

ADDITIONAL PROTOCOL CONCERNING BUSINESS
AND ECONOMIC RELATIONS WITH POLAND

MESSAGE

TRANSMITTING

THE PRESIDENT OF THE UNITED STATES

ADDITIONAL PROTOCOL BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF POLAND TO THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF POLAND CONCERNING BUSINESS AND ECONOMIC RELATIONS OF MARCH 21, 1990, SIGNED AT BRUSSELS ON JANUARY 12, 2004



MARCH 12, 2004.—The Protocol was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *March 12, 2004.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Additional Protocol Between the United States of America and the Republic of Poland to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations of March 21, 1990, signed at Brussels on January 12, 2004. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Protocol.

I have already forwarded to the Senate similar Protocols for Romania and Bulgaria and now forward simultaneously to the Senate Protocols for the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic. Each of these Protocols is the result of an understanding the United States reached with the European Commission and these six countries that will join the European Union (EU) on May 1, 2004, as well as with Bulgaria and Romania, which are expected to join the EU in 2007.

The understanding is designed to preserve U.S. bilateral investment treaties (BITS) with each of these countries after their accession to the EU by establishing a framework acceptable to the European Commission for avoiding or remedying present and possible future incompatibilities between their BIT obligations and their future obligations of EU membership. It expresses the U.S. intent to amend the U.S. BITS, including the BIT with Poland, in order to eliminate incompatibilities between certain BIT obligations and EU law. It also establishes a framework for addressing any future incompatibilities that may arise as EU authority in the area of investment expands in the future, and endorses the principle of protecting existing U.S. investments from any future EU measures that may restrict foreign investment in the EU.

The United States has long championed the benefits of an open investment climate, both at home and abroad. It is the policy of the United States to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. This Protocol preserves the U.S. BIT with Poland, with which the United States has an expanding relationship, and the protections it affords U.S. investors even after Poland joins the EU. Without it, the European Commission would likely require Poland to terminate its U.S. BIT upon accession because of existing and possible future incompatibilities between our current BIT and EU law.

IV

I recommend that the Senate consider this Protocol as soon as possible, and give its advice and consent to ratification at an early date.

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
January 22, 2004.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Additional Protocol Between the United States of America and the Republic of Poland amending the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations of March 21, 1990, signed at Brussels on January 12, 2004. I recommend that this protocol be transmitted to the Senate for its advice and consent to ratification.

This protocol is the result of an understanding that the United States reached with the European Commission and six countries that will join the European Union ("EU") on May 1, 2004 (the Czech Republic, Estonia, Latvia, Lithuania, Poland and the Slovak Republic), as well as with Bulgaria and Romania, which are expected to join the EU in 2007.

The understanding is designed to preserve our bilateral investment treaties ("BITs") with these countries after their accession to the EU by establishing a framework for avoiding or remedying present and possible future incompatibilities between our BITs with these eight countries and their future obligations of EU membership. In this regard, the understanding expresses the U.S. intent to conclude substantively identical amendments and formal interpretations of the BITs with each of these eight countries.

In addition, the understanding establishes a framework for addressing any future incompatibilities that may arise as European Union authority in the area of investment expands and evolves in the future. It endorses the principle of protecting existing U.S. investments in these countries from any future EU measures that may restrict foreign investment in the EU, and also clarifies certain protections afforded to U.S. investments in individual member states of the EU under the Treaty Establishing the European Community ("EC Treaty").

Finally, the understanding calls for the United States and each BIT partner to interpret, through an exchange of letters, two BIT provisions: (1) the right of each BIT Party to take measures necessary for the protection of its own essential security interests, and (2) the BIT prohibition on performance requirements.

Both interpretations were undertaken at the request of the European Commission to confirm the mutual understanding of the United States and Poland in the context of EU enlargement. For example, the interpretation of the BIT provision on essential security interests confirms that, for Poland, these interests may include

interests deriving from Poland's membership in the EU. As concerns the BIT prohibition on performance requirements, many U.S. BITs include a provision explicitly stating that the prohibition on performance requirements does not extend to conditions for the receipt or continued receipt of an advantage. The interpretation relating to performance requirements makes this explicit with respect to the U.S.-Poland BIT. The two interpretations are enclosed for the information of the Senate.

Investment by the United States has played an important role in the economic transformation of these eight countries, and the U.S. BITs have afforded important protections to U.S. investors. Prior to acceding to the EU, however, the European Commission has required that these countries terminate any international treaty containing incompatibilities with EU law. Without the understanding and the steps contemplated therein, including the specific amendments in this protocol, these countries would be required to terminate their U.S. BITs and the great majority of protections these treaties afford U.S. investors. Therefore, the understanding, together with the interpretations and specific amendments in the protocol, will preserve the benefits of these treaties and provide important additional protections for U.S. investors as the EU continues to evolve.

THE U.S.-POLAND PROTOCOL

The United States champions EU enlargement and, at the same time, intends that this BIT will continue to mutually benefit U.S. and Polish investors. By undertaking these amendments of the BIT with Poland, which would be brought into force just prior to its accession, incompatibilities between BIT protections and EU law are eliminated, and any future problems in this respect are addressed through a framework for consultations. This action preserves our BIT with Poland after its accession to the EU, and is consistent with the policy of the United States to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. Poland is one of the newly democratized countries in Europe transitioning to a market economy, and foreign direct investment into Poland is very much in both our countries' interests. Protection for investors facilitates investment activity, and thus directly supports U.S. policy objectives.

The principal substantive articles of the protocol provide as follows:

Article I: that the article of the BIT prohibiting performance requirements does not limit Poland's ability to impose, as necessary under EU law, certain kinds of performance requirements in the agricultural and audiovisual sectors;

Article II: that the terms of the free trade area/customs union exception of the BIT shall apply, without limitation, to all of a Party's obligations stemming from its membership in an economic integration agreement that includes a free trade area or customs union, such as the EU;

Article III: that the BIT Parties will consult promptly whenever either Party believes that steps are necessary to assure compatibility between the BIT and the EC Treaty;

Article IV: that, in certain specified sectors or matters, Poland may take a reservation against the national treatment and most-favored-nation treatment obligations of the BIT, provided such reservation is necessary to meet Poland's obligations under EU law, and subject to the following exception;

that, notwithstanding any such new reservation, existing U.S. investments in Poland shall remain protected under the national treatment and most-favored-nation treatment obligations of the BIT for at least 10 years from the date of the relevant EU law necessitating the reservation; and finally,

that the United States reserves the right to make or maintain limited exceptions to the national treatment obligation in two new sectors or matters, fisheries and subsidies, and to the most-favored-nation treatment obligation in one new sector, fisheries.

With respect to future developments in EU law, the United States recognizes that the possibility exists that these amendments may not suffice to ensure compatibility, and that consultations would be necessary to avoid or eliminate any incompatibilities that may arise. As noted above, the United States and Poland expressly agree to such consultations in the protocol.

I support this protocol to the U.S. BIT with Poland, and I favor its transmission to the Senate at an early date.

Respectfully submitted.

COLIN L. POWELL.

Enclosures: As stated.



The Ambassador

Embassy of the United States of America

Warsaw, Poland

January 12, 2004

Excellency,

I have the honor to refer to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, signed at Washington on March 21, 1990 (the "Treaty"), and to recent discussions between representatives of our Governments concerning the Republic of Poland's accession to the European Union.

I have the further honor to confirm the understanding of the Government of the United States of America that Article XII, paragraph 3, of the Treaty reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests. I have the further honor to confirm the understanding of the Government of the United States of America that, in the case of Republic of Poland, these interests may include interests deriving from its membership in the European Union.

I would be grateful if Your Excellency would confirm, by an affirmative Letter in response, that these understandings are shared by your Government.

Accept, Excellency, the renewed assurances of my highest consideration.

Sincerely,

Christopher R. Hill

His Excellency

Prof. Jerzy Hausner,

Deputy Prime Minister and Minister of Economy, Labor and Social Policy,
Republic of Poland,
Warsaw.

[COURTESY TRANSLATION]

Ministry of Economy, Labour and
Social Policy
Undersecretary of State
Mirosław F. Zieliński

Warsaw, January 12, 2004

Excellency,

I have the honor to refer to your note of today's date, which reads as follows:

"I have the honor to refer to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, signed at Washington on March 21, 1990 (the "Treaty"), and to recent discussions between representatives of our Governments concerning the Republic of Poland's accession to the European Union.

I have the further honor to confirm the understanding of the Government of the United States of America that Article XII, paragraph 3, of the Treaty reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests. I have the further honor to confirm the Parties' understanding that, in the case of Republic of Poland, these interests may include interests deriving from its membership in the European Union.

I would be grateful if Your Excellency would confirm, by an affirmative Note in response, that this understanding is shared by your Government."

I have the further honor to confirm that this understanding is shared by my Government.

Accept, Excellency, the renewed assurances of my highest consideration.

His Excellency
Mr. Christopher R. **HILL**
Ambassador of the United States of America
in Warsaw



The Ambassador

Embassy of the United States of America

Warsaw, Poland

January 12, 2004

Excellency,

I have the honor to refer to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, signed at Washington on March 21, 1990 (the "Treaty"), and to recent discussions between representatives of our Governments concerning the Republic of Poland's accession to the European Union.

I have the honor to confirm the understanding of the Government of the United States of America that the prohibition on performance requirements set forth in Article II, paragraph 4, of the Treaty does not extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a market organization for agricultural products and its market stabilizing effects.

I would be grateful if Your Excellency would confirm, by an affirmative Letter in response, that this understanding is shared by your Government.

Accept, Excellency, the renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Hill", written over a horizontal line.

Christopher R. Hill

His Excellency
Prof. Jerzy Hausner,
Deputy Prime Minister and Minister of Economy, Labor and Social Policy,
Republic of Poland,
Warsaw.

[COURTESY TRANSLATION]

Ministry of Economy, Labour and
Social Policy
Undersecretary of State
Miroslaw F. Zieliński

Warsaw, January 12, 2004

Excellency,

I have the honor to refer to your note of today's date, which reads as follows:

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I would be grateful if Your Excellency would confirm, by an affirmative Note in response, that this understanding is shared by your Government."

I have the further honor to confirm that this understanding is shared by my Government.

Accept, Excellency, the renewed assurances of my highest consideration.

His Excellency
Mr. Christopher R. **HILL**
Ambassador of the United States of America
in Warsaw

ADDITIONAL PROTOCOL
BETWEEN THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF POLAND TO THE TREATY
BETWEEN THE UNITED STATES OF AMERICA
AND THE REPUBLIC OF POLAND CONCERNING BUSINESS AND
ECONOMIC RELATIONS DONE AT WASHINGTON ON MARCH 21, 1990

Representatives of the Governments of the United States of America and the Republic of Poland;

Desiring to make more effective the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, signed at Washington on March 21, 1990 (hereinafter "the Treaty");

Have discussed the intentions of the United States of America and the Republic of Poland regarding the compatibility between the Republic of Poland's obligations under the Treaty and its obligations that arise from membership in the European Union;

Have acknowledged that the Republic of Poland, pursuant to Article 307 of the Treaty Establishing the European Community and Article 6.10 of the Republic of Poland's Act of Accession, as applicable, must take all appropriate steps to eliminate incompatibilities between the Treaty Establishing the European Community and its other international agreements, including the Treaty;

Have concluded, as a result, that certain amendments to the Treaty are necessary in order to avoid such incompatibilities;

Have decided to conclude an Additional Protocol thereto; and

Have agreed upon the following articles:

Article I

As necessary for the Republic of Poland to meet its obligations pursuant to measures adopted by the European Union, Article II, paragraph 4, of the Treaty shall not limit the ability of the Republic of Poland to impose performance requirements:

- (a) in the agricultural sector that relate to the production, processing and trade of agricultural and processed agricultural products, that implement quotas, or that require the purchase or use of goods produced or services provided in the European Union or, with respect to goods produced or services provided, a particular level or percentage of content from a source in the European Union; or

- (b) in the audio-visual sector that relate to the production, distribution and exploitation of audio-visual works, that implement quotas, or that require the purchase or use of goods produced or services provided in countries of the Council of Europe or, with respect to goods produced or services provided, a particular level or percentage of content from a source in countries of the Council of Europe.

Article II

The Parties acknowledge that the terms of the customs union or free trade area exception found at Article XII, paragraph 2(a), of the Treaty shall apply to all obligations of a Party by virtue of its membership in an economic integration agreement that includes a free trade area or customs union (*e.g.*, the European Union), including obligations owed to nationals or companies of any third country.

Article III

Article X, paragraph 1, of the Treaty shall be amended by deleting the text of the existing paragraph in its entirety and substituting the following paragraph:

“The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with this Treaty, or to discuss any matter relating to the interpretation or application of this Treaty. The Parties also agree to consult promptly whenever a Party believes that steps are necessary to assure compatibility between this Treaty and the Treaty Establishing the European Community with a view to assuring compatibility.”

Article IV

A. The Annex to the Treaty shall be amended by adding, after paragraph 4, the following additional paragraphs:

- “5. Consistent with Article II, paragraph 1, and as necessary to meet its obligations pursuant to measures adopted by the European Union, the Republic of Poland reserves the right to make or maintain exceptions to national treatment in the sectors or matters it has indicated below:

- Agriculture
- Audio-visual
- Securities, Investment Services and other Financial Services
- Fisheries
- Hydrocarbons
- Subsidies
- Transport (Air Carriers)
- Transport (Inland Waterways)
- Transport (Maritime)

6. Consistent with Article II, paragraph 1, and as necessary to meet its obligations pursuant to measures adopted by the European Union, the Republic of Poland reserves the right to make or maintain exceptions to most-favored-nation treatment in the sectors or matters it has indicated below:

Agriculture
Audio-visual
Hydrocarbons

7. Any exception by the Republic of Poland exercised pursuant to paragraphs 5 or 6 above (*i.e.*, through any law or regulation adopted by, or any European Union measure directly applicable within, the Republic of Poland) shall not apply, for the time period set forth below in subparagraph (a), to investments of nationals or companies of the United States that are existing in the relevant sector on the date this amendment takes effect or on the date the European Commission publishes its proposal to enact the relevant measure in its Official Journal, whichever date is later.

- (a) The time period referred to in this paragraph shall be ten years from the date the relevant law or regulation adopted by, or European Union measure directly applicable within, the Republic of Poland takes effect, or twenty years from the date of entry into force of the Treaty, whichever date is later.
- (b) In no case, however, may an exception exercised pursuant to paragraphs 4 or 5 above apply to an existing investment, as defined in this paragraph, to the extent that it would require divestment, in whole or in part, of such an existing investment.”

B. Paragraphs 5, 6 and 7 of the Annex to the Treaty shall be renumbered as paragraphs 8, 9 and 10.

C. Paragraph 1 of the Annex to the Treaty shall be amended to reflect that, consistent with Article II, paragraph 1, the United States also reserves the right to make or maintain limited exceptions in the new sectors or matters it has indicated below:

Fisheries
Subsidies

Article V

This Additional Protocol, which shall form an integral part of the Treaty, shall be subject to ratification.

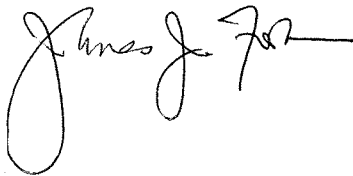
Article VI

This Additional Protocol shall enter into force upon the exchange of instruments of ratification, and shall remain in force so long as the Treaty shall remain in force.

IN WITNESS WHEREOF, the undersigned, duly authorized by their respective Governments, have signed this Additional Protocol.

DONE in duplicate at Brussels on the 12th day of January, 2004 in the English and Polish languages, both texts being equally authentic.

FOR THE
UNITED STATES OF AMERICA:

Handwritten signature of James J. Foy, representing the United States of America.

FOR THE
REPUBLIC OF POLAND:

Handwritten signature of Marek Góral, representing the Republic of Poland.