 527-30; *see also* Reichman, *supra* note 99, at 767. Reichman notes that scholars are concerned that the unilateral pressures exerted by Western nations may defeat the international agreements that have functioned for over 100 years. *Id.*

ign countries.²⁵³ Other parties too, such as the EC and the GATT Secretariat, have expressed dissatisfaction with Special 301 because it interferes with the success of the multilateral negotiations in the Uruguay Round.²⁵⁴ Implicit in these complaints is the view that GATT remains the best mechanism to accomplish global intellectual property protection.²⁵⁵

Central and Eastern European governments have cooperated openly with the EC and United States, however, in efforts to develop effective intellectual property laws.²⁵⁶ These efforts stem partially from acknowledgments by the leaders and scholars of these countries that encouraging research and development along with the accompanying capital investment is essential for their free market economies to survive.²⁵⁷ Even in Hungary and Poland, where ratification of laws has been slow, the delay has not centered around whether intellectual property laws are needed, but on more complex issues concerning the protection periods and transitions toward new forms of intellectual property restrictions.²⁵⁸

VI. INTELLECTUAL PROPERTY LAWS IN CENTRAL AND EASTERN EUROPE

A. Poland

Poland has actively pursued improvements in its intellectual property laws, primarily to comply with agreements with the United States and the EC.²⁵⁹ It amended its patent law in December 1992 and passed a new law, effective in January 1993, regulating integrated circuit topographies.²⁶⁰ It had also worked strenuously on a new copyright law that

253. Davis, *supra* note 217, at 530 n.118. See also Abbott, *supra* note 159, at 709-12.

254. Davis, *supra* note 217, at 530 n.119.

255. See *id.*

256. See *supra* Section V.E. for a discussion of the existing investment and trade agreements that include intellectual property provisions.

257. See *supra* section III.

258. See Soltysinski, *supra* note 203, at 7-8; *Hungarian and U.S. Views on Product Patent Issue*, *supra* note 233; *Poland: Weak I.P. Laws Impair Business Climate, U.S. Official Warns*, 5 World Intell. Prop. Rep. (BNA) 303 (Nov. 1991). In 1991, Polish President Walesa remarked, "If we try to leap into the West right away, we'll break our legs." *Id.*

259. See *supra* part V.E. for a discussion of the Poland-United States investment treaty. See also Interim Agreement between the European Economic Community and the Republic of Poland on Trade and Trade-Related Matters, Article 36(1) 1992 O.J. (L 114).

260. *Poland: Amendments to Patent Law, Integrated Circuits Law Signed*, 7 World

was scheduled for approval by the Polish Parliament in May 1993,²⁶¹ but progress abruptly halted when the President unexpectedly dissolved the Parliament at the end of May.²⁶² The status of the law remains uncertain until the newly elected Parliament takes action.²⁶³

The new patent law adheres to the terms requested by the United States under the United States-Poland Investment Treaty and in a side letter from the USTR to the Polish Undersecretary of State.²⁶⁴ One primary change is that foodstuffs, pharmaceuticals, and chemicals are no longer excluded as unpatentable products.²⁶⁵ These items previously qualified only for process patents and not product patents.²⁶⁶ The new patent law also provides exclusive transitional protection for these three product types if the owner obtained permission to introduce the product in another Paris Convention member state prior to December 31, 1992.²⁶⁷ The law does not apply retroactively; if the owner sold the product in Poland prior to the filing of an application in compliance with this law, the product is not protected under the new provisions.²⁶⁸ The amendment extended the term of protection to twenty years²⁶⁹ from

Intell. Prop. Rep. (BNA) 39-40 (Feb. 1993) [hereinafter *Poland: Amendments*]. Both laws were signed by President Walesa on December 28, 1992. *Id.* The topography law took effect in January 1993. *Id.* The patent law became effective at varying times, from January 15, 1993 to mid-April 1993, depending on the article number. *Id.*

261. *Poland: Draft Copyright Law Said Ready for Parliamentary Submission*, 7 World Intell. Prop. Rep. (BNA) 151-52 (June 1993).

262. *Polish Copyright Law Dies With Dissolution of Parliament*, *supra* note 204.

263. See Pomfret, *supra* note 17, at A44. The new Polish Parliament reflects a significant change in leadership. Some initial comments from the leaders of the two parties that won the most votes indicate that this new Parliament may not respond to Western interests. On issues of foreign trade, leaders from the Democratic Left Alliance and the Polish Peasant Party stated that closed markets in the West strongly accounted for their victories. *Id.* This perception that Western nations are not willing to extend trade opportunities to Poland may affect the Parliament's willingness to comply with United States and EC intellectual property requests.

264. See copies of this letter in 29 I.L.M. 1197 (1990) [hereinafter *Side Letter*].

265. See *Poland: Amendments*, *supra* note 260, at 39-40.

266. For the text of the former Polish patent law, see Law on Inventive Activity (1972) (amended 1984) [hereinafter *Former Law*], reprinted in 2 INTERNATIONAL INTELLECTUAL PROPERTY (P-H) 15-45 (1992), §§ 12(1), 12(2), at 15-46, 15-47.

267. *Poland: Amendments*, *supra* note 260, at 39. To qualify for this transitional treatment, the owner had to file an application with the Polish Patent Office by July 1993 as well as comply with several other provisions. *Id.*

268. *Id.*

269. *Id.* The transitional provisions protected products for the period allowed under the original registration, but in no case longer than 20 years. *Id.*

the previous range of five to fifteen years.²⁷⁰

The new integrated circuit law also substantially complies with the USTR's requests.²⁷¹ It protects original integrated topographies for ten years.²⁷² Applications and samples of the design, including products currently using the design, must be sent to the Polish Patent Office within two years of the topography's first commercial use.²⁷³

Trademarks are protected in accordance with international standards under the Paris Convention and the Madrid Agreement for the Repression of False or Deceptive Indications of the Source of Origin.²⁷⁴ Distinctive marks are protected for renewable ten year periods if they are registered with the Patent Office and used within Poland.²⁷⁵ Well-known foreign trademarks are also protected in Poland, even if the owner does not register the mark with the Patent Office.²⁷⁶

Poland's copyright law continues to be the primary area of concern to Westerners. Currently, copyrights are protected under a 1952 statute most recently amended in 1975.²⁷⁷ The most significant issues are that copyrights are protected for only twenty-five years after the author's death,²⁷⁸ computer programs are not specifically protected,²⁷⁹ and the enforcement provisions are inadequate to control piracy.²⁸⁰ Polish President Lech Walesa strongly supports the new draft copyright law designed to resolve these issues.²⁸¹ The draft law increases the protection period to

270. See Former Law, *supra* note 268, § 16(2), at 15-47.

271. See Side Letter *supra* note 264, at 1197.

272. *Poland: Amendments*, *supra* note 260, at 40. The 10 year period runs from the earlier of the year of application or the year of first use. *Id.*

273. *Id.*

274. See Soltysinski, *supra* note 203, at 5, for a general discussion of the Polish trademark law.

275. See Law on Trademarks (1985), *reprinted in* 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, §§ 13(3), 28(1), at 15-67, 15-69. To be eligible for renewal, the owner must use the mark in three consecutive years. *Id.* at § 28(1).

276. See *id.* § 9(2), at 15-66.

277. See Copyright Statute, No. 234 (1952) (amended 1975) [hereinafter Copyright Law], *reprinted in* 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 15-37.

278. *Id.* art. 26, at 15-40.

279. See *Intellectual Property Law of Poland*, 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 15-17. The current law implicitly protects computer programs, but the investment treaty with the United States requires explicit protection. See *id.*

280. See *Poland: Draft Copyright Law Said Ready for Parliamentary Submission*, *supra* note 261, at 152. President Walesa acknowledged that "[t]he present law is helpless in the face of crimes." *Id.*

281. Walesa sent letters to the Parliament requesting more rapid progress on passing

the international standard of fifty years after the author's death, defines computer programs as protected literary works, and provides penalties of up to five years in prison and treble damages in civil actions.²⁸² Copyright piracy remains a significant problem in Poland, and both distributors and government leaders in Poland desire a new law.²⁸³ The Clinton Administration is increasing the pressure by subjecting Poland to out-of-cycle trade reviews.²⁸⁴ The old Polish Parliament failed to pass the draft law in part because of perceived unreasonable demands by the USTR arising out of the investment treaty.²⁸⁵ Consequently, the future of this law remains uncertain, depending on the political preferences of the new Polish Parliament.²⁸⁶

B. Hungary

Hungary positioned itself at the forefront of Communist nations in intellectual property protection in 1969 by updating its laws to allow individual ownership of copyrights, patents, and trademarks.²⁸⁷ Differing views between Western nations and the strong pharmaceutical industry in Hungary, however, have inhibited further modifications of the patent system.²⁸⁸ The current Hungarian patent law specifically exempts medical and chemical products from product patents while allowing process patents.²⁸⁹ This difference in approach allows Hungarian companies to copy drugs developed and patented in foreign countries using a different process and then legally sell and export these products at greatly reduced

the law. *Id.*

282. *Id.* at 251-52.

283. See *Polish Film and Cassette Distributors Form Industry Group to Halt Piracy*, Int'l Trade Rep. (BNA) (Jan. 6, 1993). Polish distributors formed an anti-piracy agency in October 1993 with government funding. *Id.* In only two months, the group's efforts resulted in the withdrawal of 28 business licenses for pirating videocassettes. *Id.*

284. See discussion *supra* part V.F.

285. A Polish professor noted that Parliament was irritated by the extensive United States demands in the USTR side letter that exceeded the terms of the investment treaty. See Soltysinski, *supra* note 203, at 5. Some Parliament members found the requests, including the requirement that Poland "participate constructively" in the TRIPs negotiations of the Uruguay Round, excessive and paternalistic. *Id.*

286. See *supra* note 263.

287. See *Intellectual Property Law of Hungary*, 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 14-13.

288. See *Recent Developments in the Protection of Intellectual Property in Hungary*, 5 World Intell. Prop. Rep. (BNA) 71 (March 1991).

289. Patent Law (1969), reprinted in 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, § (6)(3)(a), at 14-58.

prices.²⁹⁰

Both the United States and the EC have pressured Hungary to introduce product patents for pharmaceuticals.²⁹¹ Hungary signed an association agreement with the EC allowing Hungary a five year transition period to implement full product patent protection.²⁹² Hungary requested the same flexibility from the United States.²⁹³ Negotiations with the United States were unsuccessful for over three years until the USTR recently identified Hungary as one of two countries on the priority watch list subject to an immediate action plan.²⁹⁴ The USTR required Hungary to make sufficient advancements in its patent laws by July 31, 1993 or be subject to possible trade sanctions.²⁹⁵

The United States and Hungary reached a tentative intellectual property agreement on July 28, 1993.²⁹⁶ The USTR reported that Hungary agreed to propose patent law amendments allowing product patents for newly developed pharmaceuticals.²⁹⁷ Hungary also agreed to provide transitional protection for existing United States products by granting Hungarian product patents to any products patented in the United States after 1986.²⁹⁸ The Hungarian pharmaceutical industry retained the right to continue producing these products, however, if a generic Hungarian copy was already on the market.²⁹⁹ Once both nations formally sign the agreement, the USTR will remove Hungary from the

290. One patent attorney calls it "legalised piracy." *Hungary Has the Best and Worst*, *supra* note 95.

291. *See Hungarian and U.S. Views on Product Patent Issue*, MTI ECONONEWS, Apr. 30, 1992.

292. *Id.*

293. *See U.S.-Hungary Investment Treaty Stalled on Intellectual Property, National Treatment*, Int'l Trade Rep. (BNA) (Apr. 29, 1992).

294. *See* discussion *supra* part V.F.

295. *Id.* *See also Hungary to Introduce New Measure to Protect Patents*, Minister Says, 7 World Intell. Prop. Rep. (BNA) 208 (Aug. 1993).

296. *Intellectual Property: U.S., Hungary Initial Agreement on Intellectual Property*, U.S.T.R. Says, *supra* note 13. The agreement covered patents, trademarks, copyrights, trade secrets, and semiconductor chips. *Id.*

297. *Id.* Previously, pharmaceuticals were specifically excluded from product patents. *See supra* note 289 and accompanying text.

298. *Id.* This concession reflected a change in Hungarian policy, which previously strongly opposed "pipeline protection" for drugs patented in other countries. *U.S.-Hungary Investment Treaty Stalled on Intellectual Property, National Treatment*, *supra* note 213.

299. This retention by Hungarian pharmaceutical makers of the right to continue producing products that are protected by foreign patents is a change from the previous position of the United States. Initially, the United States requested that all products previously patented in the United States be protected. *Id.*

priority watch list.³⁰⁰

Hungary's copyright laws rank among the strongest in Central Europe.³⁰¹ Any copyrighted work requires the author's consent before use,³⁰² although certain "fair use" exceptions allow use of the work under specific conditions without paying royalties or obtaining the author's permission.³⁰³ These exceptions include educational purposes and quoting small portions of copyrighted literary works.³⁰⁴ The term of economic rights protection is the author's life plus fifty years.³⁰⁵ Moral rights, such as the right to make a work known to the public, are unlimited.³⁰⁶

The recent United States-Hungary intellectual property agreement requires Hungary to improve sound recording protection.³⁰⁷ Sound recordings are currently protected for only twenty years.³⁰⁸ Hungary had already taken steps to prevent unauthorized copying of sound and video recordings prior to the agreement by providing stronger criminal penalties.³⁰⁹ Previously, counterfeiters received maximum fines of approximately 117 dollars (10,000 forints).³¹⁰ The new criminal provisions make counterfeiting a felony with penalties of three to five years imprisonment.³¹¹ Hungarian police are using these tougher penalties against street vendors in efforts to reduce piracy.³¹²

300. The agreement was expected to be signed in September 1993. *Id.*

301. See *EE Intellectual Property Protection Still Inadequate*, BUS. INT'L May 4, 1992.

302. Copyright Statute (1969) (amended 1978), *reprinted in* 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, art. 13(I), at 14-38 [hereinafter Hungary Copyright Law].

303. *Id.* arts. 16-21, at 14-39, 14-40.

304. *Id.* art. 17, 14-39. If a work is used by a radio or television organization, or for public use after the work has already been made known to the public, the author must be compensated. *Id.* arts. 22-24, at 14-40.

305. *Id.* art. 15, at 14-39. The 50 year period begins the following year after the author's death. *Id.* art. 15(2), at 14-39.

306. *Id.* arts. 8, 12, at 14-38.

307. See *Intellectual Property: U.S., Hungary Initial Agreement on Intellectual Property*, U.S.T.R. Says, *supra* note 13, at 1275.

308. *Intellectual Property Law of Hungary*, *supra* note 287, at 14-13 (citing art. 1(1), Decree Law No. 19 of 1975).

309. See *Change in Hungary's Criminal Code Seen Curbing Audio, Video Tape Piracy*, 7 World Intell. Prop. Rep. (BNA) 181 (July 1993).

310. *Id.*

311. *Id.* If the pirate is operating a business activity or causes losses to an author of 11 thousand to 55 thousand dollars, the three year term applies. The five year term applies if damages exceed 55 thousand dollars. *Id.*

312. See *id.* Police efforts include confiscating counterfeit cassettes from street ven-

Computer software protection is also a concern of the United States. Although Hungary was one of the first Central European nations specifically to protect computer software,³¹³ Hungary has experienced problems in interpreting the breadth of protection provided.³¹⁴ Therefore, the government created a special committee in 1991 to evaluate the computer software laws.³¹⁵ The government further committed to provide stronger copyright protection for software in its recent agreement with the United States.³¹⁶

Hungary also provides protection for trademarks and industrial designs under specific laws.³¹⁷ Trademarks include any distinctive mark consisting of "a word, a combination of words, a figure, a picture, a combination of colors, a two or three-dimensional device, an audio or visual signal or a combination of these elements."³¹⁸ Trademarks are protected for renewable ten year periods³¹⁹ provided that the registered owner uses the mark in Hungary at least once every five years.³²⁰ Hungary also protects foreign trademark owners even if their marks are not registered under its laws as long as the trademark is well-known in Hungary.³²¹ The Industrial Design laws protect the aesthetic shape of industrial products if the design is a new, original creation.³²² The registered owner has exclusive use and licensing rights to the design of the product for up to ten years.³²³

dors. *Id.*

313. See *Recent Developments in the Protection of Intellectual Property in Hungary*, *supra* note 288, at 75. Hungary's copyright law explicitly protected computer programs in 1983. See *Intellectual Property Law of Hungary*, *supra* note 287.

314. One Hungarian author notes that the "definition of software is often found unclear and problematic." *Recent Developments in the Protection of Intellectual Property in Hungary*, *supra* note 288, at 75.

315. *Id.*

316. See *Intellectual Property: U.S., Hungary, Initial Agreement on Intellectual Property U.S.T.R Says*, *supra* note 13, at 1275. Hungary agreed to "provide[] the highest standard of protection for computer software." *Id.*

317. See Law on Trademarks [hereinafter Hungary Trademark Law], No. 9 (1969), reprinted in 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 14-153. See also *Intellectual Property Law of Hungary*, *supra* note 287, at 14-30.

318. See Hungary Trademark Law, *supra* note 317, art. 2(2).

319. See *id.* art. 6. The 10 year period begins on the application date. *Id.*

320. If the owner does not use the trademark, the protection expires. *Id.* art. 16(c), at 14-155.

321. The Article states: "A mark shall not be granted trademark protection if: . . . (d) it is identical or confusingly similar to a trademark . . . well-known in the country, [even] if that trademark is not registered in the country." *Id.* art. 3(1), at 14-153.

322. See *Intellectual Property Law of Hungary*, *supra* note 287, at 14-30.

323. *Id.* The initial five year term can be renewed for five more years if the owner

Additional laws took effect January 1, 1992, recognizing new intellectual property rights in semiconductors and utility models.³²⁴ Semiconductor protection provides exclusive commercial use of all original spatial layout structures for ten years from the earlier of the date of first commercial use or filing.³²⁵ The Utility Model Law applies to novel forms, structures, or arrangements of products that have a large-scale manufacturing or industrial use.³²⁶ The owner receives the exclusive right to use the design in the manufacturing and sale of the product.³²⁷

C. *Russia*

Development of intellectual property laws in Russia has been uncertain over the last few years because of the instability of the governing political structure.³²⁸ In June 1990 former President Bush and former Soviet President Mikhail Gorbachev signed a trade pact granting the former Soviet Union most-favored-nation trade privileges³²⁹ if it complied with certain United States requests, including stronger intellectual property protection.³³⁰ Although the former Soviet Union passed new trademark, copyright, and patent laws in 1991,³³¹ these laws lost effect with the dissolution of the Soviet Union.³³² The new republics, including

requests an extension. *Id.*

324. See Act XXXIX of 1991 on the Patent of the Topography of Microelectric Semi-Conductor Products [hereinafter Hungary Semiconductor Law], reprinted in 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 14-105. See also Act XXXVIII of 1991 on Registered Design Patents [hereinafter Hungary Utility Model Law], reprinted in *id.* at 14-115.

325. Hungary Semiconductor Law, *supra* note 324, ¶ 6(2), at 14-106.

326. See Hungary Utility Model Law, *supra* note 324, ¶¶ 1, 4, at 14-115, 14-116. "Aesthetic shaping of a product" is expressly excluded from the Utility Model Law, so as not to interfere with the industrial design law. *Id.* ¶ 2, at 14-115.

327. *Id.* ¶¶ 10, 12, at 14-117. The 10 year period begins on the date the owner files the application. *Id.* ¶¶ 11, 29, at 14-117, 14-122.

328. See *ABA Group Examines Confusing Status of IP Rights in Former Soviet Union*, 6 World Intell. Prop. Rep. (BNA) 251 (Sept. 1992). The recent efforts by hardliners in the Russian Parliament to remove Boris Yeltsin from office demonstrate the fragility of the democratic power base. See Serge Schmemmann, *Army Ousts Yeltsin Foes From Parliament; President Takes Steps to Solidify Power*, N.Y. TIMES, Oct. 5, 1993, at A1.

329. *Russian Parliament Seen Approving Trade Pact with U.S. Within Weeks*, Int'l Trade Rep. (BNA) (Mar. 18, 1992).

330. See *Soviet Union: Central Government, Republics Seen Honoring U.S. Trade Pact*, 5 World Intell. Prop. Rep. (BNA) 306, 307 (Nov. 1991).

331. *Id.*

332. See *Analysis of the New Soviet Patent Law*, 5 World Intell. Prop. Rep. (BNA) 281 (Oct. 1991). The author noted that the Soviet Union laws would, at best, serve only

Russia, quickly acted to re-instate the terms of the United States-Soviet trade agreement by signing independent trade agreements³³³ with similar intellectual property provisions.³³⁴ For example, Russia and the United States signed a trade agreement in June 1992.³³⁵

In May and June of 1992, the Russian Parliament adopted new intellectual property laws governing trademarks, computers and databases, integrated circuits, patents, utility models, and industrial designs.³³⁶ Although power conflicts within the Russian Parliament caused an initial delay in adopting these laws, the laws took effect on October 14, 1992.³³⁷ After combining with the United States in a joint intellectual property task force to develop sufficient copyright protection,³³⁸ the Russian government enacted a new copyright law on July 9, 1993,³³⁹ which became effective one month later.³⁴⁰

The Russian patent law includes protection of inventions, utility models, and industrial designs.³⁴¹ Patents are granted on a first to file basis.³⁴² Invention patents last twenty years, while utility model and indus-

as a model for the new republics to follow in drafting their laws. *Id.*

333. See *supra* notes 214-18 and accompanying text for a discussion of the existing trade agreements.

334. For an example of the intellectual property terms typical of a trade agreement between the United States and a former Soviet republic, see *Intellectual Property Provisions of U.S.-Kazakhstan Trade Agreement*, 6 World Intell. Prop. Rep. (BNA) 202 (July 1992).

335. *United States and Russia Announce Cooperation on Wide Range of Trade and Economic Issues*, BUS. AMERICA, June 29, 1992, at 14.

336. *Russia: Situation Remains Unsettled Despite Passage of New Laws*, 6 World Intell. Prop. Rep. (BNA) 186 (July 1992).

337. The laws were originally scheduled to take effect in July, but Parliamentary disputes over Russia's constitutional authority to pass laws that would govern the 20 smaller republics of the Russian federation delayed the laws' effectiveness. *Id.* at 187. After including language in the laws giving the republics authority to either accept or reject the laws, the Parliament agreed to let the laws become effective. *Russia: Intellectual Property Bills Finally Enter Into Force*, 6 World Intell. Prop. Rep. (BNA) 305 (Nov. 1992).

338. See *Russian-U.S. Trade Force Pledges Support for New Russian Copyright Law by Year-End*, *supra* note 171.

339. *Intellectual Property: New Russian Copyright Law Could Pave Way for Nation's Accession to Berne Convention*, Int'l Trade Rep. (BNA) 1172, July 14, 1993.

340. *Intellectual Property: New Russian Copyright Law Published, Took Effect Aug. 3*, Int'l Trade Rep. (BNA) 1340 (Aug. 11, 1993). The law took effect when it was published on August 3. *Id.*

341. See *Patent Law of the Russian Federation* [hereinafter Russian Patent Law], 6 World Intell. Prop. Rep. (BNA) art. 4(1), 347 (Dec. 1992) for an unofficial translation of the Russian patent law.

342. See *id.* art. 20(1), at 351. Priority is established based on the date an applica-

trial design patents last only a maximum of nine and fifteen years, respectively.³⁴³ The Russian Patent Court may grant involuntary licenses to third parties if the owner fails to work the protected item within three to five years.³⁴⁴ The law allows both product and process patents, but the introduction of a product containing a patented substance infringes on the substance patent holder's rights even if the new product was created using a different process.³⁴⁵ Utility model patents are available for designs having a novel industrial use in the production or consumption of goods.³⁴⁶ The new law also grants original industrial design protection to novel designs of the external appearance of an industrial item.³⁴⁷

The trademark law provides legal protection for registered marks, including "verbal, figurative, three-dimensional and other signs . . . in any color or in combination of colors."³⁴⁸ Trademarks are not granted for marks owned by third parties and already protected under international treaties.³⁴⁹ The initial protection period lasts ten years and may be renewed for additional ten years periods by filing renewal requests with the Patent Office.³⁵⁰ The enforcement provisions, however, need enhancement. Even Russian officials concede their inadequacy and have

tion is filed with the Patent Office. *Id.*

343. *Id.* art. 4(3), at 347. Utility models are protected six years, with a renewal period of three years. *Id.* Industrial designs patents last an initial ten years, with an optional five year renewal period. *Id.*

344. *Id.* art. 11(3), at 349. Utility models must be used within three years of the patent date, while inventions and industrial designs must be used within five years. *Id.* Under Russian law, working the patent is "introduction into economic circulation of a product manufactured with the use of an invention, utility model, or industrial design and also the use of a process protected by the patent for an invention." *Id.*

345. *See id.* art. 11(2), at 349. Process patent holder's rights are also protected in this article. *Id.* If a product appears on the market and a process patent owned by a third party is effective, there is a presumption that the new product was illegally manufactured using the existing patented process. The manufacturer of the new product must overcome this presumption. *Id.*

346. *Id.* art. 6(1), at 348.

347. *Id.* art. 7(1), at 348. The design must be "novel, ingenious and industrially applicable." *Id.*

348. Draft Law of the Russian Federation on Trademarks, Service Marks and Appellations of Origin [hereinafter Russian Trademark Law], 6 World Intell. Prop. Rep. (BNA) Art. 5, 143 (May 1992). Although the version presented in BNA is only a draft, the final version was substantially the same, except for the additions discussed in note 343, *supra*. *See Russia: Intellectual Property Bills Finally Enter Into Force, supra* note 337, at 305.

349. Russian Trademark Law, *supra* note 348, art. 7(1), at 143.

350. *Id.* art. 16, at 145.

expressed an intent to provide stronger penalties for infringements and to allow the seizure of goods by customs authorities.³⁵¹

The new copyright law satisfies international requirements under the Berne Convention, to which Russia soon may accede, according to Russia's Information Minister.³⁵² The new law recognizes copyrights for both Russian and foreign literary and artistic works, in addition to covering computer programs and databases, photographs, and audio and video recordings.³⁵³ No registration of copyrighted works is required, and the protection period complies with the international standard of the author's life plus fifty years.³⁵⁴ Enforcement provisions also provide significant civil and criminal penalties expected to have a sizable impact on Russia's pirating industry if followed.³⁵⁵

D. *The Czech and Slovak Republics*

The Czech and Slovak Republics provide strong intellectual property protection due in part to international agreements signed by their predecessors.³⁵⁶ In 1990, Czechoslovakia entered a trade agreement with the United States requiring increased protection for patents, copyrights, and integrated circuit layout designs.³⁵⁷ The Czech and Slovak Federal Republic signed an Interim Agreement with the EC in 1991 requiring it to comply with EC standards for trademarks, semiconductors, and computer programs within five years from the effective date of the treaty.³⁵⁸

351. See *Russian, INTA Delegations Pledge Cooperation on Trademarks*, 7 World Intell. Prop. Rep. (BNA) 237 (Sept. 1993). Russian officials met with members of the International Trademark Association in June 1993 and issued a statement expressing their intent to ensure adequate enforcement of the current law, to create a specialized Patent Court, and to provide strong civil and criminal remedies. *Id.*

352. *Intellectual Property: New Russian Copyright Law Could Pave Way for Nation's Accession to Berne Convention*, *supra* note 339, at 1172.

353. *Id.*

354. *Id.* Copyright holders can pass their rights on to their heirs, and the 50 year coverage also applies to the related rights of broadcasters and performers. *Id.*

355. Damages include lost profits, up to a maximum of 50,000 times the legal minimum monthly wage, plus a fine of 10% of the total award granted by the court. Infringers also can be subject to criminal penalties. Utilization by authorities of the new penalties could drastically reduce piracy of literary works and videocassettes. *Id.*

356. See *Intellectual Property Law of the Czech and Slovak Federal Republic*, reprinted in 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 16-1, 16-3.

357. *Id.* (citing U.S.-Czech Agreement on Trade Relations, Apr. 12, 1990 (entered into force November 17, 1990). 29 I.L.M. 904 (1990)) reprinted in *id.* 16-101.

358. *Id.* at 16-4 (citing Interim Agreement between the European Economic Community and the Czech and Slovak Federal Republic on Trade and Trade-Related Matters, Art. 36(1) and Annex 17, 1992 O.J. (L 115) at 9, 51).

To comply with these agreements and international standards, the Federation amended its copyright law and enacted new patent and semiconductor laws in the early 1990s.³⁵⁹

The patent law was revised in January 1991 using the European Patent Convention as a model.³⁶⁰ The new law extended the protection period for patents from fifteen years to the international standard of twenty years.³⁶¹ The law also allows patent protection for pharmaceuticals and chemicals previously excluded under the former patent law.³⁶² The first to file a patent application has priority unless an international convention requires otherwise.³⁶³ Compulsory licenses may be granted to third parties by the Patent Office, but only when the owner has failed to work the patent within a three to four year period or if an important public interest is at risk.³⁶⁴ Patent owners can obtain injunctions or recover civil damages for infringements of their rights.³⁶⁵

A 1990 amendment to the copyright law enhanced copyright protection.³⁶⁶ The revisions specifically included computer programs; however, the programs must be "the result of the creative activity of the author."³⁶⁷ This restriction may require further amendment to comply with the United States and EC requirements.³⁶⁸ The amended copyright law also provides enhanced protection to owners by extending the period of protection for audio and video recordings to fifty years.³⁶⁹

359. *Id.* at 16-3.

360. *See* Law on Inventions, Industrial Designs and Rationalization Proposals, No. 527 (1990) [hereinafter Czech/Slovak Patent Law], *reprinted in* 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 16-53; *see also id.* at 16-16.

361. *Czech and Slovak Republics: Western Patent, Trademark Filings Up Sharply Since Fall of Communism*, 7 World Intell. Prop. Rep. (BNA) 229 (Sept. 1993) [hereinafter Republics Filings].

362. *Id.*

363. Czech/Slovak Patent Law, *supra* note 360, ¶ 27, at 16-63. If priority is valid under an international convention, the applicant must include that information in the application. *Id.*

364. *Id.* ¶ 20(1), at 16-61. A compulsory license cannot be granted until the later of four years following the date of application and three years after the patent was granted. *See id.*

365. *Id.* ¶ 75, at 16-77.

366. Law on Literary, Scientific, and Artistic Works (Copyright), No. 35 (1965) (amended 1990) [hereinafter Czech/Slovak Copyright Law], *reprinted in* 2 INTERNATIONAL INTELLECTUAL PROPERTY, *supra* note 266, at 16-37.

367. *Id.* Sec. 1(1), at 16-37.

368. *See Intellectual Property Law of the Czech and Slovak Federal Republic*, *supra* note 356, at 16-7.

369. *See* Czech/Slovak Copyright Law, *supra* note 366, Sec. 45(5), 33(4), at 16-50, 16-47.

The government enacted the Law on the Protection of Topographies of Semiconductor Products in 1991 to protect integrated circuit layout designs and semiconductors.³⁷⁰ Designs are protected for ten years from the date of first use or registration, whichever is earlier.³⁷¹ The law disallows registration if an application is not filed within two years after the first commercial use of the design.³⁷²

When Czechoslovakia separated into two distinct republics in January 1993, both countries adopted the intellectual property laws of the former Federation.³⁷³ The trademark laws are currently under consideration for amendment by both republics because the laws continue to reflect socialist views of ownership.³⁷⁴ The Czech and Slovak Republics will probably adopt amendments in the near future to comply with EC trademark standards.³⁷⁵

VI. CONCLUSION

Central and Eastern Europe is encountering a harsh transition into an entirely new economic structure. Because of the extreme capital shortages brought on by the socialist structure, the formerly Communist nations must depend on external sources of capital to update their deteriorated infrastructures. Without new communications networks, banking systems, factories, and machinery and equipment, these countries cannot become competitive in the global economy. Central and Eastern Europe must obtain foreign aid and investment for the new republics to survive.

Foreign investors hesitate to contribute capital and technology to unstable economies, especially if their proprietary knowledge may be stolen and used to create counterfeit goods. Investors desire the assurance that the increased risk of investing in Central and Eastern Europe will result in greater profits. The recent economic difficulties of General Electric in its Tungfram lighting joint venture in Hungary indicate that large prof-

370. *Intellectual Property Law of the Czech and Slovak Federal Republic*, *supra* note 356, at 16-33 (citing Law on the Protection of Topographies of Semiconductor Products, Act. No. 529 of December 3, 1991).

371. *Id.*

372. *Id.* Protection is also disallowed 15 years after creation if the topography is never registered or commercially exploited. *Id.*

373. Republics Filings, *supra* note 361, at 229.

374. See *Intellectual Property Law of the Czech and Slovak Federal Republics*, *supra* note 356, at 16-24.

375. See *id.* Amendments have already been prepared, but have not yet been passed. *Id.*

its are anything but certain.³⁷⁶ Piracy in Central and Eastern Europe only serves to discourage already reluctant foreign investors.

Although some scholars argue that the economy in Central and Eastern Europe will be further harmed by enacting and enforcing strong intellectual property laws, these laws may ultimately affect the long-term survival of some of the new democracies. Western companies place increasing emphasis on intellectual property protection. Intellectual property owners not only seek stronger border controls, but also want protection of their property abroad. Eastern European countries that continue to ignore piracy may soon encounter trade difficulties as well as decreased foreign investment. The combination of these two factors will almost certainly defeat attempts to convert to market economies.

Intellectual property owners realize, however, that even the strongest laws are ineffective without financial incentives to protect intellectual property. The government of a struggling country cannot convince its citizens to stop pirating goods when piracy may be one of the few means to generate an income. This Author believes that if large corporations in developed countries desire to create new market opportunities in Central and Eastern Europe, part of the social and economic costs of earning future profits includes a commitment to the education and capital structures of these nations. Intellectual property owners cannot expect nationals of formerly Socialist countries instantly to comprehend and embrace the concept of intangible property rights when many of these people were denied tangible property rights for much of their lifetimes.

Rather than concentrating vast resources on lobbying their own governments to create stronger border controls and international trade laws, Western companies should begin re-educating Central Europeans on a local level. The formerly Communist countries clamor for Western capital to update their factories and manufacture Western products. The educational background of the people suggests that the population is more than capable of matching the quality standards of Western nations. If Western companies create an environment of learning, pride in workmanship, and creativity, a by-product of that investment in the people will be loyalty to the trade secrets of those companies. Although not every employee will feel such loyalty, no nation is immune to stolen trade secrets. National laws will assist in protecting intellectual property rights; but to change the mindsets of entire nations, people must be convinced on an individual level. These efforts will contribute to increased living standards locally and eventually world-wide.

376. See *GE Tungsram Struggles with Losses*, MTI ECONONEWS, Feb. 11, 1993 (News Section).

Even though the private sector independently determines where to invest its funds for future development, economic problems in the United States and Japan indicate that strong corporate growth in developed nations is becoming increasingly difficult. If Western companies desire to capitalize on the market potential of Central and Eastern Europe, one of the early costs may be vulnerability on the intellectual property front. If Westerners decline to commit resources to Central Europe at this critical stage of its development, the long-term costs may include not only the failure of these nations to convert successfully to a free market, but also the loss of a vast global trading partner for the West.

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