



A STRONGER MODEL BIT AND A REENERGIZED BIT PROGRAM IS VITAL TO STRENGTHEN THE U.S. ECONOMY AND SUPPORT U.S. JOBS AND ECONOMIC GROWTH

U.S. Investment Overseas Is a Key Driver of U.S. Exports, Competitiveness, Jobs and a Stronger America¹

- With 95 percent of the world’s consumers and nearly 80 percent of global purchasing power *outside* the United States, U.S. investment overseas is a vital part of the toolbox to advance U.S. exports, economic growth, jobs and competitiveness. Indeed, as stated in a World Bank paper published in September 2009, “Foreign direct investment (FDI) is *the most important vehicle* to bring goods and services to foreign markets.”²
- Multiple studies and experiences of U.S. companies demonstrate that U.S. companies that invest abroad:
 - export more, accounting for over 50 percent of U.S. exports – made by U.S. workers;
 - spend more on U.S. research and development performed by U.S. workers; and
 - pay their U.S. workers about 24 percent more on average than purely domestic companies.
- Notably, 93 percent of sales by foreign-invested affiliates of U.S. companies are made to customers in foreign countries, rather than sent back to the United States. Those sales are about \$4 trillion per year – more than double total U.S. exports.
- U.S. investment overseas also supports economic growth and poverty reduction in developing countries, promoting broader U.S. interests in development and stability.

BITS Are Critical to Promote a Stronger American Economy and Advance U.S. Interests

- Democratic and Republican Administrations have strongly supported the U.S. BIT program for nearly 30 years as vital to support U.S. investment overseas. BITs provide a stronger and more transparent investment climate, promote the rule of law and provide stability to the type of long-term investment that is essential for economic growth and poverty reduction in developing countries.
- Among the practical benefits that BITs provide the United States are the following:

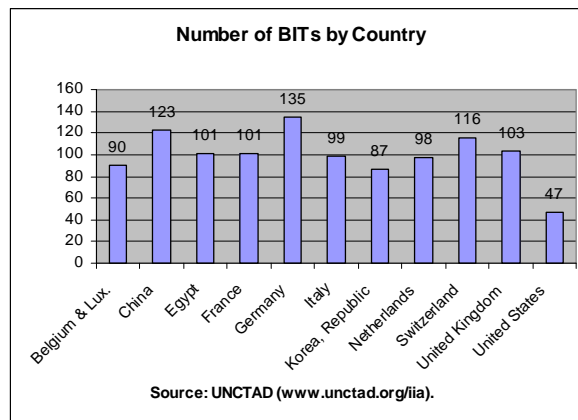
¹Data in this section are from: *Global Investments, American Returns (GIAR)* (1998 and 1999 Update), Matthew Slaughter, Published by Emergency Committee for American Trade; *U.S. Multinational Companies: Operations in 2006*, Raymond J. Mataloni, Jr., BEA (Nov. 2008); *How U.S. Multinational Companies Strengthen the U.S. Economy* (2009), Matthew Slaughter, Published by Business Roundtable and United States Council Foundation; Bureau of Economic Analysis.

² Karl Sauvart, “FDI Protectionism Is on the Rise,” Policy Research Working Paper 5052, The World Bank at 1 (Sept. 2009).

- BITs enable manufacturers and agricultural producers to establish a local presence to market, service, adapt and distribute their products. Notably, nearly 20 percent of all U.S. exports go to U.S. foreign subsidiaries worldwide, and U.S. parent companies and their foreign-affiliates account for 51 percent of total U.S. exports.
- BITs enable U.S. service providers to establish a physical presence in markets where they operate, a critical factor in accessing new customers and providing effective customer service. Our highly productive service sector – from information and telecommunications services to audio-visual, distribution and financial services – needs investments in foreign countries to compete effectively with rivals from other parts of the world and to provide services directly to foreign consumers through branch and affiliate offices.
- BITs enable U.S. retailers to open new stores in different markets, which provides enormous opportunities for many U.S. manufacturers not only to export products to sell in these overseas stores, but also provide many of the materials used to build and operate the store, from shelving and air-conditioning units to shopping carts.
- BITs enable U.S. firms to set up networks to research and develop products that meet local tastes and increase sales.
- BITs ensure that U.S. firms are protected against discrimination, unfair and inequitable treatment and uncompensated expropriations.
- BITs ensure that U.S. firms are provided with an objective and fair forum to address unfair and detrimental foreign government actions.
- BITs can better ensure the security and long-term viability of U.S. foreign investments, particularly those that are critical not only for U.S. companies, but also for broader national U.S. interests, such as developing stable sources of energy supplies, accessing scarce resources and continuing the United States’ leadership in creating new and advanced technologies.
- BITs foster the rule of law and greater stability. Strong and clear BIT obligations, coupled with strong investor-state dispute settlement, promotes resolution of conflicts between investors and host States.

The U.S. BIT Program Has Lagged Behind Our Major Trading Partners’ Programs, Putting the United States at a Competitive Disadvantage

- The United States is behind the curve, with only about 55 investment instruments in force between our BITs and investment chapters in trade agreements. The home countries of our chief competitors not only have a much more extensive network of BITs, they also have BITs with many key emerging markets with which the United States does not.
- Germany, Switzerland, the United Kingdom, and France, for example, each have signed 100 or more BITs, and Italy, the Netherlands, Belgium and Luxembourg, and Korea all have signed more than 80 BITs. Every one of these countries has a BIT in force with China, India and Russia.



- The United States, however, has only recently started negotiations with several of these critical commercial partners and also lacks protections in other key markets as well. For example, the United States has BITs or investment provisions in FTAs with only 6 of the G-20 member countries. By contrast, China has BITs with 11 G-20 members.
- If we want to improve U.S. competitiveness in the international economy, then expanding the U.S. BIT network should be near the top of our list.

Model BIT Review Should Result in a Stronger U.S. Model BIT and a Reenergized U.S. BIT Program

- In 2004, the U.S. government engaged in an extensive review of the previous (1994) Model BIT and revised it substantially. Not only did the Model BIT grow from 14 to 40 pages, it limited protections for investors in several key areas, from fair and equitable treatment to expropriation, transfers and beyond. These changes were made as a result of theoretical concerns that foreign investors may have greater protections under BITs than under the U.S. legal system. The resulting 2004 Model BIT, however, puts U.S. investors at a disadvantage compared to investors from our major competitor nations, who have retained much stronger levels of protections.
- For that reason, the Obama Administration should be seeking ways to strengthen, not weaken, the Model BIT. The business community has several proposals for how to do so, including by eliminating the use of customary international law as a limitation on the obligations of “fair and equitable treatment,” “full protection and security” and expropriation without compensation and clarifying that investor-state rights are guaranteed in the Model BIT for all claims of non-discrimination regardless of sector.
- Equally vital is for the United States to reenergize its BIT program by concluding high standard agreements with current negotiating partners – China, India, Vietnam, and Pakistan – and launching new negotiations with other key countries around the world.

Concerns about BITs Have Been Fully Addressed

- Concerns have been raised that the BIT program creates new rights for foreign investors that will undermine the U.S. democratic process and subject the U.S. government and states to increased liability. Each of these concerns is considered below:

- ***No Greater Rights.*** While foreign investors do have the ability to use an additional mechanism under the BIT – investor-state arbitration – they do not gain additional substantive rights against the U.S. government that U.S. citizens do not have.
 - The provisions of the BIT are based in large part on U.S. law, including the Takings, Equal Protection and Due Process Clauses of the U.S. Constitution and many other federal and state provisions.
 - The minimal use of investor-state arbitration against the United States – *only 15 sets of cases ever in nearly 30 years* (and all of them under NAFTA) indicates that the existence of this additional mechanism (with its costs and complexities) is generally not viewed as providing any real advantage to foreign investors.
 - By way of comparison, there are hundreds of cases filed each year in U.S. courts on just federal takings claims alone, let alone all the other bases under which a BIT claim could proceed.

- ***U.S. Government Liability:*** As noted above, investor-state arbitration has been used very little against the United States. And the United States has prevailed in every case in which a decision has been issued. More systemically, the bases for a BIT claim are essentially the same ones that a foreign investor can already take to a U.S. court under the U.S. and state constitutions and U.S. and state laws. BITs do not create in any concrete way any additional liability against the U.S. government.

- ***Ability of Governments to Regulate.*** In negotiating and entering into BITs, the U.S. government has long ensured that its ability to regulate and impose laws for the protection of the public interest is maintained. As a result, BITs have not limited the United States’ ability to regulate nor do BITs pose a threat against U.S. government regulation. Similar to the U.S. legal system, however, BITs do require countries to ensure that regulations are imposed in a fair and non-discriminatory manner and permit challenges to improper regulatory activity, just as occurs already in U.S. courts. As discussed below, trying to create an overarching exception for governmental regulation in the public interest will nullify the purpose and protections of U.S. BITs and should be rejected.

- ***BITs and the Democratic Process.*** Given that the vast majority of cases brought in the U.S. legal system (and those of other nations) are brought by domestic parties, there is no concrete danger that agreeing to international arbitration cases in these limited circumstances would undermine the U.S. democratic process. Moreover, since its origins, the United States has entered into treaties with the advice and consent of the Senate that limit certain U.S. rights and require the United States to undertake new responsibilities. BITs are not substantially different than the hundreds of other treaties into which the United States has entered. Such international agreements are part of our democratic process, not contrary to it. A few additional points are worth noting:
 - BITs do permit foreign investors to use an internationally recognized arbitration process, rather than U.S. courts, pursuant to the U.S. Government’s consent (although foreign investors can utilize U.S. courts, over investor-state arbitration).
 - Such arbitration panels are also not that dissimilar from the type of arbitration panels set up through other international agreements, starting for the United States with the Jay Treaty of 1794 which successfully resolved key issues between the United States and Great Britain, as well as the Federal Arbitration Act which authorizes commercial and labor arbitration in the United States. Notably, such arbitration panels are now increasingly included in debt-for-nature swap agreements that environmental groups conclude with foreign governments.

- The panels utilize widely noted experts and oftentimes former jurists as arbitrators.
- And the arbitration panels themselves have no ability to require a country to change its law; they can merely require the government to pay compensation for treaty breaches.
- The purpose of BITs for the United States, of course, is to provide U.S. investors overseas with a neutral forum to adjudicate disputes – a forum that is oftentimes not available absent a BIT.

Proposals to Weaken the Model BIT Would Hurt the U.S. Economy and U.S. Jobs

- Some seek to weaken BIT protections, weaken or eliminate investor-state dispute settlement or to create environmental or balance of payments exceptions to the BIT’s disciplines. Doing so would harm U.S. economic and job opportunities. America’s enterprises, workers or economy will not benefit if the Model BIT is revised to weaken enforcement mechanisms or create other new exceptions to BIT protections.
- Take for example proposed environmental exceptions, which ignore how BITs differ substantially from other international instruments, such as the GATS.
 - An expropriation, for which the BIT, like the U.S. Constitution, requires compensation, is by definition for a “public purpose.”
 - Excluding environmental matters from the BIT’s compensation requirements would allow foreign governments to take U.S. green technology without appropriately paying patent holders. As a result, the United States would lose not only our technology, but the green jobs we want to expand in our own economy would flourish elsewhere.
 - This kind of exception does not exist in U.S. law – for good reason.
 - In a world where we need more environmental technologies and innovation to solve our challenges and to create a new green economy with new green jobs for Americans, this type of provision would reverse course and cause great damage to American enterprises and workers.
- As well, proposals to limit the core “fair and equitable treatment” standard found in thousands of BITs around the world:
 - Will deny U.S. investors the ability to address effectively unfair governmental action overseas to the detriment of America’s exports, industries and workers.
 - Are inconsistent with the broad due process, arbitrary and capricious and other standards in U.S. law, meaning foreign investors will continue to have greater legal protections in the United States, than U.S. investors have overseas.
 - Will put U.S. investors at a further competitive disadvantage compared to our main competitors in Europe and Asia that benefit from this protection in their own country’s BITs. German investors in China already have an unqualified protection for “fair and equitable treatment at all times.” U.S. investors in China should be accorded nothing less.
- Similarly, a balance of payments exception should not be included as part of the Model BIT. Such an exception would allow countries to impose new restrictions on capital flows beyond what the U.S. BIT and other international agreements already allow.
 - Capital account liberalization promotes economic growth, development and higher standards of living and nothing in the BIT prevents governments from properly regulating their financial systems. As the G-20 recognized in Pittsburgh, now is *not* the time to “retreat into financial protectionism, particularly measures that constrain capital flows, especially to developing countries.”

- The 2004 Model BIT already provides extensive flexibility to countries to take measures for prudential reasons. For example, countries can impose higher capitalization requirements on foreign banks or other financial services companies to ensure they have adequate funds cover transactions in the United States.
 - Creating a balance of payments exception, which is generally *not* included in the BITs of our major trading partners, would be damaging for U.S. investors and foreign countries alike.
 - This is a timely issue, since Brazil put in place new capital controls in October 2009 and some analysts have suggested that South Africa, India, Korea and Colombia all may be considering similar policies. The United States' free trade agreements with Korea and Colombia include investment provisions, but have not yet been ratified by the US. We do not have BITs in place with Brazil, South Africa or India.
- Proposals to deny or limit access to investor-state arbitration for breaches of complex agreements, licenses and other arrangements (so-called "investment agreements") between investors and foreign governments.
 - Among U.S. companies' most significant overseas activities are those involving agreements with foreign governments. Such agreements involve everything from helping access a foreign government's natural resources (from energy resources to timber to minerals) to improving its infrastructure (from ports to airports to pipelines) to other assets (from electricity to telecommunications to computer networks). Many of these sectors are vitally important for U.S. economic interests and the development of countries receiving U.S. investment.
 - The door to international arbitration that our treaties and free trade agreements open is critical in helping encourage foreign governments to adhere to such agreements and in providing fair, objective and timely remedies when they do not.
 - While the U.S. government also enters into such contacts from foreign investors, investor-state dispute settlement does not, as explained above create any significant new liability since those contracts are already subject to remedies under U.S. law and there has been no evidence that investor-state dispute settlement results in a more favorable result than the U.S. legal system. Indeed, the United States has continued to win every investor-state case brought it.
- Proposals to require the exhaustion of local remedies, government screening of claims or otherwise limit the use of investor-state arbitration are not only unnecessary, they will also hurt the United States.
 - A strong BIT program, with investor-state dispute settlement, promotes stability and the rule of law in countries in which the United States is competing around the world. Imposing such a requirement or otherwise limiting investor-state arbitration would in many cases deny U.S. investors the ability to seek justice for bad acts or omissions by foreign governments, whose own judicial systems are oftentimes erratic or underdeveloped and sometimes corrupt.
 - Imposing any exhaustion requirement would run contrary to current international legal practice, undoing a half-century of progress in international law, and be a far lower standard than that contained in the BITs of our major competitors.
 - The delay and out-of-pocket costs in imposing an exhaustion requirement are also massive. An investor might have to spend 4 or 5 years or more in local courts and then have to begin an investor-state arbitration that may take another 2 to 5 years (or 10 years in some cases). This imposes huge costs on both the investor and the foreign government.

- Such a requirement would have a particularly negative effect on U.S. small and medium-sized investors that would be effectively denied any justice at all.
- Such proposals are also simply unnecessary. Investor-state arbitration is a difficult decision for any U.S. investor and is only pursued as a last resort. The same is true for foreign investors, as seen by the few cases ever brought against the United States.

Proposals to Add New Labor and Environmental Obligations Would Bring the U.S. BIT Program to Halt, Ceding the Field and Economic Opportunities to our Competitors

- Some propose that the Model BIT should be modified to include entirely new obligations on labor and the environment subject to binding dispute settlement, at least as strong, if not stronger, than those contained in trade agreements with Peru, Panama, Colombia and Korea. These provisions are expected to be in place and effectively enforced prior to a country entering into a BIT with the United States according to their proponents. While these are all important issues, their inclusion in the Model BIT is not appropriate or feasible.
- We should keep in mind that BIT partners are oftentimes at very different levels of socio-economic and political development than the few FTA partners with which these provisions were concluded. This is particularly the case with major emerging markets, such as China, India and Russia where U.S. investors are already at a disadvantage.
- There is great concern that these and other potential BIT partners simply would refuse to negotiate BITs with such provisions given their staunch refusal to join trade provisions with labor and environmental ones in any other forum. While such provisions were able to be negotiated in the context of a FTAs with a few countries, where there was room for trade-offs in very substantial areas, such as tariffs, the scope of BITs is much more limited, providing, in the end, less flexibility. Notably, the United States is the only major country that has ever included any labor standards language in its BITs.
- Even more problematic is the greater challenge for these countries to make the changes to their domestic laws that would be required by the May 10th agreement between the House and the Bush Administration or the stronger provisions being proposed. For example, it is unlikely that China would be able to move from government-organized unions to free unions, in any short to medium term period as part of a BIT. Requiring such provisions will, therefore, effectively halt the BIT program by preventing BITs from entering into force in any reasonable timeframe. That will leave U.S. investors unprotected, while our competitors from other countries continue to enjoy the benefits of their strong BITs.
- As a result, trying to include these issues in the model BITs will also not accomplish the desired goals of those seeking improvements in labor and environmental standards and enforcement. Paradoxically, such a result will undermine U.S. investment overseas, investment that would otherwise bring with it the high U.S. labor and environmental standards of U.S. companies.
- Requiring such unattainable provisions will bring the U.S. BIT program to a halt with the very countries where BITs are most important and where our foreign competitors already enjoy significant protections. It would also put U.S. investors at a significant disadvantage in other countries, as governments of U.S. competitors would continue to negotiate BITs with strong investor protections while the U.S. BIT program would stop all together.