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The Obama Administration's Bilateral Investment Treaties (BITs) Should Provide for Investor Visas

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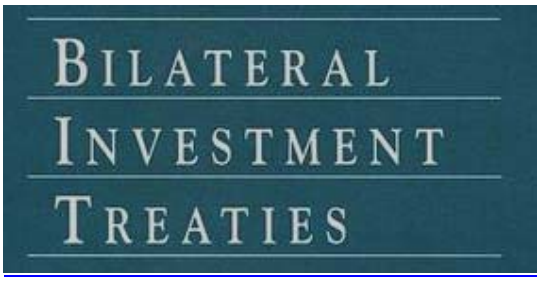

The Obama Administration is busily negotiating bilateral investment treaties (BITs) with China, India, Russia, and Vietnam.[1] BITs aim to attract foreign direct investment (FDI) to the United States and protect American investors' rights abroad. It's disappointing, then, that the Administration seems to omit from the BITs a provision for investor visas, despite the fact that previous administrations have entered into 70 treaties[2]—40 of them BITs entered into since the 1980s[3]—with investor visa provisions. If foreign investors can't get investor (E-2) visas to come to the U.S., how will they invest here? If American investors are denied visas by foreign countries, how will they manage their investments overseas?

Now is the time for companies and organizations with an interest in this issue to voice their concerns. The U.S. Department of State (DOS) and the Office of the U.S. Trade Representative (USTR) just held a July 29, 2009, public meeting and solicited written comments on the review of the Administration's "model" BIT, which is used as the starting point for the Administration's negotiations.[4] While that comment period is closed, the review is ongoing. In particular, comments can be submitted to DOS' Advisory Committee on International Economic Policy (ACIEP). Its Subcommittee on Investment is scheduled to give its review of the model BIT to the full ACIEP in September.[5] Other advisory committees at

[1] USTR, *2009 Trade Policy Agenda*, Annex III, 33, 40, 44, http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report; *U.S. Makes Eastern Push as Investment Treaty Talks Opened withy China, Vietnam, India,* Investment Arbitration Reporter (July 1, 2008), http://www.iareporter.com/Archive/IAR-07-01-08.pdf.
[2] 9 FAM 41.51 Exhibit I.
[3] *See* Appendix: Investor Visa Provisions in U.S. BITs.
[4] Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34071 (July 14, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-16639.pdf. The text of the model BIT is available at http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf.
[5] DOS, *Summary of Discussions of July 20, 2009, Meeting of the Advisory Committee on International Economic Policy*, http://www.state.gov/e/eeb/adcom/aciep/mtg/126617.htm.

USTR and the Department of Commerce may also welcome comments.[6]

I. What is a BIT?

A BIT is a treaty between two countries that sets forth binding rules on each country's treatment of investment from the other country. U.S. BITs contain three basic types of investor protections: (1) market-access provisions to allow investment in each other's territory; (2) core investment protections; and (3) provisions for dispute settlement before independent arbitration panels.[7]

Besides the 40 BITS, the U.S. also has free trade agreements (FTAs) with 17 countries.[8] A BIT is similar to an FTA in that both provide investor protections. However, an FTA is more comprehensive, covering tariffs, trade barriers, government procurement rules, intellectual property rights, and other issues, in addition to investments.

Another difference is how BITs and FTAs are reviewed by the U.S. Congress. A BIT is a treaty, so it requires a two-thirds vote by the Senate to be ratified. A treaty only needs to be passed by both chambers of Congress if the treaty requires implementing legislation, which BITs do not. In contrast, an FTA does require implementing legislation, so it must be approved by majorities in both the House and the Senate and signed into law, like other pieces of legislation. Congress has in the past enacted fast track authority (also called trade promotion authority) for FTAs, which restricts Congress to only approving or disapproving FTAs and disallows amendments and filibusters. Fast track authority expired on July 1, 2007.[9]

II. What is a Treaty-Investor Visa?

A treaty-investor visa is granted to an investor who is a national of one country covered by a BIT (or other authorizing treaty)[10] to enter into the other country to initiate and manage a

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[6] Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34071 (July 14, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-16639.pdf. Comments can be submitted to ACIEP by email to aciep@state.gov. *See also* DOS, ACIEP Current Membership as of June 2009, http://www.state.gov/e/eeb/adcom/aciep/mem/index.htm.

[7] USTR, *Bilateral Investment Treaties*, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (May 14, 2009).

[8] USTR, *Free Trade Agreements*, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Aug. 25, 2009).

[9] 19 U.S.C. §§ 2191-2194, 3803-3805.

[10] The Immigration and Nationality Act (INA) states that E-2 visas may be issued to foreign investors covered by a treaty of friendship, commerce and navigation (FCN). INA § 101(a)(15)(E). The first FCN was in 1778 with France. The U.S. has FCNs in effect with about 40 countries. With the advent of the General Agreement on Tariffs and Trade in 1948, the U.S. began entering into multilateral trade agreements. The use of FCNs faded. In the 1980s, the U.S. began negotiating BITs because the GATT didn't sufficiently cover investment issues. *See Citizens of Seven Countries to Gain E-2 Investor Status under New Treaties*, 69 Interpreter Releases 1601, 1602-03 (Dec. 21, 1992). The U.S. Citizenship and Immigration Services (USCIS) and DOS interpret the statute to allow E-2 visas for investors covered not just by FCNs but also "equivalent" treaties. 8 C.F.R. § 214.2(e)(6); 22 C.F.R. § 41.51(a)(5). This includes a BIT, 9 FAM 41.51 N3, but only if it includes a treaty investor provision. *See Matter of Inguanti*, 11 I. & N. Dec. 393 (Reg. Comm'r 1965) (E-2 visas are not available pursuant to the U.S.-Italy FCN Treaty because the treaty doesn't specifically provide for the admission to the U.S. of a nonimmigrant investor).

covered investment.[11] The U.S. calls these "E-2" visas. The basic requirements for E-2 visas are as follows:

a. A qualifying treaty must exist.
b. The applicant or business must possess the nationality of the treaty country.
c. The applicant has invested or is actively in the process of investing.
d. The enterprise is a real and operating commercial enterprise.
e. The applicant's investment is substantial.
f. The investment is more than a marginal one solely for earning a living.
g. The applicant is in a position to "develop and direct" the enterprise.
h. The applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's U.S. operations.
i. The applicant intends to depart the United States when the E-2 status terminates.[12]

As mentioned above, previous administrations have entered into 70 treaties[13]—40 of them BITs entered into since the 1980s[14]—with investor visa provisions.

III. Treaty-Investor Visa Provisions in BITs Attract FDI to the United States

A key goal of BITs is to increase FDI. FDI is a key driver of the U.S. economy and an important source of innovation, exports, and jobs. According to a recent Congressional Research Service report, "the economic benefits" of attracting foreign investors "have been positive and significant" for the United States.[15]

But the U.S. share of global FDI inflows has declined since the late 1990s, and global competition to attract FDI has grown more intense, so the United States must strive to maintain its ability to attract FDI.

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[11] A typical BIT visa provision reads as follows:

> 1. (a) Subject to its laws relating to the entry and sojourn of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.
>
> (b) Neither Party shall, in granting entry under paragraph I (a), require a labor certification test or other procedures of similar effect, or apply any numerical restriction.
>
> 2. Each Party shall permit covered investment under this treaty to engage top managerial personnel of their choice, regardless of nationality.

Treaty Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Mozambique, art. VII, Dec. 1, 1998, S. Treaty Doc. No. 106–31 (2000).

[12] 8 U.S.C. § 1101(a)(15)(E); 8 C.F.R. § 214.2(e); 22 C.F.R. § 41.51.

[13] 9 FAM 41.51 Exhibit I.

[14] *See* Appendix: Investor Visa Provisions in U.S. BITs.

[15] James K. Jackson, *CRS Report for Congress: Foreign Direct Investment: Current Issues* i, 8-9 (Apr. 27, 2007).

Foreign investors view the ease with which they can travel to the United States as a key indicator of how easy it will be to make or administer an investment.[16] Thus, treaty-investor visas help to create a stable regulatory environment that facilitates FDI.

IV. Treaty-Investor Visa Provisions Protect U.S. Investors' Rights Overseas

Another key goal of BITs is to ensure that U.S. investors are treated fairly in the countries where they invest. To this end, article 5.1 of the Model BIT provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." More specifically, BITs are intended to ensure that "covered investors [have] the right to engage the top managerial personnel of their choice, regardless of nationality."[17] A treaty-investor visa provision is key to this goal because if a U.S. investor is refused a visa, the investor will be unable to make or manage any investment. There are countries where visa regulations lack transparency, or may be implemented arbitrarily or in a discriminatory fashion. For example, in China visa written or unwritten rules appear to discriminate against persons over age 60 and persons with disabilities. To protect U.S. investors in such countries, it is especially important that the BIT set forth investors' visa rights.

V. The Administration Has Authority to Negotiate Visa Provisions in BITs

As mentioned above, the United States has entered into 70 treaties—40 of them BITs signed since the 1980s—providing for investor visas. But during George W. Bush's administration DOS and USTR stopped including visa provisions in BITs because of arguments from some members of Congress that such provisions impinge on Congress' power over immigration law. For the reasons explained below, that argument lacks merit.

The argument first arose during Congress' consideration of implementing legislation for the FTAs negotiated with Chile and Singapore. In a prepared statement included with the House Judiciary Committee report on the U.S.-Chile FTA, Chairman James Sensenbrenner (R-WI) wrote that "I have long expressed concern about substantive changes to U.S. law contained in free trade agreements. . . . I am also concerned that there not be future changes in the basic immigration law contained in future trade agreements."[18] The Chile and Singapore FTAs required implementing legislation to change the Immigration and Nationality Act in order to set aside 6,800 H-1B temporary worker visas from the worldwide cap for use by nationals of these two countries.[19] The reasoning behind Mr. Sensenbrenner's objections is that the Constitution gives Congress power to set naturalization laws[20], which has been interpreted by the courts to

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[16] U.S. Department of Commerce, *Visas and Foreign Direct Investment: Supporting U.S. Competitiveness by Facilitating International Travel* 2 (Nov. 2007).
[17] USTR, *Bilateral Investment Treaties*, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (May 14, 2009)
[18] 108 H. Rpt. 224 Part 2 (July 22, 2003). This objection to trade pacts that require changes in domestic immigration law is also apparent in correspondence between Mr. Sensenbrenner and the executive. In a May 19, 2005 letter, Mr. Sensenbrenner and John Conyers, Jr. (D-MI) asked U.S. Trade Representative Rob Portman to confirm that "the Administration will abide by the broad commitment" apparently made by prior U.S. Trade Representative Robert B. Zoellick not negotiate trade agreements with immigration provisions "that require changes to the U.S. law." Sensenbrenner, Conyers Push for Portman Commitment on Visas, Inside U.S. Trade (May 27, 2005).
[19] INA § 214(b)(8)(G)(iv).
[20] U.S. Const. Art. I, § 8, cl. 4.

include "plenary power" in setting immigration policy.[21] Another member of the House echoed that "we do not want a trade negotiator or the Administration establishing immigration policy, which is clearly the prerogative of the U.S. Congress."[22] Particular concern was raised that immigration provisions weren't mentioned in the legislation providing for fast-track authority and that immigration provisions require intense, open negotiations, not just an up or down vote.[23]

Regardless of the merits of that argument as it applies to FTAs, it doesn't apply to investor visa provisions in BITs. First, Congress has already spoken on the issue of treaty-investor visas by enacting section 101(a)(15)(E) of the Act, which provides that DOS can issue E-2 treaty trader visas to persons entering the U.S. "under and in pursuance of the provisions of" a qualifying treaty. This provision implicitly authorizes the executive to negotiate such treaties. The statute would be meaningless if the executive couldn't negotiate such treaties. Second, as explained above, BITs don't require implementing legislation, so the specific criticisms about the administration negotiating FTAs that require "substantive changes to U.S. law" simply don't apply. Third, fast-track authority only applies to trade agreements, not BITs, so concerns about fast-track limits on debate and amendments don't apply.

Thus, the Administration's negotiation of treaty-investor visa provisions does not improperly usurp congressional power and is fully authorized by Congress.[24] There is no need, as some have suggested, to rewrite the statute on investor visas as part of comprehensive immigration reform.

VI. Treaty-Investor Visas Are Not Politically Controversial

I wouldn't be surprised if the real reason that the Obama Administration has omitted visa provisions form the model BIT is concern that including a visa provision could be politically divisive enough to endanger Senate ratification of the BITs being negotiated with that and the current negotiations with China, India, Russia, and Vietnam. In any immigration debate, restrictionists inevitably argue that a flood of immigrants must be prevented. In this case, while India and China in particular have made remarkable strides towards development, they still have hundreds of millions of citizens living in poverty. But investor visas aren't available to the masses. Existing law provides strict assurances that visas will only be issued to legitimate investors. Among other things, the applicant must have a real and operating commercial enterprise, and the investment must be substantial. An investment that just provides a living for

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[21] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[22] 108 H. Rpt. 224 Part 2 (July 22, 2003) (remarks of John Conyers, Jr. (D.-MI)).
[23] 108 H. Rpt. 224 Part 2 (July 22, 2003) (remarks of Sheila Jackson Lee (D.-TX)).
[24] Mr. Sensenbrenner appears to have a view of the executive's power that is more restrictive that enunciated by other members of Congress. In 2005 he sponsored a bill to grant E-2 visas to nationals of Denmark. The House Judiciary Committee's report, which he authored, noted that the U.S. and Denmark had signed a protocol to the Treaty of Friendship, Commerce, and Navigation (FCN) on May 2, 2001, to include an investor visa provision. Mr. Sensenbrenner alleged that in the House Judiciary Committee report on the U.S.-Chile FTA the Committee had "made clear that all immigration provisions must be considered and enacted in accordance with the formal legislative process rather than be contained in trade agreements or treaties." 109 H. Rpt. 251 (Oct. 18, 2005). As explained above, the Committee had actually limited its objection to trade agreements that–unlike treaty trader visa provisions–require amendments to the immigration laws. While Mr. Sensenbrenner's bill passed the House on Nov. 16, 2005, the Senate took no action. Instead, the Senate ratified the 2001 protocol. Senate Report to Accompany Treaty Doc. 108-8 (Oct. 15, 2007). The protocol entered into force December 10, 2008, with President George W. Bush's signature. DOS, Treaty Actions (Dec. 2008). The Senate's and President's actions constitute a rejection of Mr. Sensenbrenner's restrictive position.

the investor's family is not substantial. Further, the investor must be coming to the U.S. solely to develop and direct the enterprise and is not authorized to do any other work in the U.S.

Despite the fact that the United States already has treaty investors from 70 countries, our nation isn't overrun with foreign investors. This program is remarkably uncontroversial on the ground, and the benefits to the U.S. of protecting U.S. investors abroad and stimulating FDI are significant.

VII. Take a Stand

I would encourage companies and organizations with an interest in this issue to voice their concerns. As mentioned above, while the comment period closed on July 31, 2009, for the DOS and USTR's solicitation of written comments on the review of the Administration's model BIT[25], the review is ongoing. In particular, comments can be submitted to DOS' Advisory Committee on International Economic Policy (ACIEP). Its Subcommittee on Investment is scheduled to give its review of the model BIT to the full ACIEP in September.[26] Other advisory committees at USTR and the Department of Commerce may also welcome comments.[27]

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[25] Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34071 (July 14, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-16639.pdf. The text of the model BIT is available at http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf.

[26] The Subcommittee co-chairs are Alan Larson, Sr. International Policy Advisor, Covington & Burling LLP, and Thea Lee, Policy Director, AFL-CIO. DOS, *Summary of Discussions of July 20, 2009, Meeting of the Advisory Committee on International Economic Policy*, http://www.state.gov/e/eeb/adcom/aciep/mtg/126617.htm.

[27] Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34071 (July 14, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-16639.pdf. Comments can be submitted to ACIEP by email to aciep@state.gov. *See also* DOS, ACIEP Current Membership as of June 2009, http://www.state.gov/e/eeb/adcom/aciep/mem/index.htm.

Appendix: Investor Visa Provisions in U.S. BITs[28]

Country	Date Entered Into Force	Visa Provision?
Uruguay	11/1/2006	No
Mozambique	11/3/2005	Yes
Czech Republic	5/1/2004	Yes
Jordan	6/12/2003	Yes
Lithuania	11/22/2001	Yes
Azerbaijan	8/2/2001	Yes
Croatia	7/13/2001	Yes
Honduras	7/11/2001	Yes
Bolivia	6/6/2001	Yes
Bahrain	5/30/2001	Yes
Albania	1/4/1998	Yes
Georgia	8/17/1997	Yes
Ecuador	5/11/1997	Yes
Jamaica	3/7/1997	Yes
Estonia	2/16/1997	Yes
Mongolia	1/1/1997	Yes
Trinidad and Tobago	12/26/1996	Yes
Ukraine	11/16/1996	Yes
Latvia	11/26/1996	Yes
Armenia	3/29/1996	Yes
Moldova	11/25/1994	Yes
Argentina	10/20/1994	Yes
Poland	8/6/1994	Yes
Congo, Republic of (Brazzaville)	8/13/1994	Yes
Bulgaria	6/2/1994	Yes
Romania	1/15/1994	Yes
Kazakhstan	1/12/1994	Yes
Kyrgyzstan	1/12/1994	Yes
Sri Lanka	5/1/1993	Yes
Tunisia	2/7/1993	Yes
Slovakia	12/19/1992	Yes
Egypt	6/27/1992	Yes
Panama	5/30/1991	Yes
Morocco	5/29/1991	Yes
Senegal	10/25/1990	Yes
Turkey	5/18/1990	Yes
Congo, Democratic Republic of (Kinshasa)	7/28/1989	Yes
Bangladesh	7/25/1989	Yes
Cameroon	4/6/1989	Yes
Grenada	3/3/1989	Yes

[28] *See* U.S. Dep't of Commerce, Trade and Compliance Center, *Bilateral Investment Treaties*, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Aug. 25, 2009).