

Statement of Stephen Canner
Vice President, U.S. Council for International Business
Public Hearing on the Model BIT
Department of State
July 29, 2009

I am Stephen Canner, Vice President for Investment Policy and Financial Services at the US Council for International Business. I have served in this position for 14 years and prior to taking up with the USCIB I served as Director of the Office of International Investment at the U.S. Treasury where I chaired the CFIUS review process at its legislative inception in 1988.

It is with great pleasure that I speak to you today on the importance of the U.S. seeking to attain the highest standards for its model BIT. In the time available to me today, I wish to bring to your table a point of view on the importance of BITs not often recognized as one of its key advantages. Here, I am speaking of the importance of BITs to enhance the competitive position of US companies in the global economy.

While many policy makers today focus on how best to energize our domestic economy, it is important to realize, and to shape policy accordingly, to reflect the fact that we live and compete in a globalized economy. The success of the U.S. economy depends increasingly on the global competitiveness of its companies and the ability of U.S. based global businesses to access customers in foreign and high growth markets. High standard bilateral investment treaties (BITs) are an essential element in strengthening the competitive position of the U.S. in these markets. They also help to make the U.S. a more attractive base for global business.

Exporting is one obvious mode to access these markets. But to get close to one's customers' base, to know the market, to provide after sales support and maintenance, particularly for our high technology and capital-intensive goods, our companies need a presence in the market—an investment. Service industries such as wholesale trade, distribution retail trade and financial services—virtually by definition-- require a presence in markets to be competitive. And of course, resource exploration and extraction such as petroleum, gas and other commodities require an investment abroad.

Successful investment by U.S. based global companies in foreign markets translates into greater sales by affiliates abroad than that which takes place by exports alone. For example, in 2006, the latest year for which data by the Department of Commerce are available, export sales of U.S. based global companies totaled \$495 billion. But sales by their majority owned affiliates in foreign markets were over \$4 trillion and more than 93 % of these sales were into the host country or other foreign markets. These sales by U.S. affiliates translate into a “pull” on U.S. exports with attendant benefits for US workers.

BITs serve to strengthen the competitive position of the U. S. in several ways:

- *Market access:* is provided in the 2004 U.S. Model BIT in Article 2 whereby each party commits to national treatment “...with respect to the establishment, acquisition, and expansion...”

- Further the provisions of the 2004 model BIT also apply “*post establishment*”—the terms and conditions under which a firm operates, once established.

Stated in another way, and tracking the language of the model BIT, the commitment to “...treatment no less favorable than that it [the host government] accords, in like circumstances to investments in its territory of its own investors...” helps to insure a level playing field for U.S. firms investing in overseas markets.

- *Prohibitions on certain performance requirements*, such as technology transfer requirements, domestic content requirements or limitations on imports, enable U.S. firms operating in overseas markets to run their business in the most efficient manner possible, to meet their business objectives.
- *The right to transfer all funds* related to an investment—interest, dividends, repatriated profits, etc. -- into and out of the host country—allow the investor to deploy capital in the most efficient and timely manner possible.
- Guarantees that the host government will provide “*fair and equitable treatment*”, “full protection and security” for their investments and undertakings not to engage in “arbitrary” or “discriminatory” measures helps to insure a level playing field for the U.S. investor.
- *Prohibitions from expropriating an investment*— directly or indirectly and not limited to the physical taking of property—without prompt, adequate and effective compensation. This lowers the risk factor for the U.S. investor, consistent with rights under the U.S. Constitution that U.S. investors are accustomed to at home.

These obligations reflect core US legal and long standing US policy principles that have served us well and served as a hallmark for others to emulate, as they have in large part. They should not be diluted! Indeed they should be strengthened (See for example, the writings of that distinguished arbitrator, Judge Stephen Schwebel on “fair and equitable treatment” and ‘customary international law.’”

The substantive BIT obligations are supported by a *dispute settlement mechanism* that enables the foreign investor to pursue neutral and fair arbitration when it believes that a host government has breached BIT obligations and caused it harm. Treaty-based arbitration guarantees investors the ability to assert their rights in a familiar forum under rules that are similar across multiple countries. The ability to use that forum provides investors a critical layer of security they would not have if their only recourse was the local courts of the host country.

A high standard BIT and investor to state dispute settlement also serves the host country well—as an advertisement that it (the host country) respects the rule of law and should be considered a good place in which to do business. Investor to state also protects the host government from home government pressures to intervene on behalf of one of its companies on matters of commercial interest. This feature is particularly useful for small host countries who may often feel it necessary to succumb to the political pressure of a large capital exporting country.

In short, a high standard BIT with investor to state takes the politics out of dispute settlement on cross border investment and allows companies to compete on the basis of their offerings

In wrapping up, let me take a moment to elaborate on the *free transfer provision*.

The previous speaker suggested that the academic community has spoken clearly on this provision, to wit: that capital controls may be helpful to development and should be a useful tool to “stem the tide” of short term outflows.

I could not disagree more! Let me suggest three reasons why:

1. The economic literature on capital controls has arguments on both sides of this issue. Let me suggest two. The work of Kristin Forbes at MIT, cites the cost of capital controls to small and medium size firms in Chile on Chile’s capital controls program. Professor Robert Krol of the University of California argues that capital controls merely cover up for underlying bad government policies and delay necessary reform and adjustment measures. These works, I believe, posit the better arguments on the matter of capital controls.
2. Countries who insist on the availability and possible use of capital controls impede their long term development and send a mixed message to foreign investors. On the one hand, they seem to say: bring to my country your capital, your technology, your management skills, your experience etc. But on the other hand, they also say we, the host government can decide, when and under what circumstances we will let you take our money out when things get a little rough in our economy.
3. Encouraging the use of capital controls is diametrically opposed to the policy direction and statements of the G-20. A casual reading of their communiqués points to the imperative to keep markets open for cross border capital flows and to set policy parameters to restore these flows in a responsible way.

For these reasons and more which time does not permit me to go into, capital controls in a US BIT are the wrong prescription and should be rejected by you in your consideration to revise the model BIT.

Thank you for allowing me the opportunity to address this body.