Congo, Democratic Republic Of (Kinshasa) Bilateral Investment Treaty

Signed August 3, 1984; Entered into Force July 28, 1989

The Democratic Republic of the Congo (formerly Zaire) was established in May of 1997 following a successful rebellion.

INVESTMENT TREATY WITH ZAIRE

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ZAIRE CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT, WITH PROTOCOL, SIGNED AT WASHINGTON, AUGUST 3, 1984

MARCH 25, 1986 was read the first time and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

LETTER OF TRANSMITTAL

THE,WHITE House, March 25,1986.

To the Senate of the United States:

With a view of 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 Zaire concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed August 3, 1984, at Washington. I transmit also, for the information of the Senate, the report of the Department of State with respect to this treaty.

This treaty is among the first six treaties to be transmitted to the Senate under the Bilateral Investment Treaty (BIT) program that I initiated in 1981. The BIT program is designed to encourage and protect U.S. investment in developing countries. The treaty is an integral part of U.S. efforts to encourage Zaire 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 beat and moot 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 international law standards for expropriation and compensation; free financial transfers; and procedure 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, with protocol, at an early date.

RONALD REAGAN

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,

Washington, February 26,1986.

The PRESIDENT, *The White House.*

The PRESIDENT: I have the honor to submit to you the Treaty between the United States and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington, August 3, 1984. This treaty is among the first six treaties to be negotiated under the bilateral investment treaty (BIT) program which you initiated in 1981. Development of the BIT program and the negotiation of the individual treaties have been pursued by the 0ffice of the United States Trade Representative and the Department of State with the active participation of the Department of Commerce and the U.S. Treasury, in conjunction with other interested U.S. Government agencies. I recommend that this treaty, as well as the others concluded with the Kingdom of Morocco, the Republic of Haiti, the Republic of Panama, the Republic of Senegal, and the Republic of Turkey, be transmitted to the Senate for its advice and consent to ratification.

In 1981 you initiated the global bilateral investment treaty (BIT) program 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 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 six treaties which have been signed as well as other 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. They are also fully consistent with your policy statement on international investment of September 9, 1983, which states that international direct investment flows should be determined by private market forces and should receive fair, equitable and non-discriminatory treatment.

Our 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 our 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.

Congressional support for the BIT program is reflected in Section 601(a) and (b) of the Foreign Assistance Act, as amended, in particular at Section 601(b) which provides:

In order to encourage, and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this Act, the President shall...(3) accelerate a program of negotiating treaties, for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to, and its equitable investment in, friendly countries and areas participating in programs under this Act.

BITs are consistent in purpose with the network of treaties of Friendship, Commerce and Navigation (FCNs) which the United States negotiated from the early years of the Republic until the last successful negotiations with Thailand and Togo in the late 1960s. They continue the U.S. policy of securing by agreement standards of equitable treatment and protection of U.S. citizens carrying on business abroad, and institutionalizing processes for the settlement of disputes between investors and host countries and between governments. We expect that a series of bilateral treaties with interested countries will establish greater international discipline the investment area.

The BIT, was designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment. In pursuit of this objective, the model BIT adopts FCN language and concepts. Traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection. Perhaps most significantly the BIT goes beyond the traditional FCN to provide investor-country arbitration in instances where an investment dispute arises.

Our BIT approach followed similar programs that had 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 nearly two hundred Bits in force, primarily with developing countries. Our treaties, which draw upon language used in the U.S. FCN treaties as well as European counterparts, are more comprehensive and far-reaching than European Bits

The U.S. Zairian Treaty

The treaty with Zaire was negotiated by an interagency team led by officials from the Office of the United States Trade Representative and the Department of State. The treaty satisfies all four main BIT objectives:

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

-international law standards shall apply to the expropriation of investment and 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 are to be established which allow an investor to take a dispute with a Party directly to binding third-party arbitration.

The provisions on treatment of foreign investment and arbitration, and in particular Zaire's acceptance of international law as the governing law, mark an important achievement for the BIT program and our investment and international arbitration policies.

A technical memorandum explaining in detail the provisions of this treaty will be transmitted separately to the Senate Committee on Foreign Relations. That technical memorandum explains, clause by clause, the provisions of the treaty with Zaire.

Some provisions of the treaty with Zaire differ in minor respects from the U.S. model text. In general, however, the treaty closely follows the language contained in the U.S. model text, the most significant provisions of which are as follows.

The model 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. Protected "companies of a Party" are those incorporated or otherwise organized under the laws of a Party in which nationals of that Party have a substantial interest.

The model BIT accords the better of national or most (MFN) treatment to foreign investment, subject to each Party's exceptions which are listed in a separate Annex. 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. Any future exception to these standards which a Party adopts are not to affect existing investments. The BIT also includes general treatment protection designed to a guide to interpretation and application of the treaty. 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." It specifically grants nationals of a Party the right to establish investments 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 U.S. model also provides that nationals and companies of either Party shall in the territory of the other Party be permitted to employ professional, technical and managerial personnel of their choice regardless of nationality.

The model BIT also confers protection from unlawful interference of property interests and assures compensation in accordance with international law standards. It provides that any direct or in direct 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 BIT's definition of "expropriation" is broad and flexible; essentially "any measure" regardless of form, which has the *effect* of depriving an investor of his management, control or economic value in a project can constitute expropriation requiring compensation equal to the fair market value." Such compensation, which "shall not reflect any reduction in such fair market value due to . . . the expropriatory action," must be "without delay," "effectively realizable," "freely transferable" and "bear current interest from the date of the expropriation at a rate equal to current international rates." 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 model BIT provides for free transfers "related to an investment," specifically of returns, compensation for expropriation, contract payments, proceeds from sale, and contributions to capital for maintenance or development of an investment. Such transfers are to be made in a "freely convertible 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 model 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 model BIT provides that Parties can require reports of currency transfers and inpose income taxes by such means as a withholding tax on dividends.

The model BIT provides that where certain defined investment disputes arise between a Party and a national or company of the other Party, including disputes 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"). Exhaustion of local remedies is not required. In a separate provision, the BIT Parties also agree to grant nationals and companies of the other Party access to their domestic courts in order to assert claims and enforce rights with respect to investments.

The model 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 specific procedural rules which must govern the arbitration. The BIT also outlines the procedures for the creation of the arbitral panel.

The model BIT exhorts Parties to apply their tax policies fairly and equitably. Because the United States specifically addresses tax matters in tax treaties, the BIT generally excludes such matters. It also specifically limits the arbitration provisions to only certain taxation matters. Another BIT provision exempts disputes arising under Export-Import Bank programs, or other credit guarantee insurance arrangements providing for alternative dispute settlement arrangements, from the standard BIT arbitration clauses. The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests. The model 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.

Each of these models was developed after lengthy and extensive consultations within the U.S. Government and with the private sector. Nonetheless, in negotiating a particular treaty, the U.S. Government retains, of course, some flexibility to adopt modifications as necessary and in light of experience. While the U.S. model text has recently been simplified, the provisions summarized above have all been retained.

Some provisions of the Zaire text differ in some respects from the U.S. model text. Except for transfers, we do not consider that any of these modifications represent substantive departures from U.S. objectives. The more significant of these are as follows:

(1) Definition of "own or control".-The definition, which is included in the U.S. model text, was omitted from the Zaire text. The reason for including such a definition was to highlight the fact that investments which the treaty was meant to cover included those made through subsidiaries of companies of a Party "wherever located," that is, even in third countries. The Zaire text satisfies this objective by defining investment in, Article 1, paragraph (c) as "every kind of investment, owned. or controlled directly or indirectly and we have obtained for the record a statement from Zaire's negotiators that they understand this definition to cover investments made through subsidiaries in third countries.

(2) Definition of "territory". -U.S. model text does not define this term. At the insistence of Zaire, however, we have agreed to a definition in the present treaty. This definition consists of two parts, as follows:

(a) Article 1, pargraph (f) (Definitions) contains parallel statements noting tha the territory of each Party is defined as "all the territory of' the Party; and.

(b) Paragraph 7 of the Protocol specifies that these definitions encompass "All Zairian territory within its geographical and political boundaries where its sovereignty is exercised;" and, for the United States, "the separate States, the District of Columbia, and Guam, Puerto Rico, American Samoa, and the Virgin Islands."

The formulation for the United States avoids a general definition of territory, which we consider to be problematic, while spelling out the specific entities to be encompassed in the treaty references to the territory of* the United States as a party.

(3) Competitive equality- Article II, paragraph six addresses the issue of treatment of foreign investment in those sectors in which the host government invests but does not keep out private investors. It was not possible to obtain a Zairian commitment to language which stipulates that privately owned or controlled investment "shall" receive treatment which is equivalatent with respect to any special economic advantages accorded governmentally owned or controlled investment. The Zairians did concur with the general exhortation that competitive equality "should" be maintained.

(4)Performance requirements. -It was not possible to obtain Zaire's commitment not to impose performance requirements as:conditions for investment, as called for by our model text. Zaire is one of many developing countries which imposes requirements on foreign investors to obtain certain development objectives. Therefore, we accepted hortatory language (Article ll,.paragraph 7) to the effect that each Party shall 'endeavor" within "the context of its national economic policies and goals" to"'avoid" the imposition of export or local purchase requirements. The last sentence of the paragraph notes that this provision is not meant to preclude the right of Parties to impose import restrictions. This sentence was included at the request of Zaire.

5) Transfers -The most significant departure from the model text is in respect to transfers. The treaty text itself (Article V) calls for free transfers and incorporates all the essential provisions of the prototype. However, in view of the current difficult economic situation of Zaire, paragraph 1 of the Protocol was negotiated which (a) allows Zaire to delay the full application of Article V, subject to certain conditions, for up to three years from the date *of* ratification of the treaty; (b) permits Zaire, if necessary, to delay transfers of the proceeds of sale or liquidation of an investment for up to three years from the date the transfer is requested; and (c) permits Zaire some leeway in providing specific currencies for transfers by acknowledging that all freely convertible currencies are always available. (The United States is presently seeking clarification from the Government of Zaire that for purposes of paragraph I of the Protocol "the date of

ratification" means the date of entry into force.) The Protocol does not apply to transfer of compensation in the event of expropriation, on the ground that an expropriation is a discretionary act which should not be taken by a government unless compensation can be paid. The Protocol also provides for consultations between the two governments concerning the implementation of Article V of the Protocol.

(6) Application of the treaty to existing investment. -As the model text anticipates, this treaty applies to investments which already exist at the time the treaty enters into force. At the request of Zaire, Article XIII, paragraph 2 specifies that such application shall be "in accordance with the provisions of Article IX ofTreaty." Article IX, in turn, specifies that treatment of investment required *inter alia* by national law, international legal obligations, or, obligations assumed by a Party in an investment agreement or authorization, which is more favorable than treatment accorded by the treaty, shall prevail over the provisions of the treaty.

(7) Exceptions from coverage.- In the Annex to the treaty, Zaire exempts from national treatment and the right of establishment transportation infrastructure projects; railways; aviation and airports; health and educational infrastructuture projects; energy and water projects; telecommunications and other communications; soil and sub-soil; banking; social security; and insurance.

None of these modifications from the U.S. model text represent substantive departures from U.S. objectives.

Submission of this treaty, together with the other five noted above, marks a significant development in our international investment policy. I join with the United States Trade Representative and other U.S. Government agencies in supporting these treaties and favor their approval by the Senate at an early date.

Respectfully submitted,

GEORGE P. SHULTZ.

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 II

TREATMENT OF INVESTMENT

1. Each Party shall undertake to maintain a favorable environment for investments in its territory by nationals and companies of the other Party under its laws, regulations, and administrative practices and procedures, and shall permit such investments to be established on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable.

2. Each Party shall accord existing or new investments in its territory of nationals or companies of the other Party, and associated activities, treatment no less favorable than that which it accords to investments and associated activities of its own nationals or companies or of nationals or companies of any third country, whichever is the most favorable. Associated activities include:

(a) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business;

(b) the organization of companies under applicable national laws and regulations; the acquisition of companies or interests in companies; the management, control, maintenance, use, and expansion, and the sale, liquidation, and dissolution of companies organized or acquired;

(c) the making, performance and enforcement of contracts;

(d) the acquisition, (whether by purchase, lease or otherwise), possession with rights of ownership, and disposition (whether by sale, testament or otherwise), of property, both tangible and intangible;

(e) the leasing of real property required for the conduct of business;

(f) the acquisition, maintenance, and protection of intellectual property rights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and

(g) the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

3. (a) Notwithstanding the preceding provisions of this Article, each Party reserves the right to introduce exceptions relating to one of the sectors or matters listed in the Annex to this treaty. Each Party agrees to notify the other Party of all sectors or matters of possible exception at the time this Treaty enters into force, as well as of all specific exceptions of which it is aware which are in effect on that date. Moreover, each Party agrees to notify the other Party of any future exceptions falling within the sectors or matters listed in the Annex, and to maintain the number of such exceptions at a minimum. Other than with respect to ownership of real property, the treatment accorded pursuant to this subparagraph shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country. However, either Party may require that rights to engage in mining on the public domain shall be dependent on reciprocity.

(b) No exception introduced after the date of entry into force of this Treaty shall apply to investments of nationals or companies of the other Party existing in that sector at the time the exception becomes effective.

4. Investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized 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 investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or

companies of the other Party.

5. (a) 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 or directing an investment or advising on the operation of an investment to which they, or the aforesaid companies of the first Party that employ them, have committed or are in the process of committing a substantial amount of capital or other resources.

(b) Nationals and companies of either Party, and companies which they own or control, shall be permitted to engage, within the territory of the other Party, top managerial personnel of their choice, regardless of nationality, for the planning and operation of their investments. This provision shall not be construed to confer rights with respect to the entry and sojourn of persons in the territory of either Party, except as provided by national law.

6. The Parties recognize that, consistent with paragraphs 1 and 2 of this Article, conditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities are in competition, within the territory of such Party, with privately owed or controlled investments of nationals or companies of the other Party.

7. Within the context of its national economic policies and goals, each Party shall endeavor to avoid imposing on the investments of nationals or companies of the other Party conditions which require the export of goods produced or the purchase of goods or services locally. This provision shall not preclude the right of either Party to impose restrictions on the importation of goods into their respective territories.

8. In order to maintain a favorable environment for investments in its territory by nationals or companies of the other Party, each Party shall provide all necessary means to nationals or companies of the other Party to permit them to assert their rights with respect to investment agreements, investment authorizations, and properties, in particular the right of access to its courts, tribunals and administrative agencies, and the right to employ persons of their choice, who otherwise qualify under applicable laws and regulations, regardless of nationality, for the purpose of enforcing their rights.

9. Each Party shall make public all laws, regulations, and administrative practices and procedures that pertain to or affect investments in its territory of nationals or

companies of the other Party.

ARTICLE III

COMPENSATION FOR EXPROPRIATION

1. No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation, unless the expropriation:

(a) is done for a public purpose;

(b) is accomplished under due process of law;

(c) is not discriminatory;

(d) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation; and

(e) is accompanied by prompt, adequate and effectively realizable compensation. Compensation shall be equivalent to the fair market value of the expropriated investment. The calculation of such compensation shall not result in any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall include interest at a rate equivalent to current international rates from the date of expropriation, and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. If either Party expropriates, the investment of any company duly constituted in its territory, and if nationals or companies of the other Party hold shares or any recognized right in the expropriated company, then the expropriating Party shall ensure that such nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

3. Subject to the dispute settlement provisions set forth in this Treaty, a national or company of either Party asserting that its investment was expropriated by the other Party shall have the right to prompt review by the appropriate judicial or administrative authorities of such other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefor conform to the principles of international law.

ARTICLE IV

COMPENSATION FOR DAMAGES DUE TO WAR AND SIMILAR EVENTS

1. Nationals or companies of either Party whose investments in the territory of the other Party suffer:

(a) damages due to war or other armed conflict between such other Party and a third country, or

(b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party, shall be accorded treatment no less favorable than that which such other Party accords to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, when making restitution, indemnification, compensation or any other settlement with respect to such damages.

2. In the event that such damages result from:

(a) a requisitioning of property by the other Party's forces or authorities, or

(b) destruction of property by the other Party's forces or authorities which was not caused in combat action,

the national or company shall be accorded restitution or compensation in accordance with Article III.

3. The payment of any indemnification, compensation or any other settlement granted pursuant to this Article shall be freely transferable in accordance with the

provisions of Article V.

ARTICLE V

TRANSFERS

1. Each Party shall, with respect to investment by nationals or companies of the other Party, grant such nationals and companies the free transfer of:

(a) returns;

(b) royalties and other payments derived from patents, licenses, and other similar grants or rights;

(c) payments relating to loan reimbursements;

(d) amounts expended for the management of the investment in the territory of the other Party or of a third country, (including expenses associated with management or technical assistance contracts);

(e) funds required for importation of capital equipment necessary to the maintenance, the expansion or the modernization of the investment;

(f) proceeds from the sale of all or part of the investment or the liquidation, thereof, including liquidation arising from a circumstance described in Article IV; and

(g) compensation payments made pursuant to Article III.

2. To the extent that a national or company of either Party has not made another arrangement with the appropriate authorities of the other Party in whose territory the investment of such national or company is situated, currency transfers made pursuant to paragraph 1 of this Article shall be permitted in any freely convertible currency. Such transfers shall be made at the prevailing rate of exchange on the date of transfer with respect to ordinary transactions in the currency to be transferred.

3. Notwithstanding the preceding paragraphs, either Party may maintain laws

and regulations: (a) prescribing procedures to be followed with respect to the transfers permitted under this Article, provided such procedures are carried out expeditiously and do not impair the substance of the rights set forth above in paragraphs 1 and 2; (b) requiring reports of currency transfer; and (e) 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 VI

CONSULTATIONS AND EXCHANGE OF INFORMATION

1. 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.

2. If one Party requests in writing that the other Party supply information in its possession concerning investments in its territory by nationals or companies of the Party making the request, then the other Party shall, consistent with its applicable laws and regulations and with due regard for business confidentiality, endeavor to establish appropriate procedures and arrangements for the provision of any such information.

ARTICLE VII

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN ONE PARTY AND A NATIONAL OR COMPANY OF THE OTHER PARTY

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by the competent foreign investment authorities; or (c) an alleged breach of any right

confirmed or created by this Treaty with respect to an investment.

2. (a) Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration.

(b) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between the States and Nationals of other States ("Convention") and the Regulations and Rules of the Centre, or, if the Convention should, for any reason, be inapplicable, the Rules of the Additional Facility of the International Centre for the Settlement of Investment Disputes ("Additional Facility").

3. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. The Parties to the dispute may, upon the initiative of either of them and as a part of their consultation and negotiation agree to rely upon non-binding, third party procedures, such as the fact-finding facility available under the rules of the Additional Facility. If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the Parties to the dispute may have previously agreed.

4. (a) The national or company concerned may consent in writing to submit the dispute to the Centre or the Additional Facility for settlement by conciliation or binding arbitration.

(b) Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or Additional Facility at any time after six months from the date upon which the dispute arose, provided,

(i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously approved by the parties to the dispute; 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 to the dispute disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the procedure desired by the national or company concerned shall be followed.

5. In any proceeding, judicial, arbitral or otherwise, concerning an investment dispute between a Party ("the first Party") and a nation or company of the other Party ("the second Party"), the first Party shall not assert as a means of defense, that the national or company concerned has received or will receive, pursuant to an insurance. contract, indemnification or other compensation for all or part of its alleged damages from any third party whatsoever, including the second Party.
6. For the purpose of any proceedings initiated before the Centre or the Additional Facility in accordance with this Article, any company duly constituted under the applicable laws and regulations of either Party but that, before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or a company of the other Party shall be treated as a national or company of such other Party.

ARTICLE VIII

SETTLEMENT OF DISPUTES BETWEEN THE PARTIES CONCERNING INTERPRETATION OR APPLICATION OF THIS TREATY

1. Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through consultations between representatives of the two Parties, and if this should fail, through other diplomatic channels.

2. If the dispute between the Parties cannot be resolved through the aforessaid means, and unless there is agreement between the Parties to submit the dispute to the International Court of Justice, both Parties hereby agree to submit it upon the request of either Party to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.

3. The tribunal shall be established for each case as follows. Within two months

of receipt of a request for arbitration, each Party shall appoint an arbitrator. The two arbitrators so appointed shall select a third arbitrator as Chairman, who is a national of a third State. The Chairman shall be appointed within two months of the date of appointment of the other two arbitrators.

4. If the required appointments have not been made within the time specified in paragraph 3 of this Article, either of the Parties may, in the absence of any other agreement, request that the President of the International Court of Justice. make the required appointments. If the President is a national of one of the Parties or if he is unable to act, the Vice President shall be asked to make the required appointments. If the Vice President is a national of one of the Parties or if he is otherwise unable to act, the next most senior member of the International Court of Justice who is not a national of one of the Parties and is able to act shall be asked to make the required appointments.

5. In the event that an arbitrator resigns or is for any reason unable to perform his duties, a replacement shall be appointed within thirty days, utilizing the same method by which the arbitrator being replaced was appointed. If the replacement is not appointed within the time limit specified above, either Party may invite the President of the International Court of Justice to make the required appointment.

6. Unless otherwise agreed to by the Parties, all requests shall be introduced and all hearings shall be held within six months of the date of the appointment of the third arbitrator, and the Tribunal shall render its decision within two months of the date of the final introduction of the requests or the date of the closing of the hearings, whichever is later.

7. The Tribunal shall decide in all matters by majority vote. Any such decision shall be binding on both Parties. Each Party shall bear the expenses of its own representation in the arbitration proceedings. Expenses incurred by the Chairman, the other arbitrators, and other costs associated with the proceedings shall be borne equally by both Parties. The Tribunal may, however, at its discretion, decide that a higher proportion of the costs be borne by one of the Parties. Such a decision shall be binding.

8. The Parties may agree to special procedures that the arbitral tribunal shall follow. In the absence of such agreement, the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission in 1958 ("Model Rules") and commended to Member States by the United Nations General Assembly in Resolution 1262 (XIII) shall govern.

9. This Article shall not be applicable to a dispute which has been submitted to the Centre or Additional Facility pursuant to Article VII (3). Recourse to the procedures set forth in this Article is not precluded, however, in the event an award rendered in such dispute is not honored by a Party; or an issue exists related to a dispute submitted to the Centre or Additional Facility but not argued or decided in that Facility.

ARTICLE IX

PRESERVATION OF RIGHTS

This Treaty shall not supersede, prejudice, or otherwise derogate from:

(a) laws and regulations, administrative practices or procedures, 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, whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments, or associated activities, of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE X

MEASURES NOT PRECLUDED BY THIS TREATY

1. This Treaty shall not preclude the application by either Party of measures necessary in its territory for the maintenance of public order and morality, the fulfillment of its obligations with respect to the maintenance and restoration of international peace and security, or the, protection of its own essential security

interests.

2. This Treaty shall, not prevent either Party from prescribing special formalities. in connection with the establishment of investments in its territory of nationals and companies of the other Party, but such formalities may not impair the essential rights set forth in this Party.

ARTICLE XI

TAXATION

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

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

(a) expropriation, pursuant to Article III:

(b) transfers, pursuant to Article V; or

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

Matters covered by item 2(c) shall not be covered to the extent they are subject to the dispute settlement provisions of a convention for the avoidance of double taxation that may subsequently be concluded between the two Parties, unless such matters are raised under such settlement procedures but are not resolved within a reasonable period of time.

ARTICLE XII

APPLICATION OF THIS TREATY TO POLITICAL SUBDIVISIONS OF THE PARTIES

This Treaty shall apply to political subdivisions of the Parties.

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.

FOR THE UNITED STATES OF AMERICA:
WILLIAM E. BROCK.

FOR THE REPUBLIC OF ZAIRE:

Annex UMBA-DI-LUTETE.

Annex
In accordance with Article II, paragraph 3, each Party reserves the right to maintain limited exceptions in the sectors it has indicated below:

The United States of America

Air transportation; ocean and coastal shipping; banking; insurance; government procurement; 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 provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources.

The Republic of Zaire

Transportation infrastructure projects (roads, ports, waterways (ocean, river, and lake); railways; aviation and airports); health infrastructure projects (hospitals, health centers); educational infrastructure projects (construction of educational facilities in general); energy and water projects (water production, generation of electricity, production and use of hydrocarbons); radio, television, postal, telephone, and telecommunications projects (use of ultra-short, short, and medium waves, and various frequencies; telegraph systems, telegrams, money orders, stamps, and postal checks); soil and sub-soil; establishment and operation of banks; social security and insurance services.

Protocol

The Parties recognize that general formalities imposed on transfers abroad may, as far as investments are concerned, adversely affect inflows of capital if such formalities are restrictive. Therefore, in order to promote capital inflows the Parties undertake to ensure that such formalities do not constitute an obstacle to the making of investments. Therefore, the Parties, recognizing the current external economic circumstances, agree as follows:

(a) The Republic of Zaire may delay the application of paragraphs 1 and 2 of Article V for a period not to exceed three years from the date of ratification of the present Treaty. During that period, the following provisions will be applicable:
(i) With respect to all transfers relating to investments, the Republic of Zaire shall treat nationals or companies of the United States no less favorably than it treats

nationals and companies of Zaire, and no less favorably than it treats nationals or companies of any third country.

(ii) The Republic of Zaire shall make available to nationals and companies of the United States for the purposes specified in Article V(1), reasonable amounts of foreign exchange. With respect to any investment of a national or company of the United States, the amounts of foreign exchange made available each year for such purposes shall be no less than one third of the amount of profits attributable to the investment since its establishment or acquisition, that have not previously been transferred.

(iii) The Republic of Zaire shall ensure that the national or company concerned has an opportunity to invest any unconverted currency intended to be transferred in a manner that will preserve its value until the transfer occurs.

(iv) All such transfers shall be made at the market rate of exchange prevailing on the date on which application for transfer is made.

(b) If the foreign exchange reserves of the Republic of Zaire do not permit the transfer of the proceeds of the sale or of the liquidation of all or part of an investment, the Republic of Zaire shall allow the transfer of such proceeds to take place over a period not to exceed three years from the date the transfer is requested.

(i) With respect to such transfers, the Republic of Zaire shall treat nationals and companies of the United States no less favorably than it treats nationals or companies of any third country.

(ii) The Republic of Zaire shall ensure that the national or company has an opportunity to invest the proceeds of sale or liquidation in a manner that will preserve its value until the transfer occurs.

(c) Notwithstanding any of the provisions of this paragraph, payments of compensation for expropriation pursuant to Article III shall in all cases be paid without delay in a form that is effectively realizable and freely and promptly transferable at the prevailing rate of exchange on the date of the expropriation. Moreover, consistent with Article II(4), nothing in this paragraph shall relieve either Party of its obligations resulting from international law from its own national laws or from any investment agreement, authorization, or license.

(d) Regarding the currency or currencies in which a transfer authorized under Article V may be made, the Parties acknowledge that not all freely convertible currencies are always available to the Republic of Zaire. The Republic of Zaire shall respect to the extent possible the choice of the investor, provided that the

currency chosen is available.

(e) Pursuant to Article VI(l) of this Treaty, and without prejudice to the procedures set forth in Articles VII and VIII, the two Governments agree to consult at the request of either one of them concerning the implementation of Article V and of this paragraph.

2. In accordance with Article XI(l), each Party shall strive to accord treatment in the tax area that is fair and equitable. "Fair and equitable treatment" within the meaning of Article XI(l) shall not necessarily be construed to mean the same treatment that is accorded in similar situations to a Party's own nationals or companies.

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

4. The treatment accorded by the United States of America to nationals or companies of the Republic of Zaire under the provisions of Article II(l) and (2) shall be that accorded in any state, territory or possession of the United States of America to companies constituted, incorporated, or otherwise duly organized in other states, territories or possessions of the United States of America.

5. "Direct or indirect measures tantamount to expropriation" as used in Article III(l) may include the levying of taxes equivalent to indirect expropriation, the compulsory sale of all or part of an investment, or the impairment or deprivation of the management, control, or economic value of an investment.

6. The term "top managerial personnel" within the meaning of Article II(5)(b), shall include executive personnel who are responsible, singly or jointly, for making major decisions concerning the establishment or operation of an investment.

7. "Territory" within the meaning of Article I(f)(ii) encompasses:

(a) For the Republic of Zaire: All Zairian territory within its geographical and political boundaries where its sovereignty is exercised.
(b) For the United States of America: the separate States, the District of Columbia, and Guam, Puerto Rico, American Samoa and the Virgin Islands.

8. The definition of company used in Article I paragraph (a) is limited to the purposes of this Treaty, and is without prejudice to the distinction among juridical

entities under the laws of the United States and Zaire.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Protocol

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

FOR THE UNITED STATES OF AMERICA:
WILLIAM E. BROCK.

FOR THE REPUBLIC OF ZAIRE:
UMBA-DI-LUTETE.