

PROTOCOLS AMENDING EXISTING BILATERAL INVEST-
MENT TREATIES WITH NEW EUROPEAN UNION MEM-
BER NATIONS

MAY 4, 2004.—Ordered to be printed

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

REPORT

[To accompany Treaty Docs. 108-13, 108-15, 108-17, 108-18, 108-19, 108-20, 108-21, and 108-22]

The Committee on Foreign Relations, to which was referred the 1) Additional Protocol to Investment Treaty with Romania (Treaty Doc. 108-13); 2) Protocol Amending the Additional Protocol Amending Investment Treaty with Bulgaria (Treaty Doc. 108-15); 3) Investment Protocol with Estonia (Treaty Doc. 108-17); 4) Additional Investment Protocol with the Czech Republic (Treaty Doc. 108-18); 5) Additional Investment Protocol with the Slovak Republic (Treaty Doc. 108-19); 6) Additional Investment Protocol with Latvia (Treaty Doc. 108-20); 7) Additional Investment Protocol with Lithuania (Treaty Doc. 108-21); and 8) Additional Protocol Concerning Business and Economic Relations with Poland (Treaty Doc. 108-22) (collectively “the Protocols” or “Additional Protocols”), having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of ratification.

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I. PURPOSE

The United States has Bilateral Investment Treaties (BITs) with six of the countries which joined the European Union (EU) on May 1, 2004. The U.S. also has BITs with two other countries, Romania and Bulgaria, which are expected to join the EU in 2007. These Additional Protocols seek to reconcile the obligations the European states will assume as a result of EU membership with their obligations to the United States under the existing Bilateral Investment Treaties. The Protocols also provide for the right of the parties to seek consultations in the future whenever potential conflicts arise between an investment treaty and EU obligations. The State Department has indicated that, unless these Protocols are approved, the new EU members would likely be pressured by the European Commission to terminate their Bilateral Investment Treaty with the United States.

II. BACKGROUND AND SUMMARY

The need for these Protocols to our existing BITs arose when these eight countries accepted formal invitations to join the EU. The Protocols are the result of an understanding reached through negotiations involving the United States, the European Commission,¹ and the eight countries. This understanding is designed to establish a framework for avoiding and remedying any present or future complications and incompatibilities between our existing BITs and the future requirements and obligations that each of these countries will assume upon accession to the EU.² The understanding also provides protection for U.S. investments in these countries should the EU, in the future, seek to restrict foreign investment. For example, the provisions of these Protocols are intended to preserve the benefits of direct foreign investment after each country's accession to the EU, and provide for the continued protection of investment facilities as well as investment activity.

III. ENTRY INTO FORCE AND TERMINATION

The Additional Protocols enter into force upon the exchange of instruments of ratification and remain in force as long as the underlying treaties remain in force.

IV. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed Additional Protocols on April 1, 2004. The hearing was chaired by Senator Lugar. The Committee considered the Additional Protocols on April 29, 2004 and ordered them favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to ratification.

V. COMMITTEE COMMENTS

On balance, the Committee on Foreign Relations believes that the proposed Additional Protocols are in the interest of the United

¹The European Commission is the policy initiating body of the European Union.

²The Understanding, and Annex A to the Understanding, are reprinted as an annex to this report.

States and urges the Senate to act promptly to give advice and consent to ratification.

VI. EXPLANATION OF THE ADDITIONAL PROTOCOLS

Each of the Protocols contains six Articles, four of which are discussed below. Each of the eight Protocols is structured in exactly the same manner, utilizing similar language. The only differences are technical in nature and specific to the section or phrases in the underlying BIT. None of these differences affect the substance of the Protocols.

Article I. The Article addresses requirements under EU law that each country will face upon accession. The Article interprets the appropriate section of the underlying BIT in such a way so as not to prohibit the country from imposing performance requirements, as necessary to comply with EU law, in both the agricultural and audio-visual sectors.

Article II. Article II provides that the existing exceptions of the Treaties with respect to free trade areas and customs unions shall apply without limitation to all of the countries' obligations as a result of their accession to the EU.

Article III. Article III requires that the Parties promptly enter into consultations with the United States to resolve any disputes in connection with the underlying Treaty, or discuss any matter relating to the interpretation or application of the Treaty. The Parties also agree to promptly consult whenever either party to the BIT believes that steps are necessary to ensure compatibility between a Party's EU obligations and a Party's BIT obligations.

Article IV. To the extent necessary to comply with obligations under EU law, Article IV of each Protocol allows for the European states to make or maintain exceptions to the most-favored-nation and national treatment obligations of the BIT with respect to several sectors. These reservations, however, shall not apply to existing U.S. investments for a period of ten years from the date that the relevant law or regulation enters into effect, or twenty years from the date of entry into force of the underlying treaty, whichever date is later. Thus, existing U.S. investments will be protected for at least ten years. The United States may make or maintain limited exceptions to national treatment in the fisheries sector or with respect to subsidies, and a limited exception to the most-favored-nation obligation with respect to the fisheries sector.

VII. TEXTS OF THE RESOLUTIONS OF RATIFICATION

Romania

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment of May 28, 1992, signed at Brussels on September 22, 2003 (T. Doc. 108-13).

Bulgaria

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the United States of America and the Re-

public of Bulgaria Amending the Treaty Between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment of September 23, 1992, signed at Brussels on September 22, 2003 (T. Doc. 108–15).

Estonia

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Protocol Between the Government of the United States of America and the Government of the Republic of Estonia to the Treaty for the Encouragement and Reciprocal Protection of Investment of April 19, 1994, signed at Brussels on October 24, 2003 (T. Doc. 108–17).

Czech Republic

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the United States of America and the Czech Republic to the Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991, signed at Brussels on December 10, 2003 (T. Doc. 108–18).

Slovak Republic

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the United States of America and the Slovak Republic to the Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991, signed at Brussels on September 22, 2003 (T. Doc. 108–19).

Latvia

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the Government of the United States of America and the Government of the Republic of Latvia to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 13, 1995, signed at Brussels on September 22, 2003 (T. Doc. 108–20).

Lithuania

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the Government of the United States of America and the Government of the Republic of Lithuania to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 14, 1998, signed at Brussels on September 22, 2003 (T. Doc. 108–21).

Poland

Resolved (two-thirds of the Senators present concurring therein), That the Senate advises and consents to the ratification of the Additional Protocol Between the United States of America and the Re-

public of Poland to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations of March 21, 1990, signed at Brussels on January 12, 2004 (T. Doc. 108–22).

VIII. ANNEX—UNDERSTANDING AND ANNEX A TO THE
UNDERSTANDING

**Understanding Concerning
Certain U.S. Bilateral Investment Treaties**

The United States (“U.S.”), the European Commission (“Commission”), and Acceding and Candidate Countries for accession to the European Union (“Acceding Countries” and “Candidate Countries,” respectively) identified in Annex A (collectively “the Participants”) wish to confirm their intent to support enlargement of the European Union (“EU”), the economic integration of new EU members, and a positive framework for continued U.S. investment in Acceding and Candidate Countries as they move toward full membership in the EU and thereafter.

The Participants recognize that bilateral investment treaties (“BITs”) between the U.S. and Acceding and Candidate Countries contribute to investor confidence and encourage U.S. investment in these countries.

The Participants also recognize that U.S. investors will benefit from Acceding and Candidate Countries’ accession to the EU and that long-term business relations will be fostered by EU enlargement.

The Participants also acknowledge the importance of granting protection to existing foreign investments when measures at the community level are enacted that might affect the rights of foreign investors.

At the same time, the Participants acknowledge that enlargement of the EU is based on the principle of full acceptance and implementation, upon the Acceding and Candidate Countries’ accession, of the *acquis communautaire*, including obligations under Article 307 of the Treaty Establishing the European Community (“EC Treaty”).

The Participants further recognize that, consequently, Acceding Countries have committed in Article 6.10 of the Act of Accession, and as a condition for the closure of chapter 26 of the negotiations (external relations), to take steps before accession to eliminate incompatibilities between the *acquis* and their agreements with third countries, and that similar commitments may be undertaken by Candidate Countries.

Therefore, the Participants wish to express their intent to seek compatibility between the Acceding and Candidate Countries’ obligations that arise from membership in the EU, and thereafter under EU law, and their obligations arising from their BITs with the U.S.

In furtherance of these objectives:

1. The U.S., the Commission and the Acceding and Candidate Countries have held a series of discussions and meetings since mid-2002;

2. The Commission has identified, to the extent possible, EU measures in certain sectors that raise questions of compatibility with respect to Acceding and Candidate Countries' obligations in U.S. BITs;

3. The U.S. has reviewed these measures, and the Commission's and Acceding and Candidate Countries' assessment of them, and concurs with their conclusion that it would be desirable to take steps in the interest of avoiding incompatibilities with respect to U.S. BITs with Acceding and Candidate Countries; and

4. The Participants have concluded that the possibility exists that decisions that may be taken by the EU in the future may raise both issues relating to the compatibility of EU obligations and U.S. BITs, and questions regarding the protection of existing U.S. investments.

Therefore, the Participants: (a) express their intention to address the matters identified below by relying on interpretations and specific amendments to Acceding and Candidate Countries' BITs with the U.S., including specific sectoral exceptions, as well as consultations where appropriate; (b) intend that making the interpretations and specific amendments outlined in this Understanding will eliminate incompatibilities between obligations of the Acceding and Candidate Countries that arise as a result of membership in the EU and their obligations in their BITs with the U.S.; and (c) undertake the political commitment to make good faith efforts, as necessary, to seek to avoid or to remedy further incompatibilities.

I. Capital Movements

A. The EU is currently considering the relationship between the obligations of its Member States in international agreements to freely allow investment-related transfers and the authority of the EU Council of Ministers to restrict capital movements either by: (a) enacting temporary safeguard measures in exceptional circumstances involving serious difficulties in the operation of the economic and monetary union; or (b) imposing financial sanctions as a result of a common position or joint action in relation to a common foreign or security policy. *See* EC Treaty, arts. 59 and 60, respectively.

B. The Participants acknowledge that Acceding Countries, pursuant to Article 307 of the EC Treaty and Article 6.10 of the Act of Accession, as applicable, must take all appropriate steps to eliminate incompatibilities between the EC Treaty and their agreements with third countries, and that similar commitments may be undertaken by Candidate Countries.

C. The Participants concur that it is highly desirable to find, as soon as possible, a lasting solution that would avoid or remedy such incompatibilities and that would not subject U.S. BITs or U.S. investments to discriminatory treatment as compared to Member States' agreements with third countries or third countries' investments in Member States. The U.S. and the Commission will accordingly continue to consult on this matter in parallel with devel-

opments within the EU. In the absence of mutually satisfactory conclusions from the future consultations foreseen, the Participants acknowledge that the approach in this paragraph is without prejudice to the Commission's powers under Article 226 of the EC Treaty.

D. The Participants note that the general exception addressing essential security interests contained in U.S. BITs with Acceding and Candidate Countries protects the right of a BIT Party to apply measures that it considers necessary to protect its own essential security interests, and that good faith reliance on the essential security exception would afford protection to the BIT Parties. They also note that in the case of an Acceding or Candidate Country these essential security interests may include those deriving from interests of the EU. The U.S. and individual Acceding and Candidate Countries will reflect, by means of an interpretation through an exchange of letters, these understandings of the general exception provision contained in U.S. BITs. (Draft text of an interpretation is contained in Annex B.)

II. Performance Requirements

A. Because EU requirements in certain sectors may result in incompatibilities with Acceding and Candidate Countries' obligations with respect to performance requirements in their U.S. BITs, the U.S. and individual Acceding and Candidate Countries will take steps to amend their bilateral investment treaties to provide that the performance requirement provisions are without prejudice to EU measures in certain sectors. Participants note that an EU measure requiring the use of EU or European goods or services may be satisfied by the use of goods or services of any country in the EU or Europe, respectively; and that such a measure is distinct from a requirement to use, in whole or in part, goods or services exclusively from a specific Acceding or Candidate Country that is a Party to a U.S. BIT. (Draft text of an amendment is contained in Annex C.)

B. Furthermore, the U.S. and individual Acceding and Candidate Countries will interpret, by exchange of letters, the obligations with respect to performance requirements in U.S. BITs to clarify that such obligations do not extend to performance requirements that merely establish conditions for the receipt of an advantage. (Draft text of an interpretation is contained in Annex C.)

III. Measures in Sensitive Sectors or Matters

Because there exist EU-wide measures in sensitive sectors that, upon implementation by Acceding and Candidate Countries when they become members of the EU, would conflict with the non-discrimination obligations (national and/or most-favored-nation treatment) of their BITs with the U.S., the United States and individual Acceding and Candidate Countries will take steps, where appropriate exceptions do not exist, to amend the agreements as provided in the text in Annex D. (Draft text of amendment is contained in Annex D, paragraphs 1 and 2.) The Participants also acknowledge that the obligation in Acceding and Candidate Countries' BITs of a Party to notify the other Party of actions in a sector

subject to annex exceptions pertains to actions by the BIT Party and not to EU measures.

IV. Obligations with Respect to Third Parties Arising from EU Membership

U.S. bilateral investment treaties with Acceding and Candidate Countries include a general exception to the non-discrimination obligations for advantages accorded to the nationals or companies of any third country arising from either BIT Party's obligations as a member in a free trade area or customs union. Through an exchange of letters, the U.S. and individual Acceding and Candidate Countries will acknowledge that the exception covers advantages accorded to third-country nationals or companies pursuant to all obligations of a Party arising from its membership in an economic integration agreement, including the EU, that includes a free trade area or customs union. (Draft text of Protocol is contained in Annex E.)

V. Future Developments in EU Law

A. The Participants acknowledge that Acceding Countries, pursuant to Article 307 of the EC Treaty and Article 6.10 of the Act of Accession, as applicable, must take all appropriate steps to eliminate incompatibilities between the EC Treaty and their agreements with third countries, and that similar commitments may be undertaken by Candidate Countries. The Participants also recognize that the possibility exists that EU measures adopted in the future, whether under Article 57.2 of the EC Treaty or under any other provision, might not fall within the scope of the amendments or interpretations that will be made by the U.S. and the Acceding and Candidate Countries with respect to their BITs. The Participants further recognize that such measures might raise questions with respect to the compatibility of obligations arising from international agreements between the U.S. and current EU Member States.

B. In view of these possibilities, the U.S. and the Commission will consult through established means (*e.g.*, informal contacts between Commission and U.S. officials responsible for investment, contacts through diplomatic channels and the U.S.-EU Senior Level Coordinating Group) when new EU measures affecting foreign investment are under consideration and may raise questions of compatibility with pre-existing international agreements between a Member State and the U.S. The purpose of such consultations will be to address, consistent with the objectives of this Understanding, any incompatibility that would arise from the adoption of any such measure. The U.S. and the Commission will make a good faith effort to take into account, in a manner similar to discussions leading to this Understanding, the views of Acceding and Candidate Countries, as well as Member States with international agreements with the U.S., that may be affected by the contemplated measure. In the absence of mutually satisfactory conclusions from the future consultations foreseen, the Participants acknowledge that the approach in this paragraph is without prejudice to the Commission's powers under Article 226 of the EC Treaty.

C. Furthermore, the United States and individual Acceding and Candidate Countries will acknowledge, in the respective exchange of instruments bringing into force the amendments contemplated in this Understanding, that pursuant to Article 307 of the EC Treaty and Article 6.10 of the Act of Accession, as applicable, countries acceding to the EU must take all appropriate steps to eliminate incompatibilities between the EC Treaty and their agreements with third countries. In addition, they will amend the relevant provisions of their BITs for this purpose. (Draft text is contained in Annex F.)

VI. Article 48 “European Companies”

Because the operation of Article 48 of the EC Treaty is among the reasons that the Commission seeks clarification and modification of the non-discrimination commitments in U.S. BITs with Acceding and Candidate Countries, and because the protection afforded to U.S. investments is of particular importance to U.S. investors, the Participants take note of the significance of the explanation provided by the Commission describing the scope and operation of Article 48 of the EC Treaty. (Statement provided at Annex G.)

VII. Protecting Existing Investments

A. The Participants acknowledge the Acceding and Candidate Countries’ obligation under their BITs with the U.S. not to apply new discriminatory measures otherwise permitted by these countries’ exceptions to the non-discrimination commitments of their BITs with the U.S. to existing investments. With respect to the protection of existing investments in the new sectors and matters to be excepted by the amendments described above in Section III of this Understanding, the United States and individual Acceding and Candidate Countries will take steps to amend their BITs to define existing investments and to establish the period of protection of such existing investments for purposes of these new excepted sectors and matters. (Draft text of amendment is contained in Annex D, paragraph 3.)

B. Furthermore, given that the protection of existing investments is a question relevant both to the accession of new members to the EU and to the adoption of new EU measures restricting foreign investment, the consultations referred to in Section V will be undertaken whenever: (1) the accession of new members raises questions concerning the implementation or application by the new member of EU measures that would affect U.S. investments; or (2) the imposition of new EU measures restricting foreign investment within the EU raises questions regarding the impact on existing U.S. investments. The objective of such consultations will be to protect existing investment.

Concluding Provisions

1. This Understanding constitutes a political arrangement reflecting the Participants’ intentions with regard to the matters it addresses and is not an agreement binding under international law.

2. The Participants acknowledge that certain matters addressed in this Understanding require approval of national legislatures. The Participants will inform one another should difficulties arise in this regard.

3. The Participants will act to complete the steps outlined in this Understanding to amend or interpret Acceding Countries' BITs with the United States as soon as possible, but no later than April 30, 2004, and Candidate Countries' BITs with the United States as soon as possible, but no later than the date established for accession in their accession agreement with the EU.

4. Participants acknowledge that enlargement negotiations may be launched between the EU and future candidates for EU membership that are also Parties to U.S. BITs on the principle of full acceptance and implementation upon their accession of the *acquis communautaire*, including obligations under EC Treaty Article 307, and that this Understanding may be useful in eliminating incompatibilities between the obligations of EU membership and obligations under U.S. BITs.

For the United States:

For the European Commission:

For the Czech Republic:

For Estonia:

For Latvia:

For Lithuania:

For Poland:

For the Slovak Republic:

For Bulgaria:

For Romania:

Dated: September 22, 2003

**Understanding Concerning
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Annexes

ANNEX A

**LIST OF ACCEDING AND CANDIDATE COUNTRIES
THAT ARE PARTICIPANTS TO THIS UNDERSTANDING**

Acceding Countries:

CZECH REPUBLIC

ESTONIA

LATVIA

LITHUANIA

POLAND

SLOVAK REPUBLIC

Candidate Countries:

BULGARIA

ROMANIA

