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INVESTMENT TREATY WITH RWANDA (TREATY DOC. 110–23)

DECEMBER 22, 2010.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 110–23]

The Committee on Foreign Relations, to which was referred the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed at Kigali on February 19, 2008 (the "Rwanda BIT" or the "Treaty") (Treaty Doc. 110–23), having considered the same, reports favorably thereon with one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof.

CONTENTS

I. PURPOSE

Like other U.S. bilateral investment treaties ("BITs"), the Rwanda BIT is intended to provide protections for investors that underscore the shared commitment of the United States and Rwanda to open investment and trade policies. It contains the standard features of U.S. bilateral investment treaties: nondiscriminatory treatment; the free transfer of investment-related funds; prompt, adequate, and effective compensation in the event of an expropriation; a minimum standard of treatment in accordance with customary international law; freedom of investment from specified performance requirements; prohibitions on nationality-based restrictions

99–115

for the hiring of senior managers; and transparency in governance. The Treaty also provides investors with the opportunity to resolve investment disputes with a host government through international arbitration, and it permits one party to the Treaty to bring an arbitration claim against the other party concerning the interpretation or application of the Treaty. And, it sets out an acknowledgement by the Parties that it is inappropriate to encourage investment by weakening or reducing the protection afforded in domestic environmental or labor laws.

II. BACKGROUND

The United States and Rwanda announced their intent to negotiate a BIT on June 14, 2007. The BIT negotiations grew out of consultations between the two countries under the U.S.-Rwanda Trade and Investment Framework Agreement, signed in June 2006. The proposed BIT is the 47th such treaty signed by the United States and the first between the United States and a sub-Saharan African country since 1998. Rwanda was considered a good candidate for a BIT negotiation, having opened its economy, improved its business climate, and embraced trade and investment as a means to boost economic development and help alleviate poverty. The Treaty, which was signed by the United States and Rwanda on February 19, 2008, is expected to reinforce the efforts of the Rwandan Government's economic reform program. It was submitted to the Senate for advice and consent to ratification on November 20, 2008.

The Rwanda BIT is the second BIT negotiated on the basis of the most recent U.S. model BIT, which was completed in 2004. It is largely consistent with the U.S. model, which is intended to encompass certain objectives from the Bipartisan Trade Promotion Authority Act of 2002 and contains similar provisions to the investment chapters of recently negotiated free trade agreements.

III. SUMMARY OF KEY PROVISIONS

A detailed article-by-article discussion of the proposed BIT is attached to the Letter of transmittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110-23. A summary of the key provisions of the proposed BIT is set forth below.

ARTICLE 1

Definitions

The Treaty defines the term "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." The definition of investment provides an illustrative list of different types of investments. A "covered investment" is defined, with respect to a party, as an "investment in its territory of an investor of the other party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter."

ARTICLE 2

Scope and Coverage

The proposed BIT applies to measures adopted or maintained by a party relating to: (a) investors of the other party, (b) covered investments, and (c) with respect to obligations involving performance requirements (Art. 8) and investment-related activities with environmental and labor implications (Arts. 12-13), all investment in the territory of a party.

ARTICLE 3

National Treatment

The Treaty protects investors of a party and their covered investments from discriminatory measures by the other party during the full life-cycle of an investment, including the establishment phase, when investors are attempting to make an investment. Under Article 3, a party must accord treatment to investors of the other party and covered investments no less favorable than that it accords, "in like circumstances," to its own investors or investments in its territory.

ARTICLE 4

Most Favored Nation Treatment

Each party commits to provide to investors of the other party and to their covered investments treatment no less favorable than that which it provides in like circumstances to investors from any third country and their investments. These obligations apply with regard to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

ARTICLE 5 AND ANNEX A

Minimum Standard of Treatment

Article 5 establishes a minimum standard of treatment that each party owes to covered investments. Under that standard, the Parties are obligated to treat covered investments "in accordance with customary international law, including fair and equitable treatment and full protection and security." Article 5 contains a number of other provisions further clarifying this obligation.

"Fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. The obligation to provide "full protection and security" requires the host party to provide the level of police protection required under customary international law. The Article further requires that each party must accord to covered investments of the other party non-discriminatory treatment with respect to measures adopted in relation to losses suffered by investments due to armed conflict or civil strife. In the event that an investor suffers losses as a result of a party's requisition or unnecessary destruction of its covered investment, restitution or compensation must be paid. Article 5 states that a breach of another provision of the proposed BIT or of a separate international agreement would not necessarily constitute a breach of this article. Finally, a footnote to Article 5 provides that the Article shall be interpreted in accordance with Annex A.

Annex A

Annex A contains the understanding of the Parties that "customary international law," generally and as specifically referenced in Article 5 (and Annex B), "results from a general and consistent practice of States that they follow from a sense of legal obligation." It further provides that, for purposes of Article 5, the "customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

ARTICLE 6 AND ANNEX B

Expropriation and Compensation

Article 6 incorporates into the Treaty the customary international law standard for expropriation. It prohibits either party from expropriating or nationalizing a covered investment unless such action is for a public purpose, is taken in a non-discriminatory manner, in accordance with due process of law and the minimum standard of treatment set out in Article 5(1) through (3), and is accompanied by prompt, adequate, and effective compensation. Compensation must be paid without delay and be equivalent to the fair market value of the expropriated investment immediately before the expropriation. Footnote 10 indicates that Article 6 shall be interpreted in accordance with Annexes A and B.

Annex B

Annex B clarifies the understanding of the Parties with respect to Article 6 and the determination of whether an expropriation has occurred. Annex B states that an action or series of actions by a party does not "constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." Annex B further explains that Article 6 addresses two types of expropriation: direct expropriation, involving formal transfer of title or outright seizure, and indirect expropriation, involving a case-by-case inquiry that considers the economic impact of the government action, its interference with investment-backed expectations, and its character. Finally, Annex B observes that, except in rare circumstances, non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations.

ARTICLE 7

Transfers

Article 7 sets out the Treaty's "free transfer" obligation. Under this provision, each party is required to "permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory." Notwithstanding this obligation, a party may prevent a transfer based on the "equitable, non-discriminatory, and good faith application" of certain laws, including those pertaining to bankruptcy, securities dealing, and criminal law.

ARTICLE 8

Performance Requirements

Article 8 prohibits the imposition by Parties of requirements relating to the performance of investments, including any requirement to achieve a given level or percentage of exports or domestic content or to transfer technology, production processes, or other proprietary knowledge to a person in its territory. The Article also prohibits Parties from offering advantages, such as a tax holiday, in exchange for a more limited set of performance requirements.

The Parties agreed to two footnotes not present in the 2004 Model. First, the Parties agreed to clarify that the enforcement of a commitment or undertaking to use a particular technology, a production process, or other proprietary knowledge is not, by itself, inconsistent with the performance requirement obligation relating to transfers of technology, a production process, or other proprietary knowledge. Second, the Parties agreed to clarify that nothing in Article 8(1) shall be construed to prevent a party from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, a production process, or other proprietary knowledge to a person in its territory.

ARTICLE 9

Senior Management and Board of Directors

The Treaty prohibits measures requiring that persons of any particular nationality be appointed to senior management positions in a covered investment.

ARTICLES 10–11

Publications of Laws and Decisions Respecting Investment and Transparency in Lawmaking and Administrative Proceedings

Article 10 requires each party to ensure that its laws, regulations, procedures, and administrative rulings of general application, and adjudicatory decisions respecting any matter covered by the Treaty are promptly published or otherwise made publicly available.

Article 11 includes several provisions aimed at ensuring transparency. It requires that, to the extent possible, each party publish in advance laws, regulations, procedures, and administrative rulings of general application, and provide interested persons and the other party a reasonable opportunity to comment on such proposed measures. It further requires a party, upon the request of the other party, to provide information and respond to questions pertaining to any actual or proposed measure that the party requesting the information considers may materially affect the operation of the Treaty or its interests under the Treaty. Such information requests will be made through contact points that each party will designate. Finally, Article 11 includes detailed provisions concerning the character of administrative proceedings that impact covered investments or investors of the other party.

ARTICLES 12–13

Investment in Environment and Labor

In Articles 12 and 13, the Parties acknowledge that it would be inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental and labor laws, respectively. This is a relatively new feature of the 2004 Model BIT that was also contained in the recent U.S.-Uruguay BIT. Both Articles also provide that a party may request consultations with the other party if it considers that the other party has offered such an encouragement. Article 12 provides that nothing in the Treaty shall be construed to prevent a party from adopting, maintaining, or enforcing any measure otherwise consistent with the Treaty that it considers appropriate to ensure that investment activity in its territory is conducted in a manner sensitive to environmental concerns.

ARTICLE 14 AND ANNEXES I, II, III

Non-conforming Measures

Article 14 establishes the framework for the Treaty's Annexes of non-conforming measures (NCMs), which provide the extent to which existing and future domestic measures are, or may be exempt from, BIT obligations. The Article specifies that a party may list measures that do not conform to the following four obligations: National Treatment (Article 3), Most-Favored-Nation Treatment (Article 4), Performance Requirements (Article 8), and Senior Management and Boards of Directors (Article 9). In the Annexes, each party lists existing measures to which any or all of four key obligations of the Treaty do not apply, and sectors or activities in which each party reserves the right to adopt future measures to which any or all of those obligations will not apply.

Annexes I, II, and III.

Existing NCMs of both Parties are listed in Annexes I and III. Annex III is reserved for existing financial services NCMs, and Annex II contains a list of the sectors or activities in which the Parties reserve the right to adopt future NCMs.

ARTICLE 16

Non-derogation

Article 16 stipulates that the Treaty does not derogate from other obligations or laws of a party that entitle an investor to more favorable treatment than that accorded by the Treaty.

ARTICLE 17

Denial of Benefits

Article 17 establishes that a party may deny the benefits of the Treaty to an investor of the other party that is an enterprise of the other party, and to its investments, if persons of a third country own or control the enterprise, and the denying party either (1) does not maintain diplomatic relations with the third country; or (2) adopts or maintains measures, such as foreign policy sanctions, with respect to the third country or to a person of the third country that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Treaty were accorded to the enterprise or to its investments. A party may also deny the benefits of the Treaty to an investor of the other party that is an enterprise of such other party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other party and persons of a non-party, or the denying party, own or control the enterprise.

ARTICLE 18

Essential Security

The Rwanda BIT contains a self-judging essential security exception. Article 18 states that nothing in the Treaty may be construed to preclude a party from applying measures that it considers necessary either to protect its own essential security interests or to fulfill its obligations with respect to the maintenance or restoration of international peace and security. The Treaty makes explicit the implicit understanding that 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. Article 18 also clarifies that nothing in the Treaty shall be construed to require a party to provide or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.

ARTICLE 20

Financial Services

Article 20 includes two provisions that relate to the regulation of financial markets. Paragraph 1 specifies that the Treaty does not prohibit a party from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of depositors, investors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or for the preservation of the integrity and stability of the financial system. Paragraph 2, the monetary and exchange rate policy exception, establishes that no provision of the Treaty applies to non-discriminatory measures of general application that may be taken by a party's central bank or monetary authority pursuant to monetary and related credit policies or exchange rate policies.

In the event that an investor-State claim is submitted to arbitration and the responding party invokes either of these provisions as a defense, specific provisions in Article 20 will apply to the dispute. If a party invokes one of the exceptions, it must within 120 days of the date the investor's claim is submitted to arbitration submit to the competent financial authorities of both Parties a written request for a joint determination on the issue of whether and to what extent one of the exceptions is a valid defense to the investor's claim. If the competent financial authorities agree that the defense is valid, the investor's claim will be barred from arbitration. If the competent financial authorities fail to reach a determination by the end of the 120-day period, the tribunal will decide the issue. Article 20 also contains provisions that apply to State-State disputes involving financial services.

ARTICLES 23–27

Submitting Investor Claims to Arbitration

Article 24 provides a mechanism for investors to submit to arbitration a claim that a party has breached an obligation under Articles 3 through 10 of the Treaty, an investment agreement, or an investment authorization.

Article 27 provides for the establishment of three-member arbitral tribunals, with one member appointed by each disputing party and a presiding arbitrator appointed by agreement between them. If, within 75 days of the submission of a claim to arbitration, one of the disputing Parties has failed to appoint an arbitrator, or the two disputing Parties have failed to agree on a presiding arbitrator, arbitrators may be named by the ICSID Secretary-General.

ARTICLES 28–33

Conduct of Investor-State Arbitration

Article 28 provides that, unless otherwise agreed, arbitrations must take place in a country that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. This article authorizes a party that is not involved in a dispute to make oral or written submissions to the Tribunal on questions of interpretation of the Treaty. Article 28 also grants the tribunal the power to address preliminary questions of law and issue interim measures of protection to preserve the rights of a disputing party, as well as interim decisions and awards. Article 29 ensures that all substantive documents submitted to or issued by the tribunal shall be made public, with the exception of certain proprietary or confidential information. Article 30 sets out the governing law that the Tribunal must follow.

ARTICLE 34

Awards

Under Article 34, when an arbitral tribunal makes a final award against a responding party, it may award separately or in combination (1) monetary damages and any applicable interest, and (2) restitution of property, in which case the award must provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. Punitive damages are not permitted. A disputing party may seek enforcement of an award under the New York Convention or the Convention on the Settlement of Investment Disputes (ICSID Convention). If the respondent in an arbitration fails to comply with a final award, the other party to the arbitration may ask a State-State arbitral panel to determine whether the respondent's failure to comply is inconsistent with the Treaty.

ARTICLE 37

State-to-State Dispute Settlement

Article 37 provides that any dispute between the Parties concerning the interpretation or application of the Treaty not resolved through consultations or other diplomatic channels shall be submitted on the request of either party to binding arbitration. Unless the Parties otherwise agree, the arbitration shall be governed by UNCITRAL arbitration Rules. State-State arbitration cannot be established for matters arising under Articles 12 (Environment) and 13 (Labor).

IV. Entry Into Force

The Treaty will enter into force thirty days after the date on which the Parties exchange instruments of ratification. The Treaty will remain in force for at least ten years and will continue in force thereafter unless one of the Parties terminates the Treaty. At the end of the ten year period, or any time thereafter, a party may terminate the Treaty by giving one year's written notice to the other party. Upon termination, the Treaty will remain in force for an additional ten years with respect to covered investments that existed at the time of termination.

V. Committee Action

The committee held a public hearing on the proposed BIT on November 10, 2009. The hearing was chaired by Senator Kaufman.[1] The committee considered the Treaty on December 14, 2010, and ordered the Treaty favorably reported by voice vote, with a quorum present, with the recommendation that the Senate give advice and consent to its ratification, as set forth in this report and the accompanying resolution of advice and consent to ratification. Senator Feingold asked to be recorded as voting against the Treaty.

VI. Committee Recommendations and Comments

The committee believes that the Rwanda BIT is in the interest of the United States and urges that the Senate act promptly to give advice and consent to ratification.

A. HUMAN RIGHTS IN RWANDA

The Executive Branch chose to negotiate a BIT with Rwanda, in part, based on its strong economic reform program, which has helped to rebuild the Rwandan economy since the 1994 genocide. The Rwandan government has opened its economy, improved its business climate, and embraced trade and investment as a means to boost economic development and help alleviate poverty. As a result, the Rwandan economy has grown by over 9 percent per year since 1995.

While Rwanda has served as an example of economic prosperity and stability and it has made genuine efforts to promote reconciliation after the horrific events of the 1990s, its human rights record remains more troubling. There are restraints on judicial independence and limits on freedoms of speech, press, association, and religion are widespread. In August, Rwanda's incumbent president, Paul Kagame, was re-elected with 93 percent of the vote, leading to increased criticism concerning the state of democracy and overall lack of opposition in Rwanda politics.

The committee takes such human rights concerns seriously and supports efforts to help foster democracy throughout the Great

[1] A transcript of the November 10, 2009 hearing is included as an appendix to Executive Report 111–3.

Lakes region, including Rwanda. Senator Kaufman raised this issue during the November 10, 2009 hearing on the Treaty. In response, Wesley Scholz, the Director of the Office of Investment Affairs in the Bureau of Economic, Energy, and Business Affairs at the Department of State testified:

> Rwanda's made admirable advances over the last decade in economic development and making significant progress in adjudicating an enormous backlog of genocide cases. Despite these advances, Rwanda continues to face significant challenges regarding reconciliation, human rights, democratization, as it continues its efforts to rebuild a society torn asunder by war and genocide. The United States and the international community continue to work toward the goal of a stable, growing, democratic Rwanda with improved respect for human rights. Specifically, the U.S. works with the Government of Rwanda to open the political space, increase civil liberties, and to strengthen the judiciary. The treaty itself can promote economic development and employment in Rwanda, as well as improve the rule of law and transparency. These objectives are complementary to our efforts to work with the Rwandan government to improve human rights and democracy in Rwanda. We also continue to use other channels to raise our views on issues of human rights and democratization. These include our bilateral dialogues and other contacts and the Annual AGOA Country Review and the Department's Annual Human Rights Report.

The committee shares the administration's view that the Treaty can improve the rule of law and transparency in Rwanda. At the same time, it urges the administration to ensure that promotion of human rights remains an essential aspect of our bilateral relationship with Rwanda. The committee looks forward to continued dialogue with the Executive Branch on this matter.

B. DOMESTIC IMPLEMENTATION OF THE RWANDA BIT

Following the Supreme Court's decision *in Medellin* v. *Texas,* 552 U.S. 491 (2008), the committee has taken special care to reflect in its record of consideration of treaties its understanding of how each treaty will be implemented, including whether the treaty is self-executing. As noted in Executive Report 110–25, the committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the Constitution, all treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed. In general, the committee does not recommend that the Senate give advice and consent to treaties unless it is satisfied that the United States will be able to implement them, either through implementing legislation, the exercise of relevant constitutional authorities, or through the direct application of the treaty itself in U.S. law.

The resolution of advice and consent contains a statement reflecting the committee's understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3–10 of the Treaty are self-executing and do not confer private rights of action enforceable in United States courts. The remaining provisions of the Treaty are not self-executing and do not confer private rights of action enforceable in United States courts.

Among the provisions of the treaty that are not self-executing are those related to two separate procedures for resolving disputes under the Treaty.

The first of these procedures allows investors of one party to the Treaty to bring to binding arbitration claims that the government of the other party has breached specified provisions of the Treaty. In the event that such an arbitration resulted in an award against the United States, the legal authority exists to enforce the award. Such authorities include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TIAS 6697) and related provisions of the Federal Arbitration Act (9 U.S.C. § 201 *et seq.*), as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (TIAS 6090) and related provisions of the Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. § 1650a).

The second of these procedures allows the two states parties to the Treaty (i.e. the United States and Rwanda) to submit disputes regarding the interpretation or application of the treaty to binding arbitration. No comparable treaty or statutory scheme governs the implementation in the United States of state-to state arbitration awards. In response to a question for the record on the authorities available to enforce such awards, Wesley Scholz, the Director of the State Department's Office of Investment Affairs, provided the following answer:

> State-to-State arbitrations are extremely rare. In fact, no State-to-State arbitrations have taken place to date under U.S. bilateral investment treaties. Nevertheless, there are various tools at our disposal for implementing a State-to-State award should the situation arise.
>
> Articles 3 through 10 of the BIT and other provisions that qualify or create exceptions to these Articles, such as Article 15, are self-executing but do not confer a private right of action. All remaining articles of the BIT are non-self-executing. As a result, should an arbitral decision conclude that U.S. state law is inconsistent with the BIT, the U.S. government could, if necessary, choose to initiate a legal action against the state to ensure compliance with a self-executing provision of the BIT. To the extent an arbitral decision determines that federal law is inconsistent with the BIT and an award addresses a self-executing provision of the BIT, then as long as the statute in question pre-dated the entry into force of the treaty, the later-in-time self-executing BIT provision would prevail over the earlier inconsistent statute.
>
> To the extent an award addresses Article 11 of the BIT, which is a non-self-executing provision of the BIT establishing investment protections and subject to State-to-State arbitration, the U.S. government could seek legislation where no other existing authority permitted it to comply with the award or take other appropriate steps, such as seeking to interpret the statute in a manner that is consistent with the arbitral decision. Under current U.S. law,

however, existing federal authorities, for example, the Administrative Procedures Act, 5 U.S.C. § 551 *et. seq.*, along with comparable state-level authorities, adequately ensure compliance with the transparency standards established in Article 11 of the BIT.

Finally, were a State-to-State tribunal to award money damages against the United States, funds to satisfy such an award could be sought from appropriated funds, if any, or from the Judgment Fund (31 U.S.C. § 1304) to the extent appropriate.

In brief, should a dispute between the parties lead to arbitration pursuant to the mechanism provided for in Article 37, there are a number of options available for implementing State-to-State arbitral decisions.

Under the approach outlined by the administration, state-to-state arbitral awards against the United States will not be directly enforceable in U.S. courts by private parties. Rather, in most cases (i.e. those involving awards that interpret Articles 3–10 of the treaty), the executive branch will rely on the self-executing character of substantive provisions of the treaty to give effect to arbitral awards that interpret those provisions. This approach will require U.S. courts to give substantial weight to the interpretations of such treaty provisions rendered by arbitral tribunals in cases brought by the U.S. Government to give effect to such awards. U.S. courts have not invariably agreed with treaty interpretations rendered by international courts and tribunals in cases to which the United States has been a party (*See, e.g., Sanchez-Llamas* v. *Oregon,* 548 U.S.C. 331 (2006)). However, in order to give effect to the shared intent of the Senate and the executive branch that the United States comply with its obligations in connection with the dispute settlement provisions of this Treaty and other bilateral investment treaties to which the United States is already a party, the committee expects that U.S. courts will not interpret the substantive provisions of bilateral investment treaties to preclude the United States giving effect to awards issued in state-to-state arbitrations to which the United States is a party if any other possible interpretation is available. (*cf. Murray* v. *Charming Betsy,* 6 U.S.C. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.")

There remains a category of disputes that could be referred to state-to-state arbitration involving provisions of the Treaty that are not self-executing. Such disputes could arise under Article 11 of the treaty, which addresses transparency measures to be taken by the two parties. Because Article 11 is not self-executing, the executive branch would be unable to rely on the authority of the Treaty itself as the basis for giving effect to an arbitral award related to that article. The executive branch has represented to the committee that existing federal and state laws regarding transparency measures governed by the treaty are fully adequate to satisfy U.S. obligations under the treaty, and that the possibility of an arbitral award against the United States relating to these provisions is accordingly extremely remote. In the event of such an adverse award, the executive branch has observed that it could seek legislation after the fact to provide the necessary authority to give effect to the award.

The committee has reservations about the soundness of the proposed approach for this category of disputes. Waiting until an actual case arises and an award has been rendered against the United States to secure authority to comply with the award leaves matters on an uncertain footing. Complications posed by the Congressional calendar, competing legislative priorities, and political considerations specific to the case may make it difficult for the executive branch to seek or to secure such authority in a timely manner. In an analogous case—relating to the International Court of Justice's judgment against the United States in the case of *Avena and Other Mexican Nationals* (*Mexico* v. *United States of America*) (I.C.J. Reports 2004, p. 12)—successive administrations have not formally proposed after the fact legislation to provide authority allowing the United States to comply with an adverse judgment. This has left the ability of the United States to meet its treaty obligations in a state of uncertainty, and caused concerns for our treaty partners, including our neighbor Mexico. The committee is concerned that failure to put the United States' ability to implement awards relating to non-self-executing provisions of this treaty on sounder footing at the time of ratification of the treaty creates the risk of this unfortunate situation repeating itself. The committee's concerns on this issue - which arise only with respect to a single, relatively narrow provision of this Treaty—do not lead it to decline to recommend ratification of the Treaty. However, the committee urges the executive branch to review its approach to ensuring compliance with adverse arbitral awards arising from non-self executing treaties (including as it relates to compliance with the ICJ judgment in the Avena case) and to identify effective means to facilitate U.S. compliance with its treaty obligations.

VII. Text of Resolution of Advice and Consent to Ratification

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed at Kigali on February 19, 2008 (Treaty Doc. 110-23), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

> Articles 3 through 10 and other provisions that qualify or create exceptions to these Articles are self-executing. With the exception of these Articles, the Treaty is not self-executing. None of the provisions in this Treaty confers a private right of action.

○