

INVESTMENT TREATY WITH LITHUANIA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES
OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF
LITHUANIA FOR THE ENCOURAGEMENT AND RECIPROCAL PRO-
TECTION OF INVESTMENT, WITH ANNEX AND PROTOCOL,
SIGNED AT WASHINGTON ON JANUARY 14, 1998



SEPTEMBER 5, 2000.—Treaty was read the first time, and together with
the accompanying papers, referred to the Committee on Foreign Rela-
tions and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *September 5, 2000.*

To The Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Treaty.

The bilateral investment treaty (BIT) with Lithuania was the third such treaty signed between the United States and Baltic region country. The Treaty will protect U.S. investment and assist Lithuania in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thereby strengthening the development of its private sector.

The Treaty furthers the objectives of U.S. policy toward international and domestic investment. A specific tenet of U.S. policy, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive national treatment. Under this Treaty, the Parties also agree to customary international law standards for expropriation. The Treaty includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation for expropriation; free transfer of funds related to investments; freedom of investments from specified performance requirements; fair, equitable, and most-favored-nation treatment; and the investor's freedom to choose to resolve disputes with the host government through international arbitration.

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

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, August 9, 2000.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998. I recommend that this Treaty, with Annex and Protocol, be transmitted to the Senate for its advice and consent to ratification.

The bilateral investment treaty (BIT) with Lithuania was the third such treaty signed between the United States and a Baltic Region country. The Treaty is based on the view that an open investment policy contributes to economic growth. This Treaty will assist Lithuania in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thereby strengthening the development of its private sector. It is U.S. policy, however, to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increases in private U.S. investment flows.

To date, 31 BITs are in force for the United States—with Albania, Argentina, Armenia, Bangladesh, Bulgaria, Cameroon, the Republic of the Congo, the Democratic Republic of the Congo (formerly Zaire), the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Grenada, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Mongolia, Morocco, Panama, Poland, Romania, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, and Ukraine. In addition to the Treaty with Lithuania, the United States has signed, but not yet brought into force, BITs with Azerbaijan, Bahrain, Belarus, Bolivia, Croatia, El Salvador, Honduras, Jordan, Mozambique, Nicaragua, Russia, and Uzbekistan.

The Office of the United States Trade Representative and the Department of State jointly led this BIT negotiation, with assistance from the Departments of Commerce and Treasury.

THE U.S.-LITHUANIA TREATY

The Treaty with Lithuania is based on the 1992 U.S. prototype BIT and satisfies the U.S. principal objectives in bilateral investment treaty negotiations:

—All forms of U.S. investment in the territory of Lithuania are covered.

- Investments receive the better of national treatment or most-favored-nation (MFN) treatment both while they are being established and thereafter, subject to certain specified exceptions.
- Specified performance requirements may not be imposed upon or enforced against investments.
- Expropriation is permitted only in accordance with customary international law standards.
- Parties are obligated to permit the transfer, in a freely usable currency, of all funds related to an investment, subject to exceptions for specified purposes.
- Investment disputes with the host government may be brought by investors, or by their investments, to binding international arbitration as an alternative to domestic courts.

The U.S.-Lithuania Treaty differs from the 1992 prototype in some respects. It eliminates Article VIII of the 1992 prototype text, which had excluded from the dispute settlement provision of the BIT those disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank, the Overseas Private Investment Corporation, and other relevant government agencies. Those agencies indicated prior to this negotiation that they saw no need to maintain such a provision.

The U.S.-Lithuania Treaty also differs from the 1992 prototype in that it includes provisions in Article I(1)(f) and (g) and Article II(2) that clarify and extend the requirements of the Treaty with respect to state enterprises, and in Article II(11) that clarify that investors should receive the better of national or MFN treatment with respect to activities associated with their investment.

These elements are further described in the following article-by-article analysis of the provisions of the Treaty:

Title and Preamble

The Title and Preamble state the goals of the Treaty. Foremost is the encouragement and protection of investment. Other goals include economic cooperation on investment issues; stimulation of economic development; maximum effective utilization of economic resources; promotion of respect for internationally-recognized worker rights; and development of bilateral trade and investment relations. While the Preamble does not impose binding obligations, its statement of goals may assist in interpreting the Treaty and in defining the scope of Party-to-Party consultations pursuant to Article V.

Article I (Definitions)

Article I defines terms used throughout the Treaty.

Investment

The Treaty's definition of "investment" is broad, recognizing that investment can take a wide variety of forms. Every kind of investment is specifically incorporated in the definition, which applies to investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party. Indirect ownership or control could be through other, intermediate companies or persons, including those of third countries. Control is

not specifically defined in the Treaty; ownership of over 50 percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion, or by other arrangements.

The Treaty provides an illustrative list of the forms an investment may take. These include both tangible and intangible property; interests in a company or its assets; “a claim to money or a claim to performance having economic value, and associated with an investment”; intellectual property rights; any right conferred by law or contract; and any licenses and permits pursuant to law. The requirement that a “claim to money” be associated with an investment excludes claims arising solely from trade transactions, such as a transaction involving a sale of goods across a border, from being investments covered by the Treaty.

Paragraph 3 makes explicit that any alteration in the form in which an asset is invested or reinvested will not affect its character as an investment. For example, a change in the corporate form of an investment will not deprive it of protection under the Treaty.

Company

The definition of “company” of a Party is broad, covering all types of entities legally constituted or organized under applicable laws and regulations of a Party, and includes a corporation, company, association, partnership, or other organization. The definition explicitly covers not-for-profit entities, as well as entities that are owned or controlled by the state.

The broad nature of the definitions of “investment” and “company” of a Party means that investments can be covered by the Treaty even if ultimate control lies with non-Party nationals. A Party may, however, deny the benefits of the Treaty in certain limited circumstances. Article I(2) preserves the right of each Party to deny the benefits of the Treaty to a company controlled by nationals of a third country with which the denying Party does not have normal economic relations, e.g., a country to which it is applying economic sanctions. For example, at this time the United States does not maintain normal economic relations with, among other countries, Cuba and Libya.

Paragraph 2 also permits each Party to deny the benefits of the Treaty to a company of the other Party if the company is controlled by nationals of any third country and if the company has no substantial business activities in the territory of the other Party. Thus, the United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Lithuania if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Lithuania that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, Lithuania.

National

The Treaty defines “national” of a Party as a natural person who is a national of the United States under its laws, or a citizen of Lithuania under its laws. Under U.S. law, the term “national” is

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broad than the term “citizen.” For example, a native of American Samoa is a national of the United States, but not a citizen.

Return

“Return” is defined as “an amount derived from or associated with an investment.” The Treaty provides a non-exclusive list of examples, including: profits; dividends; interest; capital gains; royalty payments; management, technical assistance, or other fees; and returns in kind.

Associated Activities

The Treaty recognizes that the operation of an investment requires protections extending beyond the investment to numerous related activities. The Treaty defines “associated activities” to include an illustrative list of such activities, including: operating a business facility; borrowing money; acquiring, using, and disposing of property; issuing stock; and purchasing foreign exchange for imports. Article II(11) lists additional activities included in the term “associated activities”, all of which are covered by the obligation in Article II(1) to provide the better of national or MFN treatment.

State Enterprise and Delegation

“State enterprise” is defined as an enterprise owned, or controlled through ownership interests, by a Party. Purely regulatory control over a company does not qualify it as a state enterprise.

“Delegation” is defined to include a legislative grant and a government order, directive, or other act that transfers governmental authority to a state enterprise or monopoly or authorizes a state enterprise or monopoly to exercise such authority.

The definitions of “state enterprise” and “delegation” are included to clarify the scope of the obligations of Article II(2)(b), which provides that any governmental authority delegated to a state enterprise by a Party must be exercised in a manner consistent with the Party’s obligations under the Treaty.

Article II (Treatment)

Article II contains the Treaty’s major obligations with respect to the treatment of investment.

Paragraph 1 generally ensures the better of national or MFN treatment in both the entry and post-entry phases of investment (national and MFN treatment). It thus prohibits, outside of exceptions listed in the Annex, “screening” on the basis of nationality during the investment process, as well as nationality-based post-establishment measures. National treatment means treatment no less favorable than that which a Party accords, in like situations, to investments or associated activities in its territory of its own nationals or companies. MFN treatment means treatment no less favorable than that which a Party accords, in like situations, to investments or associated activities in its territory of nationals or companies of a third country.

Paragraph 1 also states that each Party may adopt or maintain exceptions to the national and MFN treatment standard with respect to the sectors or matters specified in the Annex. Further restrictive measures are permitted in each such sector or matter but

are to be kept to a minimum. (The specific exceptions are discussed in the section entitled “Annex” below.) In the Annex, Parties may take exceptions only to the obligation to provide national and MFN treatment; there are no sectoral exceptions to the rest of the Treaty’s obligations. Finally, any future exception adopted under this provision does not apply to investment existing in that sector or matter at the time the exception becomes effective.

Paragraph 2 requires each Party to ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the party’s obligations under the Treaty wherever the enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges. Paragraph 2 also supports competitive equality for investments by requiring that a Party ensure that its state enterprises accord national and MFN treatment in the sale of their goods or services in the Party’s territory.

Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord “fair and equitable treatment” and “full protection and security” are explicitly cited. The general reference to international law also implicitly incorporates other fundamental rules of customary international law regarding the treatment of foreign investment. However, this provision does not incorporate obligations based on other international agreements.

In paragraph 3(b), the Parties agree not to in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.

In paragraph 3(c), each Party pledges to observe any obligation it may have entered into with regard to investments. Thus, in dispute settlement under Articles VI or VII, a Party would be foreclosed from arguing, on the basis of sovereignty, that it may unilaterally ignore its obligations to such investments.

Paragraph 4 requires each Party to allow, subject to its laws relating to the entry and sojourn of aliens, the entry into its territory of the other Party’s nationals for certain purposes related to an investment and involving the commitment of a “substantial amount of capital or other resources.” This paragraph serves to render nationals of Lithuania eligible for treaty-investor visas under U.S. immigration law. It also affords similar treatment for U.S. nationals entering Lithuania. The requirement to commit a “substantial amount of capital or other resources” is intended to prevent abuse of treaty-investor status; it parallels the requirements of U.S. immigration law.

Paragraph 5 requires that each Party allow companies that are investments to engage top managerial personnel of their choice, regardless of nationality. This provision does not require that such personnel be granted entry into a Party’s territory. Such persons must independently qualify for an appropriate visa for entry into the territory of the other Party. Nor does this provision create an exception to U.S. equal employment opportunity laws.

Paragraph 6 prohibits either Party from imposing specified performance requirements as a condition for the establishment, expansion, or maintenance of investments. Prohibited performance requirements are those which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements. Such performance requirements are major burdens on investors and impair their competitiveness.

Paragraph 7 requires that each Party provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

Paragraph 8 ensures the transparency of each Party's regulation of investments.

Paragraph 9 recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided by a State to U.S. out-of-State residents and corporations. Article XI makes clear that the obligations of the Treaty are applicable to all political and administrative subdivisions of the Parties, such as provincial, State, and local governments.

Paragraph 10 limits the Article's MFN obligation by providing that it will not apply to advantages accorded by either Party to nationals or companies of third countries by virtue of a Party's membership in a free trade area or customs union or a future (*i.e.*, after the Treaty was signed) multilateral agreement under the framework of the General Agreement on Tariffs and Trade (GATT).

Paragraph 11 provides an additional illustrative list of "associated activities" entitled to national and MFN treatment under Article II(1).

Article III (Expropriation)

Article III incorporates into the Treaty customary international law standards for expropriation. Article III also includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation.

Paragraph 1 describes the obligations of the Parties with respect to expropriation and nationalization of an investment. These obligations apply to both direct expropriation and indirect expropriation through measures "tantamount to expropriation or nationalization" and thus apply to "creeping expropriations"—a series of measures that effectively amounts to an expropriation of an investment without taking title.

Paragraph 1 further bars all expropriations or nationalizations except those that are for a public purpose; carried out in a non-discriminatory manner; in accordance with due process of law; in accordance with the general principles of treatment provided in Article II(3); and subject to "prompt, adequate, and effective compensation."

The balance of paragraph 1 more fully describes the meaning of "prompt, adequate, and effective compensation." The guiding principle is that the investor should be made whole.

Paragraph 2 entitles an investor claiming that an expropriation has occurred to prompt judicial or administrative review of the claim in the host Party, including a determination of whether the expropriation and any compensation conform to the principles of international law.

Paragraph 3 entitles investments covered by the Treaty to national and MFN treatment with respect to any measure relating to losses suffered in a Party's territory owing to war or other armed conflict, civil disturbances, or similar events.

Article IV (Transfers)

Article IV protects investors from certain government exchange controls that limit current and capital account transfers, as well as limits on inward transfers such as those imposed by screening authorities.

In paragraph 1, each Party agrees to "permit all transfers related to an investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a list of transfers that must be allowed. The list is non-exclusive, and is intended to protect flows to both affiliated and non-affiliated entities.

Paragraph 2 provides that transfers are to be made in a "freely usable currency" at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. "Freely usable" is a term used by the International Monetary Fund; at present there are five "freely usable" currencies: the U.S. dollar, Japanese yen, German mark, French franc, and British pound sterling.

Paragraph 3 recognizes that, notwithstanding the obligations of paragraphs 1 and 2, a Party may maintain certain laws or obligations that could affect transfers with respect to investments. It provides that the Parties may require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends. It also recognizes that the Parties may protect the rights of creditors and ensure the satisfaction of judgments in adjudicatory proceedings through the equitable, nondiscriminatory, and good faith application of their laws.

Article V (State-to-State Consultations)

Article V provides for prompt consultation between the Parties, at either Party's request, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Article VI (Settlement of Disputes Between One Party and a National or Company of the Other Party)

Article VI sets forth several means by which disputes brought against a Party by an investor (specifically, a national or company of the other Party) may be resolved.

Article VI procedures apply to an "investment dispute," which is any dispute arising out of or relating to an investment agreement, an investment authorization granted by the Party's foreign investment authority, or an alleged breach of rights conferred or created by the Treaty with respect to an investment.

Article VI(2) provides that when a dispute arises the disputants should initially seek to resolve the dispute by consultation and negotiation. In the event that an investment dispute cannot be settled amicably, paragraph 2 gives an investor an exclusive choice among three options to settle the dispute. These three options are: (1) submitting the dispute to the courts or administrative tribunals of the Party that is a party to the dispute; (2) invoking dispute-resolution procedures previously agreed upon by the national or company and the host country government; or (3) invoking the dispute-resolution mechanisms identified in paragraph 3.

Under paragraph 3(a), if the investor has not submitted the dispute to a court or administrative tribunal or invoked a dispute resolution procedure previously agreed upon under the procedures in paragraph 2, and 6 months have elapsed from the date the dispute arose, the investor may choose to consent to binding arbitration of the investment dispute. The investor may choose among the International Centre for Settlement of Investment Disputes (ICSID) (Convention Arbitration), the Additional Facility of ICSID (if Convention arbitration is not available), ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or any other arbitral institution or rules agreed upon by both parties to the dispute.

Paragraph 4 constitutes each Party's consent to the submission of investment disputes to binding arbitration in accordance with the choice of the investor from among those permitted under the Treaty.

Paragraph 5 provides that any non-ICSID Convention arbitration shall take place in a country that is a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards. This provision facilitates enforcement of arbitral awards.

In addition, in paragraph 6, each Party commits to enforcing arbitral awards rendered pursuant to this Article. The Federal Arbitration Act (9 U.S.C. 1 *et seq.*) satisfies the requirement for the enforcement of non-ICSID Convention awards in the United States. The Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. 1650–1650a) provides for the enforcement of ICSID Convention awards.

Paragraph 7 ensures that a Party may not assert as a defense, or for any other reason, that the investor involved in the investment dispute has received or will receive reimbursement for the same damages under an insurance or guarantee contract.

Paragraph 8 is included in the Treaty to ensure that ICSID arbitration will be available for investors making investments in the form of companies created under the laws of the Party with which there is a dispute.

Article VII (Settlement of Disputes Between the Parties)

Article VII provides for binding arbitration of disputes between the United States and Lithuania concerning the interpretation or application of the Treaty that are not resolved through consultations or other diplomatic channels. The article specifies various procedural aspects of such arbitration proceedings, including time periods, selection of arbitrators, and distribution of arbitration

costs between the parties. The article constitutes each Party's prior consent to such arbitration.

Article VIII (Preservation of Rights)

Article VIII clarifies that the Treaty does not derogate from any obligation a Party might have to provide better treatment to the investment than is specified in the Treaty. Thus, the Treaty establishes a floor for the treatment of investments. An investment may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation (e.g., to provide a tax holiday) assumed by a Party with respect to that investment.

Article IX (Measures Not Precluded)

The first paragraph of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests.

The maintenance of public order would include measures taken pursuant to a Party's police powers to ensure public health and safety. International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.

The second paragraph permits a Party to prescribe special formalities in connection with investments, provided that these formalities do not impair the substance of any Treaty rights. Such formalities could include reporting requirements for investments or for transfers of funds, or incorporation requirements.

Article X (Tax Policies)

Article X, excludes tax matters generally from the coverage of the BIT, on the basis that tax matters should be dealt with in bilateral tax treaties.

Paragraph 1 exhorts both countries to provide fair and equitable treatment to investors with respect to tax policies.

In matters of taxation, paragraph 3 expressly applies the provisions of the Treaty, in particular its dispute settlement provisions, only to tax matters concerning expropriation (Article III), transfers (Article IV), or the observance and enforcement of terms of an investment agreement or authorization under Article VI(1)(a) or (b). Paragraph 2 further provides that the Treaty applies to such tax matters only to the extent that they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such

settlement provisions and are not resolved within a reasonable period of time.

Article XI (Application to Political Subdivisions)

Article XI makes clear that the obligations of the Treaty are applicable to all political and administrative subdivisions of the Parties, such as provincial, State, and local governments.

Article XII (Entry into Force, Duration and Termination)

Paragraph 1 stipulates that the Treaty enters into force 30 days after exchange of instruments of ratification. The Treaty remains in force for a period of 10 years and continues in force thereafter unless terminated by either Party as provided in paragraph 2. Paragraph 2 permits a Party to terminate the Treaty at the end of the initial 10 year period, or at any later time, by giving 1 year's written notice to the other Party. Paragraph 1 also provides that the Treaty applies to investments existing at the time of entry into force as well as to those established or acquired thereafter. The Protocol to the Treaty confirms the Parties' mutual understanding that the provisions of the Treaty do not bind either Party in relation to any act or fact which took place before the Treaty came into force or to any situation which ceased to exist before the date of entry into force of the Treaty. This provision thus explicitly states the standard under customary international law that applies in the absence of the Parties' express intent to apply the treaty retroactively.

Paragraph 3 provides that, if the Treaty is terminated, all investments covered by the Treaty on the date of termination (i.e., 1 year after written notice) continue to be protected under the Treaty for 10 years from that date.

Paragraph 4 stipulates that the Annex and Protocol shall form an integral part of the Treaty.

Annex

U.S. bilateral investment treaties allow for exceptions to national and MFN treatment, where the Parties' domestic regimes do not afford national and MFN treatment, or where treatment in certain sectors or matters is negotiated in and governed by other agreements. Future derogations from the national treatment obligations of the Treaty and generally permitted only in the sectors or matters listed in the Annex, pursuant to Article II(1), and must be made on an MFN basis unless otherwise specified therein.

Under a number of statutes, many of which have a long historical background, the U.S. federal government or States may not necessarily treat investments of nationals or companies of Lithuania as they do U.S. investments or investments from a third country. Paragraphs 1 and 2 of the Annex list the sectors or matters subject to U.S. exceptions.

The U.S. exceptions from its national treatment obligation are: air transportation; ocean and coastal shipping; banking, insurance, securities, and other financial services; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television sta-

tions; ownership of shares in COMSAT; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

The U.S. exceptions from its MFN treatment obligation are: mining on the public domain; maritime services and maritime-related services; one-way satellite transmissions of Direct-to-Home (DTH) and Direct Broadcasting Satellites (DBS) television services and of digital audio services; and primary dealership in United States government securities.

Paragraph 3 of the Annex lists Lithuania's exceptions from its national treatment obligation, which are: ownership of: land under the objects belonging to Lithuania by the right of exclusive ownership; land of national parks, national reservations, reserves, protective areas of the territory of biosphere monitoring; agricultural land; forestry land, with the exception of plots necessary for operation of buildings and facilities designated for economic activities which have been provided for in approved planning documents; land of recreational forests and forest shelter belts, rivers and other water bodies exceeding one hectare in size as well as their protective bank area; land of resorts and communal recreational territories, separate communal recreational areas and objects; land of state-protected natural *carcass* (geographic formations); monuments of nature, history, archaeology, and culture as well as the surrounding protective areas; land of territories reserved, according to design projects, under communal roads and engineering service lines; objects of infrastructure of communal use in towns or other localities, and for other common needs of the community; land under public roads, railway lines, airports, sea and river ports, main pipelines and other engineering service lines of communal use as well as land necessary for their operation; land allotted, in accordance with the procedure established by law, under the free trade (economic) zones territory; land of protected territories where deposits of mineral resources and other natural resources have been found, with the exception of land which, according to planning documents, has been directly allotted for the construction of buildings and facilities required for the mining or use of said mineral resources; land of the Curonian Spit, the fifteen-kilometer wide strip of coastal land of the Baltic Sea and the Curonian Lagoon, with the exception of towns that are not resorts; land assigned to the frontier; land of the territories assigned or reserved for the needs of the national defense as well as territories where land acquisition restrictions are established by laws or Government decrees for safety reasons; production and sale of narcotic drugs and psychotropic substances that are not used for legitimate medicinal purposes; growing, reproduction, and sale of cultures containing narcotic drugs or psychotropic substances that are not used for legitimate medicinal purposes; and organization of lotteries.

Lithuania did not take any exceptions from its MFN treatment obligation.

The listing of a sector or matter in the Annex does not necessarily signify that domestic laws have entirely reserved it for na-

tionals. And, pursuant to Article II(1), any additional restrictions or limitations that a Party may adopt with respect to a listed sector or matter do not apply to investment existing in that sector or matter at the time the exception becomes effective.

Finally, listing a sector or matter in the Annex exempts a Party only from the obligation to accord national or MFN treatment. Both Parties are obligated to accord to investments in all sectors—even those listed in the Annex—all other rights conferred by the Treaty.

Protocol

As described under Article XII(1), the Protocol states that the Treaty does not apply retroactively. This clarification was added to the Treaty at the request of Lithuania.

The other U.S. Government agencies that participated in negotiating the Treaty join me in recommending that it be transmitted to the Senate at an early date.

Respectfully submitted,

MADELEINE ALBRIGHT.

TREATY BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA
FOR THE ENCOURAGEMENT AND RECIPROCAL
PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of the Republic of Lithuania (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 fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights;

Noting the bilateral most favored nation trade agreement of December 23, 1925, between the Parties;

In furtherance of Article three of the bilateral agreement concerning the development of trade and investment relations of 1992 between the Parties and;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purpose of this Treaty,

(a) "Investment" means every ^kkind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:

literary and artistic work, including sound recordings,

inventions in all fields of human endeavor,

industrial designs,

semiconductor mask works,

trade secrets, know-how, and confidential business information,

and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law.

(b) "Company" of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under applicable laws and regulations of a Party whether or not organized for pecuniary gain, or privately or governmentally owned or controlled.

(c) "National" of a Party means a natural person who, for the United States of America, is a national of the United States under its applicable laws, and for Lithuania, is a citizen of the Republic of Lithuania under its applicable laws.

(d) "Return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind.

(e) "Associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property; the borrowing of funds; the purchase, issuance and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(f) "State enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

(g) "Delegation" includes a legislative grant and a government order, directive or other act transferring to a state enterprise or monopoly, or authorizing the exercise by a state enterprise or monopoly of, governmental authority.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time

the exception becomes effective. The treatment accorded pursuant to any exceptions shall unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investment and associated activities of nationals or companies of any third country.

2. (a) Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.

(b) Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

(c) Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purpose of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

4. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory 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 first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

5. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

6. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

8. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

9. The treatment accorded by the United States of America to investment and associated activities of nationals and companies of the Republic of Lithuania under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the law and regulations of other States, Territories or possessions of the United States of America.

10. The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

11. The Parties acknowledge and agree that "associated activities" include, without limitation, such activities as:

(a) the granting of franchises or rights under licenses;

(b) access to registrations, licenses, permits and other approvals (which shall in any event be issued expeditiously);

(c) access to financial institutions and credit markets;

(d) access to their funds held in financial institutions;

(e) the importation and installation of equipment necessary for the normal conduct of business affairs, including but not limited to, office equipment and automobiles and the export of any equipment and automobiles so imported;

(f) the dissemination of commercial information;

(g) the conduct of market studies;

(h) the appointment of commercial representatives, including agents, consultants, and distributors and their participation in trade fairs and promotion events;

(i) the marketing of goods and services, including through internal distribution and marketing systems, as well as by advertising and direct contact with individuals and companies;

(j) access to public utilities, public services and commercial rental space at non-discriminatory prices, if the prices are set or controlled by the government; and

(k) access to raw materials, inputs and services of all types at nondiscriminatory prices, if the prices are set or controlled by the government.

ARTICLE III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin from the date of expropriation; be fully realizable; and be freely transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether such expropriation has occurred and, if so, whether any such expropriation, and any associated compensation, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE IV

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

- (a) returns;
- (b) compensation pursuant to Article III;
- (c) payments arising out of an investment dispute;
- (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement;
- (e) proceeds from the sale or liquidation of all or any part of an investment; and
- (f) additional contributions to capital for the maintenance or development of an investment.

2. Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

ARTICLE V

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.

ARTICLE VI

1. For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to:

(a) an investment agreement between that Party and such national or company;

(b) an investment authorization granted by that Party's foreign investment authority to such national or company; or

(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(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 six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or

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

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the nationals or company when given under paragraph 3, shall satisfy the requirement for:

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

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

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

ARTICLE VII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which 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 arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

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 is a national of a third state. The UNCITRAL Rules for 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 Tribunal 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. Each Party shall pay the costs of its representation in the arbitral proceedings. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

ARTICLE VIII

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

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

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE IX

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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 either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE X

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI(1)(a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XI

This Treaty shall apply to the political and administrative subdivisions of the Parties.

ARTICLE XII

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 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Annex and Protocol shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

Done in duplicate at Washington on the fourteenth day of January, 1998, in the English and Lithuanian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF THE
REPUBLIC OF LITHUANIA:



ANNEX

1. The Government of the United States of America reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking, insurance, securities and other financial services; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in COMSAT; the provision of common carrier telephone and telegraph services; the provisions of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

2. The Government of the United States of America reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

mining on the public domain; maritime services and maritime-related services; one-way satellite transmissions of DTH and DBS television services and of digital audio services; and primary dealership in United States government securities.

3. The Government of the Republic of Lithuania reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

ownership of: land under the objects belonging to the Republic of Lithuania by the right of exclusive ownership; land of national parks, national reservations, reserves, protective areas of the territory of biosphere monitoring; agricultural land; forestry land, with the exception of plots necessary for operation of buildings and facilities designated for economic activities which have been provided for in approved planning documents; land of recreational forests and forest shelter belts, rivers and other water bodies exceeding one hectare in size as well as their protective bank area; land of resorts and communal recreational territories, separate communal recreational areas and objects; land of state-protected natural carcass (geographic formations); monuments of nature, history, archaeology and culture as well as the surrounding protective areas; land of territories reserved, according to design projects, under communal

roads and engineering service lines; objects of infrastructure of communal use in towns or other localities, and for other common needs of the community; land under public roads, railway lines, airports, sea and river ports, main pipelines and other engineering service lines of communal use as well as land necessary for their operation; land allotted, in accordance with the procedure established by law, under the free trade (economic) zones territory; land of protected territories where deposits of mineral resources and other natural resources have been found, with the exception of land which, according to planning documents, has been directly allotted for the construction of buildings and facilities required for the mining or use of said mineral resources; land of the Curonian Spit, the fifteen-kilometer wide strip of coastal land of the Baltic Sea and the Curonian Lagoon, with the exception of towns that are not resorts; land assigned to the frontier; land of the territories assigned or reserved for the needs of the national defense as well as territories where land acquisition restrictions are established by laws or Government decrees for safety reasons;

production and sale of narcotic drugs and psychotropic substances which are not used for legitimate medicinal purposes; growing, reproduction and sale of cultures containing narcotic drugs or psychotropic substances which are not used for legitimate medicinal purposes; organization of lotteries.

PROTOCOL

The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of this Treaty.

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