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The Commerce Department Speaks on International Trade and  
Investment 1994

THE UNITED STATES BILATERAL INVESTMENT TREATY PROGRAM:  
PROTECTION FOR U.S. INVESTORS  
OVERSEAS

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The views in this paper and related oral presentation are solely  
those of the author. The author would like to thank Arthur  
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preparation of this paper.

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- I. The Early History of International Investor Protection
  - A. U.S. Treaties of Friendship, Commerce and Navigation (FCNs)
    1. Development from "appropriate protection" to coverage of aspects of expropriation, currency transfer and treatment (national or most-favored-nation or both)
    2. Lack of investor-state dispute settlement mechanism or restrictions on performance requirements
  - B. Development by Western European countries of bilateral investment treaty concept, primarily to handle their investment relationships with developing countries, including former colonies
  - C. Development of First U.S. prototype
- II. The Basic Treaty Provisions
  - A. Treatment of Investment
    1. Absolute protections: fair and equitable treatment; full protection and security; no less than required by international law
    2. Relative protections: national treatment; most-favored-nation treatment
  - B. Expropriation: public purpose; non-discrimination; prompt, adequate & effective compensation; due process
  - C. Transfers: free movement of investment related funds in and out of host country
  - D. Performance Requirements: no local content, export performance or similar requirements
  - E. Investor-State Dispute Settlement: investor has right to elect international arbitration to resolve disputes with host

government      III. Development of the Program

A. Thirty Treaties signed and Seventeen in force as of June 15, 1994 (see Attachment One) (Update to be provided with oral presentation)

B. Chapter 11 of the North American Free Trade Agreement as trilateral investment treaty

IV. The New U.S. Prototype Treaty (1994) (see Attachment Two)

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PAGE 2 (Publication page references are not available for this document.) A. Article I (Definitions): Clarifications such as inclusion of certain debt interests and contractual rights within "investment"; addition of definitions for "investment agreement", "investment authorization", and "state enterprise"

B. Article II (Treatment): Deletion of most-favored-nation exception for free trade areas; addition of exception for procedures found in World Intellectual Property Organization agreements

C. Article III (Expropriation): Additional detail on currency of payment, exchange and interest rates

D. Article IV (Extraordinary Losses): Addition back of article found in earliest prototypes on losses resulting from armed conflict and excessive use of force

E. Article V (Transfers): Additional detail on types of transfers covered and exceptions

F. Article VI (Performance Requirements): Former paragraph expanded to whole article; now a detailed closed list clearly covering only mandatory conditions

G. Article IX (Investor-State Dispute Settlement): Redraft based on U.S.- Argentina BIT with addition of injunctive relief possibility and shortening of waiting period from six to three months

H. Annex (Sectoral Exceptions): Generally redrafted to be shorter and narrower; explicit reciprocity provisions for financial services; new positive commitment on mineral leasing and pipeline leasing

#### United States

#### Bilateral Investment Treaty Program

June 15, 1994

COUNTRY	SIGNATURE	ENTRY INTO
FORCE 1. Argentina	November 14, 1991	
2. Armenia	September 23, 1992	
3. Bangladesh	March 12, 1986	July 25, 1989
4. Belarus	January 15, 1994	
5. Bulgaria	September 23, 1992	June, 2, 1994
6. Cameroon	February 26, 1986	April 6, 1989
7. The Congo	February 12, 1990	
8. Czech Republic	October 22, 1991	December 19,
1992 9. Ecuador	August 27, 1993	
10. Egypt	March 11, 1986 (modified)	June 27, 1992
11. Estonia	April 19, 1994	
12. Georgia	March 7, 1994	
13. Grenada	May 2, 1986	March 3, 1989
14. Haiti	December 13, 1983	
15. Jamaica	February 4, 1994	
16. Kazakhstan	May 19, 1992	January 12,

1994 17. Kyrghyzstan  
12, 1994 18. Moldova

January 19, 1993  
April 21, 1993  
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 PAGE 3 (Publication page references are not available for  
 this document.) 19. Morocco July 22, 1985  
 May 29, 1991 20. Panama October 27, 1982  
 May 30, 1991 21. Poland March 21, 1990  
 22. Romania May 28, 1992 January 15,  
 1994 23. Russia Federation June 17, 1992  
 24. Senegal December 6, 1983 October 25,  
 1990 25. Slovakia October 22, 1991 December  
 19, 1992 26. Sri Lanka September 20, 1991 May 1,  
 1993 27. Tunisia May 15, 1990 February  
 7, 1993 28. Turkey December 3, 1985 May 18,  
 1990 29. Ukraine March 4, 1994  
 30. Zaire August 3, 1984 July 28, 1989

TREATY BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF  
 AMERICA AND THE GOVERNMENT OF \_\_\_\_\_

CONCERNING THE ENCOURAGEMENT AND  
 RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the  
 Government of \_\_\_\_\_ (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them,  
 with respect to investment by nationals and companies of one  
 Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded  
 such investment will stimulate the flow of private capital and  
 the economic development of the Parties;

Agreeing that a stable framework for investment will maximize  
 effective utilization of economic resources and improve living  
 standards; Recognizing that the development of economic and  
 business ties can promote respect for internationally recognized  
 worker rights;

Agreeing that these objectives can be achieved without relaxing  
 health, safety and environmental measures of general application;  
 and Having resolved to conclude a treaty concerning the  
 encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

For the purposes of this Treaty,

(a) "company" means any entity constituted or organized under  
 applicable law, whether or not for profit, and whether  
 privately or governmentally owned or controlled, and includes a  
 corporation, trust, partnership, sole proprietorship, branch,  
 joint venture, association, or other organization; (b)  
 "company of a Party" means a company constituted or organized

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PAGE 4 (Publication page references are not available for this document.) laws of that Party;

(c) "national" of a Party means a natural person who is a national of that Party under its applicable law;

(d) "investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of:

(i) a company;  
 (ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company; (iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;

(iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges; (v) intellectual property, including:

copyrights and related rights,  
 patents,  
 rights in plant varieties,  
 industrial designs,  
 rights in semiconductor layout designs,  
 trade secrets, including know-how and confidential business information,  
 trade and service marks, and  
 trade names; and

(vi) rights conferred pursuant to law, such as licenses and permits; (e) "covered investment" means an investment of a national or company of a Party in the territory of the other Party;

(f) "state enterprise" means a company owned, or controlled through ownership interests, by a Party;

(g) "investment authorization" means an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party;

(h) "investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment.

(i) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

(j) "CENTRE" means the INTERNATIONAL CENTRE for SETTLEMENT of INVESTMENT Disputes established by the ICSID Convention; and

(k) "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

1. With respect to the establishment, acquisition, expansion,  
management, conduct, operation and sale or other disposition of  
covered investments, each  
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PAGE 5 (Publication page references are not available for this document.) Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments.

2. (a) A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective.

(b) The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law. (b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.

4. Each Party shall provide effective means of asserting claims and enforcing rights with respect to covered investments.

5. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available.

### ARTICLE III

1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3).

2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid -- converted into the currency of payment at the

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PAGE 6 (Publication page references are not available for this document.) market rate of exchange prevailing on the date of payment -- shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

#### Article IV

1. Each Party shall accord national and most favored nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events.

2. Each Party shall accord restitution, or pay compensation in accordance with paragraphs 2 through 4 of Article III, in the event that covered investments suffer losses in its territory, owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events, that result from:

(a) requisitioning of all or part of such investments by the Party's forces or authorities, or

(b) destruction of all or part of such investments by the Party's forces or authorities that was not required by the necessity of the situation.

#### ARTICLE V

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement; and (e) compensation pursuant to Articles III and IV, and payments arising out of an investment dispute.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Each Party shall permit returns in kind to be made as authorized or specified in an investment authorization, investment agreement, or other written agreement between the Party and a covered investment or a national or company of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of  
creditors; (b) issuing, trading or dealing in securities;  
(c) criminal or penal offenses; or

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PAGE 7 (Publication page references are not available for this document.) (d) ensuring compliance with orders or judgments in adjudicatory proceedings.

## ARTICLE VI

Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including any commitment or undertaking in connection with the receipt of a governmental permission or authorization): (a) to achieve a particular level or percentage of local content, or to purchase, use or otherwise give a preference to products or services of domestic origin or from any domestic source;

(b) to limit imports by the investment of products or services in relation to a particular volume or value of production, exports or foreign exchange earnings;

(c) to export a particular type, level or percentage of products or services, either generally or to a specific market region; (d) to limit sales by the investment of products or services in the Party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings;

(e) to transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws; or

(f) to carry out a particular type, level or percentage of research and development in the Party's territory.

Such requirements do not include conditions for the receipt or continued receipt of an advantage.

## ARTICLE VII

1. (a) Subject to its laws relating to the entry and sojourn of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

(b) Neither Party shall, in granting entry under paragraph 1(a), require a labor certification test or other procedures of similar effect, or apply any numerical restriction.

2. Each Party shall permit covered investments to engage top managerial personnel of their choice, regardless of nationality.

## ARTICLE VIII

The Parties agree to consult promptly, on the request of

either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty or to the realization of the objectives of the Treaty.

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## ARTICLE IX

1. For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.

2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration: (i) to the Centre, if the Centre is available; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the UNCITRAL Arbitration Rules; or

(iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

(b) A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3(a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under paragraph 3(a)(i), (ii), and (iii) or the mutual agreement of both parties to the dispute under paragraph 3(a)(iv). This consent and the submission of the dispute by a national or company under paragraph 3(a) shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, for an "agreement in writing".

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, done at New York, June 10, 1958. 6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

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PAGE 9 (Publication page references are not available for this document.) 7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

8. For purposes of Article 25(2)(b) of the ICSID Convention and this Article, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party.

#### ARTICLE X

1. Any dispute between the Parties concerning the interpretation or application of the Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted upon the request of either Party to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except to the extent these rules are (a) modified by the Parties or (b) modified by the arbitrators unless either Party objects to the proposed modification.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who shall be a national of a third State. The UNCITRAL Arbitration Rules applicable to appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the arbitral panel shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman and other arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the arbitral panel may, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

#### ARTICLE XI

This Treaty shall not derogate from any of the following that entitle covered investments to treatment more favorable than that accorded by this Treaty:

- (a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;
- (b) international legal obligations; or

(c) obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

#### ARTICLE XII

Each Party reserves the right to deny to a company of the other Party the  
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PAGE 10 (Publication page references are not available for this document.) benefits of this Treaty if nationals of a third country own or control the company and

(a) the denying Party does not maintain normal economic relations with the third country; or

(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.

#### ARTICLE XIII

1. No provision of this Treaty shall impose obligations with respect to tax matters, except that:

(a) Articles III, IX and X will apply with respect to expropriation; and (b) Article IX will apply with respect to an investment agreement or an investment authorization.

2. A national or company, that asserts in an investment dispute that a tax matter involves an expropriation, may submit that dispute to arbitration pursuant to Article IX(3) only if:

(a) the national or company concerned has first referred to the competent tax authorities of both Parties the issue of whether the tax matter involves an expropriation; and

(b) the competent tax authorities have not both determined, within nine months from the time the national or company referred the issue, that the matter does not involve an expropriation.

#### ARTICLE XIV

1. This Treaty shall not preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude a Party from prescribing special formalities in connection with covered investments, such as a requirement that such investments be legally constituted under the laws and regulations of that Party, or a requirement that transfers of currency or other monetary instruments be reported, provided that such formalities shall not impair the substance of any of the rights set forth in this Treaty.

#### ARTICLE XV

1. (a) The obligations of this Treaty shall apply to the political subdivisions of the Parties.

(b) With respect to the treatment accorded by a State, Territory or possession of the United States of America, national treatment means treatment no less favorable than the treatment accorded thereby, in like situations, to investments of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other States, Territories or possessions of the United States

of America. 2. A Party's obligations under this Treaty shall apply to a state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party.

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## ARTICLE XVI

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2. It shall apply to covered investments existing at the time of entry into force as well as to those established or acquired thereafter. 2. A Party may terminate this Treaty at the end of the initial ten year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

4. The Annex [AND PROTOCOL (if any)] shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty. DONE in duplicate at [CITY] this [NUMBER] day of [MONTH], [YEAR], in the English and \_\_\_\_\_ languages, each text being equally authentic. FOR THE GOVERNMENT OF THE UNITED STATES

OF AMERICA:

FOR THE GOVERNMENT OF \_\_\_\_\_:

## Annex

1. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national treatment to covered investments in the sectors or with respect to the matters specified below: atomic energy; custom house brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including government-supported loans, guarantees and insurance; state and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; landing of submarine cables. Most favored nation treatment shall be accorded in the sectors and matters indicated above.

2. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the sectors or with respect to the matters specified below:

fisheries; air and maritime transport, and related activities; banking [FNal] insurance [FNal] securities [FNal] and other financial services [FNal].

3. The Government of \_\_\_\_\_ may adopt or maintain exceptions... 4. Notwithstanding paragraph 3, each Party agrees to accord national treatment to covered investments in the following sectors: leasing of minerals or pipeline rights-of-

way on Government lands. FNa1. Note: If the treaty partner undertakes acceptable commitments with respect to all or certain financial services, the Government of the United States of America will consider limiting these exceptions accordingly, so that, Copr. (C) West 1995 No claim to orig. U.S. govt. works

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PAGE 12 (Publication page references are not available for  
this document.) for example, particular obligations as to  
treatment would apply on no less favorable terms than in the  
North American Free Trade Agreement. 863 PLI/Corp 127  
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