

member states to consider the harmonization of rules relating to the organization of stock exchanges, the regulation of broker-dealers, and insider trading.⁶⁵ Two years later, the Council adopted a Directive requiring the member states to harmonize the rules as to the admission of securities for listing in stock exchanges.⁶⁶ Two other directives imposed general requirements of prospectus disclosure⁶⁷ and of continuous information by listed companies.⁶⁸ The Commission also has asked a working group to study the need for harmonized rules on insider trading.⁶⁹ It cannot be denied that European legislation thus far has been a slow and cumbersome process, but the progress achieved in other fields justifies some hope that a basic framework for a European capital market will evolve over time.

5. CONCLUSION

In summation, it should be clear that these observations do not exhaust the subject. The mutual penetration of existing capital markets and the internationalization of securities trading are complex phenomena. Their regulatory implications are slow to emerge. Because the economic forces which have so far inspired and pushed the development toward bigger markets have not abated and are still growing in strength, it can be assumed that more regulatory issues will appear over time. There are and will be no simple solutions. More internationalized markets will be able to make an important contribution to better allocation of capital if all the important players involved — legislators, regulators, self-regulatory organizations, and financial institutions — will be ready and able to learn new lessons, and use this experience in much closer cooperation than they have exercised so far.

⁶⁵ See the analysis by Lempereur, *Insider Trading en droit des Communautés Européennes*, in *Lee*, *supra* note 26, at 279, 280.

⁶⁶ 22 O. J. EUR. COMM. (No. L. 66) 21 (1979).

⁶⁷ 23 O. J. EUR. COMM. (No. L. 100) 9 (1980).

⁶⁸ 25 O. J. EUR. COMM. (No. L. 48) 26 (1982).

⁶⁹ For details, see Lempereur, *supra* note 65, in *Lee*, *supra* note 26, at 284.

Uot Penn. Tot B low

COMMENTS

V.9.

winter 87
pp 121-143

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

VALERIE H. RUTTENBERG*

1. INTRODUCTION

On January 11, 1982, the United States Trade Representative announced the formulation of a prototype Bilateral Investment Treaty (Model BIT).¹ 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).² 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.³ The Reagan administration wants to move away from the position of neutrality on foreign investment announced by President Carter in 1977,⁴ a policy that neither promoted nor discouraged inward or outward investment flows. It is President Reagan's belief that "[a] world with strong

* J.D. candidate, 1987, University of Pennsylvania Law School; B.A., 1982, Yale University.

¹ *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).

² 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).

³ *Bale Statement*, *supra* note 2, at 211.

⁴ *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."⁶

Historically, the United States relied on Treaties of Friendship, Commerce and Navigation (FCNs) to facilitate trade between itself and other nations.⁶ The discontent over the general nature of the provisions in the FCNs⁷ as well as the success achieved by European countries in concluding BITs with both developing and developed nations⁸ 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.⁹ The purpose of the BIT program is to provide assurances to foreign investors that they will receive: (1) either national¹⁰ or most-favored-nation treatment¹¹ 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.¹²

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

⁶ Administration Announces Official Stance on International Investment, 8 U.S. Import Weekly (BNA) No. 23, at 879-80 (Sept. 14, 1983) [hereinafter *Administration Announcement*].

⁷ 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).

⁸ 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*].

⁹ 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).

¹⁰ *Administration Announcement*, *supra* note 5, at 879.

¹¹ 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.

¹² 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.

¹³ *First U.S. Bilateral Investment Treaty Between U.S. and African Nation*, 11 U.S. Import Weekly (BNA) No. 11, at 448 (Dec. 13, 1983) [hereinafter

some formidable, if not insurmountable, obstacles.¹⁴ There in the BIT program that indicate it may have only limited reaching the goals it has set. Specific problem areas of the include its lack of flexibility and its espousal of provisions directly opposed to the interests of many developing nations. ment will focus on the inherent limitations of the U.S. BIT proposed and thus far conducted. The analysis will focus on the earliest treaties signed by the United States, those with Panama, and Turkey. Section 2 will deal with the development of the BIT program and the standards that have been included concluded under this program. Section 3 will present an analysis of the results of the current BIT program and will offer recommendations on the standard Model BIT that may make the Model BIT 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 Commerce and Navigation¹⁶ as the basis for negotiating

ments, May 2, 1986, United States-Grenada; Treaty Concerning the Encouragement and Protection of Investments, Mar. 12, 1986, United States-Turkey; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 1985, United States-Turkey; I.L.M. _____ [hereinafter U.S.-Turkey BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Aug. 3, 1984, United States-Turkey; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Oct. 27, 1982, United States-Panama I.L.M. 1227 [hereinafter U.S.-Panama BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sep. 29, 1982, United States-Egypt [hereinafter U.S.-Egypt BIT].

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

¹⁶ See, e.g., Treaty of Friendship, Commerce and Navigation

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 requirements³¹ because they restrict the free flow of economic competition.³² The United States classifies as performance requirements such activities as export performance requirements,³³ import substitution requirements, and local content requirements.³⁴ 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.³⁵ 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.³⁶

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

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

2.2.3. Expropriation and Nationalization

Article II of the Model BIT provides that parties to the treaty shall not expropriate, nationalize, or take measures that would in effect constitute expropriation⁴¹ 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 the host country and the expropriating party; and (5) is accompanied by prompt, adequate, and effective compensation.⁴² The compensation to be paid for expropriation is to be the fair market value of the expropriated investment at the time of expropriation. The fair market value is not to reflect any reduction in the investment's value caused by the announcement of the expropriation or the occurrence of the acts that resulted in expropriation. Compensation is to be paid without delay and must be freely transferable at the current market rate of exchange on the day of expropriation.

³⁷ Model BIT, *supra* note 1, art. II, para. 1.

³⁸ *Id.* art. II, paras. 3, 4. Exceptions are listed in the treaty's Annex, some of the U.S. reservations contained in the Model BIT are: (1) ocean and coastal shipping, ownership of real estate, and use of resources. *Id.* at Annex.

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

⁴⁰ U.S.-Turkey BIT, *supra* note 13, art. II, para. 1; *cf.* Pat. 320 (discussing the potential danger of a clause in the Model BIT that allows host states' employment laws to take precedence over treaty provisions).

³¹ Model BIT, *supra* note 1, art. II, para. 7.

³² *Bale Statement*, *supra* note 2, at 204.

³³ 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.*

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

³⁵ *Id.*

³⁶ U.S.-Turkey BIT, *supra* note 13, art. II, para. 7 (stating that the parties shall

The Egyptian and Panamanian BITs⁴⁴ 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.⁴⁵ The Model BIT also provides for compensation if investments are damaged by war, revolution, insurrection, riots, or terrorism.⁴⁶ All three treaties in force are similar to the Model BIT in this provision.⁴⁷

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.⁴⁸ While the Panamanian BIT follows the Model BIT closely,⁴⁹ Egypt and Turkey each have a reservation attached to this provision.⁵⁰ 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.⁵¹

2.2.5. Investment Disputes

A detailed outline of how investment disputes should be settled is contained in the Model BIT.⁵² 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.⁵³ 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-

tional Court of Justice.⁵⁴ Alternatively, at the request of a certain length of time, the dispute may be referred to arbitration.⁵⁵ The Model BIT expressly suggests that a specific arbitral procedure agreement between the investor and the host party or an arbitral procedure agreement between the investor and the party arbitrator for the investment dispute could be the basis for the Settlement of Investment Disputes (ICSID). The provisions of the ICSID Convention vary only slightly from the Model BIT on this point.

As this discussion indicates, the Model BIT covers the key areas of interest to the foreign private investor in the Model BIT in the Egyptian and Turkish BITs. The general disagreement among many developing countries regarding the standards embodied in these provisions, however, indicates a difficulty that may arise in future attempts to conclude a Model BIT.⁵⁷

2.3. Problematical Provisions in the Model BIT

Several provisions in the Model BIT have been criticized in negotiations and are not likely to serve as a basis for the future.⁵⁸ Difficulties have arisen over the following provisions of the "Calvo" doctrine⁵⁹ and its effect on the mechanism proposed by the United States; (2) the prompt, adequate, and effective compensation in the case of nationalization or expropriation; (3) the U.S. desire for the host country to act as a national rather than merely as a most-favored-nation in U.S. policy against governmentally mandated expropriations.⁶⁰ An examination of these provisions and the objections of developing nations object to them will help to illustrate which provisions 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

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

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

⁴⁶ Model BIT, *supra* note 1, art. IV, para. 1.

⁴⁷ 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.

⁴⁸ Model BIT, *supra* note 1, art. V, paras. 1, 2.

⁴⁹ U.S.-Panama BIT, *supra* note 13, art. VI.

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

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

⁵⁴ *Id.* art. VIII, para. 2.

⁵⁵ *Id.* art. VIII, para. 2.

⁵⁶ *Id.* art. VIII, para. 2. The ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 21 U.S.T. 2517 U.N.T.S. 3.

⁵⁷ U.S.-Turkey BIT, *supra* note 13, art. VI; U.S.-Panama BIT, *supra* note 13, art. VII.

⁵⁸ *Simplification of BITs*, *supra* note 14, at 279.

counter to the principles of the Calvo doctrine.⁶¹ The Calvo doctrine insists on the strict abstention from interference by other nations in areas within the host country's exclusive control.⁶² A majority of Latin-American countries adhere to the Calvo doctrine, and it appears in many Latin-American international conventions and investment contracts.⁶³ 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.⁶⁴ The Latin-American countries appear to be unwilling to give up their position on the Calvo doctrine,⁶⁵ 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,⁶⁶ 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.⁶⁷ 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

⁶¹ 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. LECH, *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).

⁶² 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).

⁶³ See Rogers, *supra* note 62.

⁶⁴ See *id.* at 3.

⁶⁵ 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.

⁶⁶ *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 1987); see also U.S. Trade Representative

economic program;⁶⁸ (2) fear of partiality and aversion to the adversarial posture of Western law; and (3) the use of the Chinese language in international arbitration.

It is interesting to note that many European countries on the use of third party arbitration in their investment disputes to be settled on a government-to-government basis,⁷¹ its position may cause severe problems.

2.3.2. Expropriation and Nationalization

The antagonism of developing countries to the prompt, adequate, and effective compensation of the whole process of nationalization and expropriation in developing countries often view nationalization as part of the social and political framework of the change as the result of the nation's attempt to develop important areas of the economy and, often, within the society.⁷² The U.S. requirement that the investment is a fair market valuation of the investment is a principle on which nationalization is based. It is both "unrealistic and patronizing" to require that the investment have sufficient gold reserves, foreign exchange sources should not undertake social and economic development that necessitate enacting extensive deprivation.

While the United States believes that the payment of the fair market value for

⁶⁸ *Id.*

⁶⁹ Note, *Far From the Tiger's Mouth: Present and Future Settlement of Foreign Commercial Disputes in the U.S.*, 115, 133 (1983).

⁷⁰ See Voss, *The Protection and Promotion of Investment in Developing Countries*, 18 COMMON MKT. L. REV. 337 (1981); see also Dawson & Weston, *Germany incorporates diplomatic protections in BITs*, 11 U.S.T.R., *supra* note 66, at 1003.

⁷¹ U.S.T.R., *supra* note 66, at 1003.

⁷² See Muller, *Compensation for Nationalization of Property*, 35 (1981). See generally Bergman, *supra* note 19, (discussing the "effective" standard of compensation); Dawson & Weston, *Effective: A Universal Standard of Compensation for Expropriation* (1962) (providing a general analysis of the principle of compensation); Dawson & Weston, *Countries Attitudes Toward Foreign Investment*, 11 U.S.T.R., *supra* note 66, at 1003 (discussing past attitudes of developing countries toward foreign investment).

⁷³ See Muller, *supra* note 72, at 45.

⁷⁴ Dawson & Weston, *supra* note 72, at 738.



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.⁹¹ 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 treaties⁹² 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.⁹³ 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.⁹⁴ 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

sign and ratify the Model BIT with its original terms are countries most dependent on the United States for aid. Nations that receive substantial American aid are Egypt and Israel. After Israel, Egypt received the most American aid in 1984 through foreign grants and credits, military aid, and aid.⁹⁵ In that same year, Turkey received the third largest amount of foreign aid.⁹⁶ Both Egypt and Turkey experienced economic crises in the late 1970s.⁹⁷ The United States formed an international group that joined together to prevent Egyptian and Turkish economies.⁹⁸

There were valid reasons for the United States' interest in Egypt, such as Egypt's strategic importance, its need for investment already in place, and the open-door policy it had in 1974.¹⁰⁰ None of these reasons, however, explains why Egypt signed a treaty with many provisions obvious to the Egyptian Parliament,¹⁰¹ thus supporting the view that developing countries accept basically abhorrent provisions for foreign investment and a great reduction in foreign aid.¹⁰² Others argue that developing countries benefit from such treaties, noting that: (1) developing countries often

⁹¹ The other two countries are Israel and Pakistan. See R. CRISIS MANAGEMENT IN EGYPT AND TURKEY, 17 J. WORLD (1983).

⁹² 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 aid, \$1,367 million in military aid, and \$853 million in foreign aid.

⁹³ *Id.* Turkey received \$718 million in military aid, \$443 million in credits, and \$138 million in foreign aid. *Id.* It is interesting to note that Turkey received the sixth largest amount of foreign aid in 1984 (largest amount in 1983 (\$285 million) and in 1982 (\$300 million)).

⁹⁴ See Radke & Taake, *supra* note 95, at 325.
⁹⁵ See *id.* at 327, 331 (the United States helped to restructure the economy and provided funds for Egypt).

⁹⁶ Law No. 43 of 1974 concerning Arab and Foreign Free Zones, Arab Republic of Egypt, Official Gazette No. 2 (1974) (Egyptian embassy trans.), reprinted in 13 I.L.M. 1500 (1974) [hereinafter *Bilateral Investment Treaties: Egypt and Panama*, 13 I.L.M. 491, 501-02 (1983)].

⁹⁷ U.S.-Morocco Initiating, *supra* note 14, at 755.
⁹⁸ But see Voss, *supra* note 70, at 373 n.26 (arguing that the United States should encourage the developing country's ability to modify the arrangement to protect foreign investments attracts "desirable capital in the form of foreign investment").

⁹¹ See Note, *supra* note 19, at 956-57.

⁹² 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 accords).

⁹³ See *supra* notes 58-90 and accompanying text.

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.¹⁰⁸ 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,¹⁰⁴ 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)."¹⁰⁵ 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.¹⁰⁶ 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 Initiative¹⁰⁷ and is just recently recovering from its worst economic crisis, which occurred in the early 1980s.¹⁰⁸ Other Caribbean Basin Initi-

¹⁰⁸ MONTREAL CONFERENCE, *supra* note 30, at 25.

¹⁰⁴ U.S.-Senegal BIT, *supra* note 13.

¹⁰⁵ U.S.-Africa Signing, *supra* note 12, at 448.

¹⁰⁶ 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.*

¹⁰⁷ 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).

¹⁰⁸ See STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 98TH CONG., 2D SESS., CENTRAL AMERICA: THE DEEPENING CONFLICT, REPORT OF A CONGRESSIONAL

ative countries that have signed treaties with the U.S. Grenada and Panama. The situation with El Salvador is more confusing because of the political tension in the region. It seems likely, however, that a U.S.-El Salvador BIT will be signed in the future. Two other BITs have been signed but unratified: one between the United States and Morocco, and the United States and the United Kingdom. At the same meeting in which Morocco and the United Kingdom signed their BITs, the United States granted Morocco an additional \$100 million in wheat shipments under the Food for Peace program. Morocco had just recently received a blended credit from the United States.¹¹¹ Although it is likely that the United States BIT will be ratified in the near future, the U.S.-Morocco BIT has run into problems due to the recent upheavals in Hai-

3.2. An Amended Model

Working from the premise that the Model BIT will be acceptable only to those developing countries that the United States has close financial aid ties, some changes to the provisions of the Model BIT may provide a variation that will be more acceptable. Key areas of discontent include: the settlement mechanism; the standard of prompt, adequate compensation; the national standard of treatment; and performance requirements.¹¹²

3.2.1. Investment Disputes

Especially in the Latin-American countries, the Calvo doctrine, the opposition to the submission of investment disputes to the ICSID for third party arbitration has been strong. The U.S. government strongly objects to the settlement of investment disputes on a government-to-government basis,¹¹⁴ and it is a promising way to begin amending the Model BIT to regard government-to-government negotiations as

overextension and mismanagement. *Id.*

¹⁰⁹ El Salvador, a focus of U.S. political concern for many years, has received a substantial amount of aid from the U.S. For example, in 1984, the U.S. provided \$100 million in foreign grants and credits from the United States aid, and \$161 million in foreign aid. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 96, at 827-30.

¹¹⁰ U.S.-Morocco Initialing, *supra* note 14, at 755.

¹¹¹ *Id.*

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

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.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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

market value scheme of valuation. Certain sectors of the host country's economy could be exempted, just as BIT allows certain sectors of the economy to be listed in the FCN treaty as exempted from the national and standards of treatment.¹¹⁹ Areas of the economy that nations believe are vital to their political and social either be completely exempted from any prearranged standard or could be classified as receiving a lower standard such as a going concern value. Although this would provide protection for the U.S. investor in those sectors exempted from the fair market value standard, in the conclusion of a BIT so that some protection for the investor is established. It would leave the investor free to choose to invest in a less protected area of the economy.

3.2.3. Standard of Treatment

To avoid the problems of sovereignty and national treatment in the question of what standard of treatment to use (national or most-favored-nation), perhaps a universal standard of treatment in a form slightly different from the standard suggested by some European nations would be best.¹²⁰ Both national and most-favored-nation standards of treatment are dependent on how the host government is regulated by third parties. In periods of political unrest or economic depression, standards could prove to be quite restrictive to the foreign investor. A universal standard could be created that listed the standards of treatment for each country. In the course of this standard, this standard could only work well if it were negotiated with every other country, it would likely require a detailed renegotiation of standards depending on which particular concession. However, if a universal standard were agreed upon among at least a few nations, this would be a better solution than the current debate between the national and most-favored-nation standards.

3.2.4. Performance Requirements

The United States has stated repeatedly that performance requirements be banned and that it desires

¹¹⁵ Note, *supra* note 69, at 133-36.

¹¹⁶ See *supra* notes 61-71 and accompanying text.

¹¹⁹ See *supra* notes 78-84 and accompanying text.

enforced.¹³¹ 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.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵ This solution has already been suggested in the case of Japan.¹³⁶ 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.

¹³¹ See *supra* notes 85-90 and accompanying text.

¹³² U.S.-Turkey BIT, *supra* note 13, art. II, para. 7; U.S.-Egypt BIT, *supra* note 13, art. II, para. 7.

¹³³ See *supra* notes 1-14 and accompanying text.

¹³⁴ *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).

¹³⁵ U.S.-Japan FCN, *supra* note 15; U.S.-Republic of China FCN, *supra* note

The level of the country's development, as well as its framework, are important elements in determining how to issue of foreign private investment. The more developed the country, thus the greater bargaining power it can consequently have in negotiations with the United States, the less likely it seems that a 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 presents problems the United States might have in trying to negotiate with the PRC.¹³⁷ The provisions of the Sweden-PRC BIT are materially from the U.S. Model BIT. For example, the BIT contains only a most-favored-nation standard of treatment. It also contains no fair market value standard for expropriation, no clause banning performance requirements, and no international arbitration clause.¹³⁸ The United States has had several problems trying to negotiate a BIT with the PRC. The negotiations have broken down several times.¹³⁹ 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 specific protections for foreign investments, though not a BIT, would better serve all interests.

The United States is also trying to negotiate BITs with northern and western African nations.¹⁴⁰ The African nations, which the United States is currently negotiating BITs with, are poor nations that have only recently become independent. They are plagued by a number of problems including poor education facilities, cultural conflicts, the inheritance of colonial powers due to the European occupation of the region, imperialism, and problems inherent in smaller countries. For decades, the African countries have attempted to establish regional trade blocs.¹⁴¹ Many of these regional

¹³⁷ See Bergman, *supra* note 19, at 12-17.

¹³⁸ See *id.*

¹³⁹ *Conference Speakers See Immense Business Opportunity*, *Export Weekly (BNA) No. 12*, at 445 (June 21, 1983).

¹⁴⁰ See *infra* note 135 and accompanying text.

¹⁴¹ *Id.*

¹⁴² Ajomo, *Regional Economic Organizations: the African and Comp. L.Q.* 58, 101 (1976).

¹⁴³ See, e.g., *Treaty of the Economic Community of (ECOWA)*, May 28, 1975, reprinted in 14 I.L.M. 1200 (1975) (Dahomey, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast

ganized solely for economic cooperation, have proven difficult to maintain, however, due to the dissimilar political systems among the nations involved.¹⁸⁴ 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"¹⁸⁵ 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.¹⁸⁶ 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

internal unrest, a majority of the Latin and Central American nations already have a sense of national sovereignty and independence. For nations that have an interest in U.S. investment, and of their own national needs, a form of the BIT might be developed to fulfill the needs of both the United States and the African nations involved. For countries still beginning to develop economically, an updated model of the FCN would create a framework of protection for the foreign private investor while recognizing the range of concerns existing between the United States and the host country.

4. CONCLUSION

The development of the BIT program with the United States in the negotiation of protections for U.S. citizens abroad. The traditional framework of BITs, embodied in a series of FCNs, did not meet the needs of today's investors. The BIT program established, however, is too rigid in its application. The United States is forceful in requiring that certain provisions be included, and, moreover, that they be included as specific conditions for the future success of the BIT program, variations should be developed so that the treaty program could achieve wider acceptance. A series of Model BITs, each tailored to incorporate the concerns of the different African nations, may be the best approach. Although the United States may be required to relinquish some of the provisions that it has traditionally insisted upon in order to accommodate developing countries, greater protection should be provided for U.S. investors abroad in the long

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).

¹⁸⁴ Ajomo, *supra* note 132, at 82-84.

¹⁸⁵ U.S. Government-Business Mission Returns from Africa with Contracts, Enthusiasm, U.S. Export Weekly (BNA) No. 392, at 445 (Jan. 26, 1982).

¹⁸⁶ 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