

United States Senate

WASHINGTON, DC 20510

August 5, 2011

The Honorable Hillary Rodham Clinton
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

The Honorable Ron Kirk
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Secretary Clinton and Ambassador Kirk:

We write to convey our views about the model Bilateral Investment Treaty (BIT) because we understand that the Obama Administration is weighing proposals to improve it.

Trade and investment policy is one means by which the United States expresses its values and advances both foreign and domestic policy goals. We believe that the purpose of any economic arrangement between the U.S. and other countries should be to establish an environment in which our economies can grow in a manner that supports sustainable development, environmental protection, and labor rights. Investment treaties are important components of these economic relationships. We believe that BITs should be constructed to ensure that investors receive fair treatment in foreign markets while not inappropriately elevating economic rights above a country's legitimate efforts to improve the livelihood of its inhabitants.

Interpretation of the investment disciplines found in BITs is complicated and we are concerned that foreign investors operating in the U.S. are afforded greater procedural or substantive rights under BITs than those afforded to domestic investors under the Constitution. We are also wary of private investors with significant legal resources launching cases against developing-nation governments based on questionable claims. The international investment tribunals, which are available for investors to sue a state over an expropriation, are provided extraordinary discretion and power in addition to being independent from government institutions. Without a proper balance between investor rights, and the rights of a state to implement laws that it views appropriate to provide for the common welfare, BITs will not obtain the objective we seek.

A 21st Century BIT should encourage the development of strong legal frameworks and governance practices to protect the environment and labor rights and should not contain provisions that effectively chill such efforts by exposing appropriate public interest laws to untenable legal challenges.

In terms of the new Model BIT, changes to the model proposed in the past by the U.S. should be considered to ensure that an investor-state dispute mechanism is not used to discourage efforts to protect the environment or undermine a country's judicial system. Specifically, investor-state rights could require foreign investors to first exhaust reasonably available domestic remedies before obtaining a right to an arbitral tribunal. It could also incorporate a provision that enables parties to the agreement to ensure that these rights are not abused, and provide a reasonable exception for measures taken to protect the public health, its safety, and the environment.

Finally, making clear that the investment chapter does not provide any new, substantive rights to

investors could limit challenges to measures taken to preserve the environment or protect labor rights.

In sum, the new Model BIT gives us an opportunity to ensure that long-standing American values are reflected in our trade policy and to create a forward-looking standard for the world that recognizes that economic arrangements' value lies in their ability to help improve living standards, which by any account includes a safe and healthy environment and adequate worker protections. We look forward to working with you on these and other matters.

Sincerely,



Ron Wyden
United States Senator



Robert P. Casey, Jr.
United States Senator