No. __-____

In the Supreme Court of the United States

THE REPUBLIC OF ECUADOR,
PETITIONER

v.

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA or Act) states in relevant part that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. The Act "provides the sole basis for obtaining [subject-matter] jurisdiction over a foreign state in the courts of this country." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (citations omitted). "[U]nless a specified exception applies," foreign states are immune from such jurisdiction as to any and all "claim[s] against [them]." *Ibid.*

This case involves the Act's arbitration exception, an often-litigated provision that this Court has yet to address. That exception strips foreign sovereigns of immunity in actions brought, *inter alia*, "to confirm an award made pursuant to * * * an agreement to arbitrate," if that "award is or may be governed by" an "international agreement * * * calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). A foreign state's agreement to arbitrate is thus a factual predicate for jurisdiction.

The question presented is: Whether the D.C. Circuit erred in holding that there is FSIA jurisdiction over this suit to confirm an arbitral award, upon concluding that: (1) federal courts may not independently determine whether there is an agreement to arbitrate, but rather must defer to foreign arbitrators on this core FSIA jurisdictional fact; and (2) the party invoking federal court jurisdiction bears only a burden of production as to the facts supporting jurisdiction, while the foreign state bears the ultimate burden of persuasion as to the absence of those facts.

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INTRODUCTION

This petition raises recurring issues of exceptional importance concerning foreign sovereign immunity, federal jurisdiction, and investor-state treaty arbitration. The case involves the standard of review applicable to jurisdictional facts under the Foreign Sovereign Immunities Act's "arbitration exception"—an often-litigated exception to immunity that this Court has never addressed—and the question of who bears the burden of proving jurisdiction in every FSIA case.

The D.C. Circuit held that federal courts must defer to non-Article III arbitrators' findings on a core jurisdictional fact—a foreign state's agreement to arbitrate—rather than make independent findings. The court also held that, as between a foreign state presumptively immune from suit and a petitioner invoking an exception to immunity, the petitioner need not prove that the exception applies. Rather, "the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis" for jurisdiction. Pet. 7a (citation omitted). In so holding, moreover, the court applied the relevant treaty retroactively, to cover investment activity concluded before the treaty took effect.

The decision below conflicts with three lines of the Court's precedents—those holding that (1) the party invoking federal jurisdiction bears the burden of proving predicate jurisdictional facts; (2) exceptions to, and waivers of, sovereign immunity are narrowly construed; and (3) statutes and treaties apply retroactively only if there is no other way to read them.

Further, the question presented takes on elevated importance given its significance to investor-state arbitration and the fact that "[a]ctions against foreign sovereigns * * * raise sensitive issues" of "foreign relations." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). "[P]rotecting relations with foreign governments" is a "plainly compelling" interest. *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008). Even in non-FSIA cases, "a sovereign's consent to arbitration is important," and this Court has granted review based solely on "the importance of the matter for international commercial arbitration." *BG Group*, *PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1212, 1205 (2014). Those considerations apply with even greater force under the FSIA—which makes the absence of sovereign immunity a *jurisdictional* requirement.

The FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden*, 461 U.S. at 493. The Act's text is plain. It codifies a default rule of immunity, subject to enumerated exceptions: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Thus, "a foreign state is presumptively immune from suit unless a specific [FSIA] exception applies." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 197 (2007).

Here, Chevron Corporation and Texaco Petroleum Company (collectively, Chevron) petitioned the district court to confirm a foreign arbitral award rendered against the Republic of Ecuador. To establish subject-matter jurisdiction, Chevron invoked the FSIA's arbitration exception, which removes immunity in actions "to confirm an award made pursuant to * * * an agreement to arbitrate," provided the "award is or may be governed by" an "international agreement * * * calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

As evidence of "an agreement to arbitrate"—a factual predicate for the exception, and thus for exercising jurisdiction—Chevron produced the Ecuador–U.S. bilateral investment treaty (BIT, or the Treaty), a notice of arbitration nominally submitted pursuant to the Treaty, and its arbitral award. Ecuador contested jurisdiction because it had not agreed to arbitrate Chevron's claims. The BIT applies only *prospectively*, to disputes involving "investments" (a defined term) "existing at the time of entry into force" or "made or acquired thereafter." Chevron instead sought to arbitrate claims associated with an investment that expired years before the Treaty took effect.

The courts below nevertheless exercised jurisdiction, setting a dangerous precedent in the circuit that sees more lawsuits against foreign states than any other, because venue in the District of Columbia is always proper under 28 U.S.C. § 1391(f)(4). The D.C. Circuit sanctioned the retroactive application of a BIT whose text prohibits that result. It broadly construed the BIT's limited waiver of immunity. And it saddled foreign states with the burden of *disproving* their entitlement to immunity under the FSIA.

The arbitration exception, moreover, governs litigation under hundreds of treaties—including dozens with identical language to which the United States is party. The D.C. Circuit's "expansive view" of FSIA jurisdiction poses "risks to international comity" and threatens to "impede[] negotiations of international agreements." *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 763 (2014). Indeed, some nations have withdrawn from BITs, and the decision below promises to exacerbate diplomatic concerns.

Certiorari should be granted.

OPINIONS BELOW

The decision below (Pet. 1a–17a) is reported at 795 F.3d 200. The orders denying rehearing (Pet. 46a–47a) are unpublished. The district court's decision (Pet. 18a–45a) is reported at 949 F. Supp. 2d 57.

JURISDICTION

The D.C. Circuit entered judgment on August 4, 2015, and denied rehearing on September 28, 2015. On December 7, 2015, the Chief Justice extended the time for seeking certiorari to February 25, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. §§ 1330, 1602 *et seq*. (Pet. 49a–80a), and the Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15 (Pet. 81a–121a), are reproduced in the Appendix.

STATEMENT

A. The Foreign Sovereign Immunities Act and its arbitration exception

"Under the venerable principle of foreign sovereign immunity, foreign states are ordinarily 'immune from the jurisdiction of [U.S.] courts.'" *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009) (quoting 28 U.S.C. § 1604). U.S. courts do not deprive sovereigns of their immunity "absent a consent to be sued that is unequivocally expressed." *United States* v. *Bormes*, 133 S. Ct. 12, 16 (2014) (internal quotations omitted).

The FSIA is "comprehensive." *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (citation omitted). It applies "in every civil action against a foreign state" (*ibid.*), and "provides the sole basis for obtaining [subject-matter] jurisdiction over a foreign state in the courts of this country" (*Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (citations omitted)). "[U]nless a specified exception applies," foreign states are immune from any "claim." *Ibid.* Moreover, the "conditions" that states place on waivers of immunity "must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). If an exception applies, federal courts may exercise jurisdiction. 28 U.S.C. § 1330(a).

This case involves the FSIA's "arbitration exception," under which U.S. courts may exercise jurisdiction over foreign states in actions "to confirm an [arbitral] award made pursuant to * * * an agreement to arbitrate, if * * * the * * * award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6). Parties invoking this exception must establish three predicate "jurisdictional facts": (1) "a foreign state has agreed to arbitrate"; (2) "there is an award based on that agreement"; and (3) "the award 'is or may be governed by a treaty'" signed by the United States calling for enforcement of arbitral awards. Pet. 6a–7a & n.2 (quoting § 1605(a)(6)) (emphasis omitted).

The question here concerns the standard of review applicable to these jurisdictional facts and who bears the ultimate burden of proving (or disproving) them. In particular, how should a court decide whether the sovereign agreed to arbitrate?

B. The Ecuador–U.S. bilateral investment treaty

The Treaty was intended to "stimulate the flow of private capital" into Ecuador by reaching "agreement upon the treatment to be accorded such investment." Pet. 102a. As President Clinton explained, the Treaty was "designed to protect U.S. investment and encourage private sector development in Ecuador, and support the economic reforms taking place there." Pet. 81a. It was "an important milestone"—"the first [BIT] signed with a member of the Andean Pact," "the second BIT signed with a South American country," and "a model for negotiations with other Andean Pact countries." Pet. 81a–82a.

Three Treaty articles are relevant here. *First*, Article I(1)(a)(iii) defines "investment" to include "a claim to money or a claim to performance having economic value, and associated with an investment." Pet. 103a. This is the only definition of "investment" that arguably encompasses lawsuits, and it requires that lawsuits be "associated with an investment."

Second, Article VI provides for arbitrating "investment dispute[s]." Pet. 110a–111a. Such disputes include "an alleged breach of any right conferred or created by this Treaty with respect to an investment." Pet. 110a (art. VI(1)(c)). Article VI is not an agreement "between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors" under the BIT's terms. *BG Group*, 134 S. Ct. at 1213 (Sotomayor, J., concurring).

Third, Article XII(1) unambiguously delimits the Treaty's temporal scope: It "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter." Pet. 115a. Thus, investors whose investments concluded before the Treaty's effective date—May 11, 1997—may not accept Ecuador's offer of arbitration.

C. Arbitration and set-aside proceedings

From 1964 until 1992, Chevron explored Ecuador for oil. Chevron's exploration was governed by a 1973 Concession Agreement with Ecuador, under which disputes were subject to Ecuadorian law and required to be submitted to the "judges and courts of Ecuador." C.A. App. 87.

In 1992, the Concession Agreement expired. Chevron left Ecuador, heralding the "completion" of its "28-year partnership" with Ecuador in a "Farewell Advertorial" published nationally. C.A. App. 167. By 1993, Chevron had filed seven breach-of-contract lawsuits in Ecuadorian court. C.A. App. 849. Chevron viewed its claims as bargaining chips "to offset [Ecuador's] claims" against the company involving its oil-exploration efforts. C.A. App. 132. A 1995 Settlement Agreement & Release between the parties resolved most claims. It "terminat[ed]" Chevron's "rights and obligations" concerning its investment, while providing that Chevron's pending lawsuits would "continue to be heard before the authorities having the appropriate jurisdiction"—i.e., Ecuador's courts. C.A. App. 182.

The BIT did not enter into force until 1997. In 2006, Chevron initiated an international arbitration against Ecuador, invoking the Treaty. Chevron had done little to pursue its lawsuits—occasionally sending one-page letters to prevent dismissal (C.A. App. 246)—but asserted that Ecuador's courts had "unduly delayed" their resolution, in violation of the Treaty's guarantee of "effective means of asserting claims and enforcing rights with respect to investment." Pet. 16a, 39a. Chevron identified its "investment" as the "claims" asserted in its lawsuits, which derived from the oil-related investment it terminated in 1992.

Ecuador's jurisdictional objection was straightforward. The Treaty is not retroactive. It applies only "to investments existing at the time of entry into force" or "made or acquired thereafter." Pet. 115a. And although a "claim" can be an "investment" under the Treaty, the claim must be "associated with an investment" that "exist[ed] at the time of entry" (May 1997) or thereafter. Pet. 103a, 115a. Because Chevron's claims were associated only with an *expired* investment, Ecuador had not agreed to arbitrate them.

The tribunal nevertheless exercised jurisdiction. It acknowledged that Chevron's oil-related investment ended before the Treaty took effect, but announced that Chevron's claims "continued [the] original investment." Pet. 35a. The tribunal also acknowledged that some of Chevron's "[Ecuadorian] remedies" to move its lawsuits forward "remain[ed] unused." C.A. App. 1099. Yet the tribunal resolved each lawsuit—including several that had since been dismissed—in Chevron's favor, awarding over $96 million in damages and interest.

Only courts in a country with primary jurisdiction over arbitral awards—i.e., the arbitral "seat," here the Netherlands—may set aside such awards. See Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (New York Convention) arts. VI, V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (referencing applications to "set[] aside" the award in "the country in which, or under the law of which, that award was made"). Accordingly, Ecuador initiated set-aside proceedings in the Dutch courts, which upheld Chevron's award. Pet. 3a–4a.

D. The district court's decision

In 2012, Chevron petitioned the district court to confirm the award, invoking 28 U.S.C. § 1330(a) and the FSIA's arbitration exception to establish subject-matter jurisdiction. Ecuador opposed confirmation, citing the absence of an agreement to arbitrate and the presumption against retroactivity.

Rather than analyze the jurisdictional question de novo, the court held that "deferential review [was] required." Pet. 36a. Noting that Ecuador had also invoked the New York Convention—under which courts may refuse to recognize arbitral awards not supported by consent—the court deemed Ecuador's jurisdictional argument "an attempt * * * to get two bites at the apple of the merits." Pet. 24a. The court found jurisdiction without analyzing the Treaty's non-retroactivity provision.

E. The court of appeals' decision

The D.C. Circuit affirmed, applying a burden-shifting framework under which Ecuador bore the ultimate burden to *disprove* an agreement to arbitrate —a factual predicate for subject-matter jurisdiction. The court acknowledged that FSIA jurisdiction "'depends on particular factual propositions,'" including "the existence of an arbitration agreement." Pet. 6a (quoting *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008)). But as to proving an agreement, the court held that Chevron bore "'only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence.'" Pet. 7a.

The court held that Chevron had satisfied its initial burden "by producing the BIT, Chevron's notice of arbitration," and the "arbitration decision." *Ibid*. The court thus reasoned that the issue was "whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate." Pet. 8a. In the court's view, Ecuador could not do so because it "d[id] not dispute the existence of [these documents]." Pet. 7a.

The court disagreed that the FSIA requires "a *de novo* determination of whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's [claims]." Pet. 8a. Announcing that "Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention," the court held that whether Chevron's "investment" (its lawsuits) qualified for Treaty protection was subject to deferential review. *Ibid*.

The court further declared that it would find jurisdiction "[e]ven [if] * * * the FSIA required a *de novo* determination of arbitrability." Pet. 10a. Here, too, however, the court required *Ecuador* "to demonstrate by a preponderance of the evidence that Chevron's suits were not 'investments' within the meaning of the BIT." Pet. 10a–11a. The court gave two reasons why Ecuador "failed to do" so, but little support for either: (1) Chevron's lawsuits continued its oil-related investment because "an investment continues to exist until it has been fully wound up and all claims have been settled"; and (2) Article XII's non-retroactivity provision "applies only to 'investments' as defined by Article I, and *not* to the use of the term 'investments' within the [Treaty's] definitional paragraph." Pet. 11a–12a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision concerning the standard of review applicable to jurisdictional facts under the FSIA's arbitration exception—and who bears the burden of proving (or disproving) those facts—raises exceptionally important questions of foreign policy, international arbitration, and federal jurisdiction.

The issue of who must prove jurisdictional facts is important in *every* FSIA case. The idea that foreign states must disprove the existence of such facts conflicts with this Court's leading FSIA case—*Verlinden*, which held that courts must independently analyze jurisdiction even when foreign states fail to appear—and with this Court's myriad holdings that the plaintiff bears the burden of establishing jurisdiction. Further, the decision below conflicts with this Court's longstanding precedents requiring that waivers of sovereign immunity be narrowly construed.

This Court has addressed nearly every other FSIA exception, but has never taken up the arbitration exception. That exception governs litigation under hundreds of treaties—including dozens of U.S. BITs with provisions identical to those here. The D.C. Circuit held that the BIT protects claims associated with expired pre-Treaty investments despite the Treaty's *express* statement that it applies only prospectively.

That conclusion conflicts with this Court's precedents establishing a presumption against applying statutes or treaties retroactively unless there is no other way to read them. Remarkably, the court below nowhere acknowledged this settled rule.

Practically speaking, the ruling below will almost certainly be the last word on the subject, as investors seeking to confirm awards against foreign states have no reason to seek review anywhere but the District of Columbia, where venue is always proper. 28 U.S.C. § 1391(f)(4). Even outside the FSIA context, this Court has readily reviewed issues of "importance" to "international commercial arbitration." *BG Group*, 134 S. Ct. at 1205. "[A] sovereign's consent to arbitration is important" (*id*. at 1212), as a sovereign does not "lightly" "subject itself to suit," let alone to "international arbitration" and *retroactively* (*id*. at 1219–1220 (Roberts, C.J., dissenting)).

Certiorari is warranted.

I. The D.C. Circuit's jurisdictional holding—deferring to the arbitrators' findings on jurisdictional facts and requiring the foreign state to prove its entitlement to immunity—conflicts with this Court's precedents.

"Actions against foreign sovereigns in our courts raise sensitive issues" of "foreign relations." *Verlinden*, 461 U.S. at 493. "The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause," and a foreign court's decrees against them may cause a "more specific affront." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008).

Recognizing those sensitivities, this Court has repeatedly held that "a foreign state is presumptively immune from suit unless a specific [FSIA] exception applies." *Permanent Mission*, 551 U.S. at 197; accord *OBB Personenverkher AG* v. *Sachs*, 136 S. Ct. 390, 394 (2015); *Nelson*, 507 U.S. at 355. As the Solicitor General has explained, courts must be "especially careful" to "afford foreign states full procedural protections" and to "satisfy themselves" concerning "the prerequisites for the exercise of jurisdiction over foreign states." U.S. *Amicus* Br. 15–26, *Ministry of Def.* v. *Elahi*, 546 U.S. 450 (2006) (No. 04-1095).

The D.C. Circuit, however, not only required deferential review of the core "jurisdictional fact[]" here—"whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's [claims]"—but held that Chevron bore "only a burden of production" on jurisdiction. Pet. 6a–8a. According to the court, "the burden of persuasion rests with the *foreign sovereign* claiming immunity, which must establish the *absence* of the factual basis by a preponderance of the evidence." Pet. 7a (emphasis added).

That decision conflicts with three formidable lines of precedent: this Court's holdings that (1) parties invoking federal jurisdiction bear the burden of proving all facts supporting jurisdiction; (2) exceptions to sovereign immunity are narrowly construed in favor of the sovereign; and (3) statutes and treaties do not apply retroactively unless there is no other way to read them. Indeed, the decision below turns the general rule of § 1604—that foreign states are "presumptively immune from suit" (*Permanent Mission*, 551 U.S. at 197)—on its head. Review is warranted.

A. The decision conflicts with this Court's holdings, including *Verlinden*, that a party invoking federal jurisdiction bears the burden of proving jurisdictional facts.

The decision below conflicts with the Court's many precedents holding that the party invoking a federal court's jurisdiction must prove all predicate jurisdictional facts, and thus that courts must independently require proof of FSIA jurisdiction "even if the foreign state does not enter an appearance." *Verlinden*, 461 U.S. at 493 n.20.

1. In *McNutt* v. *General Motors Acceptance Corp.*, this Court held that "[t]he prerequisites to the exercise of jurisdiction" are "conditions which must be met by the party who seeks the exercise of jurisdiction in his favor." 298 U.S. 178, 189 (1936). Because the plaintiff "claims that the power of the court should be exerted," he not only "must allege in his pleading the facts essential to show jurisdiction," but also must "*carry throughout the litigation the burden of showing that he is properly in court*." *Ibid.* (emphasis added). *McNutt* rejected "the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure." *Ibid.*

More recent decisions reaffirm this rule. For example, in *Kokkonen* v. *Guardian Life Insurance Co.*, this Court followed *McNutt* in holding that "[i]t is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction," and that "the burden of establishing the contrary rests upon the party asserting jurisdiction." 511 U.S. 375, 377 (1994) (citations omitted). Similarly, the Court in *DaimlerChrysler Corp.* v. *Cuno* explained that "because [w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record, the party asserting federal jurisdiction when it is challenged has the burden of establishing it." 547 U.S. 332, 342 n.3 (2006) (quotations, citations omitted). Nor are these decisions surprising, as "the burden of persuasion" ordinarily rests on those who "attack" applicable legal "presumptions." *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981).

2. The ruling below also conflicts with *Verlinden*'s instruction that a court analyzing FSIA jurisdiction "must satisfy itself that one of the [Act's] exceptions applies" and may not rely on the plaintiff's allegations. 461 U.S. at 493–494. *Verlinden* acknowledged that, according to the Act's legislative history, "'sovereign immunity is an affirmative defense that must be specially pleaded.'" *Id.* at 493 n.20 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976)). But as the Court then explained, that legislative history cannot overcome the FSIA's text or the requirements of jurisdiction: "Under the Act, however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court must still determine that immunity is unavailable." *Ibid.*

In other words, courts may not place the burden of disproving jurisdictional facts on foreign states. And the rule that the "threshold question" of jurisdiction requires judicial verification "in every action against a foreign sovereign" (*id.* at 493) echoes *McNutt*'s teaching that even where the plaintiff's allegations are unchallenged, courts should "insist that the jurisdictional facts be established" by "a preponderance of evidence" (298 U.S. at 189). See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (summarizing the Court's "long and venerable line of cases" from 1804 forward reflecting this "inflexible" rule).

3. The decision below sharply conflicts with these precedents. The court acknowledged that FSIA jurisdiction "depends on particular factual propositions," including "the existence of an arbitration agreement." Pet. 6a. As to proof of these core FSIA "jurisdictional facts," however, the court held that courts should defer to findings of non-Article III arbitrators. Pet. 8a–10a. Worse, it reasoned that even under de novo review, the *foreign state* must still "demonstrate by a preponderance of the evidence that [the petitioner's] suits were *not* [arbitrable]." Pet. 10a–11a (emphasis added). Moreover, the court so held without attempting to reconcile its analysis with § 1604's text, or with this Court's repeated holdings that foreign sovereigns are "presumptively immune" from suit.

Nor does *Chabad*—the earlier D.C. Circuit decision cited as authority for the court's burden-shifting framework—explain the basis for that approach. Rather, *Chabad* simply cites other decisions that trace back to a single paragraph of the 46-page House Report in the FSIA's legislative history. 528 F.3d at 940 (citing *Cargill Int'l* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (citing *Baglab Ltd.* v. *Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293–294 (S.D.N.Y. 1987) (citing *Meadows* v. *Dominican Republic*, 817 F.2d 517, 522 (9th Cir. 1987) (quoting H.R. Rep. No. 1487 at 17)))). That paragraph—the innermost matryoshka doll in the foregoing citation —is the lone source of the notion that "[t]he ultimate burden of proving immunity would rest with the foreign state." H.R. Rep. No. 1487 at 17; see *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) ("Ordinarily, the burden of proof in establishing subject matter jurisdiction is on the party asserting jurisdiction. However, the legislative history of the FSIA envisions a shifting burden of proof.") (citation omitted), abrogated on other grounds by *O'Bryan* v. *Holy See*, 556 F.3d 361 (6th Cir. 2009).

Verlinden confirmed, however, that legislative history cannot rewrite the FSIA. 461 U.S. at 493 n.20. As this Court "ha[s] repeatedly held, the authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists —both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Ibid.*[1] Although the circuits have adopted

[1] The FSIA's history reveals such "strategic manipulations"—including by a Texaco vice president, who urged that the House Report "state the intent of Congress * * * to place the burden of proving entitlement to immunity on the foreign state which has itself invoked the defense, *notwithstanding any general principle of statutory construction to the contrary*." Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before Subcomm. on Admin. Law and Governmental Relations of H. Comm. on Judic., 94th Cong. 81 (1976) (statement of Cecil J. Olmstead) (emphasis added).

this rule, no circuit has reconciled it with the FSIA's text, *Verlinden*, or the rule that the burden of proving jurisdiction remains with the plaintiff.[2] And "legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996).

Not surprisingly, leading commentators question why foreign states should bear the burden of proof on FSIA jurisdiction. See 15 Moore's Fed. Prac. § 104.07 (3d ed. 2013) ("It would seem that because jurisdiction depends on absence of immunity and the plaintiff always bears the burden of establishing federal jurisdiction, the plaintiff should have the burden of proving absence of immunity."). Certiorari is warranted to confirm that the burden of persuasion under § 1604 remains with the plaintiff "throughout the litigation." *McNutt*, 298 U.S. at 189.

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[2] In addition to the cases cited above, see *Ungar* v. *Palestine Liberation Org.*, 402 F.3d 274, 289 (1st Cir. 2005); *Fed. Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 (3d Cir. 1993); *Velasco* v. *Gov't Of Indonesia*, 370 F.3d 392, 397 (4th Cir. 2004); *Forsythe* v. *Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989); *Enahoro* v. *Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005); *Cmty. Fin. Grp., Inc.* v. *Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011); *Southway* v. *Cent. Bank of Nigeria,* 328 F.3d 1267, 1271 (10th Cir. 2003); *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009); *Transam. S.S. Corp.* v. *Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985).

B. The decision conflicts with this Court's holdings that exceptions to sovereign immunity are narrowly construed.

Review is also warranted because the decision below conflicts with this Court's holdings that exceptions to (and waivers of) sovereign immunity must be narrowly construed in favor of the sovereign.

Like scores of treaties discussed below (at 25–26), the Treaty here contains reciprocal waivers of sovereign immunity by Ecuador and the United States. Those waivers are both substantively and temporally limited. But in deferring to private arbitrators' findings as to whether those waivers extend to arbitrating claims involving pre-Treaty investments—a jurisdictional fact—and in requiring *Ecuador* to persuade the court that it is immune, the court below construed the waivers broadly, retroactively, and against the sovereign.

That decision breaks from this Court's repeated holdings that U.S. courts will not deprive sovereigns of their immunity "absent a consent to be sued that is unequivocally expressed." *Bormes*, 133 S. Ct. at 16 (quotations omitted). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192 (citations omitted). Where, as here, a state attaches substantive conditions to its waiver, "those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U.S. at 287. That "critical requirement [is] firmly grounded in [this Court's] precedents." *Lane*, 518 U.S. at 192 (citing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992); *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). Yet the court below did not attempt to reconcile its decision with this principle.

Strictly construing waivers of sovereign immunity reflects the global reality that "[i]t is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country —including our own—takes that step lightly." *BG Group*, 134 S. Ct. at 1219 (Roberts, C.J., dissenting). "But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, '[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation' whose 'uniqueness and power should not be overlooked.'" *Id*. at 1220 (quoting J. Salacuse, The Law of Investment Treaties 137 (2010)).

Review is warranted to confirm that waivers of foreign sovereign immunity, no less than of domestic sovereign immunity, must be construed "in favor of the sovereign." *Lane*, 518 U.S. at 192.

C. The decision conflicts with this Court's holdings establishing a presumption against retroactive application of the law.

The decision below also conflicts with this Court's holdings that statutes and treaties apply retroactively only if there is no other way to read them. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence" and "older than our Republic." *Landgraf* v. *USI Film Prods*., 511 U.S. 244, 265 (1994) (footnote omitted). This "timeless" rule is "dictate[d]" by "[e]lementary considerations of fairness." *Ibid*. (quotations, citation omitted).

Thus, this Court applies "the uniformly accepted rule against giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that" Congress so intended. *Id.* at 271–272 (quotations omitted). The rule applies to treaties,[3] statutes implementing treaties,[4] and the "important" question whether "[a] treaty should take effect" "retrospective[ly]." *American Sugar*, 202 U.S. at 576–77, 579.

The decision below departs from the presumption against retroactivity, which the D.C. Circuit did not acknowledge. Under the BIT's non-retroactivity provision, the Treaty "appl[ies] to investments existing at the time of entry into force" or "made or acquired thereafter." Pet. 115a. Yet the court below held that the BIT authorized arbitral claims associated with expired "pre-BIT investment." Pet. 12a. The court justified this result by reasoning that Chevron's claims were "continuations of its initial investment," and that the non-retroactivity provision "applies only to 'investments' as defined by Article I, and *not* to the use of the term 'investments' within the [Treaty's] definitional paragraph." Pet. 11a–12a. But even if that reading of the BIT were plausible—and it is not (*infra* at 32–34)—it cannot be said that "no other meaning can be annexed to [the Treaty]." *American*

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[3] *Haver* v. *Yaker*, 76 U.S. 32, 34-35 (1869); *Ladiga* v. *Roland*, 43 U.S. 581, 589 (1844).

[4] *United States* v. *Am. Sugar Ref. Co.*, 202 U.S. 563, 576–577 (1906); *Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884).

Sugar, 202 U.S. at 577 (quotations omitted). Review is needed.

II. This case otherwise raises questions of critical importance to the nation's foreign relations and investor-state arbitrations.

Beyond the foregoing conflicts with precedent, certiorari is warranted because the decision below raises "delicate and important" issues (*The Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 135 (1812)) involving the nation's foreign affairs and investor-state arbitrations. The Court has never addressed the FSIA's arbitration exception—one of the Act's most often-litigated provisions—and the D.C. Circuit's decision will likely be the last word on that subject. Further, the number of affected treaties is large and growing, and the court's jurisdictional burden-shifting framework applies to *every* FSIA exception.

A. The foreign affairs concerns at issue, and the potential repercussions for purposes of international comity, warrant review.

As this Court has recognized, "protecting relations with foreign governments" is a "plainly compelling" interest. *Medellin*, 552 U.S. at 524. Even outside the FSIA context, "a sovereign's consent to arbitration is important." *BG Group*, 134 S. Ct. at 1212. That is all the more true where the absence of sovereign immunity is a *jurisdictional* requirement. Indeed, even if finding a waiver of sovereign immunity would not be troubling in cases involving the U.S. government (it would), "a problem that might be deemed *de minimis* in a domestic context * * * assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line, Ltd.* v. *Los Angeles Cnty.*, 441 U.S. 434, 456 (1979).

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other" (*Schooner Exchange*, 11 U.S. at 136), the decision below poses a risk of repercussions in similar cases abroad. The United States is party to 42 BITs with other nations (*infra* at 25), some of whom have sovereign immunity laws modeled on the FSIA.[5] As the Solicitor General has explained, "improperly subjecting a foreign state to suit can in some circumstances raise foreign-relations and reciprocity concerns." U.S. *Amicus* Br. 20, *Holy See* v. *Doe*, No. 09-1 (U.S. June 28, 2010). Thus, U.S. courts must "not expand" the FSIA "beyond the scope that Congress intended." *Ibid*.

In short, "the comity interests that have contributed to the development of the immunity doctrine" warrant "[g]iving full effect to sovereign immunity." *Pimentel*, 553 U.S. at 866.

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[5] Other nations, including those with laws modeled on the FSIA, place the burden of proof on the plaintiff. *Kuwait Airways Corp.* v. *Iraq (Republic)*, [2010] 2 S.C.R. 571, ¶ 22 (Can.) ("It is up to [the plaintiff] to establish that it may rely on an exception" to immunity); J. Crawford, Brownlie's Principles of Public International Law 491 (8th ed. 2012) ("There is a presumption that a state possesses immunity [under the British State Immunity Act], with the plaintiff bearing the burden of proof to the contrary.").

B. There is an acute need for guidance on the FSIA's arbitration exception, which the Court has yet to address and governs cases under hundreds of treaties.

The D.C. Circuit's erroneous burden-shifting rule applies to *every* FSIA exception. But even setting that aside, this case involves important, recurring issues under the Act's arbitration exception. In *BG Group*, the Court granted certiorari "[g]iven the importance of the matter for international commercial arbitration." 134 S. Ct. at 1205. Similar interests are present in even greater force here.

1. The Court has considered every major FSIA exception to immunity save one—the arbitration exception.[6] Yet that exception is among "[t]he most commonly invoked exceptions." David P. Stewart, The Foreign Sovereign Immunities Act: A Guide for Judges 41 (Fed. Judicial Ctr. 2013). This Court's guidance is urgently needed concerning how courts should determine whether the necessary jurisdictional facts under the arbitration exception have been proven.

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[6] *NML Capital*, 134 S. Ct. at 2256 (28 U.S.C. § 1605(a)(1) (waiver)); *OBB Personenverkehr*, 136 S. Ct. at 392–393 (§ 1605(a)(2) (commercial activity)); *Republic of Austria* v. *Altman*, 541 U.S. 677, 685–686 (2004) (§ 1605(a)(3) (expropriation)); *Permanent Mission*, 551 U.S. at 197 (§ 1605(a)(4) ("rights in immovable property")); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438–439 (1989) (§§ 1605(a)(5) (non-commercial torts), 1605(b) (maritime liens)); *Beaty*, 556 U.S. at 851 (§ 1605(a)(7) (terrorism) (repealed)); *Samantar* v. *Yousuf*, 560 U.S. 305, 317–318 (2010) (§ 1605A (terrorism)). The Court has not addressed §§ 1605(d) (preferred mortgages) or 1607 (counterclaims), which are less often invoked.

2. The decision below has major implications for every state party to investment-protection treaties, especially those limiting what "investments" are covered. Questions of treaty interpretation are "clearly of widespread importance" where "treaty provisions similar to [those at issue] are in effect with many other countries." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 182 n.7 (1982) (addressing a precursor to BITs). That is true in spades here.

The United States is party to 42 BITs, 23 of which contain language *identical* to the Ecuador–U.S. BIT's non-retroactivity provision and definition of "investment" as claims "associated with an investment." Compare, *e.g.*, U.S.–Bulgaria BIT, arts. I(1)(a)(iii) & XIII(1), with Ecuador–U.S. BIT, arts. I(1)(a)(iii) & XII(1); Pet. 103a, 115a, 131a, 133a (treaties). Moreover, the United States has six additional BITs pending.[7] And it is party to numerous regional treaties—including the North American Free Trade Agreement and Central America Free Trade Agreement—with investment-protection provisions.[8]

The effect of the decision below, however, is not limited to treaties with the United States. Under the New York and ICSID Conventions, U.S. courts may enforce arbitration awards against almost any foreign sovereign. *E.g.*, *Gold Reserve Inc.* v. *Bolivarian Re-*

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[7] U.S. Bilateral Investment Treaties, U.S. Dep't of State, http://www.state.gov/e/eb/ifd/bit/117402.htm.

[8] CAFTA, for example, defines an "investment agreement" as a "written agreement that takes effect on or after the date of entry into force of this Agreement." Dominican Republic–Central American Free Trade Agreement art. 10.28, May 28, 2004, 43 I.L.M. 514 (2004).

public of Venezuela, No. 14-2014, 2015 WL 7428532 (D.D.C. Nov. 20, 2015) (Canada–Venezuela BIT); *Micula* v. *Gov't of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015) (Romania–Sweden BIT). Without this Court's guidance, state parties to these treaties risk being haled into U.S. courts without their consent.

The United Nations Conference on Trade and Development reports that there are more than 2,500 international investment agreements currently in force, and the number is growing.[9] For example, the recently concluded Trans-Pacific Partnership (TPP) provides for investor-state arbitration. Much like the Ecuador–U.S. BIT, TPP Article 9.2(3) states that its investment-protection provisions "shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement."[10] Twelve countries—including the United States, Japan, and Australia—were involved in TPP negotiations, and at least nine others have expressed interest in joining.

3. The decision below threatens to deter foreign states from joining BITs—and might prompt them to withdraw—thus harming the United States' interests and frustrating "the emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Indeed, as a leading practitioner has explained, "[s]tates are increasingly coming to the conclusion that the playing field of investor/state arbitra-

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[9] See Int'l Investment Agreements Navigator, UNCTAD, http://investmentpolicyhub.unctad.org/IIA.

[10] TPP ch. 9, available at https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

tion is tilted heavily in favor of investors, particularly those from the most developed economies." G. Kahale, III, *A Problem in Investor/State Arbitration*, 6 Transat'l Disp. Mgm't. 1, 1 (2009). "That is why some [states] are reevaluating investment treaties and withdrawing or threatening to withdraw from the [ICSID Convention]." *Ibid*.

For example, South Africa's Deputy Director General of Trade and Industry has stated that his country will "refrain from entering into BITs unless there are compelling political and economic reasons to do so [and will] terminate existing BITs."[11] Australia has likewise voiced such concerns, and "the new Australia –Japan FTA ultimately omitted [investor-state dispute settlement] provisions."[12] Other countries are similarly taking steps to withdraw from investment treaties, due to concerns including anti-state bias. See *Investor-state dispute settlement: The arbitration game*, The Economist, Oct. 11, 2014 (Indonesia, South Africa, and Australia); N. Gallus, The Temporal Scope of Investment Protection Treaties 27 (2008) (discussing the backlash against investment-treaty

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[11] Xavier Carim, *Lessons from South Africa's BITs review*, Columbia FDI Perspectives No. 109 (Nov. 25, 2013), available at www.ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf.

[12] Luke R. Nottage, *Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?*, 19 J. of Japanese L. 37, 39 (May 2015)); see also Austl. Gov't Dep't of Foreign Aff. & Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (Apr. 2011), available at http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy %20Statement.pdf.

arbitration). The D.C. Circuit's decision will only heighten these concerns.

4. Zealously guarding the courthouse doors is especially important when the alternative is leaving federal jurisdictional determinations to private arbitrators, who tend to view their own jurisdiction expansively. A prime example of expanding jurisdiction beyond the parties' intent is "found in awards which have examined whether a transaction falls under the definition of an investment to qualify for protection under the treaty. The expansionists would be inclined to construe the meaning of an investment widely." M. Sornarajah, *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, in The Future of Investment Arbitration 273, 281 (C.A. Rogers & R.P. Alford eds., 2009). That is exactly what happened here, and such results "add[] to investment arbitration's uncertain nature." *Ibid*. Yet the D.C. Circuit abandoned its sentry post, deferring to a non-Article III arbitral finding that Ecuador agreed to arbitrate Chevron's claims and placing the burden of *disproving* jurisdiction on Ecuador.

A prominent commentator describes the problem as "arbitral adventurism that extends beyond the consent of the parties." *Id*. at 292. "One group has taken an instrumental view of the system and regarded it as designed to further neo-liberal tenets of investment protection," he explains, "while the other group has shown fidelity to the requirement that a tribunal should not go beyond the consent given to it." *Id*. at 293. The "[e]xpansionistic" tendency of the former group "has brought about contempt for the system of investment arbitration among the affected states, which have reacted adversely." *Ibid*.

The decision below sanctions such "arbitral adventurism" and abdicates the court's role as gatekeeper of federal jurisdiction. That in turn serves to deepen "contempt for the system of investment arbitration," contrary to healthy foreign relations and the United States' "emphatic" pro-arbitration policy. *Mitsubishi*, 473 U.S. at 631. Review is warranted.

C. This Court often reviews FSIA cases involving narrower issues, even absent a circuit split, which is unlikely to develop here.

1. Recognizing the critical foreign relations interests at stake, the Court has frequently reviewed FSIA and similar cases even absent a circuit split—and sometimes when the legal issues were far less recurring. In fact, of this Court's twelve FSIA decisions,[13] only four involved circuit splits.[14]

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[13] *OBB Personenverkher*, 136 S. Ct. 390; *NML Capital*, 134 S. Ct. 2250; *Samantar*, 560 U.S. 305; *Beaty*, 556 U.S. 848; *Permanent Mission*, 551 U.S. 193; *Elahi*, 546 U.S. 450; *Altman*, 541 U.S. 677; *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003); *Nelson*, 507 U.S. 349; *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992); *Amerada Hess*, 488 U.S. 428; *Verlinden*, 461 U.S. 480.

[14] See *Samantar*, 560 U.S. at 310; U.S. *Amicus* Br. 18, *NML Capital*, 134 S. Ct. 2250 (No. 12-842); U.S. *Amicus* Br. 5, *Permanent Mission*, 551 U.S. 450 (No. 06-134); U.S. *Amicus* Br. 6, *Dole Food*, 538 U.S. 468 (No. 01-593). Similarly, the Court's decisions discussing FSIA-related issues did not involve circuit splits. *Pimentel*, 553 U.S. 851; *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 426 U.S. 611 (1983); *Dames & Moore*, 453 U.S. 654.

Further, this Court has reviewed FSIA cases even where the issues were "narrow" and non-recurring. *E.g.*, *NML Capital*, 134 S. Ct. at 2255, 2258 (citing "[t]he single, narrow question before us" and the "rather unusual circumstances of this case"); *Samantar*, 560 U.S. at 308 (discussing "[t]he narrow question we must decide"); *Beaty*, 556 U.S. at 851 (considering a "now repealed" provision); see also *Pimentel*, 553 U.S. at 855 ("the Court of Appeals gave insufficient weight to the foreign sovereign status of the Republic and [its] Commission," and "further erred in reaching and discounting the merits of their claims"). Here, by contrast, the question affects litigation under dozens of identical BITs, and thus is "clearly of widespread importance." *Sumitomo*, 457 U.S. at 182 n.7.

2. As a practical matter, moreover, the D.C. Circuit's decision here is likely to govern most if not all future cases. Except when the seat of arbitration is in the United States, there is no vehicle to petition to *vacate* an investor-state arbitral award in U.S. court. New York Convention art. I(1) (Convention applies only "to the recognition and enforcement of arbitral awards"). Thus, the only party who may initiate U.S. court proceedings in cases such as this is the party seeking to *confirm* the award.

Going forward, such parties will head straight for the U.S. District Court for the District of Columbia, where venue is always proper. 28 U.S.C. § 1391(f)(4). Indeed, a Westlaw search reveals that the district court below already decides more New York Convention suits involving foreign states than any other court. That number is certain to rise now. The decision below makes filing there the path of least resistance for obtaining jurisdiction over a foreign state under the arbitration exception. Future parties will not risk having their petitions denied by seeking confirmation elsewhere. Thus, even absent a circuit split, review is warranted to address the important foreign relations issues that this case presents.

III. The decision below incorrectly resolved the critical issue of jurisdiction and cannot be reconciled with the FSIA, the Treaty's text, or the presumption against retroactivity.

The need for review is confirmed by the D.C. Circuit's error in finding jurisdiction. FSIA jurisdiction here turns on whether Chevron had an "investment" under the BIT. If so, Chevron's notice of arbitration accepted Ecuador's offer to arbitrate. If not, there was no agreement, and thus no jurisdiction.

In finding an agreement to arbitrate, the court below grossly misread the BIT's non-retroactivity provision and definition of "investment." That becomes even clearer when (1) the issue is reviewed de novo, (2) proving jurisdiction remains Chevron's burden, (3) doubts are resolved in favor of immunity, and (4) the long-recognized presumption against retroactivity is honored.

Ecuador and the United States agreed not to apply the BIT retroactively. Rather, they provided that it "shall apply to investments existing at the time of entry into force" and those "made or acquired thereafter." Pet. 115a. Each country encouraged prospective investment by guaranteeing investors fair treatment going forward. Applying the Treaty retroactively to defunct investments fundamentally alters the bargained-for deal—extending the sovereign's limited waiver of immunity well beyond its text while yielding no reciprocal benefits to the host country.

The facts are undisputed. Chevron's pre-Treaty oil exploration and the Concession Agreement governing that investment expired in 1992. Chevron then pulled out of Ecuador. Since then, Chevron has had no investments, operations, employees, or assets in Ecuador. Thus, the only way Chevron had an "investment" under the BIT is if its lawsuits—filed years before the Treaty took effect—themselves qualify as "investments."

Chevron says they do, arguing that (1) the claims are merely an "alteration of the form in which assets are invested or reinvested" under Treaty Article I(3), and (2) Article I(1)(a)(iii)'s provision that an "investment" includes "a claim to money or a claim to performance having economic value, and associated with an investment" allows the claim to be associated with an expired *pre-Treaty* investment. Pet. 35a. The D.C. Circuit agreed, announcing that "an investment continues to exist until it has been fully wound up and all claims have been settled." Pet. 11a. But that result cannot be squared with the Treaty.

A. The Treaty's text confirms that the D.C. Circuit erred in finding FSIA jurisdiction.

If Chevron's claims are themselves "investments," that reads the requirement that qualifying claims be "associated with an investment" out of the Treaty, in violation of "the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). Conversely, if Chevron's claims without more are *not* investments, but qualify only by virtue of being "associated with an investment," then the Treaty covers the claims only if the non-retroactivity provision does not apply to the term "investment" in the phrase "associated with an investment." The D.C. Circuit openly acknowledged this, declaring that the Treaty's non-retroactivity provision "applies only to 'investments' as defined by Article I, and *not* to the use of the term 'investments' within the [Treaty's] definitional paragraph." Pet. 12a.

That conclusion, however, flies in the face of the "presumption that a given term is used to mean the same thing throughout a statute"—a presumption "at its most vigorous when a term is repeated within a given sentence" (*Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012)), as "investment" is in Article I here. Further, the idea that the term "investment" holds an expanded meaning in Article I(1)(a)(iii) is foreclosed by the rule that a waiver of immunity must be "strictly construed, in terms of its scope." *Lane*, 518 U.S. at 592 (citations omitted).

The D.C. Circuit's error becomes still clearer when one considers "the uniformly accepted rule against giv[ing] [the law] a retrospective operation" (*Landgraf*, 511 U.S. at 270–271), which the court ignored. It cannot remotely be suggested that "no other meaning" can be ascribed to a Treaty expressly providing that it applies only prospectively. *American Sugar*, 202 U.S. at 577 (quotations omitted); see *id*. at 576 (concluding that a treaty should "take effect" prospectively, notwithstanding textual signals that it should take effect upon occurrence of a past event).

B. The decision cannot be reconciled with the Treaty's purpose of encouraging investment prospectively.

The decision below also makes no sense in terms of the Treaty's purpose—encouraging prospective investment. The ruling extends Treaty protection retroactively to expired investments, absent any reciprocal benefit to the signatory states.

Arbitrators and commentators have long agreed on the core characteristics of "investment" under a BIT. Consistent with the term's ordinary meaning, the activity must involve investment "capital," "risk," and typically a "contribution" to "the development of the State." R.D. Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentaries 9 (2005). Fundamentally, investment "transfer[s] resources into the economy of the host state." Z. Douglas, The International Law of Investment Claims 163 (2009). Chevron's lawsuits, by contrast, sought to take money *out of* Ecuador.

In sum, the D.C. Circuit's conclusion that Ecuador agreed to arbitrate Chevron's claims turns the BIT's definition of "investment" and its non-retroactivity provision upside down. The notion that Ecuador agreed to arbitrate this dispute is divorced entirely from the Treaty's forward-looking nature and "the shared expectation of the contracting parties." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). And the court reached this result while rejecting Ecuador's request that it solicit the United States' views, given its interest in the BIT and FSIA issues generally.

C. The notion that courts should defer to arbitrators as to jurisdictional facts is foreclosed by this Court's FSIA decisions and *BG Group*.

The D.C. Circuit not only got its jurisdictional analysis wrong, but reasoned that it did not really need to conduct that analysis because *BG Group* supported deferring to the arbitrators' finding that Ecuador agreed to arbitrate. Pet. 9a–10a. But *BG Group* did not involve the FSIA, which requires courts independently to ascertain jurisdictional facts. *Verlinden*, 461 U.S. at 493 & n.20. Not surprisingly, this Court's FSIA cases reflect rigorous jurisdictional analysis. *E.g.*, *OBB Personenverkeher*, 136 S. Ct. at 395–399; *NML Capital*, 134 S. Ct. at 2255–2258; *Samantar*, 560 U.S. at 313–326; *Nelson*, 507 U.S. at 355–363; *Weltover*, 504 U.S. at 610–620; *Verlinden*, 461 U.S. at 486–498. The decision below does not.

Further, *BG Group* supports review and reversal. There, an investor initiated arbitration against Argentina without first litigating in Argentina's courts for eighteen months, as the BIT required. 134 S. Ct. at 1204. The arbitrators exercised jurisdiction, ruling for the investor, and the district court confirmed the award. *Id.* at 1204–1205. The D.C. Circuit vacated that decision, concluding that it was required to interpret the litigation precondition de novo, and that the precondition was mandatory. *Id.* at 1205. This Court reversed, holding that the precondition was presumptively for arbitral determination because it was "procedural." *Id.* at 1213.

The court below analogized Ecuador's argument that its offer to arbitrate applied only to covered "investment" disputes to "Argentina's contention that its offer to arbitrate only applied to investors who complied with the local litigation requirement." Pet. 10a. But *whether* Ecuador agreed to arbitrate particular claims is a *substantive* question, and one distinct from "*when* the contractual duty to arbitrate arises." *BG Group*, 134 S. Ct. at 1207. Where the latter question turns on the "application of particular procedural preconditions for the use of arbitration," it is of a "procedural[] variety." *Ibid*. Conversely, even outside the FSIA context, *BG Group* requires de novo review of "*whether* the parties are bound by a given arbitration clause." *Id.* at 1206–1207 (emphasis added; citations omitted).

This case presents a "whether" question: Did Ecuador agree to arbitrate Chevron's claims in the first place? Whereas the investor's purported acceptance of Argentina's offer in *BG Group* was procedurally defective, but substantively valid, Chevron's purported acceptance of Ecuador's offer was procedurally valid (a notice of arbitration), but substantively defective. Having overlooked the critical distinction between *BG Group* and this case, the court below reached a decision flatly at odds with that decision.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2016

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Appellees

v.

THE REPUBLIC OF ECUADOR,

Appellant.

No. 13-7103

D.C. No. 1:12-cv-01247

OPINION

Appeal from the United States District Court for the District of Columbia
James E. Boasberg, District Judge, Presiding

Argued and Submitted
January 12, 2015—Washington, D.C.

Filed August 4, 2015

Before: Merrick B. Garland, Chief Judge, and Sri Srinivasan and Robert L. Wilkins, Circuit Judges

Opinion by Judge Wilkins

COUNSEL

Mark N. Bravin argued the cause for appellant. With him on the briefs were *Eric M. Goldstein* and *Eric T. Werlinger*.

Jeffrey S. Bucholtz argued the cause for appellees. With him on the brief were *Brian Callanan*, *James P. Sullivan*, *Brian A. White*, and *Caline Mouawad*.

OPINION

WILKINS, *Circuit Judge*:

For the last twenty years, the Republic of Ecuador and energy industry giant Chevron Corporation have been locked in a struggle involving a series of lawsuits related to an investment and development agreement. The dispute began in the Ecuadorian court system, where it languished unresolved for over a decade. It then proceeded to an international arbitration tribunal, whose verdict in Chevron's favor was appealed and sustained at all levels of the Dutch judiciary. The dispute made it to our shores in an action for confirmation of the arbitral award before the District Court for the District of Columbia. The District Court confirmed the arbitral award, prompting yet another appeal. We now affirm.

I

In 1973, Chevron[1] and Ecuador signed an agreement allowing Chevron to develop Ecuadorian oil fields in exchange for providing below-market oil to the Ecuadorian government for domestic use. The deal was set to expire in 1992, and the parties were unable to agree to an extension. As the expiration date approached, Chevron filed several breach of contract suits against Ecuador. In 1995, Chevron and Ecuador signed a settlement agreement conclusively terminating all rights and obligations between the

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[1] For purposes of this opinion, "Chevron" refers both to the Chevron Corporation and to its predecessor, Texaco Petroleum Co.

parties. The agreement provided for the continuation of the pending lawsuits.

In 1993, the United States and Ecuador signed a Bilateral Investment Treaty ("BIT")—formally known as the Treaty Between the Government of the United States of America and the Government of the Republic of Ecuador for the Encouragement and Reciprocal Protection of Investment— which took effect in 1997. Under this treaty, Ecuador made a standing offer to American investors to arbitrate disputes involving investments that existed on or after the treaty's effective date. J.A. 297, 300. For purposes of the BIT, the definition of "investment" included "a claim to money or a claim to performance having economic value, and associated with an investment." J.A. 294.

In 2006, Chevron commenced an international arbitration action before a three-member tribunal based out of The Hague, claiming that Ecuador had violated the BIT by failing to resolve its lawsuits in a timely fashion. Ecuador objected to the tribunal's jurisdiction, arguing that it had never agreed to arbitrate with Chevron. The basis of this objection was Ecuador's contention that Chevron's investments in Ecuador had terminated no later than 1995, two years prior to the entry into force of the BIT. The tribunal rejected the jurisdictional challenge, finding that Chevron's lawsuits were "investments" within the meaning of the BIT, and, after determining that Ecuador had delayed disposition of the lawsuits, ultimately decided against Ecuador on the majority of the breach of contract claims, awarding Chevron approximately $96 million. Ecuador challenged the award in the Dutch court system; the challenge was rejected by the District Court of The Hague, The

Hague Court of Appeal, and the Dutch Supreme Court.

On July 27, 2012, Chevron petitioned the District Court to confirm the arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been incorporated into the Federal Arbitration Act. *See* 9 U.S.C. §§ 201-208.

Ecuador raised three arguments in opposition: (1) that the District Court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"); (2) that confirmation should be denied under the New York Convention; and (3) that a stay should be granted until the Dutch Supreme Court could resolve the then-pending appeal of the award.

The District Court determined that it had subject-matter jurisdiction under 28 U.S.C. § 1605(a)(6), which provides that sovereign immunity does not prevent a suit to confirm an award made pursuant to an arbitration agreement governed by an international treaty, because the award was made pursuant to the BIT and governed by the New York Convention. J.A. 1427-28. The District Court rejected Ecuador's argument that the FSIA required the District Court to undertake a de novo analysis of whether the dispute was arbitrable under the BIT. J.A. 1428-29. The District Court reviewed the question of arbitrability, however, as part of its consideration of whether the confirmation should be denied under the New York Convention, J.A. 1430-45, and found that the parties had "clearly and unmistakably agreed" that the tribunal would resolve such questions. J.A. 1436. Having made this finding, the District Court engaged in a deferential review of the tribunal's arbitrability decision and determined that it was clearly supported by the text of the BIT. J.A. 1439. The District Court rejected Ecuador's argument that confirming the order was against public policy and denied the requested stay. J.A. 1439-46. Ecuador filed a timely appeal. We affirm.

II

As a general matter, the FSIA grants foreign states immunity from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. In enacting the FSIA, however, Congress enumerated several exceptions to this jurisdictional restriction. These exceptions "provide[] the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989); *see also Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 488-89 (1983). At issue in this case is the arbitration exception, which provides for federal court jurisdiction "in any case . . . in which the action is brought, either to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

The District Court concluded that the jurisdictional requirements of the FSIA were met because "the Award's own language indicates it was rendered pursuant to the BIT" and "the Award is clearly governed by the New York Convention." *Chevron Corp. v. Republic of Ecuador,* 949 F. Supp.

2d 57, 62 (D.D.C. 2013). Ecuador argues that the District Court failed to determine in the first instance that an arbitration agreement existed, instead deferring to the judgment of the arbitrator. Had the District Court undertaken the correct analysis, the argument goes, it would have determined that Ecuador had never agreed to arbitrate its dispute with Chevron, thus denying the District Court jurisdiction to enforce the arbitral award. Chevron primarily argues that the statute permits jurisdiction so long as the plaintiff presents a non-frivolous claim that the foreign sovereign has consented to arbitration.

A

There are two types of jurisdictional authorizations: (1) "jurisdiction [that] depends on particular factual propositions" and (2) "jurisdiction [that] depends on the plaintiff's asserting a particular type of claim." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). Ecuador argues that the § 1605(a)(6) exception requires the District Court to make three findings: "(1) a foreign state has agreed to arbitrate; (2) there is an award based on that agreement; and (3) the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards." Appellant's Br. at 23. Chevron argues that the exception allows jurisdiction any time a plaintiff asserts a non-frivolous claim involving an arbitration award. Appellee's Br. at 30-31.

For the most part, Ecuador has the better argument, and has identified the relevant jurisdictional facts. In most instances, the existence of an arbitration agreement is a "purely factual predicate[] independent of the plaintiff's claim." *Chabad,* 528 F.3d at 940. Likewise, the existence of an award is a factual question that the District Court must resolve in order to maintain jurisdiction. If there is no arbitration agreement or no award to enforce, the District Court lacks jurisdiction over the foreign state and the action must be dismissed.[2]

As the plaintiff, Chevron bears the initial burden of supporting its claim that the FSIA exception applies. *See id.* "[T]his is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* Chevron has met its burden of production by producing the BIT, Chevron's notice of arbitration against Ecuador, and the tribunal's arbitration decision. Ecuador does not dispute the existence of the BIT, Chevron's notice, or the tribunal's arbitration decision, but instead challenges the District Court's conclusion that the BIT (or the combination of the BIT and Chevron's notice of arbitration) is an arbitration agreement between Ecuador and Chevron.

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[2] The statute does not require that the District Court determine that the award is governed by a treaty; if the first two jurisdictional facts are established, the District Court has jurisdiction so long as the award "is or may be governed by a treaty." 28 U.S.C. § 1605(a)(6) (emphasis added). This element of the jurisdictional authorization is thus closer to the claim-based jurisdictional test proposed by Chevron. The distinction is irrelevant for purposes of this case, as the parties do not dispute that the New York Convention governs arbitral awards issued pursuant to the BIT.

B

Ecuador argues that the FSIA required the District Court to make a *de novo* determination of whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's breach of contract claims. According to Ecuador, if Chevron's claims are not covered by the BIT, then Ecuador never agreed to arbitrate with Chevron, and the District Court consequently lacked jurisdiction. In Ecuador's view, the arbitrability question is therefore a jurisdictional question that must be addressed by the District Court.

Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention. For FSIA purposes, Chevron made a prima facie showing that there was an arbitration agreement by producing the BIT and the notice of arbitration. Once Chevron made this showing, the burden shifted to Ecuador to demonstrate by a preponderance of the evidence that the BIT and the notice to arbitrate did not constitute a valid arbitration agreement between the parties. *Cf. Chabad,* 528 F.3d at 940. The jurisdictional task before the District Court was to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate.[3]

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[3] The District Court eschewed making this determination as part of its jurisdictional analysis. This was error. The statute requires the District Court to satisfy itself that the party challenging immunity has presented prima facie evidence of an agreement between the parties and that the sovereign asserting immunity has failed to sufficiently rebut that evidence. There is no need to remand, how-

The Supreme Court's recent decision in *BG Group, PLC v. Republic of Argentina,* 134 S. Ct. 1198 (2014), is instructive on this point. In *BG Group,* Argentina's primary argument was similar to Ecuador's in the present case. By its terms, the Bilateral Investment Treaty between the United Kingdom and Argentina required an investor to litigate its claims in the local court system before submitting the claims to arbitration. 134 S. Ct. at 1204. BG Group submitted a claim to arbitration without observing this process. The arbitration panel concluded that Argentina had waived the local litigation requirement and found in BG Group's favor on the merits. *Id.* at 1204-05. When BG Group sought to confirm the award in the District Court for the District of Columbia, the District Court deferred to the arbitrators' determination regarding the local litigation requirement. *Republic of Argentina v. BG Group PLC,* 715 F. Supp. 2d 108, 121-22 (D.D.C. 2010). This Court reversed, holding that "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court . . . the question of arbitrability is an independent question of law for the court to decide." *Republic of Argentina v. BG Group PLC,* 665 F.3d 1363, 1371 (D C. Cir. 2012).

The Supreme Court reversed. The Court "treat[ed] the document . . . as if it were an ordinary contract between private parties"—Argentina and BG Group—and concluded that the parties had intended to allow the arbitrator to determine whether the local

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ever, because the District Court elsewhere found that the BIT and the notice of arbitration together constituted an agreement between the parties. *See Chevron*, 949 F. Supp. 2d at 63 ("The Court thus finds [Chevron] had a valid agreement to arbitrate under the BIT.").

litigation requirement had been satisfied. *BG Group,* 134 S. Ct. at 1206 (majority op.). In doing so, the Court implicitly rejected Argentina's contention that its offer to arbitrate only applied to investors who complied with the local litigation requirement. As the Chief Justice noted in his dissent, "[t]he majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt [the arbitration provision] along with the rest of the treaty, Argentina thereby formed an agreement with all potential U.K. investors . . . to submit all investment-related disputes to arbitration." *BG Group,* 134 S. Ct. at 1216 (Roberts, C.J., dissenting).

While we are mindful of the Chief Justice's concerns, we agree with his interpretation of the Court's opinion. The BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty. The FSIA therefore allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award. The dispute over whether the lawsuits were "investments" for purposes of the treaty is properly considered as part of review under the New York Convention.

C

Even were we to conclude that the FSIA required a *de novo* determination of arbitrability, however, we would still find that the District Court had jurisdiction. In order to prevail on its jurisdictional argument, Ecuador would have to demonstrate by a preponderance of the evidence that Chevron's suits were not “investments” within the meaning of the BIT. This Ecuador has failed to do.

For purposes of the BIT, “‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . and includes . . . a claim to money or a claim to performance having economic value, and associated with an investment.” BIT Article I.1(a)(iii), J.A. 294. Ecuador argues that the final phrase - “and associated with an investment” - means that a lawsuit must be associated with an investment that existed within the effective period of the BIT in order to qualify as an investment under the BIT. This is a misreading of the treaty terms for two reasons.

First, Article 1.3 provides that “[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment.” In conjunction with the BIT’s non-exhaustive definition of “investment,” Article I.3 suggests that an investment continues to exist until it has been fully wound up and all claims have been settled. Chevron’s lawsuits were therefore continuations of its initial investment in Ecuador and protected by the BIT.

Second, Article XII limits the application of the BIT “to investments existing at the time of entry into force as well as to investments made or acquired thereafter.” J.A. 300. The investments referred to by this article are investments as defined in Article I, and include “a claim to money or a claim to performance having economic value, and associated with an investment.” J.A. 294. Ecuador argues that the Article XII temporal limitation applies both to the claim and to the investment with which that claim is associated. We disagree. In our view, Article XII applies only to "investments" as defined by Article I, and *not* to the use of the term "investments" within the definitional paragraph. A lawsuit that existed at the time of entry into force of the BIT is consequently an "investment" for BIT purposes so long as that lawsuit is associated with an investment as generally defined: "An expenditure to acquire property or assets in order to produce revenue; the asset so acquired." BLACK'S LAW DICTIONARY (6th ed. 1990). Chevron's breach of contract lawsuits indisputably were associated with its pre- BIT investment activities, and the lawsuits indisputably existed when the BIT entered into force. The lawsuits themselves were therefore "investments" within the meaning of the treaty.

The District Court correctly determined that the BIT and Chevron's notice to arbitrate satisfied the jurisdictional requirements of the FSIA. Even if the FSIA required the *de novo* review of arbitrability suggested by Ecuador, however, the District Court would still have properly exercised jurisdiction because Ecuador failed to demonstrate by a preponderance of the evidence that Chevron's lawsuits were not protected by the BIT.

III

Ecuador's arguments against confirmation of the award under the New York Convention are largely coextensive with its arguments related to the District Court's jurisdiction. There is no merit to these arguments, and the District Court properly confirmed the award.

As recognized by the court below, "the [New York Convention] affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Gov't of Belize,* 668 F.3d 724, 727 (D.C. Cir. 2012); *see also* Appellee's Brief Add. 3 (New York Convention provision setting forth exclusive grounds on which enforcement of an award may be refused). Ecuador asserts two grounds on which confirmation of the award should be denied: Articles V(1)(c) and V(2)(b) of the New York Convention. Article V(1)(c) provides that an award may be refused if it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," and V(2)(b) allows refusal if "the recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement is sought.

Ecuador's reliance on Article V(1)(c) is misplaced. The District Court did not need to reach the question of whether Chevron's lawsuits fell within the terms of submission to arbitration because the BIT allows the arbitration tribunal to make that determination. As discussed *supra,* the Supreme Court has analyzed a similar bilateral investment treaty as if it were a contract between the sovereign and the investor corporation seeking to confirm an arbitral award. "Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter . . . courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *BG Group,* 134 S. Ct. at 1206 (internal citations omitted). The BIT is not silent on who decides arbitrability. Article VI of the BIT provides that the investor company may submit a matter to arbitration "in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)" BIT Art. VI(3)(a)(iii), J.A. 298. Under these rules, which the BIT incorporates by reference, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause," and "shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part." UNCITRAL Arbitration Rules, G.A. Res. 31/91 art. 21 (Dec. 15, 1976). Ecuador therefore consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had "investments" within the meaning of the treaty. *See also Oracle America, Inc. v. Myriad Group A.G.,* 724 F.3d 1069, 1077 (9th Cir. 2013) ("Incorporation of the UNCITRAL arbitration rules . . . constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Schneider v. Kingdom of Thailand,* 688 F.3d 68, 72 (2d Cir. 2012) ("[A] bilateral investment treaty's incorporation of the . . . UNCITRAL rules [is] clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitral panel in the first instance.") (internal quotation marks omitted). There was no need for the District Court to independently determine that Chevron's suits satisfied the BIT's parameters once it had concluded that the parties had delegated this task to the arbitrator.

Ecuador's Article V(2)(b) arguments are similarly rooted in the "erroneous premise" that the BIT does not apply. *See* Appellant's Br. at 55-56 ("Finally, the District Court erred by failing to deny confirmation on public-policy grounds. At the root of its incorrect analysis was the erroneous premise that the Republic and Chevron agreed to arbitrate."). Relying on this premise, Ecuador identifies two aspects of American public policy that are purportedly inconsistent with confirmation of the award. First, Ecuador argues that "the Award is repugnant to the policy that forum-selection clauses in agreements between sophisticated parties will be upheld" because Chevron and Ecuador had contractually agreed that Chevron's claims would be litigated in Ecuadorian courts. Appellant's Br. at 57-58. Second, Ecuador argues that confirmation is inconsistent with respect for foreign sovereignty, claiming that "the Tribunal effectively usurped the jurisdictional authority of the Ecuadorian judiciary, the only adjudicative body authorized to hale the Republic into court to respond to Chevron's lawsuits." Appellant's Br. at 58.

The primary flaw with the first argument is that it misapprehends the nature of Chevron's action. Chevron's breach of contract claims were brought in Ecuadorian courts, as required by the initial investment agreement and ratified by the 1995 settlement agreement.[4] Chevron's arbitration action

[4] As Chevron notes, the 1995 settlement agreement did not expressly indicate that the claims would remain in Ecuadorian courts: "Any and all claims, of any type . . . which are separate from this agreement and which exist judicially between the parties, shall continue to be heard before the authorities having the appropriate jurisdiction." J.A. 182. While the use of the word "continue" indicates that the claims were to remain in Ecuadorian courts (where they were at the time of the settlement agreement), the language does not plainly foreclose proceedings before other authorities.

alleged that Ecuador had unduly delayed resolution of those claims in violation of the BIT. J.A. 813-14. The issue initially before the arbitration panel was not whether Ecuador had breached its contract with Chevron, but instead whether Ecuador had breached the BIT by failing to resolve the contract suits in a timely fashion. In signing the BIT, Ecuador agreed to arbitration of precisely this type of action. *See* Art. II(7), J.A. 297 ("Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.").

A similar consideration forecloses Ecuador's claim of jurisdictional usurpation. The Tribunal did not usurp the authority of the Ecuadorian judiciary; Ecuador ceded that authority, first by signing the BIT, and then by failing to resolve Chevron's legal actions in a timely fashion.

Contrary to Ecuador's protestations, enforcement of the arbitral award is fully consistent with the public policy of the United States, most notably the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631 (1985). By signing the BIT, Ecuador agreed to allow independent and neutral arbitrators to determine whether an investor company could take advantage of the substantive and procedural protections in the BIT. Chevron followed the proper procedure to request arbitration under the BIT, and the arbitrator determined that it had jurisdiction. Four courts have also considered and rejected Ecuador's argument that Chevron did not have the right to avail itself of the BIT's arbitration clause. Ecuador has given us no reason to conclude that these many authorities ruled in error.

IV

For the foregoing reasons, we affirm the District Court's confirmation of the arbitral award to Chevron.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
Petitioners,

v.

REPUBLIC OF ECUADOR,
Respondent.

Civil Action No. 12-1247 (JEB)

MEMORANDUM OPINION

Petitioners Chevron Corporation and Texaco Petroleum Company filed this action to confirm an award issued by an international tribunal under 9 U.S.C. § 207 and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention. Respondent Republic of Ecuador seeks to deny such confirmation on several bases. First, Ecuador argues that this Court lacks subject-matter jurisdiction because the case does not meet the requirements of the arbitration exception to the Foreign Sovereign Immunities Act. Second, it contends that confirmation must be denied under the New York Convention because the Award was beyond the scope of the submission to arbitration and is contrary to United States public policy. Finally, it maintains that this Court should, at a minimum, stay proceedings in this matter while Ecuador attempts to have the Award set aside by courts in the Netherlands, where the Award was rendered. Disagreeing on all fronts, the Court will deny Ecuador's request and grant Chevron's Petition to Confirm the Award.

I. Background

According to the Petition, Chevron and Texaco (together "Chevron") entered into a contract with Ecuador in 1973, permitting Chevron to exploit oil reserves in Ecuador's Amazon region, on the condition that Chevron provide a percentage of its crude-oil production at a reduced price to meet Ecuadorian domestic-consumption needs. *See* Pet., ¶ 11-12. The agreement was amended in 1977 and expired in June 1992. Id., 11, 16. As Chevron began winding up its work in Ecuador in 1991, it filed seven breach-of-contract cases there against the Ecuadorian government, seeking over $553 million in damages for various breaches of the 1973 and 1977 agreements. *Id.*, ¶ 17. These disputes largely concerned allegations that Ecuador had overstated its domestic oil-consumption needs, and appropriated more crude oil than it was entitled to acquire at the reduced price. *Id.* ¶ 17. The lawsuits remained pending in Ecuadorian courts until being incorporated into the arbitration at issue in this case in 2006. *Id.*, ¶ 21.

Meanwhile, in 1997, the U.S.-Ecuador Bilateral Investment Treaty (BIT) entered into force. *Id.*, ¶ 18; Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15. The BIT generally provides certain legal protections to American and Ecuadorian investors when they engage in foreign direct investment in the reciprocal country. It specifically provides, *inter alia,* that disputes against one of the parties arising out of such investments may be resolved by resort to binding arbitration upon request of a company or national of the other party. *Id.*, art. VI(3). After more than a decade had elapsed without a determination of its claims pending in the Ecuadorian courts, Chevron filed a Notice of Arbitration in 2006 alleging that Ecuador had breached the BIT by allowing its claims to languish in those courts without a resolution. *See* Pet., ¶¶ 21, 24-25.

A three-member arbitral Tribunal based at The Hague conducted several rounds of hearings concerning both its jurisdiction to hear the case and the merits of the dispute. *Id.*, ¶¶ 10, 22. The Tribunal issued an Interim Award in December 2008 finding it had jurisdiction to hear the case, *see* Declaration of Edward G. Kehoe, Exh. 3 (Interim Award), a Partial Award on the Merits in March 2010 finding that the Ecuadorian courts' undue delay constituted a breach of the BIT, *see id.*, Exh. 4 (Partial Award on the Merits), and a Final Award in August 2011 concerning damages. *See id.*, Exh. 5 (Final Award on the Merits). Ecuador petitioned the District Court of The Hague to set aside the Award in July 2010, but the court denied that request in May 2012. *See* Pet., ¶ 34. Ecuador subsequently appealed the Dutch District Court's judgment, and its appeal remains pending. *See* Resp. Opp. to Pet. (ECF No. 18) at 3, 9.

Chevron now seeks an order confirming the Final Award under the New York Convention. Ecuador, not surprisingly, objects.

II. Analysis

Ecuador raises three arguments in an effort to derail confirmation: the Court lacks subject-matter jurisdiction under the Foreign Sovereign Immunities Act, confirmation should be denied under the New York Convention, and a stay pending appeal in the

Netherlands is appropriate. The Court addresses each in turn.

A. Foreign Sovereign Immunities Act

Ecuador first argues that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604, deprives the Court of subject-matter jurisdiction. *See* Resp. Opp. to Pet. at 10. The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 (1989). Under the statute, "a foreign state is presumptively immune from the jurisdiction of the United States courts[] unless a specified exception applies." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355 (1993). Because "subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions . . . [a]t the threshold of every action in a District Court against a foreign state . . . the court must satisfy itself that one of the exceptions applies." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493-94 (1983). Notably, "the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 40 (D.C. Cir. 2000) (citing *Transamerican S.S. Corp. v. Somali Democratic Republic,* 767 F.2d 998, 1002 (D.C. Cir. 1985)).

The FSIA provides an exception to foreign sovereign immunity for actions to confirm certain arbitration awards. *See* 28 U.S.C. § 1605(a)(6). Specifically, foreign sovereigns are not immune from suits

> in which the action is brought[] either to enforce an agreement made by the foreign state

> with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . or *to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement* in force for the United States calling for the recognition and enforcement of arbitral awards.

Id. (emphasis added). Chevron asserts that its Petition falls under this exception because the Final Award was made pursuant to the BIT and is governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, implemented at 9 U.S.C. §§ 201 *et seq. See* Pet., ¶¶ 4-5. This is correct.

First, the Award's own language indicates it was rendered pursuant to the BIT, an agreement that provides for arbitration. *See* Interim Award at 1, 39 (referring to the Award as "under the BIT" and describing the BIT as one of the "principal relevant legal provisions" in the dispute).

Second, the Award is clearly governed by the New York Convention, which controls "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, art. I.1, 21 U.S.T. 2517. Awards are enforceable in the courts of any signatory so long as "'the place of the award . . . is in the territory of a party to the Convention.'" *Creighton Ltd. v.*

Government of the State of Qatar, 181 F.3d 118, 121 (D.C. Cir. 1999) (quoting Restatement (Third) of Foreign Relations Law § 471 cmt. b (1987)). Because the arbitration in this matter was conducted at The Hague and the Netherlands is a party to the New York Convention, the Final Award here is governed by the Convention. *See* Pet., ¶ 10; U.S. Dept. of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2007, § 2 at 12, *available at* http://www.state.gov/documents/organization/89668.pdf.

Under the law of this Circuit, moreover, the arbitration exception in § 1605(a)(6) "by its terms" applies to actions to confirm arbitration awards under the New York Convention. *Creighton*, 181 F.3d at 123. "Indeed, it has been said with authority that the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception.'" *Id.* at 123-24 (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1018 (2d Cir. 1993)). The Court thus finds that Chevron has satisfied the requirements of the FSIA's arbitration exception.

Ecuador nonetheless raises a novel argument in contesting the applicability of the exception here. It contends that it never consented to arbitrate the underlying dispute in this matter, meaning the award was not rendered "pursuant to . . . an agreement to arbitrate," and that the Court must satisfy itself of the arbitrability of the underlying dispute before finding subject- matter jurisdiction over this enforcement proceeding. *See* Resp. Opp. to Pet. at 10-11 (citing 28 U.S.C. § 1605(a)(6)). Ecuador, however, points to no authority - nor can the Court identify any - suggesting that the Court must conduct such an independent, *de novo* determination of the arbitrability of a dispute to satisfy the FSIA's arbitration exception.

Such an argument appears to be an attempt by Ecuador to get two bites at the apple of the merits of its dispute with Chevron, by seeking to have this Court separately determine the arbitrability of the underlying dispute under both the FSIA and the New York Convention. The inquiry Ecuador suggests runs counter to the clear teaching of this Circuit on the purpose and role of the FSIA. The FSIA is a jurisdictional statute that "'speak[s] to the power of the court rather than to the rights and obligations of the parties.'" *Creighton*, 181 F.3d at 124 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Likewise, "§ 1605(a)(6) does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning enforcement of an arbitral award." *Id.* (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957)). Inquiring into the merits of the enforcement dispute - that is, the arbitrability of the underlying claims - would involve an inquiry into the "contractual rights of the parties to arbitration" and would thus be beyond the reach of the FSIA's cabined jurisdictional inquiry.

In contrast to the unprecedented merits-based review Ecuador seeks, the Court's approach here is consistent with those of numerous other federal courts, which have engaged in only these two jurisdictional inquiries - namely, whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and whether the award "is or may be" governed by a relevant recognition treaty. *See, e.g., Blue Ridge Investments, LLC v. Republic of Argentina*, 902 F. Supp. 2d 367, 375 (S.D.N.Y. 2012) ("Here, Blue Ridge instituted the instant action 'to confirm an award made pursuant to [Argentina's] agreement to arbitrate.' The Award is governed by the ICSID Convention, 'a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards. Argentina and the United States are both signatories to the Convention. . . . Accordingly, this Court has subject matter jurisdiction under . . . Section 1605(a)(6).") (alterations in original); *Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 751 n.11 (E.D. Va. 2012) (collecting cases); *In the Matter of the Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 494-95 (2d Cir. 2002) (finding jurisdiction under the FSIA in proceeding to confirm arbitration award under the New York Convention); *G.E. Transp. v. Republic of Albania*, 693 F. Supp. 2d 132, 136 (D.D.C. 2010) (same); *Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16, 33-34 (D.D.C. 2007) (denying jurisdiction because Iraq, where arbitration took place, "was not a signatory to the New York Convention or (to the best of the Court's knowledge) any other 'treaty or international agreement in force for the United States calling for the recognition and enforcement of arbitral awards' when it entered into the contract with the plaintiff") (quoting 28 U.S.C. § 1605(a)(6)).

In any event, the Court's analysis in Section III.B, *infra,* affirms - albeit under a somewhat deferential standard of review - that Ecuador did consent to arbitration. Respondent's FSIA argument would thus be unlikely to prevail even if reviewed on its merits.

Indeed, in any dispute where a respondent argues under the New York Convention that the award was beyond the arbitrator's power, such merits inquiry will *always* occur. *See* New York Convention, art. V(1)(c) (Court may deny confirmation where award beyond scope of submission to arbitration). There is thus no prejudice to either party that would be incurred by a Court's not engaging in the same analysis twice.

B. New York Convention

The Federal Arbitration Act, 9 U.S.C. §§ 201-208, codifies the New York Convention. Pursuant to the Convention, a district court "shall confirm the [arbitral] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. "Consistent with the 'emphatic federal policy in favor of arbitral dispute resolution' recognized by the Supreme Court . . . the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Social Development Ltd. v. Government of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). Courts "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)) (quotation marks omitted); *see also Int'l Trading & Indus. Inv. Co. v. Dyncorp Aerospace Tech.*, 763 F. Supp. 2d 12, 19 (D.D.C. 2011) (collecting cases). Because "the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature." *Int'l Trading*, 763 F. Supp. 2d at 20 (citing *Zeiler v. Deitsch*, 500 F.3d 157, 167 (2d Cir. 2007)). The party resisting confirmation bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies. *See* New York Convention, art. V; *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *see also Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) ("[T]he showing required to avoid summary confirmation is high.").

In contending that the Award here should not be enforced, Ecuador relies on two of the grounds for denying confirmation set forth in Article V. *See* Resp. Opp. to Pet. at 23-25. First, It invokes Article V(1)(c), which allows a court to deny confirmation where "[t]he award deals with a difference . . . not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Second, Ecuador argues that confirmation may be denied under Article V(2)(b), which allows for denial of confirmation where "the recognition or enforcement of the award would be contrary to the public policy" of the country where confirmation is sought. Neither ground is availing.

1. *Article V(1)(c): Arbitrability*

Ecuador first asserts that confirmation may be denied under Article V(1)(c) because it "never agreed - with the United States or with Chevron - to arbitrate the claims in the pending litigation or Chevron's Treaty claim of undue delay concerning that litigation." *See* Resp. Opp. to Pet. at 9. It contends that since the Tribunal's decision on the arbitrability of the underlying dispute was incorrect, the Final Award was "beyond the scope of the submission to arbitration." *See* New York Convention, art. V(1)(c). To reach such a conclusion, Ecuador suggests that this Court must engage in an "independent determination" of the Tribunal's jurisdiction to resolve the underlying dispute. *See* Resp. Reply and Opp. at 5-8. Chevron disagrees, claiming instead that because the parties "clearly and unmistakably" agreed that the *Tribunal* should decide the arbitrability of the dispute, this Court's review of that decision should be highly deferential, a standard the Tribunal's reasoned decision entirely satisfies. *See* Pet. Opp. and Mot. (ECF No. 20) at 15. Chevron has the better of this debate.

Ecuador maintains that this Court must conduct a *de novo* review of the Tribunal's decision on jurisdiction because, in the ordinary case, "the question of arbitrability . . . is undeniably an issue for judicial determination." *AT&T Tech., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986); *see also* Resp. Opp. to Pet. at 12 (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2855 (2010), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). Ecuador, however, mischaracterizes the holdings of these cases, none of which provides that arbitrability is an issue for judicial determination in all circumstances. For example, while the *AT&T Technologies* court noted that, ordinarily, arbitrability is an issue for judicial determination, it held that where "the parties clearly and unmistakably provide otherwise" - *e.g.,* where they have submitted the arbitrability of the dispute to the arbitrators - the *arbitrator* determines the arbitrability of the dispute in the first instance. *See* 475 U.S. at 649; *see also, e.g., First Options,* 514 U.S.

at 943 ("We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."). Granite Rock, by contrast, concerned a case where there was no dispute about who should determine arbitrability. *See* 130 S. Ct. at 2856 (noting that on those facts, "[t]he parties agree[d] that it was proper for the District Court to decide whether their ratification dispute was arbitrable").

In cases where the parties have clearly and unmistakably delegated the question of arbitrability to the arbitrator, a court may review that arbitrability decision, but it "should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options*, 514 U.S. at 943. Indeed, at least one federal circuit has explicitly rejected the position Ecuador takes here, holding that where the parties "clearly and unmistakably agreed to arbitrate issues of arbitrability," the party resisting confirmation of the award "is not entitled to an independent judicial redetermination of that same question." *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012). To the extent that the parties here have "clearly and unmistakably" agreed to arbitrate arbitrability, then, this Court must give substantial deference to that decision. In a confirmation proceeding where arbitrability has been clearly and unmistakably delegated to the arbitrator, "the [New York] Convention . . . does not sanction [a Court's] second-guessing the arbitrator's construction of the parties' agreement." *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RATKA)*, 508 F.2d 969, 977 (2d Cir. 1974).

In deciding this question, the Court first considers whether an agreement to arbitrate exists at all, then analyzes whether such agreement intended the Tribunal to determine questions of arbitrability, and ends with a review of the Tribunal's decision on that issue in this case.

(a) Existence of an Agreement to Arbitrate

To begin, Chevron asserts that the "plain language" of the U.S.-Ecuador BIT demonstrates Ecuador's consent to arbitrate this dispute. *See* Pet. Opp. and Mot. at 14. In its view, Article VI of the BIT constitutes "a standing offer to arbitrate any 'investment dispute' brought by a U.S. 'national or company.'" *See id.* at 14-15 (citing U.S.-Ecuador BIT, art. VI § 4(b)). This position is bolstered by two recent Second Circuit decisions interpreting bilateral investment treaties as creating written agreements to arbitrate for purposes of the New York Convention on facts similar to these. In a case involving both the U.S.-Ecuador BIT and a dispute between our same parties Chevron and Ecuador, the Second Circuit explained:

> The BIT provides that "an 'agreement in writing' for purposes of Article II of the . . . New York Convention" is created when a foreign company gives notice in writing to a BIT signatory and submits an investment dispute between the parties to binding arbitration in accordance with Article VI of the Treaty. *All that is necessary to form an agreement to arbitrate is for one party to be a BIT signatory and the other to consent to arbitration of an investment dispute in accordance with the Treaty's terms.* In effect, Ecuador's accession to

> the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration *completes the "agreement in writing"* to submit the dispute to arbitration.

Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 392-93 (2d Cir. 2011) (emphasis added) (internal citations omitted). Likewise, when interpreting the Germany-Thailand BIT, the same court held that "[t]he existence of an arbitration agreement [between the investor and Thailand] is beyond dispute. Thailand, 'by signing the [treaty], and [the investor] by consenting to arbitration, have created a separate binding agreement to arbitrate.'" *Schneider*, *688 F.3d at 7172* (quoting *Chevron*, 638 F.3d at 392). Although these decisions are not binding on this Court, given the Second Circuit's sound reasoning regarding directly comparable facts, the Court sees no reason to deviate from this approach here. This is, furthermore, a point Ecuador does not truly contest.

Because the BIT constitutes Ecuador's "standing offer" to arbitrate, all Chevron must show is that it was a U.S. "company or national" that submitted an "investment dispute" in order for the Court to find it had a binding arbitration agreement with Ecuador. No one disputes that Chevron is a U.S. company or national. The BIT defines an "investment dispute" to include "an alleged breach of any right conferred or created by this Treaty with respect to an investment." *See* U.S. Ecuador BIT, art. VI § 1. Because Chevron alleged that "Ecuador breached Article II(7) of the BIT through the undue delay of the Ecuadorian courts" in deciding Chevron's breach-of-contract cases regarding its initial investment in Ecuador, *see* Pet.,

¶ 27, it properly requested arbitration of an "alleged breach of [a] right conferred by [the BIT] with respect to an investment." *See* Section III.B.1.c, *infra* (discussing definition of investment). The Court thus finds it had a valid agreement to arbitrate under the BIT.

(b) Who Determines Arbitrability?

Having determined that the parties here entered into a valid agreement to arbitrate, the Court must now inquire whether that agreement "clearly and unmistakably" shows that they intended the Tribunal to decide questions of arbitrability. In this case, the U.S.-Ecuador BIT, which forms the basis of the agreement to arbitrate, provides that arbitration may be conducted "in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." *See* U.S.-Ecuador BIT, art. VI § 3(a)(iii). Article 21 of the UNCITRAL rules requires that the arbitral tribunal "shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the . . . arbitration agreement." UNCITRAL Arbitration Rules, art. 21, 1, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). In this Circuit, clear and binding precedent dictates that in the context of a bilateral investment treaty, "incorporation of the UNCITRAL Rules provides clear[] and unmistakabl[e] evidence[] that the parties intended for the arbitrator to decide questions of arbitrability." *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (alterations in original) (internal quotation marks omitted). Indeed, the D.C. Circuit is not alone in this regard; the Second and Ninth Circuits have both reached the same conclusion. *See Chevron*, 638 F.3d at 394; *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, No. 98-16952, 1999 WL 1079625, at *2 (9th Cir. Nov. 30, 1999). And, indeed, Ecuador wisely yields to the unequivocal authority on this issue. *See* Resp. Reply and Opp. (ECF No. 26) at 6. The Court, accordingly, finds that the parties here clearly and unmistakably agreed to have the arbitrator resolve issues of arbitrability.

(c) Deferential Review of Tribunal's Decision

Having so found, the Court may now engage in only deferential review of the Tribunal's decision, granting "considerable leeway to the arbitrator." *First Options*, 514 U.S. at 943. At the outset, it is worth noting that the "beyond the scope" defense to confirmation "should be construed narrowly" and that the party resisting confirmation on such basis "must . . . overcome a powerful presumption that the arbitral body acted within its powers." *Parsons*, 508 F.2d at 976. Indeed, such limited review is consistent with "the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings." *Fed. Commerce & Nav. Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972); *see also Rich v. Spartis*, 516 F.3d 75, 81 (2d Cir. 2008) (arbitration awards subject to very limited review "in order to avoid undermining the twin goals of arbitration").

Unfortunately, the precise nature of the limited review contemplated by *First Options* is not clear from the cases that follow. *See Schneider, 688 F.3d at 74* (expressing "no opinion on the precise standard for [deferential] review"). Ecuador, for example, contends that "the court should consider the arbitrators' reasoning [and i]f it does not hold up under scrutiny, it should be rejected," *see* Resp. Reply and Opp. at 8, but it offers no authority for this position.

The Court need not determine exactly what standard of deference to employ, as even under a very mildly deferential standard, the Tribunal's decision appears well reasoned and comprehensive. In no way is it so erroneous, unjust, or unclear that this Court would be empowered to set it aside.

The Tribunal here consisted of three learned arbitrators, one chosen by Chevron, one chosen by Ecuador, and one chosen by the first two arbitrators with the consent of the parties. *See* Interim Award at 13. No one contends that the arbitrators were biased, inexperienced, or otherwise inadequate. The Tribunal held eleven days of hearings, four of which were solely devoted to jurisdiction. *See id*. at 25-26. It ultimately produced a 140-page opinion concerning arbitrability alone and addressing eight potential jurisdictional issues. *See id*. at 63-138. Ecuador thus cannot claim that the Award should be set aside for the Tribunal's failure to thoroughly engage with the issues or the parties' arguments.

Looking beyond the comprehensiveness of the Tribunal's work to its reasoning, the Court again finds no reason for reversal. At arbitration, Ecuador contended that the underlying breach- of-contract and unreasonable-delay disputes were nonarbitrable because they were not covered by the U.S.-Ecuador BIT, arguing variously that the BIT did not cover investments that had "expired" prior to its entry into force and that, in any case, the surviving breach-of-contract claims could not constitute "investments" under the Treaty. *See id*, ¶¶ 59, 79. The Tribunal disagreed. It noted that the BIT defines "investments" to include "a claim to money or a claim to performance having economic value, and associated with an investment." *Id.*, ¶ 179. The Tribunal "agreed with [Chevron] that . . . [the underlying lawsuits] concern the liquidation and settlement of claims relating to [Chevron's initial investment in Ecuador] and, therefore, form part of that investment." *Id.*, ¶ 180. It further observed that treaty language "giv[ing] a further non-exhaustive list of forms that an investment may take" and "provid[ing] that '[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as [an] investment'" bolstered its conclusion that "once an investment is established, it continues to exist and be protected [by the BIT] until its ultimate 'disposal' has been completed - that is, until it has been wound up." *Id.*, ¶¶ 181, 183. It then concluded that Chevron's "investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration." *Id.*, ¶ 184.

The Court can find nothing objectionable about this conclusion, which is based on the plain text of the BIT. Although the Tribunal discusses other jurisdictional arguments throughout the rest of the Interim Award, this analysis is alone sufficient to survive even the more searching form of review Ecuador contends is applicable here. Indeed, if the Court were asked the same question in the first instance, such plain-meaning analysis would likely end the matter, as it does in the interpretation of contracts, judgments, and statutes. *See, e.g.*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009) ("[W]here the plain terms of a court order unambiguously apply . . . they are entitled to their effect."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("[W]hen the words of a statute are unambiguous . . . this first canon is also the last: 'judicial inquiry is complete.'"); *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 859 (8th Cir. 2010) ("Where the written instrument is so worded that it can be given a certain definite legal meaning or interpretation, then it is not ambiguous, and this Court will construe [it accordingly].") (quotation and citations omitted).

Because the Treaty plainly states that an "investment" includes "a claim to money . . . associated with an investment" and dictates that "an investment . . . continues to exist . . . until it has been wound up," the Tribunal's reasoning that Chevron's breach-of-contract lawsuits were unexpired "investments" for purposes of the BIT more than "holds up under scrutiny." As the Tribunal's arbitrability decision survives the deferential review required in this circumstance, the Court cannot find that the Final Award is "beyond the scope" of the submission to arbitration and will not deny confirmation on this basis.

2. *Article V(2): Public Policy*

Ecuador also argues that confirmation must be denied because the award contravenes the public policy of the United States. *See* Resp. Opp. to Pet. at 24-25. The public-policy exception under the New York Convention is construed extremely narrowly and applied "only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons*, 508 F.2d at 974 (citing Restatement (Second) of Conflict of Laws § 117, cmt.

c (1971)); *see also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 665 F.3d 1091, 1097 (9th Cir. 2011); *TermoRio S.A. E.S.P.*, 487 F.3d at 938; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 306 (5th Cir. 2004); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996). The "provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy,'" and it does not provide that awards that might contravene U.S. interests may be resisted on such grounds. Parsons, 508 F.2d at 974. Likewise, "[a]lthough this defense is frequently raised, it 'has rarely been successful.'" *Cubic Defense Systems*, 665 F.3d at 1097 (quoting Andrew M. Campbell, Annotation, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. Fed. 481 (1998 & supp.)).

Ecuador points to no such "basic notion of morality and justice" that would be offended by the enforcement of the Award here; in fact, its public-policy argument is primarily a rehashing of its position that the Award was beyond the scope of the submission to arbitration. It also contends that enforcement would violate "strong public policies respecting foreign sovereignty and the autonomy of ongoing judicial proceedings." *See* Resp. Reply and Opp. at 16. Neither argument meets the extraordinarily high threshold required by the public-policy defense.

As to Ecuador's first argument - that the Award was beyond the scope - both the Tribunal and this Court have separately found that Ecuador did consent to arbitrate this dispute. In fact, it could just as easily be argued that enforcing the Award here furthers the strong U.S. policy of "ensur[i]ng that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1748 (2011) (citation and quotation marks omitted); New York Convention, art. II. Indeed, analysis of a proposed public-policy defense "begins with the strong public policy favoring confirmation of foreign arbitration awards," *Cubic Defense Systems*, 665 F.3d at 1098, because "[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

Ecuador's second contention - that enforcing the Award would flout its sovereignty - is similarly unavailing. Ecuador argues that enforcing the Award would sanction the forcible removal of pending litigation from Ecuadorian courts, something it suggests the U.S. would never tolerate. Such a characterization is erroneous.

Ecuador and the U.S. willingly entered into the BIT, in which they agreed to "provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." U.S.-Ecuador BIT, art.

II(7). The present dispute found its way to arbitration because Chevron alleged a breach of this clause - namely, that Ecuador had failed to provide "effective means of . . . enforcing rights" in its court system by allowing Chevron's claims to languish there for fifteen years.

In such an instance, the BIT explicitly states that disputes "arising out of . . . an alleged breach of any right conferred or created by this treaty" may be resolved through "courts or administrative tribunals" and through "binding arbitration." *See id.*, art. VI(1-3). The BIT leaves the choice of dispute-resolution method up to the national or company bringing the claim, and it provides that such awards shall be enforceable under the New York Convention. *Id.* In this sense, the BIT's provision for the arbitration of claims that a signatory has breached its treaty obligations operates as a backstop against the failure of the court systems of either of the signatory nations, and it has played that role appropriately here.

Indeed, it strains credulity to argue that both these sovereign nations would have agreed to such a choice of dispute-resolution processes if they had anticipated it would lead to results that would "violate . . . [their] most basic notions of morality and justice." *Parsons*, 508 F.2d at 974. Given that the Court has found there was a valid agreement to arbitrate between the parties formed under the BIT, the Court cannot now say that enforcing it through the precise means contemplated by the treaty would contravene the strong public policy of the United States. As a result, confirmation may not be denied on this basis.

To the extent Ecuador also claims that the Tribunal's remedy was improper, such remedy clearly does not violate U.S. public policy. In this case, the Tribunal found that Ecuador had breached its obligations under the BIT, and it concluded that the appropriate damage measure for "an international wrong is . . . the comparison of the victim's actual situation to that which would have prevailed had the illegal acts not been committed." *See* Partial Award, ¶ 374. Applying this principle to Ecuador's breach of the BIT, it found that because

> the Claimants' alleged primary "loss" in this case is the chance for a judgment by the Ecuadorian courts, the Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved [Chevron]'s claims. The Tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been.

Id., ¶ 375.

The Court offers no opinion on whether the Tribunal's proposed remedy was erroneous as an interpretation of the appropriate damages measure in an international arbitration, but even if it were, "a mere error of law would not . . . be sufficient grounds to refuse recognition of the award." *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819 n.32 (D. Del. 1990); *see also Karaha Bodas Co.*, 364 F.3d at 306 ("Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention."); *Brandeis Intsel Limited v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 165 (S.D.N.Y.

1987) ("'[M]anifest disregard' of law, whatever the phrase may mean, does not rise to the level of contravening 'public policy,' as that phrase is used in Article V of the Convention.") (emphasis in original). Based on the limited nature of the Court's review here, it could not conclude that the Tribunal's proposed remedy was so egregious that it violated U.S. public policy and should be vacated.

Finding that Ecuador has not carried its burden to show that any of the bases for denying confirmation in the New York Convention applies to the Award here, the Court must grant Chevron's Petition and confirm the Award.

C. Ecuador's Request for a Stay

Finally, Ecuador argues that "the Court should defer a final decision on the merits of Chevron's petition pending resolution of the ongoing set-aside proceedings in the Hague," as permitted by Article VI of the New York Convention. *See* Resp. Opp. to Pet. at 26. Under the Convention, district courts do have discretion to stay proceedings where "a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside." *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998). Noting that "the adjournment of enforcement proceedings impedes the goals of arbitration - the expeditious resolution of disputes and the avoidance of protracted and expensive litigation," the *Europcar* court found that "a stay of confirmation should not be lightly granted," and it identified a number of factors district courts should consider in evaluating a request for a stay of proceedings. *Id.* at 317. These factors include:

(1) The general objectives of arbitration . . .;

(2) The status of the foreign proceedings and the estimated time for those proceedings to be resolved;

(3) Whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;

(4) The characteristics of the foreign proceedings including (i) whether they were brought . . . to set the award aside (which would tend to weigh in favor of enforcement) . . . and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;

(5) A balance of the possible hardships to the parties . . .; and

(6) Any other circumstance that could tend to shift the balance in favor of or against adjournment . . . .

Id. at 317-318. "Because the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards, the first and second factors on the list should weigh more heavily in the district court's determination." *Id.* at 318. Notably, Ecuador's initial request for a stay makes no mention of the *Europcar* factors, and its Second Opposition makes only passing reference to them. The Court, finding that the balance of factors weighs against staying the proceedings, will deny Ecuador's request.

The first factor, the general objectives of arbitration, weighs strongly in favor of confirmation. The BIT, the UNCITRAL Rules, and the New York Convention all require immediate satisfaction of arbitral awards. Chevron submitted its Notice of Arbitration in this matter more than six years ago, a delay that surely does not constitute an "expeditious resolution" of the dispute, which originated in the early 1990s. *See G.E. Transport*, 693 F. Supp. 2d at 139 (finding that four-year delay "plainly weigh[ed] in favor of confirmation rather than adjournment").

Likewise, the second factor, the status of the foreign proceedings, weighs in favor of immediate confirmation: although the Dutch proceeding is ongoing, the District Court of the Hague issued a decision denying Ecuador's petition to set the award aside more than a year ago, and the appeal will likely not be resolved until late 2013 or early 2014. *See* Pet., ¶ 34; Kehoe Decl., Exh. 6 (Certified Judgment of the District Court of the Hague).

The third factor, whether the award will receive greater scrutiny in foreign proceedings, is a closer case. According to Chevron's expert, Jacob M.K.P. Cornegoor, who represents Chevron in the Dutch proceeding, "[T]he [Dutch] District Court reviewed the question whether a valid arbitration agreement was formed *de novo*," but reviewed the question of whether the dispute concerned an investment validly covered by the BIT as "one for arbitrators to consider and their answer should be reviewed under a more restrictive standard by the court." Declaration of Jacob M.K.P. Cornegoor, ¶ 4; Certified Judgment, ¶¶ 4.10-4.11. This standard is not so much more exacting than the one applied here that it weighs strongly against confirmation, and, indeed, the fact that the Dutch District Court has already denied the motion to set aside suggests that to the extent the standard is any more searching, it has not helped Ecuador in its attempt to resist confirmation.

The fourth factor does not carry much force either way. Although the parties dispute whether the vacatur proceedings are an attempt to "hinder or delay resolution of the dispute," the Court cannot say that they are so obviously either legitimate or vexatious that this factor should sway its analysis here. The fact that the proceedings were initiated to vacate the Award, rather than confirm it, however, does weigh against a stay.

The fifth factor, the balance of hardships, also counsels in favor of immediate confirmation. As Chevron notes, this dispute is more than twenty years old, and the arbitration itself began more than six years ago. Although Chevron will be entitled to prejudgment interest, which would continue to accrue in the event of a stay, that is not enough to offset its continued inability to obtain enforcement of its award. After such an extensive delay, the balance of hardships - and, indeed, the interests of justice - strongly favor immediate confirmation.

Neither side presents any other significant circumstance that should be considered as an additional factor. Because the balance of the *Europcar* factors greatly supports immediate confirmation, the Court will deny Ecuador's request for a stay.

VIII. Conclusion

For the aforementioned reasons, the Court will grant Chevron's Petition and order confirmation of the Award. A separate Order consistent with this Opinion will be issued this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: June 6, 2013

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

Appellees

V.

THE REPUBLIC OF ECUADOR,

Appellant.

No. 13-7103

D.C. No. 1:12-cv-01247-JEB

ORDER

Argued and Submitted
September Term, 2015—Washington, D.C.

Filed September 28, 2015

Before: Garland, Chief Judge, and Henderson,* Rogers, Tatel, Brown, Griffith,* Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

LANGER, *Clerk*:

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

FOR THE COURT:

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* Circuit Judges Henderson and Griffith did not participate in this matter.

Mark J. Langer,
Clerk of Court

/s/__________________
Michael C. McGrail,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,

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ORDER

Argued and Submitted
September Term, 2015—Washington, D.C.

Filed September 28, 2015

Before: Garland, Chief Judge, Srinivasan, and Wilkins, Circuit Judges

LANGER, *Clerk*:

Upon consideration of appellant's petition for panel rehearing filed on September 3, 2015, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer,
Clerk of Court

/s/
Michael C. McGrail,
Deputy Clerk

APPENDIX D

The Foreign Sovereign Immunities Act

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

28 U.S.C. § 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 109-2, § 4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United

States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that

agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to

arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub. L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) **Limitation on discovery.—**

(1) **In general.--(A)** Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) **Sunset.--**(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years

after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) **Evaluation of evidence.**--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) **Bar on motions to dismiss.**--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) **Construction.**--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat.

2892; amended Pub. L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub. L. 104-132, Title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub. L. 105-11, Apr. 25, 1997, 111 Stat. 22; Pub. L. 107-77, Title VI, § 626(c), Nov. 28, 2001, 115 Stat. 803; Pub. L. 107-117, Div. B, Ch. 2, § 208, Jan. 10, 2002, 115 Stat. 2299; Pub. L. 109-304, § 17(f)(2), Oct. 6, 2006, 120 Stat. 1708; Pub. L. 110-181, Title X, § 1083(b)(1), Jan. 28, 2008, 122 Stat. 341.)

Effective: January 28, 2008

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) **In general.**--

(1) **No immunity.**--A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) **Claim heard.**--The court shall hear a claim under this section if--

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred--

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) **Limitations.**--An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of--

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) **Private right of action.**--A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to--

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) **Additional damages.**--After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) **Special masters.--**

(1) **In general.**--The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) **Transfer of funds.**--The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such

special master shall constitute an item of court costs.

(f) **Appeal.**--In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) **Property disposition.**--

(1) **In general.**--In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is--

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) **Notice.**--A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) **Enforceability.**--Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) **Definitions.**--For purposes of this section--

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

(Added Pub. L. 110-181, Div. A, Title X, § 1083(a)(1), Jan. 28, 2008, 122 Stat. 338.)

Effective: January 28, 2008

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13477

<October 31, 2008, 73 F.R. 65965>

SETTLEMENT OF CLAIMS AGAINST LIBYA

By the authority vested in me as President by the Constitution and the laws of the United States of America, and pursuant to the August 14, 2008, claims settlement agreement between the United States of America and Libya (Claims Settlement Agreement), and in recognition of the October 31, 2008, certification of the Secretary of State, pursuant to section 5(a)(2) of the Libyan Claims Resolution Act (Public Law 110-301), and in order to continue the process of normalizing relations between the United States and Libya, it is hereby ordered as follows:

Section 1. All claims within the terms of Article I of the Claims Settlement Agreement (Article I) are settled.

(a) Claims of United States nationals within the terms of Article I are espoused by the United States and are settled according to the terms of the Claims Settlement Agreement.

(i) No United States national may assert or maintain any claim within the terms of Article I in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State.

(ii) Any pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) The Secretary of State shall provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a United States national within the terms of Article I pending or filed in any forum, domestic or foreign.

(b) Claims of foreign nationals within the terms of Article I are settled according to the terms of the Claims Settlement Agreement.

(i) No foreign national may assert or maintain any claim coming within the terms of Article I in any court in the United States.

(ii) Any pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) Neither the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I in foreign courts or through the efforts of foreign governments.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a foreign national within the terms of Article I pending or filed in any court in the United States.

Sec. 2. For purposes of this order:

(a) The term "United States national" has the same meaning as "national of the United States" in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)), but also includes any entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches).

(b) The term "foreign national" means any person other than a United States national.

(c) The term "person" means any individual or entity, including both natural and juridical persons.

(d) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

Sec. 3. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH

DETERMINATION OF PRESIDENT

PRESIDENTIAL DETERMINATION NO. 2008-9

<Jan. 28, 2008, 73 F.R. 6571>

WAIVER OF SECTION 1083 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and section 1083(d) of the National Defense Authorization Act for Fiscal Year 2008 (the "Act"), I hereby determine that:

- All provisions of section 1083 of the Act, if applied to Iraq or any agency or instrumentality thereof, may affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation.

- The economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States. Section 1083 of the Act threatens those key priorities. If permitted to apply to Iraq, section 1083 would risk the entanglement of substantial Iraqi assets in litigation in the United States including those of the Development Fund for Iraq, the Central Bank of Iraq, and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. If permitted to apply to Iraq, section 1083 would have a significant financial impact on Iraq and would result in the redirection of financial resources from the continued reconstruction of Iraq and the harming of Iraq's stability, contrary to the interests of the United States.

• A waiver of all provisions of section 1083 with respect to Iraq and any agency or instrumentality of Iraq is therefore in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq.

• Iraq continues to be a reliable ally of the United States and a partner in combating acts of international terrorism. The November 26, 2007, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups, including al-Qaida.

Accordingly, I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof.

You are authorized and directed to notify the Congress of this determination and waiver and the accompanying memorandum of justification, incorporated by reference herein, and to arrange for their publication in the Federal Register.

GEORGE W. BUSH

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894; amended Pub. L. 105-277, Div. A, § 101(h) [Title I, § 117(b)], Oct. 21, 1998, 112 Stat. 2681-491; Pub. L. 106-386, Div. C, § 2002(f)(2), Oct. 28, 2000, 114 Stat. 1543; Pub. L. 107-297, Title II, § 201(c)(3), Nov. 26, 2002, 116 Stat. 2337.)

Effective: November 26, 2002

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894; amended Pub. L. 110-181, Div. A, Title X, § 1083(b)(2), Jan. 28, 2008, 122 Stat. 341.)

Effective: January 28, 2008

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.)

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the

foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section

620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) **Waiver.**--The President may waive any provision of paragraph (1) in the interest of national security.

(g) **Property in certain actions.**--

(1) **In general.**--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) **United States sovereign immunity inapplicable.**--Any property of a foreign state, or

agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) **Third-party joint property holders.**-- Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896; amended Pub. L. 100-640, § 2, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100-669, § 3, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101-650, Title III, § 325(b)(9), Dec. 1, 1990, 104 Stat. 5121; Pub. L. 104-132, Title II, § 221(b), Apr. 24, 1996, 110 Stat. 1243; Pub. L. 105-277, Div. A, § 101(h) [Title I, § 117(a)], Oct. 21, 1998, 112 Stat. 2681-491; Pub. L. 106-386, Div. C, § 2002(g)(1), Oct. 28, 2000, 114 Stat. 1543; Pub. L. 107-297, Title II, § 201(c)(3), Nov. 26, 2002, 116 Stat. 2337; Pub. L. 110-181, Div. A, Title X, § 1083(b)(3), Jan. 28, 2008, 122 Stat. 341; Pub. L. 112-158, Title V, § 502(e)(1), Aug. 10, 2012, 126 Stat. 1260.)

Effective: August 10, 2012

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2897; amended Pub. L. 104-114, Title III, § 302(e), Mar. 12, 1996, 110 Stat. 818.)

Effective: August 1, 1996

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

(Added Pub. L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

APPENDIX E

Investment Treaty with the Republic of Ecuador

Signed at Washington August 27, 1993 Read the first time in the Senate September 10, 1993

LETTER OF TRANSMITTAL

THE WHITE HOUSE, September 10, 1993.

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 United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and related exchange of letters, signed at Washington on August 27, 1993. Also transmitted for the information of the Senate is the report of the Department of State with respect to this Treaty.

This is the first bilateral investment treaty with an Andean Pact country, and the second such Treaty signed with a South American country. The Treaty is designed to protect U.S. investment and encourage private sector development in Ecuador, and support the economic reforms taking place there. The Treaty's approach to dispute settlement will serve as a model for negotiations with other Andean Pact countries.

The Treaty is fully consistent with U.S. policy toward international and domestic investment. A specific tenet, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment. Under this Treaty, the Parties also agree to international law standards for expropriation and compensation for expropriation, free transfers of funds associated with investments, freedom of investments from performance requirements, 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, with Protocol and related exchange of letters, at an early date.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

S/S 9320385

DEPARTMENT OF STATE,

Washington, DC, September 7, 1993.

The PRESIDENT,

The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a related exchange of letters, signed at Washington on August 27, 1993. I recommend this Treaty, with Protocol and exchange of letters, be transmitted to the Senate for its advice and consent to ratification.

The bilateral investment treaty (BIT) with Ecuador represents an important milestone in the BIT program. It is the first bilateral investment treaty signed with a member of the Andean Pact, and the second BIT signed with a South American country. (A

BIT was signed with Argentina in 1991.) This Treaty will assist Ecuador in its efforts to develop its economy by creating conditions more favorable for U.S. private investment, helping to attract such investment and, thus, strengthening the development of the private sector. It is U.S. policy, however, to advise potential treaty partners during BIT negotiations that conclusion of a BIT does not necessarily result in immediate increases in private U.S. investment flows.

To date, 13 BITs are in force for the United States—with Bangladesh, Cameroon, the Czech Republic, Egypt, Grenada, Morocco, Panama, Senegal, Slovakia, Sri Lanka, Tunisia, Turkey, and Zaire. In addition to the Ecuador Treaty, the United States has signed, but not yet brought into force, BITs with Argentina, Armenia, Bulgaria, the Congo, Haiti, Kazakhstan, the Kyrgyz Republic, Moldova, Romania, and Russia—and a business and economic relations treaty with Poland, which contains the BIT elements.

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

THE U.S.–ECUADOR TREATY

The Treaty with Ecuador satisfies the principal BIT objectives, which are:

—Investments of nationals and companies of either Party in the territory of the other Party (investments) receive the better of national treatment or most-favored-nation (MFN) treatment both on establishment and thereafter, subject to certain specified exceptions;

—Investments are guaranteed freedom from performance requirements, including requirements to use local products or to export goods;

—Expropriation can occur only in accordance with international law standards: for a public purpose; in a nondiscriminatory manner; under due process of law; and upon payment of prompt, adequate, and effective compensation;

—Investments are guaranteed the unrestricted transfer of funds in a freely usable currency; and

—Nationals and companies of either Party, in investment disputes with the host government, have access to binding international arbitration, without first resorting to domestic courts.

The U.S.–Ecuador Treaty eliminates Article VIII of the prototype text. This language had excluded from the dispute settlement provisions of the BIT those disputes arising under the export credit, guarantee or insurance programs of the Export–Import Bank of the United States, as well as those arising under any other such official programs pursuant to which the Parties agreed to other means of settling disputes. The Export–Import Bank, the Overseas Private Investment Corporation and other relevant government agencies indicated prior to this negotiation that they saw no need to maintain such a provision.

The U.S.–Ecuador Treaty also differs from the prototype in that it includes provisions at Article I, paragraph 1(f) and (g), and Article II, paragraph 2, which clarify and extend the requirements of the Treaty with respect to state enterprises. This new language is discussed in further detail in the article-by-article analysis of the Treaty below.

In addition, the Treaty also includes minor clarifying changes to the text of Article VI, paragraph 2; a provision to preserve contractual arrangements made as part of any debt-equity conversion program in Ecuador, in the Protocol; Ecuador's exceptions to the obligation to provide national treatment, in the Protocol; and a related exchange of letters. These elements are further described below.

The following is an article-by-article analysis of the provisions of the Treaty:

Preamble

The Preamble states the goals of the Treaty. The Treaty is premised on the view that an open investment policy leads to economic growth. These goals include economic cooperation, increased flow of capital, a stable framework for investment, development of respect for internationally-recognized worker rights, and maximum efficiency in the use of economic resources. While the Preamble does not impose binding obligations, its statement of goals may serve to assist in the interpretation of the Treaty.

Article I (Definitions)

Article I sets out definitions for terms used throughout the Treaty. As a general matter, they are designed to be broad and inclusive in nature.

Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners in the territory of the other. Investments can be made either directly or indirectly through one or more subsidiaries, 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.

The definition provides a non-exclusive list of assets, claims and rights that constitute investment. These include both tangible and intangible property, interests in a company or its assets, "a claim to money or performance having economic value, and associated with an investment," intellectual property rights, and any right conferred by law or contract (such as government-issued licenses and permits). The requirement that a "claim to money" be associated with an investment excludes claims arising solely from trade transactions, such as a simple movement of goods across a border, from being considered investments covered by the Treaty.

Under paragraph 2 of Article I, either country may deny the benefits of the Treaty to investments by companies established in the other that are owned or controlled by nationals of a third country if 1) the company is a mere shell, without substantial business activities in the home country, or 2) the third country is one with which the denying Party does not maintain normal economic relations. For example, at this time the United States does not maintain normal economic relations with, inter alia, Cuba or Libya.

Paragraph 3 confirms that any alternation in the form in which as asset is invested or reinvested shall not affect its character as 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" is broad in order to cover virtually any type of legal entity, including any corporation, company, association, or other entity that is organized under the laws and regulations of a Party. The definition also ensures that companies of a Party that establish investments in the territory of the other Party have their investments covered by the Treaty, even if the parent company is ultimately owned by non-Party nationals, although the other Party may deny the benefits of the Treaty in the limited circumstances set forth in Article I, paragraph 2. Likewise, a company of a third country that is owned or controlled by nationals or companies of a Party will also be covered. The definition also covers charitable and non-profit entities, as well as entities that are owned or controlled by the state.

National

The Treaty defines "national" as a natural person who is a national of a Party under its own laws. Under U.S. law, the term "national" is broader 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," and 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. The scope of this definition provides breadth to the Treaty's transfer provisions in Article IV.

Associated Activities

The Treaty recognizes that the operation of an investment requires protections extending beyond the investment to numerous related activities. This definition provides an illustrative list of such investor activities, including operating a business facility, borrowing money, disposing of property, issuing stock and purchasing foreign exchange for imports. These activities are covered by Article II, paragraph 1, which guarantees the better of national or MFN treatment for investments and associated activities.

State Enterprise

"State enterprise" is defined as an enterprise owned, or controlled through ownership interests, by a Party.

Delegation

"Delegation" is defined to include a legislative grant, government order, directive or other act which transfers governmental authority to a state enterprise or authorizes a state enterprise to exercise such authority.

The definitions of "state enterprise" and "delegation" are included to clarify the scope of the obligations of Article II, paragraph 2, 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 MFN or national treatment in both the entry and post-entry phases of investment. It thus prohibits both the screening of proposed foreign investment on the basis of nationality and discriminatory measures once the investment has been made, subject to specific exceptions provided for in a separate Protocol. The United States and Ecuador have both reserved certain exceptions in the Protocol to the Treaty, the provisions of which are discussed in the section entitled "Protocol."

Paragraph 2 is designed to ensure that a Party cannot utilize state owned or controlled enterprises to circumvent its obligations under the Treaty. To this end, it requires each Party to observe its treaty obligations even when it chooses, for administrative or other reasons, to assign some portion of its authority to a state enterprise, 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 state enterprises accord the better of national or MFN treatment in the sale of its goods or services in the Party's territory.

Paragraph 3 guarantees that investment shall be granted "fair and equitable" treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph also sets out a minimum standard of treatment based on customary international law.

In paragraph 3(c), each Party pledges to respect any obligations it may have entered into with respect 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 allows, subject to each Party's immigration laws and regulations, the entry of each Party's nationals into the territory of the other for purposes linked to investment and involving the commitment of a "substantial amount of capital." This paragraph serves to render nationals of a BIT partner eligible for treaty-investor visas under U.S. immigration law and guarantees similar treatment for U.S. investors.

Paragraph 5 guarantees companies the right to engage top managerial personnel of their choice, regardless of nationality.

Under paragraph 6, neither Party may impose performance requirements such as those conditioning investment on the export of goods produced or the local purchase of goods or services. Such requirements are major burdens on investors.

Paragraph 7 provides that each Party must provide effective means of asserting rights and claims with respect to investment, investment agreements and any investment authorizations. Under paragraph 8, each Party must make publicly available all laws, administrative practices and adjudicatory procedures pertaining to or affecting 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 to U.S. out-of-State residents and corporations.

Paragraph 10 limits the Article's MFN obligation by providing that it will not apply to advantages accorded by either Party to third countries by virtue of a Party's membership in a free trade area or customs union or a future multilateral agreement under the auspices of the General Agreement on Tariffs and Trade (GATT). The free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT.

Article III (Expropriation)

Article III incorporates into the Treaty the international law standards for expropriation and compensation.

Paragraph 1 describes the general rights of investors and obligations of the Parties with respect to expropriation and nationalization. These rights also apply to direct or indirect state measures "tantamount to expropriation or nationalization," and thus apply to "creeping expropriations" that result in a substantial deprivation of the benefit of an investment without taking of the title to the investment.

Five requirements are listed. Expropriation must be for a public purpose; be carried out in a non-discriminatory manner; be subject to "prompt, adequate, and effective compensation"; be subject to due process; and be accorded the treatment provided in the standards of Article II(3). (These standards guarantee fair and equitable treatment and prohibit the arbitrary and discriminatory impairment of investment in its broadest sense.)

The second sentence of paragraph 1 clarifies the meaning of "prompt, adequate, and effective compensation." Compensation must 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 paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; be freely transferable; and be calculated in a freely usable currency on the basis of the prevailing market rate of exchange.

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

Paragraph 3 entitles investors to the better of national or MFN treatment with respect to losses related to war or civil disturbances, but, unlike paragraph 1, does not specify an absolute obligation to pay compensation for such losses.

Article IV (Transfers)

Article IV protects investors from certain government exchange controls limiting current account and capital account transfers.

In Paragraph 1, the Parties agree to permit "transfers related to an investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a non-exclusive list of transfers that must be allowed, including returns (as defined in Article I); payments made in compensation for expropriation (as defined in Article III); payments arising out of an investment dispute; payments made under a contract, including the amortization of principal and interest payments on a loan; proceeds from the liquidation or sale of all or part of an investment; and additional contributions to capital for the maintenance or development of an investment.

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 standard of the International Monetary Fund; at present there are five such "freely usable" currencies: the U.S. dollar, Japanese yen, German mark, French franc and British pound sterling.

Paragraph 3 recognizes that notwithstanding these guarantees, Parties 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 Parties may protect the rights of creditors and ensure the satisfaction of judgments in adjudicatory proceedings through their laws, even if such measures interfere with transfers. Such laws must be applied in an equitable, nondiscriminatory and good faith manner.

Article V (State–State Consultations)

Article V provides for prompt consultation between the Parties, at either Party's request, on any matter relating to the interpretation or application of the Treaty.

Article VI (State–Investor Dispute Resolution)

Article VI sets forth several means by which disputes between an investor and the host country may be settled.

Article VI procedures apply to an "investment dispute," a term which covers any dispute arising out of or relating to an investment authorization, or an agreement between the investor and the host government or to rights granted by the Treaty with respect to an investment.

When a dispute arises, Article VI provides that the disputants should initially seek to resolve the dispute by consultation and negotiation, which may include non-binding third party procedures. Should such consultations fail, paragraphs 2 and 3 set forth the investor's range of choices of dispute settlement. The investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submits the dispute to the local courts or administrative tribunals of the host country. Paragraph 2 of Article VI of the Ecuador BIT adds to the prototype BIT language a phrase reiterating that the investor may choose among these three alternatives. This addition does not alter the operation of this provision.

Under the Treaty, the investor can take an investment dispute to binding arbitration after six months from the date that the dispute arises. The investor may choose between the International

Center for the Settlement of Investment Disputes (ICSID) (if the host country has joined the Centre—otherwise the ICSID Additional Facility is available) and ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Treaty also recognizes that, by mutual agreement, the parties to the dispute may choose another arbitral institution or set of arbitral rules.

Paragraph 4 contains the consent of the United States and Ecuador to the submission of investment disputes to binding arbitration in accordance with the choice of investor.

Paragraph 5 provides that a non-ICSID arbitration shall take place in a country that is a party to the United Nations Convention the Recognition and Enforcement of Arbitral Awards. This requirement enhances the ability of investors to enforce their arbitral awards. In addition, paragraph 6 includes a separate commitment by each Party to enforce arbitral awards rendered pursuant to Article VI procedures.

Paragraph 7 provides that in any dispute settlement procedure, a Party may not invoke as a defense, counterclaim, set-off or in any other manner the fact that the company or national has received or will be reimbursed 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 (State–State Arbitration)

Article VII provides for binding arbitration of disputes between the United States and Ecuador that are not resolved through consultations or other diplomatic channels. The article constitutes each Party's prior consent to arbitration.

Article VIII (Preservation of Rights)

Article VIII clarifies that the Treaty is meant only to establish a floor for the treatment of foreign investment. An investor may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation assumed by a Party with respect to that investor, this provision ensures that the Treaty will not be interpreted to derogate from any entitlement to such more favorable treatment.

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 international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.

The maintenance of public order would include measures taken pursuant to a Party's policy powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations rising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on 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 interest of the Party involved.

The second paragraph allows a Party to promulgate special formalities in connection with the establishment of investment, provided that the formalities do not impair the substance of any Treaty rights. Such formalities would include, for example, U.S. reporting requirements for certain inward investment.

Article X (Tax Policies)

The Treaty exhorts both countries to provide fair and equitable treatment to investors with respect to tax policies. However, tax matters are generally excluded from the coverage of the prototype BIT, based on the assumption that tax matter are properly covered in bilateral tax treaties.

The Treaty, and particularly the dispute settlement provisions, do apply to tax matters in three areas, to the extent they are not subject to the dispute settlement provisions of a tax treaty, or, if so subject, have been raised under a tax treaty's dispute settlement procedures and are not resolved in a reasonable period of time.

The three areas where the Treaty could apply to tax matters are expropriation (Article III), transfers (Article IV) and the observance and enforcement of terms of an investment agreement or authorization (Article VI(1)(a) or (b)). These three areas are important for investors, and two of the three—expropriatory taxation and tax provisions contained in an investment agreement or authorization—are not typically addressed in tax treaties.

Article XI (Application to Political Subdivisions)

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

Article XII (Entry into Force, Duration and Termination)

The Treaty enters into force thirty days after exchange of instruments of ratification and continues in force for a period of ten years. From the date of its entry into force, the Treaty applies to existing and future investments. After the ten-year term, the Treaty will continue in force unless terminated by either Party upon one year's notice. If terminated, all existing investments would continue to be protected under the Treaty for ten years thereafter.

Protocol

The Treaty addresses debt-equity programs, under which an investor purchases debt of a country at a discount and receives local currency in an amount equivalent to the debt's face value. These programs normally require that the investor postpone repatriating the investment made with the local currency obtained in the conversion. Investors may choose to enter into such programs because they obtain more local currency than they otherwise would receive for a given amount of foreign exchange. The treaty's Protocol provides that any deferral of transfers agreed to under debt-equity conversion programs would not be superseded by the treaty's guarantee of transfers without delay. This provision in the Protocol was added at the suggestion of the United States. The United States has been generally supportive of debt-equity conversion programs as part of the overall solution to the debt problem and has considered them to be an important element in commercial bank financing programs which reduce debt and debt service.

U.S. bilateral investment treaties allow for sectoral exceptions to national and MFN treatment. The U.S. exceptions are designed to protect governmental regulatory interests and to accommodate the derogations from national treatment and, in some cases, MFN treatment in existing federal law.

The U.S. portion of the Protocol contains a list of sectors and matters in which, for various legal and historical reasons, the federal government or the states may not necessarily treat investments of nationals or companies of the other Party as they do U.S. investments or investments from a third country. The U.S. exceptions from national treatment are: air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; customhouse brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; 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 and maritime-related services; and, primary dealership in U.S. government securities.

Ownership of real property, mining on the public domain, maritime and maritime-related services, and primary dealership in U.S. government securities are excluded from MFN as well as national treatment commitments. The last three sectors are exempted by the United States from MFN treatment obligations because of U.S. laws that require reciprocity. Enforcement of reciprocity provisions would deny both national and MFN treatment.

The listing of a sector does not necessarily signify that domestic laws have entirely reserved it for nationals. Future restrictions or limitations on foreign investment are only permitted in the sectors listed; must be made on an MFN basis, unless otherwise specified in the Protocol; and must be appropriately notified. Any additional restrictions or limitations which a Party may adopt with respect to listed sectors may not affect existing investments. The Ecuador Treaty adds language to the prototype BIT reiterating that listing an exception to national treatment does not relieve the Parties from their obligations to accord national and most-favored-nation treatment.

Because the U.S. exceptions to national treatment and MFN treatment are based on existing U.S. law, they are not altered during negotiations.

Ecuador's exceptions to national treatment are: traditional fishing (which does not include fish processing or aquaculture); and ownership and operation of broadcast radio and television stations. These exceptions were based on provisions of investment measures currently in force or under active consideration by the Government of Ecuador. Ecuador has not reserved any sectoral exceptions to MFN treatment in the Protocol.

Exchange of Letters

In an exchange of letters at the time the Treaty was signed, Ecuador explicitly confirmed that the Treaty shall serve to satisfy a variety of substantive and procedural requirements imposed on U.S. investors and investments by Ecuadorian law. This understanding reflects the desire of the Government of Ecuador that the Treaty should operate in and of itself to reduce or eliminate certain bureaucratic practices identified as impediments to investment.

The exchange of letters clarifies, for example, that certain local training and nationality requirements for employment will be waived for U.S. investors. The letters confirm that the Treaty shall satisfy any and all authorizations necessary for issuing Ecuadorian visas for certain executives and key personnel. Except where itemized in paragraph four of the Protocol, investment is permitted in areas and enterprises that would otherwise require special administrative or other foreign investment authorizations. The Government of Ecuador stated that this would make automatic its discretion to permit foreign investment, inter alia, along the border, on the coast, and in "non-traditional" fisheries. The letters constitute an understanding between the governments and are an integral part of the Treaty.

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

Respectfully submitted,

WARREN CHRISTOPHER.

[TEXT OF TREATY]

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Ecuador (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 works, 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; 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 Protocol 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 Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, 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 Protocol, be not less favorable than that accorded in like situations to investments 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 than that 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 purposes 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 investments and associated activities of nationals and companies of the Republic of Ecuador 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 laws 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.

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 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 any such expropriation has occurred and, if so, whether 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 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, under one of the following alternatives, 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 national 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 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. 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 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 Protocol and Side Letter 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 twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

[Signature]

FOR THE REPUBLIC OF ECUADOR:

[Signature]

PROTOCOL

1. The Parties note that the Republic of Ecuador may establish a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Republic of Ecuador through the purchase of debt at a discount.

The Parties agree that the rights provided in Article IV, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, may, as such rights would apply to that part of an investment financed through a debt-equity conversion, be modified by the terms of a debt-equity conversion agreement between a national or company of the United States and the Government of the Republic of Ecuador or any agency or instrumentality thereof.

The transfer of returns and/or proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Republic of Ecuador or any third country, whichever is more favorable.

2. The United States 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; government grants; government insurance and loan programs; energy and power production; customhouse brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; 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 treatment accorded pursuant to these exceptions shall, unless specified in paragraph 3 of this Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

3. The United States 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:

ownership of real property; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

4. The Republic of Ecuador 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:

traditional fishing (which does not include fish processing or aquaculture); ownership and operation of broadcast radio and television stations.

The treatment accorded pursuant to these exceptions shall be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

27 August 1993

His Excellency

Diego Paredes,

Minister of Foreign Relations of the Republic of Ecuador, Quito.

Dear Mr. Minister:

I have the honor to confirm receipt of your letter which reads as follows:

"I have the honor to confirm the following understanding which was reached between the

Government of the Republic of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty"):

With respect to Article II, paragraph 4, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for nationals of the United States to enter and to remain in the territory of the Republic of Ecuador for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the United States that employs them, have committed or are in the process of committing a substantial amount of capital or other resources. Such authorizations include those granted by the Labor Ministry, such as to waive local training requirements established as a condition to the entry of highly trained and specially qualified employees that are essential to the company's operations. Nationals of the United States, however, can be required to fulfill limited formalities in connection with entry and sojourn in the Republic of Ecuador, including the presentation of a visa application and relevant documentation.

With respect to Article II, paragraph 5, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for the engagement of foreign nationals as top managers.

In addition, the Government of the Republic of Ecuador indicates that under the Ecuadorian

Constitution, including Article 18, and the laws of the Republic of Ecuador, foreign nationals and companies may need special administrative or other authorizations that are specific to the investments of foreign persons. The Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all such authorizations, except for those sectors or matters in which the Republic of Ecuador may make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1 and listed in paragraph 4 of the Protocol.

I have the honor to propose that this understanding be treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your government."

I have the further honor to confirm that this understanding is shared by my Government and constitutes an integral part of the Treaty.

Sincerely,

Rufus H. Yerxa

Acting United States Trade Representative

Washington, D.C., August 27, 1993

His Excellency

Ambassador Rufus Yerxa

Acting United States Trade Representative

Washington, D.C.

Mr. Ambassador:

I have the honor to confirm the following understanding, which was reached between the

Government of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty)":

[For the text of the understanding, see Ambassador Yerxa's letter immediately preceding.]

I have the honor to propose that this understanding by treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your Government.

Accept, Excellency, the assurances of highest consideration.

Diego Paredes

APPENDIX F

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ARMENIA CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Republic of Armenia (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 works, 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

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 XIII

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 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 twenty-third day of September, 1992, in the English language. An Armenian language text shall be prepared which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.

APPENDIX G

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF BANGLADESH CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The Government of the United States of America and the People's Republic of Bangladesh (hereinafter referred to as a "Party";

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; and

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 discrimination on the basis of nationality by either Party against investment in its territory by nationals or companies of the other Party is not consistent with either a stable framework for investment or a maximum effective utilization of economic resources,

Having resolved to conclude a treaty concerning the Encouragement and Reciprocal Protection of investment

HAVE AGREED AS FOLLOWS:

ARTICLE I
DEFINITIONS

FOR THE PURPOSES OF THIS TREATY,

(a) "Company" means any kind of juridical entity, including any corporation, company association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) "Company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities have a substantial interest as determines by such Party.

Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, if nationals or any third country control such company, provided that whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution to this matter.

In any event, the juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions

(c) "Investment" means every kind of investment owned or controlled directly or indirectly, including 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, 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, including rights with respect copyrights and related patents, trade marks and trade names, industrial designs, trade secrets and know-how, and goodwill.

(v) Licenses and permits issued pursuant to law, including those issued for manufacture and sale of products.

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

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

(d) "own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.

(e) "national" of a Party means a natural person who is a national of a Party under its applicable law.

(f) "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; and payment in kind.

* * *

ARTICLE XIII - ENTRY INTO FORCE AND DURATION AND TERMINATION

1. This Treaty shall be ratified by each of the Parties and the ratifications thereof shall be exchanged as soon as possible.

2. This treaty shall enter into force thirty days after the date of exchange of ratifications. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with Paragraph 3 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.

3. 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.

4. 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.

In Witness Thereof, the respective plenipotentiaries have signed this Treaty.

Done in duplicate at Washington on the 12th day of March 1986 in the English and Bangla languages, both texts being equally authentic.

APPENDIX H

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF BULGARIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Bulgaria (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;

Convinced that a free and open market for investment offers the best opportunity for raising living standards and the quality of life for the inhabitants of 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 purposes of this Treaty,

(a) "investment" means every kind 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 works, including sound recordings;

inventions in all fields of human endeavor;

industrial designs;

semiconductor mask works;

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

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, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 return 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 and industrial property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(f) "nondiscriminatory" treatment means treatment that is at least as favorable as the better of national treatment or most-favored-nation treatment;

(g) "national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of that Party in like circumstances; and

(h) "most-favored-nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies or nationals of third Parties in like circumstances.

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 an investment.

* * *

ARTICLE XIII

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 twenty-third day of September, 1992, in the English and Bulgarian languages, both texts being equally authentic.

APPENDIX I

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CAMEROON CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Republic of Cameroon (each hereinafter referred to as a "Party"),

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

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

Aware that fair and equitable treatment would contribute to maintaining a stable framework for investment in order to facilitate the maximum effective utilization of economic resources,

Have resolved to conclude a treaty concerning the encouragement and reciprocal protection of investments, and

Have agreed as follows:

ARTICLE I

Definitions

1. For the purpose of this Treaty,

(a) "Company of a Party" means any kind of juridical entity including any corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "Investment" means every kind of asset in the territory of either Party, owned or controlled directly or indirectly by nationals or companies of either party, including equity, debt, service and investment contracts; and includes:

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

(ii) all or part of the 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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and

(v) any right conferred by law or contract and all permits and licenses such as those required for the exploitation of natural resources;

(c) "Return" means any amount derived directly or indirectly from an investment, including profits; dividends; interest; capital gains; royalty payment; management, technical assistance or other fee; and payments in kind;

(d) "National" of a Party means a natural person who is a national of a Party under its laws and regulations;

(e) "Own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries of, affiliates, wherever located;

(f) "Territory" means all the territory of country recognized by international law.

2. Any assets or returns invested or reinvested are also considered as investment.

3. Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty; if nationals of any third country own or control such company. However, if one Party believes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution.

* * *

ARTICLE XIII

Entry into Force, Duration, and Termination

1. This Treaty shall be subject to ratification by each of the Parties, and the instruments of ratification shall be exchanged as soon as possible.

2. This treaty shall enter into force thirty days following the date on which the Parties have notified each other that the constitutional procedures required for ratification in their respective countries have been completed. It shall remain in force for a period of ten years and shall continue in force, unless otherwise terminated in accordance with the provisions of paragraph 3 of this Article. It shall apply to investment existing at the time of entry into force as well as to investments made or acquired thereafter.

3. This Treaty shall be renewed by tacit agreement for another ten-year period unless one of the Parties notifies the other Party in writing of its intention to terminate it, one year prior to the expiration of the initial ten year period.

If the Treaty is not renewed, its termination shall become effective one year after the other Party receives notification thereof.

4. With respect to investments made prior to the effective date of termination, the provisions of this Treaty shall remain in effect for a further period of ten years from such date of termination.

5. The Annex to this Treaty shall be an integral part thereof.

6. IN WITNESS THEREOF, the undersigned representatives, duly authorized by their respective governments, have signed this Treaty in duplicate in French and English, both texts being equally authentic.

DONE in Washington, February 26, 1986.

APPENDIX J

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ZAIRE CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Republic of Zaire,

Desiring to promote greater economic cooperation between the two states, particularly with respect to investment by nationals and companies of each 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 both Parties;

Recognizing that discrimination on the basis of nationality by either Party against investment in its territory by nationals or companies of the other Party is contrary to a stable framework for investment; and

Having resolved to conclude a treaty concerning the reciprocal encouragement and protection of investment,

Have agreed as follows:

ARTICLE I

DEFINITIONS

For the purposes of this Treaty:

(a) "Company" means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) "Company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities have a substantial interest as determined by such Party.

The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions.

Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, except with respect to recognition of juridical status and access to courts, if nationals of any third country control such company, provided that whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution to this matter.

(c) "Investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

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

(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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

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

(d) "National" of a Party means any natural person who is a national of that Party in conformity with its laws.

(e) "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.

(f) "Territory" means:

(i) For the Republic of Zaire: all the territory of the Republic of Zaire;

(ii) For the United States of America: all the territory of the United States.

* * *

ARTICLE XIII

ENTRY INTO FORCE AND DURATION AND DENUNCIATION

This Treaty shall be subject to ratification by each of the Parties, and the instruments of ratification shall be exchanged as soon as possible.

2. This Treaty shall enter into force thirty days after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless denounced in accordance with paragraph 3 of this Article. It shall apply to investments existing at the time of entry into force in accordance with the provisions of Article IX of this Treaty, as well as to investments made or acquired thereafter.

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

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

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

DONE in duplicate at Washington on the third day of August 1984 in the English and French languages, both texts being equally authentic.

APPENDIX K

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF THE CONGO CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of the People's Republic of the Congo, 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; and

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, 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) "company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "investment" means every kind 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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and

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

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

(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 and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

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 XIII

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 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 twelfth day of February, 1990, in the English and French languages, both texts being equally authentic.

APPENDIX L

TREATY WITH THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Czech and Slovak Federal Republic (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;

Reaffirming their desire to develop economic cooperation in accordance with the principles and provisions of the Final Act signed in Helsinki on the lst of August 1975, and other documents of the Conference on Security and Cooperation in Europe;

Convinced that private enterprise operating within free and open markets offers the best opportunities for raising living standards and the quality of life for the inhabitants of the Parties, improving the well-being of workers, and promoting overall respect for internationally recognized worker rights; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 movable and immovable property, as well as 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 works, 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, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

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

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

(f) "nondiscriminatory" means treatment that is at least as favorable as the better of national treatment or most-favored nation treatment;

(g) "national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of third Parties in like circumstances; and

(h) "most favored nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies and nationals of third Parties in like circumstances.

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 XIV

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, Protocol, and Side Letters shall form an integral part of the Treaty.

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

DONE in duplicate at Washington, this twenty-second day of October, 1991 in the English and Czech languages, both texts being equally authentic.

APPENDIX M

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

The Government of the United States of America and the Government of the Republic of Estonia (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 Agreement of March 2, 1925 and the bilateral Treaty of Friendship, Commerce and Consular Relations on December 23, 1925 between the Parties;

In furtherance of Article Three of the Bilateral Agreement Concerning the Development of Trade and Investment Relations of September 17, 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 purposes of this Treaty,

(a) “investment” means every kind 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 works 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, ownership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; 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 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 shall form an integral part of the Treaty.

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

DONE in duplicate at Washington on this nineteenth day of April, 1994, in the English and Estonian languages, both texts being equally authentic.

APPENDIX N

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GRENADA CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and Grenada,

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

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, and

Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment,

Have agreed as follows:

ARTICLE I

1. For the purposes of this treaty,

(a) "company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals of 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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, goodwill; and

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

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

(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 and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

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 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 3 of this Article. It shall apply to investments existing at the time of entry into force 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 a date of termination.

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

DONE in duplicate at Washington on the Second day of May 1986 in the English language.

APPENDIX O

TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAMAICA CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and Jamaica (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 worker rights; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 without limitation:

(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 works, including sound recordings,

patentable inventions,

industrial designs,

semiconductor mask works,

trade secrets and confidential business information, and

trademarks, service marks, and trade names;

(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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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" means 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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; the purchase of foreign exchange for imports; and other similar activities.

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 an investment.

* * *

ARTICLE XIII

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 ac-

cordance 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 fourth day of February, 1994, in the English language.

APPENDIX P

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KAZAKHSTAN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Kazakhstan (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 movable and immovable property, as well as 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 works, 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, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) “national,” of a Party means a natural person who is a national of a Party under its applicable law;

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

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 XIII

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 shall form an integral part of the Treaty.

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

DONE in duplicate at Washington, this nineteenth day of May, 1992 in the English and Russian languages, both texts being equally authentic. A Kazakh language text shall be prepared which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.

APPENDIX Q

TREATY BETWEEN UNITED STATES OF AMERICA AND THE REPUBLIC OF KYRGYZSTAN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Kyrgyzstan (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 movable and immovable property, as well as 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 works, 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, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

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 XIII

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, Protocol, and Side Letter shall form an integral part of the Treaty.

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

DONE in duplicate at Washington, this nineteenth day of January, 1993 in the English and Russian languages, both texts being equally authentic. A Kyrgyz language text shall be prepared which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.

APPENDIX R

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

The Government of the United States of America and the Government of the Republic of Latvia (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; and

Noting the bilateral Most–Favored–Nation Agreement on Customs Matters of April 30, 1926 and the bilateral Treaty of Friendship, Commerce and Consular Relations of July 25, 1928 between the Parties;

In furtherance of Article Three of the bilateral Agreement Concerning the Development of Trade and Investment Relations of December 9, 1992 between the Parties;

Noting the bilateral agreement on Trade Relations and Intellectual Property Rights Protection of July 6, 1994 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 purposes of this Treaty,

(a) "investment" means every kind 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 works, 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; 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 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 thirteenth day of January, 1995 in the English and Latvian languages, both texts being equally authentic.

APPENDIX S

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 kind 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 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.

APPENDIX T

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF MOLDOVA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Moldova (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 movable and immovable property, as well as 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 works, 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, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; 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 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, Protocol, and Side Letter shall form an integral part of the Treaty.

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

DONE in duplicate at Washington, this twenty-first day of April, 1993 in the English language. A

Romanian language text shall be prepared which shall be considered equally authentic upon an exchange of diplomatic notes confirming its conformity with the English language text.

APPENDIX U

TREATY BETWEEN THE UNITED STATES OF AMERICA AND MONGOLIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and Mongolia (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 works, 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

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

(g) "investment agreement" means a written agreement between the national authorities of a Party and an 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 an investment.

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 XIII

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 sixth day of October, 1994, in the English and Mongolian languages, both texts being equally authentic.

APPENDIX V

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE REPUBLIC OF SENEGAL CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and The Republic of Senegal (each hereinafter referred to as a “Party”),

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

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

Agreeing that discrimination on the basis of nationality by either Party against investment in its territory by nationals or companies of the other Party is not consistent with either a stable framework for investment or a maximum effective utilization of economic resources,

Have resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment, and

Have agreed as follows:

ARTICLE I

DEFINITIONS

For the purposes of this Treaty:

(a) “Company” means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) "Company of a Party" means a company duly incorporated, constituted, or otherwise duly organized under the all applicable laws and regulations of a Party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities have a substantial interest as determined by such Party.

The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions. Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty if nationals of any third country control such company, provided that, whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of the matter. This right shall not apply with respect to recognition of juridical status and access to courts.

(c) "Investment" means every kind of investment, owned or controlled directly or indirectly, including 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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

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

(d) "Own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.

(e) "National" of a Party means a natural person who is a national of a Party under its applicable law.

(f) "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; and payment in kind.

ARTICLE XIII

ENTRY INTO FORCE AND DURATION, AMENDMENT AND TERMINATION

1. This Treaty shall be ratified according to the appropriate constitutional procedures of each Party by each of the Parties, and the instruments of ratification thereof shall be exchanged as soon as possible.

2. 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 4 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.

3. Each Party may submit to the other in writing by diplomatic channels proposals for amendment. Any amendment will enter into force as own as it has been agreed to by the two Parties.

4. 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.

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.

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

DONE in duplicate at Washington, on the sixth day of December, 1983 in the English and French languages, both texts being equally authentic.

APPENDIX W

TREATY WITH THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Czech and Slovak Federal Republic (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;

Reaffirming their desire to develop economic cooperation in accordance with the principles and provisions of the Final Act signed in Helsinki on the lst of August 1975, and other documents of the Conference on Security and Cooperation in Europe;

Convinced that private enterprise operating within free and open markets offers the best opportunities for raising living standards and the quality of life for the inhabitants of the Parties, improving the well-being of workers, and promoting overall respect for internationally recognized worker rights; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind 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 movable and immovable property, as well as 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 works, 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, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

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

(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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

(f) "nondiscriminatory" means treatment that is at least as favorable as the better of national treatment or most-favored nation treatment;

(g) "national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of third Parties in like circumstances; and

(h) "most favored nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies and nationals of third Parties in like circumstances.

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 XIV

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, Protocol, and Side Letters shall form an integral part of the Treaty.

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

DONE in duplicate at Washington, this twenty-second day of October, 1991 in the English and Czech languages, both texts being equally authentic.

APPENDIX X

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Democratic Socialist Republic of Sri Lanka (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) ”investment” means every kind 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 works, including sound recordings, patentable 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; the borrowing of funds; the purchase, insurance and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

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 undertaken in accordance with the laws of the Party concerned, provided that the application of such laws does not impair any rights under this Treaty, shall not affect their character as an investment.

* * *

ARTICLE XIII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratifica-

tion. 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, Protocol, and related letters exchanged this day on investments in personal services and small-scale retail trade in Sri Lanka shall form an integral part of the Treaty.

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

DONE in duplicate at Colombo on the Twentieth day of September, 1991 in the English and Sinhala languages, both texts being equally authentic.

APPENDIX Y

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF TUNISIA CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

The United States of America and the Republic of Tunisia (hereinafter referred to as 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; and

Desiring to encourage the nationals and companies of one Party to invest in the territory of the other Party and to create favorable conditions for such investments; and

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; and

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and effective utilization of economic resources; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment' means every kind 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 and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and

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

(b) "national" of a Party means:

(i) with respect to Tunisia: natural persons of Tunisian nationality in accordance with Tunisian law;

(ii) with respect to the United States: natural persons who are nationals of the United States under its law;

(c) "company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(d) "return" means an amount derived directly or indirectly from or associated with an investment, including profits; dividends; interest; capital gains; royalties on industrial and intellectual property rights; management, technical assistance or other fees;

(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 and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country directly or indirectly control such company; but, in the case of a company of the other Party, only if that company has no substantial business activities in the territory of the other Party or is controlled directly or indirectly 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 XIII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratifica-

tion. 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 made or acquired after the time of entry into force as well as to investments existing at the time of entry into force. If any issue arises with respect to any pre-1956 U.S. investment, the two sides agree to consult as necessary on such issues to reach a satisfactory solution.

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 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 fifteenth day of May, 1990, in the English, Arabic and French languages, the three texts being equally authentic.

APPENDIX Z

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF TURKEY CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

The United States of America and the Republic of Turkey (each a "Party");

Desiring to promote greater economic cooperation between them, particularly 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, and

Having resolved to conclude a treaty concerning the Encouragement and Reciprocal Protection of investments,

HAVE AGREED AS FOLLOWS:

ARTICLE I

FOR THE PURPOSES OF THIS TREATY,

(a) "company" means any kind of juridical entity, including any corporation, company association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) “Company of a Party” means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities have a substantial interest as determined by such Party. The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions.

(c) “Investment” means every kind of investment owned or controlled directly or indirectly, including 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, 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, including rights with respect copyrights and related patents, trade marks and trade names, industrial designs, trade secrets and know-how, and goodwill.

(v) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) reinvestment of returns and of principal and interest payments arising under load agreements

(d) "own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.

(e) "national" of a Party means a natural person who is a national of a party under its applicable law.

(f) "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, and payment in kind.

(g) "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 rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

2. Each Party reserves the right to deny to any of its own companies or to a company of the other Party company the advantages of this Treaty if nationals of any third country control such company, provided that, whenever one party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of the matter. This right shall not apply with respect to recognition of juridical status and access to courts.

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

* * *

ARTICLE XII

1. This Treaty shall enter into force thirty days after the date on which the exchange of instruments of ratification has been completed. 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. This Treaty may be amended by written agreement between the Parties. Any amendment shall enter into force when each Party has notified the other that it has completed all internal requirements for entry into force of such amendment.

4. 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.

5. This treaty shall apply to political subdivisions of the parties.

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

DONE in duplicate at Washington, on the day of December 3, 1985 in the English and Turkish languages, both texts being equally authentic.

APPENDIX AA

TREATY BETWEEN THE UNITED STATES OF AMERICA AND UKRAINE CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and Ukraine (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; and

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

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) “investment” means every kind 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 works, 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 the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

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

(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 rights; 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; and

(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 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 Side Letter 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 fourth day of March, 1994, in the English and Ukrainian languages, both texts being equally authentic.