

January 20, 2004

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Via email

Re: Draft U.S. Model Bilateral Investment Treaty-Draft Comments from the
Department of State Subcommittee on Investment

Dear Dan and Mike:

As I indicated during the subcommittee meeting Friday, I am deeply concerned about the inaccuracies and lack of balance in the draft report (circulated last week) that the Department of State Subcommittee on Investment is considering regarding the draft U.S. Model Bilateral Investment Treaty. Unfortunately, the draft report presents an inaccurate and biased view that favors the investment community in a way that will inevitably and unfairly influence readers of the report.

Let me provide two examples, both on page 3 of the draft report. I have not had the opportunity to show these to other members of the subcommittee, so at this point these should be considered as comments only from my organization, the Center for International Environmental Law (CIEL).

- In the first paragraph on that page, the first sentence describes the investment community's position and the second sentence describes the labor and environmental communities' position. The second sentence is inaccurate because it states that the labor and environmental communities oppose "any" limitation on governmental authority to adopt and maintain labor and environmental measures. This is not accurate and would strike most readers as clearly unreasonable; even Article XX of the General Agreement on Tariffs and Trade (GATT), for example, has a chapeau that constrains its environmental and health exceptions. The word "undue" would be accurate, at least for my organization. In addition, there is no mention of our communities' concerns about transparency and public participation in dispute settlement.

- The third paragraph on that page summarizes the investment communities' views about the 1994 Model BIT in a more complete and persuasive manner than the following paragraph on that page summarizes the environmental and labor communities' positions. A greater balance could be achieved by adding two new sentences to the fourth paragraph

(to be placed between the existing first and second sentences), something like: "While there has not been much case law under the 1994 Model BIT, it abrogates long-standing rules of customary international law, and it provides for inadequate transparency and public participation. These Members believe that these flaws should be remedied but that the draft model BIT does not do so."

The draft needs other changes, as well, along the lines of these examples.

I am not suggesting that the pro-investment community bias was deliberate, especially given the well-known difficulty of drafting documents, such as this, that purport to present widely differing views. Nevertheless, it is essential that this report be accurate and balanced to carry out the mandate from the Secretary of State. I therefore urge you to review the draft carefully and revise it to remove the bias and achieve a balanced, neutral report. If that means taking a few more days to finalize the report, then it is incumbent on us to do that.

Best regards, and thank you again for your efforts in this endeavor.

Sincerely,

Daniel Magraw
President, Center for International Environmental Law