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Congo, Republic Of (Brazzaville) Bilateral Investment Treaty

Signed February 12, 1990; Entered into Force August 13, 1994

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SENATE TREATY Doc. 102-1

TREATY WITH THE PEOPLE'S REPUBLIC OF THE CONGO CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

TREATY BEEN 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, SIGNED AT WASHINGTON, FEBRUARY 12,1990

MARCH 19, 1991.-Treaty was read for the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1991

LETTER OF TRANSMITTAL

THE WHITE HOUSE, March 19, 1991.

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 People's Republic of the Congo concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington on February 12, 1990. I transmit also, for the information of the Senate, the report of the Department of State with respect to this treaty.

The Bilateral Investment Treaty (BIT) program, initiated in 1981, is designed to encourage and protect U.S. investment. The treaty is an integral part of U.S. efforts to encourage the Congo and other governments to adopt macroeconomic and structural policies that will promote economic growth. It is also fully consistent with U.S. policy toward international investment. That policy holds that an open international investment system in which participants respond to market forces provides the best and most efficient mechanism to promote global economic development. A specific tenet, reflected in this treaty, is that U.S. direct 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; to free financial transfers; and to procedures, including international arbitration, for the settlement of investment disputes.

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

GEORGE BUSH

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,

Washington, March 11, 1991.

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 People's Republic of the Congo concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington, February 12, 1990. I recommend that this treaty be transmitted to the Senate for its advice and consent to ratification.

This treaty constitutes a continuation of the bilateral investment treaty (BIT) program initiated in 1981. Negotiation of these treaties has been pursued by the Office of the United States Trade Representative and the Department of State with active participation of the Departments of Commerce and Treasury, in conjunction with other U.S. Government agencies. BITs with Bangladesh, Cameroon, Grenada, Senegal, Turkey, and Zaire have entered into force.

The global BIT program is intended to encourage and protect U.S. investment in developing countries. By providing certain mutual guarantees and protections, a BIT creates a more stable and predictable legal framework for foreign investors in the territory of each of the treaty Parties. The negotiation of a series of bilateral treaties with interested countries establishes greater international discipline in the investment area.

The BITs which have been concluded, as well as others under negotiation, are an integral part of U.S. efforts to encourage other governments to adopt macroeconomic and structural policies that will promote economic growth. Experience to date has shown that interested countries are willing to provide U.S. investors with significant investment guarantees and assurances as a way of inducing additional foreign investment. It is U.S. policy to advise potential treaty partners that conclusion of a BIT with the United States is an important and favorable factor in the investment relationship, but does not in and of itself result in immediate increases in U.S. investment flows.

The BIT approach is similar to programs that have been undertaken with considerable success by a number of European countries, including the Federal Republic of Germany and the United Kingdom, since the early 1960s. Indeed, our industrialized partners already have over 200 BITs in force, primarily with developing countries. U.S. treaties, which draw upon language used in its Treaties of Friendship, Commerce, and Navigation (FCNS) as well European counterparts, are more comprehensive and far-reaching than European BITs.

THE U.S.-CONGO TREATY

The treaty with the Congo satisfies all four main BIT objectives:

-- foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favorably than investors of the host country or no less favorably than investors of third countries, whichever is the most favorable treatment ("national" or "most-favored-nation" treatment) subject certain specified exceptions;

-- international law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation;

-- free transfers shall be afforded to funds associated with an investment into and out of the host country; and

-- procedures shall allow an investor to take a dispute with a Party directly to binding third-party arbitration.

The provisions of the treaty with the Congo do not differ in any from the U.S. model text used at the time of negotiation. A description of the most significant provisions of the treaty follows.

The Congo BIT's definition section clarifies terms such as "company of a Party" and "investment." The BIT concept of "investment is broad and designed to be flexible; although numerous types of economic interests are enumerated, the intent is to include all legitimate interests in the territory of either Party, whether directly or indirectly controlled by nationals of the other, having economic value or "associated" with an investment. "Companies of Party are those legally constituted under the laws of a Party.

The Congo BIT accords the better of national or most-favored nation (MFN) treatment to foreign investment, subject to each Party's exceptions which are set forth in the treaty or its annex, which forms an integral part of the treaty. The exceptions are designed to protect state regulatory interests and, for the United States, to accommodate the derogations from national treatment in state or federal law relating to such areas as air transport, shipping, banking, telecommunications, energy and power production, insurance; and from national and MFN treatment in the case of ownership of real property. The Congo has listed the following sectors or matters as exceptions: the insurance sector, government lending and insurance programs, energy production, certified customs agents, real estate, radio and television broadcasts, telephone and telegraph services, drinking water supply, rail transportation, and air transport. Any additional restrictions or limitations which Party may adopt with respect to those matters or sectors are not to affect existing investments.

The BIT also includes general treatment protections designed to be a guide to interpretation and application of the treaty. Thus, the parties agree to accord investments "fair and equitable treatment". Thus, the Parties agree to accord investments "fair and equitable treatment" and "full protection and security" in no case "less than that required by international law." The BIT specifically grants nationals of a Party the right to establish investments on a basis no less favorable than the better of national or MFN treatment in the territory of the other Party, restricts the right to impose performance requirements, and obliges Parties to observe their contractual obligations with investors. The BIT also provides that companies legally constituted under the laws of a Party which are investments shall be permitted to engage "top managerial personnel of their choice, regardless of nationality."

The BIT also confers protection from unlawful interference with property interests and assures compensation in accordance with international law standards. It provides that any direct or indirect taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general standards of treatment discussed above. The meaning of "expropriation" as used in the BIT is broad and flexible; it includes any measure which is "tantamount to expropriation or nationalization." Such compensation, which "shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known," must be "without delay," "fully realizable," "freely transferable" and "include interest at a commercially reasonable rate from the date of expropriation . . ." The BIT grants the right to "prompt review" by the relevant judicial or administrative authorities in order to determine whether the compensation offered is consistent with these principles. It also extends national and MFN treatment to investors in cases of loss due to war or other civil disturbance. The BIT does not provide, however, a specific valuation method for compensating such losses.

The Congo BIT provides for free transfers "related to an investment," specifically including returns, compensation for expropriation, payments, arising out of an investment dispute, contract payments, proceeds from the sale of an investment, and contributions to capital for maintenance or development of an investment. Such 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." The text recognizes that notwithstanding this guarantee Parties can maintain certain laws and regulations regarding transfers provided these are applied in a non-discriminatory fashion. In particular, the text provides that Parties can require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends. The article also recognizes that

Parties retain the right to protect the rights of creditors and ensure the satisfaction of judgments in adjudicatory proceedings.

The BIT provides that where a defined investment dispute arises between a Party and a national or company of the other Party, including a dispute as to the interpretation of an investment agreement, and the dispute cannot be solved through negotiation, it may be submitted to arbitration in accordance with any dispute-settlement procedures to which the national or company and the host country have previously agreed. Unless the national or company has submitted the dispute to previously agreed dispute settlement procedures or to adjudication by domestic courts or other tribunals of the host country, the national or company may submit the dispute to the International Centre for the Settlement of Investment Disputes ("ICSID") for conciliation or binding arbitration. Exhaustion of local remedies is not required. In a separate provision, the Parties also agree to provide effective means of asserting claims and enforcing rights with respect to investments.

The BIT provides for state-to-state arbitration between the Parties in case of a dispute regarding the interpretation or application of the treaty. In the absence of an agreement that other rules apply, the BIT refers the Parties to the arbitration rules of the United Nations Commission on International Trade Law. The BIT also outlines the procedures for the creation of the arbitral panel. Another BIT provision exempts disputes arising under Export-Import Bank programs, or other credit guarantee or insurance arrangements providing for alternative dispute settlement arrangements, from the standard BIT arbitration clauses.

The BIT exhorts Parties to apply their tax policies fairly and equitably. Because the United States specifically addresses tax matters in tax treaties, the BIT for the most part excludes such matters. The BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments. The treaty further provides that measures necessary for public order or essential security interests are not precluded.

The BIT enters into force 30 days after exchange of ratifications and continues in force for at least ten years. Thereafter, either Party may terminate the treaty, subject to one year's written notice.

I join with the U.S. Trade Representative and other U.S. Government agencies in supporting the treaty and favor its transmission to the Senate at an early date.

Respectfully submitted,

LAWRENCE EAGLEBURGER.

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 II

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

2. 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. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.

3. 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.

4. 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.

5. 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.

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

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

8. The treatment accorded by the United States of America to investments and associated activities under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein to companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of that Party's binding obligations that derive from full membership in a regional customs union or free trade area.

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 non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 11(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

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 compensation therefor, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments are losses in the territory of the other Party owing to war or armed conflict, revolution, state or 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 company 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 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) agreements made under a contract, including amortization of principle and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article III paragraph 1, transfers shall made in a freely convertible currency at the prevailing market 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 may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or re the satisfaction of judgments in adjudicatory proceedings, rough the equitable, nondiscriminatory and good faith application of its law.

ARTICLE V

The Parties agree to consult promptly, on the request of either, resolve any disputes in connection with the Treaty, or to discuss matters relating to the interpretation or application of the treaty.

ARTICLE VI

1. For the purposes of this Article, an investment dispute is deed as a dispute involving (a) the interpretation or application of investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of a investment authorization granted by a 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 between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Subject to Paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures; any dispute-settlement procedures including those relating to expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement of arbitral awards.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Settlement of Investment Disputes ("Centre") or to plying the rules of the Centre, for the settlement or binding arbitration, at any time after six upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute such proceedings provided:

(i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration, or, in the event the Centre is not available, to the submission of the dispute to ad hoc arbitration applying the rules of the Centre.

(c) Conciliation or binding arbitration of such disputes shall be done applying the provisions of the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ("Convention") and the Regulations and Rules or the Centre.

4. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counter-claim, 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.

5. For the purposes of this Article, any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events

giving rise to the dispute, was an investment of nationals or companies of the other Party, shall, in accordance with Article 25 (2) (b) of the Convention, be treated as a national or company of such other Party.

ARTICLE VII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations 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 Party 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 decision within two months of the date of the final submissions or the 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

The provisions of Article VI and VII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE IX

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicators 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 such situations.

ARTICLE X

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 XI

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 XII

This Treaty shall apply, mutatis mutandis, to the political subdivisions of the parties.

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.

For the Government People's Republic of the Congo

ANTOINE NDINGA-OBA.

For the Government of the United States of America

CARLA HILLS

ANNEX

Consistent with Article II paragraph 1, each Party reserves the right to maintain limited exceptions in the sectors or matters it has indicated below:

The United States of America

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provisions common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; primary dealerships in government securities; land-based maritime transport facilities.

The People's Republic of the Congo

The insurance sector; government lending and insurance programs; energy production; certified customs agents; real estate, radio and television broadcasts; telephone and telegraph services drinking water supply; rail transportation; air transport.

TREATY WITH THE PEOPLE'S REPUBLIC OF THE CONGO CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT

AUGUST 6 (legislative day, August 5) 1992 - Ordered to be printed

Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 102-1]

The Committee on Foreign Relations to which was referred the Treaty Between the Government of the United States of America and the Government of the People's Republic of the Congo Government, signed at Washington, February 12, 1990, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advise and consent to ratification thereof.

PURPOSE

The 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, signed at Washington on February 12, 1990 was transmitted by President Bush on March 19, 1991 (Treaty Doc. 102-1).

The Treaty is part of a series of bilateral investment treaties being negotiated by the United States. The principal purpose of the bilateral investment treaties is to promote the free flow of international investment and to encourage and protect United States investment in developing countries.

MAJOR PROVISIONS

Before entering into negotiations, the United States developed a model treaty which sought to incorporate provisions which would facilitate the free flow of investment, prohibit practices which have emerged in various countries which inhibit that free flow, and generally codify rules on investment and dispute settlement, which the United States views as well as established international law and precedent. Specifically, the model treaty seeks to achieve the following objectives:

- the better of either national or most-favored nation treatment, for each party to the treaty, thereby providing in the case of United States companies a "level playing field" in competing with national and third country investors, subject to specified exceptions set forth in the annex to each treaty;
- Application of international law standards to the expropriation of investments, permitting expropriation only for a public purpose and requiring the payment of prompt and fair compensation;
- The free transfer of funds associated with an investment into and out of the host country;
- Access to binding international arbitration for settlement of investment disputes;
- A prohibition on the imposition of performance requirement, which have become important as countries have increasingly imposed requirement to use domestically produced goods; and imposed requirements to use domestically produced goods; and
- The right of companies to hire top managers of their choice; regardless of nationality.

In each of the bilateral investment treaties, including this treaty, the United States has reserved the right to make of maintain limited exceptions to national or most-favored nation treatment in specific sectors or matters set

forth in the annex to the treaty.

INVESTMENT BARRIERS

The Administration submitted the following response to the committee's inquiry regarding investment barriers identified in the process of negotiating this treaty.

As noted above, the USF (United States Government) participates in BIT discussions with countries whose investment regimes are roughly consistent with the BIT principles. In every BIT, countries agree to provide the better of national or most-favored nation treatment to investments subject to each Party's exceptions. These exceptions are designed to accommodate the derogations from national treatment in state and national laws which may constitute investment barriers . . .

Concern was raised over government screening of foreign investment. While some Congolese laws are at present inconsistent with the elements of the treaty, the treaty will supersede domestic law in the Congo. As a result, United States investments will be granted at least the better of national treatment of MFN on entry and post establishment.

BILATERAL INVESTMENT TREATY PROGRAM

The earliest formal economic treaties that the United States negotiated with other countries were a series of Friendship, Commerce, and Navigation (FCN) treaties. These treaties set the framework for U.S. trade and investment relations with foreign countries.

With the advent of the General Agreement on Tariffs and Trade (GATT), U.S. trade relations began to be set with foreign countries through multilateral trade agreements and the use of FCN treaties faded; the last two FCNs were negotiated in the late 1960s. This multilateral approach left a gap in relations with foreign countries involving U.S. investment issue of performance requirements in the Trade Related Investment Measures (TRIMS) of the current Uruguay trade negotiations. The North American Free Trade Agreement also has investment provisions similar to a bilateral investment treaty.

In an attempt to promote the free flow of investment internationally, in the absence of multilaterally agreed to rules, the United States began, in 1981, to negotiate a new series of treaties called the Bilateral Investment Treaties (BITs). The BIT program is designed to provide certain mutual guarantees and protections and to create a more stable and predictable legal framework for foreign investors with each of the treaty partners. A special tenet of the program is to ensure that United States direct investment abroad and foreign investment in the United States receive fair, equitable and non-discriminatory treatment. The BITs are, therefore, the modern successor on the investment side to the Friendship, Commerce, and Navigation Treaty series. In comparison to its predecessor, the BIT is far more detailed and provides greater protection for the foreign investor, including an investor-to-state disputes mechanism that generates to United States investors the right to binding arbitration against the host state without the involvement of the United States government.

The Senate gave its advise and consent to ratification of BIT's with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada in 1988, and in 1990 a BIT with Panama and a business and economic relations treaty with Poland was the first extension of this program to facilitate the continuation of economic and political changes which have taken place in Eastern Europe over the last four years. All of these treaties have entered into force except the one with Poland. The treaty with Poland has not been brought into force because Polish law on intellectual property rights has not yet been revised in conformity with the terms of the treaty.

The negotiation of BITs has accelerated dramatically since 1990. The administration has signed a BIT with Kazakhstan, Argentina and Romania. These treaties should be submitted to the Senate later this year. Negotiations are currently ongoing with Uruguay, Bolivia, Nigeria, Hungary, Jamaica, Armenia, Costa Rica, Hong Kong, Venezuela, Colombia, Pakistan, Peru, Mongolia, Kyrgyzstan, Barbados and Bulgaria. In addition, there are 14 other countries with which the Administration hopes to initiate negotiations in the near future.

EXPERIENCE OF TREATIES IN FORCE

The administration has informed the committee that there have been no major problems involving a U.S. investment, with the exception of Zaire, in countries with which bilateral investment treaties are in force. They have also stated there have been no cases in which the bilateral investment treaty dispute settlement mechanism for international arbitration has been invoked.

Our experience to date with the United States bilateral investment treaties in force is that they are a valuable tool, both for the United States investor and the United States government, to insure that our bilateral investment treaty partners protect United States investment. In two cases (Panama and Zaire), the United States government has been notified by the United States investors of potential bilateral investment treaty violations, and in both cases the United States Embassy in the host country made demarches to the host government. In one case, the host government stopped the offending practice and in the other Zaire -discussed infra) consultations are continuing.***

Recently disputes have arisen between United States companies and the Government of Zaire regarding the taking of petroleum product installations, and compensation for the destruction of property during the civil disturbances of September and October 1991. The United States has informed the Government of Zaire that we expect Zaire to fulfill its obligations under the bilateral investment treaty with respect to both these problems, and to return the petroleum installations to their United States owners. We have also advised the United States companies involved of their rights under the bilateral investment treaty. If negotiated settlement cannot be reached after six months, they have the right directly to seek remedy in the courts of Zaire or through international arbitration. We will continue to remain fully engaged with the Government of Zaire in seeking resolution of these issues. (Answer to questions submitted by Chairman Pell to the administration.)

The administration has indicated that in a number of the countries with BITs in effect, U.S. investment has increased since the BIT went into force. However, the administration has pointed out that the existence of a BIT will not guarantee increased U.S. investment. Because investment decisions are based on a variety of factors and the BITs have only been in force for a short period of time, the administration says it would be difficult to draw a relationship between increased investment and the BITs.

TREATY PROVISIONS

The Congo treaty is virtually identical to the model bilateral investment treaty used by the administration and meets all of its objectives set forth above.

The Congo reserved the right to maintain limited exceptions to national or MFN treatment in the following sectors or matters set forth in the Annex to the treaty:

The insurance sector; government lending and insurance programs; energy production; certified customs agents; real estate; radio and television broadcasts; telephone and telegraph services; drinking water supply; rail transportation; and air transport.

ENTRY INTO FORCE

The treaty enters into force 30 days after exchange of ratification and continues in force for at least ten years. Thereafter, either party may terminate the treaty, subject to one year's written notice.

The treaty text and the administration's summary analysis of the treaty is set forth in Treaty Doc. 102-1. The administration's responses to committee questions regarding the interpretation of treaty provisions is available for review as part of the committee's hearing record on this treaty.

COMMITTEE ACTION

On August 4, 1992, the committee held a hearing on this treaty. Testimony was received by the Hon. Eugene J. McAllister, Assistant Secretary for Economic and Business Affairs Bureau, Department of State.

The committee also received answers from the administration to numerous questions regarding the operation of the bilateral investment treaty program and the provisions of this treaty. This material, together with the

administration's "Description of the U.S. Model Bilateral Investment Treaty (BIT) of February 1992", has been made a part of the official record of these hearings.

In addition, the committee received statements in support of the treaty from the National Association of Manufacturers, the United States Council for International Business and Kenneth J. Vandeveld, Associate Professor of Law, Western State University College of Law, San Diego, California.

The committee voted to report favorably the treaty, and recommends that the Senate give its advice and consent to ratification thereof by a voice vote, with a quorum being present, at a meeting on August 6, 1992.

TEXT OF RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the 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, signed at Washington, February 12, 1990.

TANC offers these agreements electronically as a public service for general reference. Every effort has been made to ensure that the text presented is complete and accurate. However, copies needed for legal purposes should be obtained from official archives maintained by the appropriate agency.