Of Politics and Markets: The Shifting Ideology of the BITs

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The United States has concluded over twenty bilateral investment treaties (BITs) with foreign countries. The original purpose behind the treaties was the protection of U.S. investment in foreign countries. The treaties purported to accomplish their goal by facilitating a free market and by limiting government intervention. The author argues that the ideological principles underlying the BITs have changed over the years, and that the change threatens the goal of investment protection.

The author analyzes the changes in the basic principles underlying the bilateral investment treaties and evaluates the potential consequences. First, the author describes the ideology and the reasoning behind the early BITs. The author then demonstrates how the ideology has changed. The author concludes with an analysis of the potential consequences of these changes.

I. INTRODUCTION

Since 1982, the United States has concluded some 24 bilateral investment treaties (BITs) with countries in Eastern Europe, Asia, the Middle East, Africa, Latin America, and the Caribbean.1 The BITs have, as their basic purpose, the protection of U.S. investment in foreign countries.2

These treaties rest on a conscious ideological conception of the proper role of government in protecting and facilitating transfrontier investment flows. That ideology, in turn, has been the basis for a series of rather explicit choices made in the drafting and negotiation of the BITs.

Over the course of ten years of negotiations, there has been a gradual but clearly discernible shift in the ideology underlying the BITs. Not surprisingly, the shift has resulted in both modifications in the model text used for

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1. See Appendix A for a representative listing.
negotiations and changes in the signed treaties. The modifications have in some respects strengthened and in other respects weakened the treaties.

This article analyzes the shifting ideology of the BITs. It attempts initially to articulate the underlying ideology at the program's inception and to demonstrate how that ideology was reflected in early versions of the model negotiating texts. It then describes the process by which the ideological underpinnings of the BITs began to shift, and catalogues changes in the model negotiating texts and the signed agreements that reflect this shift. Finally, the article concludes with an assessment of the implications of these changes.

II.
THE BIT PROGRAM AT ITS INCEPTION

A. The Ideology of the BITs

Although the BIT program was inaugurated in 1977, early in the Carter administration, U.S. officials did not reach agreement on a model negotiating text until the end of 1981. Successful negotiations with other states did not begin until early 1982. The temptation thus is to regard the program as an initiative of the Reagan administration, and, in fact, the State Department repeatedly has so described it. Certainly, it is fair to say that the model negotiating text crystallized in the Reagan administration and, as might be expected, very much reflected the ideology of that administration.

The ideology underlying the BIT program at the beginning of negotiations in early 1982 was characterized by three related principles. The first was that the establishment and management of private investment in other countries by U.S. nationals and companies should be governed by market rather than political considerations. Under this principle, the function of the BITs was to insulate private investment from politically driven foreign or

3. See infra text accompanying notes 6-47.
4. See infra text accompanying notes 48-76.
5. See infra text accompanying notes 78-115.
6. VANDEVELDE, supra note 2, at 29-30.
7. The United States attempted briefly in 1980 to negotiate a BIT with Singapore but abandoned the effort when it became clear that the parties had irreconcilable differences. Further negotiations were suspended while U.S. negotiators returned to the task of developing the model negotiating text.
domestic public policy—in effect, to depoliticize investment matters by placing the protection of private investment under an apolitical legal regime.

This separation of the market and politics was intended in part to protect the market from politically motivated government intervention. The theory was that government intervention distorts the efficient allocation of capital and potentially impairs the rights of private investors. Moreover, private investment would be more secure if protected by a stable legal regime rather than being left to the mercy of the political branches of government.9

The separation, however, was also intended to protect American foreign policy from the disruption caused by disputes between private U.S. investors and host-state governments.10 By providing legal protection for investment, the U.S. government could more easily refuse to intervene politically to aid private investors in their disputes with foreign governments. The wall of separation between politics and market-based investment flows thus was intended to insulate politics from business as much as business from politics.

The second principle of early BIT ideology was that the law should merely facilitate—not substantively regulate—market-based agreements. The proper function of the law, as represented by the BITs, was to facilitate and enforce contractual arrangements with respect to private investment, rather than to regulate or otherwise control private investment decisions. Under this principle, the BITs should encourage private investors to negotiate investment agreements with the host state and provide mechanisms for enforcing those agreements.

The third principle was that the law should regulate efforts by governments to intervene in the market. The BITs should have a regulatory function, but that function was to restrict host-state interference with market-based allocations of wealth.

The second and third principles were corollaries to the first and furthered the same goals. Under the second and third principles, the law actively facilitated private arrangements reached through the market, while restraining public sector interference with such arrangements. Both principles served to ensure that investment would be subject to market rather than political forces.

B. The Content of the BITs

This conception of the proper relationship between politics and markets was the cornerstone of BIT policy in 1982. This section discusses how that

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9. As discussed infra notes 24-28, in the absence of a BIT, an injured investor's remedies against the host state generally would depend upon some form of intervention by the investor's own state. Yet, for reasons of foreign policy, the investor's home state might well decline to intervene. See generally Kenneth J. Vandevelde, Reassessing the Hickenlooper Amendment, 29 VA. J. INT'L L. 115 (1988).

10. For an account of one such disruption, see ARTHUR SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 625-29 (1978).
ideological conception shaped the specific provisions of the BIT model negotiating text as it stood in 1982.11

1. Depoliticizing Investment Policy

The first tenet of the early BIT ideology was that investment policy should be depoliticized.12 International investment flows should be regulated by market forces rather than by political considerations. This tenet manifested itself throughout the BIT program.

First, the United States repeatedly refused to include provisions proposed by other governments that would require it to participate in investment promotion activities.13 Although some BITs referred to investment promotion in their titles, the United States generally denied that investment promotion was in fact a purpose of these treaties.14 Indeed, U.S. negotiators often went farther and would candidly admit to potential BIT-partners that no evidence existed that the BITs actually would promote future investment.15 Whatever the title of the treaty may have been, the operative provisions of the BITs were all structured to protect existing investment rather than to encourage future investment.16 To the extent that the BITs did promote future investment, that effect was incidental, insofar as the United States was concerned.

The rationale behind the rejection of investment promotion as an operative purpose of the BITs was ideological in origin. U.S. policymakers believed that investment decisions, like other private economic decisions, should be based on market considerations.17 Politically based public policy should not be permitted to interfere in the market allocation of capital. It was inappropriate for the United States to use the power of government to encourage investment in particular targeted-countries. The United States believed that a state should conclude a BIT only if the state embraced the underlying policy

12. VANDEVELDE, supra note 2, at 22-25.
13. Id. at 32.
14. Id. at 21-22, 32.
16. One way to encourage future investment would have been to offer advantages to new investment that were denied to existing investment. The United States steadfastly refused to agree to such arrangements, however, insisting that existing investment receive the same treatment as new investment. See VANDEVELDE, supra note 2, at 32-33.
17. It should be noted that, at least during the Carter administration, there was a second justification for refusing to promote foreign investment: U.S. policymakers believed that organized labor would oppose treaties that were seen as promoting outward investment.
and that the only direct reward for concluding a BIT should be the existence of the treaty.

Second, the depoliticization of investment policy also was reflected in the U.S. negotiating strategy, which generally was quite restrained. The United States did not attempt to persuade other states to conclude a BIT, either by threats or offers of inducements. The conclusion of a BIT was not linked to concessions in noninvestment-related areas. The BIT, in other words, was not a bargaining chip to be played in a larger foreign policy game, but a mechanism for taking investment matters, to the extent possible, off the foreign policy table entirely.

Third, the attempt to depoliticize investment policy was embodied most visibly in the "investor-to-state" disputes provision of the BITs. This provision guarantees to investors the right to binding, third-party arbitration of any investment dispute, generally through the International Centre for the Settlement of Investment Disputes (ICSID). Any resulting award in favor of the investor would be enforceable in domestic courts under either the ICSID Convention or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the absence of such a provision, virtually all of the remedies available to a U.S. investor whose investment was impaired by a foreign government depended upon intervention by the U.S. government. With sovereign immunity and the "act of state" doctrine posing barriers to litigation in domestic courts, injured U.S. investors often could be made whole only if the U.S. government obtained compensation through diplomacy, economic sanctions, or military action. Any action taken by the U.S. government, of course, would be influenced by political considerations. Thus, the United States' protection of property rights of U.S. investors traditionally had depended upon politics rather than law.

The hope of U.S. BIT negotiators was that future investment disputes between U.S. nationals or companies and BIT-partners would be settled by

18. VANDEVELDE, supra note 2, at 31-32.
19. Model Draft of 1982, supra note 11, art. VII; Model Draft of 1983, supra note 11, art. VII.
21. Id. art. 54.
26. Id. at 125-44.
27. Id. at 118-20.
arbitration in accordance with international law, rather than through the intervention of the U.S. government. Market-based allocations of wealth would be enforced through legal process rather than political intervention.

Even in its most classic form, the ideology of the BITs acknowledged that the separation between politics and the market could not be absolute. In some instances, the BITs did subordinate market arrangements to political policy considerations. This occurred in at least two ways.

First, U.S. BIT negotiators recognized limits to contract sanctity. This will be discussed in greater detail below.28

The second way that the BITs reflected some intrusion of politics into the market was in the “nonprecluded measures” provision. This provision permitted parties to take measures necessary to promote certain sovereign interests of the parties.29 More specifically, the provision stated that nothing in the treaty would preclude the application by a party of any measure necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. In effect, some public policy concerns of the state were deemed sufficiently compelling that they justified state interference with market-based allocations of capital.

2. Facilitating Markets

The second tenet of early BIT ideology was that the treaties should facilitate, rather than regulate, market arrangements. The rights and duties that exist between the host state and an investor should be created by mutual consent through the negotiation of a contract. The role of the BITs was to facilitate these contractual arrangements by preserving and enforcing them.

U.S. BIT negotiators sometimes referred to this principle as the principle of contract sanctity. The BITs contained numerous provisions intended to perform this facilitative function and thus to ensure contract sanctity.

The first of these facilitative provisions required each party to observe any contractual obligations into which it had entered with respect to an investment.30 As a result of this provision, contracts between the investor and the host state would be binding as a matter of international law.

A related provision specified that, in the event of an expropriation, any dispute settlement provision related to expropriation would remain final and binding.31 The purpose of this provision was to preclude any argument by the host state that the expropriation had terminated the contract between it

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28. See infra text accompanying notes 30-40.
29. Model Draft of 1982, supra note 11, art. X; Model Draft of 1983, supra note 11, art. X.
and the investor and thus had extinguished its obligations, if any, with respect
to dispute settlement.\textsuperscript{32}

A third facilitative provision stated that nothing in the BIT superseded
or otherwise derogated from any contractual obligation entered into by the
host state that guaranteed more favorable treatment for the investor than did
the BIT.\textsuperscript{33} To the extent that the investor was able to obtain greater protec-
tion for its investment through contract negotiations than that afforded by the
BIT, the BIT would not vitiate the contractual arrangement. This clause ap-
plied to contracts between the investor and the host state regardless of
whether the contract was concluded before or after the BIT entered into
force.

Two other provisions common to the BITs were intended to facilitate the
market by promoting transparency of regulations. One provision required
each party to make publicly available its laws, regulations, administrative
practices and procedures, and judicial decisions pertaining to investment.\textsuperscript{34}
The other provision called upon each party to provide to the other party,
upon request, information concerning investments.\textsuperscript{35} Market decisions thus
would be based on the most complete information possible.

Under a final facilitative provision, disputes involving investment agree-
ments between the host state and the investor were defined as investment
disputes.\textsuperscript{36} The practical effect of this definition was that investment agree-
ments were enforceable through the "investor-to-state" disputes provision.\textsuperscript{37}
Further, because a violation of an investment agreement would violate the
BIT, investment agreements also were enforceable under a separate, "state-to-
state" disputes provision, under which either party had the right to submit to
binding arbitration disputes with the other party concerning the interpreta-
tion or application of the BIT.\textsuperscript{38}

So strongly did the early BIT negotiators favor contractual relationships
between investors and host states that, in one instance, they decided to pre-
serve the effect of a contract between the investor and host state even where
the contract provided less favorable treatment than the treatment afforded by
the BIT. Specifically, early model negotiating texts provided that any invest-
ment dispute between the investor and the host state "shall" be submitted to

\begin{itemize}
\item \textsuperscript{32} \textsc{Vandevelde, supra note 2, at} 165-66.
\item \textsuperscript{33} \textsc{Model Draft of 1982, supra note 11, art. IX(1); Model Draft of 1983, supra note 11, art.
IX(2).}
\item \textsuperscript{34} \textsc{Model Draft of 1982, supra note 11, art. II(9); Model Draft of 1983, supra note 11, art.
II(9).}
\item \textsuperscript{35} \textsc{Model Draft of 1982, supra note 11, art. VI(2); Model Draft of 1983, supra note 11, art.
VI(2).}
\item \textsuperscript{36} \textsc{Model Draft of 1982, supra note 11, art. VII(1); Model Draft of 1983, supra note 11, art.
VII(1).}
\item \textsuperscript{37} Because a violation of an investment agreement would also violate the BIT, disputes
involving the investment agreement might well be investment disputes even in the absence of this
clause.
\item \textsuperscript{38} \textsc{Model Draft of 1982, supra note 11, art. VIII; Model Draft of 1983, supra note 11, art.
VIII.}
\end{itemize}
previously agreed-to dispute settlement procedures.\textsuperscript{39} Further, once the dispute was submitted to previously agreed-to procedures, the dispute could no longer be submitted to binding arbitration pursuant to the "investor-to-state" disputes provision.\textsuperscript{40} In other words, the investor could lose the protection of the "investor-to-state" disputes provision if it previously had agreed to some other form of dispute settlement.

Like the separation of politics and markets, however, contract sanctity was never absolute. Except in the case of previously agreed-to disputes resolution procedures, U.S. BIT negotiators were unwilling to leave investors entirely subject to the consequences of contractual negotiations between the investors and the host states. Although the BITs explicitly preserved contractual obligations of the host state which required more favorable treatment than was required by the BITs, the treaties were silent with respect to contractual provisions calling for less favorable treatment. The understanding was that the BITs required host states to provide a certain minimum standard of treatment, notwithstanding language in an investment agreement in which the investor agreed to treatment less favorable than the minimum standard. Because each BIT was a treaty between the United States and another state, any given U.S. national or company could not contract away the right of the United States to demand favorable treatment for that investor.

Contract sanctity under the BITs, then, was essentially a one-way street. Contractual obligations favoring investors were preserved, while those unfavorable to investors generally were superseded by BIT obligations. To this extent, the BITs regulated as well as facilitated the market.

3. Regulating Governments

The third tenet of early BIT ideology was that the treaties should regulate the conduct of host states with respect to investment. Host states should be regulated because they might be impelled by political considerations to interfere with the market allocation of capital. While BIT negotiators believed that market allocations should be facilitated, political allocations required regulation. Accordingly, the BITs had numerous provisions regulating the conduct of host states with respect to covered investment.

The most important of these provisions was that which prohibited the expropriation of covered investment without payment of prompt, adequate, and effective compensation.\textsuperscript{41} This provision was, in starkest terms, an internationalization of the takings clause of the U.S. Constitution.\textsuperscript{42} Not only did it perform the same function as the takings clause, U.S. negotiators maintained that the two were substantively identical in many respects.\textsuperscript{43}

\textsuperscript{39} Model Draft of 1982, \textit{supra} note 11, art. VII(2).
\textsuperscript{40} \textit{Id.} art. VII(3)(a).
\textsuperscript{41} \textit{Id.} art. III(1); Model Draft of 1983, \textit{supra} note 11, art. III(1).
\textsuperscript{42} \textit{See} U.S. \textit{CONST.} amend. V, cl. 4.
\textsuperscript{43} \textit{Vandevelde, supra} note 2, at 122-23, 131.
A second provision guaranteed to nationals and companies of one party the right to transfer payments related to an investment into and out of the territory of the other party freely and without delay.\textsuperscript{44} This provision, in effect, prohibited government-imposed currency exchange controls that could prevent an investor from trading the local currency of the host state for the currency of its own state or some other state.

Third, the BITs required each party to provide national and most-favored-nation treatment to nationals and companies of the other party with respect to the right to establish or acquire investment in the territory of the first party and with respect to the treatment of covered investment once established.\textsuperscript{45} In effect, this provision was intended to reduce government-imposed barriers to entry and to prevent the government from intervening in the market to favor some investors over others.

Most of the BITs contained a provision prohibiting a state from imposing performance requirements on investment.\textsuperscript{46} The phrase "performance requirements" refers to requirements that an investment purchase goods or services locally or export the goods produced, or other similar requirements. The BITs required that sources of supply as well as markets for finished products be determined by market forces and not by government regulation.

Many of the BITs also contained a competitive equality provision, under which each party was prohibited from giving state-owned or state-controlled investment a competitive advantage over the investments of nationals and companies of the other party.\textsuperscript{47} In other words, where the state enters the market as a proprietor, it should be subject to market forces. The government should not be permitted to use its regulatory power to favor public enterprise over private competitors.

III.
THE SHIFT IN THE IDEOLOGY OF THE BITs

In the ten years since negotiations began, there has been an identifiable shift in the ideology of the BITs. The shift began as early as 1983, but became far more visible after 1986. It is reflected in all three central tenets of classic BIT ideology.

\textsuperscript{44} Model Draft of 1982, supra note 11, art. V(1); Model Draft of 1983, supra note 11, art. V(1).
\textsuperscript{45} Model Draft of 1982, supra note 11, art. II(1), (3); Model Draft of 1983, supra note 11, art. II(1), (2).
\textsuperscript{46} Model Draft of 1982, supra note 11, art. II(7); Model Draft of 1983, supra note 11, art. II(7).
\textsuperscript{47} Model Draft of 1982, supra note 11, art. II(6); Model Draft of 1983, supra note 11, art. II(6).
A. The Politicization of the BIT Program

The shift in ideology has been characterized perhaps most visibly by a notable politicization of the BIT program. Increasingly, the BITs have been used as an instrument of foreign policy.

The first indication of this trend became apparent on May 2, 1986, when United States Trade Representative Clayton Yeutter and Grenadan Prime Minister Herbert Blaize met in a suite at Walter Reed Army Hospital where Prime Minister Blaize was undergoing treatment. After about an hour of informal discussion, the two signed the Grenada BIT, which was identical in every respect to the 1984 model negotiating text proposed by the United States as the basis of negotiations.

The Grenada BIT was the first BIT which did not deviate from the U.S. model negotiating text. Grenada had first raised the possibility of concluding a BIT with the United States in December 1985, some two years after U.S. forces invaded Grenada and restored a democratically-elected and pro-market government. For Grenada, the BIT would serve as a signal that the country had achieved political stability and would provide an environment sympathetic to foreign investment. For the United States, the BIT would signal that the invasion had been a success—a potential Cuban satellite had been transformed into a democratic, pro-market state with close ties to the United States.

In the years that followed, BIT negotiating policy continued to reflect U.S. foreign policy. In September 1989, conscious of the move toward democratization and market economies in the Soviet Union and Eastern Europe, a U.S. delegation visiting Warsaw conducted informal discussions with the Polish government about a BIT. The Poland BIT was formally negotiated and concluded the following year.

Negotiations with other Eastern European countries occurred contemporaneously. During 1990, the United States had BIT-related discussions with Czechoslovakia, Bulgaria, Hungary, Yugoslavia, and the Soviet Union. As of May 1, 1993, BITs had been concluded with Bulgaria, the Czech Republic, the Slovak Republic, Romania, and five former Soviet Republics: Russia, Kazakhstan, Armenia, Kyrgyzstan, and Moldova.

The sudden emphasis on concluding BITs with former socialist regimes in Eastern Europe again reflected the broader U.S. foreign policy goal of encouraging democracy and the development of market economies in those countries. Nor was this a goal merely of the executive branch. In 1989, Congress enacted the Support for East European Democracy Act, in which it, among other things, encouraged the President to conclude BITs with Poland

48. VANDEVELDE, supra note 2, at 38.
49. Id.
and Hungary.\textsuperscript{51} In 1992, Congress enacted the Freedom Support Act,\textsuperscript{52} in which it extended the President's authority under the Support for East European Democracy Act to the former Soviet republics.

Foreign policy concerns continued to affect the conclusion of BITs outside the former Eastern bloc as well. In early 1990, just prior to a state visit to Washington, the Congo notified the United States that it was prepared to conclude a BIT.\textsuperscript{53} Negotiations were conducted while the Congolese delegation was in Washington and a BIT was signed at the conclusion of the visit, on February 12, 1990. The document signed was identical to the 1987 model negotiating text then in use by U.S. negotiators. A state visit had provided the setting in which to conclude a BIT as a show of political good will.

Political considerations affected the determination not only of which countries to target for BIT negotiations, but also the determination of which countries to exclude from the BIT program. Two of the countries with whom the United States concluded BITs early in the program were Panama and Haiti. The Panama BIT was signed on October 27, 1982, while the Haiti BIT was signed on December 13, 1983. Both were transmitted to the Senate for advice and consent on March 25, 1986.

Between 1986, when the first ten BITs were transmitted to the Senate, and 1988, when these BITs finally reached the floor of the Senate, political events intervened to make conclusion of BITs with both countries undesirable as a matter of foreign policy. In the case of Haiti, President Jean Claude (Baby Doc) Duvalier was overthrown in February 1986 by a military coup.\textsuperscript{54} The military government initially promised elections and then cancelled them when reports that the military had rigged the elections led to protests and the deaths of 34 protesters at the hands of the military.\textsuperscript{55} The United States responded by cutting off foreign assistance to Haiti.\textsuperscript{56}

In the case of Panama, two U.S. federal grand juries in Florida indicted Manuel Noriega, the head of the Panamanian military, on drug charges in February 1988.\textsuperscript{57} Efforts by Panamanian President Eric Arturo Delvalle to remove Noriega from power led to Delvalle's own ouster and the installation of a Noriega ally in his place.\textsuperscript{58} The United States refused to recognize the new government and imposed economic sanctions on Panama.\textsuperscript{59}

\textsuperscript{51} Support for East European Democracy Act § 306.
\textsuperscript{53} VANDEVELDE, supra note 2, at 38.
\textsuperscript{54} See Robert I. Rotberg, Haiti’s Past Mortgages Its Future, FOREIGN AFF., Fall 1988, at 93.
\textsuperscript{55} Id. at 94.
\textsuperscript{56} Id.
\textsuperscript{57} See Charles Maechling, Jr., Washington’s Illegal Invasion, FOREIGN POL’Y, Summer 1990, at 116.
\textsuperscript{58} Id. at 116.
\textsuperscript{59} Id. at 117.
The Senate approved eight of the ten BITs on October 20, 1988, excluding those with Panama and Haiti. In both cases, the BITs were not approved, at least in part because to do so would have been inconsistent with broader U.S. foreign policy objectives.

B. Regulating the Market

The shift in ideology also was characterized by an increased willingness to regulate market arrangements. As noted above, the BITs had never recognized complete contract sanctity. Rather, contracts generally were sacrosanct only to the extent that they improved the level of protection afforded to investment.

Yet, there had been an exception to the BITs' general approach to contract sanctity. Where investment disputes were concerned, the early BIT model negotiating texts had reflected a much greater deference to contract sanctity. Thus, if an investor and host state had agreed to some other dispute settlement procedure, they were directed by the BIT to use the previously agreed-to procedure rather than the BIT's "investor-to-state" disputes procedure. Only if neither the investor nor the host state chose the previously agreed-to procedure would the BIT mechanism remain available. In effect, the investor could contract away its right to use the "investor-to-state" disputes procedure and the BIT would defer to that contractual arrangement.

By 1983, however, BIT negotiators thought better of this deference to contract sanctity. They decided that investors should have a right to use the "investor-to-state" dispute settlement mechanism, notwithstanding a prior agreement to use another procedure. The 1983 model negotiating text was amended to reflect this new policy, which represented a triumph of the BIT's regulatory function over its facilitative function. The only instance of true, two-way contract sanctity had been eliminated.

C. Facilitating Government Regulation

The most important feature of the shift in ideology, however, was a greater willingness to permit host-state impairment of covered investment. The BIT was weakened as an instrument for regulating host-state governments, facilitating uncompensated expropriations or other host-state impair-

60. VANDEVELDE, supra note 2, at 41.
61. Id. at 40-41.
62. See supra text accompanying note 40.
63. See supra text accompanying notes 38-40.
64. Model Draft of 1983, supra note 11, art. VII(3)(a)(i).
65. The Argentina BIT, see Appendix A, at paragraph 10 of the Protocol, does recognize one narrow situation in which the BIT will defer to an investment agreement in which the investor has waived certain BIT rights. Specifically, a U.S. investor and Argentinian officials may agree to modify the right of free transfer with respect to an investment financed through a debt-equity conversion. Thus, that single BIT contains one instance of genuine two-way contract sanctity.
ments of investment. This change was implemented by a reinterpretation of one clause in the "nonprecluded measures" provision; specifically, the clause which exempts from BIT coverage any measures necessary to protect the essential security interests of a party.

The root of the reinterpretation of the essential security interests exception lay in the claim filed at the International Court of Justice by Nicaragua against the United States on April 9, 1984. The claim alleged, among other things, that the United States had violated its Friendship, Commerce and Navigation treaty (FCN) with Nicaragua.

The United States attempted to defeat the Court's jurisdiction over Nicaragua's claims of FCN violations by arguing that its activities fell within the essential security interests exception in the FCN, which was very similar to the BIT provision. Further, the United States argued that the exception was "self-judging," meaning that each party was the sole judge of whether its actions fell within the exception. The premise was that a country's essential security interests are intrinsically subjective, making it impossible for any other entity to determine what is or is not necessary to protect a state's essential security interests. Because the exception was self-judging, the United States concluded, the Court was without jurisdiction to consider the merits of Nicaragua's claims. In its Judgment of June 27, 1986, the Court rejected the U.S. argument, with even the American member, Judge Stephen Schwebel, refusing to find the essential security interests exception to be self-judging.

Because the essential security interests exception in the Nicaragua FCN is virtually identical to that in the BITs, no textually-based justification existed for interpreting the BIT provisions differently. To the extent that the United States maintained the position it took in the Nicaragua case, it was virtually compelled to interpret the essential security interests exception in the BITs as self-judging.

The first public indication of the significance of the Nicaragua case for the interpretation of the BITs occurred less than two months later, during the August 11, 1986, hearings before the Senate Foreign Relations Committee on the first ten BITs to have been signed. During the hearings, the State Department spokesman told the Foreign Relations Committee that "[i]n light of the recent International Court of Justice treatment of our Friendship, Commerce and Navigation Treaty with Nicaragua, we are considering whether any future procedural action is necessary to underscore our interpretation" of the


68. The Court considered and rejected that argument in its Judgment on the Merits. See Nicaragua, 1986 I.C.J. at 116.

69. For the Court's decision, see id. For Judge Schwebel's conclusions, see id. at 311.
just as it had argued that the essential security interests exception in the FCNs was self-judging, the Reagan administration also regarded the essential security interests exception in the BITs to be self-judging. In effect, the State Department was seeking to widen the essential security interests exception in order to give the United States more latitude to deviate from the BITs for political reasons.

The willingness to subordinate the BITs to other foreign policy concerns was shared by both the administration and individual members of Congress. In the wake of the August 1986 hearings, Democratic Senator Christopher Dodd of Connecticut also became concerned that the BITs might inhibit the legal right of the United States government to take actions, such as the imposition of economic sanctions, against BIT-partners for national security reasons. Senator Dodd urged that the BITs be modified to permit termination for foreign policy or national security reasons. Ultimately, however, Senator Dodd’s proposal was not adopted.

Following the August 1986 hearings, one might have inferred that the United States had backed away from its position in the Nicaragua case. First, prior to the Nicaragua case, the United States had never taken the position that the essential security interests exception was self-judging. It would have been easy to characterize the position as a temporary shift in U.S. policy prompted by the highly charged atmosphere of the Nicaragua case. This was particularly so, given that attempts by the United States to defeat jurisdiction in the Nicaragua case had led to its last minute modification of its compulsory acceptance of the Court’s jurisdiction under the optional clause, contrary to a 40-year policy of consenting to the Court’s compulsory jurisdiction under that clause.

Second, although a State Department official had suggested that the United States might well take action to underscore its interpretation of the essential security interests exception, in fact no such action was ever taken. It was as if, upon reflection, the Department had decided quietly to abandon its Nicaragua position.

Third, despite the concern raised by the Department at the August 1986 hearings, the Senate took no action to endorse the Department’s interpretation. Although the first eight BITs were approved by the Senate with an
understanding that the United States reserved the right to take measures necessary to deal with any unusual and extraordinary threat to its national security,\textsuperscript{75} no attempt was made to address the question of how these threats to national security were to be identified or how the necessity of the means taken was to be determined. In effect, the Senate had very clearly stopped short of endorsing the State Department's position that the essential security interests exception was self-judging.

Fourth, there was no public record that any U.S. BIT-partner ever had been informed that the United States regarded the essential security interests exception as self-judging. Given that the International Court of Justice had rejected the United States' position, that interpretation could hardly be regarded as the obviously correct one. Yet, notwithstanding this fact, the Department did not appear to have taken any steps to ensure that BIT-partners were aware of the special meaning that the United States attached to this clause.

For these reasons, then, events after August 1986 might have suggested that the United States had abandoned its claim that the essential security interests exception was self-judging. The position taken by the Department before the International Court of Justice and at the BIT hearings could have been regarded as representing a temporary deviation in policy rather than a clear shift in ideology.

Any such inference, however, has been undercut by the special language included in the protocol of the BIT concluded with Russia, which was signed on June 17, 1992.\textsuperscript{76} That language states explicitly that "whether a measure is undertaken by a Party to protect its essential security interests is self-judging."\textsuperscript{77} This language indicates that the ideology of the BITs has changed, perhaps permanently.

IV. IMPLICATIONS OF THE IDEOLOGICAL SHIFT

A. Reinterpretation of Essential Security Interests

The most important substantive implications of the shift in ideology flow from the reinterpretation of the essential security interests exception. As will be explained below,\textsuperscript{78} the reinterpreted essential security interests exception could eviscerate the BITs' substantive protections as well as their remedial provisions.

To determine the precise implications of the Russia BIT language, two questions must be answered. First, is the essential security interests exception

\textsuperscript{76} Investment Treaty with Russia, June 17, 1992, U.S.-Russian Fed'n, Protocol para. 8, 31 I.L.M. 794 [hereinafter Russia BIT].
\textsuperscript{77} Id.
\textsuperscript{78} See infra text accompanying note 87.
self-judging in all of the BITs? Second, to the extent that the exception is self-judging in a particular BIT, what implications flow from that fact?

1. Identifying the Self-Judging Provisions

Turning to the first question, it is by no means clear that the essential security interests exception is self-judging in all of the BITs. Certainly, it is self-judging in the Russia BIT, given the explicit language in the protocol. In theory, there may have been special circumstances that made the use of self-judging language appropriate in the Russia BIT but not in the others. From a purely textual perspective, the absence of the Russia BIT protocol language from the other BITs could support the inference that the Russia BIT language is to be interpreted differently from the language in the other BITs.

On the other hand, one cannot ignore the fact that the Russia BIT language simply makes explicit the interpretation that the United States had given the essential security interests exception language in the Nicaragua case. Furthermore, during bilateral negotiating sessions held since negotiations resumed in 1989, U.S. negotiators apparently have routinely told negotiating teams from other states that the United States would regard the language as self-judging if the question arose. Indeed, the protocol language apparently was inserted in the Russia BIT not because of any considerations peculiar to that BIT, but merely because the Russian negotiators suggested its inclusion. It is difficult to avoid the conclusion that since 1984 the United States has interpreted the essential security interests exception to be self-judging, although the Russia BIT represents the first time since 1986 that the United States has made its position clear publicly.

The intent of the United States, however, is not dispositive. Under Article 31 of the Vienna Convention on the Law of Treaties, treaty language is to be interpreted in accordance with its “ordinary meaning.” The text is assumed to be the authentic expression of the parties’ mutual intent.

The International Court of Justice considered and rejected in the Nicaragua decision the U.S. argument that virtually identical language was self-judging. If one goes no further than the ordinary meaning rule, the BIT essential security interests exception is almost certainly not self-judging in any BIT except that with Russia.

The Vienna Convention does permit a party to a treaty to establish that language has a specialized meaning, but a specialized meaning must be “es-

82. Vienna Convention, supra note 80, art. 31(4).
established conclusively" by "decisive proof."

With respect to the BITs concluded prior to October 1984, when the United States made its jurisdictional arguments before the International Court of Justice, it is virtually impossible to establish a specialized meaning for the essential security interests exception because the United States had never taken the position publicly or privately that the essential security interests exception was self-judging. Thus, the essential security interests exception cannot be considered self-judging in those BITs.

With respect to the BITs concluded between October 1984, when the United States first adopted its Nicaragua position, and June 1986, when that position was rejected by the International Court of Justice, a special meaning could be established by evidence that U.S. BIT-partners were aware of the special meaning attached to the language of the essential security interests exception and concurred in that special meaning. At the same time, it is unlikely that any such evidence exists.

No BITs were concluded between June 1986 and the Senate hearings held two months later in August. With respect to the BITs concluded after August 1986, for the reasons explained above, various U.S. BIT-partners may well have concluded that the United States had abandoned its claim that the essential security interests exception was self-judging unless they were given information to the contrary during negotiations. Certainly, the total public silence on the part of the United States on this issue after 1986 does not constitute the decisive proof needed to establish a specialized meaning. Only if the matter was explicitly discussed during negotiations should it be concluded that the essential security interests exception in a post-1986 BIT is self-judging.

In short, then, the essential security interests exception in the Russia BIT is self-judging. In those BITs concluded prior to October 1984, it is virtually impossible to establish that the essential security interests exception is self-judging. In subsequent BITs, it is perhaps possible to make that showing on a case-by-case basis, provided that the evidence with respect to a particular BIT establishes that the parties accepted the specialized meaning which the United States attached to the language of the essential security interests exception.

83. Vandevelde, supra note 81, at 293 n.43.
84. The BITs on which negotiations were completed prior to October 1984 appear to be those with Egypt, Panama, Morocco, Zaire, Senegal, and Haiti. Vandevelde, supra note 2, at 35-38. It should be noted that negotiations with Egypt initially were completed as early as September 1982, but were reopened in 1983 at Egypt's request to consider a list of 20 changes proposed by Egypt. The reopened negotiations finally were completed in 1985. Id.
85. The BITs concluded between October 1984 and June 1986 were those with Cameroon, Bangladesh, Turkey, and Grenada. See id.
86. See supra text accompanying notes 73-76.
2. The Consequences of a Self-Judging Provision

Assuming that the essential security interests exception is self-judging in the Russia BIT or any other BIT, the consequences of that fact are significant. The United States asserted in the Nicaragua case that the effect of treating the essential security interests exception as self-judging was to render nonreviewable a party's invocation of that exception. Under this view, a BIT party could take action against investment and, as long as it claimed that the action was necessary to its essential security interests, the action would be immune from review by the other BIT-party or any third party, including any arbitral tribunal established under the BIT. In short, invocation of the essential security interests exception would cut off all investor remedies under the BIT. The U.S. interpretation of the self-judging essential security interests exception, as set forth in the Nicaragua case, opens what is potentially a very large loophole in the BIT.

Yet, this interpretation would seem to prove too much. If a BIT-party can excuse itself from BIT obligations at will, then it can be argued that the entire treaty is illusory—that the parties in fact have bound themselves to nothing more than a meaningless requirement that they go through a charade of citing national security. An interpretation that essentially vitiates the entire treaty is an untenable one. Therefore, the U.S. interpretation of the concept of a self-judging essential security interests exception must be rejected.

The better view is that, where the security interest is self-judging, it is nevertheless subject to a requirement of good faith. Under customary international law, all parties are obligated to abide by their treaty commitments in good faith. No reason exists for assuming that a self-judging treaty provision is necessarily exempt from that obligation.

87. See supra text accompanying notes 68-69.
90. Judge Lauterpacht's separate opinion in Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 34 (July 6) and his dissent in the Interhandel Case (Switz. v. U. S.), 1959 I.C.J. 6, 95 (Mar. 21) present the classic argument that the self-judging reservations to the Court's compulsory jurisdiction could not be subject to the obligation of good faith. None of his reasons, however, preclude good faith review here.

First, Judge Lauterpacht believed that to review an invocation of the reservation for good faith would undercut the very purpose of the reservation, which was to take certain matters outside the ambit of Court review. Norwegian Loans, 1957 I.C.J. at 52-53; Interhandel Case, 1959 I.C.J. at 103-04. But that merely assumes the matter to be decided. For example, as noted in the text accompanying infra notes 91-100, there is substantial support for the position that the United States did not originally intend the self-judging Connally Amendment to preclude judicial review of a state's good faith in invoking that Amendment.

Second, Judge Lauterpacht believed that the concept of domestic jurisdiction was potentially so broad that it might be impossible as a practical matter for a Court to conclude that an invocation of a self-judging domestic jurisdiction exception was not made in good faith. Norwegian Loans, 1957 I.C.J. at 34-35; Good Faith in Public International Law, supra note 89, at 139-41.
Indeed, the United States itself has taken the position in the past that self-judging reservations are subject to a requirement of good faith. The first use of a self-judging treaty reservation in U.S. practice occurred with the Connally Amendment, adopted by the U.S. Senate on August 2, 1946. The Connally Amendment provided that U.S. acceptance of the compulsory jurisdiction of the International Court of Justice under article 36(2) of the Statute of the Court did not extend to disputes with regard to any matter "essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."91

Senate debate on the Connally Amendment suggests an original understanding that the Amendment would not permit the United States to defeat the Court's jurisdiction unless in fact it had some reasonable or good faith basis for claiming that a matter fell within its domestic jurisdiction. Senator Wayne Morse, the most outspoken opponent of the Amendment argued that, assuming the Amendment were adopted, the United States nevertheless could not refuse to submit a dispute to the Court "on the pretense that it involved a domestic issue rather than an international issue."92 Senator Claude Pepper, another Amendment opponent, took the contrary position, contending that the Amendment would not preclude an arbitrary or capricious invocation.93 The Amendment's sponsor, Senator Tom Connally, responded by dismissing any suggestion that the United States "would adopt a subterfuge, a pretext, or a pretense in order to block the judgment of the Court on any such grounds"

gian Loans, 1957 I.C.J. at 53-55. Judge Lauterpacht conceded, however, that this did not mean that invocations of other reservations were equally unsuited for review under a good faith standard. Interhandel Case, 1959 I.C.J. at 114. It should be noted that the Court did subsequently conclude that a matter was not within the domestic jurisdiction of a state in Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 1, 33 (Apr. 12), implicitly rejecting Judge Lauterpacht's contention. See also James Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 1979 BRIT. Y.B. INT'L L. 63, 67 n.3 (arguing that in all cases where domestic jurisdiction has been invoked, it has been held or was "obvious" that the issues were not matters of domestic jurisdiction).

Third, Judge Lauterpacht believed that it was unseemly for a Court to call into question a sovereign state's good faith. This extraordinary sensitivity to the charge of bad faith seems unwarranted. The international legal system does not flinch from concluding that a state committed crimes against humanity or gross violations of human rights. Why should it flinch from concluding that a state failed to honor a treaty obligation in good faith? To take Judge Lauterpacht's position is essentially to read the obligation of good faith out of treaty law.

Finally, Judge Lauterpacht noted in the Interhandel Case that the Court in Norwegian Loans had dismissed France's claim based on Norway's invocation of the self-judging reservation and expressly declined to consider whether the matter actually was within Norway's domestic jurisdiction. He concluded that this amounted to a rejection of the argument that Norway's invocation was subject to a requirement of good faith. Interhandel Case, 1959 I.C.J. at 115. A determination that Norway's invocation was erroneous, however, is quite different from a determination that Norway's invocation was made in bad faith. It is only the former that the Court decided that it did not have to address. The possibility of a good faith limitation was not considered by the Court.

92. See Declaration of the President of the United States, supra note 74.
and asserting that any such action by the United States would be "corrupt[ ]
and improper[]."\textsuperscript{95} Some commentators have interpreted Senator Connally's
statements as essentially endorsing Senator Morse's position that invocation
of the Amendment would be subject to a requirement of good faith.\textsuperscript{96}

Thirteen years later, Senator Hubert Humphrey introduced a resolution
to remove the self-judging language from the Connally Amendment. The
August 30, 1959 report of the State Department on Senator Humphrey's res-
olution observed that

\begin{quote}
[i]t was the understanding of the Senate when the automatic proviso was
adopted that this reservation would never be improperly invoked and that the United States would be bound in good faith to accept the Court's jurisdiction in
every case involving matters not essentially within the domestic jurisdiction of
the United States.\textsuperscript{97}
\end{quote}

Thus, more than a decade after the Connally Amendment was adopted, the
United States was committed publicly to the position that the self-judging
language was subject to a requirement of good faith.

The United States reiterated that position the following year in the \textit{Case
Concerning the Aerial Incident}.\textsuperscript{98} The United States had instituted proceed-
ing in 1957 before the International Court of Justice against Bulgaria arising
out of injury suffered by American nationals when a Bulgarian military air-
craft shot down an Israeli commercial aircraft. Bulgaria objected to the juris-
diction of the Court, invoking the Connally Amendment on the basis of
reciprocity.\textsuperscript{99} In February 1960, the United States submitted a set of "Writ-
ten Observations" on Bulgaria's jurisdictional objections in which the United
States argued as follows:

\begin{quote}
Bulgaria . . . asserts that it is entitled to declare the subject matter of the pres-
ent case to be essentially within the domestic jurisdiction of Bulgaria. Bulgaria
contends that, once it has made this declaration, the Court is ousted of jurisdic-
tion by virtue of Bulgaria's reciprocal invocation of [the Connally Amend-
ment]. This contention is apparently premised on the proposition that there
\end{quote}

\begin{flushright}
96. See Louis Henkin, \textit{The Connally Reservation Revisited and, Hopefully, Contained}, 65
AM. J. INT'L L. 374, 375-76 (1971). Note also the comments of a former State Department
Legal Adviser, quoted in id. at 375 n.6. For a contrary reading of the legislative history, see J.
Patrick Kelly, \textit{The Changing Process of International Law and the Role of the World Court}, 11
MICH. J. INT'L L. 129, 140 (1989)(arguing that the legislative history "suggests that no such
good faith limitation was intended").
97. The International Court of Justice, 12 Whiteman \textit{DIGEST} § 25, at 1309 (emphasis
added).
98. (U.S. v. Bulg.), 1960 I.C.J. 146 (May 30)(order removing case from Court's
list)[hereinafter \textit{Aerial Incident Case}].
99. The doctrine of reciprocity in this context holds that one state may invoke a treaty
obligation of another state only if the first state is also subject to the same obligation. Where one
state has entered into a treaty with certain reservations, another party to the treaty may invoke
those same reservations against the first state. Because the United States had refused to accept
the Court's jurisdiction with respect to matters covered by the Connally Amendment, Bulgaria,
in a dispute with the United States, was entitled to invoke the Connally Amendment against the
United States as if Bulgaria had included a similar reservation in its own acceptance of the
Court's jurisdiction.
\end{flushright}
are no limits upon the right and ability of a State to determine, under the reservation in question, that a matter lies essentially within domestic jurisdiction.

The United States Government, which was the author of the reservation now sought to be invoked by Bulgaria, is unable to agree with this view. The United States does not consider that [the Connally Amendment] authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties.

It is the view of the United States that [the Connally Amendment] does not confer a power to nullify the jurisdiction of this Court through arbitrary determination that a particular subject matter of dispute is essentially domestic.

The position of the United States has not been consistent, however. In the *Interhandel Case*, Switzerland brought a claim against the United States based on the latter's seizure of certain assets during World War II under the Trading With the Enemy Act. The United States objected that the proceedings were barred by the Connally Amendment, arguing that "this determination ... is not subject to review or approval by any tribunal" and that "the subject matter of the determination is not justiciable." The Court ultimately did not reach the issue because it found the claim barred by the exhaustion of local remedies doctrine.

In the *Aerial Incident Case*, three months after filing its Written Observations on the Connally Amendment contending that the Amendment could not be invoked arbitrarily, the United States' agent sent a letter to the Court withdrawing its argument, asserting:

> When the United States has made [a] determination under [the Connally Amendment] that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitively from the jurisdiction of the Court the matter which it determines. A determination under [the Connally Amendment] that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination.

In short, the United States has wavered in its view of the consequences of the Connally Amendment. The record thus precludes any argument that a self-judging provision cannot be subject to an obligation of good faith. At best, it permits only an inference that the parties to a particular self-judging

100. The International Court of Justice, 12 Whiteman DIGEST § 25, at 1306.
provision may have intended that that provision be exempt from an obligation of good faith.

Assuming that the parties do intend to exclude a particular commitment from the obligation of good faith, that intent should not control for two reasons. First, it could be argued that the obligation to comply with a treaty in good faith, which is implicit in the principle of *pacta sunt servanda,* is a peremptory norm of international law. As such, the obligation of good faith cannot be modified by agreement of the parties.

Second, even if the obligation of good faith is not a peremptory norm, simple logic dictates that, as a concept implicit in the principle of *pacta sunt servanda,* the good faith obligation cannot be disavowed by agreement of the parties. A treaty that purported to exempt itself from the obligation of good faith and hence the principle of *pacta sunt servanda* "would represent a 'logical conundrum' because its 'validity would appear to depend on the very norm which it purports to abolish.'"

The history of the Connally Amendment described above lends some support to this view. Those who have argued that self-judging reservations are subject to a good faith requirement have based their argument not so much on the actual intent of Congress as on the contention that inclusion of a self-judging reservation unrestricted by a requirement of good faith would effectively nullify the agreement.

Assuming that a self-judging essential security interests exception were subject to a requirement of good faith, its invocation would not preclude judicial or arbitral review. A court or arbitral tribunal could examine whether a state made a claim in good faith that a particular action was necessary to further its essential security interests. Any action taken by a BIT-party adverse to covered investment and defended under the essential security interests exception would be subject to review under the "investor-to-state" and "state-to-state" disputes provisions of the BIT.


110. This particularly was Hersch Lauterpacht's concern in his 1953 Report on the Law of Treaties, *supra* note 88. See also Henkin, *supra* note 96, at 375 (arguing that to interpret the Connally Amendment as giving the United States unrestricted discretion would render its acceptance of the Court's jurisdiction "not merely illusory but a cynical mockery"). For a contrary view, see Crawford, *supra* note 90.

111. Indeed, certain of the judges in the *Norwegian Loans* case were prepared to undertake a somewhat similar determination concerning whether Norway's assertion that the matter lay within its domestic jurisdiction was genuine. *See* Crawford, *supra* note 90, at 67 n.2.
The inquiry, however, would not be whether the measure was in fact necessary to further the state's essential security interests, but merely whether the state acted in good faith in so concluding. The self-judging essential security interests exception would be broader than a non-self-judging exception, but would not be limitless.

B. The Symbolic Role of the BITs

A second consequence of the shift in BIT ideology is that the BITs have begun to take on a new role as a symbol not merely of a particular investment policy, but also of U.S. political support for particular BIT-partners. The danger is that, in their eagerness to conclude a BIT as a show of friendship, the United States and its BIT-partner might not discuss sufficiently the legal, political, and economic implications of bringing the treaty into force. In the end, BITs may be concluded with states that are not willing or able to observe their obligations.

Fortunately, there is no indication thus far that this has happened. Although the Grenada and Congo BITs both were concluded after only brief negotiations, neither treaty appears thus far to have been ill-advised as a matter of investment policy.

Certainly, the eagerness to conclude a BIT has not led the United States to make major new concessions. The Congo and the Grenada BITs, despite the speed with which they were negotiated, involved no concessions of any kind by the United States. Similarly, notwithstanding the eagerness in the United States to conclude several of the Eastern European BITs, particularly those with Poland and Russia, neither treaty involved major new concessions by the United States.

C. Strengthening Dispute Resolution

The shift toward a more regulatory conception of the BITs at the cost of contract sanctity has strengthened the BITs in one respect. The "investor-to-state" disputes provision is stronger because host states can no longer cut off the right to "investor-to-state" arbitration by invoking previously agreed-to dispute procedures. Only if the investor has invoked such procedures (or submitted the dispute to local courts) will the right to arbitration under the BIT's disputes provision be lost.

To the extent that the goal of the BITs was to protect U.S. investment in foreign countries, the concept of contract sanctity had never made any sense. The underlying premise of the BITs is that private investors are at a relative disadvantage in their negotiations with host states, and, thus, BITs are necessary to establish a minimum standard of treatment to which investors are

112. See supra text accompanying notes 48, 53.
113. See supra text accompanying note 64.
entitled. Preserving contracts in which investors had bargained away those rights was inconsistent with the goal of investment protection.

Investment protection, however, was never the only goal of the BITs. As has been argued here,115 the BITs also had an ideological goal: to promote a separation of public and private sectors, with investment cocooned in the latter. Contract sanctity was an important element of that ideological role. The gradual erosion of contract sanctity in the BITs was a victory of pragmatism over ideology.

V. CONCLUSION

The early ideology of the BITs, on its face, neither favored nor disfavored the protection of U.S. investment overseas. First and foremost, it reflected a premise that investment matters should be regulated by market rather than political forces. In theory, the result of such an approach could be that an investor negotiated an agreement with a host state in which the investor agreed to less favorable treatment than even customary international law otherwise guaranteed.

In fact, however, U.S. policymakers in drafting the BIT model negotiating text did not consistently adhere to the premises of the early ideology. The principle of contract sanctity, for example, generally was followed only to the extent that the contract between an investor and the host state provided the investor with more favorable treatment than the BIT. Only pro-investor contract provisions were sacrosanct; those provisions that disfavored investors usually were superseded by the BIT.

Yet, any inference that the ideology was adhered to only when it favored investment must be rejected. The early model negotiating texts, for example, treated contract provisions prescribing remedies for investment disputes as binding, even if those remedies were less favorable than the “investor-to-state” disputes provision in the BIT. Contract sanctity sometimes was enforced even when the result disfavored investors.

Further, not only did U.S. policymakers at times follow their ideological premises to conclusions unfavorable to investors, they occasionally departed from the classic ideology in ways that disfavored investor interests. For example, the treaty commitments of the BIT-parties not to impair investment in various ways, such as through uncompensated takings or currency exchange controls, were never unqualified. The parties always reserved the right to derogate from these commitments for sufficient reasons of public policy, such as to maintain public order or to protect a state’s essential security interests.

Early BIT ideology, in other words, was not a mere smokescreen for a pro-investor foreign policy. The situation was more complex. Early BIT ideology was an internally consistent vision of the proper relationship between

115. See supra text accompanying notes 8-10.
politics and markets that at times would favor investors and at other times would disfavor them, although instances of the former almost certainly outweighed instances of the latter. Departures from BIT ideology, moreover, were pragmatic adjustments that could either favor or disfavor investor interests.

The shift in the classic BIT ideology that began very early in the BIT negotiating process and continues today reflects a series of departures from the premise that investment should be regulated by market rather than political forces. The shift, however, is not a complete reconceptualization of BIT ideology. Classic BIT ideology still dominates the overall structure and content of the treaties.

These departures from the early ideology might have merited little attention, particularly given that significant departures were in the treaty text from the beginning, were it not for the potential impact of the most recent departure—the explicit reinterpretation of the essential security interests exception in the Russia BIT. Depending upon what the reinterpretation means, it has the potential to render the entire treaty meaningless.

If the position taken by the United States in the Nicaragua case is correct, then a claim by a BIT-party that a particular measure was necessary to protect its essential security interests would be nonreviewable, opening up an unlimited loophole in the treaty. This position would subordinate the entire agreement to the unfettered discretion of a BIT-partner. In effect, it would permit either party at its discretion to bring investment matters entirely within the realm of politics and to undercut the purpose of the agreement.

Such an interpretation cannot be correct. The preferred view is that even a self-judging essential security interests exception is subject to a requirement of good faith. In that view, although the essential security interests exception in the Russia BIT (and in any other BIT in which the exception is determined to be self-judging) would weaken the separation between the market and politics as well as dilute the protection afforded by the agreement, the BIT would continue to have some force.

The belief that law can and should separate the market and politics has deep roots in American legal ideology. Experience has shown that the endeavor can never be entirely successful and, indeed, the progenitors of the BIT never sought a complete separation or claimed that one was possible. Law can at least partially insulate the market from politics, but only where it is able to achieve some degree of autonomy.

It is the autonomy of the law that the self-judging exception threatens. By subordinating treaty law to the political interests of the state, the self-
judging exception vitiates the protection for investment afforded by the BITs and challenges the very core of the ideology that has underlain the BIT program since its inception.
LIST OF BILATERAL INVESTMENT TREATIES


