

PANAMA BILATERAL INVESTMENT TREATY AMENDMENT

Signed June 1, 2000; Entered into Force May 14, 2001

106th Congress

2d Session

SENATE Treaty Doc.

106-46

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PROTOCOL AMENDING INVESTMENT TREATY

WITH PANAMA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOL BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF PANAMA AMENDING THE TREATY CONCERNING THE TREATMENT OF INVESTMENTS OF OCTOBER 27, 1982. PROTOCOL WAS SIGNED AT PANAMA CITY, ON JUNE 1, 2000

SEPTEMBER 12, 2000.-Protocol was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

79-118 WASHINGTON : 2000

LETTER OF TRANSMITTAL

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The White House, September 12, 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 Protocol Between the Government of the United States of America and the Government of the Republic of Panama Amending the Treaty Concerning the Treatment and Protection of Investments of October 27, 1982. This Protocol was signed at Panama City, on June 1, 2000. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Protocol.

The 1982 bilateral investment treaty with Panama (the "1982 Treaty") was the second treaty to be signed under the U.S. bilateral investment treaty (BIT) program. The 1982 Treaty protects U.S. investment and assists Panama 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.

As explained in the Department of State's report, the Protocol is needed in order to ensure that investors continue to have access to binding international arbitration following Panama's 1996 accession to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, done at Washington, March 18, 1965 (the "ICSID Convention"). The Protocol provides each Party's consent to international arbitration of investment disputes under the 1982 Treaty before the International Centre for the Settlement of Investment Disputes, established under the ICSID Convention. The Protocol also provides for arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law. The Protocol thus facilitates the use of such procedures by investors of the Parties to resolve investment disputes under the 1982 Treaty. The Protocol also sets forth each Party's consent to ICSID Additional Facility arbitration, if Convention Arbitration is not available. Convention Arbitration would not be available, for example, if either Party subsequently ceased to be a party to the ICSID Convention.

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

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

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Department of State,

Washington, August 11, 2000.

The President,

The White House.

THE PRESIDENT: I have the honor to submit to you the Protocol Between the Government of the United States of America and the Government of the Republic of Panama Amending the Treaty Concerning the Treatment and Protection of Investments of October 27, 1982. The Protocol was signed at Panama City, on June 1, 2000. I recommend that this Protocol be transmitted to the Senate for its advice and consent to ratification.

The 1982 bilateral investment treaty with Panama ("1982 Treaty") was the second treaty to be signed under the U.S. bilateral investment treaty ("BIT") program. 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. The United States has also signed, but not yet brought into force, BITs with Azerbaijan, Bahrain, Belarus, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Nicaragua, Russia, and Uzbekistan.

One of the important objectives of the 1982 Treaty was to ensure that investors could arbitrate investment disputes with a Party in at least one forum, specified in the Treaty, by providing the prior consent of each Party to arbitrate investment disputes in that forum. This important investment protection was lost when the forum specified in the 1982 Treaty subsequently ceased to be available to the Parties. The Protocol restores this investment protection by providing the prior consent of the Parties to the use of specified alternative fora or arbitration rules to resolve investment disputes.

The forum specified in the 1982 Treaty was the Additional Facility of the International Centre for the Settlement of Investment Disputes ("ICSID"). ICSID was 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") as a forum for international arbitration of investment disputes between Contracting States and nationals of other Contracting States ("Convention Arbitration"). The United States has been a Party to the ICSID Convention since its entry into force on October 14, 1966.

When the 1982 Treaty was signed, Panama was not a party to the ICSID Convention. Convention Arbitration therefore was not available for disputes involving Panama or its nationals. The ICSID Additional Facility, however, does provide a forum for arbitration of international investment disputes arising between parties where one party is not an ICSID Contracting State or a national of a Contracting State. The 1982 Treaty therefore specifies the ICSID Additional Facility as the primary forum for international arbitration, and under Article VII of the 1982 Treaty provides the prior consent of the Parties to the use of the Additional Facility. Under the 1982 Treaty, the parties may also mutually agree to use other dispute resolution procedures to resolve their investment dispute.

The ICSID Convention entered into force with respect to Panama on May 8, 1996. As of that date, the Additional Facility ceased to be available for the settlement of investment disputes under the 1982 Treaty. The 1982 Treaty does not provide each Party's prior consent to the use of any other procedures for the resolution of investment disputes. Although an investor may still request a Party's consent to use any other dispute settlement procedures for the resolution of their investment dispute, the Party may withhold its consent.

The Parties negotiated the Protocol to restore assured investor access to dispute settlement by providing each Party's prior consent to Convention Arbitration as well as arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). The Protocol thus facilitates the use of such procedures by investors of the Parties to resolve

investment disputes under the 1982 Treaty. The Protocol also sets forth each Party's consent to ICSID Additional Facility arbitration, if Convention Arbitration is not available. Convention Arbitration would not be available, for example, if either Party subsequently ceased to be a party to the ICSID Convention.

The terms of the Protocol are described below.

#### Article I (Amending Article VII of the 1982 Treaty)

Paragraph 1 amends Article VII(3) of the 1982 Treaty by replacing that paragraph with the text set forth in Article I(1) of the Protocol.

Under amended Article VII(3)(a), at any time after 6 months from the date upon which an investment dispute has arisen, the national or company concerned ("investor") may consent in writing to the submission of the dispute to binding arbitration. In providing its consent, the investor may choose among convention Arbitration, the Additional Facility of ICSID (if Convention Arbitration is not available), or ad hoc arbitration using the UNCITRAL Rules. Once the investor has so consented, either party to the dispute may institute proceedings, provided that the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute resolution procedure previously agreed upon and the investor has not brought the dispute before a judicial, administrative or agency tribunal of competent jurisdiction of either Party.

Amended Article VII(3)(b) constitutes each Party's consent to the submission of investment disputes to binding arbitration in accordance with the choice of the investor under amended Article VII(3)(a).

Amended Article VII(3)(c) provides that if the parties elect conciliation or arbitration using Convention Arbitration or the Additional Facility, the regulations and rules of ICSID or the Additional Facility, as applicable, will govern.

Under amended Article VII(3)(d), each Party commits to enforcing arbitral awards rendered pursuant to Article VII. 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.

Amended Article VII(3)(e) provides that any non-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 done at New York, June 10, 1958. This provision facilitates enforcement of arbitral awards.

Paragraph 2 amends Article VII(5) of the 1982 Treaty by replacing that paragraph with the text set forth in Article I(2) of the Protocol. Amended Article VII(5) provides that, for the purposes of Article 25(2)(b) of the ICSID convention and Article VII of the 1982 Treaty, the nationality of a company in the host country will be determined by ownership or control, rather than by place of incorporation. This provision allows a company that is an investment covered by the 1982 Treaty to bring a claim in its own name.

#### Article II (Entry into Force and Duration)

Article II provides that the Protocol forms an integral part of the 1982 Treaty. The Protocol will enter into force upon an exchange of notes confirming that the Parties have completed their domestic legal requirements for entry into force of the Protocol. The Protocol will remain in force for so long as the 1982 Treaty is in force. If the 1982 Treaty is terminated, the Protocol will continue to be effective (as will the other Articles of the 1982 Treaty) for an additional 10 years as provided in Article XIII(4) of the 1982 Treaty.

The 1982 Treaty was negotiated jointly by the Department of State and the Office of the United States Trade Representative, with the active participation of the Departments of Commerce and the Treasury. These agencies join me in recommending that it be transmitted to the Senate at an early date.

Respectfully submitted.

Strobe Talbott.

PROTOCOL

BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

AND

THE GOVERNMENT OF THE REPUBLIC OF PANAMA  
AMENDING THE TREATY CONCERNING THE TREATMENT AND  
PROTECTION OF INVESTMENTS

The Government of the United States of America and the Government of the Republic of Panama (hereinafter "the Parties");

Desiring to make more effective the Treaty Concerning the Treatment and Protection of Investments between the Parties, signed at Washington on October 27, 1982 (hereinafter "the Treaty");

Have agreed to amend the Treaty as follows:

ARTICLE I

1. The text of Article VII(3) shall read as follows:

(a) At any time after six months from the date upon which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute:

(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"), for settlement either by conciliation or binding arbitration;

(ii) to the Additional Facility of the Centre, if the Centre is not available, for settlement either by conciliation or binding arbitration; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), for settlement by binding arbitration.

Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre, the Additional Facility or in accordance with the UNCITRAL Rules, provided the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute, and the national or company concerned has not brought the dispute before the courts of justice, administrative tribunals or agencies of competent jurisdiction of either Party.

(b) Each Party hereby consents to the submission of an investment dispute in accordance with the choice of the national or company under paragraph 3(a)(i), (ii), and (iii). This consent and the submission of the dispute by a national or company under paragraph 3(a) shall satisfy the requirement of:

(i) 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

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

(c) Where the national or company chooses to submit the dispute to the Centre or the Additional Facility, in accordance with paragraph 3(a), conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Regulations and Rules of the Centre or of the Additional Facility respectively.

(d) Each Party shall provide for the enforcement within its territory of arbitral awards rendered pursuant to this Article.

(e) Any arbitration under paragraph 3(a)(ii) or 3(a)(iii) shall be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, June 10, 1958, under the auspices of the United Nations.

2. The text of Article VII(5) shall read as follows:

5. For the purposes of Article 25(2)(b) of the ICSID Convention and this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of either Party or a political subdivision thereof but that immediately before the occurrence of the event

or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of the other Party.

ARTICLE II

1. This Protocol shall form an integral part of the Treaty, and shall enter into force upon an exchange of notes confirming that the Parties have completed their domestic legal requirements for entry into force of this Protocol.

2. This Protocol shall remain in force for so long as the Treaty shall remain in force. If the Treaty is terminated, this Protocol shall continue to be effective for a further period of ten years as provided in Article XIII(4) of the Treaty.

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

DONE in duplicate at Panama, this first day of June, 2000, in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA: FOR THE GOVERNMENT OF  
THE REPUBLIC OF PANAMA:

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