

1984

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Recommended Citation

Wayne Sachs, *The New U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192 (1984).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol2/iss1/9>

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The "New" U.S. Bilateral Investment Treaties

by
Wayne Sachst†

The United States recently signed the first four of an anticipated series of bilateral treaties "concerning the reciprocal encouragement and protection of investment."¹ These initial bilateral investment treaties (BITs) were concluded with Egypt,² Panama,³ Senegal,⁴ and Haiti.⁵ Negotiations have commenced with at least eleven other less developed countries (LDCs).⁶

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1. Office of the United States Trade Representative [hereinafter cited as USTR], Press Release No. 82/16 (Sept. 29, 1982) and Press Release No. 82/19 (Oct. 27, 1982) [hereinafter cited as USTR Press Releases]. (Model) Treaty Between the United States and ——— Concerning the Reciprocal Encouragement and Protection of Investment, January 21, 1983, [hereinafter cited as Model BIT] (on file with the Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506).

The Model BIT was derived from numerous sources, including U.S. Treaties of Friendship, Commerce, and Navigation, BITs negotiated by various European states with less developed countries, and advice from the legal and business communities. The original prototype was somewhat modified following negotiation of the first two U.S. BITs. Telephone interview with Bruce D. Wilson, Deputy Assistant U.S. Trade Representative (Mar. 24, 1983).

2. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, September 29, 1982, United States-Egypt, 21 I.L.M. 927 (1982) [hereinafter cited as Egypt BIT].

After signing the BIT, the Egyptian government re-opened negotiations and proposed certain changes. These proposals have not yet been made public, as negotiations continue. Telephone interview with James Hackney, Office of the Legal Adviser, U.S. Dep't of State (Feb. 16, 1984).

3. Treaty Concerning the Treatment and Protection of Investments, October 27, 1982, United States-Panama, 21 I.L.M. 1227 (1982) [hereinafter cited as Panama BIT]. Negotiations have also been re-opened concerning provisions of this treaty. Telephone interview with James Hackney, Office of the Legal Adviser, U.S. Dep't of State (Feb. 16, 1984).

4. Treaty Concerning Reciprocal Encouragement and Protection of Investments, December 6, 1983, United States-Senegal (on file with the Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506). Telephone interview with Stuart Lynn, Office of Investment Affairs, U.S. Dep't of State (Feb. 22, 1984).

5. Treaty Concerning Reciprocal Encouragement and Protection of Investments, December 13, 1983, United States-Haiti (on file with the Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506). Telephone interview with Stuart Lynn, Office of Investment Affairs, U.S. Dep't of State (Feb. 22, 1984).

6. USTR Computer Group Printout, Status of the Bilateral Investment Treaty Program (July 6, 1983) (available at Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506). Updated per telephone interview with James Hackney, Office of the Legal Adviser, U.S. Dep't of State (Feb. 16, 1984). Negotiations have commenced with Antigua, Bangladesh, Burundi, Cameroon, China, Costa Rica, El Salvador,

The key provisions of the treaties concern "national and most-favored-nation treatment for investors, prompt and adequate compensation in the event of expropriation, transfer rights for profits and capital, and procedures for settling investment disputes."⁷

The BITs contain many legal terms new to U.S. commercial treaty practice. As such, they are worth examining. Although no BIT has yet been submitted to the Senate for ratification, the new BIT program may be reliably evaluated through analyzing the first two treaties negotiated and the prototype⁸ on which they are based.⁹

This Article analyzes and discusses the BIT program in its historical, legal, and economic policy contexts. Part I summarizes the terms and explains the purposes of the new BITs, placing the treaties in their proper historical context. It demonstrates that, contrary to the frequent official characterizations of the BITs as "new" to U.S. diplomacy,¹⁰ the treaties are simply the newest generation in a long line of bilateral agreements formerly known as treaties of Friendship, Commerce, and Navigation (FCNs).¹¹ The goals and methods of the BITs are consistent with twentieth century U.S. foreign economic policy. Part II analyzes the more important treaty provisions, highlighting the legally new or problematic ones, and commenting on their major economic, legal, and general policy implications.

I

BILATERAL INVESTMENT TREATIES, YESTERDAY AND TODAY

An overview of the BIT program and of its underlying purposes is helpful in understanding the substantive BIT provisions discussed below.

Gabon, Honduras, Morocco, and Zaire. Consultations regarding BIT negotiations have been initiated with Argentina, Barbados, Belize, Bolivia, Chile, Dominican Republic, Ecuador, Guatemala, Hungary, Indonesia, Ivory Coast, Jamaica, Kenya, Liberia, Malaysia, Maldives, Malta, Philippines, Portugal, Saudi Arabia, Sri Lanka, Trinidad, Turkey, Uruguay, and Yugoslavia. Most of these consultations are currently inactive. *Id.*

7. USTR Press Release No. 82/16, *supra* note 1, at 3.

8. Egypt BIT, *supra* note 2; Panama BIT, *supra* note 3; Model BIT, *supra* note 1.

9. Although this Article was completed before the signing of the BITs with Senegal, *supra* note 4, and Haiti, *supra* note 5, it may reasonably be expected to reflect the terms of those and future BITs. The USTR is committed to limiting variations from the Model BIT, preferring not to enter into a treaty if significant departures from the model terms are requested. Telephone interview with Bruce Kreiger, formerly of the Office of the USTR (Mar. 25, 1983). In addition, "in past [U.S. commercial] treaty programs, the government devised a model treaty and used it in negotiations with several countries." Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy*, 2 *STUD. INT'L. & ECON. DEV.* 72, 82 (1967). Our study of the two successive generations of U.S. treaties of Friendship, Commerce, and Navigation following each of the World Wars reveals little variation in each treaty program once commenced. Principal variations in the post-World War II series can be explained by the fact that some were with LDCs and others with developed countries.

10. "The United States currently has no bilateral investment treaties." USTR Press Release No. 82/01, p. 2 (Jan. 13, 1982). "The [Egypt] Treaty will become the United States' first bilateral investment treaty . . ." Press Release No. 82/16, *supra* note 1.

11. The FCN treaties are discussed in Section I.B, *infra*.

A review of the history of U.S. commercial treaty practice is similarly helpful and demonstrates that the U.S. BITs are "new" in name only.

A. Overview of the BIT Program

The BITs deal exclusively with matters related to investment. The centerpiece, article II, describes at great length how foreign investment is to be treated.¹² In general, article II seeks to eliminate barriers to any form of financial or investment activity in the economy and territory of the treaty partner¹³ and to ensure U.S. investors unimpeded access to that economy on terms at least as favorable as those available to local and third-state investors.¹⁴ To these ends, the range of "companies" afforded treaty benefits is very broadly defined,¹⁵ and investment-related monetary transfers into and out of the host State are permitted with minimal restrictions.¹⁶ Investors are provided broad protection against non-commercial losses, whether caused by civil disorder¹⁷ or by governmental actions such as expropriation, nationalization, and confiscatory taxes and regulations.¹⁸ In addition, investors are *guaranteed* an international arbitral forum for the resolution of all disputes with the host State, which itself consents in the treaty to arbitral jurisdiction.¹⁹

The remaining provisions largely clarify, qualify, and facilitate these operational terms. Notably, taxation matters, with minor exceptions such as confiscatory taxes, are excluded from the coverage of the treaty.²⁰ The terms of the treaty are deemed effective and applicable to any investment for a period extending ten years beyond the date the treaty is terminated,²¹ whenever that may occur.

The overall purpose of the BIT program, and of U.S. investment and trade policy in general, is three-fold: to reduce barriers to and distortions in international investment so as to improve U.S. competitiveness abroad, to increase private investment in LDCs in order to promote global growth and development, and to ensure that the U.S. economy remains open to foreign investment.²² These objectives reflect the Reagan administration's views

12. Model BIT, *supra* note 1. Article II and most other articles summarized in Part I of the text are discussed at greater length in Part II, *infra*.

13. *See infra* Section II.B.

14. *Id.*

15. *See infra* Section II.A.

16. *See infra* Section II.C.

17. *See infra* Section II.D.

18. *Id.*

19. *See infra* Section II.E.

20. *See* Model BIT, *supra* note 1, art. XI.

21. *See id.*, art. XIII, para. 4.

22. *U.S. Policy Toward International Investment: Hearings Before the Subcomm. on International Economic Policy of the Comm. on Foreign Relations*, U.S. Senate, 97th Cong., 1st Sess. 180, 184 (1981) [hereinafter cited as Hearings] (statement of Harvey E. Bale, Jr., Ass't U.S. Trade Rep. for Investment Policy, Office of the U.S. Trade Rep.) [hereinafter cited as "Bale Statement"]. *See also* TWENTY-FIFTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED

that increased U.S. direct investment abroad will aid U.S. exports, that such private investment is necessary for sustained growth and development in the LDCs, that the free flow of capital is in the best interest of all countries, especially the LDCs, and that an open international investment environment is essential for an expanding network of international trade.²³

The BITs foster these objectives by establishing between the signatories a common legal framework designed to ensure fair and nondiscriminatory treatment for investors, and thus create a more open and attractive investment climate.²⁴ In particular, the BITs seek to eliminate performance requirements and other barriers to the establishment of U.S.-owned private investments in the territory of the treaty partner.²⁵ They also grant investors access to local capital markets²⁶ and seek to ensure that investors may freely transfer capital into and out of the host country regardless of local currency control policies.²⁷ Ultimately, the BIT program seeks to integrate the LDC economies into the world economy as a whole and, in so doing, to maximize investment and trade opportunities for U.S. capital.

The BITs serve other, less direct purposes. An important function of the BIT program is to lend weight in the international legal community to the United States' position on various points of international law and practice. Bilateral agreements, including the BITs negotiated with LDCs by various European states and also the U.S. FCNs, commonly achieve this end.²⁸ Another implied purpose of the program concerns the symbolic value of concluding a BIT. The event informs U.S. financial interests that the LDC signatory welcomes private foreign investment. These express and implied purposes, like many of the substantive BIT provisions, are not unique to the BITs. Rather, they are actually similar to their counterparts in the postwar FCNs.

B. The "Old BITs": Postwar Treaties of Friendship, Commerce, and Navigation

The postwar FCNs were, according to many commentators, essentially bilateral investment treaties. One of the many articles in which the State

STATES ON THE TRADE AGREEMENTS PROGRAM 1980-1981 at 9, 79, and the preambles to the Model, Egypt, and Panama BITs, *supra* notes 1-3.

23. See Bale Statement, *supra* note 22, at 184-85.

24. USTR Press Releases, *supra* note 1.

25. Model BIT, *supra* note 1, art. II, para. 7. See *infra* discussion in Section II.B.

26. Model BIT, *supra* note 1, art. II, para. 2. See *infra* discussion in Section II.B.

27. Model BIT, *supra* note 1, art. V. See *infra* discussion in Section II.C.

28. "The importance of the British [bilateral investment] treaties . . . and, incidentally, the twenty-one Friendship, Commerce, and Navigation Treaties concluded, principally, by the United States of America since the end of the Second World War lies in the contribution they make to the development of customary international law, in their being a source of law," Mann, *British Treaties for the Promotion and the Protection of Investments*, [1981] BRIT. Y.B. INT'L L. 241, 249. "A single state that secures acceptance by many other states of viable clauses in bilateral agreements may well influence progress toward a generally applied rule." R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 17 (1960).

Department Adviser on Commercial Treaties discussed this generation of FCNs was titled "Treaties for the Encouragement and Protection of Foreign Investment,"²⁹ a phrase virtually identical to the title of the new BIT prototype. That author characterized the postwar FCN as "the instrumentality . . . chosen by the United States . . . to forward investment objectives,"³⁰ a view shared by other commentators.³¹ However, despite these characterizations, the FCNs were not always investment treaties.

The first FCN was negotiated with France in 1778 as a general treaty governing most bilateral matters.³² Dozens of FCNs were entered into in the following 188 years,³³ and the FCN "repeatedly proved its flexibility and its adaptability to the varying needs of different eras."³⁴ After the Second World War, the FCNs were modified to suit the needs of the world's preeminent financial power. Rather than following the format of the treaties concluded between the First and Second World Wars, in which the main provisions concerning the establishment, conduct, and protection of enterprises comprised but a single article among approximately thirty,³⁵ upwards of half the total provisions of the postwar treaties were investment-related.³⁶ The "most striking advance" of the postwar treaties was the inclusion of the corporation within the scope of "protected persons".³⁷ "With corporations suitably fixed into the framework of the establishment provi-

29. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956).

30. *Id.*

31. "The main thrust of the modern F.C.N. is essentially as an investment or establishment treaty . . ." Norton, *The Renegotiability of United States Bilateral Commercial Treaties with the Member States of the European Economic Community*, 8 TEX. INT'L. L.J. 299, 355 (1973). See also R. WILSON, *supra* note 28, at 2. The International Chamber of Commerce includes the postwar FCNs among the BITs between European states and LDCs. INTERNATIONAL CHAMBER OF COMMERCE, *BILATERAL TREATIES FOR INTERNATIONAL INVESTMENT* (1977) [hereinafter cited as ICC PAMPHLET].

32. Treaty of Amity and Commerce, February 6, 1778, United States-France, 8 Stat. 12 (Annulled by Act of Congress, July 7, 1798). For citations to other FCNs, see Walker, *Modern Treaties of Friendship and Commerce*, 42 MINN. L. REV. 805, n.2 (1958).

33. The last FCN was concluded with Thailand, May 29, 1966, 19 U.S.T. 5843, T.I.A.S. No. 6540. For a comprehensive list of FCNs concluded through 1959, see Wilson, *supra* note 28, at app. I.

34. Walker, *supra* note 29, at 230-31. For a brief discussion of the evolution of the FCNs, see Youngquist, *supra* note 9.

35. Walker, *supra* note 32, at 806 n.6.

36. Walker, *supra* note 29, at 234.

37. As a government official stated:

In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the [other] country and controlling and managing the affairs of such local companies.

sions, the foundation for an investment treaty was laid."³⁸ The conversion process was completed "by revising and filling in the content of that framework."³⁹ Thus, the transition from FCN to BIT occurred not in the early 1980s but some thirty years earlier. Why the name of the treaty was not changed at that time is unclear. Some evidence suggests a concern over the appearance of having created a "special-interest" investment treaty.⁴⁰

Like the BITS, the postwar FCNs sought to ensure nondiscriminatory treatment of U.S. investors abroad.⁴¹ Their primary objective was to protect American investments.⁴² To this end, the FCN negotiators sought "reasonable facilities for withdrawal of earnings and transfer of capital, just compensation in the event of expropriation, prevention of discrimination against American firms in competition with state-owned or controlled enterprises, most-favored-nation treatment . . . , and means for the adjudication of disputes"⁴³ This emphasis on nondiscriminatory treatment in the establishment of investments was not new, but had been a cornerstone of U.S. foreign economic policy since the close of the nineteenth century.⁴⁴ The new BITS are fundamentally consistent with this policy.⁴⁵

The BITS resemble the FCNs in still other ways. Both treaty programs create privately enforceable rights⁴⁶ and are based on model treaties used in negotiations with several countries.⁴⁷ More significantly, the BIT program resembles earlier FCNs in its effort to adjust U.S. commercial treaty prac-

Commercial Treaties: Hearing on Treaties of Friendship, Commerce, and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before a Subcomm. of the Senate Comm. on Foreign Relations, 82d Cong., 2d Sess. 4-5 (1952) (opening statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs).

38. Walker, *supra* note 29, at 234.

39. *Id.* For example, "the subject of consular rights was detached" and the navigation provisions were "condensed". *Id.* at n.13. As a result, "[w]ith barely an utterance of the word 'investment,' the postwar FCNs were essentially redesigned to meet American investment needs abroad." Norton, *supra* note 31, at 352.

40. Walker seemed anxious to emphasize that this was not a special interest treaty. He commented that two characteristics of the FCNs stand out: "First, the FCN treaty is not a special-interest vehicle . . . , second, it is bilateral. Walker, *supra* note 29, at 239-40. Towards a similar end, Norton spoke of the necessity of "maintaining a facade of being a multi-purpose treaty." Norton, *supra* note 31, at 306.

41. Walker, *supra* note 29, at 232; Norton, *supra* note 31, at 310-11.

42. Norton, *supra* note 31, at 305.

43. Youngquist, *supra* note 9, at 83 (citations omitted).

44. See Wetter, *Diplomatic Assistance to Private Investment*, 29 U. CHI. L. REV. 275, 277 (1962). Wetter contends that U.S. policies designed to ensure nondiscriminatory access for U.S. investors pre-date the "Open Door Notes". *Id.*

45. However, as discussed in text accompanying note 107, *infra*, the treaties do depart from these policies in ways new to U.S. commercial treaty practice.

46. The FCNs "impos[e] on the signatories internationally binding obligations, many of which can be enforced in municipal courts." Norton, *supra* note 31, at 311. See also H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 284 n.48, 585 (2nd ed. 1976). The BITS are, by their terms, self-enforcing. See *infra* discussion of dispute resolution in Section II.E.

47. See *supra* note 9 concerning Model FCNs and note 1 regarding the Model BIT.

tice to new economic realities.⁴⁸ Thus, the newly christened BITs merely formalize a conversion largely completed decades ago.⁴⁹

Yet several BIT provisions clearly are new. Some add substantive topics not previously addressed in U.S. commercial treaties, such as the arbitration of investment disputes,⁵⁰ while others are subtle variations of familiar terms.⁵¹ These new provisions are important to investors and practitioners in international law because of their potentially significant legal implications and because they indicate the direction of U.S. governmental efforts to promote investment. The provisions are also of great interest to foreign policy observers, as they reveal much about recent administrations' attitudes toward development in general, and LDCs in particular. Part II highlights and evaluates the substantive content of the most important provisions of the BITs.

II SUBSTANTIVE BIT PROVISIONS

The five most significant components of the new BITs are discussed in this Part: the status of companies, the right of establishment, the scope of permissible transfers, property protection, and dispute resolution. The analysis is primarily legal, but economic implications are discussed as appropriate. The presentation focuses on the Model BIT,⁵² but salient differences between that prototype and the Egypt and Panama BITs are also

48. Both the interwar and postwar FCN programs "were conscious attempts to adjust our commercial treaty structure to new economic realities. Youngquist, *supra* note 9, at 81. Concerning the BITs, see USTR Press Release No. 82/01, *supra* note 10, at 2 (quoting U.S. Trade Rep. William E. Brock): "The trading and international investment world has undergone significant changes since most of these [FCN] treaties came into existence. With the increased importance of the developing countries in the world economy, we need new bilateral treaties in the investment area."

49. This assertion of the virtual identity of the two generations of treaties may appear overstated, given that approximately half the content of the postwar FCNs was not directly related to investment. However, as one commentator has recognized, although "friendship" appears in the FCN title:

[t]hese treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though "commerce" and "navigation" complete the title and accurately describe part of their content, their concern nowadays [1950s] is only secondarily with foreign trade and shipping. They are "commercial" in the broadest sense of that term; and they are above-all treaties of "establishment," concerned with the protection of persons, natural and juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.

Walker, *supra* note 32, at 806.

50. Model BIT, *supra* note 1, art. VII. Another significant change in the new program is the emphasis on lesser developed third world countries. See list of countries *supra* note 6; Press Releases, *supra* note 1.

51. See, e.g., *infra* Sections II.A. (nationality of foreign subsidiaries) and II.B. (application of national/most-favored-nation treatment to protected investments).

52. Model BIT, *supra* note 1.

discussed. References to the FCNs are only to the post-Second World War treaties, unless otherwise noted.

A. *The Status of Companies*

The status and definition of "companies" in the BITs is very important as "companies" are the primary beneficiaries of the BITs.⁵³ The most significant question raised by the provision on companies concerns corporate nationality. The BIT treatment of corporate nationality is ambiguous, effectively establishing a "control" test in all but name.⁵⁴ Foreign-organized subsidiaries of U.S. parent companies are, for treaty purposes, *neither* explicitly nationals of the United States nor of the host State. This departure from the traditional FCN "place of incorporation" test⁵⁵ holds major implications regarding the availability of diplomatic protection to such "U.S. companies". It also raises substantial issues new to the context of U.S. commercial treaties regarding the legal obligations of such "U.S. companies".

The Ambiguous Nationality of U.S.-owned, Foreign-organized Companies. The BITs define "company" broadly to include virtually any juridical entity.⁵⁶ The definition is comparable to that used in the FCNs⁵⁷ and reflects the BIT program goal of protecting U.S. investment interests regardless of the legal form they take.⁵⁸ However, the BIT definition of the

53. As discussed *infra* in Section II.B, most treaty benefits are accorded by each treaty Party not to nationals and companies (i.e., investors) of the other Party, but to the "investments" of those nationals and companies. In effect, however, the beneficiary is the owner of the investments, and as most foreign investment is made by juridical entities other than natural persons, "companies" are the primary treaty beneficiaries.

54. See *infra* text accompanying notes 56-65.

55. See *infra* note 59 and accompanying text.

56. "[C]ompany" means any kind of juridical entity, including any corporation . . . or other organization, that is . . . duly organized, regardless of whether . . . for pecuniary gain, privately or governmentally owned, . . . with limited or unlimited liability." Model BIT, *supra* note 1, art. I, subpara. (a).

57. See, e.g., FCN, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, art. XXXI, para. 3, [hereinafter cited as Japan FCN]; FCN, September 7, 1951, United States-Ethiopia, 4 U.S.T. 2134, T.I.A.S. No. 2864 (amended, Sept. 16-Oct. 20, 1972, 24 U.S.T. 2136, T.I.A.S. No. 7726), art. VII, para. 1 [hereinafter cited as Ethiopia FCN]. Five FCNs were analyzed for this study: the Japan FCN; the Ethiopia FCN; FCN, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter cited as Iran FCN]; Convention of Establishment, November 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625 [hereinafter cited as France FCN]; FCN, February 5, 1967, United States-Togo, 18 U.S.T. 2398, T.I.A.S. No. 4625 [hereinafter cited as Togo FCN].

Two of these, the Japan FCN and the Ethiopia FCN, are cited throughout the balance of this Article. The Japan FCN exemplifies the postwar FCNs concluded with the industrialized nations, as no "innovations of significance" were made in those FCNs after the Japan FCN was signed. Walker, *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 80 (1958). The Ethiopia FCN exemplifies the shorter treaties concluded with lesser developed countries during the same period. Youngquist, *supra* note 9, at 84. The Iran FCN is very similar to the Ethiopia FCN. The France FCN is similar in substance to the Japan Treaty but follows the format of France's other "Conventions of Establishment", a title synonymous with "investment treaty". The Togo FCN is one of the last ever concluded and resembles the BITs more than any of its predecessors.

58. Wilson Interview, *supra* note 1.

corporate *nationality* is different from the equivalent FCN provisions. While the earlier treaties deem companies to be nationals of the Party under whose laws they are organized,⁵⁹ the new treaties combine this place of incorporation test with a control test. Under the BITs, a "company of a Party" is a company: (1) organized under the laws of that Party; and (2) substantially owned by that Party or by natural persons who are nationals of that Party.⁶⁰ This leads to the anomalous result that a foreign-incorporated subsidiary of a U.S.-owned company is technically a national of neither Party.

Nonetheless, such subsidiaries receive the same treaty benefits enjoyed by companies of U.S. nationality. This result obtains because they fall within the BIT definition of "investments",⁶¹ and because each Party grants the benefits of the treaty to "investments in its territory of nationals or companies of the other Party."⁶² Moreover, where particular treaty benefits are accorded not to "investments" but to persons and companies, the BIT language is crafted to include locally-formed subsidiaries within its scope.⁶³ Thus, while foreign subsidiaries of U.S. firms are nominally nationals of neither Party under the treaty definition, the BITs require they be treated essentially as companies of the United States.⁶⁴ It is as if corporate nationality were determined solely by a "control test". This comports with recent trends.⁶⁵

59. See, e.g., Japan FCN, *supra* note 57, art. XXII, para. 3; Ethiopia FCN, *supra* note 57, art. VII, para. 1.

60. Model BIT, *supra* note 1, art. I, subpara. (b). The actual treaty language requires that the Party or nationals thereof "have a substantial interest" in the company. *Id.* The Egypt BIT defines "substantial interest" as one permitting "the exercise of control or significant influence on the company." Egypt BIT, *supra* note 2, Protocol para. 1. Neither the Model BIT nor the Panama BIT contains such guidance. The BITs, however, permit each Party to deny the benefits of the treaty to any company controlled by nationals of any third country. See Model BIT, *supra* note 1, art. I, subpara. (b). They also define "own or control" as "ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located." *Id.* at subpara. (d).

For purposes of determining what actually constitutes substantial ownership under U.S. law, see Overseas Private Investment Corporation legislation requiring ninety-five percent U.S. ownership, 22 U.S.C.A. § 2198(c) (West 1979), and the Hickenlooper Amendment requiring fifty percent U.S. ownership, 22 U.S.C.A. § 2370(e)(1)(A) (West 1979).

61. The BIT definition of "investment" is set forth in note 98, *infra*. Note that in addition to including "companies" in the definition of "investment", the BITs accord investors the right to form companies under local law and to acquire locally formed companies. See *infra* note 99, text of Model BIT, art. II(2)(b).

62. Model BIT, *supra* note 1, art. II, para. 2 (emphasis added).

63. See, e.g., Model BIT, *supra* note 1, art. II, para. 2 (providing compensation for expropriation by one Party of property owned by nationals of the other Party) and art. VII, para. 5 (for certain arbitral purposes, a company organized under the laws of one Party is expressly treated as a company of the other Party).

64. While the treatment prescribed for locally formed subsidiaries and their U.S. parent companies is not identical, simple but careful planning should ensure that any investment enjoys full treaty benefits. See *id.*, art. II(5)(b) (regarding certain employment rights).

65. The general rule provides that "a corporation has the nationality of the state that creates it." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 216 (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT (REVISED)]. "Increasingly [however], state practice

Furthermore, it would be of little or no practical consequence to contend that foreign subsidiaries of U.S.-owned corporations are nationals of the host State. As "investments", their treatment by the host State is governed, in virtually all respects, by treaty provisions requiring the more favorable of national and most-favored-nation treatment.⁶⁶ Consequently, local law will not apply, unless it provides the most favorable treatment available—and only if it also applies to U.S. nationals. Thus, categorizing local subsidiaries as nominal nationals of the host State, or even as dual nationals of the U.S. and the host State, is meaningless. Moreover, U.S. law arguably imposes on these apparently foreign companies duties which normally apply only to U.S. nationals.

Impact On Diplomatic Intervention. One significant implication of the BIT test for corporate nationality is to obviate the *Barcelona Traction* problem.⁶⁷ The U.S. has standing under the BITs to represent foreign subsidiaries in international fora because those companies are "investments" owned by companies or persons with U.S. nationality.⁶⁸ In effect, the diplomatic protection is granted not to the foreign-incorporated subsidiary but to U.S. nationals and their property. This result appears to apply regardless of how attenuated the chain of ownership is and regardless of how many distinct intervening corporate nationalities are involved. The sole question is whether natural persons with U.S. nationality possess ultimate ownership of a substantial interest in the company. If so, the U.S. may intervene diplomatically on the company's behalf.

Duties Arising from U.S. Nationality. The ambiguous BIT provisions concerning the nationality of a U.S. corporation's foreign subsidiary hold a potential impact beyond the basic problems just discussed. Dictum in *Sumitomo Shoji America, Inc. v. Avagliano*,⁶⁹ a recent U.S. Supreme Court case concerning the nationality of a foreign-owned, U.S.-operated subsidiary under the Japan FCN, suggests that companies enjoying legal rights stemming from a particular nationality are also subject to the legal responsibilities corresponding to that nationality.⁷⁰ Because the BITs potentially

and international agreements tend to treat a multinational enterprise as a unitary entity with its nationality that of the parent." RESTATEMENT (REVISED) § 713, comment f (Tent. Draft No. 3, 1982). See, e.g., Model BIT, *supra* note 1, art. VII, para. 5.

66. See *infra* Section II.B.

67. Case Concerning the *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of February 5). The Court held that Belgium lacked standing to sue Spain for an allegedly illegal taking of property located in Spain and owned by *Barcelona Traction*, a Canadian corporation, despite longstanding Belgian ownership of nearly ninety percent of the stock. The Court reasoned that Belgium was not harmed by the alleged taking because it lacked an adequate nexus with the firm. It could therefore not provide the firm with diplomatic protection.

68. See *supra* text accompanying note 62.

69. 457 U.S. 176 (1982).

70. *Id.* at 188.

provide for U.S. nationality for a foreign-incorporated subsidiary of a U.S.-owned corporation, duties might be imposed on the subsidiary by the U.S. regardless of its denomination as a local national by the host State.

In *Sumitomo*, female secretarial employees of a Japanese-owned New York corporation, including both U.S. and Japanese citizens, brought a class action suit claiming that Sumitomo's practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII of the Civil Rights Act of 1964.⁷¹ The Court held that Sumitomo was a U.S. company under the place of incorporation test of the 1953 U.S.-Japan FCN,⁷² and was therefore ineligible for special privileges granted "companies of Japan" under the treaty.⁷³

Like the BITs,⁷⁴ the Japan FCN grants companies of each Party the right to hire senior personnel of their choice in the territory of the other party, regardless of local laws.⁷⁵ Since Sumitomo was deemed a company of the United States, it was ineligible for this privilege under the FCN. However, the Model BIT explicitly grants such rights to U.S.-incorporated, foreign-owned subsidiaries.⁷⁶ Thus, if the situation faced in *Sumitomo* were controlled by the terms of a BIT, the outcome would likely be the reverse at least as to the "top managerial personnel".⁷⁷ Nevertheless, this uncertainty is a further dilemma in application of the treaties since ambiguous language in the negotiated treaties subject such hiring to the "employment laws of each party."⁷⁸ As these provisions have yet to be formally interpreted, the meaning of this language is presently uncertain.

While such suits are unlikely in the foreseeable future—since few nationals of BIT partners and potential partners possess the resources to establish investments in the U.S.⁷⁹—a variation of such suits is not so unlikely. For example, female U.S. citizens employed by a U.S.-owned, foreign-incorporated subsidiary might, as in *Sumitomo*, allege discrimination in a Title VII action in U.S. courts. Given the ambiguity of the BIT language regarding the nationality of such a subsidiary, a court could rea-

71. *Id.* at 178.

72. Japan FCN, *supra* note 57, art. XXII, para. 3.

73. *Sumitomo*, 457 U.S. at 182-83.

74. Model BIT, *supra* note 1, art. I, para. 5(b). The Egypt BIT limits this right to the position of managing director. Egypt BIT, *supra* note 2, art. II, para. 5(b).

75. Japan FCN, *supra* note 57, art. VIII, para. 1.

76. Model BIT, *supra* note 1, art. II, para. 5(b). *See also supra* notes 62-63 and accompanying text.

77. The Model BIT language might not encompass all the positions contested in *Sumitomo*.

78. Panama BIT, *supra* note 3, art. III, para. 2; Egypt BIT, *supra* note 2, art. II, para. 5(b).

79. Although the BITs are reciprocal, investments in the U.S. by nationals of its BIT partners are unlikely. As F.A. Mann has said regarding the United Kingdom-Philippines BIT, "investments by the Philippines in the United Kingdom . . . will be extremely rare[,] and it is probably no exaggeration to suggest that reciprocity is to a large extent a matter of prestige rather than reality. What is primarily intended is the promotion and protection of British investments in the Philippines." Mann, *supra* note 28, at 241-42.

sonably designate the company a U.S. national "entitled to the rights and subject to the responsibilities" prescribed by U.S. law.⁸⁰

Similar suits might be brought under any extraterritorially applicable U.S. law.⁸¹ For example, a determination that U.S.-owned foreign-incorporated subsidiaries are U.S. nationals under the BITs for purposes of U.S. law might ease enforcement of a U.S. trade boycott such as that instituted against the Soviet gas pipeline in 1982.⁸² However, a host State could interpret the ambiguous BIT language to deem such companies its own nationals.⁸³ A foreign-incorporated company deemed a U.S. national under U.S. law could conceivably face an untenable dilemma: lawful sanctions both from the host State for compliance with the boycott and from the U.S. for noncompliance.⁸⁴ The likelihood that any such conflict between the U.S. and an LDC would be resolved by political means, rather than by international legal process, does not mitigate the problematic aspects of the new BIT definition of corporate nationality.

Regardless of how the nationality question is resolved for subsidiaries, nationals and companies of either Party which invest in the territory of the other Party enjoy broad establishment rights. For convenience, such nationals and companies are hereinafter referred to as "protected investors". They are "protected" under the BIT with respect to the country in which they invest. Their property, including locally-incorporated subsidiaries, is hereinafter labeled "protected investment".

B. Establishment Provisions

The BIT establishment provisions address two broad areas, the endeavors protected investors may pursue and the treatment the host State must accord the resulting investments. In general, the BIT program seeks to secure for investors the unrestricted right to engage in any investment activity in the host State economy and to ensure that resulting investments

80. This result would not have occurred under the FCNs "place of incorporation" test since the locale of incorporation of the subsidiary would determine its nationality. See *supra* text accompanying note 65. Cf. *Bryant v. International Schools Services, Inc.*, 502 F. Supp. 472 (1980) (holding Title VII applicable to the hiring practices of schools operated in Iran by a U.S. corporation), *rev'd on other grounds*, 675 F.2d 562 (1982). However, *Bryant* did not involve a locally-incorporated subsidiary and the case did not mention the Iran FCN.

81. See RESTATEMENT (REVISED), *supra* note 65, § 402 and comment (Tent. Draft No. 2, 1981) (extraterritorial applications of U.S. law).

82. *Statement on the Extension of U.S. Sanctions on the Export of Oil and Gas Equipment to the Soviet Union*, June 18, 1982, 18 WEEKLY COMP. OF PRES. DOCS. 820 (June 21, 1982), 47 Fed. Reg. 27,250 (June 22, 1982).

83. See *supra* text accompanying notes 53-65 (analysis of BIT corporate nationality tests). See also Marcuss & Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?*, 2 INT'L TAX & BUS. LAW. 1 (1984) (discussion of the validity of U.S. export controls on foreign entities owned or controlled by U.S. persons).

84. The host State sanctions would be lawful, provided they were nondiscriminately applied, because the company is incorporated under that State's laws. The U.S. sanctions would be equally lawful because of the company's U.S. nationality under the BIT and U.S. law.

receive nondiscriminatory treatment to the greatest extent possible.⁸⁵

The new establishment language is far more detailed than analogous provisions in either the postwar FCNs or the recent European BITs.⁸⁶ Nonetheless, it differs little in effect from the terms of the FCNs previously negotiated with industrialized states.⁸⁷ It is the general application of these terms to LDCs that is new: most of the postwar FCNs negotiated with less developed countries imposed sweeping restrictions on the right of establishment, significantly narrowing its effect.⁸⁸ This may have been due to U.S. fears that the treaties might seem "imperialist", as well as to host nation concerns regarding "economic penetration" and threats to local capital.⁸⁹

85. Model BIT, *supra* note 1, art. II.

86. The FCNs are discussed in notes 87 and 88, *infra*. The BITs negotiated with LDCs by various Western European States are typically very brief and quite similar to one another, as they originated from a common European prototype. Mann, *supra* note 28, at 240 (citing G. SCHWARZENBERGER, *FOREIGN INVESTMENT AND INTERNATIONAL LAW* 109, 153 (1969)). The establishment provisions are short and general. See, e.g., Agreement for the Promotion and Protection of Investments, June 11, 1975, Egypt-United Kingdom, arts. 2 and 3, 1976 Gr. Brit. T.S. No. 97 (Cmd. 6638), — U.N.T.S. —, 14 I.L.M. 1470 [hereinafter cited as U.K.-Egypt BIT]; Agreement for the Reciprocal Promotion and Protection of Investments, September 23, 1981, Sri Lanka-Switzerland, arts. 3 and 4, — U.N.T.S. —, 21 I.L.M. 399 [hereinafter cited as Sri Lanka-Switzerland BIT].

87. The postwar FCNs with industrial states contained broad establishment terms. See, e.g., Japan FCN, *supra* note 57, art. VII, para. 1; art. V, para. 1 (according investors "national treatment with respect to engaging in all types of commercial, industrial, financial, and other business activities . . . , whether directly or by agent or through . . . any lawful juridical entity," and permitting the investor reasonably to obtain "on equitable terms the capital, skills, arts, and technology it need[ed] for its economic development"). The Japan FCN also provided for the free transfer of investment capital and the expatriation of profits and liquidation proceeds derived from investments. *Id.* art. XII.

88. For example, the Ethiopia FCN accorded investors only "reasonable opportunity for the investment of capital, and for the establishment of appropriate . . . enterprises," and granted various cognate rights, but only to nationals and companies "which are permitted to establish or acquire enterprises." Ethiopia FCN, *supra* note 57, art. VIII (emphasis added). Moreover, the standard of treatment applicable to such enterprises was dubious. Investors were to be accorded "treatment no less favorable than that accorded enterprises of whatever nationality engaged in similar activities." *Id.* While this resembles a standard requiring the more favorable of national and most favored nation treatment, it provides little security for large investments in an LDC where no investor carries on "similar activities".

The last few FCNs with LDCs included less restrictive establishment provisions. See, e.g., U.S.-Togo FCN, *supra* note 57, art. V. Note, however, that some of the recent European BITs also include restrictive establishment terms. See, e.g., Sri Lanka-Switzerland BIT, *supra* note 86, art. 3 (requiring that investments conform with the economic policies of the host state).

89. The apparent reason for the Ethiopia FCN restrictions was a perception at the State Department that strong establishment terms "in any treaty proposals to the newly independent African States [would be] likely to constitute a liability for the United States [T]he Africans," it was thought, would "tend to regard [the provisions] as 'imperialist' in nature." Youngquist, *supra* note 9, at 84 n.86 (quoting an unclassified memorandum from Setser, Commercial Treaties Division, Department of State, to Blankenheimer, Department of Commerce, March 29, 1961 [hereinafter cited as Setser Memo]). Similarly, the FCN with Iran included narrow establishment provisions because "Iran was not prepared to specify [broader] rights out of fear that this might lead to economic penetration The Department of State felt that there was some justification for this fear." *Id.* at n.87 (quoting S. EXEC. REP. NO. 9, 84th Cong., 2d Sess. 8 (1956)). Moreover, at least one commentator has suggested that, in addition

Such concerns are not apparent in the recent FCNs and new BITs.⁹⁰

This section highlights the newer and more problematic aspects of the BIT establishment provisions. An analysis of the substantive right of establishment—the range of permitted investment endeavors—is followed by a discussion of the favorable treatment each Party must provide protected investments. Although these two topics are interwoven in the Model BIT provisions,⁹¹ they are treated separately here to ease exposition and isolate the independent issues arising under each.

The Right of Establishment. The threshold requirement for enjoying treaty benefits is new. Protected investors or their employees may enter the host State for investment purposes provided the investor has “committed or [is] in the process of committing a substantial amount of capital or other resources” to that investment.⁹² The FCNs, in contrast, limited entry to those who had “invested or were investing a substantial amount of capital.”⁹³ While these provisions are couched in terms of requirements for entry and sojourn, their apparent purpose and effect is to articulate a minimum requirement for enjoying treaty benefits. In not requiring that investors contribute capital, the newer provision reflects the broad BIT definition of “investment”⁹⁴ and corresponds to the recent amendment of the OPIC definition of that term.⁹⁵ This broadened scope also acknowledges the real-

to fearing economic penetration, some LDCs may have wanted “to protect local capital.” R. WILSON, *supra* note 28, at 325.

The policy underlying the FCNs with less developed countries would, therefore, seem to have been to protect and prevent discrimination against whatever U.S.-owned investments were in fact permitted to be established and “not . . . to force open the door for investment.” Setser Memo, *supra*. This view comports with Wetter’s analysis of twentieth century foreign economic policy. See generally, Wetter, *supra* note 44, at 277.

90. U.S. policy had apparently changed by the middle 1960s. The later FCNs with LDCs included establishment provisions comparable in scope to those in the FCNs with industrialized nations. Compare Togo FCN, *supra* note 57, art. V, with Japan FCN, *supra* note 87.

91. In the treaty text, the basic grant of national and most favored nation treatment is coupled with the right of establishment: “Each party . . . shall permit . . . investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies or to nationals and companies of any third country, whichever is the most favorable.” Model BIT, *supra* note 1, art. II, para. 1.

92. Model BIT, *supra* note 1, art. II, para. 5(a).

93. Japan FCN, *supra* note 57, art. I, para. 1; Iran FCN, *supra* note 57, art. II, para. 1.

94. The BIT definition of investment is set forth *infra* at note 98.

95. The Foreign Assistance Act of 1961, as amended in 1981, provides:

[T]he term “investment” includes any contribution or commitment of funds, commodities, services, patents, processes, or techniques, in the form of (1) a loan or loans to an approved project, (2) the purchase of a share of ownership in any such project, (3) participation in royalties, earnings or profits of any such project, and (4) the furnishing of commodities or services pursuant to a lease or other contract. 22 U.S.C.A. § 2198(a) (West Supp. 1983).

The italicized words were added to the definition by section 7 of the Overseas Private Investment Corporation Amendments Act of 1981, Pub. L. No. 97-65, 95 Stat. 1021, 1024 (1981). The intent of the change was to “clarify] the definition of ‘investment’ as including

ity that foreign investment often occurs in nonfinancial form, such as commitments of commodities, services, or patents.⁹⁶

However, the language raises potentially serious questions regarding the economic impact of a BIT on a cash-poor LDC economy, for it clearly permits "investors" to engage in financial activities without any significant capital commitment.⁹⁷ While this provides commercial treaty benefits to a broader class of investors and investments than ever before, foreigners investing in an LDC economy without committing a substantial amount of capital could negatively affect the host State. Increasing the demand for local capital without increasing the supply might limit the access of local investors to domestic capital markets. This could retard development of an entrepreneurial middle class in the host State. It could also slow economic development since, while the profits of foreign investment activities might ultimately augment the local capital supply, the increase would likely be expatriated as allowed in the BITs.

Other treaty terms further suggest that a BIT may have significant adverse effects on a host LDC economy. The definitions of "investment"⁹⁸ and "associated activities"⁹⁹ are relevant in this regard. They are of general importance because to a great extent they define the scope of the right of

project commitments other than financial ones, such as commodities, services, and patents." H.R. REP. NO. 195, 97th Cong., 1st Sess. 12 (1981).

96. See *supra* note 95.

97. Perhaps partially to counter this impact, the Egypt BIT singles out certain financial sectors for expanded investment. See *supra* note 2, Protocol para. 8.

98. [I]nvestment means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

- (i) tangible and intangible property . . . ;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual and industrial property rights . . . ;
- (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
- (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
- (vii) returns which are reinvested.

Model BIT, *supra* note 1, art. I, subpara. (c). Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment. *Id.* The Egypt BIT definition, *supra* note 2, art. I, para. 1(c), and the Panama BIT definition, *supra* note 3, art. I, subpara. (d), are essentially identical to the model.

99. Associated activities include:

- (a) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business;
- (b) the organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in their property; and the management, control, maintenance, use, enjoyment and expansion, and the

establishment.¹⁰⁰ The BIT treatment of these terms is more detailed than in earlier U.S. commercial treaties¹⁰¹ and seems designed to permit protected investors to engage in virtually any investment activity in the host State. Protected investors are granted, *inter alia*, access both to local equity capital markets and to credit at local financial institutions.¹⁰² While this promotes the integration of LDCs into the global capital system, it also makes possible increased competition for scarce local capital, perhaps without significantly augmenting the amount of capital available in the LDC economy.¹⁰³

Similarly, BIT provisions permitting protected investors to acquire and liquidate locally-organized companies¹⁰⁴ may also prove disadvantageous to the host economy. Although such provisions permit profitable foreign investment in enterprises capable of increasing employment and promoting development in the host State, these provisions also equally allow the acquisition and liquidation of productive local companies. Thus, protected investors might purchase and liquidate local competitors to engage in anticompetitive practices such as monopoly pricing, or they might simply acquire and liquidate undervalued companies and expatriate the profits.¹⁰⁵ While such transactions presently may be unlikely given the underdevel-

sale, liquidation, dissolution or other disposition, of companies organized or acquired;

(c) the making, performance and enforcement of contracts;

(d) the acquisition (whether by purchase, lease or otherwise), ownership and disposition (whether by sale, testament or otherwise), of personal property of all kinds, both tangible and intangible;

(e) the leasing of real property appropriate for the conduct of business;

(f) the acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and

(g) the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

Model BIT, *supra* note 1, art. II, para. 2. The Egypt BIT, *supra* note 2, art. II, para. 2(a) is essentially identical. The Panama BIT, *supra* note 3, Agreed Minutes para. 1, adds to these terms a few items included elsewhere in the Model and Egypt Treaties.

100. As discussed in the text accompanying notes 114-136, *infra*, these are the investment activities which are granted national and most favored nation treatment and other advantages.

101. The FCNs did not include definitions, as such, for these terms. What language exists is scattered throughout those treaties and is less comprehensive.

102. See Model BIT, *supra* note 99, art. II, para. 2, subpara. (g).

103. See *supra* text accompanying note 97.

104. See Model BIT, *supra* note 99, subpara. (b). The right to acquire local companies is not new to U.S. commercial treaties with LDCs. The last of the LDC FCNs permitted investors to acquire interests in enterprises of all types. See *e.g.*, Togo FCN, *supra* note 57, art. V, para. 1. In addition, the right of access to local capital markets is also implicit in the general language of the treaties. *Id.* at para. 2. The post 1960 FCNs thus represent a bridge between the BITs and the bulk of the postwar treaties. Compare *id.* (signed in 1967) with Ethiopia FCN, *supra* note 57, art. VIII, paras. 4 and 5 (signed in 1951).

105. Unlike some of the FCNs, the BITs contain no reference to private antitrust law. See, *e.g.*, Japan FCN, *supra* note 57, art. XVIII, para. 1. Of course, the absence of such provisions in the BITs does not affect an investor's potential liability under the Parties' respective antitrust laws. Regarding recommended limitations on anticompetitive practices in the LDCs, see Organization for Economic Cooperation and Development: Council Recommendation Concerning Restrictive Business Practices, 17 I.L.M. 1527 (1978).

oped economies of the LDCs, the potential nonetheless exists because the BITs, like the FCNs, are intended for long-term application.¹⁰⁶

Whatever the eventual effect of these provisions, the establishment policies underlying U.S. commercial treaties clearly have changed. No longer are the treaties merely intended to ensure nondiscriminatory treatment for U.S. investors abroad. Instead, their current purpose is aggressively to "force open the door for investment."¹⁰⁷ If this policy is to succeed, the BIT program must resolve the problem of performance requirements.

Performance Requirements. Performance requirements frequently pose significant obstacles to foreign investment,¹⁰⁸ but are addressed by neither the postwar FCNs nor the European BITs.¹⁰⁹ The Model BIT specifically prohibits imposition of "performance requirements as a condition of establishment, expansion, or maintenance of investments."¹¹⁰ However, neither of the first two BITs signed contains such unequivocal terms. The Egypt BIT merely requires that each party "seek to avoid" imposing performance requirements,¹¹¹ a provision so weak as to establish no enforceable proscription.

The Panama BIT contains language comparable to the Model BIT provision but limits the proscription to performance requirements imposed as a condition of establishment.¹¹² Moreover, the Panama BIT contains "clarifying" language noting that Panama has "incentive laws" which grant benefits to companies agreeing to comply with specific "requirements."¹¹³ Although such requirements are technically not imposed as a "condition of establishment", they affect the relative competitive positions of firms and the profitability of prospective investments. The Panama BIT prohibition is

106. Many FCNs have been in force for several decades. *See, e.g., supra* note 57. The BITs apply for a minimum of ten years and remain applicable for an additional ten-year period, after termination, to investments which were acquired before the treaty termination date. *See, e.g.,* Model BIT, *supra* note 1, art. XIII, para. 4.

107. *See* Setser Memo, *supra* note 89. *See also supra* note 104.

108. The range of possible performance requirements is broad, and they are used "most prevalently" by LDC governments. Performance requirements placed on foreign investors include requirements regarding: (1) exports; (2) import substitution; (3) size (*e.g.*, capital invested or employment levels); (4) industrial sectors or specific industries; (5) location of industry; (6) foreign ownership (or providing for local participation); (7) employment of foreign nationals (or the employment of nationals, especially in technical or managerial positions); (8) investor financing and access to local capital; (9) the remittance of earnings and the repatriation of capital; and (10) the introduction of new products and new or high-level technology. Bale Statement, *supra* note 22, at 185.

109. Hearings, *supra* note 22, at 150 (prepared statement of G.C. Hufbauer) [hereinafter cited as Hufbauer Statement].

110. Model BIT, *supra* note 1, art. II, para. 7.

111. Egypt BIT, *supra* note 2, art. II, para 7.

112. "Neither Party shall impose performance requirements as a condition for the establishment of investment . . ." Panama BIT, *supra* note 3, art. II, para. 4.

113. *Id.* at Agreed Minutes, Introduction, and art. II, para 2. Performance requirements are often imposed as "a condition for an investment incentive." Bale Statement, *supra* note 22, at 185.

therefore probably meaningless. This failure to prohibit performance requirements in the BITs represents the most significant departure from BIT program goals as expressed in the Model Treaty.

The National and Most-Favored-Nation Standard of Treatment. The BITs require a host State to provide the more favorable of national or most-favored-nation (MFN) treatment to the establishment or acquisition of investments.¹¹⁴ While generally applicable, this national/MFN standard is not exclusive. It is subject to exceptions and overlaid with other standards based on equity considerations, international law, and specific treaty terms. These diverse rules combine to provide investors with an interlocking web of legal defenses to any act of investment discrimination or mistreatment by the host State.

The BIT use of the national/MFN standard is new. First, the BITs generally accord such treatment not to nationals and companies, as in the FCNs,¹¹⁵ but to the *investments* of those nationals and companies.¹¹⁶ This has major implications regarding corporate nationality, as already discussed.¹¹⁷ Moreover, the national/MFN standard itself is a hybrid based on earlier treaty practice. The FCNs typically accorded national treatment to protected investments, reserving the MFN standard for exceptional cases.¹¹⁸

The national/MFN treatment standard is subject to certain exceptions. For example, the right to invest in certain sectors specified by each Party is accorded only MFN treatment.¹¹⁹ Similar economic sector exceptions appeared in all the postwar FCNs,¹²⁰ as these exceptions were and are re-

114. Model BIT, *supra* note 1, art. III, para. 1. See *supra* note 91.

115. See, e.g., Japan FCN, *supra* note 57, art. VI, para. 1; Ethiopia FCN, *supra* note 57, art. VIII, para. 4.

116. Model BIT, *supra* note 1, art. III, para. 1.

117. See *supra* Section II.A.

118. See, e.g., Japan FCN, *supra* note 57, art. VII, paras. 1, 4; Togo FCN, *supra* note 57, art. V, para. 1. The FCNs occasionally employ the national/MFN standard, but not as consistently as the BITs. See, e.g., Japan FCN, *supra* note 57, art. IV, para. 1; Ethiopia FCN, *supra* note 57, art. VII, para. 2.

119. Model BIT, *supra* note 1, art. II, para. 3(a). Each party agrees to keep the number of such exceptions at a minimum. *Id.* The sectors are listed in an Annex to each BIT. These sectors vary from treaty to treaty but encompass a variety of areas as diverse as communications, import and export activities, ownership and exploitation of natural resources and public utilities, use and ownership of land, banking and loans, as well as other areas. Note that MFN treatment is due investments in all sectors except real property ownership and mining on public lands, which are governed by a reciprocity rule. Model BIT, *supra* note 1, Annex; Egypt BIT, *supra* note 2, Annex; Panama BIT, *supra* note 3, Annex. See also RESTATEMENT (REVISED), *supra* note 65, § 722 reporter's note 9 (Tent. Draft No. 3, 1982) (concerning real property).

In addition, the Egypt BIT limits the MFN standard by excluding from its scope advantages accorded by either party to investors of third nations by virtue of special security or regional arrangements including regional customs unions and free trade areas. Egypt BIT, *supra* note 2, Protocol, para. 3.

120. See, e.g., Japan FCN, *supra* note 57, art. VII, para. 2.

quired by existing U.S. law.¹²¹

The BITs also contain several provisions qualifying or augmenting the national/MFN standard. One of these provisions seems legally dubious. The BITs enable the Parties to grant protected investments treatment more favorable than required by the BITs "in like situations", whether by legislation, investment agreement, or otherwise.¹²² While one result of this language is to permit the host State generally to provide all investments with treatment superior to that required by the BIT, the language may also be interpreted as allowing the host State to extend uniquely favorable treatment to certain individuals or classes of investments without requiring comparable treatment for others in like situations.

Although investors might seek such special treatment in negotiating investment agreements, the BITs cannot logically permit unique treatment, as any special agreement would eventually become applicable to all investments. For example, if Egypt were to grant special treatment to a particular U.S. investor under a separate investment agreement, British investors could reasonably demand comparable treatment under the MFN clause in the Egypt-U.K. BIT.¹²³ Other U.S. investors could, in turn, demand it under the U.S.-Egypt national/MFN provision. The special agreement would consequently become generally applicable.¹²⁴

121. For example, exceptions falling within the U.S. Annex sectors include prohibitions on the issuance of broadcast licenses (47 U.S.C.A. § 310 (West Supp. 1983)) to alien controlled companies and on aliens serving as directors of national banks (12 U.S.C.A. § 72 (West Supp. 1983)). See *Foreign Investment in the United States: Hearings Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing and Urban Affairs Pt. 1, 93d Cong., 2d Sess. 146-50 (1974)* (concerning legal restrictions on alien investment in the United States). See also Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961) (discussion of the history of such restrictions).

Note that virtually all the benefits accorded by the United States to its BIT partners are also already required by existing U.S. law. Signing a BIT therefore changes little or nothing for investors from less developed countries seeking to invest in the United States. See RESTATEMENT (REVISED), *supra* note 65, § 722 comment f and reporter's notes 3, 6, 8 & 10 (Tent. Draft No. 3, 1982) (discussing investment rights of aliens investing in the U.S. with or without a BIT).

122. Model BIT, *supra* note 1, art. IX.

123. U.K.-Egypt BIT, *supra* note 86, art. III, para. 1.

124. The United Nations International Law Commission lends weight to this analysis. Article 16 of the Final Draft Articles on Most-Favoured-Nation Clauses in Treaties Between States provides:

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement between the granting State and the third State limiting the application of that treatment to relations between them.

Report of the International Law Commission, 33 U.N. GAOR Supp. No. 10 at 95, U.N. Doc. A/33/10 (1978) (The final draft articles were adopted by the International Law Commission in 1978).

The BITs also incorporate the "international law" standard. In no case is the treatment of investments to be less favorable than required by international law.¹²⁵ As an explicit treaty term, the international minimum standard is relatively uncommon in postwar U.S. commercial treaty practice.¹²⁶ Use of the standard in the BIT program reflects a duality in the U.S. attitude toward international law. On one hand, the government intends to use the BIT program to *create* international law.¹²⁷ Yet the BITs also *rely* upon international law as a substantive standard. Whether this reliance can ultimately be of any practical value is uncertain, particularly in light of disagreement as to what actually constitutes international law in certain key areas.¹²⁸

The BITs also require that investments "at all times be accorded fair and equitable treatment."¹²⁹ The utility of this equity standard is questionable. It prescribes no precise treatment and confers no specifically enforceable rights.¹³⁰ Nonetheless, one notable commentator recently suggested that similar language in a British BIT declares the host State's "overriding obligation"¹³¹ in the treatment of investments. This equity standard, Mann contends, is broader in scope than international law, "goes much further than the right to most-favoured-nation and to national treatment," and forms the basis for a consistent substantive law standard "almost sufficient to cover all conceivable cases."¹³² This expansive interpretation seems misplaced. Equity is unquestionably a concept over which responsible parties regularly disagree. In addition, these "very familiar terms . . . have hardly ever been judicially considered."¹³³

125. Model BIT, *supra* note 1, art. II, para. 4. See also R. WILSON, *supra* note 28, at 6 ("Used in combination with other standards in this manner, mention of [international] law may make clear to interpreters that there was no intention, in the acceptance of other standards, to waive rights under international law").

126. Of the five postwar FCNs discussed in this Article, see *supra* note 57, only the Iran FCN uses the international law standard. See Iran FCN, *supra* note 57, art. IV, para. 2. Use of the standard in the BITs probably reflects prudence on the part of the drafters. See Wilson, *supra* note 125.

127. See *infra* note 157.

128. For example, the U.S. Supreme Court has said: "There are few if any issues in international law today on which opinion seems so divided as the limitations on a state's power to expropriate the property of aliens." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 482 (1964).

129. Model BIT, *supra* note 1, art. II, para. 4. See Egypt BIT *supra* note 2, which excludes this language. The FCNs typically used the equity standard. See, e.g., France FCN, *supra* note 57, art. I; Ethiopia FCN, *supra* note 57, art. VIII, para. 1. Cf. Japan FCN, *supra* note 57 (no equity standard included).

130. "Equitable treatment" is "much more vague than the standards already mentioned [*i.e.*, national treatment, MFN treatment, and the international law standard]." R. WILSON, *supra* note 28, at 9.

131. Mann, *supra* note 28, at 243. "[I]t may well be that the other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty." *Id.*

132. *Id.*

133. Mann, *supra* note 28, at 243. However, as a basis for arbitration awards, "equity has not always proved to be superfluous." R. WILSON, *supra* note 28, at 9. Under the BITs, the

The final standard augmenting the general rule of national/MFN treatment proscribes the discriminatory or arbitrary impairment of any investment-related right.¹³⁴ This term was common in the FCNs¹³⁵ and is arguably a restatement of the national/MFN standard. It is therefore unclear what added protection this language may provide. However, its detail¹³⁶ and its character as a relative rather than an absolute rule suggest that it may ultimately prove more helpful to investors in their regular dealings with the host State than the absolute but undefined "equity" requirement.

In sum, the BITs generally require the more favorable of national and MFN treatment. This rule is subject to exceptions but is augmented by requirements that all treatment be equitable, nondiscriminatory, and in conformity with international law. The practical utility of some of these terms may, however, be limited. In addition to these general standards, the BITs contain numerous provisions prescribing specific treatment of investment. The most significant of these concern investment-related capital transfers, protection of investment property, and dispute resolution, and are discussed in the following three sections.

C. *Transfer Provisions*

The Model BIT transfer provisions manifest two primary goals. First, they seek to ensure that investment-related transfers out of the host State receive priority over all other potential uses of foreign exchange reserves. Second, they establish rules designed to permit the free flow of investment capital irrespective of national borders. The terms are more detailed than the less ambitious FCN provisions, which neither gave transfers absolute priority nor, in the case of LDC FCNs, permitted transfers to non-contracting States.¹³⁷ In practice the BIT program so far has had only limited

Parties to an investment dispute may agree to have the dispute arbitrated *ex aequo et bono*. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter cited as ICSID Convention], art. 42(3) and Arbitration (Additional Facility) Rules, art. 55(2), Doc. ICSID/11 at 25 (1978). Regarding arbitration under the BITs, see *infra* Section II.E.

134. "Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party." Model BIT, *supra* note 1, art. II, para. 4. No comparable language appears in the Egypt BIT.

135. See, e.g., Japan FCN, *supra* note 57, art. V, para. 1; Ethiopia FCN, *supra* note 57, art. VIII, para. 1.

136. See Model BIT provision, *supra* note 134.

137. The FCNs with developed States generally permitted transfers in and out of the host State on a national/MFN basis, with restrictions permitted only to prevent monetary reserves from falling too low or in accordance with IMF rules. In particular, exchange restrictions were appropriate "to assure the availability of foreign exchange for goods and services essential to the health and welfare of the [host State's] people." Japan FCN, *supra* note 57, art. XII, para. 3. After providing adequate reserves for domestic welfare, the parties were expected to "make reasonable provision for the withdrawal" of earnings of all types, including compensation for takings, capital transfers, and the like. *Id.* The controlling exchange rate was that deemed

success in these matters.

The Model BIT permits the transfer of all investment-related capital and returns, however derived, into and out of the host State "freely and without delay."¹³⁸ Unless otherwise agreed by the protected investor and the host State, the former may select the currency or currencies to be transferred.¹³⁹ Currencies are to be exchanged at the prevailing spot-market rate on the date of transfer.¹⁴⁰

Neither the Panama nor the Egypt BIT follows the Model BIT terms closely. The Panama treaty provision is brief and unequivocal: "with respect to [protected] investments . . . current and capital transactions shall remain unrestricted" and "payments and other transfers . . . shall continue to be free."¹⁴¹ The BIT therefore has no effect in Panama on investment-related transfers. The Egypt treaty also differs significantly from the Model BIT. Unless otherwise agreed in advance, Egypt, not the investor, is empowered to select the currency to be transferred.¹⁴² Moreover, Egypt may "temporarily delay" transfers when its foreign exchange reserves are at "a very low level."¹⁴³

Delays in the transfer of investment-related funds are, however, subject to three conditions. First, they may be imposed only on a MFN basis. Second, they may not be imposed for periods longer than those permitted by specific Egyptian investment laws in force on the date the treaty was signed. Finally, where the delay applies to proceeds from the sale or liquidation of investments, Egypt must "provid[e] the investor an opportunity to

applicable by the IMF or a "just and reasonable" rate. *Id.* The LDC FCNs were generally similar but differed significantly in two respects: they lacked the national/MFN standard and they limited transfers to those between the treaty signatories. *See, e.g.,* Ethiopia FCN, *supra* note 57, art. XI.

138. *See supra* note 1, art. V, para. 1.

139. *Id.* at para. 2.

140. *Id.* at paras. 1-2. Notwithstanding these provisions, either Party may maintain laws and regulations requiring currency transfer reports, imposing income withholding taxes on dividends and other transfers, and protecting the rights of creditors, including judgment creditors. *Id.* at para. 3. The exchange rate for transfers of expropriation compensation is handled differently. The Model BIT, art. V, para. 2, leaves that rate to be determined by article III, which designates the use of "the prevailing market rate of exchange on the date of expropriation."

The Egypt BIT contains contradictory provisions regarding applicable exchange rates. It includes a substantially identical article III rule but fails to except compensation from its article V transfer provisions. Nowhere does the Egypt BIT indicate which of these two equally specific provisions shall prevail. Perhaps this error will be corrected in the renegotiations proposed by Egypt. *See supra* note 2.

141. Panama BIT, *supra* note 3, art. VI. Note that the Panama treaty also contains language providing that other treaties in force between the Parties are unaffected by the BIT. Panama BIT, *supra* note 3, art. IX, para. 2. Whether this implies a role for the IMF is not clear. The Egypt treaty contains an identical paragraph but the Model BIT does not. Egypt BIT, *supra* note 2, art. IX, para. 2.

142. Egypt BIT, *supra* note 2, art. V, para. 2. While Egypt's control over this choice is not explicit, the language nevertheless has this effect. Note that Egypt shall be permitted to select "the currency of the original investment or . . . any other freely convertible currency." *Id.*

143. Egypt BIT, *supra* note 2, Protocol para. 6.

invest the . . . proceeds in a manner which will preserve their real value free of exchange risk until transfer occurs."¹⁴⁴ This language may be construed as effectively obligating Egypt to guarantee the value of its currency regardless of exchange rate fluctuations,¹⁴⁵ a result perhaps unintended by Egypt. While the first two conditions are at least implicit in the LDC FCNs,¹⁴⁶ this final condition is new. It suggests that U.S. BIT negotiators extract a substantial price for any limits on transfer rights.¹⁴⁷

D. Protection of Property

The BITs protect investors against property losses whether caused by expropriation, war or civil strife. These provisions are new in several respects. First, they expand the scope of protection to include losses not covered by earlier commercial treaties. Second, they elaborate the "prompt, adequate, and effective compensation" formula in greater detail than did the FCNs.¹⁴⁸ In this regard they are quite similar to the European BITs.¹⁴⁹ Finally, they combine with other treaty provisions effectively to protect any property interest owned by a U.S. investor, regardless of the form of that investment.

144. *Id.*

145. Whether the investor is insulated from exchange-based risks of *gain* in value as well as risks of loss is unclear. The investor might avoid this latter outcome by re-proposing the transfer when exchange rates vary in its favor, thus increasing the value of the fund awaiting transfer. However, as Egypt controls the selection of currencies to be expatriated, this may be difficult where convertible currency exchange rates are varying inversely.

146. They are implicit in the general promise of nondiscriminatory treatment, *supra* note 137, which requires MFN treatment and compliance with local laws to the extent they are applied to others.

147. One final difference among the transfer-related provisions in the Egypt, Panama, and Model BITs concerns the associated activities granted national/MFN treatment. In the Egypt treaty, associated activities include "the purchase of foreign exchange for the operation of the enterprise." Egypt BIT, *supra* note 2, art. II, para. 2(a)(vii). The Model BIT includes "the purchase of foreign exchange for imports." Model BIT, *supra* note 1, art. II, para. 2(g). The Panama BIT is silent in this regard.

148. The U.S. view that alien property is protected by an international standard requiring "prompt, adequate, and effective compensation" dates at least to a 1938 exchange between Secretary of State Hull and the Mexican Minister of Finance. 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, 657-661. This is generally referred to as the Hull Rule. The postwar FCNs reflected this view by typically guaranteeing that property would enjoy "the most constant protection and security" and would "not be taken except for a public purpose, [and] not . . . without the prompt payment of just and effective compensation." Ethiopia FCN, *supra* note 57, art. VIII, para. 2. The interwar FCNs were quite similar. *See, e.g., Treaty of Friendship, Commerce and Consular Relations* December 8, 1923, United States-Germany, art. I, 44 Stat. 2132, T.I.A.S. No. 725.

Most of the postwar FCNs elaborated on the language quoted above by providing, for example, national/MFN treatment regarding compensation, protection of both direct and indirect property interests, or by positing international law as a minimum standard. *See, e.g.,* Japan FCN, *supra* note 57, art. VI, paras. 3-4, and Protocol para. 2; Iran FCN, *supra* note 57, art. IV, para. 2.

149. The property protection provisions in the European BITs are very similar to those in the U.S. BITs. *See, e.g.,* U.K.-Sri Lanka BIT, 19 I.L.M. 886 (1980), arts. IV and V; U.K.-Egypt BIT, *supra* note 86, arts. IV and V. *See also* Sri Lanka-Switzerland BIT, *supra* note 86, art. VI.

The property protection provisions comprise two articles. One governs compensation for expropriation and is at its core very similar to the comparable FCN provisions. This similarity may pose a serious threat to the BIT program.¹⁵⁰ The other article concerns losses caused by war and various forms of civil strife.

Compensation for Expropriation. Article III of the BITs characterizes "expropriation" broadly to include nationalizations and all other measures, direct or indirect, which are tantamount to expropriation or nationalization, whether in the form of taxation, condemnation, or regulation.¹⁵¹ Although

150. The common core of the property protection provision in the FCNs and the new BITs is the Hull Rule, *supra* note 148. This similarity may pose problems for the BIT program, as a recent U.S. District Court decision casts doubt upon the efficacy of the rule. In *Kalamazoo Spice Extraction Co. v. Provisional Revolutionary Gov't of Socialist Ethiopia*, 543 F. Supp. 1224 (W.D. Mich., 1982), *appeal docketed*, No. 82-1521 (6th Cir. Oct. 1983), *Kal-Spice* challenged defendant's expropriation of its Ethiopian subsidiary. *Kal-Spice* contended that, given the existence of a specific compensation standard in the U.S.-Ethiopian FCN, the act-of-state doctrine did not bar judicial review of the expropriation. The District Court disagreed, holding the treaty exception to the act-of-state doctrine inapplicable because the Ethiopia FCN

is not the type of "treaty or other unambiguous agreement regarding controlling legal principles" contemplated by the Supreme Court in *Sabbatino* [T]here are no definitions of "prompt," "just," or "effective," and . . . the Treaty does not demonstrate the unambiguous agreement on controlling legal standards . . . necessary for judicial decision-making.

. . . . The terms . . . are so inherently general, doubtful, and susceptible of multiple interpretation that in the absence of an established body of law to clarify their meaning a court cannot reasonably be asked to apply them to a particular set of facts.

543 F. Supp. at 1230.

Unless overturned on appeal, the *Kal-Spice* decision may threaten the BIT program by rendering its compensation standard unenforceable in U.S. courts. On the other hand, the case is potentially distinguishable in that the BIT provisions are far more elaborate than the sparse language found in the Ethiopia FCN.

In any event, the District Court is arguably mistaken. Viewed in the context of U.S. commercial treaty practice, the U.S.-Ethiopia FCN states an enforceable legal standard. In *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (1980), *modified on other grounds*, 657 F.2d 430 (1981) (modified due to the Executive Agreement ending the Iranian hostage crisis, January 19, 1981), insurance companies representing all U.S. insurance operations in Iran sued the new host government under the 1957 U.S.-Iran FCN for compensation for nationalized assets. Contrary to *Kal-Spice*, the District Court applied the treaty exception to the act-of-state doctrine, holding the FCN an "unambiguous treaty setting forth agreed principles of international law applicable to the case at hand." 493 F. Supp. at 525. The court so held despite its finding that "the exact scope and precise requirements of the Treaty . . . may be subject to interpretation." *Id.* at 524. While the compensation provisions in the Iran FCN are slightly more detailed than those in the Ethiopia FCN, the two are arguably equivalent. [Editor's note: during the production of this Article, the Circuit Court published its decision in *Kalamazoo Spice Extraction Co. v. The Provisional Military Gov't of Socialist Ethiopia*, No. 82-1521 (6th Cir. Mar. 9, 1984). In reversing the District Court to find the treaty provided a controlling legal standard of international law, the Circuit Court applied reasoning similar to that suggested above.]

151. Model BIT, *supra* note 1, art. III, para. 1. The fact that the word "expropriation" is not defined may have serious implications. See *infra* text accompanying note 170. The Panama BIT provision is similar, but abbreviated. Panama BIT, *supra* note 3, art. IV, para. 1.

this description is comparable in scope to terms used elsewhere in U.S. law,¹⁵² it is new to U.S. commercial treaty practice.¹⁵³ Its purpose is to encompass all forms of property loss caused by the host government, including "creeping expropriation" and other instances in which no property is actually transferred from the investor to the host State.¹⁵⁴

The BITs expressly proscribe expropriations and nationalizations which fail to comply with five requirements. The expropriation must be "for a public purpose", "accomplished under due process of law", nondiscriminatory, "accompanied by prompt, adequate, and effective compensation", and may not "violate any specific provision on contractual stability or expropriation in an investment agreement between" the protected investor and host State.¹⁵⁵ As elaborated in the Model BIT, these requirements are said to constitute "the principles of international law."¹⁵⁶ In this manner, the United States seeks to lend weight to its view of the customary international law of expropriation, a view by no means uncontroversial.¹⁵⁷

152. The BIT description is similar to the OPIC definition, 22 U.S.C.A. § 2198(b)(West 1979), and to the matters covered by the Hickenlooper Amendment, 22 U.S.C.A. § 2370(e) (West 1979), which empowers the President to terminate foreign aid to governments which fail to compensate U.S. investors for, among other things, expropriations, contract nullifications, and discriminatory taxes.

153. None of the FCNs surveyed herein, *see supra* note 57, includes a definition of expropriation.

154. "Creeping expropriation" is summarized in the RESTATEMENT (REVISED) as follows: "A state is responsible as for an expropriation . . . when it subjects alien property to taxation or regulation that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays effective enjoyment of an alien's property or its removal from the state's territory." RESTATEMENT (REVISED), *supra* note 65, § 712 comment g (Tent. Draft No. 3, 1982). This does not include bona fide, nondiscriminatory general taxation and regulation. *Id.* *See also id.*, Reporters' Note 7; *Some Recent Instances or Threats of Creeping Expropriation*, 109 CONG. REC. 21,773, 21,774 (1963); Mann, *supra* note 28, at 247.

155. Model BIT, *supra* note 1, art. III, para. 1. The Egypt BIT uses the language "prompt and adequate compensation, freely realizable," rather than "prompt, adequate, and effective compensation." Egypt BIT, *supra* note 2, art. III, para. 1. The Panama BIT excludes the language regarding contractual stability but refers to "the general principles of treatment laid down in article II(2)." Panama BIT, *supra* note 3, art. IV, para. 1. The referenced provision ends as follows: "Each Party shall observe any obligation it may have entered into with regard to investment of nationals and companies of the other Party." These deviations should have no practical impact.

156. Model BIT, *supra* note 1, art. III, para. 3. The Panama BIT excludes this reference to international law.

157. It is well accepted that treaties generally contribute to the development of international law. Mann, *supra* note 28, at 249 (BITs and FCNs strengthen compensation rules); R. WILSON, *supra* note 28, at 121-22, 328; ICC Pamphlet, *supra* note 31, at 12; and Youngquist, *supra* note 9, at 87. It is controversial whether this view of property rights is ensconced in customary international law and whether bilateral treaties can give it this status. At least one authority takes issue with the argument that bilateral treaties can make the Hull Rule into the international legal standard, questioning the general authority of the Rule itself. *See Dolzer, New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L. L. 553, 564-66 (1981).

Interpretations of the international law of compensation are deeply divided and may be classified in three groups. One view requires the expropriating State to compensate foreign owners promptly, adequately, and effectively. Another holds that, while the expropriating State should compensate foreign owners, the State's ability to pay must also be considered.

The heart of the five BIT requirements governing expropriation is its mandate of prompt, adequate, and effective compensation,¹⁵⁸ as an investor is less likely to object to a fully compensated expropriation, even if it violates the other four requirements. This standard is intended to remove all doubt concerning the host State's obligation to pay protected investors and is elaborated at length. The requisite compensation must equal the fair market value of the investment as of the expropriation date, without reduction for prior announcements or events. It must also include interest payments at international market rates, accruing from the date of expropriation, and must be freely transferable at the exchange rate prevailing on that date.¹⁵⁹

The provisions requiring that expropriations not violate investment agreements between the protected investor and the host State may also be useful to investors. In particular, they may hold serious implications for the measurement of damages and the scope of diplomatic protection available to the investor under U.S. law. For example, the remedy for unlawful repudiation of a contract by the host State "is generally monetary compensa-

The third view requires only that the State not discriminate against foreigners; if it denies compensation for property taken from its own nationals, it is not obligated to compensate foreign owners. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 429-30 (1976) (citing Li Hao-p'ei, *Nationalization and International Law*, in COHEN & CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 720-27 (1973)). See also, *RESTATEMENT (REVISED)*, *supra* note 65, § 712 reporter's note 1 (Tent. Draft No. 3, 1982).

158. The "public purpose" requirement is likely to be of little use to investors.

[This] limitation has not figured prominently in international claims practice, perhaps because the concept of a public purpose is broad and not subject to effective re-examination by other states The similar requirement . . . in the constitutions of the United States and of other States, is also interpreted very broadly and is rarely a basis for successful challenge.

RESTATEMENT (REVISED), *supra* note 65, § 712 comment c (Tent. Draft No. 3, 1982). The requirements that expropriations accord with due process and be nondiscriminatory merely reiterate requirements stated or implied elsewhere in the treaties. See, e.g., Model BIT, *supra* note 1, art. II. Note, however, that such violations may be considered in determining the "adequate" amount of compensation. See *RESTATEMENT (REVISED)*, *supra* note 65, § 713 comment k (Tent. Draft No. 3, 1981) ("A taking that is unlawful only because it was discriminatory or not for a public purpose but was accompanied by just compensation might bring only nominal damages, and might not be challenged on that ground alone").

159. Model BIT, *supra* note 1, art. III, para. 1. The Egypt BIT *supra* note 2, art. III, para. 1 is substantially identical and therefore is internally inconsistent regarding exchange rates. See *supra* note 140. The Egypt BIT clarifies the word "prompt": payment need not be instantaneous. "The intent is that the Party diligently and expeditiously carry out any necessary formalities." Egypt BIT, *supra* note 2, Protocol para. 5.

Here, as elsewhere, the Panama BIT is considerably less detailed. Some differences are substantive. The compensation to be paid is to equal the value of the investment "immediately before the expropriatory action became known," apparently without regard to events resulting in the expropriation; interest is to be paid at "a commercially reasonable rate." Panama BIT, *supra* note 3, art. IV, para. 1. As article IV is silent on exchange rates, the rate is presumably governed by the transfer provisions discussed previously. See *supra* note 140. Thus, events preceding the actual expropriation may not be considered in offsetting a decline in the value of the assets, and there is a possibility that market interest rates need not be paid so long as the rate paid is "commercially reasonable".

tion.”¹⁶⁰ Thus, presumably, if an investment agreement guarantees ten years security against expropriation, but the protected investment is nationalized after two years, the owner could claim, in addition to the fair market value of the investment, an expectation interest as well, such as the present value of eight years profits.¹⁶¹ Hickenlooper Amendment sanctions may also apply where the host State has compensated the investor only for the value of the investment but not for the breach of contract.¹⁶² In addition, protected investors are guaranteed the right to prompt review by appropriate judicial or administrative authorities of the host State to determine whether an expropriation has occurred and whether any compensation paid conforms with the treaty requirements.¹⁶³

These same rules apply to equity interests in expropriated local companies not otherwise covered by the treaty, whether held directly or indirectly by protected investors.¹⁶⁴ Although the provisions leave many questions unanswered, such as the valuation method to be used in determining fair market value,¹⁶⁵ most ambiguities could reasonably be resolved by arbitrators under the present treaty language.¹⁶⁶

Compensation for Other Losses. The BITs also include compensation rules for losses caused by war between the host State and any third country or by revolution, insurrection, riot, or terrorism.¹⁶⁷ These provisions of article IV are wholly new to U.S. commercial treaty practice, but mirror both foreign treaty practice¹⁶⁸ and recent changes in U.S. law.¹⁶⁹

160. RESTATEMENT (REVISED), *supra* note 65, § 713 comment k, (Tent. Draft No. 3, 1982). *See id.* § 712 comment h (concerning contract breaches for which a Party may be held liable). Note that for OPIC purposes, “expropriation” includes . . . any abrogation, repudiation or impairment by a foreign government of its own contract with an investor” where the investor is not at fault and the act “adversely affects” the investment. 22 U.S.C.A. § 2198(b) (West 1979).

161. Arguably, this issue merely falls under the rubric of the “adequacy” of the compensation paid. *See supra* text accompanying note 158.

162. 22 U.S.C.A. § 2370(e)(1)(B) (West 1979). The text of the amendment is ambiguous in this regard. While such an outcome may be unlikely, the President nonetheless could take action under the amendment in such circumstances. For a brief discussion of the amendment, *see supra* note 152.

163. Model BIT, *supra* note 1, art. III, para. 3. This provision is subject to the provisions of any other applicable dispute resolution agreement, *id.*, and is absent from the Panama BIT.

164. *Id.*, art. III, para. 2.

165. The Panama BIT allows that full value can be estimated using different methods depending on circumstances but does not comment on how to determine which method is appropriate. Panama BIT, *supra* note 3, Agreed Minutes, para. 4.

166. All investment disputes are arbitrable at the investor’s request. *See infra* Section II.E.

167. Model BIT, *supra* note 1, art. IV. The Egypt BIT covers damage “due to any kind of civil disturbance or insurrection.” Egypt BIT, *supra* note 2, art. IV. The Panama BIT also differs somewhat from the Model BIT. *Compare* Model BIT, *supra* note 1, art. IV with Panama BIT, *supra* note 3, art. V. Although the language of the two provisions may differ, they appear to have the same effect.

168. For example, the British BITs contain similar provisions. *See, e.g.*, Egypt-U.K. BIT, *supra* note 86, art. IV, para. 1.

Unlike the absolute terms of article III *obligating* the host State to compensate protected investors for expropriated property regardless of the circumstances, compensation for the damages enumerated in article IV is only granted on a national/MFN basis. Thus, while the host State is not obligated to compensate anyone, it must treat protected investors no less favorably than it does local investors and those from third countries when arranging restitution, indemnification, compensation, or other appropriate settlement.

Article IV poses a potential problem. Because its compensation rules are comparative, not mandatory as are those prescribed for expropriation in article III, a host State might attempt to categorize an expropriation in the course of revolution, war, or under similar circumstances as an investment loss under article IV. If such an argument were to succeed, the host State could conceivably take property and legally avoid compensating anyone, as long as all investors were treated similarly. Although article III lists examples of "expropriation",¹⁷⁰ the BIT does not define the term. Neither the examples nor any other language in article III mentions "revolution" or similar upheavals. A revolutionary government could therefore contend that the treaty drafters intended that takings resulting from revolutions be covered by article IV as "damages due to revolution". This argument could easily be foreclosed by clearly defining the term "expropriation" or by explicitly stating that article III takes primacy over article IV in ambiguous cases.

E. Dispute Resolution

Perhaps the most significant difference between the BITs and prior U.S. commercial treaties is the addition of provisions for the arbitration of investment disputes. The treaties are genuinely new in this regard. While the assumption of continuing amicable relations between the protected investor and the host State is implicit in the BITs, the treaties guarantee investors access to a neutral arbitral forum in which to present any claims. To this end, the signatories consent to international arbitral jurisdiction in the BITs, and the treaties establish mechanisms to ensure that arbitration may proceed even if the host State refuses to cooperate. These treaty terms are wholly unlike any in the FCNs¹⁷¹ but are similar to provisions in Euro-

169. As recently amended, OPIC legislation provides for insurance of losses caused by domestic unrest short of insurrection and revolution as well as expropriation, war, and all forms of civil strife. 22 U.S.C.A. § 2194(a)(1)(c) (West 1982) (as amended).

170. These examples include "the levying of taxation, compulsory sale of all or part of an investment or the impairment or deviation of its management, control or economic value." Model BIT, *supra* note 1, art. III, para. 1.

171. The FCNs made no provision for arbitration of disputes between the investor and the host State. They did provide, however, that neither Party would invalidate or deem unenforceable arbitration agreements in contracts between companies of one Party and companies of the other Party or awards based thereon solely because the proceeding transpired outside the territory of the host State or because foreign arbitrators participated. *See, e.g.,* Japan

pean BITs.¹⁷² The treaties also establish similar rules for the resolution of disputes between the signatory States. These provisions are more familiar than those governing investment disputes, as they are comparable to the FCN rules.¹⁷³

Treaty-related disputes between the Parties which are not solved by diplomacy or other means may be submitted by either Party for neutral international arbitration. The Parties consent to arbitral jurisdiction in the BITs, and the treaties provide for the composition of the tribunal whether or not both Parties cooperate.¹⁷⁴ These arrangements differ only partially from the FCNs, in which the Parties generally consented to the jurisdiction of the International Court of Justice.¹⁷⁵ However, the BIT provisions for resolving investment disputes between a Party and a protected investor have no precedent in the FCNs.

Arbitration of Investment Disputes. Under the U.S. BITs, an "investment dispute" is any disagreement between a protected investor and the host State regarding the interpretation or application of an investment agreement or an investment authorization, or concerning the alleged breach of any right conferred in the treaty.¹⁷⁶ If an investment dispute is not settled within six months of the date on which it arose and has not, for any good faith reason, been submitted for resolution according either to previously agreed upon procedures or to the administrative or judicial tribunals of either treaty Party, the protected investor may submit the dispute for

FCN, *supra* note 57, art. IV, para. 2; Iran FCN, *supra* note 57, art. III, para. 3. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter cited as New York Convention], superceded the FCN arbitration provisions for those States also party to the New York Convention. See H. STEINER & D. VAGTS, *supra* note 157, at 833.

172. See, e.g., U.K.-Singapore BIT, *supra* note 88, art. 8; U.K.-Egypt BIT, *supra* note 86, art. 8; Sri Lanka-Switzerland BIT, *supra* note 86, art. 9.

173. The BIT handling of treaty related inter-Party disputes is comparable to the FCN treatment. The FCNs provided for submission of disputes between the signatories to the International Court of Justice (ICJ), with each signatory consenting to ICJ jurisdiction. See, e.g., Japan FCN, *supra* note 57, art. XXIV; Ethiopia FCN, *supra* note 57, art. XXIV. This compromissory clause was new in the postwar FCNs. R. WILSON, *supra* note 28, at 23-24. The European BITs are also quite similar to the U.S. BITs in this area. See, e.g., U.K.-Singapore BIT, *supra* note 88, art. 9; U.K.-Egypt BIT, *supra* note 86, art. 9; Sri Lanka-Switzerland BIT, *supra* note 86, art. 10.

174. Model BIT, *supra* note 1, art. VIII. The arbitrators are instructed to follow the United Nations International Law Commission Model Rules on Arbitral Procedure. 13 U.N. GAOR Supp. (No. 9) at 5-8, U.N. Doc. A/3859 (1958). The Model Rules were commended to the Member States by the General Assembly. G.A. Res. 1262, 13 U.N. GAOR Supp. (No. 18) at 53, U.N. Doc. A/4090 (1958). Note that, by its terms, Model BIT article VIII is inapplicable to disputes arising under either U.S. Export-Import Bank programs or under other official credit, guarantee, or insurance arrangements for which the Parties have agreed to other dispute settlement measures. Model BIT, *supra* note 1, art. VIII, para. 10.

175. See *supra* note 173.

176. Model BIT, *supra* note 1, art. VII, para. 1. The Egypt BIT, *supra* note 2, art. VII, para. 1, omits the reference to investment authorizations. This difference does not appear to be of any practical significance.

conciliation or binding arbitration.¹⁷⁷

The BITs provide for two arbitral fora to govern disputes. If both signatories have ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,¹⁷⁸ as is true of the U.S. and Egypt, the investor may submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID) for resolution according to the terms of the Convention and the ICSID Rules.¹⁷⁹ If, as is the case with Panama, the host State has not ratified the Convention, the investor may submit the dispute to ICSID for binding arbitration or conciliation in accordance with the Rules of the Additional Facility.¹⁸⁰

The treaty Parties consent in the BIT to submit to the jurisdiction of the relevant arbitral entity.¹⁸¹ A company organized under host State law but owned by nationals of the other treaty Party is considered a national of the latter Party.¹⁸² These terms are deemed to control all dispute situations, including those resulting from expropriation.¹⁸³ In effect, the protected investor thus has complete control over the dispute resolution process, within the range of possible alternatives.

Two differences between the arbitration regimes available under the BITs negotiated with Panama and Egypt are noteworthy. First, unlike the Convention,¹⁸⁴ the Additional Facility Rules do not obligate the host State disputant to recognize and enforce awards against itself in its own territory.

177. Model BIT, *supra* note 1, art. VII, para. 3. If the disputants disagree as to whether to employ conciliation or arbitration, the investor's choice prevails. *Id.* This provision is not stated explicitly in either signed treaty but is implicit in both. See Egypt BIT, *supra* note 2, art. VII, para. 3(a); Panama BIT, *supra* note 3, art. VII, para. 3(a) ("In the event that the legal investment dispute is not resolved . . . , the national or company concerned may choose to submit the dispute to [ICSID] for settlement by conciliation or binding arbitration").

178. ICSID Convention, *supra* note 133. The Convention applies to those Contracting States which have ratified it and who consent to its jurisdiction over a dispute arising out of an investment. Once given, the consent for jurisdiction over a particular dispute is unilaterally irrevocable. *Id.* at ch. II, art. 25, para. 1.

179. Egypt BIT, *supra* note 2, art. VII, para. 3.

180. Panama BIT, *supra* note 3, art. VII, para. 3. Concerning the Rules of the Additional Facility, see INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, ADDITIONAL FACILITY, DOC. ICSID/11 (Washington, D.C. 1978) [hereinafter cited as ADDITIONAL FACILITY DOCUMENT].

181. Egypt BIT, *supra* note 2, art. VII, para. 3(b); Panama BIT, *supra* note 3, art. VII, para. 3(b). Regarding Egypt, ratifying the Convention does not confer jurisdiction. This requires separate written consent, ICSID Convention, *infra* note 178, ch. II, art. 25, para. 1, such as that given in the BIT. In a letter to the governments of Panama and the United States, the Secretary-General of ICSID confirmed that ICSID considers the BIT to be a valid consent to the use of the Additional Facility Rules administered by the ICSID. ICSID Newsletter No. 83-1, at 5, 7 (January 1983).

182. Model BIT, *supra* note 1, art. VII, para. 5. This is in accord with the Convention and the Additional Facility Rules.

183. *Id.* art. VII, para. 2.

184. ICSID Convention, *supra* note 133, art. 54, para. 1. The ICSID Convention effectively solves the problem of enforcing international arbitration awards. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 814, 815 (1980). Note that the United States and Egypt have both ratified the New York Convention, but that Panama has not. ICSID Newsletter, *supra* note 181, at 3, 5.

To fill this gap, the Panama BIT requires that each Party provide for the enforcement within its territory of Additional Facility arbitral awards, but does not elaborate this obligation.¹⁸⁵

The other significant difference concerns the exclusivity of the investor's remedy. ICSID arbitration is an exclusive remedy.¹⁸⁶ Once the dispute is submitted under the Convention, the investor's state of nationality may provide no diplomatic protection unless the disputant State fails to comply with the award.¹⁸⁷ Moreover, provisional measures to preserve a disputant's rights, such as prejudgment attachment of assets, are not permitted without approval of the tribunal.¹⁸⁸ In contrast, under the Arbitration Rules of the Additional Facility, diplomatic protection is not proscribed and provisional measures do not require tribunal approval.¹⁸⁹

The new dispute resolution provisions are important in several respects. As arbitration under the ICSID Convention may well "afford the best legal protection" presently available,¹⁹⁰ the new treaty terms should increase the security of investments in LDCs. Similar arrangements have proven effective in recent years.¹⁹¹ While the Panama treaty relies instead on Additional Facility procedures, this too is significant. Latin American nations have long resisted pressures to grant special arbitral status to foreign investors.¹⁹² As of the date the Panama BIT was signed, no Latin American country had ratified the Convention.¹⁹³ Panama's consent to Additional Facility jurisdiction is, therefore, an important development for U.S. investors.

185. Panama BIT, *supra* note 3, art. VII, para. 3(d). Note that investors could probably enforce arbitral awards against Panamanian governmental assets in the United States under the creditor protection provision of the Panama BIT. *Id.*, art. VI and Agreed Minutes (5). See *supra* note 140 for text of Model provision.

186. ICSID Convention, *supra* note 178, ch. II, art. 26. The consenting State may specify otherwise. *Id.* However, no BIT signatory has yet done so.

187. *Id.* at ch. II, art. 27, para. 1. Similar language appears in some European BITs. See *supra* note 172.

188. ICSID Convention, *supra* note 178, ch. IV, art. 47; ICSID Regulations and Rules, Arbitration Rules, Rule 39, ICSID/4/Rev. 1 (1975). Unless the disputants have agreed otherwise, the Tribunal may approve such actions and may revoke its recommendation of such measures at any time. *Id.* Apparently the ICSID Exclusivity Rule "bars the [disputants] from seeking interim measures in domestic courts," absent a specific agreement to the contrary. Delaume, *supra* note 184, at 794. See *id.* at 795 concerning agreements to the contrary.

189. Arbitration (Additional Facility) Rules, art. 47(4), reprinted in ADDITIONAL FACILITY DOCUMENT, *supra* note 180.

190. Mann, *supra* note 28, at 248.

191. See, e.g., *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic* (1977), 17 I.L.M. 3 (1978); Schmidt, *Arbitration Under the Auspices of the International Centre for the Settlement of Investment Disputes*, 17 HARV. INT'L L.J. 90, 92 (1976).

192. H. STEINER & D. VAGTS, *supra* note 157, at 484-85, 476-78.

193. In January 1983, Paraguay became the first Latin American country to ratify the Convention. ICSID Newsletter, *supra* note 181, at 1.

III CONCLUSION

The worth and success of the BITs, of course, will not be known until some of the treaties have been ratified and in effect for at least several years. Nonetheless, the likelihood of success and some of the probable effects of the program may be predicted based upon past commercial treaty experience and the BIT negotiations to date. The most reasonable criteria for evaluating the treaties stem from the treaty program goals. Briefly, those goals are to foster growth and development in the LDCs and to promote and strengthen U.S. foreign trade and investment.¹⁹⁴ While the success of past commercial treaties in promoting the development of international law is well documented,¹⁹⁵ their success in such economic matters is less clear. The key economic issue is whether the BITs will in fact increase U.S. investment in signatory LDCs. In all likelihood they will not, because the existence of a signed BIT offers little to either the signatory LDC or the potential U.S. investor. Although the BITs are explicitly reciprocal,¹⁹⁶ most of the establishment rights granted by treaty to potential investors *from* the LDC are already provided by U.S. law.¹⁹⁷ Reciprocity is, practically speaking, largely "a matter of prestige rather than reality."¹⁹⁸ In exchange, the LDC signatory is asked to substantially open its economy to U.S. investors. In particular, it is asked to eliminate currency controls and performance requirements which the host State may consider important instruments of national economic policy. This largely one-sided nature of the BITs may account for early negotiating failures.¹⁹⁹

The BIT program may be of little use to U.S. investors. Investment treaties "more often record the existence of a favorable climate than create it."²⁰⁰ Investors may be hesitant to commit resources in an LDC which has signed a BIT, absent significant other indications that the investments will be safe and productive. Arguably, an LDC may be wiser to attract investment by establishing "pragmatic pro-business policies" than by signing a BIT.²⁰¹ Without such policies, no LDC can expect foreign investment.

194. See *supra* text accompanying notes 22-28.

195. See *supra* note 28.

196. See, e.g., title to Model BIT, *supra* note 1.

197. See *supra* note 121.

198. See Mann, *supra* note 28, at 241. Of course, if the U.S. were to increase barriers to investment, the reciprocity of the BITs might gain meaning.

199. See Bale Statement, *supra* note 22, at 189 (the U.S. failed in its early efforts to negotiate BITs with Singapore and Brazil).

200. R. WILSON, *supra* note 28, at 21 (quoting *Report to the President and the Congress, Commission on Foreign Economic Policy* (1954)).

201. If the host country follows reasonably pragmatic pro-business policies (such as [those implemented by] Singapore, Brazil or Kenya) it can generally attract a good deal of foreign investment without binding itself by a treaty. If the country does not follow pro-business policies, there is not much reason for it to negotiate a treaty giving special benefits to foreign firms.

Hufbauer Statement, *supra* note 109, at 151.

With such policies, foreign investment may well be attracted without the far reaching provisions of a BIT.

It remains to be seen whether the BIT program as exemplified by the Model Treaty will gain wide acceptance. Certain provisions, especially those regarding performance requirements, have been considerably altered in the first two negotiated treaties. Provisions for the protection of investment and the transfer of capital have fared better. Whether nations which do choose to sign a BIT will experience increased investment is also yet unknown. Absent additional pro-business policies, such increase is unlikely.

The treaties nonetheless serve a purpose. They provide a legal framework to govern investments ultimately placed in signatory countries. In this sense, the likely effect of the program will be to protect investment, rather than to increase it, despite BIT terms designed to aggressively open LDC economies to U.S. investment.²⁰² In effect, then, as in most other respects, the BITs are not new.²⁰³ Although they contain many new terms, they are fundamentally similar to earlier U.S. commercial treaties.

202. See *supra* text accompanying note 107.

203. See Wetter, *supra* note 44.