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PRICE: Keep international protections

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COMMENTARY

Cross-border investment, like trade, is vital to our economic prosperity. The United States has long sought to protect our investors abroad through bilateral investment treaties (BITs) and similar provisions in free trade agreements.(FTAs)

These agreements are today in the cross hairs of traditional opponents of trade liberalization. They wrongly charge that the treaty safeguards against arbitrary, discriminatory and confiscatory treatment, as well as their impartial arbitration mechanism, are threats to our sovereignty.

So it is worrisome that Rep. Sander M. Levin, Michigan Democrat, chairman of the House Ways and Means Trade subcommittee, has set a hearing today to consider changes to future bilateral investment treaties and free trade agreements. Concurrently, the State Department established an advisory committee, co-chaired by an AFL-CIO representative, to review investment protections.

According the hearing notice, the subcommittee will consider whether U.S. treaties should provide that foreign investors in the United States shall have "no greater rights" than do U.S. investors under U.S. law, and whether investors should be deprived of the right, in U.S. agreements since 1982, to seek compensation from governments for treaty breach.

This may sound innocuous, even academic. It is not. Were these changes to be made it would constitute a dramatic reversal of longstanding,

bipartisan U.S. policy, jeopardize billions of dollars of U.S. investment abroad and place us in the company of those on the wrong side of history.

The "no greater rights" mantra is not new. It was historically invoked by the Soviet bloc, Iranian revolutionaries and various others who sought to expropriate U.S. property with impunity. They claimed that foreign investors had no international law rights and were entitled to "no greater rights" than domestic law provided their own citizens.

The modern standard-bearers of this view, Presidents Hugo Chavez of Venezuela and Evo Morales of Bolivia, recently renounced treaty commitments to resolve investment disputes under international law, claiming foreign investors should receive only local justice under local law.

By contrast, the United States maintained that U.S. investors abroad enjoy rights under international law that are independent of the domestic rights in the host country. The United States fought for decades to establish this view and succeeded: a network of treaties now numbering more than 2,600 worldwide (the United States is a party to some 50 such agreements) contains strong rules that protect investment against discrimination, arbitrary treatment, and expropriation without compensation - rules drawn from the U.S. Constitution.

And, importantly, these rights are enforceable by the investor through arbitration in a neutral forum, thus depoliticizing disputes. Without this recourse, U.S. investors would be left to the mercies of potentially biased local courts or to the discretion of the State Department to press their claims, which may be traded off for other foreign policy objectives.

But we can't expect other countries to subject their actions to treaty rules and international arbitration if we won't do the same. Reciprocity lies at the heart of all international agreements. In April, the Business Roundtable identified as a top priority concluding BITs with India and China. If U.S. policy moves in the wrong direction, those treaties will do no more than grant U.S. investors what Chinese or Indian law already provide and refer them to local courts in the event of disputes.

The United States need not go down this path. The risk that the "no greater rights" limitation seeks to address - that a treaty arbitration tribunal could find a treaty breach where there would be no breach of domestic law - is negligible. That's because U.S. law already reflects treaty rules through the Constitution's equal protection, due process, commerce and takings clauses, as well as the Administrative Procedure Act's "arbitrary and capricious" standard that constrains regulatory action.

Those rights, coupled with access to the independent U.S. judiciary, mean foreign investors in the United States get the benefits of strong investment protection and impartial dispute settlement with or without a treaty. It is U.S. investors abroad who will suffer without treaty protections.

And it's not just foreign potentates who decry this treaty system. It has come under fire at home as well from the usual array of opponents of the North American Free Trade Agreement (NAFTA) and globalization.

Since the United States was first named as a defendant in an investor-state case about a decade ago, domestic critics have engaged in relentless fear-mongering, claiming "secret tribunals" of "unelected foreign judges" are poised to strike down laws duly passed by Congress or state legislatures.

In fact, investor-state tribunals typically comprise distinguished jurists of all nationalities, and have included former Secretary of State Warren Christopher and former U.S. Attorney General Benjamin Civiletti. They cannot strike down U.S. laws but only award money damages. And their proceedings are open to the public. Another little reported fact: The U.S. government has never lost a case.

The critics' deep-seated suspicion that making the world safer for international investment will hurt the U.S. economy is also wrongheaded.

A recent study by Professor Matthew J. Slaughter of Dartmouth College shows U.S. companies with significant investment abroad pay 24 percent higher wages than other U.S. firms, account for more than 30 percent of all capital expenditures in the United States, more than 75 percent of all research and development performed by U.S. companies, and are the source of almost 50 percent of all U.S. exports.

Weakening U.S. treaty protections creates no discernible benefits but imposes real costs. Our standard of living and economic growth are increasingly dependent on cross-border investment. Our companies, entrepreneurs, workers and shareholders have billions of dollars at risk abroad and are thus the principal beneficiaries of current investment rules.

Any dilution of these rules may simply result in U.S. multinationals moving economic activity to other jurisdictions - e.g., the United Kingdom, Germany, the Netherlands - whose treaty network retains strong protections.

Congress and the administration should reject the nativist and protectionist voices - at home and abroad - that call for rolling back legal protections for international investment. It is we who have the most to lose.

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