7 FAM 670
ASSISTANCE TO CITIZENS INVOLVED IN COMMERCIAL, INVESTMENT AND OTHER BUSINESS RELATED DISPUTES ABROAD

(CT:CON:114; 10-17-2005)
(Office of Origin: CA/OCS/PRI)

7 FAM 671 SUMMARY

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a. Commercial disputes are ordinary business disputes, typically concerning the performance of contractual obligations relating to the exchange of goods, services or technology. In most commercial disputes that arise abroad the foreign government is not involved at all. These are cases involving, for example, a United States business and a foreign supplier or customer where a dispute arises due to nonpayment or non-delivery.

b. United States assistance to citizens/nationals involved in commercial disputes is generally confined to helping the citizen navigate the host country legal system. For example, posts can provide a list of local attorneys who have expressed an interest in representing United States citizens/nationals. You can share relevant general information about the judicial system and dispute resolution procedures in the host country, when available. You should also share information about how to contact host government officials and ministries that are responsible to or otherwise can be of assistance to United States citizens/nationals in their efforts to resolve their claims.

c. In no case, however, should posts ever recommend or advise a specific course of action to United States citizens/nationals involved in such private commercial disputes (apart from advising them in general terms to pursue on their own behalf available avenues of redress). The provision of advice or direction on how best to resolve a dispute could give rise to legal action against the Department if a United States citizen/national sought to hold the United States Government (USG) or the officer responsible for an outcome adverse to the United States citizen/national's interests.

d. The scope of appropriate USG assistance is more complex in cases where the contract party is a government or a government-owned entity, but the transaction is otherwise a purely a commercial one (e.g., where a

United States consulting firm provides a service to a state-owned enterprise abroad, and a dispute arises about the adequacy of performance and/or adequacy of payment). Such cases may merit treatment akin to that afforded United States citizens/nationals with investment disputes, as described below.

e. Other complications relating to private commercial disputes may arise where the host government does not meet its responsibility to provide an effective dispute resolution system, or fails to follow its international obligations. Problems can occur, for example, when a host country legal system does not provide an impartial or effective forum for resolving disputes or enforcing arbitral awards. Although such cases can give rise to host government responsibility under international law, you should take particular care in handling United States citizen/national requests for assistance in cases in the local judicial system.

f. Investment disputes typically arise when a host government action threatens the operations or value of a United States citizen investment abroad. They include, for example, cases where the government has expropriated property, imposed a discriminatory tax on an investment, revoked a license or concession to operate, or has violated the terms of an investment authorization. United States policy regarding the investments of United States nationals in foreign countries seeks to encourage those countries not to discriminate against or harm those investments. When an investment dispute occurs, the USG can support the investor by providing consular and facilitative assistance, such as by encouraging a negotiated settlement.

g. As with private commercial disputes, however, a United States citizen/national engaged in an investment dispute with a host government bears the primary responsibility for pursuing its resolution. Before the USG takes a position on the merits of the investor's dispute with the host government, normally the investor must pursue all available local remedies on its behalf. Apart from the Bilateral Investment Treaty (BIT) and Free Trade Agreement (FTA) context, this principle -- that the injured investor must exhaust local remedies -- is firmly established in international law and as a matter of United States policy. Note, however, that in countries with which the United States has a BIT in force, the situation may instead be that recourse to local remedies would defeat pursuit of remedies under the treaty. In such cases a United States citizen should be advised that there is a BIT or FTA in force, and that they and their legal counsel may wish to investigate fully all potential remedies before pursuing a course of action.

h. To exhaust local remedies the United States investor must pursue all avenues of redress that are reasonably available, including presentation of all available evidence to local courts, and appeal of adverse decisions

of lower courts when possible. This step allows the host government to provide redress for the injury through its own legal system, helps refine issues of fact and law, and prevents unnecessary international disputes between governments. United States investors often resist taking this step where the prospect of protracted litigation in foreign courts -- just as in United States courts -- is unattractive due to delay and costs. However, under international law, a local remedy may be available and effective even where local courts are still grappling with a case for years. On the other hand, the investor need not exhaust local remedies if it is evident and demonstrable that such remedies are manifestly ineffective or futile. The definition of ineffectiveness or futility depends on the individual circumstances of each case, and raises questions of international law that should be addressed with EB/IFD/OIA, CA/OCS/ACS and L/CID.

i. Investors who seek USG intervention with a host government before having exhausted available remedies should generally be advised that our ability to assist them depends on their assuming primary responsibility for defending their own interests.

j. During the period when an investor is pursuing his/her own remedies, the scope of appropriate USG assistance is generally confined to consular services aimed at helping the United States citizen/national navigate the host country legal system. As with private disputes, such assistance generally consists of providing a list of local attorneys who have expressed an interest in representing United States citizens/nationals, sharing information about the judicial system and dispute resolution procedures in the host country, and providing basic information about how to contact host government officials that may help investors resolve their claims.

k. In some circumstances during this period, the USG may in its discretion decide to make diplomatic representations to the host government in order to encourage expeditious resolution of the dispute. The level and intensity of the USG involvement may take a variety of forms: a minor dispute or issue may require only an informal inquiry (e.g., alerting relevant ministries to the existence of a particular dispute). In other cases, it might be appropriate for posts to make specific suggestions to host governments. Posts might urge that a host government identify an appropriate official with authority to address and resolve a dispute, or encourage an official to meet with an investor. Posts might also encourage both parties to consider some third-party dispute resolution mechanism such as the International Center for the Settlement of Investment Disputes, the Multilateral Investment Guarantee Agency, or a private arbitration service, such as may be provided by a regional chamber of commerce or similar organization. In still other cases, posts might deem it appropriate to remind the host government of its

obligations under international law and treaties.

l. The goal of such action should be to facilitate a resolution of the dispute between the government and the investor. In all such cases, however, posts should be clear both with the host government and with the investor that such representations do not reflect a decision on the part of the USG that the claim is valid, but rather reflect our interest in having the claim amicably and expeditiously resolved. In typical cases, the appropriate scope of such involvement in individual disputes should follow the general approach below:

   (1) Describe the extent and importance of United States investment and commerce in the host country;

   (2) Encourage a transparent procurement, taxation, customs, standards regime, in compliance with due process and applicable international standards;

   (3) Emphasize the direct link between an open and transparent investment climate, including dispute resolution mechanisms, and future United States citizen/national investment decisions;

   (4) Explain the United States interest in seeing the parties to the dispute reach an amicable and timely resolution of the controversy in accordance with applicable law;

   (5) Refer to our countries' mutual interest in adequate legal protection for all parties;

   (6) Refer to United States legislation that under certain circumstances limits financial assistance to countries that expropriate United States citizen/ United States national property; or

   (7) Remind appropriate officials of international obligations and the importance of transparency and fair judicial practices.

m. Except in coordination with the Department, posts should always avoid taking a position on the merits of a dispute with the United States citizen/national, the host government, or any other participant. For example, posts should not:

   (1) Advocate for a particular outcome in a dispute;

   (2) Argue a legal position on behalf of a United States citizen/national;

   (3) Assert a position on disputed facts;

   (4) State that a particular claim or allegation is true or well-founded;

   (5) Advise or opine on the adequacy of any proposed settlement;

   (6) Opine on the applicability or inapplicability of United States legislation prohibiting assistance to governments that expropriate without prompt, adequate and effective compensation;

(7) Opine on whether an investor has exhausted all legal remedies in a host country; or

(8) Assert that a host government action is clearly discriminatory or illegal.

n. BITs provide investors the right to submit an investment dispute with the government of the treaty partner to international arbitration. Similar provisions exist in the investment chapters of Free Trade Agreements (FTA) such as the U.S.-Chile Free Trade Agreement, the U.S. Singapore Free Trade Agreement and the NAFTA. (Note: This list is not exhaustive. The United States continues to negotiate FTA's and BIT's. The USTR and EB/OIA provide regularly updated information on FTA's and BIT's in force.

o. When assisting United States businesses embroiled in investment disputes with the host government, posts should, as appropriate, provide the investors with a copy of the BIT or investment chapter of the FTA and encourage them to seek the help of private legal counsel to determine if the BIT or FTA investment chapter might be useful in resolving the dispute. USG officials must refrain from offering legal advice concerning:

(1) Interpretation of the treaty or agreement;

(2) The possible application of the treaty or agreement to a particular investment dispute; or

(3) The choice of a strategy for pursuing the dispute under the BIT or FTA.

p. Posts assisting United States investors should make note of additional points about BITS and FTAs:

(1) BIT provisions (and, in some circumstances, FTA provisions) may prevent an investor from seeking international arbitration if he/she has already sought resolution of the particular issue in a local court;

(2) BIT and FTA provisions generally do not apply retroactively; and

(3) BIT and FTA obligations are, in most cases, binding on the central government of treaty partners and sub-central (regional and local) levels of government.

q. Disputes that have been submitted to litigation in foreign courts, including disputes about the enforcement of arbitral awards, require special care from posts.

r. In general, posts should never communicate to courts a position on the merits of litigation, except in exceptional circumstances and with clearance from the Department. Posts should consult with the Department when asked to provide affidavits, declarations or to participate otherwise in litigation. Inappropriate contacts with foreign courts may undermine United States arguments for the independence of

the judicial system and may give the appearance of a lack of respect for that system. USG communications directly with a court on the merits of a pending case could be argued to waive USG immunity in certain limited circumstances. Inquiries with local courts for information about procedural issues (e.g. the status of a case or the next scheduled hearing), by contrast, are permissible. Whenever possible, such inquiries should be directed to non-judicial court officials, such as clerks, rather than to judges.

s. Posts should exercise similar caution about intervening in cases where a dispute has been sent to arbitration. Such intervention might give rise to arguments that USG involvement has compromised the independence of a particular arbitration, which could jeopardize the interests of the United States citizen/national party.

t. If it appears to post that a court's handling of a dispute should be raised with the court or host government -- for example due to inordinate delay, evidence of bias, or other problems -- post should seek guidance from the Department (CA/OCS/PRI, L/CA, L/CID).

7 FAM 672 THROUGH 679 UNASSIGNED.