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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38Q63S

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United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards

by
K. Scott Gudgeon†

INTRODUCTION

The United States Government created the Bilateral Investment Treaty (hereinafter BIT) program to provide a mechanism for protecting U.S. foreign investment in the Third World from unfair or discriminatory treatment and for promoting treatment standards compatible with U.S. policies and principles of international law. The model treaty (hereinafter Model BIT) that ultimately developed under the BIT program was the product of years of extensive bureaucratic analysis, refinement by members of the business and

† General Counsel, Multinational Force and Observers, Rome, Italy; former Assistant Legal Adviser, U.S. Department of State, 1982-1984. The views expressed in this Article do not represent the official views of the U.S. Government or any agency, but are solely those of the author. The author is grateful for the insightful suggestions and comments of many colleagues who took the time and effort to review this Article. Special thanks are extended to Ms. Susan Bell and Ms. Francesca Corrias for their patience in assisting in the preparation of the draft.

1. The signed BITs with Senegal, Haiti, Zaire, Morocco, Turkey, Bangladesh, and Cameroon were based on the 1983 version of the Model BIT. Treaty Between the United States and — Concerning the Reciprocal Encouragement and Protection of Investment, Revised Draft of Jan. 21, 1983, reprinted in Recent Development, Developing A Model Bilateral Investment Treaty, 15 LAW & POL’Y INT’L BUS. 273, A-1 (1983) [hereinafter cited as the 1983 Model BIT]. While the original draft of the BIT with Egypt was based on earlier December 1981 and May 1982 BIT prototypes, the subsequent Supplementary Protocol was modeled after the 1983 Model BIT. The signed BIT with Grenada was based on the most recent draft of the Model BIT, revised February 24, 1984. Telephone interview with Edward M. Rozynski, Office of the United States Trade Representative, Executive Office of the President (June 4, 1986). The 1984 draft of the Model BIT is set out in an appendix to this Article [hereinafter cited as 1984 Model BIT].

For purposes of documenting the original intent and purpose of BIT formulations, this Article is based on relevant provisions within the first five signed treaties with Panama, Senegal, Haiti, Zaire, and Egypt (as signed in 1982).

2. Variations in law and policy among potential treaty partners presented both substantive and tactical difficulties for developing a treaty prototype. For example, agreements with Latin American states implicated Calvo-related issues, and "graduated" and "non-graduated" developing countries set different priorities for investment-related concerns. The unique concerns of communist countries, such as the People's Republic of China, were especially difficult to address in any model treaty.
legal communities, and modification during negotiations of the initial treaties. While emergence of a package of treaties ripe for Senate ratification has been slow, the BIT program has yielded signed BITs emulating the Model BIT with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada.

3. Members of various business and legal groups advised the government in the development of the BIT Model principally through consultations in Washington, D.C. arranged by the American Society of International Law.

4. The creation of a BIT prototype was first announced by the Office of the United States Trade Representative in January 1982. Office of the United States Trade Representative, Reagan Administration Initiates Bilateral Treaty Negotiations, Press Release (Jan. 13, 1982). This initial draft was modified as a result of BIT negotiations with Egypt and Panama. Telephone interview with Edward M. Rozynski, Office of the United States Trade Representative, Executive Office of the President (June 4, 1986).

5. After considerable delay, due partly to Egypt's and Panama's requests to reopen negotiations on certain technical points, the treaties with Panama, Senegal, Haiti, Zaire, Morocco, and Turkey were submitted by the President to the Senate Foreign Relations Committee on March 25, 1986 for advice and consent to ratification. The treaties with Cameroon, Bangladesh, and Egypt were submitted to the Senate Foreign Relations Committee on June 2, 1986, and the treaty with Grenada was submitted on June 3, 1986. According to the Office of the United States Trade Representative, other BITs are in various stages of negotiation and signings are anticipated. Telephone interview with Edward M. Rozynski, Office of the United States Trade Representative, Executive Office of the President (June 4, 1986).


This Article does not represent a comprehensive survey of the U.S. BITs. It serves the more limited purpose of examining the origins, objectives, and provisions of the U.S. BITs from the perspective of one who worked within the U.S. Government on the application of U.S. commercial treaties and the development of the U.S. BIT program. This Article also limits its discussion to the general treatment standards set forth in Article II of the Model BIT. These provisions, the most dynamic in terms of impact on established and prospective U.S. transnational investment, most clearly reflect the inter-relationship between U.S. foreign investment and trade policies.16

Part I of this Article discusses the development and purposes of the U.S. BIT program and highlights the innovations of the Model BIT in relation to traditional U.S. and European commercial treaties. Part II describes the protections afforded under the key general treatment standards of Article II of the Model BIT and as adopted by the BITs with Egypt, Haiti, Panama, Senegal, and Zaire. In addition, it discusses the nature of the exceptions to the national/MFN treatment standard and analyzes the prospect and effect of future expansion of these exceptions. Part III considers the influence of both U.S. and non-U.S. BITs on the development of customary international law and on the willingness of U.S. courts to enforce such international standards of transnational investment law. The Article concludes with a discussion of the BIT program’s prospects in light of its intended purposes.

I

GENESIS OF THE MODEL BIT

A. Sources of the U.S. Bilateral Investment Treaties

1. Treaties of Friendship, Commerce and Navigation.

Commercial treaties traditionally have played an important role in the articulation and implementation of U.S. policy regarding standards of treatment and protection of transnational investment.17 These commercial treaties are generically known as Treaties of Friendship, Commerce and


16. At the time of this writing, the BITs with Morocco, Turkey, Cameroon, Bangladesh, and Grenada, and the Supplementary Protocol of the Egypt BIT were unavailable to the public. For purposes of discussing Article II of the BITs, this Article will refer to relevant provisions within the BITs with Panama, Senegal, Haiti, Zaire, and Egypt (as signed in 1982).

17. On U.S. FCN treaties, see generally R. Wilson, United States Commercial Treaties and International Law (1960) [hereinafter cited as R. Wilson, Commercial Treaties]; H. Hawkins, Commercial Treaties and Agreements; Principles and Practice (1951); Wilson, Postwar Commercial Treaties of the United States. 43 Am. J. Int’l L. 262 (1949); Wilson, A Decade of New Commercial Treaties, 50 Am. J. Int’l L. 927 (1956). On property
Navigation (hereinafter FCN treaties) and are currently in force between the United States and almost fifty countries. The provisions of the FCN treaties have developed over time to reflect, inter alia, shifts in business practices, U.S. commercial interests, and the political and legal environment. Nearly half of the current U.S. FCN treaty partners are linked by treaties developed and concluded in the immediate post-World War II period. The main innovation of these post-World War II FCN treaties over their predecessors lies in the application of traditional FCN treaty benefits to corporate activities, including those of local subsidiaries.

The U.S. FCN treaty program has in large part accomplished its objective of modernizing U.S. commercial relationships with key trading partners among the developed countries. However, efforts to extend the FCN treaty program to developing countries have been frustrated by the complexity and scope of the U.S. FCN treaty model, which covers many sensitive topics other than commerce, such as consular relations, immigration, and religious and personal rights. Despite concessions made by the United States in certain of these areas, skepticism among Third World countries about the benefits of unrestrained inward investment and protectionist policies impeded the U.S. FCN treaty program, which faltered after the entry into force of treaties with Thailand and Togo in the late 1960s. The last, unsuccessful U.S. FCN treaty negotiation occurred with the Philippines in the early 1970s.

18. For the Department of State's compilation of FCN treaties in force, see 20 I.L.M. 565 (1981).
19. FCN provisions guarantee, inter alia, commercial access, property protections, and standards of treatment.
22. Such skepticism is by no means limited to developing countries. The entry provisions of FCN treaties with developed countries are not uniformly unqualified. See, e.g., Convention of Establishment, Nov. 25, 1959, United States-France, Protocol, paras. 14, 16, 11 U.S.T. 2398, 2423, T.I.A.S. No. 4625; Organisation for Economic Co-operation and Development [OECD], National Treatment for Foreign-Controlled Enterprises Established in OECD Countries (1978) [hereinafter cited as OECD National Treatment]. Certain developed countries, a number of which have adopted formal screening mechanisms in recent years, were completely unreceptive to the policies underlying the FCN Treaty attempt to facilitate inward investment. One such country was the United States' largest trading partner, Canada. See Franck & Gudgeon, Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice, 50 N.Y.U. L. REV. 76, 137 n.344 (1975).
2. The European BIT Model.

Beginning in the early 1960s, several European countries successfully concluded bilateral investment treaties with developing countries. Unlike the U.S. FCN treaties, the European BITs addressed only essential investment-related subjects such as treatment standards, expropriation, financial transfers, and dispute settlement. While the U.S. FCN treaties failed as a model for extending treaty ties to the Third World, the European BIT experience presented the investment experts within the U.S. State Department with a proven success story. The Legal Adviser’s Office of the State Department thus recommended that the United States emulate the European example.

B. Customization of the U.S. FCN Treaty and European BIT Models

The U.S. BIT program can fairly be characterized as the successor to the U.S. FCN treaty program. However, it is more focused than the FCN treaty program in terms of targeted host countries in that prospective BIT partners are limited to developing countries with which the United States has no contemporary FCN treaty in place. Furthermore, in contrast to the FCN treaties, the Model BIT is stripped of non-investment and non-establishment features, which include traditional subjects that either have declined in the hierarchy of U.S. international policy objectives (e.g., navigation) or are now handled by other instruments (e.g., trade by GATT and taxation by the U.S. bilateral tax treaty program). The Model BIT retains, but expands upon, FCN treaty establishment concepts and terminology in the areas of entry and general treatment standards, property protection, and financial transfers. Finally, while the Model BIT mirrors the FCN treaties in conferring on private parties rights which are directly enforceable by them in the courts, it goes beyond its predecessors by also providing for the resolution of investor-host

23. For a compilation of non-U.S. BIT texts, see INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES [ICSID], INVESTMENT PROMOTION AND PROTECTION TREATIES (1983). See also INTERNATIONAL CHAMBER OF COMMERCE [ICC], BILATERAL TREATIES FOR INTERNATIONAL INVESTMENT (Pub. No. 303) 13–35 (1977) (list of FCN treaties and BITs with commentary and illustrative texts) [hereinafter cited as ICC, BILATERAL TREATIES]. The BITs of the Federal Republic of Germany and of Switzerland in particular provided models for the U.S. BIT program. By the end of 1976, the Federal Republic of Germany and Switzerland had signed bilateral investment treaties with 51 developing countries. Id. at 16, 22.

24. Only Japan, the United Kingdom (with Iran in 1957) and the Federal Republic of Germany (with the Dominican Republic in 1959) followed the U.S. FCN treaty example. For analysis of why developing countries favor specialized bilateral treaties over the U.S. FCN treaty form, see also ICC, BILATERAL TREATIES, supra note 23, at 7–12 (this author does not share the ICC view that BIT detail in provisions substantively similar to those of the FCN treaties renders the BITs “superior from a legal point of view.” Id., at 8.) On the evolution of FCN treaties, see R. WILSON, THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES 102–05 (1953) [hereinafter cited as R. WILSON, INTERNATIONAL LAW STANDARD]; Wilson, Property-Protection Provisions, supra note 17, at 90–104. Often cited as a typical FCN treaty is that with the Federal Republic of Germany, 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 cited as FRG FCN].
country disputes through binding arbitration.\textsuperscript{25} Despite these differences, the general interpretation and application of BITs should lead to results equivalent to those of the FCN treaties in common areas of coverage.\textsuperscript{26}

In limiting the scope of the Model BIT to exclusively investment-related issues, the U.S. BIT program was patterned after the European model. However, the European BITs were adapted to allay certain U.S. legal and business concerns. In particular, the brevity and simplicity of the European BITs, which in part made them attractive, also caused reservations about their utility. For example, there was concern that the European model lacked sufficient specific guidance in the enforcement context. Furthermore, the European model's blanket requirement that the parties arbitrate all investment-related disputes raised questions as to the wisdom of granting full U.S. reciprocity. Consequently, the U.S. Model BIT frames the arbitration provisions with deference to U.S. court jurisdiction in matters relating to tax, criminal law, antitrust, and other investment regulation that the United States has traditionally been reluctant to view as appropriate subjects of arbitration.\textsuperscript{27}

\section*{C. Intended Purposes of the U.S. BITs}

The primary purpose of the BIT program was to create an instrument of U.S. legal policy which was responsive to the unique issues facing private foreign investment in developing countries. The BIT initiative gained momentum within the bureaucracy in the mid-1970s after a cycle of expropriation activity by developing countries. The Legal Adviser's Office of the U.S. State Department recommended the extension of treaty ties as a means of reinforcing congenial and stable legal standards for the protection of U.S. investment interests in the Third World.

Utilizing bilateral treaties such as the FCN treaties and BITs for the purpose of stabilizing the international legal environment is a long-standing U.S. practice. In relation to an FCN treaty with Iran,\textsuperscript{28} which was invoked following the hostage incident, the International Court of Justice described the core purpose of such bilateral treaties as follows:

\begin{quote}
The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the
\end{quote}


\textsuperscript{26} But see infra text accompanying notes 39--42 for discussion of the BITs' rejection of the FCN treaties' distinction between foreign-incorporated subsidiaries and host country-incorporated branches.

\textsuperscript{27} However, the exclusion of antitrust matters from arbitration has recently been contested. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), \textit{rev'd in part, aff'd in part}, --- U.S. ---, 105 S.Ct. 3346 (1985).

protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object . . . of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means.29

The Model BIT was accordingly intended to provide legal standards that would be applicable notwithstanding a deterioration or rupture of political relations between the host country and the United States.

Quite apart from the legal protection afforded U.S. investment in specific cases, BITs were proposed as a means of strengthening principles of customary international law and practice as observed and advocated by the United States and its developed-country partners in the Organization for Economic Cooperation and Development (hereinafter OECD). The Model BIT restatement of traditional international commercial law responded to criticism in the United Nations and other multilateral fora that customary standards articulated by developed countries were unresponsive to the needs and interests of developing host countries.30 The Model BIT was specifically designed to dovetail with efforts of the OECD31 and other OECD-country BIT initiatives, and with developed-country positions adopted in multilateral organizations in maintaining, refining, and expanding adequate investment treatment standards.

As an initiative proposed by international legal specialists within the U.S. Government, the BIT program was originally endowed with primarily legal policy concerns. Although the titles and preambles to most of the BITs refer to the “encouragement” as well as the “protection” of investments, the BIT Model was not designed with an intent to catalyze investment decisions. Rather, the practical functions of the BIT program were conceived in more static, protective terms, in relation to stocks of investment already in place. In fact, the framers of the Model BIT were unaware of any proven relationship between the existence of FCN treaties or European BITs and investment


Indeed, the developers of the Model BIT regarded the absence of evidence of a capital flow relationship as advantageous in rallying support for the BIT program, since evidence of a positive correlation between investment treaties and increased capital flow abroad could have spurred opposition by organized labor and regional economic interest groups within the United States.

II

TREATMENT OF INVESTMENTS

In a general sense, all of the BIT provisions regulate the treatment of investment. In its more narrow and technical usage, however, "treatment" refers to the national, most-favored-nation, or other specified treaty standards imposed on a host country's regulation of foreign investment. These treatment standards, predominately set forth in Article II of the U.S. BITs, are supplemented by three other sets of specific treaty provisions addressing rights with respect to nationalization and expropriation, payments and financial transfers, and dispute settlement. The discussion that follows is confined to the general treatment provisions of Article II. The supplementary provisions will be referred to only as they relate to these general treatment standards.

Following a brief discussion of the investment interests protected under the U.S. BITs, this Part discusses the national/MFN treatment standard, the scope and nature of that standard's exceptions, the treatment standards for investment in competition with state-owned enterprises, and the gap-filling standards of international law and "fairness and equity". In addition, it reviews the prohibition against performance requirements and the treatment of property loss in the event of war or civil disturbance. Relevant provisions of

32. For discussion concerning the lack of evidence substantiating a relationship between BITs and capital flow, see Comment, The BIT Won't Bite: The American Bilateral Investment Treaty Program, 33 Am. U. L. Rev. 931, 942-43 (1984) (the criticism of the BITs in this Comment is largely based on analysis of early prototypes rather than of the signed treaties). Given the age and number of FCN treaties in place, there was also limited documentation of the FCN treaties' utilization and impact on investment decisions. This author recalls a questionnaire of the Comptroller of the Currency which was distributed to U.S. banks in the late 1970s. Not one positive answer was elicited from the questionnaire's inquiry as to the banks' use of or reliance on FCN treaty provisions in conducting investment activities. Documentation of the European BITs' impact on investment flows was also meager; see ICC, Bilateral Treaties, supra note 23, at 10-11.

33. U.S. BIT expropriation provisions are discussed and compared to the European BITs in Gudgeon, Valuation of Nationalized Property Under U.S. and Other Bilateral Investment Treaties, in IV The Valuation of Nationalized Property in International Law (R. Lillich ed.) (anticipated publication 1986).

34. The United States seeks rights in respect of payments and financial transfers on the basis of free transferability. However, where balance of payments circumstances so militate, long term objectives may be supplanted in the short term by rights defined in national, MFN, particular treaty terms, or a combination of these.

35. See supra notes 25, 27 & 33 and accompanying text.
specific signed BITs are also discussed, with cross-references to FCN treaty practice.

A. Interests Protected

The major function of the U.S. BITs is to protect U.S. investment by eliminating impediments to financial or commercial activity in the host country, guaranteeing U.S. investors the same benefits accorded domestic and third-country investors, and assuring adequate remedies in the event of unlawful interference or discriminatory treatment. In general, the coverage of BIT protections is broad given the liberal definition of "investment". "Investment" is defined by example in substantively identical terms in Article I of each of the signed treaties. The examples are not exclusive but rather purely illustrative. The framers of the Model BIT, like those of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, were wary of defining the concept of "investment" for fear

36. For example, the relevant provisions of Article I of the Zaire BIT provide as follows:
   (c) "Investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:
      (i) tangible and intangible property, including all property rights, such as liens, mortgages, pledges and real security;
      (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
      (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
      (iv) intellectual and industrial property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill;
      (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
      (vi) any rights conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
      (vii) returns which are reinvested.
   Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

   (e) "Return" means an amount derived from or associated with an investment, including profit, dividend, interest; capital gain, royalty payment; management, technical assistance or other fee; or returns in kind.

Zaire BIT, supra note 9, art. I(c),(e).

37. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 575 U.N.T.S. 159. See also Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, arts. 2, 4, Doc. ICSID/11 (June 1979), reprinted in 21 I.L.M. 1443, 1445-46 (1982) (stipulating that the Secretary General is to determine whether a matter to be submitted to the Facility for resolution is in fact investment-related) [hereinafter cited as ICSID Rules]. Article 4(3)(b) of the ICSID Rules directs the Secretary General to distinguish investment-related disputes from disputes arising from "ordinary" commercial transactions. The Comment to Article 4 suggests that one role of the Facility, in seeking to expand utilization of the Centre, is to address border-line cases in which there is either doubt on the part of the parties as to whether the underlying transaction is investment-related, or risk that an ICSID tribunal will reject the case on the ground that the transaction does
of excluding any of the variety of potential investment arrangements and contexts that may arise. The BIT approach is thus consistent with the FCN treaties, which refrain from imposing a potentially limiting definition of protected "property". Nevertheless, the BIT concept of "investment" should be coterminous with the FCN treaty concept of "property" for all practical purposes, and should include any legitimate interest having economic value and which is associated with an investment.\(^{38}\)

One significant departure of the Model BIT from the FCN treaties is the abandonment of the distinction between branches of foreign-incorporated entities and foreign-owned subsidiaries incorporated under the laws of the host country for purposes of determining the applicability of certain treaty provisions. The potentially broad practical consequences of this formalistic distinction are evident in the U.S. Supreme Court decision of \textit{Sumitomo Shoji America v. Avagliano},\(^{39}\) which construed a provision of the U.S.-Japan FCN treaty granting investors the privilege to appoint foreign nationals to upper level management regardless of nationality.\(^{40}\) In \textit{Sumitomo}, the hiring practices of a Japanese subsidiary in the United States were challenged under U.S. laws prohibiting discriminatory hiring practices. Under the FCN treaty, a company operating in the territory of the other party must be deemed of foreign "nationality" in order to fall within this treaty privilege. In utilizing the FCN treaty's prescribed place of incorporation test to determine corporate nationality, the Supreme Court held that the Japanese-owned subsidiary, a New York company, was excluded from treaty coverage.

This distinction, whatever its merit at the time or in certain selective contexts, did not comport with the general objectives of the BIT investment protection standards. Thus, the BITs extend their protections directly to all "investment", rather than to "nationals" or "companies" of a treaty partner \textit{qua} owners of investment. "Investment", as uniformly defined in Article I of
all the signed BITs, includes investment accomplished through any local corporate form. While the Supreme Court should reach a contrary result in Sumitomo if it were to construe the same case under a BIT, the BIT provision affects only the appointment of a relatively narrow range of upper management personnel, reflecting the relative sophistication of U.S. corporations in accommodating multinational staffing. Like the analogous FCN treaty provision, it aims at restraining nationality discrimination by the host country itself (i.e. in favor of local employment), and not at promoting discrimination on other bases by subsidiaries in violation of national laws, or International Labor Organization or other relevant UN and OECD commitments by the treaty parties.

Due to the difficulty of setting thresholds which are neither subjective nor artificially rigid, the BITs with Egypt, Haiti, Panama, Senegal, and Zaire do not condition treaty coverage on a de minimis test, nor do they require conduct of a given volume of local business. Treaty protections apply to non-traditional forms of otherwise qualified investments, including service and contract investments. Investments may be accomplished directly or indirectly through a chain of subsidiaries, including affiliates in third countries. Disputes over the nature of a property interest for purposes of determining BIT coverage can be resolved by binding arbitration pursuant to the treaty.

The investments protected under the BITs are those of a "national" or a "company" of either party which are located in the territory of the other.42 A "company of a Party" is a company organized under the laws of that party.

41. This broad definition was aimed at circumventing the result reached by the International Court of Justice in the Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3. In the Barcelona Traction case, the court stressed corporate formalities over ownership as well as the substantive policy objectives of international investment law in denying protection to the ultimate owners of expropriated property held through a corporate chain involving a third country.

42. The definitions of "national" and "company" are provided in the Haiti BIT as follows: For the purposes of this Treaty:

(a) "Company" means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.

(b) "Company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a party or a political subdivision thereof in which

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities have a substantial interest as determined by such Party.

The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions.

Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, except with respect to recognition of juridical status and access to courts, if nationals of any third country control such company, provided that whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for
and in which nationals or governmental agencies of that party have a "substantial interest", as determined by that party. The investments of companies that are controlled by nationals of third countries can be excluded from treaty coverage. As in the FCN treaties, this feature is intended to preclude abuse of a BIT agreement by shell corporations created by nationals of non-

this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution to this matter.

(e) "National" of a Party means a natural person who is a national of a Party under its applicable law. Haiti BIT, supra note 8, art. I(a),(b),(e).

Note that "territory" is undefined, except in the case of the Zaire BIT. The purpose of leaving the term undefined was to allow a signatory's national law on territorial jurisdiction to control for treaty purposes, thus permitting investors and their home governments to invoke such a definition in a manner that does not necessarily prejudice the position of the home government even if the assertion of jurisdiction in question is disputed or questionable under international law. However, the Zaire BIT provides that the term for Zaire means "all Zairian territory within its geographical and political boundaries where its sovereignty is exercised"; for the United States it means "the separate States, the District of Columbia, and Guam, Puerto Rico, American Samoa, and the Virgin Islands." Zaire BIT, supra note 9, Protocol, para. 7. Further, the BIT, like the FCN treaties and customary international law of expropriation and property protection, protects investments of nationals or companies of one party which are located in the territory of the other from the actions of that other party; it does not provide a basis for citizens or companies to proceed against their own country of nationality, nor for a citizen or company of one party to proceed against the other for events occurring in the territory of their own country.

43. For the definition of "company of a party" as provided in the Haiti BIT, see supra note 42, art. I(b). See also Egypt BIT, supra note 14, art. I(b); Panama BIT, supra note 6, art. I(c). The Egypt BIT omits the feature that the country of incorporation may determine whether the domestic interest is "substantial". The 1983 version of the Model BIT included the substantial interest requirement in the definition of "company of a Party". See 1983 Model BIT, supra note 1, art. I(b). However, the 1984 Model BIT omits the requirement from its definitional section and now simply permits either party to deny the advantages of the Treaty to any company which "has no substantial business activities in the Territory of the other Party." See 1984 Model BIT, supra note 1, art. I(2). Note that treaty coverage of "investment" vests if ownership is ultimately in nationals of the parties, regardless of compliance with company definitions. Failure of "company" coverage of course may complicate investor (but not necessarily home government) invocation of the treaty.

The requirement of "substantial interest" was intended to preclude governmental claims on behalf of corporations with a de minimis equity or other beneficial interest held by that government's nationals. However, the provision does not indicate the nature (i.e. creditor, heir, trustee, beneficiary) and degree of interest necessary to satisfy the requirement. By implication, the degree of interest need not be so great as to satisfy the corporate nationality test of "control". Moreover, where investment interests of nationals are slight, there is a high probability that the company is controlled by an identifiable third country national or group, an explicit basis for exclusion from BIT coverage under Article I. Thus, the "substantial interest" standard may be an unnecessary complication (it was not an FCN treaty requirement). The Egypt BIT provides that "[t]he term 'substantial interest' as used in the provisions of Article I of the Agreement means such extent of interest as to permit the exercise of control or significant influence on the company." Egypt BIT, supra note 14, Protocol, para. 1. In defining a range of interests between some level above zero ("significant influence") and a level that permits control, the language of the Egypt BIT is arguably indistinct from a "substantial" interest test, since it does not appear to require active management and may include portfolio as well as direct investment. Moreover, this definition would not seem to compensate for the absence of a device by which the country of incorporation determines the sufficiency of domestic "interest".

44. See, e.g., FRG FCN, supra note 24, art. XXIV(1)(e). "Control" would be determined as an issue of fact in accordance with familiar tests.
BIT partners. Multinational joint ventures must satisfy Article I definitions of "national" or "company" in order to fall within BIT formulations of substantive protections. Thus, BIT coverage of multinational joint ventures will follow or fail based on whether the requisite "substantial interest" test is met and whether third-country control exists.\(^{45}\)

Consistent with the broad definition of "investment", Article XIII of the BITs (with the exception of the Egypt BIT) accords treaty protection to all qualified investments, whether they exist on the date of the BIT's entry into force or are established thereafter. The BIT with Egypt accomplishes substantially the same result through Article II(2)(b), subject to the proviso that the application of BIT protections is not inconsistent with contracts, authorizations, or licenses concluded under laws in force at the time the investment is made.\(^{46}\)

B. National or Most-Favored-Nation Treatment

There is no principle of customary international law stipulating that foreign investment is entitled to national or most-favored-nation (hereinafter MFN) treatment. Rather, such treatment of foreign investments results solely from the operation of treaty or domestic law. Ensuring that host countries grant U.S. investment the more favorable of either national or MFN treatment has been a cornerstone of U.S. policy objectives, as reflected in both the FCN treaties and Model BIT.\(^{47}\)

Given the competing interest of host...(Continued on next page)
countries in erecting protectionist barriers, however, the BITs, just as the FCN treaties before them, have been forced to provide for exceptions to the national/MFN treatment standard. As will be discussed below, the manner in which these exceptions are stated is a core issue in drafting Article II of a BIT.

The structure of Article II of most of the signed BITs distinguishes between the establishment of new investment and the post-establishment operation of the investment. The BITs nevertheless seek to require the same standard of the better of either national or MFN treatment in "like situations" with respect to both phases of investment. While the establishment versus post-establishment investment distinction is temporal and thus can be convenient for defining the scope of protected interests, national laws, including many U.S. laws regulating foreign investment, do not necessarily distinguish the two stages of investment activity. In particular, the distinction is ignored in flat prohibitions and screening or review mechanisms, which apply the same procedures and criteria both to new investments and to "expanded" investment or reinvestment.

The U.S. BITs include illustrative and non-exclusive lists of "associated activities" to clarify the scope of national/MFN treatment obligations with respect to a number of key business operations such as the establishment of offices, agencies, and branches, the organization, management, and disposal of subsidiaries, the acquisition or leasing of property, and the raising of local financing. There are additional areas which receive separate treaty attention in terms of national/MFN treatment. An example is the right of access to courts which, except in the case of the Panama BIT, is not included in the national treatment exceptions within the OECD community. See, e.g., OECD NATIONAL TREATMENT, supra note 22; OECD Draft Declaration, supra note 31, and related Decision of the Council on National Treatment, OECD Press Release A(76)20 (June 21, 1976), reprinted in 15 I.L.M. 978 (1976).

Protectionist barriers exist in the United States as well. The U.S. BITs provide a multiplicity of relatively insignificant sectoral exceptions to national/MFN treatment as a result of both U.S. federal and state laws. On U.S. exceptions, see infra Part II, Section B, Subsection 1; see also Notification by the Delegation of the United States [to the OECD], reprinted in OECD NATIONAL TREATMENT, supra note 22, at 57-59. On analogous U.S. FCN treaty exceptions, see R. WILSON, COMMERCIAL TREATIES, supra note 17, at 7; FRG FCN, supra note 24, arts. VII(2) & XXIV(1).

This distinction is reinforced in all the BITs, except the Panama BIT, by addressing the authorization for establishment of new investment and the treatment of established investment in separate paragraphs. "Investment establishment" encompasses capital inflows to create new businesses and to acquire existing businesses, and reinvestment by growth, diversification or acquisition, whether in a "related" business field or not.

For discussion of this concept, see infra note 64 and accompanying text.

The national/MFN treatment standard is subject to exceptions prescribed in the Annex section of the BITs. See infra Part II, Section B, Subsection 1.

These areas are also subject to the stipulated exceptions of the BIT Annexes. See infra Part II, Section B, Subsection 1.
associated activities list. In each signed treaty, with the exception of the Zaire BIT, this right is expressly accorded national/MFN treatment.\(^5\)

1. Exceptions to the National/MFN Treatment Standard.

Exceptions to national/MFN treatment are principally contained in the Annex to each BIT and are largely addressed by sector. The fact that the United States and its BIT partners have provided for these exceptions reflects the conflict between the desire for certainty in treatment and host countries' legitimate interests in regulating sensitive sectors. The exception regime of the Annex was designed to reach a compromise between these competing interests. The Annex device attempts to promote clarity as well as stability in defining the scope of exceptions by specifying and placing investors on notice of concrete sectors or activities of overriding national interest in which regulation deviating from national treatment may occur.

In recognition that freezing existing law would be politically unacceptable, the BITs permit future regulation within the specified exception areas. To alleviate problems of investor uncertainty, future sectoral exceptions are made inapplicable to investments which are in place in the affected sector prior to the date of the exception. Furthermore, future exceptions are to be maintained "at a minimum" and require express, although not necessarily advance, notification to the other party.\(^5\) As are all proposed modifications of the treaty, new exceptions are subject to consultations between the parties. Under the "Consultations and Exchange of Information" provision of Article VI, the BITs provide a formal basis for consultations on development of new exceptions.\(^5\) Finally, future exceptions must be applied on an MFN basis, except with respect to the ownership of real estate. The United States insisted on excepting real property interests from coverage of MFN treatment since at

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53. See, e.g., Egypt BIT, supra note 14, art. II(8); Panama BIT, supra note 6, Agreed Minutes, para. 1(j). The Zaire BIT requires each party to "provide all necessary means to nationals or companies of the other Party to permit them to assert their rights." Zaire BIT, supra note 9, art. II(8). Each treaty permits, either through the access to courts provision or, in the case of the Panama BIT, under Article III(2), the retention of counsel of any nationality provided he/she is qualified to practice.

54. Requiring advance notice would be unfeasible in light of political and administrative processes. The United States, for example, would have difficulty predicting congressional as well as state legislative actions that might affect treaty provisions.

55. The consultation provision is lacking in the case of the Panama BIT since it was deemed that the parties were free to consult in any event at the request of either party. Consultations are envisaged in the Panama BIT only in Article VIII which is more narrowly drafted in relation to "dispute" settlement at the intergovernmental level.
least one existing FCN treaty confers national treatment in this area; applica-
tion of MFN treatment thus would have undermined federal and state regula-
tion of realty purchases, a matter of recurring political controversy within the
United States.\textsuperscript{56}

Also as a result of U.S. law, the BITs condition mining concessions on
reciprocity by the treaty partner. While the Panama BIT does not expressly
provide for this condition, it effectively imposes the reciprocity requirement
by providing for exceptions "resulting from laws and regulations in effect on
the date that [the BIT] enters into force."\textsuperscript{57} The reciprocity feature, fully
consistent with U.S. objectives of attempting to freeze existing regulations
and limiting the possibility of future exceptions, calls for the compilation of
relevant laws of both parties on the date of a BIT's entry into force. This
exercise is in fact no more than what the United States should do in any
negotiation of a BIT to establish a base line for prescribed exceptions. The
BIT with Zaire, in a similar but bureaucratically more cautious vein, requires
that each party notify the other not only of specific exceptions of which it is
aware on the date of entry into force of the BIT, but also of all sectors or
matters potentially subject to regulation on that date.\textsuperscript{58}

By providing for only relatively specific exceptions on a sectoral or sub-
ject-matter basis, the Annex device seeks to prevent subjecting investment
treatment to broad treaty formulations such as consistency "with applicable
national laws and regulations" at the moment of investment. The body of law
which would thereby be incorporated by reference into the treaty would be
uncertain over time, and might encompass screening, exchange control, or
other laws entailing even more unpredictable ministerial discretion. Condi-
tions imposed on the entry of investments as a result of any such law or
regulation may be of a continuing nature, thus defeating any attempt to draw
distinctions between entry and post-entry treatment. The long term conse-
quences of such conditions must be carefully considered, particularly where a

\textsuperscript{56} On extensive U.S. state regulation of foreign realty holdings, see F. MORRISON & K.
KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWN-
ERSHIP AND FARM OPERATION 73 app. B (1975) (Agricultural Economic Report No. 284, is-
sued by Economic Research Service, U.S. Dep't of Agriculture).

\textsuperscript{57} Panama BIT, supra note 6, art. II(1). The reciprocity requirement may also be picked
up by the "like situations" test, discussed infra Section C.

\textsuperscript{58} Zaire BIT, supra note 9, art. II(3)(a). The bureaucratic caution reflects the practical
difficulties of ensuring that Washington officials responsible for the treaties have current informa-
tion on state legislative as well as relevant federal actions. Paragraph 3 of the Protocol to the
Egypt BIT excepts from even the grandfathering and MFN protections of the Article II excep-
tion regime those advantages conferred under a "special security or regional arrangement, in-
cluding customs unions or free trade areas"., presumably because of intra-Arab country
preferences. Egypt BIT, supra note 14, Protocol, para. 3. Several FCN treaties also contained
customs union exceptions; for an example of a more limited FCN exception, see FRG FCN,
supra note 24, art. XXIV(3) (excluding from the MFN treatment provisions any advantages
accorded by either party to adjacent countries to facilitate frontier traffic).
potential BIT partner wishes to subject entry to the then-prevailing require-
ments of national law in exchange for an offer of more attractive post-entry
general standards.

As a theoretical alternative approach to the Annex device, the exceptions
could be framed in terms of specified laws in force. However, unless the BIT
froze the exceptions as of the date of the treaty, or provided a sector approach
to limiting the scope of future amendments to the laws (as did the Panama
and Zaire BITs), the scope of future exceptions through legislative amend-
ments would be open-ended and any certainty for the investor illusory. This
approach would run the similar risk of incorporating discretionary or review
mechanisms.

As with comparable exceptions in the FCN treaties, the U.S. component
of the BIT Annexes covers longstanding areas of federal and state regulation
of inward investment. U.S. BIT exceptions are not sensitive to entry and
post-entry (or diversification) distinctions. In general, the exceptions are
comprised of simple prohibitions or limitations on alien ownership or partici-
pation. Depending on one's view of the current and future sensitivity of the
sectors falling within the U.S. national treatment exceptions, it can be argued
that the diversity of the various, albeit relatively minor, U.S. exceptions in-
vites the drafting of a breadth of sectoral exceptions in both the FCN treaty
and BIT contexts which is not well-suited to stated U.S. open investment
policies. While the Annex device, by setting forth each exclusion against a
backdrop of investment “promotion”, might conceivably encourage substan-
tive streamlining of treaty partner exceptions, U.S. treaty drafters have not
sought to use BITs to pare U.S. exceptions.59

Each BIT defines “national treatment” in the United States as the treat-
ment each state accords “foreign” persons and corporations of other states.60
Thus, the BITs preserve the right to prefer in-state enterprise provided such
preference survives Constitutional scrutiny.

Other important exceptions to national/MFN treatment are contained
in Articles X and XI of the BITs. In terms analogous to the FCN treaties,
Article X preserves the parties’ right to implement any measures necessary
for the maintenance of public order (in U.S. constitutional practice, this civil
law concept is roughly the equivalent of the police power), the protection of
national security interests, and the fulfillment of international obligations.61

59. The Egypt BIT is the only treaty which qualifies the traditional U.S. exception for
“banking and insurance”; the Protocol to the Egypt BIT applies the national/MFN treatment
standard to investments in investment banks, merchant-banks, and reinsurance companies whose
activities are confined to transactions in foreign currencies. Egypt BIT, supra note 14, Protocol,
para. 8.

60. See, e.g., Panama BIT, supra note 6, Agreed Minutes, para. 6; this definition is not
provided for in the 1982 Egypt BIT. For the equivalent FCN treaty formula concerning U.S.
“national treatment”, see FRG FCN, supra note 24, art. XXV(3).

61. Article X(1) typically provides as follows:

This Treaty shall not preclude the application by either Party of any and all
measures necessary for the maintenance of public order and morals, the fulfillment
At the instance of the United States, Article XI removes taxation matters from the general treatment obligations of the BIT.\textsuperscript{62}

While the application of national/MFN treatment of investments, subject to the exception regime described above, is the principal function of Article II of the BITs, there are complementary provisions prescribing distinct treatment standards, as well as provisions that define the application of such standards to particular situations. These provisions are discussed below.

\textbf{C. The "Like Situation" and "Competitive Equality" Standards for Investments Competing with State-Owned Enterprises}

A sensitive issue in the national treatment area is the eligibility of foreign private investment to claim the advantages afforded state-owned corporations. Host countries often contend that state-owned enterprises serve unique domestic policy objectives which justify conferring treatment that is preferential to private or foreign investments. However, the United States has consistently promoted equality with state-owned enterprises in the treatment of foreign investments. U.S. BITs accomplish this objective in two ways.

First, by defining “company” to include publicly or governmentally-owned enterprises,\textsuperscript{63} the BITs impose the national/MFN treatment standard of Article II indiscriminately in relation to all investments, whether they are of foreign, or of domestic private or state-owned enterprises. Foreign investments are thus eligible for treatment no less favorable than that accorded state-owned entities, subject to the proviso that they be in a “like situation”. The “like situation” phrase, while not defined, was deliberately chosen by the Model BIT framers. The framers rejected the phraseology of “like circumstances”, which would have permitted host countries to argue that State enterprises, given their purposes, organization, and funding, are never in the same general “circumstances” as a private or foreign investor. Instead, they adopted the “like situation” test of the FCN treaty model and OECD practice.\textsuperscript{64} This test is intended to be transactional; that is, it focuses the treatment standard on a concrete transaction, activity, application, or other situation, and on an inquiry whether the respective characters or natures of

\textsuperscript{62}See, e.g., Egypt BIT, supra note 14, art. XI. Article XI of the Senegal BIT states that each Party should “strive” for “fairness and equity” in tax treatment of investment of the other Party, but, as in other BITs, applies the provisions of the treaty to matters of taxation solely in respect of expropriation, transfers, and contract enforcement. Senegal BIT, supra note 7, art. XI. See also Panama BIT, supra note 6, art. XII(2).

\textsuperscript{63}See supra note 43 and accompanying text.

\textsuperscript{64}See e.g., FRG FCN, supra note 24, art. XXV(4); OECD Declaration, supra note 31, at para. II.1., reprinted in 15 I.L.M., at 968 (providing that Member countries accord the enterprises of other Members “treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises”).
the entities concerned, as participants, consumers, applicants, or other actors in that specific context, are so distinguishable as to necessarily defeat a reasonable comparability of their treatment for the purposes of that situation.

Second, Article II of the U.S. BITs affords "fair and equitable" treatment to foreign private investments that are in competition with State-owned enterprises. In every treaty except that with Egypt, this "competitive equality" provision is expressly linked to the national/MFN treatment standard, and would appear to be simply a restatement of the national/MFN treatment rule in this special context and not a separate, distinct, and by implication undefined, standard. The Egypt and Senegal BITs, however, employ hortatory language that conceivably could be argued to dilute the express requirements of the national/MFN treatment formula.

The Haiti and Panama BITs further provide that in no case shall foreign investment be treated less favorably than any domestic private investment also in competition with a State enterprise. This provision recognizes that special advantages are often conferred on domestic private businesses, particularly where the State enterprise and one or two private firms enjoy an oligopoly.

D. International Law and Other Treaty Standards

Consistent with the general property protection provisions of the FCN treaties, Article II of each BIT provides three general treatment protections not anchored to national/MFN treatment. As set forth in the BIT with Senegal, the relevant provision states that:

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

65. Egypt BIT, supra note 14, art. II(6); Panama BIT, supra note 6, art. II(3); Senegal BIT, supra note 7, art. II(7); Haiti BIT, supra note 8, art. II(6); Zaire BIT, supra note 9, art. II(6).

66. Panama BIT, supra note 6, art. II(3); Haiti BIT, supra note 9, art. II(6). The Annex listings of the Panama and Egypt BITs include state companies and state monopolies, respectively. Such mentions do not affect the general applicability of "competitive equality" obligations. Article II refers to exceptions "within" the sector or matter listed in the Annex. Thus, these Annex inclusions would, for example, permit discrimination on the basis of nationality in the "privatization" of a state corporation or monopoly, in whole or in part.

67. See, e.g., FRG FCN, supra note 24, art. 1 ("Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests"); art. V(1) ("Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party"); art. V(3) ("Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied").
shall observe any engagement it may have entered into with regard to investment of nationals or companies of the other Party. 68

The BITs with Haiti, Zaire, and Panama contain provisions that are substantively identical. The BIT with Egypt simply provides that "the treatment, protection and security of investments shall never be less than that required by international law and national legislation." 69

1. Standards of International Law.

The reference to international law in each BIT signifies a reaffirmation that customary standards of international law which are consistent with and relevant to the purposes and provisions of the investment treaty exist external to the treaty. 70 These international law standards are incorporated by reference as a treatment principle independent of the BITs’ national/MFN treatment standard.

The FCN treaties similarly rely on international law as an independent source of treatment standards, but not as consistently as the BITs. The absence of any reference to international law standards in certain FCN treaties appears to have resulted from a fear on the part of the treaty drafters that, given the contemporary controversy over the content of international investment law, specific reference to international standards might undercut superior treaty language. 71 The incorporation of international law in the BITs reflects a more optimistic view of its current state of health. The framers of the Model BIT believed that reference to international law would add to,

68. Senegal BIT, supra note 7, art. II(4) (emphasis added).

69. Egypt BIT, supra note 14, art. II(4). The Panama BIT provides that “[t]he treatment, protection and security of investment shall be in accordance with applicable national laws and international law.” Panama BIT, supra note 6, art. II(2). If such diplomatic drafting might seem to beg the question of which law definitively controls, it is a familiar device to accommodate an hierarchical reference to international law standards. Cf. United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 U.N. GAOR Annex 1 (Agenda Item 39), para 3, U.N. Doc. A/5344 (1962), reprinted in 2 I.L.M. 223, 225 (1963). Article VIII of the BITs, which stipulates binding arbitration for the ultimate resolution of treaty disputes at the inter-governmental level, makes clear that such disputes are to be decided “in accordance with the applicable rules and principles of international law.” Arbitral decisions suggest that this interpretation will find favor. See Award of the ICC Court of Arbitration in the case of S.P.P. (Middle East) Ltd. (Hong Kong) v. The Arab Republic of Egypt, paras. 49, 54, reprinted in 22 I.L.M. 752, 768-71, 772-74 (1983) [hereinafter cited as S.P.P. Case] and the arbitral award in the dispute between Texaco Overseas Petroleum Co./California Asiatic Oil Co. (United States) and the Government of the Libyan Arab Republic, reprinted in 17 I.L.M. 1 (1978) [hereinafter cited as TOPCO Case].

70. These standards can be found in the usual sources of international law. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1060, T.S. No. 993.

71. See R. WILSON, COMMERCIAL TREATIES, supra note 17, at 122-24; Wilson, Property-Protection Provisions, supra note 17, at 103-05. See also Iran FCN Memo, supra note 29, at S16057, reprinted in 22 I.L.M., at 1408. The non-U.S. BITs have largely not incorporated similar references. This deletion may be the result of a belief that such references would be superfluous given detailed provisions of the treaties or, as in the apparent case of some FCN treaties, that such references may carry little agreed-upon content in the present state of the law and that the frequently-employed “prompt, adequate and effective” formulation in the expropriation context accomplishes much of the same purpose more effectively.
rather than detract from, the bundle of rights set forth in the treaty. First, they assumed that the precedent and practice under international law would lend support and guidance to the interpretation of the general treaty concepts. Second, they believed that reference to international law would minimize the risks of inconsistency and literalism in applying the language of the actual BIT texts which, through the process of negotiation, may have been shortened or revised in alternative but not substantively different wording from the Model BIT. Finally, on the basis of these positive assumptions, they intended for the reference to assist investors in the process of negotiation, litigation, or arbitration over the interpretation and application of the BIT provisions.

2. The Standard of “Fair and Equitable” Treatment.

Article II of the Panama, Haiti, Zaire, and Senegal BITs also precludes the application of arbitrary and discriminatory measures, and broadly provides a general standard of “fair and equitable treatment.” This provision is self-contained and distinct from both the national/MFN treatment standard and the reference to principles of international law. This standard of treatment is residuary in the sense that it governs only where no other treaty provisions are specifically on point. The concept of fairness and equity serves as a guide to interpreting and applying treaty provisions, such as the “like situation” test discussed above, in a manner most favorable to the investor. To the extent that generally-accepted principles of law or commercial practices may assist in defining the application of this equitable standard to specific cases, they may be adverted to, but will not necessarily control.


73. BIT framers also believed that the Article VII investor-host country arbitration mechanism, discussed supra text accompanying note 25, would be the functional complement to accomplish amplification and gap-filling in practice.

74. See, e.g., Panama BIT, supra note 6, art. II(2). On arbitrariness and discrimination generally, see Wilson, Property-Protection Provisions, supra note 17, at 87; OECD Draft Convention, supra note 31, art. 1, notes and comments, reprinted in 7 I.L.M., at 199-22; Iran FCN Memo, supra note 29, at S16057, reprinted in 22 I.L.M., at 1408 (requiring prompt payment of just compensation for expropriation).
3. The Maintenance of Pre-existing Contracts and Agreements.

Article II of each BIT (except the Egypt BIT) also requires that each party respect the obligations of investment agreements and contracts entered into by the other. This provision raises to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise. Unless permissible as a measure to effectuate the purposes enumerated in Article X, or otherwise excusable under international law, a breach of contract constitutes a breach of treaty. This provision has particular relevance in expropriatory contexts because it precludes a host government from modifying its domestic law to unilaterally alter the substance or procedures of investment contracts that incorporate stabilization clauses or that regulate the nationalization process if it occurs. Stabilization provisions, which expressly preclude or regulate expropriatory action, are also sanctioned by additional language in the expropriation provisions of most of the BITs.

It is also worth noting that Article IX of the BITs preserves any rights by law, regulation, contract, or authorization that are more favorable than those accorded by the treaty.

E. The Prohibition Against Performance Requirements

The BITs have included a provision on avoidance of the imposition of performance requirements on investors. Performance requirements imposed on an investor by law, or by review or screening mechanisms, may have

75. See supra note 61 and accompanying text.
76. The purpose of Article IX was to attempt to preclude any invocation of the BIT to limit benefits of specific investment contracts or approvals that arguably exceeded treatment strictly required by the BIT, particularly in areas subject to treaty exceptions and exclusions. While the provision was inserted out of prudence and may not be strictly necessary, it certainly was not intended to confer a basis for derogations from the requirements of national/MFN treatment. See Sachs, The New U.S. Bilateral Investment Treaties, 2 INT'L TAX & BUS. L.W. 192, 210 (1984). In concluding that the use of Article IX in an attempt to circumvent the national/MFN standard of Article II is "legally dubious", Sachs reasons as follows:

... [Article IX of the] BITs enable[s] the Parties to grant protected investments treatment more favorable than required by the BITs "in like situations", whether by legislation, investment agreement, or otherwise. While one result of this language is to permit the host State generally to provide all investments with treatment superior to that required by the BIT, the language may also be interpreted as allowing the host State to extend uniquely favorable treatment to certain individuals or classes of investments without requiring comparable treatment for others in like situations.

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

Id. (citations omitted).
77. See, e.g., Egypt BIT, supra note 14, art. II(7); Panama BIT, supra note 6, art. II(4).
a disruptive effect on trade and investment patterns. In addressing the performance requirements issue explicitly and apart from other barriers to open trade and investment flows, the drafters of the Model BIT believed that elimination of such requirements is of particular concern in creating a mutually acceptable, open investment environment. The express prohibition was also intended to afford investor home governments leverage in pursuing inter-governmental consultations where injury is threatened or caused. The separate identification of the issue may also reflect appreciation of the potentially divergent interests of investors and home countries; a particular investor might accept such requirements in compensation for offsetting incentives or advantages, or simply because the potential profits of the investment are worth the concession.

Despite the explicit prohibition provided in the Model BIT, the BITs with Egypt, Haiti, and Zaire set forth the proscription in hortatory terms (“shall seek/endeavor to avoid”), thus diluting the provision’s legal force. The relevant provision in the Panama and Senegal BITs is drafted in mandatory language, but it is subject to certain qualifications.

F. Treatment Standards in the Event of War or Civil Disturbance

Following the example of many of the European BITs, the U.S. BITs provide two standards of treatment in the event of property loss resulting from war or civil disturbance. First, if compensation is offered for losses from war, other conflict, or civil disturbance (including terrorism), the host country must provide the investment of the treaty partner with the better of either national or MFN treatment. The provision does not mandate that host countries provide compensation; it merely requires that if such payment is

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78. Screening and review mechanisms condition entry or establishment of new investments on the investor's acquiescence to on-going requirements with respect to local sourcing, export promotion, and other undertakings. These requirements can be sufficiently burdensome to discourage investors from investing, likewise causing a distortion of market forces.

79. Egypt BIT, supra note 14, art. II(7); Haiti BIT, supra note 6, art. II(7); Zaire BIT, supra note 9, art. II(7). The experience of these three BITs demonstrates the difficulty of adapting this particular U.S. trade policy to the precision of a self-executing legal document such as the BIT.

80. Panama BIT, supra note 6, art. II(4); Senegal BIT, supra note 7, art. II(8). Paragraph 2 of the Agreed Minutes in the Panama BIT recognizes Panama's “incentive laws” which grant special benefits to government contractors. Paragraph 3 of the Protocol to the Senegal BIT clarifies that the intent of the provision is not to preclude sourcing from domestic sources if based on legitimate economic or commercial grounds.

81. See Egypt BIT, supra note 14, art. IV; Panama BIT, supra note 6, art. V. The relevant text of Article IV of the Zaire BIT provides as follows:

1. Nationals or companies of either Party whose investment in the territory of the other Party suffer
   (a) damages due to war or other armed conflict between such other Party and a third country, or
   (b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party, shall be accorded treatment no less favorable than that which such other Party accords to its own
made, it be made on terms that are equal to those offered nationals or other foreign interests.

The descriptive terms illustrating events other than "armed conflict" (which might generally be termed "civil disturbance") vary somewhat among the BITs. While a more uniform definition of the events triggering application of either national or MFN treatment may be desirable, deletion of this entire provision would be inconsequential given the substantive protection already afforded under Article II of the BITs. By the same token, the variances in terminology with respect to covered "civil disturbances" is not material.

The second treatment standard relates to government requisitions of property. Three of the signed BITs, those with Haiti, Zaire, and Senegal, provide treatment standards in the event the host partner requisitions property in time of conflict or civil disturbance. In addition, these BITs provide treatment standards in the case of destruction of property not caused by combat or, as stated in the Haiti and Senegal BITs, when not required by the "necessity of the situation." In such cases, the Article concerning expropriation is applied to afford restitution or compensation. The BITs with Panama and Egypt are silent on these points.

With respect to situations of armed conflict, the BIT provisions are arguably superfluous in light of the protections afforded private property under the laws of war. In non-armed conflict situations, the requisitioning provision would appear to be no more than an illustration of the application of the BIT article on nationalization or expropriation.

Zaire BIT, supra note 9, art. IV(1).

82. To the extent any governmental act (or an act subsequently ratified by a government) is expropriatory in character or effect, the intent is that it be covered by Article III, as amplified by Article IV(2), which itself confirms the controlling nature of Article III. Article IV(1) is principally designed to cover physical damage or loss in situations of conflict or disorder, to which state responsibility does not attach under Article II, IV(2) or otherwise by law, and discretionary state compensation programs in response thereto.

Article IV of the Zaire BIT continues as follows:

2. In the event that such damages result from:
   (a) a requisitioning of property by the other Party's forces or authorities, or
   (b) destruction of property by the other Party's forces or authorities which was not caused in combat action, the national or company shall be accorded restitution or compensation in accordance with Article III.

3. The payment of any indemnification, compensation or any other settlement granted pursuant to this Article shall be freely transferable in accordance with the provisions of Article V.

Zaire BIT, supra note 9, art. IV(2),(3).

83. The law of war conventions address general property protection, but in less precise terms than the BITs. See, e.g., Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Regulations, arts. 23, 25, 28, 46-47, 49, 51-53, 1 Bevans 631; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 53,
BILATERAL INVESTMENT TREATIES

III
IMPLICATIONS OF BITs FOR GLOBAL AND U.S. LEGAL CONCERNS

A. BITs and the Development of International Law

Since the 1960s, the pace of BIT conclusion among countries other than the United States has been accelerating. Of the 175 non-U.S. BITs concluded since 1960, most were signed in the past decade.\footnote{The United States and Japan are relatively new entrants into the pool of nations promulgating BITs, as are certain developing countries such as Panama. For compilation of non-U.S. BIT texts, see International Centre for Settlement of Investment Disputes [ICSID], Investment Promotion and Protection Treaties (1983).} The global network of BITs is no longer confined to treaties between developed and developing countries, but has expanded to include treaties among developing countries and treaties between developing countries and Socialist States. While the prudence of concluding treaties to safeguard international investments is not particularly controversial, there is considerable discord over the nature of the impact of the network of U.S. and foreign BITs on the current state of customary international law standards relating to transnational investment.

Variations in approach and substance among the non-U.S. BITs can be significant. However, a survey of non-U.S. BIT provisions indicates that the trend of the treaties appears to generally support standards of treatment which are equivalent or similar to "traditional" standards of international law. All of the non-U.S. BITs proceed from broad definitions and general treatment standards, and afford at least basic expropriation protections. Approximately two-thirds of the non-U.S. BITs signed in the past four years (including several treaties between developing countries) have selected the "prompt, adequate and effective" compensation standard, or a close equivalent.\footnote{See Comment, supra note 32, at 952 (noting that while developing countries have adopted the "prompt, adequate and effective" phraseology, there may be wide variation in interpretation of this language). However, given the absence of documentation concerning actual practice under the FCN treaties and BITs (see supra note 32), firm support for this conclusion may be lacking.} The treaties regularly provide for international arbitration, and many of the BITs "internationalize" enforcement of investment contracts and agreements.

The implications of the growth of the network of treaties linking half of the world's nations, including 65 developing and Socialist countries, and the
standardized aspects of their form and content, cannot be dismissed as having legal relevance to the treaty parties alone. While developing countries in the 1960s and 1970s promoted concepts of economic "sovereignty" in autarkic and atomistic terms, the adoption of BITs indicates that more balanced trade and investment principles based on interdependence may be emerging. The fact that the BITs among developing and Socialist countries contain "traditional" international law concepts may also reflect a sensitivity to the importance of the reciprocal nature of treaty rights and protections as capital is exported. There is some, though limited, evidence that BITs have been invoked to successfully resolve investment disputes. 86

At the very least, the proliferation of BITs suggests that there may be a divergence between the attitudes of national governments and the positions taken in multilateral fora by the Group of 77. Commentators, by focusing on broad-brush North-South differences between developed and developing countries, may not have been sensitive to important differences of approach and change in attitudes within the Group of 77. At the same time that the current debt crisis and resulting contraints on lending which have tended to refocus attention on financing development through private investment, 87 and traditional valuation and compensation rules have been reaffirmed in various arbitral decisions (e.g., those of the Iran-U.S. Claims Tribunal), 88 the advances of the BIT network may be evidence that core traditional investment rules have an intrinsic value in relation to the promotion and reciprocal protection of transnational investments, regardless of the source of such rules. 89

86. See ICC, BILATERAL TREATIES, supra note 23, at 10–11 (noting three cases in which the invocation of a BIT resulted in successful dispute resolution); see also Comment, supra note 32, at 943 (where the author cites the ICC in concluding that the low level of expropriation activity over the past ten years evidences that the BITs "have been remarkably successful at protecting foreign investment"). While the treaties are a fine idea, ascribing the current nationalization environment to the BITs alone is undoubtedly too flattering to them, and stands the limited evidence on the practical role played by the treaties on its head.


88. See American International Group, supra note 72; ITT Industries, supra note 72. See also S.P.P. Case, supra note 69, TOPCO Case, supra note 69; Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 RECUEIL DES COURS 259 (1982).

89. For the argument that certain aspects of traditional international expropriation law are so fundamental as to be capable of being framed in terms of constitutional or human rights law, see R. Wilson, COMMERCIAL TREATIES, supra note 17, at 114–15; R. Wilson, INTERNATIONAL LAW STANDARD, supra note 24, at 88, 101; Wilson, Property-Protection Provisions, supra note 17, at 83, 103–04; Universal Declaration of Human Rights, G.A. Res. 265 (III), U.N. Doc. A/810, art. 17(2)(1948)("No one shall be arbitrarily deprived of his property"); Higgins, supra note 88, at 355–75. For U.S. Government's views, see communication to the Inter-American Commission on Human Rights in the Wilfong case, no. 7967 (Aug. 10, 1982), Dep't of State ARA/USOAS file, 1982 Digest of U.S. Practice in International Law.
B. BITs and Their Enforcement by U.S. Courts—Revisiting Sabbatino

If expansion of the international BIT network has had positive implications for the status of customary international law with respect to transnational investments, then such implications may also extend to the on-going controversy over the role of U.S. courts in enforcing and defining such international investment standards. The 1964 U.S. Supreme Court decision in Banco Nacional de Cuba v. Sabbatino90 established a broad rule of judicial abstention in expropriation cases under the Act of State doctrine. *Sabbatino* represented a highwater mark in this country for judicial skepticism over the existence of a consensual basis for customary international law and the wisdom of judicial activism in enforcing such "politicized" norms.

Since the *Sabbatino* decision, U.S. courts have refrained from rigidly applying the Act of State doctrine. U.S. courts have refined or suggested exceptions to the doctrine based on state commercial activities and non-public acts,91 situs requirements,92 set-offs and counterclaims (including close scrutiny of the "alter ego" relationship of states to their corporate entities),93 treaty standards,94 international torts,95 and Executive Branch assurance that adjudication would not interfere with U.S. foreign relations ("Bernstein letters").96 Congress also sought to limit, if not wholly eliminate, the doctrine as applied to expropriation cases through the promulgation of the Sabbatino

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95. See Letelier v. Republic of Chile, 488 F. Supp. 665, 673–74 (D.D.C. 1980) (illegal act of perpetrating assassination held contrary to "precepts of humanity as recognized in both national and international law" and not an act entitling state to immunity or act of state defenses); Filartiga v. Pena-Irala, 630 F.2d 876, 889–90 (2d Cir. 1980) (where Act of State issues were submerged at trial and treated inconsistently on appeal). The treatment of Act of State aspects in these human rights cases is cursory and arguably *sui generis* by reason of the context. But, from the viewpoint of international human rights as well as expropriation law, the taking of alien property in contravention of international law would seem to be equally a tort or illegal act. The treatment of Act of State in this line of cases is thus susceptible of easy translation to an expropriation context. On human rights aspects of expropriation, see *supra* note 89. Moreover, while it has been questioned whether the main sources of international human rights law confer a private remedy or cause of action (see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983) and in particular, brief of the United States, on file at the U.S. Dep't of Justice), traditional international expropriation and claims law has been clearly both derivative of private rights and in part designed to secure private parties compensation for infringement of these rights. Conferring a right of action on private parties to seek redress directly in the courts is certainly one object of the self-executing FCN treaties and BITs.
amendment to the Foreign Assistance Act of 1966, a legislative incursion which has been interpreted narrowly by the courts.\textsuperscript{97}

Moreover, the Office of the Legal Adviser recently cast doubt on the pro-abstention views expressed in its \textit{amicus curiae} brief in \textit{Sabbatino}. United States foreign policy now appears to endorse a "reverse" Bernstein approach in which adjudication on the basis of a legally controlling standard found in a treaty is presumed to be consistent with U.S. interests unless the Executive indicates a contrary opinion.\textsuperscript{98} Although reserving the right to express views on the wisdom of adjudication, the Office of the Legal Adviser has largely discontinued the practice of \textit{ad hoc} letter-writing.\textsuperscript{99} The Office of the Legal Adviser is thus moving closer to treating Act of State cases in a manner paralleling the developments in sovereign immunity practice.

The \textit{Sabbatino} Court did not, however, deny that relevant international legal standards exist; in fact, it expressly disclaimed any such intent.\textsuperscript{100} The Court refused to apply customary international law perhaps in part because the Executive branch's brief advised that a general rule of abstention would better serve U.S. interests in securing foreign claims settlements. Given the BITs' reinforcement of the international standard the Court acknowledged in \textit{Sabbatino}, as well as the current position of the State Department, the Court today might regard a broad abstention rule as unnecessary. Judicial abstention in the area of international investment law is difficult to reconcile with the oft-stated, but less well understood, maxim that international law is part of U.S. law.\textsuperscript{101} Nor does abstention conform with the role of national courts as contemplated by the Statute of the International Court of Justice in the

\textit{Extraction Co.}, 729 F.2d 422; Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).


\textsuperscript{98} The brief of the United States as \textit{amicus curiae} in \textit{Sabbatino} appears at 2 I.L.M. 1009 (1963). For subsequent views of the Department of State and the United States, see \textit{Kalamazoo Spice Extraction Co.}, 729 F.2d at 425 (citing the \textit{amicus curiae} brief of the United States wherein the U.S. Department of State argued in favor of applying the treaty exception to the Act of State doctrine); Department of State Letter with Regard to Act of State Doctrine and Foreign Expropriations to Rex E. Lee, Solicitor General of the United States (Nov. 19, 1982), reprinted in 22 I.L.M. 207 (1983) [hereinafter cited as Dep't of State Letter]. \textit{See also} Robinson, \textit{Expropriation in the Restatement (Revised)}, 78 AM. J. INT'L L. 176 (1984). In this as in other areas of U.S. law where relevant treaty standards to date have been articulated by the FCN treaties, the BITs will now become additional sources of reference.

\textsuperscript{99} Contrast the Office of the Legal Adviser's views in its \textit{amicus curiae} brief in \textit{Sabbatino}, reprinted in 2 I.L.M. 1019-23, with those contained in its \textit{amicus curiae} brief in \textit{Kalamazoo Spice Extraction Co.}, 729 F.2d at 425, and in the Dep't of State Letter, supra note 98. While there has been a flip-flop in presumptions, under either approach it is seen as necessary to reserve some right for the Executive to address the courts regarding their engagement in or abstention from specific cases for particular foreign policy reasons.

\textsuperscript{100} \textit{Sabbatino}, 376 U.S. at 428-29 n.26.

\textsuperscript{101} \textit{See, e.g.}, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Paquette Habana, 175 U.S. 677 (1899).
maintenance and development of international law. Consequently, the U.S. abstention policy may well be more difficult to reconcile with the appropriate judicial function of U.S. courts than would be a policy of deference in the likely infrequent cases in which the Executive might request abstention for ad hoc policy reasons under a reverse-Bernstein approach.

Since Sabbatino has spawned uncertainty over both substance and justiciability, any further shift in Act of State practice might also invite renewed efforts toward articulation of relevant customary rules which would be applicable to all cases, particularly in non-treaty contexts. Such a recitation could be based on the U.S. BIT formulations. In theory, the courts themselves could accomplish this formulation, as there appears to be little judicial inclination to articulate standards of substantive international law that are weaker than standards propounded by the Executive and Congress or applied by the courts in a purely domestic context. However, a more efficacious approach would be for the Executive to seek Congressional enactment of codified standards consistent with the FCN treaties and BITs to replace the limited Sabbatino Amendment. In order to ensure consistency in practice, relevant aspects of U.S. sovereign immunity law might also be reconsidered.

CONCLUSION

In analyzing the advantages and objectives of the U.S. BIT program, it stands to reason that investment decisions have been and will continue to be motivated by expectations of profit, in light of the overall investment climate and risk analysis. Since a host country is unlikely to enter into a BIT relationship unless already committed to promoting a positive investment climate, the conclusion of a BIT likely will not have much direct impact per se on investment decision-making, except perhaps in a close case.

Whatever the difficulties may be in attempting to find a correlation between investment decisions and the existence of a BIT, the recent surge in BIT negotiations and signings indicates that developing countries are interested in promoting these treaties. The existence of a BIT may have symbolic importance for developing countries in favorably affecting risk perceptions of potential investors. As for investors, the BITs may offer subtle advantages beyond the substantive investment protections. For example, the treaties, backed by a compulsory arbitration mechanism, may provide a means of leverage with authorities of the host country or, if invoked in a timely manner,

102. Statute of the International Court of Justice, supra note 70, art. 38(1)(d).
104. For example, the limitations on immunity exceptions and execution relating to property situs, defendant identity, and commercial activity. 28 U.S.C. §§ 1605(a)(2),(3), 1610 (1982).
may prevent serious disputes. These leveraging and dispute prevention functions may be of critical importance in achieving a stable investment experience, even if the past record of FCN treaties and BITs is not readily quantifiable.

The contribution of BITs to the development of international law congenial to U.S. investment and trade policies is of course partially dependent on the treaties' coherence in articulating uniform treatment standards. This has been affected by the purely bilateral nature of the BIT negotiation and conclusion, whatever may be the efforts in the OECD to discuss developments or, among Caribbean or ASEAN countries, to evolve common models. Given the mosaic of BIT treaty partners to date, and divergent developed country emphases in proselytizing BIT standards, it is not surprising that many of the non-U.S. BITs have not conformed to U.S. drafting preferences. Nonetheless, as noted above, the process has not precluded emergence of commonality in approach, and trends that are interesting in their implications for maintenance of customary protective standards. Inevitably, however, while the BIT development is quite positive from the perspective of U.S. policy, its results are not consistent.

As the United States attempts to expand its own network of BITs, it also remains to be seen whether the U.S. BIT program can maintain the homogeneity of standards reflected in the initial tranche of signed BITs. The United States should be able to maintain the general integrity of its BIT model in concluding a respectable number of bilateral investment treaties with countries from among those already familiar with and party to the BIT network. Although certain adjustments will be inevitable, U.S. objectives in preserving core BIT treatment standards should be possible to realize among this group. The interesting question is where will the BIT program head after that? Since its earliest treaty negotiations, the United States has maintained a policy of not expending diplomatic capital to conclude treaties with the unwilling.105

The United States' gradual extension of treaty negotiations, particularly with most Latin American, Socialist, and more ideologically orthodox developing countries, therefore will likely increasingly invite compromise or truncation of treaty coverage in order to secure agreements. Pressures may be anticipated that the United States should nevertheless pursue BIT negotiations on the grounds that an incremental agreement is better than no agreement at all, and that short term concessions may encourage broader acceptance of U.S. BIT standards over time. Expansion of the BIT program based on a treaty-by-treaty analysis of potential gains and losses for U.S. trade and investment policy may be difficult to reconcile with the original goal of producing a coherent set of regulations fostering more uniform international legal standards. In such a conflict of objectives, U.S. business interests are likely to support a pragmatic approach.

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105. The first U.S. BIT negotiations with Singapore commenced in 1980 but were unsuccessful and discontinued.
The impact of an evolving U.S. BIT program on international legal trends is thus difficult to predict, and cannot be examined in isolation from the general BIT treaty phenomenon. It remains to be seen whether the U.S. experience will influence non-U.S. treaty drafting, or open doors to treaty conclusion hitherto shut to European negotiators. Nevertheless, an extensive U.S. BIT program would pick up the pace of developments in the international BIT network (as will the growing Japanese BIT activity, which may be more influenced by the U.S. experience than the well-established European BIT models) and reinforce the apparent international preference for concrete regulation of transnational investment on a regional or bilateral, rather than multilateral basis.

The recent developments in BITs reflect the truism that international law is dynamic, resulting from advocacy carried into practice. Although the actual utility and benefits of the U.S. BIT program will undoubtedly be called into question during Senate hearings on the first package of BITs, the U.S. Government conclusion of bilateral treaties for furthering its policy objectives and protecting U.S. overseas investment continues and refines a long history of U.S. commercial treaty practice. The United States, as both a home and host country of significant transnational investment, cannot afford to remain silent on the legal structure it prefers to have regulate those flows. The signed BITs, like the FCN treaties, occupy a logical place in the execution of U.S. trade, investment, and international legal policies.