U.S. BILATERAL INVESTMENT TREATIES: THE SECOND WAVE

Kenneth J. Vandevelde*

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* Associate Dean and Professor of Law, Western State University--San Diego. From 1982-1988, the author was an attorney in the Office of the Legal Adviser, during which time he was involved in drafting the model negotiating texts for the BITs and served as counsel to BIT negotiating teams. Portions of this article appeared in a memorandum submitted to the Senate Foreign Relations Committee during hearings in August 1992. The author wishes to thank Jose E. Alvarez, Margaret S. Pickering, Kenneth R. Propp, and Steven Ratner for commenting on a draft of this article and for generously sharing their insight into and analysis of these treaties.

INTRODUCTION

August 15, 1992 marked fifteen years since the Carter Administration formally inaugurated the United States bilateral investment treaty (BIT) program. It was exactly fifteen years prior that Under Secretary of State Richard N. Cooper had authorized negotiation of a new series of bilateral treaties to protect U.S. investment in foreign countries.[1]

These first fifteen years of the BIT program comprise three distinct periods of approximately equal length. In the first period, which ran from early 1977 through the end of 1981, the principal accomplishment of the program was the development of a model text for use in negotiations.[2] The second period, which ran from early 1982 through 1986, featured the first wave of BIT negotiations, resulting in the conclusion of ten BITs and their transmission to the Senate for advice and consent to ratification.[3] The third period, which began in 1988 and continues to the present, has seen the approval of the first wave of BITs and the negotiation and conclusion of a second wave of treaties, some of which now have received Senate approval and a few of which have entered into force[4]

The first two periods, the development of the model negotiating text and the first wave of negotiations, are the subject of a moderately extensive literature.[5] This Article describes and appraises the second wave of negotiations. It functions as a sequel to an earlier article[6] that described the first ten years of the program.

Although the second wave of negotiations continues, and thus any conclusions about it necessarily are tentative, the second wave already has developed a variety of characteristics that

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1. KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 29 (1992).
2. *See infra* text accompanying notes 11-41.
3. *See infra* text accompanying notes 42-54.
4. *See infra* text accompanying notes 55-94.
5. *See* VANDEVELDE, *supra* note 1; Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evaluation and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1 (1983); Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT.'L L. 373 (1985); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105 (1986); Joseph E. Pattison, *The United States--Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation*, 16 CORNELL INT'L L.J. 305 (1983); Wayne Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW 192 (1984); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201 (1988); Saul Aronson, Note, *An Examination of Compensation Terms in the United States--Egypt Bilateral Investment Treaty*, 16 CASE W. RES. J. INT'L L. 287 (1984); Deirdre A. Cody, Note, *United States Bilateral Investment Treaties: Egypt and Panama*, 13 GA. J. INT'L & COMP. L. 491 (1983); Patricia M. Robin, Note, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931 (1984); Timothy A. Steinert, Note, *If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People's Republic of China*, 2 J. CHINESE L. 405 (1988); Kathleen Kunzer, *Recent Development, Developing a Model Bilateral Investment*, 15 LAW & POL'Y INT'L BUS. 273 (1983).
6. Vandevelde, *supra* note 5.

distinguish it from the first wave. The goal of this Article is to identify the ways in which the second wave appears to differ from the first and to assess the significance of the differences.

Part I of this Article traces the evolution of the BIT program, describing the principal events of each of the three periods of development.[7] Although certain elements of this material may be familiar to those acquainted with the literature, a recapitulation is necessary in order to place the second wave in context.

Part II describes some of the principal changes in U.S. foreign investment policy that have accompanied the second wave of BITs.[8] It attempts to determine the extent to which these changes have been reflected in the language of the current model negotiating text or the treaties concluded during the second wave.

Part III traces the changes that have occurred in the model negotiating text in the transition from the first wave to the second.[9] To provide a baseline for considering the text as it appears in the second wave, this part summarizes the most important features of the model text as it developed in the first wave.

Part IV analyzes the substance of the BITs that have been concluded during the second wave as of January 1993.[10] It attempts to identify the extent to which the negotiation of these treaties resulted in departures from the model negotiating texts and assesses the significance of any notable departures.

I. THE EVOLUTION OF THE BIT PROGRAM

A. *1977-1981: Launching the BIT Program*

The BIT program was launched in 1977 as a successor to the 190 year old Friendship, Commerce and Navigation (FCN) treaty program. The United States had begun negotiating FCNs during the American Revolution largely as the basis for establishing commercial relations with the European powers.[11] Later, as trade with Latin American, Asian, and African States opened up, FCNs were negotiated with these countries as well.[12]

Although the FCNs from the beginning had included provisions to protect property owned by U.S. nationals but located in the territory of the treaty partner,[13] after the Second World War,

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7. *See infra* text accompanying notes 11-98.
8. *See infra* text accompanying notes 99-130.
9. *See infra* text accompanying notes 131-253.
10. *See infra* text accompanying notes 254-651.
11. *See, e.g.,* Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, U.S.-Spain, 8 Stat. 138; Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; Treaty of Peace and Friendship, Jan., 1787, U.S.-Morocco, 8 Stat. 100; Treaty of Amity and Commerce, July, 1785, U.S.-Prussia, 8 Stat. 84; Treaty of Amity and Commerce, Apr. 3, 1783, U.S.- Swed., 8 Stat. 60; Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Neth., 8 Stat. 32; Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., 8 Stat. 12.
12. *See, e.g.,* Treaty of Amity, Commerce and Navigation, Jan. 24, 1891, U.S.-Congo, 27 Stat. 926; Treaty of Peace and Amity, Mar. 31, 1854, U.S.- Japan, 11 Stat. 597; Treaty of Peace, Amity and Commerce, July. 3, 1844, U.S.- China, 8 Stat. 592; Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091; Treaty of Peace, Friendship, Commerce and Navigation, May 13, 1858, U.S.-Bol., 12 Stat. 1003 Treaty of Friendship, Commerce and Navigation, July 27, 1853, U.S.-Arg., 10 Stat. 1005; Treaty of Friendship, Commerce and Navigation, July 10, 1851, U.S.-Costa Rica, 10 Stat. 916; Treaty of Peace, Friendship, Navigation, June 13, 1839, U.S.-Ecuador, 8 Stat. 534, General Convention of Peace, Amity, Commerce and Navigation, May 16, 1832, U.S.-Chile, 8 Stat. 434; General Convention of Peace, Amity, Navigation and Commerce, Oct. 3, 1824, U.S.-Colom., 8 Stat. 306.
13. *See* VANDEVELDE, *supra* note 1, at 14-19.

investment protection became a primary purpose of the modern FCNs.[14] By 1967, however, there appeared to be no other countries willing to conclude a U.S. FCN treaty.[15] Accordingly, the FCN program expired in the mid-1960s.[16]

At the very time the U.S. FCN program was drawing to a close, several European States were enjoying considerable success negotiating bilateral investment protection agreements which differed from the U.S. FCNs in that they were devoted exclusively to investment protection.[17] After repeated calls from Congress and the U.S. business community for a U.S. investment treaty program similar to the European programs, the State Department decided in 1977 to launch the U.S. BIT program.[18]

The BIT program, as it was conceived in the mid-1970s, had a number of purposes. One of the most important, at least in the minds of the early proponents of these treaties, was to counter the claim made during the 1970s by many developing countries that customary international law no longer required that expropriation be accompanied by prompt, adequate, and effective compensation, if indeed it ever had.[19] This claim was embodied most visibly in the U.N. General Assembly's adoption in 1974 of the Charter of Economic Rights and Duties of States (CERDS), which had provided that compensation for expropriation was to be measured by the law of the expropriating State.[20] That is, the CERDS seemed not only to challenge the standard of prompt, adequate, and effective compensation, but to assume that there was no international minimum standard at all. The United States hoped to create a network of bilateral treaties embracing the prompt, adequate, and effective standard that would counter assertions that State practice no longer supported that standard.[21]

A second purpose was to protect existing stocks of investment owned by U.S. nationals and companies in the territory of other States.[22] U.S. BIT negotiators, at least at the inception of the program, did not consider the promotion of future investment to be a goal of the BITs.[23] The promotion of investment in particular countries would have been inconsistent with the U.S. policy of letting the market direct investment flows and could have raised opposition to these treaties on the part of labor groups concerned about the loss of jobs.[24] Even had the promotion of foreign investment been a goal of the program, U.S. negotiators saw no evidence that a BIT actually would result in increased investment in a particular country.[25] Rather, investment decisions were based on

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14. Herman Walker Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956).

15. VANDEVELDE, *supra* note 1, at 19.

16. The last two treaties were with Togo and Thailand, both signed in 1966. *See* Treaty of Amity and Economic Relations, Feb. 8, 1966, U.S.-Togo, 18 U.S.T. 1; Treaty of Amity and Economic Relations and Exchange of Notes, May 27, 1966, U.S.-Thail., 19 U.S.T. 5843.

17. VANDEVELDE, *supra* note 1, at 19-20

18. *Id.* at 20-22.

19. *See, e.g.*, Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981); Burns H. Weston, *The Charter of Economic Rights and Duties and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

20. G.A. Res. 3281, U.N. GAOR, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975) (Article 2.2(c) provides that each State has the right "[t]o nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that State considered pertinent.").

21. VANDEVELDE, *supra* note 1, at 21.

22. *Id.*

23. *Id.* at 22.

24. *Id.*

25. *See* Robin, *supra* note 5, at 942-43.

numerous factors--such as political stability, the availability of low wage labor or natural resources, the development of the infrastructure, the size of the domestic market, and the legal climate--very few of which were addressed by a BIT.[26]

A third purpose of the BITs was to depoliticize investment disputes.[27] Traditionally, the remedies available to an investor whose investment was expropriated or otherwise injured by actions of the host State depended upon the involvement of the investor's government in the dispute.[28] This resulted in the U.S. government's routine involvement in disputes between individual investors and foreign States, which inevitably complicated the conduct of foreign policy. [29] The BITs were intended to establish legal remedies for investment disputes that would not necessitate the involvement of the investor's own government.

The first four years of the BIT program were devoted almost entirely to the preparation of a model text for use in negotiations.[30] The text was a mixture of provisions taken from the modern FCNs and the European bilateral investment protection agreements.[31]

The model negotiating texts were approved through a lengthy process of interagency consultations. In early 1980, primary responsibility for the BIT program was shifted from the State Department to the Office of the United States Trade Representative. Because the two agencies did not agree in all respects on the content of the model negotiating text, the transfer resulted in further delays in the development of the text.[32]

Agreement finally was reached in December 1981 on a model negotiating text, which was used in negotiations beginning the following month.[33] The commencement of negotiations, however, did not end the process of preparing the model text. Rather, negotiations had the effect of identifying ambiguities and even contradictions in the language so laboriously worked over by the interagency group.[34]

As a result, the model text was revised several times in 1982[35] before the relevant agencies reached a relatively permanent agreement on a January 1983 draft (hereinafter "the 1983 draft").[36] The 1983 draft was considerably streamlined in February 1984 (hereinafter "the 1984 draft"), with few substantive changes.[37] The model negotiating text was revised again in September 1987 (hereinafter "the 1987 draft"), [38] in February 1991 (hereinafter "the 1991 draft"), [39] and once more in February 1992 (hereinafter "the 1992 draft").[40] Changes made since 1984, however, have been relatively minor.[41]

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26. VANDEVELDE, *supra* note 1, at 32.
27. *Id.* at 22-25
28. *Id.* at 7-14. *See also* Kenneth J. Vandevelde, *Reassessing the Hickenlooper Amendment*, 29 VA.. J. INT'L L.. 115 (1988).
29. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 625-29 (1978).
30. VANDEVELDE, *supra* note 1, at 29-31.
31. *Id.*
32. *Id.* at 30.
33. *Id.*
34. *Id.*
35. One early version of the model negotiating text, dated January 11, 1982, is reprinted in VANDEVELDE, *supra* note 1, app. A-1.
36. *Id.* The January 1983 draft is reprinted in *id.* app. A-2 [hereinafter 1983 draft].
37. *Id.* at 31. The February 1984 draft is reprinted in *id.* app. A-3 [hereinafter 1984 draft].
38. The September 1987 draft is reprinted in *id.* app. A-4 [hereinafter 1987 draft].
39. Unpublished draft on file with the *Michigan Journal of International Law* [hereinafter 1991 draft].
40. Unpublished draft on file with the *Michigan Journal of International Law* [hereinafter 1992 draft].
41. *See infra* text accompanying notes 148-253.

B. *1982-1986: The First Wave of Negotiations*

The first wave of negotiations began with Egypt and Panama in early 1982. Over the next four years, BITs were concluded with ten States: Egypt,[42] Panama,[43] Morocco,[44] Zaire,[45] Cameroon,[46] Bangladesh,[47] Senegal,[48] Haiti,[49] Turkey [50] and Grenada.[51]

The first wave of BITs established several characteristics of the negotiations that have remained unchanged. One feature of these negotiations was the unwillingness of the United States to compromise on the standard of compensation or the right of investors to binding third-party arbitration of investment disputes.[52] A second feature was the practice of developing relatively standard fallback positions with respect to provisions on which the United States was willing to compromise.[53] Accordingly, where the United States did agree to concessions, they often would be very nearly uniform among the treaties.

This unwillingness to compromise limited the number of agreements that the United States was able to negotiate. After four years of negotiations, the United States had concluded only ten agreements.

At the same time, however, the United States could find some satisfaction in the diversity of States that had concluded BITs. At the end of the first wave, the United States had treaties with

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42. Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, Sept, 29, 1982, S. TREATY DOC. NO. 24, 99th Cong., 2d Sess. (1986) [hereinafter Egypt BIT].

43. Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, Oct. 27, 1982, S. TREATY DOC. NO. 14, 99th Cong., 2d Sess. (1986) [hereinafter Panama BIT].

44. Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, July 22, 1985, S. TREATY DOC. NO. 18, 99th Cong., 2d Sess. (1986) [hereinafter Morocco BIT].

45. Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, Aug. 3, 1984, S. TREATY DOC. NO. 17, 99th Cong., 2d Sess. (1986) [hereinafter Zaire BIT].

46. Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investments, Feb. 26, 1985, S. TREATY DOC. NO. 22, 99th Cong., 2d Sess. (1986) [hereinafter Cameroon BIT].

47. Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, Mar. 12, 1986, S. TREATY DOC. NO. 23, 99th Cong., 2d Sess. (1986) [hereinafter Bangladesh BIT].

48. Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 6, 1983, S. TREATY DOC. NO. 15, 99th Cong., 2d Sess. (1986) [hereinafter Senegal BIT].

49. Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 13, 1983, S. TREATY DOC. NO. 16, 99th Cong., 2d Sess. (1986) [hereinafter Haiti BIT].

50. Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, S. TREATY DOC. NO. 19, 99th Cong., 2d Sess. (1986) [hereinafter Turkey BIT].

51. Treaty Between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, May 2, 1986, S. TREATY DOC. NO. 25, 99th Cong., 2d Sess. (1986) [hereinafter Grenada BIT].

52. VANDEVELDE, *supra* note 1, at 125, 172.

53. For example, a number of States were unable to agree to a standard provision guaranteeing to investors the right to transfer currency out of the host State freely and without delay. The United States developed a relatively standard escape clause permitting delays in transfer in certain circumstances. Although there were differences of detail, the essential structure of the clause was the same in all BITs. *See* VANDEVELDE, *supra* note 1, at 144-46.

countries in Asia, Africa, the Middle East, Latin America, and the Caribbean. BIT partners ranged from important regional powers, such as Turkey and Egypt, to small island States, such as Grenada and Haiti. Further, whereas the post-war FCNs generally had been targeted at developed countries, particularly those in Europe, that already were in agreement with U.S. investment policy, the first wave of BITs typically were with developing countries that had not necessarily been associated with the economic policy of western Europe and the United States.

In March 1986, President Reagan began the process of transmitting the first wave of BITs to the Senate for advice and consent to ratification. The program then went into a hiatus while the executive branch awaited Senate approval. U.S. BIT negotiators, in effect, decided to await the results of Senate action before negotiating or concluding any additional agreements.

Hearings were held on the BITs on August 11, 1986.[54] The Senate took no further action on the BITs, however, until 1988.

C. *1988-1992: The Second Wave of Negotiations*

In the time between the transmission of the BITs to the Senate in 1986 and the next Senate action in 1988, events in Haiti and Panama called into question whether the Senate should approve a BIT with either nation. In February 1986, after popular uprisings forced Haitian ruler Jean-Claude Duvalier to leave the country, a military junta took power with a promise that elections would be held.[55] Elections were scheduled, then cancelled amid violent protests over allegations that the military intended to control the results.[56] Elections finally were held in January 1988, but when newly elected President Leslie F. Manigat attempted to remove the army chief of staff from power, he was overthrown and exiled.[57] The United States responded to these events by terminating financial assistance to Haiti.[58]

In February 1988, federal grand juries in Miami and Tampa indicted Manuel Noriega, the commander of the Panamanian Defense Forces, on drug charges.[59] Efforts by Panamanian President Eric Arturo Delvalle to remove Noriega from power led to his own overthrow and the installation of a Noriega ally as the new President.[60] The United States refused to recognize the new government and imposed a number of economic sanctions on Panama, including freezing Panamanian bank accounts in the United States and blocking currency transfers from the United States by the Panamanian government.[61]

As a result of the events in Haiti and Panama, the Senate declined to give further consideration to either the Haiti or Panama BITs. The remaining eight BITs, however, were approved on October 20, 1988, and ratified by the President on December 6, 1988.

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54. *See Bilateral Investment Treaties with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada: Hearings Before the Senate Committee on Foreign Relations*, 99th Cong., 2d Sess. (1986).
55. *See generally* Robert I. Rotberg, *Haiti's Past Mortgages Its Future*, 67 FOREIGN AFF., Fall 1988, at 93-94.
56. *Id.* at 94.
57. *Id.* at 95.
58. *Id.* at 94-95.
59. *See generally* Charles Maechling, *Washington's Illegal Invasion*, 79 FOREIGN POL'Y, Summer 1990, at 113, 116.
60. *Id.* at 116.
61. *Id.* at 117.

Senate approval of the first wave of BITs in late1988 ended the negotiating hiatus. Further, the collapse of the Soviet empire at the end of the 1980s reinvigorated the program. With the Soviet Union and several Eastern European States moving toward democracy and market economies, the United States opened BIT negotiations with several formerly communist States, including the Soviet Union.

The first of these States to conclude a BIT with the United States was Poland, which signed its BIT on March 21, 1990[62]. Three months later, the Poland BIT was transmitted to the Senate for advice and consent. Meanwhile, the U.S. invasion of Panama on December 20, 1989, removed General Noriega from power. As a result, the Senate decided to consider the Panama BIT along with the Poland BIT, approving both on October 28, 1990.

Negotiations with the Soviet Union were very far advanced in late 1991, when the Soviet Union disintegrated and was succeeded by the Commonwealth of Independent States. Negotiations then resumed with several of the former Soviet republics.

Eastern Europe, however, was not the only scene of activity. Negotiations continued in Africa, Asia, and Latin America. Between early 1989 and January 1993, twelve BITs were signed. In addition to Poland, treaties were signed with Argentina,[63] Armenia,[64] Bulgaria,[65] the Congo,[66] the Czech and Slovak Republic,[67] Kazakhstan,[68] Kyrgyzstan, [69] Romania,[70] Russia,[71] Sri Lanka,[72] and

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62. Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations, Mar. 21, 1990, S. TREATY DOC. NO. 18, 101st Cong., 2d Sess. (1990) [hereinafter Poland BIT].

63. Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, S. TREATY DOC. NO. 2, 103d Cong., 1st Sess. (1993) [hereinafter Argentina BIT].

64. Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, Sept. 23, 1992 (unpublished treaty, on file with the *Michigan Journal of International Law*) [hereinafter Armenia BIT].

65. Treaty Between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment, Sept. 23, 1992, S. TREATY DOC. NO. 3, 103d Cong., 1st Sess. (1993) [hereinafter Bulgaria BIT].

66. Treaty Between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 12, 1990, S. TREATY DOC. NO. 1, 102d Cong., 1st Sess. (1991) [hereinafter Congo BIT].

67. Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, Oct. 22, 1991, S. TREATY DOC. NO. 31, 102d Cong., 2d Sess. (1992) [hereinafter Czech and Slovak BITs].

68. Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Reciprocal Encouragement and Protection of Investment, May 19, 1992, Hein's No. KAV 3249, Temp. State Dep't No. 92-113 [hereinafter Kazakhstan BIT].

69. Treaty Between the United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment, Jan. 19, 1993 (unpublished treaty, on file with the *Michigan Journal of International Law*) [hereinafter Kyrgyzstan BIT].

70. Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, May 28, 1992, S. TREATY DOC. NO. 36, 102d Cong., 2d Sess. (1992) [hereinafter Romania BIT].

71. Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, June 17, 1992, S. TREATY DOC. NO. 33, 102d Cong., 2d Sess. (1992) [hereinafter Russia BIT].

72. Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment, Sept. 20, 1991, S. TREATY DOC. NO. 25, 102d Cong., 2d Sess. (1992) [hereinafter Sri Lanka BIT].

Tunisia.[73] The Czech and Slovak Republic separated into two States, the Czech Republic and the Slovak Republic, effective January 1, 1993, with the result that the Czech and Slovak Republic BIT has been succeeded by two treaties, one with each Republic.[74] Accordingly, the second wave now includes thirteen treaties.

U.S. BIT negotiators attached particular significance to the conclusion of BITs both with the former communist States and with Argentina. The Soviet bloc had been among the foremost opponents of international protection for property rights,[75] while Argentina historically had been a firm adherent to the Calvo Doctrine.[76]

The Senate Foreign Relations Committee conducted hearings on the BITs with the Congo, the Czech and Slovak Republic, Russia, Sri Lanka, and Tunisia on August 4, 1992.[77] The Senate gave its advice and consent to ratification on August 11, 1992. The Romania BIT was transmitted to the Senate on August 3, 1992,[78] while the Argentina[79] and Bulgaria[80] BITs were transmitted on January 13, 1993. BITs with Armenia, Kazakhstan, and Kyrgyzstan are still awaiting transmittal to the Senate.

As of May 1, 1993, thirteen BITs had entered into force. These are the BITs with Grenada,[81] Cameroon,[82] Bangladesh, [83] Zaire,[84] Turkey,[85] Senegal,[86] Morocco,[87] Panama,[88] Egypt,[89] the Czech

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73. Treaty Between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, May 15, 1990, S. TREATY DOC. NO. 6, 102d Cong., 1st Sess. (1991) [hereinafter Tunisia BIT].

74. *See infra* text accompanying note 428.

75. *See, e.g.,* Report of the Centre on Transnational Corporations on Work on the Formulation of the United Nations Code of Conduct on Transnational Corporations, U.N. Doc. E/C. 10/1985/s/2, *excerpted in* LOUIS HENKIN ET AL., INTERNATIONAL LAW 1049-51 (2d ed. 1987).

76. The Calvo Doctrine (named for the Argentine jurist, Carlos Calvo) holds that aliens are entitled to no more than national treatment from a host state and that the host state is responsible to an alien, if at all, only in municipal courts. *See generally* Alden F. Abbott, *Latin American and International Arbitration Conventions: The Quandry of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976). The Calvo Doctrine thus is inconsistent with both the substantive and the remedial provisions of the BIT.

77. *See* Treaty with the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment, S. EXEC. REP. NO. 44, 102d Cong., 2d Sess. 5 (1992); Treaty with Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, S. EXEC. REP. NO. 45, 102d Cong., 2d Sess. 6 (1992); Treaty with Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment, S. EXEC. REP. NO. 46, 102d Cong., 2d Sess. 6 (1992); Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, S. EXEC. REP. NO. 47, 102d Cong., 2d Sess. 8 (1992); Treaty with the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, S. EXEC. REP. NO. 48, 102d Cong., 2d Sess. 9 (1992).

78. Romania BIT, *supra* note 70, at III.

79. Argentina BIT, *supra* note 63, at III.

80. Bulgaria BIT, *supra* note 65, at III.

81. Grenada BIT, *supra* note 51 (entered into force Mar. 3, 1989).

82. Cameroon BIT, *supra* note 46 (entered into force Apr. 6, 1989).

83. Bangladesh BIT, *supra* note 47 (entered into force July 25, 1989).

84. Zaire BIT, *supra* note 45 (entered into force July 28, 1989).

85. Turkey BIT, *supra* note 50 (entered into force May 18, 1992).

86. Senegal BIT, *supra* note 48 (entered into force Oct. 25, 1990).

87. Morocco BIT, *supra* note 44 (entered into force May 29, 1991).

88. Panama BIT, *supra* note 43 (entered into force May 30, 1991).

89. Egypt BIT, *supra* note 42 (entered into force June 27, 1992).

Republic,[90] the Slovak Republic,[91] Tunisia,[92] and Sri Lanka.[93] In sum, all of the BITs in the first wave of negotiation have entered into force, with the exception of the Haiti BIT. Of the treaties in the second wave, only those with the Czech and Slovak Republics, Tunisia, and Sri Lanka are in force.[94]

Because no BIT has been in force for more than four years, relatively little information is available to assess the success of the first wave of treaties. However, disputes which may put BIT provisions to the test have begun to arise. For example, during hearings on the BITs on August 4, 1992, the Bush administration reported that it had been notified by U.S. investors in Panama of a potential BIT violation by Panama. After the U.S. embassy made a demarche to the Panamanian government, however, the practice which had been the subject of the complaint ceased.[95]

Disputes also have arisen between the United States and Zaire over the seizure of petroleum product installations in Zaire and the destruction of property during civil disturbances in 1991.[96] The governments of the United States and Zaire have been in consultation with respect to these disputes.[97] Further, on February 2, 1993, the American Manufacturing and Trading Corporation submitted to International Centre for the Settlement of Investment Disputes (ICSID) a request for arbitration of a claim against Zaire, the first dispute to have been submitted to arbitration under a U.S. BIT.

U.S. investment in several countries with BITs has increased since the treaties entered into force. At the August 4, 1992 Senate hearings, however, a Bush administration representative noted that it was unclear to what extent the increased investment is attributable to the BITs. [98]

II. INVESTMENT POLICY IN THE SECOND WAVE

The commencement of the second wave of BIT negotiations occurred in a world remarkably changed from that which had greeted the first wave only seven years before. Although these changes have altered U.S. investment policy to some extent, they have not always been reflected in the BITs. This Part describes some of the trends that could be expected to affect the BIT program and assesses their impact, if any, on the BITs concluded to date.

A. *Use of Investment Policy to Promote Foreign Policy*

By far the most important change that occurred in the interim between the beginning of the first wave of negotiations in 1982 and the beginning of the second wave in early 1989 was the collapse of the Soviet empire, followed by the disintegration of the Soviet Union itself. The former communist regimes not only ceased to be adversaries in the geopolitical realm, but began to embrace openly both democratic government and free market economics.

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90. Czech and Slovak BITs, *supra* note 67 (entered into force Jan. 1, 1993).
91. *Id.*
92. Tunisia BIT, *supra* note 73 (entered into force Feb. 7, 1993).
93. Sri Lanka BIT, *supra* note 72 (entered into force May 1, 1993).
94. For a discussion of the entry into force of these two BITs, *See infra* text accompanying note 428.
95. See Treaty with the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, S. EXEC. REP. NO. 48, 102d Cong., 2d Sess. 4 (1992).
96. *Id.*
97. *Id.* at 4-5.
98. *Id.* at 5.

These were trends which the United States was anxious to endorse and facilitate. One way to do this was to promote increased private investment in Eastern Europe and in the States that had constituted the former Soviet Union. To assist in promoting foreign investment, the United States, among other efforts, encouraged these States to negotiate and conclude a BIT.

BITs with the former communist States could have a variety of impacts, all of which would be advantageous to U.S. foreign policy.[99] They would serve as a symbol that these States had embraced the pro-market economic policy endorsed by the United States, which could, in turn, attract private investment to these States. By obtaining guarantees of national and most favored nation treatment, the BITs would open these new market economies to U.S. investors, who would have the same legal right to acquire and establish investment as local or European investors. Moreover, once established, the BITs would provide genuine protection for U.S. investment, which would be beneficial to U.S. investors and which could have the effect of attracting still more investment. The treaties also would perform the educational function of informing government officials with virtually no experience in operating a market economy of the kinds of policies considered necessary or advisable by private investors. U.S. negotiators, for example, sometimes provided copies of the model negotiating text to States that were drafting foreign investment codes, in the hopes that these States would enact codes not inconsistent with BIT principles. Finally, the BITs would tend to lock in pro-market policies once adopted, so that States would be less likely to retreat to nonmarket principles during times of economic adversity.

Congress appeared fully to support the new policy of negotiating BITs in Eastern Europe. In its Support for East European Democracy Act of 1989,[100] Congress called upon the President to negotiate bilateral investment treaties with Poland and Hungary in particular.

The first East European State to begin formal BIT negotiations with the United States was Poland. Negotiations began with Poland in 1989 and a treaty was concluded the following year. Indeed, negotiations with former communist States have largely dominated the second wave of BITs. Of the thirteen BITs included in the second wave, nine are with Eastern European or former Soviet States--those with Poland, the Czech Republic, the Slovak Republic, Romania, Russia, Kazakhstan, Kyrgyzstan, Armenia, and Bulgaria.

The remaining four BITs are with countries dispersed around the globe: Argentina, the Congo, Tunisia, and Sri Lanka. Thus, the second wave, like the first, continues to enjoy geographic diversity. No other region, however, can begin to compare with Eastern Europe for the intensity of BIT activity in the second wave.

The use of BITs to signal support for political events in Eastern Europe reflected a change in BIT policy. The policy at the inception of the first wave had been to depoliticize investment matters, particularly investment disputes. The theory underlying the BITs had been that investment flows should be channeled by market forces, rather than public policy, and that investment matters and foreign policy generally should be kept separate.[101] The second wave of negotiations, by contrast, represented a willingness to use BITs to accomplish political objectives.

The Eastern European BIT negotiations, however, were not the first instance of using the BITs to signal political support, even if they were the most visible. Discussions leading to the conclusion of the Grenada BIT had commenced two years after the August 1983 invasion of Grenada and the restoration of democracy. The Grenada BIT was concluded in a single, hour- long

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99. *See id.* at 2-3.

100. Pub. L. No. 101-179, § 306, 103 Stat. 1298, 1314.

101. *See* Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, INT'L TAX & BUS. LAW. (forthcoming 1994).

negotiating session that resulted in a treaty identical to the 1984 model negotiating text[102]. The treaty seemed quite clearly an attempt to signal that the U.S. invasion had been a success and that conditions for foreign investment in Grenada now were favorable.

The entry into force of the Panama BIT similarly reflected other foreign policy concerns. As already noted,[103] the Senate had delayed consideration of that treaty because of a rupture of political relations between the Bush administration and Manual Noriega. The Senate ultimately did approve the Panama BIT in October 1990, only ten months after a U.S. invasion removed Noriega from power.

The Congo BIT also had been negotiated at a politically propitious moment. Just prior to a State visit to Washington in early 1990, the Congolese government notified the United States that it would be interested in concluding a BIT. Negotiations were completed during the State visit and an agreement signed at the conclusion of the visit.[104] The final agreement was identical to the 1987 model negotiating text. In both cases, the almost unavoidable inference is that the value of the BITs as political symbols was an important factor in their negotiation.

The desire to subordinate the BITs to other foreign policy concerns also was reflected in the text of the BIT itself. As described below, the BITs contain a provision which exempts from their coverage any measure necessary to protect a State's essential security interests,[105] language which also had appeared in the modern FCNs.[106] During the 1986 Senate hearings on the BITs, the Reagan Administration asserted that this exemption provision is self-judging, meaning that each State is the sole judge of what measures are necessary to protect its essential security interests,[107] a position that the United States had argued unsuccessfully with respect to the FCN counterpart provision two years earlier during the jurisdictional phase of Nicaragua's claim against the United States before the International Court of Justice.[108]

The original purpose of this interpretation had been to shelter U.S. support for the Nicaraguan contras from the Nicaragua FCN. The reiteration of this interpretation with respect to the BITs reflected, in part, a desire to reaffirm the argument that the United States had made unsuccessfully before the Court and, in part, a desire to reserve the discretion to derogate from the BITs in furtherance of other foreign policy concerns.

Nor was the desire to ensure the subordinate position of the BITs relative to other aspects of foreign policy limited to the executive branch. During these same hearings, Senator Christopher Dodd expressed the concern that a BIT might preclude the United States from imposing economic sanctions on another State, such as an assets freeze.[109] He proposed that the BITs contain a provision which would permit them to be terminated for foreign policy reasons. His proposal, however, ultimately was not adopted.

The Senate did, however, attach an understanding to the first eight BITs, stating that the United States reserved the right to take measures necessary to deal with any unusual and

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102. VANDEVELDE, *supra* note 1, at 38.
103. *See supra* text accompanying notes 59-61.
104. VANDEVELDE, *supra* note 1, at 38.
105. *See infra* text accompanying note 145.
106. *See infra* text accompanying note 511.
107. *See* Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA.. J. INT'L L.. 1, 37-38 (1989).
108. The court rejected this argument in its Judgment on the Merits. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
109. See Alvarez, *supra* note 106, at 37-39.

extraordinary threats to national security.[110] The understanding did not explain how such threats were to be determined. Thus, in the final analysis, the understanding added nothing to what already was on the face of the essential security interests exception. Yet, the understanding does reflect Senate concern about preserving for the United States the flexibility to take national security measures without violating the BIT. Indeed, it could be argued that, at least in the immediate aftermath of the Nicaragua case, the Senate would not have approved the first eight BITs without some assurance that such flexibility had been preserved.

B. *The Changing Investment Climate*

A second trend, related to the first, was the change in the global investment climate. As noted above, a major purpose of the BITs was to establish a body of State practice in support of the prompt, adequate, and effective standard of compensation, which was under attack by communist and developing States during the 1970s.[111] The United States had attempted to reaffirm, through a network of BITs, that international law protected private property, in the face of arguments that private property was subject to expropriation without full compensation in the name of economic development and national sovereignty.

By the late 1980s, however, the collapse of the Soviet model of political and economic organization, as well as changing attitudes toward private investment in developing countries, appeared to have robbed the attack on private property of much of its force. International arbitral awards of recent years continue to support the prompt, adequate, and effective standard[112] and few voices have been raised in political fora to question that standard.

As a result, the need for a network of treaties in support of the prompt, adequate, and effective standard seems less urgent than it did in the 1970s, when the program was conceived, or the early 1980s, when the first wave of negotiations began. Yet, however pronounced it may be, this trend appears to have had little, if any, impact on the expropriation compensation provision of the BITs. All BITs continue to include the expropriation compensation provision without substantive modification.

In at least one respect, however, the changing investment climate has had a marked impact on the negotiated BITs. The international movement toward free market economic policies has expanded the number of States wishing to negotiate a BIT with the United States. For many developing countries, the BIT represents a tangible way of signaling their receptivity to foreign investment, and thus may seem to assist in attracting capital from the United States and other developed countries. This trend has strengthened the bargaining position of the United States, with the result that it has been less willing to make concessions than in the past. For example, concessions on performance requirements[113] and currency exchange controls[114] are less common in the second wave than in the first. Even minor, nonsubstantive changes in wording that have

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110. *See* Investment Treaties with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada, S. EXEC. REP. NO. 32, 100th Cong., 2d Sess. (1988).

111. *See supra* text accompanying notes 19-21.

112. *See* Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 488 n. 116 (1991).

113. *See infra* text accompanying notes 399-409, 423-27, 532-35.

114. Four BITs in the first wave, those with Egypt, Zaire, Bangladesh and Turkey, contained escape clauses permitting host states to temporarily delay the transfer of sale or liquidation proceeds during periods of exceptional balance of payment difficulties, subject to certain exceptions. Only two BITs in the second wave, those with Tunisia and Sri Lanka, contain such a provision. *See infra* text accompanying notes 381-87.

appeared liberally throughout the first wave have become more infrequent in the second wave, so that treaties in the second wave track the precise wording of the model negotiating texts to a much greater degree than those in the first.

The tougher negotiating stance with respect to currency exchange controls is potentially inconsistent with earlier BIT policy. Although it always had been the United States' strategy to make relatively few concessions, that approach was tempered by a concern that BIT partners not be induced to make promises that they could not keep. BITs were intended to provide genuine protection for investors and not be mere empty endorsements of market economics. U.S. negotiators thus were willing to include an escape clause for situations where a promise of free transfer of all payments related to an investment was unrealistic. A State that is unable to permit free transfer of sale or liquidation proceeds and that cannot rely on an escape clause will be left either to violate the BIT or to invoke some general treaty exception, such as those for preserving the public order or the State's essential security interests. It would seem preferable to encourage States to make any limitations on the right of free transfer of currency consistent with a carefully structured and relatively confining escape clause, rather than forcing them to invoke a more general clause that, once properly invoked, may authorize a more open-ended array of measures restricting the free exchange of currency.

C. *Rise of U.S. Economic Protectionism*

The commencement of the second wave also coincided with the decline of the United States as a net exporter of capital. By the late 1980s, annual foreign direct investment in the United States nearly equaled or exceeded annual U.S. direct investment in foreign countries.

In 1982, for example, the year the first wave of negotiations began, the book value of foreign direct investment in the United States was $124.7 billion, while the book value of U.S. direct investment abroad was $207.8 billion.[115] In 1989, the first year of the second wave of negotiations, inward investment actually exceeded outward investment. Foreign direct investment in the United States totaled $373.8 billion, while U.S. direct investment abroad was $370.1 billion. [116]

U.S. BIT policymakers during the initial formulation of the model negotiating text and the first wave of negotiations had rarely discussed the extent to which BIT provisions might hinder U.S. treatment of foreign investment. In those days, BIT policy assumed a world in which net investment flows were outward from the United States. Accordingly, the BIT was designed to ensure the maximum protection for private investment.

The rise of foreign direct investment in the United States during the 1980s prompted a wave of economic protectionism. The bipartisan consensus that investment should flow freely collapsed amid calls for restrictions on foreign direct investment in the United States. Congress responded by enacting the Exon-Florio Amendment to permit the screening of foreign investment.[117]

Exon-Florio, of course, was very difficult to reconcile with the national treatment provisions of the BITs.[118] Although the mere enactment of such legislation would not necessarily violate any BIT, its enforcement against a national or company of a BIT partner very likely would, unless the enforcement was regarded as a measure necessary to protect the essential security interests of the

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115. EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 17 (1991).

116. *Id.*

117. See Alvarez, *supra* note 107, at 56-80.

118. The national treatment provisions require each party to permit nationals and companies of the other party to establish investment on terms no less favorable than those accorded to its own nationals. *See* text accompanying note 133.

United States, or was against investment in a sector of the economy in which the United States had reserved the right, under some circumstances, to deny national treatment.[119]

As it has happened, the enactment of protectionist legislation and the negotiation of the second wave of BITs appear to have had little reciprocal effect. The fact that protectionist legislation was potentially contrary to BIT obligations has had little impact on Congressional consideration of such legislation. At the same time, the passage of the legislation has not been reflected in the text of the BITs.

The explanation for this phenomenon perhaps rests in large part on the distinct roles played by the President and Congress in the treaty process and in part on the increased political significance of the BITs. The Reagan and Bush Administrations, which were committed to free trade, had the authority to negotiate the BITs and declined to modify the agreements to accommodate protectionist sentiment in the Senate. Conversely, the Senate, which has been a locus of protectionist activity at the federal level, has refused to allow treaty obligations entered into by the President (with Senate advice and consent) to stand in the way of the Exon-Florio Amendment.

The Senate might have been expected during its consideration of the BITs concluded in the second wave to question the consistency of these agreements with a protectionist policy, but it has declined to do so. This may be attributed to the fact that the BITs increasingly have been seen as an instrument of U.S. foreign policy, rather than simply a means of ensuring legal protection for U.S. investment abroad.[120] BITs from the second wave were presented to the Senate in two groups. The first group consisted of the Poland and Panama BITs, both of which were imbued with considerable political significance and were politically popular. The second group included the Russia BIT, which also was symbolically important and politically popular. Thus, neither occasion presented a suitable opportunity for protectionist elements in the Senate to question whether the BITs were consistent with other elements of U.S. investment policy.

D. *Regionalization of Investment Policy*

One of the more subtle trends in the second wave is the emerging regionalization of foreign investment policy. At the inception of the BIT program, U.S. policymakers sought to ensure that U.S. investors would receive Most Favored Nation (MFN) treatment with respect to the right to establish investment and with respect to the treatment of investment once established.[121] Whether to seek national treatment was somewhat more controversial, but U.S. policymakers ultimately decided in the affirmative.[122]

In 1985, during the hiatus between the first and second waves, the United States signed a free trade agreement with Israel.[123] Free trade agreements with Canada[124] and with Mexico and Canada[125]

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119. Alvarez, *supra* note 107, at 20-40. On the essential security interests exception, *See infra* text accompanying notes 509-16. On exceptions to national treatment, *See infra* text accompanying notes 148-54.

120. *See supra* text accompanying notes 99-108.

121. *See* VANDEVELDE, *supra* note 1, at 72.

122. *Id.* The concern was that insistence on national treatment would severely limit the number of states willing to conclude a BIT.

123. Agreement on the Establishment of a Free Trade Area, April 22, 1985, U.S.-Israel, H.R. DOC. NO., 99th Cong., 1st Sess., 3, 24 I.L.M. 653 [hereinafter Free Trade Area Agreement].

124. Free Trade Agreement, December 22-23, 1987 and January 2, 1988, U.S.-Can., H.R. DOC. NO. 216, 100th Cong., 2d Sess., 297, 27 I.L.M. 281.

125. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.- Mex., 32 I.L.M. 289, 605 (as this article went to press, this agreement was not yet ratified by the United States).

jointly followed in 1987 and 1992, respectively. Further, commencing with the 1987 draft, the United States inserted into every BIT language exempting from the general MFN obligation any advantage conferred by virtue of membership in a customs union or free trade area.[126] Although a number of pre-1987 BITs had included customs union exceptions,[127] these generally had been concessions made to other States, rather than a U.S. sponsored exception to the general MFN obligation.

A further and potentially more sweeping derogation from the general MFN obligation came with the 1991 draft. The 1991 and 1992 drafts permit each State to exempt specific sectors or matters from the general MFN obligation by listing the sector or matter in an annex to the BIT.[128] The effect could be to encourage far more deviations from MFN treatment than in the past.[129]

Finally, a third derogation from the MFN standard appeared initially in the Poland BIT and became part of the model negotiating text, commencing with the 1991 draft. Specifically, the 1991 and 1992 drafts exempt from the general MFN obligation those advantages accorded by virtue of a party's binding obligations under multilateral agreements within the framework of the GATT, entered into subsequent to the BIT.[130] This language was intended to exclude investment related concessions made during the Uruguay Round from the general MFN obligations.

Taken together, these modifications to the BIT model negotiating text signal a clear move away from the original goal of establishing a single, global standard of MFN treatment for investment. The decision of the United States to regionalize its trade policy through the creation of various free trade areas has led inexorably to a regionalization of foreign investment policy. Although a general standard of MFN treatment for investment remains the rule, the path has been cleared for a proliferation of exceptions. It remains to be seen what will become of the MFN obligation in future BITs.

III. THE EVOLUTION OF THE MODEL NEGOTIATING TEXT

This Part describes changes in the model negotiating text that have occurred during the second wave. For purposes of comparison, section A describes the principal provisions of the model negotiating texts used during the first wave. As noted above, the most important texts during the first wave were the 1983 and 1984 drafts.[131]

Just prior to the commencement of the second wave, U.S. BIT negotiators completed a 1987 draft. Section B describes the more significant changes incorporated in that draft.

Negotiations during the second wave, particularly those with Poland, suggested the need for additional changes and thus the model negotiating text was revised again in 1991. Section C describes the more significant changes made in the 1991 draft.

The negotiation of the Argentina BIT occasioned a marked revision of the investor-to-State dispute provision. The revised provision along with a couple of minor changes were incorporated into the model negotiating text in 1992. Section D describes the changes made in developing the 1992 draft.

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126. *See infra* text accompanying notes 152-53.
127. *See infra* text accompanying notes 148-51.
128. *See infra* text accompanying notes 189-90.
129. *See infra* text following note 181.
130. *See infra* text accompanying notes 186-88, 191-97.
131. *See infra* text accompanying notes 35-41.

A. *The First Wave: The 1981-1984 Negotiating Texts*

The principal provisions in the model negotiating text as it emerged in 1981 and was modified over the next three years during the first wave of negotiations were as follows:

RELATIVE TREATMENT STANDARDS:[132] Required host State to permit covered investment to be established in its territory on a national and MFN basis, and to provide such investment, once established, with national and MFN treatment; permitted each party to specify, in an annex to the treaty, sectors or matters in which it reserved the right to deny national treatment to covered investment.

ABSOLUTE TREATMENT STANDARDS:[133] Required host States to provide covered investment with the most constant protection and security and with treatment no less favorable than that required by international law; prohibited impairment of investment activity by arbitrary and discriminatory measures; also required host States to observe any contractual obligations into which they had entered with respect to investment.

PERFORMANCE REQUIREMENTS:[134] Prohibited host States from establishing performance requirements, such as requirements to use local sources of supply or to export products, as a condition of investment.

ENTRY AND SOJOURN:[135] Entitled investors of one party to enter the territory of the other party for investment-related purposes, subject to the other party's immigration laws.

EMPLOYMENT:[136] Granted to nationals and companies of one party the right to hire the top managerial personnel of their choice in the territory of the other party.

JUDICIAL ACCESS:[137] Guaranteed to covered investors effective means of asserting claims against the host State in the courts of the host State.

PUBLICATION:[138] Required each party to make public laws and regulations pertaining to foreign investment.

INFORMATION EXCHANGE:[139] Although this provision was omitted from the 1984 draft, earlier drafts required each party to endeavor to establish procedures for the exchange of information concerning investments of nationals and companies of the other party.

TAXATION:[140] Excluded taxation matters from BIT coverage, except for the obligations with respect to expropriation, free transferability of currency, and disputes involving an investment agreement or authorization.

EXPROPRIATION:[141] Prohibited expropriation of covered investment unless the expropriation was nondiscriminatory, for a public purpose, in accordance with due process of law, accompanied by prompt, adequate, and effective compensation, and not inconsistent with any contractual obligation.

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132. 1983 draft, *supra* note 36, art. II(1)-(3); 1984 draft, *supra* note 37, art. II(1).
133. 1983 draft, *supra* note 36, art. II(4); 1984 draft, *supra* note 37, art. II(2).
134. 1983 draft, *supra* note 36, art. II(7); 1984 draft, *supra* note 37, art. II(5).
135. 1983 draft, *supra* note 36, art. II(5)(a); 1984 draft, *supra* note 37, art. II(3).
136. 1983 draft, *supra* note 36, art. II(5)(b); 1984 draft, *supra* note 37, art. II(4).
137. 1983 draft, *supra* note 36, art. II(8); 1984 draft, *supra* note 37, art. II(6).
138. 1983 draft, *supra* note 36, art. II(9); 1984 draft, *supra* note 37, art. II(7).
139. 1983 draft, *supra* note 36, art. VI(2).
140. 1983 draft, *supra* note 36, art. XI; 1984 draft, *supra* note 37, art. XI.
141. 1983 draft, *supra* note 36, art. III(1); 1984 draft, *supra* note 37, art. III(1).

CURRENCY TRANSFERS:[142] Guaranteed to investors the right to transfer payments related to an investment into and out of the host State freely and without delay.

INVESTOR-TO-STATE DISPUTE RESOLUTION:[143] Guaranteed to investors the right to binding, third-party arbitration of investment disputes with the host State under the auspices of ICS*Id*. Early drafts provided that disputes were to be submitted to any previously-agreed disputes procedures and, once so submitted, no longer were within the investor-to-State dispute provision of the BIT. The 1983 and 1984 drafts provided that disputes were excluded from the arbitration provision of the BIT only if the investor elected to use previously-agreed dispute procedures.

STATE-TO-STATE DISPUTE RESOLUTION:[144] Guaranteed to each party the right to binding, third-party arbitration of disputes with the other party involving the interpretation or application of the BIT.

NONPRECLUDED MEASURES:[145] Exempted from BIT obligations any measures necessary to maintain the public order, to protect a State's essential security interests, or to fulfill a State's obligations involving the maintenance or restoration of international peace and security.

PRESERVATION OF RIGHTS:[146] Provided that the BIT would not derogate from prior legislation, treaties or investment agreements granting covered investment treatment more favorable than that required by the BIT.

POLITICAL SUBDIVISIONS:[147] The 1983 draft stated explicitly that the BIT applied to political subdivisions of the parties. The 1984 draft was silent on this point, assuming that it was implicit.

B. *The 1987 Model Negotiating Text*

The second wave of BITs, the negotiation of which began in early 1989, was based on a 1987 draft, and, later, 1991 and 1992 drafts of the model negotiating text. This section discusses significant changes in the model text that appeared in the 1987 draft. The next two sections discuss significant changes that appeared in the 1991 and 1992 drafts, respectively. Unless otherwise noted, changes that appeared in the 1987 draft were carried forward into the 1991 draft and changes that appeared in either the 1987 or the 1991 draft were carried forward into the 1992 draft.

1. Customs Unions

During the first wave of BITs, Egypt,[148] Morocco,[149] Bangladesh,[150] and Haiti[151] had successfully negotiated for the inclusion of provisions authorizing a limited exception to the requirement that covered investment be provided MFN treatment by the host State. The exception applied to any advantage afforded to investors of a third State by virtue of the host State's membership in a customs union or free trade area.

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142. 1983 draft, *supra* note 36, art. V(1); 1984 draft, *supra* note 37, art. IV(1).
143. 1983 draft, *supra* note 36, art. VII; 1984 draft, *supra* note 37, art. VI.
144. 1983 draft, *supra* note 36, art. VIII; 1984 draft, *supra* note 37, art. VII.
145. 1983 draft, *supra* note 36, art. X(1); 1984 draft, *supra* note 37, art. X(1).
146. 1983 draft, *supra* note 36, art. IX; 1984 draft, *supra* note 37, art. IX.
147. 1983 draft, *supra* note 36, art. XII.
148. Egypt BIT, *supra* note 42, Protocol, para. 4.
149. Morocco BIT, *supra* note 44, Protocol, para. 2(a).
150. Bangladesh BIT, *supra* note 47, Protocol, para. 2.
151. Haiti BIT, *supra* note 49, art. II(12).

As a matter of policy, U.S. BIT negotiators always had been prepared to accommodate customs unions and free trade areas. During the negotiation of the first wave of BITs, however, the United States belonged to neither a customs union nor a free trade area. Thus, accommodating language was necessary only if a particular BIT partner belonged or hoped to belong to such an arrangement.

Nevertheless, as a reflection of both the general willingness of the United States to include a customs union exception, and the large number of States that sought one in negotiations, U.S. BIT negotiators inserted into the 1987 draft a provision, at article II(9), which exempts from the general MFN obligations of the treaty any advantages afforded to nationals and companies of a third country by virtue of the host State's "binding obligations that derive from full membership in a regional customs union or free trade area." The word "regional" was dropped from subsequent drafts of the model negotiating text.

The inclusion of the customs union exception also may have drawn some impetus from the fact that in 1985 the United States concluded a free trade agreement with Israel.[152] The Israeli Free Trade Agreement, however, contained no investment provisions and thus did not necessitate the inclusion of a customs union exception in the BITs. In 1987, the United States entered into a second free trade agreement with Canada, which did include a limited set of investment provisions.[153] In addition, as this article goes to press, negotiators for the United States, Canada, and Mexico have reached agreement on the North American Free Trade Agreement, which contains more extensive investment provisions.[154]

2. Previously-Agreed Dispute Procedures

The 1987 draft language explicitly states that the investor has the right to invoke the investor-to-State dispute mechanism in the BIT, notwithstanding the specification of other dispute resolution mechanisms in a prior agreement between the investor and the host State. At the inception of the BIT program, U.S. policymakers believed that the BIT's investor-to-State dispute mechanism should not displace any previously-agreed disputes mechanism. Accordingly, early model negotiating drafts had required that investment disputes be submitted to previously-agreed procedures and provided that the BIT's investor- to-State dispute mechanism could be invoked only if the dispute had not been submitted to any such previously-agreed procedures and six months had elapsed since the dispute arose.[155]

Under these early drafts, an investor theoretically still could use the investor-to-State dispute mechanism in the BITs, despite the existence of other previously-agreed procedures. The investor simply needed to decline to invoke any previously-agreed procedures and then submit the dispute to ICSID after six months had elapsed. The host State, however, could cut off the right to ICSID arbitration by invoking previously-agreed procedures. Beginning with the 1983 draft, U.S. BIT negotiators decided that investors should have the right to invoke the BIT's investor-to-State dispute procedures, regardless of the existence of other previously-agreed procedures.[156] The 1983 and 1984

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152. Free Trade Area Agreement, *supra* note 123.
153. Free Trade Agreement, *supra* note 124.
154. North American Free Trade Agreement, *supra* note 125.
155. *See, e.g.*, 1982 draft, *supra* note 35, art. VII(3)(a).
156. VANDEVELDE, *supra* note 1, at 167.

drafts thus were revised to provide that the right to ICSID arbitration was lost only if the investor submitted the dispute to previously- agreed procedures.[157]

This revision still left room for misinterpretation because the BITs continued to state that previously-agreed dispute procedures "shall" be used. The 1987 draft corrected the situation by providing explicitly that the obligation to use previously-agreed procedures is subordinate to the investor's right to invoke the investor-to-State dispute mechanism.[158] The 1987 draft, then, does not change the approach followed in the 1983 and 1984 drafts, but only clarifies the language.

3. State-to-State Dispute Provision

The State-to-State dispute provision of the early BIT model negotiating texts[159] had provided for arbitration in accordance with the Model Rules on Arbitral Procedures, adopted by the United Nations International Law Commission in 1958.[160] The 1987 draft provides for arbitration in accordance with the Arbitration Rules[161] of the United Nations Commission on International Trade Law (UNCITRAL).[162] The UNCITRAL Rules, as modified, had been used successfully by the Iran-United States Claims Tribunal during the 1980s, a fact which influenced their eventual adoption in the BITs. In any event, the BITs provide explicitly that the parties may adopt other rules by mutual agreement.[163]

The adoption of the UNCITRAL rules in the 1987 draft led to one other change, with respect to the appointing authority. All BIT model negotiating texts had anticipated the problem of one party's refusing either to appoint the arbitrator it is allowed to appoint or to replace an arbitrator who has resigned or become incapacitated. The 1983 draft had specified that in such an event, a party could request the President of the International Court of Justice to designate an appointing authority to make the necessary appointment.[164] The 1983 draft language, however, had been unnecessary because the matter was covered in virtually identical language in the ILC Model Rules,[165] which governed State-to-State arbitration under that draft. Accordingly, as part of its streamlining of the BITs, the 1984 draft omitted any reference to the appointing authority.[166]

The UNCITRAL Rules adopted by the 1987 draft provide for designation of an appointing authority by the Secretary General of the Permanent Court of Arbitration.[167] In the aftermath of the United States' unsuccessful defense of the Nicaragua case before the International Court of Justice, the fact that the UNCITRAL rules designated an official other than the President of the Court as the appointing authority may have seemed to some in the Reagan administration to be another reason

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157. 1983 draft, *supra* note 36, art. VII(3)(a); 1984 draft, *supra* note 37, art. VI(3)(a).
158. 1987 draft, *supra* note 38, art. VI(2).
159. 1983 draft, *supra* note 36, art. VIII(8); 1984 draft, *supra* note 37, art. VII(1).
160. MODEL RULES ON ARBITRAL PROCEDURE, reprinted in 53 AM. J. INT'L L. 239 (1959) [hereinafter ILC MODEL RULES].
161. U.N. COMMISSION ON INTERNATIONAL TRADE LAW, DECISION ON UNCITRAL RULES, U.N.Doc. A/CN.9/IX/CRP.4/Add.1, amended by U.N.Doc. A/CN.9/SR.178 (1976), reprinted in 15 I.L.M. 701 (1976) [hereinafter UNCITRAL RULES].
162. 1987 draft, *supra* note 38, art. VII(1).
163. 1983 draft, *supra* note 36, art. VIII(8); 1984 draft, *supra* note 37, art. VII(1); 1987 draft, *supra* note 38, art. VII(1).
164. 1983 draft, *supra* note 36, art. VIII(4).
165. ILC MODEL RULES, *supra* note 160, art. 3(2).
166. 1984 draft, *supra* note 37, art. VII.
167. UNCITRAL RULES, *supra* note 161, arts. 6, 7.

to prefer the UNCITRAL Rules over the ILC Model Rules. The 1987 draft rejected even the reference to the Permanent Court of Arbitration and provides instead that the appointing authority is to be the Secretary General of ICS *Id.*[168]

4. Jurisdictional Limitation on Nonprecluded Measures

The 1987 draft corrects what appears to have been an unwise drafting decision made during the preparation of the 1984 draft. The change appears in the nonprecluded measures provision, which excludes from BIT obligations any measure necessary to further a party's own essential security interests.

The 1984 draft had modified this language to apply only to measures "in [the party's] jurisdiction."[169] This modification appears to have been a reaction to concerns by various potential BIT partners that the essential security interests exception might be used by the United States as a legal justification for intervening in the internal affairs of a BIT partner. Indeed, Zaire,[170] Cameroon,[171] and Morocco[172] all had successfully negotiated the inclusion of language in their BITs that limited the entire nonprecluded measures provision to measures taken in a party's own territory.

As an initial matter, the concern was largely misplaced. The nonprecluded measures provision does not affirmatively authorize conduct of any kind. It merely provides that certain measures, otherwise potentially prohibited by the BIT, shall not be prohibited. That is, it is not an authorization, but a limitation on a prohibition.

In any event, the United States sought a way to address these concerns other than through the approach used in the Zaire, Cameroon, and Morocco BITs. To the United States, the jurisdictional limitation seemed advantageous because a State's jurisdiction often exceeds its territory and thus "measures within its jurisdiction" was a broader formulation than "measures within its territory." At the same time, the jurisdictional limitation had the virtue of acknowledging in some way the concern of many States about territorial intervention.

The problem with the jurisdictional limitation lay in its potential to cause confusion. The extent of a State's extraterritorial jurisdiction remains a subject of controversy in contemporary international law.[173] The question whether a particular action was permitted by the nonprecluded measures provision would turn on whether the action was within the State's jurisdiction, an issue which easily could become entangled in the modern debate over the scope of extraterritorial jurisdiction. Because the BIT generally protects investment only if it is in the host State's territory, action taken by the host State which impairs covered investment usually will be considered action taken within the host State's territory and thus, by even the most conservative measure of jurisdiction, within its jurisdiction. Situations may arise, however, where actions taken within the host State's territory have extraterritorial consequences, leading to questions concerning whether such measures were within the host State's jurisdiction and thus within the scope of the

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168. 1987 draft, *supra* note 38, art. VII(2).
169. 1984 draft, *supra* note 37, art. X(1).
170. Zaire BIT, *supra* note 45, art. X(1).
171. Cameroon BIT, *supra* note 46, art. X(1).
172. Morocco BIT, *supra* note 44, art. IX(1).
173. *See, e.g.*, Mark B. Feldman, *The Restructuring of National Security Controls under the 1985 Amendments to the Export Administration Act: Multilateral Diplomacy and the External Application of United States Law*, 21 STAN. J. INT'L L. 235 (1985); Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT.'L L.247 (1982).

nonprecluded measures provision. Fortunately, the jurisdictional limitation was deleted from the 1987 draft.[174]

5. Political Subdivisions

U.S. BIT negotiators have vacillated in the way in which they seek to address the applicability of the BIT to political subdivisions, although the underlying intent has not changed. The underlying intent of the drafters is that substantive protections afforded by the BIT govern the conduct of BIT parties and their political subdivisions.[175] Thus, an uncompensated expropriation of covered investment by one of the fifty states would violate the BIT to the same extent as an identical expropriation by the United States government. Further, the BIT parties are responsible for individual violations of BIT rules by their political subdivisions.[176] Thus, a covered investor injured by a treaty violation by one of the fifty states could invoke any of the remedies created by the BIT against the U.S. government.

One question that arose was whether the BIT remedies also could be invoked against the political subdivisions. The BIT drafters did not intend to require or to authorize political subdivisions to be parties to international arbitration under the BIT.[177] Indeed, the International Centre for the Settlement of Investment Disputes (ICSID), the arbitral mechanism used in the investor-to-State dispute provision of most of the BITs, does not permit arbitrations involving political subdivisions unless the State has specially notified ICS*Id.*[178] In short, the BIT model negotiating texts were drafted on the assumption that BIT violations by a party or its political subdivision would be remedied by an arbitration against the party itself.

In the early drafts, the applicability of the BIT to political subdivisions was addressed by article XII, which provided that "[t]his Treaty shall apply to political subdivisions of the Parties."[179] This article was eliminated from the 1984 draft as superfluous. U.S. BIT negotiators thought better of that decision in preparing the 1987 draft and reinserted article XII in a slightly modified form. The 1987 language provides that " t his Treaty shall apply, mutatis mutandis, to the political subdivisions of the Parties." The phrase "mutatis mutandis" makes clear that the manner in which the BIT applies to political subdivisions varies with context. In addition, the clause was formulated specifically with the problem of remedies in mind.[180] Only the Grenada BIT was based in its entirety on the 1984 draft and thus, only the Grenada BIT omits any reference to political subdivisions.

C. *The 1991 Model Negotiating Text*

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174. 1987 draft, *supra* note 38, art. X(1).
175. VANDEVELDE, *supra* note 1, at 62.
176. *Id.*
177. *Id.*
178. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27, 1965, art. 25(3), 17 U.S.T. 1280.
179. *See, e.g.*, 1983 draft, *supra* note 36, art. XII.
180. VANDEVELDE, *supra* note 1, at 62.

The 1991 draft includes a number of minor changes from prior drafts. There was minor tinkering, for example, with several of the definitions of terms in article I.[181] Three changes, however, are noteworthy.

1. Arbitrary and Discriminatory Measures

The model negotiating texts prior to 1991 had prohibited impairing "by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal" of covered investment[182]. The 1991 draft inserted a new sentence which provides that " f or purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party."[183]

This sentence was added in response to the decision of the International Court of Justice in the *Case Concerning Elettronica Sicula S.p.A. (ELSI).*[184] In that case, the United States had alleged that the requisitioning by the Mayor of Palermo of an Italian subsidiary of an American company was an "arbitrary or discriminatory" measure in violation of the FCN treaty between the United States and Italy. In rejecting the U.S. argument, the Court observed with respect to the requisition order that:

> here was an act belonging to a category of public acts from which appeal on juridical grounds was provided in law (and indeed in the event used, not without success). Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and local courts. These are not at all the marks of an "arbitrary" act.[185]

The United States was concerned that, as a result of this decision, an arbitral panel formed pursuant to the investor-to-State or State-to-State dispute procedures of the BIT might conclude that the act of a host State which impaired investment was not an arbitrary and discriminatory act in violation of the BIT, because the act was subject to review or appeal under local law. Such an interpretation, of course, would rob the prohibition on arbitrary and discriminatory measures of much of its force. Accordingly, the new language was inserted into the 1991 draft to preclude a tribunal from deciding that a host State act subject to appeal ipso facto could not be an arbitrary and discriminatory act within the meaning of the BIT.

2. The GATT Exception

The 1991 draft includes a new provision, at article II(9)(b), which provides that the MFN obligations imposed by the BIT shall not apply to advantages accorded by virtue of a party's binding obligations under any multilateral agreement within the framework of the GATT, entered into

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181. The most noteworthy may have been the explicit inclusion of certain forms of intellectual property within the definition of investment. *See infra*1991 draft, *supra* note 39, art. I(1)(a)(iv). The definition of investment in prior drafts had included fewer references to specific types of intellectual property.

182. *See, e.g.*, 1984 draft, *supra* note 37, art. II(2); 1983 draft, *supra* note 36, art. II(a).

183. 1991 draft, *supra* note 39, art. II(2)(b).

184. Elettronica Sicula S.p.A., [hereinafter ELSI] (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

185. *Id.*

subsequent to the BIT.[186] The inclusion of this language was prompted by a concern that the general MFN language would grant to BIT partners investment-related concessions made by the United States in multilateral agreements resulting from the Uruguay Round of GATT negotiations, without those partners having to adhere to such agreements. The BITs thus could undercut to some extent any progress made at the Uruguay Round.

This language had first appeared in the Poland BIT,[187] probably because that BIT, unlike the others, covered trade as well as investment, and because it was the first BIT to have been entirely negotiated after the commencement of the Uruguay Round.[188] In preparing the 1991 draft, U.S. negotiators decided to incorporate the Poland BIT's language into the model negotiating text for future BITs.

3. Restructuring the Annex

The model negotiating texts prior to 1991 had permitted the parties at the time each BIT was signed to specify sectors of their economies in which they reserved the right to deny national treatment to covered investment.[189] In addition, they had exempted ownership of real estate and mining on the public domain from the MFN obligations of the BIT in order to accommodate U.S. federal and state laws on these subjects.[190]

The 1991 draft bifurcated the annex so that it contains separate paragraphs for those sectors of the economy in which national treatment may be denied and those sectors in which MFN treatment may be denied. The real estate and mining exemptions were moved to the annex where they appear as sectors exempt from MFN treatment.

The change, at first glance, seems merely to simplify the treaty text by moving some exceptions from the main text to the annex, and this appears to have been the initial impetus for the restructuring. Unfortunately, however, it could have the effect of encouraging more departures from MFN treatment. Under prior model negotiating texts, MFN treatment was required even in the sectors listed in the annex. Thus a BIT partner could exempt a sector from MFN treatment only by negotiating for a specific exception. The contents of the annex, on the other hand, generally are established by the unilateral declaration of each party prior to the signing of the BIT. Although the United States presumably would refuse to sign a BIT with a State that wished to reserve the right to exempt an excessive number of sectors from the BIT's MFN obligations, the 1991 draft's approach does make it possible for BIT partners to exempt at least some sectors from MFN as well as national treatment by unilaterally placing them in the annex, without having to negotiate for a specific exception.

D. *The 1992 Model Negotiating Text*

The 1992 draft incorporates stylistic improvements made in three areas: (1) the GATT exception; (2) the provision for transfer of expropriation compensation; and (3) the investor-to-State dispute provision.

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186. *See* 1991 draft, *supra* note 39, art. II(9)(b).
187. Poland BIT, *supra* note 62, art. XII(2)(b).
188. *See infra* text accompanying notes 255-65.
189. 1983 draft, *supra* note 36, art. II(3); 1984 draft, *supra* note 37, art. II(1); 1987 draft, *supra* note 38, art. II(1).
190. 1983 draft, *supra* note 36, art. II(3); 1984 draft, *supra* note 37, art. II(1); 1987 draft, *supra* note 38, art. II(1).

1. The GATT Exception

The 1991 draft provided that the GATT exception[191] applied to multilateral agreements "entered into subsequent to this Agreement."[192] It was unclear under this language whether "entered into" referred to the signature of the agreements or their entry into force. The 1992 draft clarifies the language by providing that the GATT exception applies to any multilateral international agreement under the framework of the GATT that "enters into force subsequent to the signature of this treaty."

The ambiguity in the 1991 draft language was caught early by BIT negotiators. Thus, the 1991 language appears in only two BITs: those with the Czech and the Slovak Republics.[193] Of the remaining BITs negotiated from the 1991 draft, the Sri Lanka[194] and Bulgaria[195] BITs use the 1992 draft language, while the Russia BIT uses a unique formulation, [196] and the Argentina BIT omits the provision entirely.[197]

2. Transfer of Expropriation Compensation

The expropriation article of the 1991 draft required that compensation for expropriation "be freely transferable at the prevailing market rate of exchange on the date of expropriation."[198] This formulation was criticized because, as a practical matter, compensation would be transferred at the exchange rate in effect on the date of transfer. Thus, the language misstated the actual mechanics of the transfer process.

The 1991 draft language, in essence, had sought to establish that the investor should not bear the risk of a change in the exchange rate. Accordingly, compensation should be calculated in such a way that, when the compensation is converted to a freely usable currency at the exchange rate in effect on the date of transfer, the investor will receive the same amount of new currency as it would have received had the transfer occurred on the date of expropriation.

The 1992 draft makes this principle explicit. It requires that expropriation compensation be "calculated in any freely usable currency on the basis of the prevailing market rate of exchange at that time."[199] By calculating compensation in this way, the investor receives the amount of freely usable currency that it would have received had transfer occurred on the date of expropriation, even though the transfer will be carried out at the rate of exchange on the date of transfer. In essence, the compensation amount is adjusted to prevent loss to the investor attributable to a change in the exchange rate.

The transfers article of the 1991 draft had provided that transfers of payments related to an investment generally must occur at the prevailing market rate of exchange on the date of transfer.[200] This was inconsistent with the expropriation compensation provision, and thus the transfers article had exempted expropriation compensation from this provision. The principle was that expropriation

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191. See *supra* text accompanying notes 186-88.
192. 1991 draft, *supra* note 39, art. II(9)(b).
193. Czech and Slovak BITs, *supra* note 67, art. II(9)(b).
194. Sri Lanka BIT, *supra* note 72, art. II(9)(b).
195. Bulgaria BIT, *supra* note 65, art. II(9)(b).
196. *See infra* text accompanying notes 481-84.
197. *See infra* text accompanying note 540.
198. 1991 draft, *supra* note 39, art. III(1).
199. 1992 draft, *supra* note 40, art. IV(2).
200. 1991 draft, *supra* note 39, art. IV(2).

compensation be calculated based on the rate of exchange in effect on the date of expropriation while all other payments related to an investment be transferred at the rate of exchange in effect on the date of transfer. Because the new language in the expropriation compensation provision of the 1992 draft indicates that expropriation compensation shall be transferred using the exchange rate on the date of transfer, it no longer was necessary to exclude the expropriation compensation provision from the general language of the transfers provision. Thus, the 1992 draft omitted the exclusionary language.

3. Investor-to-State Dispute Provision

The 1992 draft includes a number of stylistic and substantive changes to the investor-to-State dispute provision of the 1991 draft. As an initial matter, the definition of an investment dispute is broadened slightly. The 1991 draft defined an investment dispute as a dispute "involving" the "interpretation or application" of an investment agreement or authorization.[201] The 1992 draft defines it as a dispute "arising out of or relating to an investment agreement or authorization," a formulation which seems somewhat more inclusive.[202]

The 1992 draft improves on its predecessors in its description of the process of selecting dispute resolution mechanisms. The 1991 draft had provided that, in the event of an investment dispute, the investor and the host State "shall" initially seek to resolve it by "consultation and negotiation, which may include the use of non-binding, third-party procedures." The 1992 draft softens this language by stating that the parties "should" seek resolution through consultation and negotiation.[203] The reference to nonbinding third-party procedures was dropped as unnecessary, a change that had been anticipated in the Morocco BIT.[204]

In the event that the dispute could not be resolved through consultations or negotiations, the 1991 draft provided that the dispute "shall" be submitted in accordance with previously-agreed applicable dispute settlement procedures,[205] subject to article VI(3), which gave the investor the right to submit the dispute for arbitration before ICSID, notwithstanding the existence of previously-agreed procedures, provided that the investor had not already invoked such previously-agreed procedures. The 1992 draft states in far less elliptical terms the choices available to the investor. It provides that in the event that the dispute cannot be resolved amicably, the investor "may choose" to submit the dispute to local remedies in the host State, to applicable previously-agreed dispute settlement procedures, or to the dispute procedures specified in article VI(3).[206] The 1992 draft avoids using the word "shall" because the BIT does not actually require the use of previously-agreed procedures. It also states explicitly that the choice among local remedies, previously-agreed procedures, and the BIT dispute mechanism is to be made by the investor, a point that was only implicit in prior drafts.

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201. *Id.* art. VI(1).

202. 1992 draft, *supra* note 40, art. VI(1). In the 1991 draft, the definition of an investment dispute also includes a dispute "involving" an "alleged breach of a right conferred or created" by the BIT. 1991 draft, *supra* note 39, art. VI(1). The 1992 draft definition includes a dispute "arising out of or relating to an alleged breach" of any such right. 1992 draft, *supra* note 40, art. VI(1).

203. 1992 draft, *supra* note 40, art. VI(2).

204. Morocco BIT, *supra* note 44, art. VI.

205. 1991 draft, *supra* note 39, art. VI(2).

206. 1992 draft, *supra* note 40, art. VI(2).

The 1992 draft omits a stabilization clause which provided that, in the event of an expropriation, any dispute settlement provision in a previously existing agreement remained final and binding.[207] Given that the 1992 draft, like the 1991 draft,[208] contains a separate clause obligating each party to observe any obligations it may have entered into with regard to investments,[209] the stabilization clause was redundant. The omission thus is without substantive significance. The same omission occurs in the Zaire BIT.[210]

The 1991 draft made two dispute resolution mechanisms potentially available to an investor: arbitration before ICSID or ad hoc arbitration using the ICSID rules.[211] Either was available, provided that the investor had not submitted the dispute to local remedies or previously-agreed dispute settlement procedures, and six months had elapsed since the dispute arose.

The 1992 draft modifies this menu of choices to include: (1) arbitration before ICSID; (2) arbitration before the Additional Facility;[212] (3) ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or (4) arbitration before any other arbitration institution or in accordance with any other arbitration rules to which the parties to the dispute mutually agree. The reference to the Additional Facility had appeared in the 1983[213] and 1984[214] drafts, but had disappeared in 1987, only to reappear in the 1992 draft. The substitution of ad hoc arbitration under the UNCITRAL rules for ad hoc arbitration under the ICSID rules marked a change in U.S. practice. It is likely this change was influenced by the successful experience of the Iran-United States Claims Tribunal with the UNCITRAL rules, and by concerns on the part of some investors that the efficacy of ICSID awards could be undercut by annulment proceedings in local courts. This same set of four arbitration mechanisms originally appeared in the Poland BIT,[215] and, prior to the 1992 draft, also appeared in BITs with Argentina,[216] the Czech and Slovak Republics,[217] Russia,[218] and Bulgaria.[219]

In theory, the investor selects its preferred dispute resolution mechanism by consenting in writing to one of them. Once such consent has been given, either party may invoke the appropriate mechanism. In practice, however, not all of the mechanisms may be available to an investor. Arbitration before ICSID is available only if the host state is a party to the ICSID Convention, while the fourth mechanism--arbitration before an institution or under rules mutually agreed upon--obviously is available only if the parties reach some further agreement.

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207. *See* 1991 draft, *supra* note 39, art. VI(2).
208. *Id.* art. II(2)(c).
209. 1992 draft, *supra* note 40, art. II(2)(c).
210. Zaire BIT, *supra* note 45, art. VII.
211. 1991 draft, *supra* note 39, art. VI(3)(a).
212. The Additional Facility was created by ICSID in 1978 to serve as a mechanism for resolving certain types of disputes outside ICSID's jurisdiction under the ICSID Convention. The rules of the Additional Facility are set forth in ICSID, Additional Facility, Doc. No. ICSID/II (1979), reprinted in 21 I.L.M. 1443 (1982) [hereinafter ADDITIONAL FACILITY RULES].
213. 1983 draft, *supra* note 36, art. VII(3)(a).
214. 1984 draft, *supra* note 37, art. VI(3)(a).
215. Poland BIT, *supra* note 62, art. IX(3)(a).
216. Argentina BIT, *supra* note 63, art. VII(3)(a).
217. Czech and Slovak BITs, *supra* note 67, art. VII(3)(a).
218. Russia BIT, *supra* note 71, art. VI(3)(a).
219. Bulgaria BIT, *supra* note 65, art. VI(3)(a).

As in the case of the 1991 draft,[220] the 1992 draft constitutes the host State's consent to the investor-to-State dispute settlement mechanisms specified in the BIT.[221] In addition, the 1992 draft contains new language[222] specifying that the consent of the host State set forth in the BIT, together with the investor's written consent, shall satisfy the requirement for written consent of the parties under the ICSID Convention[223] and the Additional Facility[224] rules, as well as constituting an agreement in writing for purposes of the New York Convention.[225] This provision makes explicit that which had been implicit in prior BITs.

The 1992 draft includes a few provisions necessitated by the broadening of the menu of arbitration procedures available under the investor-to-State dispute article. The ICSID Convention includes clauses relating to the finality and the enforcement of awards that may not be present in other arbitral conventions or rules. U.S. BIT negotiators sought to ensure that investors who selected an arbitral mechanism not subject to the ICSID Convention would have a final, enforceable award. They did this by incorporating counterparts to the ICSID clauses into BIT provisions.

The first such provision requires that any arbitration, other than that before ICSID, be held in a State that is a party to the New York Convention.[226] Some States will not enforce awards under the New York Convention unless the arbitration was conducted in a State that is a party to the Convention.[227] This provision, thus, is intended to ensure enforceability of the arbitral award. The provision does not apply to arbitration before ICSID because ICSID awards are enforceable under the ICSID Convention.[228] Prior to the 1992 draft, similar language had appeared in the BITs with Haiti,[229] Poland,[230] the Czech and Slovak Republics,[231] Russia,[232] Argentina,[233] and Bulgaria.[234]

A second such provision requires that any award rendered pursuant to the investor-to-State dispute article be final and binding on the parties to the dispute.[235] ICSID awards are final and binding under the ICSID Convention.[236]

A third provision states that each party to the BIT undertakes to carry out without delay the provisions of the award[237]. This language would not seem strictly necessary, given that the obligation to comply with an award is implicit in the consent to binding arbitration. An obligation to comply with ICSID awards is contained in the ICSID Convention.[238] Prior to the 1992 draft,

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220. 1991 draft, *supra* note 39, art. VI(3)(a).
221. 1992 draft, *supra* note 40, art. VI(4).
222. *Id.*
223. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1968, art. 25, 17 U.S.T. 1270 [hereinafter the ICSID Convention].
224. Additional Facility Rules, *supra* note 203, art. 2, 4.
225. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, 21 U.S.T. 2517 [hereinafter New York Convention].
226. 1992 draft, *supra* note 40, art. VI(5).
227. The United States, for example, included this condition in its instrument of accession. *See* 9 U.S.C. § 201 (1988).
228. ICSID Convention, *supra* note 223, art. 54(1).
229. Haiti BIT, *supra* note 49, art. VII(3)(d).
230. Poland BIT, *supra* note 62, art. IX(3)(d).
231. Czech and Slovak BITs, *supra* note 67, art. VI(3)(d).
232. Russia BIT, *supra* note 71, art. VI(3)(d).
233. Argentina BIT, *supra* note 63, art. VII(5).
234. Bulgaria BIT, *supra* note 65, art. VI(3)(d).
235. 1992 draft, *supra* note 40, art. VI(6).
236. ICSID Convention, *supra* note 223, art. 53(1).
237. 1992 draft, *supra* note 40, art. VI(6).
238. ICSID Convention, *supra* note 223, art. 53(1).

similar language had appeared in the BITs with Panama,[239] Haiti,[240] Bulgaria,[241] the Czech and Slovak Republics,[242] Poland,[243] Russia,[244] and Argentina.[245]

A fourth provision requires that each party to the BIT provide for the enforcement in its territory of any award rendered pursuant to the investor-to- State disputes article. With respect to ICSID awards, the ICSID Convention provides that each party to the Convention shall "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[246] Prior to the 1992 draft, similar language had appeared in the BITs with Panama,[247] Haiti,[248] Bulgaria,[249] the Czech and Slovak Republics,[250] Poland,[251] Russia,[252] and Argentina.[253]

IV. THE SUBSTANCE OF THE BITS IN THE SECOND WAVE

All of the signed BITs in the second wave are based on the 1987, 1991, or 1992 drafts of the model negotiating text. This Part identifies the particular draft on which each of the signed BITs in the second wave was based and analyzes the principal modifications to that draft that were made in the course of negotiating the treaty.

A. *Congo*

As has been described, the Congo BIT was negotiated in its entirety during a State visit by a Congolese delegation in 1990.[254] It is identical in every respect to the 1987 draft of the model negotiating text.

B. *Poland*

The Poland BIT follows the 1987 draft with numerous minor changes that have been analyzed elsewhere.[255] The more significant changes are noted below.

1. Commercial Activity

239. Panama BIT, *supra* note 43, art. VII(3)(d) (The Panama BIT omits the language calling upon the parties to carry out the award without delay).
240. Haiti BIT, *supra* note 49, art. VII(3)(d) (The Haiti BIT omits the language calling upon the parties to carry out the award without delay).
241. Bulgaria BIT, *supra* note 65, art. VI(3)(e).
242. Czech and Slovak BITs, *supra* note 67, art. VI(3)(e).
243. Poland BIT, *supra* note 62, art. IX(3)(e).
244. Russia BIT, *supra* note 71, art. VI(3)(e).
245. Argentina BIT, *supra* note 63, art. VII(6).
246. ICSID Convention, *supra* note 223, art. 54(1).
247. Panama BIT, *supra* note 43, art. VII(3)(d).
248. Haiti BIT, *supra* note 49, art. VII(3)(d).
249. Bulgaria BIT, *supra* note 65, art. VI(3)(e).
250. Czech and Slovak BITs, *supra* note 67, art. VI(3)(e).
251. Poland BIT, *supra* note 62, art. IX(3)(e).
252. Russia BIT, *supra* note 71, art. VI(3)(e).
253. Argentina BIT, *supra* note 63, art. VI(6).
254. See *supra* text accompanying note 104.
255. *See, e.g.*, VANDEVELDE, *supra* note 1.

The Poland BIT differs from all other BITs in that it protects commercial activity, as well as investment. The FCN agreements, of course, had been directed principally at trade relations, with investment protection becoming a primary purpose only after the Second World War, when the GATT became the primary instrument of U.S. trade policy.[256] Although both Poland and the United States belong to the GATT, U.S. BIT negotiators nevertheless decided to incorporate some provisions on trade into the Poland BIT.

In some instances, commercial activity is protected simply by adding a reference to it in an investment protection provision, so that commercial activity is protected to the same extent and in the same way as investment. Examples of such provisions include the currency transfers provision,[257] the publications provision,[258] and the taxation provision. [259]

In other instances, the Poland BIT included provisions relating specifically to trade that paralleled very closely certain investment protection provisions of the BIT. Thus, the Poland BIT imposes several absolute standards on the treatment afforded to commercial activity, such as fair and equitable treatment; the enjoyment of full protection and security; treatment no less favorable than that required by international law; treatment that is not arbitrary and discriminatory; and treatment consistent with the contractual obligations between the BIT party and the national or company of the other party.[260] The Poland BIT also contains a judicial access provision applicable to trade;[261] an entry and sojourn provision for traders;[262] and a provision guaranteeing MFN and national treatment with respect to certain matters that consistently have posed problems for those seeking to do business in Eastern Europe.[263]

In still other instances, the Poland BIT has special trade provisions that are unlike any specific investment protection provision. For example, it includes a provision requiring each party to encourage the participation of its nationals in trade promotion events held in the territory of the other party and a provision requiring each party to permit the importation and re-export on a duty free basis of articles for use in trade promotion events.[264] The Poland BIT also contains a provision endorsing the use of arbitration for settlement of commercial disputes and prohibiting either party from requiring that the place of any such arbitration be in Poland or the United States.[265]

2. MFN and National Treatment

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256. *See supra* text accompanying notes 13-14.

257. Poland BIT, *supra* note 62, art. V. For a summary of the currency transfers provision, *See supra* text accompanying note 142.

258. Poland BIT, *supra* note 62, art. VIII(2). For a summary of the publication provision, *See supra* text accompanying note 138.

259. Poland BIT, *supra* note 62, art. VI. For a summary of the taxation provision, *See supra* text accompanying note 140.

260. Poland BIT, *supra* note 62, art. III(3).

261. *Id.*, art. II(7). For a summary of the judicial access provision, *See supra* text accompanying note 137.

262. Poland BIT, *supra* note 62, art. III(7). For a summary of the entry and sojourn provision, See *supra* text accompanying note 135.

263. Poland BIT, *supra* note 62, art. III(2). For a summary of the analogous investment related provision, See infra text accompanying notes 327- 34.

264. Poland BIT, *supra* note 62, art. III(1).

265. *Id.* art. III(6).

Under the Poland BIT, the obligation to permit investment on a national and MFN treatment basis is "in accordance with [each party's] relevant laws and regulations."[266] That is, either party may deny national or MFN treatment to nationals and companies of the other party with respect to the right to establish or acquire investment, as long as the denial is in accordance with local law. Provisions authorizing some form of investment screening also appear in the BITs with Panama,[267] Morocco,[268] Turkey,[269] Tunisia,[270] the Czech and Slovak Republics,[271] and Russia.[272]

The Poland BIT, however, was accompanied by a side letter that imposes additional conditions on Poland's discretion to exclude U.S. investment. First, a permit for entry of U.S. investment must be issued or denied within sixty days of application by the U.S. national or company. Further, permission may be denied only if the investment presents a threat to State economic interests, national security, or the environment. The denial of permission must be accompanied by a written statement of the reasons for denial. The standards for evaluating environmental impact must be the same as those applied to domestic enterprises, while the criterion of a threat to State economic interests may be used only in "exceptional cases" and never for the purpose of limiting competition. U.S. nationals and companies, moreover, are to receive MFN treatment with respect to the implementation of these procedures. A somewhat similar set of provisions appears in the BITs with Russia[273] and the Czech and Slovak Republics.[274]

Poland and the United States also agreed that, within two years of the entry into force of the Poland BIT, the two parties would review these provisions on entry of investment with a view toward narrowing the category of investments subject to the provisions and ultimately eliminating them completely. Polish negotiators told U.S. negotiators that screening provisions, even at the time of negotiations, resulted in the exclusion of investment "only very rarely."[275]

The annex to the Poland BIT contains an especially large number of sectors or matters excluded from the various national and MFN treatment provisions of that treaty. In recognition of that fact, the Poland BIT contains language reaffirming Poland's intention to eliminate the State monopoly with respect to many of the sectors or matters listed in the annex and, ultimately, to remove the sectors or matters from the annex entirely.[276]

On the other hand, the annex also reserved to Poland the right until December 31, 1992, to add sectors or matters to the annex.[277] The model negotiating texts had not permitted the parties to add sectors or matters to the annex once the treaty was signed, except by treaty amendment. The Poland BIT does impose three conditions on Poland's right to make additions to the annex.[278] First, any additions to the annex must be kept to a minimum. Second, any additions may not significantly

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266. *Id.* art. II(1).
267. Panama BIT, *supra* note 43, art. II(1)(2).
268. Morocco BIT, *supra* note 44, art. II(1).
269. Turkey BIT, *supra* note 50, art. II(1).
270. Tunisia BIT, *supra* note 73, art. II(1).
271. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).
272. Russia BIT, *supra* note 71, Protocol, para. 4.
273. *Id.*
274. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).
275. Poland BIT, *supra* note 62, Letter of Submittal (from Deputy Secretary of State Lawrence Eagleburger to President George Bush).
276. *Id.* Annex, para. 4.
277. *Id.* Annex, para. 7.
278. *Id.*

impair investment or commercial[279] opportunities for U.S. nationals and companies. Third, any addition to the annex shall not apply to investment or associated activities in existence at the time the modification to the annex becomes effective.

3. Judicial Access

The Poland BIT modified the language of the judicial access provision[280] in a way that is consistent with its general tolerance of investment screening by Poland.[281] Specifically, the Poland BIT omits denials of investment authorizations from the scope of the judicial access provision. Thus, Poland has reserved the right to make denials of investment authorizations nonreviewable in Polish courts. To the extent that a denial of an investment authorization violates the BIT, however, it will be reviewable under the State-to-State dispute provisions of the Poland BIT.[282]

4. Currency Exchange

The Poland BIT's currency transfers provision differs from that of the 1987 draft in that it protects transfers "related to an investment [or] commercial activity"[283] rather than simply transfers related to an investment. This reflects the fact that the Poland BIT, unlike other BITs, protects commercial activity as well as investment.

A second important change appears in the protocol. Specifically, the protocol permits Poland to delay the transfer of "profits derived from an investment" in accordance with Polish law in effect at the time the BIT was signed, subject to certain limitations.[284] The referenced Polish exchange law provides that an investor may transfer profits in any calendar year only up to the amount of the surplus of its exports in that year over its expenditures on imports.[285] In addition, the investor is permitted to obtain foreign currency for fifteen percent of its profits in excess of the export surplus.[286] The protocol essentially imposes on Poland the obligation to increase yearly the percentage of profits over and above the export surplus which it will permit the investor to transfer. Thus, as of January 1, 1992, Poland is required to permit an investor to transfer twenty percent of all profits gained in 1990 or later and not previously transferred. This figure rises to thirty-five percent on January 1, 1993; fifty percent on January 1, 1994; eighty percent on January 1, 1995; and 100 percent on January 1, 1996. In effect, Poland promises full convertibility as of January 1, 1996. If full convertibility is achieved prior to that date, then the protocol requires Poland to permit transfers of profits to be made without limitation from the date full convertibility is achieved.[287]

The protocol also provides that, during the period in which profits are not freely transferable, Poland shall guarantee to the investor an opportunity to reinvest any profits which Poland has not

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279. The Poland BIT is unique among the BITs in that it covers commercial as well as investment matters.

280. Poland BIT, *supra* note 62, art. II(7). For a summary of the judicial access provision, *See supra* text accompanying note 137.

281. *See supra* text accompanying note 266.

282. Poland BIT, *supra* note 62, art. X(2)-(5). The denial would not be reviewable under the investor-to-State disputes provision because denials of investment authorization were excluded from the coverage of that provision. *See infra* text accompanying note 322.

283. *Id.* art. V(1).

284. *Id.* Protocol, para, 4.

285. *Id.* Letter of Submittal.

286. *Id.*

287. *Id.* Protocol, para. 4.

permitted to be transferred.[288] In particular, Poland must ensure that the investor has the opportunity to invest such profits in a bank account that yields a "positive real rate of interest."[289]

The Poland BIT's exception to free transferability differs from that found in most other BITs in that it applies only to profits from an investment and only for a limited time until free transferability of Polish currency is achieved. Most other BITs, by contrast, permit an exception to free transferability only for sale or liquidation proceeds and only in exceptional circumstances.[290]

5. Investor-to-State Dispute Provision

The Poland BIT modified the investor-to-State dispute provision in a number of ways that reflect the fact that Poland was not a member of ICSID at the time the Poland BIT was signed. First, the Poland BIT provides that Poland consents to arbitration before the Additional Facility or by an ad hoc tribunal established under the UNCITRAL rules, as modified by mutual agreement.[291] One modification to the UNCITRAL Rules specified by the Poland BIT is that the appointing authority shall be the Secretary General of ICSID,[292] language which also appears in the Bulgaria BIT.[293] The Poland BIT also constitutes Poland's consent to conciliation or arbitration before ICSID, provided that Poland becomes a party to the ICSID Convention. [294]

The Poland BIT provides that the investor may consent to ad hoc arbitration under any rules upon which the investor and host State mutually agree.[295] This language adds relatively little to the treaty because it does not include Poland's consent to such arbitration. This provision thus only makes explicit that which was implicit in the BIT: the investor and the host State by mutual agreement may choose a dispute resolution mechanism other than those specified by the BIT. The choice of arbitration before ICSID, through the Additional Facility, under the UNCITRAL Rules, or under any other set of rules mutually agreed upon was incorporated into the 1992 draft[296] and the BITs based on that draft. Prior to that draft, it had appeared in BITs with Russia,[297] the Czech and Slovak Republics,[298] Argentina,[299] and Bulgaria.[300]

A second change attributable to the fact that Poland had not become a party to the ICSID Convention was a requirement that the place of any arbitration conducted pursuant to the investor-to-State dispute article be in a State that is a party to the New York Convention to ensure

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288. *Id.* Protocol, para. 5.
289. *Id.*
290. *See*, e.g., Egypt BIT, *supra* note 42, Protocol, para. 10; Zaire BIT, *supra* note 45, Protocol, para. 1(b); Bangladesh BIT, *supra* note 47, Protocol, para. 4; Turkey BIT, *supra* note 50, Protocol, para. 2(b), Tunisia BIT, *supra* note 73, Protocol, para. 3; Sri Lanka BIT, *supra* note 72, Protocol, para. 6.
The Zaire BIT, however, differs from the other BITs above. It not only has an escape clause permitting delay of sale or liquidation proceeds, but also permits Zaire to delay full implementation of the transfers article for a period of three years, beginning with the date on which the Zaire BIT entered into force. See Zaire BIT, *supra* note 45, Protocol, para. 1(a).
291. Poland BIT, *supra* note 62, art. IX(3)(b)(ii).
292. *Id.*
293. Bulgaria BIT, *supra* note 65,art. VI(3)(b)(ii).
294. *Id.*
295. Poland BIT, *supra* note 62, art. IX(3)(a).
296. 1992 draft, *supra* note 40, art. VI(3)(a).
297. Russia BIT, *supra* note 71, art. VI(3)(a).
298. Czech and Slovak BITs, *supra* note 67, art. VI(3)(a).
299. Argentina BIT, *supra* note 63, art. VII(3)(a).
300. Bulgaria BIT, *supra* note 65, art. VI(3)(a).

enforceability of the award.[301] A similar provision appears in the BITs based on the 1992 draft[302] and, prior to that draft, in BITs with Haiti,[303] the Czech and Slovak Republics,[304] Russia, [305] Argentina,[306] and Bulgaria.[307]

A third such change is an undertaking by each party to comply with any award resulting from an arbitration pursuant to the investor-to-State dispute article.[308] This language merely reflects an overabundance of caution by BIT negotiators, since the obligation to comply with an award is implicit in a party's consent to binding arbitration. Similar language appears in the BITs based on the 1992 draft[309] and, prior to that draft, in BITs with Russia,[310] Argentina,[311] Bulgaria,[312] and the Czech and Slovak Republics.[313]

A final such change is a requirement that each party provide for the enforcement in its territory of arbitral awards issued pursuant to the investor-to-State dispute provision.[314] Comparable language appears in the BITs based on the 1992 draft[315] as well as in BITs with Panama,[316] Haiti,[317] the Czech and Slovak Republics,[318] Russia,[319] Argentina,[320] and Bulgaria.[321]

The Poland BIT also modified the investor-to-State dispute provision in a way that reflects the Poland BIT's relative tolerance of investment screening. Specifically, the investor-to-State dispute provision excludes from its coverage disputes involving denials of investment authorizations.[322] A similar provision appears in the Bulgaria BIT[323]. The Poland BIT also excludes such disputes from the coverage of the judicial access provision.[324]

Finally, the Poland BIT contains one other change that is unique to that treaty. It provides that, in the event that a third party succeeds to the claims of the investor against the host State by virtue of subrogation or assignment, the investor shall not continue to pursue its claim against the host State except on behalf of that third party.[325] Thus, for example, where an expropriated U.S. investor received compensation under an insurance agreement with the Overseas Private Investment Corporation (OPIC) and OPIC thereby became subrogated to the investor's claim for compensation

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301. Poland BIT, *supra* note 62, art. IX(3)(d). For further discussion, *See supra* text accompanying notes 226-34.
302. 1992 draft, *supra* note 40, art. VII(5).
303. Haiti BIT, *supra* note 49, art. VII(3)(d).
304. Czech and Slovak BITs, *supra* note 67, art. VI(3)(d).
305. Russia BIT, *supra* note 71, art. VI(3)(d).
306. Argentina BIT, *supra* note 63, art. VII(5).
307. Bulgaria BIT, *supra* note 65, art. VI(3)(d).
308. Poland BIT, *supra* note 62, art. IX(3)(e).
309. 1992 draft, *supra* note 40, art. VI(6).
310. Russia BIT, *supra* note 71, art. VI(3)(e).
311. Argentina BIT, *supra* note 63, art. VII(6).
312. Bulgaria BIT, *supra* note 65, art. VI(3)(e).
313. Czech and Slovak BITs, *supra* note 67, art. VI(3)(e).
314. Poland BIT, *supra* note 62, art. IX(3)(e).
315. 1992 draft, *supra* note 40, art. VI(6).
316. Panama BIT, *supra* note 43, art. VII(3)(d).
317. Haiti BIT, *supra* note 49, art. VII(3)(d).
318. Czech and Slovak BITs, *supra* note 67, art. VI(3)(e).
319. Russia BIT, *supra* note 71, art. VI(3)(e).
320. Argentina BIT, *supra* note 63, art. VII(6).
321. Bulgaria BIT, *supra* note 65, art. VI(3)(e).
322. Poland BIT, *supra* note 62, art. IX(1).
323. Bulgaria BIT, *supra* note 65, art. VI(1)(c); *See* also infra text accompanying note 616.
324. See *supra* text accompanying notes 280-82.
325. Poland BIT, *supra* note 62, art. IX(4).

against Poland, the U.S. investor no longer could pursue its claim against Poland except on behalf of OPIC.[326] By contrast, under the model negotiating texts, an investor who had been compensated by some third party for an injury to investment caused by the host State was permitted to continue to pursue any claims against the host State, notwithstanding the receipt of such compensation or the fact that the third party had become subrogated to the claim.

6. Special Investment Treatment Provisions

The Poland BIT contains a provision intended to address specific problems that investors have encountered in Eastern Europe in the past.[327] This provision, in slightly varying forms, appears in the BITs with Russia,[328] the Czech and Slovak Republics,[329] Romania,[330] Kazakhstan,[331] Armenia,[332] Bulgaria,[333] and Kyrgyzstan[334] as well.

The provision requires each party to offer nationals and companies of the other party MFN and national treatment status with respect to eleven matters. These matters include: (1) the granting of franchises or rights under license; (2) the issuance of approvals necessary for the conduct of commercial activity; (3) access to financial institutions and credit markets; (4) access to the investors' funds held in financial institutions; (5) the importation of equipment necessary for conducting business; (6) the dissemination of commercial information; (7) the conduct of market studies; (8) the appointment of commercial representatives and their participation in trade fairs or other promotional events; (9) the marketing of goods and services; (10) access to public utilities, public services, and commercial rental space at nondiscriminatory prices, if prices are controlled by the government; and (11) access to raw materials, inputs, and services at nondiscriminatory prices, if prices are controlled by the government.

Two other special investment provisions in the Poland BIT are noteworthy. One requires each party to provide nationals and companies of the other party with national and MFN treatment with respect to the sale and acquisition of equity shares and other securities.[335] This provision is subject to each party's right to make exceptions falling within one of the matters or sectors listed in the annex. The other provision requires Poland to provide MFN treatment to U.S. nationals and companies with respect to the acquisition of interests in any governmentally owned enterprise in the process of privatization.[336]

7. Customs Unions and the GATT

The Poland BIT contains language under which the MFN and national treatment provisions shall not apply to advantages accorded pursuant to a party's binding obligations under any

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326. It is unclear that the treaty provision actually would preclude the investor from pursuing the claim as a matter of law because the investor is not a party to the BIT.
327. Poland BIT, *supra* note 62, art. II(8).
328. Russia BIT, *supra* note 71, art. I(1)(e).
329. Czech and Slovak BITs, *supra* note 67, art. II(1), (10).
330. Romania BIT, *supra* note 70, arts. I(1)(e), II(1).
331. Kazakhstan BIT, *supra* note 68, art. II(10).
332. Armenia BIT, *supra* note 64, art. II(10).
333. Bulgaria BIT, *supra* note 65, art. II(10).
334. Kyrgyzstan BIT, *supra* note 69, art. II(10).
335. Poland BIT, *supra* note 62, art. II(9).
336. *Id.*

multilateral agreement within the framework of the GATT.[337] This provision was attributable to the fact that the Poland BIT, unlike other BITs, addressed commercial activity as well as investment.[338] Although novel when incorporated into the Poland BIT, this language has become standard in the 1991 and 1992 drafts.[339]

The Poland BIT also has a standard provision exempting from its general MFN and national treatment provisions any advantage accorded by virtue of a party's membership in a customs union or free trade area.[340] Similar language had initially appeared in the Egypt,[341] Morocco,[342] Bangladesh,[343] and Haiti[344] BITs and was added to the model negotiating text beginning with the 1987 draft.[345]

8. Intellectual Property

The Poland BIT has very extensive and detailed provisions on intellectual property protection. As an initial matter, several types of intellectual property are explicitly included within the definition of investment,[346] while the acquisition and protection of intellectual property are included as an "associated activity," as that term is used in the BIT.[347] These provisions make clear that intellectual property receives the same protection as investment generally.[348]

A separate provision, however, requires the parties to provide "adequate and effective protection and enforcement of intellectual property rights" and includes a nonexhaustive list of measures entailed by that requirement, such as extending copyright protection to computer programs; providing product as well as process patent protection for pharmaceuticals and chemicals; and providing adequate and effective protection for integrated circuit layout designs and against unfair competition generally.[349]

Finally, an exchange of letters between Poland and the United States imposes still additional obligations on Poland. In particular, Poland agreed to adhere to the Berne Convention for the Protection of Literary and Artistic Works[350] and to enact legislation to protect intellectual property by certain prescribed dates.[351] A series of annexes to the exchange of letters describes the details of the legislation.[352]

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337. Poland BIT, *supra* note 62, art. XII(2)(b).
338. *See supra* text accompanying notes 256-65.
339. *See supra* text accompanying notes 191-97.
340. Poland BIT, *supra* note 62, art. XII(2)(a).
341. Egypt BIT, *supra* note 42, Protocol, para. 4.
342. Morocco BIT, *supra* note 44, Protocol, para. 2(a).
343. Bangladesh BIT, *supra* note 47, Protocol, para. 2.
344. Haiti BIT, *supra* note 49, art. II(12).
345. *See supra* text accompanying notes 148-54.
346. Poland BIT, *supra* note 62, art. I(1)(b)(iv).
347. *Id.* art. I(1)(e).
348. The explicit inclusion of intellectual property in the general definition of investment was later incorporated in the 1991 draft. *See supra* note 181 and accompanying text. The inclusion of intellectual property as an "associated activity" tracks language that had been standard in the 1984 and 1987 drafts. *See* 1984 draft, *supra* note 37, art. I(1)(e); 1987 draft, *supra* note 38, art. I(1)(e).
349. Poland BIT, *supra* note 62, art. IV.
350. *Completed at Paris* May 4, 1896, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. (1986), 331 U.N.T.S. 217.
351. Poland BIT, *supra* note 62, Exchange of Letters (Mar. 21, 1990).
352. *Id.*, Exchange of Letters, Annexes 1-3.

9. Agency for Foreign Investments

In an exchange of letters, Poland agreed to designate a Deputy President of its Agency for Foreign Investment to assist U.S. investors in obtaining the full benefits of the agreement. The Deputy President's responsibility is to function as a "government coordinator and problem solver" for U.S. investors.[353] The Deputy President in particular will provide information on business and investment laws, potential investment projects and sources of finance and will also assist investors having difficulty repatriating profits or obtaining foreign exchange.[354] The BITs with the Czech and Slovak Republics,[355] Romania,[356] and Bulgaria[357] provide for the designation of a similar official.

10. Information Exchange and Transparency

The Poland BIT also has more extensive provisions on information exchange than other BITs. In addition to the standard provision contained in other BITs, stating that each party will publish all relevant laws,[358] the Poland BIT contains a requirement that each party make publicly available all nonconfidential, nonproprietary information which may be useful for investment and commercial activities.[359] Each party also is required to disseminate to its own business community information made available by the other party, where the information will assist investors in settling disputes that may arise under the treaty.[360]

C. *Tunisia*

The Tunisia BIT is based on the 1987 draft with a number of minor changes, generally made for purposes of clarification. A few changes are noteworthy and are described below.

1. Expropriation Compensation

The provision that requires prompt, adequate, and effective compensation for expropriation omits the language explicitly requiring the payment of interest from the date of expropriation until the date of payment, at the market rate of exchange on the date of expropriation.[361] The protocol, however, does guarantee to an expropriated investor payment of "an amount to compensate for any delay in payment that may occur."[362]

This language is intended to impose the substantive equivalent of a requirement of interest. A similar approach has been used in other BITs with Muslim countries--including Egypt,[363]

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353. *Id.*, Exchange of Letters.
354. *Id.*
355. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).
356. Romania BIT, *supra* note 70, Exchange of Letters (May 28, 1992).
357. Bulgaria BIT, *supra* note 65, Exchange of Letters (Sept. 23, 1992).
358. Poland BIT, *supra* note 62, art. VIII(2). *See supra* text accompanying note 138.
359. Poland BIT, *supra* note 62, art. VIII(2).
360. *Id.* art. VIII(3).
361. Tunisia BIT, *supra* note 73, art. III(1).
362. *Id.* Protocol, para. 2.
363. Egypt BIT, *supra* note 42, art. III(1).

Morocco,[364] and Turkey[365]--because of religious sensitivities about explicit references to interest. The protocol language in the Tunisia BIT also requires the use of a commercial exchange rate on the date of expropriation,[366] language similar to that used in the Morocco BIT.[367]

The expropriation compensation provision of the Tunisia BIT further differs from the model texts in that it specifies that compensation must equal the "full value" rather than the "fair market value" of the expropriated investment.[368] Tunisia requested this change because it does not have a fully developed market economy.[369] The use of the term full value does not alter the substance of the provision.[370] The same term is used in the Panama[371] and Morocco[372] BITs.

2. Currency Exchange

As an initial matter, the currency exchange provision of the Tunisia BIT has been slightly narrowed in scope because the right of free exchange applies only to certain enumerated payments, rather than to all payments related to an investment, as is the case in the model negotiating texts.[373] The list of enumerated payments is that which appears in the 1987 draft.[374] In the model negotiating text, however, the list was merely illustrative, while in the Tunisia BIT it is exhaustive. In any event, the list is broad enough that the provision guarantees substantial protection for U.S. investors.

The Tunisia BIT also modifies the language of the transfers article in several minor respects. It provides that transfers shall be made in a "freely convertible currency" rather than a "freely usable currency."[375] The former term was employed in the 1984 draft of the model negotiating text[376] and thus does not represent a departure from U.S. practice. Additionally, the phrase "prevailing rate of exchange for commercial transactions" replaces "prevailing market rate of exchange" and the requirement that the exchange rate be calculated "with respect to spot transactions in the currency to be transferred" is omitted.[377] These changes bring the language of the Tunisia BIT in close conformity with that of the Morocco BIT.[378] The changes were made to "reflect actual conditions with respect to Tunisian currency" and are not believed by the U.S. government to change the provision materially.[379] A similar rationale lay behind the Morocco BIT changes.[380]

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364. Morocco BIT, *supra* note 44, Protocol, para. 4.
365. Turkey BIT, *supra* note 50, art. III(2).
366. Tunisia BIT, *supra* note 73, Protocol, para. 2.
367. Morocco BIT, *supra* note 44, Protocol, para. 4.
368. Tunisia BIT, *supra* note 73, art. III(1).
369. *Id.* Letter of Submittal (from Deputy Secretary Lawrence Eagleburger to President George Bush, Apr. 24, 1991).
370. VANDEVELDE, *supra* note 1, at 128. The term "full value" was the formulation used in the modern FCN treaty series and is synonymous with "fair market value."
371. Panama BIT, *supra* note 43, art. IV(1).
372. Morocco BIT, *supra* note 44, art. III(3).
373. Tunisia BIT, *supra* note 73, art. IV(1).
374. 1987 draft, *supra* note 38, art. IV(1).
375. Tunisia BIT, *supra* note 73, art. IV(2).
376. 1984 draft, *supra* note 37, art. IV(2).
377. Tunisia BIT, *supra* note 73, art. IV(2).
378. Morocco BIT, *supra* note 44, art. IV(2) (providing that transfers "shall be made at the prevailing rate of exchange used for commercial purposes ...").
379. Tunisia BIT, *supra* note 73, Letter of Submittal.
380. VANDEVELDE, *supra* note 1, at 148.

The substantially more significant change to the currency exchange provision is the inclusion of an escape clause in the protocol.[381] That clause permits Tunisia to delay temporarily the transfer of sale or liquidation proceeds "in exceptional financial or economic circumstances relating to foreign exchange."[382] The delay, however, is subject to certain conditions. Specifically, it must be on a national and MFN treatment basis and may not exceed three years, during which the investor must have an opportunity to invest the proceeds in a way that will preserve their value until transfer occurs.

The Tunisia BIT escape clause is very similar to that in the Turkey BIT.[383] Comparable clauses also appear in the Egypt,[384] Bangladesh,[385] Zaire,[386] and Sri Lanka[387] BITs. In each case, the escape clause has been a response to a concern by a BIT partner that its limited foreign exchange may preclude it at times from permitting transfer of the potentially large sums involved in the sale or liquidation of an investment.

3. MFN and National Treatment

The Tunisia BIT modifies the approach generally used in the BITs to specify exceptions to the obligation of national or MFN treatment. Rather than specifying certain sectors of the economy in which either party may deny national or MFN treatment to covered investment, the Tunisia BIT states that the parties' existing laws and regulations are excepted from the national treatment requirement with respect to the right to establish investment.[388] In the case of Tunisia, these existing laws include: (1) an Agriculture and Fishing Code which limits foreign participation in agricultural investment to fifty percent, requires authorization from the Ministry of Agriculture for all foreign investment in agriculture, and restricts foreign ownership of land in Tunisia; and (2) a Service Industry Code which permits service industry firms to be majority owned by foreign investors only if the firm serves the export market exclusively.[389]

The Tunisia BIT language would appear to be more restrictive than the model negotiating text because it makes no provision for future exceptions. A right to make future exceptions, however, is reserved for the United States in certain sectors specified in the protocol.[390] Special provisions permitting some form of investment screening also appear in BITS with Panama,[391] Morocco,[392] Turkey,[393] Poland,[394] the Czech and Slovak Republics,[395] and Russia.[396]

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381. Tunisia BIT, *supra* note 73, Protocol, para. 3.
382. *Id.*
383. Turkey BIT, *supra* note 50, Protocol, para. 2(b).
384. Egypt BIT, *supra* note 42, Protocol, para. 10.
385. Bangladesh BIT, *supra* note 47, Protocol, para. 4.
386. Zaire BIT, *supra* note 45, Protocol, para. 1(b).
387. Sri Lanka BIT, *supra* note 72, Protocol, para. 6.
388. Tunisia BIT, *supra* note 73, art. II(1).
389. Treaty with Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 77, at 5-6.
390. Tunisia BIT, *supra* note 73, Protocol, para. 1.
391. Panama BIT, *supra* note 43, art. II(1).
392. Morocco BIT, *supra* note 44, art. II(1).
393. Turkey BIT, *supra* note 50, art. II(1).
394. Poland BIT, *supra* note 62, art. II(1).
395. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).
396. Russia BIT, *supra* note 71, Protocol, para. 4.

The Tunisia BIT was transmitted to the Senate accompanied by a letter from Deputy Secretary of State Lawrence Eagleburger explaining certain provisions of the treaty. Deputy Secretary Eagleburger's letter, however, appears open to misinterpretation with respect to this provision of the Tunisia BIT. Specifically, the letter refers to article X(2) of the Tunisia BIT, which provides that the treaty "shall not preclude either Party from requiring that investments and associated activities be established in accordance with the terms and conditions set forth in its legislation provided that such terms and conditions do not impair any right set forth in this Treaty."[397] The letter concludes that, as a result of article X(2), Tunisia "is permitted to favor its own nationals with respect to the establishment of investment."[398] In fact, however, article II(1) guarantees national treatment with respect to establishment of investment, except to the extent of each Party's existing laws and regulations. Because article X(2) expressly does not authorize impairment of any treaty right, it is subordinate to article II(1). In short, the Tunisia BIT permits Tunisia to favor its own nationals with respect to the establishment of investment only to the extent of Tunisia's existing laws and not under any future law.

4. Performance Requirements

The prohibition on performance requirements that appeared in all of the model negotiating texts was weakened in the Tunisia BIT such that the parties are required only to "endeavor not to impose" them.[399] At the time the Tunisia BIT was submitted to the Senate, the U.S. government believed Tunisia was no longer applying performance requirements, except for a provision of the Tunisian Service Industry Code under which service industry firms may be 100 percent foreign owned only if they serve the export market exclusively, while those which serve the domestic market must be majority owned by Tunisians.[400]

The prohibition on performance requirements generally has been one of the most difficult BIT provisions on which to reach agreement. In fact, six other BITs–those with Egypt,[401] Morocco,[402] Zaire,[403] Bangladesh,[404] Haiti,[405] and Turkey[406]--modified their performance requirements in a manner similar to the Tunisia BIT. The Sri Lanka BIT also modified the performance requirements provision, although in a somewhat different fashion,[407] and the Argentina BIT contains a limited exception to the performance requirements provision.[408]

The difficulty in negotiating the performance requirements provisions has been a matter of some concern to the Senate. In reporting the first eight BITs favorably to the Senate in 1988, the Senate Committee on Foreign Relations noted that it would have preferred that the performance

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397. Tunisia BIT, *supra* note 73, Letter of Submittal.
398. *Id.*
399. *Id.* art. II(6).
400. See Treaty with Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 77.
401. Egypt BIT, *supra* note 42, art. II(6).
402. Morocco BIT, *supra* note 44, art. II(5).
403. Zaire BIT, *supra* note 45, art. II(7).
404. Bangladesh BIT, *supra* note 47, art. II(6).
405. Haiti BIT, *supra* note 49, art. II(7).
406. Turkey BIT, *supra* note 50, art. II(7).
407. *See infra* text accompanying notes 423-27.
408. Argentina BIT, *supra* note 63, Protocol, para. 9.

requirements provisions had not been modified during negotiations.[409] U.S. negotiators in fact have been far more successful in preserving the performance requirements provision intact in the second wave of BITs than they were in the first, and the Senate has not pursued the matter further.

5. Employment Rights

The 1987 draft contained an employment provision that guaranteed to investors the right to employ the top managerial personnel of their choice "regardless of nationality."[410] The basic purpose of this provision was to protect investors against host State laws requiring that nationals of such States be given preference in employment.

The Tunisia BIT modified that provision so that it is subject to the right of each party to prescribe "fair procedures" in connection with the employment of such personnel.[411] This change appears to subordinate the right to choose top managerial personnel to local law, provided that local law meets a rather amorphous standard of "fairness."

6. Application to Existing Investment

Like the model negotiating texts, the Tunisia BIT applies to "investments made or acquired after the time of entry into force as well as to investments existing at the time of entry into force."[412] That provision, however, is followed by an additional sentence stating that " i f any issue arises with respect to any pre-1956 U.S. investment, the two sides agree to consult as necessary on such issues to reach a satisfactory solution."[413]

The policy of the United States was to refuse proposals by potential BIT partners to treat pre-treaty investment differently than post-treaty investment.[414] The Tunisia BIT appears to be consistent with this policy since the additional sentence does little more than add an obligation to consult and does not derogate from the general dispute resolution mechanisms of the BIT. The sentence was included because of Tunisia's concern about pre- independence investments[415]. Ultimately, the sentence may be irrelevant because there may not be any pre-1956 U.S. investment in Tunisia.[416]

D. *Sri Lanka*

The text of the Sri Lanka BIT follows very closely that of the 1991 draft, although a protocol to the treaty contains numerous paragraphs clarifying certain provisions of the main text. In a couple of instances, the protocol effects substantive changes.

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409. *Bilateral Investment Treaties with Panama, Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada*, *supra* note 54, at 3.
410. 1987 draft, *supra* note 38, art. II(4).
411. Tunisia BIT, *supra* note 73, art. II(5).
412. *Id.* art. XIII(1).
413. *Id.*
414. VANDEVELDE, *supra* note 1, at 32-33. For a discussion of the minor departures from this practice that have occurred, *See Id.* at 64-65.
415. Tunisia BIT, *supra* note 73, Letter of Submittal.
416. *Id.*

1. Currency Exchange

The protocol contains an escape clause permitting either party to delay the transfer of sale or liquidation proceeds "in the event of exceptional balance of payments difficulties."[417] The delay is subject to the condition that it cannot exceed three years. Additionally, during each year of delay, the investor must be permitted to transfer a third of the proceeds, and the investor must have the opportunity to invest the delayed proceeds in a manner that will preserve their value, free of exchange risk. Similar clauses have been included in the Egypt,[418] Zaire,[419] Bangladesh,[420] Turkey,[421] and Tunisia[422] BITs.

2. Performance Requirements

The protocol notes that Sri Lanka has laws that provide incentives for meeting performance requirements relating to exports or the contribution of new technology.[423] The United States was concerned that this incentive program might pose a barrier to U.S. investment.[424] Thus, the protocol states that the parties agree to consult at the request of either, should "adverse effects" arise from such laws, with a view to eliminating the adverse effects.[425]

Sri Lanka presumably did not consider its incentive program to violate the general prohibition on performance requirements because it involved incentives for engaging in particular conduct rather than penalties. The Panama BIT is similar in noting that Panama provides certain incentives to businesses without including any obligation to terminate the incentive program.[426] As discussed above, the elimination of performance requirements has been a particularly difficult goal to achieve.[427]

E. *Czech and Slovak Republics*

The Czech Republic BIT and the Slovak Republic BIT actually were negotiated as a single treaty with the Czech and Slovak Federal Republic. The treaty was signed on October 22, 1991, amid predictions of the ultimate break up of the Federal Republic. Ratification of the treaty was carried out on an expedited basis by both parties[428] and the treaty entered into force on December 19, 1992.

On January 1, 1993, the Czech and Slovak Federal Republic separated into two new States: the Czech Republic and the Slovak Republic. Each new State accepted the treaty obligations of the

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417. Sri Lanka BIT, *supra* note 72, Protocol, para. 6.
418. Egypt BIT, *supra* note 42, Protocol, para. 10.
419. Zaire BIT, *supra* note 45, Protocol, para. 1(b).
420. Bangladesh BIT, *supra* note 47, Protocol, para. 4.
421. Turkey BIT, *supra* note 50, Protocol, para. 2(b).
422. Tunisia BIT, *supra* note 73, Protocol, para. 3.
423. Sri Lanka BIT, *supra* note 72, Protocol, para. 4.
424. Treaty with Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 77, at 2.
425. Sri Lanka BIT, *supra* note 72, Protocol, para. 4.
426. Panama BIT, *supra* note 43, Agreed Minutes, no. 2.
427. *See supra* text accompanying notes 400-09.
428. See Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 77, at 6- 8.

former Federal Republic. Thus, the single Czech and Slovak Federal Republic BIT entered into force for the two new republics on January 1, 1993.

Because they are successors to a single treaty, the Czech Republic BIT and the Slovak Republic BIT are identical, at least in the English text. Both refer to the Czech and Slovak Federal Republic rather than to the two successor republics.

The Czech and Slovak BITs are based on the 1991 draft, with a number of modifications of no real significance. Indeed, the Czech and Slovak BITs contain fewer differences from the model negotiating text than did the Poland BIT, the first Eastern European BIT to receive Senate approval.

1. MFN and National Treatment

The most significant changes in the Czech and Slovak BIT from the model negotiating text involve the right to national and MFN treatment guaranteed by article II and reflect the Czech and Slovak Republics' transformation from communism to a market economy. An exchange of letters dated October 22, 1991, which accompanied signature of the treaty, permits the Czech and Slovak Republics to require U.S. investors seeking to acquire or establish investment in the Czech or Slovak Republics to obtain government approval in either of two situations. The first situation occurs where the U.S. investor seeks to invest in or with a company that is majority-owned by the State.[429] Secretary of State James Baker's letter submitting the treaty to the President describes the situation as one in which "U.S. nationals or companies acquire majority ownership of State companies."[430] Contrary to Secretary Baker's letter, however, the letters do not seem to limit this first situation to acquisition of majority ownership. Rather, they define it more broadly to include any investment in a State company.[431] The second situation occurs where the U.S. investor seeks to acquire the equity interest of the government of the Czech or Slovak Republic in a company.

The exchange of letters, however, places certain conditions on the right of the Czech and Slovak Republics to screen out U.S. investors in these situations. One condition requires that the request for approval not be denied for the purpose of limiting competition or discouraging investment by U.S. nationals and companies, except in those sectors listed in the annex.[432] Another condition holds that the granting of such approvals shall be on an MFN basis.[433] The parties also agree to consult in two years with a view toward narrowing and ultimately phasing out the approvals authorized by the exchange of notes. The substance of this exchange of letters is similar in many ways to provisions in the Poland[434] and Russia[435] BITs.

Finally, the exchange of letters also recites the parties' understanding that the governments of the Czech and Slovak Republics are to approve new commercial codes liberalizing the procedures

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429. The letters describe this category of investments as "investments of nationals or companies of the United States in or with companies the majority of the assets or ownership of which are owned by the Czech and Slovak Federal Republic." Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).

430. *Id*. Letter of Submittal (from Secretary of State James A. Baker III to President George Bush, May 12, 1992). The Secretary's understanding was repeated in the Report of the Senate Foreign Relations Committee. *See* Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 77, at 5.

431. Czech and Slovak BITs, *supra* note 67, Exchange of Letters.

432. *Id.*

433. *Id.*

434. Poland BIT, *supra* note 62, Exchange of Letters (Mar. 21, 1990).

435. Russia BIT, *supra* note 71, Protocol, para. 4.

for government approval of foreign investment in a manner consistent with the treaties. The new codes were enacted and became effective on January 1, 1992.[436]

2. Special Treatment Provisions

Another change to article II reflecting the transformation of the economy of the Czech and Slovak Republics is the inclusion of a list of additional activities which are to be considered "associated activities" within the meaning of the BIT.[437] The significance of so designating these activities is that each party must afford national and MFN treatment to investors of the other party with respect to such activities.

The list follows very closely a similar list that appeared in the Poland BIT[438] and which has been repeated with variations in the BITs with Russia,[439] Kazakhstan,[440] Armenia,[441] Romania,[442] Bulgaria,[443] and Kyrgyzstan.[444] It includes activities such as the granting of franchises and licenses; access to financial institutions and credit markets; the importation of equipment; the marketing of goods and services; and access to public utilities, public services, commercial rental space, raw materials, and inputs at nondiscriminatory prices, if prices are set or controlled by the government. Essentially, the list covers activities which traditionally have posed problems for foreign investors in Eastern European countries.

3. Customs Union

The Czech and Slovak BITs contain the standard customs union exception as it appeared in the 1991 draft.[445] Additional language in the protocol acknowledges that the terms of the customs union exception are satisfied if an economic relationship between a BIT party and a third country includes a free trade area or customs union.[446] This language ensures that, in the event that the Czech or Slovak Republic becomes part of a *supra*national entity involving economic and even political integration beyond that normally associated with a customs union or free trade area, whether the European Community or some association of East European states, such membership would fall within the customs union exception. As such, the language merely clarifies what in all likelihood would have been the U.S. understanding in any event. Similar language appears in the Romania BIT.[447]

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436. Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 77, at 5.
437. Czech and Slovak BITs, *supra* note 67, art. II(10).
438. Poland BIT, *supra* note 62, art. II(8).
439. Russia BIT, *supra* note 71, art. I(1)(e).
440. Kazakhstan BIT, *supra* note 68, art. II(10)
441. Armenia BIT, *supra* note 64, art. II(10).
442. Romania BIT, *supra* note 70, art. I(1)(e).
443. Bulgaria BIT, *supra* note 65, art. II(10).
444. Kyrgyzstan BIT, *supra* note 69, art. II(10).
445. Czech and Slovak BIT, *supra* note 67, art. II(9)(a).
446. *Id.* Protocol, para. 3.
447. Romania BIT, *supra* note 70, Protocol, para. 2.

4. Investor-to-State Dispute Provision

The investor-to-State dispute provision includes a number of changes attributable to the fact that the Czech and Slovak Republics were not parties to the ICSID Convention at the time the Czech and Slovak Federal Republic BIT was signed. First it provides for binding third-party arbitration: (1) under ICSID where the relevant party has adhered to the ICSID Convention; (2) before the Additional Facility where such adherence has not occurred; (3) under the UNCITRAL Rules; or (4) under any other set of rules to which the parties mutually agree.[448] The same alternatives are provided for in BITs based on the 1992 draft and in earlier BITs with Poland,[449] Russia,[450] Argentina,[451] and Bulgaria.[452] The Czech and Slovak BITs also require that arbitration take place in a State that is a party to the New York Convention to ensure that the arbitral award will be enforceable in domestic courts under that Convention,[453] and require each party to provide for enforcement of arbitral awards in its territory.[454] Similar provisions have been included in BITs based on the 1992 draft[455] and, prior to that draft, in BITs with Panama,[456] Haiti,[457] Poland,[458] Argentina,[459] Russia,[460] and Bulgaria.[461]

5. Investment Facilitation

An exchange of letters dated October 22, 1991, memorializes the intent of the Czech and Slovak Republics to designate an entity to ensure that U.S. investors receive the full benefits of the treaty.[462] The function of this entity will include providing information regarding business laws and regulations, proposed changes in laws and regulations affecting investors, and investment projects and sources of financing. The entity also will coordinate with national, regional, and local governments to facilitate investment and assist investors who experience difficulties with the establishment and operation of investments. The Poland,[463] Romania,[464] and Bulgaria[465] BITS have similar provisions.

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448. Czech and Slovak BITs, *supra* note 67, art. VI(3)(a).
449. Poland BIT, *supra* note 62, art. IX(3)(a).
450. Russia BIT, *supra* note 71, art. VI(3)(a).
451. Argentina BIT, *supra* note 63, art. VII(3)(a).
452. Bulgaria BIT, *supra* note 65, art. VI(3)(a).
453. Czech and Slovak BITs, *supra* note 67, art. VI(3)(d). *See also supra* text accompanying notes 220-25.
454. Czech and Slovak BITs, *supra* note 67, art. VI(3)(e).
455. 1992 draft, *supra* note 40, art. VI(6).
456. Panama BIT, *supra* note 43, art. VII(3)(d). The Panama BIT omits the provision with respect to the New York Convention.
457. Haiti BIT, *supra* note 49, art. VII(3)(d).
458. Poland BIT, *supra* note 62, arts. IX(3)(d) and (e).
459. Argentina BIT, *supra* note 63, art. VII(5) and VII(6).
460. Russia BIT, *supra* note 71, art VI(3)(d) and (e).
461. Bulgaria BIT, *supra* note 65, art. VI(3)(d) and (e).
462. Czech and Slovak BITs, *supra* note 67, Exchange of Letters.
463. Poland BIT, *supra* note 62, Exchange of Letters (March 21, 1990).
464. Romania BIT, *supra* note 70, Exchange of Letters (May 28, 1992).
465. Bulgaria BIT, *supra* note 65, Exchange of Letters (Sept. 23, 1992).

F. *Russia*

The main text of the Russia BIT is based on the 1991 draft, although it contains a variety of minor changes generally intended either to clarify the model language or to improve the style of the agreement. The protocol does contain a few changes that are of some significance and that generally are attributable either to Russia's conversion from a command to a market economy or to the disintegration of the Soviet Union. One provision of the protocol, relating to the security interests exception, is not attributable to either of these events, however, and raises some questions about the strength of the protection afforded by the Russia BIT.[466]

1. Definition of Control

The BITs generally protect only investment in the territory of one party "owned or controlled" by nationals or companies of the other party. The terms "own" and "control" were not defined in the model negotiating texts and the United States generally resists attempts to define the terms, although it had agreed to define the term "control" in two prior BITs. Specifically, the Egypt BIT defines control as having "a substantial share of ownership rights and the ability to exercise decisive influence."[467] The Poland BIT defines the term to mean "having a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment...."[468]

The Russia BIT does not define the term, but lists three factors to be considered, among others, in determining control. These are a substantial interest in the investment, the ability to exercise substantial influence over the management and operation of the investment, and the ability to exercise substantial influence over the composition of the managing body[469]. The same provision notes that "the question of control will depend on the factual circumstances of the particular case."[470]

2. Right to Establish Investment

The protocol of the Russia BIT reserves for Russia the right to require prior permission for "large scale" investments as defined in the Russian Federation Law on Foreign Investments of July 4, 1991.[471] This right, however, is subject to a five year time limit. The term large scale investments as currently defined refers to investments of $800,000 or more[472]. Within one year of the treaty's entry into force, the threshold for screening will be raised to that intended by the law at the time of its enactment, which would mean that "large scale" investments would be those of approximately fifty-six million dollars or more.[473]

During the five year period in which investment screening is allowed, permission to establish investment shall not be denied for the purpose of limiting competition or discouraging investment by U.S. nationals or companies in particular sectors of the economy (except for those listed in the

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466. See infra text accompanying notes 509-16.
467. Egypt BIT, *supra* note 42, Protocol, para. 2.
468. Poland BIT, *supra* note 62, art. I(1)(j).
469. Russia BIT, *supra* note 71, Protocol, para. 2(b).
470. *Id.*
471. Russia BIT, *supra* note 71, Protocol, para. 4(a).
472. *Id.* Letter of Submittal (from Lawrence S. Eagleburger to President George Bush, July 21, 1991).
473. *Id. See also id.* Protocol, para. 4(b).

annex). Permission must be granted or denied in conformity with all other provisions of the treaty, including presumably the MFN requirements of article II. Similar restrictions on screening appear in the BITs with Poland[474] and the Czech and Slovak Republics.[475]

3. Arrangements with Former Soviet Republics

The protocol also contains the parties' acknowledgement that Russia has certain existing economic arrangements and relationships with the other States that constituted the former Soviet Union under which investors of these other States may be guaranteed national treatment with respect to investment in the sectors specified in the annex.[476] The protocol further acknowledges that the general MFN obligations of the treaty shall not entitle U.S. investors to the same treatment.[477] The MFN obligations of the treaty, however, will apply to any such future arrangements, unless the arrangement falls within the exception for customs unions or free trade areas set forth in the Russia BIT.[478]

The 1991 draft model negotiating text permits derogations from MFN treatment attributable to membership in a customs union or free trade area.[479] The Russia BIT goes beyond the model language to permit some derogations under existing arrangements with certain States, even in the absence of a formal customs union or free trade area.

The Russia BIT provision, however, is not entirely unprecedented in BIT practice. The Egypt BIT excludes from the obligation to provide MFN treatment in the sectors listed in the annex any advantage provided "by virtue of a special security or regional arrangement, including regional customs unions or free trade areas."[480] Thus, the Egypt BIT also permits derogations from MFN treatment attributable to an arrangement that does not meet the formal requirements of a customs union or free trade area, as long as it is a special security or regional arrangement. The Russia BIT provision arguably is narrower because it applies only to derogations under existing arrangements with States that were part of the former Soviet Union.

4. GATT Exception

The Russia BIT moves the GATT exception to the protocol, where it is reworded.[481] In the Russia BIT, the GATT exception applies to multilateral international agreements under the framework of the GATT "concluded" after the signature of the BIT. The 1991 draft GATT exception applied to agreements "entered into" subsequent to the BIT[482] while the 1992 draft applied to agreements that enter into force subsequent to signature of the BIT.[483]

The Russia BIT contains the parties' agreement to "discuss holding consultations to determine whether a mutually beneficial basis exists" for according advantages under GATT related

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474. Poland BIT, *supra* note 62, Exchange of Letters (Mar. 21, 1990).
475. Czech and Slovak Republic BITs, *supra* note 67, Exchange of Letters (Oct. 27, 1991).
476. Russia BIT, *supra* note 71, Protocol, para. 5(a).
477. *Id.* Protocol, para. 5(b).
478. *Id.*, art. II(9). The customs union exception is at paragraph 5(c) of the Protocol.
479. 1991 draft, *supra* note 39, art. II(9)(a).
480. Egypt BIT, *supra* note 42, Protocol, para. 4.
481. Russia BIT, *supra* note 71, Protocol, para. 6.
482. 1991 draft, *supra* note 39, art. II(9)(b).
483. 1992 draft, *supra* note 40, art. II(9)(b).

agreements to Russian investors.[484] In short, the United States held out the prospect that it might, at least in part, decline to invoke the GATT exception with respect to Russian investors.

5. Associated Activities

The Russia BIT,[485] like the BITs with Poland,[486] the Czech and Slovak Republics,[487] Kazakhstan,[488] Romania,[489] Armenia,[490] Bulgaria,[491] and Kyrgyzstan[492] contains a list of additional activities that are considered "associated activities" within the meaning of the BIT. The lists vary slightly among the BITs, but generally cover activities that in the past have presented difficulties for investors in Eastern Europe.[493]

6. Investor-to-State Dispute Provision

The Russia BIT modifies in several respects the investor-to-State dispute provision because Russia had not yet ratified the ICSID Convention at the time the Russia BIT was signed. The modifications include provision for arbitration before the ICSID Additional Facility, which does not require adherence to the ICSID Convention; ad hoc arbitration using the United Nations Commission on International Trade Law (UNCITRAL) rules;[494] or arbitration under any other set of rules to which the parties mutually agree. This same set of arbitration possibilities also is included in the BITs with Poland,[495] the Czech and Slovak Republics,[496] Argentina,[497] and Bulgaria[498] and was incorporated into the 1992 draft[499] and the BITs based thereon. Some of these alternatives may be illusory in practice because Russia has unconditionally consented only to arbitration before the Additional Facility and under the UNCITRAL Rules.[500]

The Russia BIT also includes a requirement that any arbitration under this provision take place in a State that is a party to the New York Convention[501] and an obligation to provide for the enforcement of awards under this provision in the parties' own territories.[502] Similar provisions

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484. Russia BIT, *supra* note 71, Protocol, para. 6.
485. *Id.* art. I(1)(e) and Protocol, para. 3.
486. Poland BIT, *supra* note 62, art. I(1)(e).
487. Czech and Slovak BITs, *supra* note 67, art. II(10).
488. Kazakhstan BIT, *supra* note 68, art. II(10).
489. Romania BIT, *supra* note 70, art. I(1)(e).
490. Armenia BIT, *supra* note 64, art. II(10).
491. Bulgaria BIT, *supra* note 65, art. II(10).
492. Kyrgyzstan BIT, *supra* note 69, art. II(10).
493. For illustrative lists, *See supra* text accompanying notes 327 and 437.
494. Russia BIT, *supra* note 71, art. VI(3)(a).
495. Poland BIT, *supra* note 62, art. IX(3)(a).
496. Czech and Slovak BITs, *supra* note 67, art. VI(3)(a).
497. Argentina BIT, *supra* note 63, art. VII(3)(a).
498. Bulgaria BIT, *supra* note 65, art. VI(3)(a).
499. 1992 draft, *supra* note 40, art. VI(3)(a).
500. Russia BIT, *supra* note 71, art. VI(3)(b).
501. *Id.* art. VI(3)(d).
502. *Id.* art. VI(3)(e).

appear in the BITs based on the 1992 draft as well as in the BITs with Panama,[503] Haiti,[504] Poland,[505] Argentina,[506] Bulgaria,[507] and the Czech and Slovak Republics.[508]

7. Essential Security Interests Exception

One unique provision of the Russia BIT is quite troubling. Specifically, the protocol confirms the parties' mutual understanding that the security interests exception[509] is "self-judging."[510]

The security interests exception exempts from BIT obligations any measure necessary to further a party's essential security interests. It is similar to standard language found in the modern FCNs[511] and traces its origin to a provision of the GATT.[512]

The United States argued in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua [513] that essential security interest exceptions are inherently "self-judging," by which the United States meant that a party's invocation of such an exception is not subject to review. The International Court of Justice rejected that argument and it appeared for a time that the United States had abandoned its position in that regard.[514]

The Russia BIT protocol provision, however, resurrects the U.S. interpretation, at least insofar as the Russia BIT is concerned. A self- judging provision, of course, is considerably broader than one measured by an objective standard. The Russia BIT language thus appears to open a potentially large loophole in the Russia BIT.[515] Further, to the extent that the self-judging language reflects the implicit understanding between the parties in other BITs, the loophole would appear in those other BITs as well.[516]

G. *Argentina*

The Argentina BIT in most respects follows rather closely the 1991 draft. A few provisions, however, are novel.

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503. Panama BIT, *supra* note 43, art. VII(3)(d).
504. Haiti BIT, *supra* note 49, art. VII(3)(d).
505. Haiti BIT, *supra* note 49, art. VII(3)(d).
506. Argentina BIT, *supra* note 63, arts. VII(5) and VII(6).
507. Bulgaria BIT, *supra* note 65, art. VI(3)(d) and (e).
508. Czech and Slovak Republic BITs, *supra* note 67, art. VI(3)(d) and (e).
509. Russia BIT, *supra* note 71, art. X(1).
510. *Id*. Protocol, para. 8.
511. See, e.g., Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, art. XXI(1)(d), 4 U.S.T. 2063; Treaty of Friendship, Commerce, and Navigation, Mar. 27, 1956, U.S.-Neth., art. XXII(1)(d), 8 U.S.T. 2043.
512. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. XXXII(b), 61 Stat. A3, TIAS NO. 1700, 55 U.N.T.S. 187.
513. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 4, 14, 116, (Judgment on the Merits).
514. See Vandevelde, *supra* note 101.
515. *Id.*
516. *Id.*

1. Definition of Territory

The BIT model negotiating texts, after about mid-1981, have not defined the territory of a party because U.S. negotiators believe that no satisfactory definition is possible.[517] The term is of some importance, however, because the BITs generally protect investment only if it is investment of nationals and companies of one party in the territory of the other party.

The Argentina BIT includes a definition of the term[518] that is loosely based on a definition in a U.S. tax treaty with Indonesia.[519] Specifically, the Argentina BIT provides that the term:

> "territory" means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.[520]

The reference to the Convention on the Law of the Sea is noteworthy because the United States has not signed the Convention, although it regards it as declaratory of customary international law in many respects.[521] The Romania BIT adopted the same definition of territory as that which appeared in the Argentina BIT.[522]

The Argentina BIT is not the first BIT to define the term territory. The Cameroon BIT defines the term as "all the territory of a Party recognized by international law,"[523] thus adopting the approach used in the Argentina BIT of specifying the body of law by which the term is to be defined, rather than attempting actually to define it.

The Zaire BIT, by contrast, is much more elaborate and attempts, at least in the case of the United States, to describe the limits of territory. The main text of the Zaire BIT initially provides that territory means "all territory" of the respective parties.[524] Additional language in the protocol explains that the territory of Zaire encompasses " a ll Zairian territory within its geographical and political boundaries where its sovereignty is exercised."[525] The territory of the United States encompasses "the separate States, the District of Columbia, and Guam, Puerto Rico, American Samoa, and the Virgin Islands."[526]

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517. See Zaire BIT, *supra* note 45, Letter of Submittal (from Secretary of State George P. Schultz to the President, Feb. 26, 1986).

518. Argentina BIT, *supra* note 63, art. I(a)(f).

519. Convention Between the Government of the United States of America and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, July 11, 1980, art. 3, S. Treaty Doc. No. 100-22, 100th Cong., 2d Sess. (1988).

520. Argentina BIT, *supra* note 63, art. I(a)(f).

521. James L. Malone, *Freedom and Opportunities: Foundations for a Dynamic Oceans Policy*, DEP'T ST. BULL., Dec. 1984, at 76.

522. Romania BIT, *supra* note 70, art. I(1)(f).

523. Cameroon BIT, *supra* note 46, art. I(1)(f).

524. Zaire BIT, *supra* note 45, art. I(f).

525. *Id*. Protocol, para. 7.

526. *Id*. The definition also should be interpreted to include the Commonwealth of the Northern Mariana Islands, which like Puerto Rico is considered a commonwealth of the United States. The Northern Mariana Islands apparently were omitted from the definition because, at the time the Zaire BIT was concluded, they were trust territories covered by the Trusteeship Agreement for the Pacific Islands.

2. Definition of Company of a Party

BIT protections generally apply to investment of nationals or companies of a party. A company of a party typically is defined as a company organized under the laws of that party.[527]

Under the 1991 draft of the model negotiating text, each party reserved the right to deny treaty protection to a company organized under the laws of the other party if nationals of a third country controlled the company, and the company had no "substantial business activities" in the territory of the other party.[528] For example, under this approach Argentina would have reserved the right to deny treaty protection to a company organized under the laws of the United States if third country nationals controlled the company and the company did not have substantial business activities in the United States. Obviously, the purpose of the provision was to prevent companies with no real connection to a BIT party from organizing under the laws of that party merely to obtain treaty protection.

The Argentina BIT broadens this reservation of right to permit a party to deny treaty protection to a company of the other party, if the company is controlled by nationals of one party and does not have substantial business activities in the territory of the other party.[529] For example, Argentina reserves the right to deny treaty protection to a company organized under U.S. law but controlled by Argentine nationals, where that company lacks substantial business activities in the United States.

This change represents a minor departure from prior BIT practice. Under the various model negotiating texts, it had been theoretically possible for a company organized under the laws of one party but controlled by nationals of the other party to claim treaty protection as a company of the first party. The model negotiating texts in use prior to 1984 would have required that nationals of the first party also have a substantial, albeit not controlling, interest in the company.[530] Even that requirement, however, had been abandoned in 1984, thus making it easier for a company owned or controlled by nationals of one BIT party to be treated as a company of the other party and thereby come under the umbrella of BIT protection.[531] Clearly, Argentina wished to limit the ability of its nationals to claim BIT protection against their own government by incorporating under U.S. law.

3. Performance Requirements

Although the Argentina BIT contains the standard performance requirements provision in the main text,[532] the protocol addresses the subject of performance requirements in two further provisions. As previously noted, modifications to the performance requirements provision were not uncommon in the first wave and have appeared in a limited fashion in the second.[533]

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527. *See, e.g.*, 1983 draft, *supra* note 36, art. I(b); 1984 draft, *supra* note 37, art. I(1)(a); 1987 draft, *supra* note 38, art. I(1)(a).

528. 1991 draft, *supra* note 39, art. I(2). A separate clause in the same provision reserved the right of a party to deny treaty protection to a company of the other party if the company is controlled by nationals of a third country with which the denying party does not maintain normal economic relations. This clause was not changed in the Argentina BIT.

529. Argentina BIT, *supra* note 63, art. I(3).

530. Argentina BIT, *supra* note 63, art. I(3).

531. *See, e.g.*, 1984 draft, *supra* note 37, art. I(1)(a); 1987 draft, *supra* note 38, art. I(1)(a).

532. Argentina BIT, *supra* note 63, art. II(5).

533. *See supra* text accompanying notes 400-09.

One provision permits Argentina to maintain existing performance requirements in the automotive sector, with certain conditions.[534] Specifically, Argentina must eliminate such performance requirements within eight years of the treaty's entry into force and must apply them in such a manner as not to place existing investments at a competitive disadvantage, relative to new entrants into the automotive sector. This provision reflected the fact that the Ford Motor Company has a substantial investment in Argentina which it has operated in conformity with past performance requirements. Ford might be placed at a disadvantage if new investors were permitted immediately to operate without regard to such requirements.

A second provision recites the parties' agreement that they will use best efforts to ensure that misinterpretation of the performance requirements provision does not adversely affect Argentina's process of privatizing various industries, such as public utilities.[535] Argentina's concern was that, in privatizing a company, it may wish to impose on the new owners various restrictions on the operation of the investment. For example, a privatized utility might be required to provide certain types of service. Because the United States resists attempting to compile an exhaustive list of what it considers to be performance requirements, Argentina could not be certain that some of these restrictions would not be considered performance requirements. Thus, the protocol language memorializes the fact that the parties discussed this concern during negotiations and shared the expectation that the BIT prohibition on performance requirements would not be interpreted to impede Argentina's planned privatization process.

4. Customs Union Exception

The Argentina BIT modified and clarified the customs union exception contained in the 1991 draft.[536]

The modification requires that the customs union be "regional." The word "regional" had appeared in the 1987 draft [537] as well as in each of the pre-1987 BITs that contained a customs union exception,[538] but was dropped from the 1991 draft. The Argentina BIT, in effect, modifies the 1991 language to track the language used in prior BIT practice.

The clarification was to include a clause specifying that an arrangement could qualify as a regional customs union or free trade area, regardless of "whether such an arrangement is designated as a customs union, free trade area, common market or otherwise."[539] Thus, the Argentina BIT provides explicitly that the substance of the arrangement is controlling, rather than its formal designation, a principle that presumably was implicit in the model negotiating text.

5. GATT Exception

The Argentina BIT does not contain the GATT exception that had first appeared in the Poland BIT and that subsequently had been incorporated in the 1991 draft.[540] Thus, the general MFN provision of the Argentina BIT requires that favorable treatment for investment granted by

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534. Argentina BIT, *supra* note 63, Protocol, para. 9.
535. *Id.* Protocol, para. 11.
536. *Id.* art. II(9).
537. 1987 draft, *supra* note 38, art. II(9).
538. For a listing of such BITs included prior to the 1987 draft, *See supra* notes 148-51.
539. Argentina BIT, *supra* note 63, art. II(9).
540. *See supra* text accompanying notes 181-88.

either party to nationals or companies of any third country under future GATT related agreements be extended to nationals and companies of the other party.

6. Currency Transfers

The currency transfers article of the Argentina BIT follows the 1991 draft with a couple of minor changes of no real significance.[541] One modification is that the illustrative list of transfers covered by the provision is modified slightly so that the reference to "payments made pursuant to a loan agreement" becomes "payments made pursuant to a loan agreement directly related to an investment."[542] Because no transfer is covered unless it is a transfer "related to an investment," this change adds very little, particularly given that the list is not exhaustive in any event.

A second minor modification is the addition of language permitting each party to prescribe procedures for the transfer of currency, provided that such procedures do not impair the rights set forth in the treaty.[543] A procedure which did not impair the rights set forth in the treaty would not be prohibited by the treaty in any event and thus this provision in no way weakens the protections afforded by the BIT.

The protocol contains a novel provision which, in effect, allows an investor in a particular situation to waive the protection of the transfers provision.[544] Under this provision, the parties agree that a U.S. investor and Argentina may agree to modify the right to free transfer of payments related to an investment with respect to that part of an investment financed through a debt-equity conversion program. In no case, however, may Argentina deny to U.S. investors national or MFN treatment with respect to the transfer of returns or of proceeds from the sale or liquidation of such an investment.

In the absence of this provision, nothing in the treaty would have precluded an investor from waiving its right to free transfers. Argentina's obligations under the BIT, however, technically are to the United States. Thus, even where an investor is prepared to forego a protection afforded by the treaty, the United States would retain the right to insist that the protection be afforded. Accordingly, the significance of the protocol provision is that it constitutes consent by the United States to the relinquishment of the right of free transfer in a limited group of cases where the investor involved also consents. This provision was included at the suggestion of the United States as a means of encouraging debt-equity conversions.

7. Investor-to-State Dispute Provision

The negotiation of a BIT with Argentina that contained an investor-to-State dispute provision was a considerable accomplishment, given that Argentina was a longstanding adherent to the Calvo Doctrine and indeed the native land of Dr. Calvo himself. Ultimately, Argentina agreed to the inclusion of an investor- to-State dispute provision without any substantive concessions from the United States. The provision negotiated with Argentina eventually was incorporated almost verbatim in the 1992 draft and is described above.[545]

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541. *See* Argentina BIT, *supra* note 63, art. V.
542. *Id.* art. V(1).
543. *Id.* art. V(2).
544. *Id.*, Protocol, para. 10.
545. *See supra* text accompanying notes 201-53.

One novel provision that was not incorporated into the 1992 draft appears in the protocol.[546] It states that the investor may be required during arbitration to provide evidence of its ownership or control. This, of course, was implicit in all prior BITs. The ownership or control of the investor party is relevant to the tribunal's jurisdiction and like any relevant fact, if contested, it must be established by the party whose claim rests upon the fact.

8. State-to-State Dispute Provision

The Argentina BIT contains minor changes to the State-to-State dispute provision. First, the appointing authority is the Secretary General of the Permanent Court of Arbitration rather than the Secretary General of ICS*Id.*[547] This change apparently reflects the fact that Argentina had not yet adhered to the ICSID Convention and thus did not want to specify a role for an ICSID official. A similar change appears in the Romania[548] and Bulgaria[549] BITs.

The second change was to delete the language authorizing the tribunal to direct one party to pay a greater share of the arbitration costs than the other party. The Argentina BIT replaces that clause with language specifying that the expenses of the arbitration panel shall be borne equally by the parties.[550] Similar language appears in the Bulgaria, [551] Cameroon,[552] Morocco,[553] and Bangladesh[554] BITs.

9. Nonprecluded Measures Provision

The nonprecluded measures provision of the 1991 draft excludes from BIT coverage measures taken by a party necessary to fulfill its obligations with respect to the maintenance or restoration of international peace and security.[555] This language was intended as a reference to a party's obligations under the United Nations Charter. The Argentina BIT contains a provision which makes this meaning explicit.[556] Although fully consistent with the understanding of U.S. BIT negotiators, this language had not appeared in any prior BIT.

10. Relationship with FCN

Another novel provision of the Argentina BIT contains the parties' acknowledgement and agreement that, in the event of any inconsistency between the terms of the BIT and the terms of the 1853 FCN between Argentina and the United States,[557] the terms of the BIT shall control.[558] This is merely a specific application of the general principle of customary international law, codified in

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546. Argentina BIT, *supra* note 63, Protocol, para. 1.
547. *Id.* art. VIII(2).
548. Romania BIT, *supra* note 70, art. VII(2).
549. Bulgaria BIT, *supra* note 65, art. VII(2).
550. Argentina BIT, *supra* note 63, art. VIII(4).
551. Bulgaria BIT, *supra* note 65, art. VII(4).
552. Cameroon BIT, *supra* note 46, art. VIII(7).
553. Morocco BIT, *supra* note 44, art. VII(4).
554. Bangladesh BIT, *supra* note 47, art. VIII(6).
555. 1991 draft, *supra* note 39, art. X(1).
556. Argentina BIT, *supra* note 63, Protocol, para. 6.
557. Treaty of Friendship, Commerce and Navigation, July 27, 1853, U.S.- Arg., 10 Stat. 1005.
558. Argentina BIT, *supra* note 63, Protocol, para. 7.

the Vienna Convention on the Law of Treaties,[559] which states that, in the event of a conflict between two treaties, the later in time prevails.

One practical effect of the subordination of the 1853 FCN to the BIT is to solve a problem that the 1853 FCN had caused in the negotiation of other BITs. Specifically, article IX of the 1853 FCN had granted to Argentine nationals the right of national treatment with respect to ownership of real estate in the United States, the only U.S. treaty to do so. Various of the fifty States, however, have enacted restrictions on alien ownership of real estate.[560] If a BIT granted to nationals of the other party MFN treatment with respect to the right of ownership of real property, then such nationals would have acquired the right of national treatment, thereby creating the possibility that the BIT would have conflicted with some of the State restrictions. Accordingly, the United States had included in the BITs language exempting ownership of real property from the general MFN obligation.[561]

The Argentina BIT explicitly reserves to the parties the right to make exceptions to national treatment with respect to the ownership of real property.[562] In so doing, it overrides the guarantee of national treatment with respect to ownership of real property in the 1853 FCN. Since Argentina no longer has the right to national treatment, other States will not obtain the right through general MFN guarantees in their BITs. This eliminates the potential for conflict between the MFN language of the BITs and State restrictions on the ownership of real property.[563] At the same time, it eliminates the need to exclude ownership of real property from the general MFN provisions of other BITs. However, to prevent a potential conflict between the BITs and State restrictions on alien land ownership, the BITs still must except ownership of real estate from the right of national treatment, and they continue to do so in the annexes.

11. Retroactivity of the BIT

The Argentina BIT addresses explicitly the retroactivity of its provisions. The protocol states that "the provisions of this Treaty do not bind either Party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of this Treaty."[564] This language tracks a provision of the Vienna Convention on the Law of Treaties[565] and thus merely states explicitly the customary rule that would have applied even without the language. Similar language appears in the Romania BIT.[566]

It had been understood, in any event, that BIT-created rules do not apply to events which occur prior to the treaty's entry into force.[567] Indeed, the very purpose of establishing a date on which a treaty enters into force is to fix the time at which treaty rules begin to apply to the actions of the parties.

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559. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, art. 30, U.N.Doc. A/CONF. 39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969).

560. *See* James A. Frechter, Note, *Alien Land Ownership in the United States*, XIV BROOKLYN J. INT'L L. 147 (1988).

561. *See, e.g.*, 1983 draft, *supra* note 36, art. II(3)(a); 1984 draft, *supra* note 37, art. II(1). The exemption from national treatment was effected by placing ownership of real estate in the annex.

562. Argentina BIT, *supra* note 63, Protocol, para. 2.

563. It also eliminates the potential conflict between the 1853 FCN and various state laws.

564. Argentina BIT, *supra* note 63, Protocol, para. 8.

565. Vienna Convention, *supra* note 559, art. 28.

566. Romania BIT, *supra* note 70, Protocol, para. 4.

567. See generally VANDEVELDE, *supra* note 1, at 65-67.

The question whether a treaty is retroactive, however, actually comprises several distinct questions, not all of which are addressed by the Argentina BIT protocol language. One question, for example, is whether the BIT applies to existing investment. All of the model negotiating texts provided that the BIT applies to all investment established before the BIT's entry into force.[568] Many BIT parties sought to exclude existing investment from coverage under the theory that coverage for such investment constituted a "windfall" for the investor.[569] The United States consistently refused, however, to exclude classes of U.S. investment from full or partial BIT coverage.[570] The Argentina BIT does not appear to alter the 1991 draft in this respect. Although the substantive provisions of the BIT do not apply to conduct by the United States or Argentina occurring prior to the BIT's entry into force, those provisions will apply to future conduct by either party with respect to investment existing at the time the treaty enters into force.

Another question is whether the BIT's remedial provisions apply to a dispute already in existence at the time the BIT enters into force. Assuming, for example, that an investment had been expropriated by the host State prior to the BIT's entry into force, and even conceding that the measure of compensation would not be governed by the BIT's substantive provisions, could the investor nevertheless invoke the investor-to-State dispute provision as a remedy for the expropriation? The BITs have traditionally been silent on this question, although the negotiating history of the Panama BIT reflects the assumption of both parties that the BIT's dispute provisions would apply to previously existing disputes, once the BIT entered into force.[571]

H. *Romania*

The Romania BIT follows the 1992 draft, but includes several modifications inspired by the Argentina BIT and other modifications which are characteristic of many Eastern European BITs.

1. Definition of Investment

The Romania BIT adds to its definition of the term "investment" an explicit reference to "concessions to search for, extract or exploit natural resources."[572] It long has been the position of many developed countries that mineral concession agreements could constitute property under international law.[573] Further, the early model negotiating texts explicitly had included, within the definition of investment, "rights to search for or utilize natural resources...." [574] This language had been deleted from the 1984 and subsequent drafts as surplusage. The Romania BIT merely makes explicit that which had been implicit in the BITs negotiated after 1984.

2. Definition of Associated Activities

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568. *See, e.g.*, 1983 draft, *supra* note 36, art. XIII(2); 1984 draft, *supra* note 37, art. XII(1); 1987 draft, *supra* note 38, art. XIII(1).

569. VANDEVELDE, *supra* note 1, at 32-33.

570. *Id.*

571. *Id.* at 66.

572. Romania BIT, *supra* note 70, art. I(1)(a)(v).

573. *See, e.g.*, Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 477-78 (1991); Earnest E. Smith & John S. Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L. L. J. 13 (1984).

574. *See, e.g.*, 1983 draft, *supra* note 36, art. I(c)(vi).

Like the BITs with Poland,[575] Russia,[576] the Czech and Slovak Republics,[577] Kazakhstan,[578] Armenia,[579] Bulgaria,[580] and Kyrgyzstan,[581] the Romania BIT includes a list of additional activities which are to be considered "associated activities" within the meaning of the BIT.[582] The activities are those which traditionally have posed problems for foreign investors in Eastern European countries. The Romania and Russia BITs differ from the other agreements in that, rather than inserting a special separate provision defining these activities as associated activities, the Romania BIT simply includes them in its general definition of that term--a stylistic improvement.

3. Definition of Territory

The Romania BIT includes the definition of territory[583] that had appeared in the Argentina BIT.[584]

4. State-to-State Dispute Provision

As in the Argentina[585] and Bulgaria[586] BITs, the State-to-State dispute provision of the Romania BIT modifies the language of the 1992 draft to provide that the appointing authority shall be the Secretary General of the Permanent Court of Arbitration rather than the Secretary General of ICS*Id.*[587] The Romania BIT also differs from the 1992 draft in its inclusion of a provision explicitly stating that each party is to bear its own costs of arbitration.[588] Such language had been standard in the early model negotiating texts,[589] but had been omitted beginning with the 1984 draft on the grounds that it was implicit.

5. Customs Unions

The Romania BIT contains the standard customs union exception from the 1992 draft.[590] In addition, special language in the protocol states that the customs union exception applies if the economic relationship between a party and a third country includes a free trade area or customs union.[591] The obvious intent is to ensure that an economic (and perhaps political) union that went

575. Poland BIT, *supra* note 62, art. II(8).
576. Russia BIT, *supra* note 71, art. I(1)(e).
577. Czech and Slovak BITs, *supra* note 67, art. II(10).
578. Kazakhstan BIT, *supra* note 68, art. II(10).
579. Armenia BIT, *supra* note 64, art. II(10).
580. Bulgaria BIT, *supra* note 65, art. II(10).
581. Kyrgyzstan BIT, *supra* note 69, art. II(10).
582. Romania BIT, *supra* note 70, art. I(1)(e).
583. *Id.* art. I(1)(f). For a discussion of the definition, *See supra* text accompanying notes 517-26.
584. Argentina BIT, *supra* note 63, art. I(1)(f).
585. *Id.* art. VIII(2).
586. Bulgaria BIT, *supra* note 65, art. VII(2).
587. Romania BIT, *supra* note 70, art. VII(2).
588. *Id.* art. VII(4)(a).
589. *See, e.g.*, 1983 draft, *supra* note 36, art. VIII(7).
590. Romania BIT, *supra* note 70, art. II(9)(a).
591. *id.* Protocol, para. 2.

beyond the traditional definition of a customs union or free trade area fit within this exception in the BIT.

The protocol language does not appear to alter the interpretation that the United States otherwise would have placed on the customs union exception. At the same time, it provides some assurance to Romania that, should it join the European Community or integrate in some form with other Eastern European States or any former Soviet republics, the BIT exception would apply, as long as the arrangement included a customs union or free trade area. The BITs with the Czech and Slovak Republics have similar language.[592]

6. Retroactivity of the BIT

Like the Argentina BIT, the Romania BIT contains language in the protocol which addresses the retroactivity of the agreement.[593] The language is virtually identical to that which appears in the Argentina BIT.[594]

7. Foreign Investment Office

The Romania BIT is accompanied by a side letter dated May 28, 1992, under which Romania agrees to designate an office to assist U.S. nationals and companies in obtaining the full benefits of the treaty. The office is to serve as a "coordinator and problem solver" for U.S. investors experiencing difficulties. The office, in particular, will provide information on investment laws, investment projects, and sources of finance; coordinate with national and local government agencies to facilitate investment and resolve disputes; and assist in the repatriation of profits. The BITs with Poland,[595] Bulgaria,[596] and the Czech and Slovak Republics[597] contain similar provisions.

I. *Kazakhstan*

The Kazakhstan BIT follows the 1992 draft rather closely. One change is that it includes a list of additional activities that are to be considered "associated activities" within the meaning of the BIT.[598] The activities are those which traditionally have posed problems for foreign investors in Eastern European countries. Similar provisions appear in the BITs with Poland,[599] Russia,[600] the Czech and Slovak Republics,[601] Romania, [602] Armenia,[603] Bulgaria,[604] and Kyrgyzstan.[605]

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592. Czech and Slovak BITs, *supra* note 67, Protocol, para. 3.
593. Romania BIT, *supra* note 70, Protocol, para. 4.
594. Argentina BIT, *supra* note 63, Protocol, para. 8. For a discussion of this language, *See supra* text accompanying notes 564-71.
595. Polant BIT, *supra* note 62, Exchange of Letters (Mar. 21, 1990).
596. Bulgaria BIT, *supra* note 65, Exchange of Letters (Sept. 23, 1992).
597. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).
598. Kazakhstan BIT, *supra* note 68, art. II(10).
599. Poland BIT, *supra* note 62, art. II(8).
600. Russia BIT, *supra* note 71, art. I(1)(e).
601. Czech and Slovak BITs, *supra* note 67, art. II(10).
602. Romania BIT, *supra* note 70, art. I(1)(e).
603. Armenia BIT, *supra* note 64, art. II(10).
604. Bulgaria BIT, *supra* note 65, art. II(10).
605. Kyrgyzstan BIT, *supra* note 69, art. II(10).

J. *Armenia*

The Armenia BIT also resembles the 1992 draft, except that it includes the special list of associated activities common to BITs with East European countries and former Soviet Republics.[606]

K. *Bulgaria*

The Bulgaria BIT is based on the 1991 draft, with several deviations generally inspired by the Poland BIT.

1. Definition of Investment

The Bulgaria BIT contains one unique provision. Language in the protocol provides that the term "investment" as used in the treaty shall not apply to loans that were extended prior to January 1, 1992 to the Bulgarian government or to banks owned or controlled by the Bulgarian government and that are subsequently rescheduled in the London Club. [607]

2. Definition of Associated Activities

The Bulgaria BIT includes a list of additional activities considered to be associated activities within the meaning of the treaty.[608] Similar lists appear in the BITs with Poland,[609] Russia,[610] the Czech and Slovak Republics,[611] Romania,[612] Kazakhstan,[613] Armenia,[614] and Kyrgyzstan.[615]

3. Investor-to-State Dispute Provision

The Bulgaria BIT modifies the definition of an investment dispute in a way that does not appear to affect the substance of the rights guaranteed by the 1991 draft. Specifically, the Bulgaria BIT provides that "the denial of an investment authorization shall not in itself constitute an investment dispute unless such denial involves an alleged breach of any right conferred or created by the Treaty."[616] Because under the 1991 draft investment disputes included only disputes involving a breach of a treaty right or the interpretation or application of an investment agreement or authorization, an investment authorization presumably could not give rise to an investment dispute until such time as the authorization was granted. Denial of an investment authorization

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606. *See supra* text accompanying notes 437-44.

607. The London Club refers to the process whereby sovereign debt to commercial banks is rescheduled or refinanced. *See generally* Richard W. Edwards, Jr., *Is an IMF Stand-by Arrangement a "Seal of Approval" on Which Other Creditors Can Rely?*, 17 N.Y.U. J. INT'L L. & POL. 573 (1985); Karen Hudes, Coordination of Paris and London Club Rescheduling, 17 N.Y.U. J. INT'L L. & POL. 553 (1985).

608. Bulgaria BIT, *supra* note 65, art. II(10).

609. Poland BIT, *supra* note 62, art. II(8).

610. Russia BIT, *supra* note 71, art. I(1)(e).

611. Czech and Slovak BITs, *supra* note 67, art. II(10).

612. Romania BIT, *supra* note 70, art. I(1)(e).

613. Kazakhstan BIT, *supra* note 68, art. II(10).

614. Armenia BIT, *supra* note 64, art. II(10).

615. Kyrgyzstan BIT, *supra* note 69, art. II(10).

616. Bulgaria BIT, *supra* note 65, art VI(1)(c).

could give rise to a dispute under the 1991 draft only if it violated some provision of the treaty, such as the provision guaranteeing national and MFN treatment with respect to the right to establish investment. Thus, the Bulgaria BIT language does not appear to modify in substance the 1991 draft.

A parallel, but different, provision appears in the Poland BIT. The Poland BIT, unlike the Bulgaria BIT, reserved for each party the right to deny national and MFN treatment with respect to the right to establish investment[617] and then provided in addition that a denial of an investment authorization would not constitute an investment dispute.[618] Thus, the counterpart provision in the Poland BIT was a substantive departure from the model negotiating texts.

The Bulgaria BIT follows the Poland BIT[619] in authorizing the investor potentially to invoke any one of four conciliation or arbitration mechanisms: (1) ICSID; (2) the Additional Facility; (3) ad hoc arbitration under the UNCITRAL rules; or (4) ad hoc arbitration under the rules of any other arbitral institution mutually agreed upon by the parties.[620] The same set of choices was provided for in the BITs with Argentina,[621] Russia[622] and the Czech and Slovak Republics[623] as well as in those BITs based on the 1992 draft. As in the case of these other BITs, however, some of the choices may be illusory because the Bulgaria BIT constitutes unconditional consent only to use of the Additional Facility and to ad hoc arbitration under the UNCITRAL rules.[624] The BIT also will constitute consent to proceedings before ICSID if Bulgaria becomes a party to the ICSID Convention.[625] Like the Poland BIT,[626] the Bulgaria BIT provides that, in the event of arbitration under UNCITRAL rules, the appointing authority shall be the Secretary General of ICS *id.*[627]

The Bulgaria BIT again follows the Poland BIT[628] in containing additional provisions to ensure the enforceability of awards under the investor-to-State dispute provision. These additional provisions: (1) require the place of any arbitration to be in a country which is a party to the New York Convention;[629] (2) set forth an undertaking by each party to carry out without delay the provisions of any award resulting from arbitration under the investor-to-State dispute provision;[630] and (3) mandate that each party provide for the enforcement in its territory of any such award.[631]

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617. Poland BIT, *supra* note 62, art. II(1).
618. *id.* art. IX(1).
619. *id.* art. IX(3).
620. Bulgaria BIT, *supra* note 65, art. VI(3)(a).
621. Argentina BIT, *supra* note 63, art. VII(3)(a).
622. Russia BIT, *supra* note 71, art. VI(3)(a).
623. Czech and Slovak BITs, *supra* note 67, art. VI(3)(a).
624. Bulgaria BIT, *supra* note 65, art. VI(3)(b).
625. *id.* art. VI(3)(b)(i).
626. Poland BIT, *supra* note 62, art. IX(3)(b)(ii).
627. Bulgaria BIT, *supra* note 65, art. VI(3)(b)(iii).
628. Poland BIT, *supra* note 62, art. IX(3)(b).
629. Bulgaria BIT, *supra* note 65, art. VI(3)(d).
630. *Id.* art. VI(3)(e).
631. *Id.*

Similar provisions also appeared in BITs with Haiti,[632] Panama,[633] Poland,[634] Russia,[635] the Czech and Slovak Republics,[636] and Argentina,[637] and in the BITs based on the 1992 draft.

4. State-to-State Dispute Provision

The State-to-State dispute provision of the Bulgaria BIT modifies the language of the 1991 draft in some minor respects. First, the appointing authority shall be the Secretary General of the Permanent Court of Arbitration, rather than the Secretary General of *ICS id.*[638] The Argentina[639] and Romania[640] BITs included a similar change. Second, the Bulgaria BIT does not authorize the tribunal to require one party to pay a higher proportion of the costs of the arbitration and, indeed, provides that such costs shall be borne equally by the parties.[641] A similar change appears in the Argentina, [642] Cameroon,[643] Morocco,[644] and Bangladesh[645] BITs. The Bulgaria BIT also states explicitly that each party is to bear the costs of its own representation,[646] a matter that had been left implicit in the 1991 draft.

5. Foreign Investment Office

The Bulgaria BIT contains an exchange of notes confirming Bulgaria's agreement to create an office to assist U.S. investors in deriving the full benefits of the treaty. Among the specific duties of the office will be providing information on business regulations, investment projects, and sources of finance; coordinating with Bulgarian agencies to facilitate investment and resolve disputes; and assisting U.S. investors experiencing difficulties with repatriating profits or obtaining foreign exchange. The BITs with Poland,[647] Romania,[648] and the Czech and Slovak Republics[649] have similar provisions.

L. *Kyrgyzstan*

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632. Haiti BIT, *supra* note 49, art. VII(3)(d), (e). The Haiti BIT does not include the understanding to carry out the award without delay.
633. Panama BIT, *supra* note 43, art. VII(3)(d). The Panama BIT includes only the requirement that the parties provide for the enforcement of the award in their territory.
634. Poland BIT, *supra* note 62, art. IX(3)(d), (e).
635. Russia BIT, *supra* note 71, art. VI(3)(d), (e).
636. Czech and Slovak BITs, *supra* note 67, art. VI(3)(d), (e).
637. Argentina BIT, *supra* note 63, art. VII(5), (6).
638. Bulgaria BIT, *supra* note 65, art. VII(2).
639. Argentina BIT, *supra* note 63, art. VIII(2).
640. Romania BIT, *supra* note 70, art. VII(2).
641. Bulgaria BIT, *supra* note 65, art. VII(4).
642. Argentina BIT, *supra* note 63, art. VIII(4).
643. Cameroon BIT, *supra* note 46, art. VIII(7).
644. Morocco BIT, *supra* note 44, art. VII(4).
645. Bangladesh BIT, *supra* note 47, art. VIII(6).
646. Bulgaria BIT, *supra* note 65, art. VII(4).
647. Poland BIT, *supra* note 62, Exchange of Letters (Mar. 21, 1990).
648. Romania BIT, *supra* note 65, Exchange of Letters (May 28, 1992).
649. Czech and Slovak BITs, *supra* note 67, Exchange of Letters (Oct. 22, 1991).

The Kyrgyzstan BIT adheres very closely to the 1992 draft. It includes a list of associated activities that traditionally have posed problems for investors in Eastern Europe and the Soviet Union, similar to that which appears in the other BITs with former Soviet republics or East European countries.[650] Additionally, it makes some minor stylistic changes to the expropriation article.[651]

CONCLUSION

The second wave of BITs reflects the considerable continuity and consistency in the program. After more than ten years of negotiation and twenty-three signed agreements, the BIT program has changed little from the original conception.

All of the major provisions of the early model negotiating texts remain intact. The United States continues to refuse to compromise on the issues of compensation for expropriation and the right of investors to binding, third- party arbitration of investment disputes.

Although compromises on the principles of national and MFN treatment have been made, such compromises were anticipated from the inception of the program and, particularly in the case of national treatment, the BIT was structured to accommodate such compromises. Most compromises on other important provisions, principally on the right of free transfer, were made relatively early in the program and subsequent compromises on such provisions have departed little from those early precedents.

The continuity is all the more remarkable, given the phenomenal changes in the world that have taken place during the decade between 1982 and 1992, including the collapse of the Soviet empire and the decline of the United States as a net exporter of capital. The collapse of the Soviet empire by and large has been favorable to the BIT program. Not only did this eliminate the principal alternative model of economic organization to the free-market model underlying the BIT, but it also has resulted in the emergence of a large number of States seeking a major influx of foreign direct investment. The transformation of the U.S. economy, by contrast, generally should disfavor the BIT program because it creates political pressure for a protectionist policy in lieu of the BIT's free market approach. Thus far, however, the rise of protectionist sentiment has had no clearly discernible impact on BIT negotiations. Whether it has an impact on the ability of the United States to abide by BIT obligations remains to be seen.

Yet, the second wave of negotiations is not without its distinctive features. By far the most significant is an erosion of the original policy of using the BITs to take investment matters out of the politically driven realm of foreign policy, both to protect foreign policy from the disruptive effect of private investment disputes and to ensure that U.S. investment abroad had legal protection that would be to some extent insulated from the vagaries of foreign policy. The result of this erosion has been twofold: a greater willingness to use BITs as political symbols and some modifications in the BIT terms themselves.

One such modification to the BITs is of special importance. The decision by the United States to characterize the essential security interests exception as self-judging has opened a potentially large loop-hole in the BITs, although the number of BITs in which the language must be regarded as self-judging remains unclear.[652]

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650. *See supra* text accompanying 485-93.
651. Kyrgyzstan BIT, *supra* note 69, arts. III(1), (2).
652. *See supra* text accompanying notes 509-16.

Another distinctive feature of the second wave has been the program's infiltration of geographic areas previously closed to the BITs. Whereas the Soviet bloc once represented a formidable ideological foe of the BIT program, the former members of that bloc now represent the most fertile source of new BIT partners. Similarly, although U.S. BIT negotiators have had discussions with Latin American states from the inception of the program, it has not been until the second wave that a strong adherent of the Calvo doctrine, Argentina, signed a BIT.

A newly emerging feature of the second wave has been the increased regionalization of investment policy and the concomitant move away from the MFN standard. All of the BITs concluded after 1987 permit exceptions to the MFN obligations of the BIT attributable to membership in a customs union or free trade area. Further, the BITs based on the 1991 or 1992 drafts allow exemptions from the general MFN obligations for concessions made in the Uruguay Round and allow the parties unilaterally to exclude entire sectors of their economies from the treaty's general MFN obligations simply by listing the sectors in the annex. This represents a considerable departure from prior practice, which had permitted derogations from the general MFN requirement only where the parties specially agreed to such derogations in the treaty text or the annex.

The prognosis for the BIT program is excellent. It has produced more agreements in ten years of negotiation than the post-war FCN program produced in twenty. The BITs offer more and stronger protections for investment than any prior U.S. treaty program, and BITs have been concluded with many developing or formerly communist countries that historically had opposed the free-market regime represented by the BITs.

Perhaps the most important question still to be resolved is how much impact the BITs will have in practice. Unfortunately, much of the impact may be impossible to detect or measure. Host States that are deterred by BIT provisions from taking actions that would impair investment can hardly be expected to advertise that fact. The utility of the BITs will be most visible where their dispute provisions are used to obtain relief for an injured investor. Yet, the more effective the BIT as a preventive instrument, the less investors will need to invoke the dispute provisions. In short, the failures of the BIT program will be far more visible than its successes. In the end, the real contribution of the BIT program to investment protection may never be known.