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ADDITIONAL INVESTMENT PROTOCOL WITH LITHUANIA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

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



MARCH 12, 2004.—The Protocol was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE

29–118 WASHINGTON : 2004

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *March 12, 2004.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the 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. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Protocol.

I have already forwarded to the Senate similar Protocols for Romania and Bulgaria and now forward simultaneously to the Senate Protocols for the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic. Each of these Protocols is the result of an understanding the United States reached with the European Commission and these six countries that will join the European Union (EU) on May 1, 2004, as well as with Bulgaria and Romania, which are expected to join the EU in 2007.

The understanding is designed to preserve U.S. bilateral investment treaties (BITs) with each of these countries after their accession to the EU by establishing a framework acceptable to the European Commission for avoiding or remedying present and possible future incompatibilities between their BIT obligations and their future obligations of EU membership. It expresses the U.S. intent to amend the U.S. BITs, including the BIT with Lithuania, in order to eliminate incompatibilities between certain BIT obligations and EU law. It also establishes a framework for addressing any future incompatibilities that may arise as EU authority in the area of investment expands in the future, and endorses the principle of protecting existing U.S. investments from any future EU measures that may restrict foreign investment in the EU.

The United States has long championed the benefits of an open investment climate, both at home and abroad. It is the policy of the United States to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. This Protocol preserves the U.S. BIT with Lithuania, with which the United States has an expanding relationship, and the protections it affords U.S. investors even after Lithuania joins the EU. Without it, the European Commission would likely require Lituania to terminate its U.S. BIT upon accession because of existing and possible future incompatibilities between our current BIT and EU law.

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

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
January 3, 2004.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Additional Protocol Between the Government of the United States of America and the Government of the Republic of Lithuania amending the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment of January 14, 1998, signed at Brussels on September 22, 2003. I recommend that this protocol be transmitted to the Senate for its advice and consent to ratification.

This protocol is the result of an understanding that the United States reached with the European Commission and six countries that will join the European Union ("EU") on May 1, 2004 (the Czech Republic, Estonia, Latvia, Lithuania, Poland the Slovak Republic), as well as with Bulgaria and Romania, which are expected to join the EU in 2007.

The understanding is designed to preserve our bilateral investment treaties ("BITs") with these countries after their accession to the EU by establishing a framework for avoiding or remedying present and possible future incompatibilities between our BITs with these eight countries and their future obligations of EU membership. In this regard, the understanding expresses the U.S. intent to conclude substantively identical amendments and formal interpretations of the BITs with each of these eight countries.

In addition, the understanding establishes a framework for addressing any future incompatibilities that may arise as European Union authority in the area of investment expands and evolves in the future. It endorses the principle of protecting existing U.S. investments in these countries from any future EU measures that may restrict foreign investment in the EU, and also clarifies certain protections afforded to U.S. investments in individual member states of the EU under the Treaty Establishing the European Community ("EC Treaty").

Finally, the understanding calls for the United States and each BIT partner to interpret, through an exchange of notes, two BIT provisions: (1) the right of each BIT Party to take measures necessary for the protection of its own essential security interests, and (2) the BIT prohibition on performance requirements.

Both interpretations were undertaken at the request of the European Commission to confirm the mutual understanding of the United States and Lithuania in the context of EU enlargement. For example, the interpretation of the BIT provision on essential secu-

rity interests confirms that, for Lithuania, these interests may include interests deriving from Lithuania's membership in the EU. As concerns the BIT prohibition on performance requirements, many U.S. BITs include a provision explicitly stating that the prohibition on performance requirements does not extend to conditions for the receipt or continued receipt of an advantage. The interpretation relating to performance requirements makes this explicit with respect to the U.S.-Lithuania BIT. The two interpretations are enclosed for the information of the Senate.

Investment by the Untied States has played an important role in the economic transformation of these eight countries, and the U.S. BITs have afforded important protections to U.S. investors. Prior to acceding to the EU, however, the European Commission has required that these countries terminate any international treaty containing incompatibilities with EU law. Without the understanding and the steps contemplated therein, including the specific amendments in this protocol, these countries would be required to terminate their U.S. BITs and the great majority of protections these treaties afford U.S. investors. Therefore, the understanding, together with the interpretations and specific amendments in the protocol, will preserve the benefits of these treaties and provide important additional protections for U.S. investors as the EU continues to evolve.

THE U.S.-LITHUANIA PROTOCOL

The United States champions EU enlargement and, at the same time, intends that this BIT will continue to mutually benefit U.S. and Lithuanian investors. By undertaking these amendments of the BIT with Lithuania, which would be brought into force just prior to its accession, incompatibilities between BIT protections and EU law are eliminated, and any future problems in this respect are addressed through a framework for consultations. This action preserves our BIT with Lithuania after its accession to the EU, and is consistent with the policy of the United States to welcome market-driven foreign investment and to permit capital to flow freely to seek its highest return. Lithuania is one of the newly democratized countries in Europe transitioning to a market economy, and foreign direct investment into Lithuania is very much in both our countries' interests. Protection for investors facilitates investment activity, and thus directly supports U.S. policy objectives.

The principal substantive articles of the protocol provide as follows.

Article I: that the article of the BIT prohibiting performance requirements does not limit Lithuania's ability to impose, as necessary under EU law, certain kinds of performance requirements in the agricultural and audiovisual sectors;

Article II: that the terms of the free trade area/customs union exception of the BIT shall apply, without limitation, to all of a Party's obligations stemming from its membership in an economic integration agreement that includes a free trade area or customs union, such as the EU;

Article III: that the BIT Parties will consult promptly whenever either Party believes that steps are necessary to assure compatibility between the BIT and the EC Treaty;

Article IV: that, in certain specified sectors or matters, Lithuania may take a reservation against the national treatment and most-favored-nation treatment obligations of the BIT, provided such reservation is necessary to meet Lithuania's obligations under EU law, and subject to the following exception;

that, notwithstanding any such new reservation, existing U.S. investments in Lithuania shall remain protected under the national treatment and most-favored-nation treatment obligations of the BIT for at least 10 years from the date of the relevant EU law necessitating the reservation; and finally,

that the United States reserves the right to make or maintain limited exceptions to the national treatment obligation in two new sectors or matters, fisheries and subsidies, and to the most-favored-nation treatment obligation in one new sector, fisheries.

With respect to future developments in EU law, the United States recognizes that the possibility exists that these amendments may not suffice to ensure compatibility, and that consultations would be necessary to avoid or eliminate any incompatibilities that may arise. As noted above, the United States and Lithuania expressly agree to such consultations in the protocol.

I support this protocol to the U.S. BIT with Lithuania, and I favor its transmission to the Senate at an early date.

Respectfully submitted.

COLIN L. POWELL.

Enclosures: As stated.

Note No. 205/03

The Embassy of the United States of America refers the Ministry of Foreign Affairs of the Republic of Lithuania to the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998 (the "Treaty"), and to recent discussions between representatives of the two Governments concerning the Republic of Lithuania's accession to the European Union.

The Embassy confirms the understanding of the Government of the United States of America that Article IX, paragraph 1, of the Treaty reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests.

The Embassy further confirms the understanding of the Government of the United States of America that, in the case of the Republic of Lithuania, these interests may include interests deriving from its membership in the European Union.

DIPLOMATIC NOTE

The Embassy would be grateful if the Ministry of Foreign Affairs would confirm, by an affirmative Note in response, that these understandings are shared by the Government of the Republic of Lithuania.

The Embassy of the United States of America avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Republic of Lithuania the assurances of its highest consideration.

EMBASSY OF THE UNITED STATES OF AMERICA VILNIUS

Embassy of the United States of America,

Vilnius, December 16, 2003.

MINISTRY OF FOREIGN AFFAIRS
OF THE REPUBLIC OF LITHUANIA

Nr. 636/2003

The Ministry of Foreign Affairs of the Republic of Lithuania presents its compliments to the Embassy of the United States of America and, with reference to the Embassy's Note No. 205/03 of December 16, 2003, has the honour to confirm the understanding that Article IX, paragraph 1, of the Treaty Between the Government of the Republic of Lithuania and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment, signed at Washington on January 14, 1998, reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests. The Ministry of Foreign Affairs of the Republic of Lithuania has the further honor to confirm the understanding that these interests may include interests deriving from the membership of the Republic of Lithuania in the European Union.

The Ministry of Foreign Affairs of the Republic of Lithuania avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

LIETUVOS RESPUBLIKA
UŽSIENIO REIKALŲ MINISTERIJA

Vilnius, December 17, 2003

EMBASSY OF THE UNITED STATES OF AMERICA
VILNIUS

Note No. 206/03

The Embassy of the United States of America refers the Ministry of Foreign Affairs of the Republic of Lithuania to the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998 (the "Treaty"), and to recent discussions between representatives of the two Governments concerning the Republic of Lithuania's accession to the European Union.

The Embassy confirms the understanding of the Government of the United States of America that the prohibition on performance requirements set forth in Article II, paragraph 6, of the Treaty does not extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a market organization for agricultural products and its market stabilizing effects.

The Embassy would be grateful if the Ministry of Foreign Affairs would confirm, by an affirmative Note in response, that this understanding is shared by the Government of the Republic of Lithuania.

The Embassy of the United States of America avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Republic of Lithuania the assurances of its highest consideration.



Embassy of the United States of America,

Vilnius, December 16, 2003.

MINISTRY OF FOREIGN AFFAIRS
OF THE REPUBLIC OF LITHUANIA

Nr. 637/2003

The Ministry of Foreign Affairs of the Republic of Lithuania presents its compliments to the Embassy of the United States of America and, with reference to the Embassy's Note No. 206/03 of December 16, 2003, has the honour to confirm the understanding that the prohibition on perfomance requirements set forth in Article II, paragraph 6, of the Treaty Between the Government of the Republic of Lithuania and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment, signed at Washington on January 14, 1998, does not extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a market organisation for agricultural products and its market stabilizing effects.

The Ministry of Foreign Affairs of the Republic of Lithuania avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

LIETUVOS RESPUBLIKA
USIENIO REIKALŲ MINISTERIJA

Vilnius, December 17, 2003

EMBASSY OF THE UNITED STATES OF AMERICA
VILNIUS

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

The Government of the United States of America and the Government of the Republic of Lithuania (hereinafter the "Parties");

Desiring to make more effective the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on January 14, 1998 (hereinafter "the Treaty");

Have discussed the intentions of the United States of America and the Republic of Lithuania regarding the compatibility between the Republic of Lithuania's obligations under the Treaty and its obligations that arise from membership in the European Union;

Have acknowledged that the Republic of Lithuania, pursuant to Article 307 of the Treaty Establishing the European Community and Article 6.10 of the Republic of Lithuania's Act of Accession, as applicable, must take all appropriate steps to eliminate incompatibilities between the Treaty Establishing the European Community and its other international agreements, including the Treaty;

Have concluded, as a result, that certain amendments to the Treaty are necessary in order to avoid such incompatibilities;

Have decided to conclude an Additional Protocol thereto; and

Have agreed upon the following articles:

Article I

As necessary for the Republic of Lithuania to meet its obligations pursuant to measures adopted by the European Union, Article II, paragraph 6, of the Treaty shall not limit the ability of the Republic of Lithuania to impose performance requirements:

(a) in the agricultural sector that relate to the production, processing and trade of agricultural and processed agricultural products, that implement quotas, or that require the purchase or use of goods produced or services provided in the European Union or, with respect to goods produced or services provided, a particular level or percentage of content from a source in the European Union; or

(b) in the audio-visual sector that relate to the production, distribution and exploitation of audio-visual works, that implement quotas, or that require the purchase or use of goods produced or services provided in countries of the Council of Europe or, with respect to goods produced or services provided, a particular level or percentage of content from a source in countries of the Council of Europe.

Article II

The Parties acknowledge that the terms of the customs union or free trade area exception found at Article II, paragraph 10(a), of the Treaty shall apply to all obligations of a Party by virtue of its membership in an economic integration agreement that includes a free trade area or customs union (*e.g.*, the European Union), including obligations owed to nationals or companies of any third country.

Article III

Article V of the Treaty shall be amended by deleting the text of the existing article in its entirety and substituting the following text in its place:

"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. The Parties also agree to consult promptly whenever a Party believes that steps are necessary to assure compatibility between the Treaty and the Treaty Establishing the European Community with a view to assuring compatibility."

Article IV

A. The Annex to the Treaty shall be amended by adding the following additional paragraphs:

"4. As necessary to meet its obligations pursuant to measures adopted by the European Union, the Government of Republic of Lithuania reserves the right to make or maintain exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Agriculture
Audio-visual
Securities, Investment Services and other Financial Services
Fisheries
Hydrocarbons
Subsidies
Transport (Air Carriers)
Transport (Inland Waterways)
Transport (Maritime)

5. As necessary to meet its obligations pursuant to measures adopted by the European Union, the Government of the Republic of Lithuania, reserves the right to make or maintain exceptions to most-favored-nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Agriculture
Audio-visual
Hydrocarbons

6. Any exception by the Government of the Republic of Lithuania exercised pursuant to paragraphs 4 or 5 above (*i.e.*, through any law or regulation adopted by, or any European Union measure directly applicable within, the Republic of Lithuania) shall not apply, for the time period set forth below in subparagraph (a), to investments of nationals or companies of the United States that are existing in the relevant sector on the date this amendment takes effect or on the date the European Commission publishes its proposal to enact the relevant measure in its Official Journal, whichever date is later.

(a) The time period referred to in this paragraph shall be ten years from the date the relevant law or regulation adopted by, or European Union measure directly applicable within, the Republic of Lithuania takes effect, or twenty years from the date of entry into force of the Treaty, whichever date is later.

(b) In no case, however, may an exception exercised pursuant to paragraphs 4 or 5 above apply to an existing investment, as defined in this paragraph, to the extent that it would require divestment, in whole or in part, of such an existing investment."

B. Paragraph 1 of the Annex to the Treaty shall be amended to reflect that the Government of the United States of America reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the new sectors or matters it has indicated below:

Fisheries
Subsidies

C. Paragraph 2 of the Annex to the Treaty shall be amended to reflect that the Government of the United States of America reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the new sectors or matters it has indicated below:

Fisheries

Article V

This Additional Protocol, which shall form an integral part of the Treaty, shall be subject to ratification.

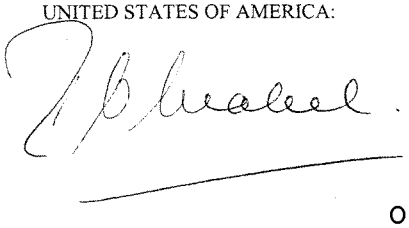
Article VI

This Additional Protocol shall enter into force on the date of the exchange of instruments of ratification, and shall remain in force so long as the Treaty shall remain in force.

IN WITNESS WHEREOF, the undersigned, duly authorized by their respective Governments, have signed this Additional Protocol.

DONE in duplicate at Brussels, this 22nd day of September, 2003 in the English and Lithuanian languages, both texts being equally authentic. In case of divergences, the English text shall prevail.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA:



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