NOTES

UNITED STATES BILATERAL INVESTMENT TREATIES: EGYPT AND PANAMA

I. INTRODUCTION

The private sector has traditionally become involved in assisting developing countries through foreign investment. Until recently, the United States has relied on unilateral encouragement of private investment in developing countries through its domestic law and through the Overseas Private Investment Corporation (OPIC). The Bilateral Investment Treaty (BIT) is an innovative mechanism for stimulating and protecting United States private investment in developing nations because the Treaty involves agreement between the host and home governments. This bilateral approach may foster foreign investment more effectively than unilateral methods, thus increasing private sector involvement in the development effort.

Although the bilateral approach to private foreign investment is new to the United States, developed nations began to arrange BITs with the developing world in the late 1970's. There are two advantages in not being the first developed nation to sign a BIT. First, the experience of other countries with BITs can be drawn upon by United States negotiators in drafting provisions which will meet the two-pronged goal of investment encouragement and investment protection. Second, because many developing nations al-

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1 See infra note 11.
2 The major encouragement found in domestic law is favorable United States tax treatment afforded foreign enterprises. See generally H. Steiner & D. Vagts, Transnational Legal Problems 1104-26 (2d ed. 1976) [hereinafter cited as Steiner & Vagts]. For a discussion of OPIC, see infra note 60.
3 "Host country" refers to the country in which the foreign investment project is located; "home country" refers to the country of which the investor is a national.
4 Bilateral investment treaties were signed as early as 1962, but many more have been concluded quite recently. About 25 such treaties were negotiated in 1979-80. Asken, The Case for Bilateral Investment Treaties, in Private Investors Abroad—Problems and Solutions in 1981, 357, 358 (M. Landwehr ed. 1981).
5 See infra notes 10-11 and accompanying text.
ready have similar agreements in force, the United States does not need to introduce an entirely new concept in order to begin negotiating BITs. Those nations which are familiar with such treaties may be more easily convinced of the merits of investment protection through a bilateral agreement.

This Note discusses the United States efforts in negotiating BITs through an examination of three documents. First, provisions in the Model Bilateral Investment Treaty (Model BIT) of critical importance to the investor are examined in an effort to expose potential problems and differences between the Model BIT and prior United States investment protection treaties. Second, the Egypt-United States BIT (Egyptian BIT) is analyzed in light of relevant Egyptian law. Third, the Panama-United States BIT (Panamanian BIT) is examined, and the Panamanian BIT is compared with the Egyptian BIT. It is hoped that the key elements of interpretation and the rights that an investor should acquire through implementation of BITs will be illuminated by discussing the varying provisions of the three documents. As the United States concludes more BITs with developing countries, interpretation of these treaties becomes essential to United States investors planning to establish or currently operating a project in a nation where a BIT is in force. Examination of these treaties may even convince potential investors to enter a developing country where the investment law was previously unclear.

II. THE UNITED STATES MODEL BILATERAL INVESTMENT TREATY

In January 1982, the United States Trade Representative for Investment Policy announced the formulation of a Model BIT* and the commencement of negotiations toward the conclusion of investment treaties with Egypt and Panama.* The Model BIT will be

* As of 1981, approximately 170 bilateral investment treaties had been concluded between nations other than the United States. Asken, supra note 4, at 358.
* The BIT clarifies investment law by providing an understandable legal framework. See infra note 47 and accompanying text. Thus, it may remove doubts about the law which act as impediments to potential foreign investment.
* For the text of the Model Bilateral Investment Treaty, see Treaty Between the United States of America and — Concerning the Reciprocal Encouragement and Protection of Investments (Jan. 11, 1982), U.S. EXPORT WEEKLY (BNA) No. 400, at 734 (Mar. 23, 1982) [hereinafter cited and referred to as Model BIT].
the basis for a series of BITs between the United States and developing nations, the primary purpose of which will be to improve the climate for United States investment in the developing world and potentially to enhance the private sector’s role in development. By securing governmental agreement on the treatment that an investor will receive if difficulties concerning his project should arise and by prescribing a standard of national treatment for investors in countries Parties to the treaty, the BIT establishes a legal framework within which the investor may operate with a higher degree of confidence.

The basic thrust of the Model BIT is to require that the host country government accord foreign investment the same treatment as domestic investment and that any advantages given to third-party investment be offered to investors in countries Parties to the treaty. This standard of national treatment is to apply to newly established investments and associated activities and to investments already in place.

In addition to establishing a basic level of treatment, the Model BIT addresses many specific difficulties that investors typically face in establishing and operating a project in a developing na-
The most important difficulties addressed are: 1) conditions or prerequisites for the establishment and continued operation of the foreign investor's activities; 2) effects of expropriation; 3) problems with monetary transfers; and 4) means of settling investment disputes.

Many potential United States investors are concerned by the increasing imposition of "performance requirements" as a condition of establishing enterprises funded with foreign capital in developing nations. Performance requirements may take the form of export quotas, production quotas, or requirements that supplies be purchased from the host country's market. By imposing these requirements, the developing nation hopes to increase its hard currency reserves and ensure that local industries actively participate in the foreign investment. The effect of such conditions, however, is to deter investors from entering a country and, assuming compliance with the conditions, to affect adversely the economy of the home country. United States government opposition to performance requirements is clearly expressed in the Model BIT, which

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16 The Treaty does not provide insurance for investments. See infra notes 58-60 and accompanying text.
17 BIT Announcement, supra note 9, at 439.
19 BIT Announcement, supra note 9, at 439.
20 Requirements that supplies be purchased locally may deter investors who wish to import materials from a known supplier or who wish to service the investment project themselves using materials manufactured at another location. The developing country may not even currently produce the necessary supplies. See infra note 119. Export requirements diminish the attraction of a large domestic market in the developing country.
21 BIT Announcement, supra note 9, at 439. United States trade officials have complained that performance requirements place undue burdens on foreign investment and often act as a protectionist trade measure. Id. "These measures tend to 'tilt' the benefits of foreign investment to the host country at the expense of home or third countries." Katz, Direct Investment in the United States—Advantages and Barriers, 11 CASE W. RES. J. INT'L L. 473, 482 (1979).
22 The United States policy toward both outgoing and incoming foreign investment is to neither encourage nor discourage international investment, and the United States prefers that market considerations determine the location of investment. This policy calls for implementation of the principle of national treatment with regard to the admission of foreign capital into a country and subsequent operation of an investment project or other use of the foreign capital. Performance requirements are diametrically opposed to this principle. Katz, supra note 21, at 482. The Reagan Administration is formulating a new policy statement on foreign investment which will place greater emphasis on minimization of investment barriers than the current neutral position. Government Seeking Bilateral Investment Treaty with Japan as well as with LDC's, 18 U.S. EXPORT WEEKLY (BNA) 830, 831 (Mar. 1, 1983). Increasing governmental concern over investment barriers has also prompted President Reagan to commence a study of the economic effects of the practice of imposing performance
forbids imposition of such conditions.\textsuperscript{23}

The Model BIT specifically delineates the rights of an investor and the duties of the host country in the event of expropriation.\textsuperscript{24} Any expropriation, direct or indirect,\textsuperscript{25} is disallowed unless it is done for a public purpose, is under due process of law, is non-discriminatory, and is not violative of any prior contractual agreement between the investor and the expropriating state.\textsuperscript{26} The Model BIT sets forth a requirement for compensation of governmental takings which conforms to the United States standard, \textit{i.e.} prompt, adequate, and effective compensation.\textsuperscript{27}

requirements. \textit{White House Requests International Study of Investment Performance Requirements}, U.S. \textit{Export Weekly} (BNA) No. 405, at 113 (Apr. 27, 1982). \textit{OPIC}, see infra note 60, has also been directed to refuse to insure any investment subject to performance requirements which would be detrimental to United States trade benefits. The factors which OPIC will review include: 1) whether “United States exports to establish or supply a foreign investment project are displaced by local products because of performance requirements”; 2) whether “exports to third country markets originating in the United States are displaced by exports from the foreign investment because of performance requirements”; and 3) whether “production from the foreign investment is exported to the United States as a result of performance requirements.” A finding of any of these factors will cause OPIC to refuse to insure or assist in financing the investment. \textit{OPIC Official Explains Efforts Against Investment Requirements}, U.S. \textit{Export Weekly} (BNA) No. 411, at 370 (June 8, 1982).

\textsuperscript{23} Model BIT, \textit{supra} note 8, art. II, para. 7, at 735.

\textsuperscript{24} Id. art. III, at 736.

\textsuperscript{25} Expropriation may occur as an outright taking of the investor's property by the government; it also can take the form referred to as “creeping” or indirect expropriation. The latter form may be achieved through taxation and burdensome regulatory measures designed to render continued operation of the project uneconomical so that it is soon abandoned. \textit{Restatement of the Foreign Relations Law of the United States} § 712 comment g & reporter's note 5 (Tent. Draft No. 3, 1982). Examples of indirect expropriation include: blocking a factory entrance under the guise of maintaining order; setting prohibitive wage levels; denying entry visas for essential personnel; and imposing restrictive customs, foreign exchange, or export regulations. Neville, \textit{The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property}, 13 \textit{Vand. J. Transnat'l L.} 51, 52 (1980). \textit{See also Note on Indirect Takings}, in \textit{Steiner & Vagts, supra} note 2, at 487.

\textsuperscript{26} Model BIT, \textit{supra} note 8, art. III, para. 1, at 736.

\textsuperscript{27} Id. \textit{See Smith, The United States Government Perspective on Expropriation in Developing Countries}, 9 \textit{Vand. J. Transnat'l L.} 517, 518 (1976); \textit{Restatement (Second) of the Foreign Relations Law of the United States} § 187 (1965). This standard is generally agreed upon by the developed nations as proper compensation for the taking of property rights from the investor. Developing nations, however, tend to follow a theory which bases compensation on unjust enrichment. Therefore, these nations may set off excessive profits of the investment against the compensable value of the alien investor's property. Other factors considered under the “unjust enrichment” theory of compensation include the contribution of the enterprise to the economic and social development of the host country, the investor's respect for labor laws, and the reinvestment policies of the enterprise. Neville, \textit{supra} note 25, at 67. \textit{See also Muller, Compensation for Nationalization: A North-South Dialogue}, 19 \textit{Colum. J. Transnat'l L.} 35 (1981).
further provides that the investor receive the fair market value of the expropriated investment as measured before announcement of the expropriation.\textsuperscript{28} The compensation "shall be paid without delay, shall be effectively realizable, shall bear current interest from the date of the expropriation, and shall be freely transferable . . . ."\textsuperscript{29} This provision represents the paradigm for the United States; however, it may be changed during the negotiating process with some states.\textsuperscript{30} Even if some concession has to be made on this provision, an explicit definition of expropriation, coupled with a liberal compensation requirement, would constitute a significant improvement in the legal investment climate of many developing nations.\textsuperscript{31}

The potential foreign investor is necessarily concerned with both the transferability of funds essential to establishing the investment project and to purchasing supplies during operation as well as the transferability of profits.\textsuperscript{32} The Model BIT binds the Parties to permit any monetary transfer related to those foreign investments covered by the Treaty.\textsuperscript{33} The exchange rate stipulated is the "mar-

\textsuperscript{28} Model BIT, supra note 8, art. III, para. 1, at 736. The "fair market value" of an expropriated foreign investment may still vary, depending on the method of computation, because there is usually no actual market available for comparison. There are three basic methods to derive fair market value. First, the "going-concern" approach attempts to value the property by measuring earning power; this method renders the highest value and is favored by developed nations. Second, the replacement cost of the property at the time of expropriation, less actual depreciation, may be employed. Third, the book value, which is the acquisition cost of the assets less the depreciation taken on the books, is the method of computation favored by developing countries. This method yields the lowest figure and may bear little relationship to actual value. Smith, supra note 27, at 519.

\textsuperscript{29} Model BIT, supra note 8, art. III, para. 1, at 736.

\textsuperscript{30} United States Trade Representative Harvey Bale stated that the Model BIT represents the philosophical position of the United States and that some provisions are expected to change during negotiations. BIT Announcement, supra note 9, at 439.

\textsuperscript{31} See Restatement of the Foreign Relations Law of the United States § 712 reporter's note 1 (Tent. Draft No. 3, 1982). In addition to compensation for expropriation, the Model BIT accords national treatment to investments of the Parties if the investment projects are damaged due to war or similar events. Model BIT, supra note 8, art. IV, at 736. Although the treaty calls for compensation for damage due to war in accordance with the article on expropriation, id., it is unlikely that such a high level of compensation would be available in such an event because even nationals of a state are rarely compensated for damage incurred while the country is at war.

\textsuperscript{32} Guarantees of access to foreign currency for debt servicing and for meeting requirements for importing materials used in construction and operation of the foreign plant are essential to any project. The investor will also seriously consider the consequences of limitations on access to foreign currency for the purpose of the remittance of profits, royalties, and other fees before deciding where to locate. Barringer, supra note 11, at 372.

\textsuperscript{33} Model BIT, supra note 8, art. V, para. 1, at 737.
ket rate of exchange on the date of transfer . . . ," and the investor is entitled to select the currency (or currencies) in which to transfer unless he has made other arrangements prior to the transaction. This provision is designed to provide flexibility and guaranteed liquidity to the investor, but the governmental Parties retain the right to require reports of currency transfers and to impose withholding taxes. The Treaty does not specify criteria concerning the sufficiency of reporting; consequently, the possibility that the Parties could severely hamper currency transfers by imposing burdensome reporting requirements is not precluded under the Treaty. Some protection against this possibility appears in a separate article which states that formalities prescribed by the Parties in connection with the establishment of investments should not impair the substance of the rights set forth in the Treaty. This provision could be interpreted to mean that any reporting required by the Parties must not derogate from substantive Treaty rights.

A final issue which the Model BIT addresses is the settlement of investment disputes. The Treaty defines an "investment dispute" as one which arises between the investor and the host country government. Settlement of disputes between the Parties concerning the Treaty is dealt with separately. The Model BIT provides for the submission of an investment dispute to negotiation and consul-

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44 Id. art. V, para. 2, at 737.
45 Id.
46 Id. art. V, para. 3, at 737.
47 Time-consuming bureaucratic bottlenecks are a major legal issue for the investor to consider when entering a developing country. Barringer, supra note 11, at 370. The ultimate effect of extremely burdensome requirements may be indirect, "creeping" expropriation. See supra note 25.
48 Model BIT, supra note 8, art. X, para. 2, at 739.
49 The rights of the Parties under the Treaty must be exercised in accordance with the good faith standard of international law. Therefore, if reporting requirements for currency transfers hamper the goals of the Treaty, the requirements could be considered a violation of the Treaty under principles of international law. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (Tent. Draft No. 1, 1980).
50 Model BIT, supra note 8, art. VII, at 737.
51 Id.
52 Id. art. VIII, at 738. Disputes between the Parties are to be resolved through diplomatic channels, if possible; otherwise, the dispute will be submitted to the International Court of Justice (ICJ) if the Parties agree to such submission. If the Parties do not agree to submit the dispute to the ICJ, the Model BIT details an arbitration procedure which may be used. Rules and principles of international law are to apply to disputes concerning the interpretation or application of the Treaty if the ICJ or an arbitral tribunal is called upon. Id.
tation; if these methods fail, the parties to the dispute may then employ settlement procedures to which they have previously agreed.\textsuperscript{48} If these efforts are unsuccessful, the parties may employ the procedures for conciliation or binding arbitration available through the International Centre for the Settlement of Investment Disputes (ICSID).\textsuperscript{44} The provision allowing the investor a right to settle disputes directly with the host country government is important because it adds to the effectiveness of the Treaty's imposition of obligations on governments and because it permits a foreign investor to use objective third-party dispute settlement mechanisms rather than those of the host country when pursuing his claim.\textsuperscript{46} Affording the investor this right also alleviates the fear that his home country will decline espousal of the claim on his behalf at the international level.\textsuperscript{46}

If ratified as written, the Model BIT would provide a legal framework within which the rights of the foreign investor are

\textsuperscript{44} Id. art. VII, para. 2, at 737.

\textsuperscript{45} Id. art. VII, para. 3, at 738. The ICSID has been in operation since 1966. As of 1979, nine requests for arbitration proceedings had been registered; out of six instances in which an arbitration tribunal had been formed, dispute resolution was achieved in five. Sutherland, The World Bank Convention on the Settlement of Investment Disputes, 28 Int'l & Comp. L.Q. 367, 398 (1979). In light of its record, the ICSID affords a forum in which the private foreign investor has direct access to the government in the event of a dispute. Furthermore, "the Centre itself believes that the very existence of binding arbitration arrangements acts as a powerful incentive for the amicable settlement of investment disputes as they arise." \textit{Id.} at 399. \textit{See also} Restatement of the Foreign Relations Law of the United States § 713 reporter's note (Tent. Draft No. 3, 1982).

\textsuperscript{46} Some developing countries adhere to the principle that an alien may only use locally available remedies to pursue claims. This principle may pose considerable difficulty in the attempt to procure agreement to the dispute settlement provisions. \textit{See infra} notes 140-41 and accompanying text.

\textsuperscript{48} Typically, a private investor must initially seek redress through local remedies; according to a basic tenet of international law, a government cannot assert an international claim on behalf of one of its nationals until local remedies have been exhausted. Brower, \textit{International Legal Protection of United States Investment Abroad}, in 3 LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, folio 6, at 40 (W. Surrey & D. Wallace 2d ed. 1981). After local remedies have been exhausted, the investor may request that his own government assist him in resolving the dispute. This assistance is a customary activity of the United States government and typically consists of a statement to the host government relating the United States position on an acceptable resolution of the matter. Formal "espousal" consists of the state's asserting its national's claim as the state's own. Unfortunately, this process may be of little benefit to the investor because he loses legal control over his claim since the government decides how much to accept in settlement. In deciding whether to espouse a claim, the United States Department of State weighs a number of factors and is not required to take action. \textit{Id.} at 64-69. Therefore, unless the investor provides protection for himself, \textit{see infra} note 58, or obtains relief through local remedies, he may have no redress for injury suffered in another country.
clearly outlined.47 The Treaty would not significantly affect current United States policy toward incoming investment48 since it is not likely to increase the amount of investment capital entering the United States.49 While the title of the Treaty is "Reciprocal Encouragement and Protection of Investments,"50 and while there is no difference between the obligations of the United States and those of the other Party, the developing countries with whom these treaties will be signed do not have at present the economic capacity to invest significant amounts of capital in the United States.51

Foreign investment has a positive impact on the home and host country economies.52 The United States interest therefore lies in protecting its investments abroad.53 Although the United States has long used treaties to provide investment protection, most prior agreements of this nature were concluded with industrialized nations.54 Thus, the BIT format is innovative not only because it is designed to accommodate the interests of developing countries, but

48 The United States position on foreign investment is outlined supra note 22. The reciprocity principle of the BIT is not expected to affect current protections afforded the foreign investor in the United States. BIT Announcement, supra note 9, at 439.
49 BIT Announcement, supra note 9, at 439.
50 Model BIT, supra note 8, at 734 (emphasis added). The preamble is also couched in terms of reciprocity. Id.
51 See, e.g., infra note 114.
52 Positive effects on the home country economy include the domestic supply linkage, sales to those foreign markets which are unreachable through exports, stimulation of additional exports through foreign affiliates, and production of income which may be repatriated. Major host country benefits are increased capital and employment and, in the developing world, assistance in modernization and growth. Connor, Wanted: A Fair Shake for United States Investors Abroad, 26 PRICE WATERHOUSE REV. 3, 4 (Nov. 1, 1982). Although the economic benefits of foreign investment are documented, there are many socio-political arguments in opposition to foreign investment. These arguments are often aimed at the activities of large multinational enterprises. See generally, Note on the MNE as Hero or Villain: Political Perspectives, in STEINER & VAGTS, supra note 2, at 1179. In particular, Latin American countries tend to view private investment as the result of corporate interest in profits rather than the welfare of the host nation. Administration Set to Unveil Caribbean Basin Initiative, U.S. EXPORT WEEKLY (BNA) No. 392, at 433, 434 (Jan. 26, 1982).
53 In addition to the home country benefits, see supra note 52, increased private investment may benefit the United States by reducing demands for additional foreign aid. See supra note 10. Protection of private investment abroad also serves the United States policy of allowing market, rather than political, considerations to determine the location of investments. See supra note 22.
54 Brower, supra note 46, at 10. The United States had not only concluded very few agreements of this nature with developing nations, it also had not signed any investment protection treaty since 1968. Therefore, the United States was ready for new treaties, like the BIT, which are designed to meet modern investment needs. Asken, supra note 4, at 364.
also because it focuses on investment of foreign capital. In contrast, the traditional Treaties of Friendship, Commerce, and Navigation cover a broad range of other topics, such as shipping rights, export-import privileges, and taxation. The investor’s ability to hold the host country to its treaty obligations under the dispute settlement mechanisms of the Model BIT constitutes another departure from previous United States investment agreements, thereby providing a greater degree of investment protection to the investor than was previously available under earlier treaties.

Although investors have other avenues available to protect investment abroad, a BIT represents governmental commitment to provide fair treatment to foreign investors in the country where it is in force. Unlike agreements between the United States and developing nations under the auspices of OPIC, the BIT does not

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55 Although the focus of the BIT is an innovation for the United States, other developed nations have already negotiated bilateral investment treaties focusing exclusively on protection of their investment capital in developing nations. Many of the treaties to which the United States is not a party are listed in Recent Actions Regarding Treaties to which the United States is not a Party, 21 I.L.M. 1208 (1982). See also supra note 6.

56 Although not solely concerned with investment, the more modern Treaties of Friendship, Commerce, and Navigation (FCN treaties), i.e. those signed after World War II, contain a number of useful provisions for private foreign investors concerning matters such as expropriation, foreign exchange convertibility, and access to local courts. Brower, supra note 46, at 9-12.

57 For the Model BIT dispute settlement scheme, see supra notes 40-44 and accompanying text. While the more modern FCN treaties typically provide that disputes arising under them will be subject to the jurisdiction of the ICJ, Brower, supra note 46, at 12, the Model BIT provision allows the investor to pursue claims personally, without exhausting local remedies or attempting to procure an espousal from the home state government. See supra note 46.

58 A United States foreign investor may obtain insurance from OPIC, if available. See infra note 60. The United States Export-Import Bank offers advance protection against losses incurred by exporters, a service which may be valuable to a foreign investor whose project entails substantial export of materials and supplies from the United States. Brower, supra note 46, at 20-21. The investor may also attempt to procure agreement to a protective contract from the host country government or from his local partner. The contract may include a clause applying law other than that of the host country to the parties’ relations and may provide for use of arbitration or a forum other than the host country to settle disputes. Id. at 29-30.

59 Barovick, supra note 47, at 3.

60 OPIC is a semi-autonomous agency of the United States government which provides insurance to United States corporations against the risks of investing abroad. Neville, supra note 25, at 53 n.6. See 22 U.S.C. §§ 2191-2200 (1976). OPIC may insure investments for a maximum period of 20 years in countries entering into a bilateral “umbrella” agreement with the United States which provides general approval of the OPIC program and limited protections. Currently, over 80 countries have entered these agreements and are thus eligible for OPIC-insured investments. Brower, supra note 46, at 14-15. See, e.g., Egypt-United States Investment Guarantee Agreement, July 16, 1974, reprinted in 13 I.L.M. 1257 (1974).
afford insurance for the investor; rather, it outlines his legal rights. While the BIT is essentially a practical document, highly advantageous to a potential investor, it is not the exclusive form of protection on which the investor should rely. No treaty can make absolute assurances that the rights conferred by that treaty will withstand political insurrections or inherent political or economic instability.

III. THE ARAB REPUBLIC OF EGYPT-UNITED STATES BILATERAL INVESTMENT TREATY

The first nation to negotiate and sign a BIT with the United States was the Arab Republic of Egypt. Egypt was a logical nation to target for the first United States BIT because of its strategic importance, its favorable attitude toward foreign invest-

OPIC may go beyond merely insuring an investor; it may become an active party in the settlement of investment disputes. Five specific examples of OPIC's involvement in dispute settlement are discussed in Gilbert, Enforceability of Foreign Investment Disputes, 17 Va. J. Int'l L. 361 (1977).

* The investor should utilize as many self-protective devices as possible. See supra note 58. Obtaining OPIC insurance, if available, is especially important. See supra note 60.

* While the question of whether a "fundamental change of circumstances" is grounds for termination of a treaty under international law has not been conclusively determined, political changes may undoubtedly affect the enforceability of a treaty. See Steiner & Vagts, supra note 2, at 287-89. An example of such a situation with respect to an FCN treaty, see supra note 56, is the Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, Iran-United States, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

Special problems may be presented in Latin America because its nations adhere to a concept of sovereignty under which the "state" typically is identified as the government in power; thus, succeeding governments do not feel compelled to honor their predecessors' commitments. Helander, Legal Framework for Foreign Investment in Latin America, in 4 Lawyer's Guide to International Business Transactions 223, 242 (W. Surrey & D. Wallace, 2d ed. 1980).


Negotiations on the BIT began before the assassination of Sadat and were interrupted by his death. BIT Announcement, supra note 9, at 439. Due to Egypt's smooth governmental transition and President Husne Mubarak's decision to follow many of Sadat's economic policies, negotiations resumed promptly and were quickly concluded. The new government feels that Sadat's assassination was not damaging to Egypt's attractiveness as a favorable nation in which to invest. To the contrary, it is believed that the smooth transition of power is perceived as evidence of the stable political climate. Egypt Will Attempt to Redirect its Foreign Private Investment, U.S. Export Weekly (BNA) No. 394, at 521 (Feb. 9, 1982).

* Stability in Egypt has obvious repercussions for stability throughout the Middle East. Since the early 1970's, the United States has tried to assist Egyptian development, presumably for strategic as well as humanitarian reasons. See Hostler, The Contribution of the United States to Egyptian Development, 30 Middle E.J. 539 (1976). BITs will be negoti-
and the substantial amount of United States private investment already in place.66

Since 1974, Egypt has followed an "open door" policy regarding incoming foreign investment.67 This policy was embodied in Egyptian Law No. 43 of 1974,68 which provided for the General Authority for Investment and Free Zones (Authority) to oversee foreign investments and to give a package of governmental protections and incentives to those foreign-funded projects approved by it.69 Even after enactment of this law, however, significant impediments to foreign private investment in Egypt remained, including the foreign exchange rate structure, the difficulty of transferring profits from a foreign-owned project, the inadequate availability of foreign currency, barriers to profit reinvestment, bars to capital repatriation, and disadvantageous taxation.70 Incentives under Law No. 43 were not available to all foreign projects, but only for those approved by the Authority,71 whose vague criteria for approval of-

ated with Caribbean nations primarily because the economies of those nations are viewed as strategically important. See infra notes 103-06 and accompanying text. The purpose underlying the Caribbean negotiations further supports the relevance of this factor in the United States determination of countries with which to negotiate BITs.

66 See infra notes 67-75 and accompanying text.

67 See infra notes 67-75 and accompanying text.

68 At the end of 1981, United States investment in Egypt was in excess of one billion dollars. Egypt and U.S. Sign BIT, supra note 10, at 16.

69 R. DRISCOLL, P.F. HAYEK, & F. ZAKI, FOREIGN INVESTMENT IN EGYPT: AN ANALYSIS OF CRITICAL FACTORS WITH EMPHASIS ON THE FOREIGN INVESTMENT CODE 9-10 (1978) [hereinafter cited as DRISCOLL]. Even prior to the implementation of this policy, Egyptian law was not entirely adverse to foreign investment. Id. at 5. See also Abdel-Meguid, Egypt's Policy Towards Foreign Investment, 10 VAND. J. TRANSNAT'L L. 97 (1977).


71 Law No. 43 of 1974; ch. 1, art. 1, 13 I.L.M. at 1501. The incentives are granted to promote selected industries and sectors deemed important for the economic development of the country. El Nazer, The Legal Framework of Foreign Investment in Egypt, 11 CASE W. RES. J. INT'L L. 613, 614 (1979).

72 DRISCOLL, supra note 67, at 24-26. For additional analysis of the problems posed for the investor by the original Law No. 43, see Note, supra note 68, at 304-06.

73 Law No. 43 of 1974, supra note 68, ch. 1, art. 1, 13 I.L.M. at 1501.
ferred little guidance to Egypt's potential foreign investors. Furthermore, in its original form, Law No. 43 tended to discourage joint ventures with the Egyptian private sector because its incentives and guarantees applied solely to the foreign investor and not to his Egyptian partner.

Many of these problems were alleviated through a major revision of Law No. 43 by Law No. 32 of 1977. Although reasonably favorable to foreign investment subsequent to this revision, Egyptian law retained a dichotomy in the treatment accorded to projects funded with foreign capital by granting more favorable treatment to those projects which were specifically designed to produce goods for export than to those designed to supply the local market. Such discriminatory treatment is similar to the performance requirements which the United States Model BIT aims at eliminating and the existence of this dichotomy may have been one of the factors stimulating the negotiations between the United

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72 Note, supra note 68, at 304.
73 DRISCOILL, supra note 67, at 27. Foreign investors do not seek joint ventures with the public sector because they tend to view the Egyptian public sector as a competitor. Id. at 31. Thus, a joint venture with the private sector is a mutually satisfactory mode of assuring local participation in foreign investment projects. Id. at 27.
74 Law No. 32 of 1977, Egypt, Official Gazette (Jarida Rasmia), June 9, 1977. The amendments are included in the English translation of Law No. 43 in DRISCOILL, supra note 67, at 59-86. The operation of Law No. 43 as amended is detailed in Note, supra note 68, at 306-23. The general fields of foreign investment in which projects funded with foreign capital are now encouraged under Law No. 43 are: industrialization, mining, energy, tourism, transportation, and other related activities; the reclamation and cultivation of barren land; the development of animal and water resources; construction activities in regions outside the agricultural area and existing cities; construction contracting in which Egyptian capital holds at least a 50% interest; joint venture technical consultant activities; investment banks, investment companies, commercial banks, and reinsurance companies whose activities are limited to transactions in free foreign currencies; and banks engaged in local currency transactions, provided that they take the form of a joint venture in which Egyptian capital holds at least a 51% interest. El Nazer, supra note 69, at 615-16.
75 Note, supra note 68, at 323-24.
76 Id. at 308. This dichotomy was more of a problem before Law No. 43 was amended. The original Law No. 43 did not encourage investment by the majority of foreign companies who were interested in production for the large inland market rather than for export. Id. at 304-05.
77 For a discussion of performance requirements and the United States position, see supra notes 20-22 and accompanying text. Discriminatory incentive laws do not preclude establishment of foreign enterprises which fail to meet requirements for incentives and are not, therefore, as detrimental to foreign investment as actual performance requirements. However, the United States International Trade Commission's study of performance requirements entails an investigation of incentives which are tied to performance criteria, thus indicating that the United States is concerned about such discriminatory laws. White House Requests International Study of Investment Performance Requirements, supra note 22, at 114.
States and Egypt. However, it is most likely that the overall favorable investment framework of Egyptian law constituted the major factor; the United States probably felt that agreement with Egypt could be reached quite smoothly because of Egypt's advantageous investment climate. Furthermore, by entering into the first BIT quickly, the groundwork would be laid for later, more difficult negotiations with developing nations which either have no investment scheme or are antagonistic to foreign investment.78

In most respects, the Egyptian BIT closely parallels the United States prototype; however, the Egyptian Treaty does not impose an absolute bar on performance requirements.79 The agreement with Egypt only states that the Parties "seek to avoid" such conditions for establishment.80 Egypt has bilateral investment treaties mandating most-favored-nation treatment of investments with other countries.81 If the Model BIT's clause were adopted, Egypt could not have imposed performance requirements on third-party investments made by countries under those bilateral investment treaties.82

The clause in the Egyptian BIT concerning expropriation is identical to that contained in the Model BIT, including reference to the liberal compensation standard.83 This is not surprising since Egyptian law recognizes the state's duty to compensate for a gov-

78 Another reason that Egypt was a prime candidate for the first United States BIT is Egypt's prior experience with similar agreements. Egypt currently has bilateral investment treaties in force with nine nations and has signed five others. Recent Actions Regarding Treaties to Which the United States is not a Party, 21 I.L.M. 1208 (1982).

79 Compare Egyptian BIT, supra note 63, art. II, para. 7, at 933 with Model BIT, supra note 8, art. II, para. 7, at 735. An absolute bar on performance requirements would have been highly valued by the United States. See supra notes 21-22.

80 Egyptian BIT, supra note 63, art. II, para. 7, at 933.

81 See, e.g., Agreement for the Promotion and Protection of Investments, June 11, 1975, Egypt-United Kingdom, reprinted in 14 I.L.M. 1470 (1975). "Neither Contracting Party shall in its territory subject investments or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state." Id. art. 3, para. 1, 14 I.L.M. at 1470 (emphasis added).

82 Egypt's bilateral investment treaties with nations other than the United States typically do not contain clauses which prohibit the imposition of performance requirements. If Egypt had, however, consented to such a prohibition in its agreement with the United States, the prohibition could have been enforced by parties to the earlier treaties under a clause such as the one contained in the Egypt-United Kingdom Agreement. See supra note 81.

83 Egyptian BIT, supra note 63, art. III, at 934. For discussion of the Model BIT provision, see supra notes 24-29 and accompanying text.
ernmental taking of property. Moreover, a previously concluded bilateral investment treaty between Egypt and the United Kingdom contains a similar provision.

While the monetary transfers article of the Egyptian BIT is substantially the same as the Model BIT article, the protocol to the Egyptian Treaty explicitly recognizes the problem of insufficient currency reserves faced by the Egyptian government. Due to that problem, Egypt is permitted to delay United States investors from transferring funds in order to prevent a currency shortage.

Disputes between an investor and the host government may be resolved within a framework similar to that set forth in the Model BIT. Since Egypt has ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the wording of the dispute settlement procedure differs slightly from the Model BIT, which contains an alternative provi-

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84 Since 1974, foreign investments to which Law No. 43 is applicable have been protected from nationalization without judicial procedures. Law No. 43 of 1974, supra note 68, ch. 1, art. VII, 13 I.L.M. at 1502. The Egyptian Constitution also prohibits nationalizations except in "cases of public interest and only by means of law and against a fair compensation." Al-Dusṭūr al-Misrī (Egyptian Constitution), art. 35 (1972) (D. Heller trans.).

85 Agreement for the Promotion and Protection of Investments, supra note 81, art. 5, at 1471-72.

86 Compare Egyptian BIT, supra note 63, art. V, at 937 with Model BIT, supra note 8, art. V, at 737.

87 Egyptian BIT, supra note 63, protocol, para. 6, at 948. Bilateral aid from the United States and funds from the Arab states have been used to help Egypt bolster its exchange reserves when shortages arise. Abdel-Meguid, supra note 67, at 106.

88 Egyptian BIT, supra note 63, protocol, para. 6, at 948. This is prevented from becoming a "bureaucratic bottleneck," see supra note 37, by restriction of permissible delays. The Egyptian government may delay monetary transfers only:

(i) in a manner not less favorable than that accorded to comparable transfers of investors of third countries;

(ii) to the extent and for the time period necessary to restore its [foreign currency] reserves to a minimally acceptable level . . . ; and

(iii) after providing the investor an opportunity to invest the sales or liquidation proceeds in a manner which will preserve their real value free of exchange risk until transfer occurs.

Egyptian BIT, supra note 63, protocol, para. 6, at 948.

89 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (1965) [hereinafter cited as Convention]. For the states which have signed and/or ratified the Convention, see Brower, supra note 46, at 35 n.139. Egypt codified ratification of the Convention in Law No. 90 of 1971. Duscoll, supra note 67, at 8. The Convention established an International Centre for Settlement of Investment Disputes (ICSID) which is available for conciliation and arbitration of investment disputes between nationals of states which are members of the Convention and the governments of other member states. Convention, supra, art. I, 17 U.S.T. at 1273, 575 U.N.T.S. at 162.

90 Egyptian BIT, supra note 63, art. VII, at 939.
sion for states not parties to the Convention.\textsuperscript{91} The right to use third-party procedures to settle investment disputes is an important provision for investors because they might otherwise be limited to remedies of local law.\textsuperscript{92}

The primary emphasis in the Egyptian BIT is substantially equivalent to that in the Model BIT.\textsuperscript{8} Egypt's BIT accords national or most-favored-nation treatment, whichever is more favorable, to the foreign investments and associated activities of each Party.\textsuperscript{94} Both Parties, however, are given the right to exempt certain industries and activities from the national treatment standard.\textsuperscript{95} The annex lists sectors of the economy in which the Parties maintain this right.\textsuperscript{96} The Egyptian BIT specifies the procedure which a Party must follow to make an exception in a listed sector.\textsuperscript{97} Egypt has reserved the right to make exceptions in a broad spectrum of possible investment areas.\textsuperscript{98} The current government of Egypt favors increased investment in industrial production, and no right to make an exception was reserved in that area.\textsuperscript{99} The United States has listed sectors of the economy in which foreign ownership is currently regulated to some extent,\textsuperscript{100} basically, secur-

\textsuperscript{91} Model BIT, supra note 8, art. VII, at 737.

\textsuperscript{92} See supra note 46. Egyptian law entitles foreign investors to use the dispute resolution mechanisms of the Convention, supra note 89, if their project is approved by the General Authority for Investment and the Free Zones. Law No. 43 of 1974, supra note 68, ch. 1, art. 8, 13 I.L.M. at 1502. The Egyptian BIT extends this privilege to all United States investors in Egypt. Egyptian BIT, supra note 63, art. VII, at 939.

\textsuperscript{8} For a discussion of the thrust of the Model BIT, see supra notes 13-15 and accompanying text.

\textsuperscript{94} Egyptian BIT, supra note 63, art. II, at 930.

\textsuperscript{95} Id. art. II, para. 3, at 932.

\textsuperscript{96} Id. annex, at 946.

\textsuperscript{97} Id. art. II, para. 3, at 932.

\textsuperscript{98} Egypt reserved the right to make exceptions in the following sectors: air and sea transportation; land transportation; mail, telecommunication, and telegraph services; banking and insurance; distribution, wholesaling, retailing, and import and export activities; commercial agency and broker activities; ownership of real estate; use of land and natural resources; national loans; radio, television, and issuance of newspapers and magazines. Id. annex, at 946.

\textsuperscript{99} President Mubarak has stressed the need for "productive" foreign investments and has supported the "open door" toward industrial production. McQueen, Egypt: Growing Economy Attracts Horde of U.S. Companies, 5 Bus. Am. 31 (Feb. 8, 1982). He has indicated, however, that the attempt to channel foreign capital into heavy industry rather than into consumer goods would take the form of incentives rather than restrictions. Egypt Will Attempt to Redirect its Foreign Private Investment, supra note 63, at 521.

\textsuperscript{100} See generally Note On Federal Control Over Economic Activity of Aliens, in STEIN & VAGTS, supra note 2, at 58.
BILATERAL INVESTMENT TREATIES

The right to make exceptions should not detract from the viability of the Treaty because the Parties have agreed to hold such exceptions to a minimum and because, even if an exception from national treatment is made, treatment accorded foreign investments thereby excluded must be on a most-favored-nation basis.

IV. THE REPUBLIC OF PANAMA-UNITED STATES BILATERAL INVESTMENT TREATY

A program aimed at establishing BITs is one element of the multifaceted Caribbean Basin Initiative (Initiative) launched last year by the Reagan Administration. The Initiative was developed in response to severe economic problems and the consequential threat to political and social stability in the Caribbean, an area of strategic and economic importance to the United States. Although the Model BIT will provide the basis for negotiating treaties with developing countries in Asia and Africa as well as in Latin America, current plans call for implementing the largest number of BITs with Caribbean and Central American nations. The BIT program will be integrated into the economic assistance scheme of the Initiative. Panama, the second country to sign a BIT with the United States, is one of the states targeted in the Caribbean Basin Initiative. The Panamanian BIT was signed one month after negotiations with Egypt were completed.

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101 Egyptian BIT, supra note 63, annex, at 946. These restrictions include: air and maritime transport; banking; insurance; government grant, insurance, and loan programs; energy and power production; use of natural resources; customs brokers; ownership of real estate; radio, satellite, television, telephone, and telegraph communications; and submarine cable services. Id.

102 Id. art. II, para. 3, at 932.

103 See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE SPECIAL REP. NO. 97, BACKGROUND ON THE CARIBBEAN BASIN INITIATIVE 5 (Mar. 1982) [hereinafter cited as BACKGROUND REPORT].

104 Id. at 1.

105 BIT Announcement, supra note 9, at 439.

106 One-way free trade, special United States tax incentives for investment, increased foreign aid, and expanded availability of investment insurance are all part of the economic assistance package which is to comprise the Caribbean Basin Initiative. BACKGROUND REPORT, supra note 103, at 1-2.

107 See id. at 3 (map and statistics on targeted Caribbean states).

Panamanian law concerning incoming private foreign investment is not as detailed and does not provide as many incentives as Egyptian law. However, foreign investment is encouraged, and some incentives do exist. Panama does not specifically preclude foreign investment from primary industrial sectors, although foreigners may not engage in the local retail trade. In addition, Panamanian law restricts the employment of aliens. With the exception of technicians and other specialists, ninety per cent of the work force of foreign-owned firms must be composed of Panamanian nationals or their spouses. Land ownership less than ten kilometers from the borders is also restricted to Panamanian nationals.

The Panamanian Treaty follows the Model BIT format. Although the word “encouragement” does not appear in the title of the Treaty, it is designed to stimulate United States investment in Panama by providing protection and favorable treatment. A national treatment standard for foreign investment and associated activities is prescribed; thus, the primary emphasis in the Panamanian BIT is the same as that in the Egyptian BIT.

While the purposes are congruent, the Panamanian and Egyptian BITs differ in several material respects. Unlike the Egyptian BIT, the Panamanian BIT places an absolute ban on the imposi-

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110 PRICE WATERHOUSE, INFORMATION GUIDE: DOING BUSINESS IN PANAMA 11 (non-tax incentives such as information services and the Colón Free Trade Zone) and 45 (tax incentives, such as concessions on import and export duties) (July 1980) [hereinafter cited as DOING BUSINESS IN PANAMA].

111 Id. at 7. See CONSTITUCION DE LA REPUBLICA DE PANAMA, art. 252 (G. Flanz trans.).

112 DOING BUSINESS IN PANAMA, supra note 110, at 25. Even foreign specialists and technicians are limited to 15% of the total number of a firm’s employees. However, a five-year exemption from this ceiling may be obtained from the Ministry of Labor and Social Welfare. Id.

113 “Foreign natural or juridical persons and national juridical persons having foreign capital in whole or in part may not acquire ownership of land situated less than ten kilometers from the borders.” CONSTITUCION DE LA REPUBLICA PANAMA, art. 250 (G. Flanz trans.).

114 The need for private sector assistance through foreign investment in Panama is evident from that nation’s poverty. Panama’s Gross Domestic Product (GDP) is only $3,511 million, its exports to the United States amount to a mere $262 million, and its population is under two million. BACKGROUND REPORT, supra note 103, at 3.

In fiscal year 1977, Egypt’s GDP was $12 billion; however, per capita income was only $280. 1 COUNTRIES OF THE WORLD AND THEIR LEADERS 446 (1982).

115 Panamanian BIT, supra note 108, art. II, para. 1, at 1229.

116 See supra notes 93-94 and accompanying text.
tion of performance requirements.\textsuperscript{117} Neither Party to the Panamanian BIT may condition the establishment of investments of the other Party on export requirements, local purchase of supplies requirements, or any similar requirement.\textsuperscript{118} This difference seems unusual in light of Panama's tax incentives for foreign investment since these incentives are designed to promote exports.\textsuperscript{119} In this respect, the tax incentives are similar to performance requirements, as are the Egyptian tax incentive laws.\textsuperscript{120} Furthermore, as in Egypt, Panama's balance-of-payments is a major governmental concern,\textsuperscript{121} and developing countries often impose performance requirements specifically to alleviate this problem.\textsuperscript{122} This is Panama's first BIT, however, and Panama thus remains free to impose performance requirements on investments from countries other than the United States.\textsuperscript{123}

Panama's BIT proscribes direct or indirect expropriation in the same way as the Egyptian BIT.\textsuperscript{124} Compensation for lawful expropriation is to be "prompt, adequate, and effective."\textsuperscript{125} Panama made a major concession to the United States in adopting this compensation standard because Panama is a traditional Calvo

\begin{footnotes}
\item[117] Compare Panamanian BIT, \textit{supra} note 108, art. II, para. 4, at 1230-31, \textit{with} Egyptian BIT, \textit{supra} note 63, art. II, para. 7, at 933. For a discussion of the Egyptian provision concerning performance requirements, see \textit{supra} notes 80-83 and accompanying text.
\item[118] Panamanian BIT, \textit{supra} note 108, art. II, para. 4, at 1231.
\item[119] Panama's Cabinet Decree No. 413 of December 1970, as modified by Cabinet Decree No. 172 of August 1971, provides for exemption from import duties on a number of items used in industry and for a total exemption of income tax on profits for firms which export products manufactured in Panama. \textit{Doing Business in Panama}, \textit{supra} note 110, at 47. Non-traditional products manufactured in Panama and subsequently exported entitle the investor to additional tax credit in the form of certificates used to pay other taxes. \textit{Id.} The ban on performance requirements contained in the Panamanian Treaty supports the Reagan Administration's view that poorer countries such as those in the Caribbean region lack the infrastructure to pursue such requirements. \textit{White House Requests International Study of Investment Performance Requirements}, \textit{supra} note 22, at 114.
\item[120] See \textit{supra} note 77 and accompanying text.
\item[121] Panama has relied heavily upon international loans to finance net deficits in its balance of payments. \textit{Doing Business in Panama}, \textit{supra} note 110, at 6.
\item[122] See \textit{supra} note 82 and accompanying text. Panama is not concerned with maintaining adequate hard currency reserves. \textit{See infra} note 131. Maintaining adequate reserves is the primary reason that other developing countries feel compelled to impose performance requirements.
\item[123] Compare the Panamanian position on performance requirements \textit{with} that of Egypt, discussed \textit{supra} note 82 and accompanying text.
\item[124] For a discussion of indirect expropriation, see \textit{supra} note 28; \textit{see also} Panamanian BIT, \textit{supra} note 108, art. IV, at 1231-32. The Egyptian expropriation provision is discussed \textit{supra} note 83 and accompanying text.
\item[125] Panamanian BIT, \textit{supra} note 108, art. IV, para. 1 at 1231.
\end{footnotes}
Doctrine adherent.\textsuperscript{126}

Monetary transfers do not pose a problem in Panama because Panama has neither exchange controls\textsuperscript{127} nor its own currency.\textsuperscript{128} Thus, the transfers provision merely obliges the Parties to keep currency and capital transactions unrestricted.\textsuperscript{129} This treatment of monetary transfers differs from the explicit provision concerning transfers contained in the Egyptian BIT;\textsuperscript{130} Egyptian exchange controls and periodic lack of adequate hard currency mandated greater specificity.\textsuperscript{131}

The two Treaties also differ in the way in which they deal with aliens employed by foreign firms.\textsuperscript{132} Although the Panamanian BIT does permit employment of aliens in top managerial positions, certain domestic employment laws restricting the opportunity for foreign firms to employ aliens are specifically noted.\textsuperscript{133} Panama's uncharacteristic agreement to allow any alien employment is also limited by the laws regarding the entry and sojourn of aliens.\textsuperscript{134} In contrast, the Egyptian BIT does not specify laws which may restrict alien employment by foreign firms.\textsuperscript{135}

\textsuperscript{126} For a discussion of the Calvo Doctrine, see infra note 140 and accompanying text. The concession is also unusual because disputes between United States investors and Panama have obstructed ratification of the Treaty. See infra note 141.

\textsuperscript{127} Juncadella, supra note 109, at 466.

\textsuperscript{128} Panama uses the United States dollar as its circulating currency. Law No. 84 of 1904 granted legal circulation to the dollar in Panama. Doing Business in Panama, supra note 110, at 13.

\textsuperscript{129} Panamanian BIT, supra note 108, art. VI, at 1232.

\textsuperscript{130} Egyptian BIT, supra note 63, art. V, at 937.

\textsuperscript{131} See supra notes 86-88. Panama does not own official foreign exchange reserves because it has not issued paper currency. Doing Business in Panama, supra note 110, at 13.

\textsuperscript{132} The Panamanian Treaty sets out the subject of alien employment in a separate article, thus heightening the emphasis of this provision. Panamanian BIT, supra note 108, art. III, at 1231. The Egyptian Treaty incorporates the topic in a paragraph of an article. Egyptian BIT, supra note 63, art. II, para. 5, at 933.

\textsuperscript{133} Panamanian BIT, supra note 108, Agreed Minutes, para. 3, at 1242.

\textsuperscript{134} See supra note 112 and accompanying text. The Panamanian Treaty explains in detail the type of laws to which the restriction refers: regulations of the terms and conditions of employment; equal opportunity laws; preferential hiring laws; anti-discrimination laws; and laws relating to the training of local employees in order to qualify for all professional, technical, and managerial positions. The Parties have agreed to flexibly administer "laws requiring employment of [a Party's] own nationals in certain positions or the employment of a certain percentage of its own nationals in positions in connection with investment made in its territory by nationals or companies of the other Party." Panamanian BIT, supra note 108, Agreed Minutes, para. 3, at 1242-43.

\textsuperscript{135} The Egyptian provision merely states that, subject to laws relating to the entry and sojourn of aliens, nationals of the Parties will be permitted to enter the territory of the other Party in connection with investments. Egyptian BIT, supra note 63, art. II, para. 5, at 933. Egypt has some requirements for employment of nationals, but these can be eased
One difference between the Panamanian and Egyptian BITs which at first appears significant is in the definition of a "company of a Party." The Panamanian Treaty defines this as one "incorporated under the applicable laws and regulations of a Party in which . . . nationals . . . or such Party . . . have a substantial interest as determined by such Party" (emphasis added). The Egyptian BIT defines "substantial interest" to mean "such extent of interest as to permit the exercise of control or significant influence on the company" and provides for the Parties to consult where they differ as to the existence of substantial interest. Providing for unilateral definition of "substantial interest" may prove risky to the investor in Panama, especially in view of conflicting definitions of corporate nationality in international law. The significance of this risk is somewhat diminished because, even if Panama chose to determine that a company incorporated in Panama, but in which United States nationals owned the majority of stock, is to be considered a Panamanian corporation, the United States stockholders would still be entitled to protection of their "investment" under a separate provision.

That corporate nationality is to some extent unilaterally determinable by the Parties under the Panamanian BIT may be explained by the influence of the Calvo Doctrine during negotiations. The Calvo Doctrine, widely followed in the Caribbean, Central

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when qualified foreign personnel must be obtained. **Ernst & Whinney, International Series: Egypt** 1-2 (Feb. 1980).

186 Panamanian BIT, supra note 108, art. I(c), at 1227.

187 Egyptian BIT, supra note 63, protocol, paras. 1, at 947.

188 "Under international law, a corporation has the nationality of the state that creates it, but other states need not accept that nationality if it is not based on a genuine link between the state and the corporation." **Restatement of the Foreign Relations Law of the United States** § 216 (Tent. Draft No. 2, 1981). If there is no "genuine link" with the state of incorporation, a corporation may be deemed a national of its state of incorporation, of its siège sociale (principal place of business or management), or of the state where its shareholders reside, depending upon the reason for determining its nationality. See **Note on Different Approaches to Attributing a "Nationality" to a Corporation**, in **Birnkrant & Vagts, supra** note 2, at 74-76. See also **Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 4** (New Application: 1962), where the ICJ held that Belgium, the country where the shareholders of a corporation located in Spain were nationals, could not assert a claim on behalf of the corporation against Spanish nationalization because the corporation was incorporated in Canada and Canada had not waived its sovereign right to assert the claim.

189 The definition of investment for purposes of the Treaty includes ownership of shares of stock. Panamanian BIT, supra note 108, art. I(d)(ii), at 1228. Direct or indirect equity ownership is specifically protected from expropriation without proper compensation. **Id.** art. IV, para. 2, at 1232.
America, and South America, holds that aliens are entitled to no greater rights than nationals and, therefore, may seek redress for grievances only before local authorities. The Calvo Doctrine was thus considered a major hurdle to overcome in negotiating the Panamanian BIT. The Calvo Doctrine is ordinarily applied by its adherents to disputes concerning expropriation; moreover, the concept of absolute sovereignty on which the Doctrine is based is also antithetical to other concepts embodied in a BIT. Nevertheless, Panama has made substantial concessions in order to accommodate the goals of this Treaty. Particularly important is Panama's consent to the submission of investment disputes to the Additional Facility of the International Centre for the Settlement of Investment Disputes (Additional Facility), which allows foreign inves-

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Lillich, The Valuation of Nationalized Property in International Law 191-95 (1976).

United States Trade Representative Resumes Investment Discussions With Egypt, Panama Talks Hit Snag, U.S. Export Weekly (BNA) No. 399, at 688, 689 (Mar. 16, 1982). Panama was particularly concerned about relinquishing its local authority over investment disputes to an international tribunal. Id. The dispute settlement mechanisms in the final Treaty demonstrate that Panama overcame this reluctance in order to sign the BIT. See infra note 144. Ratification may still be hindered, however, due to Panama's continued unwillingness to compromise the "sanctity of its tribunals." U.S.-Panama Treaty Signed, but Problems Remain Before Ratifying, 18 U.S. Export Weekly (BNA) 170 (Nov. 2, 1982). The United States will delay ratification until three outstanding investment disputes with Panama are settled. Id. at 171.

The effect of a Calvo Clause, see infra note 145, is that the host country usurps full sovereignty over the foreign investment and over the investor's activities in the host country. The Latin American concept of absolute sovereignty also underlies the notions that subsoil rights lie with the sovereign and that industries operated by the state should be closed to foreign investment. Helander, supra note 62, at 241.

Calvo Doctrine adherents do not believe that the host state must provide the standard of compensation for expropriation which the Model BIT requires. See Helander, supra note 62, at 241-43. The Doctrine is also antithetical to third-party settlement of investment disputes. Id. at 241.

The Doctrine is opposed to the United States position that no individual can renounce the rights of his government and that the United States may invoke its own sovereign rights to intervene on behalf of its citizens because injury to a citizen constitutes injury to the United States. Restatement of the Foreign Relations Law of the United States § 713(1) comment g. (Tent. Draft No. 3, 1982). The opposition of the Calvo Doctrine to the United States position has forced United States foreign investors to solve investment disputes in ad hoc arrangements agreeable to Latin American governments and themselves. Helander, supra note 62, at 241.

Panamanian BIT, supra note 108, art. VII, para. 3(b), at 1234. Neither Panama nor any other Latin American Calvo Doctrine adherent is a party to the International Convention for the Settlement of Investment Disputes, supra note 89. In order to use the ICSID procedures, one of the parties to the dispute must be a "Contracting State or any constituent subdivision or agency of a Contracting State designated to the Centre by that State." Convention, supra note 89, art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 174. "Contracting
tors to settle disputes before an impartial tribunal rather than limiting dispute settlement to local remedies. Finally, any Calvo Clauses in previous investment contracts between the Panamanian government and United States investors could conceivably be annulled by operation of this Treaty.

V. CONCLUSION

The United States initiative in negotiating Bilateral Investment Treaties with developing nations should foster private participation in the development effort. The treaties which have been signed with Panama and Egypt afford the investor rights which were previously either nonexistent or difficult to enforce. While these two treaties conform closely to the Model BIT, they do have some significant differences which will affect the legal framework for investors. Future BITs should be examined for these types of differences before any conclusions as to their legal effect are reached. After the Egyptian and Panamanian BITs have been rati-

State" means a state which has confirmed its previous signature of the Convention by ratification at least 30 days prior to its attempt to use the ICSID procedures. Sutherland, supra note 44, at 382. The ICSID has constituted an Additional Facility for investment disputes which are outside the jurisdiction of the Centre. International Centre for Settlement of Investment Disputes: Additional Facility for the Administration of Conciliation, Arbitration, and Fact-Finding Proceedings, introductory notes, 21 I.L.M. 1443 (1982). Heribert Golsong, Secretary-General of the ICSID, interprets article VII, para. 3(a) of the Panamanian BIT, supra note 108, at 1234, to constitute consent by the two Parties to use of the Additional Facility. Letter of H. Golsong to J. McCarthy, 21 I.L.M. 1244 (1982).

Calvo Clauses are inserted into contracts between alien investors and the host country as a means of implementing the Doctrine:

The contractor and all persons who . . . may be engaged in the execution of the work under this contract . . . , shall be considered as [host state nationals] in all matters, within the [host state] concerning the . . . fulfillment of this contract. They shall not claim, nor shall they have, with regard to the . . . business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the [host state] . . . . They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted in any manner related to this contract. Brower, supra note 46, at 70-71.

Panamanian BIT, supra note 108, art. IX, at 1237-38. This article provides that the Treaty will not derogate from any laws or investment agreements existing when the BIT enters into force which entitle investments to treatment more favorable than that accorded by the BIT. Because a Calvo Clause would curtail the investor's available remedies, it would be less favorable than treatment accorded by the Treaty; consequently, the Treaty may supersede such a clause.
fied and in force for several years, investors and potential investors will have a greater understanding of their rights under this type of treaty.

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