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The Bilateral Investment Treaty Program of the United States

The Senate is currently considering ten bilateral investment treaties ("BITs") which the United States recently signed with Egypt,[1] Panama,[2] Cameroon,[3] Morocco,[4] Zaire,[5] Bangladesh,[6] Haiti,[7] Senegal,[8] Turkey,[9] and Grenada.[10] The purpose of these agreements is to protect the

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1. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, S. Treaty Doc. No. 24, 99th Cong., 2d Sess. (1986) [hereinafter Egypt BIT].

2. Treaty Concerning the Treatment and Protection of Investments, Oct. 27, 1982, United States-Panama, S. Treaty Doc. No. 14, 99th Cong., 2d Sess. (1986) [hereinafter Panama BIT].

3. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 26, 1985, United States-Cameroon, S. Treaty Doc. No. 22, 99th Cong. 2d Sess. (1986) [hereinafter Cameroon BIT].

4. Treaty Concerning the Encouragement and Reciprocal Protection of Investments, July 22, 1985, United States-Morocco, S. Treaty Doc. No. 18, 99th Cong. 2d Sess. (1986) [hereinafter Morocco BIT].

5. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Aug. 3, 1984, United States-Zaire, S. Treaty Doc. No. 17, 99th Cong. 2d Sess. (1986) [hereinafter Zaire BIT].

6. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Mar. 12, 1986, United States-Bangladesh, S. Treaty Doc. No. 23, 99th Cong. 2d Sess. (1986) [hereinafter Bangladesh BIT].

7. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 11, 1983, United States-Haiti, S. Treaty Doc. No. 16, 99th Cong. 2d Sess. (1986) [hereinafter Haiti BIT].

8. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 6, 1983, United States-Senegal, S. Treaty Doc. No. 15, 99th Cong. 2d Sess. (1986) [hereinafter Senegal BIT].

9. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, United States-Turkey, S. Treaty Doc. No. 19, 99th Cong. 2d Sess. (1986) [hereinafter Turkey BIT].

10. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, May 2, 1986, United States-Grenada, S. Treaty Doc. No. 25, 99th Cong. 2d Sess. (1986) [hereinafter Grenada BIT].

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investments of each party's nationals and companies in the territory of the other. The BITs establish minimum standards of treatment for investments and mechanisms for enforcement of rights arising under the treaties or investor-to-state agreements. This Article traces the development of the BIT, describes the BIT's principal provisions, and analyzes how negotiations of the ten signed BITs modified those provisions.

The Article is intended to serve two purposes. The first is to assist in the task of interpreting the text of a particular BIT. It analyzes the ten signed BITs based on the author's personal experience with BIT negotiations and a review of the BIT negotiating history contained in State Department files.[11] This Article is, however, the author's own analysis and is in no sense an official statement of the United States Government's interpretation of the BITs.

The Article's second purpose is to address the general problem of treaty interpretation, particularly in the case of multiple agreements which, like the BIT's, were negotiated from a single model text.[12] Although the Article does not provide a theoretical framework for interpreting all such agreements, it does provide one source of data from which to develop such a framework.[13]

Four provisions form the core of the BIT. The first of these is the "treatment provision."[14] This provision imposes both relative and absolute standards on the host state's treatment of foreign investment. The absolute standards require the host state to provide covered investment with fair and equitable treatment, full protection and security, and treatment which in no case is less than that required by international law. The absolute standards also prohibit arbitrary and discriminatory treatment. The relative standards generally require the host state to treat covered investment no less favorably than investment of its own nationals ("national treatment") or of nationals of any third country ("most-favored-nation treatment" or "MFN treatment").

The second core provision is the "expropriation provision."[15] This provision prohibits expropriation of covered investment unless the expropriation meets the following criteria. It must be for a public purpose, nondiscriminatory, in accordance with due process of law, consistent with any agreements between the expropriating state and the expropriated investor, and accompanied by prompt, adequate, and effective compensation.

11. Unfortunately, the negotiating history is silent on a number of the more curious changes found in the BITs. *See, e.g., infra* text accompanying notes 173-76. In addition, much of it remains classified and cannot be cited or directly referred to in public documents.

12. *See infra* notes 76-79 and accompanying text.

13. For some comments on this subject generally, see Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281 (1988).

14. *See infra* notes 107-99 and accompanying text. The author uses the term "treatment provision" to refer collectively to certain specific clauses of the BIT. Other clauses relating to the treatment of investment are not considered for reasons of space.

15. *See infra* notes 200-88 and accompanying text. The author uses the term "expropriation provision" to refer collectively to certain specific clauses of the BIT. Other clauses related to the expropriation of investment are not considered for reasons of space.

The third core provision is the "transfers provision."[16] This provision guarantees the investor the right to transfer freely in and out of the host country payments related to an investment.

The final core provision is the "disputes provision."[17] This provision gives investors the right to binding arbitration of disputes between the investor and the host State regarding the investment. Although the other three core provisions all have some antecedents in earlier U.S. bilateral treaty practice, the BITs represent the first United States bilateral treaty series to provide for arbitration of investment disputes between investors and host states.[18]

I. The Development of the BIT

A. Early FCN Treaties

The United States first obtained treaty protection for United States investment abroad through brief provisions inserted in a long series of Friendship, Commerce, and Navigation treaties ("FCNs").[19] Until recently, however, purposes of investment protections were merely incidental to the FCNs, which focused upon trade and navigation.[20]

FCN agreements date from the founding of the Republic. Benjamin Franklin, Arthur Lee, and Silas Deane negotiated the first FCN, with France, shortly after the signing of the Declaration of Independence.[21] The treaty, signed in 1778, established trade between the two countries on a most-favored-nation basis and adopted certain principles of maritime trade related to war. The United States concluded similar agreements with the Netherlands in 1782,[22] and with Sweden in 1783.[23]

In 1784, following the end of the War of Independence, Congress established a commission consisting of Benjamin Franklin, John Adams, and Thomas Jefferson to negotiate additional FCNs and renegotiate the

16. *See infra* notes 289-380 and accompanying text.

17. *See infra* notes 381-490 and accompanying text.

18. *See infra* notes 381-389 and accompanying text.

19. The term "FCN" is a generic one. Not all the treaties in this series bear that title. The earliest agreements, for example, typically were called treaties of "amity and commerce." *See* 20 I.L.M. 565 (1981) (State Department compilation of FCNs still in force as of December 1980).

20. *See* S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 25-29, 65-84, 101-10 and 200-02 (1965) (describing the early history of FCN agreements). *See also* J. MOORE, A DIGEST OF INTERNATIONAL LAW, § 734 (1906).

21. Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, 8 Stat. 12, T.S. No. 83.

22. Treaty of Amity and Commerce, Oct. 8, 1782, United States-Netherlands, 8 Stat. 32, T.S. No. 249.

23. Treaty of Amity and Commerce, Apr. 3, 1783, United States-Sweden, 8 Stat. 60, T.S. No. 346.

three existing treaties.[24] The United States signed agreements with Prussia in 1785,[25] and Morocco in 1787.[26] In 1794 the United States signed an FCN with England,[27] and a comparable agreement with Spain in 1795.[28]

From the beginning of the nineteenth century until the mid-1960s the United States negotiated several additional waves of FCNs.[29] Typically, these agreements provided for MFN treatment with respect to trade, mutual guarantees against discrimination, exchange of consuls, and duties of parties with respect to neutral trade in time of war.

Investment protection provisions did not play a prominent part in these early FCNs. Of the four principal provisions of the BIT, only the treatment provision is found in early nineteenth century FCNs. The early FCNs imposed an absolute standard of treatment for the property of the other party's nationals[30] by guaranteeing "special protection"[31] or "full and perfect protection."[32]

24. S. BEMIS, *supra* note 20, at 66.

25. Treaty of Amity and Commerce, May 17, 1785, United States-Prussia, 8 Stat. 84, T.S. No. 292.

26. Treaty of Peace and Friendship, Jan. 1787, United States-Morocco, 8 Stat. 100, T.S. No. 244-1.

27. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-England, 8 Stat. 116, T.S. No. 105. This was the infamous "Jay Treaty."

28. Treaty of Friendship, Limits, and Navigation, Oct. 22, 1795, United States-Spain, 8 Stat. 138, T.S. No. 325.

29. The earliest trade agreements were with the European powers, then the United States' primary trade partners. As trade expanded in other directions, the United States tried to negotiate FCN agreements establishing a bilateral treaty basis for advantageous commercial relations. S. BEMIS, *supra* note 20, at 65-66.

Thus, in the early nineteenth century the United States negotiated a long series of FCN agreements with the newly formed Latin American republics following their break from Spain. Agreements were negotiated with the Central American Confederation in 1824, Colombia in 1825, Brazil in 1828, Mexico in 1831, Chile in 1832, Venezuela in 1836, Ecuador in 1849, New Granada in 1846, Peru-Bolivia in 1851, Argentina in 1853 and Bolivia in 1858. *Id.* at 201.

Similarly, the opening of trade with the Far East was accompanied by an FCN agreement with China in 1844 and with Japan in 1854. *Id.* at 345, 356. Among the earliest forays of United States diplomacy into the affairs of sub-saharan Africa was an FCN agreement in 1884 with the International Association of the Congo, an organization established by Belgium for the purpose of securing an empire on the continent. *Id.* at 575.

30. These early FCNs also included a right of access to courts, a provision which appears in the BITs as well. *See infra* note 89. The development of that right, in the FCNs or in the BITs, is beyond the scope of this Article.

31. *See, e.g.*, General Treaty of Amity, Commerce and Consular Privileges, Dec. 6, 1870, United States-El Salvador, art. XIII, 18 Stat. 725, 730, T.S. No. 310, at 1554 [hereinafter 1870 El Salvador FCN]; Treaty of Peace, Friendship, Commerce and Navigation, May 13, 1858, United States-Bolivia, art. XIII, 12 Stat. 1003, 1010, T.S. No. 32, at 8 [hereinafter 1858 Bolivia FCN]; General Convention of Peace, Amity, Navigation and Commerce, Oct. 3, 1824, United States-Colombia, art. X, 8 Stat. 306, 310, T.S. No. 52, at 295 [hereinafter 1824 Colombia FCN].

32. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, United States-Paraguay, art. IX, 12 Stat. 1091, 1094, T.S. No. 272, at 8 [hereinafter 1859 Paraguay FCN]; Treaty of Friendship, Commerce and Navigation, July 27, 1853, United States-Argentina, art. VII, 10 Stat. 1005, 1008, T.S. No. 4, at 22 [hereinafter 1853 Argentina FCN]; Treaty of Friendship, Commerce and Navigation, July 10, 1851, United States-Costa Rica, art. VII, 10 Stat. 916, 920, T.S. No. 62, at 343 [hereinafter 1851 Costa Rica FCN].

By the mid-nineteenth century, antecedents of the BIT's expropriation provision prohibited the seizures of "vessels, cargoes, merchandise and effects" of the other party's nationals without payment of "equitable and sufficient compensation."[33] Later treaties broadened this guarantee to "property" generally.[34] The FCNs also forbade the confiscation of debts or other property during hostilities.[35]

Toward the end of the century, FCNs began to address currency transfer restrictions. An 1881 FCN with Serbia guaranteed the right to "export proceeds of the sale of property" without paying higher duties than nationals of the host state or any third state.[36] Protection against currency restrictions thus was relative rather than absolute. FCNs of that period also began to include relative standards of treatment for investment.[37] FCNs concluded in the late nineteenth century guaranteed either national treatment, MFN treatment, or both for commercial activities in each party's territory.[38]

During the 1920s and 1930s, the United States negotiated a series of FCNs containing a uniform protection of investment provision.[39] The absolute treatment standard language guaranteed "the most constant protection and security" and the protection "required by international law."[40] The relative treatment standard language guaranteed MFN treatment, national treatment, or both for commercial activity.[41] The expropriation provision provided that "property [of the other party's nationals] shall not be taken without due process of law and with-

33. *See, e.g.*, 1870 El Salvador FCN, *supra* note 31, art. VIII; General Treaty of Peace, Amity, Navigation and Commerce, Dec. 12, 1846, United States-New Granada, art. VIII, 9 Stat. 881, T.S. No. 54, at 304 [hereinafter 1846 New Granada FCN].

34. *See* Treaty of Amity, Commerce and Navigation, Jan. 24, 1891, United States-Congo, art. III, 27 Stat. 926, T.S. No. 60, at 4 [hereinafter 1891 Congo FCN].

35. 1870 El Salvador FCN, *supra* note 31, at art. XXVII; 1846 New Granada FCN, *supra* note 33, at art. XXVIII.

36. Treaty of Commerce, Oct. 14, 1881, United States-Serbia, art. II, 22 Stat. 963, 964, T.S. No. 319, at 1614 [hereinafter 1881 Serbia FCN].

37. *See id.*

38. 1891 Congo FCN, *supra* note 34, at art. 1; 1881 Serbia FCN, *supra* note 36, at art. 1.

39. *See, e.g*, Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, art. 1, 94 Stat. 1739, T.S. No. 956 [hereinafter 1938 Liberia FCN]; Treaty of Friendship, Commerce and Consular Rights, Feb. 13, 1934, United States-Finland, art. 1, 49 Stat. 2659, T.S. No. 868, at 1; Treaty of Friendship, Commerce and Consular Rights, June 19, 1928, United States-Austria, art. 1, 47 Stat. 1876, T.S. No. 838, at 2; Treaty of Friendship, Commerce and Consular Rights, June 5, 1928, United States-Norway, art. 1, 47 Stat. 2135, T.S. No. 852, at 1; Treaty of Friendship, Commerce and Consular Rights, Apr. 20, 1928, United States-Latvia, art. 1, 45 Stat. 2641, 2641, T.S. No. 765, at 1; Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, United States-Honduras, art. 1, 45 Stat. 2618, 2618, T.S. No. 764, at 1; Treaty of Friendship, Commerce and Consular Rights, Dec. 23, 1925, United States-Estonia, art. 1, 44 Stat. 2379, 2379, T.S. No. 736, at 1.

40. *Id.*

41. *Id.*

out payment of just compensation."[42] Although currency transfer provisions were not common, at least one of the FCNs in this series provided MFN or national treatment for certain transfers.[43]

The Trade Agreements Act of 1934,[44] authorizing negotiation of a series of reciprocal trade agreements, diminished the FCN's importance as the United States's primary instrument of international trade policy. The United States's signing of the General Agreement on Tariffs and Trade ("GATT"),[45] which obliged all contracting parties to afford MFN treatment with respect to trade, further eroded the FCN's importance.[46] The GATT's multilateral provisions largely obviated the need for the FCN's bilateral trade obligations.

B. The Modern FCN Treaty Series

Following World War II, the United States negotiated a new series of FCNs ("the modern FCNs").[47] This was the first series of United States treaties in which the protection of United States investment abroad was a primary goal.[48] The United States negotiated these treaties using a model text derived from the FCNs concluded during the 1920s and 1930s. The earlier FCNs served as the model because they provided an existing framework into which new provisions for investment protection could be inserted and they were demonstrably acceptable to potential treaty partners.[49] Moreover, the FCNs covered a diverse range of subjects with respect to which concessions could be made in return for investment protection.[50] Indeed, contemporary commentators believed that a treaty limited to investment-specific provisions would be "unrealistic and inadequate."[51] They also believed that the FCN trade provisions helped establish a generally favorable investment climate,

42. *Id.*

43. *See* 1938 Liberia FCN, *supra* note 39, at art. 10.

44. Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (codified as amended at 19 U.S.C. §§ 1351-54 (1982)).

45. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 3689, T.I.A.S. No. 1700, 55 U.N.T.S. 188.

46. *Id.* at art. I.

47. *See generally* H. HAWKINS, COMMERCIAL TREATIES AND AGREEMENTS: PRINCIPLES AND PRACTICE (1951) (discussing the modern FCNs); R. WILSON, THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES (1953); R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956) [hereinafter Walker, *Protection of Foreign Investment*]; Wilson, *A Decade of New Commercial Treaties*, 50 AM. J. INT'L L. 927 (1956); Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951); Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262 (1949).

48. *See generally* Walker, *Protection of Foreign Investment*, *supra* note 47.

49. *Id.* at 230.

50. *Id.* at 243-44.

51. *E.g.*, *id.* at 244. Walker recognized a need for special-purpose agreements on topics too specialized for FCNs, specifically taxation and government guarantees of certain investments. *Id.*

furthering the protection of United States investment abroad.[52]

The modern FCNs contained antecedents to three of the four BIT core provisions.[53] First, both aspects of the treatment provision were largely anticipated. As a relative standard of treatment, they guaranteed that certain types of investment of a national of one party would be given national and MFN treatment by the other party with respect to certain types of transactions,[54] a protection that the BITs broadened.[55] The modern FCNs contained antecedents to all but one of the absolute standards present in the BIT treatment provision.[56]

Second, the modern FCNs contained an expropriation provision that guaranteed prompt, adequate, and effective compensation. Although the BITs revised and expanded the wording of this provision, the protection afforded remains essentially the same.[57]

Finally, the modern FCN continued protection against exchange controls,[58] although not as extensive as that provided by the BITs.[59] Nevertheless, the modern FCNs marked the first time that the United States had negotiated a series of bilateral agreements that protected investors from exchange controls.

The United States successfully negotiated modern FCN agreements with major developed countries but had difficulty concluding them with third world states. The United States ultimately negotiated twenty-one such agreements,[60] beginning with Taiwan in 1946,[61] and concluding

52. *Id.* at 244.

53. Although the modern FCNs did not guarantee to investors the right to third-party arbitration of disputes with the host states, they did provide that state-to-state disputes over the agreement's interpretation or application be submitted to the International Court of Justice. This provision has a counterpart in the BITs. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. XVII, 14 U.S.T. 251, T.I.A.S. No. 5306, at 12 [hereinafter Luxembourg FCN]; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, art. XXIV, 8 U.S.T. 2217, T.I.A.S. No. 3947, at 17 [hereinafter Korea FCN]; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. XXIV, 5 U.S.T. 550, T.I.A.S. No. 2948, at 26 [hereinafter Israel FCN]; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. XXIII, 1 U.S.T. 785, T.I.A.S. No. 2155, at 18 [hereinafter Ireland FCN]; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. XXVI, 63 Stat. 2255, T.I.A.S. No. 1965, at 42 [hereinafter Italy FCN].

54. *See infra* notes 109-18 and accompanying text.

55. *See infra* notes 119-36 and accompanying text.

56. *See infra* notes 129-41 and accompanying text.

57. *See infra* notes 200-32 and accompanying text.

58. *See infra* notes 294-302 and accompanying text.

59. *See infra* notes 303-12 and accompanying text.

60. *See* Luxembourg FCN, Korea FCN, Israel FCN, Ireland FCN, and Italy FCN, *supra* note 53. *See also* Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540 [hereinafter Thailand FCN]; Treaty of Amity and Economic Relations, United States-Togo, Feb. 8, 1966, 18 U.S.T. 1, T.I.A.S. No. 6193 [hereinafter Togo FCN]; Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Viet-Nam, 12 U.S.T. 1703, T.I.A.S. No. 4890 [hereinafter Viet-Nam FCN]; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432 [hereinafter Belgium FCN]; Convention of Establishment, Nov. 25, 1959, United States-

with Togo and Thailand in 1966.[62]

C. Initiation of the BIT Program

Just as the United States's FCN program was winding down, several European countries were commencing negotiation of new bilateral investment protection agreements ("BIPAs")[63] with a large number of developing and developed countries.[64] Between 1962 and 1972, for example, West Germany entered into forty-six BIPAs, and Switzerland twenty-seven.[65] During that same period, the United States negotiated only the two FCNs with Togo and Thailand.[66] The European BIPAs differed from the modern FCNs in that they were concerned solely with investment protection.

The active BIPA programs contrasted sharply with the moribund American FCN program. Increasingly, the United States business community and Congress agitated for an investment protection treaty program comparable to that of the Europeans.[67]

France, 11 U.S.T. 2398, T.I.A.S. No. 4625 [hereinafter France FCN]; Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Muscat and Oman Dependencies, 11 U.S.T. 1835, T.I.A.S. No. 4530 [hereinafter Muscat and Oman FCN]; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 [hereinafter Netherlands FCN]; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024 [hereinafter Nicaragua FCN]; Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter Iran FCN]; Treaty of Friendship and Commerce, Nov. 12, 1954, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683 [hereinafter Pakistan FCN]; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter Germany FCN]; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter Japan FCN]; Treaty of Amity and Economic Relations, Sep. 7, 1951, United States-Ethiopia, 4 U.S.T. 2134, T.I.A.S. No. 2864 [hereinafter Ethiopia FCN]; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797 [hereinafter Denmark FCN]; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057 [hereinafter Greece FCN]; Treaty of Friendship, Commerce, and Navigation, Nov. 4, 1946, United States-Taiwan, 63 Stat. 1299, T.I.A.S. No. 1871 [hereinafter Taiwan FCN].

61. Taiwan FCN, *supra* note 60.

62. *See supra* note 60.

63. As used herein, "BIPA" refers to non-United States investment protection agreements, whereas "BIT" refers only to the United States bilateral investment treaty program.

64. From 1962 to 1977, West Germany entered into forty-six BIPAs, the Swiss twenty-seven, and the Netherlands sixteen. *See generally* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT PROMOTION AND PROTECTION TREATIES (1983).

65. *See id.*

66. *See supra* text accompanying note 62.

67. A GAO report noted that the United States had modern FCNs with only two African countries, while the Federal Republic of Germany, as of June 30, 1974, had signed BIPAs with twenty-six African countries. *See* GENERAL ACCOUNTING OFFICE, NATIONALIZATION AND EXPROPRIATION OF U.S. DIRECT PRIVATE FOREIGN INVESTMENT: PROBLEMS AND ISSUES (1977). Aware of the European success, groups like the International Chamber of Commerce and the State Department's Advisory Committee on Transnational Enterprises encouraged initiation of a bilateral investment treaty program during the 1970s. In Congress, Senators Claiborne Pell and Frank Church both wrote to the State Department in 1977 urging negotiation of additional investment protection agreements. The Foreign Assistance Act of 1961, though prior to the BIPAs, also provided a Congressional mandate to negotiate additional investment protection agreements. The Act provides in pertinent part that "the President shall . . . accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to, and its equitable treatment in, friendly countries and areas participating in programs under this chapter. . . ." Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151, 2351(b) (1982).

New developments in international law also encouraged the development of an investment treaty program. In 1974, the United Nations General Assembly adopted the Charter of Economic Rights and Duties of States.[68] Article 2.2(c) of the Charter provided that each state has the right "[t]o nationalize, expropriate or transfer ownership of foreign property in which appropriate compensation should be paid by the State adopting such measures, taking into account . . . all circumstances that State considered pertinent."[69] This standard of appropriate compensation under the circumstances conflicted with the United States belief that traditional international law required full compensation for expropriations. The United States hoped, however, that a network of recently negotiated bilateral investment treaties would show that, despite states' political statements in fora such as the General Assembly, actual state practice as embodied in treaties conformed to the traditional standard of compensation.[70] Moreover, a series of expropriations of U.S. investment during the 1960s and 1970s underscored the need for strong investment protection,[71] while the rapid growth of United States overseas investment put more wealth at risk of expropriation.[72]

In 1977 the State Department responded to these considerations by proposing a new series of bilateral investment treaties.[73] Unlike the modern FCNs, which were directed primarily at developed countries, the BITs were targeted at developing countries. The BITs had three

68. G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31), at 50, U.N. Doc. A/9631 (1975).

69. *Id.* at art. 2.2(c).

70. For a treatment of the conflict in expropriations law, see Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981).

71. Gantz reports 87 instances of expropriatory acts during a two year period in the early seventies. *See* Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 n.2 (1977). *See generally* Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1 (1978).

72. From 1975 to 1985, the book value of United States direct investment in the Less Developed Countries increased from $19 billion to almost $75 billion (testimony of Harvey E. Bale, Jr., Assistant United States Trade Representative before the Senate Foreign Relations Comm., Aug. 11, 1986) (unpublished testimony).

73. During the Carter Administration, these proposals took the form of memoranda circulated in the State Department. After the election of Ronald Reagan in 1980, the State Department moved out of the drafting stage and became increasingly involved in negotiations.

purposes: (1) to provide greater protection for United States investment in those countries with which the United States negotiated BITs, (2) to reaffirm that the protection of United States foreign investment remained an important element of United States foreign policy, and (3) to establish a body of practice to support the United States view of international law governing the protection of foreign investment.

The first step was to develop a model negotiating text through interagency consultations. The drafters began with a model text used to negotiate modern FCNs, which they stripped of provisions unrelated to investment protection. This core was expanded to strengthen or add greater specificity to the FCN formulations. The drafters also drew upon the successful example set by the European BIPAs.

Stripping the modern FCN to its core investment provisions reflected a change in philosophy. In the 1950s, the FCN negotiators believed it necessary to use non-investment concessions to entice treaty partners.[74] The BIT negotiators of the 1980s believed that potential treaty partners would perceive investment protection to be mutually beneficial and thus non-investment incentives would not be necessary.[75] Indeed, far from regarding the non-investment provisions of the FCNs as inducements, the negotiators regarded them as unnecessary complications which would increase the difficulty of negotiating new agreements.

Developing a model text was a difficult process. Significant interagency differences over the scope and content of the BIT program emerged almost immediately. Efforts to resolve these differences and to produce a draft negotiating text were not successful until 1980, when the United States commenced BIT negotiations with Singapore. These negotiations were unproductive and were eventually abandoned. In December 1981, an interagency team completed a significantly revised model negotiating text, which was in use weeks later in ultimately successful negotiations with Egypt and Panama.

Developing a model text was also a continuous process. Experience in the early rounds of negotiations, primarily with Egypt and Panama, suggested the need for improvements in the December 1981 model text. The United States negotiating team produced a series of revised models through 1982, resulting in a model dated January 21, 1983 ("the 1983 draft").[76] Each new model became available for use in existing negotiations and served as the principal text for negotiations commenced after its completion. The 1983 draft became available in the course of, or

74. *See supra* text accompanying notes 50-52.

75. *See infra* notes 81-82 and accompanying text. The U.S. government believed that BITs should be negotiated only with countries which already perceived them as desirable reflections of an existing policy in favor of foreign investment, obviating the need for inducements.

76. "Treaty between the United States of America and ———— Concerning the Reciprocal Encouragement and Protection of Investment" (Jan. 21, 1983) (on file at the office of the Cornell International Law Journal).

served as the principal negotiating text for, negotiations for eight of the ten[77] signed BITs.

Experience with the 1983 draft revealed the need for further improvements, particularly to simplify some of its wordier passages. Accordingly, United States negotiators developed a streamlined model, dated February 24, 1984 ("the 1984 draft"). They used the 1984 draft as a supplementary text in several existing negotiations, and as the primary negotiating text for the Turkey and Grenada BITs.[78] Although much shorter, the 1984 draft is similar in organization to the 1983 draft and essentially identical in the protections it affords.[79] As this Article is written, the 1984 draft remains the current negotiating text, although the revision process continues.

D. Negotiation of the BITs

After developing a model text, United States negotiators approached friendly developing countries which they believed might be interested in concluding a BIT. Those expressing interest were provided with a copy of the current model text. If the other country remained interested after reviewing the text, a round of face-to-face negotiations generally followed. In some cases, the other nation's negotiating team appeared at the first round with a completely revised counter-draft. More often, the negotiations proceeded entirely from the United States model, with discussion confined to those provisions which the other country found unclear or objectionable.[80]

The United States negotiating stance throughout was low key. Although the United States briefed potentially interested countries about the BIT program, it exerted no pressure to start negotiations. The United States did not want the BITs to be an instrument for changing the investment policies of a developing country, but rather a reflection of existing policy. For that reason, the United States did not offer to make concessions in other areas to entice a country into signing a BIT. Similarly, the United States was willing to make few concessions in the BIT itself.[81] If a potential BIT partner was unwilling to accept the

77. The exceptions were the BITs with Turkey, *supra* note 9, and Grenada, *supra* note 10, which used the 1984 draft as the primary negotiating text.

78. "Treaty Between the United States of America and ———— Concerning the Reciprocal Encouragement and Protection of Investment" (Feb. 24, 1984) (on file at the office of the Cornell International Law Journal). The Panama BIT, *supra* note 2, aptly illustrates the use of new 1984 draft in existing negotiations. The BIT follows the 1983 draft's organization but in many respects is worded more closely to the 1984 draft. *See infra* notes 155-57 and accompanying text.

79. *See infra* text accompanying note 101.

80. For further elaboration upon the process of BIT negotiations, see Vandevelde, *supra* note 13.

81. Where concessions were made, United States policy was generally to place them in a protocol, annex, or agreed minute appended to the main text of the BIT. Concessions often were in the form of exceptions to a general principle, and the negotiators thought it desirable to highlight the principle in the main text, while accumulating exceptions, qualifications and explanations in a single place outside the

substance of the agreement as proposed, then in the United States view it did not have the policy toward foreign investment that the BIT was intended to reflect, and negotiation of a BIT with such a country would therefore be undesirable.

This negotiating stance was reflected in candor by the United States concerning the potential benefits offered by BITs. The primary United States interest in concluding BITs was to protect existing investment while reaffirming the United States understanding of traditional international law on foreign investment.[82] Developing countries saw BITs as a means of attracting new United States investment. United States negotiators were candid, however, about the lack of evidence that BITs actually would attract new investment.[83]

This divergence of interests between the United States and its negotiating partners gave rise to a difficult problem during BIT negotiations. Negotiators from other countries repeatedly sought to limit various BIT protections to new investment. They believed that extending such protections to existing investors would constitute a "windfall" to those investors who came to the host country without any such guarantees. The United States resisted any distinctions in the protection afforded existing and new investment. The United States did not want to create two classes of overseas investors, some with greater protection than others. First, it was thought that this would give later investors a kind of government-induced competitive advantage. Second, in the absence of any certainty that future investment would occur, the United States considered a BIT that did not apply to existing investment to be in one sense illusory. Finally, the State Department also thought that the Senate would be far less likely to give its advice and consent to a BIT lacking the enthusiastic support of existing investors.

Another problem during negotiations arose from the structure of the BIT. The drafters had developed the BIT by expanding upon simpler provisions in the modern FCNs as well as borrowing language from successfully negotiated European BIPAs.[84] Although the drafters usually added new language in order to broaden the protections of the modern FCNs, in some instances their purpose was simply to clarify the protections already present in modern FCNs. As the drafters identified potential ambiguities, they sought to eliminate them by inserting still

main text. These addenda nevertheless are integral parts of the BIT. In some instances, the parties either explicitly or implicitly signaled the importance of the protocols. Thus, article XIII(5) of the Egypt BIT provides that "[t]he attached Annex and Protocol are integral parts of this Treaty." In the case of the Zaire and Senegal BITs, the parties signed the protocol as well as the treaty text, while the case of the Morocco BIT they signed once, at the end of the protocol.

82. *See supra* notes 67-72 and accompanying text.

83. Factors other than legal considerations, such as the lack of supporting infrastructure or the small size of domestic markets, may deter new investment in developing countries. The United States generally refused requests by various BIT partners to include provisions requiring the parties to promote investment by their nationals and companies in the territory of the other party.

84. *See supra* notes 73-74 and accompanying text.

more, often redundant, language. Longer provisions, however, were more likely to raise objection from potential treaty partners, due either to redundancy or to confusing or inelegant language. Although these objections were purely formal, the United States negotiators were reluctant to accept changes because of their concern that any modification, even the elimination of redundancy, might be interpreted as a substantive concession. In effect, the BIT's "improvements" on the modern FCN's language occasionally could prove counterproductive. The drafters alleviated this problem in part by the preparation of the 1984 draft, which considerably shortened many BIT provisions without altering their substance.[85]

Where changes were necessary, the United States negotiators preferred to use existing language, particularly that with an established meaning in international practice. They commonly took language from earlier BIT models or previously-signed BITs. They avoided novel language when possible because it might be perceived as weaker.

The sequential negotiations of several treaties from a single model text caused a final set of problems. Once the United States made a concession to one country, it became difficult to deny that concession to countries in subsequent negotiations.[86] United States negotiators feared that each new BIT negotiation would begin with demands for all previous concessions. In some instances, the United States could rebuff a country's demand for a previously-made concession by pointing out that the United States had made the first concession in return for a concession the later party considered unacceptable.[87] In general, however, the best remedy was *not* to make the concession in the first place.

II. The Substance of the BIT

Although different model texts were in use during the BIT negotiations, the 1983 draft served as the principal text during the most active negotiation period. It differed from its immediate predecessors only in minor respects. The successor 1984 draft significantly revised the language, but not the substance, of the 1983 draft. Thus, the 1983 and 1984 drafts are the primary reference points for analyzing the ten signed BITs.

The 1983 draft contains thirteen articles. Article I defines certain

85. *Compare* the 1983 draft treatment provision, *infra* note 119, *with* the 1984 draft treatment provision, *infra* note 125. *Compare* also the 1983 draft expropriation provision, *infra* note 208, *with* its 1984 counterpart, *infra* note 208.

86. This point should be kept in mind when considering the analysis of the signed BITs. Analyzing particular BIT provisions in a vacuum is potentially misleading in that concessions made by the United States may be balanced by concessions from the other party in other provisions not discussed herein. Although that circumstance does not affect the substance of any provision under consideration, it precludes generalizations about whether one BIT is "stronger" or "weaker" than another without reviewing the entire BIT.

87. On the other hand, the fact that one state had made a concession sometimes made that concession more palatable to other states.

important terms in each of the treaties.[88] Article II contains the first of the substantive provisions analyzed in this Article, standards of treatment for investment.[89] Article III contains the second substantive provision analyzed herein, conditions for expropriation.[90] Article IV concerns compensation for damages due to war.[91] Article V, the third substantive provision analyzed here, guarantees free transferability of currency by investors.[92] Article VI obliges the parties to engage in consultations and information exchanges.[93] Article VII contains the last substantive provision considered here, settlement of investment disputes.[94] Article VIII concerns disputes between the parties over interpretation or application of the treaty.[95] The subsequent articles, IX to

88. Article I defines the following terms: (a) company; (b) company of a party; (c) investment; (d) own or control; (e) national of a party; and (f) return.

89. Article II, entitled "Treatment of Investment," covers: (1) the right to MFN and national treatment with respect to establishing investment; (2) the right to MFN and national treatment with respect to investment once established; (3) authorization of exceptions to national treatment in specified sectors; (4) the right to certain absolute standards of treatment of investment; (5) the right of entry of aliens in connection with investment and for investors to select top managerial personnel; (6) the right of competitive equality with state-owned investment; (7) prohibition on certain performance requirements; (8) the right of access to local courts; (9) obligation to make investment laws public; and (10) definition of national treatment in the case of a federal republic. *See infra* notes 107-99 and accompanying text.

90. Article III, "Compensation for Expropriation," provides for: (1) a prohibition on expropriations unless in accordance with specified conditions; (2) an obligation to compensate investors of the other party who hold any interest in expropriated property; and (3) the right of investors to prompt judicial review of any expropriation. *See infra* notes 200-88 and accompanying text.

91. Article IV, "Compensation for Damages Due to War and Similar Events," provides for: (1) the right to MFN and national treatment with respect to damages caused by armed conflict with third parties or certain internal disturbances; (2) the right to restitution or prompt, adequate, and effective compensation for such damages; and (3) the right to free transferability of compensation.

92. Article V, "Transfers," provides for: (1) the right that transfers related to an investment shall be free; (2) the right of investors to select the currency to be transferred; and (3) authorization to require currency reports, withhold income taxes, and enforce judgments. *See infra* notes 289-380 and accompanying text.

93. Under Article VI, "Consultation and Exchange of Information," parties have an obligation to: (1) consult on treaty matters; and (2) endeavor to provide investment information.

94. The provisions of Article VII, "Settlement of Investment Disputes Between One Party and a National or Company of the Other Party," include: (1) the scope of the article; (2) an obligation to consult and use previously-agreed procedures to resolve investment disputes with investors; (3) the procedure for submission of the dispute to conciliation or binding arbitration; (4) that recovery from collateral sources will not diminish liability of host state to the investor; (5) the right of companies to invoke arbitration against state of incorporation; and (6) exclusion from scope of article of disputes involving official export credit, guarantee, or insurance programs. *See infra* notes 381-490 and accompanying text.

95. Article VIII, "Settlement of Disputes Between the Party Concerning Interpretation or Application of This Treaty," covers: (1) a requirement of effort to resolve disputes through consultations and other diplomatic channels; (2) the right of either party to submit disputes to binding arbitration; (3) the composition of arbitral tribunal; (4) the right of either party to request the President of the International Court of Justice to act as appointing authority for the arbitral tribunal; (5) the procedure for

XIII, cover, respectively, preservation of rights,[96] measures not precluded by the treaty,[97] taxation,[98] the treaty's applicability to political subdivisions,[99] and the treaty's entry into force, duration, and termination.[100]

The 1984 draft was similarly organized, but with three principal changes. First, the drafters merged article IV, concerning property losses in time of war or civil disturbances, into article III, relating to expropriation generally. Second, they created a new article VIII, excluding from the investor-to-state and state-to-state disputes provisions certain disputes arising under government credit, guarantee, or insurance arrangements. This language had appeared in articles VII and VIII of the 1983 draft. Third, they eliminated as unnecessary article XII, concerning application of the BIT to political subdivisions.[101] The

replacing arbitrators; (6) the schedule for conduct of arbitration; (7) provisions that the tribunal shall decide by majority vote, its decisions shall be binding, and expenses shall be equally borne by the parties unless the tribunal otherwise directs; (8) a requirement that the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission be used, unless otherwise agreed; (9) exclusion from the scope of the Article of disputes submitted to investor-to-state conciliation or arbitration; and (10) exclusion from the scope of the Article of disputes involving official export credit, guarantee, or insurance programs.

96. Under Article IX, "Preservation of Rights," the Treaty shall not derogate from: (a) the laws of either party; (b) international legal obligations; or (c) contractual obligations of either party which provide a higher level of protection than that afforded by the BIT.

97. Article X, entitled, "Measures Not Precluded By This Treaty," contains: (1) a provision that the BIT shall not preclude measures necessary to maintain public order, fulfill obligations with respect to the maintenance of international peace or security, or protect a party's essential security interests; and (2) authorization of special formalities involving establishment of investment.

98. Article XI, "Taxation", includes: (1) an obligation to strive for fairness and equity in a party's tax treatment of investment of the other party's nationals and companies; and (2) a provision that the BIT shall apply to tax matters only with respect to expropriation, transfers, and the observance of terms of an investment agreement or authorization, except in the latter case where the matter is subject to the disputes provision of a convention for the avoidance of double taxation.

99. Article XII, "Application of This Treaty to Political Sub-Divisions of the Parties," provides that the BIT shall apply to political subdivisions of the parties.

100. Article XIII, "Entry Into Force, Duration, and Termination of the BIT," contains: (1) an obligation to exchange ratifications as soon as possible; (2) a provision that the BIT shall enter into force 30 days after the exchange of ratifications, shall remain in force for 10 years and thereafter unless terminated, and shall apply to investments existing at the time of its entry into force; (3) the right of parties to terminate after ten years upon one-year's written notice; and (4) a provision that the BIT shall apply for ten years to investments made after entry into force.

101. Letter of Submittal from Secretary of State George P. Shultz to President Ronald Reagan (Feb. 20, 1986), *reprinted in* Panama BIT, *supra* note 2. The following table correlates the articles of the 1983 and 1984 drafts:

Substance	1983 Draft	1984 Draft
Definitions	Article I	Article I
Treatment Provision	Article II	Article II
Expropriation Provision	Article III	Article III
War/Civil Disturbance	Article IV	Article III
Transfers Provision	Article V	Article IV

1984 draft also modified language and organization within articles.[102]

Although all of the provisions play some role in the BIT's investment protections, the United States Government regarded four provisions as the most important: The treatment, expropriation, transfers, and disputes provisions. The balance of this Article analyzes the content of these four provisions and assesses the principal modifications made to each during the course of negotiating the ten signed BITs.[103] In part to illustrate the effects of negotiating sequential treaties from a single model text,[104] the Article analyzes the BITs in the order in which their negotiations commenced.[105] The 1983 draft is the primary reference point in analyzing the signed BITs, with the 1984 draft serving as a secondary reference point.[106]

A. Treatment of Investment

The nineteenth century FCN provisions were the earliest antecedents to the BIT's treatment provision. Early nineteenth century FCNs imposed absolute standards of investment protection.[107] FCNs of the latter part of the nineteenth century regularly included relative standards, requiring national treatment of investment, MFN treatment, or both.[108]

Most modern FCNs lacked a single provision which can be regarded as the counterpart to the BIT treatment provision. Rather, the modern FCNs included a number of articles establishing various absolute and relative standards of treatment for covered investment.[109] The most important of the relative standards of treatment required the host country to provide nationals and companies of the other party with national and MFN treatment when "engaging in" various commercial, industrial, and financial activities.[110] Other provisions provided MFN treatment, national treatment, or both with respect to other aspects of doing business or investing in the host country, such as obtaining patents,[111] or acquiring property.[112]

Notwithstanding these general rights to MFN and national treatment, the modern FCNs also contained a provision reserving to either party the right to limit the legal entitlement of nationals and companies of the other party to establish, acquire, or carry on enterprises in certain sectors of the host's economy.[113] These limitations were required to be on an MFN basis.[114] New limitations generally were not to apply to enterprises existing when the limitations became effective.[115]

The modern FCNs imposed absolute standards on the treatment of investment by host countries which foreshadowed BIT provisions. First, they provided that each party accord "equitable treatment" to the property of nationals and companies of the other.[116] Second, such property was to receive "the most constant protection and security" within the

Consultations	Article VI	Article V
Disputes Provision	Article VII	Article VI
State-to-State Disputes	Article VIII	Article VII
Disputes Exclusion	Articles VII,VIII	Article VIII
Preservation of Rights	Article IX	Article IX
Measures Not Precluded	Article X	Article X
Taxation	Article XI	Article XI
Political Subdivisions	Article XII	omitted
Entry/Termination	Article XIII	Article XII

102. These changes are too numerous to list. They are immaterial to the analysis herein.

103. The ten signed BITs contain numerous minor wording changes from the 1983 or 1984 drafts, which are of no substantive significance. These generally are disregarded in the following discussion. Substantive concessions outside these four provisions also generally are not treated.

104. *See supra* text accompanying note 86.

105. The comparative analysis of the BITs proceeds in chronological order of negotiation, primarily because contemporaneous BITs were negotiated from the same model text, facilitating the comparative process. The utility of this approach is limited, however, since some BITs required much more time to negotiate than others. For example, the Egypt BIT was the first on which negotiations commenced, but the eighth on which they were completed.

106. *See supra* notes 76-79 and accompanying text.

107. *See supra* notes 30-32 and accompanying text.

108. *See supra* note 38 and accompanying text.

109. For the United States the BIT defines "national treatment" as the treatment that each of the 50 states accords companies of the other 49 states, rather than that which it provides to its own citizens. *See* 1983 draft, *supra* note 76, at art. II(10).

110. "Engaging in" covered all phases of establishing and operating these enterprises. The list of activities varies among the various FCNs. *See, e.g.*, Netherlands FCN, *supra* note 60, at art. VII(1) and (4); Nicaragua FCN, *supra* note 60, at art. VII(1) and (4); Japan FCN, *supra* note 60, at art. VII(1) and (4); Israel FCN, *supra* note 53, at art. VII(1) and (4); Greece FCN, *supra* note 60, at art. XII(1); Ireland FCN, *supra* note 53, at art. VI(1)(a) and (3). Some of the modern FCNs provided only for national treatment in this regard. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. VI(1); Belgium FCN, *supra* note 60, at art. VI(2); France FCN, *supra* note 60, at art. V(1).

111. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. 5; Belgium FCN, *supra* note 60, at art. V; France FCN, *supra* note 60, at art. VIII(1); Netherlands FCN, *supra* note 60, at art. X(1); Nicaragua FCN, *supra* note 60, at art. X(1); Pakistan FCN, *supra* note 60, at art. X(1); Israel FCN, *supra* note 53, at art. X; Greece FCN, *supra* note 60, at art. X; Japan FCN, *supra* note 60, at art. X; Ireland FCN, *supra* note 53, at art. VI(1)(b).

112. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. IX; France FCN, *supra* note 60, at art. VII; Muscat and Oman FCN, *supra* note 60, at art.VI(1); Netherlands FCN, *supra* note 60, at art. IX; Nicaragua FCN, *supra* note 60, at art. IX; Pakistan FCN, *supra* note 60, at art. IX; Japan FCN, *supra* note 60, at art. IX; Israel FCN, *supra* note 53, at art. IX; Ireland FCN, *supra* note 53, at art. VII(2).

113. *See, e.g.*, Netherlands FCN, *supra* note 60, at art. VII(2); Japan FCN, *supra* note 60, at art. VII(2); Israel FCN, *supra* note 53, at art. VII(2); Nicaragua FCN, *supra* note 60, at art. VII(2); Belgium FCN, *supra* note 60, at art. VI(5); Luxembourg FCN, *supra* note 53, at art. VI(2).

114. *See, e.g.*, Netherlands FCN, *supra* note 60, at art. VII(4); Nicaragua FCN, *supra* note 60, at art. VII(4); Japan FCN, *supra* note 60, at art. VII(4); Israel FCN, *supra* note 53, at art. VII(4). MFN treatment was not always guaranteed. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. VI; Belgium FCN, *supra* note 60, at art. VI.

115. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. VI(2); Belgium FCN, *supra* note 60, at art. VI(5); Netherlands FCN, *supra* note 60, at art. VII(2); Nicaragua FCN, *supra* note 60, at art. VII(2); Japan FCN, *supra* note 60, at art. VII(2).

116. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. I; Belgium FCN, *supra* note 60, at art. I; France FCN, *supra* note 60, at art. I; Muscat and Oman FCN, *supra* note 60, at art. IV(1); Netherlands FCN, *supra* note 60, at art. I(1); Nicaragua FCN, *supra* note 60, at art. I; Pakistan FCN, *supra* note 60, at art. I; Israel FCN, *supra* note 53, at art. I; Greece FCN, *supra* note 60, at art. I; Ireland FCN, *supra* note 53, at art. VI(1).

territory of the host party.[117] Third, neither party was permitted to take "unreasonable and discriminatory measures" that would impair the legally acquired rights or interests within its territory of nationals and companies of the other.[118]

With respect to relative standards, the treatment provision of the 1983 draft BIT modified the approach taken by the majority of modern FCNs.[119] While the modern FCNs enumerated rights to national or

117. *See, e.g.*, Netherlands FCN, *supra* note 60, at art. VI(1); Nicaragua FCN, *supra* note 60, at art. VI(1); Pakistan FCN, *supra* note 60, at art. VI(1); Japan FCN, *supra* note 60, at art. VI(1); Israel FCN, *supra* note 53, at art. VI(1); Greece FCN, *supra* note 60, at art. VII(1); Ireland FCN, *supra* note 53, at art. VIII(2); Italy FCN, *supra* note 53, at art. V(1).

118. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. IV(2); Belgium FCN, *supra* note 60, at art. IV(2); Muscat and Oman FCN, *supra* note 60, at art. IV(1); Netherlands FCN, *supra* note 60, at art. VI(3); Nicaragua FCN, *supra* note 60, at art. VI(3); Pakistan FCN, *supra* note 60, at art. VI(3); Japan FCN, *supra* note 60, at art. V(1); Israel FCN, *supra* note 53, at art. VI(4); Greece FCN, *supra* note 60, at art. VIII; Ireland FCN, *supra* note 53, at art. V.

119. The text of article II(1) through (4) of the 1983 draft [hereinafter the 1983 draft treatment provision] is as follows:

ARTICLE II

TREATMENT OF INVESTMENT

1. Each Party shall endeavor to maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall permit such 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.
2. Each Party shall accord existing or new investments in its territory of nationals or companies of the other Party, and associated activities, treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies or of nationals or companies of any third country, whichever is the most favorable. [There follows a lengthy definition of associated activities, omitted here.]
3. (a) Notwithstanding the preceding provisions of this Article, each Party reserves the right to maintain limited exceptions to the standard of treatment otherwise required if such exceptions fall within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party of all such exceptions at the time this Treaty enters into force. Moreover, each Party agrees to notify the other Party of any future exceptions falling within the sectors or matters listed in the Annex, and to maintain the number of such exceptions at a minimum. Other than with respect to ownership of real property, the treatment accorded pursuant to this subparagraph shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country. However, either Party may require that rights to engage in mining on the public domain shall be dependent on reciprocity.
   (b) No exception introduced after the date of entry into force of this treaty shall apply to investments of nationals or companies of the other Party existing in that sector at the time the exception becomes effective.
4. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. 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. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.

1983 draft, *supra* note 76, at art. II(1)-(4).

Article II contained additional material regarding the treatment of investment. For reasons of space, however, these additional paragraphs will not be considered in this Article and thus will not be included in references to the treatment provision. *Compare* 1984 draft, *supra* note 78, at art. II.

120. 1983 draft, *supra* note 76, at art. II. The BIT does not require identical treatment, but treatment which is no less favorable. Covered investment may be treated differently than investment of nationals of the host state or third states, so long as the difference is not unfavorable. An exception to the general right of MFN and national treatment is article XI, which exempts taxation from the coverage of article II, but imposes a general requirement of "fairness" and "equity" in the taxation of covered investment.

121. *Id.* at art. II(1). Article X(2) of the 1983 and 1984 drafts permits each party to prescribe special formalities in connection with the establishment of investment by nationals or companies of the other party, provided that such formalities do not impair the substance of any treaty rights.

122. 1983 draft, *supra* note 76, at art. II(3)(a).

123. Allowing exceptions to the national treatment standard makes a BIT easier to negotiate and defuses political objections to foreign investment in especially sensitive sectors, thereby reducing the risk that the BIT will be violated after entering into force.

124. First, the obligation to provide MFN treatment does not apply to the ownership of real estate. Certain states within the United States restrict alien ownership of real property in ways which could be inconsistent with such an obligation. Applying the BIT MFN obligation to real estate ownership would have, from the United States

MFN treatment for specified investments with respect to certain transactions, paragraph two of the 1983 draft treatment provision requires that all investment of nationals and companies of the other party, once established in the host country, receive the better of MFN or national treatment in all matters generally.[120]

Paragraph one of the 1983 draft's treatment provision covers the right to establish or acquire new investment in the host country. Parties must provide nationals and companies of the other party with MFN and national treatment with respect to this right.[121]

Paragraph three of the 1983 draft treatment provision permits exceptions to the general rules in paragraphs one and two. Specifically, parties have the right to designate certain sectors of their economies in which they may limit the other party's right to national treatment.[122] These sectors must be listed in an Annex to the BIT. Such future exceptions are to be kept "at a minimum" and shall not apply to any investment existing at the time the exception is created.[123] Moreover, with two exceptions, the parties must continue to provide MFN treatment to nationals and companies with respect to the establishment of investment in these designated sectors of the economy.[124] Each party is required to

notify the other of existing and future exceptions to national treatment in the listed sectors.

The 1984 draft merged these first three paragraphs of the 1983 draft treatment provision into a single paragraph, article II(1), without changing the substance of the provision.[125]

The BIT requires national and MFN treatment for investment and "associated activities." Article II(2) of the 1983 draft contains a lengthy illustrative, non-exclusive list of such activities to clarify the scope of the term.[126] The 1984 draft omits the list but defines "associated activities" in article I.[127] The term is intended to have the same scope in both

viewpoint, the undesirable effect of requiring that American states provide national treatment to nationals and companies of our BIT partners. *But see* 1853 Argentina FCN, *supra* note 32, at art. XIII, for one FCN agreement that contains national treatment provisions for real estate.

Second, the parties also reserved the right to limit the right of establishment in the mining industry to strict reciprocity. The Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 (1982), necessitates this exception by providing that United States corporations owned by aliens may lease federal land for purposes of mineral exploitation only if the alien's country grants similar or like privileges to United States citizens and corporations.

125. Article II(1) and (2) of the 1984 draft [hereinafter the 1984 draft treatment provision] reads as follows:

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exceptions with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exceptions by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent upon reciprocity.
2. Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe an obligation it may have entered into with regard to investments.

1984 draft, *supra* note 78, at art. II. Article II of the 1984 draft contains six other paragraphs relating to the treatment of investment which for reasons of space will not be analyzed herein or included in reference to the 1984 draft treatment provision.

126. 1983 draft, *supra* note 76, at art. II(2).

127. *Id.* at art. I(e).

drafts.[128]

Both drafts' treatment provisions include counterparts to three of the absolute standards of treatment commonly required by the modern FCNs.[129] First, investments of companies and nationals of the other party must be accorded "fair and equitable treatment," the equivalent of the "equitable treatment" required by the modern FCNs.[130] Second, this investment must "enjoy full protection and security," equivalent to the modern FCN's "most constant protection and security" formulation,[131] and similar to the language used in nineteenth century FCNs.[132] This clause requires protection from injurious activities by the government and by private persons. Third, the BITs provide that neither party may impair the investment of nationals or companies of the other by "arbitrary and discriminatory measures."[133] This clause recalls the modern FCN's prohibition of "unreasonable or discriminatory measures."[134] The 1983 draft further required that treatment of investment be "in accordance with applicable national laws,"[135] language dropped from the 1984 draft.[136]

The 1983 draft included two further requirements. First, the treatment accorded investment must not be "less than that required by international law,"[137] language that only occasionally appeared in the modern FCNs with respect to property protection.[138] Because international law binds states even in the absence of this provision,[139] the goal

128. The discussion of "associated activities" is beyond the scope of this Article.

129. *See* 1983 draft, *supra* note 76, art. II(4); 1984 draft, *supra* note 78, at art. II(2).

130. *See supra* note 116 and accompanying text. *Cf.* art. XI(1), calling for "fairness and equity" in tax matters.

131. *See supra* note 117 and accompanying text.

132. *See supra* notes 31-32, 39 and accompanying text.

133. *See* 1983 draft, *supra* note 76, at art. II(4); 1984 draft, *supra* note 78, at art. II(2). "Discriminatory" measures include those which are intentionally discriminatory, as well as those which are facially neutral but discriminatory in effect. The use of "and" in the phrase "arbitrary and discriminatory" permits parties to take certain actions, such as antitrust enforcement measures, which though arguably discriminatory are not arbitrary.

134. *See supra* note 118 and accompanying text.

135. *See* 1983 draft, *supra* note 76, at art. II(4). Both the use of the modifier "applicable" for national laws, and the remainder of the sentence, that such treatment "shall in no case be less than that required by international law," suggests that if national laws conflicted with international law, international law would govern.

136. References to national laws are inherently problematic in a treaty such as a BIT. At best, they offer only limited protection since a state may change its national laws. At worst, no matter how worded, they may tempt an arbitral tribunal to apply the law of the host state rather than international law. Given the requirement of national treatment, and the other absolute guarantees of the BIT, a requirement of strict conformity with national law adds very little additional protection.

137. *See* 1983 draft, *supra* note 76, at art. II(4). Where the BIT requires treatment exceeding that required by international law, host states must abide by the higher BIT standard.

138. *See, e.g.*, Ireland FCN, *supra* note 53, at art. VIII(2).

139. States generally are not bound by customary international law principles to which they have been persistent objectors. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10-11 (2d ed. 1973). In a given case, however, this provision

of this clause in part is to render the BIT and international law mutually reinforcing. The BITs rely on international law to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts. The incorporation of international law into the BITs allows investors or their states to enforce international legal norms in the investor-to-state arbitral disputes provision or the state-to-state disputes provision of the BITs. Moreover, State practice under the BIT could strengthen the United States position on international law, especially through the rendering of arbitral decisions under these disputes provisions.

Second, each party must observe its investment obligations.[140] In effect, any party's breach of an investment contract with an investor is a treaty violation as well, for which the disputes provision provides a remedy.[141] This clause had no counterpart in the predecessor FCN agreements.

Egypt

The treatment provision of the Egypt BIT contains several significant departures from the language of the 1983 draft.[142] A new subparagraph authorizes the parties to screen investment in accordance with national plans, but only if the screening is done on an MFN and national-treatment basis.[143] Because the 1983 draft guaranteed with respect to the right of establishment only MFN and national treatment, this clause does not derogate from that draft.

A related clause grants Egypt the right to provide only MFN treatment to United States investors wishing to establish investment in "limited sensitive geographic areas designated for exclusive Egyptian investment."[144] This clause responded to "Egypt's public order and

could be interpreted as constituting a state's consent to a particular relevant principle of customary international law to which it previously had objected.

140. *See* 1983 draft, *supra* note 76, at art. II(4).

141. Where the BIT provides greater protection than a preexisting investment agreement, the host state must provide this greater protection. Failure to do so would not violate the investment agreement but would violate the BIT, which applies to investment existing at the time it comes into force. Where the preexisting investment agreement provides greater protection than the BIT, article IX of the BIT specifically provides that the greater protection of the earlier agreement shall prevail over any weaker BIT provision. *See* 1983 draft, *supra* note 76, at art. IX(c). A failure to provide the greater protection guaranteed by the investment agreement thus would violate the investment agreement as well as article IX, providing two separate bases for invoking the disputes provision. The violation of article IX also could provide a basis for state-to-state arbitration under article VII of the 1983 draft and article VI of the 1984 draft.

142. Egypt BIT, *supra* note 1, at art. II(1)-(4).

143. *Id.* at art. II(3)(b) (stating that "[e]ach Party retains the discretion to approve investments according to national plans and priorities on a nondiscriminatory basis consistent with paragraphs (1) and (3)(a) of this Article").

144. *Id.* at Protocol para. 3(1). As the text implies, this clause does not authorize exceptions to national treatment with respect to investment already established at the time an area is designated for exclusive Egyptian investment.

national security concerns about foreign investment in certain sensitive border regions."[145] Such restricted areas are to be kept to a minimum and may not "substantially impair" the investment opportunities of United States investors.[146] This approach is consistent with the 1983 draft which allows parties to designate certain sectors as exempt from the national treatment requirement.

The Egypt BIT excludes from the obligation to provide MFN treatment in excepted sectors any advantage which is provided "by either party to nationals, or companies of a third country by virtue of a special security or regional arrangement, including regional customs unions or free trade areas."[147] The same clause also excludes from the parties' obligation to provide MFN treatment with respect to the right of establishment any benefit extended by virtue of membership in a customs union. Egypt requested these changes because it is a member of the Arab League.[148]

Several deviations from the 1983 Draft in the final Egypt BIT are not concessions to Egypt, but rather were based on the language of earlier 1982 model texts which had been used to negotiate the Egypt BIT. The most noticeable example is the absence of the 1983 draft's provision requiring certain absolute standards of treatment.[149] Instead, the Egypt BIT follows the 1982 drafts in providing that "[t]he treatment, protection and security of investment shall never be less than that required by international law and national legislation."[150]

Another example is omission of the phrase "in like situations" in article II, paragraph 1, describing the standard of treatment for permitting the establishment of new investments, although it remains in paragraph 2, relating to the treatment of investments once established.[151] This was the approach taken in the 1982 drafts, although the phrase was

145. Letter of Submittal to the President from Secretary George P. Shultz (May 20, 1986), *reprinted in* Egypt BIT, *supra* note 1 [hereinafter Egypt Submittal Letter] at XI. This approach is consistent with the overall thrust of the BIT. For example, Article XI also excludes from BIT coverage measures necessary for the maintenance of public order or the protection of a party's security interests. Specifically providing for Egypt's right to impose geographic restraints on foreign investments reduces the likelihood of subsequent disagreement concerning whether such restrictions are justifiably related to the maintenance of public order or national security.

146. *Id.* at XI.

147. *Id.* "Regional" arrangements for Egypt would be those in the Mid-East or Africa, but not Europe.

148. Egypt BIT, *supra* note 1, at Protocol para. 4. Similar exceptions limited to customs unions and free trade areas appear in the Morocco, Bangladesh, and Haiti BITs. *See infra* notes 169, 180, and 184 and accompanying text.

149. 1983 draft, *supra* note 76, at art. II(4).

150. Egypt Submittal Letter, *supra* note 145, at XI. In the event of a conflict between international and national law, international tribunals will apply the former. *See* Egypt BIT, *supra* note 1, at art. VIII. *See also* Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic, 20 I.L.M. 1 (1981); TOPCO/CALASIATIC Arbitration, 17 I.L.M. 1 (1978). The use of the conjunction "and" in the phrase "international law and national legislation" also appears in the Panama and Cameroon BITs.

151. Egypt BIT, *supra* note 1, at art. II(1)-(2).

inserted in both paragraphs of the 1983 draft.[152] This departure from the 1983 draft may actually strengthen the article, for the phrase "in like situations" arguably weakens the provision. Without that phrase, covered investment could claim the privileges provided to any investment owned by nationals of the host state or third countries, not merely privileges provided to such enterprises in like situations. Still, some notion of comparability is implicit in any relative standard and thus it is debatable how much the phrase really adds.

Finally, the negotiators altered the 1983 draft language in paragraph 1 of article II, which provides that each party "shall . . . permit such investments" to be established on MFN and national treatment basis. The negotiators instead inserted the phrase "in applying its laws, regulations, administrative practices and procedures."[153] This language is from earlier 1982 model texts and does not alter the meaning of the provision.[154]

Panama

The Panama BIT treatment provision is structured largely after the 1984 draft, with text taken from the 1983 draft.[155] The principle substantive change is that the general right of MFN and national treatment is made subject to laws and regulations in force at the time the parties enter the Treaty.[156] As in the 1983 draft, future exceptions to national treatment are permissible only in the sectors listed in the Annex, and these must be on an MFN basis.[157]

152. *See* 1983 draft, *supra* note 76, at art. II. The Zaire BIT reverses this pattern. *See infra* text accompanying note 174.

153. Egypt BIT, *supra* note 1, at art. II(1).

154. Similar language appears in the Zaire and Bangladesh BITs. *See infra* notes 172, 179 and accompanying text. One change in the Egypt BIT treatment provision not attributable to use of the 1982 drafts was the insertion of language drawn from an Egypt-West Germany BIPA possibly limiting the applicability of the BIT to existing investment. *See* Egypt Submittal Letter, *supra* note 145, at X. Applicability of the BIT to existing investment generally is a subject outside the scope of this Article. Negotiations also strengthened the 1983 draft language requiring parties to "endeavor to maintain" a favorable environment for investment by rewording it to read "[e]ach Party undertakes to provide and maintain a favorable environment. . .", although the word "undertake" was not intended to have the same force as "guarantee" or "ensure." Similar language appears in the Panama, Zaire, and Bangladesh BITs. *See infra* notes 157, 171, and 178.

155. Panama BIT, *supra* note 2, at art. II(1)-(2).

156. *Id.* at art. II(1). The Morocco BIT has a similar exception to the right of MFN and national treatment with respect to the establishment of new investment only, not the treatment of investment generally. *See infra* text at notes 163-64.

157. Panama BIT, *supra* note 2, at art. II(1). In addition, the clause expressly authorizing the parties to impose restrictions on the right to engage in mining in the public domain on a reciprocal basis was deleted, but the BIT effectively retained its substance through language authorizing exceptions in existence when the BIT enters into force. The 1983 draft language requiring parties to "endeavor to maintain" a favorable environment for investment was strengthened by deletion of the words "endeavor to." Identical language appears in the Bangladesh BIT and similar language appears in the Egypt and Zaire BITs. *See supra* note 154, and *see infra* notes 171 and 178.

Cameroon

The treatment provision of the Cameroon BIT slightly rewords the 1983 draft language in several places, generally without substantive effect.[158] Paragraph 3 does contain one change of slight significance: the parties are not required to notify each other of existing exceptions to the national-treatment standard, only future ones.[159]

Morocco

The Morocco BIT contains one important change.[160] It omits the 1983 draft language authorizing new exceptions to the national-treatment standard.[161] Additional exceptions by either party thus are permissible only by Treaty amendment.[162]

Morocco also insisted on qualifying national treatment on entry of new investment because of ownership provisions contained in its 1983 investment law.[163] Therefore, in the treatment provision of the Morocco BIT, the right to national treatment regarding establishment of new investment exists only "within the framework of [each Party's] existing laws and regulations."[164] The effect of this qualification is to authorize any exception to national treatment with respect to establishment which is in place on the date of the treaty's entry into force. Any additional exceptions to national treatment with respect to the right of establishment would violate the BIT, unless the exception applied to one of the sectors listed in the Annex. This deviation from the draft

158. Cameroon BIT, *supra* note 3, at art. II(1)-(4). For example, the phrase "existing or new," which had modified "investments" in paragraph two, was used to modify that term in paragraph one as well. The phrase was added to make clear that the obligation to endeavor to maintain a favorable environment applied to both new and existing investments. As a result of the insertion, however, a literal reading of paragraph 1 indicates somewhat nonsensically that investors have a right to establish "existing" investment. However, because the right of establishment includes the right to acquire investment, a literal reading does contain some sense. Another nonsubstantive change was that the requirement that the parties "maintain at a minimum" the number of exceptions to national treatment in the sectors listed in the Annex was reworded to require that such exceptions be "limit[ed] as much as possible."

159. *Id.* at art. II(3).

160. Morocco BIT, *supra* note 4, at art. II(1)-(3).

161. *See* 1983 draft, *supra* note 76, at art. II(3).

162. Morocco BIT, *supra* note 4, at art. II. The same is true of the Turkey BIT. *See infra* note 198.

163. Letter of Submittal to the President from Secretary George P. Shultz (February 20, 1986), *reprinted in* Morocco BIT, *supra* note 4, at IX [hereinafter Morocco Submittal Letter].

164. *See* Morocco BIT, *supra* note 4, at art. II(1). In addition, these exceptions apply only to the right to national treatment with respect to establishment. Once an investment is established, the Morocco BIT, like the 1983 draft, requires the better of MFN or national treatment with respect to such investment. The Panama BIT has a similar exception which extends to the right of treatment generally and is not limited to the right of establishment. *See supra* note 157. The Turkey BIT has a similar exception which, like the Morocco BIT, is limited to the right of establishment but which, unlike either the Morocco or Panama BITs, includes both laws in existence when the BIT enters into force and subsequently enacted laws. *See infra* note 198.

language, however, does not represent a concession by the United States. All of the BITs allow the parties to specify sectors of the economy excepted from the obligation to provide national treatment.[165] The Morocco BIT merely specifies one set of exceptions by reference to a body of existing law.

The Morocco BIT moved the clause allowing parties to specify sectors of the economy excepted from the requirement of national treatment to paragraph 2 of the Protocol.[166] That clause lists the Moroccan exceptions to national treatment, omitting the 1983 draft language expressly providing that United States investors nevertheless retain the right to MFN treatment with respect to investment in such sectors.[167] The omission is unimportant, however, for the main text explicitly grants MFN treatment.[168] Paragraph 2(a) of the Protocol also authorizes Morocco to exclude from its MFN obligation any advantage offered to nationals of a third country required by virtue of Morocco's membership in a common market, regional customs union, or free trade association.[169]

Paragraph 2(b) of the Protocol sets forth the sectors of the United States economy excepted from the obligation to provide national treatment. These include air transportation, banking, insurance, energy and power production, and ownership of real estate.[170] The language used is essentially the 1983 draft language and, therefore, includes the express requirement of MFN treatment in the excepted sectors (as well as language concerning real estate and mining rights).

The Morocco BIT contains no other significant deviations from the 1983 draft language, despite the numerous wording changes. The BIT

165. *See supra* notes 113-14 and accompanying text.

166. Morocco BIT, *supra* note 4, at Protocol, para. 2.

167. Morocco BIT, *supra* note 4, at Protocol, para. 2(a).

168. The right to MFN treatment in the excepted sectors was made explicit in the 1983 draft because the 1983 draft had subordinated the general right to MFN treatment to paragraph 3 authorizing exceptions to the general obligation. In the case of the Morocco BIT, the Protocol reserves to Morocco the right to give certain preferences to its nationals, but without derogating from its general obligation to provide United States investors with MFN treatment. *Cf.* Turkey BIT, *supra* note 9, at Protocol para. 1(b), where the omission of this language effectively cuts off Turkey's obligation to provide MFN treatment in the exception sectors. *See infra* text at note 194.

169. Morocco BIT, *supra* note 4, at Protocol para. 2(a). Similar language also appears in the Egypt, Bangladesh, and Haiti BITs. *See supra* note 147 and *infra* notes 181, 185. The Morocco Submittal Letter appears to be in error on this point. It states that "[a]lso exempt from the national treatment requirement are advantages extended to other countries by virtue of membership in a common market, regional customs union, or free trade association." Morocco Submittal Letter, *supra* note 163, at X. The text of the Morocco provision, however, states that "the Kingdom of Morocco reserves the right to . . . extend to nationals or companies of a third country advantages required by virtue of its participation or association with a common market, regional customs union, or free trade area." Morocco BIT, *supra* note 4, at Protocol para. 2(a)(ii). By its terms, this would seem to derogate only from the right to MFN treatment, leaving the right to national treatment intact. Thus, it would seem that the right to MFN treatment, not national treatment, is what is qualified.

170. Morocco BIT, *supra* note 4, at Protocol para. 2(b).

omits the clause requiring treatment of investment according to a party's own laws, which the 1984 draft also omits. The negotiators also omitted the language requiring parties to endeavor to maintain a favorable environment for investment.

Zaire

The treatment provision of the Zaire BIT provides that each party shall "undertake," rather than merely "endeavor," to maintain a favorable environment for investments by nationals of the other party, a strengthening of the provision.[171] The Zaire BIT then adds the qualifier that this favorable environment is "under its laws, regulations, and administrative practices and procedures."[172] This qualifying language presumably makes explicit that, although the parties shall undertake to maintain a favorable legal environment, they have no specific obligation respecting the economic, social, or cultural environment.

One change to the treatment provision of the Zaire BIT is intriguing. The 1983 draft required national and MFN treatment of new and existing investment "in like situations."[173] An early 1982 draft, however, lacked the phrase "in like situations" with respect to the right to establish new investments, but included it with respect to the treatment of investment once established, a pattern followed in the Egypt BIT.[174] The Zaire BIT reverses this pattern, omitting the phrase from the paragraph dealing with the treatment of existing investments, while retaining it in the earlier section dealing with the right of establishment.[175]

Another notable change was the narrowing of the 1983 draft's requirement that the parties notify each other of all exceptions to national treatment existing at the time the Treaty enters into force. The language was limited to refer only to exceptions "of which [the Party] is aware,"[176] probably to accommodate Zaire's concern that it not be charged with a treaty violation for any exceptions resulting from having failed to notify the United States at the time the treaty entered into

171. *See* Zaire BIT, *supra* note 5, at art. II(1). Similar strengthening language also appears in the Egypt, Panama, and Bangladesh BITs. *See supra* notes 154, 157 and *infra* note 178. The Morocco BIT, however, omits the sentence altogether.

172. Zaire BIT, *supra* note 5, at art. II(1). The earlier 1982 model texts used similar language in the same location. The language was deleted from the 1983 draft. *See supra* note 154 and accompanying text. *Cf.* similar language in the Egypt and Bangladesh BITs, described *supra* note 154 and *infra* note 179, respectively.

173. *See* 1983 draft, *supra* note 76, at art. II(1)-(2).

174. *See supra* text at note 152.

175. *See* text following note 152, suggesting that omission of the term "in like situations" arguably strengthens the provision. The Zaire BIT also deleted the word "full" from the clause requiring that investment of nationals and companies of either party enjoy "full protection and security." The change is cosmetic, however, since the most constant protection and security of foreign investment was required by international law. *Treaty Protection of Foreign Investment*, 84 DEP'T ST. BULL. 62 (1984) [hereinafter *Treaty Protection*]. The next sentence of the Zaire BIT requires that covered investment be afforded treatment no less than that required by international law.

176. Zaire BIT, *supra* note 5, at art. 2(a).

force. The parties, of course, are obligated to notify each other of existing exceptions of which they later become aware.

Bangladesh

The Bangladesh BIT somewhat strengthens the opening language of the treatment provision's[177] first paragraph. The BIT stipulates that each party "shall maintain" favorable conditions for investment by nationals and companies of the other, rather than the more hortatory "endeavor to maintain" language used in the 1983 draft.[178]

The Bangladesh BIT moved the second paragraph of the treatment article to the Protocol and amended it slightly. The clause requiring each party to accord national and MFN treatment to investment of the nationals of the other party was amended to read "shall accord, under its laws and regulations," national and MFN treatment to such investment.[179] To ensure that this change did not weaken the MFN requirement, the negotiators inserted a new sentence providing that the "[a]pplication of laws and regulations shall not impair the substance of the rights guaranteed by this treaty."[180] Finally, a further clause in the Protocol excludes from the MFN obligation in article II(2) any advantages accorded to nationals of a third country by virtue of a party's binding obligations derived from membership in a regional customs union or free trade area.[181]

Haiti

The treatment provision of the Haiti BIT contains one significant derogation from the 1983 draft language. It omits the requirement that each party observe any obligations into which it has already entered with respect to investments.[182] The practical consequences of the omission should be limited, however, because the Haiti BIT still grants investors the right to third-party arbitration of disputes involving breaches of investment agreements.[183] Thus, investment agreements are enforceable under the BIT, notwithstanding the omission of this language. The

177. Bangladesh BIT, *supra* note 6, at art. II(1)-(3).

178. *Id.* at art. II(1). Identical language appears in the Panama BIT, *see supra* note 157. Similar language appears in the Egypt BIT, *see supra* note 154, and Zaire BIT, *see supra* note 171.

179. Bangladesh BIT, *supra* note 6, at art. II(1); *cf.* Egypt and Zaire BITs, discussed in the text at notes 153 and 173, *supra*.

180. Bangladesh BIT, *supra* note 6, at Protocol para. 1. The insertion of this sentence is an excellent illustration of the overabundant caution United States negotiators exercised at various points. As discussed *supra* at note 172, the phrase this sentence qualifies was contained in an earlier United States draft (albeit in paragraph 1 rather than paragraph 2 of the treatment provision) and generally was not regarded by United States negotiators as prejudicial to United States investor interests.

181. Bangladesh BIT, *supra* note 6, at Protocol para. 2. Comparable language also appears in the Egypt, Haiti, and Morocco BITs. *See supra* notes 148 and 169 and *infra* note 186.

182. Haiti BIT, *supra* note 7, at art. II(1)-(4).

183. *Id.* at art. VII(2).

chief consequence of its omission may be that breach of an investment agreement will not necessarily constitute a breach of the BIT, and thus the breaching country would not be answerable through the state-to-state disputes clause.

Two other changes are worth noting. First, the Haiti BIT contains language providing that neither party is required, except as otherwise provided in the Treaty, to provide treatment more favorable than MFN or national treatment to investments of the other party's nationals.[184] That assertion seems to make explicit what was already implicit in the Treaty. Second, another clause provides that the MFN treatment requirement for investments in sectors set forth in the Annex would not apply to advantages accorded to nationals of a third country by virtue of a party's obligations to a regional customs union.[185]

Senegal

The Senegal BIT's treatment provision slightly rewords the first two paragraphs of the 1983 draft, omitting the unnecessary phrase "whichever is most favorable."[186] The sentence permitting either party to require that rights to engage in mining on the public domain be conditioned on reciprocity was broadened to "mining activities,"[187] a phrase intended to embrace any initial transformation of the mined product. Finally, in the clause requiring parties to observe any investment commitment, "commitment" was replaced by "engagement" in order to meet a Senegalese assertion that the modified text would be more clear in French.[188]

Turkey

The treatment provision of the Turkey BIT is both narrower and broader than that in the 1984 draft.[189] It narrows the draft in two ways. First, the right to national treatment with respect to establishment exists only "within the framework of its laws and regulations," effectively subordinating that right to local law.[190] This concession is of limited

184. *Id.* at art. II(11).

185. *Id.* at art. II(12). Similar language also appears in the Egypt, Bangladesh, and Morocco BITs.

186. Senegal BIT, *supra* note 8, at art. II(1)-(4). The BIT requires parties to afford both MFN and national treatment to covered investments. Thus, the requirement that the more favorable be afforded is implicit. The omitted phrase was intended to clarify the intention of the paragraph, but it is in fact another example of BIT redundancy.

187. *Id.* at art. II(3)(a).

188. *Id.* at art. II(4).

189. Turkey BIT, *supra* note 9, at art. II(1)-(3).

190. *Id.* at art. II(1). The President's Message to the Senate asserts that this language also was used in the Morocco BIT. *See* Letter from Secretary of State George P. Shultz to President Ronald Reagan (Feb. 19, 1986), *reprinted in* Turkey BIT, *supra* note 9 [hereinafter Turkey Submittal Letter]. The Morocco BIT language, however, is "within the framework of *existing* laws and regulations," a much narrower exception (emphasis added). *See supra* notes 163-64 and accompanying text.

importance since all of the BITs allow the parties to exclude sectors from national treatment with respect to establishment, subject to a promise to maintain such sectors to a minimum.[191] Second, negotiators moved to the Protocol the 1984 draft's language permitting discrimination in certain sectors[192] and omitted the express language reserving to United States investors the right to MFN treatment.[193] Unlike a similar change in the Morocco BIT, this change represents a substantive concession.[194]

The Turkey BIT broadened the 1984 draft's treatment provision by omitting the language authorizing the parties to add new sectors to those excluded from national treatment.[195] Thus, any new restrictions on existing investment would require an amendment to the Treaty.[196] Because of the first limitation on the right of national treatment,[197] however, Turkey may impose new restrictions on the right of establishment merely by enacting new local laws, as long as those laws do not derogate from the general right of United States investors to MFN treatment.[198]

Grenada

The treatment provision of the Grenada BIT is identical to that of the 1984 draft.[199]

191. *See* 1983 draft, *supra* note 76, at art. II(3)(a); 1984 draft, *supra* note 78, at art. II(1).

192. Turkey BIT, *supra* note 9, at Protocol para. 1.

193. *Id.* at Protocol para. 1(b).

194. The President's Message to the Senate reporting on this provision states, apparently in error, that the Turkey BIT "permits limited exceptions to the national treatment standard on an MFN basis for specified economic sectors and activities." Turkey Submittal Letter, *supra* note 190, at IX. The language of the Protocol states that "Turkey reserves the right to limit the extent to which nationals or companies of the United States or their investments may establish, acquire interests in, or carry on investment within Turkish territory [in certain listed sectors]. Turkey BIT, *supra* note 9, at Protocol para. 1(a). The reservation of right clearly is broad enough to permit derogation from the right to both MFN and national treatment. For a discussion of the comparable provision in the Morocco BIT, which does not permit derogations to United States investors' MFN rights, see *supra* text accompanying note 168. The Turkey BIT retained the standard 1984 draft language excluding mining and ownership of real estate from the MFN obligation with respect to the United States but not Turkey. Turkey BIT, *supra* note 9, at Protocol para. 2(a).

195. Hence, the Turkey BIT also omits the language requiring the parties to notify each other of future exceptions and stipulating that future exceptions shall not apply to existing investments.

196. Turkey BIT, *supra* note 9, at art. II. Future exceptions are permissible only by amendment in the Morocco BIT as well. *See supra* text accompanying note 162.

197. *See supra* text accompanying note 190.

198. The Submittal Letter notes that no future changes to the exceptions list are possible without an amendment to the Treaty. Turkey Submittal Letter, *supra* note 190, at X. This conclusion is somewhat misleading because Turkey can derogate from the right of United States investors to national treatment by changing local law.

199. Grenada BIT, *supra* note 10, at art. II(1)-(2).

B. Compensation for Expropriation

The BIT, like the modern FCN series, incorporates the traditional United States view of international law, requiring "prompt, adequate, and effective compensation" for expropriated property. Secretary of State Cordell Hull first articulated this standard on behalf of the United States in a 1938 note to the Government of Mexico.[200] The United States believed this standard to be in accordance with a rule established by several earlier international arbitral and judicial decisions,[201] as well as long-standing United States policy.[202]

Other states, principally those of western Europe, were quick to embrace Secretary Hull's formulation.[203] Mexico, however, responded by denying its obligation to pay prompt, adequate, and effective compensation,[204] a position adopted by other Latin American and third-world countries in the post-war period.[205]

The developed nations have responded to the disagreement over the customary international law of compensation for expropriation by seeking to establish their version of the rule as customary state practice through bilateral treaties with third-world nations. As of 1982, the State Department had identified more than a hundred bilateral treaties incorporating the developed nations' view.[206]

200. The relevant portion of the note stated that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment." Note of Aug. 22, 1938, *reprinted in* III G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942).

201. Chorzow Factory (Ger. V. Pol.), 1928 P.C.I.J. (ser. A) No. 17; Lena Goldfields, Ltd. (1930) (unpublished opinion), *discussed in* 36 CORNELL L.Q. 42 (1950); Shufeldt Case (U.S. v. Guat.), 2 R. Int'l Arb. Awards 1080 (1929); Norwegian Shipowners Claim (Nor. v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); Cape Horn Pigeon Case (U.S. v. Russia), 9 R. Int'l Arb. Awards 63 (1902). The prompt, adequate, and effective standard as now interpreted by the United States would seem to require more than these earlier cases. For early policy statements on the standard, see note 202 *infra*.

202. Thus, for example, in 1922, Secretary of State Hughes advised the United States Minister in China that the United States recognized China's right to take United States nationals' property in China subject to payment of "just compensation." *See* III G. HACKWORTH, *supra* note 200, at 654. This was the formulation used in the FCNs of that era. *See supra* text following notes 39-43. Two years later, Secretary Hughes notified the United States embassy in Bucharest that Romania could nationalize United States nationals' property subject to payment of "adequate compensation." *See* V G. HACKWORTH, *supra* note 200, at 702-05. Indeed, as early as 1794, the United States had agreed in the Jay Treaty that it would make "full and complete compensation" to British nationals for debts that the United States had prevented them from collecting. *See* Treaty of Amity, Commerce and Navigation, United States-Great Britain, Nov. 19, 1794, at art. V, 8 Stat. 116, T.S. No. 105, at 593. The nineteenth century FCNs used the formulation "equitable and sufficient compensation."

203. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 519 (3d ed. 1979).

204. *See* III G. HACKWORTH, *supra* note 200, at 655-65.

205. *See generally Dolzer*, *supra* note 70, for objections to the prompt, adequate, and effective standard.

206. *See* Brief for the United States as *Amicus Curiae*, Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (No. 82-1521).

Although the requirement of prompt, adequate, and effective compensation is a cornerstone of U.S. foreign investment policy, the United States view in recent years recognizes an expropriation as lawful only if it is for a public purpose, nondiscriminatory, and in accordance with due process of law.[207] The BIT's expropriation provision imposes these four requirements and one further condition on all takings of covered investment and thus is the most comprehensive and detailed statement of the United States view of the international law of expropriation ever included in a United States bilateral treaty.

The BIT sets out the parties' obligations with respect to expropriation or nationalization in article III of both the 1983 and the 1984 drafts.[208] The BITs apply to both individual acts of expropriation as well as expropriations that form part of a broad restructuring of the

207. The modern FCNs did not expressly refer to all of these additional requirements, but includes them implicitly by requiring that investment be treated in accordance with international law. *See, e.g.*, Israel FCN, *supra* note 53, at art. VI(3); Netherlands FCN, *supra* note 60, at art. VI(4); Pakistan FCN, *supra* note 60, at art. VI(4); Luxembourg FCN, *supra* note 53, at art. IV(3); Japan FCN, *supra* note 60, at art. VI(3); Muscat and Oman FCN, *supra* note 60, at art. IV(2); Greece FCN, *supra* note 60, at art. VII(3); Belgium FCN, *supra* note 60, at art. IV(3). *See also supra* notes 103-06. They expressed the requirement of prompt, adequate, and effective compensation generally in the equivalent formulation of "prompt payment of just compensation . . . in an effectively realizable form." *See infra* note 260.

208. Article III(1) of the 1983 draft [hereinafter the 1983 draft expropriation provision] provides:

> No investment or any part of an investment of a national or company of a national of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment of deprivation of its management, control or economic value), all such actions hereinafter referred to as "expropriation," unless the expropriation:
>
> (a) is done for a public purpose;
>
> (b) is accomplished under due process of law;
>
> (c) is not discriminatory;
>
> (d) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation; and
>
> (e) is accompanied by prompt, adequate and effective compensation.
>
> Compensation shall be equivalent to the fair market value of the expropriated investment. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall be paid without delay, shall be effectively realizable, shall bear current interest from the date of expropriation at a rate equivalent to current international rates, and shall be freely transferable at the prevailing market rate of exchange on the date of expropriation.

1983 draft, *supra* note 76, at art. III(1). The 1983 draft contained two additional paragraphs not discussed herein for reasons of space.

The final paragraph of the expropriation provision spelled out in detail certain elements which the United States regards as implicit in the general standard of prompt, adequate, and effective compensation. *See infra* text accompanying notes 223-32. The length and obvipus redundancy can be attributed to the drafters' desire to cover every contingency, close every loophole, and remove every ambiguity.

economy or some sector thereof, such as where a government expropriates all oil companies or all banks. Article II governs those interferences with property insufficient to amount to a taking.[209]

Article III also applies to indirect expropriation, "creeping expropriation," and partial expropriation. Article III defines indirect expropriation as including, but not limited to, the levying of taxation,[210] compulsory sales, or impairments of the management, control, or economic value of a company.[211] The test is whether the host state's actions have an effect tantamount to an expropriation.[212] A creeping expropriation generally is one that a government effects through a series of measures, each of which may be no more than an interference with the property but which, taken together, amount to an expropriation. A partial expropriation is a taking of part of the property.

The BIT implicitly recognizes that expropriation is lawful, provided that it meets the five requirements.[213] First, the expropriation must be for a public purpose.[214] "Public purpose" is a broadly-construed term,[215] but the intention is to prohibit expropriations that merely

Article III(1) of the 1984 draft [hereinafter the 1984 draft treatment provision] contained a much shorter version than the 1983 draft, but provided the same protection as its counterpart in the 1983 draft:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be made without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

Article III of the 1984 draft also contained two additional paragraphs that for reasons of space will not be further considered.

While the BITs do not define the terms "nationalization" and "expropriation," they should be regarded for BIT purposes as synonymous with each other and with the frequently used term "taking." A taking in the international legal context has been defined as "[c]onduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, . . . even though the state does not deprive him of his entire legal interest in the property." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (1965). *See generally* Christie, *What Constitutes A Taking of Property Under International Law?*, 1962 BRIT. Y.B. INT'L L. 307. This Article uses the terms "expropriation," "nationalization" and "taking" interchangeably.

209. *See supra* note 126.

210. *See, e.g.*, Corn Products Refining Co., 1955 I.L.R. 333-34, in which the United States Foreign Claims Settlement Commission found that excessive taxation could amount to an expropriation.

211. *See* 1983 draft, *supra* note 76, at art. III.

212. *Id.*

213. *Id.*

214. *Id.*

215. "[T]here is little authority in international law establishing any useful criteria by which a state's own determination of public purpose can be questioned." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 185

transfer property from one private party to another or which are carried out as a political reprisal.

Second, the expropriation must be accomplished through due process of law.[216] This means that the expropriation must be in keeping with the laws of the expropriating state and the minimum standard of international due process. The international standard would seem to include a requirement of non-arbitrariness and of the availability of judicial review.[217]

Third, the expropriation may not be discriminatory.[218] That is, the expropriation may not harm one or more investors solely on the basis of nationality or some arbitrary basis. The national and MFN treatment clauses of the treatment provision independently require that United States investors not be treated in a discriminatory manner with respect to nationality,[219] and the treatment provision also prohibits arbitrary and discriminatory treatment.[220]

Fourth, the 1983 draft explicitly provides that the expropriation may not "violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation."[221] This clause prohibits a government from repudiating an investment agreement as part of the act of expropriation. The 1984 draft replaced this explicit provision with a cross-reference to the general requirement in article II(2) of the 1984 draft that "each Party . . . observe any obligation it may have entered into with regard to investments."[222]

Fifth, the appropriation must be accompanied by prompt, adequate, and effective compensation.[223] As commonly understood, prompt payment means payment within a reasonable time, *i.e.*, as soon as necessary formalities can be completed.[224] The phrase contemplates that the expropriating government, at the time of taking, should have the ability

comment b (1965). *See generally* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1036-62 (1967).

216. 1983 draft, *supra* note 76, at art. III.

217. Article III(3) of the model BIT imposes an independent requirement that expropriations be subject to judicial review. *See supra* note 90.

218. 1983 draft, *supra* note 76, at art. III.

219. *See supra* text accompanying notes 119-36.

220. *See supra* text accompanying note 133.

221. 1983 draft, *supra* note 76, at art. III.

222. 1984 draft, *supra* note 78, at art. III.

223. 1983 draft, *supra* note 76, at art. III. For the United States Government's view of the meaning of prompt, adequate and effective compensation, see Department of State GIST, July 1978, *excerpted in* 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1226-27; Address of Richard Smith, Director of the Office of Investment Affairs, Department of State, at Vanderbilt University (Apr. 9, 1976), *excerpted in* 1976 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 443-44 [hereinafter 1976 DIGEST]; M. WHITEMAN, *supra* note 215, at 1143-86.

224. *See* 1983 draft, *supra* note 76, at art. III. Elsewhere in the expropriation provision, both the 1983 and the 1984 drafts require payment of compensation "without delay." *See supra* note 208.

to pay for the expropriated property and that actual payment is but a matter of formality to be effected expeditiously.

Adequate compensation means payment of the fair market value of the property as of the date of expropriation,[225] including interest from the date of expropriation until the date of payment.[226] The calculation of fair market value should disregard any reduction in value caused by the expropriating government's actions in carrying out the expropriation or by public knowledge of the expropriation.[227] Fair market value may be measured in any of several ways, depending upon the circumstances. In the case of an operating commercial enterprise, for example, the fair market value of the enterprise generally is regarded as its value as a "going concern."[228] Fair market value reflects the price that a willing seller and a willing buyer would have reached in a sale of the investment. Where a market does not exist for the asset, parties must derive a hypothetical fair market value through indirect means.[229] In practice,

225. The BIT explicitly requires payment of fair market value. *See supra* note 208. In addition, the United States regards fair market value as implicit in the prompt, adequate and effective formulation. *See generally Treaty Protection*, *supra* note 175.

226. The BIT explicitly requires payment of interest from the date of expropriation. The 1983 draft specified a rate "equivalent to current international rates." *See* 1983 draft, *supra* note 76, at art. III. The 1984 draft called for "a commercially reasonable rate." *See* 1984 draft, *supra* note 78, at art. III. The United States Government regards the requirement of interest as implicit in the standard of prompt, adequate and effective compensation. *See* Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 at 47; Norwegian Shipowners (Nor. v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); OECD Draft Convention on the Protection of Foreign Property [hereinafter OECD Convention], at art. 3, *reprinted in* 7 I.L.M. 117 (1968); *Treaty Protection*, *supra* note 175, at 67 n.52; 8 M. WHITEMAN, *supra* note 215, at 1186-92.

227. In essence, the property is valued as if the expropriation had not occurred. This is to prevent the expropriating government from driving down the value of a company prior to expropriating it so that it can thereby reduce its compensation to the owner. This requirement is explicit in both the 1983 and 1984 drafts, and is regarded by the United States Government as implicit in the requirement of prompt, adequate, and effective compensation. The former provides that the "calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action." 1983 draft, *supra* note 76, at art. III. The 1984 draft uses the equivalent formulation that compensation be calculated as of the time "immediately before the expropriatory action was taken or became known." 1984 draft, *supra* note 78, at art. III. This element is discussed extensively in *Treaty Protection*, *supra* note 175. Authorities relied upon by the United States Government include Lighthouse Arbitration, (France v. Greece), 23 I.L.R. 299 (1956); Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17; Norwegian Shipowners, (Nor. v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); Mariposa Claim, 7 Ann. Dig. 255 (1933); OECD Convention *supra* note 226, at art. 3 comment 9(a); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 comment b (1965).

228. *See Treaty Protection*, *supra* note 175, at 62; 1976 DIGEST, *supra* note 223, at 444 (address of Richard Smith describing the going-concern, replacement cost, and book-value approaches).

229. One such method is the discounted cash flow method, whereby the total amount of an enterprise's future net income is discounted by the time value of money and the probability that such income will in fact be received, to derive the present value of the asset's future income. Another method is to value an asset with refer-

the investor and the expropriating government rarely agree on the value of the investment, making it necessary to negotiate or arbitrate the issue. The BIT dispute provision, of course, specifies the procedure for resolving investor-state disputes.[230]

Finally, effective compensation is compensation paid in a freely-convertible currency at the prevailing market exchange rate calculated on the date of expropriation.[231] In other words, the investor must be able to repatriate the compensation payment without delay.[232]

Egypt

The expropriation provision of the Egypt BIT deviates from the 1983 model in minor ways without changing the rights involved.[233] A few changes simply make explicit that which the United States had regarded as implicit in the 1983 draft.[234]

ence to other comparable enterprises which have recently been assigned a fair market value. *See Treaty Protection*, *supra* note 175, at n.58.

230. 1983 draft, *supra* note 76, at art. III; 1984 draft, *supra* note 78, at art. III.

231. The 1983 draft explicitly requires that compensation be "effectively realizable . . . and . . . freely transferable at the prevailing market rate of exchange on the date of expropriation." 1983 draft, *supra* note 76, at art. III. The 1984 draft requires that compensation be "fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation." 1984 draft, *supra* note 78, at art. III. The United States Government regards these requirements as implicit in the requirement of prompt, adequate, and effective compensation. *See supra* note 223.

232. The transfers provision also establishes the right to transfer payments related to an investment. *See infra* text accompanying notes 303-06.

233. Egypt BIT, *supra* note 1, at art. III(1). One example is that the Egypt BIT omits the illustrative listing of government actions considered tantamount to expropriation (e.g., levying of taxation, compulsory sale, impairment of management). The general language, however, is broad enough to cover all these elements. The omission was requested by Egypt to avoid domestic political controversy, but with no intention of altering the substance of the provision. Second, the phrase "prompt, adequate and effective compensation" is replaced by "prompt and adequate compensation, freely realizable," a less commonly used but equivalent formulation. *See* Egypt Submittal Letter, *supra* note 145, at XIII. Third, the lengthy 1983 provision requiring that expropriation not violate any investment agreement's stabilization provision is replaced by the broader requirement that expropriation not violate any specific contractual engagement, the approach also used in the 1984 draft. *See supra* text accompanying note 221. Fourth, the provision that compensation be freely transferable at the "prevailing market rate of exchange" was modified to read "at the prevailing rate of exchange for current transactions." Egypt BIT, *supra* note 1, at art. III(1). Fifth, the phrase "effectively realizable" is rendered as "freely realizable," an equivalent formulation. *Id.* Finally, the Egypt BIT replaces the requirement that compensation bear interest at a rate equivalent to current international rates with the equivalent requirement that compensation "shall include payment for delay as may be considered appropriate under international law." *See* Egypt Submittal Letter, *supra* note 145, at XIII. The Morocco and Turkey BITs have a similar formulation. *See infra* notes 263-64, 286 and accompanying text.

234. For example, the Egypt BIT specifies that compensation be calculated as of the date of expropriation, a provision which the United States regards as implicit in the 1983 draft. *See* Egypt BIT, *supra* note 1, at art. III(1). *See also supra* text accompanying note 231. The 1984 draft was explicit: compensation is to be calculated as of a time "immediately before" the expropriation. 1984 draft, *supra* note 78, at art. III. That, in effect, is what the Egypt BIT means. The Morocco and Turkey BITs include

Paragraph nine to the Protocol clarifies that the phrase "events that constituted or resulted in the expropriatory action" refers to conduct attributable to the expropriating party and not to conduct of the national or company.[235] That paragraph further stipulates that the inclusion of article III(1)(e), requiring that expropriation not violate any contractual provision, is without prejudice to the measure of compensation due in the event of expropriation.[236]

By an exchange of letters on March 11, 1985, the parties agreed that compensation in the event of expropriation "shall be determined in a manner consistent with international legal norms and standards rather than norms and standards that are particular to a specific domestic legal system."[237] Although Egypt requested this exchange of letters, they reflect the United States's intention in entering into the BIT.[238]

Panama

The Panama BIT expropriation provision makes minor modifications to

similar language. *See infra* text accompanying notes 262, 284. The principle is that compensation should not reflect any reduction in value caused by the expropriation or public announcement of it. *See supra* note 227. Similarly, the Egypt BIT expressly extends the prohibition on expropriation except under certain circumstances to include expropriations by political subdivisions of a party, language that makes express the implicit understanding of the United States. *See supra* text accompanying note 101. Also, the Protocol states that "the term 'prompt' does not necessarily mean instantaneous." Egypt BIT, *supra* note 1, at Protocol para. 8. The intent is that the party "diligently and expeditiously carry out any necessary formalities," *id.*, a formulation consistent with the United States view of the term. *See supra* text accompanying note 224; *see also* Egypt Submittal Letter, *supra* note 145, at XIII. The Senegal BIT has a similar provision. *See infra* note 282 and accompanying text.

235. Egypt BIT, *supra* note 1, at Protocol para. 9. Egypt was concerned that it would be required to compensate an investor for loss in the value of its investment caused by the investor's own outrageous conduct. The protocol language makes clear that each party is chargeable for losses in value only if caused by such party's own conduct.

236. *Id.* This clause was added at Egypt's request. Egypt was concerned that the requirement in article III(1)(e) that expropriation not violate any specific contractual engagement would, in the event of such expropriation, give rise to a claim by the investor for additional compensation for breach of the contractual obligation. The United States replied that any implication for damages would flow from the existence of a stabilization clause in the investor's contract with Egypt, not from the presence of article III(1)(e). Accordingly, the parties agreed to the protocol language specifying that article III(1)(e) is without prejudice to the measure of compensation in the event of an expropriation.

237. *See* Egypt Submittal Letter, *supra* note 145, at XIV.

238. This provision is implicit in the BIT requirement that treatment of investment conform to international law. Egypt BIT, *supra* note 1, at art. II(4). *See* Egypt Submittal Letter, *supra* note 145, at XIV. The exchange of letters resulted from Egypt's desire to preclude the use of the discounted cash flow method, described *supra* at note 229, which Egypt seemed to regard as peculiar to United States law. The United States contended that the discounted cash flow method is an established part of international law and accounting practice and must be available in an appropriate case to an arbitrator for valuing expropriated property. The exchange of letters accomplishes the result sought by the United States by providing that compensation be determined in accordance with international law.

the 1984 draft provision, but none affect its substance.[239] First, the drafters reworded the requirement that expropriations be for a public purpose to say "public or social purpose."[240] The public purpose clause was already sufficiently broad that the rewording cannot be regarded as effecting a substantive change.[241]

Second, the Panama provision states that compensation shall be the investment's "full value" instead of its "fair market value."[242] "Full value," of course, was the formulation used in the modern FCN treaty series and is synonymous with fair market value.[243] In any event, the Panama language retains the phrase "prompt, adequate, and effective,"[244] which establishes beyond doubt the requirement of fair market value.[245]

Third, the Panama BIT requires the payment of interest, but omits the requirement that it be paid from the date of expropriation.[246] This omission , however, is not substantive. The calculation of interest from the date of taking until the date of payment is standard practice under customary international law and, again, is implicit in the requirement of prompt, adequate, and effective compensation.[247]

Fourth, the Panama BIT omits as unnecessary the requirement that parties pay compensation at the prevailing market rate of exchange since Panama uses United States currency.[248]

Fifth, paragraph 4 of the Agreed Minutes adds the parties' understanding that, depending upon the circumstances, the estimate of full value can be made using several methods of calculation.[249] This idea long has been part of United States expropriation policy and is implicit in all of the BITs.[250]

Finally, the Panama BIT provides that compensation shall be computed as of the date immediately before the expropriatory actions "became known" in place of "became known or was taken."[251] The

239. Panama BIT, *supra* note 2, at art. IV(1).
240. *Id.*
241. *See supra* text accompanying note 215.
242. Panama BIT, *supra* note 2, at art. IV(1).
243. *See infra* note 260. *See generally Treaty Protection*, *supra* note 175 at 62. The Morocco BIT also uses the "full value" formulation. *See infra* note 261 and accompanying text.
244. Panama BIT, *supra* note 2, at art. IV(1).
245. Panama Submittal Letter, *supra* note 101, at X; *see also supra* text accompanying note 225.
246. Panama BIT, *supra* note 2, at art. IV(1).
247. *See supra* text accompanying note 226.
248. Panama Submittal Letter, *supra* note 101, at X.
249. Panama BIT, *supra* note 2, at art. IV(1).
250. Panama Submittal Letter, *supra* note 101, at X. *See also supra* text accompanying notes 228-29. The Haiti BIT has a similar provision. Haiti BIT, *supra* note 7, at art. III(1). *See infra* text accompanying note 274.
251. The Haiti BIT takes a similar approach. *See infra* text accompanying note 276. The Morocco BIT does not mention either announcement or occurrence of the expropriation. *See infra* text accompanying note 265. The requirement that both elements be disregarded is implicit in the prompt, adequate, and effective standard. *Id.*

change is insignificant since the knowledge of an expropriation is what affects a property's fair market value. A secret expropriation presumably would have no effect on fair market value.

Cameroon

The expropriation provision of the Cameroon BIT is based on the 1984 draft, which became available during the negotiations.[252] The negotiators made several modifications to the draft language without affecting its substance.[253] Under the Cameroon expropriation provision, parties value an investment "as of the date before the measures were taken, or, as the case may be, as of the day before the measures contemplated were made public,"[254] as opposed to the 1984 draft's conceptually indistinguishable standard, "immediately before the expropriatory action was taken or became known."[255] Parties calculate interest at "current international rates," the phrase used in the 1983 draft.[256] Parties also use "the rate of exchange generally used by the IMF on that date."[257]

Morocco

Negotiation of the Morocco BIT led to a complete redrafting of the expropriation provision, although the parties' obligations are no different from those set forth in the 1983 and 1984 drafts.[258] The negotiators

The Panama BIT's expropriation provision also incorporates by reference article II(2), instead of expressly requiring that expropriations not derogate from investment agreements. This is the 1984 draft's general approach. *See supra note* 208.
252. Cameroon BIT, *supra* note 3, at art. III(1).
253. *See* Unsigned Letter of Submittal from the Department of State to the President (May 6, 1986), *reprinted in*, Cameroon BIT, *supra* note 3, at IX [hereinafter Cameroon Submittal Letter]. For example, the reference to expropriations occurring "directly or indirectly through measures tantamount to expropriation" was shortened to read "directly or indirectly" without affecting the provision's meaning. *Id.* Similarly, the express prohibition on discriminatory expropriations was deleted, but the Cameroon provision requires that expropriations be in accordance with article II(4), which proscribes discriminatory measures and which requires that property be protected in accordance with international law. Customary international law, in turn, prohibits discriminatory expropriations. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 166 (1965) (general prohibition on discrimination). Also, the Cameroon BIT omits the phrase requiring that compensation be "fully realizable," but that requirement is embraced in the third component of the "prompt, adequate, and effective" formula which the BIT retains. *See supra* notes 223, 231 and accompanying text.
254. Cameroon BIT, *supra* note 3, at art. III(1).
255. Article III(1) of the 1984 draft.
256. *Id.*
257. The phrase "that date" refers to the date of expropriation. *See* Cameroon Submittal Letter, *supra* note 253, at IX. The Cameroon BIT transfers provision also specifies that parties use the IMF rate of exchange. *See infra* text accompanying note 331.
258. The Morocco BIT's expropriation provision read as follows:

Article III

1. Nationalization or expropriation measures, or any other public measure having the same effect or nature, which might be taken by either Party against investments of nationals or companies of the Party, shall be neither discriminatory nor taken for reasons other than a public purpose.

reworded the requirement of prompt, adequate, and effective compensation to require that an expropriating party "pay promptly just and effective compensation."[259] The term "just compensation" commonly appeared in the modern FCN treaty series and is widely understood to be synonymous with the United States's use of "adequate" compensation.[260] To remove any doubt, the Morocco BIT further provides that "compensation shall be equivalent to the full value of the expropriated investment on the date of expropriation."[261]

The Morocco BIT requires that parties value the investment on the

Any such measures shall only be taken under legal procedures which afford due process of law.

2. When such measures are taken, each Party shall pay promptly just and effective compensation to the nationals or companies of the other Party.
3. The compensation shall be equivalent to the full value of the expropriated investment on the date of expropriation.

Morocco BIT, *supra* note 4, at art. III(1)-(3). Two additional paragraphs of article III will not be considered here. Also relevant, however, is paragraph 4 of the Morocco BIT Protocol, which provides:

For purposes of Article III(3), the full value shall not be affected by prior notice or public announcement by the government of the expropriatory action. The compensation shall include, as appropriate, an amount to compensate for any delay in payment that may occur from the date of expropriation. Prompt transfer of the compensation at the rate of exchange used for commercial purposes shall be guaranteed in order to maintain the value of the compensation.

Id. at Protocol para. 4.

259. *Id.* at art. III(2).

260. Secretary Shultz, in his message transmitting the Morocco BIT from the State Department to the President, observed that

The Morocco treaty's "just . . . compensation" standard is derived from the language of our Treaties of Friendship, Commerce and Navigation (FCN). It has a clear meaning, built up through judicial decision, arbitral awards, and treaty practice, and has particular constitutional sanction in the United States inasmuch as it is the term employed in the Fifth Amendment. The treaty's "full value" standard for evaluating an investment is the same as in the treaty with Panama and is incorporated in the Hickenlooper Amendment (section 620(e) of the Foreign Assistance Act of 1961) and the International Claims Settlement Act. In our view, it provides the same protection as a "fair market value" standard.

Morocco Submittal Letter, *supra* note 163, at X; *see also Treaty Protection*, *supra* note 175, at 62.

For international authorities establishing the equivalence between "just compensation" and "fair market value," see Norwegian Shipowners (Nor. v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); OECD Draft Convention on the Protection of Foreign Property, at art. 3 comment 9(a), *reprinted in* 7 I.L.M. 117, 127 (1968); Sohn & Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, in RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 133, 203 (F. Garcia-Amador ed. 1974). For United States Supreme Court decisions holding that "just compensation" means "fair market value," see United States v. 564.54 Acres of Land, 441 U.S. 506 (1979); Almoto Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961); United States v. Miller, 317 U.S. 369 (1943); Olson v. United States, 292 U.S. 246 (1934).

261. Morocco BIT, *supra* note 4, at art. III(3). The Panama BIT also uses the "full value" formulation. *See supra* note 243.

date of, instead of immediately before, expropriation.[262] To accommodate Muslim sensitivities,[263] the Morocco BIT avoids reference to interest payments, but includes the functionally equivalent provision that "compensation shall include . . . an amount to compensate for any delay in payment that may occur from the date of expropriation."[264] This would seem to include an amount sufficient to compensate for any change in the exchange rate as well. Although the Morocco BIT fails to specify that compensation not reflect reductions in value caused either by public announcement of the expropriation or the events that constituted the expropriation, the requirement is implicit in the standard of prompt, adequate, and effective compensation.[265]

Finally, the free transferability requirement is implied in the requirement of "effective compensation."[266] More explicitly, paragraph 4 of the Protocol specifies that "[p]rompt transfer of the compensation at the rate of exchange used for commercial purposes shall be guaranteed in order to maintain the value of the compensation."[267]

Zaire

The expropriation provision of the Zaire BIT contains no modifications of any importance to the 1983 draft.[268]

Bangladesh

The expropriation provision of the Bangladesh BIT adopts the 1983 model language on expropriation with two minor changes.[269] First, the drafters modified the clause requiring that compensation be freely transferable by adding the phrase, "in accordance with the provisions of Article V," which is the transfers provision.[270] As explained below, the

262. The Egypt and Turkey BITs have a similar provision. *See supra* note 234 and *infra* note 285. This is not a substantive deviation from the 1984 draft. *See supra* note 234.

263. Morocco Submittal Letter, *supra* note 163, at X.

264. Morocco BIT, *supra* note 4, at Protocol para. 4. The Egypt and Turkey BITs use a similar approach. *See supra* note 233 and *infra* text accompanying note 286.

265. *See Treaty Protection*, *supra* note 175, at 63. *Compare* the Panama BIT, *supra* note 251 *with* the Haiti BIT, *infra* note 276, which omit only the first element, public knowledge of the expropriation.

266. Morocco BIT, *supra* note 4, at art. III(2).

267. *Id.* at Protocol para. 4. The Morocco BIT does not expressly state whether to apply the exchange rate in effect on the date of expropriation or the date of transfer. The general principle of just and effective compensation, preserving the full value of the investment on the date of expropriation, however, would require the use of the exchange rate on the date of expropriation. *See supra* text accompanying note 231.

268. Zaire BIT, *supra* note 5, at art. III(1). The parenthetical language following "measures, direct or indirect, tantamount to expropriation," for instance, was slightly reworded and moved to paragraph 5 of the Protocol. The requirement that compensation be paid without delay and be effectively realizable was reworded slightly and moved to paragraph 1(c) of the Protocol. The phrase "prompt, adequate, and effective compensation" is rendered as "prompt, adequate, and effectively realizable compensation."

269. Bangladesh BIT, *supra* note 6, at art. III(1).

270. *Id.*

transfers provision of the Bangladesh BIT requires free transferability[271] with certain exceptions applicable to sale or liquidation proceeds, but not to compensation for expropriation.[272] Second, the drafters changed the requirement that compensation be paid "without delay" to read "promptly," which conforms with the "prompt, adequate, and effective" formulation.

Haiti

The expropriation provision of the Haiti BIT contains three noticeable changes from the 1983 draft.[273] First, the Haiti BIT expressly provides that compensation shall be equivalent to the fair market value of the investment "as determined according to different methods of calculation as appropriate in each specific case."[274] This formulation is consistent with United States expropriation policy.[275]

Second, although the 1983 draft provided that compensation not reflect any reduction in the investment's fair market value due to prior knowledge of the expropriation or the events which constitute the expropriation, the Haiti BIT excludes only the first element from the compensation calculus.[276] As noted above, it may be impossible to distinguish between the two elements in practice, and thus the change may be of little practical significance.[277] Finally, the Haiti BIT provides that compensation shall be freely transferable at the "official market" rate of exchange, rather than the "prevailing market" rate.[278]

Senegal

The expropriation provision of the Senegal BIT follows the 1983 draft very closely,[279] although new language in the Protocol amplifies the

271. *See infra* text accompanying notes 359-64.

272. The express reference in the 1983 draft transfers provision to the free transferability of compensation for expropriation was deleted from the transfers provision of the Bangladesh BIT because such free transfer was guaranteed by article III. *See infra* text accompanying notes 363-64.

273. Haiti BIT, *supra* note 7, at art. III(1).

274. *Id.* The Panama BIT has a similar provision. *See supra* text accompanying note 249.

275. *See supra* text accompanying notes 228-29.

276. *See* Haiti BIT, *supra* note 7, at art. III(1). The Panama BIT takes a similar approach. *See supra* text accompanying note 251. The Morocco BIT omits the reference to both elements: occurrence and announcement of the expropriation. *See supra* text accompanying note 265.

277. *See supra* text accompanying note 251. During negotiations, Haiti supported the change on the ground that the prior events language was unnecessary for the Haiti situation. To the rejoinder that, if the language were not unnecessary Haiti should not object to its retention, Haiti replied that the Treaty was unique to Haiti. The point is that Haiti did not show any clear intent to modify the general standard, but only resisted blind application of boilerplate. Note that the standard of prompt, adequate and effective compensation requires that both the occurrence and the announcement of the expropriation be disregarded in calculating the value of expropriated property. *See Treaty Protection*, *supra* note 175, at 68.

278. Haiti BIT, *supra* note 7, at art. III(1).

279. Senegal BIT, *supra* note 8, at art. III(1).

1983 draft in two minor respects.[280] First, the Protocol defines the requirement that payment be made "without delay" to require that "adequate provision" be made prior to the date of expropriation for determination and payment of compensation, and that payment actually be made "within a period of time no longer than is necessary for the prompt completion of all necessary formalities."[281] Second, the expropriating government must pay interest at a "commercially reasonable rate," defined in case of an expropriation by Senegal as "the discount rate established by the Central Bank of West African States during the period between the expropriation and the payment of compensation. . . ."[282]

Turkey

The expropriation provision of the Turkey BIT contains only a few minor modifications to the 1984 draft, none affecting its substance.[283] First, compensation is to be calculated "at the time" of the expropriation rather than "immediately before."[284] The formulation is consistent with United States investment policy.[285]

Second, the Turkey BIT modifies the 1984 draft language requiring payment of interest and use of the market rate of exchange on the date of expropriation to read: "in the event that payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately on the date of expropriation."[286] Putting the investor in the same position it would have occupied but for the delay requires compensation for the time value of money as well as protection against the risk of adverse changes in the exchange rate.[287] The formulation used in the Turkey

280. *Id.* at Protocol para. 4.

281. *Id.* at Protocol para. 4. This is consistent with United States expropriation policy. *See* Egypt submittal Letter, *supra* note 145, at IX-X. *See also supra* text accompanying note 224. The Egypt BIT contains similar language. *See supra* note 235 and accompanying text.

282. Senegal BIT, *supra* note 8, at Protocol para. 4. "Commercially reasonable note" was the phrase used in the 1984 draft. *See supra* note 208. The 1983 draft had used the phrase "current international rates." *See id.*

283. Turkey BIT, *supra* note 9, at art. III(1)-(2).

284. *Id.*

285. The Egypt and Morocco BITs have similar language. *See supra* notes 234, 262. This language reflects a key concept of the expropriation provision, namely, that valuation of the investment should not reflect any events associated with the expropriation that are attributable to the expropriating government.

286. Turkey BIT, *supra* note 9, at art. III(1). The Egypt and Morocco BITs have a similar provision. *See supra* note 233 and *supra* text accompanying notes 263-64.

287. According to the Turkish negotiators, the Constitution of Turkey requires payment of interest in the event of expropriation in an amount sufficient, in their view, to cover the time value of money as well as exchange risk. They proposed that the constitutional rate be specified in the treaty. This was unacceptable to United States negotiators, who were concerned that the government rate would prove insufficient in many circumstances and who, in any event, were unwilling to incorporate Turkish law on this point into the BIT.

BIT was preferred by Turkey because it avoided the implication that any delay at all would occur, but was acceptable to the United States because it made clear that interest would be paid and exchange risk avoided where such delay did occur.

Grenada

The expropriation provision of the Grenada BIT is identical to that of the 1984 draft.[288]

C. Currency Transfers

Customary international law does not require that countries permit foreign investors to repatriate their earnings freely. Highly burdensome restrictions on transferability of funds may constitute an expropriation, which would give rise to a right of prompt, adequate, and effective compensation.[289] Nevertheless, investors can suffer considerable losses from currency restrictions that fall short of expropriation.

Conventional limitations were imposed on a State's freedom to restrict currency exchanges by the Articles of Agreement of the International Monetary Fund.[290] Article VIII(2) of the Agreement permits transfer restrictions for current (as opposed to capital) international transactions only with prior approval of the Fund, while article VIII(3) permits discriminatory currency arrangements or multiple currency practices only with such approval.[291] In recognition, however, of some members' balance of payments difficulties, especially in the period following the Second World War, article XIV permits members to elect certain "transitional arrangements" which except them from the operation of article VIII.[292] Such members may "maintain and adapt" the restrictions that were in force on the date they joined the Fund.[293]

The modern FCN treaty series sought to create independent, bilateral restrictions on states' prerogatives to impose exchange controls.[294] One FCN formulation permits a country to enact exchange restrictions only "to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves."[295] Another formulation permits such restrictions only "to the extent necessary to maintain or restore adequacy to its monetary reserves. . . ."[296]

288. Grenada BIT, *supra* note 10, at art. III(1).

289. 8 M. WHITEMAN, *supra* note 215, at 981-82 (1967); B. WORTELY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 107 (1977).

290. 60 Stat. 1401, 2 U.N.T.S. 39, T.I.A.S. No. 1501, *entered into force* Dec. 27, 1945, *as amended by* Bd. Governors Res. No. 23-5, 20 U.S.T. 2775, T.I.A.S. No. 6748; *amended effective* Apr. 1, 1978, by Bd. Governors Res. No. 31-4, 29 U.S.T. 2203, T.I.A.S. No. 8937. For a general discussion of the IMF Agreement, see K. DAM, THE RULES OF THE GAME (1982).

291. *Id.* at art. VIII(2), (3).

292. *Id.* at art. XIV.

293. Only a minority of IMF members have come under the article VIII structure; the majority are governed by article XIV. K. DAM, *supra* note 290, at 100-01.

294. The modern FCNs' provision on exchange controls generally was subordinate to the parties' obligations under the IMF agreement. *See infra* text accompanying note 300. To this extent, the FCN obligation was not an "independent" one.

Both formulations place further constraints upon transfer restrictions. Specifically, after assuring the availability of foreign exchange for goods and services essential to the health and welfare of its people, the party imposing the transfer restriction must make "reasonable provisions" for the withdrawal, in the currency of the other party, of compensation for expropriation earnings, or amounts for amortization of loans, depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions.[297] In addition, the treaty forbids parties to impose exchange controls that unnecessarily harm, or arbitrarily discriminate against, the investment of nationals and companies of the other party.[298] The modern FCNs further require parties to afford national and MFN treatment to such nationals and companies with respect to currency transfers.[299] Despite the foregoing, the modern FCNs do allow a party to impose IMF-authorized currency restrictions.[300]

Some of the modern FCNs omitted the absolute standards for exchange controls. These agreements, however, did provide for MFN and national treatment with respect to financial transactions,[301] coupled with an obligation to administer currency restrictions so as not to "influence disadvantageously the competitive position" of the other party's

295. *See, e.g.*, Greece FCN, *supra* note 60, at art. XV(2); Pakistan FCN, *supra* note 60, at art. XII(2); Japan FCN, *supra* note 60, at art. XII(2); Nicaragua FCN, *supra* note 60, at art. XII(2).

296. *See, e.g.*, Luxembourg FCN, *supra* note 53, at art. XI(2); Belgium FCN, *supra* note 60, at art. X(2); Netherlands FCN, *supra* note 60, at art. XII(2).

297. In the event that more than one rate were available, the rate applicable to the withdrawals described in the text would be a rate approved by the IMF. If there were no IMF-approved rate, the parties were to use an "effective rate" that was "just and reasonable." *See, e.g.*, Greece FCN, *supra* note 60, at art. XV(3); Pakistan FCN, *supra* note 60, at art. XII(3); Luxembourg FCN, *supra* note 53, at art. XI(3); Belgium FCN, *supra* note 60, at art. X(3); Netherlands FCN, *supra* note 60, at art. XII(3); Nicaragua FCN, *supra* note 60, at art. XII(3). The Belgium and Luxembourg FCNs required "provision to the fullest extent practicable in light of the level of the monetary reserves and it's balance of payments" rather than "reasonable provision."

298. *See, e.g.*, Greece FCN, *supra* note 60, at art. XV(4); Pakistan FCN, *supra* note 60, at art. XII(4); Japan FCN, *supra* note 60, at art. XII(4); Luxembourg FCN, *supra* note 53, at art. XI(4); Belgium FCN, *supra* note 60, at art. X(4); Netherlands FCN, *supra* note 60, at art. XII(4); Nicaragua FCN, *supra* note 60, at art. XII(4).

299. *See, e.g.*, Greece FCN, *supra* note 60, at art. XV(1); Pakistan FCN, *supra* note 60, at art. XII(1); Japan FCN, *supra* note 60, at art. XII(1); Luxembourg FCN, *supra* note 53, at art. XI(1); Belgium FCN, *supra* note 60, at art. X(1); Netherlands FCN, *supra* note 60, at art. XII(1); Nicaragua FCN, *supra* note 60, at art. XII(1).

300. *See, e.g.*, Greece FCN, *supra* note 60, at art. XV(2); Pakistan FCN, *supra* note 60, at art. XII(2); Japan FCN, *supra* note 60, at art. XII(2); Luxembourg FCN, *supra* note 53, at art. XI(2); Belgium FCN, *supra* note 60, at art. X(2); Netherlands FCN, *supra* note 60, at art. XII(2); Nicaragua FCN, *supra* note 60, at art. XII(2).

301. *See, e.g.*, Italy FCN, *supra* note 53, at art. XVII(2)-(3); Ireland FCN, *supra* note 53, at art. XVII(2)-(3). The Ireland FCN also included a requirement of "reasonable provision" for certain withdrawals. *See id.* at art. XVII(5).

investors.[302]

The transfers provision of the 1983 draft and the 1984 draft go considerably beyond the modern FCN agreements[303] by proscribing all

302. *See, e.g.*, Italy FCN, *supra* note 53, at art. XVII(4); Ireland FCN, *supra* note 53, at art. XVII(4).

303. Article V of the 1983 draft [hereinafter the 1983 draft transfers provision] provides:

ARTICLE V
TRANSFERS

1. Each Party shall permit all transfers related to an investment in its territory of a national or company of the other Party to be made freely and without delay into and out of its territory. Such transfers include the following: returns; compensation; payments made arising out of a dispute concerning an investment; payments made under a contract, including amortization of principal and accrued interest; payments made pursuant to a loan agreement; amounts to cover expenses relating to the management of the investment; royalties and other payments derived from licenses, franchises or other grants of rights from administrative or technical assistance agreements, including management fees; proceeds from the sale of all or any part of an investment and from the partial or complete liquidation of the company concerned, including any incremental value; additional contributions to capital necessary or appropriate for the maintenance or development of an investment.
2. To the extent that a national or company of either Party has not made another arrangement with the appropriate authorities of the other Party in whose territory the investment of such national or company is situated, currency transfers made pursuant to Paragraph 1 of this Article shall be permitted in a currency or currencies to be selected by such national or company. Except as provided in Article III, such transfers shall be made at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency or currencies to be transferred.
3. Notwithstanding the preceding paragraphs, either Party may maintain laws and regulations: (a) requiring reports or currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

1983 draft, *supra* note 76, at art. V.

Article IV of the 1984 draft [hereinafter the 1984 draft transfers provision] provides:

ARTICLE IV

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
2. Except as provided in Article III paragraph 1, transfers shall be made in a freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.
3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations: (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

exchange controls on payments related to investment. Specifically, these drafts require the parties to permit transfers related to an investment to be made freely and without delay.[304] The right to free transfers is essentially unqualified and includes transfers into and out of the host state.[305] The BIT contains a non-exclusive list of transfers that illustrate the meaning of the general phrase "transfers related to an investment."[306]

The 1983 draft transfers provision stipulates that foreign exchange shall be allowed in a currency selected by the investor at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the transferred currency or currencies, unless the host state and investor have otherwise agreed.[307] That is, consistent with the disputes provision,[308] the 1983 draft defers to alternative arrangements agreed to by the investor and the host state.

The 1984 draft's transfers provision provides more flexibility to the host state. It does not require that the host state allow the investor to select currencies, but requires only that the host country permit transfers in "a freely convertible currency."[309]

The transfers provisions of both drafts contain several exceptions to the general rule of free transferability.[310] Either party may require reports of currency transfers,[311] impose withholding taxes, and ensure

304. 1983 draft, *supra* note 76, at art. V(1); 1984 draft, *supra* note 78, at art. IV(1). The phrase "without delay" does not require instantaneous transfer but is intended to permit a reasonable time for the expeditious completion of formalities. The phrase is not strictly necessary, since the term "free transfer" contemplates transfer without unreasonable delay. The phrase illustrates again the BIT's tendency toward redundancy.

305. The host state's right to limit use of funds once they are in its territory is governed by the treatment provision. *See supra* notes 119, 126.

306. 1983 draft, *supra* note 76, at art. V(1); 1984 draft, *supra* note 78, at art. V(1). The list is to some extent redundant. For example, the first element, returns, is defined in article I(f) to include profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees, and payment in kind, a definition which overlaps certain of the other items on the list.

307. 1983 draft, *supra* note 76, at art. V(2). Note that, under the expropriation provision, the exchange rate for expropriation compensation is that prevailing on the date of expropriation, not transfer. *See supra* note 208.

308. *See infra* text accompanying notes 404-05.

309. 1984 draft, *supra* note 78, at art. IV(2).

310. *See* 1983 draft, *supra* note 76, at art. V(3); 1984 draft, *supra* note 78, at art. IV(3).

311. This exception for reporting requirements seems largely unnecessary given that the requirement of free transferability allows time for the expeditious completion of formalities. *See supra* note 304.

the satisfaction of judgments.[312]

Egypt

The President's Message to the Senate transmitting the Egypt BIT aptly describes the first significant deviation from the 1983 draft's transfers provision:

> The current model text specifically states that "transfers related to an investment" shall be made "freely and without delay into and out of its territory • • •," and lists examples of types of funds subject to free transfer. This treaty by contrast simply states that each Party "shall in respect to investments by nationals or companies of the other Party grant to those nationals or companies the free transfer of," enumerated specific types of funds subject to free transfer. The types of funds listed are identical in substance to those in the current model text except that two categories identified in the current model text are not explicitly listed in the Egypt text: additional funds for the development (not merely the maintenance of) an investment and compensation payments arising from an investment dispute other than an expropriation.[313]

The Egypt BIT requires that transfers covered by the transfers provision be permitted, not in a currency selected by the investor, as the 1983 draft required,[314] but in the currency of the original investment or in any other freely convertible currency,[315] except to the extent that the investor and host country agree otherwise. Such transfers will be made at the "prevailing rate of exchange" (as compared to the "prevailing market rate of exchange"[316]) with respect to "current" (as compared to "spot") transactions.[317]

Finally, the Egypt BIT[318] permits Egypt, when its foreign exchange reserves are at a very low level,[319] to delay temporarily transfers of sale

312. These exceptions were included to ensure that court-imposed restraints on property, such as liens or attachments, would not be regarded as illegal restrictions on currency transfers.

313. Egypt Submittal Letter, *supra* note 145, at XII. The Zaire BIT uses a similar approach. *See infra* text accompanying note 345.

314. 1983 draft, *supra* note 76, at art. V(2).

315. Egypt BIT, *supra* note 1, at art. V(2). The Cameroon BIT has a similar provision. *See infra* note 334.

316. Egypt BIT, *supra* note 1, at art. V(2). The Zaire BIT also deletes the term "market." *See infra* text accompanying note 346.

317. Egypt BIT, *supra* note 1, at art. V(2). The Egypt BIT omits the phrase which subordinates this clause to the expropriation provision. The omission is unimportant since, under the rule of *generalibis non derogant specialibis*, the expropriation provision governs the transferability of compensation for expropriation even without the subordinating clause. The same omission occurs in the Morocco, Zaire, and Turkey BITs. *See infra* note 336. Note, however, that in the case of the Zaire BIT, a special clause in the Protocol assures the primacy of the expropriation provision. *See infra* text accompanying note 356. *Cf.* the Bangladesh BIT, *infra* notes 363-64.

318. Egypt BIT, *supra* note 1, at Protocol para. 10. A similar clause also appears in the Zaire, Bangladesh, and Turkey BITs. *See infra* notes 319-23.

319. The term "very low level" originates with art. XII(2)(a)(i) and (ii) of the GATT which permits certain import restrictions "in the case of a contracting party with very low monetary reserves. . . ." GATT, *supra* note 45, at art. XII(2)(a)(ii). The modern FCN series contained a standard provision permitting exchange restrictions "necessary to prevent [a Party's] monetary reserves from falling to a very low level." *See supra* text accompanying note 295. The transfers provision of the Egypt BIT, unlike the FCN counterpart, does not allow restrictions to prevent reserves from falling to very low levels, but only to restore them once they have so fallen. The comparable provision of the Bangladesh BIT has the same language. *See infra* text accompanying note 361. The comparable provision of the Zaire BIT is triggered when Zaire's foreign exchange reserves "do not permit the transfer." *See infra* text accompanying note 353. The comparable provision of the Turkey BIT is triggered by "exceptional financial or economic circumstances relating to foreign exchange." *See infra* text accompanying note 370.

or liquidation proceeds. Egypt may do so, however, only if: (1) the delay is on an MFN basis;[320] (2) the delay is to the extent and for the time necessary to restore reserves to a minimally acceptable level,[321] but in no case for longer than the time permitted by Egypt's Law 43 as of the date the BIT was signed;[322] and (3) Egypt provides the investor an

320. The actual wording is "in a manner not less favorable than that accorded to comparable transfers to investors of third countries." Egypt BIT, *supra* note 1, at Protocol para. 10. The analogous clause of the Bangladesh BIT has the same language. *See infra* text following note 361. The analogous clause of the Zaire BIT is similar in substance, although it omits any reference to "comparable transactions," an arguable strengthening of the provision. *See infra* note 349 and accompanying text. *Cf.* text following note 152 *supra*. The analogous clause of the Turkey BIT provides that Turkey shall delay transfers by United States investors only in a manner consistent with article II, a more restrictive condition since article II also requires national treatment and imposes a set of absolute standards on treatment of investment. Turkey BIT, *supra* note 9, at Protocol para. 2(b). *See infra* text accompanying note 371.

321. Egypt BIT, *supra* note 1, at Protocol para. 10. The meaning of "minimally acceptable level" ultimately will have to be worked out on a case-by-case basis through the BIT's consultation and arbitration provisions. The counterpart clause of the Bangladesh BIT has the same language but adds an outer limit of five years, during each year of which Bangladesh must permit transfer of at least 20% of the delayed amount, *see infra* text accompanying note 362. The counterpart clause of the Turkey BIT also requires that transfers be permitted should reserves return to minimally acceptable levels, but adds an outer limit of three years. *See infra* text accompanying note 372. The Turkey BIT is slightly less restrictive than the Egypt and Bangladesh BITs in that it does not limit the scope of the restriction "to the extent" necessary to restore reserves to minimally acceptable levels. *Id.* The counterpart clause of the Zaire BIT allows Zaire three years to permit the transfer in full, regardless of the extent to which reserves improve during that time. *See infra* text accompanying note 353.

322. Under Article 21 of Law 43, an investor may not, except in "exceptional circumstances," repatriate or dispose of his invested capital in less than five years after the importation of the capital into Egypt. (Within the statutory five year period, he may transfer the capital out of the country "at the highest rate prevailing and declared for freely convertible foreign currency in five equal annual installments.").
Egypt Submittal Letter, *supra* note 145, at XIII. The comparable clause of the Bangladesh BIT also requires full transfer within five years, and during each year at least 20% of the proceeds' value must be transferred. *See infra* text accompanying note 362. The comparable clause of the Zaire BIT requires full transfer over a period not to exceed three years, during which Zaire must permit an unspecified amount of the transfer to occur. *See infra* text accompanying note 353. The Turkey BIT also allows a delay of three years and does not expressly require Turkey to permit any transfers during those three years unless reserves return to minimally acceptable levels. *See infra* text accompanying note 372.

opportunity to invest the delayed proceeds in a manner that will preserve their real value free of exchange risk.[325]

Panama

Panama uses United States currency.[324] The parties decided, therefore, that detailed guarantees with respect to transferability were unnecessary.[325] The transfers provision of the Panama BIT simply provides that "current and capital transactions shall remain unrestricted and that payments and other transfers with respect to such transactions shall continue to be free."[326] The Panama BIT incorporates the exceptions to the general free transfer requirement set forth in paragraph 3 of the 1983 draft with one change:[327] the exclusive right to maintain laws relating to the reporting of currency transactions was reserved by the United States but not Panama.[328]

Cameroon

The transfers provision of the Cameroon BIT contains only minor deviations from the 1983 draft.[329] First, the Cameroon BIT explicitly recognizes that the provision's illustrative list of transfers is not exhaustive.[330] Second, the Cameroon BIT provides that transfers shall be at the "prevailing rate of exchange used by the IMF" rather than at the "prevailing market rate of exchange . . . with respect to spot transactions."[331] Third, the Cameroon BIT provides that Cameroon shall permit transfers in the currency in which the investment was constituted, or, in the absence of that currency, any other freely convertible currency.[332] The United States shall permit transfers in any freely convertible currency.[333] This modification brings the Cameroon transfers provision closer to that of the 1984 draft.[334] Finally, the Cameroon BIT provides

323. Egypt BIT, *supra* note 1, at Protocol para. 10. The analogous clauses of the Zaire, Bangladesh, and Turkey BITs are similar, but omit the phrase "free of exchange risk." *See infra* text accompanying notes 354, 362, and 372. The requirement that transfers be permitted "free of exchange risk," however, is implicit in the preservation of the value of the investment, explicitly required by all three of those BITs, and thus the omitted phrase is unnecessary.

324. *See supra* text accompanying note 248.

325. *See* Panama Submittal Letter, *supra* note 101, at X.

326. Panama BIT, *supra* note 2, at art. VI.

327. Panama BIT, *supra* note 2 (Agreed Minute para. 5).

328. *Id.* This clause was limited to the United States to avoid giving the impression that Panama, well-known for its bank secrecy laws, might require any disclosure.

329. Cameroon BIT, *supra* note 3, at art. V.

330. *Id.* at art. V(1). The 1983 draft had said "[s]uch transfers include the following . . . ." 1983 draft, *supra* note 76, at art. V(1). The Cameroon BIT provides that "[s]uch transfers include, among others, the following . . . ." Cameroon BIT, *supra* note 3, at art. V(1).

331. Cameroon BIT, *supra* note 3, at art. V(2). The IMF rate also is to be used to convert compensation for expropriation. *See supra* text accompanying note 257.

332. Cameroon BIT, *supra* note 3, at art. V(2).

333. *Id.* at art. V(2)(a)

334. The 1983 draft permitted transfers in any currency selected by the investor. 1983 draft, *supra* note 76, at art. V(2). The 1984 draft was modified to require only

that, notwithstanding the other provisions of the transfers article, either party may maintain laws and regulations prescribing transfers procedures, provided that such procedures are carried out "expeditiously" and do not derogate from the transfers provision's other requirements.[335]

Morocco

Paragraph 1 of the Morocco BIT transfers provision provides only that: "Each party shall permit prompt transfers of the proceeds of an investment."[336] The free transfer right thus applies to "proceeds of an investment" rather than "transfers related to an investment,"[337] a change which arguably narrows the provision.

Paragraph 2 modified the language of the 1983 draft to require that transfers be permitted in a "convertible currency" rather than "a freely convertible currency," an unimportant distinction given the general requirement of promptness. The Morocco BIT further provides that

that transfers be permitted in "a freely convertible currency." 1984 draft, *supra* note 78, at art. V(2). The President's Message to the Senate on this point is potentially misleading. It states that, "if the free currency of the investor's choice is unavailable," transfers related to investment will be permitted in the currency in which the investment was constituted or any freely convertible currency. Cameroon Letter of Submittal, *supra* note 3, at X. In fact, the Cameroon BIT does not require Cameroon to permit transfers in the currency of the investor's choice, if available. Even where such currency is available, Cameroon may, consistent with the treaty, permit transfer instead in the currency in which the investment was originally constituted or in any freely convertible currency. Cameroon BIT, *supra* note 3, at art. V(2)(a). The Egypt BIT has a similar provision, although one which applies to Egypt and the United States equally. *See supra* text accompanying note 316.

335. Cameroon BIT, *supra* note 3, at art. V(3)(a). Similar clauses appear in the Zaire BIT, *supra* note 5, at article V(3)(a), the Senegal BIT, *supra* note 8, at article V(3)(a), and the Turkey BIT, *supra* note 9, at article IV(3)(a). The latter two clauses use the term "without delay" instead of "expeditiously." For the definition of "without delay" as used in the Turkey BIT, see *infra* text accompanying note 379. The Morocco BIT, at article IV(3)(c), contains analogous language. *See* Morocco BIT, *supra* note 4, at art. IV(3)(c) and text accompanying *infra* note 336.

336. Morocco BIT, *supra* note 4, at art. IV(1). The remainder of article IV provides:

> 2. To the extent that a national or company of either Party has not made anther [sic] arrangement with the appropriate authorities of the other Party in whose territory the investment of such national or company is situated, transfers made pursuant to this Article shall be permitted in a convertible currency. Such transfers shall be made at the prevailing rate of exchange used for commercial purposes on the date of transfer in the country from which such transfers are being made.
> 3. Notwithstanding the preceding paragraphs, either Party may maintain laws and regulations (a) requiring reports of currency transfer, (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers, and (c) prescribing or maintaining procedural formalities governing transfers related to investments. Furthermore, either Party may protect the rights of creditors or ensure the satisfaction of judgment in adjudicatory proceedings, through equitable, nondiscriminatory and good faith application of its laws.

Id. at art. IV(2)-(3).

337. 1983 draft, *supra* note 76, at art. V(1).

transfers "be made at the prevailing rate of exchange used for commercial purposes" rather than "at the prevailing market rate of exchange . . . with respect to spot transactions."[338] Paragraph 3 authorizes either party to prescribe or maintain "procedural formalities" with respect to transfers related to investments.[339]

The Protocol to the Morocco BIT qualifies the right of transfers in three ways not found in other BITs. First, United States investors must obtain the approval of the Moroccan government before making certain types of investments.[340] Otherwise, the proceeds from such investments will not be freely transferable.[341] Second, certain other investments may be made freely, but should be reported promptly to the Moroccan authority in charge of exchange controls.[342] Finally, transfers relating to an investment of a United States national resident in Morocco shall be carried out in accordance with existing Moroccan law.[343]

Zaire

The text of the Zaire BIT transfers provision follows the 1983 draft language with minor changes.[344] For example, the Zaire transfers provision guarantees "free transfer" rather than transfers "made freely and without delay" and applies only to certain enumerated transfers.[345] Transfers are to be made at the prevailing (as compared to the "prevailing market")[346] rate of exchange with respect to ordinary (as compared to "spot") transactions in the transferred currency.[347]

The Zaire BIT Protocol contains two substantial changes. First, it allows a delay in the application of the transfers provision for a period not to exceed three years, during which Zaire is permitted to impose exchange restrictions, subject to certain conditions.[348] These are: (1)

338. Morocco BIT, *supra* note 4, at art. V(2).

339. *Cf.* the analogous clauses in the Cameroon, Zaire, Senegal, and Turkey BITs, described *supra* at note 335 and accompanying text. *See supra* note 317 for an additional change in the Morocco BIT from the 1983 draft.

340. Morocco BIT, *supra* note 4, at Protocol para. 5.

341. *Id.*

342. *Id.*

343. *Id.* "Existing law" refers to that existing on the date the Treaty enters into force. Note that under article I(6) of the Morocco BIT, the term "nationals" refers only to natural persons. *Id.*

344. Zaire BIT, *supra* note 5, at art. V. Other deviations from the 1983 draft are described *supra* notes 317, 335.

345. Zaire BIT, *supra* note 5, at art. V(1). The Egypt BIT uses the same language. *See supra* text accompanying note 313.

346. Zaire BIT, *supra* note 5, at art. V(2). The Egypt BIT also deletes the word "market." *See supra* text accompanying note 316.

347. Zaire BIT, *supra* note 5, at art. V(2).

348. *Id.* at Protocol para. 1. According to the Protocol language, the three years commences with the date of ratification. The United States intended this to mean the date of entry into force and was to have sought clarification from Zaire on this point. *See* Letter of Submittal from Secretary of State George Shultz to President Ronald Reagan (Feb. 26, 1986), *reprinted in* Zaire BIT, *supra* note 5, at X. The United States apparently is interpreting this same term in the Panama BIT to mean the exchange of

United States nationals must receive national and MFN treatment with respect to all investment transfers;[349] (2) Zaire must make available to United States nationals "reasonable amounts of foreign exchange," defined as "no less than one-third of the amount of profits attributable to the investment since its establishment or acquisition that have not been previously transferred;"[350] (3) Zaire must guarantee United States nationals the opportunity to invest any unconverted currency in a manner that will preserve its value;[351] and (4) all transfers must be made at the market rate of exchange prevailing on the date the application for transfer is made.[352]

Second, even after the three-year period has elapsed, Zaire may allow the transfer of sale or liquidation proceeds over a period of three years if its foreign exchange reserves "do not permit the transfer,"[353] subject to two conditions: (1) Zaire must give United States nationals MFN treatment with respect to transfers; and (2) Zaire must ensure that United States nationals have an opportunity to invest the proceeds in a manner that will preserve their value.[354] United States negotiators expect Zaire to make a good-faith effort to permit meaningful transfers during each year of the three-year period, but agreed not to insist on a particular percentage.

Protocol paragraph 1 concludes with a special provision under which the two Governments "agree to consult at the request of either one of them concerning the implementation of article V and of this paragraph."[355] This provision, of course, is in addition to the consultation and dispute resolution measures set forth in treaty articles VI, VII, and VIII.

The Protocol further provides that nothing therein shall derogate from Zaire's obligation to permit compensation for expropriation to be

ratification which triggers entry into force 30 days later. *See* Panama BIT, *supra* note 2, at art. XIII(2). *See also* Panama Submittal Letter, *supra* note 101, at X.

349. Zaire BIT, *supra* note 5, at Protocol para. 1(a)i. The Zaire BIT transfers provision applies only to enumerated types of payments, not to all transfers related to an investment. The Protocol's requirement of MFN and national treatment during the interim period, however, applies to all transfers related to an investment, not just those enumerated. *Id.*

350. *Id.* at Protocol para. 1(a)(ii).

351. *Id.* at Protocol para. 1(a)(iii).

352. *Id.* at Protocol para. 1(a)(iv). Note that in the transfers provision, the rate of exchange is that prevailing on the date of *transfer*. The assumption in the main Treaty text is that transfer will occur shortly after application is made. Therefore, the exchange rate on the transfer date, which would vary little from the rate on the application date, is to be utilized. The investor bears the risk of any change in the rate that occurs during this short period. This paragraph of the Protocol applies only during a three-year period in which a delay in transfers is permissible. During this period, the exchange rate on the date of *application* is to be used and Zaire bears the risk of change in that rate during the delay between application and transfer.

353. Zaire BIT, *supra* note 5, at Protocol para. 1(b). The Egypt, Bangladesh, and Turkey BITs have similar clauses. For a comparison of these clauses, see *supra* notes 319-23.

354. Zaire BIT, *supra* note 5, at Protocol para. 1(b).

355. Zaire BIT, *supra* note 5, at Protocol para. 1(e).

"paid without delay in a form that is effectively realizable and freely and promptly transferable at the prevailing rate of exchange on the date of expropriation."[356] Thus, Zaire's obligation to pay prompt, adequate, and effective compensation for expropriated property remains absolute. If Zaire's foreign exchange reserves are insufficient to allow it to pay compensation for expropriation in a freely transferable currency, then it may not expropriate. Similarly, the Protocol provides that nothing therein shall relieve either party of its obligations under international law, its own national laws, or any investment agreement, authorization, or license.[357]

Finally, Zaire shall respect "to the extent possible" the investor's choice of currency, provided that such currency is available.[358] If not, then Zaire must permit the transfer in a freely convertible currency. This clause was a concession to the fact that not all currencies are available in Zaire.

Bangladesh

The Bangladesh BIT Protocol[359] permits Bangladesh temporarily to delay transfers of sales or liquidation proceeds[360] when its foreign exchange reserves are at "a very low level,"[361] provided (1) that such delays are imposed on an MFN basis; (2) that any delay is only to the extent and for the time period necessary to restore reserves to a minimally acceptable level but in no case for more than five years, during each year of which Bangladesh shall permit the investor to transfer no less than 20% of the value of the delayed proceeds;[362] and (3) that the investor may invest the proceeds in a manner that will preserve their value until transfer.

The Bangladesh BIT also contains one minor change from the 1983 draft in its transfers provision.[363] The negotiators deleted "compensation" from the illustrative list of transfers covered by that provision. This change reflects the fact that the free transferability of compensation for expropriation is provided for by the expropriation provision.[364]

356. *Id.* at Protocol para. 1(c). That is, the Protocol is a derogation only from Zaire's obligations under the transfers provision and does not authorize a derogation from its obligations under the expropriation provision.

357. *Id.*

358. *Id.* at Protocol para. 1(d).

359. Bangladesh BIT, *supra* note 6, at Protocol para. 4. The Egypt, Zaire, and Turkey BITs have similar clauses. For a comparison, see *supra* notes 319-23.

360. During negotiations, Bangladesh officials were particularly concerned with the effect that the liquidation of a substantial investment could have on the country's foreign exchange reserves. *See* Letter of Submittal from Under Secretary Michael Armacost to President Ronald Reagan (May 9, 1986) [hereinafter "Bangladesh Submittal Letter"] *reprinted in* Bangladesh BIT, *supra* note 6, at X.

361. For a discussion of this term, *see supra* note 319.

362. *See supra* note 321.

363. Bangladesh BIT, *supra* note 6, at art. V.

364. *Id.* at art. III(1). *See supra* discussion at note 317.

Haiti

The transfers provision of the Haiti BIT is identical to that of the 1983 draft.[365]

Senegal

The Senegal BIT transfers provision[366] generally follows the 1983 draft. An additional sentence, however, provides that transfer of liquidation proceeds shall be permitted "in any freely usable currency"[367] chosen by the host country, rather than in a currency selected by the investor. Thus, with respect to liquidation proceeds, the Senegal BIT follows the 1984 draft's more flexible approach.[368]

Turkey

The Turkey BIT contains language in the Protocol[369] that allows Turkey temporarily to delay the transfer of sale or liquidation proceeds "[i]n exceptional financial or economic circumstances"[370] relating to foreign exchange. Such delays are permissible, however, only (1) in a manner that is consistent with the treatment provision;[371] (2) for the time period necessary for Turkey to restore its foreign exchange reserves to "a minimally acceptable level but in no case more than three years";[372] and (3) if the investor has an opportunity to invest the proceeds in a manner which will preserve their value until the transfer occurs.

The transfers provision of the Turkey BIT[373] modifies the language of the 1984 draft in several non-substantive ways.[374] First, the negotiators deleted two items from the illustrative list of transfers covered by the transfers provision.[375] The scope of that provision was not affected, however, because the general phrase "all transfers related to an investment" was retained and the list, in any event, is only illustrative. The first deletion was of the phrase "payments made under a contract".[376]

365. Haiti BIT, *supra* note 7, at art. V.

366. Senegal BIT, *supra* note 8, at art. V.

367. *Id.* at art. V(2). "Freely usable currency" refers to a currency that may be freely exchanged for other currencies in the principal foreign exchange markets and is equivalent to the term "freely convertible currency" used in the 1984 draft.

368. A second change in the Senegal BIT is described *supra* note 335.

369. Turkey BIT, *supra* note 9, at Protocol para. 2(b). Similar clauses appear in the Egypt, Zaire, and Bangladesh BITs. For a comparison of these clauses, *see supra* notes 319-23.

370. The BIT does not further define this term. Like "minimally acceptable levels," *see supra* note 321, it will have to be defined on a case-by-case basis through the BIT's consultation and arbitration provisions.

371. Thus, for example, such delays must be on an MFN and national treatment basis and may not violate international law.

372. "Minimally acceptable levels" will need to be defined on a case-by-case basis. *See supra* note 321.

373. Turkey BIT, *supra* note 9, at art. IV.

374. One such modification is described *supra* text accompanying note 335. A second modification is described *supra* text accompanying note 317.

375. Turkey BIT, *supra* note 9, at art. IV(1).

376. 1984 draft, at art. IV(1)(d). *See supra* note 303.

This deletion was to satisfy Turkey's desire to exclude from the provison's scope payments arising under an ordinary commercial contract which were not transfers related to an investment.[377] The second deletion was of the phrase "additional contributions to capital for the maintenance or development of an investment."[378] Additional contributions become part of the investment and, therefore, the Turkish negotiators contended, the transfers provision need not specifically mention them.

Finally, the Turkey BIT defines "without delay," as used in the transfers provision, to mean "as rapidly as possible in accordance with normal commercial transaction procedures and in no case [more than] two months from the date of application."[379]

Grenada

The transfers provision of the Grenada BIT is identical to that of the 1984 draft.[380]

D. The Disputes Provision

One of the most important functions of the BIT series is to encourage investors and host countries to resolve investment disputes through binding third-party arbitration. The modern FCNs had no comparable provisions for investors, but did provide for third-party resolution of disputes between states arising out of the interpretation or application of the FCN.[381]

In the absence of an agreement to the contrary, an investor who has been expropriated or otherwise injured by a foreign government has few remedies. First, it can pursue any local administrative or judicial remedies it may have in the host country, in effect seeking redress directly from the government against which it has a claim. Second, the investor can appeal to its own government to espouse its claim, *i.e.*, to assume the investor's claim as its own and to pursue relief through diplomatic channels. The government could then seek to arbitrate the claim. Neither international nor United States law requires government espousal of claims of its citizens. If it chooses espousal, the United States may settle an espoused claim on any basis it wishes. Proceeds of any settlement become property of the United States government, though as a matter of practice, such proceeds generally are distributed to the injured party

377. In place of the deleted item the negotiators placed a new item concerning principal and interest payments arising under loan agreements. *See* Turkey BIT, *supra* note 9, at art. IV(1)(d). This is one form of payment under a contract that Turkey was willing to concede was a transfer related to an investment. Whether payments under any other contracts are guaranteed to be freely transferable will depend upon whether the transfer is regarded as related to an investment and may require in some cases resort to the consultation or dispute provisions. The line between the two, in any event, would seem to be an extremely difficult one to draw in many cases.

378. 1984 draft, *supra* note 78, at art. IV(1)(f).

379. Turkey BIT, *supra* note 9, at Protocol para. 2(a).

380. Grenada BIT, *supra* note 10, at art. IV.

381. *See supra* note 53.

by an act of Congress. Third, the investor can sue the host state in United States courts or third party courts, but the act of state doctrine[382] and sovereign immunity[383] will often defeat an investor's claim. Finally, the investor may try to negotiate a settlement with the host state. Such an agreement could include investor-to-state arbitration of the dispute by a third party.

The modern FCNs improved the investor's remedies by including a provision giving the International Court of Justice ("ICJ") jurisdiction over disputes between the parties arising out of the application or interpretation of the treaty.[384] Thus, an investor's State could compel ICJ adjudication of claims that the host country had violated the FCN's investment provisions.

This remedy nevertheless had three serious disadvantages. First, and perhaps most important, claims could be brought in the ICJ only by the investor's state. Resolution of investment disputes thus continued to be linked to the overall political relationship between the investor's country and the host country.[385] Second, under the customary rules of international law, a claim generally does not arise until local remedies have been exhausted. Investors, therefore, could not seek invocation of the FCN's disputes clause unless they first had exhausted their remedies in the host country.[386] Finally, ICJ judgments generally are not enforceable in domestic courts.[387]

382. The act of state doctrine as it applies to expropriation cases was articulated by the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law"). The BITs provide the "controlling legal principles" necessary to overcome the act of state bar should the investor choose to pursue its remedies in United States courts.

383. Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-11 (1976) (codifying the law of foreign sovereign immunity in the United States).

384. *See supra* note 53.

385. For one account of the conflict between United States foreign policy objectives and the interests of United States investors overseas, see A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 625-29 (1978). *See generally* Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA. J. INT'L LAW xxx (forthcoming).

386. *See generally* 8 M. WHITEMAN, 769-807 *supra* note 215. A debate exists as to whether the exhaustion of remedies rule is procedural or substantive. If substantive, the investor has no claim unless it has first exhausted local remedies, and thus the investor's host state could not espouse the claim in the absence of exhaustion. If procedural, failure to exhaust would preclude the investor from pursuing claims only in forums that require exhaustion as a condition of their jurisdiction. The BITs do not require exhaustion prior to invoking the disputes provision. Note, however, that any individual investor may agree to other disputes procedures which may take precedence over the BIT disputes provision. *See infra* notes 416, 431 and accompanying text. Such other procedures may require exhaustion of local remedies. *See infra* note 441 and accompanying text.

387. Under art. 94(2) of the U.N. Charter, ICJ judgments are enforceable through action of the Security Council. For a suggestion that ICJ judgments should be

The BIT drafters sought to eliminate the weaknesses in the modern FCN disputes clause by providing investors with (1) an absolute right to binding third-party arbitration of investment disputes with the host government through the International Center for the Settlement of Investment Disputes ("ICSID"),[388] without first having to exhaust local remedies,[389] and (2) a judicial mechanism to enforce such arbitral awards. In this way, the BIT ensures investors a neutral mechanism for settlement of investment disputes that is wholly insulated from the political relationship between the investor's government and the host government.[390] In addition, arbitration of disputes over time should result in further elaboration of the substantive provisions of the BITs.

At the same time, the BITs eliminate none of the traditional remedies. Investors still may pursue local remedies, seek arbitration of the claim outside the framework of the BIT,[391] or pursue espousal of the claim by their own governments. However, BITs generally require an election of remedies: an investor who pursues some other disputes mechanism (except espousal) generally loses its right to arbitration under a BIT.[392] The BITs also provide for state-to-state arbitration of disputes arising out of the interpretation or application of the agreement.[393]

enforceable in domestic courts, see Francke, *Review Essay: The Case of the Vanishing Treatises*, 81 AM. J. INT'L L. 763, 770-71 (1987).

388. 17 U.S.T. 1270, T.I.A.S. 6090 [hereinafter ICSID Convention]. ICSID is an international organization established by an international agreement to which more than 75 countries, including the United States, are party. ICSID does not itself conciliate or arbitrate disputes, but maintains lists of available conciliators and arbitrators and provides rules for the conduct of proceedings.

389. The BIT avoids the question whether exhaustion of remedies is procedural or substantive. *See supra* note 386.

390. This is advantageous for the investor, the investor's state, and the host state. The investor can pursue its remedies without having to enlist the support of its government, which may not be forthcoming where the investor's government is concerned that espousing the investor's claim will damage otherwise good relations with the host government or make otherwise bad relations even worse. For a description of some of the efforts of the Kennedy and Johnson Administrations to prevent expropriations of United States investors from interfering with foreign policy generally, see *supra* note 385. The investor's government can avoid having its foreign policy implicated in investment disputes between its nationals and other states, while the host state faces a reduced likelihood that the expropriation will disrupt its relations with the investor's state. Moreover, several statutes require the United States to suspend various forms of aid to, or preferences for, governments which have expropriated the property of United States investors without taking steps toward payment of prompt, adequate and effective compensation. *See, e.g.*, 22 U.S.C. § 2370(e)(1); 22 U.S.C. § 284(j); 22 U.S.C. § 283(r); 19 U.S.C. § 2462(b)(4)(D). The cut-off generally is not required, however, if the host state is engaged in arbitration directed at resolving the claim. *See generally* Vandevelde, *supra* note 385.

391. *See infra* notes 406-07 and accompanying text. Indeed, investors may be required to pursue any previously-agreed dispute resolution mechanisms. *See also infra* note 416 and accompanying text.

392. *See infra* notes 409-13 and accompanying text.

393. *See* 1983 draft, *supra* note 76, at art. VIII; 1984 draft, *supra* note 78, at art. VII.

Article VII of the 1983 draft[394] and article VI of the 1984 draft[395] contain the disputes provision. Although the 1984 draft's disputes pro-

394. Articles VII(1)-(5) of the 1983 draft [hereinafter referred to collectively as the 1983 draft disputes provision] provides:

ARTICLE VII

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN ONE PARTY AND A NATIONAL OR COMPANY OF THE OTHER PARTY

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. The parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility ("Additional Facility") of the International Centre for the Settlement of Investment Disputes ("Centre"). If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed. With respect to expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and relevant provisions of domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed.
3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the Centre or the Additional Facility, for settlement by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose, provided:
   (i) the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute; and
   (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or the Additional Facility. If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

   (b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration.

   (c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States ("Convention") and the Regulations and Rules of the Centre, or, if

vision is more concise than the 1983 draft's, the substance of the rights

the Convention should, for any reason, be inapplicable, the Rules of the Additional Facility.

4. In any proceeding, judicial, arbitral or otherwise, concerning an investment dispute between it an a national or company of the other Party, a Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any source whatsoever, including such other Party and its political subdivisions, agencies and instrumentalities.
5. For the purpose of any proceedings initiated before the Centre or the Additional Facility in accordance with this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of either Party or a political subdivision thereof but that, before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of such other Party.

For a discussion of the sixth and final paragraph of art. VII, *see infra* note 398.

395. Article VI of the 1984 draft [hereinafter "the 1984 draft disputes provision"] provides:

ARTICLE VI

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third-party procedures. If the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement of arbitral awards.
3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") or under the rules of the Additional Facility of the Centre ("Additional Facility"), for settlement by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or the Additional Facility provided:
   (i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures; and
   (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.
   (b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration, or, in the event the Centre is not available, to the submission of the dispute to ad hoc arbitration in accordance with the rules and procedures of the Center [sic].
   (c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States done at Washington March 18, 1965 ("Convention") and the Regulations and Rules of the Centre or, if the Convention should for any reason be inapplicable the Rules of the Additional Facility shall govern.
4. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
5. For the purposes of this Article, any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall, in accordance with Article 25(2)(b) of the Convention, be treated as a national or company of such other Party.

396. There is a procedural difference between the two drafts. Under the 1983 draft, an investor could not consent to ICSID dispute resolution if the investor had invoked previously agreed procedures or had submitted the dispute to local remedies in the host state. Under the 1984 draft, the investor may file its consent but neither party to the dispute may institute proceedings if the investor has invoked either of the dispute mechanisms described above. This procedural change has no substantive significance. *See infra* notes 398, 400, 403, 424, and 429 for a few minor wording changes.

397. "Foreign investment authority" is understood to mean a national, central, or federal investment authority. It does not include investment agreements or authorizations issued by political subdivisions.

398. Paragraph 6 of art. VII of the 1983 draft excludes from the coverage of the Article any dispute arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States or other official credit, guarantee or insurance arrangement, where the parties have, under such arrangement, provided for dispute procedures. The BIT was not intended to displace such agreed dispute procedures. The 1984 draft moved that paragraph to art. VIII. That paragraph will not be considered further in this essay. In addition, article XI excludes certain disputes involving tax matters from the scope of the disputes provision.

afforded is the same.[396]

The disputes provision applies only to "investment disputes" which comprise three categories: (a) the interpretation or application of an investment agreement between a party and a national or company of the other party; (b) the interpretation or application of any investment authorization granted by its "foreign investment authority"[397] to such national or company; or (c) an alleged breach of a BIT-based right concerning an investment.[398] Under this definition of "investment disputes," the disputes provision does not apply to disputes involving domestic law, such as antitrust or securities statutes, unless those disputes implicate treaty rights. This prevents foreign investors in the

United States from using the arbitration provision to thwart federal business regulation. The disputes clause also excludes ordinary commercial disputes, such as an action to recover payment for sale of a good.[399]

One apparently unresolved issue is how the disputes provision applies to disputes between an investor and a political subdivision of the host state. The BIT's general presumption is that its undertakings are binding on the parties' political subdivisions and that the parties are accountable for violations of the undertakings by such subdivisions. Article XII of the 1983 draft explicitly provides that the BIT "shall apply to political subdivisions of the Parties."[400]

On the other hand, ICSID has jurisdiction over political subdivisions only with their specific consent.[401] In the absence of consent to ICSID arbitration by a political subdivision, the investor must seek its remedy under the disputes provision againt the host State's central government. Where such consent has been given, the investor presumably has a choice of pursuing its remedy against the subdivision or the central government, or both.

Once an investment dispute has arisen, the BITs require the investor and host state to seek initially to resolve it through negotiation and consultation.[402] The BIT allows the parties to rely upon non-binding third-party procedures, such as the Additional Facility of ICSID.[403]

If the dispute is not resolved through negotiation and consultations, the BIT directs the parties to employ any previously agreed-upon dispute settlement procedures.[404] The BIT specifies no minimum time period which must elapse before the parties may abandon negotiations

399. Article II covers the investor's right of access to the host state's courts.

400. The 1984 draft omits this article as unnecessary. Its substance was assumed by the drafters to be implicit in the BIT.

401. ICSID Convention, *supra* note 388, at art. 25(3).

402. 1983 draft, *supra* note 76, at art. VII(2); 1984 draft, *supra* note 78, at art. VI(2).

403. 1983 draft, *supra* note 76, at art. VII(2); 1984 draft, *supra* note 78, at art. VI(2). The 1983 draft refers expressly to the Additional Facility, while the 1984 draft does not. The Additional Facility, created in 1978, is a mechanism for resolving certain types of disputes outside the jurisdiction of ICSID. The Additional Facility Rules have less extensive provisions on recognition and enforcement of awards, but do require that Additional Facility proceedings take place in a state which is a party to the New York Convention. For information on ICSID enforcement, see *infra* note 420 and accompanying text. The rules of the Additional Facility are set out in ICSID, Additional Facility, Doc. No. ICSID/11.

404. 1983 draft, *supra* note 76, at art. VII(2); 1984 draft, *supra* note 78, at art. VI(2). The BIT provides that the parties "shall" submit the dispute to previously agreed procedures. This is consistent with art. II(4) of the 1983 draft (art. II(2) of the 1984 draft) which provides that host states shall honor agreements with respect to investment. If the state party refuses to adhere to previously agreed procedures which have been invoked by the investor, the state's refusal clearly would violate the BIT and could give rise to a state-to-state arbitration. The investor, however, is not a party to the BIT and thus is not technically bound by the BIT's provisions. For a discussion of whether an investor who refuses to submit to previously-agreed dispute procedures may obtain ICSID arbitration, see *infra* text accompanying note 416.

and resort to other settlement mechanisms.[405]

In the case of expropriation, the BIT provides that any "dispute-settlement procedures specified in an investment agreement" between the state and the investor remain binding and enforceable in accordance with the terms of the investment agreement and applicable law.[406] This provision serves as a stabilization clause intended to ensure that an investment agreement's dispute settlement procedures survive expropriation of the investment, even in the event of repudiation or nullification of the investment agreement.[407]

The investor may consent to submission of the dispute to ICSID or the Additional Facility for conciliation or binding arbitration if three conditions are met:[408] the investor must not have submitted the dispute to previously-agreed dispute settlement procedures; the investor must not have brought the dispute before the courts or administrative agencies of the host state;[409] and six months must have elapsed since the dispute arose.[410] The BIT does not require exhaustion of local remedies,[411] but resort by the investor to such remedies will result in forfei-

405. Under ICSID rules, however, the parties to the dispute may not invoke ICSID arbitration until six months after the dispute arises. *See infra* note 410 and accompanying text.

406. 1983 draft, *supra* note 76, at art. VII(2); 1984 draft, *supra* note 78, at art. VI(4). The reference to "applicable law" is not intended to permit the host state to change local law so as to render the previously-agreed procedures non-binding or unenforceable. Such an interpretation would defeat the purpose of this clause.

407. This clause may be unnecessary in light of the parties' general obligation under Article II to observe their agreements with respect to investment. Inclusion of the clause, however, precludes an argument by the host state that, following the expropriation, there is no agreement to observe.

408. 1983 draft, *supra* note 76, at art. VII(3)(a); 1984 draft, *supra* note 78, at art. VI(3)(a). Under the 1984 draft, the investor technically may file its consent as long as the third condition is met, but may not institute proceedings unless all three conditions are met. *See supra* note 396.

409. If the host institutes proceedings regarding the dispute in its domestic courts, the investor may still pursue ICSID arbitration. Further, article 26 of the ICSID Convention provides that consent to ICSID arbitration, unless otherwise stated, is deemed consent to the exclusion of any other remedy. Once the investor has submitted the dispute to ICSID, efforts by a host state to adjudicate an investment dispute in its own courts violates the ICSID Convention and art. VII(3)(c) of the BIT (article VI(3)(c) in the 1984 draft), requiring the parties to adhere to the ICSID Convention, Rules, and Regulations. Where a dispute with the United States is submitted to ICSID, United States courts presumably would have discretion to decide whether to stay their proceedings pending an ICSID award. *See* Landis v. North American Co., 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to both the power inherent in every court . . . the suppliant for a stay must make out a clear case of hardship or inequity . . . if there is even a fair possibility that the stay for which he prays will work damage to someone else").

410. The BIT does not provide any formula for determining when a dispute may be considered to have arisen.

411. Note that if the investor does decide to pursue its remedies in local courts, the 1983 draft (art. II(8)) guarantees a right of access to the courts of the host state on an MFN and national treatment basis. Both drafts require the parties to provide investors with "effective means" of asserting claims and enforcing rights with respect to investment agreements, investment authorizations, and property. *See* 1983 draft, *supra* note 76, at art. II(8); 1984 draft, *supra* note 78, at art. II(6). In addition, Article

ture of its right under the BIT to ICSID arbitration.[412] The consent to ICSID arbitration is irrevocable.[413] The BITs require further[414] that both state parties to the BIT consent to conciliation or arbitration before the Centre so that, in the event of a dispute, only the investor's consent is necessary to establish jurisdiction.[415]

The early model negotiating drafts from 1981 and 1982 had provided that recourse to ICSID was unavailable if the dispute had been submitted to previously agreed dispute settlement procedures. In effect, the host state could preclude resort to ICSID by invoking previously-agreed procedures. Thus, the procedure for third-party arbitration before ICSID was not intended to replace any previously-agreed dispute settlement provisions, but was available in the absence of any such procedures. Recourse to ICSID presumably was available if neither the investor nor the host state elected to pursue previously agreed procedures after six months. This early language is reflected in four of the BITs.[416]

The result whereby an investor might have no right to ICSID arbitration was seen as undesirable by some involved in BIT negotiations for the United States. They took the position that resort to ICSID should be available to investors regardless of the existence of previously-agreed procedures, a view inconsistent with the BIT's general position that contracts between host states and investors should be enforced. Accordingly, in preparing the 1983 and 1984 drafts, BIT negotiators revised paragraph 3(a) of the disputes provision to provide that recourse to ICSID is unavailable if the *investor* has submitted the dispute to previously agreed procedures, language which found its way into the other six signed BITs. That is, the investor was to be given the choice of utilizing previously-agreed procedures or pursuing ICSID arbitration.

This change made the text confusing. The BIT provided, on the one hand, that the parties "shall" utilize previously-agreed procedures, while on the other hand suggested that ICSID arbitration remained available if the investor in fact did not invoke previously-agreed procedures. Such an approach seemed to invite the situation in which the host state submitted the dispute to previously-agreed procedures only to find that, six months later, the same dispute had been submitted by the investor to ICSID.

To eliminate the confusion, the U.S. has again revised the clause relating to ICSID arbitration. The negotiating text to be used in future BIT negotiations expressly subordinates the requirement that previously-agreed procedures be invoked to the stipulation that the investor has a right to ICSID arbitration of the dispute if the investor has not submitted the dispute to previously-agreed procedures. Thus, assuming the language is not changed in negotiations, future BITs will make unequivocally clear that previously-agreed procedures are binding on the host state if the investor selects them, but the investor has the right to forego such procedures and submit the dispute to ICSID.

While the BIT establishes the host country's consent to arbitration, ICSID's jurisdiction is limited by the terms of its own Convention. Article 25(4) of the Convention allows a state, by the terms of its accession, to limit ICSID jurisdiction applicable to it. Thus, the BIT right to ICSID arbitration could prove illusory where the dispute was excluded from ICSID's jurisdiction by either the Convention or the host state's accession. The BIT implicitly obligates the parties not to vitiate the disputes clause by using reservations in their accession to the ICSID Convention.[417]

Once the investor's consent has been given, either party to the dispute may institute proceedings before the Centre or Additional Facility, as appropriate.[418] In the event of a disagreement concerning whether to use conciliation or binding arbitration, the wishes of the investor prevail.[419] The ICSID Convention requires the parties to recognize and enforce any resulting awards.[420]

The 1983 draft's state-to-state disputes provision prohibits an investor unsatisfied with an ICSID arbitration from petitioning its own

III(2) of both drafts gives investors the right to judicial review in the host state of the sufficiency of compensation for expropriation but does not require the investor to invoke such a remedy. If the investor does invoke local remedies, it forfeits its right to ICSID arbitration (except where the local remedy failed to meet the requirements of the BIT). *See infra* note 412 and accompanying text.

412. 1983 draft, *supra* note 76, at art. VII(3)(a); 1984 draft, *supra* note 78, at art. VI(3)(a). Dispute settlement procedures to which the parties have previously agreed may include a requirement that local remedies be exhausted. In such a case, exhaustion presumably would be required before such procedures could be invoked.

413. ICSID Convention, *supra* note 388, at art. 25(1).

414. 1983 draft, *supra* note 76, at art. VII(3)(b); 1984 draft, *supra* note 78, at art. VI(3)(b).

415. *See* ICSID Convention, *supra* note 388, at art. 25.

416. *See infra* note 431.

417. The principle of *pacta sunt servanda* implicitly obligates a party to a treaty not to defeat the purpose of the treaty. *See, e.g.*, T. ELIAS, THE MODERN LAW OF TREATIES 41-42 (1974). The Vienna Convention on the Law of Treaties codifies the requirement that treaties be performed in good faith. Vienna Convention on the Law of Treaties, art. 27, U.N. Doc. A/CONF.39/27 (1969) [hereinafter Vienna Convention].

418. 1983 draft, *supra* note 76, at art. VII(3)(a); 1984 draft, *supra* note 78, at art. VI(3)(a).

419. 1983 draft, *supra* note 76, at art. VII(3)(a); 1984 draft, *supra* note 78, at art. VI(3)(a). The BIT leaves unclear whether parties to a dispute may first invoke conciliation, then binding arbitration. Arbitration before the Centre must be in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States and the rules and regulations of the Centre. 1983 draft, *supra* note 76, at art. VII(3)(c); 1984 draft, *supra* note 78, at art. VI(3)(c). Arbitration before the Additional Facility shall be in accordance with the rules and regulations of the Additional Facility. 1983 draft, *supra* note 76, at art. VII(3)(c); 1984 draft, *supra* note 78, at art. VI(3)(c). Thus, the host state's failure to abide by the Convention or the Rules and Regulations of the Centre or the Additional Facility would violate the BIT.

420. ICSID Convention, *supra* note 388, at art. 54.

government to re-litigate the issue through state-to-state arbitration.[421] There are two exceptions to this exclusion: (1) where the host state failed to abide by the ICSID arbitral award[422] or (2) where the issue arbitrated at a state-to-state level, though arising from the same dispute, differed from that arbitrated by ICSID.[423] This paragraph was deleted from the 1984 draft as unnecessary.[424]

The BIT contains what is known in United States law as a collateral source rule.[425] The BITs prohibit the host party from asserting as a defense, counterclaim, right of set-off or otherwise, the amount of any compensation received by the investor pursuant to an investment agreement.[426] This clause also precludes a host state from arguing that a compensated investor is no longer a real-party-in-interest and thus has no claim.[427]

The BIT also provides that, for purposes of proceedings before ICSID, a company organized under the laws of one party, but which prior to the occurrence of the events giving rise to the dispute was owned or controlled by investors of the other party, shall be considered a company of that other party.[428] This clause was necessary because of Article 25 of the ICSID Convention, which provides that companies are ordinarily deemed to have the nationality of the country of incorporation and that companies may not initiate proceedings before ICSID or the Additional Facility against their own states.[429] This clause ensures

421. 1983 draft, *supra* note 76, at art. VIII(9). In addition, art. 27 of the ICSID Convention specifically precludes diplomatic espousal of a claim once it has been submitted to the Centre, unless the state party fails to comply with the ICSID award.

422. ICSID Convention, *supra* note 388, at art. 27(1).

423. *Id.*

424. *See* 1984 draft, *supra* note 78, at art. VII. It was deemed unnecessary in light of article 27 of the ICSID Convention.

425. Under that rule any recovery by a victim from a third-party is not applied to reduce the liability of the wrongdoer. *See generally* Gypsum Carrier, Inc. v. Handelsmann, 307 F.2d 525 (9th Cir. 1962), 4 A.L.R.3d 517 (1962) (award to seaman for maintenance and cure against non-negligent shipowner is not subject to reduction by disability payments under California Compensation Disability Act); 22 AM. JUR. 2D § 206; RESTATEMENT (SECOND) LAW OF TORTS, § 920A(2).

426. 1983 draft, *supra* note 76, at art. VII(4); 1984 draft, *supra* note 78, at art. VI(4).

427. This clause assumes the investor can continue to pursue the claim notwithstanding receipt of compensation through insurance. A question arises, however, where the investor's insurer is its own government. If the investor refuses to pursue the claim, may its government then recover the loss? Although a principal purpose of the BIT disputes provision is to prevent investment disputes from becoming state-to-state disputes, nothing in the BIT expressly precludes such a result. Note, however, that when an investor submits a dispute to ICSID, the 1983 draft precludes the BIT parties from submitting the same dispute to the ICJ, while art. 27 of the ICSID Convention prohibits espousal of the claim. *See supra* note 422 and accompanying text.

428. 1983 draft, *supra* note 76, at art. VII(5); 1984 draft, *supra* note 78, at art. VI(5).

429. The drafters included this clause to render irrelevant any change in ownership or control effected by an expropriation. The 1984 draft added the qualifier "immediately" in front of the word "prior" to clarify the intent of the 1983 draft. *See infra* notes 435-36 and accompanying text. This provision is contrary to the approach generally taken elsewhere in the BIT at art. I(b) (art. I(c) of the 1984 draft) which

that a company will be considered to have the nationality of those who control it provided that it is incorporated under the laws of either of the parties.

Egypt

The disputes provision of the Egypt BIT contains several notable deviations from the 1983 draft.[430]

First, whereas under the 1983 draft the investor's right to ICSID arbitration is cut off if the investor submits the dispute to previously-agreed procedures, under the Egypt BIT, the right to ICSID arbitration procedures is cut off if *either* party to the dispute submits it to previously-agreed procedures in good faith.[431] That is, bad faith invocation of previously-agreed settlement procedures does not preclude recourse to ICSID. Although explicit in this instance, the obligation to act in good faith is implicit in treaties generally.[432]

The Egypt BIT contains two important derogations from the collateral source rule. The first qualifies the rule to apply only to compensation from any "third-party whatsoever" (rather than "any source whatsoever").[433] Thus, contrary to the 1983 draft,[434] insurance received from the host government, its political subdivisions, agencies

provides that, to be considered a national of a state, a company must be incorporated under the laws of that state.

430. Egypt BIT, *supra* note 1, at art. VII(1)-(5).

431. *Cf.* 1983 draft, *supra* note 76, at art. VII(3)(a)(ii); *supra* note 394. Specifically, art. VIII(3)(a) of the Egypt BIT provides:

> In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: (i) the dispute has not been settled through consultation and negotiation; or (ii) the dispute has not, for any good faith reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to the dispute; or (iii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute.

The same change was made in the Panama BIT, *supra* note 2, at art. VII(3)(a), the Haiti BIT, *supra* note 7, at art. VII(3)(a)(i), and the Senegal BIT, *supra* note 8, at art. VII(3)(a)(i). Note that, in the case of the Haiti BIT, I.C.C. arbitration is specified in lieu of ICSID arbitration and thus it is a right to I.C.C. arbitration which is cut off by recourse to previously-agreed procedures. *See infra* notes 477-80.

432. *See* Vienna Convention *supra* note 417, at art. 26. *See generally* 8 WHITEMAN, *supra* note 215, at 282-85 (1970). The "good faith" language is unique to the Egypt BIT.

433. Egypt BIT, *supra* note 1, at art. VII(4). *Cf.* 1983 draft, at art. VII(4). The capitalization of "Party" in the quoted phrase presumably is an error, since "Party" with a capital "P" refers to the parties to the BIT, of which there are but two. The Cameroon BIT, *supra* note 3, at art. VII(4), contains the same two derogations described in the text. The Panama BIT, *supra* note 2, at art. VII(4), and the Zaire BIT, *supra* note 5, at art. VII(5), also refer to "any third party whatsoever," but do not contain the second derogation.

434. 1983 draft, *supra* note 76, at art. VII(4). *Supra* note 394.

and instrumentalities, *shall* be applied to reduce the host country's liability. The second provides that the investor is not entitled to compensation "for more than the value of its affected assets, taking into account all sources of compensation from within the territory of the Party liable for compensation."[435] In other words, compensation from all collateral sources in the territory of the host state, not merely that from the host state government, shall be credited against the amount due from the host state. In effect, this second derogation prevents double recovery from sources inside the host state.[436]

The Egypt BIT modified the clause specifying that, for purposes of the disputes provision, a company would have the nationality of the party that it had prior to the events giving rise to the dispute.[437] It provides instead that the company would have the nationality which it possessed "immediately prior" to the occurrence of such events—an improvement in the text (since it should not matter what nationality a company had, say, ten years before the dispute arose). The 1984 draft retained this modification.[438] The same paragraph was further modified to provide that, in order to take its host government to arbitration, a company must be a "company of the other party," *i.e.*, incorporated under the laws of the other party as well as substantially owned by nationals of such other party. The 1983 draft had permitted ICSID arbitration if the company was incorporated under the laws of either party, so long as it was owned or controlled by nationals of the party not involved in the dispute.[439]

The Protocol contains a clause acknowledging an understanding that the parties[440] to a dispute may previously agree to submission of

435. Egypt BIT, *supra* note 1, at art. VII(4).

436. As was explained to the Senate, "[t]he intent of this language, inserted at the insistence of Egypt, is to protect the Parties against 'double indemnity.'" *Egyptian negotiators were concerned that United States investors not receive payment for the value of a single claim from both a local Egyptian insurance company (which is likely to be publicly owned) and the Egyptian Government.* The language would not limit a United States investor from collecting payment on the same claim from a third-party (non-Egyptian) insurance company. Egypt Submittal Letter, *supra* note 145, at XIV. With respect to the Cameroon BIT, the report to the Senate on this point appears to be in error. It suggests that investors will "not be compensated, through insurance or otherwise, *in excess of the actual losses incurred.*" *Cameroon Submittal Letter*, *supra* note 253, at X. Clearly what the BIT intends is merely to preclude double recovery from Cameroon sources. An investor may recover its entire loss one time from Cameroon sources and a second time from non-Cameroon sources.

437. Egypt BIT, *supra* note 1, at art. VII(5). *Cf.* 1983 draft, *supra* note 76, at art. VII(5); *supra* note 394. *See* discussion at *supra* notes 428-29 and accompanying text.

438. 1984 draft, *supra* note 78, at art. VI(5), *supra* 398. *Cf.* Bangladesh BIT, *supra* note 76, at art. VII(5), *infra* note 474 which follows the 1984 draft only with respect to *this paragraph of the disputes provision; the balance of the disputes provision of the* Bangladesh BIT follows the 1983 draft. This same change occurred in the Panama BIT, *supra* note 2, at art. VII(5), which, like the Egypt BIT, generally follows the 1983 draft. The Morocco, Turkey, and Grenada BITs are based on the 1984 draft and follow it in this regard. *See infra* notes 459, 484, 490 and accompanying text.

439. 1983 draft, *supra* note 76, at art. VII(5).

440. The word "parties" is incorrectly capitalized in the Treaty. *Cf. supra* note 433.

the dispute to domestic courts, although the State parties are required to *maintain* a nondiscriminatory policy with respect to the inclusion and implementation of any such provision in an investment contract. This clause makes explicit what was arguably implicit in the draft BIT.[441]

The Egypt BIT departs from the 1983 draft in several less "practically" significant aspects. Its definition of "investment dispute" omits the express reference to disputes involving the application or interpretation of an investment authorization.[442] The definition continues to include disputes involving the interpretation or application of investment agreements, which would seem sufficiently broad to render the deletion of little or no significance.[443]

The Egypt BIT omits all references to the Additional Facility.[444] It also omits the clause specifying that the investor's preference prevails in the event of a dispute between the investor and host state over whether to submit the dispute to conciliation or arbitration.[445] The BIT itself, however, constitutes consent by the host government to either arbitration or conciliation before the ICSID, and the investor retains the discretion to consent to arbitration.[446] Presumably, the investor still controls the choice between conciliation or arbitration by consenting only to one or the other. Hence, the omission of this language appears to have no practical effect.

Panama

The disputes provision of the Panama BIT[447] contains several changes

441. Although it is implicit in the BIT that investors may agree to exhaust local remedies and will be bound by that agreement, Egypt's insistence upon inclusion of this express provision gave rise to the concern that Egypt might insist upon an agreement to exhaust local remedies in every case, in effect requiring investors to waive the disputes provision across-the board. The inclusion of a requirement that the parties not discriminate in the inclusion and implementation of such waivers in investment agreements was intended to provide some protection in this regard.

442. Egypt BIT, *supra* note 1, at art. VII(1). The same change appears in the Morocco BIT, *supra* note 4, at art. VI(1). *Cf.* 1983 draft, *supra* note 76, at art. VII(1); *supra* note 394.

443. *See* Egypt Submittal Letter, *supra* note 145, at XIV. The Egypt BIT refers to investment disputes as "legal investment disputes," Egypt BIT, *supra* note 1, at art. VII(1), a change made at Egypt's request which was not intended to affect the scope of the provision.

444. This change was a partial response to Egyptian complaints that the disputes provision was too detailed. Reference to the Additional Facility also was omitted from the disputes provision of the Cameroon, Morocco and Turkey BITs. *Cf.* Panama BIT, *supra* note 2 (providing for arbitration by the Additional Facility, but not ICSID). *See infra* note 449 and accompanying text. *See also* the Senegal BIT, *supra* note 8, at Protocol § 5, which provides for Additional Facility arbitration of disputes if either party withdraws from ICSID.

445. 1983 draft, *supra* note 76, at art. VII(3)(a); 1984 draft, *supra* note 78, at art. VI(3)(a). This language also was omitted from the Panama, Cameroon, Morocco, and Turkey BITs.

446. Egypt BIT, *supra* note 1, at art. VII(3)(a).

447. Panama BIT, *supra* note 2, at art. VII(1)-(6).

in the language of the 1983 draft.[448] First, because Panama is not a member of ICSID, the draft specifies that conciliation, binding arbitration, or both is to be conducted before the Additional Facility of ICSID.[449] The parties undertake to enforce arbitral awards issued by the Additional Facility.[450] The Panama BIT also acknowledges that the "previously-agreed" dispute procedures that take precedence over ICSID arbitration may include arbitration before the Inter-American Commercial Arbitration Commission.[451]

Second, the Panama BIT precludes recourse to conciliation or arbitration if the investor, during the six month cooling-off period, submits the dispute to the courts of either the host government or its own government.[452] The 1983 draft, by omitting the reference to the investor's government, had left open the possibility that an investor might file suit in the courts of its own country as well as institute proceedings before ICSID.[453] The Panama BIT does not, however, preclude investors from

448. Four such changes are described at *supra* notes 431, 433, 438, and 445 and accompanying text.

449. Panama BIT, *supra* note 2, at art. VII(3). *Cf.* the Egypt, Cameroon, Morocco, and Turkey BITs, in which all references to the Additional Facility were omitted. *See supra* note 444 and accompanying text. *See also* Senegal BIT, *supra* note 8, at Protocol ¶ 5, which provides for recourse to the Additional Facility if either party withdraws from ICSID. *See infra* text at note 483.

450. Panama BIT, *supra* note 2, at art. VII(3)(d). The rules of the Additional Facility do not contain provisions for recognition and enforcement of awards, other than to require that arbitration take place in a state which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 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 New York Convention]. Enforcement of an Additional Facility award in the United States under the New York Convention may not always be possible under United States law. In ratifying the New York Convention, the United States, like a number of other parties, declared that it would apply the Convention only to "commercial" disputes. *See* Federal Arbitration Act, 9 U.S.C. § 201 *et seq.* (1982). The Additional Facility rules provide that the Additional Facility is available for resolving other than ordinary commercial disputes. The term "commercial," as used in the Federal Arbitration Act, could be construed broadly enough to include investment disputes, thus allowing enforcement of awards by the Additional Facility. The United States' reservation to the New York Convention also limited recognition and enforcement of awards to those "made *in* the territory of another contracting state." *But see* Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983). Thus, an Additional Facility award issued in the United States may not be enforceable in the United States, even though the same award would be enforceable in the United States if issued in another state. A comparable clause relating to the enforcement of ICC awards appears in the Haiti BIT. *See infra* note 479 and accompanying text.

451. Panama BIT, *supra* note 2, at art. VII(2). Panama is not a party to the New York Convention but ICAC Awards are enforceable under the 1975 Inter-American Convention on International Commercial Arbitration, *reprinted in* 14 I.L.M. 336 (1975), to which Panama and the United States are party. *See generally* Kearney, *Developments in Private International Law*, 81 AM. J. INT'L L. 724, 735-738 (1987).

452. Panama BIT, *supra* note 2, at art. VII(3)(a).

453. 1983 draft, *supra* note 76, at art. VII(3)(a). *See* text of 1983 draft disputes provision, *supra* note 394. Article 26 of the ICSID Convention, however, requires that collateral proceedings be suspended during pendency of a case before ICSID. *See supra* note 410.

filing suit in a third country as well as proceeding before ICSID.[454]

Cameroon

The disputes provision of the Cameroon BIT[455] deviates from the 1983 draft in only minor respects.[456] For example, it omits the 1983 draft language[457] expressly limiting the disputes provision to disputes involving investment in the territory of a party. The omitted language is unnecessary, however, because the term "investment" is defined to mean investment within the territory of a party[458] and thus "investment dispute" refers only to a dispute involving such investment.

Morocco

The Morocco BIT[459] departs from the 1984 draft[460] by including a concession to the exhaustion of local remedies doctrine. Specifically, the Morocco BIT provides that a United States investor may not submit an investment dispute with Morocco to ICSID unless the investor first submits it to the appropriate judicial or administrative body of primary jurisdiction under Moroccan law, and either: (1) a final judgment has been rendered or (2) one year has elapsed since the local proceedings were initiated.[461] This clause effectively requires United States investors to defer to local remedies for a period of one year or until those local remedies are exhausted, whichever occurs first, before going to ICSID.

Although this mechanism reintroduces the requirement of exhausting local remedies, two fundamental points preserve the BIT's guarantee of the investor's right to third-party dispute resolution. First, regardless of how the dispute is handled by local authorities, the investor has an absolute right to submit the dispute to ICSID after one year. Second, once the dispute is referred to ICSID, the local proceedings must be terminated.

The Morocco BIT also contains several minor deviations from the

454. Nor do the draft BITs. *But see supra* note 453.

455. Cameroon BIT, *supra* note 3, at art. VII(1)-(5).

456. Three such deviations are described in *supra* notes 433, 444, 445 and accompanying text. *See also supra* note 436 for a comparison of Cameroon's collateral source rule to that of Egypt and the draft BITs.

457. 1983 draft, *supra* note 76, at art. VII(2). *See* text of 1983 draft disputes provision at *supra* note 394.

458. Cameroon BIT, *supra* note 3, at art. I(1)(b).

459. Morocco BIT, *supra* note 4, at art. VI.

460. The Morocco BIT disputes provision follows the 1983 draft in one respect: including the phrase "for any reason" in art. VII(3)(a)(i), requiring as a condition to ICSID arbitration that the investor not have submitted the dispute "for any reason" to previously agreed procedures. The 1984 draft deleted the phrase as unnecessary. The disputes provision of the Turkey BIT, which similarly was based on the 1984 draft, also reinserts that phrase.

461. Morocco BIT, *supra* note 4, at art. VI(3)(a)(ii)(b). Although structured differently, the Turkey BIT also imposes a one year delay on investment disputes before empowering the investor to submit the dispute to ICSID. *See infra* note 486 and accompanying text.

draft language.[462] First, the Morocco BIT provides that investor indemnification from a third source shall not be a "defense" to a claim for compensation against the host government.[463] The 1984 draft had said "defense, counterclaim, right of set-off or otherwise."[464] Second, following the provision that the parties shall initially seek to resolve the dispute by consultation and negotiation, the Morocco BIT omits the phrase "which may include the use of non-binding third party procedures."[465] Since the parties obviously are always free to use non-binding third-party consultation and negotiation mechanisms, the change is not substantive.

Zaire

The disputes provision of the Zaire BIT[466] reorganizes and slightly rewords, but does not significantly alter the meaning of, the 1983 draft's language.[467] A few changes are particularly noteworthy.

The Zaire BIT omits the language from the 1983 draft specifying that existing dispute settlement procedures between the investor and the host government concerning expropriation remain binding and enforceable.[468] The Zaire BIT, however, does provide that investors have the right to invoke previously-agreed dispute procedures and contains a stabilization clause.[469] Hence, the specific expropriation provision is not necessary and its deletion does not diminish the investor's rights.

The Zaire BIT slightly modifies the sequence for referring an investment dispute to conciliation or arbitration. The 1983 draft requires a six month delay before an investor may consent to conciliation or arbitration before ICSID.[470] Following such consent, either party may institute ICSID proceedings. The Zaire BIT departs from the draft and provides that the investor may consent at any time to ICSID proceedings,[471] although the proceedings may not be instituted until six months after the dispute arises.

462. Three such changes are described in *supra* notes 442, 444-45.

463. Morocco BIT, *supra* note 4, at art. VI(4). The same change to the 1983 draft appears in the Zaire BIT, *supra* note 5, at art. VII(5), and the Senegal BIT, *supra* note 8, at art. VII(4).

464. 1984 draft, *supra* note 78, at art. VI(4). The 1983 draft language was the same on this point. *See* 1983 draft, *supra* note 76, at art. VII(4); *supra* note 395.

465. Morocco BIT, *supra* note 4, at art. VI(2).

466. Zaire BIT, *supra* note 5, at art. VII.

467. Two changes were described in *supra* notes 433 and 463.

468. 1983 draft, *supra* note 76, at art. VII(2). For the text of the 1983 draft disputes provision, *see supra* note 394. For a discussion of the significance of this provision, *see supra* notes 407-08 and accompanying text.

469. *See* Zaire BIT, *supra* note 5, at art. VII(3) and art. II(4).

470. 1983 draft, *supra* note 76, at art. VII(3). For the text of the 1983 draft disputes provision, *see supra* note 394.

471. Zaire BIT, *supra* note 5, at art. VII(4).

Bangladesh

The disputes provision of the Bangladesh BIT[472] generally follows the 1983 draft. Bangladesh was troubled, however, by the section providing that companies incorporated under the laws of one party, but owned or controlled by nationals of the other party, possess the nationality of the latter party for purposes of the disputes provision.[473] Bangladesh initially opposed this clause because it effectively allows Bangladesh subsidiaries of United States companies to take Bangladesh to arbitration.[474] The United States prevailed on the issue, although the parties chose to use 1984 draft language. An additional sentence explicitly reaffirms that the disputes provision "shall not apply to an investment dispute between a Party and a national of that Party."[475]

Haiti

Unlike the 1983 draft, the Haiti BIT[476] specifies that investment disputes shall be referred to the International Chamber of Commerce rather than ICSID, of which Haiti is not a member.[477] To ensure the enforceability of ICC awards, the Haiti BIT requires the award to be made in a state which is a party to the New York Convention,[478] and requires that each party provide for the enforcement of ICC awards within its territory.[479] Both Haiti and the United States are parties to the New York Convention.[480]

472. Bangladesh BIT, *supra* note 6, at art. VII(1)-(5).

473. Bangladesh BIT, *supra* note 6, at art. VII(5).

474. *See supra* notes 428-29 and accompanying text. Their concern was to avoid treating some Bangladesh companies (those which were subsidiaries of United States companies) more favorably than other Bangladesh companies. It was necessary that the matter be resolved explicitly in the treaty since, under ICSID Rule 25(2)(b), a company is considered a national of the country of incorporation unless that country has agreed with another state that such companies will be considered nationals of that other state. Art. VII(5) constitutes that agreement.

475. Bangladesh BIT, *supra* note 6, at art. VII(5). This sentence is consistent with the United States view of the treaty, provided that, for purposes of the disputes provision, companies are regarded as having the nationality of their owners or controllers rather than of the state of incorporation.

476. Haiti BIT, *supra* note 7, at art. VII(1)-(5). Another significant departure from the 1983 draft is described *supra* at note 431.

477. Since Haiti had not chosen to join ICSID, it did not want to appear to modify that decision indirectly by acceding to use of the Additional Facility.

478. New York Convention, *supra* note 450. The United States ratification of the Convention includes a declaration that United States courts will enforce arbitral decisions only if issued in states which are party to that Convention. *See* 9 U.S.C. §§ 201-208 (1982).

479. Haiti BIT, *supra* note 7, at art. VII(3)(d). Comparable language with respect to enforcement of Additional Facility awards appears in the Panama BIT. *See supra* note 450 and accompanying text.

480. *See* New York Convention, *supra* note 450.

Senegal

The disputes provision of the Senegal BIT[481] generally follows the 1983 draft. One difference is that the investor's right to conciliation or binding arbitration is limited to ICSID and does not extend to the Additional Facility.[482] The Protocol provides, however, that the Additional Facility shall be used if either party withdraws from the ICSID Convention or ICSID is unavailable for any other reason.[483]

Turkey

The disputes provision of the Turkey BIT[484] contains one significant modification of the 1984 draft language. Recourse to ICSID[485] may not be had until one year after the dispute arises, rather than six months as provided by the draft.[486] The Turkish negotiators desired that every possible opportunity for a bilateral negotiated settlement be made before escalating the dispute to third-party procedures, whether binding or non-binding.[487]

The Turkey BIT also provides only for arbitration, not conciliation, before ICSID.[488] Accordingly, it deletes as unnecessary the provision that the investor's wishes shall prevail in the event of a dispute over whether to use conciliation or arbitration.[489]

481. Senegal BIT, *supra* note 8, at art. VII(1)-(5). Additional changes of note to the Senegal BIT disputes provision are described *supra* at notes 431, 468.

482. Senegal BIT, *supra* note 8, at art. VII(3)(a).

483. Senegal BIT, *supra* note 8, at Protocol para. 5. The Egypt, Cameroon, Morocco, and Turkey BITs omit all reference to the Additional Facility. *See* supra note 441. *See also* the Panama BIT, *supra* note 2, at art. VII(3), which provides for arbitration before the Additional Facility, but not ICSID. *See supra* note 449 and accompanying text.

484. Turkey BIT, *supra* note 9, at art. VI.

485. Turkey was not a member of ICSID at the time the BIT was signed, but the Turkish negotiators assured United States negotiators that Turkey intended to join. The intent of both parties was that Turkey would join ICSID prior to the BIT's entry into force.

486. Turkey BIT, *supra* note 9, at art. VI(3)(a). The Morocco BIT also imposes a one-year delay on United States (but not Moroccan) investors before permitting recourse to ICSID. *See supra* note 461 and accompanying text.

487. Consistent with this intent, the Turkey BIT, *supra* note 9, also provides at art. VI(2) that parties to an investment dispute must attempt to resolve the dispute through bilateral negotiations or consultations "in good faith" before resorting to non-binding third party procedures or previously agreed dispute settlement procedures. *Cf.* art. VI(2) of the 1984 draft, *supra* note 395, in which the parties are required initially to resolve the dispute through negotiations and consultations, which may include third-party procedures.

488. Turkey BIT, *supra* note 9, at art. VI(3)(a). Other changes from the 1984 draft are described *supra* at notes 444, 460. Less noteworthy, the Turkey BIT dropped the 1984 draft's reference to art. 25(2)(b) of the ICSID Convention without affecting the substance of the disputes provision. 1984 draft, *supra* note 78, at art. VI(5). The reference had not appeared in the 1983 draft. The Turkey BIT also moves the provision concerning expropriation settlement procedures to a separate paragraph. 1984 draft, *supra* note 78, at art. VI(2); Turkey BIT, *supra* note 9, at art. VI(4).

489. A similar change occurs in the Egypt, Panama, Cameroon, and Morocco BITs. *See supra* note 442 and accompanying text.

Grenada

The disputes provision of the Grenada BIT[490] is identical to that of the 1984 draft.

III. Conclusion

Although the BITs are, in many respects, a continuation of United States practice dating back to the early nineteenth century of securing bilateral treaty protection for United States investment abroad, they differ in form from the predecessor FCN agreements in that they are dedicated exclusively to that purpose. The BITs also represent a substantial advance over the FCNs as a matter of substance in that, for the first time, the United States has secured for its investors the right to arbitration of investor-to-state investment disputes.

The provision for third party arbitration of investor-to-state disputes is but one of four core provisions in the BIT. The first of the core provisions, relating to the general treatment to be provided to investors, is rooted in United States treaty practice dating back to the last century and generally was accepted by BIT signatories with only minor concessions. The second core provision, setting forth the compensation standard for expropriation, also has roots dating back to the nineteenth century. It is a cornerstone of United States foreign investment policy, and was incorporated into all ten signed BITs without any substantive concessions. The third core provision, concerning free transfer of payments related to an investment, embodies a principle not regularly included in United States treaty practice until the modern FCNs. This provision was the only one of the four in which significant concessions were made, generally in the form of exceptions allowing delays in transfers in exigent circumstances for specified periods or, in one case, an exception delaying the effective date of the entire provision. The fourth core provision, the disputes provision, despite its novelty in United States treaty practice, appears in all ten BITs without any substantive concessions.

The United States has been remarkably successful in negotiating agreements that advance the protection accorded to American investors abroad, especially in third world countries where the threat of hostile government action against investors generally is the greatest. These agreements, moreover, both in their substantive provisions and in the dispute procedures they establish, also may play a significant role in bolstering customary international legal protection of foreign investment.

The unwillingness of the United States to compromise on substantive issues (except for allowing certain delays with respect to currency transfers) will limit significantly the number of additional countries with which it will be possible to sign BITs. It should be recalled, however, that the United States engaged in successful FCN negotiation for some

490. Grenada BIT, *supra* note 10, at art. VI.

twenty years and the conclusion of additional BITs seem only a matter of time. Even a program of relatively modest geographic coverage will have succeeded in extending treaty protection of United States investment to a number of third world countries that never concluded FCN treaties, while demonstrating the feasibility of negotiating bilateral investment protection agreements of unprecedented scope and rigor.

Bernard Rudden

Contract Law in the USSR and the United States: History and General Concept. E. Allan Farnsworth & Viktor P. Mozolin. Washington: International Law Institute, 1987. Pp. 350. Cloth.

This work represents the first in a series on contract law jointly produced by the International Law Institute in Washington, D.C., and the Institute of State and Law, Academy of Sciences of the USSR. Volume I appears in both English and Russian, and promised successors (described as "upcoming" by the publisher) will cover required terms and adhesion contracts[1] and sales contracts.[2] Such a collaborative venture is both novel and exciting, and the first volume—since it "fixes the working methodology for the entire series"[3]—merits serious consideration.

The chosen approach is avowedly doctrinal and non-comparative. The book falls into two halves, in each of which a distinguished specialist describes the law of his own country. Both halves follow the same plan, dividing their treatment into the following five chapters: the concept of contract; its history; the sources of contract law; the characteristics and organization of contract law (i.e. the birth, life, death, and afterlife of a contract); and the settlement of disputes (mainly the court and arbitral systems).

The American contribution constitutes the second part of the volume. It will be treated briefly, certainly not from reasons of disrespect for the Reporter to the great Restatement Second on Contracts,[4] but because this review is of the English-language edition. It can be assumed that most readers are already acquainted with a capitalist system's approach to contract; indeed, the text prepared for this work seems in large measure a precis (with the necessary generalization and re-organization) of Farnsworth's magisterial treatise on contracts.[5] No doubt the reviewers of the Russian-language version will have much to say about what they learn from him, and it is tempting to try to predict their reactions. They likely will note that, in typically common-law fashion, the author devotes only 12 pages to the concept of contract,[6] while

1. T. Vukowich, V. Yakovlev, & M. Shiminov, The Extent of the Power to Contract: Required Terms and Contracts of Adhesion. Volume 2 is expected to be published in 1988.

2. V. Mozolin & R. Summers, The Law of Sales. Volume 3 is expected to be published in 1990.

3. E. Farnsworth & V. Mozolin, Contract Law in the U.S.S.R. and the United States: History and General Concept xi (1987).

4. Restatement (Second) of Contracts (1982).

5. E. Farnsworth, Contracts (1982).

6. *Supra* note 3, at 177-88.