A REPORT OF THE CSIS PROJECT ON U.S. LEADERSHIP IN DEVELOPMENT

Reinvigorating the U.S. Bilateral Investment Treaty Program

A TOOL TO PROMOTE TRADE AND ECONOMIC DEVELOPMENT

Authors
Meredith Broadbent
Robbins Pancake

June 2012

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CONTENTS

Summary 1

Introduction 1

Background: Global Trade Context 2

Background: The U.S. BIT Program 3

Case Study: The U.S.-Rwanda BIT 4

Critical Issues: The 2004 Model BIT 6

Critical Questions to Be Addressed 8

Conclusion 10

About the Project 12

REINVIGORATING THE U.S. BILATERAL INVESTMENT TREATY PROGRAM

A TOOL TO PROMOTE TRADE AND ECONOMIC DEVELOPMENT

Meredith Broadbent and Robbins Pancake[1]

Summary

The CSIS Project on U.S. Leadership in Development is focused on leveraging the U.S. private sector to promote international economic development. A key ingredient to success in trade and investment will be encouraging U.S. foreign direct investment in struggling economies to bring needed capital and commercial know-how. A principal instrument available to the government to facilitate such investment is the Bilateral Investment Treaty (BIT). This paper provides an update on the current use of BITs and discusses their effectiveness as a development tool. It considers the political and negotiating challenges impeding the progress of the U.S. BIT program and concludes with a recommendation to move this program forward.[2]

Introduction

During the last 50 years, private foreign investment has replaced foreign aid as the principal source of funding for international economic development.[3] Roughly speaking, the ratios of financial flows into developing countries have flipped: what used to be 70 percent aid and 30 percent private investment is now 30 percent aid and 70 percent private investment. In addition, given the large budget deficits and extraordinary levels of national debt in the United States and the European Union, foreign aid to developing countries is unlikely to increase in the foreseeable future, either in real terms or as a percentage of GDP. Thus, it is becoming increasingly important to focus on foreign direct investment (FDI), and the role that BITs can play in framing and supporting FDI.

Renewed efforts in this area would be directly responsive to current events and reinvigorate the U.S. trade-negotiating agenda. The dramatic political developments of the Arab Spring have sparked interest by U.S. government officials in expanding U.S. trade and investment in the Middle East and North Africa to promote economic development and support a smooth transition to democracy. On May 19, 2011, President Obama called for a Trade and Investment Partnership

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2. On April 20, 2012, as this paper was about to be published, the Office of the United States Trade Representative announced a final version of the 2012 Model BIT, addressing many of the issues discussed herein.

3. U.S. Agency for International Development (USAID), "Public Private Partnerships: Doing Business through Partnership," USAID presentation, 2010, http://ec.europa.eu/europeaid/infopoint/documents/presentations/presentation_25_05_2010_en.pdf; also, Hudson Institute Center for Global Prosperity, *The Index of Global Philanthropy and Remittances 2011,* 2011, http://www.hudson.org/files/documents/2011%20Index%20of%20Global%20Philanthropy%20and%20Remittances%20downloadable%20version.pdf, 9 and 15.

Initiative with the Middle East and North Africa that delineated the need for programs and support in several different economic areas, including investment.[4]

The Office of the United States Trade Representative (USTR) followed up this announcement with a request for public comments on constructing a "framework for trade" with the region.[5] Also, the proposed Trans-Pacific Partnership trade agreement will include an investment chapter, which has had the effect of pressuring the administration and other stakeholders to reach consensus on negotiating objectives relating to investment.

In addition, interest continues on Capitol Hill and elsewhere in having the United States and India to pursue BIT negotiations, which were initiated in 2008 during the Bush administration.[6] U.S. trade representative Ron Kirk has acknowledged that both countries have agreed to resume "technical discussions" and expect to begin talks in the "very near future."[7] However, Kirk has sounded cautious regarding the prospects of a speedy conclusion.[8]

Background: Global Trade Context

The importance of the U.S. BIT program must be viewed in the context of investment as an issue of international trade and the way it has been addressed—or not—in multilateral trade negotiations in the General Agreement on Trade and Tariffs (GATT) and World Trade Organization (WTO) since World War II. In reality, the consensus since 1947 has been that international trade in goods should be addressed by the GATT/WTO, but no such international consensus has existed for investment. The first time that investment was incorporated at all as a trade issue in those negotiations was during the Uruguay Round negotiations (the eighth such negotiating round) concluded in 1994 in the WTO agreement on Trade-Related Investment Measures (TRIMs). The TRIMs Code was a first, and partial, step at incorporating BIT-type provisions multilaterally.

In the absence of such multilateral treaty protections, the bilateral investment treaty was created, beginning in 1959 with the BIT between Germany and Pakistan, as the primary means for promoting, regulating, and protecting FDI flows.[9] For the investor and developed countries generally, the benefit of the BIT is to protect overseas investment and increase the opportunities of further investments. For developing countries, the BIT is an economic-development tool that promotes inward FDI and confirms to foreign investors that the country hosting investment intends to respect foreign property rights. From a legal perspective, the purpose of the BIT has been to reestablish principles of international law regarding the protection of private-property rights, particularly with regard to expropriations and basic minimum standards of treatment, such as fair

4. Barack Obama, "Remarks by the President on the Middle East and North Africa," speech, Washington, D.C., May 19, 2011, http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa.

5. Office of the United States Trade Representative, "The Trade and Investment Partnership for the Middle East and North Africa," *Federal Register* 76, no. 173 (September 7, 2011).

6. U.S. Senate India Caucus, Letter to President Barack Obama, December 19, 2011.

7. "India, U.S. to Fast-Track BIT Dialogue," *The Hindu,* June 23, 2011, http://www.thehindu.com/business/Economy/article2128250.ece.

8. "Long Way to Go for India-U.S. Investment Treaty, Says Kirk," *Business Standard* (India), October 5, 2011, http://www.business-standard.com/india/news/long-way-to-go-for-india-us-investment-treaty-says-kirk/451533/.

9. Martin A. Weiss, *The U.S. Bilateral Treaty Program: An Overview* (Washington, D.C.: Congressional Research Service, January 28, 2008).

and equitable treatment. These principles had been weakened after World War II by decolonization, the rise of North-South political tensions, and the emergence of a group of Soviet socialist states and their allies that had a different view of private-property rights. Many developing countries turned inward and restricted foreign investment, instead establishing import substitution policies that included high tariffs on imported goods, import licensing regimes, and national programs to stimulate local production of needed goods and services.

However, the steady worldwide increase of BITs between 1960 and 1990, and the explosive growth of BITs through the 1990s, has still not led to a successful multilateral approach. The most notable attempt was the proposed Multilateral Agreement on Investment (MAI), negotiated between 1995 and 1998 at the Organization for Economic Cooperation and Development (OECD).[10] The purpose of the MAI was to enhance the WTO TRIMs provisions to provide greater security to investors and to preserve international arbitration for settling disputes between investors and states. However, some developing countries (not OECD members) opposed the negotiations, believing multinational corporate investors would override their sovereignty and culture. And some international nongovernmental organizations (NGOs) also opposed the negotiations, complaining that local labor and environmental protections would be undermined.[11] Ultimately, this opposition led to the withdrawals of France, Canada, and Australia, and the suspension of negotiations in late 1998.[12]

Subsequently, when efforts to reopen TRIMs negotiations as part of the WTO Doha Round also stalled, the bilateral BIT process provided the only way forward. This is particularly true today in the United States, in the absence of any presidential trade-negotiating authority to proceed with new free trade agreements.

Background: The U.S. BIT Program

The United States initiated a BIT program in 1981 and has negotiated agreements with 47 countries, most of which were concluded in the 1990s. In addition, with the exception of U.S. free trade agreements with Bahrain, Israel, and Jordan, U.S. free trade agreements (covering 18 additional countries)[13] include investment chapters that mirror the provisions of the BITs.

However, the United States has lagged behind the rest of the world in negotiating BITs: the first European BITs were signed in 1959, more than 20 years before any in the United States; since 1990, the number of BITs has exploded, with the rest of the world now having more than 2,600.[14] In contrast, the United States has 47 BITs, and in the last 10 years the United States has negotiated

10. Rainer Geiger, "Towards a Multilateral Agreement on Investment," *Cornell International Law Journal* 31, no. 467 (1998).

11. Theodore H. Cohn, *Global Political Economy: Theory and Practice* (New York: Pearson/Longman, 2005), 350.

12. Eric Neumayer, "Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiations," *Wirtschaftspolitische Blätter* 46, no. 6 (1999): 618–28.

13. U.S. free trade agreements in force with the following countries all have investment chapters that are largely comparable to a BIT: Australia (although it lacks investor-state dispute settlement), Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea, Mexico, Morocco, Nicaragua, Oman, Peru, and Singapore. U.S. trade promotion agreements with Colombia and Panama, which are not yet in force, also include comparable investment chapters.

14. Weiss, *The U.S. Bilateral Treaty Program*.

only two—with Uruguay and Rwanda. By comparison, Germany, China, Switzerland, the United Kingdom, and Egypt have each signed more than 100 BITs, and Italy, France, the Netherlands, Belgium, Luxembourg, and Korea have all signed more than 80 BITs.

In general, modern U.S. BITs provide seven basic benefits that promote capital investment:

1. Nondiscriminatory national treatment and most-favored nation treatment for the full life cycle of the investment;
2. Treatment in accordance with customary international law, including fair and equitable treatment and full security and protection;
3. Limits on expropriation and obligation to provide prompt, adequate, and effective compensation;
4. Transfer of funds in and out of the country using market rate of exchange;
5. Restrictions on performance requirements such as local content and technology transfer;
6. Choice of top management, regardless of nationality; and
7. Binding international dispute arbitration between investors and states.

These protections reduce investor risk and provide investors with legal recourse in geopolitically sensitive regions. These obligations apply both to governments and state-owned enterprises that are acting under delegated government authority.

Recent events in Latin America and North Africa provide good examples of the necessity of BITs. Beginning in 2007, President Hugo Chávez of Venezuela nationalized several telecommunications and energy companies. Although the United States lacks a BIT with Venezuela, it does have ones with Ecuador and Bolivia, both considered ideological allies of Chávez. Should those countries move to nationalize, American investments should benefit from protections established under the U.S. BIT. In North Africa, the national revolutions in Tunisia, Egypt, and Libya could present serious concerns for investors: the BITs with Tunisia and Egypt are 20 years old and need significant updating, and the United States has not negotiated a BIT with Libya. In the case of Egypt, the BIT signed in 1992 excludes most services that should be included within the scope of covered investments such as telecommunications, banking, insurance, commercial distribution, or import/export, nor does it define investment to include intellectual property rights.[15]

Case Study: The U.S.-Rwanda BIT[16]

The U.S. Senate approved the U.S.-Rwanda BIT on September 26, 2011, and the two governments ratified it on December 2, 2011.[17] It therefore serves as an appropriate case study for how the United States could proceed with Egypt, and perhaps later Tunisia and Libya, in order to enhance trade and economic development in North Africa.

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15. Barbara Kotschwar and Jeffrey J. Schott, *Reengaging Egypt: Prospects for US-Egypt Relations* (Washington, D.C.: Peterson Institute for International Economics, 2010).

16. U.S. Senate Committee on Foreign Relations, *Investment Treaty with Rwanda* (Treaty Doc. 110-23), Executive Report 111-8, 111th Congress, 2nd Session (December 22, 2010), http://www.gpo.gov/fdsys/pkg/CRPT-111erpt8/html/CRPT-111erpt8.htm.

17. "U.S. and Rwanda Ratify Bilateral Investment Treaty," AMIP News, December 2011, http://us-africarelationsupdates.blogspot.com/2011/12/us-rwanda-ratify-bilateral-investment.html.

The Rwanda BIT negotiations grew out of consultations under the U.S. and Rwanda Trade and Investment Framework Agreement signed in June 2006.[18] The United States and Rwanda announced their intent to negotiate a BIT on June 14, 2007, and the final agreement was signed on February 19, 2008. The Bush administration submitted the BIT to the U.S. Senate for ratification on November 20, 2008, two weeks after the 2008 presidential election and two months before President Obama's inauguration.

In spite of the devastation caused by the 1994 genocide, Rwanda was considered a good candidate for a BIT because of the economic strides it made in the last several years. During this time, Rwanda opened its economy, improved its business climate, and embraced trade and investment as a means to boost economic development and help alleviate poverty. The BIT is expected to reinforce the Rwandan government's economic reform program.

The provisions of the Rwanda BIT are largely based on the 2004 U.S. Model BIT and include in Articles 3–9 the seven benefits or principles listed above. Articles 23–34 establish binding international investor-state arbitration for the settlement of disputes relating to these benefits. The Rwanda BIT also does not exempt any sector from the use of investor-state dispute settlement, as earlier U.S. BITs had provided only state-to-state dispute settlement for claims by financial services institutions of a denial of national treatment or most-favored nation treatment.

In addition to these basic benefits, several additional notable areas include the environmental and labor provisions and the excluded laws and sectors of the respective economies called "non-conforming measures." Under Article 12 (Investment and Environment) and Article 13 (Investment and Labor), the United States and Rwanda acknowledge that it is "inappropriate" to encourage investment by weakening or reducing the protections afforded in domestic environmental or labor laws. Further, each party agrees to "strive" to ensure that it does not waive or derogate from such laws to encourage a foreign investment. If one party considers that the other party has offered such an encouragement, it may request consultations, and the other must consult "with a view" to avoid any such encouragement. However, if there is no resolution, these consultations are not subject to the arbitration provisions contained in Articles 23–34 of the treaty.

Article 14 (Non-Conforming Measures) establishes the framework of annexes to the treaty, which identify the existing and future measures, sectors, or activities that are, or may be, exempt from treaty obligations. For example, in Annex I, Rwanda has exempted its law that requires a higher minimum capitalization for foreign corporations as well as its law that limits foreign NGO permits to a renewable five-year term. Also, in its Annex I, the United States has exempted its laws that restrict foreign ownership of nuclear facilities, certain mining rights on federal lands, Overseas Private Investment Corporation (OPIC) insurance and loan guarantees, air transportation, customs broker's licenses, and radio and broadcast licenses.

The Senate Foreign Relations Committee held a hearing on the treaty on November 10, 2009, and on December 14, 2010, ordered the treaty favorably reported with the recommendation to ratify it. It is clear from the committee report that the two principal issues of interest for the committee were economic modernization and reform on the one hand and human rights and democracy on the other.[19] The committee noted Rwanda's strong program of economic reforms, which the State Department described as "admirable." Rwanda appears to be a model country regarding its economic policies, which is all the more remarkable given the devastation caused by the 1994

18. U.S. Senate Committee on Foreign Relations, *Investment Treaty with Rwanda.*
19. Ibid.

genocide. But the committee, which was concerned about restraints on human and political rights, expressed concerns that limits on freedom of speech, press, association, and religion are widespread. Nonetheless, the treaty was reported out by voice vote, with only Senator Russ Feingold (D-WI) voting against it.

The Rwanda BIT is probably unique, due not only to the dramatic rise of its economy but also to the extraordinary outreach to the U.S. business community by its president, Paul Kagame. President Kagame is building Rwanda a new reputation in the United States and worldwide as a business-friendly nation that wants to become a model of private-sector development in Africa.[20] He has strongly promoted U.S.-Rwanda trade and investment to U.S. CEOs from Starbucks, Costco, and Google through U.S. visits to corporate headquarters, and those companies have responded with enthusiasm.[21] Rwanda is one of Starbucks' high-end coffee suppliers; Costco is making investments and buying local products including coffee for sale in the United States; and Google has agreed to make its free Web-based software available in Rwanda and install e-mail and other IT services in government offices and universities.

Critical Issues: The 2004 Model BIT

Despite the success of the Rwanda BIT, there has been hesitation in the United States to pursue a more aggressive program to negotiate BITs. The business community remains very supportive of moving forward with a strong and active BIT program despite residual concerns over changes made to the 2004 Model BIT and concerns over efforts in the Obama administration to use the BITs to include new labor and environmental standards. Previous efforts to address outstanding issues at the State Department's Advisory Committee on International Economic Policy (ACIEP) in 2004 and 2010 were not able to reach a consensus between businesses and NGOs. Going forward, therefore, the challenge has been for the Obama administration to reach its own decision about these issues so that a Model BIT can be finalized and USTR can table a proposed text that will enable negotiations to proceed.[22] As noted above, the administration has now done so as of April 20, 2012.

In the decade following implementation of the North American Free Trade Agreement (NAFTA), labor and environmental organizations raised concerns that foreign (Canadian and Mexican) investors could undermine U.S. environmental, health, and safety laws by using the NAFTA dispute-settlement process to challenge enhancements to those U.S. laws as an illegal "taking" or indirect expropriation. Although there were no arbitral cases under NAFTA where this was the result, Congress nonetheless directed the Executive Branch in the Trade Act of 2002 to narrow the scope of investment protections to ensure that "foreign investors in the United States are not accorded greater substantive rights . . . than U.S. investors in the United States."[23] The resulting 2004 Model BIT represented a substantial modification to the earlier 1994 Model BIT in several

20. Jeff Chu, "Rwanda Rising," Fast Company Special Report, March 18, 2009, http://www.fastcompany.com/magazine/134/special-report-rwanda-rising.html?page=0%2C0.

21. Marc Gunther, "Why CEOs Love Rwanda," *Fortune,* April 3, 2007.

22. "Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty," Presented to the Department of State, September 30, 2009, http://www.uschamber.com/sites/default/files/grc/BITReviewReportandAnnexFinalVersion.pdf.

23. United States, *Trade Act of 2002,* Public Law 107-210, 107th Congress, 2nd Session (August 6, 2002), http://www.doleta.gov/tradeact/directives/107pl210.pdf.

respects: narrowing the definition of investment; weakening the standard of minimum "fair and equitable" treatment and expropriation; adding new provisions to procedures for settling disputes between investors and states; adding provisions to increase the transparency of national laws and proceedings; permitting the filing of amicus briefs; and adding articles addressing environmental and labor standards. Despite these changes, NGOs continue to argue that BIT provisions provide greater substantive rights to foreign investors. In the most extensive legal analysis of claims by those groups and individuals arguing that U.S. BIT protections provide greater substantive rights than U.S. law, the authors conclude quite definitively that such claims are "inaccurate or exaggerated" and then examine all of the core provisions.[24]

For U.S. investors abroad, however, many of these changes will result in weaker protections under arbitral panels in developing countries where legal and judicial systems are less developed and where local courts are not a viable alternative to arbitration. By comparison, foreign investors in the United States always have the alternative of filing complaints in U.S. federal courts, where they are accorded full protections and due process.

In addition to the above "defensive" concern, labor and environmental interests are pushing the Obama administration to use BITs as a sword, and not just a shield. These groups want to ensure that BITs include a substantive legal obligation to comply with national environmental and labor laws. In other words, rather than provide a forum to remediate investors' rights vis-à-vis the host government, dispute-settlement proceedings under a BIT would turn into a forum for ruling on regulatory compliance with local labor and environmental laws. This appears to be a function for which a BIT mechanism for settling disputes is not suited. Most business groups argue that including such an obligation would bring the U.S. BIT program to a halt.[25] For example, the current language of the 2004 Model BIT and the Rwanda BIT is aspirational, requiring only that each party "strive to ensure" it does not waive or derogate from environmental and labor laws as an inducement to foreign investors.[26]

Ultimately, according to the 2004 ACIEP report, labor and environmental NGOs believe that the Model BIT protections should be weakened in several major respects and that the Model BIT should also be used to change domestic laws to raise standards, when necessary, for protecting the environment and workers' rights.[27] And then they believe that the BIT should be used to obligate investors to meet those standards. In general, this is because the NGOs object to any treaty that they believe would facilitate outbound investment, which they view as causing jobs or production to transfer out of the United States.

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24. Parvan Parvanov and Mark Kantor, "Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar Than You Might Expect," *Yearbook on International Investment Law and Policy* (New York: Oxford University Press, 2010–2011).

25. "Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B—Particular Viewpoints of Subcommittee Members," Presented to the U.S. Department of State, September 30, 2009, http://www.uschamber.com/sites/default/files/grc/BITReviewReportandAnnexFinalVersion.pdf.

26. See U.S.-Rwanda BIT, Article 12: Investment and Environment, and Article 13: Investment and Labor, http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf.

27. "Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty," Presented to the Advisory Committee on International Economic Policy, January 30, 2004, http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf.

Critical Questions to Be Addressed

Do U.S. BITs promote investment abroad? If they do, is that at the expense of domestic jobs and production?

This question goes to the core of the BIT program and needs to be addressed directly to persuade some key Democratic members of Congress, and Americans generally, of the merits of FDI.

A BIT is only one of many factors that contribute to a company's decision to invest abroad.[28] Other factors include rule of law, availability of infrastructure, level of corruption, taxes, availability of skilled labor, and the adequacy of intellectual-property protection. An equally important variable is the size of the investor: a large multinational may have the resources and international experience to negotiate an individual and customized investment agreement with the local government that a small or medium-sized company would not be able to do. Given the Obama administration's goal in the March 2010 National Export Initiative to double exports in five years with a special focus on small and medium enterprises (SMEs), the Small Business Administration and other representatives of small business, in addition to the U.S. multinationals, should be expected to strongly support the utility of BITs to facilitate their international expansion.

Several economic studies have examined the possible connection between BITs and increased FDI. Although early studies found no significant connection,[29] more recent research suggests that BITs do lead to increased foreign direct investment. For instance, a 2006 study of BITs negotiated by OECD countries with developing countries found a positive impact on FDI,[30] and a 2005 study of BITs between 119 countries from 1970 to 2001 also demonstrated a positive impact.[31]

Given that BITs do help promote foreign investment, then the question becomes whether such investment occurs at the expense of domestic production and jobs. U.S. labor unions and some of their allies in Congress frequently make this allegation. However, most studies do not confirm this,[32] and, in fact, some studies show that foreign investment actually adds to U.S. employment, particularly in headquarters functions, global marketing, and research and development.[33] The labor argument assumes that the total global production and investment dollars of a company are

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28. Karl P. Sauvant et al., eds., *FDI Perspectives: Issues in International Investment* (New York: Vale Columbia Center, January 2011); see chapter 22 by Jason Webb Yackee, "How Much Do US Corporations Know (and Care) about BITs?" at p. 74.

29. Mary Hallward-Dreimeier, "Do Bilateral Investment Treaties Attract FDI? Only a Bit…and They Could Bite," Policy Research Working Paper 3121, World Bank, June 2003, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/09/23/000094946_03091104060047/additional/105505322_20041117160010.pdf.

30. Susan Rose-Ackerman and Jennifer Tobin, "When BITs Have Some Bite: The Political Economic Environment for Bilateral Investment Treaties," Yale Law School, November 2006, http://www.law.yale.edu/documents/pdf/When _BITs_Have_Some_Bite.doc.

31. Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development* 33 (October 2005), http://eprints.lse.ac.uk/archive/00000627/01/World_Dev_(BITs).pdf.

32. Raymond J. Mataloni Jr. and Daniel R. Yorgason, "Operations of U.S. Multinational Companies, Preliminary Results from the 2004 Benchmark Survey," *Survey of Current Business,* November 2006, http://www.bea.gov/scb/pdf/2006/11November/1106_mncs.pdf.

33. Ibid. Also, Matthew Slaughter, "How U.S. Multinational Companies Strengthen the U.S. Economy," Business Roundtable and United States Council Foundation, spring 2009, http://www.uscib.org/docs/foundation_multinationals.pdf.

fixed, and therefore an increase in one leads directly to a decrease in the other. This is rarely the case, but an industry sectoral analysis of U.S. FDI may help clarify the issue.[34]

Do U.S. BITs promote legal reform in developing countries?

Little research has been done in this area although the international business community believes that BITs do indeed promote reform and the rule of law—that is, BITs and international dispute settlement panels aid reformers within local governments to ensure predictable, fair, and nondiscriminatory government action. A few analysts argue that U.S. BITs may have the opposite effect[35] by substituting a convenient alternative dispute-settlement mechanism for local courts, thereby retarding the development of local legal institutions. More research on case studies may be needed in this area.

Also, an examination of other programs, trade agreements, and trade assistance programs that directly help the host government develop institutions for the rule of law would provide a more complete picture. For instance, on a bilateral level the United States provides targeted capacity-building assistance through the Millennium Challenge Corporation (MCC) and free trade agreements. In addition, for those host countries that are members of the WTO, implementing the substantive obligations of WTO commitments provides a framework for domestic trade and investment law. For instance, the WTO TRIMs agreement provides additional new disciplines and protections to the nondiscriminatory national treatment standard of the BITs and the original GATT. Finally, the Aid for Trade program initiated by the World Bank, OECD, and WTO in 2006 provides international funding to enable these reforms.

What are the key constituencies?

Two constituencies in Washington tend to oppose BITs—significant portions of the development community and some Democratic members of Congress close to labor and environmental interest groups. The concerns of both constituencies need to be addressed in order for a robust BIT program to go forward.

Traditionally, the development community has taken the view that economic development is best promoted by foreign aid that, if targeted correctly, should be sustainable and eventually spur local private-sector growth. Included in that view may also be skepticism about whether private multinational business investors will actually integrate into the local economy and help develop the institutional infrastructure and good governance necessary for long-term growth and employment. The truth may be somewhere in the middle, but additional outreach to the development community, advocacy organizations, and the African Development Bank would be useful.

A message in support of BITs needs to be crafted to confirm that in the twenty-first century global economy, private-sector trade and investment are economic development tools that create jobs and commerce in developing countries, thereby improving living standards.[36] In addition, it is important to demonstrate that BITs and other regional and multilateral agreements are vehicles for

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34. Theodore H. Moran, *Foreign Direct Investment and Development: Launching a Second Generation of Policy Research* (Washington, D.C.: Peterson Institute for International Economics, April 2011), pp. 9–74.

35. Ronald Daniels, "Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World," March 23, 2004, http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf.

36. Theodore H. Moran, *Beyond Sweatshops: Foreign Direct Investment and Globalization in Developing Countries* (Washington, D.C.: Brookings Institution Press, 2002).

increasing transparency and rule of law, not part of a hidden agenda of multinational companies to exploit the developing world. For instance, the huge increase (cited above) in FDI as a percentage of total investment, compared to foreign aid, demonstrates that dramatic changes have taken place over the last 50 years. Further, of the 2,600 BITs concluded in the last 50 years, more than 1,200 are South-South BITs between developing countries, which tend to disprove the allegation of a North-South plot by the United States and multinational companies. In addition, the World Bank and in particular its outgoing president Robert Zoellick are strong advocates of trade and investment as development tools preferable to aid.

Congress, for its part, plays a direct role in developing and implementing national policy on investment because the Senate, led by the Foreign Relations Committee, has the constitutional responsibility to ratify treaties, including BITs. In addition, since foreign trade agreements—which include chapters on investment—are subject to approvals by both houses, all members are involved to some extent.

Therefore, part of a BIT program should include framing a message to Congress in support of BITs and addressing the issues of interest to members. For instance, the studies referenced above, which show that establishing BITs is a job creator in the United States, would be very useful. Likewise, characterizing a reenergized U.S. BIT program as a counterweight to Chinese commercial outreach to the developing world would appeal to many members.[37] Certain members of Congress, including Democrats like Congressmen Greg Meeks (D-NY) and Joe Crowley (D-NY) and Senators Mark Warner (D-VA) and possibly Robert Menendez (D-NJ), could serve as champions for the FDI and BITs with their colleagues. Indeed, given the arcane nature of BITs, finding a few willing advocates to champion the merits of BITs is probably the way to proceed.

Ultimately, despite all the concerns and criticisms, on September 28, 2011, the Senate did ratify the pending U.S.-Rwanda BIT by unanimous voice vote. So, the partisanship in the current Congress apparently did not prove insurmountable in passing a BIT, as some had previously thought.

Conclusion

The themes highlighted in this paper point conclusively to the need for reenergizing the program for negotiating BITs. The merits of BITs seem undeniable. For the United States to have concluded merely two BITs—one with Uruguay and one with Rwanda—over the last 10 years puts the United States out of step with the rest of the world and puts U.S. foreign investors at risk compared with their foreign competitors. Of equal concern, at a time when the United States needs to support a strong program of international economic development in the Middle East and Africa, it needs as many tools as possible at its disposal. BITs should be one of them.

In addition, BITs have two political advantages over FTAs: the president does not need special trade-negotiating authority from the full Congress in order to proceed, and BITs only have to pass the Senate for congressional approval.

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37. Ronald Daniels, "Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World," draft dated March 23, 2004, http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf. China has more than 100 BITs, more than twice as many as the United States.

Finally, negotiating a BIT can be a comfortable middle ground for countries not prepared for full-scale FTA negotiations. There have been suggestions from a variety of countries over the past year—India, the East African Community, Mauritius, and Ghana—for BITs with the United States as a vehicle for trade and economic development. Now that USTR has announced a final version of a 2012 Model BIT, negotiations with these—and perhaps other—countries can proceed expeditiously.

ABOUT THE PROJECT

The Project on U.S. Leadership in Development is a partnership with Chevron Corporation focused on leveraging all U.S. assets—the private sector in particular—to promote economic development, improve livelihoods, and reduce poverty worldwide. The project seeks to renew the discourse in Washington and develop a fresh, actionable set of policy recommendations for 2012 and beyond. The project builds on the ongoing work of CSIS in global health, water, trade, food security, governance, and economic development in the areas of conflict and post conflict.

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