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BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries

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The negotiation of bilateral investment treaties, commonly known as BITs, has been quantitatively one of the more active areas of public international law-making during the last three decades. West Germany and Pakistan signed the first BIT in 1959.[1] By 1989 over three hundred BITs had been concluded,[2] and their signatories included all of the world's principal capital-exporting states and approximately eighty developing nations. Thus, in thirty years, the nations of the world fashioned an instrument of public international law to create rules for private foreign investments, an area that, despite western nations' claims to the contrary,[3] has few generally accepted principles of customary international law.[4]

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1. Treaty for the Protection of Investment, Nov. 25, 1959, West Germany-Pakistan, 457 U.N.T.S. 23.

2. For a listing of 309 bilateral investment treaties concluded through Dec. 31, 1988, see Pappas, *References on Bilateral Investment Treaties*, 4 ICSID REV.-FOREIGN INVESTMENT L.J. 189, 194–203 (1989). For a collection of BITs, see generally INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT PROMOTION AND PROTECTION TREATIES (1983).

3. *E.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

4. In 1970 the International Court of Justice, in the well-known case of *Barcelona Traction Company* (Belg. v. Spain), stated:

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

1970 I.C.J. 3, 46–47.

Although a BIT binds only the two signatory states, the general effect of the BIT movement has been to establish an increasingly dense network of treaty relationships between capital-exporting states and developing countries, a trend that appears likely to continue, and indeed accelerate, in the future. The Third World's increasing need for capital, its lack of other financial alternatives, and its growing willingness to accept foreign investment will undoubtedly lead it to sign many more BITs in the years ahead. As the nations of Eastern Europe seek to attract foreign capital, they too may conclude BITs with capital-exporting states. This article examines the BIT phenomenon, the process by which it has come about, the substantive rules it has created, and the effect it has had on foreign investment transactions.

I. History of the BIT

Bilateral commercial treaties have been a traditional method of facilitating trade between states. Since its earliest days, the United States has made a large number of such agreements, generally known as treaties of friendship, commerce, and navigation,[5] and their geographic spread has reflected the expansion of American foreign trade.[6] Although these early treaties were intended to facilitate trade and shipping, they occasionally contained provisions affecting the ability of one country's nationals to do business or own property in the territory of the other state. After World War I, the United States' treaties of friendship, commerce, and navigation increasingly dealt with investment abroad by securing agreement with other states on the treatment to be accorded U.S. nationals with respect to the establishment of businesses, the protection of American-owned property from arbitrary or discriminatory action, the mechanisms for the settlement of disputes, and the protection of patents and trademarks.

With the great expansion in U.S. foreign investment following World War II, the United States Government undertook a program to conclude a network of bilateral treaties of friendship, commerce, and navigation that, in addition to other commercial matters, specifically sought to facilitate and protect U.S. direct investments abroad.[7] From 1946 until 1966 the United States signed approximately twenty-two such treaties.[8] This effort soon lost momentum, however, as

5. *See* R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960). For a history of U.S. treaties of friendship, commerce, and navigation (FCN), see generally Walker, *Modern Treaties of Friendship Commerce and Navigation*, 42 MINN. L. REV. 805 (1958).

6. Thus, the United States first made bilateral commercial treaties with Western Europe, then with Latin America, later with Asia, and still later with Africa. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203–206 (1988).

7. For a discussion of the history of United States bilateral treaties by the United States Supreme Court, see Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

8. Note, *Developing a Model Bilateral Investment Treaty*, 14 LAW & POL'Y INT'L BUS. 273, 276 (1983). As of 1981, FCN treaties were in force between the United States and approximately

developing countries, increasingly skeptical of the benefits that they might derive from unregulated foreign investment, demonstrated growing reluctance to make the types of guarantees requested by the United States Government to protect investments by American nationals.[9]

A new and important phase in the historical development of the BIT began on the eve of the 1960s, as individual European countries undertook to negotiate bilateral treaties that, unlike previous commercial agreements, dealt exclusively with foreign investment and sought to create a basic legal framework to govern investments by nationals of one country in the territory of the other country. The modern BIT was thus born.

Germany, which had lost all of its foreign investments as a result of its defeat in World War II, took the lead in this new phase of bilateral treaty making. After concluding the first such agreement with Pakistan in 1959, Germany proceeded to negotiate similar treaties with countries throughout the developing world, and today it numerically remains the leader, having signed nearly seventy BITs.[10] Switzerland, France, Italy, the United Kingdom, the Netherlands, and Belgium followed in a relatively short time. By the beginning of 1980, European countries had concluded approximately 150 BITs with a broad array of developing countries.[11] The reason for the greater success of the European programs, as compared to earlier American efforts, is not completely clear, but it may lie in the fact that the European countries were less demanding than was the United States with respect to guarantees on such matters as free convertibility of local currency, abolition of performance requirements, and protection against expropriation. Moreover, the special relationship between European countries and their former colonies may have predisposed some newly independent nations to look favorably on concluding investment treaties with their previous colonial rulers.

Encouraged by the experience of the Europeans, the United States in 1981 launched its own program to negotiate specific BITs with developing countries.[12] By 1986 the United States had signed ten such treaties, and President Reagan submitted them in that year for Senate approval. Concerns in the Senate about the

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fifty foreign countries. For a listing of FCN treaties in force, prepared by the United States Department of State, see 20 I.L.M. 565 (1981).

9. Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR L. & COM. 969, 990–91 (1985).

10. UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 90–91 (1988) [hereinafter BILATERAL INVESTMENT TREATIES].

11. INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL TREATIES FOR INTERNATIONAL INVESTMENT (1980).

12. *See* Coughlin, *The U.S. Bilateral Investment Treaty: An Answer to Performance Requirements?*, in REGULATING THE MULTINATIONAL ENTERPRISE: NATIONAL AND INTERNATIONAL CHALLENGES 136–37 (B. Fisher & J. Turner eds. 1983); *see also* Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105, 110 (1986). *See generally* Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985).

effect of the treaties on the United States' ability to take action to protect its national security delayed ratification for a time. But ultimately, in late 1988, the Senate approved, and President Reagan subsequently signed, eight of these treaties with the proviso that "either Party may take all measures necessary to deal with any unusual and extraordinary threats to national security."[13] The eight countries with which the United States has concluded BITs as of January 1, 1990, are Senegal,[14] Zaire,[15] Morocco,[16] Turkey,[17] Cameroon,[18] Bangladesh,[19] Egypt,[20] and Grenada.[21] The Senate deferred consideration of the signed BITs with Haiti and Panama for political reasons. Negotiations are continuing with other countries.

As certain non-Western countries have become capital-exporting states, they too have negotiated bilateral treaties to create a legal framework for their investments with specific foreign countries. Kuwait,[22] for example, has signed agreements with Tunisia,[23] Morocco,[24] and Pakistan,[25] and Japan has concluded BITs with Egypt,[26] Sri Lanka,[27] and China.[28] Although the usual BIT is between a

13. 34 CONG. REC. S16,940 (daily ed. Oct. 20, 1988). The President signed the eight treaties on Dec. 6, 1988.

14. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Dec. 6, 1983, United States-Senegal, S. TREATY DOC. No. 99-15, 99th Cong., 2d Sess. (1986).

15. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Aug. 3, 1984, United States-Zaire, S. TREATY DOC. No. 99-17, 99th Cong., 2d Sess. (1986) [hereinafter United States-Zaire Treaty].

16. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, July 22, 1985, United States-Morocco, S. TREATY DOC. No. 99-18, 99th Cong., 2d Sess. (1986).

17. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Dec. 3, 1985, United States-Turkey, S. TREATY DOC. No. 99-19, 99th Cong., 2d Sess. (1986), *reprinted in* 25 I.L.M. 85-101 (1986) [hereinafter United States-Turkey Treaty].

18. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Feb. 26, 1986, United States-Cameroon, S. TREATY DOC. No. 99-22, 99th Cong., 2d Sess. (1986).

19. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Mar. 12, 1986, United States-Bangladesh, S. TREATY DOC. No. 98-23, 99th Cong., 2d Sess. (1986).

20. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Sept. 29, 1982, with a Related Exchange of Letters signed Mar. 11, 1985, United States-Egypt, S. TREATY DOC. No. 99-13, 99th Cong., 2d Sess. (1986), *reprinted in* 21 I.L.M. 927 (1982); Supplementary Protocol, Mar. 11, 1986, S. TREATY DOC. No. 99-24, 99th Cong., 2d Sess. (1986).

21. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, May 2, 1986, United States-Grenada, S. TREATY DOC. No. 99-25, 99th Cong., 2d Sess. (1986) [hereinafter United States-Grenada Treaty].

22. *See generally* Salacuse, *Arab Capital and Middle Eastern Development Finance*, 14 J. WORLD TRADE L. 283 (1980).

23. Treaty between Kuwait and Tunisia, Sept. 14, 1973.

24. Treaty between Kuwait and Morocco, Apr. 3, 1980.

25. Treaty between Kuwait and Pakistan, Mar. 17, 1983.

26. Treaty between Japan and Egypt, Jan. 28, 1977.

27. Agreement Concerning the Promotion and Protection of Investments, Mar. 1, 1982, Japan-Sri Lanka, *reprinted in* 21 I.L.M. 963 (1982) [hereinafter Japan-Sri Lanka Treaty].

28. Agreement Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1988, Japan-China, *reprinted in* 28 I.L.M. 575 (1989) [hereinafter Japan-China Treaty].

capital-exporting state and a developing country, occasionally two developing countries or two developed countries also make BITs. An example of the former is the BIT between Singapore and Sri Lanka.[29] The most notable example of the latter is the United States-Canada Free Trade Agreement,[30] signed in 1988 to create the largest free trade area in the world. Chapter Sixteen of the Agreement[31] in effect constitutes a BIT, dealing with such matters as treatment, monetary transfers, entry, expropriation, and dispute settlement.

The impetus for this flurry of treaty-making activity over the last thirty years has been the strong drive by nationals and companies of certain states to undertake direct foreign investments in other countries and the consequent need to create a stable international legal framework to facilitate and protect those investments. These investors felt that relying on host country law alone subjected foreign investment capital to a variety of risks. Host countries may easily change the law after an investment is made, and host government officials responsible for applying local law may not always act impartially toward foreign investors and their enterprises. Moreover, investors and their home country governments considered that local law in some countries impeded the entry of foreign capital, treated foreign investments in an arbitrary and discriminatory manner, and imposed onerous conditions on the operation of privately owned foreign enterprises. These concerns proved to be more than theoretical, for the 1960s and 1970s witnessed numerous interferences by host governments with foreign investments in their territories.[32]

International law offered foreign investors little effective protection. Not only did customary international law contain no generally accepted rules[33] on the subject, it also lacked a binding mechanism to resolve investment disputes. Moreover, the very nature of the international law governing foreign investment became a matter of serious controversy in the 1970s with the demand by developing countries for the establishment of a New International Economic Order. While capital-exporting countries asserted that customary international law imposed an obligation on the host country to respect a minimum standard of

29. Agreement on the Promotion and Protection of Investments, May 9, 1980, Singapore-Sri Lanka, Treaties Supplement (Singapore), Government Gazette, No. 21, Nov. 28, 1980.

30. United States-Canada Free Trade Agreement, Jan. 2, 1988, *reprinted in* 27 I.L.M. 281 (1988). *See generally* Note, *International Trade,* 29 HARV. INT'L L.J. 572 (1988).

31. United States-Canada Free Trade Agreement, *supra* note 30, arts. 1601–1611, at 373–80.

32. *E.g.*, as of Feb. 28, 1977, the U.S. Department of State estimated that there were 102 existing investment disputes between U.S. nationals and foreign host country governments. BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, REP. NO. 855, DISPUTES INVOLVING U.S. FOREIGN DIRECT INVESTMENTS: FEB. 1, 1975—FEB. 28, 1977. The United Nations identified 875 distinct acts of governmental taking of foreign property in 62 countries during the period 1960–74. Piper, *New Directions in the Protection of American Owned Property Abroad,* 4 INT'L TRADE L.J. 315 (1979).

33. *See supra* note 4.

protection in dealing with foreign investors,[34] many developing countries rejected this view of customary international law. Their position appears to be summarized in article 2(c) of the United Nations Charter of Economic Rights and Duties of States, which provides that each state has the right to nationalize or expropriate foreign property, and that the exercise of this right is not subject to any condition beyond the duty to pay appropriate compensation having regard to all the circumstances.[35] Moreover, article 2(c) also holds that the host country is not required to give foreign companies preferential treatment, and that it has the power to revise and renegotiate contracts it has made with foreign companies. This lack of consensus creates great uncertainty as to the degree of legal protection that an investor might expect under international law.

What is clear under customary international law is that the ability of a foreigner to undertake an investment in the host country is subject exclusively to the sovereignty of the host country. The host country has the right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activity by natural and legal persons, and to control the entry and activity of aliens.[36] Foreign investors and their home countries often consider these sovereign rights as having the potential to create barriers to foreign capital and to limit their freedom to undertake investments in the first place.

Despite various efforts,[37] no multilateral arrangements emerged to supplant the uncertainties of customary international law. Accordingly, western capital-exporting countries sought to conclude bilateral treaties with individual developing states to establish specific legal rules governing investment and economic activities by their nationals in the territories of other states. For their part, many Third World countries have seen such bilateral agreements as a way to promote foreign investment in their territories and have therefore willingly negotiated and ratified them.

It should be noted, however, that important parts of the developing world have thus far refrained from participating in the BIT movement. With one or two exceptions, most of Latin America has yet to sign a BIT, no doubt because of the view embodied in the Calvo doctrine that foreign investors should receive no better

34. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

35. *Report of the Second Committee*, U.N. Doc. A/9946 (1974), and G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

36. A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 40–41 (1962).

37. *E.g.*, the 1948 Draft Charter for the International Trade Organization contained rules on Expropriation but was never ratified. In 1961 the Organization for Economic Cooperation and Development (OECD) adopted the Code of Liberalization of Capital Movements, but it has had no real effect. *See* OECD, CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS (1973).

treatment than nationals. Similarly, some of the larger Third World economies, such as India and Nigeria, have also chosen not to become BIT signatories.

II. The BIT-Making Process

The movement to conclude BITs has been initiated and driven by Western, capital-exporting states. Their primary objective has been to create clear international legal rules and effective enforcement mechanisms to protect investment by their nationals in the territories of foreign states. The essence of this protection is to defend the investment and the investor from exercises of state power by host governments with respect to such matters as expropriation, treatment, transfer of currency abroad, and restrictions on operations. These treaty rules and enforcement mechanisms are intended to supplant local legislation and institutions and also to avoid disputes over the content and applicability of customary international law. A secondary objective of industrialized countries has been to facilitate the entry of their investments by inducing other states to remove impediments in their regulatory systems.

The primary objective pursued by a developing country in negotiating a BIT is to encourage investment and increase the amount of foreign capital flowing to its territory. How does a BIT encourage investment? The basic assumption upon which this aspect of the BIT rests is that a bilateral treaty with clear, enforceable rules to protect the foreign investor reduces the risks that the investor would otherwise face, and that a reduction in risk, all other things being equal, encourages investment. Developing countries have sometimes entered into BIT negotiations with the expectation that the capital-exporting country would take affirmative measures to encourage its nationals to invest in the developing country—an expectation no doubt fostered by the word "encouragement" appearing in the titles of most draft treaties. Capital-exporting states, however, have steadfastly refused to agree to any provision obligating them to encourage or induce their nationals to invest in the foreign state. On the contrary, many BITs have terms that encourage the host country to create favorable investment conditions in its territory. Other reasons besides hopes for increased investment may prompt a developing country to sign a BIT. Signing a bilateral treaty may be a condition to securing other benefits, such as participation in the capital-exporting country's foreign investment insurance program or obtaining increased political and economic support.

The goals of the capital-exporting state and those of the capital-importing state often differ when they negotiate a BIT. The primary objective of the capital-exporting state is to protect present and future investment by its nationals, while the basic goal of the capital-importing state is to encourage future investment. This duality of objectives is reflected in the title of many BITs: "Treaty Concerning the Reciprocal *Encouragement* and *Protection* of Investments" (emphasis supplied). While the objectives of encouragement and protection are compatible in theory, developed countries tend to stress the former and developing countries the latter. This difference in emphasis can affect the negotiating process significantly.

In theory and in law, the objective of a bilateral treaty is to encourage and protect investment in both countries; in fact, in the case of a BIT between a developing nation and an industrialized state, the industrialized country will be the source, and the developing country will be the recipient, of virtually all investments undertaken. Indeed, many developing countries, desperately short of capital, would strongly oppose any measure that encouraged their own nationals to invest their capital abroad, rather than at home. It is for this reason, no doubt, that the titles of certain BITs refer to "Encouragement and Reciprocal Protection of Investments,"[38] rather than the more common designation, "Reciprocal Encouragement and Protection of Investments."

Having determined the need for treaty protection for their investors abroad, individual capital-exporting countries did not proceed immediately to negotiate BITs with developing nations. Instead, they first devoted considerable time and effort to the preparation of what they call a "model treaty," "prototype treaty," or "draft treaty," to serve as a basis for their negotiations with individual developing countries. Preparing the draft treaty usually took significant time and normally involved intensive consultation with various organizations, including relevant government agencies and representatives of the private sector. For example, preparation of the U.S. model treaty took nearly four years.[39] For capital-exporting states, which without exception have been the ones to initiate negotiations, their model or prototype treaties are basic and essential elements in their programs to conclude BITs.

The prototype treaty serves several purposes. First, its preparation is an occasion for capital-exporting states to study the entire question of investment protection, to consult with interested governmental and private sector organizations, and to formulate a national position on the question. The government emerges from this process with a firm idea of the kind of treaty that would be acceptable to various constituencies, knowledge that is essential if a treaty, once negotiated, is to secure the approval and ratification of the home country authorities. Second, since the capital-exporting country contemplates negotiating BITs with many developing countries, it sees the prototype as an efficient means of communicating to those countries a concrete idea of the type of treaty that the capital-exporting state seeks. Thirdly, to the extent possible, a capital-exporting state usually wants relative uniformity in its BITs with various developing countries. Starting all negotiations with the same draft treaty is a way to attain that goal.

38. *E.g.*, Japan-China Treaty, *supra* note 28; Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Oct. 1, 1984, Dominica-West Germany, 2 *Bundesgesetzblatt*, No. 36, at 1170 (Nov. 13, 1985).

39. Vandevelde, *supra* note 6, at 210.

An additional motivation for the preparation of a prototype is that it gives the capital-exporting state a negotiating advantage, since the party who controls the draft usually controls the negotiation. By preparing a draft BIT that becomes the basis of discussion, the capital-exporting country has, in effect, determined the agenda of the negotiation and has established the conceptual framework within which bargaining will take place. The developing country, at least at the outset, is placed in a position of merely reacting to the draft.[40]

After completing the preparation of the prototype, a capital-exporting state makes contact, often on an informal basis, with developing countries to determine their interest in concluding a BIT. When selecting countries to approach for an indication of interest, a developed country considers a variety of factors, including the state of friendly diplomatic relations between the two countries, the extent to which its nationals have already invested in the developing country in question, whether their nationals can be expected to invest in the host country in the future, and finally, the extent to which the potential host country's existing economic policies are conducive to foreign private investment.

If a developing country decides to enter into BIT negotiations with a capital-exporting state, it too must engage in a consultative process among various government agencies and representatives of its private sector to formulate its own negotiating position. Often the consultative process is accomplished by creating a team of representatives to carry on the negotiations. Inevitably, the views of individual negotiating team members may differ on many questions with respect to the proposed BIT. For example, officials of the Central Bank normally oppose treaty obligations that increase demands on the country's foreign exchange reserves. With a different viewpoint, representatives of the government's investment promotion agency stress the importance of securing new investment for the country and therefore often urge quick acceptance of the proposed BIT with as little change as possible.

A BIT purports to create a symmetrical legal relationship between the two states, for it provides that either party may invest under the same conditions in the territory of the other. In reality, an asymmetry exists between the parties to most BITs since one state will be the source and the other the recipient of virtually any investment flows between the two countries. This asymmetry conditions the dynamics of the BIT negotiation. Recognizing that the BIT essentially defines the developing country's obligations toward investment from the developed country, the developing country tends to negotiate obligations that are general rather than specific, vague rather than precise, and subject to exceptions rather than absolute. On the other hand, capital-exporting countries seek guarantees of protection that are precise and all-encompassing. Thus, for example, a capital-exporting country will want the treaty to guarantee investors the

40. For a discussion of this negotiating problem, see generally Salacuse, *Your Draft or Mine?*, 5 NEGOTIATION J. 337 (1989).

right to transfer revenues and capital from an investment in all cases. In contrast, a developing country will try to negotiate exceptions in appropriate situations, so that the transfer obligation will not apply, for example, if the country is suffering balance of payment difficulties. Generally, negotiations that successfully result in an agreement do not depart significantly from the capital-exporting state's model.

III. The BIT's Substantive Provisions

The basic elements of all BITs are similar and relatively limited in number.[41] While the precise nature of the host country's obligations may differ from treaty to treaty, virtually every BIT addresses the following issues:

A. Scope of Application of the BIT;
B. Conditions for the Entry of Foreign Investment;
C. General Standards of Treatment;
D. Monetary Transfers;
E. Operational Conditions of the Investment;
F. Protection Against Dispossession;
G. Compensation for Losses from Armed Conflict or Internal Disorder; and
H. Settlement of Disputes

Each issue is considered briefly.

A. Scope of Application of the BIT

A key element in any BIT is its scope of application: the investors and investments that benefit from its provisions. The principles on scope of application are generally found in the treaty provisions defining "investments," "nationals," "companies," and "territory" of the contracting parties. Recognizing that the concept of "investment" has no fixed meaning and is constantly evolving, most recent BITs have given the term a broad, open-ended definition by listing particular types of investments (e.g., moveable and immovable property, shares in companies, industrial property rights, business concessions, and so forth) while stating that the listing is not exclusive.[42]

The BIT's definition of investment also has a time dimension, and this element is often the subject of disagreement during negotiations. Specifically, do the rights and treatment granted to "investments" include investments made before, as well as after, the conclusion of the BIT? Capital-exporting countries naturally want the treaty to protect all investments made by their nationals and companies, regardless of the time when they were made. For example, the U.S. prototype

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41. For a discussion of various BIT treaty provisions, see generally Bilateral Investment Treaties, *supra* note 10.

42. *See, e.g.*, Agreement on the Mutual Protection of Investments, July 15, 1978, Sweden-Egypt, art. 1, 1979 S.V.O. 1.

provides: "[The treaty] shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter."[43]

Developing countries, on the other hand, sometimes seek to limit the BIT to future investment only. Viewing a BIT as an investment mechanism, they see little purpose in granting an incentive for investments already in the country. Moreover, such prior investments might not have received approval had the authorities realized that the investments' rights and treatment later would be expanded by treaty. For example, if the treaty increased the currency transfer rights of existing projects, this change might place a new and unexpected burden on the host country's foreign exchange reserves. A counterargument to this position is that existing foreign investors in the country are a potential source of new investment, and that to deny them coverage for their "old" investments might reduce their confidence in the host country's investment climate. In any event, most BITs do cover both existing and future investment; however, a few specifically limit coverage to investments at the time the treaty is made. A compromise position, found particularly in some of the Federal Republic of Germany's treaties,[44] provides that the BIT will cover existing investments on the condition that the capital-exporting country makes a special request, and the host government approves such request.

Determining which investors will be covered by the BIT is also an important issue, an issue that also reveals the asymmetry in the relationship between the two countries. A capital-exporting country will generally seek broad coverage encompassing as many of its nationals as possible, while a capital-importing state will usually seek a more limited scope. In particular, capital-importing states are normally reluctant to grant the benefits of a bilateral treaty to persons and companies having only a tenuous relationship with a treaty partner. To allow the treaty to benefit persons or companies that are nationals of or primarily associated with third countries with which a state has no treaty relationship would be, in effect, to abandon its right to negotiate corresponding privileges and obligations from those countries.

A basic task of the BIT therefore is to determine whether an investor, particularly if it is a company or other legal person, has a sufficient link to a treaty country to be covered by the BIT. Three types of investors raise particular problems in this respect: (1) companies organized in a treaty country by nationals of a third country; (2) companies organized in a third country by nationals of a treaty country; and (3) companies in which nationals of a third country have a substantial interest. For a company to be covered by the treaty, most BITs

43. Treaty between the United States of America and _______ Concerning the Reciprocal Encouragement and Protection of Investment, Jan. 21, 1983, art. XIII (2), *reprinted in* 5 W. STRENG & J. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION app. 27D-14 (1990) [hereinafter United States Prototype Treaty].

44. *E.g.*, Germany's agreements with Egypt, Indonesia, Morocco, and Zaire.

provide that the treaty partner have one or more of the following relations to it: (1) country of the company's incorporation; (2) country of the company's seat, required office, or principal place of business; and (3) country whose nationals have control over, or a substantial interest in, the company making the investment. Often these requirements are combined so that an investing company must satisfy two or more to qualify for coverage under the BIT.[45]

B. Conditions for the Entry of Foreign Investment

Most BITs obligate signatory states to encourage and create favorable conditions for investment;[46] however, no treaty between a developed and a developing country has provided for free entry of capital. The laws of most developing countries regulate the entry of foreign investment.[47] In negotiating bilateral treaties, some capital-exporting countries have sought to reduce the extent of required approvals for investments covered by the treaty, but developing countries have generally taken the position that the treaty applies only to investments that have been duly approved in accordance with host country legislation.

Another negotiating goal of capital-exporting countries has been to assure that the investments of its nationals are given treatment on entry that is no less favorable than the treatment given to investments by nationals of the host country or nationals from any third country, whichever is the more favorable. For example, article II of the United States-Panama Treaty, not yet ratified, provides: "Each party shall permit and treat such investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable . . . ."[48]

The implication of this provision is clear: In deciding on admission of a foreign investment project, the host country must treat applications by investors of its treaty partner the same as it treats applications by its own national investors or those from other countries. For countries seeking to encourage national investment, such a provision may raise problems. For one thing, the host country may have closed certain sectors to foreign investment for strategic or political reasons. For another, most developing countries give special preference to na-

45. *E.g.*, Japan-China Treaty, *supra* note 28, at 582, provides: "Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party."

46. *E.g.*, Agreement for the Promotion and Protection of Investment, Feb. 27, 1985, Netherlands-Philippines, art. 2, 1985 Tractatenblad (Neth.) No. 86 [hereinafter Netherlands-Philippines Treaty] states: "Each Contracting Party shall encourage and create favorable conditions for investments, consistent with its national objectives, of nationals of the other Contracting Party, subject to the laws and regulations of the Party in whose territory the investment is made . . . ."

47. Salacuse, *Host Country Regulation of Joint Ventures and Foreign Investment*, in Joint Venturing Abroad—A Case Study 103 (D. Goldsweig ed. 1985).

48. Treaty Concerning the Treatment of Protection of Investments, Oct. 27, 1982, United States-Panama, art. II, 21 I.L.M. 1227, 1229 (1982).

tional investors because they feel that national investors cannot compete on an equal footing with foreign firms. They therefore would probably find it easier to grant most-favored-nation treatment on the entry of foreign investment than to grant national treatment.

On the other hand, the application of the concepts of national treatment and most-favored-nation treatment to foreign investment projects, no two of which are exactly alike, is far more difficult than the application of these concepts to international trade in fungible goods, where the concepts were first developed. The qualifying words "in like situations" contained in the clause quoted from the United States-Panama Treaty above may also allow lawfully differing treatment on entry of foreign investment if the projects themselves or the surrounding circumstances are sufficiently dissimilar. Moreover, treaties that have included this type of entry provision also include a specific list of areas in which foreign investment may be prohibited. For example, the United States-Grenada Treaty grants most-favored-nation and national treatment with respect to the entry of investment from each country, but it also stipulates the following provision: "subject to the right of each Party to make or maintain exceptions falling within one of the sectors to which the respective host countries may restrict investment by the country."[49] The list with respect to Grenada consists of the following areas: air transportation, government grants, government insurance and loan programs, ownership of real estate, and use of land and natural resources.

C. General Standards of Treatment

Once the investment is made, a basic question is the standard of treatment it is to receive from the host government thereafter. As noted earlier, the international community is not in agreement on the standard of treatment for foreign investments under customary international law. Through the BIT process, individual states have sought to define such standards between themselves. The general standards of treatment found in BITs are as set out below.

1. *Fair and Equitable Treatment*

Many treaties provide that the country is to give "fair and equitable treatment" to investments and investors covered by the treaty. Fair and equitable treatment is a classic formulation of international law and has therefore been the subject of much commentary and state practice. Nonetheless, the precise meaning of this phrase is open to a variety of interpretations in the specific case.[50] Some treaties amplify the meaning by reference to a requirement of nondiscrimination, and full protection and security of the law, or a treatment no less than that

49. United States-Grenada Treaty, *supra* note 21, art. II.
50. For a discussion of this standard of treatment, see BILATERAL INVESTMENT TREATIES, *supra* note 10, at 30–33.

required by international law. The standard of fair and equitable treatment is often coupled with other standards mentioned below.

2. *National Treatment*

Many bilateral treaties, with various exceptions and qualifications, provide that the host country shall treat investments from its treaty partners in the same way it treats investments by host country nationals and companies. All capital-exporting countries attach great importance to this standard, known as national treatment, and their prototypes invariably include it. Some developing countries, recognizing the disparity in financial and technological resources between their own national enterprises and those of foreign multinational enterprises, have sought to limit the scope of this national treatment. At the very least, developing countries have created exceptions, as, for example, when a host country has reserved certain economic sectors for development by its own public enterprises or private entrepreneurs.

3. *Most-Favored-Nation Treatment*

Many BITs contain "most-favored-nation clauses" that guarantee treaty-protected investments will receive treatment at least as favorable as the treatment the host country grants to investments by nationals and companies from any third state. A typical formulation is found in The Netherlands-Philippines BIT: "Each Contracting Party shall extend to investments, in its territory, of nationals of the other Contracting Party treatment no less favorable than that granted to investment of any third state."[51]

4. *Both National Treatment and Most-Favored-Nation Treatment*

Many BITs combine both national treatment and most-favored-nation treatment so that the foreign investor may take advantage of whichever standard of treatment is more favorable. Capital-exporting states, such as the United States, are particularly desirous of securing this combined standard because it assures them equality of treatment with both host country nationals and investors from third countries.

D. MONETARY TRANSFERS

For both the investor and the host country, the BIT provisions on monetary transfers are among the most important in the treaty. On one hand, foreign investors consider the ability to transfer income and capital and to make foreign expenditures freely as indispensable to operating and profiting from their investment project; therefore, their home countries, through the BIT negotiation pro-

51. Netherlands-Philippines Treaty, *supra* note 46, art. 3.

cess, press for unrestricted guarantees to make monetary transfers. On the other hand, chronic balance-of-payments difficulties of many host countries and the host countries' need to conserve foreign exchange to pay for essential goods and services considerably reduce their ability and their willingness to grant investors the unrestricted right to make monetary transfers. For this reason, most developing countries have exchange-control laws to regulate the conversion and transfers of currency abroad. As a result of these conflicting goals, the negotiation of BIT provisions on monetary transfer is often one of the most difficult negotiations to conclude. Capital-exporting countries seek broad, unrestricted guarantees on monetary transfers,[52] while developing countries press for limited guarantees, subject to a variety of exceptions.

The monetary transfer provisions of most BITs deal with five basic issues: (1) the general nature of the investor's rights to make monetary transfers, (2) the types of payments that are covered by the right to make transfers, (3) the nature of the currency with which the payment may be made, (4) the applicable exchange rate, and (5) the time within which the host country must allow the investor to make transfers.

In most treaties the concept of "returns" determines the breadth of the monetary transfer rights, and it is usually given special meaning in the BIT's definitional section. For example, article I, section (d) of the United States-Zaire BIT gives the term a broad, nonexclusive definition: " 'return' means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind."[53] While some capital-exporting states have sought to obtain transfer rights with no qualifications or exceptions, many BITs have given developing countries flexibility in this area. The Netherlands-Philippines BIT, article 7, is an example:

> 1. Each Contracting Party shall in respect of investments permit nationals of the other Contracting Party the unrestricted transfer in free convertible currency of their investments and of the earnings from it to the country designated by those nations, *subject to the right of the former Contracting Party to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its cur-*

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52. The United States Prototype Treaty, article IV, exemplifies this approach:

> 1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III [from expropriation]; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
>
> 2. Except as provided in Article III paragraph 1 [on expropriation], transfers shall be made in a freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

United States Prototype Treaty, *supra* note 43, at 27D-8.

53. United States-Zaire Treaty, *supra* note 15.

> *rency, its external financial position and balance of payments, consistent with its rights and obligations as a member of the International Monetary Fund.*[54]

In certain cases the application of such an exception is itself subject to a limitation. Thus, the United Kingdom-Jamaica BIT, referring to the power to take exceptional measures to preserve balance of payments, states:

> (a) Such powers shall not however be used to impede the transfer of profit, interest, dividends, royalties or fees;
>
> (b) as regards investments and any other form of return transfer of a minimum of 20% per year is guaranteed.[55]

Sometimes a BIT makes special provision for the repatriation of capital because of the size of the transfer by allowing the payment to be made in installments or during a period of a few years.

E. Operational Conditions of the Investment

In addition to stating general standards of treatment, the BIT may provide for specific rights and treatment standards in connection with the operation of the investor's enterprise. These may include the investor's right to enter the country, to employ foreign nationals, and to be free of performance requirements mandated by the host country.

F. Protection Against Dispossession

One of the primary functions of any BIT is to protect foreign investments against nationalization, expropriation, or other forms of interference with property rights by host country governmental authorities. Despite positions taken by Third World nations in various multilateral fora, virtually all BITs with developing countries adopt some variation of the traditional Western view of international law that a state may not expropriate property of an alien except: (1) for a public purpose; (2) in a nondiscriminatory manner; (3) upon payment of compensation; and, in most instances, (4) with provision for some form of judicial review.[56] The various elements of the traditional rule have taken different formulations in different treaties, some more and some less protective of investor interests.

The greatest variations of the traditional rule, and the most difficult negotiations, arise with respect to the standard of compensation. Many, if not most, BITs have adopted the traditional rule, expressed in the so-called "Hull formula," that such compensation must be "prompt, adequate, and effective."[57]

54. The Netherlands-Philippines Treaty, *supra* note 46, art. 7 (emphasis added).

55. Agreement for the Promotion and Protection of Investments, Jan. 20, 1987, United Kingdom-Jamaica, art. V(1), U.K. Doc., Jamaica, No. 1, 1987, CMND. No. 89.

56. Bilateral Investment Treaties, *supra* note 10, at 49.

57. In 1938, United States Secretary of State Hull, in response to Mexican agrarian nationalization measures, declared in correspondence to the ambassador of Mexico that "under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose,

The treaties then proceed to define the meaning of these words. For example, the United Kingdom-Costa Rica Treaty, which adopts the rule of prompt, adequate, and effective compensation, states: "Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, and be effectively realizable and be freely transferable."[58] On the other hand, the Japan-China Treaty, article 5, paragraph 3, adopts a formulation somewhat more flexible and more protective of host country interest. It states:

> [C]ompensation . . . shall be such as to place the nationals and companies in the same financial position as that in which the nationals and companies would have been if expropriation, nationalization, or other measures . . . had not been taken. Such compensation shall be paid without delay. It shall be effectively realizable and freely transferable at the exchange rate in effect on the date used for the determination of amount of compensation.[59]

On its face, this provision does not provide for the payment of interest and might allow less than fair market value. To clarify its meaning, China and Japan agreed to an explanatory minute, annexed to the Treaty, that states:

> It is confirmed that with reference to the provisions of Article 5 of the Agreement, the compensation referred to in the provisions of paragraph 3 of the aforesaid Article shall represent the equivalent of the value of the investments and returns affected at the time when expropriation, nationalization, or any other measures . . . are publicly announced or when such measure[s] are taken, whichever is the earlier, and shall carry an appropriate interest taking into account the length of time until the time of payment.[60]

Nonetheless, this clarification does not specify the type of valuation method to be used. Its language might permit the application of market value, book value, or some other method, each of which might have a different result. Similarly, the difference between "interest at a normal commercial rate" and an "appropriate interest" may also represent a wide variation.

G. Compensation for Losses from Armed Conflict or Internal Disorder

Most BITs also address losses to an investment resulting from armed conflict or internal disorder; however, they do not normally establish an absolute right to compensation. Instead, many BITs promise that foreign investors will be treated

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without provision for prompt, adequate, and effective payment therefor." L. Henkin, R. Pugh, O. Schacter & H. Smit, International Law, Cases and Materials 688 (1980). Since that time, the United States Government has taken the position that this phrase (prompt, adequate, and effective), sometimes referred to as the "Hull formula," is the standard of compensation required by international law. Schacter, *Compensation for Expropriation*, 78 Am. J. Int'l L. 121 (1984).

58. Agreement for the Promotion and Protection of Investments, Sept. 7, 1982, United Kingdom-Costa Rica, art. V(1).

59. Japan-China Treaty, *supra* note 28, art. 5, para. 3.

60. *Id.*, Agreed Minutes, para. 3.

in the same way as nationals of the host country with respect to compensation. Thus, if the host country compensates or assists its own nationals whose property has been damaged, it would be required to give similar assistance to foreign investors covered by the BIT. Some treaties may also provide for most-favored-nation treatment on this question.[61]

In addition to the standard of treatment, a key interpretational issue is the definition of the specific loss-causing damage that the BIT protects against. Some BITs are quite specific and broad, such as the Denmark-Indonesia Treaty, which protects against "losses . . . owing to war or other armed conflict, revolution, a state of national emergency, or revolt . . . ;[62] while others are more general, for example, the China-Japan Treaty that refers to "damages . . . owing to the outbreak of hostilities or a state of national emergency."[63]

H. Settlement of Disputes

For foreign investors and their governments, one of the great deficiencies of customary international law is that it does not afford an effective and binding mechanism for the resolution of investment disputes. One aim of the BIT movement is to remedy this situation. Indeed, most recent BITs provide for two distinct dispute settlement mechanisms: one for disputes between the two contracting states and the other for disputes between a host country and an aggrieved foreign investor. With respect to the former, most BITs provide that in the event of disputes over the interpretation or application of the treaty, the two states concerned will first seek to resolve their differences through negotiation and then, if that fails, through ad hoc arbitration.[64]

The recent trend among BITs is to provide a separate procedure, normally under the auspice of the International Center for Settlement of Investment Disputes (ICSID),[65] for disputes between an aggrieved foreign investor and the host country government. By concluding a BIT, the two states, in most cases, give the required consent needed to establish ICSID jurisdiction in the event of a future dispute.[66] Although the investor must first try to resolve the conflict through negotiation, it ultimately has the power to invoke compulsory arbitration to secure a binding award. This feature may be the reason that so few Latin Amer-

61. The U.S. BITS provide for both most-favored-nation and national treatment, whichever is more favorable. *See, e.g.*, United States-Zaire Treaty, *supra* note 15, art. IV.

62. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Jan. 30, 1968, Denmark-Indonesia, art. V, 720 U.N.T.S. 223.

63. Japan-China Treaty, *supra* note 28, art. VI.

64. *E.g.*, United States-Turkey Treaty, *supra* note 17, art. VII.

65. Convention of the Settlement of Investment Disputes Between States and Nationals from Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

66. *E.g.*, Japan-Sri Lanka Treaty, *supra* note 27, art. 11, United States-Turkey Treaty, *supra* note 17, art. VI(6). *But see* China: Bilateral Investment Promotion Treaty Program, Introductory Note, 24 I.L.M. 537 (1985), for the differing approach in the BITs concluded with China.

ican countries have signed BITs, since international arbitration conflicts with the Calvo doctrine, an important element in the legal systems of most countries in the region. A compulsory arbitration provision creates the potential for an individual investor, with or without the approval of its home government, to press a conflict that may ultimately have diplomatic implications and may affect relations between the two countries concerned.

IV. The Effect of BITs on Foreign Investment Transactions

Having reviewed the history, negotiation, and contents of BITs, one may well ask: What, after all is said and done, is their effect on private foreign investment? Do they really lead to increased foreign investment? Do they actually give private foreign investors increased protection? To what extent do they affect investor decision making? Unfortunately, empirical evidence does not exist to answer any of these questions. One can only extrapolate from anecdotal data[67] and speculate as to the relationship between a BIT and the actual process of foreign investment.

The BIT would appear to have relevance at two important stages of the investment process: (1) when the investment is made, and (2) when the investment is threatened or actually harmed by host government action.

A. Undertaking a Foreign Investment

It is usually claimed that a BIT, by guaranteeing certain rights to foreign investors, will encourage increased investment in the developing country by the nationals of the other country. The effect of the treaty is to improve the investment climate in the host country and thereby heighten investor confidence, factors which presumably have a positive impact on the investment decision.

The decision to invest is affected by a variety of factors, and it is difficult to determine with any precision whether the existence of a BIT is one of them. Certainly, major investments have been made when no BIT existed at all between the host country and the investor's home country. For example, between 1978 and 1989, approximately 350 United States companies invested more than $3.5 billion in China[68] despite the fact that no BIT existed between the two centuries, and that BIT negotiations had been dragging on for over five years. On the other hand, one does not know whether additional investments would have taken place if the United States and China had signed a BIT. Similarly, there have been cases when investments have been made in countries where the investor was unaware of the existence of a BIT.

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67. The author has conducted interviews with BIT negotiators from both industrialized and developing countries in connection with this article and an earlier study on the negotiation of BITs.
68. 1989 ALMANAC OF CHINA'S FOREIGN ECONOMIC RELATIONS AND TRADE 54.

Anecdotal evidence suggests that a few home countries may dissuade, or at least not encourage, their nationals to invest in foreign countries with which they have no treaty. Thus, signing a BIT may be a way of inducing a foreign government to assist in persuading its nationals at least to consider investments in a country with which it has a BIT. The BIT movement may also have the effect of facilitating the entry of foreign investment as host countries reevaluate and ultimately adjust laws, policies, and bureaucratic attitudes to fit treaty provisions.

One can say that BITs are one of several confidence-building measures that can be used to improve the host country's investment climate. At the very least, the signing of a BIT by a host country is a clear signal to investors from a treaty partner that their investment is welcome. Lawyers and investors would therefore be well advised to refer to, and use, relevant BITs in their investment negotiations with host country officials.[69] It may also be worthwhile to examine all BITs made by a prospective host country since a U.S. enterprise, through a wholly or partially owned foreign subsidiary, may be able to take advantage of a BIT between the foreign country in which the subsidiary is established and the potential host country.

B. Protecting Foreign Investment

Documented use of BIT provisions to protect an investment appears to be slight. Occasionally, courts have invoked the investment provisions of friendship, commerce, and navigation treaties,[70] but these judicial decisions have usually emanated from the courts of capital-exporting countries, rather than developing nations. There is, however, anecdotal evidence to suggest that in diplomatic and bureaucratic practice the fact that a developing nation has signed a BIT gives rise to increased investor protection in those states. Thus, one country that nationalized foreign property in a particular industry appears to have exempted foreign investments covered by a BIT. In diplomatic or bureaucratic negotiations, an investor protected by a BIT will probably be in a stronger position to seek redress than otherwise. Certainly, the BIT's mandatory dispute settlement provisions and the ultimate prospect of compulsory arbitration will cause host country officials to pause before taking actions toward foreign investments.

69. *See* Malecek, *United States Bilateral Non-Tariff Commercial Treaty Practice: A Section Membership Survey*, 10 INT'L LAW. 561 (1976).

70. In the United States, the following are examples of cases that have referred to treaties of friendship, commerce, and navigation: Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); Kalamazoo Spice Extraction Co. v. Ethiopia, 729 F.2d 422 (6th Cir. 1984); American Int'l Group v. Iran, 493 F. Supp. 522 (D.D.C. 1980). *See also* Electronica Sicula S.P.A. (ELISI), 1989 I.C.J. 15, *reprinted in* 18 I.L.M. 1109 (1989) (involving a dispute over "requisitioned" property owned by an Italian subsidiary of a United States corporation in which the U.S. corporation relied on the U.S.-Italy Treaty of Friendship, Commerce, and Navigation).

For their part, investors may have a greater sense of security because of the BIT's dispute settlement provisions and its written rules. Thus far, however, no dispute governed by a BIT has actually been resolved by arbitration. The inference to be drawn from that fact is either that arbitration provisions are untested and therefore dubious, or that they have served as an effective deterrent to arbitrary host government action. Moreover, while the defined, written provisions of the BIT may give greater security to investors than does customary international law, those provisions, often drafted in general, sometimes vague language, are capable of widely varying interpretations.[71]

V. Conclusion

Despite the lack of proof of their effectiveness, the BIT movement as a whole may be seen as part of an ongoing process to create a new international law of foreign investment to respond to the demands of the new global economy that has so rapidly emerged within the last few years. While the world has developed a relatively elaborate legal structure for trade in the form of the General Agreement on Tariffs and Trade, it has yet to create a similar structure for international investment. Such a multilateral arrangement, a General Agreement on Direct International Investment,[72] is many years away and will only be achieved through a gradual, step-by-step approach. The negotiations on trade-related investment measures in the current Uruguay Round of GATT[73] represent an important initiative for that organization, and the results may contribute to a new international law on foreign investment. The BIT movement of the past thirty years has also been an important step in this direction. Although BITs themselves only bind the two countries concerned and are probably not sufficiently widespread to constitute customary international law,[74] the process of study, consultation, discussion, and negotiation that has been part of the BIT movement has certainly laid a foundation for the creation of an international investment framework that may eventually attract the consensus of the nations of the world.[75]

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71. BILATERAL INVESTMENT TREATIES, *supra* note 10, at 74.

72. For a discussion of this idea, see Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR L. & COM. 969, 1005–10 (1985).

73. GATT, Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, *reprinted in* 3 W. STRENG & J. SALACUSE, *supra* note 43, App. 3-0 (1982–1989). For a history of the discussion which led to the Uruguay Round, see Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57 (1987).

74. For a discussion of whether BITs have contributed to the development of customary rule of international law, see BILATERAL INVESTMENT TREATIES, *supra* note 10, at 76–77.

75. A recent example of a multilateral investment treaty that has clearly been influenced by the BIT movement is the Agreement Among the Governments of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, The Republic of Singapore, and The Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987, *reprinted in* 27 I.L.M. 612 (1988), which resulted from the Third Meeting of the Heads of Government of the Association of Southeast Asian Nations (ASEAN) held in Manila, Dec. 14–15, 1987.