

TREATY BETWEEN THE UNITED STATES OF AMERICA AND
JAMAICA CONCERNING THE RECIPROCAL ENCOURAGE-
MENT AND PROTECTION OF INVESTMENT

—————
JUNE 20, 1996.—Ordered to be printed
—————

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

REPORT

[To accompany Treaty Doc. 103-35]

The Committee on Foreign Relations to which was referred The Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, with Annex and Protocol, signed at Washington on February 4, 1994, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof as set forth in this report and the accompanying resolution of ratification.

I. PURPOSE

The principal purposes for entering into a bilateral investment treaty (BIT) are to: protect U.S. investment abroad where U.S. investors do not have other agreements on which to rely for protection, encourage adoption of market-oriented domestic policies that treat private investment fairly, and support the development of legal standards consistent with the objectives of U.S. investors. The BIT, therefore, is intended to ensure that United States direct investment abroad and foreign investment in the United States receive fair, equitable and nondiscriminatory treatment.

II. BACKGROUND

The proposed treaty together with the proposed annex and protocol, was signed on February 4, 1994. No bilateral investment treaty is currently in force between the United States and Jamaica.

The proposed treaty, annex, and protocol were transmitted to the Senate for advice and consent to ratification on September 27, 1994

(see Treaty Doc. 103–35). The Committee on Foreign Relations held a public hearing on the proposed treaty together with the proposed annex and protocol on November 30, 1995.

III. SUMMARY

A. GENERAL

Bilateral investment treaties (BITs) are the result of a treaty program begun in 1982 as a successor to the Friendship, Commerce, and Navigation Treaties that formerly set the framework for U.S. trade and investment with foreign countries. The BIT is based on a U.S. model treaty.

All parties must agree to the basic guarantees of the model before the United States will enter into negotiations on a treaty. The six basic guaranties contained in the model are:

- investors receive the better of national or most favored nation status;
- expropriation of private property is limited and a remedy exists;
- investors have the right to transfer funds into and out of the country without delay using a market rate of exchange;
- inefficient and trade distorting practices such as performance requirements are prohibited;
- investment disputes may be submitted to international arbitration; and
- top managerial personnel of an investor's choice may be engaged regardless of nationality.

Since 1982, the United States has signed 37 BITs, and the Senate has given its advice and consent to the ratification of 24 BITs. Twenty two BITs are currently in force. The Senate has ratified two treaties that have not entered into force with Russia, where the Duma has failed to ratify, and with Ecuador, which was ratified by both countries, but the U.S. is delaying the exchange of instruments until Ecuador enters into an IPR agreement. There are currently 12 on-going negotiations for BITs with other countries.

B. COMPARISON TO THE MODEL

The Treaty Between the United States of America and Jamaica Concerning the Encouragement and Reciprocal Protection of Investment, with Annex (Treaty Doc. 103–35) (BIT), is based on the United States 1990 and 1991 Model Bilateral Investment Treaties. The following analysis compares the treaty with Jamaica to the 1994 Model BIT. The BIT and the 1994 Model contain the same general obligations as to coverage, treatment, prohibitions on performance requirement, and dispute settlement. As shown below, the 1994 Model reorganizes some of these obligations and amplifies others.

Preamble.—The Preamble of the BIT establishes the goals of the treaty to include: greater economic cooperation, the stimulation of the flow of private capital and economic development, maximization of effective utilization of economic resources and the improvement of living standards, respect for internationally recognized worker rights, and the maintenance of health, safety and environmental measures of general application. The goals outlined are not

legally binding but may be used to assist in interpreting the Treaty and in defining the scope of Party-to-Party consultation procedures pursuant to Article VIII.

The preamble of the BIT does not contain language added by the 1994 Model regarding health and environmental standards. The 1994 Model adds to earlier Models the caption, "Agreeing that these [treaty] objectives can be achieved without relaxing health, safety and environmental measures of general application."

Article I (general provisions).—Article I contains a separate paragraph containing definitions; a second, reserving the right to deny treaty benefits to companies owned or controlled by third country nationals or companies having no substantial business interests in the territory of the Treaty partner or controlled by nationals with which the denying Party does not maintain normal economic relations; and a third, providing that any alteration of the form in which assets are invested or reinvested will not change the character of the investment.

The 1994 Model places the denial of benefits in a separate article (Article XII) and does not contain a provision containing the language of the third paragraph. State Department officials have informed Committee staff that the 1994 Model removed this provision because it was implicit in the definition of investment and therefore unnecessary.

Definitions in the BIT and the 1994 Model are generally similar. Some differences are as follows:

(1) The BIT provides that an investment means every kind of investment in the territory of one Party owned or controlled by nationals or companies of the other Party, while the Model defines investments in terms of control by a national or company and contains a separate definition for "covered investment," as an investment of a national or company of a Party in the territory of the other Party. The State Department has informed Committee staff that by inserting the terms "national treatment" and "most favored nation" after the descriptions of the obligations in paragraph one of Article II, the Treaty defines these terms.

(2) The BIT includes governmentally-owned enterprises in the definition of company, while the Model contains a separate definition for "state enterprise." The Model makes certain obligations specifically applicable to "state enterprises."

(3) Specific intellectual property rights are slightly reformulated in the Model, which also adds a listing for "rights in plant varieties."

(4) The 1994 Model adds definitions for "investment authorization," (meaning an authorization by a foreign investment authority), "investment agreement" (relating to agreements with a Party regrading natural resources or other assets controlled by the National authorities); ICSID Convention, Centre (meaning "International Centre for the Settlement of Investment Disputes established by the ICSID Convention"), and UNCITRAL Arbitration Rules.

(5) The BIT contains definitions for "return" and "associated activities" which are not contained in the Model. The Model makes the treatment article applicable to the establishment,

acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, where the BIT specifies “investments and associated activities.”

(6) The word “employment” was inserted into the Treaty in Art. II(3). According to the State Department, this change was made for the purpose of clarification at the request of the Jamaican Government.

Article II (treatment).—The BIT contains a provision identical to that in the Model setting forth each Party’s obligation to provide the better of national or MFN treatment to investment and associated activity of the other Party and its right to exempt certain sectors from this obligation (Art. II:1).

The BIT also contains provisions identical to the Model as to the minimum treatment to be accorded investments; prohibiting arbitrary and discriminatory impairment of investments; and requiring each Party to observe any obligation it may have entered into with respect to an investment (Art. II:2).

The BIT also follows the Model as to entry of nationals for investment purposes (Art. II:3); engaging top managerial personnel of choice (Art. II:4); prohibiting performance requirements (Art. II:5); providing effective means of asserting claims and enforcing rights (Art. II:6); making public all laws, regulations, administrative processes, and adjudicatory decisions pertaining to or affecting investments (Art. II:7); clarifying the application of the BIT on a national treatment basis in states, territories, and possessions of the United States (Art. II:8); removing from the scope of MFN treatment a Party’s binding obligations under free trade areas or customs union and under any multilateral international agreement entered into under the auspices of the GATT subsequent of the signature of the BIT (Art. II:9).

Article III (expropriation).—The BIT follows the Model’s expropriation article as to the fundamental obligation placed on Parties with respect to expropriatory activity (expropriations must be carried out 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 minimum treatment standards set forth in Article II (generally requiring “fair and equitable treatment”) (Art. III:1).

The BIT and the Model differ in that the BIT provides that compensation is to be equivalent to the fair market value (FMV) of the expropriated investments immediately before the expropriatory action was taken or was made known by the authorities, whichever is earlier, where the Model provides it should be equivalent to the fair market value of the expropriated investments immediately before the expropriator action was taken. While the Model qualifies this provision stating that the FMV may not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation (Art. III:2), the BIT also adds a proviso in this regard, stating that the determination of FMV may not reflect any change in the value of the investment attributable to the expropriation or to public knowledge of the expropriatory action before it was taken or made known by the authorities (Art. III:1). The State Department informs staff that this addition confirms the Parties’ understanding of the meaning of the

provision contained in the prototype and increases the level of protection afforded to investors by this Article. A similar sentence was added to the 1994 prototype.

The BIT provides that compensation must be calculated at a commercially reasonable rate from the date of expropriation and be freely transferable at the prevailing market rate of exchange on the date of expropriation. Unlike the Model, it does not contain separate standards for calculation based on freely usable currency and currency that is not freely usable. While Article III compensation is considered a transfer, the transfer article exempts inconsistent provisions of Article III:1 from the requirement that transfers be made in freely usable currency at market exchange rates with respect to spot transactions on the date of transfer (see Art. IV:2).

Losses due to civil conflicts.—The BIT provides that investors whose investments suffer losses due to war or other civil conflicts are to receive the better of national or MFN treatment, with respect to any measures it adopts in relation to such losses (Art. III:3). The 1994 Model creates a separate article which specifies the international requirement for obligations as to these types of losses and providing an obligation to compensate for losses in certain circumstances (Article IV).

While the Model continues to require that parties accord covered investments national and MFN treatment regarding any measures relating to losses that investments suffer due to war or other civil conflict or disturbance, it specifies that Parties must accord restitution, or pay compensation in accord with the standards set forth in the expropriation article, in the event that covered investments suffer losses due to such events, where the losses result from requisitioning or unnecessary destruction of the investment (Art. IV:2).

Article IV (transfers).—The BIT is identical to the Model in that each requires Parties to permit investment-related transfers to be made freely into and out of their territory. Transfer problems that may result from a lack of sufficient currency reserves in Jamaica are addressed in the Treaty's Protocol (discussed below).

Both the BIT and the Model cover roughly the same transactions in their non-inclusive lists of what constitute transfers, specifying compensation from expropriations and losses from civil strife, payments arising out of investment disputes, payments made under a contract, proceeds from the sale or liquidation of an investment. While the BIT specifically lists returns (which are defined earlier in the Treaty and specifically include returns in kind), the Model specifies transactions constituting returns and specifically requires that Parties allow returns in kind to be made pursuant to investment authorizations, investment agreements, or other written agreements between the party and a covered investment or a national or company of the other Party. In general, returns would appear to have the same meaning in both.

The BIT requires that transfers be made in a freely usable currency at the current market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred, but provides an exemption for inconsistent requirements of Article III:1 (Art. IV:2). The Model simply states that Parties must allow transfers to be made in a freely usable currency at the mar-

ket rate of exchange prevailing on the date of transfer. The exception in the BIT would appear to mean that where expropriations are concerned, the relevant date for determining the market rate of exchange and thus calculating the amount to be transferred is the date of expropriation.

The BIT provides that notwithstanding the former, either Party may maintain laws and regulations requiring reports of currency transfer and imposing income taxes by such means as withholding tax on dividends or other transfers (Art. IV:3). In addition, each Party may protect the rights of creditors, or ensure judicial satisfaction of judgments, or prevent fraudulent transfers through the equitable, nondiscriminatory and good faith application of its law (Art. IV:3). The Model reformulates this obligation, which appears also in the 1992 Model, to provide that notwithstanding other obligations in the transfer article, Parties may prevent a transfer through the equitable, non-discriminatory and good faith application of law relating to bankruptcy, issuing and trading in securities; criminal offenses; or ensuring compliance with judicial orders or judgments (Art. V:4).

Article V (consultations).—The BIT follows the Model regarding the obligation of Parties to consult with respect to disputes and other matters arising under the Treaty, except that the Model provides for consultations as to matters related to the realization of treaty objectives. This additional language may apply to the addition of health and environmental matters in the treaty preamble.

Article VI (investor/state disputes).—The BIT and the Model are generally similar as to their provisions for consultation and arbitration in investor-State disputes. The BIT, however, exhorts parties to the dispute to first attempt to resolve their dispute through consultation and negotiation before an investor, at his discretion, seeks judicial relief, invokes previously agreed-upon dispute settlement, or requests binding international arbitration. The BIT adds that a Party to a dispute elects one of the three dispute resolution procedures contained in the paragraph to the exclusion of the others. The State Department informs Committee staff that this sentence confirms the Parties' understanding of this provision. The BIT requires a party to wait for six months from the time the dispute arises before he may request arbitration, while the Model cuts this time to three months (The 1992 Model also has a six month waiting period).

As in the 1994 Model, each Party consents to the submission of any investment dispute to binding international arbitration in the event that the Parties to the dispute have failed to resolve it amicably and this consent satisfies the requirement for an agreement in writing under the ICSID Convention (BIT) and both the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Model). As of January 1, 1995, Jamaica was a party to the ICSID Convention, but was not a party to the New York Convention. Jamaica has nevertheless agreed to carry out without delay the provisions of any arbitral award rendered under the BIT dispute article and to provide in its territory for its enforcement (Art. VI:5). A like obligation is contained in the Model.

Unlike the Model, the BIT contains a provision referring to Parties' obligation under Article 27 of the ICSID Convention that neither Party will be given diplomatic protection to or bring an international claim with respect to such an investment dispute unless the other Party has failed to abide by and comply with the award. Application of Article 27 does not limit, however, informal diplomatic contacts intended to facilitate dispute settlement in a given case.

Article VII (interstate disputes).—The BIT is identical to the Model in providing for binding arbitration for interstate disputes in the event such a dispute has not been resolved through consultations or other diplomatic means.

Article VIII (exemption of dispute settlement arising under official credit agreements).—Unlike the 1994 Model, the BIT contains a provision contained in earlier models exempts from its interstate dispute procedures those disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

Article IX (preservation of rights).—The BIT and the Model each allow the Parties to provide investments of the other Party treatment that is more favorable than that minimally required under the BIT, as a result of national laws, regulations, administrative procedures, or adjudications, international legal obligations, or other obligations assumed by either Party.

Article X (measures not precluded).—The BIT is identical to Model Article XIV as to exceptions for measures necessary for public order, the fulfillment of certain international obligations, and protecting essential security interests. According to transmittal documents, measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.

Like the Model, the BIT also allows Parties to prescribe special formalities for investments so long as the substance of treaty rights is not impaired. Where the BIT provides for special formalities in connection with the establishment of an investment, the Model broadens this right, referring to special formalities with respect to covered investments in general, providing as examples, a requirement that investments be legally constituted under a Party's laws or a requirement that transfers of currency or monetary transactions be reported (Art. XIV:2). As stated earlier, however, the BIT's transfer article specifically allows laws and regulations requiring reports of currency transfer.

Article XI (taxation).—Unlike the Model, the BIT contains a provision exhorting Parties to provide fair and equitable tax treatment of investments of the other Party. Although the Model uses somewhat stronger language as to the exemption of tax matters from the scope of the treaty, both provide that certain tax matters may be addressed in dispute settlements involving expropriation and investment agreements or authorizations. The BIT also provides such coverage for disputes involving Article IV transfers.

At the same time, it provides that such disputes may be brought only if the tax matter is not subject to the dispute settlement provi-

sions of a tax treaty or has been raised under such dispute settlement provisions and is not resolved within a reasonable period of time. The Model requires that a disputant claiming that a tax matter is involved in an expropriation must first refer the issue to the Parties' tax authorities and seek a determination from each of these authorities that the matter involves an expropriation.

Article XII (extent of application).—Like the Model (Art. XII), the BIT clarifies that it fully applies to all political subdivisions. The Model also specifies that the treaty obligation extends to state enterprise in the exercise of governmental authority delegated to it by the Party.

Article XIII (final provisions).—The BIT is identical to the Model as to its entry into force, its application to current and future investments, termination, and continued temporary application to investments made or acquired prior to any termination date. As in the Model, the BIT Annex and Protocol form an integral part of the Treaty.

Annex (sectoral exemptions).—Both the United States and Jamaica have exempted listed sectors and matters from their MFN and national treatment obligations. The United States exemptions are identical to those in the 1992 Model.

Jamaica may adopt or maintain national treatment exceptions as to the following: civil aviation; real estate; banking; shipping; communications (including postal and telegraph services, and broadcasting; mining and natural resources; government grants and other assistance to small-scale enterprises with total assets of U.S. \$50,000 or less; customs brokerages; car rental; real estate agencies; travel agencies; gaming, betting and lotteries (Annex paragraph 3). Jamaica has made an MFN exception for shipping.

Protocol.—The BIT contains a protocol addressing the scope of the term “regulation,” requirements as to the employment of managerial personnel, and procedures to be followed in the event Jamaica encounters limited currency reserves.

Parties state their understanding that “regulations” affecting sectoral matters, as the term is used in Article II:1(b), include the provisions of treaties to which a Party has adhered (Protocol, paragraph 1).

As for Article II:4, regarding employment, Parties agree that neither will apply its laws and regulations to require that its nationals be engaged as top managerial personnel by investments (Protocol, paragraph 2).

Under Protocol, paragraph 3, if Jamaica's foreign exchange reserves do not permit the transfer of the proceeds of the sale or the liquidation of all or part of an investment as provided for in Article IV:1(e), Jamaica has agreed to allow the transfer to take place over a period not to exceed 3 years from the date of the transfer is requested and to make available at least one-third to the proceeds during the first 2 years of that period. It has further agreed to provide MFN treatment to United States investment in this regard. Further, it must ensure that the investor has the opportunity to invest the proceeds in a manner to preserve its value in the interim. Parties agree to consult under Article V as to the implementation of the transfer article, without prejudice to the possibility of Article VI or Article VII dispute settlement on the matter. Similar or more

extensive exceptions to transfer provisions exist in other BITs already in force including Poland, Egypt, Sri Lanka, Tunisia, Turkey, Zaire, and Argentina.

IV. ENTRY INTO FORCE AND TERMINATION

A. ENTRY INTO FORCE

The proposed treaty will enter into force 30 days after the date of the exchange of instruments of ratification. From the date of its entry into force, the BIT applies to existing and future investments.

B. TERMINATION

The proposed treaty will continue in force for ten years after ratification without termination. A party may terminate the proposed treaty ten years after entry into force if the Party gives one year's written notice of termination to the other Party. If terminated, all existing investments would continue to be protected under the BIT for ten years thereafter.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed treaty, annex and protocol with Jamaica on November 30, 1995. The hearing was chaired by Senator Thompson. The Committee considered the proposed treaty and annex with Jamaica on March 27, 1996, and ordered the proposed treaty and annex favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaty, annex and protocol.

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommended favorably the proposed treaty and, on balance, the Committee believes that the proposed treaty is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. Several issues did arise in the course of the Committee's consideration of the BIT, and the Committee believes that the following comments may be useful to Senate consideration of this treaty and to the State Department and the Office of the United States Trade Representative, which share jurisdiction over this treaty.

A. CURRENT INVESTMENT STATISTICS

[In millions of dollars]

	Direct investment	Stock	Exports	Imports
1992	137	892	938	644
1993	172	1053	1113	766
1994	231	1272	1066	790
1995	(¹)	(¹)	1421	895

¹ No data.

United States direct investment flows to Jamaica

The chart above reflects the amounts of direct investment which flowed from the United States to Jamaica in the indicated calendar year, as published in the Commerce Department's "Survey of Current Business." Data for 1995 have not yet been released.

United States year-end stocks of direct investment in Jamaica

The chart above reflects the total amount of U.S. direct investment accumulated over time as of the end of each year cited, as published in the Commerce Department's "Survey of Current Business." The data are available only through 1994 and are valued at historical cost less depreciation and scrapping. They do not reflect the current market value of the businesses in which U.S. persons have invested.

United States trade with Jamaica

The trade data in the chart above for 1994 and 1995 comes from the U.S. Bureau of Census' December 1995 press release. Those through 1993 are taken from the International Monetary Fund's "Directions of Trade." The IMF received its trade data for this report from the Bureau of Census. The import data include the cost of the imported goods, shipping insurance and freight. Overall imports totaled \$2.2 billion and overall exports totaled \$1.2 billion in 1994.

The Committee is encouraged by the improved climate of openness in the Jamaican economy to foreign investment, as well as the reduction in taxes, and believes it will have a positive impact on the volume of U.S. business transactions in Jamaica. Since the Jamaican economy was characterized by high protectionism and government intervention until recently, the Committee is encouraged that there are efforts underway to reverse these trends. The Committee expects that ratification of this treaty will solidify protections for U.S. citizens doing business in Jamaica. In particular, the Committee believes that this treaty will help bring an end to trade distorting measures, which have proven to be deterrents to American investment in Jamaica. The Committee is concerned, especially urges, about black market activities in the area of pirated video and music. However, this Convention does provide some protections for intellectual property and the Committee urges that this treaty be used to curb black market activities.

B. TRANSFER PROVISION

The Committee notes that the transfers provisions of the Jamaican BIT provide for free and prompt transfer of all payments related to an investment, with one exception. In the case of the Jamaican BIT, transfer of the proceeds from the sale and liquidation of an investment may be spread out over three years with no less than one-third of the transfer of the total being made in each of the first two years.

State Department officials have cited balance of payments shortages in Jamaica as a reason for the modified provision. In the 1980s, Jamaica experienced severe balance of payments problems. Jamaican officials informed U.S. negotiators that they wanted to

conclude a U.S. BIT to improve the balance of payments situation by attracting foreign investment, but were concerned about maintaining adequate foreign exchange reserves. There are many large-scale, U.S.-owned projects in Jamaica, such as resorts and mining operations. According to State Department officials, Jamaican officials feared that if one of these projects were sold or liquidated, the demand for foreign exchange could exceed their foreign exchange reserves.

State Department officials have informed Committee staff that this was the last major outstanding issue in the negotiation of this BIT. Jamaican officials argued that this exception was necessary to insure that their cabinet and parliament would accept the United States-Jamaican BIT. After interagency review, U.S. officials concluded that securing the benefits of a BIT for the U.S. investment community justified agreeing to a limited restriction on transfers if Jamaica agreed to certain safeguards.

These safeguards include:

Jamaica can only restrict the transfer of the proceeds of the sale or liquidation of an investment if the country has insufficient reserves to permit the transfer.

U.S. investors must receive at least the same treatment as Jamaican nationals and the investors of other countries, i.e., the U.S. investor cannot be discriminated against.

As noted earlier, Jamaica must permit at least one-third of the transfer each year for up to three years.

Jamaica must permit the investor to make investments which preserve the value of the remaining transfer so that any delay in the transfer does not amount to an interest free loan to Jamaica.

Jamaica is to consult with the U.S. on implementing this balance of payments exception.

Both the U.S. and individual investors may resolve disputes over this provision through international arbitration.

Similar exceptions to the transfer provision exist in other BITs already in force including those with Poland, Egypt, Sri Lanka, Tunisia, Turkey and Zaire.

The Committee believes that, given that direct U.S. investment to Jamaica totaled more than \$400 million in 1993 and 1994 combined, there is sufficient basis for accepting this exception to the standard provision contained in the model BIT. However, given the importance of preserving the ability of U.S. businesses to transfer the proceeds of sale or liquidation out of a foreign country, the Committee does not believe that the Jamaican variation on the transfer provision should become a standard negotiating position and cautions against the inclusion of such a modified provision in future BITs.

C. ENFORCEMENT

Following the hearing on the bilateral investment treaties, Senator Helms requested information regarding the utility of the bilateral investment treaty with Argentina. Specifically, Senator Helms requested that the State Department identify outstanding investment disputes with U.S. corporations doing business in Argentina and actions taken by the U.S. to address the BIT violations. Since

its entry into force on October 24, 1994, two disputes have developed in Argentina. The following is excerpted from the State Department's response to Senator Helms:¹

We are aware of two investment disputes that have developed in Argentina recently.

1. CDSI

CDSI is a Maryland computer firm involved in a contract dispute with the Cordoba provincial government in Argentina. CDSI believes that Cordoba officials improperly reversed a contract award to a firm with which it had a subcontract, depriving it of the value of its investment.

Department officials have discussed the case with CDSI representatives in Washington. Embassy officials are in regular contact with CDSI representatives in Buenos Aires.

CDSI has informed us that, if the dispute is not resolved through ongoing negotiations, it may avail itself of the right to binding arbitration under the BIT. We will continue to work with company and officials in Argentina to resolve this case.

[State Department officials have informed Committee staff that CDSI recently reached an agreement with the provincial government of Cordoba. According to State Department officials the parties are satisfied with the agreement.]

2. Mi-Jack

Mi-Jack, based in Illinois and Texas, owns about 30 percent of a company that purchased the right to operate one of five terminals at the Port of Buenos Aires. (The rest of the equity is not owned by Americans.) Mi-Jack is operating the dock in accordance with regulations, fees, and labor rules specified by the Government of Argentina in the tender.

At some point after this tender process began, the Argentine federal government transferred adjacent dock property to the Buenos Aires provincial government. The provincial government leased the property to a company which began operating a sixth terminal, without the conditions imposed on other dock operators by the federal government. Mi-jack maintains that this unequal treatment is a BIT violation, and has requested USG assistance.

Department and other agency officials have discussed the case with Mi-jack. Our Ambassador recently urged the Argentine Minister of Economy and the Governor of the Province of Buenos Aires to address the issues Mi-jack has raised and resolve the dispute.

The Committee believes that the value of the proposed treaty depends upon the extent to which it is enforced. The Committee refers to the two cases in Argentina, cited above, as examples of how the proposed treaty can be a useful tool both to business and U.S. embassies in protecting the interests of U.S. business directly investing in-country. The Committee believes that the treaty should serve as more than a diplomatic tool. The Committee notes that local remedies and domestic enforcement of arbitral awards are essential steps in enforcing the guarantees provided in the proposed

¹Letter from Assistant Secretary for Legislative Affairs, Wendy R. Sherman, to Senator Helms, Committee on Foreign Relations, December 18, 1995.

treaty and believes that the President should communicate, at the time of the exchange of the instruments of ratification, the importance of a domestic enforcement regime to the ultimate success of the proposed treaty. Such an indication would add credence to the U.S. position that BITs provide genuine protections to investors, and are not merely rhetorical endorsements of market economies.

D. PROTECTING U.S. BUSINESSES INVESTING ABROAD

Although a BIT provides certain legal protections designed to give investors recourse in the case of unfair treatment, the role of the U.S. State Department and other government agencies such as USTR remains essential to the protection of U.S. citizens doing business abroad.

Issues regarding the role of the State Department and U.S. posts abroad in assisting U.S. investors were raised during the Committee's consideration of the BIT. After the November 30, 1995 hearing, Senator Helms requested a description of the general procedure at U.S. Embassies, and the Washington, for assisting U.S. investors when potential BIT violations, or investment disputes, including expropriated property claims, in countries not a Party to a BIT, are brought to the attention of the Embassy by the investors. State Department's response to this inquiry, in a letter dated December 18, 1995,² is reproduced below:

An important responsibility of all U.S. diplomatic posts abroad is to assist U.S. investors and property owners in the resolution of disputes with the host government. Where disputes arise, U.S. posts and the Department provide a range of services to the U.S. claimant.

These services include:

- (1) advising the U.S. claimant of local legal counsel which may be available to handle similar disputes;
- (2) assisting the U.S. claimant in contacting host government officials which may be in a position to facilitate a resolution of his claim;
- (3) directly encouraging host government officials to negotiate a resolution of the claim; (such contacts may be on behalf of a single claimant or multiple claimants where there are a number of outstanding claims);
- (4) occasionally, where the circumstances warrant, the U.S. may decide to directly espouse a claim or claims; and
- (5) in addition, where a BIT is in force, other options (e.g., binding investor-state arbitration) may be brought to the attention of the investor and/or local officials.

Given the wide variety of circumstances associated with investment disputes around the globe, the range of resources available at individual diplomatic posts, the variety of assistance being requested by individual investors, and the diversity of host country investment regimes, a good deal of discretion is necessary to tailor individual responses to the particular circumstances of the case.

For example, the approach taken in the case of a country which has a well functioning judicial system and demonstrated effective-

²Letter from Assistant Secretary for Legislative Affairs, Wendy R. Sherman, to Senator Helms, Committee on Foreign Relations, December 18, 1995.

ness in adjudicating disputes may be quite different from that taken with respect to cases where some or all of these conditions do not prevail. The investor's preferences also guide our response. The current approach to providing assistance to U.S. claimants in investment disputes permits us the flexibility needed to tailor a response that reflects both the conditions prevalent in the host country and the investor's own strategy.

Action on investment disputes is coordinated through constant routine communication among Embassy and Washington offices. This is supplemented by periodic formal requests from the Department for information on investment disputes and by the Posts' preparation of the Investment Climate Statements for each country. In addition, the Department chairs the Interagency Staff Coordinating Group on Expropriations ("Expropriation Group"), which is comprised of representatives from the Office of the United States Trade Representative, the Overseas Private Investment Corporation, the Department of Commerce, and the Department of Treasury. This group meets periodically to discuss expropriation and related issues.

In addition to assisting individual U.S. investors when they have an investment dispute, we engage in activities that could help prevent investment disputes. Officials in Washington and in our Embassies also examine investment practices in other nations and work to discourage other governments from passing legislation that might disadvantage U.S. investors and lead to investment disputes. The results of these examinations are included in the annual Investment Climate Statement, a report which is widely used by both U.S. officials and investors. We also engage in negotiations with other governments on BITs and multilateral disciplines that help protect the interests of U.S. investors.

In the past year or two, we have reached a point where a significant number of BITs have entered into force and, thus, apply to U.S. investment. At this time, we are reviewing ways to even better inform our posts about the obligations contained in these BITs, in order to assist U.S. investors and monitor compliance with these obligations by our BIT treaty partners.

The Committee supports the efforts of the State Department and U.S. foreign posts to educate businesses and ensure that the investment climate in these countries remains open and fair for U.S. businesses. The Committee supports the BIT as a tool for both businesses and U.S. diplomats to ensure fair investment environments where U.S. companies are doing business.

In addition, Senator Helms requested an assessment of the utility of developing procedures at the State Department to ensure consistently timely response when investors bring foreign investment problems to the attention of U.S. Posts and the Department. State Department's response to this inquiry, was also included in the dated December 18, 1995 letter, as reproduced below:

It is current State Department policy and practice to respond in a timely manner when investors bring investment problems to the attention of embassies. Any lapse in such practice can and should be brought to the attention of the Office of Investment Affairs in Washington, which will ensure that a response is forthcoming.

While a timely response should be a constant, we believe that the nature of that response should vary from case to case. Investors benefit from the freedom our diplomats enjoy to pursue solutions tailored to the investor's problems. In some countries, a quiet call from an Embassy officer to a government official can help an investor. Elsewhere, if the government has not been responsive, we may directly approach senior government officials.

The following examples illustrate the variety and complexity of individual circumstances.

A company informed us of an investment dispute, but specifically requested that we not take any action as negotiations continued.

In a country undergoing civil strife, investors are pursuing arbitration through an international financial institution.

In one country, we have had to develop specialized procedures and increase Embassy staffing to deal with a very large number of claims.

Supplanting our existing flexible process for assisting U.S. claimants with a "one size fits all" policy would not likely work to the benefit of investors. Investors gain when we are free to fashion a response that takes into consideration the facts unique to that dispute, the investor's strategy for obtaining resolution to the dispute, the resources available to the USG to promote a quick resolution to the dispute, and the broader economic and political context within which we and the investor must work to achieve the desired outcome.

As described in the previous question, American diplomats and Department employees use a wide variety of strategies to assist U.S. citizens in investment disputes abroad. Required procedures could have significant resource implications without increasing the effectiveness of these strategies. Furthermore, we do not believe that a procedure developed in Washington which may not reflect either the unique conditions existing in a particular country or the experiences of our diplomats or businessmen is in the interests of either U.S. investors or the United States.

The Committee agrees that a "one size fits all" approach to addressing how best to protect U.S. investors faced with disputes with foreign governments would not be useful. However, the Committee supports the development by State and USTR of flexible procedures that ensure that all U.S. investors, large and small, will be given timely assistance when they raise investment issues with the U.S. State Department, both at the missions and in Washington. The Committee expects that such procedures would ensure appropriate coordination between U.S. missions and the State Department and the Office of the U.S. Trade Representative in Washington.

VII. EXPLANATION OF PROPOSED TREATY AND PROTOCOL

For a detailed article-by-article explanation of the proposed bilateral investment treaty, annex, and protocol, see the analysis contained in the transmittal documents included in Treaty Doc. 103-35.

VIII. TEXT OF THE 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 United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, with Annex and Protocol, signed at Washington on February 4, 1994 (Treaty Doc. 103-35).

