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zerbaijan Bilateral Investment Treaty

ZSigned August 1, 1997; Entered into Force August 2, 2001

106th Congress

2d Session

SENATE

Treaty Doc.

106-47 **A**

INVESTMENT TREATY WITH AZERBAIJAN

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF AZERBAIJAN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, WITH ANNEX, SIGNED, AT WASHINGTON ON AUGUST 1, 1997, TOGETHER WITH AN AMENDMENT TO THE TREATY SET FORTH IN AN EXCHANGE OF DIPLOMATIC NOTES DATED AUGUST 8, 2000, AND AUGUST 25, 2000

SEPTEMBER 12, 2000.-Treaty 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

U.S. GOVERNMENT PRINTING OFFICE

79-118 WASHINGTON : 2000 **A**

LETTER OF TRANSMITTAL

The White House, September 12, 2000.

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 Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on August 1, 1997, together with an amendment to the Treaty set forth in an exchange of diplomatic notes dated August 8, 2000, and August 25, 2000. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Treaty. **A**

The Bilateralism Treaty (B T) with Azerbaijan is the fourth such treaty signed between the United States and the Caucasus or the Asia country. The Treaty will promote U.S. interests and assist Azerbaijan in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thereby encourage the development of its private sector.

The Treaty fulfills the objectives of U.S. policy toward the bilateral domestic interests. A specific element of U.S. policy, reflected in this Treaty, is that U.S. interests abroad are foreign interests in the United States should receive equal treatment. Under the Treaty, the Parties also agree to consult on any bilateral law or administrative action. The Treaty includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation for expropriation; free trade of funds related to interests; freedom of interests from specified performance requirements; fair, equitable, and most-favored-nation treatment; and the interests of freedom to choose to resolve disputes with the host government through international arbitration.

According to the Secretary as soon as possible, and give advice and consent to ratification of the Treaty and related matters.

WILLIAM J. LINTON

LETTER OF SUBMITTAL

Department of State,

Washington, September 8, 2000.

The President,

The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan on creating the European Agreement and Reciprocal Promotion of interests, with Annex, signed at Washington on August 1, 1997, together with a memorandum on the Treaty and the exchange of diplomatic notes dated August 8, 2000 and August 25, 2000. According to the Treaty, with Annex and the related diplomatic notes, between the Secretary of State and the President to advise and consent to ratification.

The bilateralism Treaty (B T) with Azerbaijan is the fourth such treaty signed between the United States and the Caucasus or the Asia country. The Treaty is based on the mutual interests in policy cooperation and economic growth. This Treaty will assist Azerbaijan in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thereby encourage the development of its private sector. As U.S. policy, however, to advise potential treaty partners during B T negotiations has concluded that such treaty does not necessarily result in increases in private U.S. investment flows.

To date, 31 B Ts are in force for the United States--with Albania, Armenia, Bangladesh, Bulgaria, Cambodia, the Republic of the Congo, the Democratic Republic of the Congo (formerly Zaire), the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Greece, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Mongolia, Morocco, Panama, Poland, Romania, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, and Ukraine. Additionally, the Treaty with Azerbaijan, the United States has signed, but not yet brought into force, B Ts with Bahrain, Belarus, Bolivia, Bosnia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Nicaragua, Russia, and Uzbekistan.

The Office of the United States Trade Representative and the Department of State jointly led this B T negotiations, with assistance from the Department of Commerce, Treasury, and Energy.

The U.S.-Azerbaijan Treaty C

The Treaty, thereafter annexed on the 1994 U.S. prototype BIT and satisfies the U.S. principal objectives in bilateral investment treaty negotiations:

which for U.S. investment in the territory of thereafter annexed are covered. in

--Covered investments receive the better of national treatment or most-favored-nation (MFN) treatment, both while they are being established and thereafter, subject to certain specified exceptions.

--Specified performance requirements may not be imposed upon or enforced against covered investments.

--Expropriation is permitted only in accordance with customary international law standards.

--Parties are obligated to permit the transfer, in a freely usable currency, of all funds related to a covered investment, subject to exceptions for specified purposes.

--Investment disputes with the host government may be brought by investors, or by the covered investments, to binding international arbitration as an alternative to domestic courts.

These elements are further described in the following article-by-article analysis of the provisions of the Treaty: in Title and Preamble

The Title and Preamble state the goals of the Treaty. Foremost is the encouragement and protection of investment. Other goals include economic cooperation on investment issues; the stimulation of economic development; higher living standards; promotion of respect for internationally-recognized worker rights; and maintenance of health, safety, and environmental measures. While the Preamble does not impose binding obligations, its statement of goals may assist in interpreting the Treaty and in defining the scope of Party-to-Party consultations pursuant to Article VIII.

Article I (Definitions)

Article I defines terms used throughout the Treaty.

Company, Company of a Party

The definition of "company" is broad, covering all types of legal entities constituted or organized under applicable law and includes corporations, trusts, partnerships, sole proprietorships, ranches, joint ventures, and associations. The definition explicitly covers not-for-profit entities, as well as entities that are owned or controlled by the state. "Company of a Party" is defined as a company constituted or organized under the laws of that Party.

National

The Treaty defines "national" as a natural person who is a national of a Party under its own law. Under U.S. law, the term "national" is broader than the term "citizen." For example, a native of American Samoa is a national of the United States, but not a citizen.

Investment, Covered Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. Every kind of investment is specifically incorporated in the definition; moreover, it is explicitly noted that investment may consist or take the form of any of a number of interests, claims, and rights.

The Treaty provides an illustrative list of the forms an investment may take. Establishing a subsidiary as a company of making an investment. Other forms that an investment might take include equity and debt interests in a company; contractual rights; tangible, intangible, and intellectual property; and rights conferred pursuant to law such as licenses and permits. Investment as defined by the Treaty generally excludes claims arising solely from trade transactions, such as a sale of goods across a border that does not otherwise involve an investment.

The Treaty defines "covered investment" as an investment of a national or company of a Party in the territory of the other Party. An investment of a national or company is one that the national or company owns or controls, in

either direct or indirect. If direct ownership is concerned, there, intermediate companies or persons, including the third countries. Contract is specifically defined in the Treaty; ownership of over 50 percent of the voting stock of a company would remain a controlling interest, but in many cases the requirement could be satisfied by less than that proportion, rather than arrangements.

The bracketed nature of the definitions of "investment," "company," and "contract" of a Part II means that investments can be covered by the Treaty even if ultimate contracts are with a third party as a Part II member, however, despite the benefits of the Treaty in the limited circumstances described in Article XII.

State Enterprise, Investment Authorization, Investment Agreement

The Treaty defines "state enterprise" as a company owned, controlled through ownership interests, by a Part II member. Regulation of contracts involving a company does not qualify it as a state enterprise.

The Treaty defines an "investment authorization" as an authorization granted by the foreign investment authority of a Part II member to an investment contract with a company of the other Part.

The Treaty defines an "investment agreement" as a written agreement between the parties authorities of a Part II member to an investment contract with a company of the other Part that (1) grants rights with respect to natural resources or other assets controlled by the parties authorities and (2) the investment, that is, a company relies upon the establishment of a contractual relationship. This definition thus excludes agreements with subparties authorities (including U.S. States) as well as agreements arising from various types of regulatory activities of the parties government, including, in the tax area, rulings, customs agreements, and advance pricing agreements.

ICSID Convention, Centre, UNCITRAL Arbitration Rules

The "ICSID Convention," "Centre," and "UNCITRAL Arbitration Rules" are explicitly defined to make the text brief and clear.

Article II (Treatment of Investment)

Article II contains the Treaty's major obligations with respect to the treatment of covered investments.

Paragraph 1 generally ensures the better of either a most-favored-nation treatment or the better of the two standard phases of investment. It thus prohibits, outside of exceptions listed in the Annex, "screening" the basis of either a treatment or the investment process, as well as either a treatment-based or establishment measures. For purposes of the Treaty, "either a treatment" means treatment less favorable than that which a Part II member accords, in like situations, to investments in its territory of its own nationals or companies. For purposes of the Treaty, "most-favored-nation treatment" means treatment less favorable than that which a Part II member accords, in like situations, to investments in its territory of either a third country. The Treaty obliges each Part II member to provide whichever of either a treatment or most-favored-nation treatment is the most favorable. This is defined by the Treaty as "either a most-favored-nation treatment." Paragraph 1 explicitly states that the parties to a most-favored-nation treatment obligation will extend to state enterprises in their provision of goods and services to covered investments.

Paragraph 2 states that each Part II member may adopt or maintain exceptions to the either a most-favored-nation treatment standard with respect to the sectors or matters specified in the Annex. Further restrictive measures are permitted in each sector (The specific exceptions are discussed in the section entitled "Annex" below.) In the Annex, Parties may take exceptions to the obligation to provide either a most-favored-nation treatment; there are sectoral exceptions to the rest of the Treaty's obligations. Finally, in addition to the exceptions under this provision, a Part II member may require the divestment of a preexisting covered investment.

Paragraph 2 also states that a Part II member is required to extend to covered investments either a most-favored-nation treatment with respect to procedures provided for in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights. This provision clarifies that certain procedures preferred or granted under intellectual property conventions, such as the Patent Cooperation Treaty, fall outside the BIT. This exception applies to the Uruguay Round's Agreement on Trade-Related Aspects of Intellectual Property Rights.

on Trade e a ed spec s of In e ec ua Proper y igh s (T IPS) and he Nor h merican ree Trade greemen (N FT).

Paragraph se s ou a minimum s andard of Bea men based on s andards found in cus omary in erna iona aw. The ob iga ions o accord "fair and equi abe rea men " and "fu pro ec ion and securi y" are exp ici y ci ed, as is each Par y's ob iga ion no o impair, hrough unreasonab e and discrimina ory means, he managemen , conduc , opera ion, and sa e or o her disposi ion of covered inves men s. The genera reference o in erna iona aw a so imp ici y incorpora es o her fundamen a ru es of cus omary in erna iona aw regarding he rea men of foreign inves men . However, his provision does no incorpora e ob iga ions based on o her in erna iona agreemen s.

Paragraph 4 requires ha each Par y provide effec ive means of asser ing c aims and enforcing righ s wi h respec o covered inves men s.

Paragraph 5 ensures he ransparency of each Par y's regu a ion of covered inves men s.

Article III (Expropriation)

ric e III incorpora es in o he Trea y cus omary in erna iona aw s andards for expropria ion. ric e III a so inc udes de aid ed provisions regarding he comp u a ion and paymen , adequa e, and effec ive compensa ion.

Paragraph 1 describes he ob iga ions of he Par ies wi h respec o expropria ion and na iona iza ion of a covered inves men . These ob iga ions app y o bo h direc expropria ion and indirec expropria ion hrough measures " an amoun o expropria ion or na iona iza ion" and hus app y o "creeping expropria ions" a series of measures ha effec ive y amoun s o an expropria ion of a covered inves men wi hou aking i e.

Paragraph 1 fur her bars a expropria ions or na iona iza ions excep hose ha are for a pub ic purpose; carried ou in a non discrimina ory manner; in accordance wi h due process of aw; in accordance wi h he genera princip es of rea men provided in ric e II(); and subjec o "prompt , adequa e, and effec ive compensa ion."

Paragraph 2, , and 4 more fu y describe he meaning of "prompt , adequa e, and effec ive compensa ion." The guiding princip e is ha he inves or shou d be made who e.

Article IV (Compensation for Damages Due to War and Similar Events)

Paragraph 1 en i es inves men s covered by he Trea y o na iona and MFN rea men wi h respec o any measure re a ing o osses suffered in a Par y's erri ory owing o war or o o her armed conf ic , civi dis urbances, or simi ar even s. Paragraph 2, by con ras , crea es an uncondi iona ob iga ion o pay compensa ion for such osses when he osses resu from requisitioning or from des ruc ion no required by he necessi y of he si ua ion.

Article V (Transfers)

ric e V Pro ec s inves ors from cer ain government exchange con ros ha imi curren and capi o accoun ransfers, as we as imi s on inward ransfers made by screening au hori ies and, in cer ain circums ances, imi s 3 on re urns in kind.

In paragraph 1 each Par y agrees o "permi a ransfers re a ing o a covered inves men o be made free y and wi hou de ay in o and ou of i s erri ory." Paragraph 1 a so provides a is of ransfers ha mus be a owed. The is is non excusive, and is in ended o pro ec fows o bo h affi ia ed and non affi ia ed en i es.

Paragraph 2 provides ha each Par y mus permi ransfers o be made in a "free y usab e currency" a he marke ra e of exchange prevail ing on he da e of ransfer. "Free y usab e" is a erm used by he In erna iona Mone ary Fund; a presen here are five "free y usab e" currencies; he U.S. do ar, Japanese yen, German mark, French franc, and Bri ish pound s er ing.

In paragraph , each Par y agrees o permi re urns in kind o be made where such re urns have been au horized by an inves men au horiza ion or wri en agreemen be ween a Par y and a covered inves men or a na iona or company of he o her Par y. 3

Under paragraph a, the investor can submit an investment dispute to binding arbitration months after the dispute arises; provided that the investor has not submitted the claim to a court or administrative tribunal of the Party or invoked a dispute resolution procedure previously agreed upon. The investor may choose among the International Centre for Settlement of Investment Disputes (ICSID) Convention Arbitration, the Additional Facility of ICSID if Convention Arbitration is not available, ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or any other arbitral institution or rules agreed upon by both parties to the dispute.

Before or during such arbitral proceedings, however, paragraph b provides that an investor may seek, without affecting its right to pursue arbitration under this Treaty, interim injunctive relief not involving the payment of damages from local courts for administrative tribunals of the Party that is a party to the dispute for the preservation of its rights and interests. This paragraph does not alter the power of the arbitral tribunals to recommend or order interim measures they may deem appropriate. I

Paragraph 4 constitutes each Party's consent to the submission of investment disputes to binding arbitration in accordance with the choice of the investor.

Paragraph 5 provides that any non-ICSID Convention arbitration shall take place in a country that is a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards. This provision facilitates enforcement of arbitral awards. I

In addition, in paragraph 6, each Party commits to enforcing arbitral awards rendered pursuant to this Article. I The Federal Arbitration Act 9 U.S.C. 1 et seq. satisfies the requirement for the enforcement of non-ICSID Convention awards in the United States. The Convention on the Settlement of Investment Disputes Act of 1966 22 U.S.C. 1650-1650a provides for the enforcement of ICSID Convention awards.

Paragraph 7 ensures that a Party may not assert as a defense, or for any other reason, that the investor involved in the investment dispute has received or will receive reimbursement for the same damages under an insurance or guarantee contract.

Paragraph 8 provides that, for the purposes of this article, the nationality of a company in the host country will be determined by ownership or control, rather than by place of incorporation. This provision allows a company that is a covered investment to bring a claim in its own name.

Article X (Settlement of Disputes Between the Parties)

Article X provides for binding arbitration of disputes between the United States and Azerbaijan concerning the interpretation or application of the Treaty that are not resolved through consultations or other diplomatic channels. The article specifies various procedural aspects of such arbitration proceedings, including time periods, selection of arbitrators, and distribution of arbitration costs between the Parties. The article constitutes each Party's prior consent to such arbitration.

Article XI (Preservation of Rights)

Article X clarifies that the Treaty does not derogate from any obligation a Party might have to provide better treatment to the covered investment than is specified in the Treaty. Thus, the Treaty establishes a floor for the treatment of covered investments. A covered investment may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation. e.g., to provide a tax holiday assumed by a Party with respect to that covered investment.

Article XII (Denial of Benefits)

Article X preserves the right of each Party to deny the benefits of the Treaty to a company owned or controlled by nationals of a non-Party country with which the denying Party does not have normal economic relations, e.g., a country to which it is applying economic sanctions. For example, at this time the United States I does not maintain normal economic relations with, among other countries, Cuba and Libya.

Article _____ permits each Party to deny the benefits of the Treaty to a company of the other Party if the company is owned or controlled by non-Party nationals and if the company has no substantial business activities in the Party where it is established. Thus, the United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Azerbaijan if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Azerbaijan that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, Azerbaijan.

Article XIII (Taxation)

Article _____ excludes tax matters generally from the coverage of the B T, on the basis that tax matters should be dealt with in bilateral tax treaties. However, Article _____ does not preclude a national or company from bringing claims under Article _____ that taxation provisions in an investment agreement or authorization have been violated. In addition, the dispute settlement provisions of Articles _____ and _____ apply to tax matters in relation to alleged violations of the B T's expropriation article.

Under paragraph 2, a national or company that asserts in a dispute that a tax matter involves expropriation may submit that dispute to arbitration pursuant to Article _____ only if 1 the investor has first referred to the competent tax authorities of both Parties the issue of whether the tax matter involves an expropriation, and 2 the tax authorities have not both determined, within 9 months from time of referral, that the matter does not involve expropriation. The "competent tax authority" of the United States is the Assistant Secretary of the Treasury for Tax Policy, who will make such a determination only after consultation with the Inter-Agency Staff Coordinating Group on Expropriations.

Article XIV (Measures Not Precluded)

The first paragraph of Article _____ reserves the right of a Party to take measures for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests.

International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter V of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. 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.

The second paragraph permits a Party to prescribe special formalities in connection with covered investments, provided that these formalities do not impair the substance of any Treaty rights. Such formalities could include reporting requirements for covered investments or for transfers of funds, or incorporation requirements.

Article XV (Application to Political Subdivisions and State Enterprises of the Parties)

Paragraph 1 a makes clear that the obligations of the Treaty are applicable to all political subdivisions of the Parties, such as provincial, State, and local governments.

Paragraph 1 recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided by a State to U.S. out-of-State residents and corporations.

Paragraph 2 extends a Party's obligations under the Treaty to its state enterprises in the exercise of any delegated governmental authority. This paragraph is designed to clarify that the exercise of governmental authority by a state enterprise must be consistent with a Party's obligations under the Treaty. U

Article XVI (Entry Into Force, Duration, and Termination)

Paragraph 1 stipulates that the Treaty enters into force 30 days after exchange of instruments of ratification. The Treaty remains in force for a period of 10 years and continues in force thereafter unless terminated by either Party as provided in paragraph 2.

Paragraph 2 permits a Party to terminate the Treaty at the end of the initial 10-year period, or at any later time, by giving 90 days' written notice to the other Party. Paragraph 3 also provides that the Treaty applies to covered investments existing at the time of entry into force as well as to those established or acquired thereafter. The Treaty does not state an intention by the Parties to apply the Treaty's provisions retroactively. Thus, under customary international law, the Treaty does not apply to disputes with respect to acts or facts which took place before the Treaty came into force or to any situation which ceased to exist before the date of entry into force of the Treaty.

Paragraph 3 provides that, if the Treaty is terminated, all investments that qualified as covered investments on the date of termination (i.e., 90 days after the date of written notice of termination) continue to be protected under the Treaty for 10 years from that date as long as the investments qualify as covered investments. A Party's obligation with respect to the establishment and acquisition of investments would lapse immediately upon the date of termination of the Treaty.

Paragraph 4 stipulates that the Annex shall form an integral part of the Treaty.

Annex

U.S. bilateral investment treaties allow for exception to national and MFN treatment, where the Parties' domestic regime does not afford national and MFN treatment, or where treatment in certain sectors or matters is negotiated in and governed by other agreements. Future derogation from the national treatment obligation of the Treaty are generally permitted only in the sectors or matters listed in the Annex, pursuant to Article II(2), and must be made on an MFN basis unless otherwise specified therein.

During a review of the Treaty in preparation for its submission to the Senate for advice and consent to ratification, the Parties determined that there was an ambiguity in the Annex. This ambiguity reflected a misunderstanding regarding whether Azerbaijan had taken an exception from its national and MFN treatment obligation for investment services. To resolve this ambiguity, the Parties agreed in an exchange of notes to amend the Treaty. Specifically, as amended, the Annex now takes an explicit exception from the Parties' respective national and MFN treatment obligation for investment services, and in so doing, removes a U.S. commitment to limit its exception for investment services. The Annex, as amended, is further described below.

Under a number of statutes, many of which have a long historical background, the U.S. federal government or State may not necessarily treat investments of national or companies of Azerbaijan as they do U.S. investments or investments from a third country. Paragraphs 1 and 2 of the Annex list the sectors or matters subject to U.S. exception.

The U.S. exception from its national treatment obligation are: atomic energy; customs brokerage; license for broadcast, common carrier, or aeronautical radio station; COMSAT; subsidies or grants, including government-guaranteed loans, guarantees, and investment; State and local measures exempt from Article XXIV of the North American Free Trade Agreement pursuant to Article XXVIII thereof; and landing of submarine cable.

The U.S. exception from its national and MFN treatment obligation are: fisheries; air and maritime transport, and related activities; banking, investment, securities, and other financial services; and one-way satellite transmission of Direct-to-Home (DTH) and Direct Broadcasting Satellite (DBS) television services and of digital audio services.

The Treaty is the first to include a U.S. exception from its national and MFN treatment obligation for one-way satellite transmission of DTH and DBS television services and of digital audio services. This exception was added to the prototype BIT following conclusion of the 1997 WTO Basic Telecommunication Services Agreement to be consistent with the U.S. position taken with respect to that agreement. The Treaty is the first BIT negotiated after conclusion of the 1997 WTO Basic Telecommunication Services Agreement.

Th Gø rnmén h Uni d S a s merica and h Gø rnmén h R public z rbaijan (h r ina r k
h "Par i s");

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Agreeing h hese b ec ives c n be chieved wi h u rel xing he l h, s fe y nd envirn^{me}n l^{me} sures f gener l lic i n; nd

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ARTICLE I

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(b) "c ny f P ry"^{me} ns c ny c ns i u ed r rg nized under he l ws f h P ry; j

(c) "n i n l" f P ry^{me} ns n ur l ers n wh is n i n l f h P ry under is lic ble l w;

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(i) c ny;

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(v) in ellec u l r er y, including: c y righ s nd rel ed righ s, en s, righ s in l n v rie ies, indus ri l designs, righ s in se^{mi}c nduc rly u designs, r de se cre s, including kn w-h w nd c nfiden i l business inf r i n, r de nd service rks, nd r de n^{me}s; nd

(vi) righ s c nferred ursu n l w, such s licenses nd er s;

(e) "c vered inves^{me}n" ns n inves^{me}n f n i n l r c ny f P ry in he erri ry f he her P ry;

(f) "s e en er rise" ^{me} ns c ny wned, r c n r lled jhr ugh wnershi in eres s, by P ry; j

(g) "inves^{me}n u h riz d n" ^{me} ns n u h riz i n gr ned by he f reign inves^{me}n u h ri y f P ry c vered inves^{me}n r n i n l r c ny f he her P ry;

(h) "inves^{me}n gree n" ns wri en gree^{me}n be ween he n i n l u h ries f P ry nd c vered inves^{me}n r n i n l r c ny f he her P ry h (i) gr n s righ s wi h res ec n ur l j

resources or other assets controlled by the treaty authorities (ii) the investment, treaty or compulsory relies upon the establishment or acquisition covering investment.

(i) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for Signature, March 18, 1965;

(j) "Centre" means the International Centre for Settlement of Investment Disputes established by the ICSID Convention;

(k) "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

ARTICLE II

1. With respect to the establishment, acquisition, expansion, management, conduct, operation or other disposition of covering investments, each Party shall accord treatment no less favourable than that accorded, in like situations, to investments in its territory of its own nationals or companies (hereafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereafter "most favoured nation treatment"), whichever is most favourable (hereafter "national treatment or most favoured nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord treatment most favourable to treatment to covering investments.

2. (a) A Party may opt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In opting such exceptions, a Party may not require the investment, in whole or in part, of covering investments existing at the time the exception becomes effective.

(b) The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

3. (a) Each Party shall at times accord to covering investments fair and equitable treatment and full protection and security, without discrimination, no less favourable than that required by international law.

(b) Neither Party shall in any way impair by unreasonable discrimination measures the management, conduct, operation, or operation or other disposition of covering investments.

4. Each Party shall provide effective means of asserting claims and enforcing rights with respect to covering investments.

5. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, judicial decisions, that pertains to or affect covering investments are promptly published or otherwise made publicly available.

ARTICLE III

1. Neither Party shall expropriate or nationalize covering investments either directly or indirectly through measures that amount to expropriation or nationalization ("expropriation") except for public purpose; in accordance with the law; upon payment of prompt, adequate and effective compensation; and in accordance with the process of the general principles of the treaty provided for in Article II(3).

2. Compensation shall be paid at once; be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); and be freely transferable. The fair market value shall not reflect any change in value occurring because of expropriation and become known before the date of expropriation.

3. If the fair market value is determined in a freely usable currency, the compensation shall be expressed in the fair market value of the date of expropriation, plus interest at a commercial rate for the currency, accrued from the date of expropriation until the date of payment.

4. If the fair value is denominated in a currency that is not freely usable, the compensation paid -- converted into the currency of payment at the rate of exchange prevailing on the date of payment -- shall be no less than:

() the fair value on the date of expiration, converted into freely usable currency at the rate of exchange prevailing on that date, plus

(b) net cost, including all reasonable costs for that freely usable currency, accrued from the date of expiration until the date of payment.

ICLE IV

RT Each Party shall indemnify most favored nation treatment to covered investments, such as dividends, interest, and losses that investments suffer in its territory owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or social events.

2. Each Party shall accord investment on a parity basis with paragraphs 2 through 4 of Article III, in the event that covered investments suffer losses in its territory owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or social events, the result of:

() equitization of all property of such investments by the Party's forces or authorities, or

(b) destruction of all property of such investments by the Party's forces or authorities that was not equated by the necessity of the situation.

ICLE V

RT Each Party shall permit the transfer of proceeds of covered investment to be freely and without delay into and out of its territory. Such transfers include:

() contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all property of the investment of from the property of complete liquidation of the investment;

(c) net cost, including payments, management fees, and technical assistance and other fees;

(d) payments under contract, including long-term lease;

(e) compensation pursuant to Articles III and IV, and payments arising out of investment dispute.

2. Each Party shall permit transfers to be freely usable currency at the rate of exchange prevailing on the date of transfer.

3. Each Party shall permit a treaty to be designated or specified in an investment authorization, investment agreement, or other written agreement between the Party and covered investment or national company of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent transfer through the equitable, non-discriminatory and good faith application of laws relating to:

() bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal offenses; or

(d) enforcement of laws or judgments not adjudicated to proceedings. **A**

ICLE VI

RT

Neither Party shall undertake or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of covered investment, nor require investment (including non-covered investment or undertaking in connection with the receipt of government permission or authorization)

() to achieve particular level or percentage of local content, or to purchase, use or otherwise give preference to product or service of domestic origin or from domestic source;

(b) to limit import of the investment of product or service in relation to particular volume or value of production, export or foreign exchange earnings ;

(c) to export particular type, level or percentage of product or service, either generally or to specific market region;

(d) to limit the investment of product or service in the Party's territory in relation to particular volume or value of production, export or foreign exchange earnings ;

(e) to transfer technology, production process or other proprietary knowledge to nation or company in the Party's territory, except pursuant to national order, contract or undertaking that is enforced by court, administrative tribunal or competition authority to remedy alleged or adjudicated violation of competition law ; or

(f) to carry out particular type, level or percentage of research and development in the Party's territory . :

Such requirements do not include condition for the receipt or continued receipt of investment goods.

ARTICLE VII

1. () Subject to its respective rights to the entry and sojourn of aliens, each Party shall permit to enter and to reside in its territory in relation to the other Party for the purpose of establishing, developing, administering or dividing on the operation of investment to which the, or company of the other Party that the two have contracted or are in the process of contracting substantial amount of capital or other resources .

(b) Neither Party shall, in granting entry under paragraph 1(), require labor certification test or other procedure of immigration effect, or passport requirements.

2. Each Party shall permit covered investment to engage top management personnel of their choice, regardless of nationality .

ARTICLE VIII

The Parties agree to consult promptly, on the request of either, to resolve any dispute in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty or to the realization of the objective of the Treaty .

ARTICLE IX

1. For purpose of this Treaty, an investment dispute is a dispute between a Party and a nation or company of the other Party arising out of or relating to investment authorization, investment agreement or alleged breach of a right conferred, created or recognized by this Treaty with respect to covered investment.

2. A nation or company that is a party to an investment dispute shall submit the dispute for resolution under one of the following alternative

() to the court or administrative tribunal of the Party that is a party to the dispute; or

(b):in accordance with an applicable, previously agreed dispute-settlement procedure ; or

(c) in accordance with the terms of paragraph 3.

3. () Provided that the nation or company concerned has not submitted the dispute for resolution under paragraph 2 () or (b), and that three months have elapsed from the date on which the dispute arose, the :

national or o an on rn d^{ma} sub^{mi}tt th dis ut for s ttl nt b binding arbitration:

(i) to th C ntr , if th C ntr is availabl ; or

(ii) to th Additional Fa ilit of th C ntr , if th C ntr is not availabl ; or

(iii) in a ordan with th U CITRAL Arbitration Rul s; or

(iv) if agr d b both arti s to th dis ut , to an oth r arbitration institution or in a ordan with an oth r arbitration rul s.

(b) a national or o an , notwithstanding that it^{ma} hav sub^{mi}tt d a dis ut to binding arbitration und r aragra h 3(a), s k int ri injun tiv r li f, not involving th a nt of da^{ma}g s, b for th judi ial or ad inistrativ tribunals of th Part that is a art to th dis ut , rior to th institution of th arbitral ro ding or during th ro ding, for th r s rvation of its rights and int r sts.

4. Ea h Part h r b ons nts to th sub^{mi}ssion of an inv st nt dis ut for s ttl nt b binding arbitration in a ordan with th hoi of th national or o an und r aragra h 3(a)(i), (ii), and (iii) or th^{mu}tual agr nt of both arti s to th dis ut und r aragra h 3(a) (iv). This ons nt and th sub^{mi}ssion of th dis ut b a national or o an und r aragra h 3(a) shall satisf th r quir nt of:

(a) Cha t r II of th ICSID Conv ntion (Jurisdi tion of th C ntr) and th Additional Fa ilit Rul s for writt n ons nt of th arti s to th dis ut ; and

(b) Arti l II of th Unit d ations Conv ntion on th R ognition and Enfor nt of For ign Arbitral Awards, don at w York, Jun 10, 1958, for an "agr nt in writing."

5. An arbitration und r aragra h 3(a) (ii), (iii) or (iv) shall b h ld in a stat that is a art to th Unit d ations Conv ntion on th R ognition and Enfor nt of For ign Arbitral Awards, don at w York, Jun 10, 1958.

6. An arbitral award r nd r d ursuant to this Arti l shall b final and binding on th arti s to th dis ut . Ea h Part shall arr out without d la th rovisions of an su h award and rovid in its t rritor for th nfor nt of su h award.

7. In an ro ding involving an inv st nt dis ut , a Part shall not ass rt, as a d f ns , ount r lai^m, right of s t-off or for an oth r rason, that ind^{mn}ifi ation or oth r o nsation for all or art of th all g d da ag s has b n r iv d or will b r iv d ursuant to an insuran or guarant ontra t.

8. For ur os s of Arti l 25(2)(b) of th ICSID Conv ntion and this Arti l , a o an of a Part that, i diat l b for th o urr n of th v nt or v nts giving ris to an inv st nt dis ut , was a ov r d inv st nt, shall b tr at d as a o an of th oth r Part .

ARTICLE X

1. An dis ut b twe n th Parti s on rning th int r r tation or a li ation of th Tr at , that is not r solv d through onsultations or oth r di lo^{ma}ti hann ls, shall b sub tt d u on th r qu st of ith r Part to an arbitral tribunal for binding d ision in a ordan with th a li abl rul s of int rnational law. In th abs n of an agr nt b th Parti s to th ontrar , th U CITRAL Arbitration Rul s shall gov rn, x t to th xt nt th s rul s ar (a) difi d b th Parti s or (b) ^{mo}difi d b th arbitrators unl ss ith r Part obj ts to th ro os d difi ation.

2. Within two nths of r i t of a r qu st, a h Part shall a oint an arbitrator. Th two arⁿitrators shall s l t a third arbitrator as hair^{ma}n, who shall b a national of a third stat . Th U CITRAL Arbitration Rul s a li abl to a oirting rs of thr - r an ls shall a l^{mu}tatis^{mu}tandis to th a oint nt of th arbitral an l x t that th a ointing authorit r f r n d in thos rul s shall b th S r tar Gen ral of th C ntr . No

(b) With respect to the treatment accorded by a State, Treaty or other arrangement of the United States of America, national treatment means treatment no less favorable than the treatment accorded thereby, in like situation, to investment of national of the United States of America resident in, and companies legally constituted under the laws and regulation of, other States, Treaty or other arrangement of the United States of America

2 A Party's obligation under this Treaty shall apply to a treatment in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party

ARTICLE XVI

1 This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force until terminated in accordance with paragraph 2. It shall apply to covered investment existing at the time of entry into force as well as to those established thereafter

2 A Party may terminate this Treaty at the end of the initial ten year period or at any time thereafter by giving notice in writing to the other Party

3 For ten years from the date of termination, all other Articles shall continue to apply to covered investment established prior to the date of termination, except insofar as the Articles extend to the establishment or acquisition of covered investment

4 The Annex shall form an integral part of this Treaty

DONE in duplicate at Washington this first day of August, 1997, in the English and Azerbaijani languages, a handwritten equally authentic

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE REPUBLIC OF AZERBAIJAN:

[Signature]

[Signature]

ANNEX

1 The Government of the United States of America may adopt to maintain exceptions to the obligation to accord national treatment to covered investment in the telecommunications sector with respect to the matters identified below:

atomic energy; submarine cables; lines for broadcast, common carrier, aeronautical radiotelephony; COMSAT; submarine cables, including government-owned cables, guarantee and insurance; telecommunication measurement equipment; Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables

Most favored nation treatment shall be accorded in the telecommunications sector and matters identified above

2 The Government of the United States of America may adopt to maintain exceptions to the obligation to accord national and most favored nation treatment to covered investment in the telecommunications sector with respect to the matters identified below:

financial; air and maritime transportation, and related activities; banking, utilities, and other financial services; and on-way satellite communication of Direct-to-Home (DTH) and Direct Broadcast Satellite (DBS) television services and of digital audio services

3 The Government of the United States of America may adopt to maintain exceptions to the obligation to accord national and most favored nation treatment to covered investment, provided that the exceptions do not result in treatment under this Treaty less favorable than the treatment that the Government of the United States of America has undertaken to accord in the North American Free Trade Agreement with respect to another party to that Agreement, in the telecommunications sector with respect to the matters identified below: .

insurance

The Government of the Republic of Azerbaijan may adopt or maintain exceptions to the obligation to accord national treatment to covered investments in the sectors or with respect to the matters specified below

ownership of land, its subsoil, water, plant and animal life, and other natural resources; ownership of real estate (during the transition period to a market economy); ownership or control of television and radio broadcasting and other forms of mass media; air transportation; preparation of stocks and bond notes issued by the Government of the Republic of Azerbaijan; fisheries; and construction of pipelines for transportation of hydrocarbons

Most favored nation treatment shall be accorded in the sectors and matters indicated above

5 The Government of the Republic of Azerbaijan may adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the sectors or with respect to the matters specified below

banking, securities, and other financial services

EMBASSY OF THE

UNITED STATES OF AMERICA

No. 222/2000

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Azerbaijan Republic and refers to the previous correspondence between our Governments regarding the Bilateral Investment Treaty

Text of U.S. Note

Excellency

I have the honor to refer to the Treaty between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on August 1, 1997 ("the Treaty")

In conjunction with the preparation of documents for submission of the Treaty to the U.S. Senate for its advice and consent to ratification, representatives of our two governments have discussed the intentions of the parties regarding the application of the national treatment and most-favored-nation obligations of the Treaty to our respective insurance sectors

Our representatives have concluded that an amendment to the Treaty would provide greater clarity regarding our respective undertakings. Based on those discussions, I have the honor to propose that the Annex to the Treaty is amended as follows:

1. The phrase "banking, securities, and other financial services;" in Paragraph 2 of the Annex shall read "banking, securities, insurance, and other financial services;"

2. Paragraph 3 of the Annex shall be deleted in its entirety and the subsequent paragraphs of the Annex shall be renumbered accordingly.

3. The phrase "banking, securities, and other financial services" in Paragraph (as renumbered) of the Annex shall read "banking, securities, insurance, and other financial services"

If the foregoing is acceptable to your government, I have the further honor to propose that this note, together with your reply to that effect, shall constitute an agreement between the two governments amending the Treaty, which agreement shall be subject to ratification and shall enter into force upon entry into force of the Treaty.

Accept, Excellency, the renewed assurances of my highest consideration:

Text of draft GOAJ response

Excellency:

I have the honor to refer to your note of (date) regarding the Treaty between the Government of the Republic of Azerbaijan and the Government of the United States of America Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on August 1, 1997 ("the Treaty"), the substantive portions of which note read as follows:

"In conjunction with the preparation of documents for submission of the treaty to the U.S. Senate for its advice and consent to ratification, representatives of our two governments have discussed the intentions, of the parties regarding the application of the national treatment and most-favored-nation obligations of the treaty to our respective insurance sectors.

Our representatives have concluded that an amendment to the Treaty would provide greater clarity regarding our respective undertakings. Based on those discussions, I have the honor to propose that the Annex to the treaty is amended as follows:

1. The phrase "... banking, securities, and other financial services; ..." in Paragraph 2 of the Annex shall read "... banking, securities, insurance, and other financial services; ..."
2. Paragraph 3 of the Annex shall be deleted in its entirety and the subsequent paragraphs of the Annex shall be renumbered accordingly.
3. The phrase "... banking, securities, and other financial services" in Paragraph 4 (renumbered) of the Annex shall read "... banking, securities, insurance, and other financial services."

If the foregoing is acceptable to your government, I have the further honor to propose that this note, together with your reply to that effect, shall constitute an agreement between the two governments amending the treaty, which agreement shall be subject to ratification and shall enter into force upon entry into force of the treaty."

I have the further honor, on behalf of my government, to accept the foregoing proposal and to confirm that your note and this reply constitute an agreement between the two governments that will enter into force upon entry into force of the treaty. Accept, excellency, the renewed assurances of my highest consideration.

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

[Embassy Baku Seal]

Embassy of the United States of America,

Baku, August 8, 2000

[Hand-written note states: "This is a certified copy of the original note."]

DEPARTMENT OF STATE

OFFICE OF LANGUAGE SERVICES

(Translation)

LS No. 09-2000-0033

OKR/

Aeri

REPUBLIC OF AZERBAIJAN

MINISTRY OF FOREIGN AFFAIRS

TO: THE EMBASSY OF THE UNITED STATES OF AMERICA

BAKU

August

No.: 13 6

The Republic of Azerbaijan Ministry of Foreign Affairs sends its best regards to the Embassy of the United States of America and would like to point out these comments regarding the Bilateral Investment Contract between the two countries:

Dear Sir :

We have the honor to refer to the Embassy's note numbered / and dated August 8 . This note was related to the contract ("Contract") and its amendment which was signed on August 1 in Washington between the Governments of the United States of America and the Republic of Azerbaijan for the promotion and protection of investment. The main essence of the note was:

"The representatives of both Governments have discussed the intentions of the two sides regarding the application of national treatment and also our obligations for a better treatment in the area of insurance and a deepening the documents related to the Contract in order to present them to the United States Senate for advice and ratification. Our representatives have concluded that an amendment to the Contract would clarify the obligations on our part. Based on the subject under discussion I propose the amendment to the Addition of the Contract to be changed as following:

1. In the second paragraph the statement of ". . . bank procedures securities and the other financial services. . ." to be changed to ". . . bank procedures securities insurance and the other financial services. . ."

. The third paragraph of the amendment to be taken out and the other paragraphs to be numbered accordingly. r

3. The fourth paragraph of the amendment (after enumeration) to be changed as ". . . bank procedures securities insurance and the other financial services. . ."

If these proposals are acceptable to your Government I also propose that this note along with your reply shall serve as an agreement between the two Governments related to the amendment to the Contract. This agreement shall enter into force after the ratification and on the same date when the Contract takes effect.

I would like to inform you on behalf of my Government that we accept the abovementioned proposal. We also approve that your note along with this reply shall constitute the agreement between the two Governments and it shall enter into force at the same time with the Contract.

Please accept my highest regards.

The Republic of Azerbaijan Ministry of Foreign Affairs taking advantage of this opportunity again sends its highest regards to the Embassy of the United States of America.

[Stamp of certification of correct translation Office of Language Services of Department of State]

TANC offers these agreements electronically as a public service for general reference. Every effort has been made to ensure that the text presented is complete and accurate. However, copies needed for legal purposes should be obtained from official archives maintained by the appropriate agency. r