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**Subcommittee on Terrorism, Nonproliferation and Trade**  
**“State Department Assistance in**  
**Foreign Commercial and Investment Disputes”**

Chairman Sherman, Ranking Member Royce, Members of the Committee, thank you for giving me this opportunity to discuss how the State Department helps U.S. nationals resolve foreign commercial and investment disputes.

U.S. portfolio and foreign direct investment abroad promotes U.S. and global economic growth, creates jobs both here and in the recipient country, enhances prosperity and fosters political stability in recipient countries. In 2006, the stock of U.S. foreign direct investment abroad exceeded \$1.8 trillion, and U.S. businesses invested over \$216 billion worldwide in that year. U.S. foreign direct investment serves as a magnet for U.S. exports and increases U.S. job growth. In 2005, U.S. multinationals exported \$491 billion, accounting for more than 54 percent of total U.S. exports. Nearly half of this amount, \$189 billion, was exported to their foreign affiliates. In the same period, U.S. companies with foreign affiliates enjoyed a faster rate of domestic U.S. employment growth than U.S. companies as a whole.

The instructions every Ambassador receives before assuming his or her responsibilities emphasize that support for U.S. investors and businesses overseas is a core diplomatic and consular function and a top priority for all U.S. economic agencies. To assist this mission, the Department of State is committed to supply the best information available to U.S. businesses contemplating doing business, including investing, overseas and to provide vigorous advocacy and support for U.S. businesses operating in the overseas environment. State also works in close coordination both here and overseas with our colleagues at Commerce, so we are pleased that they join us today to provide additional insights into how U.S. businesses and individuals involved in disputes can be assisted.

In addition to direct assistance for U.S. persons, the Department encourages foreign governments to undertake reforms to improve their business and investment climates and to provide fair, nondiscriminatory and transparent

operating conditions for U.S. businesses. Where necessary, the United States encourages foreign governments to become “responsible stakeholders” that will work with the United States to sustain and advance an open and fair global investment and trade environment.

### U.S. Policy Addressing Commercial and Investment Disputes

U.S. policy to address commercial and investment disputes involving U.S. nationals has three primary elements: First, the Department provides pre-investment guidance including commercial guides and investment climate information, in-country commercial and business environment briefings and business outreach assistance to U.S. businesses, investors, and property owners abroad. Second, the Department provides information and assistance to U.S. investors and property owners that may be engaged in a dispute. Assistance includes providing local attorney lists maintained by the Consular section and exploring remedies that may be available under bilateral investment treaties (BITs) or other agreements, or through local domestic procedures. Where appropriate, the State Department engages in active diplomacy with foreign officials to emphasize the importance of resolving commercial and investment disputes fairly, in accordance with due process of law. Third and more broadly, the State Department promotes more open and transparent investment environments through encouraging States to become parties to key international conventions related to the resolution and enforcement of investment disputes, as well as setting investment policy standards and guidelines through important multilateral organizations. The Department also negotiates with other governments to conclude bilateral investment treaties ("BITs") and investment chapters in free trade agreements which provide enhanced protections for U.S. businesses when they engage in foreign direct investment and other forms of investment abroad.

### Assistance to U.S. Businesses, Investors, and Property Owners

First I will talk about the State Department’s work to provide pre-investment support, information and advocacy for U.S. businesses, investors and property owners entering foreign markets. Then I will discuss how Department serves U.S. investors, businesses, and property owners involved in disputes with private individuals or with government entities and distinguish the particular support and options the Department is able to provide to investors with claims against a foreign government.

State Department representatives at Embassies around the world seek to provide as much information and assistance as possible to U.S. Citizens involved in investment, trade agreement compliance and other business-related activities. To this end, the Department furnishes a broad range of services, including: researching and publishing annual, country-specific investment climate statements, providing business pre-briefings for U.S. nationals, suggesting and facilitating appropriate local business and government contacts for new businesses or investments, and indicating consular and other assistance available to U.S. businesses and individuals in case they become involved in a commercial or investment disputes abroad. These services provide information relevant to the initial investment decision, but also to business decisions such as legal or regulatory options that may be pursued in the event a dispute arises. Specifically, the Department monitors and shares relevant information about foreign laws, judicial systems, property ownership, regulatory transparency, corruption and claims procedures. The Department also shares relevant information on how U.S. claimants can pursue relief for commercial and investment disputes through local domestic procedures as well as what recourse may be available under an applicable bilateral investment treaty or otherwise through arbitration.

The Embassy or Consulate may also share information on prior disputes, known criminal activity and other important investor information. Investor pre-briefs can be a valuable tool should the investor choose to avail him or herself of the tool. For example, in seven cases in the last year, the Commercial Service (CS) in Beijing helped clients to identify that their potential Chinese partners were actually parts of scams. CS Beijing was able to protect U.S. companies from signing contracts with fraudulent Chinese companies.

Investment Climate Statements are another useful tool which strives to give the full picture of a country's investment climate -- including the challenges of doing business. We do not sugarcoat these reports. For example, the February 2008 Russia Investment Climate Statement states, "According to numerous reports, corruption in the judicial system is widespread and takes many forms, including bribes to judges and prosecutors and fabrication of evidence." The February 2008 China Investment Climate statement provides: "Investors continue to face an unreliable legal system incapable of guaranteeing the sanctity of contracts." State Department Investment Climate Statements are part of the individual Country Commercial guides published by Commerce on their website, [www.buyusa.gov](http://www.buyusa.gov).

The Department provides a variety of tools and services to U.S. nationals in the event they become involved in commercial business disputes with private parties or investment disputes with a foreign government. The Department distributes information about local attorneys who have indicated an interest or experience in representing U.S. nationals abroad to U.S. claimants and views this as an essential Consular function. The Department also provides information about how to contact relevant host government officials and offices that can be of assistance to U.S. Citizens in their efforts to resolve their claims. Embassy or Consular officials may also facilitate such contacts and urge the foreign government to ensure that the dispute is resolved expeditiously and in accordance with local law.

Oftentimes, an inquiry by USG officials for more information on the status of the case yields positive results for the U.S. claimant. For example, a U.S. airplane leasing company in Indonesia was unable to retrieve its leased planes from an Indonesian airline in default. The Ministry of Transportation delayed de-registering the planes well past its official 60-day regulatory deadline. Without de-registration, the U.S. lessor could not remove the planes from Indonesia. The U.S. company also detailed rumors of commercial relationships between the defunct airline and ministry officials. The Embassy Transportation officer spoke to three government official contacts at the Ministry on a variety of occasions seeking information and status on the case, and reminded host officials that even the appearance of unfair treatment by host officials could negatively affect the investment environment, especially an environment in which there was an international plane shortage and a rapidly growing domestic airline industry. The planes were returned and deregistered in six months.

Our colleagues in the Department of Commerce are heavily involved in business briefing and commercial disputes through the Commercial Service (CS) offices located in over 80 larger U.S. consulates and Embassies overseas. They will be able to describe the additional support the CS can provide. State and Commerce Foreign Service Officers work closely together on economic and commercial issues at Embassies and Consulates. In Posts with CS offices, a commercial officer may take the lead in monitoring and interacting with a U.S. national who would like to invest or who is already involved in a commercial dispute. State colleagues may provide attorney lists maintained by the Consular section, relevant foreign government or other contacts, and facilitation of such contacts. In the past, and subject to staff availability, Commerce and State Department officers have sat in as observers at court proceedings.

The U.S. is the world's largest investor. More and more Americans are pursuing investment opportunities in emerging markets that provide attractive returns, but increased risks. From 2003 to 2006, U.S. foreign direct investment abroad grew from \$129 billion to \$216 billion. In China alone, U.S. investment doubled from \$11 billion in 2002 to \$22 billion in 2006. Embassies and Consulates also report an increase in commercial and investment disputes, but note that the number of cases is relatively low compared to the number of investors. For example, CS Shanghai noted 22 disputes in the past year, while the American Chamber of Commerce in Shanghai noted its membership rolls have increased to 3,500 U.S. affiliated companies in the same time period. Although U.S. investors face a difficult investment environment in China, of 618 U.S. companies surveyed by the American Chamber of Commerce in 2007, 89 percent expressed their five-year outlook about business in China as "optimistic" or "cautiously optimistic."

#### Assistance with Investment Disputes Involving Another Government

The Department may also actively provide diplomatic assistance to U.S. nationals involved in investment disputes – that is, disputes against a host country relating to a U.S. business's investment in the host country's territory. The Department encourages active Embassy reporting on, and involvement in claims and disputes of, U.S. nationals against foreign governments. It has strengthened coordination in Washington of assistance to U.S. nationals, on occasion has sent experts to meet with other governments and assess claims resolution progress, and has encouraged other governments to adopt procedural avenues for investors to seek redress. The resolution of investment disputes is a priority for the Department.

As with commercial disputes involving private parties, U.S. claimants bear the primary responsibility for pursuing resolution of their investment disputes through the local court system or through arbitration, where available. While the U.S. investor is pursuing a remedy in local courts, the U.S. Government may and, where appropriate, does engage diplomatically with the host government in order to encourage expeditious and fair resolution of the dispute. The level and degree of such assistance may take a variety of forms. In some cases, a diplomatic intervention may require only an informal inquiry, such as alerting relevant ministries to the existence of a particular dispute. In other cases, U.S. officials might urge a host government to identify an appropriate official with authority to address and resolve a dispute, or encourage an official to meet with an investor. The United States might also encourage both parties to consider some third-party dispute resolution mechanism, if available, such as the International Centre for the Settlement of Investment Disputes (ICSID), the Multilateral Investment Guarantee

Agency (MIGA), or a private arbitration service such as may be provided by a regional chamber of commerce or similar organization. In other cases, it may be appropriate to remind the host government of its obligations under international law generally and specifically under treaties to which it is a party. Diplomatic interventions in support of investors in such instances can be and are pursued at the highest levels of the U.S. Government.

Where the United States has concluded a bilateral investment treaty (BIT) or a free trade agreement (FTA) investment chapter with the host government, and where the dispute falls within the scope of the agreement, U.S. claimants may wish to pursue their claims directly against the host State through international arbitration. The United States has 40 BITs in force and comparable provisions apply with the 12 countries that are Parties to U.S. free trade agreements with investment chapters. The Administration is actively seeking to expand the number of countries with which we have such agreements, as evidenced by our conclusion of a BIT with Rwanda in February, and our launch of BIT negotiations with China and Vietnam in June. Where an investment dispute arises in a country that is a party to a U.S. investment agreement, U.S. officials are happy to provide an aggrieved U.S. investor a copy of the agreement and will encourage the investor to seek legal counsel to determine whether the agreement might be useful in resolving the dispute.

In countries where no BIT or FTA investment chapter is in force, other remedies may be available to the U.S. investor under customary international law. Under certain circumstances, the U.S. Government may be entitled to espouse the investor's claim, that is, formally present the claim, on the investor's behalf, to the foreign government for resolution as a diplomatic matter. Before considering whether to do so, however, the U.S. investor must meet certain criteria, including that it was a U.S. national from the time the claim arose through the resolution of the claim, that the claim is based on a violation of international law attributable to the host State, and the investor has pursued all available local remedies unsuccessfully, or demonstrated that doing so would be futile.

The requirement that a claimant exhaust all available local remedies, in particular, is required under international law and supported as a matter of policy by the United States. Exhaustion means that the investor must pursue all avenues of redress which are reasonably available, presenting all available evidence to local courts, and appealing adverse decisions of lower courts when possible. This step allows the host government an opportunity to provide redress through its own legal system, helps refine issues of fact and law, and avoids unnecessary international

disputes between governments. In addition, as a matter of international comity, this step helps to avoid one government second guessing another government's ability to provide a judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of that government.

Under international law, if an investor can demonstrate that pursuit of a remedy through a national court system would be ineffective or futile, he may be excused from the requirement to exhaust local remedies. A determination of ineffectiveness or futility can only be made on a case-by-case basis, but would at least require, for example, convincing evidence of systematic corruption. The Department carefully evaluates the claims of U.S. investors brought before it to determine whether there is evidence of futility before taking a position on the merits of the dispute.

With regard to claims by U.S. citizens for expropriations by foreign governments, the Department prepares and submits an annual report to Congress (pursuant to section 527(f) of the Foreign Relations Authorization Act (the "FRAA")) detailing expropriation and other noteworthy investment disputes of U.S. citizens against foreign governments. In certain cases and in coordination with other U.S. agencies, the Department's strategy calls for the possible withholding of benefits in response to expropriations or other foreign government actions that meet the law's criteria. In 2007, the number of countries against which U.S. nationals face these type of investment claims presented to the Department has risen to 88, a 24% increase from 2004. The Department followed a total of 363 cases in 2007 (an 8% increase for the same period). Close cooperation with governments, regular meetings between senior U.S. Government and foreign government officials, and constant work with U.S. citizen claimants has resulted in the steady and significant resolution of many of these pending property claims.

In certain investment dispute cases, under Section 2225 of the Foreign Affairs Reform and Restructuring Act of 1998, the Secretary of State has the authority to deny visas to an alien who, through the abuse of official position, converts for personal gain confiscated or expropriated real property to which a U.S. national owns a claim. Section 2225 is a valuable tool discouraging the conversion of expropriated or confiscated real property for personal gain, and in appropriate cases, can help to facilitate the resolution of outstanding claims, particularly in countries with unresolved cases of expropriation of the real property of U.S. Citizens. In practice this Section 2225 has been applied against Nicaragua. There are currently nine Nicaraguan visa denial cases as of April 2008. In most cases expropriation claims are either resolved through diplomatic efforts or through local

or international arbitration, and a step like the 2225 visa ineligibility determination is not needed.

### U.S. Development of Open and Fair Investment Environments

More broadly, the Department has played a key role in negotiating multilateral agreements that can assist investors in enforcing the arbitral awards that resolve their investment disputes. These include the Convention on the Settlement of Investment Disputes between States and Nationals of Other Countries (the Washington Convention), which came into force on October 14, 1966, and which established the International Centre for Settlement of Investment Disputes (ICSID). Pursuant to the Convention, ICSID provides conciliation and arbitration facilities for the settlement of disputes between member countries and investors who qualify as nationals of other member countries. Under U.S. BITs, U.S. investors have the option of choosing to resolve their disputes before an ICSID arbitral tribunal.

Another example of a multilateral agreement that may assist U.S. investors is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York. The New York Convention, as it is commonly known, obligates the local courts of State Parties to recognize and enforce arbitral awards rendered outside their jurisdiction in accordance with fair and uniform standards. Together, these conventions offer U.S. investors an additional line of protections, remedies, and enforcement mechanisms. Persuading states to accede to these conventions is a long-standing element of U.S. foreign policy. To date, there are 143 parties to the Washington Convention and 142 parties to the New York Convention.

The Department also encourages open investment regimes through its leadership of U.S. engagement with the Investment committee of the Organization for Economic Cooperation and Development (OECD). The Department participates in the OECD to develop rules and practices for international investment agreements, investment regime liberalization, and prevention of investment protectionism. The OECD also engages with non-member countries, such as India, China, Brazil, and Indonesia, through “enhanced engagement” partnerships in order to garner participation and support for broad-based open investment practices and policies in these countries.

The Department promotes open and transparent economies and increased opportunities for U.S. businesses and individual investors through high-level dialog with foreign governments. The June 2008 Strategic Economic Dialogue

between cabinet-level U.S. and Chinese government officials yielded commitments for negotiations of a Bilateral Investment Treaty and inauguration of an “Investment Forum” to review investment screening mechanisms that are often barriers for U.S. investment.

Finally, but perhaps most importantly, the Department encourages the development of nondiscriminatory, open, and market-oriented investment environments for U.S. investment overseas through active negotiation of bilateral investment treaties (BITs) and free trade agreement investment chapters. BITs and FTA investment chapters protect U.S. investors and investments abroad and help promote greater access for U.S. investors in foreign markets. These treaties and agreements create important substantive protections and allow U.S. investors to bring investment claims directly against the host State in binding international arbitration. The protections afforded U.S. investors are comparable to those foreign investors enjoy under U.S. law, and the right to binding arbitration may provide important leverage to U.S. investors in resolving their disputes with foreign governments.

Mr. Chairman and members of the Committee, I’ve given you today an overview of the policies of this Administration and the strong commitment of the Department of State towards helping U.S. Citizens resolve investment disputes abroad.

Thank you for giving me the opportunity to come and share our thoughts with you. I will be happy to answer your questions.