S. HRG. 103–292

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HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SEPTEMBER 10, 1993

Printed for the use of the Committee on Foreign Relations

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FRIDAY, SEPTEMBER 10, 1993

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:50 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senator Pell.

The CHAIRMAN. The Committee on Foreign Relations will come to order. The first order of business is to apologize to those who are here both as witnesses and people in the audience, but we were delayed at a ceremony at the White House and I do apologize.

This morning we will be considering the bilateral investment treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania. The principal purpose of the bilateral investment treaties is to promote the free flow of international investment and to protect our own American investment in foreign countries.

There are currently investment treaties in force with 13 countries. In addition to the 8 treaties before the committee this morning, the administration is negotiating similar treaties with 20 additional countries. In view of the rapid expansion of these treaties, we are eager to hear how successful these treaties have been in increasing U.S. investment.

I will be particularly interested to learn whether there is any evidence to suggest that increased investment as a result of the protection of these treaties may result in a reduction in direct U.S. foreign assistance over a period of time.

We have received statements in support of these treaties from the National Association of Manufacturers, the United States Council for International Business, and Joel Messing, an international lawyer, which, without objection, will be made a part of the record of this hearing.

[The information referred to may be found in the appendix.]

The CHAIRMAN. I welcome as a witness this morning the Hon. Daniel Tarullo, Assistant Secretary of State for Economic and Business Affairs, who is accompanied by Donald Abelson, Assistant U.S. Trade Representative for Services, Investment and Intellectual Property.

I would also add that I hope the human rights treaties, the conventions on racism, and women's rights, the American Convention on Human Rights, and the Covenant on Economic, Social, and Cultural Rights, would be coming up soon from the State Department. They have languished there for too many years and we really would welcome them coming.

But that is not the business in hand. That was just to make this request to the Department.

[The information referred to follows:]

The U.S. ratified the Covenant on Civil and Political Rights last year and will ratify the Torture Convention as soon as Congress enacts the necessary implementing legislation, which we earnestly hope will be in the near future.

Four other human rights treaties are currently pending before the U.S. Senate for advice and consent to ratification: (1) the Convention on the Elimination of All Forms of Racial Discrimination, (2) the American Convention on Human Rights, (3) the International Covenant on Economic, Social and Cultural Rights, and (4) the Convention on the Elimination of All Forms of Discrimination Against Women. The first three were transmitted to the Senate in February 1978; the Women's Convention was signed and transmitted to the Senate in 1980.

As Secretary Christopher announced at the World Conference on Human Rights in June, the Administration has given priority to ratification of the Convention on the Elimination of All Forms of Racial Discrimination. The detailed legal analysis which forms the basis for the "package" of reservations, understandings and declarations is well under way. We hope to be in a position for a hearing before the Senate Foreign Relations Committee shortly.

In addition, the Administration has indicated its strong support of the Convention on the Elimination of All Forms of Discrimination against Women. As Assistant Secretary Shattuck recently announced at a hearing of the House Foreign Affairs Subcommittee on International Security, International Organizations and Human Rights, we will move for ratification of this Convention as soon as the Senate has acted on the Racial Discrimination Convention. Preparing the legal analysis of the impact this treaty will have on domestic law is a somewhat larger undertaking since no "package" of reservations, understandings and declarations was prepared when the Convention was submitted to the Senate in 1980. However, the Departments expects to be able to make a detailed recommendation to the White House on this treaty later this fall.

A fifth treaty, the Convention on the Rights of the Child, was adopted by the UN General Assembly in 1989 and entered into force the following year. So far, there has been no decision by the White House on whether the U.S. should sign the treaty. We strongly support the purposes and principles of this Convention, but believe it requires careful study because it could have a significant impact on state and local law (for example in the areas of child custody and support, foster care, primary education, etc.) and because of its potential budgetary and programmatic impact in terms of benefit programs for children.

The CHAIRMAN. Secretary Tarullo, we are glad you are here and look forward to hearing whatever you have to say.

STATEMENT OF HON. DANIEL K. TARULLO, ASSISTANT SECRETARY OF STATE FOR ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE; ACCOMPANIED BY DONALD S. ABELSON, ASSISTANT U.S. TRADE REPRESENTATIVE FOR SERVICES, INVESTMENT AND INTELLECTUAL PROPERTY, AND MARGARET PICKERING, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE

Mr. TARULLO. Thank you very much, Mr. Chairman. If I might, two preliminary matters first. There is a written statement from Deputy USTR Charlene Barshefsky which I would ask be taken into the record.

The CHAIRMAN. It will be inserted in the record as if read.

[The prepared statement of Ms. Barshefsky may be found in the appendix.]

Mr. TARULLO. Thank you. Second, you and your staff submitted a number of questions to the Department. We have written answers to those which I would also ask to be entered into the record.

The CHAIRMAN. They will be part of the record and the dialog on this subject, Mr. Tarullo.

[The information referred to may be found in the appendix.]

Mr. TARULLO. Thank you very much. I appreciate the opportunity to testify before the Foreign Relations Committee as the administration seeks the advice and consent of the Senate to ratification of bilateral investment treaties with Argentina, Armenia, Bulgaria, Ecuador, Moldova, Kazakhstan, Kyrgyz Republic, and Romania.

The administration welcomes the holding of hearings at this time. Argentina, Bulgaria, Kazakhstan, and Romania have already ratified the treaties. The Senate's advice and consent would permit the treaties with those countries to enter into force as soon as all necessary formalities and instruments of ratification could be accomplished and achieved.

I have submitted prepared testimony which includes a report on the status of U.S. relations with the proposed treaty partners. In my oral statement today I would like to briefly touch on three topics. First, how the bilateral investment treaty program fits into the administration's overall policy on outward direct investment. Second, the protections for U.S. investors provided by our bilateral investment treaties. And third, how these treaties can advance certain U.S. interests and encourage reform-minded countries to adopt and maintain market-oriented policies.

As part of our outward investment policy, the BIT program is one element of the administration's overall international economic policy, which has as two of its key aims promotion of U.S. exports and the enhancement of the international competitiveness of our companies. This approach is consistent with the President's program to renew the American economy, and his insistence that as foreign investment is welcomed here, our investors must be equally welcome in other countries.

The bilateral treaty program, which has enjoyed bipartisan support during its existence, is consistent with our overall investment policy. It is a useful tool for promoting and protecting U.S. investment interests, especially in those countries where our rights are not protected through treaties of friendship, commerce, and naviga-

tion, or through the various instruments of the Organization of Economic Cooperation and Development.

The program has assumed a new and, I think, very important dimension as it has been applied to the Republics of the former Soviet Union and to other countries which are making the shift from a command and control economy to a market-based economy.

U.S. bilateral investment treaties provide five basic protections for U.S. investors. First and fundamentally, they level the playing field by guaranteeing U.S. investors parity with investors from other countries. Altogether, other countries have signed over 600 BIT's worldwide. Parties to those treaties use them to increase their company's ability to penetrate new markets. We likewise need to help our companies compete, and we can use BIT's to open up investment opportunities for them.

The national treatment and most favored nation treatment are two of the key obligations of the treaties. Our BIT's insure that U.S. companies will receive treatment no less favorable than that accorded to their competitors.

Second, these treaties protect U.S. investors in the event of expropriations by incorporating into the treaty the highest international law standards for expropriation and compensation, and by guaranteeing that the compensation is prompt, adequate, and effective.

Third, U.S. investors are guaranteed the right to transfer funds without delay using a market rate of exchange. Such a guarantee can help increase U.S. exports and its free transfers facilitate the purchase and import of U.S-produced goods and services.

Fourth, our BIT's prohibit a party from imposing performance requirements on an investor, such as local content or export performance requirements. This requirement helps—this prohibition helps guarantee that U.S. investors will not be coerced by host governments into inefficient trade distorting practices. This provision may also open up new markets for U.S. producers and increase U.S. exports.

Fifth, our BIT's grant investors the option of submitting an investment dispute with the government of the other treaty partner to international arbitration. The BIT's give the investor the option of going to an international forum, rather than having the sole choice of the domestic courts of the host country.

Secretary Christopher has emphasized the promotion of U.S. economic security as a principal goal of our foreign policy. I have noted that our BIT program contributes toward this goal.

Today, I believe our BIT's are especially important in promoting our economic interests and developing commercial opportunities in the countries of Central and Eastern Europe and the former Soviet Union. The changes in these countries present our companies with unique opportunities to participate in the privatization of those economies.

Our BIT's will remove investment restrictions and establish common market based legal, economic, and commercial rules. In doing so, they will give our companies effective first-mover or first-in advantages by getting them in at the beginning of the moves to a market system, with obvious important long-term implications.

They constitute a framework of government obligations on the treatment of investments within which U.S. companies can operate.

The choice to invest, of course, is a choice made by private companies, but these treaties in the former Soviet Union Republics do assure that there is a basic framework providing some certainty for U.S. investors that choose to do business in those countries.

We hope to encourage market-oriented policy changes in other countries through the BIT negotiation process, such as in the area of privatization and performance requirements. Moreover, BIT's give protection against future expropriation, should any of these countries reverse course.

I might mention in particular the treaty with Argentina, which is our first to be completed with a South American country. It represents an important milestone in the BIT program and, indeed, in international law generally. Argentina is engaged in the most comprehensive privatization program in its history and is implementing over wide-ranging market reforms as well. The BIT can help support these moves and get our companies in on the ground floor.

One item of particular interest in the Argentine BIT is that, like many Latin American countries, Argentina has long subscribed to the so-called Calvo Doctrine which requires that foreign investors submit disputes arising in a country to that country's local courts. This treaty contains an absolute right to international arbitration of investment disputes and thereby removes U.S. investors from the restrictive operation of the Calvo Doctrine. Such a precedent with Argentina has already helped pave the way for similar agreements with other Latin American countries.

While the treaty with Ecuador is our first with an Andean Pact country, we are also negotiating with Bolivia, Peru, Colombia, and Venezuela. In addition, we are in advanced stages of negotiations with Costa Rica and Jamaica and we have other negotiations at various stages in Latin America as well.

In closing, let me thank you, Mr. Chairman, for your continued interest in the BIT program and also for that of your very able staff. I would be happy to answer any questions you may have.

[The prepared statement of Mr. Tarullo follows:]

PREPARED STATEMENT OF DANIEL K. TARULLO

Mr. Chairman, thank you very much for the opportunity to testify before the Foreign Relations Committee as the administration seeks the advice and consent of the Senate to ratification of bilateral investment treaties with Argentina, Armenia, Bulgaria, Ecuador, Moldova, Kazakhstan, Kyrgyzstan (Kyrgyz Republic) and Romania.

The administration welcomes the holding of hearings at this time. Argentina, Bulgaria, Kazakhstan and Romania have already ratified the treaties. The Senate's advice and consent would permit the treaties with those countries to enter into force as soon as instruments of ratification can be exchanged.

In my statement today, I would like to cover three topics:

1. First, how the bilateral investment treaty program fits into the administration's overall policy on outward direct investment.

2. Second, the protections for U.S. investors provided by our bilateral investment treaties.

3. Third, how these treaties advance U.S. interests and encourage reform-minded countries to adopt and maintain market-oriented policies. In addition, I am providing in an annex to my testimony a report on the status of U.S. relations with the proposed treaty partners.

THE PLACE OF BITS IN U.S OUTWARD INVESTMENT POLICY

As part of our outward investment policy, the BIT program is one element of the administration's overall international economic policy, which has as two of its key aims the promotion of U.S. exports and the enhancement of the international competitiveness of U.S. companies. This approach is consistent with the President's program to renew the American economy, and his insistence that as foreign investment is welcomed here, our investors must be equally welcome in other countries. The importance of our outward investment is seen in various ways.

U.S. companies in energy and other natural resource sectors continue to search around the world for profitable investments. Particularly in countries that have only recently adopted market-oriented reforms, a government-to-government structure of investment rights and protections can be vital. Investment abroad is also an increasingly important part of a successful export strategy. Manufacturers need a local presence to market, service and adapt their products. In many instances, the need is for a distribution outlet or network under the control of the manufacturer. In some cases, production facilities or joint ventures may be desirable as well, particularly in sectors that are evolving into truly global industries.

Finally, service providers almost by definition require a physical presence in markets where they operate. Our highly efficient financial services, telecommunications and other sectors need investments in foreign economies in order to compete effectively with rivals from other parts of the world.

The administration is pursuing on multiple fronts the dual aims of export promotion and international competitiveness in our outward investment policy. We seek market opening, nondiscriminatory treatment and basic fairness for U.S. investors.

In key markets such as Japan and Korea, where an on-the-ground presence is especially important in gaining effective access for U.S. exports, we are embarking on intensive bilateral negotiations to address a variety of formal and informal barriers to U.S. investors. In the Uruguay round, we have negotiated an agreement that contains important prohibitions on trade-related performance requirements. The services negotiations in the round will also open up important markets for U.S. companies.

In the OECD, we have in place the codes of liberalization of capital movements and current invisible operations, which cover the establishment of an investment, and the national treatment instrument concerning established investment. We now are supporting the OECD's conduct of a comprehensive study on the feasibility of negotiating a so-called "wider investment instrument" that could serve as a binding, state-of-the-art, comprehensive multilateral investment agreement. The bilateral investment treaty program, which has enjoyed bipartisan support during its existence, is consistent with our overall investment policy. It is a useful tool for promoting and protecting U.S. investment interests, especially in those countries where our rights are not protected through the treaties of friendship, commerce and navigation (FCN), or similar agreements, or through the OECD instruments. The program has assumed a new and important dimension in its application to the republics of the former Soviet Union and other countries embarking on market-based reforms.

BILATERAL INVESTMENT TREATIES PROVIDE VITAL PROTECTIONS

U.S. bilateral investment treaties provide five basic protections for U.S. investors:

—First, they level the playing field by guaranteeing U.S. investors parity with investors from other countries. Altogether, other countries have signed over 600 BITs worldwide. Parties to those treaties use them to increase their companies' ability to penetrate new markets. We likewise need to help our companies compete and can use BITs to open up opportunities for them, particularly where countries have heretofore restricted foreign direct investment.

Our treaties specify that U.S. investors will be treated as well as domestic investors (national treatment). If a country chooses to treat foreign investors more favorably than domestic investors, these treaties also ensure that U.S. investors will be treated as well as any other foreign investor (most favored nation treatment). Any exceptions to these rules are limited and specifically described in annexes or protocols of the treaties.

Our BITs thus ensure that U.S. companies will receive treatment no less favorable than that accorded to their competitors.

—Second, these treaties protect U.S. investors in the event of expropriations by incorporating into the treaty the highest international law standards for expropriation and compensation and by guaranteeing prompt, adequate and effective compensation equal to the market value of their investments. Such a guarantee serves as both a deterrent to and remedy for expropriation.

—Third, U.S. investors are guaranteed the right to transfer funds without delay using a market rate of exchange. This is clearly very important for repatriating profits, but it covers all transfers, including interest and proceeds from the liquidation of an investment. Such a guarantee can also help increase U.S. exports since free transfers facilitate the purchase and import U.S.-produced goods and services. Further, by covering royalties and fees, such a guarantee should help increase U.S. exports related to intellectual property.

—Fourth, our BITs prohibit a party from imposing performance requirements on an investor, such as local content or export performance requirements. This helps guarantee that U.S. investors will not be coerced by host governments into inefficient and trade distorting practices. This provision may also open up new markets for U.S. producers and increase U.S. exports. U.S. investors protected by BITs can purchase competitive U.S.-produced components without restriction as inputs in their production of various products. They can also import other U.S.-produced products for distribution and sale in the local market. And they cannot be forced, as a condition of establishment or operation, to export back to the U.S. market or to third-country markets locally produced goods.

Argentina has agreed in its BIT with us to eliminate its performance requirements in the automotive industry no later than eight years from the entry into force of the treaty, a step that should benefit U.S. automotive parts producers.

—Fifth, our BITs grant investors the option of submitting an investment dispute with the treaty party's government to international arbitration. There is no requirement to use that country's domestic courts.

As some of the examples I have cited indicate, many investment restrictions have the effect of restricting trade flows. Our BITs thus not only help remove restrictions on U.S. investments but also remove impediments to U.S. exports.

I would like to point out two other important BIT elements:

—In our treaties with countries which are still in transition to market economies—i.e., those in Central and Eastern Europe and the New Independent States of the former Soviet Union, we have explicitly addressed "doing business" issues. These include obtaining office space; ensuring nondiscriminatory access to public utilities and other public services; and the right to conduct market studies, advertise, disseminate commercial information and market goods and services. We have included such provisions in our BITs with Armenia, Bulgaria, Kazakhstan, Kyrgyzstan, Moldova and Romania to make clear that BIT guarantees extend to the basics of doing business.

—Our BITs give companies the right to engage top managerial personnel of their choice, regardless of nationality. This ensures that a company can hire the best available talent to manage its investment—a key element in being competitive in a global market. It is also a protection against any arbitrary local hire quotas which might interfere with a company's ability to manage its investment.

In sum, U.S. BITs are the most rigorous in the world. In areas such as freedom from discriminatory treatment in establishing an investment and freedom from performance requirements the standards of U.S. BITs exceed those of other industrialized nations.

BITS ADVANCE U.S. INTERESTS

Secretary Christopher has emphasized that promotion of U.S. economic security is a principal goal of our foreign policy. I have noted that our BIT program contributes toward this goal. Let me amplify how the BIT program advances our commercial, foreign policy, and international economic interests.

The commercial importance of BITs is illustrated by the fact that U.S. investors had some $487 billion invested overseas (on a historical cost basis) at the end of 1992. Traditionally, countries such as Canada, the U.K., Germany and other West European countries have been the primary hosts of U.S. investment abroad. In recent years, however, U.S. investment in Central and Eastern Europe, in Latin America, and in East Asia has grown significantly. U.S. companies are also beginning to invest in Russia and the other republics of the former Soviet Union. Thus, U.S. investors are particularly interested in receiving BIT protections in those countries.

U.S. investment abroad generates important trade, employment and other important benefits for the United States. Trade and investment are linked, and are becoming increasingly so. U.S. affiliates abroad are our best customers. As I have discussed, companies need to have an on-site presence, even in developing countries. American firms increasingly use their overseas affiliates' sales and distribution net-

works, R&D expertise and specialized production techniques to compete with Japanese and European companies in foreign markets.

U.S. exports to foreign affiliates rose from $68 billion in 1986 to $115 billion in 1991, an increase of 70 percent. Such exports accounted for 27 percent of total U.S. merchandise exports in 1991. Moreover, these exports accounted for an estimated 2.2 million of the 7.9 million U.S. jobs supported by overall U.S. merchandise exports in 1991.

The overseas operations of U.S. companies also make substantial contributions to the U.S. balance of payments. For example, in 1991, they contributed a record net surplus of $21 billion thru sales to affiliated companies overseas.

To date, the United States has signed 25 BITs, of which 13 are now in force. Over the last three years, we have had negotiations with another 20 countries, and at least 25 additional countries have expressed interest in a BIT.

The U.S. business community strongly supports the BIT program. Through the State Department's Advisory Committee on International Investment and the various advisory committees of USTR and the Commerce Department, we have closely consulted with business, labor, legal and academic representatives in developing and refining the BIT prototype text and in pursuing the program. The bilateral treaty subgroup of the U.S. Council for International Business has also been particularly helpful in this regard.

Our BITs especially are important in promoting our economic interests and developing commercial opportunities in the countries of Central and Eastern Europe and the former Soviet Union. Our companies may enjoy once-in-a-lifetime opportunities to participate in the privatization of these economies.

Our BITs will remove investment restrictions and establish common, market-based legal, economic and commercial rules. In doing so, they give our companies "first mover" or "first in" advantages by getting them in at the beginning of the move to market systems, with obvious important long-term implications. They constitute a framework of government obligations on the treatment of investments within which U.S. companies can operate.

In addition, these countries learn from our negotiations, and apply these lessons not just in the treaty but also in their domestic legislation. The administration will continue to pursue treaty negotiations with those countries in transition with which we have not yet concluded BITs.

—The Senate has already given its advice and consent to treaties with Poland, Russia, the Czech Republic and Slovakia;

—Today, we are presenting BITs with Armenia, Bulgaria, Kazakhstan, Kyrgyzstan, Moldova and Romania;

—We are negotiating with the Baltics, Belarus, Hungary, Mongolia, Turkmenistan and Ukraine; and

—We are prepared to negotiate treaties with all of the other newly emerging democracies which want BITs with us.

Let me also add that our BIT program with these countries helps advance our foreign policy goal of promoting their moves to democratic pluralism and the rule of law as well as a market economy. We have worked closely with the Congress in shaping the components of our policy, which include support for privatization, economic stabilization, debt rescheduling, trade financing, humanitarian and food aid, and the promotion of nuclear safety and environmental programs.

BITs are also a means of promoting our economic and commercial interests in other countries that are turning toward market-oriented policies. We hope to encourage these policy changes through the BIT negotiation process, such as in the area of privatization. Moreover, BITs give protection against future expropriations should any of these countries reverse course.

The treaty with Argentina, our first to be completed with a South American country, represents an important milestone in the BIT program and, indeed, in international law generally. Argentina is engaged in the most comprehensive privatization program in its history and is implementing other wide-ranging, market-oriented reforms as well. The BIT can help support these moves and get our companies in on the ground floor.

Like many Latin American countries, Argentina has long subscribed to the so-called Calvo Doctrine, which *inter alia* requires that foreign investors submit disputes arising in a country to that country's local courts. The conclusion of this treaty, which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from this restriction. Such a precedent has already helped pave the way for similar agreements with other Latin American countries as the competition for foreign investment intensifies there and in other areas of the world.

While the treaty with Ecuador is our first with an Andean Pact country, we are also negotiating with Bolivia, Peru, Colombia and Venezuela. In addition, we are in advanced stages of negotiations with Costa Rica and Jamaica and have other ongoing negotiations.

Outside of Latin America, we have held at least one round of negotiations with a number of countries. Our BIT program has posed a challenge with respect to many of the countries in East Asia, particularly the members of ASEAN. A number of those countries heretofore have not been willing to meet all of our BIT standards, such as providing national treatment for establishment or prohibiting performance requirements. Some have suggested that we lower our standards in order to conclude BITs with those countries. We believe that would be a mistake, since we have been very successful in raising international standards through our BIT program. We want to continue that process, not step backwards.

One final point: the resources available from foreign investment to the economies in transition and other reforming countries far exceed anything the international donor community could provide in foreign assistance on a sustained basis. In fact, foreign direct investment has been the largest component in international resource flows to developing countries over the last five years. At a time of increased demand for foreign assistance and the reduced levels of that assistance available from some traditional donors, it is vitally important for developing countries and the economies in transition to attract domestic and foreign private investment. To do so, these countries must undertake the market-oriented reforms needed to make themselves attractive to private capital and otherwise establish a favorable investment climate. A bilateral investment treaty is one element in this program. Other important elements include bilateral tax and intellectual property rights agreements, which provide additional important guarantees and protections for U.S. investors.

In closing, let me thank you, Mr. Chairman, for your continued interest in the BIT program, and for that of your very able staff. I would be happy to answer any questions you may have.

ANNEX

STATUS OF U.S. RELATIONS WITH THE PROPOSED BIT PARTNERS.

This annex reviews briefly the status of U.S. relations with the eight countries on whose BITs the Senate is being asked to give its advice and consent. It also reports on the status of the BITs the senate approved over the last two years.

In Eastern Europe, Romania has made substantial progress toward democracy, human rights and a free market economy over the last eighteen months, and our bilateral relationship is expanding proportionately. Romania complies fully with the freedom of emigration requirements of the Jackson-Vanik amendment. The focus of U.S. policy is to anchor Romania firmly to the West. Thus, in addition to approval of the BIT, the administration supports the extension of MFN status to Romania—once our largest trading partner in Eastern Europe—as quickly as possible and urges speedy approval of the complementary U.S.-Romania trade agreement as well.

In Bulgaria, successive governments have sought since 1990 to improve relations with the U.S. on the grounds that Bulgaria's foreign policy goals basically converge with ours. Bulgaria has made dramatic progress in consolidating a democratic system, and civil and human rights have been restored to ethnic minorities. It has also made significant progress in its economic reform efforts, quickly laying most of the building blocks for a market economy. We are sending an OPIC investment mission to both Romania and Bulgaria this fall.

Turning to the Republics of the former Soviet Union, the United States has good diplomatic relations with the countries whose treaties are before you today.

- Kazakhstan has advanced toward democratization and the establishment of a market economy. Its enormous mineral resources make it attractive to foreign investment, with oil and natural gas reserves that exceed Kuwait's. U.S., British, French and Italian energy firms have already formed joint ventures in the country.
- Kyrgyzstan is one of the most democratic-minded of the New Independent States. President Akayev and his government are committed to maintaining good relations with a broad range of countries, particularly the United States.
- Moldova has made significant progress in implementing democratic and economic reforms. The Moldovan Government has a positive record of achievement in the human rights field. Relations with the United States are accordingly positive and forward-looking.
- Although Armenia has made advances toward democratization and the establishment of a market economy, we are very concerned about the conflict with Azerbaijan over Nagorno-Karabakh.

In South America, our relationship with Argentina is perhaps closer now than at any other time in history. President Menem's market-oriented policies have won widespread support. Argentina seeks to further deepen our relationship into a full partnership of consultation and cooperation on bilateral and global issues.

Ecuador has a long history of cooperative relations with the United States. It has strong democratic institutions and participates actively in inter-American organizations. Ecuador has eliminated almost all coca production and has developed a vigorous program of combating money laundering and drug trafficking. The current government also resolved to our satisfaction an investment dispute involving the U.S. owner of the EMELEC power company.

Over the last two years, the Senate has given its advice and consent to treaties with Sri Lanka, Poland, Russia, the Congo, Tunisia and Czechoslovakia. The treaties with Sri Lanka and Tunisia are in force. The treaty with Czechoslovakia entered into force at the end of 1992 and automatically continued in force with the Czech Republic and the Republic of Slovakia when they came into being.

The business and economic relations treaty with Poland, which contains BIT elements, has been ratified by both the United States and Poland and awaits an exchange of instruments of ratification to bring it into force. The exchange is pending action by the Government of Poland to improve its intellectual property rights regime. The treaty with the Congo has also been ratified by both parties and we are making arrangements to exchange instruments of ratification.

The Russian Parliament has not yet ratified our BIT with Russia. When the Parliament has ratified the treaty and instruments of ratification have been exchanged, the treaty will enter into force.

The CHAIRMAN. Thank you very much indeed. I would like to know why the countries you chose were chosen to negotiate these BIT's with, when there were many others in the world that were not chosen?

Mr. TARULLO. Mr. Chairman, it is not so much a question of choosing only a limited list of countries. We have indicated generally to countries throughout the world our general interest in negotiating BIT treaties. And, indeed, we have in many instances made available prototype drafts so that governments have an opportunity to assess whether they are interested.

But we do require, before we are going to begin negotiations, an indication of a certain commitment to the kinds of principles that are embodied in the treaties. When a country evinces an interest in adhering to those principles and when we have good reason to believe that they are sincere in that indication of interest, then in general we are prepared to negotiate with them. As the negotiations proceed, we may find out that there are some problems; a country cannot move quite as quickly as it may have wanted to. In these instances, the negotiations over various time periods have been successfully concluded.

So there is no magic to the list of eight. As you know, there have been 15 beforehand and there will be others to come later.

The CHAIRMAN. I believe it is correct to say that we have given our advice and consent to BIT's with 15 nations now. It is my understanding that each of these has entered into force except the ones with Poland, Russia, and China, the People's Republic. What were the reasons for delay in each of these countries?

Mr. TARULLO. Mr. Chairman, in the case of Poland, as a matter of policy we are awaiting satisfactory changes in the intellectual property protections afforded by the Government of Poland before we formally exchange notices of ratification. Once the Polish Government has made the required changes, that treaty—we will ratify that treaty and it will enter into force.

In the case of Russia, the Russian Parliament has not acted on the treaty to this point, and we are simply awaiting action by the Russian Parliament.

And I believe in the case of China——

The CHAIRMAN. I misspoke. I should not have said China. I meant the Congo.

Mr. TARULLO. I understand, Mr. Chairman. In the case of the Congo, I believe we have a problem of conforming language. Ms. Pickering?

Ms. Pickering: We are making arrangements with the Congo to exchange instruments of ratification, which we hope to do very soon.

Mr. TARULLO. I gather the technical problems have been worked out.

The CHAIRMAN. All right. And with what countries is the administration presently negotiating BIT?

Mr. TARULLO. Let us see. We have a broad range that are in various stages of negotiation. I might ask my colleagues from USTR to review that list for you.

The CHAIRMAN. Or maybe you could submit the list for the record.

Mr. TARULLO. Or submit it for the record if you would like.

Mr. Abelson: Oh, sure, absolutely. There are about 18 countries and we can submit that for the record.

[The information referred to follows:]

BIT negotiations have been held with the following countries:

AMERICAS

Barbados; Bolivia; Colombia; Costa Rica; Jamaica; Peru; Uruguay and Venezuela.

AFRICA/NEAR EAST

Nigeria.

ASIA

China; Hong Kong and Pakistan.

EUROPE—INCLUDING FORMER SOVIET UNION

Belarus; Estonia; Hungary; Latvia; Lithuania; Mongolia; Turkmenistan and Ukraine.

The CHAIRMAN. Good. And when do you expect some of these BIT's will be submitted to the Senate?

Mr. ABELSON. Well, we always have high hopes but much of the chance of progress relies on the other governments. We are hopeful that after action on advice and consent on the eight that are before you now, that we will have additional ones to supply you next year. We are always hopeful.

Mr. TARULLO. Mr. Chairman, my understanding is that there are no negotiations which are on the verge of completion right now.

The CHAIRMAN. What have been the significant accomplishments, in your view, of the BIT program?

Mr. TARULLO. Mr. Chairman, I believe the BIT program has been significant, but I will also acknowledge to you at the outset that it is difficult to isolate the effect that the BIT program has from all the other factors which affect investment, foreign direct investment in a particular country. But let me try to explain why, at

least at a qualitative level, I think the BIT program is important and is an ongoing success.

First, as you know, Mr. Chairman, when companies are considering investments, one of the most considerations for them is the certainty of the rules which they will face once they put the money into a particular distribution network or plant or any other kind of investment. The guarantees which I mentioned in my opening statement provide a substantial amount of certainty for those companies and provide an international arbitration forum for them should they have a dispute with the host countries.

Through our conversations with various business groups, including those two which you mentioned in your opening statement, and through our consultations with the advisory committees that are operated by the Department of State and the Office of the U.S. Trade Representative, we continually get support and reinforcement from our businesses to the effect that this kind of certainty, this kind of rule-based approach is important to them. It provides an additional level of certainty and protection from expropriation, from restrictions on transfer, from discriminatory treatment, among others.

Second, if I may return for a moment to the situation of the countries of the former Soviet Union and some of the East European countries, I think there we see another kind of benefit. These countries, as you know, Mr. Chairman, do not have legal and commercial institutions of any sort that resemble what we in the United States, or in Europe, or in many parts of Asia have come to expect and rely upon. They are just getting started in creating institutions within which a market economy can operate.

There is a—it is not so much a problem of what the rules are, as a complete absence of rules in some instances because so much was done by decree. In these cases, the negotiation of the BIT's provides some first legal building blocks for the investment in economic circumstances and climate of those countries, and thus it provides very important protections to our potential investors in the short term. I think in the medium term it also moves those countries along the road toward a more sophisticated set of market-based institutions, which will also redound to the benefit of our companies in the future.

We have, in response to the questions from the committee, Mr. Chairman, provided you with data on investment flows to the countries whose BIT's the Senate has given its advice and consent. What you will see is the flows go up and down, and that really gets back to my first point which is investment in a country, in a foreign country, is a decision by a private company based on a whole set of considerations: economic growth potential of the country, the political stability, and the existence of certain rules on which they can rely. We believe the BIT program contributes to that third among other factors, and thus we think it is important to continue.

The CHAIRMAN. Is there any evidence to suggest that increased investment as a result of the protection provided by these treaties might be able to reduce the direct U.S. foreign assistance?

Mr. TARULLO. Well, Mr. Chairman, I do not know that there is direct evidence that can link the two. Once again, it is hard to isolate the variables. But what I will say is that it is essential for

these countries that they create environments in which investment is welcome. Because we all know that even foreign assistance at higher levels than are possible today in the United States and throughout the world, are not going to be adequate, anywhere close to adequate to meet the development needs of these countries.

Not only do they need capital coming into those countries, but they need to have the business environment in which that capital will be productive, will produce growth. And an investment climate in which companies from the United States and other developed countries find opportunity is an economy that has some growth potential.

The CHAIRMAN. Thank you. The treaties with Armenia, Kazakhstan, Kyrgyzstan, Moldova, and Romania have provisions to assist American investors with the transition from a centrally controlled nonmarket economy. Could you explain how this helps American investors and why there are these differences? I understand some of these countries have set up special offices to help American investors.

Mr. TARULLO. That is correct, Mr. Chairman. And I think you rightly point to a special feature of some of these treaties with formerly state-controlled economies. Elaborating a bit on the point I made earlier, the institutions for a market economy do not exist. Not only don't the institutions of a legal code exist, but in many instances the operation of a market for renting office space, for example, does not exist. And for getting oneself linked up to public utilities if you are coming in as a new investor, that does not exist.

So it has been the judgment of the executive branch that inclusion of special so-called doing-business provisions in treaties with countries moving away from state control toward market orientation are an important complementary element of the BIT which further facilitates investment by U.S. investors which choose to make it.

The CHAIRMAN. I thank you very much indeed, and there will be some further questions that will be submitted to you. The record should stay open for at least 3 working days for the submission of any questions by any of my colleagues who would choose to.

And I do hope you would take back with you, as I mentioned earlier, the desire on our part that you send up soon the human rights treaties on racism, women's rights, and the American Convention and the Covenant on Economic, Social, and Cultural Rights.

Mr. TARULLO. Mr. Chairman, with respect to your former point, of course we will answer any questions you or your colleagues may have. With respect to the latter point, I will communicate it to the appropriate authorities in my Department.

The CHAIRMAN. Well, aren't you the appropriate authority?

Mr. TARULLO. Not for the human rights or women's rights issues, Mr. Chairman. But I will speak to the appropriate assistant secretary.

The CHAIRMAN. Right, good. Well, I thank you very much indeed and again apologize for the delay, and the hearing is adjourned.

[Whereupon, at 11:15 a.m., the hearing adjourned, to reconvene subject to the call of the Chair.]

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APPENDIX

STATEMENT OF JERRY J. JASINOWSKI, PRESIDENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

DEAR MR. CHAIRMAN: On behalf of the National Association of Manufacturers, I urge prompt and favorable action by your committee and by the full Senate in the matter of ratifying U.S. bilateral investment treaties with Argentina, Bulgaria and Romania. We understand that a number of additional treaties may also he submitted, primarily with certain former Soviet republics in Central Asia and with certain nations in South America. We would equally support ratification of these treaties, if they are submitted at this time.

The NAM has supported the U.S. bilateral investment treaty program from its inception. These treaties provide critical legal protection for U.S. investments and trade interests in signatory host nations. Foreign affiliates of U.S. companies remain our best export customers; the United States maintains a surplus in trade relations with such affiliates, as opposed to our continued overall trade deficit.

All of the treaties that will be reviewed by the committee follow the general U.S. model in providing:

- National treatment of investors in accordance with international law, and including refraining from imposition of trade-restricting performance requirements;
- Protection of U.S. intellectual property rights;
- Establishment of agreed restraints on any future expropriations or nationalizations, including payment of prompt, adequate and effective compensation;
- Establishment of agreed dispute settlement procedures, including timely access to international arbitration;
- Guaranteed right to repatriate earnings and to pay for imports of machinery and other imports in convertible currency. This provision is especially important in supporting the ability of U.S. companies to expert U.S.-made products to their affiliates, since foreign governments frequently cite balance of payments and other problems as an excuse to deny investors the right to exchange currency freely for the purpose of importing equipment and materials.

While the NAM supports this entire program and all treaties under consideration for submission at this time, we believe that the bilateral investment treaty with Argentina is especially significant. Argentina has long maintained an inward-looking "import substitution" economic model, characterized by high tariff rates, high levels of government ownership or control of industry and discouragement of foreign investment and imports. This system was a model for much of America.

The Argentinian system is now being liberalized, with substantial benefits for U.S. industry and U.S. exporters, as well as, of course, for the living standard of Argentina's citizens. In 1988, U.S. exports to Argentina were barely $1 billion, and the U.S. deficit in trade with Argentina was almost $400 million. Last year, our exports were $3.2 billion, and the U.S. trade surplus with Argentina was $2 billion. An estimated 40,000 jobs have been created in the United States due to this increase in exports to Argentina. This turnaround is clearly linked with growing U.S. investment: direct U.S. investment has inch from $2.2 billion in 1989 to $3.4 billion by the end of 1992.

But the growth of U.S. exports to Argentina has only kept pace with the growth of exports from our competitors in Europe to Argentina. We need to maintain and improve our competitive position, and this would be assisted by the proposed treaty. Moreover, it is important that we encourage continued policies of reform and economic liberalization in Argentina, which will lead to a sounder economy, greater support for democracy and a higher standard of living for the Argentinian population. And far from being a model of authoritarian political and economic policies, Argentina is now becoming a model of economic reform in South America. U.S. ratification of this treaty, we believe, will encourage political developments favorable to

Argentina, as well as economic results favorable to U.S. exports. At the NAM, we also believe that this will be true for the other bilateral investment treaties being considered in this package.

STATEMENT OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

The United States Council for International Business strongly supports prompt ratification of the bilateral investment treaties (BITs) currently before the Senate. These treaties represent a continuation of the United States' highly successful BIT program, and their ratification will help ensure that U.S. investors in each of the countries in question are treated fairly through legal and administrative regimes that facilitate free investment flows and guarantee basic protection for investor property.

The United States Council for International Business is an organization of some 300 leading U.S. companies, service firms, and associations. Dedicated to promoting an open system of world trade, finance, and investment, it represents American business views in the major international economic institutions and before the executive and legislative branches of the U.S. Government. Through its status as the U.S. member of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee to the OECD (BIAC), and the International Organization of Employers (IOE), the Council is the U.S. business organization that officially consults with the United Nations system, the GATT, the OECD, and the ILO. The Council has strongly supported the U.S. Government's bilateral investment treaty program and has provided U.S. negotiators with private sector views on a regular basis.

The economic benefits of private foreign investment—including access to new capital, new technologies, and new and better products—are well-documented, and such investment is widely recognized as an important engine for worldwide economic growth. Investment abroad by American firms contributes significantly to U.S. exports and to our competitiveness in general—as illustrated by an important recent study by the Emergency Committee on American Trade *(July 1993 ECAT report, "Mainstay II: A New Account of the Critical Role of U.S. Multinational Companies in the U.S. Economy").* Moreover, with official development assistance from the industrialized countries scarce, private foreign investment will provide the main source of international capital flows and technical expertise to the developing and formerly communist countries over the coming years. U.S. investors are well-placed to take advantage of these new opportunities, provided that the basic international environment for foreign investment continues to be one of openness and fair treatment.

Bilateral investment treaties are an important means of securing such an open and fair environment. The U.S. Council fully supports the U.S. BIT program, and welcomes the progress achieved thus far by U.S. negotiators. Given the importance of BITs to U.S. investors abroad, we are pleased that the new Administration has wisely chosen to continue the vigorous efforts of previous Administrations in this field.

By establishing basic legal principles for the protection of foreign investment, BITs improve investors' confidence in the investment climate in a host country, which when combined with positive economic conditions encourages foreign investment in that country. The more than 400 such treaties concluded thus far by all governments worldwide illustrate that BITS are recognized by most countries as an important tool for promoting and protecting foreign investment.

The United States began its BIT program during the late 1970s and early 1980s, after European states originated the concept, and much has been accomplished in this relatively short period of time. Treaties have been completed (or are in the final stages of negotiation) with virtually all the formerly communist states of Eastern Europe and Central Asia, along with a number of countries in Latin America, Africa, and Asia. U.S. BITs are among the very best in the world in terms of explicit commitments imposed on governments in their treatment of foreign investment. Unlike the broader friendship, commerce, and navigation (FCN) treaties that the U.S. used in the past, BITs address themselves exclusively to investment issues and provide greater assurances to the investor. They incorporate five basic features:

- A very broad definition of what constitutes investment, covering numerous areas of importance for U.S. companies, including explicit recognition of intellectual property as a form of investment to be protected.
- Establishment of agreed dispute settlement procedures, allowing investors to bring disputes directly to binding third-party arbitration. This is the most valuable of the BIT provisions for promoting investor confidence.

- Treatment of foreign-owned investment on a most-favored-nation basis and on terms no less favorable than those applying to locally-owned investment.
- The right of the investor to make all transfers related to an investment without restriction.
- Explicit recognition of clearly defined international law standards in cases of expropriation or nationalization, and in the payment of compensation for such actions.

U.S. BIT negotiations have provided a practical forum for dialogue on investment policy with developing countries and those in transition from centrally planned economies. This dialogue has had the beneficial effect of helping to secure effective reversal of many deleterious developing country policies and practices with respect to foreign investment.

To cite a relevant example from the treaties now before the Senate: the treaty with Argentina commits that country to respect for the settlement, at the investor's initiative, of disputes between the private investor and the host country via international arbitration. Argentina is to be complimented for its positive attitude towards such third-party dispute resolution and to reconciling this approach with its internal legal order. This is but one of many successes the U.S. BIT program has achieved in creating a more investor-friendly climate abroad, and we are confident that further such advances will result from continued negotiations.

More broadly, BIT negotiations and the constructive dialogue they promote have contributed greatly to the emergence of an international consensus on the fundamental standards of investment policy. Although some countries still resist this consensus, bilateral negotiations are an excellent means of locking in key host countries and of contributing to the development of a more effective international legal framework in the investment field.

The proinvestment consensus which the U.S. has helped to foster is reflected in numerous multilateral forums, including the GATT Uruguay Round negotiations over trade related investment measures, the European Energy Charter negotiations, and, of course, the agreed text of the proposed North American Free Trade Agreement—which would in essence establish a trilateral investment agreement between the U.S., Canada, and Mexico. The Council is hopeful that the advances made bilaterally by the U.S. can be further translated into effective multilateral disciplines over government treatment of foreign investment.

These treaties represent substantial advances in the protection of U.S. private investment in several countries that are, or have the potential to be, important host states for American investment. Given the inherent value of such treaties to U.S. investors, we believe the U.S. should continue its aggressive negotiating strategy and avoid linking such negotiations to other, nonrelated issues. We urge the Senate to ratify these treaties swiftly, and we further recommend that the Administration and Senate work together to ensure prompt attention to additional BITs either already signed or in the final processes of negotiation.

Statement of Joel W. Messing

INTRODUCTION AND BACKGROUND

As an individual citizen of the United States, I support our Government's Bilateral Investment Treaty program and the investment treaties now before the Senate.

I have been an international lawyer and businessman for more than 20 years. I had the privilege of studying international economics and law and conducting research on the economic development of underdeveloped nations. My professional career has involved investment issues in countries representing a wide spectrum of development.

BILATERAL INVESTMENT TREATIES

International investment is a critical foundation for economic strength—global economic strength and American economic strength. International investment stimulates economic activity: new enterprises, new jobs, profits, savings, and further investment—in the United States and abroad. External investment by American business interests will stimulate the growth of countries which are markets for our exports. Inward investment by foreigners will create jobs in America and reduce imports to America. For better or worse, global economic strength and American economic strength have become interdependent, and this interdependence will deepen in the 21st century.

With national economies becoming more globally interdependent, with economic borders becoming more porous, with telecommunications becoming more widely instantaneous, a strong, reliable, legal infrastructure for international investment is

essential if investments are to flow unimpeded in response to market forces. Unless and until a satisfactory multilateral investment regime is developed, bilateral investment treaties will continue to form the backbone of this legal infrastructure.

For more than a century, the United States has entered into Treaties of Friendship, Commerce and Navigation, primarily with European states, to protect the expansion of trade and shipping and to encourage United States investment abroad by prescribing the treatment to be given to nationals of the contracting parties regarding the establishment and protection of investments. These classic treaties of Friendship, Commerce and Navigation are the forebears of modern treaties concerning the encouragement and reciprocal protection of investment, commonly referred to as "bilateral investment treaties."

Since World War II, highly industrialized countries and developing countries have found common ground in the utility of bilateral investment treaties. Developing countries, seeking to import capital as a lever for economic development, have entered into bilateral investment treaties in order to induce capital-rich countries to invest there. Many developing countries have requested negotiations leading toward a bilateral investment treaty with the United States. These countries recognize that rational American investors are unlikely to invest scarce capital in the absence of a law-based regime under which the treatment of their investments is fair, predictable and enforceable.

FAVORABLE TREATY PROVISIONS

Our Government, acting with the advice and support of the business community, has developed a modern prototype bilateral investment treaty which has gained wide international acceptance and become the standard against which other international investment treaties and guidelines are measured. This prototype contains a variety of provisions which are designed to ensure the treatment of cross-border investments in accordance with criteria which responsible American business managers expect. The most important provisions are:

1. Investment is broadly defined and includes intellectual property—a subject which remains unresolved and hence unprotected under the General Agreement on Tariffs and Trade.
2. The right of entry and establishment, subject to agreed exceptions for specified industries.
3. National treatment or most favored nation treatment, whichever is more favorable to the investor.
4. Prohibition of arbitrary or discriminatory measures and of performance and local content requirements.
5. Transparency of local investment regulation to ensure due process of law.
6. Protection against discriminatory or private purpose expropriation and, in case of expropriation, payment of "prompt, adequate and effective compensation."
7. Freedom to make cash transfers in and out, including the realization of returns and the recovery of an investment which has been sold or liquidated.
8. Binding arbitration of disputes.
9. Freedom of each country to tax investments and investment returns fairly and equitably and to protect its own essential security interests.

Two points bear elaboration. Each country may carve out exceptions for specific industries through an annex to the treaty. Thus some pure protectionism survives in an otherwise liberal investment regime. And each country may protect its national security through "necessary measures," such as section 71 (the Exon-Florio provision) of the Defense Production Act of 1950.

ECONOMIC POLITY CONCERNS

It is natural to inquire whether and why the United States should promote investment by Americans in other countries when our domestic investment needs are so great. The question, thus framed, suggests a *non sequitur:* that bilateral investment treaties, by developing a reliable infrastructure for international investment, are somehow antithetical to domestic investment. However, if we believe in free enterprise, if we believe that free market forces will direct investment capital to the highest returns, and if we also believe in the vitality and productivity of American labor and capital, then there is no inconsistency between the development of a legal regime for international investment and the allocation of investment capital to domestic uses.

By providing reciprocal protection, bilateral investment treaties ensure a free market, consistent with American economic and political traditions. With these trea-

ties in force, rational investment decisions can then be made by private enterprises, not by governments.

CONCLUSION

The United States has long emphasized the virtues of an open investment policy that creates a hospitable climate for foreign capital. The logic of this position has been proven by the virtual stampede of newly liberated Central European and East European countries toward market economies which invite foreign capital to spur development and by the flow of foreign capital into the United States when market conditions warranted. To retreat now from free market principles would undermine our moral position, shake the confidence of other nations in the stability and fairness of American foreign policy, and threaten the very infrastructure we have labored so arduously to create. To support free market principles as applied to international investment is to take the high road and to demonstrate confidence in the ability of our economy to grow through both domestic and foreign investment opportunities.

For all the foregoing reasons, I support our Government's Bilateral Investment Treaty program. Accordingly, I urge you to recommend that the U.S. Senate advise and consent to the ratification of the bilateral investment treaties before you.

STATEMENT OF AMBASSADOR CHARLENE BARSHEFSKY

The office of the United States Trade Representative is pleased to submit written testimony with respect to the eight bilateral investment treaties (BITs) submitted for the Senate's approval. We are gratified that these treaties are moving toward ratification, as the BIT program is an important component of U.S. trade and overall economic policy. We hope that these treaties, with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, the Kyrgyz Republic, Moldova and Romania, can be brought quickly into force.

Following letters in 1977 from Senators Claiborne Pell and Frank Church, this program was initiated in the late 1970's and the first negotiations were held in 1980. The first prototype tea was completed in 1982—the same year that the first agreements were signed. Finally, the first treaties were brought into force in 1989.

Over this period, we have worked closely with representatives of the private sector, particularly through the Investment Policy Advisory Committee to the United States Trade Representative and the interested Industry Sectoral Advisory Committees to the Secretary of Commerce and to the USTR and also through the Advisory Committee on International Investment. The treaties incorporate the advice on policy received from these and many other private sector groups. The investment policy issues involved have been the responsibility of USTR's interagency committee—with the negotiation of each of the submitted BITs cochaired by USTR and State, actively supported by Commerce and Treasury.

Since this program was initiated, the role of international investment in the global economy has steadily strengthened. Foreign direct investment in the international economy is growing rapidly; from 1980 to 1990, real foreign direct investment grew 11 percent annually—versus 4 percent annually for trade and 3 percent for GDP. Foreign direct investment has become a vital form of economic activity, channeling financial and human resources throughout the world.

The U.S. plays a key role in this process since it is the world's leading *home* and *host* country for international investment. The stock of foreign direct investment in the U.S. nearly quintupled in the 1980's to $420 billion in 1992. Similarly, US direct investment abroad stood at $487 billion at year-end 1992, growing at an average of 9 percent annually since 1982.

Looking at the role of U.S. investment abroad, exports are now a key source of employment and growth in America. Every billion dollars of U.S. exports meant nearly 19,000 domestic jobs in 1990—we now have over seven million export-related jobs in America. In fact, one in every six manufacturing jobs in America is related to exports. The average wage for these export-related jobs is 17 percent higher than the U.S. national average. Since 1987 growth in exports has generated more than half our GDP growth.

Investment is providing a key motor for this export growth. While trade and foreign investment were traditionally seen as alternative means of penetrating foreign markets, they are now understood to be integral elements of a firm's strategy for maximizing global production efficiencies. Growth in exports by U.S. parent firms to their affiliates has recently averaged 10 percent per year—coming to constitute $115 billion, 27 percent of all U.S. exports, in 1991.

Based on the fact that foreign and domestic investment promote trade, stimulate economic growth, create jobs, and foster competition and consumer welfare, the

United States has championed the cause of liberal, transparent foreign investment regimes. As the most important source and recipient of foreign investment, the U.S. has a critical stake in investment climates both here and abroad.

U.S. investment policy starts from the principle of national treatment with limited sectoral exceptions. Those exceptions generally derive from national security, e.g. in transportation and communications. This principle protects foreigners from general "screening" of their investments in the U.S. In addition, the U.S. provides freedom from performance requirements—no mandatory local content, export or technology transfer requirements. The United States allows free transfers of investment-related funds and maintains standards for expropriation that meet or exceed international norms. Finally, foreign investors are provided access to international arbitration to resolve investor-state disputes. All U.S. Bilateral Investment Treaties (BITs) provide for international arbitration at the investor's choice.

The President stated in his speech to the American University that, "We welcome foreign investment in our businesses, knowing that with it [comes] new ideas as well as capital * * * But as we welcome that investment, we insist that our investors should be equally welcome in other countries." This insistence is embodied in three concepts reflected in the prototype BIT.

First, American property overseas should be afforded fair and equitable treatment, including those standards required by international law. Property should only be taken in accordance with due process of law, for a public purpose and in a non-discriminatory manner. In such a case, the investor should be provided prompt, adequate and effective compensation. An American investor in a foreign country should be accorded full protection and security—and not be hindered by arbitrary or discriminatory measures.

Second, American investors should have full access to foreign markets. Clearly, prohibitions on, and discrimination against, U.S. investment impedes competitive U.S. companies in their global operations. Similarly, once a U.S. company is operating in a foreign country, restrictions on free transfers are a handicap in maximizing competitiveness. Foreign royalties, for example, may be critical to a smaller company trying to exploit world-class technology on a world-wide basis. Even large U.S. multinationals cannot indefinitely justify to their domestic shareholders profits blocked abroad.

Finally, foreign restrictions on investment must not result in agreements with private investors that damage overall U.S. competitiveness. The argument for free flows of investment and trade stems from the welfare gains arising from a more efficient and competitive supply of goods and services. Through general performance requirements, and through screening "according to the national welfare," countries distort such flows. By forcing local purchases by investors, for example, many countries have traditionally kept U.S. suppliers from the benefits of additional sales, greater economies of scale, and exposure to new markets. Even when the investor is able to accommodate such demands, these local content, export performance and technology transfer requirements appropriate U.S. jobs and know-how. We were successful in eliminating such measures in Mexico, through the Investment Chapter of the NAFTA, and we expect to achieve like results with other negotiating partners.

President Clinton stated in his transmittal of the recent BIT treaties that they will establish an agreed-upon basis for the protection and encouragement of investment. The BIT Program is thus a successful and important element of our international investment agenda. But we have several other efforts underway with respect to this investment agenda. The investment chapter of the NAFTA goes even further in some respects than the BIT, greatly liberalizing our trading partners' investment regimes. Among the industrialized countries, the U.S. currently relies on the Capital Movements Code of the OECD to bind the right of establishment. The United States also supports the OECD's conducting of a feasibility study for a comprehensive, binding multilateral investment agreement, known as the *"Wider Investment Instrument"*; any new instrument will have to incorporate the principles of our BIT on right of entry, post-establishment protections (including performance requirements) and dispute settlement. With respect to others' regional arrangements, we are working to ensure that integration efforts are not completed in a way that disadvantages U.S. interests—for example, through investment liberalization implemented on a non-MFN basis. With respect to the Uruguay Round TRIMs negotiations, we expect that baseline standards on local content and trade balancing requirements will be established; such an agreement will benefit the U.S. economy by automatically prohibiting these practices. Finally we are addressing investment issues with several trading partners, including Japan, in bilateral fora.

The tenets reflected in these negotiations follow Congressional actions in drafting U.S. trade laws. Section 301 of the Trade Act of 1974 has been amended to clarify that its coverage extends to foreign investment practices—such as restrictions on eq-

uity ownership, transfers, or local content—related to trade in goods and 'services. Legislation renewing the Generalized System of Preferences (GSP) also contains provisions reflecting such concerns, particularly with respect to expropriation and to equity ownership. Section 307 of the Trade and Tariff Act of 1984 established specific authority for the USTR to deal with export performance requirements, including retaliation, if necessary.

In conclusion, it should be emphasized that the BIT program is still in its early stages; more than a dozen other treaties are under negotiation and many more countries have expressed interest. Such agreements, with their high standards of protection and treatment, lend credibility to our efforts in every fora to achieve these high standards, assist countries in their domestic reforms and in achieving market-led growth, and promote U.S. exports and jobs. We would ask that the Senate give its advice and consent to ratification of these treaties as soon as possible.

RESPONSES OF U.S. DEPARTMENT OF STATE TO QUESTIONS ASKED BY SENATOR PELL

SUCCESS OF THE BIT PROGRAM

CURRENT OBJECTIVES OF CLINTON ADMINISTRATION

Question. What are the current objectives of the Clinton Administration with the Bilateral Investment Treaty program?

Answer. The BIT program is one element of the Administration's overall international economic policy, which has as its key aims the promotion of U.S. exports and the enhancement of international competitiveness of U.S. companies. The basic aims of the BIT program itself are:

—To provide protection for U.S. investment abroad, especially in regard to: treatment that does not discriminate on the basis of nationality either on or after establishment; performance requirements; hiring; expropriation; transfers associated with an investment; and international arbitration of investor-state disputes.

—To encourage adoption of market-oriented domestic policies that would treat private investment fairly, and thus allow foreign and domestic private investment to play a full role, consistent with market forces, in development.

—To support development of international law standards consistent with the previous two objectives and with our long-held position on the protections afforded foreign investors under international law.

In negotiating BITs, the U.S. is careful to point out that the existence of a BIT alone will not guarantee increased investment.

SIGNIFICANT ACCOMPLISHMENTS

Question. What have been the significant accomplishments or successes of the BIT program?

Answer. The BITs signed with members of the former Soviet Union (Russia, Armenia, Kazakhstan, Kyrgystan, and Moldova) as well as with members of the former Soviet bloc (Bulgaria, the Czech Republic, Slovakia, Romania, and the Business & Economic Agreement with Poland), are historic: formerly centrally-planned, communist dictatorships, closed to foreign investment, have signed agreements that embody liberal and transparent foreign investment principles.

The BIT signed with Argentina is an important milestone in our relations with South America. Like many South American countries, Argentina has long subscribed to the Calvo Doctrine (named after a 19th century Argentine jurist). The U.S. Argentina BIT, which provides investors the absolute right to international arbitration for the resolution of investment disputes, removes U.S. investors in Argentina from the Calvo Doctrine requirement to submit disputes arising there only to local courts. This treaty should help pave the way for similar agreements with other states in the region.

In addition, our BIT talks have coincided with, and in part influenced, efforts of several of our negotiating partners to reformulate laws and regulations with an aim to more fully join the world market system. Our dialogues with countries in transition have reflected their relatively broad reviews of current regimes; with other specific policies have been more frequent topics.

We have also found that our steadily increasing number of BITs, setting the highest standards of bilateral investment protection, provide very important support to U.S. positions in multilateral discussions. In our dialogues with the World Bank, the United Nations, the Asia-Pacific Economic Cooperation (APEC) group, and the OECD, and in our negotiations for an European Energy Charter we can point to these bilateral standards as goals for our partners to achieve.

RELATIONSHIP BETWEEN BITS AND INVESTMENT LEVELS

Question. During the period since April of 1989, when the first bilateral investment treaties entered into force, has the Administration seen an increase in U.S. investment in the countries involved?

Answer. In negotiating BITs, the U.S. is careful to point out that, while a BIT offers U.S. investors increased security, the existence of a BIT alone will not guarantee increased investment, as private sector investment decisions are made in response to a variety of factors in a free market.

The U.S. direct investment position in each of the BIT countries for 1988–92 may be found in Table 1, on the following page; In some cases (e.g., Morocco, Panama, Turkey), a BIT's entry into force seems to take place amidst a generally upward trend of U.S. direct investment. In others, (e.g., Senegal and Zaire), investment has decreased. The changes in investment levels in these countries resulted from a variety of factors. In some cases investors may have reacted favorably to statutory or regulatory changes governments took to bring their investment regimes into line with the BIT principles. In other cases, investors may have reacted to changes in political or economic conditions. In any case all of the treaties have only recently entered into force, and it would be premature to draw any definitive conclusions.

Table 1.—U.S. Direct Investment In BIT Countries Historical Cost Position: 1988–1992

[In millions of dollars]

Year	1988	1989	1990	1991	1992
Bangladesh	13	6	7	33	42
Cameroon	236	(2)	(2)	(2)	261
Czech & Slov Reps.	.....	.....	(1)	(2)	(2)
Egypt	1,637	1,541	1,226	1,239	922
Grenada	1	(1)	1	1	2
Morocco	26	35	49	57	76
Panama	6,874	8,913	9,257	10,427	11,457
Senegal	29	16	19	19	13
Sri Lanka	13	10	12	7	9
Tunisia	17	38	42	46	33
Turkey	246	343	515	529	705
Zaire	90	60	26	32	28
Total BIT	9,182	10,962	11,154	12,390	13,548

[1] Less than $500,000 (+,-)

[2] Suppressed to avoid disclosure of data of individual companies.

Technical note: The Bureau of Economic Analysis recently revised its estimates of the direct investment position for 1989–91 to incorporate information from its 1989 benchmark survey.

Source: U.S. Department of Commerce, Bureau of Economic Analysis.

RELATION OF INCREASED INVESTMENT TO U.S. FOREIGN ASSISTANCE

Question. Is there any new evidence to suggest that increased investment, as a result of protections provided through these treaties, will or could result in a reduction in direct U.S. foreign assistance over a period of time with respect to the countries involved?

Answer. In negotiating BITs, the U.S. is careful to point out that the existence of a BIT alone will not guarantee increased investment. Private sector investment decisions are made in response to a variety of factors in a free market; the BITs address only elements of how the investment is treated by the government. Other factors affecting investment decisions include the political stability of the host country; the economic, industrial and administrative framework, particularly whether the country has adopted sound, market-oriented policies; intellectual property protection and tax regimes; and, most important, the probable profitability of the investment. Thus, while a BIT offers U.S. investors increased security, it may not be sufficient to cause an investment to take place.

Since a BIT in and of itself lay not result in increased investment, it is not possible to claim that a BIT will lead to a reduced need for U.S. assistance. However, at a time of increased demand and competition for foreign assistance worldwide, it is vitally important for developing countries to attract foreign direct investment, which has been the single largest component in international resource flows to developing countries over the last five years. A BIT is an important part of the economic reform needed to attract private capital.

PROTECTION OF U.S. INVESTORS

Question. Do BITs actually provide United States foreign investors with more protection? Please supply examples of a United States company's use of BIT provisions to protect an investment.

Answer. A Bilateral Investment Treaty (BIT) affords important protections to U.S. investors in several ways. While the other country's investment regime would ordinarily be consistent with the Treaty at the time a BIT is concluded, a BIT can, as a matter of domestic law in the other country, serve to improve the actual treatment of investment. (One common example would be access to, and enforcement of awards arising from, international arbitration.) Moreover, investors are deeply interested in the stability of the investment regime, particularly once they've made their investment. The BIT binds key elements of the investment regime—such as free transfers, full compensation in case of an expropriation, and no discriminatory forced divestitures. And the BIT underwrites these bindings with effective dispute settlement provisions.

One investor, in Zaire, has made use of the international investor-state dispute settlement mechanism (discussed infra).

EXPERIENCE WITH BITS—STATUS OF ZAIRE CASE

Question. Between 1988 and 1992, the Senate has given its advice and consent to the ratification of fifteen bilateral investment treaties. What has been the experience with these treaties? What is the current status of the BIT's operation in Zaire?

Answer. We have found the thirteen (13) U.S. BITs in force to be valuable tools, both for the U.S. investor and the U.S. government, to insure that our BIT partners protect U.S. investment. In two cases (Panama and Zaire), the U.S. government has been notified by U.S. investors of potential BIT violations, and in both cases the U.S. Embassy in the host country made demarches to the host government. In one case, the Panamanian government stopped the offending practice.

The investor-state dispute in Zaire was recently submitted to ICSID for arbitration. An arbitral Tribunal has been constituted to hear the case. The panel will begin its deliberations after all the presentations have been made. We understand that this process has been made more difficult by the fact that, due to political instability Zaire, the government of Zaire is not participating in the case. However, the Zairian government's absence does not bar the case from proceeding to an award.

BIT NEGOTIATION PROCESS

CRITERIA FOR NEGOTIATING A BIT

Question. When selecting countries to approach for an indication of interest in negotiating a BIT, what criteria or set of factors does the Administration employ?

Answer. Support for market-oriented domestic policies that treat private investment fairly is an integral part of our general economic agenda; in such discussions, reference to our Bilateral Investment Treaty (BIT) program can be useful. The BIT program is also regularly noted in our trade dialogue with a variety of countries, including those in transition and those with which Trade and Investment Councils (or similar arrangements) have been established.

In deciding to open formal BIT negotiations, the U.S. weighs a variety of business, economic and foreign policy criteria. However, the most important criterion is the willingness and ability of the country to undertake BIT obligations.

AGENCIES RESPONSIBLE FOR BIT NEGOTIATIONS

Question. Who in the Clinton Administration is responsible for setting the objectives and implementing the BIT program? Please submit their names and current responsibilities.

Answer. Negotiation of each of the BITs under Senate consideration was co-chaired by the Office of the United States Trade Representative (USTR) and the Department of State, with the active assistance of the Commerce and Treasury Departments. Other agencies, including the Departments of Energy and Justice, and the Overseas Private Investment Corporation (OPIC) have participated in negotiations of particular interest to them.

The investment policy issues involved in the negotiation, implementation and review of BITs fall within the jurisdiction of the USTR-chaired Trade Policy Review Group (TPRG), with first line policy development and coordination responsibilities residing with the Trade Policy Staff Committee (TPSC) and its Investment Subcommittee. In addition to the agencies named above, the TPRG/TPSC constituency

included Agriculture, CEA, Defense, Interior, Labor, NSC, OMB, and Transportation. Other agencies may participate as appropriate.

RESOURCES NEEDED FOR BIT NEGOTIATIONS

Question. Given the dramatic increase in the number of countries with which the United States either has or plans to negotiate BITs, does the Clinton Administration feel it has adequate resources?

Answer. The U.S. Government believes it has adequate negotiating resources to serve its investment priorities.

INVESTMENT BARRIERS

BARRIERS IDENTIFIED IN ARGENTINA, BULGARIA, KAZAKHSTAN, AND ROMANIA

Question. In the process of negotiating the treaties with Argentina, Bulgaria, Kazakhstan, and Romania, what investment barriers were identified in each of those countries?

Answer. At the outset of our negotiations with Argentina, the U.S. side identified several elements of the Argentine investment regime of concern—including the use of performance requirements and the insistence on investors' exhausting local remedies before proceeding to international arbitration. The U.S. side also sought to use the BIT to preempt such possible impediments to U.S. investment as remittance limitations (particularly with respect to royalties), other exchange controls, discrimination in granting mining concessions, and restrictions on foreign participation in privatization.

Our concern with Armenia, Bulgaria, Kazakhstan, Moldova, and Romania was aimed at guaranteeing an open investment climate in these economies in transition, particularly with respect to free transfers. Because of the lack of hard currency in these countries, U.S. investors wanted assurances that they would be able to repatriate their profits. We also wanted to ensure that as these countries formulated their foreign investment and privatization plans, U.S. investors would be, to the greatest extent possible, provided with the same treatment as nationals and as other foreign investors.

INITIATION OF NEGOTIATIONS

Question. How were the BIT negotiations with these countries initiated?

Answer. We have distributed copies of our prototype BIT, noting its principal elements, to many countries pursuing economic reform, including all the newly emerging democracies of Eastern Europe and the former Soviet Union. Consistent with our general approach, negotiation of each of the agreements now under consideration was initiated, based upon the current U.S. prototype, following the other country's expression of interest in opening formal talks.

SELECTION OF COUNTRIES

Question. Why were these four countries chosen to negotiate a BIT?

Answer. In each case the country showed the willingness and ability to negotiate a BIT with the United States.

The BIT with Argentina has proven a landmark; Argentina is the first South American country to sign a treaty (FCN or BIT) to protect U.S. investors in this century.

Treaties with Armenia, Bulgaria, Kazakhstan, Moldova and Romania were seen as assisting those countries in their transition to a market economy by strengthening the role of the private sector and by encouraging appropriate macroeconomic and structural policies.

Each of these BITs will serve to ensure essential elements of an open investment climate for U.S. investors and so play a part in the overall framework of our trade and economic relations.

STATUS OF U.S. RELATIONS WITH TREATY PARTNERS

Question. What is the status of United States diplomatic and economic relations with each of these countries?

Will ratification of these treaties be interpreted as United States approval of the policies of particular countries that the United States may oppose or disapprove of?

Answer. Relations of the U.S. with each of these countries are good.

A significant foreign policy problem with a country could prevent our asking for Senate advice and consent to a BIT. Nevertheless, ratification of a BIT does not indicate U.S. approval or acceptance of a country's policies outside the scope of the

agreement. Ratification of a BIT does signify that a country has accepted high standards of legal protect ion and liberal treatment for U.S. investment.

STATUS OF OTHER TREATIES

CONGO, POLAND AND RUSSIA

Question. The Senate has given its advice and consent to BITs with Egypt, Panama, Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Grenada, a business and economic relations treaty with Poland which contains the BIT elements, Russia, the Congo, Sri Lanka, Tunisia and the Czech and Slovak Republics. It is our understanding that each of these has entered into force except the ones with Poland, Russia and the People's Republic of the Congo. What have been the reasons for delay in these countries.

Answer. The Polish treaty has not yet been brought into force because Polish law on intellectual property protection has not yet been revised in conformity with the terms of the treaty. The Russian Parliament has not yet ratified the Russian BIT. Both the Republic of the Congo and the United States have ratified the Congo BIT; it will enter into force upon exchange of instruments of ratification.

PROSPECTS FOR ADDITIONAL TREATIES

Question. What are the countries with which the Administration is currently negotiating, or contemplating negotiating bilateral investment treaties?

Answer. In the past three years, formal talks have been held - with Barbados, Belarus, Bolivia, Colombia, Costa Rica, Estonia, Hong Kong, Hungary, Jamaica, Latvia, Lithuania, Mongolia, Nigeria, Pakistan, Peru, Turkmenistan, Ukraine, Uruguay, Venezuela, and Yugoslavia.

Informal discuss ions have been held with several other countries in recent years.

INTERNATIONAL ARBITRATION

BINDING INTERNATIONAL ARBITRATION

Question. In each of the treaties is binding international arbitration mandated or is it merely an option for an investor to choose? Please explain how this provision would be applied in each of the pending treaties. What are the similarities and differences in each treaty with respect to this issue?

Answer. In each of the treaties, investors are given a choice among binding international arbitration, local courts and previously agreed-upon dispute solution procedures, with the proviso that the choice of one precludes resort to the others. The investor's choice is binding on the host state. The submittal letters of each treaty describe the differences from our prototype.

EXPERIENCE WITH ARBITRATION

Question. What has been the Administration's experience with respect to the compulsory arbitration provisions of the BITs?

Have there been any instances where disputes between United States investors and foreign countries which are parties to a BIT have resulted in the use of these arbitration provisions?

Answer. Experience with the arbitration provisions of the BITs has been limited; our only experience has been a case in Zaire. Earlier this year, a U.S. investor invoked its right to pursue ICSID arbitration against the Government of Zaire. An arbitral tribunal has been constituted, and is currently hearing the case.

Anecdotal evidence from investors in countries with whom we have a BIT in effect suggests that the existence of the right of the investor to seek arbitration facilitates the negotiated settlement of investment disputes.

WAIVING ARBITRATION RIGHTS

Question. Can an investor waive the right to arbitration?

Answer. The investor has the right to choose among several mechanisms to resolve disputes arising out of or relating to investment agreements, investment authorizations or an alleged breach of a BIT. These mechanisms are local courts or administrative tribunals, any previously agreed dispute-settlement procedure, or binding international arbitration. Once the investor has submitted the dispute for resolution via one of these mechanisms, the investor cannot pursue any other mechanism.

INTELLECTUAL PROPERTY RIGHTS

EXISTENCE OF SEPARATE IPR AGREEMENTS

Question. The treaties with Argentina, Bulgaria, Kazakhstan and Romania make specific reference to intellectual property as an investment. Have separate intellectual property rights agreements been entered into with these countries as executive agreements? If so, please describe the essential elements of those agreements and submit copies with the response to these questions.

Answer. No separate intellectual property rights agreement was entered into with Argentina. Comprehensive intellectual property rights protection is provided for in the trade agreements with Bulgaria, Romania, and Kazakhstan. The agreements with Bulgaria and Kazakhstan are in effect. The agreement with Romania is currently before the Congress for approval and we hope for passage of a joint resolution to that effect in early fall.

NATIONAL OR MOST FAVORED NATION TREATMENT

POLICY OBJECTIVES

Question. Fundamental to each BIT is the national treatment principle, i.e., a guarantee that investment will receive the better of national treatment or most favored nation treatment from the host government, subject to some specified sectoral exceptions.

Please explain the policy objectives of this principle and how well it has operated with BITs in force to accomplish those objectives.

Answer. The objective of the principle of national treatment is to ensure that U.S. investments will not be discriminated against by the host government because they are owned or control led by Americans rather than host country nationals. similarly, the objective of the most favored nation (MFN) principle is to ensure that U.s. investment will receive the most favorable treatment accorded by the host government to investments of any foreign nation. The BITs provide for the better of national or MFN in like circumstances. The overall objective is to get the best possible treatment for U.S. investors in the host country and to assure this treatment in a treaty obligation. MFN provides a particularly important treatment floor in the sectors or matters where a country reserves the right to deny national treatment, or where there is no domestic investment at all.

The principle of the better of national and most favored nation treatment has operated quite well with BITs in force. The private sector has expressed its satisfaction with the operation of our treaties.

NATIONAL TREATMENT ON AND AFTER ENTRY

Question. How has the objective of national treatment at the point of entry as well as thereafter, been achieved with respect to the pending treaties?

Answer. The three treaties with Argentina, Bulgaria, and Romania fully adopt the principle of the better of national or most favored treatment both upon and after entry.

GENERAL

CHANGES IN PROTOTYPE BIT

Question. What changes have been incorporated into the prototype BIT that would vary from the February 1992 prototype treaty submitted to the Committee in August of 1992?

If there have been changes in the prototype BIT of February 1992, please submit to the Committee the revised version, together with an updated section by section description (to supplement the July 30, 1992 version previously submitted to the committee).

Answer. The February 1992 prototype treaty was the basis for most BITs submitted to the senate. Any changes from the prototype BIT in a treaty were agreed to in the context of that particular negotiation.

EFFECT OF CHANGES IN PROTOTYPE BIT

Question. What substantive changes in the prototype BIT have emerged from any of the negotiations of the pending BITs? what effect do those changes have on the BITs already in existence?

Answer. The current prototype BIT has not been substantively changed as a result of any of the negotiations of the pending BITs.

Under international law, a treaty must be interpreted in accordance with its own terms, so the terms of a BIT continue to prevail between States notwithstanding changes made in subsequent treaties with other States. At the same time, since all of the treaties are based on a prototype text, a change in one treaty may result in similar changes in future treaties, and consequently may influence interpretation of a similar term in previous treaties.

DESCRIPTION OF TREATY VARIATIONS FROM PROTOTYPE BIT

Question. Since negotiations presumably commence with the prototype BIT, why does the Letter of Submittal not contain detailed explanations on changes from, additions to, or deletions from that prototype?

Answer. The Letters of Submittal for Argentina, Bulgaria and Romania each describe significant provisions which differ from some of the past BITs or which warrant special attention. Other changes in wording may exist in a BIT for reasons specific to the negotiation, perhaps to express a concept more clearly, but would not be considered substantive changes.

Due to the Committee's interest, we expect that future BIT submittal letters will present an explanation of the relevant similarities and differences between a specific BIT and the prototype BIT.

DEFINITION OF TERMS

Question. If a new term is employed in a recently negotiated BIT, would it not be appropriate for that term to be defined in the treaty?

Answer. The answer to this question depends on the term in question. If the term is one commonly used and understood in international law or investment or commercial practice, for example, no definition may be needed. Another possibility is that the term may already be adequately defined in another international agreement or international law. On occasion, we expect terms to be applied depending on the circumstances of the case.

DEFINITION OF "SUBSTANTIAL BUSINESS ACTIVITIES" AND "CONTROL"

Question. There has been some recent criticism as to certain terms not being defined, such as "substantial business activities" and "control," as well as delineating which party's laws would be used in making such determinations. Are any changes in the prototype BIT planned to meet such criticism?

Answer. The terms "substantial business activities" and "control" have been left undefined in the prototype BIT because these involve factual situations that must be evaluated on a case-by-case basis. The U.S. government's position has been that precise definition of these terms could be to the disadvantage of U.S. investors.

USE OF ANNEX OR PROTOCOL

Question. What would be the basis for a change in format from the prototype BIT? For instance, the BIT with Argentina does not have an Annex, and the material heretofore covered by an Annex is found in the protocol of that treaty. If an Annex is not needed, why has it been used in the format of the Prototype BIT? Will it be necessary to use it again?

Answer. An annex is not, as a legal matter, needed. The same legal effect has been achieved using other formats in several treaties, including the BITs with Morocco, Tunisia, and Turkey.

In negotiations the U.S. seeks to have sectoral exceptions placed in an annex. Nevertheless, for presentational or other purposes, the U.S. continues to be willing to consider alternatives which are legally equivalent.

RETROACTIVITY OF BITS

Question. What is the necessity for the inclusion in some of these BITs of a provision declaring that the treaty is not binding on facts, acts or situations which ceased to exist before entry into force of the treaty? Might one argue that those BITs which do not contain such a provision may, by virtue of this specific inclusion in other like treaties, that there is an intention that they may be applicable to just to situations? In other words, since international law already provides for a presumption of nonretroactivity, why would it be included in a series of treaties unless it is to offset an implied intention of retroactivity?

Answer. Several of these BITs include a provision in the Protocol confirming the mutual understanding of the Parties that the BIT does not apply retroactively. This language merely restates the international law principle of nonretroactivity of treaties. This provision was added, in each instance, due to a specific request from the

other country, and does not imply an intention of retroactivity in those BITs which do not contain the provision.

REFERENCE TO LAW OF THE SEA CONVENTION

Question. What are the legal ramifications of incorporating another treaty by reference, such as the Law of the Sea Convention, particularly when either or both of the parties to a pending treaty are not a party to the treaty so named?

Answer. It is long-standing U.S. policy that the relevant international law governing the sovereignty, sovereign rights and jurisdiction of the states in marine areas is as set forth in the Law of the Sea Convention.

ROMANIA

INCLUSION OF "MOVABLE AND IMMOVABLE PROPERTY"

Question. Why is "movable and immovable" property included within the coverage of "investment" in Article I, para. 1(a)(i)?

Answer. The clarifying addition of "movable and immovable" property under the definition of "investment," Article I (1)(a)(i), was made at the request of the Government of Romania to ensure that coverage of "investment" under the Treaty encompassed property as defined under Romanian law. (Like other civil law jurisdictions, Romania classifies property according to its "movable" or "immovable" nature.)

LANGUAGE ON NATURAL RESOURCES IN RIGHTS CONFERRED BY LAW

Question. Why are "concessions to search for, extract, or exploit natural resources" added to the phrase pertaining to rights conferred by law or contract in Article I, para. 1(a)(v)?

Answer. The clarifying reference to "concessions to search for, extract, or exploit natural resources" was added to Article 1(a)(v) at the request of the Government of Romania to draw attention to an economic sector that the Government of Romania views as particularly attractive to U.S. investors. The U.S. Government views such concessions as encompassed by the prototype language, "rights conferred by law or contract * * * and any licenses and permits pursuant to law."

LANGUAGE ON ASSOCIATED ACTIVITIES

Question. Can it be a detriment to have an expanded list of "associated activities" under Article I, paragraph 1(e)(v)? Is that list all inclusive?

Answer. The list of "associated activities" under Article I, 1(e) is illustrative only, and therefore not intended to be all-inclusive. In negotiating BITs with formerly Communist countries whose economies are in transition, the United states has often found it useful to expand the illustrative list of "associated activities" to make clear to the other side the types of associated activities to which the obligations of the Treaty would apply. Since the list is merely illustrative, the U.S. Government does not believe that an expanded list should be viewed as detrimental.

DEFINITION OF "TERRITORY"

Question. Why is there a definition of "territory" included here (Art. I, para. 1(f)), when such a term is not defined in the Prototype BIT?

Answer. At the request of Romania, a mutually agreed-upon definition of the term was drafted. The definition does not change the territorial scope of the BIT.

REFERENCE TO LAW OF THE SEA CONVENTION

Question. Why does the definition of "territory" make reference to the Law of the Sea Convention, a treaty which the United States has heretofore refused to sign?

Answer. It is longstanding U.S. policy that the relevant international law governing the sovereignty, sovereign rights and jurisdiction of States in marine areas is as set forth in the Law of the Sea Convention.

DELETION OF EXCHANGE RATE LANGUAGE IN ARTICLE III

Question. With respect to the expropriation provisions, why has the phrase at the end of Article III, paragraph 1, that the compensation shall be freely transferable "at the prevailing market rate of exchange on the date of expropriation" been deleted in this BIT? Can Romania thereby arbitrarily set a rate of exchange?

Answer. The Treaty requires that compensation for an expropriation be calculated on the basis of the prevailing market rate of exchange "at that time," i.e., at the earlier of the date of expropriation or the date that such action became known. This

provision clarifies the intention that the exchange rate for calculating compensation for expropriation must be determined in accordance with the effective date of expropriation, and is consistent with international practice.

ARTICLE VI—CONCEPT OF CONSULTATION AND NEGOTIATION

Question. What is the significance of the addition in Article VI, paragraph 2, that the concept of consultation and negotiation "may include the use of nonbinding third-party procedures such as conciliation?"

Answer. The reference to "nonbinding third-party procedures such as conciliation" generally conforms to the text of U.S. prototypes in use prior to 1992 and makes explicit the availability of such procedures referenced in Article VI (3) of the prototype text. This provision is not intended to prevent access to binding arbitration at the investor's choice.

ARBITRATION COSTS

Question. What is the intention and effect of the addition in Article VII, paragraph 4(a) that each Party shall bear the costs of its own representation in the arbitral proceedings? Might one argue that for the BITs that do not contain such a pronouncement that a Tribunal might have authority to apportion the costs?

Answer. The Prototype BIT requires the Parties to share the costs of an arbitration panel equally, subject to the discretion of the panel to reallocate costs where appropriate. In the Romania BIT, costs incurred by an arbitral panel remain governed by the procedures in the prototype BIT. The Government of Romania requested the addition of a sentence clarifying that each Party bears the costs of its own representation in the proceedings. This reflects the intended operation of the prototype text and should not affect the interpretation of other BITs.

LOTTERIES AND GAMES OF CHANCE EXCEPTED FROM NATIONAL TREATMENT

Question. In the list of sectors for Romania excepted from national treatment are "lotteries and games of chance." Is there some special reason why this unusual category is included?

Answer. The Government of Romania requested this exception after demonstrating that its existing laws denied national treatment to foreign investors in this economic sector. Such laws are typical in many nations in Eastern Europe, where investment in "lotteries and games of chance" is often reserved to the state.

DEFINITION OF "NATIONAL" IN PROTOCOL

Question. Section 1 of the protocol addresses the meaning of a "national" with respect to Romania. In light of all the other changes in the main body of the treaty, why was this clarification not made in the definition of "national" in Article I, paragraph 1(c)?

Answer. Protocols are often used to further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT, or to clarify or otherwise address issues that affect only one of the Parties to an agreement. Since the provision in question constituted a clarification with respect to Romania, the protocol, rather than the main body of the Treaty, was considered the more appropriate place to include the provision.

CLARIFICATION OF MEANING OF COVERAGE OF ARTICLE II(9)

Question. What is the distinction between Section 2 of the Protocol and the actual text language of Article II, paragraph 9(a)?

Answer. Section 2 of the Protocol clarifies that an arrangement that is greater in scope than a customs union or free trade area, and designated by some other term, falls within the coverage of Article 11(9) of the Treaty.

BULGARIA

NEED FOR PROTOCOL

Question. Why was a protocol necessary for this treaty since it is so brief and the gist of its substance could have been incorporated into the text of the treaty?

Answer. Protocols are often used to further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT, or to clarify or otherwise address issues that affect only one of the parties to an agreement. Since the provision in question constituted a clarification with respect to Bulgaria, the protocol, rather than the main body of the Treaty, was considered the more appropriate place to include the provision.

SIGNIFICANCE OF TERM "CONVICTION" IN PREAMBLE; COMPARISON WITH RUSSIAN BIT

Question. What is the significance of the "conviction" in the preamble concerning a free and open market investment offering the best opportunity for raising living standards? what is the difference in the similar concept, but with different language, used in the preamble of the BIT with the Russian Federation?

Answer. The expression of this conviction in both cases serves to identify the conclusion of a BIT with the commitment of the Russian and Bulgarian governments to increase productivity and improve living standards by implementing market reforms that promote integration into the world economy. The variation in wording is not significant.

DEFINITION OF "COMPANY"

Question. Under the definitions, a "company" is further defined to include "state enterprise" (Art. 1, para. 1(b). Why is such an addition necessary when the definition of "company" already includes organizations governmentally owned and controlled?

Answer. This addition to the illustrative list of "companies" is not substantive. The Bulgarian side, however, requested that we add state enterprises to the illustrative but nonexhaustive list included in the definition on the grounds that such a list should include the most common type of enterprise in Bulgaria.

DEFINITION OF "NONDISCRIMINATORY, NATIONAL TREATMENT AND MFN"

Question. Why was it deemed necessary in this treaty to specifically define "nondiscriminatory," "national treatment," and "most-favored-nation" treatment? [Art. 1, paras. 1(f), 1(g), and 1(h)].

Answer. These definitions are not necessary to the Treaty. The Bulgarians thought that they would simplify the treatment article and that it was preferable to express the treatment obligations in familiar terms such as "national treatment" and "most-favored-nation" treatment.

ABSENCE OF DEFINITION OF "TERRITORY"

Question. Why is there no definition of "territory" in this treaty since such a definition appears in the Romania BIT?

Answer. The Bulgarian BIT conforms to our prototype in this respect. A definition of territory is not necessary.

TREATMENT OF "ASSOCIATED ACTIVITIES" IN COMPARISON WITH ROMANIA BIT

Question. What accounts for the difference in the treatment of "associated activities" in this treaty with the BIT with Romania? Why is the expanded list different since both of these nations have a centrally-controlled, nonmarket economy?

Answer. The difference, a long list for Bulgaria as compared to two shorter lists for Romania, is one of form only. There is no difference in substance, since the lists for both countries are illustrative rather than exhaustive. These lists were compiled at different times.

MODIFICATION IN PROHIBITION ON EXPROPRIATION

Question. What is the reason for, and the significance of, the change in the prohibition on expropriation (Art. 3) from "through measures tantamount to expropriation" to "through measures tantamount in their consequences to expropriation"?

Answer. The two express ions are equivalent. Both cover creeping expropriation. The Bulgarians, however, thought that the longer version was clearer.

EXCEPTION TO TRANSFERS

Question. In Art. IV, para. 2, an exception to the transfer in freely usable currency is set forth for compensation. Why was this added, and why was it dropped from the Congo BIT when that was the prototype text?

Answer. This is not actually an exception with respect to the obligation of the parties to permit transfers in freely usable currency. Instead it is a clarification that refers the reader to a provision in the expropriation article which specifies that the relevant exchange rate for calculating compensation payments related to an expropriation is the rate prevailing on the date of expropriation. We use the rate prevailing on the date of expropriation because we do not want the expropriated investor to bear the exchange risk in the event that compensation is delayed.

This clarification appeared in earlier BIT prototypes; and it therefore appears in the BITs that we negotiated on the basis of these prototypes, including those with Argentina, Bulgaria, and the Congo. We dropped it on the grounds of redundancy

in later prototypes and in the treaties based on these later prototypes, as for example in the Romania BIT.

COMPENSATION CALCULATIONS

Question. In Art. IV, para. 2 the concept found in the Prototype BIT of "calculated" at the prevailing rate is removed. What accounts for this modification?

Answer. The wording of this paragraph in the Argentine and Bulgarian BITs is based on an earlier BIT prototype which did not contain the phrase "be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time" (the date of expropriation). We added this phrase to our current prototype in an ongoing effort to be more explicit about how the investor is to be made whole in the event of an expropriation.

In our view, the absence of this phrase in our earlier BITs, including those with Argentina and Bulgaria, does not change the substance of what must be done to make the investor whole. These BITs specify that compensation shall "be freely transferable at the prevailing market rate of exchange on the ate of expropriation." To determine the amount of foreign exchange to be transferred, it is necessary to calculate the value of the investment in a freely usable currency at the time of expropriation and then to fully compensate the investor for any delay in the payment of compensation by adding on interest at a commercially reasonable interest rate that would be available to a holder of the freely usable currency.

FORMAT CHANGE IN ARTICLE VI

Question. What is the reason for the change in format of Art. VI?

Answer. The two different formats are from different editions of the prototype BIT.

MODIFICATION OF DEFINITION OF INVESTMENT DISPUTE

Question. What is the reason for, and significance of, adding a proviso to the definition of an investment so that the denial of an investment authorization in itself does not constitute an investment dispute unless the denial involves a breech of any right in the treaty.

Answer. This proviso was added at the request of Bulgaria to clarify, for example, that an investment authorization otherwise permitted by the Treaty would not here be forbidden. The proviso notes that the provision in question confers rights with respect only to authorizations which have been granted; however, the investor's right, pursuant to Article I(1), to challenge a denial of an investment authorization as a breach of the treaty is explicitly not affected.

CHOICE BETWEEN CONCILIATION AND ARBITRATION

Question. What is the purpose of providing in Art. VI, para. 3 that if the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure, the opinion of the national or company concerned shall prevail?

Answer. The purpose of this provision is to ensure that the investor always has the ability to choose binding international arbitration to resolve an investment dispute. This is one of the main BIT objectives and is part of the prototype BIT.

ARBITRATION COST ALLOCATION

Question. What is the reason for the variation in language from the BIT with Romania concerning each party bearing the cost of its "legal representation" as distinguished from the "cost of its own representation in the arbitral proceedings." (Art. VII, para. 4(a)?

Answer. The variations are purely ones of form. There is no difference in substance.

ARGENTINA

CALVO DOCTRINE DEFINED

Question. Please supply a complete legal definition and explanation of the "Calvo Doctrine" and the "Calvo Clause." Include the position of the United States on the validity thereof.

Answer. The Calvo Doctrine, named after a nineteenth century Argentine jurist and diplomat, states that foreigners are not entitled to rights not accorded to nationals, and that a government's liability can be no greater for foreigners than that which it has for its own nationals. Thus, although the Doctrine provides for national treatment, it excludes the possibility that disputes between a foreign investor and a host government can be decided other than in the host country legal system.

A Calvo Clause is a clause, usually contractual, in which a foreigner agrees to waive any right that the foreigner may have to the diplomatic protection of his or her government in connection with matters arising under the contract.

The United States has consistently taken the position that the Calvo Doctrine is invalid and that the rights and obligations of the United States with respect to the protection of the interests of its nationals in foreign countries cannot legally be affected by the Calvo Doctrine or a Calvo Clause.

RECOGNITION OF CALVO DOCTRINE

Question. Is it possible to argue that by asserting a treaty provision negates a doctrine then there is an implied recognition of that doctrine?

Answer. No. For example, the United States has maintained a firm and consistent position that the Calvo Doctrine is invalid. Argentina, in entering into the BIT, has removed U.S. investors in Argentina from the obligation to submit disputes only to local courts. Our noting this cannot be read to imply any recognition of the Calvo Doctrine by the United States.

RIGHT TO ARBITRATION

Question. In what way is there an "absolute" right to arbitration in the treaty? Isn't arbitration just one option under the treaty?

Answer. The BIT with Argentina provides that investors are given a choice among international arbitration, resort to local courts, or previously agreed-upon dispute settlement procedures, with the proviso that the choice of one precludes use of the others. An investment dispute between a Party and a national or company of the other Party, including a dispute involving an investment authorization or the interpretation of an investment agreement, may be submitted to international arbitration six months after the dispute arose. Exhaustion of local remedies is not required or permitted, and any such requirement is inconsistent with this BIT.

USE OF PROTOCOL

Question. Why is the format changed here by putting sector exceptions in the Protocol rather than in an Annex? If such material is properly place in a Protocol, why is an Annex needed at all in any of the BITs?

Answer. Because the U.S. uses a Prototype text in all of our BIT negotiations, it is our preference to use a protocol and not the main body of text to make changes. In addition, protocols often further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT.

The Argentine BIT contains a lengthy protocol. The items normally placed in an annex were combined with the items in the protocol for presentational purposes. Annexes and protocols are integral parts of the treaty, and as a legal matter, there is no difference between an obligation contained in the text and one effected through an annex or a protocol.

DEFINITION OF INVESTMENT TO INCLUDE CLAIMS DIRECTLY RELATED TO AN INVESTMENT

Question. What is the significance in a change of language from claims "associated with" an investment to "directly related" to an investment Article I(1)(a)(iii)?

Answer. The language in sub-paragraph iii of the definition of investment—Article I(1)(a)(iii)—was changed from claims "associated with" an investment to "directly related" to an investment at the request of the Argentine side to state that debt that otherwise would not be considered as an investment has to have a direct relation to an investment to be covered by the treaty. This language is consistent with the intent of the provision of the prototype treaty.

DEFINITION OF COMPANY TO INCLUDE "STATE ENTERPRISE"

Question. Why is it necessary to include "state enterprise" within the definition of "company" (Article I, paragraph 1(b))?

Answer. The definition of "company" in the Prototype BIT is broad to cover virtually any type of legal entity organized under the laws and regulations of a Party, including state enterprises.

DEFINITION OF "TERRITORY"

Question. Why has a specific definition of "territory" been included in this treaty (Article I, paragraph 1(f))?

Answer. At the request of Argentina, a mutually agreed-upon definition of the term was drafted. The definition does not change the territorial scope of the BIT.

REFERENCE TO LAW OF THE SEA CONVENTION

Question. Why does the definition of "territory" include reference to the Law of the Sea Convention?

Why would reference be made in a pending bilateral treaty to a multilateral treaty to which neither of the present parties are a party to?

Answer. The BIT is intended to cover investment activities in maritime areas under the sovereignty or jurisdiction of each State. It is long-standing U.S. policy that the relevant international law governing the sovereignty, sovereign rights and jurisdiction of States in marine areas is as set forth in the Law of the Sea Convention.

TERRITORIAL SEA CLAIM

Question. By including any reference to sea law, is the United States implied recognizing Argentina's claim to a 200-mile territorial sea?

Answer. In 1991 Argentina rolled back its territorial sea claim to 12 nautical miles.

REFERENCE TO BINDING OBLIGATIONS UNDER MULTILATERAL AGREEMENTS

Question. In the provision dealing with the nonapplicability of the most favored nation provisions of the treaty (Article II, paragraph 9), why has there been a removal of the reference to any binding obligations under any multi lateral international agreement under the framework of GATT subsequently entered into?

Answer. The negotiation with Argentina was concluded before this provision was added to the Prototype BIT.

SIGNIFICANCE OF ARTICLE III

Question. What is the reason for, and significance of, Article III?

Answer. This article contains language found in paragraph 2 of Article X of the Prototype BIT. It allows a Party to apply formalities in connection with the establishment of investment, provided that the formalities do not impair the substance of any Treaty rights. Such formalities would include, for example, U.S. reporting requirements for certain inward investment.

ARTICLE III—SIGNIFICANCE OF "ADMISSION OF INVESTMENTS"

Question. What is the meaning of "admission of investments" as used in Article III?

Answer. "Admission of investments" is identical in meaning to the language "establishment of investments," contained in the Prototype BIT.

EXPROPRIATION COMPENSATION

Question. With respect to compensation to be paid for expropriated investments (Art IV, para. 1), why has, and what is the meaning of, the phrase been removed that such is to "be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at the time?"

Answer. The wording of this paragraph in the Argentine and Bulgarian BITs is based on an earlier BIT prototype which did not contain the phrase "be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time" (the date of expropriation). This earlier prototype served as the basis for the BIT negotiations with Argentina and Bulgaria. We added this phrase to our current prototype in an ongoing effort to be more explicit about how the investor is to be made whole in the event of an expropriation.

In our view, the absence of this phrase in our earlier BITs, including those with Argentina and Bulgaria, does not change the substance of what must be done to make the investor whole. These BITs specify that compensation shall "be freely transferable at the prevailing market rate of exchange on the date of expropriation." To determine the amount of foreign exchange to be transferred, it is necessary to calculate the value of the investment in a freely usable currency at the time of expropriation and then to fully compensate the investor for any delay in the payment of compensation.

TRANSFERS—DIRECTLY RELATED OF AN INVESTMENT

Question. What is the legal effect of adding the phrase "directly related to an investment" in Article V, paragraph 1(d)?

Answer. Article V, paragraph 1(d) indicates "transfers related to an investment," and includes payments made under a contract. The phrase "directly related to an investment" was added to the illustrative example of "amortization of principal and accrued interest payments made pursuant to a loan agreement" at the request of the Argentine side. This language is consistent with the objectives of this provision of the prototype treaty—which already contains the qualifying language, "related to an investment," in the first line.

TRANSFERS

Question. In comparison to the comparable provision in the Prototype BIT, please explain the meaning of Art V, para. 2.

Answer. The Argentine text has two additional provisions:

First, it contains the phrase "Except as provided in Article IV para. 1." This phrase is from an earlier prototype that was in use when the BIT negotiations with Argentina began. It is a redundant clarification that refers the reader to a provision in the expropriation article which specifies that the relevant exchange rate for calculating compensation payments related to an expropriation is that prevailing on the date of expropriation. We use the rate prevailing on the date of expropriation because we do not want the expropriated investor to bear the exchange risk in the event that compensation is delayed.

The second additional provision is this sentence: "The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty."

This provision makes it clear that either country has the right to prescribe certain formal procedures in connection with a transfer, such as filling out reports for statistical purposes or application forms, but only if these procedures do not substantively impede the free transfer. We believe this right is implicit in the treaty and does not need to be specified. The Argentine negotiators, however, wished explicit assurance on this point.

EXPENSES OF ARBITRATION

Question. Why has the authority of the Tribunal to direct on Party to pay a higher proportion of the costs been removed here (Article VIII, paragraph 4)?

Answer. This was done at the request of Argentina, to reflect common international treaty practice.

PRESCRIBING FORMALITIES IN CONNECTION WITH AN INVESTMENT

Question. Why has the provision found in the Prototype BIT to the effect that the treaty does not preclude either Party from prescribing special formalities in connection with the establishment of investments but that such cannot impair the substance of any of the treaty rights been removed here?

Answer. This provision is contained in Article III of the Treaty with Argentina.

CHANGE IN ANNEX FORMAT

Question. Why has the format for the United States sectoral exceptions been changed?

Answer. Because the U.S. uses a Prototype text in all of our BIT negotiations, it is our preference to use a protocol and not the main body of text to make changes. In addition, protocols often further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT.

The Argentine BIT contains a lengthy protocol. The items normally placed in an annex were combined with the items in the protocol for presentational purposes. Annexes and protocols are integral parts of the treaty, and as a legal matter, there is no difference between an obligation contained in the text and one effected through an annex or a protocol.

DEBT-EQUITY CONVERSIONS

Question. Please explain the role of debt-equity conversions in relation to this Treaty.

Answer. In the Argentine-U.S. BIT, an investor has an unqualified right to transfer funds related to the investment into and out of country in which the investment is made. notwithstanding this right, an investor may agree separately that an investment made through a debt-equity swap program is subject to restrictions on profits and dividends as well as on transfers of capital.

The purpose of this protocol is to ensure that the transfer provision of the BIT does not override or otherwise modify the transfer restrictions of a debt-equity program. In a debt-equity swap, an investor agrees to restrictions on caplital and prof-

its in return from a better deal than can be obtained through more conventional means. The price of an investment made through a debt-equity conversion presumably reflects a mutually agreeable and beneficial arrangement which takes transfer restrictions into account.

DEBT-EQUITY EXCEPTIONS

Question. Would the investor have any rights under the treaty or would all rights be determined by the debt-equity conversion agreement? Who makes such a determination?

Answer. The investor retains all the rights of the treaty except for the provision on free transfers which may be affected by the debt-equity swap agreement. Moreover, the investor would retain the right of free transfer for any prior or subsequent investments that were made outside the context of the debt-equity swap agreement.

FUTURE DEBT EQUITY PROGRAMS UNDER OTHER BITS

Question. What would happen if a nation with which the United Sates has a BIT decides to establish a debt-equity conversion program?

Answer. As a condition for receiving the financial benefit of a debt-equity swap, an investor typically agrees to restrictions on transfers. The purpose of the protocol is to make it clear that the BIT does not affect the contractual obligations regarding transfers under the debt-equity swap agreement, and that the host country's right to enforce such restrictions is likewise unaffected.

We believe the protocol is useful, but not essential, for countries that either have or may establish a debt-equity swap program. Therefore, we offer it to such countries.

KAZAKHSTAN

AMENDMENTS TO KAZAKHSTAN BASIC LAW ON INVESTMENTS

Question. At last year's hearing on BITs, the Department of State indicated that several amendments to the Kazakhstan Basic Law were being drafted which will expand the privileges granted to joint ventures and international banks. They were due to be submitted to the Supreme Soviet at a session in September 1992. Were they passed?

Answer. Yes, these amendments were passed, as expected, by the Kazakhstani Supreme Soviet in September 1992.

AGENCY FOR FOREIGN INVESTMENT

Question. Last year, the Department of State indicated that the Kazakhstan Government had established a National Agency for Foreign Investment to aide foreign investors. Is this agency still in existence?

Answer. Yes. The Kazakhstan National Agency for Foreign Investment (NAFI), established by a June 8, 1992 presidential decree, is now operational. It is also the recipient of technical assistance and institution-building support from the World Bank, which will begin programs to help investment in mining, and foreign investment and regulation, later this fall.

ARMENIA

NEED FOR EXCHANGE OF NOTES TO CONFIRM LANGUAGE CONFORMITY

Question. What is the reason for providing specifically that for the Armenian language text to be equally authentic with the English that there be an exchange of diplomatic notes confirming its conformity with the English text? Is this an intended divergence from the requirement set forth in 22 CFR 181.4? Since this similar requirement appears in some other recent BITs, will this be a regular feature in future BITs?

Answer. At the time the Treaty was signed an authentic Armenian language text had not been certified to conform with the English language text. Therefore, only the English language text was signed. The exchange of diplomatic notes acknowledges the completion of the steps to conform the Armenian text that was prepared with the English.

The procedure was not inconsistent with 22 CFR 181.4 in that no foreign language text was signed or concluded at the time the English language text was signed. Rather, the Treaty provides specifically for the subsequent preparation of an Armenian text to conform with the English language.

This procedure was followed in this case, and with several other of the newly independent states of the former Soviet Union, because of the dearth of U.S. experts

in these languages, and the extraordinary length of time needed to perfect treaty texts in these languages. It does not indicate a change in routine U.S. practice.

MOLDOVA

DEFINITION AND LEGAL SIGNIFICANCE OF SIDE LETTER

Question. What is the definition of and legal significance of a "side letter?"

Answer. Side letters may be used, inter alia, to refine, interpret, or expand on issues related to the subject of a treaty, including issues that may affect only one of the Parties to an agreement, as is the case with the side letter in the Moldova BIT.

The legal significance of the side letter to the Moldova BIT is specifically set forth in Article XII(4) of the Treaty, which states that the side letter forms an integral part of the Treaty- and the in terms of the side letter itself, which provide that the side letter be treated as an integral part of the Treaty.

DELETION OF EXCLUSIONS FROM DISPUTE SETTLEMENTS

Question. Why has the Article dealing with exclusion from dispute settlements been removed from this treaty?

Answer. Article VIII had served to exclude from the dispute settlement provisions of the BIT disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, as well as those of any other such official program pursuant to which the Parties have agreed to other means of settling disputes. The Export-Import Bank, the Overseas Private Investment Corporation, and other relevant government agencies indicated prior to this negotiation that this provision is no longer necessary.

KYRGYZSTAN

REASON FOR LACK OF PROTOCOL

Question. If no Protocol was necessary for this BIT, why would such an addition be needed in any of the others?

Answer. Protocols are often used to further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT, or to clarify or otherwise address issues that affect only one of the Parties to an agreement. Since no such situations arose in our negotiations with Kyrgyzstan, a protocol was not necessary.

REASON FOR LACK OF EXCEPTIONS TO NATIONAL TREATMENT

Question. Is there any special reason why Kyrgyzstan has not reserved the right to make section exceptions from national treatment?

Answer. The Kyrgyz delegation explained that there were no restrictions on foreign investment under their laws, so no exceptions to national treatment were necessary. The Kyrgyz government sees this as an advantage that it wants to publicize in its efforts to attract foreign investment. Paragraph 3 was added to the Annex to the Treaty to make this clear.

TRANSITION FROM CENTRALLY CONTROLLED MARKET

PROVISIONS TO ASSIST U.S. INVESTORS

Question. The treaties with Armenia, Kazakhstan, Kyrgyzstan, Moldova, and Romania have provisions to assist U.S. investors with the transition from a centrally-controlled, non-market economy.

Please describe how those provisions in each of the treaties will assist U.S. investors.

I understand some of these countries have set up special offices to assist U.S. investors with investment information and bureaucratic red tape. which countries have take these initiatives, how is each office structured to assist U.S. investors, and what practical assistance have they provided U.S. investors to date?

Answer. All these agreements include, in the last paragraph of Article II, a provision giving a more illustrative list of activities associated with an investment. (These activities are protected by all our BITs.) These provisions assisted U.S. negotiators in describing and clarifying, for those treaty partners making a transition to a market economy,the breadth of activities to which the obligations of national and MFN treatment apply.

Romania and Moldova will be obliged, by the terms of their treaties, to designate a development office to assist U.S. investors. We expect these offices to be of assistance to U.S. investors.

ECUADOR

COMPARED TO BIT WITH ARGENTINA

Question. What accounts for the differences between this BIT and the one with Argentina? Can it be expected that future BITs with other Latin American nations will not follow any predictable pattern?

Answer. The differences in the BITs reflect the different circumstances of each country, as well as the fact that the Argentine BIT is based on an earlier version of the prototype BIT than our BIT with Ecuador. However, the obligations contained in the two treaties are essentially the same. Each BIT's variations from the prototype are discussed in the letter from the Secretary of State to the President describing that treaty.

LEGAL STATUS OF TREATIES IN ECUADOR

Question. What is the legal status of treaties in Ecuador? why is it necessary to have pronouncements in the side letter that the treaty satisfies specific administrative or other authorizations found in the laws of Ecuador?

Answer. In accordance with international law, upon entry into force Ecuador must comply in good faith with the obligations of the Treaty. Thus, Ecuador has to take those steps necessary under its domestic law in order to be able to fulfill its international obligations.

The side letter was made an integral part of the Treaty at the request of Ecuador in order to simplify and hasten the granting of administrative and other authorizations under Ecuadorian law to U.S. investors. By explicitly confirming that the treaty constitutes the necessary approval under these laws, the Ecuadorian government sought to reduce or eliminate certain bureaucratic practices identified as impediments to investment there. The U.S. government believes that these provisions will make it easier for U.S. investors to operate in Ecuador.

ECUADOR DEBT-EQUITY CONVERSION PROGRAM

REASON FOR AND DESCRIPTION OF PROGRAM

Question. The Protocol to the treaty with Ecuador notes that Ecuador may establish a program to allow U.S. nationals to invest in the Republic of Ecuador through purchase of debt at a discount.

Why was this aspect of the treaty agreed to?

Has such a program been established and have U.S. investors expressed any interest?

Answer. This provision in the Protocol was added at the suggestion of the United States. The United States has been generally supportive of debt-equity conversion programs as part of the overall solution to the debt problem and has considered them to be an important element in commercial bank financing programs to reduce debt and debt service payments. Ecuador has not established such a program. However, this provision ensures that the BIT will not impede the government of Ecuador from establishing a debt-equity conversion program in the future.

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