



USCIB Policy Pillars on Foreign Direct Investment

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Investment drives economic growth, innovation, international trade, competition, job creation and prosperity in any economy. Without investment, economies stagnate and citizens suffer. Foreign Direct Investment (FDI) has long been a vital pillar in the overall investment dynamic in the U.S., in successful economies around the world and at various levels of development – even more so in today’s (and tomorrow’s) world of global value chains (GVCs) and heightened global competition. The world of trade is moving, indeed at an accelerating pace, to become more integrated, faster-paced, and built around GVCs.

At the same time, unfortunately, some countries are succumbing to the temptation to tilt playing fields to advantage local producers. “Forced localization,” often involving intersecting trade and investment barriers, is an increasing challenge for global companies. Too many governments are choosing to force foreign investors to favor local procurement, employment, or investment as the price of doing business in that country. Similarly, some governments also are abusing regulatory rules and procedures to discriminate against foreign suppliers and/or investors. USCIB is working to counter this trend along with its member companies, the U.S. Government, and our global partners, including the Business and Industry Advisory Committee (BIAC) to the OECD, the International Chamber of Commerce (ICC), and the International Organization of Employers (IOE).

A key message is that in this increasingly GVC-driven world, effective investment protection and promotion is a vital enabling framework. The results are clear:

USCIB’s FDI Pillars:

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investment policy really matters. Countries that have pro-investment, pro-business policies and well-established rule-of-law systems attract more and higher-quality FDI – and their economies, workers and citizens reap significant additional benefits.

USCIB, working through its Trade and Investment Committee, has adopted nine policy pillars to guide the organization’s activities and advocacy in the investment field.

1. Successful Government Policies Attract Successful Investors

Nations as well as sub-central governmental units with clear and well-implemented policies on taxation, protection of property (including intellectual property) rights, common sense laws and regulations (including labor and liability issues), and clean government create a climate that nurtures private investment, including FDI. A strong investment climate is much more important than investment incentives in attracting FDI.

2. Strong Investment Agreements Are More Important than Ever

International investment agreements provide essential protections for investors putting their capital, intellectual property, management resources and reputation at risk outside the comforts and security of their home markets. Strong Bilateral Investment Treaties (BITs) and investment chapters in bilateral or regional Free Trade Agreements (FTAs) are very important tools to facilitate and protect FDI flows. We strongly support the network of BITs and FTA Investment Chapters that the U.S. Government has negotiated and brought into force, as well as comparable “gold standard” investment agreements around the world.

We strongly support the ongoing efforts of the U.S. Government to negotiate major FTAs with 11 Pacific partners (the TransPacific Partnership or “TPP”) and with the European Union (the Transatlantic Trade and Investment Partnership or “TTIP”). USCIB staff co-chairs the Investment Working Groups in both the business coalition for the TPP and the business coalition for the TTIP, and works closely with the lead U.S. Government investment negotiators and key international partners on these issues.

We also strongly support, and work with U.S. negotiators on the efforts to negotiate more “gold standard” BITs with key partner countries, including advanced developing countries where the U.S. does not yet have a BIT in place. The U.S. BIT negotiations underway with China and, at a much earlier stage, with India are high priorities for USCIB and our member companies. We also support other BIT negotiations underway or under discussion with other partner countries.

3. Gold Standard BITs Require Three Strong Investment Protections

Strong, enforceable investment protections are what can turn a potential investor into an on-the-ground operator and employer. There are three key elements in a strong 21st century BIT: 1) **core**

investor protections including fair, equitable and non-discriminatory treatment, protection against expropriation and “localization” requirements, and free transfers of capital and earnings; 2) **“market access” or “pre-establishment” scope for those protections**, i.e. the ability to break down investment protectionist barriers and open up opportunities to invest across the full range of sectors in a partner country, subject to a negotiated and limited “negative list” or exceptions or non-conforming measures; and 3) **direct access to independent and effective dispute settlement** to resolve disputes with the host government, typically through an “Investor-State Dispute Settlement” (ISDS) system for independent arbitration.

We also believe strongly that investment protections under BITs and Investment chapters must continue to be available to all sectors and to all investors. Proposals to deny some or all investment protections and/or access to ISDS procedures for some black-listed sectors or industries are unjustified, and set a very troubling precedent.

While we feel that there is room for improvement on some details of the latest 2012 Model BIT, we continue to think, on balance, it represents a good basis for negotiating a high standard BIT or investment chapter. We do believe that the Model text should continue to be carefully customized to ensure that unique challenges with individual negotiating partners are adequately addressed.

4. The Investor-State Dispute Settlement System Works

Experience has shown that a strong ISDS system can play a key role in promoting and protecting investments and in resolving knotty disputes, either through the arbitration process or through negotiations against the backdrop of a possible arbitration. ISDS simply assures access to a neutral forum for the resolution of a dispute between a state and an investor that is a national of another state. The process emphasizes transparency and public participation, with recent agreements requiring the publication of key documents and decisions, as well as allowing for the public to watch many arbitration hearings in real time (via the Internet). NGOs and other interested parties are permitted leave to file amicus curiae submissions on key legal questions, as they would in a U.S. appellate court. ISDS takes disputes out of the political arena and lets them be resolved by recognized independent and impartial arbitrators. Importantly, and contrary to allegations of some critics, ISDS provisions do not undermine host government regulation. U.S. BITs and FTA Investment chapters actually enhance, rather than undermine, the rule of law as they ‘export’ core U.S. legal practices. There are, furthermore, safeguards in place to deter the filing of frivolous cases.

USCIB has played a leading role in both of the extensive reviews of the U.S. Model BIT text, one in 2002-04 during the Bush Administration and most recently in the 2009-12 review under the Obama Administration. Current and

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former USCIB staff were active members of the formal and quite diverse (business, labor, NGOs, academics, and arbitrators) Advisory Subcommittee set up by USTR and the State Department under ACIEP auspices.

5. Emerging SOE Issues Deserve Greater Attention

As in trade and other broad policy areas, State-Owned Enterprises (SOEs) raise several important issues in the investment area. SOEs, and more broadly state-championed enterprises, can enjoy a range of preferential benefits which give them clear advantages when competing with private firms, domestic or international, for investment opportunities. SOEs may receive direct or indirect subsidies, favorable tax treatment, preferential treatment or even exemption from regulations applied to private investors. In some cases, SOEs even act as the government regulator within a sector, granted regulatory oversight of themselves as well as their private competitors. Operations invested in SOEs can also indirectly benefit from government directed procurement. Large, powerful SOEs may even gain from monopoly or oligopoly power and/or favorable treatment in their home markets, generating excess profits they can use to subsidize investment in foreign markets. For all these reasons, we encourage the U.S. Government and other market economies, as well as relevant international organizations, to devote greater attention and resources to the emerging issue of SOEs. It is important to ensure level playing fields when SOEs compete, including in investment and trade areas, with the private sector. We support strong SOE chapters in the on-going TPP and TTIP negotiations, as well as in U.S. BIT negotiations with China and other large emerging market economies.

6. A Multilateral Investment Agreement?

Some commentators have explored, even promoted, the idea of a multilateral investment agreement. Some propose this erstwhile multilateral body could perhaps be affiliated with the World Trade Organization, UNCTAD or the OECD. Or perhaps a new international bureaucracy would need to be created. We at USCIB are certainly open-minded toward any new ideas that can bolster the international investment environment. But we reject the premise of some critics that the international investment regime is in crisis, is fundamentally flawed, or in need of radical revisions. The system, while not perfect, is working quite well and should not be condemned or thrown overboard based solely on an over-hyped political campaign.

While we remain open to debating a possible multilateral investment agreement and institution, the key is that any such new entity must meet at least the current high standard of investment protection and market opening which we find in recent U.S. BITs. The burden of proof must be on the advocates of a new multilateral agreement to show convincingly how they will maintain world-class levels of ambition, coverage, discipline and rule-of-law. This may be difficult in a multilateral negotiating process involving a hundred or more countries, many of whom unfortunately are not as open to international investors, and have not yet adopted international standards on rule-of-law and judicial independence. We have yet to be convinced that such a broad international

negotiation process could deliver the quality of investment agreement which we consider essential. We would love to be proven wrong. Until that happens, we at USCIB will continue to support responsible efforts to improve the current system of bilateral and regional investment agreements.

7. Complement the SelectUSA Program with Support for Outward Investment

After a long period of official “neutrality” by the Federal Government on inward FDI into the U.S., the U.S. Government in recent years has belatedly but increasingly come to value and officially support inward FDI, citing its contributions to the U.S. economy: job creation, technology and management expertise, tax revenues, increased competition and consumer choice. The Obama Administration has enthusiastically embraced inward FDI, bolstering the “SelectUSA” program at the Department of Commerce to strengthen America attractiveness for FDI and hosting the 2013 Investment Summit, where President Obama and multiple senior government and business leaders highlighted our new national priority on inward FDI. USCIB enthusiastically welcomes this strong push on behalf of inward FDI.

At the same time, we at USCIB urge the Administration to support the other half of the overall investment equation in today’s competitive global economy. USCIB recognizes and appreciates that the Administration is moving ahead with BIT negotiations, most notably with China; is working hard to get robust BIT-type provisions in TPP and TTIP; and day-in, day-out helps the foreign operations of U.S. firms address problems in those foreign markets. But President Obama and key U.S. Government leaders have been hesitant to acknowledge the broadly positive role of outward FDI in driving U.S. economic growth, competitiveness and jobs. We commend the recent U.S.-Africa Summit in Washington and the strong endorsement by President Obama and cabinet members for U.S. investment in Africa. USCIB encourages the Administration to publicly recognize the important benefits of FDI around the world by U.S. companies to U.S. economic growth and competitiveness in today’s and tomorrow’s globalized economy.

8. National Security Reviews of FDI Are a Fact of Life

One feature of most BITs and FTA investment chapters is a broad “national security” or “essential security” exception, allowing each partner government to invoke security provisions to trump open investment commitments. It is long-established standard practice for governments to have essential security procedures of one sort or another in their trade and investment agreements.

In the U.S., security reviews of certain inward FDI cases have gone on since at least 1988 under the “Exxon-Florio” Amendment to the Defense Production Act. More recently, the legislation was updated in the Foreign Investment and National Security Act (FINSA) of 2007. The FINSA is implemented through the Committee on Foreign Investment in the United States (CFIUS), an influential interagency group chaired by the Treasury Department.

The U.S. national security reviews consider only national security issues, under a rigorous standard, and under a formal structure with tight deadlines. Many foreign countries take a different approach than the United States with broader, less formal and more politicized reviews and quite elastic definitions of “national security.” USCIB and other business groups as well as many economists have complained that abuses of the national security FDI reviews in some countries can interfere with market efficiencies, deny companies legitimate investment opportunities, and be abused for protectionist purposes. The reality is that such national security reviews are and will remain a fact of life. The U.S. and other governments feel it is necessary to have that “essential security” tool in their arsenal to deal with exceptional cases where FDI and national scrutiny intersect.

We at USCIB will continue to speak out for common sense approaches in CFIUS and other national security reviews around the world to ensure that such reviews by other governments of FDI cases are, indeed, focused in a limited and very rigorous way on legitimate national security concerns. We will speak out emphatically in the case of any governmental abuses of essential security provisions in disguised discrimination or protectionism. We continue to oppose broad “investment screening” regimes by either developed or developing countries.

9. Leveraging USCIB’s Unique Role

We at USCIB, working through and with our members on the USCIB Trade and Investment Committee, will continue to work with the key U.S. Government agencies (specifically USTR and State as well as Treasury and Commerce) on investment policy issues. We will also continue to play a leading advocacy role in Washington and beyond, including to international audiences, on investment policy issues.

We will also actively use our unique international networks as the U.S. business representative to the Business and Industry Advisory Committee (BIAC) to the OECD, the International Chamber of Commerce, and the International Organization of Employers. We will push in those bodies for strong pro-investment, pro-FDI policies and will also reach out through those networks to cooperate bilaterally with our national committee partners in key countries.

About USCIB:

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.