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Case study submitted by the United States of America*

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1. Summary of statistical data on the amount and shares of outward FDI going to developing countries and to countries in transition. (U.S. Department of Commerce data on U.S. foreign direct investment positions is attached as Annex 1.)

<u>Answer</u>

The total stock of U.S. foreign direct investment (USFDI) (measured on a historical-cost basis) increased 43% between end-of-year 1987 and end-of-year 1991. Worldwide USFDI stocks rose from $314 billion to $450 billion. (At current cost, the stock of USFDI totalled $655 billion. At market value, the stock of USFDI totalled $802 billion.) The United States continues to maintain the largest stock of FDI in the world.

The percentage of the USFDI stock in developing countries increased from 23% to 25% during this time period, increasing from $73 billion to $112 billion. This increase is primarily the result of increasing foreign direct investment in Latin America and the Caribbean, which at year-end 1991 accounted for 17% of the stock of USFDI ($77 billion), up from 15% ($48 billion) in 1987. USFDI levels in Africa (excluding South Africa) remained static in absolute terms (at $4.4 billion), and decreased from 1.4% to 1.0% of total USFDI stock. The percentage of total USFDI stock located in the Middle East also fell (from 1.3% to 1.0%), and in OPEC countries (from 3.1% to 2.4%). USFDI stock in Asia, other than Japan, increased from $17 billion in 1987 to $25 billion in 1991. That stock increased slightly as a percent of total USFDI, from 5.4% to 5.6%. USFDI in China rose from a stock of $207 million in 1987 to a stock of $350 million in 1991.

Flows of USFDI to the countries in transition increased significantly. Between 1989 and 1991, USFDI stocks in Poland rose from less than $1 million to $23 million, from $3 million to $269 million in Hungary, and from $4 million to $11 million in Romania.

The percentage of USFDI flowing to different sectors has, in some cases, changed significantly in recent years. Between 1987 and 1991, USFDI in manufacturing decreased from 42% to 39% of total USFDI stocks; FDI in the petroleum industry decreased from 19% to 13% of total USFDI stocks; and, FDI in financial services (other than banking), insurance, and real estate increased from 17% to 26% of the total stock of USFDI.

Data for 1992 and revised data for 1989-1991 should be available by July 1993.

2. Summary of overall policy with regard to promoting FDI in developing countries and countries in transition.

Answer

United States foreign direct investment policy is founded on an appreciation that openness to foreign investment and the free flow of capital are economically beneficial to the investor, the home country and the host country. Like domestic investment, foreign direct investment stimulates growth, creates jobs, fosters competition, and facilitates the creation and exchange of goods, services and innovative techniques. The United States, the world's largest source and recipient of direct investment, has a major interest in fostering open investment climates around the world.

We are committed to our open investment policy, and we are aggressively seeking to open markets abroad. Through multilateral, regional and bilateral negotiations we are actively seeking to extend application of principles founded on the highest standards of right of entry and establishment, post-establishment treatment of investment, expropriation and compensation, transfers of funds, and dispute settlement. The U.S. government believes that these principles can and should find greater application as the basis for developing a body of international law leading to liberal foreign direct investment regimes in nations at all levels of economic development

U.S. Direct Investment Abroad

The United States believes that U.S. investment abroad should also receive fair, equitable, and non-discriminatory treatment. The basic tenet of our policy is that U.S. investors should be accorded the better of national or most-favored-nation treatment. Our objective is for U.S. investors to receive the most favorable treatment offered by the host country to any investor, foreign or domestic, at the time of establishment and thereafter. U.S. investors should be able to compete on equal terms with other entrepreneurs, private businesses, and state enterprises for investment opportunities.

By foreign investment, we refer to any kind of investment, including that involving tangible and intangible property, owned or controlled directly or indirectly by nationals of another country, such as equity, debt, and service and investment contracts. Inherent in the concept of investment is the principle that investment may take several forms, and should not be limited to a certain percentage of a given enterprise or restricted in other discriminatory ways.

U.S. policy in bilateral and multilateral negotiations is to prohibit screening of foreign investment. We do provide for host countries to take limited exceptions to the obligation to accord national treatment and most-favored-nation treatment. We believe our approach is consistent with maximizing the free flow of capital.

It is also U.S. policy to seek the prohibition of performance requirements, such as export, local content and foreign exchange requirements. Such requirements distort and discourage trade and investment, and result in diminished returns to both investors and host countries.

Other keys to attracting foreign investment include free transfers, adherence to international law standards on expropriation, protection of intellectual property rights, the availability of binding international arbitration, and the right of the investor to employ management of its choice.

Free, prompt and unrestricted <u>transfers</u> in any freely usable currency should be permitted for all funds related to an investment. The bottom line to a business is the ability to both make a profit and to distribute funds related to an investment to partners and shareholders. Investors place a high priority on commitments that transfers will not be blocked or delayed. During the 1980s countries that guaranteed that profits could be repatriated attracted over 93 percent of measured foreign investment flows.

Firms must be confident that they can obtain a fair hearing in the event of a dispute. The standard for dispute settlement is the reciprocal ability to seek <u>international arbitration</u>. Investors should have full access to the local court system, but also have the choice to take the host government directly to third party international binding arbitration to settle investment disputes. It has been our experience that investors view access to international arbitration of disputes as an important assurance, even if the investor never uses the recourse to such arbitration. In the 1980s countries adhering to the Convention on Settlement of Investment Disputes attracted 81 percent of measured foreign investment.

<u>Expropriations</u> should only occur in accordance with international law standards and be subject to due process. An expropriation should be for a public purpose and nondiscriminatory, and prompt, adequate and effective compensation must be paid. Funds received by an investor as compensation for the expropriation of an investment should be freely transferable at the prevailing market rate of exchange on the date of expropriation. Investors do not challenge the right of sovereign governments to expropriate where these actions are consistent with international law. Investors do, however, want assurances that they will not lose the value of their investment if their assets are expropriated.

In the area of employment, we seek commitments on the part of host governments to permit companies to hire top managers of their choice, regardless of nationality.

-- Intellectual Property

The four principal types of intellectual property -- copyrights, patents, trademarks and trade secrets -- have all been subjects of increasing attention in U.S. trade and investment policy in developing and emerging economies in the past decade.

IP is uniquely expensive, yet uniquely vulnerable. The average patented drug in the U.S. costs more than $100 million to bring to market, yet may be reverse engineered by a chemist with a Master's degree. Computer programs require years of work by large teams of creative minds to develop, yet copying them is child's play. A company may spend years developing recognition of its trademark, only to have the value of that mark eroded by counterfeit goods. Similarly, business confidential information -- from mailing lists to manufacturing processes -- may be a company's chief asset. Without adequate trade secret protection, the company may find itself at the mercy of a disgruntled former employee who has sold it to a competitor.

The importance of these problems has made IPR protection a cornerstone of U.S. international economic policy. There is increasing recognition that world-class IPR protection drives an economy forward by helping create an investment climate attractive to foreign investors. Improved IPR protection, along with developing infrastructure and rising educational levels, helps to move economies from net importers of technology to net exporters, because IPR protection gives domestic innovators the incentive to develop and market their ideas. It ensures them an economic return on their ideas. IPR protection is increasingly important as a country moves from labor-intensive basic industries for export to higher technology -- and higher value-added -- industries.

U.S. Investment Initiatives

The United States has signed bilateral investment treaties with twenty-four countries in Eastern Europe, Latin America, the Caribbean, Africa and Asia and is negotiating such agreements with a number of other countries. These treaties represent important commitments to investment reform, incorporating the principles outlined above. These principles generally set a higher standard of liberal treatment for investment than do the principles found in the BITs of other OECD members, especially with regard to right of entry and establishment, freedom from performance requirements, and right to seek international arbitration for investor-state dispute

settlement. As the investment policy standards in our BITs have risen, more and more countries are seeking to enter into BIT negotiations with us.

Within the framework of the OECD, at our initiative, Member countries are studying ways to strengthen multilateral commitment to open, non-discriminatory treatment of investment. As nonmembers seek closer association with the OECD, we believe that one requirement for that association should be a commitment to link requests for benefits to the acceptance of the responsibilities of such association through adherence to the principles of the Codes of Liberalization, the National Treatment Instrument and any future broader investment instrument.

In the GATT Uruguay Round, the U.S. is encouraging the negotiation of key multilateral agreements to eliminate trade-related investment measures; to protect trade-related intellectual property; and to promote trade in services. Restrictions on trade in services are particularly frustrating to U.S. enterprises as this is an area in which investment rules in many potential host countries have prohibited highly competitive U.S. service companies from doing business abroad.

The United States, Canada, and Mexico have concluded the North American Free Trade Agreement, which incorporates liberal investment standards based on principles consistent with U.S. bilateral investment treaties.

In the Enterprise for the Americas Initiative, the United States and its partners are working with the Inter-American Development Bank to help nations of Latin America and the Caribbean to liberalize their investment regimes. We are very encouraged by the response in Latin America and the Caribbean to this effort. There has been a sea change in the hemisphere with regard to attitudes toward direct foreign investment. Many Latin American and Caribbean countries have already undertaken significant reforms resulting in improved climates for FDI, and are beginning to reap the rewards in significantly increased levels of non-debt-creating capital flows.

3. Overview of governmental organizations engaged in the promotion of FDI in developing countries and countries in transition:

- Information and advisory services
- Match-making, targeted missions, etc.
- Subsidies in the pre-investment phase
- Financing of investment projects

- Insurance of investment

Answer

Several United States government agencies provide support for U.S. foreign direct investment in developing countries and countries in transition. The most important of these are the Overseas Private Investment Corporation (OPIC), the U.S. Agency for International Development (USAID), and the Trade and Development Agency (TDA).

The Overseas Private Investment Corporation provides project financing, investment insurance and a variety of investor services in more than 140 developing nations and emerging economies throughout the world. OPIC encourages American overseas private investment in sound business projects, thereby improving U.S. global competitiveness and increasing U.S. exports. OPIC supports, finances and insures projects that have a positive impact on U.S. employment and the host country economy and environment. All of OPIC's guaranty and insurance obligations are backed by the full faith and credit of the United States, as well as OPIC's own reserves of over $1.8 billion. While a government agency, OPIC is managed as though it were a private enterprise and has recorded a net positive income for every year of operations.

Countries or areas within countries may be eligible to receive insurance, reinsurance, financing, or other financial support from OPIC if that country has established diplomatic relations with the United States, is a developing country or area, or a country in transition from a nonmarket to a market economy, and if that country respects internationally recognized human rights. OPIC is active in 140 countries.

Investment Finance

OPIC implements its finance program through direct loan, loan guaranty, and equity techniques that provide medium- to long-term funding and permanent capital to ventures involving significant equity and management by U.S. businesses.

OPIC loans and loan guaranties normally are provided in the form of "project financing", which is based primarily on the economic, technical, marketing, and financial soundness inherent in the project. There must be adequate cash flow to pay all operational costs, to service the debt, and to provide the owners an adequate return on the investment. To the extent that such project financing is appropriate, sponsors need not pledge their own general credit. In those ventures where project financing is impractical, OPIC will consider more conventional secured lending techniques.

OPIC can provide a significant portion of medium- and long-term funds for financing U.S. investment in countries where conventional financial institutions often are reluctant or unable to lend on such a basis. Because its programs support private sector investments in financially viable projects, OPIC does not offer concessional terms usually associated with government-to-government lending, nor does it offer financing of export sales unrelated to long-term investment in overseas business.

In certain circumstances OPIC may purchase equity in a project, including convertible notes and certain other debt instruments with equity participating features.

Eligibility Criteria: All projects considered for OPIC financing must be commercially and financially sound. They must be within the demonstrated competence of the proposed management, which must have a proven success record in the same or closely related business, as well as a significant continuing financial risk in the enterprise. OPIC's criteria are the same whether it is making a direct loan in dollars or issuing a loan guaranty.

OPIC weighs the balance-of-payments and employment effects on the U.S. economy of every project it considers supporting. Such factors as the level of U.S. procurement, net financial flows, and net project exports to the United States are taken into consideration. Projects that can demonstrate a potential for positive effects on the U.S. economy are of special interest to OPIC.

The contribution of the proposed project to the economic and social development of the host country is also examined, including such factors as:

Increased availability of goods and services of better quality or at lower cost;
Development of skills through training;
Transfer of technological and managerial skills;
Foreign exchange earnings or savings'
Host country tax revenues; and
Increases in stimulation of other local enterprises.

OPIC also is required to review host government agreements or concessions and must consider the environmental effects of ventures to which it supplies capital. A review of the host country's adherence to internationally recognized workers' rights is also required.

By statute, and consistent with overall U.S. government policy, OPIC does not participate in projects having performance requirements that would substantially reduce the potential U.S. trade benefits of the investment, such as

host-government stipulations placed on investments so they will perform in such as a way as to extract economic advantages that might not have occurred based on ordinary business considerations. Of particular concern are "trade-related" performance requirements covering local content and maximum import and minimum export levels.

Financing Techniques: Financing for smaller projects is provided through a direct loan program from OPIC's own funds. These loans generally range in amount from $500,000 to $6 million. This source of funding may be used only for financing projects sponsored by or significantly involving U.S small businesses or cooperatives. Major corporations not eligible for direct loans may take advantage of OPIC's loan guaranty program. (Small businesses and cooperatives investing in large projects may also use this type of funding.) Typical OPIC loan guaranties range from $2 million to $50 million. For adjudicating loans and loan guaranties, OPIC analyzes both political and credit risks.

In addition to providing debt capital to U.S. investors, OPIC also can provide permanent capital through capital stock investments and purchase of a project's debentures convertible to stock. In these cases, owners share their equity in a project with OPIC. This permits them to reduce their exposure to risk and, by improving the project's capital base, often makes it possible to obtain substantially more debt capital for the project as well. Because making investments such as these usually entails greater investor risk than being a secured creditor of a project, OPIC is very selective in its equity investment program, investing only in those projects with highly qualified and experienced management, efficient, strongly competitive operations, and established, market-tested products or services.

Investment Insurance

OPIC provides political risk insurance to U.S. investors, contractors and exporters, and financial institutions involved in international transactions. Insurance is available for new ventures or expansions of existing enterprises, and can cover equity investments, loans, technical assistance agreements, leases and other long-term exposures.

Typically, OPIC insurance covers the following three risks:

Currency Inconvertibility -- the inability to convert profits, debt service and other remittances from local currency into U.S. dollars;
Expropriation -- loss of an investment due to expropriation, nationalization or confiscation by a foreign government; and
Political Violence -- loss of assets or income due to war, revolution, insurrection or civil strife.

Investor Services

OPIC Investor Services consist of five principal components: Advisory Services; Investment Missions; the Opportunity Bank; the Investor Information Service; and Outreach. Each of these components is designed to assist small and medium-sized businesses in successfully planning and implementing overseas investment projects.

1) Advisory Services

OPIC offers fee-based advisory services to small, medium-sized and "new to market" U.S. businesses contemplating investment in overseas markets. Through OPIC's advisory services, companies obtain professional guidance and assistance with business plan development, prospective joint venture partner identification, field reconnaissance and prefeasibility evaluation, and project finance sourcing.

In addition to these project-specific activities, OPIC's investor services staff assists with securing country and industry-specific investment information, including investment codes, laws and regulations, and labor and environmental regulations.

2) Investment Missions

OPIC conducts periodic investment missions to selected countries in which OPIC operates. To be considered for an OPIC-sponsored mission, countries must offer excellent investment climates and opportunities for American businesses.

OPIC missions provide U.S. companies with a unique and valuable opportunity to support their international strategic planning and expansion requirements. On each mission, U.S. business executives are introduced to key private sector leaders, government officials and potential joint venture partners. A strong emphasis is placed on arranging custom-tailored schedules of business appointments and site visits for each mission participant with officials and executives who can play an active role in bringing proposed investment projects to fruition. In fiscal year 1992, a record total of 263 U.S. firms participated in 11 investment missions, visiting 21 countries on four continents.

OPIC also periodically arranges "reverse" investment missions which bring foreign government officials and key business leaders to the U.S. to discuss investment possibilities and seek potential joint venture partners.

3) Opportunity Bank

OPIC's Opportunity Bank is a computerized data base which matches the investment interests of American companies with

investment opportunities offered by project sponsors in host countries. Both American firms and host country project sponsors can register with the data bank by completing and submitting a profile of their organization to OPIC. There is no registration fee. Currently, more than 1,300 U.S. firms and 1,800 project opportunities are registered with the Opportunity Bank.

Interested parties can access the Opportunity Bank "on-line" through LEXIS /NEXIS services. Alternatively, OPIC will search the Opportunity Bank based on an interested party's selection of country and industry sector criteria.

4) Investor Information Service

The Investor Information Service (IIS) is a publications clearinghouse that provides one-step shopping for general business, economic, political, social and investment climate information on more than 125 countries and 20 major market regions. IIS information is collected from U.S. and host country governments, private sources and multilateral organizations.

5) Outreach

OPIC periodically sponsors seminars and conferences throughout the U.S. and overseas as a means of informing the U.S. business community of investment opportunities in the developing world and economies in transition. The objective is to increase the awareness among American companies, especially small and medium-sized firms, of opportunities for business expansion through overseas investment, as well as the OPIC services available to assist them. To enhance the outreach, OPIC works with other federal government agencies, state and local governments, private organizations and multilateral institutions. For example, OPIC and the U.S. Small Business Administration (SBA) have arranged to encourage use of the finance and outreach programs of both agencies to increase international trade and investment by smaller U.S. firms.

OPIC has been highly effective. In 1992, OPIC supported 118 projects totalling $8 billion. Those investments created some 24,000 person years of employment in the U.S. and 47,000 jobs in recipient countries. Successful OPIC-assisted projects also serve as bellwethers for other U.S. investors seeking opportunities in developing and emerging economies.

Both at the local mission level and through its headquarters staff, the <u>U.S. Agency for International Development</u> (AID) has established several programs to assist U.S. exporters and investors overseas.

Center for Trade and Investment Services (CTIS)

CTIS is AID's central source for the U.S. public and private sector on AID programs and procurement/business opportunities abroad. CTIS disseminates AID information to facilitate business opportunities for U.S. and indigenous firms in AID-supported countries. AID operates in more than 120 developing countries in Asia, Africa, Latin America, the Middle East, the emerging democracies of Eastern Europe and the Newly Independent States of the former Soviet Union.

CTIS provides the following services:

Business Information Clearinghouse: detailed information on the developing world, including activities of AID, other U.S. government agencies, and multilateral donor organizations which support the private sector;
Tailored Counseling and Research Services: analyses of clients' needs for specific market information, utilizing numerous international trade and investment databases, market reports, and referrals to other organizations, when appropriate;
Opportunity Identification: information on procurement/ business opportunities in AID-assisted countries; and
Seminars: industry-specific seminars on market sector environment and potential commercial opportunities.

International Executive Service Corps - Trade and Investment Services (IESC/TIS)

IESC is a highly successful private and voluntary organization (PVO) created by AID 25 years ago. IESC/TIS is a transaction-oriented organization which assists small- and medium-sized companies in developing countries and newly-emerging democracies to forge links with firms in the U.S. The TIS staff accesses the more than 12,400 IESC volunteer executives and its worldwide business networks to help promote and create new, mutually-beneficial business ventures between U.S. and indigenous foreign companies in AID-assisted countries.

The TIS project has been independently evaluated and has received high marks for attaining project goals. AID recently authorized a two year extension of the IESC grant and an increase in funding.

American Business and Private Sector Development Initiative (ABI)

The ABI consists of several programs to foster U.S private sector trade and investment in Central and Eastern Europe and the Baltics. The programs are designed to provide direct assistance to small and medium-size U.S. firms. These programs

are targeted at five industry sectors which are key to reform and economic growth: energy; environment; telecommunications; agriculture/agribusiness; and housing.

For example, the Capital Development Initiative (CDI) is designed to help build infrastructure by offering technical assistance and grant funding to U.S. firms or consortia for up to fifty percent of the costs associated with the design of projects in the five targetted sectors. The grants range from $100,000 to $500,000 and are administered by Coopers & Lybrand.

The U.S. Trade and Development Agency (TDA) is an independent U.S. Government agency, established in 1980. TDA seeks to:

help position U.S. companies to compete successfully as investors and suppliers of goods and services for major capital projects in developing countries;
assist economic growth in the developing and middle-income world by increasing access to U.S. private sector expertise;
serve as a front-line agency for implementing U.S.trade, investment, and foreign assistance objectives by rapidly and effectively mobilizing U.S. technical assistance; and
maximize the reciprocal benefits of U.S. foreign assistance.

TDA provides grants to fund feasibility studies and other planning services for major projects which are economic development priorities of recipient countries. TDA-funded studies must be performed by U.S. companies or consortia. Host countries play active roles in developing the scope of studies, selecting on a competitive basis U.S firms to complete it, and monitoring the progress of the study. TDA's emphasis on host country participation seeks to ensure that TDA-funded projects contribute to the economic growth and development of recipient countries. The cooperation between the host country, TDA, and the U.S. business community builds goodwill that often extends to future investment projects.

In fiscal year 1992, TDA supported 297 activities in 61 host countries. These activities were principally in the energy and transportation sectors. FY 1992 program obligations totalled $39.4 million, and total U.S. exports associated with TDA-funded activities totalled $4.6 billion. TDA's multiplier effect is very large, despite its limited budget.

Other U.S. Government programs in support of USFDI are administered by the Department of Commerce, the Small Business Administration, and EXIM bank.

4. Overview of the availability and role of specific incentives, fiscal and other, and an assessment of experience gained.

Answer

As mentioned earlier, the United States believes that U.S. investment abroad should receive fair, equitable, and non-discriminatory treatment. The basic tenet of our policy is that U.S. investors should be accorded the better of national or most-favored-nation treatment, at the time of establishment and thereafter. Accordingly, the United States continues to seek the reduction and elimination of practices by governments which restrict, distort, discriminate against, prohibit, or place unreasonable demands on foreign investment. A transparent, market-based investment regime serves the best interests of home and host countries, and investors.

In keeping with this policy, the U.S. seeks (for example, in Uruguay Round talks) to minimize international use of fiscal and other incentives that distort the market.

5. Summary of policy with regard to the conclusion of:

   - bilateral investment promotion and protection agreements

   - bilateral agreements on the avoidance of double taxation

Answer

Bilateral Investment Treaties

Because freely functioning markets ensure the most efficient and productive allocation of capital, the United States promotes market-oriented international investment free of discriminatory treatment and opposes measures by other governments that impede or distort investment and related trade flows. Bilateral investment treaties (BITs) serve to promote growth in developing countries and countries in transition by encouraging adoption of sound economic policies to help attract investment capital.

By the end of the 1980s, the statist economic models that predominated in the developing world at the start of that decade were generally being replaced by market-oriented policies. This occurred most dramatically in the former Soviet Union, Eastern Europe and Latin America, but was also a clearly discernable trend elsewhere.

As part of this change, countries which had previously limited foreign investment removed barriers to market flows of investment and provided greater security for investors once established.. Anxious to indicate the permanence of the changes and to establish themselves as full competitors in the

market for foreign investment, many of these countries undertook to negotiate BITs with the United States.

At the same time, the U.S. moved to welcome and support policy shifts toward market economies by competitive policies which included BITs as a fundamental element. In Latin America and the Caribbean, the BIT Program is an integral part of the Enterprise for the America's Initiative. In Eastern Europe and the former Soviet Union, the U.S. is also actively negotiating BITs in support of the transition of these countries to market economies.

The U.S. remains interested in negotiating BITs wherever it is likely to further the objectives of the program and U.S. investors.

U.S. BITs: HOW THEY WORK

The purpose of the U.S. bilateral investment treaty program is to establish greater discipline by governments around the world with regard to establishment and implementation of investment policy, and so allow investment to flow according to market forces. The U.S. bilateral investment treaty program has the strong support of the U.S. business community and is consistent with longstanding U.S. government policy that the private sector should be encouraged to play an important role in the global development process.

Since the inception of the BIT program in the late 1970s, the United States has signed BITs with 24 countries. (In addition, 47 Treaties of Friendship, Commerce and Navigation provide certain protections for U.S. foreign direct investment.)

U.S. BITs are designed to afford a high degree of protection for investment by U.S. investors and investors of the treaty partner. The objective is to create a level playing field and open access for investors in the treaty partner's country, while at the same time establishing certain rights and protections as absolute standards protected under international law.

The treaties permit the private investor to take the host government to international arbitration to enforce treaty rights. In several areas -- such as national treatment on entry, freedom from performance requirements and international arbitration for investor-state dispute settlement -- the U.S. BIT goes well beyond what European BITs have traditionally provided for their investors.

The BIT program does not actively promote U.S. investment to go abroad. Instead, it encourages removal of foreign governmental barriers to the free flow of investment and ensures that U.S. investment, once established, will be

protected. The principal elements of the BITs are:

- a broad definition of investment
- the better of national or MFN treatment
- the right to hire top managers of the investor's choice
- freedom from performance requirements
- international law standards on expropriation
- free transfer of funds associated with an investment
- the freedom to choose to settle investor-state disputes through international arbitration

Nondiscriminatory Treatment: The BITs open the doors for foreign investment and ensure investment is treated fairly and in an nondiscriminatory manner after entry. BITs provide that both in establishment and in operations, investment by investors of treaty parties is provided with the better of national or MFN treatment, subject to certain specified, limited exceptions. Thus, in setting up a business or running one, the investor must be treated by the host government as would a domestic investor. We find that BITs make it easier for U.S. business to negotiate joint venture contracts, by guaranteeing certain rights business would otherwise have to forgo.

Hiring: The BIT gives investors the right to hire top management of their choice, and so protects them from the possibility that national hiring quotas will restrict their ability to control and manage their investment with the people they consider most appropriate. The provision applies both to existing investment and the start-up phase.

Performance Requirements: The treaty prohibits the host government from imposing performance requirements -- such as export or local content requirements -- as a condition for establishing or operating an investment. This provision also helps to ensure that the treaty partner will not use U.S. investment in ways detrimental to U.S. trade. In other words, they provide much greater flexibility by allowing companies to make business decisions based on rational policies and sound business practices.

Expropriation: The treaty provides that in those cases where an expropriation occurs, it can only be done in a non-discriminatory manner, for a public purpose, in accordance with due process and international law, and upon payment of prompt adequate and effective compensation. These protections extend to any acts that are tantamount to expropriation, such as "creeping expropriation".

Transfers: In one of the most crucial provisions for investors, the BIT guarantees that all transfers related to an investment will be made freely and without delay in a freely

usable currency and at a market exchange rate. The investor is thus protected against government mandated queues for foreign exchange, inconvertibility, or export or other requirements to access hard currency.

Dispute Settlement: A BIT provision that is highly prized by investors is the right to take the host state to international binding arbitration to settle investment disputes arising under the treaty. The treaty provides investors, at their option, the choice between resolving disputes in domestic courts, by international arbitration, or by previously agreed mechanisms. This "fork-in-the-road" choice is irreversible and binding on both the investor and host state.

In addition, in response to the recognized importance of protecting investors' ideas, products and inventions, we seek to negotiate BITs and intellectual property rights (IPR) agreements simultaneously, where IPR protection has not otherwise been achieved.

Achievement cannot be measured in a quantitative way. Since BITs are relatively young, the track record is limited. Recently, we understand, the first case under a U.S. BIT dispute settlement mechanism has been submitted to ICSID arbitration. What is clear is that U.S. BITs -- which are legally binding on the parties -- have set a high level of protection and liberalization for investment that is increasingly being adopted by others in the international community.

Bilateral Tax Treaties

Bilateral income tax treaties tend to encourage international trade and investment by reducing the possibility of double taxation, providing a formal resolution mechanism for tax disputes and prohibiting certain types of tax discrimination. Currently, the United States has treaties in effect with 40 countries, with several others under negotiation. Recent policy initiatives have prompted the negotiation of tax treaties with the newly independent states of the former Soviet Union.

The negotiation of income tax treaties is based on a standard prototype prepared by the U.S. Department of the Treasury. This prototype reflects the model developed by the Organization for Economic Cooperation and Development, and widely used by members of that Organization.

In general, treaties to avoid the double taxation of income set forth agree definitions of terms; rules allocating taxing jurisdiction with respect to each type of income (business profits, wages and salaries, dividends, interest, royalties, rentals, capital gains, etc.) between the country of source of

the income and the company of residence of the beneficial owner of the income; the method to be used by each country to avoid double taxation; and establish procedures for administrative cooperation in resolving doubts and disputes, coordinating adjustments of tax liability and exchanging tax information.

6. Overview of government policies affecting portfolio equity outflows to developing countries and countries in transition, including policies relating to institutional investors.

Answer

Purchase of foreign securities by U.S. investors: The United States government does not impose capital controls on outward financial flows (except with respect to a few countries according to the provisions of the International Emergency Economic Powers Act -- IEEPA). Legal and natural persons in the United States are free to make portfolio investments in equities of developing countries and countries in transition.

Sale of foreign securities to U.S. investors: In the United States, securities and transactions involving securities are generally regulated under the federal securities laws, which are administered and enforced by the Securities and Exchange Commission (SEC). The federal securities laws are applicable to a broad variety of instruments defined as "securities". The federal laws in most cases provide national treatment for persons engaged in the securities business within the United States. In addition, foreign issuers generally are subject to substantially the same requirements as U.S. issuers. In fact, the SEC has adopted specialized registration and reporting forms to accommodate foreign issuers. Recent SEC initiatives have addressed issues raised by movements toward global trading of securities and the development of closer links between national securities markets.

The most important U.S. institutional investors are insurance companies and pension funds. The U.S. insurance regulatory system is designed to protect insurance buyers and third parties, and is administered at the state level. This goal is accomplished through laws and regulations designed to prevent or minimize the adverse impact on consumers of insurer insolvencies (and to prevent unfair and deceptive marketing practices by insurers and their intermediaries). To minimize insolvencies, states have developed comprehensive insurance laws and regulations governing the financial operations of licensed insurers, which include inter alia investment limitations. These regulations often limit the percentage of insurance companies' investment in foreign securities.

The federal "Employee Retirement Income Security Act of 1974" (ERISA) provides standards for the operation of pension funds to prevent fund managers from taking actions that would undermine the integrity of funds. ERISA states that a fund's fiduciary shall discharge duties with respect to a plan in the interest of participants and beneficiaries and with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims... by diversifying the investments of the plan so as to minimize the risk of large losses...." ERISA does not provide any more specific criteria with regard to the percentage or type of domestic or foreign securities in which a fund fiduciary may invest. Individual funds may establish internal fund management rules regarding investments outside the U.S., but these presumably are based on market principles, specifically the evaluation of best risk/return ratios.

Foreign securities are often marketed to U.S. investors through mutual funds. Many international funds are marketed in the U.S. The SEC regulates mutual funds marketed in the U.S., including those funds which include foreign securities.

7. An overall critical assessment of the effectiveness of the various instruments and programmes.

Answer

The United States has the most open foreign investment regime in the world. With regard to outward foreign direct investment, the standards we seek for the right of entry and post-establishment treatment of our investors are the highest and most complete of any country. The U.S. maintains no controls over outward capital flows. In part as a result of these policies, the U.S. is the world's largest source and recipient of foreign direct investment.

Despite a late start, compared with many other OECD countries, and a more comprehensive and challenging model agreement than in other OECD countries (including freedom from screening, and the right of independent dispute settlement mechanisms for investor-state disputes), the U.S. BIT program has been very successful. The U.S. has signed 24 BITs, and is negotiating a number of others with countries in every region. A number of countries from Latin America and elsewhere have indicated interest in becoming parties to NAFTA. While too many still screen foreign investment, most OECD countries have continued to liberalize their foreign direct investment regimes in recent years. Some of the high standards espoused by the U.S. can be found in the World Bank Guidelines on the Treatment of Foreign Direct Investment.

Some multilateral negotiations in which the U.S. government is currently engaged are more difficult than many of our recent bilateral and plurilateral agreements. The GATT Uruguay Round TRIMS Dunkel text is very limited in terms of the scope of performance requirements it would prohibit. In the European Energy Charter negotiations, some European parties and the EC seek to carve out the EC its associates from full liberalization according to the terms of the current draft, and several parties to the negotiations still seek to screen investment despite the lack of economic and developmental rationale for such a procedure.

Nevertheless, we believe that the best practices supported by the U.S. are gradually becoming the standard by which other countries seeking greater flows of foreign direct investment judge themselves and their neighbors. We believe the worldwide trend towards liberalization will continue, and we will continue to work toward that end for the benefit of our investors, and the economic growth and continued development of our economy and the economies of our economic partners.

With regard to the U.S. Government programs to support foreign direct investment, OPIC stands out as the most successful of the agencies engaged in these activities. OPIC fields a highly trained, motivated, and professional staff. Its programs and financial position constitute the best example of market principles at work within the government, and the programs are highly regarded and sought after by the U.S. private sector.

The Trade and Development Agency is quite successful given its size and budget. Dollar for dollar it is one of the U.S. government's most successful ventures. It is hindered by funding and staffing constraints.