

Written Testimony

of Franklin J. Vargo

Vice President, International Economic Affairs
The National Association of Manufacturers

Submitted to the Subcommittee on Trade
Of the Committee on Ways and Means

House of Representatives

Hearing on “Investment Protections in U.S. Trade and Investment
Agreements”

**Hearing Held May 14, 2009; Written Testimony Submitted May 28,
2009**

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Washington, D.C.**

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Chairman Levin, Ranking Member Brady and Members of the Subcommittee,

I am pleased to have the opportunity to submit written testimony on behalf of the National Association of Manufacturers (NAM) to be included in the Subcommittee’s official record of the important hearing held May 14, 2009, on “Investment Provisions in U.S. Trade and Investment Agreements.”

The NAM is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM member companies must compete internationally in today’s global economy and for many of them international investment is a key element of their strategy to remain globally competitive, to grow and to keep manufacturing operations and good manufacturing jobs in the United States.

I commend you, Chairman Levin, Mr. Brady, and the entire Subcommittee for holding this important hearing on Investment Protections in U.S. Trade and Investment Agreements. The Hearing provided a useful forum to examine long-standing U.S. policy and practice regarding foreign investment.

NAM Policy on International Investment

The NAM is a strong, member-driven, organization where policies are developed through a committee and subcommittee process and then debated and formally adopted by the Board of Directors. NAM's policy on International Investment has long been clear. Our board-approved policy statement on international investment, adopted in the winter of 2008, is very clear. It reads "Because investment is so important for business growth and competitiveness, the NAM places a high priority on advancing domestic and international policies that favor investment in U.S. manufacturing and enable U.S. manufacturers to take advantage of growing opportunities in the global marketplace."

Today the United States is the world's largest source of investment into foreign markets and also the largest recipient of inward investment from abroad. As the pace of globalization has accelerated, inward and outward foreign investment have come to play an increasingly important role in U.S. industry, strengthening the competitiveness of U.S. manufacturers and facilitating their access into developed and emerging markets. And the success of U.S. manufacturers in today's global economy translates directly into creating and retaining good manufacturing jobs in the United States.

Annual sales of the foreign affiliates of U.S. multinational corporations are nearly \$4 trillion, about three times the total exports of U.S. goods and services. Here at home in the U.S., two million manufacturing workers – approximately one in every seven - are employed by companies in which foreign investors are the majority shareholders. The impact on the U.S. economy of international investment on U.S. manufacturing is substantial, growing and very positive. Those benefits accrue both to large multinational companies and to small and medium-sized manufacturers as well as to their workers and communities.

On the critical issues of outward investments by U.S.-headquartered manufacturers, the NAM is equally strong. Given the importance of international investment to the competitiveness of the U.S. manufacturing base, we support greater efforts by the U.S. Government to extend a framework of strong, well-established rules governing foreign investment in the developed and developing world. Such protections are fundamental to managing the risks associated with foreign investment, obtaining equitable treatment for U.S. investors, and ensuring access to international arbitration that will provide fair treatment in international disputes.

Such rules are also important for ensuring that U.S. companies have opportunities to invest and participate in the economic growth of foreign countries, particularly emerging nations, and are not unduly restricted by foreign government, for example, through investment caps. Fully 95 percent of the world's population and approximately 75 percent of global purchasing power is located outside the United States. For U.S. manufacturers and other companies to continue to lead their respective sectors on a global basis, we must have access to and protections in those markets, especially the fast growing emerging economies.

Bilateral Investment Treaties (BITs)

Bilateral Investment Treaties (BITs) and strong investment chapters in U.S. Free Trade Agreements (FTAs) are absolutely critical to advancing these important goals. The U.S. Government should continue extending this network of agreements, maintaining the highest quality of protections in the texts of the agreements.

The NAM understands that the Administration is conducting a serious review of the U.S. Bilateral Investment Treaty (BIT) program. One important element of that review, as explained by several witnesses at the May 14 hearing, is a private sector advisory subcommittee, under the auspices of the Department of State's Advisory Committee on International Economic Policy (ACIEP). That subcommittee, co-chaired by two of the witnesses at the May 14 hearing, will review the U.S. "Model BIT" text. The NAM will be participating actively and constructively in that review process. We will also continue to convey our views on the important issues in international investment policy directly to senior levels in the relevant U.S. Government agencies. We also look forward to an ongoing dialogue with the subcommittee and others in the Congress.

The NAM is particularly concerned with the urgent need for the U.S. Government to push forward and achieve strong BITs with key emerging economies such as China, India, and Vietnam. Currently in those countries, U.S. companies are without BIT or comparable protections while most of their competitor companies based in Europe, Asia or elsewhere already benefit from investment protections, under foreign BITs and comparable agreements. As was testified at the May 14 hearing, there are currently over 2,300 BITs (or comparable agreements) in the world and the United States is party to only about 40 of those. When one adds our 17 FTA partners, one still is struck that U.S.-based companies are at a serious comparative disadvantage in terms of global investment protections compared to their foreign competitors.

Thus the NAM is strongly of the view that the current de facto “time out” in the U.S. BIT and FTA programs must be kept to a minimum and, especially with regard to key emerging markets such as China, India, and Vietnam, quick and strong reengagement in the pursuit of BIT agreements is a high priority. We also see other large emerging investment markets such as Brazil and Russia as important BIT targets in the medium term. The United States has to get back into the international investment game. Sitting on the sidelines is a recipe for letting ourselves get passed, indeed lapped, by foreign competitors. The world is not going to sit quietly and wait for the United States to take the lead on investment, trade, or other international economic policies. If we take ourselves out of the game, it will be U.S. companies and, very directly, their workers which will be the losers. Strong, proactive global leadership from the U.S. Government on investment issues translates into investment climates around the world where U.S.-based manufacturers can prosper. And that translates into good jobs for American workers here at home.

But quality is even more important than quantity when it comes to U.S. investment agreements, whether BITs or FTA investment chapters. The United States must continue to demand Gold Standard agreements with strong provisions in all the key substantive areas: national treatment, Most-Favored-Nation (MFN) treatment, fair and equitable treatment, transparency, and dispute settlement. A bedrock principle for the NAM is that bilateral and other investment agreements both with developed and developing countries must contain effective provisions for “investor-state” dispute settlement mechanisms. Such protections are critical for assuring the basic objectives of investment agreements and represent virtually the only way that smaller U.S. manufacturers can seek fair redress in cases of disputes for foreign governments.

Both countries and investors generally prefer to resolve issues before arbitration is necessary, and a strong investor-state arbitration mechanism increases the likelihood that good faith negotiations can be successfully concluded. The existence of an arbitration option enables the investor to pursue more meaningful discussions with a host government and settle most disputes on a fair basis. Nonetheless, there are circumstances where investor-state arbitration is the only way a fair hearing can be obtained, and it remains an important last resort. There are countries whose laws do not provide adequate safeguards and protections for foreign investment, and where through corruption or lack of institutional capacity the rule of law is absent or severely compromised. Ecuador is a good example of this problem. A U.S. State Department report issued earlier this year noted as much, observing that corruption and denial of due process are common in Ecuador and that disputes with U.S. companies have become politicized. Lacking access to a fair trial in Ecuador, international arbitration available under the US-Ecuador BIT is currently the only forum where an impartial fact-based judicial process is available. It is a critical tool to ensure that US companies receive fair and impartial justice.

A Delicate, Delicate Balance from 2004

As was discussed at the hearing, current U.S. model BIT and investment chapters were developed over a nearly two-year period in a careful, inclusive, and balanced interagency process based on the clear instructions from the Congress expressed in Trade Act of 2002 and there have been no developments in the past seven years to suggest the 2004 Model somehow “got it wrong.” That 2004 Model was crafted in close consultation with the Congress, the business community, non-government organizations, and other stakeholders. The compromises embedded in the 2004 model BIT represent a very delicate balance among the many interests and stakeholders. While the NAM and others in the business community would certainly have preferred a different balance in the Model BIT, we – like all other stakeholders – accepted that carefully-struck compromise and we are prepared to live with it going forward. One of the clear messages from the recent hearing is just how delicate that balance in the 2004 Model BIT really is and the many risks incumbent in reopening that text.

In the view of the NAM, it is critical that the Administration’s ongoing review of investment protections be concluded expeditiously, that the fundamental balance in the existing Model BIT be respected, and that upon completion of the review, that the Administration should aggressively resume its effort to close the large and growing investment protection “gap” that the United States is facing today, especially in critical priority markets where strong investment protections and increased market access for U.S. investors are critical.

Foreign Investment and U.S. Multinational Companies

We at the NAM are struck that some of the criticisms of the U.S. BIT and investment protection programs and policies are based on flawed, indeed biased, views of the nature of U.S. multinational companies and the contributions that they and their global operations make to the U.S. economy. The NAM encourages the Subcommittee and other interested parties to review carefully a recent publication by Professor Matthew Slaughter of the Tuck School of Business at Dartmouth and a former member of the President’s Council of Economic Advisors.

This study clearly lays out the broad benefits to the U.S. economy from global engagement by American companies, including manufacturers. For example, the study shows that 93% of the production from overseas investments of U.S. multinational companies is sold outside the United States. Less than seven percent of that production is exported back to the U.S. The NAM encourages the subcommittee to make Dr. Slaughter’s study a part of the formal record of this hearing.

Some critics seem to believe that investment abroad by U.S. companies is per se a bad thing, that all foreign investment is somehow just “off-shoring” and/or exporting jobs. Dr. Slaughter’s work and other serious studies disprove this argument and demonstrate that international investment is a critical element for a global competitiveness strategy for many U.S. firms and indeed for us as a nation. Global success for U.S. manufacturers translates into good jobs here at home, growing U.S.-based R & D, headquarters and support programs and jobs, increased tax revenues for all levels of U.S. governments, and bolstered U.S. global competitiveness.

Some U.S. manufacturers invest abroad for access to vital natural resources (e.g. minerals, oil and gas, timber) which are scarce or unavailable here at home. Other manufacturers invest abroad to have key final stages of production close to foreign consumers, and to be price competitive where exporting from the U.S. is not an option. Other manufacturers need to source or produce components abroad for final manufacturing or assembly here at home. The bottom line is that American manufacturers invest abroad because they have to in today’s competitive global economy. And those investments are working for America and for Americans.

Conclusion

The NAM appreciates the opportunity to contribute comments for inclusion in the formal record of the Subcommittee’s hearing on the important issue of U.S. investment protections. We commend the Subcommittee for providing a forum where some very important tissues could be discussed, debated and clarified. The NAM strongly supports a strong, proactive, Gold Standard Bilateral Investment Treaty program (and comparable FTA investment chapter protections) for the United States. We urge the Subcommittee to endorse that view.

We also urge the Administration to conclude expeditiously its current review of the U.S. Model BIT and to reaffirm the carefully-struck compromise in the 2004 BIT review. Diverging from that delicate compromise risks taking the United States out of the investment game internationally which would damage the interests of U.S. companies, workers and governments at all levels for years to come. We all need a strong, proactive U.S. policy on international investment based on a Gold Standard model Bilateral Investment Treaty.

The NAM stands ready to work with the Subcommittee, others in the Congress, the Administration, and other stakeholders on this important issue of investment policy. Time is of the essence.