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Bilateral Investment Treaties: A Means for Liberalizing Trade in Services

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Bilateral Investment Treaties: A Means for Liberalizing Trade in Services

INTRODUCTION

Over the past decade, service industries have accounted for an ever increasing share of international trade revenues in developed countries. It has been estimated that, since 1950, over 50 percent of the United States gross national product has originated in service sectors.1 Until 1982, surpluses in the service accounts of the U.S. balance of payments compensated for deficits in merchandise trade and helped keep the overall balance of payments in the black.2 Between 1981 and 1983, however, the country's merchandise trade deficit increased dramatically and the U.S. service trade surplus plummeted by 25 percent.3 Contributing to this development were the cumulative effects of world-wide barriers to trade in services.4 It is not surprising, therefore, that obtaining conditions more favorable to growth in international trade in services has become a high priority trade issue in the United States.5

Although the U.S. is pursuing an initiative to include services within the framework of the General Agreement on Tariffs and Trade (GATT), at present that treaty applies to only two service industries: transport insurance and motion pictures (subject to

2 Id. at 23, 119 (statement of Gilbert Simonetti, Jr., Chairman, Committee on Services, National Foreign Trade Council).
3 Id. at 111.
4 Id. at 32 (statement of Geza Feketekuty).
5 The United States is particularly concerned with foreign investment rules that prohibit service industries from doing business abroad. Service sectors are among the most dynamic in today's economy, but there exist a number of limitations that inhibit export opportunities. For many service sectors, there is a universal requirement of establishment in host countries, with the competitive success of these industries heavily dependent upon the presence of branches to meet peculiar regulatory requirements. Thus, the investment policies of foreign countries have special importance to the service sectors.

quota restrictions). Those intimately involved with the ongoing GATT negotiations maintain that trade in services, while solidly on the agenda for discussion, remains probably the trickiest issue to be resolved by the new GATT preparatory committee. Proponents of a GATT regime for services concede it will take a very long time to accomplish their goal.

The United States has also initiated reform efforts in international trade organizations like the Organisation for Economic Co-operation and Development (OECD). But in the face of the delays and complications of multilateral efforts, the current administration has made plain its intention to pursue liberalization of services trade in alternative fora, the most important of which may be the bilateral negotiations of the Bilateral Investment Treaty (BIT) program.

Considerable progress has been made toward reducing the barriers to international investment capital flows. In 1981, the United

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* Ronald Kent Shelp, Beyond Industrialization: The Ascendancy of the Global Service Economy 150-52 (1981). Shelp argues that three existing provisions of the GATT might be broadened to admit the broad range of non-tariff barriers which threaten trade in services: (1) the Government Procurement and Subsidies Codes, both of which presently exclude all but incidental services per se; (2) the standards agreement, which discourages technical barriers to trade but presently only applies to laboratory testing among services; and (3) the Agreement on Import Licensing Procedures, which when drafted was never envisioned as applying to services. Id. at 178-182.

* Barbel Jacob, Washington D.C. Delegate from the European Community, quoted in Sen. Baucus Suggests Much Work Remains to Gain Support for Upcoming MTN Round, 2 Int'l Trade Rptr. 1555 (December 11, 1985).

* First must come the accumulation of data and thoughtful analysis that enables the formulation of concepts—the kind of process that drawing up an inventory of barriers and dealing with services within the various GATT consultative groups engenders. . . . Next must come a general agreement on principles—something that ultimately must be ordained at the highest political levels. . . . When the groundwork has been laid . . . a temporary “cease fire” would be imposed on all new regulatory actions, incentives, or disincentives to service trade. This could be followed . . . by an in-depth continuation of the preparatory process . . . . Finally, . . . following the GATT example, actual negotiation on removal of constraints would begin.

Shelp, Beyond Industrialization at 187 (cited in note 6).

* The basic weaknesses of the OECD approach are: (1) the Codes are not actually directed at services but rather deal with invisible operations and capital movements that arise incidentally to any international commerce; (2) they therefore do not address the underlying threats to trade in services (i.e. foreign monopolies, non-tariff barriers to investment, and labor and immigration restrictions); and (3) where services are covered, the effect is nullified by various exceptions, reservations and outright violations, since the OECD lacks effective enforcement capabilities. Id. at 160. See also John H. Barton, Negotiation Patterns for Liberalizing International Trade in Professional Services, 1986 U. Chi. Legal F. 97, 132.

* Administration Considering Simplifying Bilateral Investment Treaties With LDCs, 20 U.S. Export Weekly 279, 280 (Nov. 15, 1983) ("Administration Considering Simplifying BITs").
States government initiated the BIT program in an effort to expedite this process between the U.S. and certain nations, particularly less developed countries (LDCs). The Model BIT generated by the Office of United States Trade Representative is primarily designed to liberalize international investment flows, but the provisions of the treaty are nevertheless of great importance to trade in services. Indeed, the concerns of service industries were specifically contemplated throughout development of the BIT program.

Many provisions of the treaty are directly related to the difficulties faced by U.S. service industries and may have specific application in the liberalizing of trade in that sector. Trade in services frequently accompanies foreign investment. A factory built in South America by a U.S. manufacturer must employ managers, accountants, and lawyers, and may require insurance and banking services, as well as computer and communication services. The link between investment and services is so strong that many commentators have suggested that any regime proposing to liberalize trade in services will have to resolve questions of the treatment to be accorded foreign investment.

This comment will explore the extent to which bilateral investment treaties may constitute a mechanism for the reduction of barriers to international trade in services and serve as stepping stones to obtaining a broader multilateral service trade regime. Many commentators and members of the current administration have taken the position that BITs “contribute to but are not a substitute for broader international understandings,” along the lines of GATT. There is no argument to the contrary here. It will, however, be contended that, at least for the present, bilateral nego-

12 “We are in the process of negotiating bilateral investment treaties . . . and over time we will be seeking to complete such negotiations with all developing countries. Of course, those bilateral investment treaties are very much designed to cover services as well as goods manufacturing investments.” General Trade Policy: Hearings before the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 81 (1983) (testimony of Geza Feketekuty, Assistant U.S. Trade Representative for Policy Development and Services) (“General Trade Policy”). Edward M. Rozynski, Director for International Investment Policy, Office of the United States Trade Representative, concurred with Mr. Feketekuty’s assessment in a telephone interview, December 20, 1985. (“Rozynski Interview”).
13 Shelp, Beyond Industrialization at 203-04 (cited in note 6).
14 W. Allen Wallis, Undersecretary of State, quoted in Administration Considering Simplifying BITs at 280 (cited in note 10). Still government officials have acknowledged the importance of bilateral negotiations:
tiations are the best means by which concrete discussions of the sensitive issues surrounding trade in services may be developed.

Although BITs are most directly targeted at reducing various barriers and disincentives to international investment, including investment in services, the problems of international investors are sufficiently similar to those of service firms to allow BITs to directly benefit these service firms. Moreover, BITs offer a form of treaty which easily could be adapted to the specific concerns of international business service firms.

After a brief review of certain specific obstacles to free trade in business services, and a short discussion of the development of BITs in Europe, the specific applicability of the U.S. BIT to international trade in services will be explored. This comment will conclude that BITs are a viable instrument for the pursuit of liberalization of international services trade. It will be recommended that the United States strengthen the applicability of the BIT to services and vigorously utilize BITs to expand opportunities for U.S. service industries.

I. BARRIERS TO TRADE IN SERVICES AND PROBLEMS OF LIBERALIZATION

The U.S. Government defines services as "intangible economic goods," but this definition fails to account for services that are provided incidentally and in conjunction with trade in other sectors. In the context of retail sales and manufacture, for example, an exporter or importer employs a shipping agent in a foreign port. In the broadest sense, therefore, trade in services involves the direct transfer, often in person, of intangible goods such as knowledge and special skills (e.g., legal services, engineering and management

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Mr. Feketekuty: . . . The GATT has never effectively found a way of dealing with investment issues, so . . . we have to . . . at least try to deal with trade issues at this time. At the same time we must continue to look at possible avenues for dealing with investment more broadly.

Mr. Florio: You are suggesting . . . that bilateral negotiations between our nation and another nation, [which] may very well be following policies that are inappropriate with regard to our investments in their nation for the purpose of services, would be not only the immediate mechanism for restoring some equity between the relationships, but would also provide the incentive for allowing further discussions on a multilateral basis. . . .

Mr. Feketekuty: I agree with that fully.

consulting) or the handling and processing of information (e.g., computer processing).¹⁵

In its 1984 U.S. National Study on Trade in Services ("U.S. Study"), the Office of the United States Trade Representative (USTR) discussed the various non-tariff restrictions on trade that are of greatest concern to service industries.¹⁶ Many countries, particularly LDCs, consider the local services sector vital to their national security. The governments of these countries often subject foreign service firms to unfair competition by protecting domestic firms through subsidies, sponsored monopoly control, and discriminatory regulations.¹⁷ These tactics are particularly effective in areas such as telecommunications and postal services. Non-tariff regulations involving discriminatory taxation, discriminatory government procurements, and even complete bans of services produced by foreign companies are also commonly employed.¹⁸

Other non-tariff barriers, reflecting national concerns about the effect of foreign investment on local economies, hinder the flow of investment capital into and out of their countries. Foreign countries often impose personnel and professional practice limitations, such as unreasonable immigration restrictions and employment bans or quotas based on nationality, race and religion.¹⁹ Finally, and perhaps most importantly, investment disputes are often subject to strictly local resolution. This requirement is a disincentive for investors since laws and procedures are frequently vague or in-

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¹⁵ U.S. service industries important in international trade include banking, communications, computer services, construction and engineering, consulting and management, education services, equipment leasing, franchising, health services, insurance services, motion pictures and television, shipping and air transport, and hotels and motels. United States International Trade Commission, Operation of the Trade Agreements Program, 35th Report 145 (1984) ("Trade Agreements Program").

¹⁶ U.S. National Study on Trade in Services, A Submission by the United States Government to the General Agreement on Tariffs and Trade 37 (1984) ("U.S. Study"). Commonly used barriers to trade in services include: "investment performance requirements, exclusionary import policies, discriminatory treatment of foreign versus domestic firms, discriminatory government procurement, and government monopolies. . . . The degree of restrictiveness of these barriers varies from one service industry to another." Trade Issues and Trade Prospects for the Mid-Atlantic Region: Hearing before the Subcommittee on International Economic Policy of the Senate Committee on Foreign Relations, 98th Cong., 2nd Sess. 34 (1984) (statement of Allan I. Mendelowitz, Associate Director, National Security and International Affairs Division) ("Trade Issues").

¹⁷ Shelp, Beyond Industrialization at 166 (cited in note 6).


¹⁹ Shelp, Beyond Industrialization at 223 (cited in note 6). See also Barton, 1986 U. Chi. Legal F. at 104-05 (cited in note 9).
accessible to those unfamiliar with the local legal system. All of these non-tariff barriers to foreign investment have proven particularly difficult to address in multilateral negotiations to date. The U.S. BIT program makes important strides toward liberalizing the environment for international investment and, at the same time, exhibits a great potential for the liberalization of international trade in services.

II. THE BILATERAL INVESTMENT TREATY: HISTORICAL DEVELOPMENT

BITs are now a primary mechanism for promoting and protecting foreign investments in less developed countries by investors from many industrialized nations. More than 200 BITs have been negotiated world-wide; some have been in force for over twenty years. The United States, however, only recently began exploring the use of BITs in its own foreign trade policy. On January 11, 1982, the USTR released a prototype of the United States BIT, and in the fall of that year, the United States signed its first bilateral investment treaties with the Arab Republic of Egypt and the Republic of Panama. Since then, the United States has signed treaties with Senegal, Haiti, Panama, Morocco, Turkey, and Cameroon.

21 List of BITs in force as of October 1, 1982, 21 Int'l Legal Mat. 1208 (1982).
22 Model BIT (cited in note 11). This model has been revised twice. The revisions, according to USTR Director of International Investment Policy Edward M. Rozynski, were basically cosmetic, the substance of the model remaining constant. Rozynski Interview (cited in note 12). References in this comment to the U.S. Model BIT will refer to the most recent version of the Model Treaty.
23 Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (September 29, 1982), reprinted in 21 Int'l Legal Mat. 927 (1982) ("Egypt BIT").
24 Treaty Between the United States of America and the Republic of Panama Concerning the Reciprocal Encouragement and Protection of Investments (October 27, 1982), reprinted in 21 Int'l Legal Mat. 1227 (1982) ("Panama BIT").
25 Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment (December 6, 1983) ("Senegal BIT") (copy on file with the University of Chicago Legal Forum).
26 Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment (December 13, 1983) ("Haiti BIT") (copy on file with the University of Chicago Legal Forum).
28 Treaty Between the United States of America and the Kingdom of Morocco Con-
eroon, Bangladesh and Grenada. Negotiations are nearing completion with Costa Rica and a number of other foreign nations. The evolution of the U.S. BIT can be traced through the country's use of treaties of Friendship, Commerce and Navigation (FCN) and, more recently, to the development of BITs by the industrialized nations of Europe.

A. Friendship, Commerce and Navigation Treaties

Since 1778, when the first American Treaty of Friendship, Commerce and Navigation was concluded with France, the U.S. has relied heavily on FCNs to facilitate trade and investment with foreign nations, particularly developing countries. FCNs have been of enormous importance in the evolution of U.S. bilateral international relations. Most importantly, FCNs have made extensive provision for most-favored-nation (MFN) treatment, and

cerning the Reciprocal Encouragement and Protection of Investments (July 22, 1985) ("Morocco BIT") (copy on file with the University of Chicago Legal Forum).

30 Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (December 3, 1985) ("Turkey BIT") (copy on file with the University of Chicago Legal Forum).

31 U.S.-Cameroon Bilateral Investment Treaty Signed as Private Participation Encouraged, 3 Int'l Trade Rptr. 320 (March 5, 1986).

32 General Developments: Also in the News, 3 Int'l Trade Rptr. 388 (March 19, 1986).

33 General Developments: Also in the News, 3 Int'l Trade Rptr. 431 (May 7, 1984).

34 The United States has signed ten bilateral investment treaties, the most recent of which was concluded May 3, 1986 with Grenada, and there are ongoing negotiations with China, Malaysia, Sri Lanka, Uruguay, Costa Rica, Honduras, Antigua/Barbuda, Burundi and Gabon. Government, Business Officials Tell Senate Bilateral Investment Treaties Aid Exports, 3 Int'l Trade Rptr. 1029 (August 13, 1986). There has been some discussion, though little action, on possible BITs with Japan and with Canada. U.S. Continues its Fight for Investment Requirements Discussion at GATT Meeting, 18 U.S. Export Weekly 248 (November 16, 1982). The idea of a U.S.-Japan BIT was first raised by the American Chamber of Commerce in Japan. Harvey Bale, interviewed in Government Seeking Bilateral Investment Treaty with Japan As Well As With LDCs, 18 U.S. Export Weekly 830 (March 1, 1983).

The package of treaties has been sent to the United States Senate where advise and consent committee hearings began early in the summer of 1986. The treaties are all similar in format, containing the five basic sections of the model BIT, but variations may be found in specific provisions. The appendix of this comment provides a closer examination of the differences in the seven negotiated treaties that were available for public perusal at the time of this writing.

sometimes for national treatment of foreign companies.\textsuperscript{36}

Unfortunately, FCNs have had only limited success in promoting trade in services. Since most FCNs were concluded before any nations were particularly concerned with trade in services, the unique problems of services trade were not a high priority during their negotiation.\textsuperscript{37} Moreover, FCN provisions were often too vaguely drafted to offer any concrete benefits to service firms. For example, in requiring MFN or national treatment, the treaties would fail to explain what the requirements of such treatment were and how far its protections were to extend.\textsuperscript{38} FCNs in general are rife with various reservations ranging from limiting foreign service industries to prohibiting them; where the terms of the treaty are clear, they tend to exclude services from national treatment.\textsuperscript{39}

Although the U.S. BIT could be called the successor to the FCN, the USTR Model is more clearly patterned after the investment protection treaties of Europe.

B. European BITs

Investors from industrialized nations have long recognized that investment in developing countries, while potentially of great value, is risky due to the threat of expropriation or impairment of investment rights by young, unstable governments.\textsuperscript{40} European governments, responding to the needs of their outward-looking investors, constructed arrangements which sought to protect against those risks.

European BITs generally contain ten to twelve provisions striving to establish an overall tone of cooperation and mutual assistance, and a hospitable environment for foreign investment.\textsuperscript{41} The key provision offered in most of these treaties is the assurance

\textsuperscript{36} Shelp, Beyond Industrialization at 155 (cited in note 6). MFN treatment ensures that the host signatory will treat the nationals or companies of the foreign signatory at least as favorably as those of any third country. MFN treatment effectively places all foreign firms and citizens on an equal footing with each other while in the host country. National treatment requires a host government to treat foreign nationals and companies as it would treat its own citizens and companies. Countries which agree to accord national treatment to foreigners effectively agree to eschew the use of any and all measures which discriminate against foreigners to the benefit of the indigenous population.

\textsuperscript{37} Id. at 156.

\textsuperscript{38} Arakaki, FCNs and Treatment of Service Industries at 5-7 (cited in note 35). FCNs with Denmark (1951) and Ireland (1950), for example, grant U.S. investors the bald right to organize companies but offer no further explanation.

\textsuperscript{39} Id. at 7, 10.

\textsuperscript{40} Bergman, 16 N.Y.U.J. Int'l L. & Pol. at 10-11 (cited in note 21).

\textsuperscript{41} Pattison, 16 Cornell Int'l L.J. at 311-12 (cited in note 35).
that neither party shall expropriate any investment without prompt compensation. Since investors fear most the loss of their investment, agreements containing a guarantee against expropriation without compensation tend naturally to encourage greater investment by foreigners. The European BIT also provides for the right to freely transfer capital, which is crucially important for assuring investors of their ability to repatriate profits derived from investments in the host country.

The most important achievement of European BITs is the establishment of formal procedures for the settlement of disputes. Typically the treaties prescribe that upon failure of diplomatic efforts to resolve a conflict over claimed rights or privileges, the dispute must be submitted to impartial arbitration. These settlement procedures provide a crucial incentive to foreign investment by guaranteeing foreign investors an impartial forum in which to present claims. A major deterrent to foreign investment is thereby removed, encouraging investors to expend resources over longer periods with a sense of security.

Although European BITs have many positive elements that the U.S. Model BIT has drawn from, they have several drawbacks that the U.S. drafters have tried to avoid. The most important of these is a common provision for prior approval of investments by the host government. Details vary from treaty to treaty, but basically parties to a European BIT often reserve the right to review and reject any and all investments sought to be made in their territory. The broad scope of this arbitrary review and reject clause

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42 Bergman, 16 N.Y.U.J. Int'l L. & Pol. at 17-18 (cited in note 21). As a general matter, FCN transfer provisions are far less ambitious than those in the BITs. They do not provide an absolute protection, nor do they apply to transfers of funds to any country other than the contracting party in treaties with LDCs. Sachs, 2 Int'l Tax & Bus. Law. at 212 (cited in note 42).
45 The Switzerland-Singapore BIT, typical of European BITs, provides in part:
The making of investments by nationals or companies of one Contracting Party in the territory of the other Contracting Party shall comply with such admission procedures as may be established by that other Contracting Party. Only an investment so admitted and . . . specifically approved in writing . . . as an admitted investment, shall enjoy the benefits and protection of this Agreement.
impedes the ability of the European BITs to fulfill the potential for liberalization present in most of their terms. Another drawback of European BITs is the scant notice taken in their provisions of trade in services. While their typical definition of "investment" does not expressly exclude services, no commentators have considered European BITs a major factor for the liberalization of services trade.

C. The Provisions of the United States Model BIT

In 1982, the Bilateral Investment Treaty program was announced as a U.S. bilateral initiative to promote investment liberalization. The objectives formulated by the Reagan administration for the pursuit of its international investment policy included: (1) the reduction of barriers to and distortions of investment abroad; (2) the encouragement of private foreign investment in developing countries; and (3) the maintenance of a maximum degree of openness for foreign direct investment in the United States. Of particular concern to the administration in setting out its objectives was the link between trade and investment in the services sector of the U.S. economy.

The U.S. BIT, immediately distinguishable from its "less demanding" European and Japanese predecessors, is designed to achieve reciprocal opportunities [for U.S. and foreign investors]. . . . The prototype BIT addresses a number of areas of concern to U.S. investors: (1) favorable treatment of U.S. investors and their activities on a national treatment or most-favored-nation basis; (2) avoidance of trade and investment restricting performance requirements; (3) the permission of transfer of earnings and capital in and out of host countries; (4) the provision for prompt and effective compensation in expropriation cases; and (5) procedures for the resolution of

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47 "For certain sectors of the U.S. economy . . . there is an absolute necessity to invest abroad in order to export. . . . Possibilities for U.S. exports of many services . . . are extremely limited without the ability to establish branch [or affiliated] activities abroad." Id.

Like its predecessors, the Model BIT aims to "facilitate investment flows . . . by establishing a common frame of reference and legal base for investors." But beyond this the United States hopes to set an international precedent for liberalizing investment that will help to establish new customary norms of international law. As one commentator has put it, "[n]o longer are the treaties merely intended to ensure nondiscriminatory treatment for U.S. investors abroad. Instead, their current purpose is aggressively to 'force open the door for investment.'" It is hoped that the offer of reciprocal opportunities will make this prospect more palpable to U.S. trading partners who become parties to BITs.

An examination of the provisions of the U.S. BIT will reveal the ways in which the link between international investment issues and the concerns of international service firms coalesce and expand the potential applications of the BIT into the realm of services trade.

1. Treatment of Investments. Article II of the Model BIT addresses the treatment of investments made by companies or nationals of the other party. Paragraph 1 establishes the most desirable protection possible, national or most-favored-nation (MFN) treatment, whichever the parties find most favorable. The U.S. BIT goes to much greater lengths than its predecessors in extending full protection to all manner of investment activities. Article II, paragraph 2 strengthens the protections of the first paragraph in providing that "[n]either Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments."

Article II, paragraph 3 of the Model BIT makes explicit the right of investors to enter the foreign territory, subject only to laws of entry and sojourn of aliens, "for the purpose of establishing, de-

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49 Id. at 89, 91.
50 Harvey Bale, Assistant U.S. Trade Representative for Investment Policy, quoted in U.S. Trade Representative Announces New Bilateral Investment Treaty Model, 392 Int'l Trade Rptr. 438 (January 26, 1982).
51 Sachs, 2 Int'l Tax & Bus. Law. at 195 (cited in note 42); see also Pattison, 16 Cornell Int'l L.J. at 312 n. 26 (cited in note 35).
53 Model BIT at art. II, par. 1 (cited in note 11).
55 Model BIT at art. II, par. 2 (cited in note 11).
veloping, administering or advising on the operation of an investment to which they . . . have committed or are in the process of committing a substantial amount of capital or other resources."56

Presumably, local laws of entry and sojourn must be reasonably related to legitimate immigration concerns, though this point could be more importantly stressed in the treaty. Paragraph 4 guarantees investors the right to employ "top managerial personnel of their choice, regardless of nationality," and specifically prohibits "performance requirements . . . which specify that goods or services must be purchased locally, or which impose any similar requirements."57 Article II also requires transparency of laws, regulations and judicial decisions that may affect foreign investments in the territory, and ensures non-discriminatory access to a means of asserting claims and enforcing rights.58 All of these provisions in Article II directly preclude the most common methods of avoiding MFN or national treatment agreements through non-tariff barriers.59

2. Expropriation of Investments. Article III of the Model BIT guarantees the protection of an investor's property against expropriation or nationalization by a host country without prompt compensation. Only expropriation made for a "public purpose" in a non-discriminatory manner is permitted, and then only if there is prompt payment of the property's fair-market-value.60 The Model BIT also contains special provisions for investor losses in time of war,61 which is of particular concern to those seeking to invest in the more volatile regions of the Third World.

3. Investment-Related Transfers of Funds. Article IV ensures that there will be a free flow of investment capital; "transfer

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56 Id. at art. II, par. 3.
57 Id. at art. II, pars. 4, 5. It should be noted that the earlier models of the treaty (1982 and 1983) spoke of the right to employ "professional, technical and managerial personnel of their choice." This difference, however, is likely a case of the USTR streamlining the treaty and responding to what one USTR representative termed the "overkill" characteristic of the treaty. Rozynski Interview (cited in note 12).
58 Model BIT at art. II, pars. 6, 7 (cited in note 11).
59 One exception and possible weakness in the model BIT (present also in the treaties so far negotiated) is Article XI, which exempts tax policies from coverage under Article II (but not Articles III and IV) and requires only that "[w]ith respect to its tax policies, each Party should strive to accord fairness and equality in the treatment of investment of nationals and companies of the other Party." Of course, reliance on the fairness and equity of foreign governments is central to the operation of all BITs. Bergman, 16 N.Y.U.J. Int'l L. & Pol. at 12 (cited in note 12). The power of this clause with regard to tax policies should not be underestimated.
60 Model BIT at art. III, par. 1 (cited in note 11).
61 Id. at art. III, par. 3.
of funds related to an investment is to proceed freely and without
delay.62 Funds related to an investment include compensation
payments, proceeds from the sale or liquidation of any part of an
investment, and payments for capital improvements to or mainte-
nance and development of an investment.63 Article IV also pro-
vides for free exchange of foreign currency.64

4. Dispute Resolution. Articles V, VI and VII of the Model
BIT deal with dispute resolution. As mentioned earlier, fear of be-
ing subject to arbitrary adjudication of complaints and claims is a
major factor discouraging foreign investment in less developed
countries. The signatories of the U.S. BIT consent to international
arbitration of disputes at the choice of the foreign investor, once
diplomatic or other agreed settlement procedures have failed. This
represents a significant change from U.S. policy as represented in
FCN treaties and marks the most important reason for the more
likely success of BITs in encouraging foreign investment.65 Dis-
putes are directed primarily to the International Centre of Invest-
ment Dispute Resolution (ICSID), as in European BITs. As for
disputes that may arise between the parties to the treaty, Article
VII provides for a self-executing submission of the dispute to an
arbitral tribunal empowered to issue binding decisions. The U.S.
BIT contains in its provisions explicit consent by the parties to
ICSID jurisdiction. As a result, failure of a party to appear or pre-
sent its case does not prevent the tribunal from rendering an
award, and failure to honor such an award is no less than a breach
of international obligation.66

5. The Annex Exceptions. The Model BIT concludes with an
extensive list of “limited exceptions” to the U.S. guarantee of na-
tional treatment. The exempted sectors are predominantly service
oriented,67 but they also include the use of land and natural re-

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62 Id. at art. IV, par. 1.
63 Id.
64 Id. at art. IV, par. 2.
66 ICSID Convention on the Settlement of Investment Disputes Between States and
Nationals of Other States, art. 45(2), 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159
(signed March 18, 1985). Arbitration by the ICSID is particularly advantageous to investors
because signatory members of the Centre have agreed to enforce arbitral awards against
themselves “as if it were a final judgment of a court in that State.” Id. at arts. 54, 55. See
also Bergman, 16 N.Y.U.J. Int'l L. & Pol. at 16-17 (cited in note 21). See generally Gerald
Asken, The Case for Bilateral Investment Treaties, 1981 Private Investors Abroad —
Problems and Solutions in International Business 357, 377-381.
67 The following service related sectors are exempted in the Annex of the Model BIT:
“Air transportation; ocean and coastal shipping; banking; insurance; . . . energy and power
production; custom house brokers; . . . operation of broadcast or common carrier radio and
sources. Certain service industries have historically been considered either of special industrial or of national security importance, including coastal shipping, airline, banking, communications and insurance services. But the annex list of exceptions can only encourage U.S. trading partners to adopt equally extensive annexes. One commentator has asserted:

the “limited exceptions” . . . of the treaty emasculate the national treatment standard. 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.

It has been suggested that one way to mitigate the effects of the exceptions would be careful drafting of provisions to allow legal restrictions on specific investments without establishing industry-wide exceptions.

III. THE U.S. BIT AND LIBERALIZATION OF TRADE IN SERVICES

A. The BIT as Applied to Services

The U.S. BIT is an instrument of general trade policy whose applicability to services trade has never been in doubt. The treaty addresses the basic threats to trade in services outlined

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television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services.

** Another reason for exclusion from the national treatment standard is . . . the public interest in the functioning of the banking system distinguishes investment in banking from many other kinds of private investments because it implements the nation’s monetary system and the credit structure supporting the economy. Insurance is also highly susceptible to government regulations because of its dual role in capital formation and in safeguarding individual and corporate welfare.

Arakaki, FCNs and Treatment of Service Industries at 7 (cited in note 35).

** Pattison, 16 Cornell Int’l L.J. at 333 (cited in note 35).

* Pattison suggests an “existing legal restrictions” clause in the BIT that would exempt those investment activities specifically protected by an act of the country’s government. For example, the U.S. Mineral Lands Leasing Act, 30 U.S.C. § 181 (1982), prohibits aliens from entering mineral leases upon public lands. Such a restriction may be desirable, but the desired effect can be achieved without broadly exempting use of public lands from the protections of the BIT. Rather, the BIT could state specifically that the signatories will recognize the binding effect of restrictive laws in certain sectors, provided that proper notification is given by the host government. Id.

*1 See General Trade Policy (cited in note 12).
BILATERAL INVESTMENT TREATIES

above: (1) unfair competition by foreign government subsidized monopolies, (2) discriminatory treatment and regulation of foreign firms, and (3) the disincentives created by uncertain dispute settlement procedures.\(^7\)

1. **Treatment of Investments.** Assuring in Article II the more favorable of either national or MFN treatment for investments and their associated activities is of crucial importance to service industries. This provision in the Model prohibits the most detrimental discriminatory barriers to trade in services because contracts to perform services are included in the definition of “investment.”

   The definition of “investment” in Article I of the treaty includes “every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts.”\(^3\) Examples of investments given in the model treaty include any claim to money or performance having economic value associated with an investment, and any licenses, permits or rights conferred by law or contract.\(^4\) If ordinary meaning is to be given to the terms of the treaty, a “service contract” is quite simply any contract for the purchase or sale of services not explicitly exempted from the effect of the treaty.\(^5\) Thus, a U.S. service firm which obtains a contract to provide its service in a foreign country under a BIT is an investor in the country, and therefore benefits from all the protections of the treaty.

   Service firms also enjoy protection under the definition of “associated activities” in Article I which recognizes non-exclusively four general categories of activities: (1) organization, operation, and maintenance of companies, branches, and offices; (2) the making and performance of contracts; (3) acquisition, protection, and disposition of all types of property (tangible and intangible); and (4) the raising of capital (through loans, stock issues, etc.) and conversion of currency.\(^6\) The definition covers all the activities necessary for the successful operation and expansion of a service enterprise.

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\(^7\) The USTR has formulated certain objectives that will guide the administration’s efforts to resolve service trade problems. These objectives are: (1) to obtain national treatment for foreign enterprises, that is, fully non-discriminatory treatment; (2) to guarantee transparency of domestic regulations and laws, and (3) to establish consultation and impartial dispute settlement mechanisms. These principles are given practical effect in the model BIT, currently the focal point of bilateral negotiations by the U.S. government. Services Industries at 38 (cited in note 1) (statement of Geza Feketekuty).

\(^3\) Model BIT at art. I, par. 1(b) (cited in note 1).

\(^4\) Id. at art. I, pars. 1(b)(iii), (v).

\(^5\) Rozynski Interview (cited in note 12).

\(^6\) Model BIT at art. I, par. 1(e) (cited in note 11).
The right to operate and maintain branch offices is particularly important to service industries which, unlike other trade sectors, depend on continual relationships with clients and consequently require freedom to manage their investments—the service contracts. In practice, these provisions will mean that the American accounting firm or hotel chain will be able to serve clients in a foreign country secure in the knowledge that the host government will preserve an environment of free competition. The treaty partner will take no actions for the purpose of favoring any domestic or third country company, including any government-sponsored monopoly.

Many service industries, such as financial consulting or computer data processing, must staff operations with personnel possessing special skills or knowledge not easily found in other countries. Such service providers are effectively barred from a foreign country that requires the use of native employees or even a certain percentage of native employment. Guarantees of the right of entry, establishment and employment in paragraphs 3 and 4 of Article II play a central role in the liberalizing effect of the treaty on trade in services.

Provisions for the transparency of laws and adjudications have a liberalizing effect on trade in services because they increase the perception of investment security by enhancing the foreign firm’s ability to plan, formulate reasonable expectations, and competently prepare claims which they are entitled to present under the dispute settlement provision.

Given the vital importance of all aspects of investment security, the reservation of various discriminatory powers by the signatory parties in their BITs with the United States is detrimental to liberalization efforts since it tends to offset the benefits derived from the transparency provisions. The Morocco and Panama BITs in particular contain several provisions reserving to themselves certain powers with which they may discriminate against foreign investors. The Morocco BIT is also the only treaty of the seven examined that does not contain a definition of “associated activities” that includes the establishment and maintenance of offices and branches. Reluctance on the part of all the countries, except Senegal, to commit to abolishing performance requirements, while particularly the bane of trade in goods, also poses a threat to trade in services.

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[77] See discussion in the Appendix at 214-15.
[78] The terms of the Senegal BIT match the Model BIT on every point with regard to
2. *Expropriation of Investments.* The guarantee against expropriations without prompt compensation is important to service industries because: (1) it encompasses all forms of property, as defined in Article I, and (2) it prohibits all forms of expropriation, whether "directly or indirectly . . . tantamount to expropriation." This provision protects foreign investors in services from burdensome taxation of necessary activities, such as advertising, from unjustified revocation of licenses and patents, and from all other manner of "creeping expropriation" in which no actual property is taken. For example, the hotel chain operator is assured that a required license to operate may not be revoked absent a good cause, like a health code violation. If a host government were to determine that a building in which the hotel is located was needed to house a week long government assembly, the owner would be entitled to due notice of the taking and prompt compensation for the revenue lost that week.

3. *Investment-Related Transfers of Funds.* The free flow of investment capital is of particular importance to service industries which, unlike most dealers in goods, expect to receive returns on their investments on a continuous basis as the service is being rendered. These concerns are addressed in the transfer provisions of the Model BIT which protect the flow of returns from government interference. Transfer provisions also embody the greatest concern of LDCs that worry that the increase in the flow of international investment and the protection given to foreign investors will lead to exploitation of their national wealth by the transfer of profits to other countries. For this reason, the transfer provisions have met treatment of investments, an important precedent for developing U.S. bilateral economic relations. We should also note that the other six treaties examined for this comment declare in terms stronger than the model BIT itself that competitive equality must be maintained even where foreign investors seek to compete with state-operated industries, thus directly addressing the problem of government-sponsored monopolies. See discussion in the Appendix.

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79 Model BIT at art. I, par. 1(b), art. III, par. 1 (cited in note 11).
80 Pattison, 16 Cornell Int'l L.J. at 323 (cited in note 35). Note that the removal of taxation from the scope of Articles II and XI does not extend to Article III. Taxation that arguably constitutes expropriation of an investment is not allowed under the model BIT.
81 All seven of the existing U.S. BITs reviewed by this author include service contracts in their definition of investments. Service contracts are apparently safe from expropriation in these seven countries. Particularly in the treaties with Egypt, Senegal, Haiti and Zaire, which do not contain countervailing reservations of potentially discriminatory powers (see discussion in Appendix), U.S. investors can feel protected against the myriad of methods for indirect expropriation and, while expropriation of service contracts for a public purpose may not seem a likely event, the promise of compensation in any event encourages trade in services by U.S. investors.
with much resistance in actual negotiations. A major drawback of the Panama BIT is its failure to protect the right of transfer and one should expect liberalization efforts with that country to be that much less successful. On the other hand, the practical approach to the transfer provisions adopted in the Zaire BIT was born out of necessity. Zaire does not attract enough foreign currency to be able to satisfy all foreign investors’ demands for exchange of currency and thus some provision was made for necessary delays. Nevertheless, the differences in Zaire’s transfer guarantees represent a positive compromise and should not greatly hamper an increase in U.S. service investment in that country.

4. Dispute Resolution. The BIT dispute resolution provisions are entirely applicable to trade in services. Just as the availability of impartial arbitration naturally tends to promote general investment by making investors feel more secure, the added feeling of security should have the same effect on potential foreign service providers (and investors in services). Needless to say, it is critical that BIT provisions be perceived as enforceable; the built-in dispute resolution mechanism should provide ample credibility for enforcement. Once ratified, U.S. BITs will provide a concrete and legally enforceable framework of legal obligations which will render international trade between the two parties more stable, predictable, reliable, and therefore attractive to investors.

5. The Annex Exceptions. One of the benefits of bilateral negotiations is the flexibility with which special arrangements may be made in negotiations. Yet, while the ability to exempt certain trade sectors facilitates negotiation of BITs, it also threatens to water down the overall effect of the liberalization effort. The one major obstacle to the U.S. BIT program becoming the vehicle through which liberalization of trade in services may be achieved is the treaty Annex. The exemptions provided for are largely required by the operation of U.S. laws that prevent liberalization of certain service areas, often as a result of our federal form of government. While these restrictions may have foundation in legiti-

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Footnotes:
1 See discussion in Appendix at 216-17.
2 On these provisions the USTR negotiators have remained adamant. Panama and Haiti, countries which were not members of the ICSID, needed slightly different arrangements to establish the impartial dispute resolution guarantees.
4 Arakaki, FCNs and Treatment of Service Industries at 8-9 (cited in note 35). A variety of U.S. laws prevent liberalization of certain service areas, in particular: (1) Section 1108...
BILATERAL INVESTMENT TREATIES

mate concerns of Congress, they make it difficult for U.S. negotiators to push for greater liberalization on the part of foreign countries while U.S. practice is itself quite restrictive.

On the other hand, the Annex provisions, in conjunction with Article II, provide only that these areas not be granted national treatment. The MFN standard, which generally can be granted under U.S. law, is in itself a significant step forward in the liberalization of trade in services. Furthermore, other nations which do not have a federal system of government may not exempt some of the service industries found in the U.S. annex. Indeed, as the appended chart reveals, with the exceptions of the Egypt and Panama treaties, LDCs have not exempted a majority of services from national treatment. Computer services, education services, equipment leasing, franchising, health services, motion pictures, and hotels and motels are completely covered in all seven of the treaties examined.

B. Case in Point: Accounting Firms

Many governments consider it a legitimate state interest to strictly regulate the provision of professional services, often with a bias against foreigners. A cursory examination of barriers to the provision of international accounting services and the ways in which the U.S. BIT can work to reduce those barriers may be helpful in demonstrating the usefulness of BITs as mechanisms of liberalization for services in general. Accounting firms, classified under "liberal professions" in the BIT, have become increasingly internationalized over the past twenty-five to thirty years. While several firms have managed to expand into a number of foreign markets, a variety of serious impediments exist that hinder the

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of Federal Aviation Act under which air transport is subject to the exclusive sovereignty of the Federal Government, which effectively denies aliens the right to utilize U.S. airspace except under limited circumstances; (2) the "dual banking system" of our federal form of government which subjects foreign banks to differential treatment in individual states and effectively prohibits any broad, reciprocal agreements; (3) the Federal Communications Act of 1934 which prohibits foreign ownership or control of wireless communications facilities and limits issuance of radio and television operating licenses; (4) the McCarran-Ferguson Act which authorizes individual state regulation of insurance companies, resulting in much the same problem found in banking; and (5) various laws including the Merchant Marine Act of 1920 that bar transportation of goods between points in the U.S. by any ship not built in the U.S. and owned by citizens of the U.S.

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* See chart in Appendix at 219.

ability of these firms to compete effectively in providing their services.\footnote{Id. at 150-60.}

The most significant barrier complained of by accounting firms is the common restriction on the use of company names.\footnote{Id. at 158.} In an effort to prevent foreign firms from competitively benefiting from the association of local operations with their well-known international reputations, host governments routinely require local affiliates to adopt new names at considerable administrative expense and often with the result of client confusion. A party to a U.S. BIT, which did not exclude accounting from national treatment, could not "impair by arbitrary and discriminatory measures the management, operation, maintenance, use [and] enjoyment of investments" in an accounting venture.\footnote{Model BIT at art. II, par. 2 (cited in note 11).}

A second major barrier to international accounting firms is the limitation of rights of establishment. Firms may be forced into association with domestic accounting firms in the host country or, conversely, be barred from doing so in situations where association would be beneficial. They may face size restrictions or be required to hire a certain number of nationals as partners, regardless of their ability or availability. Such regulations would be explicitly barred under Article II, paragraphs 2, 3 and 4, which guarantee U.S. companies the right to enter and establish investments, to acquire equity shares in a domestic firm (an associated activity), to expand investments, and to engage top managerial personnel of their choice.

A number of foreign governments also limit the scope of practice of foreign accounting firms. This limitation is often accomplished by imposing ceilings on the number of clients each foreign firm may serve, or by discriminatory licensing procedures. Performance ceilings are almost certainly prohibited under the ban on performance requirements in Article II, paragraph 5, while discriminatory licensing and government procurement is a violation of the national treatment standard in paragraph 1 of Article II.

Accounting firms have reported difficulties in repatriating fees, royalties and profits. Many countries tend to link the determination of the permissible amount of funds repatriation to the foreign company's local assets. This practice is highly restrictive for service industries which are labor intensive and generally hold few capital assets outside of their home offices. The repatriation/local
assets linkage technique is clearly disallowed under Article IV which guarantees free and prompt transfer of "returns," defined in Article I as "an amount derived from or associated with an investment, including profit; . . . capital gain; . . . [or] management, technical assistance or other fee." Accounting firms also report difficulty in repatriating profits simply as a result of unpublicized regulations, regulations with which the host government itself may fail to comply. This barrier is eliminated under the requirements of transparency in laws and adjudications in Article II, paragraph 7.

The final commonly observed barrier to the international operation of accounting firms is discriminatory taxation. In one country it was reported that foreign accounting consultants were taxed at 40 percent, while domestic consultants were taxed at only 5 percent. This policy undoubtedly falls under the Article II admonitions against discriminatory treatment of foreign investments; and at 40 percent, even if Article II were inoperative, this tax might also trigger the protections of Article III against expropriation.

C. BITs as a Strategic Alternative

BITs provide the United States, as well as other service-rich economies, a good mechanism for liberalizing international trade in services. They offer a variety of advantages which, properly utilized, can benefit services trade in many ways.

The most basic advantage that the BIT offers, particularly with respect to the process of negotiation, is in the narrow range of interests that must be served by the agreement. If the long-term goal of a given country is to take a step-by-step approach to opening its doors to foreign service firms, BITs provide a solid form of agreement which can be tailored to the needs of the parties. If the long term goal remains the conclusion of an all-encompassing international services accord, U.S. BITs at the very least can help lay the groundwork for a future multilateral effort.81

The bilateral approach of BITs also has advantages which arise out of the fact that only two parties are involved. First, particularly where advanced countries are negotiating BITs with LDCs, the bilateral approach reduces the political pressure that leads to counterproductive "group-think" among LDCs in multilateral fora. That is, it may be less likely that an individual LDC (or advanced country) would stonewall on a given issue for a purely

81 Shelp, Beyond Industrialization at 205-207 (cited in note 6).
political reason; negotiations may be less likely to be characterized by mere posturing for the purpose of showing group solidarity. Second, bilateral negotiations can focus on "projects" and practical problems in areas where multilateral negotiations get bogged down by arguments of principle. Trade liberalization will be easier to sell to developing countries when adoption of a trade treaty can be directly linked to the concrete economic opportunities that it may offer. Finally, multilateral agreements by their very breadth indicate a recognition by the signatories of binding international law. LDCs are often much more willing to conclude bilateral treaties, which represent an exercise of their national sovereignty, than they are to sign multilateral treaties, which signify a surrender of a degree of their sovereignty to the conscripts of international law.92

As we have seen, BITs are not a perfect solution to the problems of international trade in services. Certain factors, outside of the slow negotiation process and internal problems of the treaty, have hampered the progress of BITs. BITs negotiated some time ago, as well as those more recently concluded, remain in congressional committee, delaying ratification.93 The USTR has run up against significant resistance to a number of the treaty provisions, particularly with respect to national treatment of investments, prompt compensation, performance requirements, and third party arbitration of disputes.94

For the meantime, it would appear that the United States has obtained treaties which, when ratified, will help liberalize trade in services with a number of foreign nations. Placing a national treatment standard in a treaty ensures investors of continuity and predictability, for even if policies or administrations change, the treaty will nevertheless remain in force.95 A ten year initial period of duration and an automatic renewal feature (unless either party desires to end the accord), promotes stability in the agreement.96

IV. Conclusion

The BIT is well suited to realizing many of the U.S. goals necessary to set in motion the liberalization of international trade in

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92 For further discussion of these advantages see Voss, 18 Common Mkt. L. Rev. at 372-73 (cited in note 84).
93 Bilateral Investment Treaties Aid Exports 1029 (cited in note 34).
94 Harvey Bale, paraphrased in Administration Considering Simplifying BITs at 279 (cited in note 10).
95 United States, Egypt Sign First Treaty on Bilateral Investments, 18 U.S. Export Weekly 16 (October 5, 1982).
96 Pattison, 16 Cornell Int'l L.J. at 332 (cited in note 35).
services. Yet, without clear recognition of the needs of service firms, the extent to which the BIT can achieve such liberalization will be limited. Already the annex provisions of most of the negotiated treaties exempt several important service industries from full national treatment coverage, and many of the formal treaty provisions have been diluted through the process of negotiation. Although certain natural constraints are inherent in the process of negotiation, the United States government can do more to promote the liberalization of international trade in services through the use of BITs, and should make a coordinated and determined effort to do so.

Congress should support the program in at least two ways. First, the Senate should ratify the ten BITs which are presently in committee. The stamp of Senate approval will clear the way for increased negotiation efforts by the USTR as well as encourage the supporters of BITs who already exist in the private sector. Second, to promote the inclusion of even greater protection for service industries and the reduction of the annex provision exceptions, Congress should repeal those statutes which impede foreign service investors from entering the U.S. market in all but the most security-sensitive areas of activity. Some U.S. restrictions, particularly in the field of shipping, reflect concerns of a different century and are clearly outdated.9

The USTR should assume a stronger stance in the negotiation of BITs. Even though the provisions of the U.S. BIT are much more ambitious than any of its predecessors, firm but principled negotiation must seek to prevent overbroad annex provisions and discriminatory power reservations from undercutting the effectiveness of a negotiated BIT. The USTR should also consider making more explicit in the terms of the BIT the protections accorded to service firms and the applicability of the BIT to trade in services. Continuing efforts on all fronts, including GATT and the OECD, of course remain desirable. But for now, bilateral investment treaties should be recognized as the most promising development in the ongoing effort to liberalize international trade in services.

Gregory G. Garner

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9 Arakaki, FCNs and Treatment of Service Industries at 8-9 (cited in note 35).
Appendix: The Negotiated BITs

The following discussion will analyze the contents of the first seven Bilateral Investment Treaties negotiated by the Office of the United States Trade Representative (USTR) with Panama,1 Egypt,2 Senegal,3 Haiti,4 Zaire,5 Morocco6 and Turkey.7 The treaties are very similar in format: each contains the five basic provisions formulated by the USTR in the Model BIT as explicated below.

A. Treatment of Investments

All seven treaties establish the more favorable of either national or most-favored-nation (MFN) treatment for foreign investments and define investments to include "service contracts." However, each of the treaties, except for the Senegal BIT, modifies the investment protection terms of the Model BIT to some extent. For example, the Article II provision against discriminatory government practices, is substantially weakened in both the Panama and Morocco treaties.

The Morocco BIT of 1984 does not contain a definition of protected "associated activities" that includes the establishment and maintenance of offices and branches, as the Model does. Moreover,

1 Treaty Between the United States of America and the Republic of Panama Concerning the Reciprocal Encouragement and Protection of Investments (October 27, 1982), reprinted in 21 Int'l Legal Mat. 1227 (1982) ("Panama BIT"). This treaty has been renegotiated, but the revised version was not available to the public as of this writing. The following analysis is based on the text of the original treaty.

2 Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (September 29, 1982), reprinted in 21 Int'l Legal Mat. 927 (1982) ("Egypt BIT"). This treaty has been renegotiated, but the revised version was not available to the public as of this writing. The following analysis is based on the text of the original treaty.

3 Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investments (December 6, 1983) ("Senegal BIT") (copy on file at the University of Chicago Legal Forum).

4 Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investments (December 13, 1983) ("Haiti BIT") (copy on file at the University of Chicago Legal Forum).

5 Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investments (August 3, 1984) ("Zaire BIT") (copy on file at the University of Chicago Legal Forum).

6 Treaty Between the United States of America and the Kingdom of Morocco Concerning the Reciprocal Encouragement and Protection of Investments (July 22, 1985) ("Morocco BIT") (copy on file at the University of Chicago Legal Forum).

7 Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (December 3, 1985) ("Turkey BIT") (copy on file at the University of Chicago Legal Forum).
in the Protocol to its treaty, Morocco reserves the right to extend government grants, loans and insurance to its own nationals or companies within the framework of national development programs; it may likewise grant loans to nationals or companies of third countries that participate in certain associations or even by virtue of "regional customs." The "Agreed Minutes," of the Panama BIT permit that country to maintain "incentive laws granting benefits to duly constituted companies which sign contracts with the government in which they agree to meet the requirements established therein." These "backdoors" may allow the parties to reintroduce the threat of non-tariff barriers.

The five other treaties declare absolutely, and in terms stronger than the U.S. Model itself, that:

conditions 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 . . . with privately owned or controlled investments of nationals or companies of the other Party.\footnote{\footnote{Morocco BIT at Protocol, par. 2(a) (cited in note 6).} \footnote{Panama BIT at Agreed Minutes (cited in note 1).} \footnote{\footnote{Egypt BIT at art. II, par. 6 (emphasis added) (cited in note 2).} \footnote{Recent Development, Developing a Model Bilateral Investment Treaty, 15 Law & Pol'y Int'l Bus. 273, 288 (1983).} \footnote{Panama BIT at Agreed Minutes, par. 3 (cited in note 1).}}

Thus, these BITs address directly the problem of government-owned monopolies, perhaps proving wrong one commentator who predicted that national treatment for industries competing with state-run companies would be an early casualty in the negotiating of BITs.\footnote{\footnote{The five other treaties declare absolutely, and in terms stronger than the U.S. Model itself, that:}}

All of the treaties contain provisions guaranteeing foreign investors rights of entry and establishment. All of the countries, except Panama, allow employment of managerial personnel regardless of nationality. Panama reserves the right to impose native employment quotas.\footnote{Except Panama, allow employment of managerial personnel regardless of nationality. Panama reserves the right to impose native employment quotas.} All the treaties, except the Panama BIT, promise that laws, regulations and adjudications shall be made public and that access to adjudicatory bodies will not be denied or hindered.

Model BIT provisions that preclude the use of performance requirements have suffered in negotiated BITs. Only three of the seven treaties explicitly prohibit the use of performance requirements as conditions for establishment, expansion or maintenance of investments. Two of these are Panama and Morocco, countries
which might be able to impose such regulations anyway by means of their reserved discriminatory powers. Still, the four treaties that depart from the Model BIT's absolute prohibition of these regulations, Egypt, Haiti, Zaire and Turkey, do maintain that the parties should "seek to avoid" performance requirements, which at least enables the United States to pressure these trading partners to keep barriers down.

B. Expropriations

The expropriation provisions in the seven negotiated treaties are all basically faithful to the Model's example. The Egypt, Senegal, Haiti and Zaire treaties give examples of what could be means of indirect expropriation, and include "the levying of taxation, the compulsory sale of all or part of . . . an investment, or impairment or deprivation of management, control or economic value of . . . an investment." 3

C. Investment-Related Transfer of Funds

The Panama BIT essentially does not protect the freedom to transfer investment funds. Only current and capital transactions and related transfers are required to be free of host government interference. 4 The refusal of Panama to guarantee investors the right to repatriate freely their profits and liquidated assets is troublesome because restrictions on investment related transfers of funds might even become a method for avoiding the strict rules against expropriation. Egypt, Zaire, Morocco and Turkey all reserve the right to delay some transfers for up to three years. Notably, compensation payments are not included in this class of transfers, and are avoided as a result the expropriation problem.

Zaire in particular maintains stringent controls over transfers of funds out of the country, its treaty providing that due to "current external economic circumstances," "In order to promote capital inflows," Zaire may hold the transfer provisions of the BIT wholly inapplicable for up to three years after ratification. 5 During that period, Zaire promises to make available foreign exchange for transfer of at least one-third of the profits attributable to an investment since its establishment. 6 After that period, however,

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3 Zaire BIT at Protocol, par. 1(a) (cited in note 5).
4 Panama BIT at art. VI (cited in note 1).
5 Zaire BIT at art. III, par. 1 (cited in note 2).
6 Egypt BIT at art. III, par. 1 (cited in note 2).
7 Panama BIT at art. VI (cited in note 1).
8 Egypt BIT at Protocol, par. 1(a) (cited in note 5).
9 Id.
Zaire has reserved the right to delay transfers of proceeds from the sale or liquidation of assets for up to three years, if foreign reserves in the country become dangerously low. In the Protocol to its treaty, Zaire also notes that transfer of investment related funds will be limited to those currencies available at the time. Zaire's reservations probably stem from recognition of the reality that Zaire does not attract large amounts of foreign currency. Notably, the treaties that contain limited right of transfer provisions also provide that decisions made with respect to transfer requests will be made on a most-favored-nation basis.

D. Dispute Resolution

U.S. negotiators have encountered a fair amount of resistance to the Model BIT's dispute resolution provisions. Many countries have been reluctant to relinquish local authority over investment disputes arising within their territories. In Panama, this reluctance may be rooted in the "Calvo Doctrine," to which a number of Latin American countries currently adhere. The doctrine considers outside settlement of disputes a threat to national sovereignty.

Similarly, current negotiations with the People's Republic of China have been stymied largely because of that nation's refusal to accept third party arbitration of disputes.

Nevertheless, all seven of the treaties examined are essentially faithful to the Model BIT's dispute resolution provisions, perhaps because Articles VI and VII are in many ways the cornerstone of the treaty. Panama and Haiti were not members of the ICSID when negotiations were completed on their BITs. In the former case, disputes are directed to the Inter-American Commercial Arbitration Commission; in the latter case, to the International Chamber of Commerce.

E. The Annex Exceptions

The annex provisions in the seven negotiated treaties are clearly the major stumbling blocks to liberalization of investment,
and thereby trade in services by the BIT mechanism. In the first two BITs, concluded with Egypt and Panama, essentially all the exceptions reserved by the U.S. Annex were included in those countries’ annexes, along with certain additional items. This process naturally yielded a rather extensive collection of “limited exceptions” and demonstrates the danger of the U.S. maintaining so many Annex exceptions. Annex provisions in the later treaties are much more varied, particularly as they relate to service trade concerns, and are considerably less deleterious in their effect. Senegal’s annex provision is unique in that it exempts no sectors entirely, exempting only “small and medium-sized enterprises,” as defined by Senegal law.\textsuperscript{2}\textsuperscript{1} Overall, the Senegal BIT is the closest to the USTR Model, and as U.S. investments tend to be larger than those described in the Senegalese statute, there appear to be no barriers to trade in services with Senegal.\textsuperscript{2}\textsuperscript{2}

The following chart provides an overview of the services which are exempted from treatment in negotiated BITs. An “x” indicates exemption from the treaty protections. Especially noteworthy is the fact that computer services, education services, equipment leasing, franchising, health services, motion pictures, and hotels/motels are completely covered by all seven of the examined treaties.

\textsuperscript{21} Senegal BIT at Annex (cited in note 3).

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<tr>
<td>Unincorporated Service Co.</td>
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<td>Utilities</td>
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