The United States-Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation

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ARTICLES

THE UNITED STATES-EGYPT BILATERAL INVESTMENT TREATY: A PROTOTYPE FOR FUTURE NEGOTIATION

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On September 29, 1982, the United States signed bilateral investment treaties (BITs) with the Arab Republic of Egypt and the Republic of Panama. These treaties represent a major deviation from past United States trade policy. Traditionally, the United

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1. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, reprinted in 21 I.L.M. 927 [hereinafter cited as United States-Egypt BIT]. To date, neither the Egyptian Parliament nor the United States Senate has ratified the treaty.

2. Treaty Concerning the Treatment and Protection of Investment, Oct. 27, 1982, United States-Panama, reprinted in 21 I.L.M. 1227 [hereinafter cited as United States-Panama BIT]. The Panamanian Legislature has ratified the treaty. Telephone Interview with Bruce Wilson, Office of the Trade Representative (Dec. 29, 1983) (confirming ratification) [hereinafter cited as Wilson Telephone Interview]. The United States Senate, however, still has not taken any action on the BIT.
States refused to embrace the investment treaty concept, and instead utilized the Friendship, Commerce, and Navigation Treaty (FCN) System to facilitate trade between itself and developing nations. The treaties with Egypt and Panama signal the end of the “FCN era” and mark the beginning of a new approach to bilateral economic relations. Indeed, the United States recently signed BITs with Haiti and Senegal and began BIT negotiations with a number of other countries, including Argentina, China, El Salvador, Honduras, Malaysia, and Saudi Arabia.

Undoubtedly, the Egyptian and Panamanian treaties will serve as prototypes for future investment agreements and will assume a significance that extends far beyond the relations between the signatories. Because these treaties will establish the framework for United States investment in developing countries for many years to come, they merit close scrutiny. United States treaty negotiators should identify the major benefits that such treaties provide to United States companies and include them in future bilateral

3. In contrast, leading Western industrial nations have negotiated at least 175 bilateral investment treaties. See Asken, The Case for Bilateral Investment Treaties, in Symposium for Private Investors Abroad 357, 358 n.1 (1981).

4. These BITs resulted from an United States initiative in December 1981 aimed at exploring new legal frameworks to nurture investment in developing countries. See Barovick, Bilateral Investment Treaties, 5 Bus. Am. 3 (Aug. 3, 1982). That effort attracted the interest of a number of foreign governments. In the first eight months after the United States announced its intention to enter into BITs, 23 countries approached the United States seeking to improve economic relations. Immediate negotiations began with Egypt, Panama, and Antigua/Barbuda. Id. As a result of all this activity, the United States developed a BIT prototype which served as a model for the Egyptian and Panamanian treaties. This prototype presented new challenges in the field of treaty negotiations. It not only displayed the simplicity inherent in the BIT concept, but also contained many of the basic BIT provisions utilized by Organization for Economic Cooperation and Development (OECD) countries. See infra note 22 and accompanying text. As the Assistant U.S. Trade Representative for Investment Policy observed in 1982, the United States was “charting new territories” which may present “an uphill battle” in dealing with developing countries whose experiences with less comprehensive BITs shaped their expectations with respect to their negotiations with the United States. Barovick, supra, at 4.


6. The treaties complement the efforts of the Panamanian and Egyptian governments to attract foreign capital to their countries. Through its “infitah” or open-door policy, for example, Egypt has encouraged foreign investment. See generally McLaughlin, Infitah in Egypt: An Appraisal of Egypt's Open-Door Policy for Foreign Investment, 46 Fordham L. Rev. 885 (1978); Note, The Development of Foreign Investment Law in Egypt and Its Effect on Private Foreign Investment, 10 Ga. J. Int'l & Comp. L. 301 (1980).
investment agreements. Similarly, the negotiators should identify any treaty provisions that are unfavorable to United States interests and attempt to exclude them from subsequent agreements. By doing this, the United States can develop a model treaty that provides maximum protection to its overseas investments.7

This Article examines the evolution and current status of the bilateral investment treaty concept as it relates to the United States. First, it reviews the history and important characteristics of the FCN and BIT systems. Second, it describes the United States-Egypt BIT and analyzes its most important provisions.8 Third, it examines the Treaty's deficiencies and recommends solutions. The Article concludes that BITs will enhance the overseas investment opportunities available to American investors and will provide better investment security. The Article also notes, however, that BITs will not solve all of the problems that United States investors encounter abroad.

I

THE HISTORY OF THE FCN AND BILATERAL INVESTMENT TREATY SYSTEMS

A. THE FCN TREATY SYSTEM: AN AGING FRAMEWORK

To comprehend the importance of the bilateral investment treaty, it is necessary to understand why the FCN treaty network established by the United States has become obsolete. Currently, the United States is a party to over forty FCN treaties.9 Although the United States entered into a number of these in the 19th century, it negotiated most of them, including those with both industrial trading partners and developing countries, during the 1940's and 1950's. They served as broad frameworks for general commercial relations.10 But the United States signed the FCN treaties in a world economic atmosphere that no longer exists—the post-war era when Europe and Japan were forced to devote their funds to domestic

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7. See Model Bilateral Investment Treaty, released by Office of Trade Representative (January 1983) [hereinafter cited as Model or Model BIT].
8. In addition to examining the treaty the United States recently signed with Egypt, this Article examines and makes frequent reference to the Model BIT released by the Office of the Trade Representative in January 1983. See supra note 7. These frequent references, however, should not detract from the importance of the United States-Egypt BIT. This treaty has received substantial public attention and has evoked considerable discussion about the efficacy of BITs.
9. See Asken, supra note 3, at 382-90 (listing FCN treaties currently in effect between the United States and other nations).
reconstruction and the United States had unparalleled sources of private capital available for investment overseas.\textsuperscript{11}

Typically, an FCN treaty contains broad provisions that deal with issues such as commerce, foreign investment, travel, and individual rights.\textsuperscript{12} A signatory to such a treaty usually promises to protect property that is within its borders and is owned by nationals of the other signatory.\textsuperscript{13} The substantive provisions of an FCN treaty discuss:

(a) National treatment in the administration of local laws;
(b) Individual citizens’ rights, such as freedom of movement and entry, right to counsel and speedy trial, and protection from molestation;
(c) Private standing in national courts;
(d) The enforceability of arbitration awards between private parties;
(e) National treatment when engaging in and operating a business;
(f) The right freely to purchase and lease land;
(g) Protection of property;
(h) Protection of exchanges involving scientific and technical knowledge;
(i) Protection of property from unfair seizure in accordance with most-favored-nation treatment;
(j) The rights of professionals to practice;
(k) Exchange controls;
(l) National and most-favored-nation treatment for patents and trademarks;
(m) Rules on customs administration, import or export duties, and other charges;
(n) Transportation of goods and services;
(o) National and most-favored-nation treatment in the areas of taxation and products distribution and use;
(p) The right to compete with local monopolies;
(q) Freedom of commerce and navigation for ships;
(r) Bilateral consultation regarding competitive restraint practices; and
(s) Dispute settlement between the treaty signatories.\textsuperscript{14}

The FCN treaties thus focus on the protection of individual rights as well as, in a general way, the promotion of business between the United States and other nations. They strongly emphasize “friendship” rather than funds transfers, expropriation, dispute settlement, or other contemporary international business problems.

\textsuperscript{11} Between 1946 and 1959, for example, the United States’ overseas investment increased from $7.2 billion to $29.7 billion. See Jova, \textit{Private Investment in Latin America: Renegotiating the Bargain}, 10 Tex. Int’l L.J. 455 (1975).


\textsuperscript{13} See, e.g., Treaty of Friendship, Commerce and Navigation, Nov. 12, 1959, United States-Pakistan, art. 1, 12 U.S.T. 110, T.I.A.S. No. 4683 [hereinafter cited as United States-Pakistan FCN Treaty].

Because the FCN treaties fail to deal adequately with these important subject areas, a need exists for a more business-oriented agreement. The BIT attempts to accomplish this goal. The BIT also addresses a number of other problems that plague the FCN treaty system. First, the formal and sweeping nature of FCN treaties may cause developing countries to be reluctant to enter into such agreements. These nations may perceive that an FCN treaty aligns them politically with the United States when in fact they desire to remain non-aligned. The BIT cures this problem because it focuses exclusively on economic matters. Second, the substantial monetary losses incurred in recent years by United States businesses as a result of expropriations in Iran, Libya, and other nations have demonstrated the inability of the current treaty system to protect America's overseas investments. A BIT, on the other hand, usually provides for both specific conditions under which expropriation can occur and

15. In the early 1970's, the Libyan government expropriated foreign owned oil companies doing business in Libya. Victims of the expropriations complained bitterly that this action discriminated against them, lacked a valid public purpose, and failed to provide adequate compensation. In regard to the expropriation of the assets belonging to Nelson Bunker Hunt Oil Company, an American company, President Nixon stated: Under international law, the United States has a right to expect:  
— that any taking of American private property will be nondiscriminatory;  
— that it will be for a public purpose;  
— that its citizens will receive prompt, adequate, and effective compensation from the expropriating country.

Economic Assistance and Investment Security in Developing Nations, Policy Statement 8 WEEKLY COMP. PRES. DOC. 64, 65 (Jan. 19, 1972). In addition, the U.S. State Department made formal protests to the Libyan government:

It is clear . . . that the reasons for the action of the Government of the Libyan Arab Republic against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other United States nationals in Libya.

Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.


In the wake of the overthrow of the Shah of Iran, the new Islamic government of that nation nationalized certain foreign-owned industries. These actions led more than 400 parties, mostly United States corporations, to file suit in United States courts against Iran's government. The plaintiffs claimed that the expropriatory actions violated the Treaty of Amity, Economic Relations, and Consular Rights signed by Iran and the United States in 1955. See Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 (This treaty was an FCN treaty and was typical of the type of agreements entered into by the United States in the late 1940s and 1950s.). Specifically, they alleged that Iran failed to pay prompt, adequate, and effective compensation. To date, the victims of the expropriatory actions have not been fully compensated.
prompt and adequate compensation.\footnote{16} These facts, combined with the political instability in many developing countries, the extensive use of BITs by other industrial nations, the occasional criticism in the United Nations by developing nations of foreign investors, and the evolution of a specialized multilateral trading framework under the General Agreement on Tariffs and Trade (GATT), indicate that the FCN treaty system has outlived its usefulness as a vehicle to facilitate international trade. In conclusion, it is clear that FCN treaties are too complex and too broadly phrased to foster and protect adequately overseas investments.

B. THE CONCEPT OF THE BILATERAL INVESTMENT TREATY: RECIPROCAL OPPORTUNITY

Many Western industrial nations have successfully employed BITs for a number of years.\footnote{17} Indeed, Japan is the only United

\footnote{16} In regard to expropriation, the United States-Egypt BIT states:

(1) No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or a political or administrative subdivision thereof—or subjected to any other measure, direct or indirect (including, for example, the levying of taxation, the compulsory sale of all or part of such an investment, or impairment or deprivation of management, control or economic value of such an investment by the national or company concerned), if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as "expropriation")—unless the expropriation

(a) is done for a public purpose;
(b) is accomplished under due process of law;
(c) is not discriminatory;
(d) is accompanied by prompt and adequate compensation, freely realizable; and

(e) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation.

Compensation shall be equivalent to the fair market value of the expropriated investment on the date of expropriation. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall include payments for delay as may be considered appropriate under international law, and shall be freely transferable at the prevailing rate of exchange for current transactions on the date of the expropriatory actions.

(2) If either Party or a political or administrative subdivision thereof expropriates the investment of any company duly incorporated, constituted or otherwise duly organized in its territory, and if nationals or companies of the other Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, then the Party within whose territory the expropriation occurs shall ensure that such nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

United States-Egypt BIT, \textit{supra} note 1, at art. III, para. 1 & 2.

\footnote{17} A number of international organizations have attempted to improve the BIT system. As a result, many multilateral discussions regarding BITs have taken place. In addition, many organizations have published BIT guidelines. \textit{See, e.g., International
States trading partner that has used FCN treaties in its relations with developing nations. Although the BITs used by the United States' trading partners vary from relatively abbreviated instruments, such as those utilized recently by the United Kingdom, to long and complex documents, the goal of any BIT is to facilitate trade between the signatories.

A fundamental feature of BITs is that they focus upon the economic relations between industrial and developing nations rather than the relations among industrial nations. Multilateral agreements, such as the Treaty of Rome and the Code of Liberalization of Capital Movements of the Organization for Economic Cooperation and Development (OECD), on the other hand, typically govern the economic relations among industrial nations.

The preamble of a BIT typically reflects the general spirit and intent of the treaty. Japan and Sri Lanka, for example, recently signed a BIT that contains such a statement. In it, the parties enunciated their

(i) desire to strengthen economic cooperation between the two countries;

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18. INT'L CHAMBER OF COMMERCE, supra note 17, at 8.
21. The Treaty of Rome, for example, provides that member states should remove obstacles that prevent the free movement of persons, services and capital. Treaty of Rome, Mar. 25, 1957, art. 3, 298 U.N.T.S. 11.
23. Although the stark distinctions between some developing nations and the OECD nations have begun to erode as the economies of the former countries have begun to mature, those distinctions remain sufficiently strong to justify the use of bilateral investment treaties by OECD nations to enhance their economic relations with developing nations. In contrast to multinational agreements designed for complex commercial regimes dominated by companies with multinational bases, BITs provide a streamlined, adaptable framework for commercial relations between developing and industrialized nations. This framework more than adequately meets the needs of the comparatively simple, and often homogenous, economies of developing nations.
(ii) intent to create favorable investment conditions for each signatory's citizens and companies doing business and investing within the other signatory's borders; and

(iii) recognition that the promotion and protection of investment will stimulate the flow of capital and technology between the signatories and that the economies of the signatories will benefit as a result of the flow.\textsuperscript{25}

Clearly, the spirit of this treaty is one of cooperation.

In contrast to the typical FCN treaty entered into by the United States, a BIT is a concise instrument that addresses the economic concerns of the signatories.\textsuperscript{26} Such a treaty typically has only a few substantive provisions. In its simplest form, a BIT establishes a standard for the reciprocal treatment of foreign investment,\textsuperscript{27} provides for the compensation of certain investment losses such as expropriations,\textsuperscript{28} and establishes standards for the repatriation of capital and

\textsuperscript{25} Id. at preamble.

\textsuperscript{26} A BIT's basic premises are that both parties to the treaty benefit when the nationals and companies of one signatory invest in the economy of the other and that this type of activity should be promoted and protected. Usually, overly complex and unwieldy agreements govern the relations between nations. BITs, however, have a unique place in international economic relations in that they are simple and functional instruments. The United Nations compared the BIT concept with the broader FCN approaches and noted that

[i]the increasing resort to such bilateral investment agreements, which can be readily adapted to the particular conditions and relations of the contracting countries and are frequently co-ordinated with actual investment projects, may point to a more promising process for evolving a new system of workable international law on which investors may rely.


\textsuperscript{27} See, for example, the United States-Egypt BIT's articulation of the most-favored-nation principle, infra text accompanying note 37. Compare with Model BIT, supra note 7, at art. II, para. 1.

\textsuperscript{28} See, e.g., United States-Egypt BIT, supra note 1, at art. III (providing conditions under which expropriation can occur and providing a compensation formula); id. at art. IV (providing compensation for damages due to war and similar events). See also Model BIT, supra note 7, at art. III; id. at art. IV.

Because of the importance expropriations have played in international relations in recent years, the Model BIT's and the United States-Egypt BIT's treatment of expropriation merit study and comparison. Such a study reveals three differences. First, the United States-Egypt BIT covers expropriations and nationalizations by both the signatory and its political and administrative subdivisions. The Model BIT only covers expropriations by the signatory. Second, the United States-Egypt BIT provides that the fair market value of the expropriated investment should be measured as of the date of expropriation. The Model BIT, however, does not indicate when the fair market value of the expropriated investment should be measured. Third, the United States-Egypt BIT states that the compensation for expropriated investments "shall include payments for delay as may be considered appropriate under international law . . . ." United States-Egypt BIT, supra note 1, at art. III, para. 1. The Model BIT, on the other hand, treats this subject with substantially more specificity. It states that "[s]uch compensation shall be paid without delay, shall be effectively realizable, [and] shall bear current interest from the date of expropriation at a rate equivalent to current international rates." Model BIT, supra note 7, at art. III, para. 1.

War damage compensation also has received considerable attention in recent years. A comparison of the Model BIT's and the United States-Egypt BIT's treatment of war
profits. To clarify these provisions and to make them workable, a BIT also contains ancillary provisions dealing with subjects such as dispute resolution procedures.

Damages reveals two significant differences. First, the United States-Egypt treaty covers damages due to war between a signatory and a third country and “damages due to any kind of civil disturbance or insurrection in the territory” of a signatory. United States-Egypt BIT, supra note 1, at art. IV. The Model also covers damages arising from war between a signatory and a third country. Compared to the United States-Egypt BIT, however, it better defines the types of internal events that can lead to compensation. The Model states that a signatory can be compensated for “damages due to revolution, state of national emergency, revolt, insurrection, riot or act of terrorism in the territory” of the other signatory. Model BIT, supra note 7, at art. IV, para. 1. In addition, the Model provides:

In the event that such damages result from:
(a) a requisitioning of property by the other Party’s forces or authorities, or
(b) destruction of property by the other Party’s forces or authorities which was not caused in combat action or was not required by the necessity of the situation,
the national or company shall be accorded restitution or compensation consistent with Article III.

Model BIT, supra note 7, at art. IV, para. II. The United States-Egypt BIT contains no such provision.

The United States-Egypt BIT states:
Either Party shall in respect to investments by nationals or companies of the other Party grant to those nationals or companies the free transfer of:
(a) returns.
(b) royalties and other payments deriving from licenses, franchises and other similar grants or rights.
(c) installments in repayment of loans.
(d) amounts spent for the management of the investment in the territory of the other Party or a third country.
(e) additional funds necessary for the maintenance of the investment.
(f) the proceeds of partial or total sale or liquidation of the investment, including a liquidation effected as a result of any event mentioned in Article IV; and
(g) compensation payments pursuant to Article III.

United States-Egypt BIT, supra note 1, at art. V, para. 1.

The Model BIT’s treatment of this subject is slightly different. It states that each Party shall permit all transfers related to an investment in its territory of a national or company of the other Party to be made freely and without delay into and out of its territory. Such transfers include the following: returns; compensation; payments made arising out of a dispute concerning an investment; payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; amounts to cover expenses relating to the management of the investment; royalties and other payments derived from licenses, franchises or other grants of rights or from administrative or technical assistance agreements, including management fees; proceeds from the sale of all or any part of an investment and from the partial or complete liquidation of the company concerned, including any incremental value; additional contributions to capital necessary or appropriate for the maintenance or development of an investment.

Model BIT, supra note 7, at art. V, para. 1.

See, e.g., United States-Egypt BIT, supra note 1, at art. IV (providing for biennial consultations and exchange of information); id. at art. VII (providing for settlement of investment disputes between one party and a national or company of the other party); id. at art. VIII (providing for settlement of disputes between the parties concerning interpretation or application of the Treaty).
A BIT's true test of efficiency is, of course, its ability to provide security to investors when they invest overseas. European countries that have entered into BITs with developing nations have indeed found their investments protected from certain expropriatory actions. In two reported cases, for example, German interests were given protection based upon BIT provisions.\footnote{31} In one of these cases, after formal German protests, a developing country refrained from expropriating the property of German investors because of protections provided by a BIT.\footnote{32} In the other case, the developing nation refrained from expropriating German properties, but expropriated the property owned by other foreigners.\footnote{33}

II

AN EXAMINATION OF THE BILATERAL INVESTMENT TREATY AS USED BY THE UNITED STATES AND EGYPT

Bilateral investment treaties are an important way to improve economic relations between industrialized and developing nations. When examining the relationship of this type of treaty to United States foreign investment policy, one must necessarily examine the United States-Egypt BIT. Although the United States has adopted a prototype treaty and has signed bilateral investment agreements with Panama, Haiti, and Senegal, only the treaty between the United States and Egypt has received substantial public attention. Thus, in many ways, this treaty is the only true model.\footnote{34} This section of the Article reviews the United States-Egypt BIT's most important provisions. Upon completing this review, the reader should be more able to appreciate the BIT and its impact on the United States' economic relations with developing countries.

A. PROTECTION AND PROMOTION OF INVESTMENT

The focus of any BIT is the mutual protection of investments in the "contracting states".\footnote{35} The basic standard of protection is generally the most-favored-nation standard. As part of its basic commit-

\footnote{31. INT'L CHAMBER OF COMMERCE, supra note 17, at 10.}
\footnote{32. Id.}
\footnote{33. Id.}
\footnote{34. See supra note 8.}
\footnote{35. See, e.g., Agreement on the Mutual Protection of Investments, Mar. 29, 1982, People's Republic of China-Sweden, reprinted in 21 I.L.M. 477 [hereinafter cited as Mutual Protection Treaty]. That treaty expresses the spirit of such a covenant in typical fashion by stating that "[e]ach Contracting State shall at all times ensure fair and equitable treatment to the investments by investors of the other Contracting State." Id. at art. 2, para. 1.}
ment to create a “favorable environment” for investment, Article II of the BIT between the United States and Egypt incorporates this standard:

Each party undertakes to provide and maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall, in applying its laws, regulations, administrative practices and procedures, permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords to investments of its own nationals or companies or to nationals and companies of any third country, whichever is the most favorable.

This provision reflects an expanded most-favored-nation commitment because it treats the contracting parties the same as most-favored third country investors and domestic investors.

Significantly, treaty negotiators deleted from the final version of the United States-Egypt BIT a related provision that had been included in early drafts of that treaty. The deleted provision stated:

Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment made by nationals or companies of the

36. As noted previously, this Article focuses on the BIT signed by the United States and Egypt. This treaty resembles in principle and in scope the treaty the United States signed with Panama. The United States-Egypt BIT, however, has received substantial notoriety in international commercial circles. As a result, many foreign negotiators have viewed this treaty as the prototype BIT. In its talks with other countries, however, the Office of the United States Trade Representative has utilized a prototype that it promulgated specifically for use by treaty negotiators as a reference tool. It released the current version of the prototype in January 1983. See supra note 7.

37. United States-Egypt BIT, supra note 1, at art. II, para. 1. Close scrutiny reveals that this provision deals only with the most-favored-nation standard as it relates to the establishment or acquisition of investments. It makes no mention of the standard of protection afforded to the investing party after it acquires or establishes an investment within the borders of the other signatory. The second paragraph of the Treaty’s second article, however, deals with this subject. It states that:

Each Party shall accord investments in its territory, and associate activities related to these investments, of nationals or companies of the other Party treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies, or nationals or companies of any third country, whichever is the most favorable.

Id. at art. II, para. 2(a).

As used in the above treaty excerpt, a “company of a party” means “a company incorporated, constituted, or otherwise duly organized under the applicable laws and regulations of a Party . . . in which natural persons who are nationals of such Party” or “such Party or its political or administrative subdivisions, agencies or instrumentalities have a substantial interest.” Id. at art. I, para. 1(b).

38. “National treatment” occurs when a nation gives foreign investors the same rights and privileges with respect to investments that it affords to its own nationals. Such treatment is one of the most significant features of a BIT. Inclusion of this standard in the United States-Egypt BIT represents an important commitment by the United States to expand protection beyond the terms of many existing OECD investment treaties. Early investment treaties of other nations often included only a provision dealing with most-favored-nation treatment. In recent years, however, a national treatment standard has been incorporated into most BIT agreements negotiated by OECD nations. See, e.g., Japan-Sri Lanka BIT, supra note 20, at art. 3. But see Philippines-United Kingdom BIT, supra note 19, at art. 4 (only providing most-favored-nation treatment).
other Party. Deletion of this language may not weaken the most-favored-nation standard or the national treatment protections because the provision simply underscored those protections. The deleted language, however, would have effectively prohibited indirect impairment of rights created by the BIT. Without the provision, both the United States and the Egyptian governments can impair investments by actions falling short of explicit expropriation or of overt acts prohibited by the formal protections of Article II. Indeed, perhaps the purpose of the deleted language was to prevent subtle, indirect discrimination, because this type of behavior is usually more prevalent than overt departures from the most-favored-nation standard or national treatment. Although no treaty provision can effectively eliminate all possible "arbitrary and discriminatory measures," the deleted language was of value not only as an expression of the parties' commitment to avoid such measures, but also as a basis for protesting them under treaty dispute procedures. Thus, this language serves the interests of United States investors and should be included in future BITs.

I. Investment and "Associated" Activities

The United States-Egypt BIT protects a broad spectrum of investments. It states that the term "investment" includes all "equity, debt, service and investment contracts" and provides a non-exclusive list of these protected investments. In addition, the Treaty extends the scope of protected conduct to so-called "associ-
ated" activities. Examining the sample list of these activities provided in the Treaty, it becomes clear that they consist of the primary business activities appurtenant to any investment. As the provisions just described indicate, the United States-Egypt BIT protects substantially more investment-related activities than do most investment treaties. Usually, such treaties contain only a short and equivocal definition of protected investments.

(iii) a claim to money or a claim to performance having economic value due under an investment agreement;

(iv) valid intellectual and industrial property rights, including, but not limited to, rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets, and know-how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract including, but not limited to, rights, within the confines of law, to search for or utilize natural resources, and rights to manufacture, use and sell products;

(vii) returns which are reinvested.

United States-Egypt BIT, supra note 1, at art. I, para. 1(c). See also Model BIT, supra note 7, at art. I, para. 1(c).

See United States-Egypt BIT, supra note 1, at art. I, para. 1(f) (defining return as "an amount derived from an investment, including but not limited to, profit; dividend; interest; royalty payment; management, technical assistance or other fee; and payment in kind"); Model BIT, supra note 7, at art. I, para. 1(c).

44. Sample "associated activities" include:

(i) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business;

(ii) the organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in their property; and the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposition, of companies organized or acquired;

(iii) the making, performance and enforcement of contracts related to investment;

(iv) the acquisition (whether by purchase, lease or any other legal means), ownership and disposition (whether by sale, testament or any other legal means) of personal property of all kinds, both tangible and intangible;

(v) the leasing of real property appropriate for the conduct of business;

(vi) the acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and,

(vii) the borrowing of funds at market terms and conditions from local financial institutions, as well as the purchase and issuance of equity shares in the local financial markets, and, in accordance with national regulations and practices, the purchase of foreign exchange for the operation of the enterprise.

United States-Egypt BIT, supra note 1, at art. II, para. 2.

45. The BIT between the Philippines and the United Kingdom, for example, provides in pertinent part:

The term 'investment' shall mean every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens and pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;
2. Reservation of Limited Industry Sectors

Protections under the United States-Egypt BIT extend to investments and associated activities that occurred before the treaty took effect.\textsuperscript{46} Significantly, the Treaty permits the contracting parties to except a limited group of industries from the standard of national treatment. These exceptions encompass industries of strategic or other special importance to the parties.\textsuperscript{47} Thus, in an annex to the United States-Egypt BIT, both parties reserved the right to maintain limited exceptions in commercial areas such as air transportation, maritime shipping, banking, insurance, land use, ownership of real estate, natural resource use, radio and television broadcasting, telecommunications, and custom brokering.\textsuperscript{48} Moreover, Egypt reserved exceptions in areas such as distribution, wholesaling, retailing, importing, and exporting.\textsuperscript{49} These exceptions, which are much

(iii) claims to money or to any performance under contract having financial value;
(iv) intellectual property rights and goodwill;
(v) business concessions conferred by law or under contract.

Philippines-United Kingdom BIT, \textit{supra} note 19, at art. I, para. 5.

\textsuperscript{46} Retroactive application occurs if it “is not inconsistent with agreements, contractual arrangements, investment authorizations and licenses made under legislation existing at the time the concerned investments were made.” United States-Egypt BIT, \textit{supra} note 1, at art. II, para. 2(b).

\textsuperscript{47} \textit{Id.} at art. II, para. 3. Traditionally, industries that have been accorded such protection have included: (1) industries dealing in nonrenewable natural resources and (2) industries playing a vital role in national security.

\textsuperscript{48} United States-Egypt BIT, \textit{supra} note 1, at art. II, para. 3 (referring to the Treaty’s Annex which lists specific exceptions). \textit{See also} Model BIT, \textit{supra} note 7, at art. II, para. 3(a).

\textsuperscript{49} Under the United States-Egypt BIT’s Annex, the United States reserves the right to maintain limited exceptions for the following:
Air transportation, ocean and coastal shipping; banking; insurance, government grants; government insurance and loan programs; energy and power production; use of land and natural resources, custom house brokers; ownership of real estate; radio and television broadcasting; telephone and telegraph services, submarine cable services; satellite communications.

United States-Egypt BIT, \textit{supra} note 1 at Annex.

Egypt, on the other hand, specifically reserves the right to maintain exceptions for the following:
Air and sea transportation; maritime agencies; land transportation other than that of tourism; mail telecommunication, telegraph services and other public services which are state monopolies; banking and insurance; commercial activity such as distribution, wholesaling, retailing, important export activities; commercial agency and broker activities; ownership of real estate; use of land, natural resources; national loans; radio, television and the issuance of newspapers and magazines.

\textit{Id.} With regard to the “commercial activity” exception listed by Egypt, the parties noted that the term does not include “integrated operations which combine production and sales activities for their products.” \textit{Id.} at Protocol, para. 7. The parties further agreed that these exceptions do not apply to investment banking, merchant banking, and reinsur-
broader than those appearing in other BITs, are not retroactive. Further, they cannot result in treatment that is less favorable than that accorded to investments and associated activities of nationals or companies of any third country. Consequently, the exceptions only apply to the standard of national treatment and do not in any way weaken the most-favored-nation treatment of investments. Despite the exceptions, the Treaty assures that the “treatment, protection and security of investments shall never be less than that required by international law and national legislation.”

The “limited exception” provisions of the United States-Egypt BIT may be the most significant departure from the practices of other OECD countries, and they pose a potentially dangerous precedent for future United States investment agreements. Although the provisions exclude only national treatment protection, the scope of industries reserved by the parties creates a substantial void in the Treaty. This void undermines uniform and comprehensive investment protection. Additionally, the need for or viability of exceptions in several of the listed industry sectors is tenuous when viewed against the background of applicable laws and economic realities.

3. Immigration and Labor

To encourage investment, the United States-Egypt BIT permits the nationals of a contracting party to enter and remain in the other party’s territory to direct investment activity. These nationals, however, are “subject to the [host nation’s] laws relating to the entry and sojourn of aliens.” The BIT provides that nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, directing, administering or advising on the operations of an investment to which they or the companies that employ them have committed or are in the process of committing a substantial amount of capital or other resources.

50. The Japan-Sri Lanka BIT, for example, excludes only certain matters concerning banking, shipping, and aviation. These exclusions apply only to the national treatment. Japan-Sri Lanka BIT, supra note 20, at art. 3, para. 3. Exception clauses in many contemporary treaties exclude only preferences or privileges resulting from customs union and tax agreements. See, e.g., Agreement for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, Sri Lanka-Switzerland, art. 5, reprinted in 21 I.L.M. 399; Philippines-United Kingdom BIT, supra note 19, at art. IV, para. 3.

51. United States-Egypt BIT, supra note 1, at art. II, para. 3.

52. Id. at art. II, para. 3.

53. Id. at art. II, para. 4.

54. See id. at art. II, para. 3; id. at Annex.

55. See infra notes 146-51 and accompanying text.

56. United States-Egypt BIT, supra note 1, at art. II, para. 5(a).

57. Id.

58. Id.
Concomitantly, the Treaty permits nationals or companies of the contracting parties and companies owned and controlled by the parties to choose the individuals who will manage their investments. This provision protects against the common demand of developing countries that their nationals manage foreign owned investments and businesses within their borders. Additionally, subject to the employment laws of the parties, nationals and companies of either party may engage "professional and technical personnel of their choice for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of investment." Finally, the BIT guarantees that nationals and companies of the parties may employ persons of their choice "who otherwise qualify under applicable laws and regulations of the forum.'

At first glance, the United States-Egypt BIT’s employment provisions appear quite liberal because they make hiring only “subject to [the] employment laws of each party.” These provisions, however, may establish a limitation more severe than that imposed by FCN treaties. In Sumitomo Shoji America, Inc. v. Avagliano, the Supreme Court held that a provision in an FCN treaty between the United States and Japan did not insulate an American subsidiary of a Japanese company from a suit alleging employment discrimination under Title VII of the Civil Rights Act of 1964. Sumitomo, how-

59. Id. at para. 5(b).
60. Id.
61. Id. at para. 8.
62. Id. at para. 5(b).
63. FCN treaties typically state that “companies of either party shall be permitted to engage within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.” See, e.g., United States-Japan FCN Treaty, supra note 12, at art. VIII, para. 1.

[C]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice.

Id. at art. VIII, para. 1. The Treaty goes on to define “companies” as follows:

As used in the present treaty, the term “companies” means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within territories of the other Party.

Id. at art. XXII, para. 3.
65. The subsidiary was incorporated in New York. Sumitomo, 457 U.S. at 178. Thus, it was a United States company, not a Japanese company. Relying on this fact, the
ever, does not limit the broad employment rights of a bona fide foreign company of an FCN treaty nation operating in the United States. Moreover, it does not address whether such treaty provisions could be modified or superseded by national employment laws.

4. Competitive Equality

The protections afforded by a BIT should extend to competition between enterprises run by the host government and companies or nationals of the other party. Consequently, "[i]n the context of national economic policies and the desire to promote investments of all types, both private and public," the United States and Egypt agreed to extend protections to such competition. The two nations agreed that:

[c]onditions of competitive equality should be maintained where investments owned or controlled by a Party or its agencies or instrumentalities, within the territory of such Party, are in competition under similar conditions and situations with privately owned or controlled investments of nationals or companies of the other Party.

To ensure competitive equality, the United States-Egypt BIT seeks to prevent the misuse of national performance requirements. Previously, nations have applied such requirements inequitably so as to restrict trade and investment. According to the BIT's terms, however, the United States and Egypt must "seek to avoid the imposition of performance requirements on the investments of nationals and companies of the other Party."

66. In Sumitomo, the Court indicated that each FCN must be interpreted in light of its negotiation history and that, in the case at hand, the contracting parties clearly intended to exclude United States subsidiary corporations from the treaty's coverage. Sumitomo, 457 U.S. at 187-88. This view limits the application of Sumitomo to situations involving treaties with similar negotiation histories.

67. The Court noted that the question whether the Treaty's provision regarding the employment of Japanese nationals violated Title VII was "not properly before the court" for procedural reasons. Id. at 180 n.4.

68. United States-Egypt BIT, supra note 1, at art. II, para. 6.

69. Id. at art. II, para. 6. The Model BIT uses similar language. It states that "[i]n such situations, the privately owned or controlled investments shall receive treatment which is equivalent with regard to any special economic advantage accorded the governmentally owned or controlled investments." Model BIT, supra note 7, at art. II, para. 6.

70. United States-Egypt BIT, supra note 1, at art. II, para. 7.


5. Access to Adjudicatory Process and Transparency of Laws

A requirement that the contracting parties provide "effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations, and properties" is one of the United States-Egypt BIT's more important features. To this end, the Treaty requires that the parties make access to the appropriate adjudicatory bodies available to nationals or companies of the other party. Thus, the Treaty provides that each contracting party must grant a "right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority," so that investment-related claims and rights can be asserted and enforced.

The contracting parties' access to legal process is augmented further by a requirement that each party make public its applicable legal requirements. This clause seeks to avoid the inequitable application of laws to a foreign party who may be ignorant of them.

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73. Id. at para. 8.
74. Id.
75. Id.
76. Under long established legal principles, nations can grant foreigners access to their courts. The territorial principle allows each party to impose its laws on the investors of the other party. Thereby, a nation can exercise judicial, legislative, or enforcement jurisdiction over all persons or things within its borders. In discussing this principle, Chief Justice John Marshall stated:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction, all exceptions, therefore, to the full and complete power of a nation within its territories, must be traced to the consent of the nation itself.


77. See United States-Egypt BIT, supra note 1, at art. II, para. 9. Under this provision,

[j]eアク Party and its political or administrative subdivisions shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments in its territory of nationals or companies of the other Party.

Id.

This disclosure is important because in many nations non-public laws dealing with subjects such as product standards, procurement, and general commercial activity have created a formidable trade barrier. Exporters whose products fail to comply with technical standards and to pass customs inspections have often been frustrated in their attempts to obtain such standards for two reasons: (1) vast bureaucratic obstacles and (2) the failure of many nations to publicize their standards.

78. United States-Egypt BIT, supra note 1, at art. II, para. 9.
B. Expropriation

Investment treaties historically have established specific standards for expropriation or nationalization of investments, the threat of which is always of major concern to investors. The model BIT incorporates such a standard and includes assurances of due process and non-discriminatory treatment similar to those within recent OECD BITs. The United States-Egypt BIT specifically provides that no portion of an investment made by a national or company of a signatory shall be expropriated unless the expropriation

(a) is done for a public purpose;
(b) is accomplished under due process of law;
(c) is not discriminatory;
(d) is accompanied by prompt and adequate compensation, freely realizable; and
(e) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation.

In this context, “expropriation” includes not only all expropriations and nationalizations, but also “the levying of [taxes], the compulsory sale of all or part of such an investment, [the] impairment or deprivation of management, control or economic value of such an investment” and other direct or indirect measures by a signatory or its political or administrative subdivisions which, in effect, are tantamount to expropriation or nationalization.

The prompt, adequate, and “freely realizable” compensation for expropriated property mandated by the United States-Egypt BIT must be equivalent to the fair market value of the investment on the

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79. See generally supra note 28.
80. See, e.g., United States-Pakistan FCN Treaty, supra note 13. Thai treaty states:

Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

81. Model BIT, supra note 7, at art. III, para. 1.
82. See, e.g., Japan-Sri Lanka BIT, supra note 20, at art. 5, para. 2.
83. United States-Egypt BIT, supra note 1, at art. III, para. 1.
84. Id.
date of expropriation. Significantly, this amount is not to be reduced because of a prior public announcement of the expropriatory action or because of the occurrence of events leading to the expropriation. Moreover, it must include interest or “other payments for delay” deemed appropriate under international law and must be freely transferable at the prevailing exchange rate.

In cases of alleged expropriation, the United States-Egypt BIT grants each party’s nationals and companies a right to prompt review “by the appropriate judicial or administrative authorities.” Such authorities will determine whether expropriation has actually occurred, and if so, whether it and any attendant compensation conform to the treaty standards.

C. COMPENSATION FOR WAR DAMAGES

The United States-Egypt BIT, like many modern bilateral agreements, explicitly provides for losses incurred due to war, civil disturbance, and other types of violent conflict. Specifically, the treaty applies the dual standards of most-favored-nation and national treatment to two situations in which the investments or returns of nationals or companies of either signatory can sustain losses: (1) war or other armed conflict between the host country and a third country and (2) civil disturbance or insurrection in the host country. Applying these standards, the treaty provides that the damaged party shall be entitled to “restitution, indemnification, compensation or other appropriate settlement” and shall receive “treatment no less favorable than that which such other party accords to its own nationals or companies or to nationals or companies of any third country, whichever is most favorable.”

85. *Id.* See supra note 83 and accompanying text. Other BITs have stated this principle in alternative fashion. See, e.g., Agreement for the Promotion and Protection of Investment, July 22, 1975, United Kingdom-Singapore, *reprinted in* 15 I.L.M. 591, art. 5, para. 1 (“compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge”).

86. United States-Egypt BIT, supra note 1, at art. III, para. 1. The United States-Egypt BIT also emphasizes that the right to compensation extends to the expropriation of any direct or indirect ownership or other rights “with respect to the equity” held by nationals or companies of either party in an investment expropriated by the other party. *Id.* at art. III, para. 2.

87. *Id.* at art. III, para. 1.

88. *Id.* at art. III, para. 3.

89. *Id.*

90. United States-Egypt BIT, supra note 1, at art. IV.

91. *Id.*

92. *Id.* This principle has been incorporated into other recent BITs. See, e.g., Japan-Sri Lanka BIT, supra note 20, at art. 6.
D. Transfer of Investment Proceeds and Other Funds

In Article V of the United States-Egypt BIT, the two signatories agreed to allow nationals or companies of the other party to transfer freely investment-related proceeds and other funds. Although such transfer provisions are a typical and vital feature of investment treaties, the United States-Egypt BIT has substantially more detail than most treaties. For example, it guarantees that when arrangements regarding the type of currency to be used in a transfer are not made in advance, transfers can be made in the currency of the original investment or in “any other freely convertible currency” and at the prevailing rate of exchange on the date of transfer.

93. These proceeds and other funds include:
   a. returns.
   b. royalties and other payments deriving from licenses, franchises and other similar grants or rights.
   c. installments in repayment of loans.
   d. amounts spent for the management of the investment in the territory of the other Party or a third country.
   e. additional funds necessary for the maintenance of the investment.
   f. the proceeds of partial or total sale or liquidation of the investment, including a liquidation effected as a result of any event mentioned in Article IV; and
   g. compensation payments pursuant to Article III.

United States-Egypt BIT, supra note 1, at art. V, para. 1.

Notwithstanding the agreement to allow the free transfer of proceeds and other funds, the United States and Egypt recognized that Egypt may “find its foreign exchange reserves at a very low level,” thereby necessitating “temporary” delays in transfers. Such delays are permitted only “(i) in a manner not less favorable than that accorded to comparable transfers to investors of third countries; (ii) to the extent and for the time period necessary to restore its reserves to a minimally acceptable level, but in no case for periods of time longer than that permitted by . . . [Egyptian domestic law] . . . in force on the date of signature of . . . the Treaty; 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 the transfer occurs.” Id. at Protocol, para. 7.

94. In their recently signed BIT, Japan and Sri Lanka agreed to guarantee the “freedom of payments, remittances, and transfers of financial instruments or funds including value of liquidation of an investment.” Japan-Sri Lanka BIT, supra note 20, at art. 8, para. 1. See also Philippines-United Kingdom BIT, supra note 19, at art. VII. However, in another recent investment agreement, Sweden and the People’s Republic of China agreed upon an unusually detailed provision:

Each Contracting State shall, subject to its laws and regulations, allow without undue delay the transfer in any convertible currency of:
   a. the net profits, dividends, royalties, technical assistance and technical service fees, interest and other current income, accruing from any investment by an investor of the other Contracting State;
   b. the proceeds of the total or partial liquidation of any investment by an investor of the other Contracting State;
   c. funds in repayment of borrowings which both contracting States have recognized as investment; and
   d. the earnings of nationals of the other Contracting State who are allowed to work in connection with an investment in its territory.

Mutual Protection Treaty, supra note 35, at art. 4.

95. United States-Egypt BIT, supra note 1, at art. V, para. 2.
Under early agreements, repatriation of investment proceeds proved to be a problematic issue. The Andean Foreign Investment Code, for example, limited the repatriation of annual profits to a fixed percentage. Even though the United States-Egypt BIT insures that monetary transfers can occur without such harsh restrictions, it does permit the parties to maintain laws and regulations that require reports of currency transfers and that allow the collection of income taxes through the imposition of withholding taxes on dividends and other transfers. In addition, the Treaty allows the parties to preserve the rights of creditors through "the equitable, nondiscriminatory and good faith application" of their laws.

E. Consultations

The United States-Egypt BIT provides for biennial consultations between the parties for the purpose of reviewing the Treaty's operation. Such consultations "should aim at exchanging information and views on the progress regarding investments." Furthermore, the Treaty allows either party to make a written request for additional consultations to discuss the application of the Treaty or the resolution of disputes arising thereunder. These supplemental consultations "seek to avoid the adverse effects" of the host country's laws, regulations, decisions, administrative practices, or policies upon the activities of the other party's investors. Where a party, on behalf of its nationals or companies, requests investment information from the second party, the BIT provides that the second country shall, "consistent with the applicable laws and regulations and with due regard for business confidentiality, endeavor to establish appropriate procedures and arrangements for the provision of any such information."

97. United States-Egypt BIT, supra note 1, at art. V, para. 3.
98. Id.
99. Id. at art. VI, para. 2. Interestingly, the Model BIT does not provide for biennial or other regular consultations.
100. Id.
101. Id. at art. VI, para. 1. Dispute settlement procedures are specifically addressed in Article VII of the United States-Egypt BIT. See infra notes 104-32 and accompanying text.
102. United States-Egypt BIT, supra note 1, at art. VI, para. 1.
103. Id. at art. VI, para. 3.
From the investor's perspective, one of the most important aspects of the United States-Egypt BIT is its dispute resolution procedures. The Treaty divides disputes into "legal investment disputes" and disputes between the parties concerning the Treaty's interpretation. This distinction not only mirrors the pattern generally established in bilateral agreements utilized by several OECD nations, but also reflects the practical distinction inherent in disagreements between governments and disagreements between a private party and a government.

I. Investment Disputes

Article VII of the United States-Egypt BIT states that an investment dispute involves either "the interpretation or application of an investment agreement between a party and a national or company of the other party" or "an alleged breach of any right conferred or created by [the] treaty with respect to an investment." When this type of dispute arises, the BIT directs the parties initially to seek a resolution through consultation and negotiation, including the use of nonbinding third-party procedures.

In cases where consultation or negotiation fails the Treaty mandates that the investment dispute be settled in accordance with the applicable procedures set forth in the investment agreement between the investor and host government. This same procedure also applies to an expropriation dispute and may be enforced "in accordance with the terms of the investment agreement and relevant proviso..."
sions of [the host country’s] domestic law.” As an alternative to reliance on investment agreement provisions, the parties can refer to treaties and other international agreements that the host country has signed and that deal with the enforcement of arbitral awards.

Under the United States-Egypt BIT, a national or company has the right to resort to third-party arbitration or conciliation if the procedures described above fail to resolve the investment dispute. Specifically, the Treaty provides that investors may submit the dispute to the International Center for the Settlement of Investment Disputes (ICSID) if, within six months of the date upon which the dispute occurred, at least one of the following three events takes place:

(i) the dispute has not been settled through consultation and negotiation;

(ii) the dispute has not, for any good reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the parties to the dispute; or

(iii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of the host country.

Once a dispute has been submitted to the ICSID, the BIT mandates settlement in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the applicable rules and regulations of the ICSID.

110. Id.
111. Id.
112. See generally id. at para. 3.

114. United States-Egypt BIT, supra note 1, at art. VII, para. 3. The Model BIT does not provide that the dispute may be submitted to the ICSID if the parties cannot settle their dispute through consultation and negotiation. The absence of this provision from the Model, however, is unimportant because it is unlikely that an investor will submit a dispute to the ICSID if the dispute has already been settled through consultation and negotiation. See Model BIT, supra note 7, at art. VII, para. 3.

Under both the United States-Egypt BIT and the Model BIT, the parties have officially consented to the submission of any legal investment dispute to the ICSID for settlement by conciliation or binding arbitration. See id. at para. 3(b); United States-Egypt BIT, supra note 1, at art. VII, para. 3(b).

115. See supra note 113.
116. United States-Egypt BIT, supra note 1, at art. VII, para. 3(c). See ICSID Regulations and Rules, reprinted in 7 I.L.M. 351-91 (1968) (these rules and regulations, which took effect on January 1, 1968, help the ICSID resolve disputes more efficiently).

Although the ICSID often functions as an arbitrator in BIT disputes, treaty provisions may alter this procedure. In the United States-Panama BIT, for example, the parties
In a judicial, arbitral, or other proceeding involving an investment dispute between the host country and an investor of the other party, the host country cannot assert as a defense, counter-claim, or right of set-off that the particular investor "has received, or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages" from any third party, including the host country. An investor, nevertheless, "shall not be entitled to compensation for more than the value of its affected assets, taking into account all sources of compensation within the territory of the party liable for compensation." 

The above dispute settlement procedures generally contain more detail than those utilized in the BITs between industrial and developing nations. In the Philippines-United Kingdom BIT, for example, the parties agreed that they must assent to a request by an investor of the other party to submit "for conciliation or arbitration" to the ICSID "any dispute that may arise in connection with the investment." Article 8 of the BIT between the United Kingdom and Sri Lanka provides a typical example of this type of requirement:

Each Contracting Party hereby consents to submit to the International Center for the Settlement of Investment Disputes . . . for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

designated the Inter-American Commercial Arbitration Commission as a possible arbitration panel. United States-Panama BIT, supra note 2, at art. VII, para. 2.

117. United States-Egypt BIT, supra note 1, at art. VII, para. 4. This supplemental compensation provision reflects the policy expressed in most BITs. The BIT between Sri Lanka and the United Kingdom, for example, provides that a party to the Treaty "shall not raise as an objection at any stage of the proceedings . . . the fact that the national or company which is the other Party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses." Sri Lanka-United Kingdom BIT, supra note 19, at art. 8, para. 3.

Significantly, the United States-Egypt BIT fails to address the validity of rights assigned pursuant to an indemnity. BITs signed by other nations do address this subject. The Sri Lanka-United Kingdom BIT, for example, provides that each party shall recognize the assignment of rights to the other party by an investor pursuant to an indemnity given to that investor for losses in the territory of the first party. Under this BIT, the second party shall be "entitled by virtue of subrogation to exercise the rights and enforce the claims" of such an investor provided that such party "shall not be entitled . . . to exercise any rights other than such rights as the national or company [i.e. the investor] would have been entitled to exercise." Id. at art. 10.

118. United States-Egypt BIT, supra note 1, at art. VII, para. 4.

119. Philippines-United Kingdom BIT, supra note 19, at art. X.

120. Sri Lanka-United Kingdom BIT, supra note 19, at art. 8, para. 1. See also Japan-Sri Lanka BIT, supra note 20, at art. II; Sri-Lanka-Switzerland BIT, supra note 50, at art. 9.
As in the United States-Egypt BIT, the aforementioned agreement also stipulates an initial period for informal dispute settlement “through local remedies or otherwise.”

2. Disputes between the Parties

As is typical of most BITs, the United States-Egypt BIT commits the parties to employ diplomatic channels to resolve any dispute between them regarding the interpretation or application of the treaty. Should such diplomatic efforts fail, the BIT provides that the dispute shall, upon agreement of the parties, be submitted to the International Court of Justice. This option, not typically found in other BITs, establishes an additional alternative for dispute resolution by providing recourse beyond diplomacy or unilaterally-imposed arbitration.

In the absence of an agreement to submit a dispute to the International Court of Justice and upon written request by either party, the BIT provides for the dispute to be submitted to binding arbitration. As in many BITs entered into by other industrial nations, the arbitration must be conducted by a tripartite tribunal in accordance with principles of international law. The tribunal must consist of a chairman—someone who is not a national of either party—and two other arbitrators, one appointed by each of the parties.

121. Sri Lanka-United Kingdom BIT, supra note 19, at art. 8, para. 3 (providing a three month informal settlement period).
122. United States-Egypt BIT, supra note 1, at art. VIII, para. 1. As with legal investment disputes, the BIT provisions concerning disputes between the parties do not apply to disputes arising under “an official export credit, guarantee or insurance arrangement, pursuant to which the Parties have agreed to other means of settling disputes.” Id. at para. 4.
123. Id. at para. 2.
124. See infra notes 99-103 and accompanying text.
125. Id. at para. 3(a). This provision states that if the parties do not agree to submit the dispute to the International Court of Justice, “the dispute shall, upon written request of either Party, be submitted to an arbitral tribunal for binding decision in accordance with applicable rules and principles of international law.” Id.
126. See, e.g., Sri Lanka-United Kingdom BIT, supra note 19, at art. 9; Philippines-United Kingdom BIT, supra note 19, at art. XI; Mutual Protection Treaty, supra note 35, at art. 6.
127. United States-Egypt BIT, supra note 1, at art. VIII, para. 3(a)-(b).
128. Id. at para. 3(b): Each party must appoint an arbitrator within 60 days after arbitration is requested. These two arbitrators must in turn select a third arbitrator to serve as chairman. This latter decision must be made within 90 days after the initial arbitration request. Id. See also United States-Panama BIT, supra note 2, at art. VIII, para. 3 (providing that the Chairman must be appointed within two months after the selection of the other two arbitrators). If the appointments are not made within the ninety-day period, either party may request the President of the International Court of Justice to make the appointment. If the President is a national of either party or is unable to act for any reason, the Court’s Vice President will be asked to make the appointment. If, for any reason, the Vice President cannot make the decision, the Court’s next most senior member will be asked to appoint the Chairman. United States-Egypt
Should any arbitrator be unable to perform his duties, the Treaty provides that a replacement shall be appointed within thirty days of the determination of such disability and by the same procedure used to appoint the original arbitrator.\textsuperscript{129}

With a specificity lacking in most OECD BITs, the United States-Egypt BIT calls for sharply expedited arbitration proceedings. Unless the parties otherwise agree, they must file all submissions and complete all hearings before the arbitration tribunal within 120 days of the appointment of the full tribunal.\textsuperscript{130} Furthermore, the tribunal must reach its decision within thirty days of the last day of hearings or of the filing of final submissions, whichever is later.\textsuperscript{131} The tribunal’s final decision must be determined by majority vote and, unless the parties otherwise agree, must be in accord with the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission.\textsuperscript{132}

G. PRESERVATION OF RIGHTS

By its own terms, the United States-Egypt BIT does not supersede, prejudice, or otherwise derogate from fundamental categories of rights and obligations.\textsuperscript{133} Additionally, it allows the parties com-

\textsuperscript{129} United States-Egypt BIT, supra note 1, at art. VIII, para. 3(c). The costs incurred by the Chairman are shared equally by the parties. Id. at para. 3(g). See also United States-Panama BIT, supra note 2, at art. VIII, para. 7 (providing for a similar apportionment of expenses, but also stating that the tribunal may, at its discretion, order that one of the Parties pay a higher proportion).

\textsuperscript{130} United States-Egypt BIT, supra note 1, at art. VIII, para. 3(d). If a replacement is not appointed within the requisite time period, either party may invite the President of the International Court of Justice to make the appointment in the same manner as the original appointment of tribunal members. Id. See supra note 128.

\textsuperscript{131} Id. Under the Model BIT and the United States-Panama BIT, submissions must be made and hearings must be concluded within six months of the Chairman’s selection. In addition, under both treaties the tribunal must make a decision within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later. Model BIT, supra note 7, at art. VIII, para. 6.; United States-Panama BIT, supra note 2, at art. VIII, para. 6.

\textsuperscript{132} United States-Egypt BIT, supra note 1, at art. VIII, para. 3(f).

\textsuperscript{133} The United States-Egypt BIT specifically states:

1. This Treaty shall not supersede, prejudice, or otherwise derogate from (a) laws, regulations, administrative practices or procedures, or adjudicatory decisions of either Party, (b) international legal obligations, or (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments or associated activities of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.

United States-Egypt BIT, supra note 1, at art. IX, para. 1. In addition, the BIT states that it “shall not derogate from or terminate any other agreement entered into by the two Parties and in force as between the two Parties on the date on which the Treaty enters into force.” Id. at para. 2.
plete latitude in prescribing organizational, registrational, and other investment formalities, provided that they do not "impair the substance of any of the rights" established by the BIT.134 Moreover, the Treaty specifically emphasizes that it does not preclude the parties and their political or administrative subdivisions from applying "any and all measures necessary for the maintenance of public order and morals," fulfilling existing international obligations, protecting their security interests, and taking other measures deemed appropriate to satisfy future international obligations.135

H. Taxation

The Treaty does not establish separate tax treatment for investments falling within its provisions:136 "all matters relating to the taxation of nationals or companies of a Party, or their investments in the territories of the other Party or a political or administrative subdivision thereof shall be excluded".137 Instead, the parties agree to "strive to accord fairness and equity in the treatment of investments of nationals or companies of the other Party" under their respective tax policies.138 Of course, this provision is subject to the Treaty's basic provisions dealing with fair compensation for expropriations and free funds transfers.139

I. Duration and Termination

The Treaty remains in force for an initial ten-year period and continues thereafter unless terminated by either the United States or Egypt.140 Termination at the end of the initial period or any time thereafter is effected by either party giving one year's written notice.141 Even after termination, however, the Treaty's provisions will continue to apply to and protect any investments made or acquired prior to the termination date for an additional ten-year period after that date.142 This provision, which essentially extends the Treaty to a twenty-year period, is necessary to establish the security needed by investors and is a feature common to BITs uti-
lized by other countries.  

III
THE BIT CONCEPT: A NUMBER OF CURABLE
PROBLEMS

By adopting the BIT concept, the United States has undoubtedly enhanced the overseas investment opportunities available to its investors. Thus, it follows that the United States should enter into many more BITs. Successful negotiation of these treaties, however, will not be accomplished without some difficulty. Experience with Egypt demonstrates that pressures will invariably arise requiring departure from the Model BIT. Of course, in some circumstances, adaptations are not only inevitable but desirable. Despite this fact, the United States should not forget that BITs should be simple and straightforward. Indeed, this type of treaty evolved because of the complexities and broad scope of its predecessor, the FCN treaty.

Besides the general problem just noted, BITs have a number of specific deficiencies, as illustrated by the United States-Egypt BIT. First, the "limited exceptions" provisions of the treaty emasculate the national treatment standard. These provisions effectively restrict investment in a number of important business sectors in the United States and Egypt. In the future, the demand for limited exception provisions will pose significant problems for United States treaty negotiators. Exceptions provide a vehicle through which parties to a treaty can compromise and effect agreement. They also, however, restrict severely investment opportunities, impinge on basic BIT principles, and reduce the BIT's overall attractiveness.

To solve the "exceptions" problem, negotiators should refrain from including sweeping, industry-wide exceptions in a treaty. Instead, they should carefully examine the relevant policies and explore the alternative methods of effectuating them. The use of specific references to existing legal restrictions may, for example, provide a viable and less damaging alternative to broad industry

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143. See, e.g., Philippines-United Kingdom BIT, supra note 19, at art. XII (providing a supplemental ten-year effective period after termination); Japan-Sri Lanka BIT, supra note 20, at art. 16 (providing a fifteen-year supplemental effective period after termination); Mutual Protection Treaty, supra note 35, at art. 1 (providing a fifteen-year supplemental effective period after termination); Sri Lanka-Switzerland BIT, supra note 50, at art. 12 (providing a ten-year supplemental effective period after termination).

144. See supra notes 27-29. These notes demonstrate some of the differences between the United States-Egypt BIT and the most recent Model BIT.

145. See supra notes 9-16 and accompanying text.

146. See supra notes 46-55 and accompanying text.

147. See supra notes 48-49.
exceptions. Where industry-wide exceptions are necessary, this approach obviously will not work. In these situations, treaty negotiators must carefully draft pertinent provisions. Unfortunately, the American and Egyptian negotiators failed to do this. As a result, the United States-Egypt BIT contains a number of poorly drafted provisions. The ambiguous phrasing of Egypt's reservation of "commercial activity such as distribution, wholesaling, retailing, [and] import and export activities," for example, might dissuade potential investors from pursuing worthwhile investment opportunities, notwithstanding the exception to this provision enunciated in the Treaty's Protocol dealing with operations combining "production and sales activities."

Second, the United States-Egypt BIT fails to guard adequately against discriminatory actions taken by the host country against investors of the other party. As noted previously, early drafts of the Treaty contained a provision which enjoined a party from "impair[ing] by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment made by nationals or companies of the other Party." Surprisingly, the final draft of the Treaty did not include this or similar language. Although one can argue that this language simply underscores the national treatment standard and thus adds no new protections, the deletion cannot be justified. The deleted provision safeguards against the type of subtle interference which, over the years, has discouraged persons from investing in developing countries. More importantly, it provides a valuable

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148. See, e.g., Mineral Lands Leasing Act, Pub. L. No. 66-146, 41 Stat. 437 (1920) (current version at 30 U.S.C. § 181 (1976 & Supp. V 1981). This Act, which prohibits aliens from entering mineral leases upon public lands, is illustrative of the kind of narrow exceptions the United States might want to include in a future BIT. If the United States adopts "the existing legal restrictions" approach, future BITs would have to contain a provision whereby the United States and the other signatory agree to notify each other immediately after their respective legislative bodies promulgate relevant restrictions. This approach would be more precise and unequivocal than the approach currently taken for "exceptions."

149. See United States-Egypt BIT, supra note 1, at art. II, para. 3; id. at Annex.

150. Id.

151. Specifically, the Protocol states that "[w]ith regard to the Annex, the exceptions noted by the Arab Republic of Egypt under 'commercial activity' do not include integrated operations which combine production and sales activities for their products." Id. at Protocol, para. 7. Clearly, careful drafting would have obviated the need for this supplemental qualification.

152. See supra notes 39-42 and accompanying text.

153. See Voss, The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies, 31 INT'L & COMP. L.Q. 686, 702-05 (1982). Subtle interference can take two basic forms. First, it can deal with the substance of an investor's property rights. This type of interference takes the form of tax or administrative laws and includes: "prohibitive taxation of profits, interest income, and revenue from licenses; forced sales of majority interests to local partners or employees;
assurance to the investor. Thus, from the perspective of signatories, it is difficult to understand why they would consider the deleted language to be undesirable.

Third, many of the terms used in the United States-Egypt BIT are ambiguous. Future BITS should clarify, for example, the meaning of the term “substantial interest” as used in the definition of “company of a Party.” The Model BIT and the United States-Panama BIT attempt to solve this problem by providing that this interest shall be determined by the concerned party. An even more precise definition, however, would be desirable. To accomplish this task, future treaties could define “substantial interest” as a percentage of equity. Such a definition would reduce or even eliminate any ambiguities associated with that term.

Other terms used in the United States-Egypt BIT are also ambiguous. Because of the geographic diversity of the countries involved in negotiating BITs, and because of the interest of investors in offshore areas, “territory” is the term that most needs clarification. The Model BIT attempts to clarify the meaning of this term by stating:

The treatment accorded by a Party to nationals or companies of the other Party under the provisions of Paragraphs 1 and 2 of this Article shall in any State, Territory, possession, or political or administrative subdivision of the Party be the treatment accorded therein to companies incorporated, constituted or otherwise duly organized in other States, Territories, possessions,

depriving the investor of his management rights flowing from his equity holdings (e.g., by appointing government inspectors); indirect transfer restrictions by means of transfer delays by central banks.” Id. at 702. Second, it can interfere with the “functional property” rights of the investor. This type of interference deals with an enterprise’s ability to operate at a profit and includes restrictions in the following areas: (1) raw materials acquisition; (2) production processes and quantities; (3) labor (i.e. hiring and firing of employees, hiring of local persons for managerial positions, etc.); (4) pricing; and (5) finance (i.e. exclusion from local capital market). Id. at 702.

154. See, e.g., United States-Egypt BIT, supra note 1, at art. I, para. 1(b) (“substantial interest”); id. at art. I, para. 1(d) (“own or control”); id. at para. 1(e) (“national”); id. at art. II (“territory”).

155. The relevant provision in the United States-Egypt BIT states:
“company of a Party” means a company duly incorporated, constituted, or otherwise duly organized under the applicable laws and regulations of a Party or a political or administrative subdivision thereof in which
(i) natural persons who are nationals of such Party, or
(ii) such Party or a political or administrative subdivision thereof or their agencies or instrumentalities
have a substantial interest.

United States-Egypt BIT, supra note 1, at art. I, para. 1(b).

156. Model BIT, supra note 7, at art. I, para. 1(b); United States-Panama BIT, supra note 2, at art. I, para. 1(b).

157. See supra note 154.

158. The United States-Egypt BIT refers to the term “territory” a number of times. See, for example, Article II, para. 2(a), supra note 37.
Unfortunately, the United States-Egypt BIT contains no such provision. And it is not clear whether future BITs entered into by the United States will contain a similar provision.

Fourth, the provisions dealing with compensation for expropriation need to be refined. Because of the volatile circumstances surrounding many expropriations, BITs should clearly and strongly state the terms of compensation. To accomplish this task, future treaties should provide that the minimum compensation level equals the replacement value of the assets. Inclusion of such a provision would add considerable precision to the "fair market value" compensation standard employed by Article III of the United States-Egypt BIT.

The form of compensation is another aspect of Article III compensation which concerns investors. The requirements that expropriation payments be made without delay and be "freely transferable" are sound provisions which track the language of most other OECD treaties. Nonetheless, this requirement falls short of the one guarantee most investors seek—immediate compensation in the currency of the investor’s home country. In this regard, one can think of a number of scenarios that worry investors.

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159. Model BIT, supra note 7, at art. II, para. 10.
160. See United States-Egypt BIT, supra note 1, at art. III.
161. With regard to compensation, the United States-Egypt BIT provides:

Id. at art. III, para. 1.

162. The United States-Egypt BIT states that "compensation shall include payments for delay as may be considered appropriate under international law, and shall be freely transferable at the prevailing rate of exchange for current transactions on the date of the expropriatory action." Id. The Model BIT, on the other hand, treats this subject with more specificity. It states that

Id. at art. III, para. 1.

163. See, e.g., Sri Lanka-United Kingdom BIT, supra note 19, at art. 5, para. 1 (providing for "prompt, adequate and effective compensation"); Mutual Protection Treaty, supra note 35, at art. 3, para. 1 (compensation must be "convertible and freely transferable").

164. The United States and Egypt agreed that currency transfers associated with compensation payments shall be "in the currency of the original investment or in any other freely convertible currency." United States-Egypt BIT, supra note 1, at art. V, para. 2. Because these transfers can be in "in any other freely convertible currency," an investor has no guarantee that compensation shall be in his home country's currency. The Model BIT treats the investor more favorably by allowing him to select the currency of the transfers associated with the compensation payments. Model BIT, supra note 7, at art. V, para. 2.
strophic problems would arise, for example, if compensation made by a new, untested government took the form of thirty-year bonds issued by that government. Such compensation probably meets the "effective realization" and "freely transferable" compensation standards of the United States-Egypt BIT and Model BIT, but fails to satisfy investor demands for speedy and adequate compensation. In future BIT negotiations, negotiators should attempt to solve this problem by providing guarantees that are less broad than the "effective realization" and "freely transferable" standards. 165

Last, the United States-Egypt BIT's dispute settlement procedure has one major defect. In general, the Treaty contains typical OECD investment treaty provisions which provide an expeditious and sound framework for resolving disputes between the parties. 166

By using language similar to that used in other OECD treaties, however, negotiators created a procedural problem. This problem arises from the requirement that the parties resort to the International Court of Justice for appointment of arbitrators when the parties do not appoint an arbitral panel within the required period. 167

Significantly, the Treaty provides that if the President of the International Court of Justice is a national of one of the parties or is "unable to act," other members of the Court should act accordingly. 168 An investor with a grievance against a party may find that this language impedes prompt dispute resolution in situations where the President

165. Regardless of how treaty negotiators articulate the compensation standard, investors will almost always question the adequacy of expropriation compensation. To resolve the dispute, aggrieved parties will probably employ the judicial review and dispute resolution procedures provided by BITs. See United States-Egypt BIT, supra note 1, at art. VII. To be effective, however, such procedures must remain simple and expeditious.

166. Article VIII, paragraph 3 provides, in part, that

(a) In the absence of such agreement, the dispute shall, upon the written request of either Party, be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.

(b) The Tribunal shall consist of three arbitrators, one appointed by each Party, and a Chairman appointed by agreement of the other two arbitrators. The Chairman shall not be a national of either Party. Each Party shall appoint an arbitrator within 60 days, and the Chairman shall be appointed within 90 days, after a Party has requested arbitration of a dispute.

(c) If the periods set forth in (b) above are not met, and in the absence of some other arrangement between the Parties, either Party may invite the President of the International Court of Justice to make the necessary appointment. If the President is a national of either of the Parties or is unable to act for any reason, either Party may invite the Vice President, or if he is also a national of either Party or otherwise unable to act, the next most senior member of the International Court of Justice, to make the appointment.

Id. at para. 3(a)-(c).

167. Id. at para. 3(c).

168. Id.
of the Court simply fails to act even though he is capable of acting or is a national of a non-party. A simple modification could rectify this procedural defect. The Treaty should state that junior members of the Court must proceed with appointments if the President is a national of a party, or, for whatever reason, fails to make the required appointments within a set period of time. Such a change would not only eliminate the problem of non-action by the President of the Court, but also enhance the spirit of promptness that pervades the BIT dispute settlement process.

In sum, the United States-Egypt BIT contains a number of deficiencies. These deficiencies, however, can be rectified with a minimal amount of effort. Negotiators of future BITs should implement solutions to these problems. At the same time, they should keep BITs simple and concise. In this way, the treaties can best serve the interests of both the parties and their investors.

**CONCLUSION**

BITs are simple and concise documents that provide numerous protections to United States investors desiring to invest in developing countries.⁶⁶⁹ Because investors perceive investment security as the principal purpose of an investment treaty, the United States' efforts to enter into more BITs should lead to a significant increase in the number of overseas investments made by American investors. Although no bilateral treaty can assure protection from the inherent instability of many developing nations, BITs have adequately protected the investments of OECD countries in such nations.¹⁷⁰ Moreover, BITs have worked effectively in expropriation situations.¹⁷¹ As a result, these treaties should be employed frequently in the future by the United States' foreign policy makers.

Clearly, the BIT represents an important step in protecting overseas investments. This type of treaty, however, cannot solve all of the United States' foreign investment problems. Indeed, the United States-Egypt BIT has a number of faults which should be eliminated in future treaties.¹⁷² Unquestionably, the most important of these problems is the deviation by the United States and Egypt from the Model BIT.¹⁷³ Although flexibility is an important aspect of successful treaty negotiations, negotiators should avoid substantially changing the Model every time they approach the bargaining

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169. See supra notes 17-30 and accompanying text.
170. See supra notes 31-33 and accompanying text.
171. Id.
172. See supra notes 144-68 and accompanying text.
173. See supra notes 144-45 and accompanying text.
table simply because a party wants to protect a limited special interest. The purpose of the BIT is to provide a straightforward, concise, and uniform vehicle for investment security. It is in the interest of both the United States and its prospective BIT partners to avoid assiduously major changes of the Model which would defeat that purpose and would derogate from the BIT's role of protecting United States investors and their foreign counterparts.