

# COMMENTS

## THE UNITED STATES BILATERAL INVESTMENT TREATY PROGRAM: VARIATIONS ON THE MODEL

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### 1. INTRODUCTION

On January 11, 1982, the United States Trade Representative announced the formulation of a prototype Bilateral Investment Treaty (Model BIT).<sup>1</sup> The BIT program is one aspect of the Reagan Administration's program for improving the climate for investment and capital flows worldwide, especially to the Less Developed Countries (LDCs).<sup>2</sup> The Reagan administration stresses that concluding BITs with developing countries will enhance the attractiveness of these countries to U.S. investors by establishing a common frame of reference and commitment as well as a legal base for dealing with the complex problems that accompany direct private investment in any foreign nation.<sup>3</sup> The Reagan administration wants to move away from the position of neutrality on foreign investment announced by President Carter in 1977,<sup>4</sup> a policy that neither promoted nor discouraged inward or outward investment flows. It is President Reagan's belief that "[a] world with strong

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<sup>1</sup> *Treaty Between the United States of America 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 *Model BIT*]. This version of the treaty was the prototype from which all BITs were created. For a look at other model BITs, see *Model Bilateral Investment Treaty Proposed by the U.S. Trade Representative*, U.S. Export Weekly (BNA) No. 400, at 734 (Mar. 23, 1982) (1982 version); *Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984*, 4 INT'L TAX & BUS. LAW. 136 (1986) (1984 version).

<sup>2</sup> See, e.g., International Meeting on Cooperation and Development, 17 WEEKLY COMP. PRES. DOC. 1185, 1185-88, 1189-91 (Nov. 2, 1981); see also *Hearings before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 202-13 (1982) [hereinafter *Bale Statement*] (statement of Harvey Bale, Jr., Assistant U.S. Trade Representative).

<sup>3</sup> *Bale Statement*, *supra* note 2, at 211.

<sup>4</sup> *Id.* at 203.

foreign investment flows is the opposite of a zero-sum game. We believe there are only winners, no losers and all participants gain from it."<sup>5</sup>

Historically, the United States relied on Treaties of Friendship, Commerce and Navigation (FCNs) to facilitate trade between itself and other nations.<sup>6</sup> The discontent over the general nature of the provisions in the FCNs<sup>7</sup> as well as the success achieved by European countries in concluding BITs with both developing and developed nations<sup>8</sup> led the United States to develop its own BIT program. Added impetus to the BIT program resulted from the U.S. business community's unhappiness with the Carter administration's neutrality stance and the community's concern that other countries were increasing the amount of restrictions they placed on foreign investment.<sup>9</sup> The purpose of the BIT program is to provide assurances to foreign investors that they will receive: (1) either national<sup>10</sup> or most-favored-nation treatment<sup>11</sup> for their investments; (2) adequate compensation in the event of expropriation or nationalization; (3) the ability to transfer capital and profits relating to their investments to other countries, including the United States; and (4) the right to obtain international arbitration for investment disputes.<sup>12</sup>

Although the United States has signed treaties with Bangladesh, Cameroon, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire,<sup>13</sup> there are indications that the treaty program may face

<sup>5</sup> *Administration Announces Official Stance on International Investment*, 8 U.S. Import Weekly (BNA) No. 23, at 879-80 (Sept. 14, 1983) [hereinafter *Administration Announcement*].

<sup>6</sup> See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 498 (1986) (the United States has concluded 130 such treaties since the 18th century; 40 of those treaties are still in force); Asken, *The Case For Bilateral Investment Treaties*, in *SYMPOSIUM FOR PRIVATE INVESTORS ABROAD 1981*, at 357, 382-90 (M. Landwehr ed. 1981) (listing U.S. FCNs currently in force).

<sup>7</sup> See Asken, *supra* note 6, at 367-73; Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 *MINN. L. REV.* 805 (1958) [hereinafter *Modern FCN*]; Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 *AM. J. COMP. L.* 229 (1956) [hereinafter *U.S. Practice*].

<sup>8</sup> See *INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL INVESTMENT TREATIES FOR INTERNATIONAL INVESTMENT 5* (1977) (by the late 1970s, 180 BITs among 65 states had been negotiated).

<sup>9</sup> *Administration Announcement*, *supra* note 5, at 879.

<sup>10</sup> Under a national treatment standard, a nation gives foreign investors the same rights and privileges with respect to investments as it gives to its own nationals. See *Model BIT*, *supra* note 1, art. II, para. 1.

<sup>11</sup> The most-favored-nation standard means that foreign investors will be treated the same as the most favored of all third-party investors. See *Model BIT*, *supra* note 1, art. II, para. 1.

<sup>12</sup> *First U.S. Bilateral Investment Treaty Between U.S. and African Nation Signed*, 20 U.S. Export Weekly (BNA) No. 11, at 448 (Dec. 13, 1983) [hereinafter *U.S.-Africa Signing*].

<sup>13</sup> Treaty Concerning the Reciprocal Encouragement and Protection of Invest-

some formidable, if not insurmountable, obstacles.<sup>14</sup> There are elements in the BIT program that indicate it may have only limited success in reaching the goals it has set. Specific problem areas of the Model BIT include its lack of flexibility and its espousal of provisions that are directly opposed to the interests of many developing nations. This comment will focus on the inherent limitations of the U.S. BIT program as proposed and thus far conducted. The analysis will focus on three of the earliest treaties signed by the United States, those with Egypt, Panama, and Turkey. Section 2 will deal with the development of the U.S. BIT program and the standards that have been included in the treaties concluded under this program. Section 3 will present an interpretation of the results of the current BIT program and will offer several variations on the standard Model BIT that may make the Model BIT more acceptable to many developing countries.

## 2. THE DEVELOPMENT OF THE U.S. MODEL BIT

### 2.1. *The Inadequacy of the FCN Framework*

Traditionally, the United States concluded Treaties of Friendship, Commerce and Navigation<sup>15</sup> as the basis for negotiating all aspects of

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ments, May 2, 1986, United States-Grenada; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Mar. 12, 1986, United States-Bangladesh; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Feb. 27, 1986, United States-Cameroon; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 1985, United States-Turkey, *reprinted in* 25 I.L.M. \_\_\_\_\_ [hereinafter U.S.-Turkey BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Aug. 3, 1984, United States-Zaire; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Mar. 1, 1984, United States-Morocco; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 6, 1983, United States-Haiti; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 6, 1983, United States-Senegal [hereinafter U.S.-Senegal BIT]; Treaty Concerning the Treatment and Protection of Investments, Oct. 27, 1982, United States-Panama, *reprinted in* 21 I.L.M. 1227 [hereinafter U.S.-Panama BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, *reprinted in* 21 I.L.M. 927 [hereinafter U.S.-Egypt BIT].

<sup>14</sup> See *U.S.-Panama Investment Treaty Signed But Problems Remain Before Ratifying*, 18 U.S. Export Weekly (BNA) No. 5, at 170 (Nov. 2, 1982) [hereinafter *U.S.-Panama Signing*] (detailing Panama's objection to the BIT program); see also *U.S.-Morocco Initial Bilateral Investment Treaty During State Visit to Washington*, 20 U.S. Export Weekly (BNA) No. 23, at 755 (Mar. 13, 1984) [hereinafter *U.S.-Morocco Initialing*] (Assistant U.S. Trade Representative Harvey Bale discussing problems in concluding both the Egyptian and Panamanian treaties); *Administration Considering Simplifying Bilateral Investment Treaties with LDCs*, 20 U.S. Export Weekly (BNA) No. 7, at 279 (Nov. 15, 1983) [hereinafter *Simplification of BITs*] (Bale enumerating problems encountered in negotiating BITs).

<sup>15</sup> See, e.g. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4

its relationship with other nations.<sup>16</sup> Although the treaties were modified over time to incorporate newer problems<sup>17</sup> such as investment, they remained treaties concerned with the protection of persons and property abroad, rather than treaties addressing the particular problems of foreign private investment.<sup>18</sup> Current criticisms of these treaties stress the general nature of the provisions and the lack of attention to specific investment issues and concerns.<sup>19</sup> In this context, BITs are seen as a beneficial new development because they focus on narrower objectives and enumerate specific ways of regulating the establishment and control of foreign investments.<sup>20</sup> Yet, there have been rumblings of discontent among the nations negotiating these treaties with the United States that have created difficulties in concluding these treaties at all.<sup>21</sup>

Although it has been suggested that BITs are in reality no different than FCNs,<sup>22</sup> a comparison of the FCN and the European BIT

U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter U.S.-Japan FCN]; Treaty of Friendship, Commerce and Navigation, Dec. 26, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871 [hereinafter U.S.-Republic of China FCN].

<sup>16</sup> See *Modern FCN*, *supra* note 7; *U.S. Practice*, *supra* note 7.

<sup>17</sup> See *Modern FCN*, *supra* note 7, at 805-06 (the first FCN was concluded between the United States and France in 1778, the last was concluded between the United States and Thailand in 1966).

<sup>18</sup> See *Modern FCN*, *supra* note 7, at 806; *U.S. Practice*, *supra* note 7, at 230-31.

<sup>19</sup> See Asken, *supra* note 6, at 367-73; Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1, 7 (1983); Note, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931, 940-41 (1984).

<sup>20</sup> An example of a specific provision in the Model BIT is Article III, outlining each party's obligation to compensate foreign private companies for expropriation of their investments. *Model BIT*, *supra* note 1, art. III, para. 2; see also Asken, *supra* note 6, at 376; Pattison, *United States-Egypt Bilateral Investment Treaty*, 16 CORNELL INT'L L.J. 305, 312 (1983).

<sup>21</sup> The Panamanian Ambassador to the United States, Aquilino Boyd, stated to the group assembled at the signing of the U.S.-Panama BIT that "he questioned whether it was worth compromising principles such as the 'sanctity of our tribunals,' in order to attract more U.S. investment." *U.S.-Panama Signing*, *supra* note 14, at 170. The Egyptian Parliament was extremely reluctant to ratify the U.S.-Egyptian BIT due to its reluctance to relinquish sovereignty over certain sensitive areas of the Egyptian economy. *Government Seeking Bilateral Investment Treaty with Japan as well as LDCs*, 7 U.S. Import Weekly (BNA) No. 21, at 685 (Mar. 2, 1983) [hereinafter *U.S. Seeking BIT With Japan*]. Assistant U.S. Trade Representative Harvey Bale stated that, as a general matter, he expected to have trouble negotiating BITs because investment in a developing country is a particularly sensitive political issue. *Id.*

<sup>22</sup> Sachs, *The 'New' U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192, 193 (1984).

program with the Model BIT illustrates that the Model BIT is not only quite different from a standard FCN,<sup>23</sup> but also quite different from the European BIT program.<sup>24</sup> FCNs evolved into treaties that addressed the problems of foreign private investment after World War II.<sup>25</sup> Even this new shift towards dealing with the problems of investment failed to provide much protection to the individual investor. FCN investment provisions are vague<sup>26</sup> and do not clearly address the key issues of interest to private investors.<sup>27</sup> At the same time, the United States has also failed to sign FCNs with many nations where investors believe they need the protections of a treaty program.<sup>28</sup> BITs, on the other hand, are treaties directly concerned with the problems faced by private investors abroad and with providing the greatest possible amount of protection for these individuals.

The European BIT program has been described as a program whose "agreements are not confined to a recital of general principles, but rather attempt to establish the most comprehensive protection for investment."<sup>29</sup> Comparing the FCNs, the European BIT program, and the U.S. BIT program, the U.S. program appears to be the least flexible. This is where its inherent problems lie. The United States' pattern of success in concluding BITs indicates that only countries that are heavily dependent on the United States for aid will be willing to adopt the Model BIT as proposed. Numerous other developing nations, however, will refuse to conclude BITs with the United States unless the provisions are modified.<sup>30</sup> The United States has signed but not ratified treaties with Bangladesh, Cameroon, Costa Rica, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. Negotiations are also underway with Antigua, Burma, Burundi, The People's Republic of China, El Salvador, Gabon, and Honduras. The test will be to de-

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<sup>23</sup> See *Modern FCN*, *supra* note 7, at 810-15; *U.S. Practice*, *supra* note 7, at 230-39.

<sup>24</sup> See Bergman, *supra* note 19, at 18.

<sup>25</sup> *Modern FCN*, *supra* note 7, at 806-09.

<sup>26</sup> The treaties do not define such terms as "expropriation" or "prompt and just compensation." See, e.g., Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. VI, para. 4, 9 U.S.T. 451, 454, T.I.A.S. No. 4024.

<sup>27</sup> FCNs do not clearly define when expropriation takes place, leaving open the question of when "creeping expropriation" has occurred and thus when compensation is owed. See S. RUBIN, *PRIVATE FOREIGN INVESTMENT* 29 (1956).

<sup>28</sup> The United States currently has FCNs in force with 43 nations. See Brower, *International Legal Protection of United States Investment Abroad*, in *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* 53 (1981).

<sup>29</sup> See Bergman, *supra* note 19, at 11.

<sup>30</sup> For an opposing view on the position of the developing countries in relation to aid and BIT programs in general, see INTERNATIONAL LAW ASSOCIATION, MONTREAL CONFERENCE, PERMANENT SOVEREIGNTY, FOREIGN INVESTMENT AND STATE PRACTICE 25 (1982) [hereinafter MONTREAL CONFERENCE].

termine, given that these countries are unwilling to accept the Model BIT, whether variations of the Model BIT can be created that preserve the BIT's beneficial aspects for the foreign investor while expanding its acceptability to the developing countries.

## 2.2. Provisions of the Model BIT and Current U.S. BITs

The Model BIT addresses a series of issues governing the treatment of foreign private investment in states that are parties to the treaty. The following subsections discuss the primary targets of the BIT program: performance requirements, standard of treatment, expropriation and nationalization, monetary transfers, and the settlement of investment disputes.

### 2.2.1. Performance Requirements

The Model BIT contains an absolute prohibition against a host country's imposition of performance requirements<sup>31</sup> because they restrict the free flow of economic competition.<sup>32</sup> The United States classifies as performance requirements such activities as export performance requirements,<sup>33</sup> import substitution requirements, and local content requirements.<sup>34</sup> Restrictions such as those that stipulate the percentage of the total product to be bought from local producers are viewed as a distortion of international trade and investment policies.<sup>35</sup> Although the United States stresses the importance of banning performance requirements, it has had limited success in retaining this ban in the treaties thus far concluded. While the U.S.-Panamanian BIT does forbid all performance requirements, the Egyptian and Turkish BITs do not.<sup>36</sup>

### 2.2.2. Standard of Treatment

The standard of treatment for foreign investment in a host country is set out in the Model BIT as either a national or most-favored-nation

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<sup>31</sup> *Model BIT*, *supra* note 1, at art. II, para. 7.

<sup>32</sup> *Bale Statement*, *supra* note 2, at 204.

<sup>33</sup> An example of an export performance requirement is when foreign investors are required to export a minimum volume or percentage of their output, often as a condition for an investment incentive. *Id.*

<sup>34</sup> Local content requirements and import substitution requirements divert purchases of foreign-owned firms to local producers, often over favored foreign suppliers. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> U.S.-Turkey BIT, *supra* note 13, art. II, para. 7 (stating that the parties shall seek to avoid the imposition of performance requirements); U.S.-Egypt BIT, *supra* note 13, art. II, para. 7 (providing merely that Egypt shall 'seek to avoid the imposition of performance requirements').

standard, whichever is more favorable to the investor.<sup>37</sup> The treaty parties are allowed, however, to set out certain areas of their economies where neither a national nor a most-favored-nation standard will apply.<sup>38</sup> While both Egypt and Panama have incorporated this basic standard into their treaties with the United States,<sup>39</sup> the Turkish provision differs in what could be a substantial manner. The Turkish BIT provides that a most-favored-nation standard will exist for all investments covered by the treaty, and then qualifies the potential application of the national standard by phrasing it as “within the framework of its laws and regulations, no less favorable than that accorded in like situations to investments of its own nationals and companies.”<sup>40</sup> Depending on the content of laws and regulations enacted by Turkey, this clause could essentially limit the rights of U.S. investors in Turkey to rights of only a most-favored-nation.

### 2.2.3. *Expropriation and Nationalization*

Article II of the Model BIT provides that parties are not to expropriate, nationalize, or take measures that would in effect be “creeping expropriation” unless the expropriation: (1) is for a public purpose; (2) is accomplished under due process of law; (3) is not discriminatory; (4) is not in violation of any specific agreement between a national of one party and the expropriating party; and (5) is accompanied by prompt, adequate, and effective compensation.<sup>41</sup> The compensation provided is to be the fair market value of the expropriated investment.<sup>42</sup> The calculation of fair market value is not to reflect any reduction in the investment’s value caused by the announcement of the expropriatory action or the occurrence of the acts that resulted in expropriation. Compensation is to be paid without delay and must be freely transferable at the market rate of exchange on the day of expropriation.<sup>43</sup>

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<sup>37</sup> *Model BIT*, *supra* note 1, art. II, para. 1.

<sup>38</sup> *Id.* art. II, paras. 3, 4. Exceptions are listed in the treaty’s Annex. For example, some of the U.S. reservations contained in the Model BIT are: air transportation, ocean and coastal shipping, ownership of real estate, and use of land and natural resources. *Id.* at Annex.

<sup>39</sup> U.S.-Panama BIT, *supra* note 13, art. II, para. 1; U.S.-Egypt BIT, *supra* note 13, art. II, para. 3.

<sup>40</sup> U.S.-Turkey BIT, *supra* note 13, art. II, para. 1; *cf.* Pattison, *supra* note 20, at 320 (discussing the potential danger of a clause in the Model BIT that would allow host states’ employment laws to take precedence over treaty provisions in the employment area).

<sup>41</sup> *Model BIT*, *supra* note 1, art. III, para. 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

The Egyptian and Panamanian BITs<sup>44</sup> follow the Model BIT on the expropriation provision. The Turkish BIT contains a new aspect in the compensation standard provision. The Turkish BIT provides that if the payment of compensation is delayed, the compensation would be the amount that would put the investor in a position no less favorable than the investor would have been in had payment occurred on the date of expropriation.<sup>45</sup> The Model BIT also provides for compensation if investments are damaged by war, revolution, insurrection, riots, or terrorism.<sup>46</sup> All three treaties in force are similar to the Model BIT in this provision.<sup>47</sup>

#### 2.2.4. *Monetary Transfers*

The Model BIT also provides that all monetary transfers related to the foreign investment may be freely transferred out of the territory, without delay, in the currency selected by the investor.<sup>48</sup> While the Panamanian BIT follows the Model BIT closely,<sup>49</sup> Egypt and Turkey each have a reservation attached to this provision.<sup>50</sup> The Protocols of both the Egyptian and Turkish treaties state that if the foreign exchange reserves of the country fall to a low level, the host countries are allowed to delay all monetary transfers.<sup>51</sup>

#### 2.2.5. *Investment Disputes*

A detailed outline of how investment disputes should be settled is contained in the Model BIT.<sup>52</sup> Although three different types of investment disputes are identified in the treaty, the one primarily addressed is a disagreement between a national or company of one party and the host party.<sup>53</sup> A detailed procedure is outlined in the Model BIT by which the parties, after consultation and negotiation have failed, can mutually agree to submit themselves to the jurisdiction of the Interna-

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<sup>44</sup> U.S.-Panama BIT, *supra* note 13, art. IV, para. 1; U.S.-Egypt BIT, *supra* note 13, art. III, para. 1.

<sup>45</sup> U.S.-Turkey BIT, *supra* note 13, art. III, para. 2.

<sup>46</sup> *Model BIT*, *supra* note 1, art. IV, para. 1.

<sup>47</sup> U.S.-Turkey BIT, *supra* note 13, art. III, para. 4; U.S.-Panama BIT, *supra* note 13, art. V; U.S.-Egypt BIT, *supra* note 13, art. IV.

<sup>48</sup> *Model BIT*, *supra* note 1, art. V, paras. 1,2.

<sup>49</sup> U.S.-Panama BIT, *supra* note 13, art. VI.

<sup>50</sup> U.S.-Turkey BIT, *supra* note 13, at Protocol, para. 2(b); U.S.-Egypt BIT, *supra* note 13, at Protocol, para. 6.

<sup>51</sup> U.S.-Turkey BIT, *supra* note 13, at Protocol, para. 2(b); U.S.-Egypt BIT, *supra* note 13, at Protocol, para. 6.

<sup>52</sup> *Model BIT*, *supra* note 1, art. VII.

<sup>53</sup> *Id.* art. VII, para. 1.



tional Court of Justice.<sup>54</sup> Alternatively, at the request of one party, after a certain length of time, the dispute may be submitted to third party arbitration.<sup>55</sup> The Model BIT expressly suggests that, in the absence of a specific arbitral procedure agreement between the parties, the third party arbiter for the investment dispute could be the International Centre for the Settlement of Investment Disputes (ICSID).<sup>56</sup> All three treaties vary only slightly from the Model BIT on the dispute provision.

As this discussion indicates, the Model BIT covers a great many of the key areas of interest to the foreign private investor. The deviations from the Model BIT in the Egyptian and Turkish treaties and the general disagreement among many developing countries over the standards embodied in these provisions, however, indicate the areas of difficulty that may arise in future attempts to conclude treaties based on this Model.<sup>57</sup>

### 2.3. *Problematical Provisions in the Model BIT*

Several provisions in the Model BIT have proven to be problematic in negotiations and are not likely to serve as universal standards in the future.<sup>58</sup> Difficulties have arisen over the following: (1) the implications of the "Calvo" doctrine<sup>59</sup> and its effect on the dispute settlement mechanism proposed by the United States; (2) the U.S. insistence on prompt, adequate, and effective compensation in the event of nationalization or expropriation; (3) the U.S. desire for the status and treatment as a national rather than merely as a most-favored-nation; and (4) the U.S. policy against governmentally mandated performance requirements.<sup>60</sup> An examination of these provisions and the reasons why developing nations object to them will help to illustrate how the Model BIT should be modified.

#### 2.3.1. *Investment Disputes*

The United States has had difficulty in gaining acceptance of the dispute settlement provision of the Model BIT in part because it runs

<sup>54</sup> *Id.* art. VIII, para. 2.

<sup>55</sup> *Id.* art. VIII, para. 2.

<sup>56</sup> *Id.* art. VIII, para. 2. The ICSID was established by the World Bank in 1965 at the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

<sup>57</sup> U.S.-Turkey BIT, *supra* note 13, art. VI; U.S.-Panama BIT, *supra* note 13, art. VII; U.S.-Egypt BIT, *supra* note 13, art. VII.

<sup>58</sup> *Simplification of BITs*, *supra* note 14, at 279.

<sup>59</sup> See *infra* notes 61-65 and accompanying text.

<sup>60</sup> *Simplification of BITs*, *supra* note 14, at 279.

counter to the principles of the Calvo doctrine.<sup>61</sup> The Calvo doctrine insists on the strict abstention from interference by other nations in areas within the host country's exclusive control.<sup>62</sup> A majority of Latin-American countries adhere to the Calvo doctrine, and it appears in many Latin-American international conventions and investment contracts.<sup>63</sup> Two areas of special concern to the Latin-American states are the adjudication of disputes involving resources or conduct within their borders and the control over compensation for acts of nationalization or expropriation.<sup>64</sup> The Latin-American countries appear to be unwilling to give up their position on the Calvo doctrine,<sup>65</sup> and whether or not their position is based on real fears of foreign intervention and partiality in international tribunals, it remains a real stumbling block for the U.S. BIT program.

Other countries, particularly The People's Republic of China (PRC), object to the Model BIT's dispute resolution provision on different grounds. This provision has been the central objection of the PRC to the Model BIT,<sup>66</sup> partially because the PRC concept of sovereignty differs from that of Western democracies, i.e., the PRC is uncomfortable with the idea of an independent body having authority over disputes.<sup>67</sup> Other concerns of the Chinese about entering into a formal investment treaty with the United States include: (1) fear that the treaty will make it appear as though they are part of an imperialistic

<sup>61</sup> The original source of the Calvo doctrine is the 1868 treatise on international law by Carlos Calvo, an Argentine diplomat. See J. SWEENEY, C. OLIVER & N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 1112 (1981). Two fundamental propositions form the Calvo doctrine. The first is that due to the equality of all states, all states must be free from any intervention by a foreign state. The second postulate states that diplomatic protection of an alien in a foreign country is an impermissible interference with the independence of the nation. *Id.* Therefore, an alien will be treated as though he were a national of the state in terms of any grievances he may have against the state or against any individual within the state. *Id.*; see also G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 635 (1943).

<sup>62</sup> See Rogers, *Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1, 2-3 (1978); see also Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256, 260-62 (1971) (arguing that the Calvo doctrine should not stop Latin America from participating in ICSID).

<sup>63</sup> See Rogers, *supra* note 62.

<sup>64</sup> See *id.* at 3.

<sup>65</sup> For example, many Latin-American countries boycotted the World Bank Convention and refused to sign the ICSID Draft Treaty. See *id.* at 3-4; Szasz, *supra* note 62, at 258.

<sup>66</sup> *U.S. Trade Representative Hopes to Deliver Eight Bilateral Investment Treaties to Senate This Year*, 9 U.S. Import Weekly (BNA) No. 32, at 1002, 1003 (May 16, 1984) [hereinafter *U.S.T.R.*] (statement of Assistant U.S. Trade Representative Harvey Bale).

<sup>67</sup> *Id.*

economic program;<sup>68</sup> (2) fear of partiality in Western tribunals; (3) an aversion to the adversarial posture of Western law; and (4) the lack of the use of the Chinese language in international tribunals.<sup>69</sup>

It is interesting to note that many European countries do not insist on the use of third party arbitration in their BIT programs.<sup>70</sup> Although the United States continues to assert that it does not wish individual investment disputes to be settled on a government-to-government basis,<sup>71</sup> its position may cause severe problems in treaty negotiations.

### 2.3.2. *Expropriation and Nationalization*

The antagonism of developing countries toward the standard of prompt, adequate, and effective compensation lies in their outlook on the whole process of nationalization and expropriation.<sup>72</sup> Developing countries often view nationalization as part of a fundamental change in the social and political framework of the nation. They perceive this change as the result of the nation's attempt to reestablish control over important areas of the economy and, often, to redistribute the wealth within the society.<sup>73</sup> The U.S. requirement of compensation based on a fair market valuation of the investment is contrary to the political principles on which nationalization is based. One commentator has noted that it is both "unrealistic and patronizing" to expect "that states lacking sufficient gold reserves, foreign exchange, or other financial resources should not undertake social and economic reforms which may necessitate enacting extensive deprivation laws".<sup>74</sup>

While the United States believes that international law requires the payment of the fair market value for expropriated investments,<sup>75</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> Note, *Far From the Tiger's Mouth: Present Practice and Future Prospects for the Settlement of Foreign Commercial Disputes in the People's Republic of China*, 3 J. L. & COM. 115, 133 (1983).

<sup>70</sup> See Voss, *The Protection and Promotion of European Private Investment in Developing Countries*, 18 COMMON MKT. L. REV. 363, 370 n.16 (1981) (for example, West Germany incorporates diplomatic protections into its investment agreements).

<sup>71</sup> U.S.T.R., *supra* note 66, at 1003.

<sup>72</sup> See Muller, *Compensation for Nationalization*, 19 COLUM. J. TRANSNAT'L L. 35 (1981). See generally Bergman, *supra* note 19, at 37-38 (discussing how countries often ultimately negotiate compensation); Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 FORDHAM L. REV. 727 (1962) (providing a general analysis of the principle of compensation); Note, *Host Countries Attitudes Toward Foreign Investment*, 3 BROOKLYN J. INT'L L. 233, 243-44 (1977) (discussing past attitudes of developing countries that there is a need to control foreign investment).

<sup>73</sup> See Muller, *supra* note 72, at 45.

<sup>74</sup> Dawson & Weston, *supra* note 72, at 738.

<sup>75</sup> Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 517, 519 (1976) (At

many developing countries believe that their domestic law should determine the measure of compensation.<sup>76</sup> Although the United States and many of the developing countries may never agree on the principles behind expropriation and nationalization, perhaps another standard of compensation would provide an easier base from which to negotiate the BITs. As alternatives to the fair market value approach, three standard methods of indirect valuation used to approximate the fair market value include the going concern approach, the replacement cost approach, and the book value approach.<sup>77</sup> In future negotiations, perhaps a middle ground between a fair market valuation and a book valuation can be found.

### 2.3.3. *Standard of Treatment*

The resistance of many developing nations to the adoption of a standard of treatment incorporating a national standard, as opposed to merely a most-favored-nation standard, again relates to issues of sovereignty and independence. Many Latin-American countries believe that the policies of foreign governments are heavily influenced by their nationals who operate businesses in Latin-American countries.<sup>78</sup> Thus, they view U.S. policies as designed to further U.S. citizens' business concerns as well as international strategic concerns.<sup>79</sup>

Latin-American countries believe that the national treatment standard is the most advantageous standard for the foreign investor, but not for the host country, because it guarantees that those investors will not be discriminated against solely because they are foreigners. It has been argued, though, that there are no reciprocal benefits for the host country.<sup>80</sup> Although the internal logic of the Calvo doctrine would seem to suggest that a national standard would be acceptable to Latin-American countries, this is not often the case.<sup>81</sup>

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the time he gave this speech, Richard J. Smith was the Director of the Office of Investment Affairs, Bureau of Economic and Business Affairs, Department of State).

<sup>76</sup> See, e.g., *Charter of Economic Rights and Duties of States* ch. 2, art. 2(c), G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, 52, U.N. Doc. A/9946 (1974).

<sup>77</sup> Smith, *supra* note 75, at 519. The going concern approach attempts to measure earning power and, next to the fair market value approach, is the approach most favored by the United States. *Id.* The replacement cost approach calculates the replacement cost of the property at the time of expropriation less actual depreciation. The United States regards this standard as inadequate because it does not take into account earning capacity. *Id.* The book value approach values the asset at the acquisition cost less depreciation. This method is the least acceptable to the United States. *Id.*

<sup>78</sup> Grunwald, *Foreign Private Investment: The Challenge of Latin American Nationalism*, 11 VA. J. INT'L L. 228, 232 (1971).

<sup>79</sup> *Id.*

<sup>80</sup> See Bergman, *supra* note 19, at 27.

<sup>81</sup> The Calvo doctrine stresses that foreigners should be treated the same as the

European BITs, in contrast to the Model BIT, sometimes allow the inclusion of only a most-favored-nation clause in the BIT provisions.<sup>82</sup> Those European BITs that do include a clause similar to that contained in the Model BIT, providing for a national as well as a most-favored-nation standard, often restrict the amount of activities governed by the standard.<sup>83</sup> There have been some attempts to develop a universal minimum standard of treatment for foreign investment,<sup>84</sup> and this may be the best approach.

#### 2.3.4. Performance Requirements

The inability of the United States to retain the performance requirement prohibition clause in the Egyptian and Turkish BITs demonstrates the existing opposition to this provision.<sup>85</sup> The reluctance of countries to ban performance requirements relates to a fear that unrestricted private foreign investment may not be beneficial to their interests.<sup>86</sup> They fear that foreign investment may subvert their national policies in such areas as employment, pricing, regional development, market competition, and foreign trade.<sup>87</sup> Performance requirements also serve a function for the developing countries by promoting their balance of trade and fostering growth in local industries.<sup>88</sup> A contrast between the European and American practices in this area can once again be drawn. Not only is the United States the sole country to prohibit the performance requirement standard in its BIT program,<sup>89</sup> but it is also the only country that reserves the right to take action against the use of performance requirements.<sup>90</sup>

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citizens of the state. See Szasz, *supra* note 62, at 260-61.

<sup>82</sup> See Bergman, *supra* note 19, at 12 (discussing the Sweden-People's Republic of China Treaty).

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.* at 20. The proposed universal standard would merely require the host country to treat investors in a manner no less beneficial than required by international law. *Id.* This would create a universal minimum standard of treatment below which no negotiated standard of treatment would be allowed to fall. *Id.*

<sup>85</sup> U.S.-Turkey BIT, *supra* note 13, art. II, para. 7 (no performance requirements clause); U.S.-Panama BIT, *supra* note 13, art. II, para. 4 (clause banning all performance requirements); U.S.-Egypt BIT, *supra* note 13, art. II, para. 7 (no performance requirements clause).

<sup>86</sup> See Note, *supra* note 72, at 243.

<sup>87</sup> *Id.* at 257.

<sup>88</sup> Note, *supra* note 19, at 950.

<sup>89</sup> See Bergman, *supra* note 19, at 31.

<sup>90</sup> *Administration Announcement*, *supra* note 5, at 880.

### 3. VARIATIONS ON THE MODEL

As this analysis has indicated, serious problems exist in the provisions of the current Model BIT. The U.S. BIT program is too rigid in its outlook. All of the provisions thus far discussed represent the ideals of a developed country with very few concessions to developing countries for what the latter perceive to be important protections of their national sovereignty.<sup>91</sup> Although the United States has had some success in concluding BITs, an examination of those countries that are parties indicates that only nations heavily dependent on U.S. aid may be willing to accept the Model BIT in its present form.

As a tool for the protection of investment, the BIT has shown its worth in both the success European nations have had in concluding these treaties<sup>92</sup> and the seriousness with which most nations have adhered to the BIT provisions. The European BITs, however, contain a measure of flexibility that the Model BIT does not.<sup>93</sup> If the United States is to succeed in expanding the opportunities for protected direct investment abroad, some changes will have to be made in the Model BIT. Perhaps a variety of Model BITs would be the best solution. By having several standard models relating to the different types of nations with which the United States is negotiating, the BIT could retain its present speed and efficiency that arises from its precise outlining of provisions.<sup>94</sup> At the same time, the BIT would be better adapted to a given country's individual needs. The United States does have vital national interests in safeguarding the rights of its citizens who invest abroad, but a tailoring of the treaty to the variety of situations that exist among nations today would be the most pragmatic and, it is hoped, the most successful avenue to take.

#### 3.1. *Acceptance of the Model BIT*

A pattern seems to be emerging among the countries with which the United States is able to negotiate and conclude BITs based on the terms of the Model BIT. The countries who have thus far agreed to

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<sup>91</sup> See Note, *supra* note 19, at 956-57.

<sup>92</sup> See Bergman, *supra* note 19, at 10 (by the late 1970s, over 170 BITs had been negotiated in Europe). *But see Bilateral Treaties Not Directing Capital to LDCs that Sign Them, U.N. Study Finds*, 3 U.S. Export Weekly (BNA) No. 14, at 447 (Apr. 2, 1986) [hereinafter *U.N. Study*] (U.N. study stating that BITs are not increasing direct investment into developing nations that enter the accord).

<sup>93</sup> See *supra* notes 58-90 and accompanying text.

<sup>94</sup> See generally Bergman, *supra* note 19, at 42-43 (arguing that BIT provisions must be drafted narrowly or they will not provide the stable investment environment required).

sign and ratify the Model BIT with its original terms are among those countries most dependent on the United States for aid. Two of the four nations that receive substantial American aid are Egypt and Turkey.<sup>95</sup> After Israel, Egypt received the most American governmental aid in 1984 through foreign grants and credits, military aid, and direct foreign aid.<sup>96</sup> In that same year, Turkey received the third largest amount of military aid and foreign grants and credits, and the sixth largest amount of foreign aid.<sup>97</sup> Both Egypt and Turkey experienced massive economic crises in the late 1970s.<sup>98</sup> The United States was part of an international group that joined together to prevent the collapse of the Egyptian and Turkish economies.<sup>99</sup>

There were valid reasons for the United States to pursue a BIT with Egypt, such as Egypt's strategic importance, its favorable attitude toward foreign investment, the substantial amount of U.S. private investment already in place, and the open-door policy established in 1974.<sup>100</sup> None of these reasons, however, explains the willingness of Egypt to sign a treaty with many provisions obviously objectionable to the Egyptian Parliament,<sup>101</sup> thus supporting the view that these developing countries accept basically abhorrent provisions because of a pressing need for foreign investment and a great reliance on U.S. foreign aid.<sup>102</sup> Others argue that developing countries believe BITs can be beneficial, noting that: (1) developing countries often initiate discussions

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<sup>95</sup> The other two countries are Israel and Pakistan. See Radke & Taake, *Financial Crisis Management in Egypt and Turkey*, 17 J. WORLD TRADE L. 325, 334 (1983).

<sup>96</sup> BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 802-07 (104th ed. 1986) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES]. Egypt received \$1,923 million in foreign grants and credits, \$1,367 million in military aid, and \$853 million in foreign aid. *Id.* at 829-30.

<sup>97</sup> *Id.* Turkey received \$718 million in military aid, \$443 million in foreign grants and credits, and \$138 million in foreign aid. *Id.* It is interesting to note that although Turkey received the sixth largest amount of foreign aid in 1984, it received the third largest amount in 1983 (\$285 million) and in 1982 (\$300 million). *Id.*

<sup>98</sup> See Radke & Taake, *supra* note 95, at 325.

<sup>99</sup> See *id.* at 327, 331 (the United States helped to restructure the Turkish economy and provided funds for Egypt).

<sup>100</sup> Law No. 43 of 1974 concerning Arab and Foreign Capital Investment and Free Zones, Arab Republic of Egypt, Official Gazette No. 26, at 366-74 (June 27, 1974) (Egyptian embassy trans.), reprinted in 13 I.L.M. 1500 (1974); see also *United States Bilateral Investment Treaties: Egypt and Panama*, 13 GA. J. INT'L & COMP. L. 491, 501-02 (1983).

<sup>101</sup> *U.S.-Morocco Initialing*, *supra* note 14, at 755.

<sup>102</sup> *But see* Voss, *supra* note 70, at 373 n.26 (arguing that the bilateral treaty safeguards the developing country's ability to modify the arrangement and that the protection of foreign investments attracts "desirable capital investment"); MONTREAL CONFERENCE, *supra* note 30, at 25 (stating that the initiative for treaties often lies with developing countries and that such treaties are concluded between developing countries).

with developed countries to establish BITs; (2) BITs between developing countries exist; and (3) many developing countries have enacted legislation dealing with foreign investment in much the same manner as does the BIT.<sup>103</sup> These facts indicate that many developing countries wish to sign BITs, although they may not wish to sign a BIT containing the provisions in the U.S. Model BIT. It seems likely that the need for foreign aid may be a controlling factor in determining how willing developing countries will be to sign U.S. BITs.

It is difficult to predict based on aid statistics alone whether or not a country will sign the Model BIT because of the impact political tensions may have on the negotiating process. The United States has recently signed new treaties with several developing countries. An examination of some of these countries and a few countries with which the United States is currently negotiating may be helpful in determining the future success of the BIT. The U.S.-Senegal BIT,<sup>104</sup> which was signed but has not yet been ratified, was declared to be "closer to the general BIT prototype than either of the two previous treaties (Egypt and Panama)."<sup>105</sup> It is unclear whether the failure to ratify has been caused by the reluctance on the part of the United States or Senegal. Statistics show that, in 1982, the United States awarded Senegal the ninth largest amount of foreign grants and credits in Africa, and the seventh largest amount of foreign aid.<sup>106</sup> Even with this data, it is difficult to predict if the treaty will be ratified as it is, with modifications, or not at all.

It is likely that the U.S.-Costa Rica BIT will be ratified in the near future. Costa Rica is a recipient of aid under the Caribbean Basin Initiative<sup>107</sup> and is just recently recovering from its worst economic crisis, which occurred in the early 1980s.<sup>108</sup> Other Caribbean Basin Initi-

<sup>103</sup> MONTREAL CONFERENCE, *supra* note 30, at 25.

<sup>104</sup> U.S.-Senegal BIT, *supra* note 13.

<sup>105</sup> U.S.-Africa Signing, *supra* note 12, at 448.

<sup>106</sup> STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 96, at 827-30. Senegal received \$74 million in foreign grants and credits and \$35 million in foreign aid. No statistics are available for the amount of military aid received. *Id.*

<sup>107</sup> Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701 (Supp. I 1983). The Caribbean Basin Initiative originally included the following countries in its aid packages: Barbados, Costa Rica, Dominica, Dominican Republic, Jamaica, Panama, Saint Christopher - Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the Netherlands Antilles. Later, new beneficiaries were added such as Belize, El Salvador, Grenada, Guatemala, Haiti, Honduras, and Montserrat. *Id.* § 2702(b).

<sup>108</sup> See STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 98TH CONG., 2D SESS., CENTRAL AMERICA: THE DEEPENING CONFLICT, REPORT OF A CONGRESSIONAL STUDY MISSION (Comm. Print 1984). Costa Rica's financial crisis was purportedly caused by drastic increases in the international price of Costa Rica's exports, high energy import prices, a decrease in investment due to regional instability, and economic



ative countries that have signed treaties with the United States include Grenada and Panama. The situation with El Salvador<sup>109</sup> is a little more confusing because of the political tension and instability in the region. It seems likely, however, that a U.S.-El Salvador BIT will be signed in the future. Two other signed but unratified treaties exist between the United States and Morocco, and the United States and Haiti. At the same meeting in which Morocco and the United States signed a BIT, the United States granted Morocco an additional twenty million dollars in wheat shipments under the Food for Peace program.<sup>110</sup> Morocco had just recently received a blended credit offer of \$244 million from the United States.<sup>111</sup> Although it is likely that the U.S.-Morocco BIT will be ratified in the near future, the U.S.-Haiti BIT may run into problems due to the recent upheavals in Haiti.<sup>112</sup>

### 3.2. *An Amended Model*

Working from the premise that the Model BIT as it now stands will be acceptable only to those developing countries with whom the United States has close financial aid ties, some changes in several key provisions of the Model BIT may provide a variation of the Model that will be more acceptable. Key areas of discontent include the dispute settlement mechanism; the standard of prompt, adequate, and effective compensation; the national standard of treatment for investments; and performance requirements.<sup>113</sup>

#### 3.2.1. *Investment Disputes*

Especially in the Latin-American countries that adhere to the Calvo doctrine, the opposition to the submission of investment disputes to the ICSID for third party arbitration has been very strong. Although the U.S. government strongly objects to the settlement of investment disputes on a government-to-government basis,<sup>114</sup> perhaps this would be a promising way to begin amending the Model. If the United States regards government-to-government negotiations as too time-consuming

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overextension and mismanagement. *Id.*

<sup>109</sup> El Salvador, a focus of U.S. political concern for many years, receives a substantial amount of aid from the U.S. For example, in 1984, El Salvador received \$454 million in foreign grants and credits from the United States, \$197 million in military aid, and \$161 million in foreign aid. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 96, at 827-30.

<sup>110</sup> U.S.-Morocco Initialing, *supra* note 14, at 755.

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., N.Y. Times, Feb. 8, 1986, at A1, col. 6.

<sup>113</sup> See *supra* notes 58-90 and accompanying text.

<sup>114</sup> U.S.T.R., *supra* note 66, at 1003.

and too politically based, an arbitration panel composed of members from the United States and the host nation could be created for the settlement of disputes. This alternative, however, might still be rejected by many countries.

Another alternative could be to put a third party arbitration clause of some type into the treaty, and the details of the clause could be worked out with the individual countries. For example, the PRC has expressed a preference for the Swedish international arbitration tribunals, if there is to be any third party arbitration at all, because they see Sweden as the most neutral Western country.<sup>115</sup> This would retain the U.S. goal of third party arbitration while increasing the adaptability of the Model. The arbitration clause may still be objectionable to many countries that follow the Calvo doctrine because of the doctrine's stress on the treatment of foreigners in the same manner as citizens in the area of investment dispute.<sup>116</sup>

A clause outlining the types of disputes most commonly found and outlining mutually acceptable ways of resolving standard problems could simultaneously provide guidance and protection for the investor while allowing the Calvo adherents freedom from the imposition of third party arbitration.

### 3.2.2. *Expropriation and Nationalization*

It is impossible to remove completely conflicts between the United States and the developing nations over the question of nationalization and expropriation because of the sensitive nature of the topic and its implications for national sovereignty.<sup>117</sup> A modification, however, in either the method of valuation or the application of the standard of valuation could be made so that the standard would be acceptable to both parties for the purposes of the treaty. The United States might be able to gain acceptance of the going concern method of valuation, which is acceptable to U.S. interests.<sup>118</sup> It might also be possible to create a modified standard of value, one evaluating both the flow of the investment's earnings and the value of the property determined as of some predetermined date.

Another approach would be to divide the economy of the host country into categories that could accomplish the goal of flexibility without forcing the United States to abandon all adherence to the fair

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<sup>115</sup> Note, *supra* note 69, at 133-36.

<sup>116</sup> See *supra* notes 61-71 and accompanying text.

<sup>117</sup> See *supra* notes 72-77 and accompanying text.

<sup>118</sup> See *supra* note 77 and accompanying text.

market value scheme of valuation. Certain sectors of investment in the host country's economy could be exempted, just as the current Model BIT allows certain sectors of the economy to be listed in the Annex of the FCN treaty as exempted from the national and most-favored-nation standards of treatment.<sup>119</sup> Areas of the economy that the developing nations believe are vital to their political and social development could either be completely exempted from any prearranged valuation standard or could be classified as receiving a lower standard of valuation, such as a going concern value. Although this would provide less, if any, protection for the U.S. investor in those sectors of the economy exempted from the fair market value standard, it would at least allow conclusion of a BIT so that some protection for the investor would be established. It would leave the investor free to choose whether or not to invest in a less protected area of the economy.

### 3.2.3. *Standard of Treatment*

To avoid the problems of sovereignty and national control inherent in the question of what standard of treatment to grant foreign investments (national or most-favored-nation), perhaps the adoption of a universal standard of treatment in a form slightly different than that suggested by some European nations would be best.<sup>120</sup> Both the national and most-favored-nation standards of treatment necessarily fluctuate depending on how the host government is regulating its nationals or third parties. In periods of political unrest or economic crisis, both standards could prove to be quite restrictive to the foreign investor. A universal standard could be created that listed the protections allowed. Of course, this standard could only work well if it were a universal standard. If each country had to negotiate an independent standard of treatment with every other country, it would likely deteriorate into a continual renegotiation of standards depending on which country last received a particular concession. However, if a universal standard could be agreed upon among at least a few nations, this would be a better solution than the current debate between the national and the most-favored-nation standards.

### 3.2.4. *Performance Requirements*

The United States has stated repeatedly that it wishes all performance requirements be banned and that it desires to see this provision

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<sup>119</sup> See *supra* notes 78-84 and accompanying text.

<sup>120</sup> See *supra* note 84 and accompanying text.

enforced.<sup>121</sup> Unfortunately, this is one area where the United States may have to give up its demands. In two out of the three treaties already concluded with the nations most likely to conform to the U.S. Model BIT provisions, performance requirements have not been banned.<sup>122</sup> It is even more unlikely that the United States will gain acceptance of this provision in treaties with countries less willing to comply with U.S. wishes.

Perhaps the United States can restrict some of the import and export requirements that fall under the heading of performance requirements. It may not be possible to remove performance requirements such as local content requirements, and it may not be in the best interests of the United States to insist upon their removal. The United States has repeatedly claimed that a large part of the focus of the BIT program is on stimulating the development of less-developed nations.<sup>123</sup> The banning of requirements that would cause a channeling of money into the local economy and a resulting spur to the local market is hard to justify. Such a ban appears to be contrary to the enunciated goals of the program.

### 3.3. Countries Where the BIT Does Not Fit

There are some developing and developed countries for whom the Model BIT does not seem to provide even a workable framework. The United States has conceded that certain countries do not appear to need BITs.<sup>124</sup> However, there also appear to be countries, with which the United States is negotiating BITs, that might fit better into a different treaty framework or set of agreements than that provided by the Model BIT.

Countries such as Japan and the PRC, that already have Treaties of Friendship, Commerce and Navigation, might do better with an updated framework of the FCN treaty rather than negotiation of a BIT.<sup>125</sup> This solution has already been suggested in the case of Japan.<sup>126</sup> The PRC could be a candidate for the same solution. Both the PRC and Japan are more highly developed nations than a majority of the other countries with which the United States is negotiating BITs.

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<sup>121</sup> See *supra* notes 85-90 and accompanying text.

<sup>122</sup> U.S.-Turkey BIT, *supra* note 13, art. II, para. 7; U.S.-Egypt BIT, *supra* note 13, art. II, para. 7.

<sup>123</sup> See *supra* notes 1-14 and accompanying text.

<sup>124</sup> U.N. Study, *supra* note 92, at 447 (stating that countries like Brazil and Mexico did not need BITs because they were already able to generate sufficient investment).

<sup>125</sup> U.S.-Japan FCN, *supra* note 15; U.S.-Republic of China FCN, *supra* note 15.

<sup>126</sup> U.S. Seeking BIT With Japan, *supra* note 21, at 686.

The level of the country's development, as well as the existing treaty framework, are important elements in determining how to approach the issue of foreign private investment. The more developed a nation is and thus the greater bargaining power it can consequently wield in negotiations with the United States, the less likely it seems that the BIT program will be either an appropriate or a successful vehicle for the establishment of investment protection.

The BIT signed between the PRC and Sweden highlights the problems the United States might have in trying to conclude a BIT with the PRC.<sup>127</sup> The provisions of the Sweden-PRC BIT differ dramatically from the U.S. Model BIT. For example, the Sweden-PRC BIT contains only a most-favored-nation standard of treatment for investments. It also contains no fair market value standard of valuation for expropriation, no clause banning performance requirements, and no international arbitration clause.<sup>128</sup> The United States has had substantial problems trying to negotiate a BIT with the PRC and, in fact, the negotiations have broken down several times.<sup>129</sup> The best solution in this situation is neither a total revamping of the Model BIT, nor an abandonment of all hope for negotiating an investment treaty with the PRC. Instead, an updating of the existing FCN to include more specific protections for foreign investments, though not as detailed as those found in the BIT, would better serve all interests.

The United States is also trying to negotiate BITs with a host of northern and western African nations.<sup>130</sup> The African nations with which the United States is currently negotiating are predominantly poor nations that have only recently become independent.<sup>131</sup> They are plagued by a number of problems including poor education and transportation facilities, cultural conflicts, the inheritance of artificial borders due to the European occupation of the region, inequities in development, and problems inherent in smaller countries.<sup>132</sup> In the past few decades, the African countries have attempted to establish regional ties and regional trade blocs.<sup>133</sup> Many of these regional arrangements, or-

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<sup>127</sup> See Bergman, *supra* note 19, at 12-17.

<sup>128</sup> See *id.*

<sup>129</sup> Conference Speakers See *Immense Business Opportunities in China*, 19 U.S. Export Weekly (BNA) No. 12, at 445 (June 21, 1983).

<sup>130</sup> See *infra* note 135 and accompanying text.

<sup>131</sup> *Id.*

<sup>132</sup> Ajomo, *Regional Economic Organizations: the African Experience*, 28 INT'L & COMP. L.Q. 58, 101 (1976).

<sup>133</sup> See, e.g., Treaty of the Economic Community of West African States (ECOWA), May 28, 1975, reprinted in 14 I.L.M. 1200 (1975) (signatories include Dahomey, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra-Leone, Togo, and Upper Volta); Charter and

ganized solely for economic cooperation, have proven difficult to maintain, however, due to the dissimilar political systems among the nations involved.<sup>134</sup> A type of treaty that differs from the Model BIT might also be the most appropriate way to approach these developing African nations.

Although BITs have been signed but not ratified with Morocco, Senegal, and Zaire, it is unclear whether these BITs will succeed with the other African nations, or if they will even be ratified in the countries where they have already been signed. At present, the African nations may not be in the same position as, for example, the Latin or Central American nations. A U.S. government and business mission to Cameroon, the Ivory Coast, Morocco, and Nigeria found that the small businessmen were the most successful in concluding contracts in these nations, and that "in many countries you see they actually prefer dealing with small businesses . . . ." <sup>135</sup> Perhaps the establishment of some type of FCN would be the most appropriate way to begin comprehensive relations and investment reciprocity with these nations. Several nations already have FCNs with the United States.<sup>136</sup> In such cases, an updating of the current investment framework is probably what is needed. For many of the nations with which the United States has no FCN, the establishment of an FCN would lay the groundwork for the protection of persons, property, and investments abroad.

The framework of the Model BIT is too narrow and too focused on the amount of investment to facilitate interaction with many of the African nations with whom the United States is negotiating. Their concerns are more broadly based and their opportunities for and interest in foreign private investment are on a different scale than many other developing countries. The African nations are still in the position of having to build regional trade groups, of encouraging interaction with outside nations and of developing a climate suitable for foreign private investment. Their position is in striking contrast to that of the Latin and Central American countries. Although subject to great problems of

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Regulations of the Organisation Commune Africaine et Malgache (OCAM), June 27, 1966, *reprinted in* 6 I.L.M. 53 (1967) (signatories include Cameroon, Central African Republic, Chad, Republic of Congo, Dahomey, Gabon, Ivory Coast, Malagasy Republic, Niger, Ruanda, Senegal, Togo, and Upper Volta).

<sup>134</sup> Ajomo, *supra* note 132, at 82-84.

<sup>135</sup> *U.S. Government-Business Mission Returns from Africa with Contracts, Enthusiasm*, U.S. Export Weekly (BNA) No. 392, at 445 (Jan. 26, 1982).

<sup>136</sup> See Treaty of Peace and Friendship, Sept. 16, 1836, United States-Morocco, 8 Stat. 484, T.S. No. 244-2, *reprinted in* MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1776-1909, S. Doc. No. 357, 61st Cong., 2d Sess. 1212 (1910).

internal unrest, a majority of the Latin and Central American countries already have a sense of national sovereignty and a regional consciousness. For nations that have an interest in U.S. investment and a sense of their own national needs, a form of the BIT program will probably fulfill the needs of both the United States and the developing nation involved. For countries still beginning to develop internally and regionally, an updated model of the FCN would create the greatest amount of protection for the foreign private investor while addressing the whole range of concerns existing between the United States and the host country.

#### 4. CONCLUSION

The development of the BIT program was a step forward for the United States in the negotiation of protections for the investments of U.S. citizens abroad. The traditional framework of investment relations, embodied in a series of FCNs, did not meet the needs of many of today's investors. The BIT program established by the United States, however, is too rigid in its application. The United States has been very forceful in requiring that certain provisions be included in the treaties and, moreover, that they be included as specified by the U.S. For the future success of the BIT program, variations on the Model BIT should be developed so that the treaty program as a whole can find wider acceptance. A series of Model BITs, each containing provisions that incorporate the concerns of the different regions of developing nations, may be the best approach. Although the United States may have to relinquish some of the provisions that it believes are important in order to accommodate developing countries, greater protection will be provided for U.S. investors abroad in the long run.