If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People's Republic of China

INTRODUCTION[1]

Since the normalization of relations between the People's Republic of China (PRC) and the United States in 1979, the two governments have conducted a number of bilateral negotiations aimed at establishing closer economic ties and greater mutual understanding. These negotiations have yielded several trade- and investment-related agreements including a bilateral trade agreement,[2] several bilateral income tax agreements,[3] and a bilateral investment guarantee agreement.[4] However, after five years of intermittent negotiations, the two sides have yet to come to terms on a bilateral investment treaty (BIT).[5]

As the modern day successor to the post World War II treaties of Friendship, Commerce, and Navigation (FCN), a BIT is a more specialized reciprocal agreement to encourage investment and provide certain guarantees and formal protection for investment activities in a

---

1. Because the BIT between the U.S. and the PRC is still under negotiation, there is no draft text per se to analyze. The respective positions of the United States and China are culled from a variety of sources, including model treaties, published articles, interviews with involved individuals, and similar treaties already concluded by each side with third countries.

2. Agreement on Trade Relations, July 7, 1979, United States-China, 31 U.S.T. 4651, T.I.A.S. No. 9630 [hereinafter U.S-PRC Trade Agreement].

3. Agreement for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, Apr. 30, 1984, United States-China (entered into force Jan. 1, 1987) —— U.S.T. ——, T.I.A.S. No. ——; Agreement Relating to Relief from Double Income Tax on Shipping Profits, Nov. 18, 1981, United States-China (entered into force Jan. 1, 1981) —— U.S.T. ——, T.I.A.S. No. 10297; Agreement with Respect to Mutual Exemption from Taxation of Transportation Income of Shipping and Air Transportation Enterprises, May 3, 1982, United States-China (entered into force Jan. 1, 1981) —— U.S.T. ——, T.I.A.S. No. ——.

4. Agreement on Investment Guarantees, Oct. 30, 1980, United States-China, 32 U.S.T. 4010, T.I.A.S. No. 9924 [hereinafter U.S.-PRC Investment Guarantee Agreement]. *See infra* text accompanying notes 30-47.

5. Talks were initiated in June 1983. *Bilateral Investment Treaty*, U.S. Department of State Briefing Paper, at 1 (on file at the *Journal of Chinese Law*). *See also* Lachica, *China, U.S. Agree to Hold Talks on Investment Treaty*, Asian Wall St. J. (weekly), Mar. 21, 1983, at 4, col. 1.

foreign country.[6] BIT negotiations with the PRC arose from three sources. First, they follow a general campaign formulated by the U.S. government in the late 1970s and initiated in 1981 to negotiate these treaties with developing countries.[7] Second, they respond to private business pressure, both by individual companies and through organizations like the National Council on U.S.-China Trade, to improve treatment of foreign investment in China.[8] And third, they reflect the PRC government's own desire to improve the investment climate in China so as to attract more foreign capital.[9] However, since the initial negotiations began with China in mid-1983, six rounds of formal talks[10] and several informal "exchanges of view" have not borne fruit. Efforts to reach an agreement have bogged down because of apparent strong disagreement on the fundamental principles underlying the proper protections of foreign investment.[11]

To a certain extent, the conflict reflects long-standing differences of opinion between industrialized capital exporting countries and capital-importing developing countries.[12] But closer examination reveals that this explanation is incomplete. Indeed, the U.S. has already successfully negotiated and signed BITs with a number of other developing countries.[13] Likewise, the PRC has already signed its share of agreements with industrialized countries.[14]

The PRC's socialist planned economic system and extensive state

6. *See infra* text accompanying notes 58-105.

7. *Bilateral Investment Treaties: Hearings Before the Senate Foreign Relations Committee*, 100th Cong., 2d Sess. (Draft Statement of Eugene J. Mcallister, Assistant Secretary of State for Economic and Business Affairs, Aug. 9, 1988, at 2 [hereinafter Mcallister statement]. For a general contemporaneous statement of U.S. policy in this regard, see United States Government Policy on International Investment, 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983).

8. Lachica, *supra* note 5, at 5.

9. *See* Gu Ming, *Investment Environment Seen as Favourable*, BEIJING REV., July 16, 1984, at 16. At that time, Gu Ming was Deputy Secretary-General of the State Council of the PRC.

10. For a brief summary of the then current status of the negotiations, *see* Frisbie, *The Investment Treaty Impasse*, CHINA BUS. REV., Sept.-Oct. 1986, at 41.

11. Telephone interviews with Donald Eiss, Deputy Assistant U.S. Trade Representative (Nov. 27 and Dec. 4, 1987) [hereinafter Eiss Interview]. Mr. Eiss said that because of the serious and basic disagreements between the parties there does not seem to be any early prospect for resumption of formal negotiations. *Id.* The November 1987 "exchange of views" was just that — and no more.

12. *See infra* text accompanying notes 106-123; Heine, *Impasse and Accommodation: The Protection of Private Direct Investment in Developing States*, 14 CASE W. RES. J. INT'L L. 465 (1982).

13. These countries are Bangladesh, Cameroon, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. *See infra* note 64. As of December 1986, only Panama had ratified its treaty with the U.S.

14. China has signed over 20 BITs. *See infra* notes 161-163 and accompanying text.

ownership are important characteristics that distinguish it from other U.S. BIT partners. Government price-setting and controlled allocation of resources in the PRC are an anathema to many foreign investors who want a flat playing field to compete on. In part precisely because of China's uniqueness, the office of the U.S. Trade Representative (USTR), which co-chairs the U.S. negotiating team with the Department of State, seems to have singled out negotiations with the PRC as a forum to establish a precedent for future BITs with other socialist countries.[15]

Negotiations with China are unique for other reasons. First, because of the well-known abuses of China's sovereignty by Western countries in the nineteenth and early twentieth centuries, China's notion of the protective reach of the principle of sovereignty is generally much broader than that of Western countries. Consequently, Chinese leaders are still unusually reluctant to discuss any agreement that they believe might threaten that sovereignty.[16] Second, the relatively undeveloped condition of the PRC legal system not only causes uncertainty among foreign investors, but at the same time may also prevent the adoption of any complex international agreements unsuited to the internal legal development.

These fundamental differences cause disagreements during negotiations in three important areas: 1) the level of treatment to be accorded to foreign investments, 2) expropriation processes and compensation, and 3) dispute settlement.[17] These areas will be discussed in part III below. But in order to further understand the context in which these issues arise, it is necessary, first, to review the background of U.S. government efforts to protect American investments abroad and, second, to present a summary of China's past experiences with and attitudes towards foreign direct investment (FDI).[18]

I. PROTECTING UNITED STATES INVESTMENTS ABROAD

The flow of private capital across international borders has

15. Then Assistant U.S. Trade Representative for International Investment Policy, Harvey Bale Jr., was quoted in 1983 as follows: "If we can get a socialist country like China to agree to some basic principles, our work will be easier elsewhere." Lachica, *supra* note 5, at 4.

16. *See infra* notes 175-190 and accompanying text.

17. The Model BIT addresses three other substantive areas that this note will not look into in depth: transfers, tax, and consultation and exchange of information.

18. FDI can be broadly defined as the investment of money, goods or services in a project for entrepreneurial commitment. Such investment projects may include the establishment of companies, capitalizing branches and plants, securing equity holdings sufficient to establish management control of companies, and making long-term loans with low interest rates in conjunction with acquisition of equity holdings. Note, *The World Bank's Multilateral Investment Guarantee Agency*, 25 COLUM. J. TRANSNAT'L L. 101, 104 (1986) [hereinafter Note, *MIGA*].

expanded exponentially during the 20th century. In early years, host country laws and investment contracts formed the primary legal protection for foreign investments, but often proved inadequate, from the point of view of foreign investors. Customary international law also failed to provide satisfactory protection. If disputes arose between private investors and host governments over treatment of investments, unless binding international arbitration was agreed upon or the local courts provided acceptable solutions, often the only recourse for foreign investors was to ask their own government to press their claim diplomatically by asserting the international law of state responsibility. This process proved only marginally successful at times, since, especially in this century, many countries resisted and resented the use of diplomatic pressure to resolve claims they believed to be solely within their sovereign jurisdiction.

The U.S. government and other nations have sought to supplement customary law with a number of guarantee programs and with bilateral agreements, creating treaty obligations aimed at encouraging and protecting FDI. Prior to the BIT program, investment was partially protected by treaties of Friendship, Commerce, and Navigation (FCN) between the U.S. and many other countries. More recently, the U.S. government has founded and promoted a national insurance mechanism, the Overseas Private Investment Corporation (OPIC), to help encourage investment in developing countries. And in 1988 the government approved participation in the Multilateral Investment Guarantee Agency (MIGA), a multilateral cousin to national investment insurance programs like OPIC. Other U.S. government efforts have included statutory attempts to protect investments through the imposition of sanctions against countries that seize U.S. investments. Most notable of these are the "First Hickenlooper Amendment"[19] and the "Gonzalez Amendment,"[20] neither of which has been used often nor appears to have produced desired results.[21]

A. The FCN Treaty System

In the post World War II international commercial arena, the primary bilateral mechanism utilized by the U.S. government to protect U.S. international trade and investment has been the FCN treaty.

19. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2370(e)(1) (1982). *See* Note, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931, 938 (1984) [hereinafter Note, *The BIT Won't Bite*].

20. International Development Association Act, Pub. L. No. 92-247, 86 Stat. 60, (1971) (codified at 22 U.S.C. § 284(j) (1982).

21. Note, *The BIT Won't Bite, supra* note 19, at 939-940.

The U.S. has concluded 44 of these treaties with other countries; 15 have been signed since World War II, including a number with Asian countries.[22] The U.S. signed a treaty with the Republic of China in 1946,[23] but this treaty only remains in effect with regard to the Nationalist government on Taiwan.

The typical FCN contains broad provisions covering a variety of topics, including not only trade and investment, but also travel and individual rights.[24] These treaties, however, tend to emphasize "friendship" and give more protection to individuals and their property than to business investors.[25] Most commentators agree that FCNs are unsuited to the needs of contemporary international investment.[26] For instance, a typical FCN expropriation clause does not cover creeping expropriation.[27] Moreover, the arbitration clauses are poorly drafted.[28] In addition, FCNs have been associated with U.S. economic expansionism and alleged imperialism, thereby making them historically unappealing to developing countries where investments face high risk.[29]

22. Aksen, *The Case for Bilateral Investment Treaties*, 24 PRIVATE INVESTORS ABROAD 357, 358-59, app. A (1982). The bulk of FCNs signed with Latin American countries date from the 19th century. Bergman, *Bilateral Investment & Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U.J. INT'L L. & POL. 1, 8 n. 37 (1983).

23. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-China (Republic of China), T.I.A.S. No. 1871, 25 U.N.T.S. 69 [hereinafter U.S.-ROC FCN].

24. *See* Pattison, *The United States-Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation*, 16 CORNELL INT'L L.J. 305, 308 (1982). The substantive provisions of most FCNs addressed the following topics, among others: 1) general national treatment in administration of local laws, and national and MFN treatment for patents and trademarks and the areas of taxation and products distribution and use; 2) individual rights, such as freedom of movement and entry, right to counsel and a speedy trial, and protection from molestation; 3) private standing in national courts; 4) the enforceability of arbitration awards between private parties; 4) national treatment when engaging in and operating a business; 5) the right to freely purchase and lease land; 6) protection of property; protection of exchanges involving scientific and technical knowledge; 7) the rights; exchange controls; 8) rules on customs administration, import or export duties, and other charges; 9) transportation of goods and services; 10) the right to compete with local monopolies; 11) freedom of commerce and navigation for ships; 12) bilateral consultation regarding competitive restraint practices; and 13) dispute settlement between the treaty signatories. *Id. See, e.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, T.I.A.S. No. 2862.

25. Aksen, *supra* note 22, at 370-72.

26. *See, e.g.*, Aksen, *supra* note 22, at 367-68; Note, *The BIT Won't Bite*, *supra* note 19, at 931-936; Pattison, *supra* note 24, at 309.

27. Bergman, *supra* note 22, at 8, *citing* S.J. RUBIN, PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES 88 (1956); Aksen, *supra* note 22, at 377.

28. *Id.*

29. Pattison, *supra* note 24, at 309.

B. Investment Guarantees: OPIC and MIGA

A second mechanism utilized by the U.S. government to encourage U.S. investment overseas, particularly in less developed countries (LDCs), is the Overseas Private Investment Corporation (OPIC). OPIC, which was authorized by the Foreign Assistance Act of 1969,[30] succeeded a similar program offered by the U.S. Agency for International Development since 1948.[31] OPIC is a U.S. government-funded corporation managed by a board of directors composed of representatives from the government and the private sector.

OPIC's statutory mandate is to "mobilize and facilitate the participation of United States private capital and skills in the economic and social development of friendly LDCs, thereby complementing the development assistance objectives of the United States."[32] OPIC guarantees function by insuring new investments in developing countries against a number of political risks, including inconvertibility of earnings, loss of investment due to expropriation, nationalization, or confiscation and loss due to war, revolution, insurrection, or civil strife.[33]

In the late 1970s this mandate faced increasing political pressures from two fronts. Criticism focused first on the rising trade deficit, alleging that OPIC exacerbated the trend.[34] Second, organized labor argued that OPIC, by assisting FDI, helped export 150,000 domestic jobs a year.[35] These criticisms resulted in some statutory modification.[36] But concerns about the loss of U.S. jobs to cheap labor markets in the developing world promise to continue to confront OPIC. One of the recent amendments particularly relevant to investment in the PRC is a provision aimed at withholding insurance for investment "subject to performance requirements which would reduce substantially the positive trade benefits likely to accrue to the United States from the investment."[37] Performance requirements typically take the form of host country stipulations that new foreign investment projects export most or all of production. OPIC, however, has generally

30. Foreign Assistance Act of 1969, 22 U.S.C. §§ 2191-2200a (1982).

31. The Economic Cooperation Act of 1948, ch. 169, § III(b)(3), 62 Stat. 144.

32. 22 U.S.C. § 2191.

33. *See* OVERSEAS PRIVATE INVESTMENT CORPORATION, INVESTMENT INSURANCE HANDBOOK 3 (1988). In 1987, OPIC insured a record 144 new projects. At year end, total political risk insurance in force amounted to $9.422 billion. *Id.*

34. *See* Note, *MIGA*, *supra* note 18, at 111; Note, *The BIT Won't Bite*, *supra* note 19, at 937. According to a report submitted in Senate hearings, the negative effect of OPIC insurance has on U.S. trade is slight. Note, *The BIT Won't Bite*, *supra* note 19, at 937 n. 47.

35. Note, *MIGA*, *supra* note 18, at 936-37 n. 47.

36. *See* 22 U.S.C. §§ 2191(k)(1), (l) (1982).

37. 22 U.S.C. § 2191(m) (Supp. III 1985).

deflected the bulk of attacks on its development mandate.[38]

OPIC coverage for investments in a given country is available only after the U.S. government reaches an investment guarantee agreement with that country's government.[39] The bilateral agreement provides that the host government recognize the subrogation of the U.S. government if OPIC pays a claim. Typically, the bilateral agreement provides that disputes will be resolved by negotiation between the two governments. Disputes not settled by negotiation go to binding international arbitration. This provision formalizes in a bilateral treaty obligation the application of the principle of state responsibility. Where in the past the home government might take up a private investment dispute on an ad hoc basis, OPIC makes this subrogation automatic and procures host country consent at the same time. But by creating a formal mechanism for converting a private claim to a state claim, OPIC dispute settlement provisions potentially increase the likelihood of diplomatic rifts if host governments believe that a given claim is outside the coverage of the investment guarantee agreement.[40]

The U.S. and PRC governments signed an investment guarantee agreement on October 30, 1980.[41] In 1982, the first guarantee, amounting to less than $1 million in value, was issued for a U.S. investment in China.[42] In 1987, the total insured amount had risen to over $23 million.[43] Like most such agreements, the U.S.-PRC agreement makes OPIC insurance of projects or activities in China contingent on PRC government approval.[44] Subrogation of the U.S. government to the claims of the investor, provided for in article 3 of the agreement, is qualified in part by a provision contemplating that particular PRC laws may not permit certain property owned by the investor in the PRC to be transferred to the U.S. government. In such a case, the PRC government "will permit the investor and the Issuer [OPIC] to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of the [PRC]."[45]

Only certain disputes will be negotiated. These pertain to the

38. Note, *MIGA*, *supra* note 18, at 119-20.

39. 22 U.S.C. § 2197(a) (1982).

40. *See* Note, *The BIT Won't Bite*, *supra* note 19, at 938.

41. U.S.-PRC Investment Guarantee Agreement, *supra* note 4.

42. OVERSEAS PRIVATE INVESTMENT CORPORATION, ANNUAL REPORT, 30 (1982).

43. OVERSEAS PRIVATE INVESTMENT CORPORATION, ANNUAL REPORT, 40-41 (1987). A total of 11 projects were insured in 1987. These projects range from hotels to fish procession and rutile mining to sanitary articles. *Id.*

44. U.S.-PRC Investment Guarantee Agreement, *supra* note 4, art. 2.

45. *Id.* art. 4.

"interpretation" of the agreement or which "in the opinion of one of the Governments, involves a question of public international law."[46] If negotiation fails, binding arbitration can be requested by either government. The arbitral tribunal is bound to base its decision on the "applicable principles and rules of public international law."[47]

MIGA[48] is an independent organization established under the sponsorship of the World Bank.[49] Although it responds to a number of the same needs that led to the establishment of OPIC, there are several distinguishing characteristics that may make MIGA a more acceptable mechanism for both capital exporting and capital importing countries. As a multilateral agency, MIGA is both managed by its signatory states[50] and capitalized with funds contributed by capital importers as well as exporters.[51] Both the U.S. and the PRC, among other states, are members.[52] Thus, greater commitment to the organization's purposes is achieved under MIGA as compared to a single nation-based insurance system like OPIC. Moreover, MIGA's independent status isolates it from the domestic political influences that OPIC and similar programs must face. Therefore, MIGA should be able to play a more neutral, and thus more effective role in promoting capital-importing policies on behalf of developing countries looking to encourage foreign investment which will conform with their own development goals.[53]

---

46. *Id.* art. 6(a).

47. *Id.* art. 6(b)(ii).

48. *See generally* Note, *MIGA*, *supra* note 18, at 124-136; M. HOLTHUS, D. KEBSCHULL, K. W. MENCK, MULTINATIONAL INVESTMENT INSURANCE AND PRIVATE INVESTMENT IN THE THIRD WORLD (1954).

49. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985 (into force Apr. 12, 1988), *reprinted in* 24 I.L.M. 1605 (1985) [hereinafter MIGA Convention]. MIGA was inaugurated on June 8, 1988, and has yet to issue any guarantees, although many applications have been received. Telephone interview with Christina Westhold-Schroder, consultant to MIGA (Nov. 14, 1988) [hereinafter Westhold-Schroder interview].

50. There are three levels of MIGA management: a Council of Governors consisting of one member from each signatory country and charged with making structural changes and voting on fundamental policy issues; a Board of Directors responsible for general operations and elected under a formula giving some preference to states holding the largest number of shares; and the President who will be elected by the board and conduct the daily business of MIGA. MIGA Convention, *supra* note 49, arts. 30-33.

51. Each state's subscription in MIGA will be made in accordance with its relative economic strength as measured in the allocation of the World Bank's capital. *Id.* art. 6.

52. The U.S. signed the convention on June 18, 1988, and its membership became effective as of April 12, 1988. China signed the convention on April 28, 1988, and its membership became effective on April 30, 1988. Westhold-Schroder Interview, *supra* note 49. A number of applications for MIGA guarantees of investments in China have been filed, but none of them are from U.S. companies. *Id.*

53. Note, *MIGA*, *supra* note 18, at 129.

In addition to guarantees for risks covered by OPIC, MIGA will issue guarantees for breach of a "legal commitment" by the host-government.[54] OPIC's guarantee against expropriation may offer some protection for related types of breaches, but this MIGA provision should have the added benefit of covering a broader variety of host-government actions and of encouraging a closer attention to the legal details of foreign direct investment by both the investor and the host-country.[55] Because of this provision, investors will likely draft more detailed contracts and seek written opinions and approvals from relevant host country government agencies. Similarly, the host government will pay closer attention to the commitments it makes, since it will be bound to them under the MIGA agreement. Moreover, at least in some cases, MIGA will provide insurance for risks that might fail statutory eligibility tests for coverage under national programs such as OPIC despite their developmental value to LDCs.[56] The multilateral participation in MIGA should by itself reduce the number of disputes arising under the Convention, however, its sturdy arbitration system should further encourage settlement and successfully enforce awards for those disputes that do arise. The arbitration mechanism, which parallels that of the Convention on the Settlement of Investment Disputes (ICSID Convention), permits the exhaustion of local remedies first, if preferred, and the application of local laws.[57] The fact that guarantee claims will be subrogated to an international organization and that the MIGA arbitral tribunal will also be international in character should encourage confidence in MIGA and produce equitable resolution of disputes.

C. The United States BIT Program

The U.S. BIT program was developed as a coordinated effort by various offices of the government with the help and support of the private sector. The program attempts to deal with the inadequacies of existing protection for U.S. investments abroad under FCN treaties and OPIC.[58] BITs had originally been initiated by European countries with LDCs in the 1960s and early 1970s, focusing, unlike FCN

54. MIGA Convention, *supra* note 49, art. 11.

55. Note, *MIGA*, *supra* note 18, at 130.

56. MIGA Convention, *supra* note 49, art. 19 and comment 29. *See* Note, *MIGA*, *supra* note 18, at 127.

57. MIGA Convention, *supra* note 49, annex II. *Compare* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 26, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

58. *See generally* Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985); Note, *An Examination of Compensation Terms in the U.S.-Egypt Bilateral Investment Treaty*, 16 CASE W. RES. J. INT'L L. 287 (1984).

treaties, exclusively on investments by nationals or companies of one state party in the territory of another.[59] During the 1970s, substantial losses of American investments due to expropriations in Libya and Iran added to the perceived need in the U.S. for stronger guarantees. The U.S. government also reacted to pressure from individual firms and to the strong urging by the Council of the International Chamber of Commerce and other Western private trade and investment organizations to help develop a more stable international investment framework by adopting BITs.[60]

The U.S. government initiated BIT negotiations with several countries in 1981,[61] publicly issuing a proposed model treaty (hereinafter Model BIT) on January 11, 1982.[62] The first BIT was signed with Egypt on September 29, 1983,[63] and BITs with nine other countries have been concluded since then.[64] Negotiations with at least seven more countries, including the PRC, have been opened.[65] However, in the past two years negotiations have slowed, as the Executive Branch failed to win ratification from the Senate of any of the signed

59. Bergman, *supra* note 22, at 8-9.

60. Bergman, *supra* note 22, at 9.

61. McAllister Statement, *supra* note 7, at 2.

62. Treaty between the United States of America and ———— Concerning the Reciprocal Encouragement and Protection of Investment, Jan. 11, 1982, *reprinted in* 17 BNA EXPORT WEEKLY 734 (March 23, 1981) [hereinafter Model BIT]; Revised Model Bilateral Investment Treaty, February 24, 1984, *reprinted in* 20 BNA EXPORT WEEKLY 960 (May 15, 1984).

63. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, *reprinted in* 21 I.L.M. 927 (1983) [hereinafter U.S.-Egypt BIT].

64. Treaty Concerning the Treatment and Protection of Investments, Oct. 27, 1982, United States-Panama, *reprinted in* 21 I.L.M. 1227 (1982) [hereinafter U.S.-Panama BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 6, 1983, United States-Senegal (on file at the Office of the USTR) [hereinafter U.S.-Senegal BIT]; Treaty Concerning the Treatment and Protection of Investments, Dec. 13, 1983, United States-Haiti (on file at the Office of the USTR) [hereinafter U.S.-Haiti BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Aug. 3, 1984, United States-Zaire (on file at the Office of the USTR) [hereinafter U.S.-Zaire BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 3, 1985, United States-Turkey (on file at the Office of the USTR) [hereinafter U.S.-Turkey BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, July 22, 1985, United States-Morocco (on file at the Office of the USTR) [hereinafter U.S.-Morocco BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 27, 1986, United States-Cameroon (on file at the Office of the USTR) [hereinafter U.S.-Cameroon BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Mar. 12, 1986, United States-Bangladesh (on file at the Office of the USTR) [hereinafter U.S.-Bangladesh BIT]; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, May 2, 1986, United States-Grenada (on file at the Office of the USTR) [hereinafter U.S.-Grenada BIT].

65. In addition to those with the PRC, inconclusive negotiations have been conducted with Malaysia, Costa Rica, Sri Lanka, Honduras, Gabon, and Uruguay as well. McAllister Statement, *supra* note 7, at 2.

BITs. When the Senate finally approved eight of the ten BITs in October 1988,[66] the approval was made contingent on an "understanding" offered by the Executive, underlining existing language in the BITs reserving the right to either state party to take action contrary to the substantive terms of the treaties if necessary to protect national security interests. Apparently, some Senators were concerned that the treaties limited U.S. freedom to act in emergencies.[67]

1. Substantive Provisions[68]

The most important substantive provisions of the U.S. Model BIT cover four major investment-related areas. Three of these areas, as they appear in the Model BIT, will be introduced here, but analysis of BITs actually negotiated to date will be reserved for part III below. First of all, article II of the Model BIT, regarding treatment of investment, seeks to create mutually favorable investment environments by establishing several levels of protection relating to different stages of investment and covering a specified list of investment-related activities. The first paragraph of the article provides for most favored nation[69] (MFN) or national treatment,[70] whichever is more favorable, towards the establishment and acquisition of investments.[71] The same standard of treatment is also applied to investments established prior to the effective date of the treaty.[72] The Model BIT then lists seven groups of associated investment activities covered by the same stan-

66. The Senate gave its advice and consent to ratification on October 18, 1988. *See* 134 CONG. REC. S16939, S16940 (Oct. 20, 1988). The BITs enter into force 30 days after exchange of ratification documents.

67. Interview with Claudia H. Serwer, Director of Investment Affairs, Office of the U.S. Trade Representative, in Washington D.C. (Aug. 23, 1988) [hereinafter Serwer Interview]. Despite existing language in article X of the Model BIT and each of the signed BITs, Senate staff delayed approval until the "understanding" was added. *Id.* The understanding reads as follows: "(Senate advice and consent is contingent on the understanding that) "[u]nder article X of the treaty, either party may take all measures necessary to deal with any unusual and extraordinary threat to its national security." 134 CONG. REC. S16939, 16940 (Oct. 20, 1988) Conscious of Senate concern evident in the need for such an "understanding," the Executive Branch did not resubmit the Panama and Haiti BITs for ratification with the other BITs. Considering the unstable economic and political condition of these two countries, it is unclear when and if these BITs will be resubmitted. *Id. See infra* text accompanying notes 100-105.

68. *See generally* Gann, *supra* note 58, for a complete discussion of the provisions of the Model BIT.

69. Under a most favored nation clause, a state signatory normally grants to the other state, or in this case companies of the other state, the broadest rights and privileges which it accords to any other state in treaties it has made or will make.

70. The obligation of national treatment means treatment no less favorable than treatment accorded by the host party to its nationals and companies in like situations. Gann, *supra* note 58, at 384 n. 46.

71. Model BIT, *supra* note 62, art. II, para. 1.

72. *Id.* para. 2.

dard of treatment.[73]

It is significant that the Model BIT excludes a considerable number of economic sectors and other matters from national treatment. These exceptions include all areas in which U.S. federal law already distinguishes between foreign investors and U.S. nationals. Sectors and matters traditionally left to the states or in which states already discriminate against foreign investment are also excepted.[74] As what seems to be a fall-back clause, the next paragraph of article II establishes a non-contingent "fair and equitable" standard and forbids impairment of investments by "arbitrary and discriminatory" measures.[75] Treatment, moreover, "shall in no case be less than that required by international law," although this level remains undefined.[76]

Three additional clauses of article II are of particular interest in relation to investment in the PRC. Paragraph six further defines the national treatment provided for in the first two paragraphs. It stipu-

---

73. These activities include the following:

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

(b) 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;

(c) the making, performance and enforcement of contracts;

(d) the acquisition (whether by purchase, lease or otherwise), ownership and disposition (whether by sale, testament or otherwise), of personal property for the conduct of business;

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

(f) 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,

(g) the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

Id.

74. *See id.*, Annex, which reads as follows:

Consistent with Article II, paragraph 3, each Party reserves the right to maintain limited exceptions in the sectors or matters indicated below:

The United States

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and 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; use of land and natural resources.

Id. See also Gann, *supra* note 58, at 387-89.

75. Model BIT, *supra* note 62, art. II, para. 4.

76. *Id.*

lates that when private companies established by nationals of one state in the territory of the other are in competition with entities owned or controlled by the other state party, conditions of "competitive equality should be maintained."[77] Paragraph seven specifically prohibits "performance requirements as a condition of establishment, expansion or maintenance of investments," including requiring exports or local purchase of goods and services.[78] Paragraph eight, finally, dictates that laws, regulations and other legal decisions relating to investment must be made public.[79]

The second area comprises the question of legitimate methods of expropriation and nationalization and the level of compensation to be paid. According to article III of the Model BIT, all manner and form of expropriation and nationalization, including indirect measures, are prohibited. The Model BIT offers this protection to all interests, large and small, in any investment.[80] However, exceptions are allowed if expropriation is undertaken for a public purpose; is accomplished under due process of law; is not discriminatory; does not violate a contractual provision between a national of one state party and the other state party; and is accompanied by prompt, adequate, and effective compensation.[81]

"Prompt" compensation is defined as payment "without delay," and if there is delay, that interest at current international rates shall be paid.[82] "Adequate" compensation, according to the U.S. Model BIT, is equivalent to the fair market value of the expropriated investment on the date of expropriation.[83] This valuation, moreover, "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." The term "effective" means that the compensation must be realizable and freely transferable.[84]

Each of these compensation requirements must be met. In other words, even in the case that an expropriated domestic enterprise is not compensated, the expropriation of a U.S. investment would still entitle the owners to compensation. "Stabilization clauses" in contracts, which stipulate that a contract shall be governed by laws and regula-

77. *Id.* para. 6.
78. *Id.* para. 7.
79. *Id.* para. 9
80. *Id.* art. II, para. 2.
81. *Id.* art. III, para. 1.
82. *Id.*
83. *Id.*
84. *Id.*

tions in effect when the contract is concluded, must be enforced under the Model BIT. A stabilization clause might, for instance, explicitly state a formula for determining and providing compensation in the event of expropriation.[85] This clause must be enforced, regardless of expropriation legislation purporting to vacate the entire contract.[86] Chinese notions of the sovereign right of a state to expropriate if necessary, which are discussed below, would likely disfavor any such clause.

Dispute settlement is the third major substantive area encompassed by the Model BIT. The Model BIT provides detailed dispute settlement principles and mechanisms for two types of disputes: 1) disputes between a state party to the treaty and a national or company of the other state party; 2) disputes between the two state governments. The provisions regarding the former type of disputes are designed to interact closely with the relevant parts of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention), which established the Centre for Settlement of Investment Disputes and the Additional Facility, an alternate settlement mechanism.[87] The inclusion of investor-state party dispute settlement procedures in article VII is intended to reduce the need for the U.S. government to take up a claim of a private investor by invoking the state-party provisions of Model BIT article VIII.[88]

Article VII defines three categories of private party investment disputes:

> [Disputes involving] a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or c) an alleged breach of any right conferred or created by [the treaty] with respect to an investment.[89]

However, disputes solely concerning interpretation or application of

85. According to Professor Schachter, some countries dispute the binding effect of stabilization clauses. O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 313-314 (1982) (unpublished offprint of the Academy of International Law) [hereinafter SCHACHTER, THEORY & PRACTICE].

86. Thus, in the event of a taking, the investor would be entitled to the remedy *restitutio in integrum*, rather than damages. *See* Gann, *supra* note 58, at 400 n. 127 and accompanying text.

87. Gann, *supra* note 58, at 414, *citing* ICSID Convention, *supra* note 57.

88. Gann, *supra* note 58, at 421.

89. Model BIT, *supra* note 62, art. VII, para. 1.

securities and anti-trust and other local laws, which do not implicate rights created by an investment agreement or authorization or by the BIT, are not included.[90]

Settlement of investor-state party disputes through direct consultation or negotiation is first encouraged.[91] At this stage, non-binding fact-finding procedures of the Additional Facility of the Centre, as provided by the ICSID Convention, may be used. If these non-binding third-party procedures fail, the Model BIT directs that the parties to the dispute may resort to settlement procedures previously agreed on by contract.[92] If each of these preliminary efforts fail to resolve the dispute, the investor may choose to submit the dispute to the Centre or the Additional Facility for settlement by conciliation or binding arbitration.[93] Although submission is triggered by the investor's request, according to the ICSID Convention, the state parties must also agree. This agreement is accomplished by a specific consent clause written into the Model BIT.[94] In order to trigger the arbitration clause of the Model BIT, the following conditions must be met: 1) at least six months must have passed since the dispute arose; 2) the dispute may not have been submitted for settlement in accordance with any dispute procedures previously agreed to by the parties to the dispute; and, 3) the investor may not have brought the dispute before the courts or administrative organs of competent jurisdiction of the host state party to the treaty.[95] Two further provisions of the Model BIT take into account alternate dispute settlement procedures in other agreements that may have been made between the state parties, those provided for in the OPIC agreement, for example.[96]

---

90. Gann, *supra* note 58, at 415.

91. Model BIT, *supra* note 62, art. VII, para. 2.

92. *Id.* Dispute procedures agreed upon by contract remain available despite any expropriatory act. Similarly, awards made on such procedures would be enforceable under the original contract, domestic law, or international agreements for the enforcement of arbitral awards, such as the 1958 New York Convention. Gann, *supra* note 58, at 416.

93. Model BIT, *supra* note 62, art. VII, para. 3. Conciliation or binding arbitration shall be in accordance with the provisions of the Convention and the rules of the Centre or of the Additional Facility. *Id.* para. 3(c). If the parties to the dispute disagree as to which procedure to use, the choice of the investor shall be followed. *Id.* para. 3(a).

94. *Id.* para. 3(b).

95. *Id.* para. 3(a).

96. The government party cannot assert as a defense that the investor has received or will receive, pursuant to an insurance contract, indemnification or compensation. *Id.* para. 4. This provision thus allows for subrogation of claims under an OPIC insurance policy or Export-Import Bank contracts for insurance. Gann, *supra* note 58, at 419. If, however, dispute resolution mechanisms are provided for in either of these two other programs, then this article of the BIT shall not apply. Model BIT, *supra* note 62, art. VII, para. 6. The U.S.-PRC agreement on Investment Guaranties does provide such an alternate dispute resolution mechanism for any dispute regarding the interpretation of the investment guaranty agreement or

Article VIII deals with the settlement of disputes between the state parties. It applies to any dispute between the state parties concerning the "interpretation or application" of the treaty.[97] However, either government has the discretion to invoke this provision on behalf of an investor, if article VII is unavailing.[98] According to a former USTR official, however, the U.S. government expects that investors will invoke article VII rather than rely on the government to invoke article VIII.[99] The substance of this provision is largely concerned with the procedure and make-up of the arbitral tribunal established by the parties to resolve disputes.

It is important to note, finally, that the drafters of the Model BIT were careful to include an escape clause in the treaty. Thus, article X provides that the treaty shall not preclude measures by a party "necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[100] These exceptions are intended, respectively, to allow for the exercise of domestic police powers, the implementation of United Nations Security Council measures, and the imposition of extraordinary measures taken in times of national emergency or war.[101] With respect to the third exception, relevant measures are defined by U.S. statutes, such as the Trading with the Enemy Act[102] and the International Emergency Economic Powers Act.[103] Only a limited class of actions in times of no national emergency or war are permitted.[104] Concerned that this article still does not provide an adequate preservation of U.S. government freedom of action in emergencies, such as the recent political chaos in Haiti and alleged drug activities of Panama's General Noriega, the Senate had held up ratification of BITs signed to date until an "understanding" emphasizing the exception was added.[105] Whether the domestic legislation of U.S. BIT signatories provides parallel definitions of and limitations on action permissible "for protection of essential security interests" is questionable. In a

which "in the opinion of one of the Governments, involves a question of public international law." U.S.-PRC Investment Guarantee Agreement, *supra* note 4, art. 6.

97. Model BIT, *supra* note 62, art. VIII, para. 1.

98. Gann, *supra* note 58, at 421.

99. *Id.*

100. Model BIT, *supra* note 62, art X., para. 1. According to Professor Gann, article X closely follows exceptions contained in most international trade and investment agreements. Gann, *supra* note 58, at 424.

101. Gann, *supra* note 58, at 424-425.

102. 50 U.S.C. § 1.

103. 50 U.S.C. App. § 1701. *See* Gann, *supra* note 58, at 425.

104. Gann, *supra* note 58, at 425.

105. Serwer Interview, *supra* note 67.

crisis, a BIT signatory would likely take advantage of this language to claim that the substantive BIT provisions are temporarily suspended.

2. The "Prompt, Adequate, and Effective" Standard in International Law

One of the most contentious issues raised by the U.S. Model BIT, as pointed out in the preceding section, involves the issue of the proper conditions of compensation for expropriation. For the past half century the U.S. government has consistently claimed that international law requires that any expropriation of foreign property by a government within its borders must be made in a non-discriminatory manner and accompanied by "prompt, adequate, and effective" compensation.[106] This principle, sometimes known as the Hull Formula,[107] has been built into the U.S. Model BIT.[108] However, the Hull Formula has been long disputed by many LDCs, especially those in Latin America who support the Calvo Doctrine. According to the Calvo Doctrine, a state that expropriates the property of an alien is obligated under international law to pay compensation only to the extent that its own nationals are compensated,[109] although most countries accept that discrimination directed specifically against foreign investments is prohibited.[110] The jurisdiction over expropriation-related disputes, moreover, lies exclusively in the courts of the host state. Similarly, socialist countries also generally maintain that the regulation of alien property is exclusively the subject of municipal law.[111]

---

106. *See* Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984).

107. The Hull Formula was asserted in a series of diplomatic notes to the Mexican government over agricultural expropriations by Mexico. Notes of July 21 and August 22, 1938, Secretary Hull to the Mexican Ambassador, L. HENKIN, R.C. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 1044-45 (2d ed., 1987) [hereinafter HENKIN].

108. *See* Model BIT, *supra* note 62, art. III, para. 1(e).

109. The 1985 Report of the Centre on Transnational Corporations on Work on the Formulation of the United Nations Code of Conduct on Transnational Corporation, E/C. 10/1985/S/2 (1985), para. 42 [hereinafter UN TNC Code Report], *quoted in* HENKIN, *supra* note 107, at 1049, 1050. The report defines the doctrine as embodying the following propositions:

> a) international law requires the host State to accord national treatment to aliens; b) national law governs the rights and privileges of aliens; c) national courts have exclusive jurisdiction over disputes involving aliens, who may therefore not seek redress by recourse to diplomatic protection; d) international adjudication is inadmissible for the settlement of disputes with aliens.

Id.

110. *See* SCHACHTER, THEORY AND PRACTICE, *supra* note 85, at 314-321.

111. UN TNC Code Report, *supra* note 109, para. 43. Although socialist countries have paid compensation arising from their expropriation of foreign property, Soviet legal doctrine holds that property rights are not an international law issue. Socialist countries adhere to the

In the United Nations, there have been a number of important statements regarding the proper standard of compensation. In 1962, the U.N. General Assembly resolved that in the event of nationalization, "appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[112] The U.S. supported this resolution but unilaterally interpreted it to mean that "prompt, adequate, and effective" compensation was required.[113] Since then, however, two other U.N. statements have chipped away at the meaning of "appropriate." The 1974 resolution on Permanent Sovereignty over Natural Resources[114] left the decision on "possible compensation" totally up to the expropriating country.

The Charter of Economic Rights and Duties of States, however, revived the word "appropriate."[115] Under the Charter, appropriate compensation would be paid "taking into account the relevant regulations and all circumstances" of the expropriating state.[116] Disputes would be "settled under domestic law" unless otherwise "freely and mutually agreed."[117] The U.S. abstained from the vote on this article after having failed to win approval of an alternate draft that would have used the words "just compensation."[118]

Professor Schachter argues persuasively that international law has not adopted the "prompt, adequate, and effective"[119] standard of compensation. He refers not only to the wide divergence of opinion among states, evidenced in part by the above U.N. statements, but also to various "traditional" decisions and to state practice. The tribunal decisions recognize an international obligation to pay some level of compensation, but contain no reference to the "prompt, adequate, and effective" standard.[120] Thus, Professor Schachter points out that in past negotiations on compensation it is doubtful that the Hull Formula has had any real role "beyond preliminary

concept of absolute sovereignty, so that state action in expropriation is completely within that states prerogative. *Id.* paras. 43-45.

112. Permanent Sovereignty over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962).

113. HENKIN, *supra* note 107, at 1052.

114. G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973). The United States and 15 other countries abstained.

115. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 30) at 50, U.N. Doc. A/9630 (1974). The United States and five other countries voted against this resolution.

116. *Id.* at ch. II, art. 2, para. 2(c).

117. *Id.*

118. HENKIN, *supra* note 107, at 1054.

119. *See generally* Schachter, *Compensation for Expropriation*, 78 A.J.I.L. 121 (1984).

120. *Id.* at 122-23.

incantation."[121]

In addition, if "prompt, adequate, and effective" compensation was the standard under customary international law, there would be little reason for the U.S. requirement of a contractual commitment to the Hull Formula. Thus, U.S. insistence is arguably an indicator that this principle is not merely declaratory of existing international obligations.[122] Finally, it is trenchant to note that U.S. courts have refused to agree that the Hull Formula is international law.[123] Given the historical background and developmental stage of the PRC, it is even less likely that the Chinese government will accept it.

II. CHINESE EXPERIENCES WITH AND ATTITUDES REGARDING FOREIGN INVESTMENT

China's recent policy of opening to outside trade and investment (*duiwai kaifang zhengce*) is often translated in the West as the "open door policy."[124] However, the irony is that these are the very words that stood for a policy of economic exploitation and territorial abuse of China by Western countries during the second half of the 19th century and the first half of the 20th century. By the middle of the 19th century, a weakening Qing Dynasty could no longer fend off Western pressures to join the international community and to open China's economy to Western trade. Britain waged the First Opium War against the Chinese largely so that British traders could continue and expand opium imports into China.[125] A series of treaties creating unilateral rights for Western powers were thereafter imposed on China. Spheres of influence were carved out of China.[126] Not until 1943 did

121. *Id.* at 126, *citing* Rogers, *Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 71 A.J.I.L. 474 (1977), and S. RUBIN, PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES 23-28, 85-88 (1956).

122. Schachter, *Compensation for Expropriation*, *supra* note 119, at 127.

123. *See* Banco National de Cuba v. Sabbatino, 376 U.S. 398, 428-29 (1964); Banco National de Cuba v. Chase Manhattan Bank, 658 F. 2d 875, 872 (2d Cir. 1981).

124. *See, e.g.*, S.P.S. HO & R.W. HUENEMANN, CHINA'S OPEN DOOR POLICY: THE QUEST FOR FOREIGN TECHNOLOGY AND CAPITAL (1984) [hereinafter Ho & Huenemann].

125. J.A. COHEN & H. CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 6 (1974) [hereinafter COHEN & CHIU]. *See generally* I.C.Y. HSÜ, CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE, 1858-1880 chaps. 2-7 (1968). P.W. FAY, THE OPIUM WARS IN CHINA, 1854-1860 (1975); J. BEECHING, THE OPIUM WARS IN CHINA, 1854-1860 (1975); WAKEMAN, THE CANTON TRADE AND THE OPIUM WAR and FAIRBANK, THE CREATION OF THE TREATY SYSTEM,in 10 THE CAMBRIDGE HISTORY OF CHINA (J.K. Fairbank ed. 1978) 163-212, 213-63; G.S. GRAHAM, THE CHINA SITUATION: WAR AND DIPLOMACY, 1830-1860 (1978).

126. *See generally* J.C. VINCENT, THE EXTRATERRITORIAL SYSTEM IN CHINA (1970). Vincent describes 14 forms of special privileges claimed by western powers in China in addition to "consular jurisdiction" as follows. Among them were extraterritorial courts, a fixed ad-valorem tariff, foreign-administered salt tax agency and maritime customs service, free sailing

Great Britain and the United States finally relinquish their extraterritorial jurisdiction in China.[127] With the strong memory of this period of extraterritoriality and unequal treaties, often forced on China in the name of "free trade" and international law, the PRC's present leaders have vowed that China will never be taken advantage of again.

A. Early Practices Towards Foreign Investment in the People's Republic

Communist victory and the declaration of the People's Republic in 1949 was not a heartening sign to foreign investors and traders in China. Major industries were nationalized. The 1949 Common Program,[128] promulgated as a temporary constitution for the new People's Republic, however, spoke with mixed voices on the question of the continuation of private enterprise, both domestic and foreign-owned.[129] "Imperialist prerogatives" would be abolished,[130] but commercial relations with foreigners were still envisioned.[131] The State would "control and regulate" all sectors of the economy[132] and directly operate strategic enterprises[133] and those of "bureaucratic capital."[134] However, article 30 of the Common Program provided that the government would "encourage the active operation of all private economic enterprises beneficial to the national welfare and to the people's livelihood and . . . assist in their development."[135] Yet article 31 counters that "whenever necessary and possible" the transformation of private capital into "state capital," or joint ownership and control, would be encouraged.[136]

In the early 1950s, the government's policy towards private capital not already confiscated, was one of attrition and gradual "socialist transformation." Mao asserted that this policy was pragmatic; China

rights for foreign gunboats in inland waters, special missionary privileges, immunity from direct taxation, and others. *Id.* at 2.

127. *See* W. FISHEL, THE END OF EXTRATERRITORIALI TY IN CHINA 1 (1952).

128. Zhonghua Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (The Common Program of the Chinese People's Consultative Conference) (passed Sept. 29, 1949) [hereinafter Common Program], *reprinted in* ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN 1949-1950 17 (1982) (Collection of Laws and Decrees of the Central People's Government 1949-1950) [hereinafter FALING HUIBIAN], *trans. in* THE CHINESE COMMUNIST REGIME: DOCUMENTS AND COMMENTARY 34 (T.H.E. Chen, ed., 1967).

129. COHEN & CHIU, *supra* note 125, at 681.

130. Common Program, *supra* note 128, art. 3.

131. *Id.* art. 47.

132. *Id.* art. 26.

133. *Id.* art. 28.

134. *Id.* art. 3.

135. *Id.* art. 30.

136. *Id.* art. 31.

needed private enterprise in the short term.[137] The government used laws such as the Provisional Regulations for Private Enterprises[138] and a series of quasi- and extra-legal measures gradually to wrest control of smaller enterprises from their private owners. These measures included tax pressures, credit rationing, capital levies, increased state competition, and union demands.[139] The 1954 Constitution, meanwhile, more clearly pronounced the national goal of abolishing private ownership.[140] By 1956, most domestic private enterprise had realized the impossibility of continuing as totally private entities and began "requesting" joint state ownership.[141]

At first, the confiscation of foreign-owned enterprises was accomplished through the "subtle" forms,[142] but this treatment was precipitously subsumed by the advent of the Korean War in June 1950. The U.S. government began to further limit already restricted trade.[143] On December 3, 1950, the U.S. Commerce Department halted virtually all exports to China.[144] On December 17, the Treasury Department, under the authority of the Trading with the Enemy Act,[145] froze all PRC assets in the U.S.[146] The U.S. State Department justified this action on the grounds of Chinese Communist "intervention" and assistance in unprovoked aggression in the Korean conflict but claimed that the freeze would last only "[a]s long as a willful group of Chinese Communist leaders are willing to subvert their national interests and the welfare of the Chinese people to the designs of international Communist imperialism."[147] Only after this did the PRC

137. J.N. HAZARD, COMMUNISTS AND THEIR LAW 177 (1969), *citing* THE PRESENT SITUATION AND OUR TASKS, (Dec. 24, 1947), in 4 SELECTED WORKS OF MAO TSE-TUNG 167 (1961).

138. Siying Qiye Zanxing Tiaoli (passed Dec. 29, 1950), in 1 FALING HUIBIAN 1949-50, *supra* note 128, 702.

139. ECKSTEIN, CHINA'S ECONOMIC DEVELOPMENT 196 (1975). *See generally* N.R. CHEN & W. GALENSON, THE CHINESE ECONOMY UNDER COMMUNISM (1960); N.R. CHEN, CHINESE ECONOMIC STATISTICS (1967).

140. COHEN & CHIU, *supra* note 125, at 682. The 1954 Provisional Regulations for Joint State-Private Industrial Enterprise implemented the government policy of encouraging the merging of private enterprise into state ownership. Gongsi Heying Gongye Qiye Zanxing Guiding, in 5 FALING HUIBIAN 1954/1-9, *supra* note 128, at 81.

141. HSUEH MU-CHIAO, SU HSING, LIN TSE-LI, THE SOCIALIST TRANSFORMATION OF THE NATIONAL ECONOMY IN CHINA 232.(1960).

142. J.S. PRYBYLA, THE POLITICAL ECONOMY OF COMMUNIST CHINA 61 (1970).

143. *See* Lee & McCobb, *United States Trade Embargo on China, 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U.J. INT'L L. & POL. 1, 4 (1971).

144. *Id.* at 5.

145. Trading with the Enemy Act October 6, 1917, c. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. §§ 1-44 (1982), amended by 50 U.S.C. app. §§ 5-44 (1988)).

146. *Id.* at 5. Foreign Assets Control Regulations 31 C.F.R. §§ 500.101-500.509 (1967).

147. *Control of Economic Relations with Communist China*, DEPARTMENT OF STATE BULLETIN 23.599:1004 (Dec. 25, 1950), *reprinted in* COHEN & CHIU, *supra* note 125, at 685.

government retaliate on December 28, 1950, to "control and inventory all property of the American government and American enterprises."[148] Within a year, most U.S. government and private assets in China had been "controlled." By the end of 1952, most British and French assets had also been seized. The last Western firms, mostly West European shipping companies, were liquidated by 1960-61.[149]

B. The Open Policy and Legal Changes

The Third Plenum of the 11th Party Central Committee of the Communist Party in December 1978 heralded the beginning of a new era in Chinese economic relations with Western traders and investors. In July of the next year, the government promulgated the Sino-Foreign Equity Joint Venture Law,[150] which launched a series of new laws creating a legal regime for renewed foreign investment in China. China's new opening should not be viewed as simply a repetition of past periods of active foreign investment. The goal of the "Four Modernizations," to transform the nation's economy by the year 2000, demands a broad spectrum of reforms. Among them, increasing China's access to advanced technology and encouraging the growth of export industries are seen by Chinese policy makers as vital components.[151]

After the promulgation of the Equity Joint Venture Law, an ambitious, if cursory framework of laws and regulations relating to foreign investment began to take shape.[152] The most symbolically important among them is the new 1982 Constitution, which in article 18 grants explicit recognition of and protection to foreign invest-

148. *Government Administrative Council Issues Order for the Control of American Government and Private Property in China*, New China News Agency-English Service (Dec. 28, 1950), *reprinted in* Survey of China Mainland Press, no. 38:1-2, U.S. Consulate, Hong Kong (Dec. 28, 1950), *reprinted in* COHEN & CHIU, *supra* note 125, at 686. The term "expropriation" was carefully avoided by the Chinese government.

149. J.S. PRYBYLA, *supra* note 142, at 61.

150. Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment) (adopted July 1, 1979, promulgated July 8, 1979) [hereinafter Equity JV Law], *trans. in* CHINA LAWS FOR FOREIGN BUSINESS (CCH) ¶ 6-500 [hereinafter CHINA L. FOR. BUS.].

151. *See* HO & HUENEMANN, *supra* note 124, at 21; Cohen & Valentine, *Foreign Direct Investment in the People's Republic of China: Progress, Problems and Proposals*, 1 J. CHINESE. L. 161, 164 (1987). The "four modernizations" (*sixiang xiandai jianhua*) is the national development policy aimed at achieving advances in science, industry, agriculture, and defense. The primary goal is to raise per capita income to US $1000 and quadruple GNP by the year 2000.

152. Many of these laws and regulations have been dealt with in depth elsewhere. Rather than repeat this work unnecessarily, I will refer to the relevant parts of each law when appropriate in part III below.

ment.[153] A partial list also includes the Equity Joint Venture Regulations,[154] the Wholly Foreign-Owned Venture Law and regulations,[155] the Foreign Economic Contract Law,[156] the Provisions for the Encouragement of Foreign Investment,[157] the new Cooperative Joint Venture Law,[158] and various special provisions for the Special Economic Zones.[159] The 1986 General Principles of Civil Law, while not a comprehensive civil code, states and defines many of the basic principles and legal relationships at the core of the new Chinese legal system.[160]

C. *The Chinese BIT Program*

The development of the Chinese BIT program has paralleled reforms in the domestic legal system. The PRC signed its first BIT with Sweden in 1982.[161] Since then, some 20 more treaties have been concluded with countries as divergent as Great Britain, the Soviet

153. Constitution of the People's Republic of China (Zhonghua Renmin Gongheguo Xianfa) (1982) art. 18 [hereinafter PRC Constitution].

154. Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa Shishi Tiaoli (Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Foreign Investment) [hereinafter Equity JV Regulations], *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 6-550.

155. Zhonghua Renmin Gongheguo Waizi Qiye Fa (The Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment) (adopted Apr. 1, 1986), *trans. in id.* at ¶ 6-100 [hereinafter Wholly Foreign Owned Venture Law].

156. Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa (Foreign Economic Contract Law of the People's Republic of China) (adopted Dec. 15, 1981), *trans. in id.* at ¶ 5-550 [hereinafter Foreign Economic Contract Law].

157. Guowuyuan Guanyu Guli Waishang Touzi de Guiding (State Council Regulations Concerning Encouragement of Foreign Investment) (promulgated Oct. 11, 1986), *trans. in id.* at ¶ 13-509 [hereinafter 22 Articles].

158. Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa (Law of the People's Republic of China on Sino-foreign Co-operative Ventures), *trans. in id.* at ¶ 6-100 [hereinafter Cooperative J.V. Law].

159. *See e.g.*, Zhonghua Renmin Gongheguo Guangdong Sheng Jingji Tequ Tiaoli (Regulations of the People's Republic of China on Special Economic Zones in Guangdong Province) (approved Aug. 26,1970), *trans. in id.* at ¶ 70-800; Shenzhen Tequ Shewai Jingji Hetong Guiding (Regulations of Shenzhen Special Economic Zone on Economic Contracts Involving Foreigners) (promulgated Feb. 8, 1984), *trans. in id.* at ¶ 73-505; Shenzhen Jingji Tequ Jishu Yinjin Zanxing Guiding (Provisional Regulations of Shenzhen Special Economic Zone Governing the Import of Technology) (promulgated Feb. 8, 1984), *trans.in id.* at ¶ 73-510; Guanyu Jingji Tequ he Yanhai Shisi ge Chengshi Jianheng Mianzheng Qiye Suodeshui he Gongshang Tongyishui de Zanxing Guiding (Provisional Regulations on Reduction and Exemption of Enterprise Income Tax and Consolidated Industrial Income Tax for the 14 Coastal Cities and the Special Economic Zones) (promulgated Nov. 15,1984), *trans. in id.* at ¶ 70-845.

160. Zhonghua Renmin Gongheguo Minfa Tongze (General Principles of Civil Law of the People's Republic of China) [hereinafter Civil Law Principles], *trans in* 34 A.J. COMP. L. 715 (W. Gray & H.R. Zheng trans. 1986).

161. Agreement on the Mutual Protection of Investments, Mar. 29, 1982, China-Sweden, *reprinted in* 4 E. ASIAN EXEC. REP., May 15, 1982, at 25.

Union, West Germany and Thailand. Of particular note is the recent signing with Japan, after unusually long and heated negotiations.[162] In some cases, the PRC has signed treaties with countries with which China has exchanged little or no bilateral investment.[163] In these cases, at least, the treaties serve more as diplomatic talesmen than as pragmatic investment tools.

Moreover, while all of the PRC BITs examined by this author contain provisions concerning the most important investment topics provided for in the U.S. Model BIT, they are uniformly less detailed and, except for the PRC-Japanese BIT, fall considerably short of the protection provided in the U.S. Model BIT in a number of substantive areas. Unlike the U.S., China has not published a Model BIT of its own. Thus it is also more difficult to deduce what form an ideal BIT would take in the eyes of Chinese policy-makers and negotiators. Specific clauses of various provisions of Chinese BITs will be discussed in conjunction with the analysis of major substantive differences between the U.S. and the PRC in part III below.

Despite the summary character of the PRC BITs, they should not be dismissed as useless instruments. With China's expanding participation in other bilateral agreements and international organizations, a growing web of relationships and mutual obligations is weaving itself increasingly tighter, making it progressively more difficult for China to withdraw from its commitments. The Chinese BIT program should be viewed in conjunction with other investment-related programs like OPIC and MIGA. In addition, it should be viewed within the context of continuing gradual development and increasing sophistication of the treaty provisions themselves, from the PRC-Sweden BIT of 1982 to the most recent and exceptional BIT with Japan.

D. Recent Landmarks in Relations with the U.S.

China's turnaround in diplomatic relations with the U.S., beginning with the signing of the Shanghai Communique by President Richard Nixon and Premier Zhou Enlai in 1972[164] and culminating

162. Agreement Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1988, China-Japan, reprinted in EAST ASIAN EXEC. REP., Dec. 1988, at 23 [hereinafter PRC-Japan BIT].

163. *E.g.*, Romania, Finland, and the Belgium-Luxembourg Economic Union. Other PRC BIT partners include: Australia, Austria, Denmark, France, Italy, Kuwait, Malaysia, The Netherlands, New Zealand, Norway, Pakistan, Poland, Singapore, Sri Lanka, and Switzerland.

164. Joint Communique, Feb. 28, 1972, United States-China, *Dept. of State Bulletin*, Mar. 20, 1972, at 435, *reprinted in* 11 I.L.M. 443 (1972).

with American recognition of the People's Republic in 1979,[165] has brought with it a resurgence in economic contacts. To facilitate these contacts, a U.S.-PRC bilateral trade agreement was signed in 1979.[166] Among other trade-related activities, the trade agreement encourages the establishment of business offices by firms,[167] a first step on the road to large investment. In addition, in order to facilitate the new relations, Congress amended the sections of the Export Administration Act formerly limiting trade with China.[168]

As an important prerequisite to the reestablishment of bilateral investment activities, a claims settlement agreement was signed on May 11, 1979.[169] In the agreement, the PRC government agreed to pay the U.S. government a sum of $80.5 million for claims arising out of de facto expropriation of U.S. property after October 1, 1949. In exchange, the U.S. government agreed to unblock PRC assets in the U.S. frozen on or after December 17, 1950.[170] This agreement was necessary to allow PRC entities to do business and acquire assets in the U.S. free from the threat of attachment by U.S. investors with claims against the PRC. However, the claims agreement did not put the claims issue to rest, much to the consternation of the Chinese government. While the U.S. government received cash, the Chinese obtained only a right to sue in U.S. courts for now unfrozen assets, as much as $10-40 million of which were subject to adverse claims.[171] A number of other suits in U.S. courts by former investors asserting claims for compensation separate from or in addition to the claims settlement funds threatened the developing U.S.-PRC investment relationship. Among these suits, two are noteworthy. First, holders of defaulted Qing Dynasty Huguang Railroad bonds asserted claims against the PRC government in *Jackson v. People's Republic of China*.[172] In a second case, *Shanghai Power v. United States*, plaintiffs

165. Joint Communique on Establishment of Diplomatic Relations, Dec. 15, 1978, United States-China, *reprinted in* 18 I.L.M. 272 (1979).

166. U.S.-PRC Trade Agreement, *supra* note 2.

167. *Id.* art. III(c).

168. Foreign Assets Control Regulations, 31 C.F.R. § 500, *et seq.* (1970); The Export Administration Act of 1969, 83 Stat. 841 (1969), as codified at 50 U.S.C. app. § 2410 (1985), as amended 50 U.S.C. at § 2401 (1988). U.S. domestic controls on contacts and trade with the PRC had been relaxed somewhat as early as 1969-70, with a series of amendments to the Foreign Assets Control Regulations, *supra*.

169. Agreement on the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306 [hereinafter U.S.-PRC Claims Agreement], *reprinted in* 18 I.L.M. 551 (1979). *See Recent Developments*, 20 HARVARD INT'L L.J. 681 (1979).

170. U.S.-PRC Claims Agreement, *supra* note 169, art. II(b).

171. *See, e.g.*, PRC Aide Memoire, Feb. 2, 1983, *reprinted in* 22 I.L.M. 81 (1983).

172. 550 F. Supp. 869 (N.D. Ala. 1982). Initially, due to non-appearance by the Chinese side, a default judgment was entered. This judgment was later set aside when, on the urging of the U.S. State Department, the Chinese made a special appearance. 596 F. Supp. 386 (N.D.

sought additional compensation over and above that provided by the settlement agreement for claims arising out of the 1950 expropriation of Shanghai Power Company's assets in China. The former case, finally resolved in 1987,[173] raised issues of successor government assumption of debts and sovereign immunity, while the latter challenged the executive branch's power to settle private claims against foreign governments. The PRC government viewed both these cases as judicial meddling in areas that should be dealt with purely on a state-to-state level.[174]

E. Chinese Attitudes towards International Law

As the *Jackson* case illustrated, the Chinese understand sovereign immunity to be absolute[175] in contrast to some western states that support the restrictive notion of sovereign immunity.[176] This view and other Chinese concepts of international law influence the PRC government's approach to any treaty negotiation. Central to the early formation of Chinese opinions of international law, in this connection, were Marxism and China's historical experience in the international arena. Thus, some Chinese interpreted the role and effect of international law through class analysis transported from the domestic arena: "Bourgeois international law . . . is mainly a weapon used by 'civilized states' to control and oppress what they consider to be 'uncivilized states.'"[177]

This view is applied to analyze the investment of "bourgeois imperialist states" in both the bilateral and multilateral contexts. For example, the 1946 FCN treaty between the U.S. and the Nationalist Chinese government is seen by one writer as exploitative, despite its facially neutral rights and obligations, because of the imbalance in

---

Ala. 1984). The Court also held that the Foreign Sovereign Immunities Act was not intended by Congress to apply retroactively. *Id.*, at 389. The decision was affirmed on appeal. *Id.*, *aff'd*, 794 F.2d 490 (11th Cir. 1986), *reh'g denied*, 801 F.2d 404 (1986) (*en banc*), *cert. denied*, 107 S.Ct. 1371 (1987). *See generally* Theroux & Peele, *China and Sovereign Immunity: The Huguang Railway Bonds Case*, 3 CHINA L. REP. 129 (1983); Tarnapol, *The Role of the Judiciary in Settling Claims Against the PRC*, 25 HARVARD INT'L L.J. 355 (1984).

173. This decision was affirmed on appeal. *Id.* 4 Cl. Ct. 237 (1983), *aff'd*, 756 F. 2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909 (1985).

174. PRC Aide Memoire, *supra* note 171. *See* Tarnapol, *supra* note 172, at 378.

175. *See* Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE LAW 23, 29 (1987). "We hold that compulsory jurisdiction over a foreign state (by another state's courts) is inconsistent with the principle of sovereign equality among states enshrined in the United Nations Charter." *Id.* (footnotes omitted).

176. *See* HENKIN, *supra* note 107, at 901-913, for a discussion of the restrictive form of sovereign immunity.

177. Ying Tao, *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts*, 1 GUOJI WENTI YANJIU (Studies in International Problems) 43-44 (1960), *reprinted in* COHEN & CHIU, *supra* note 125, at 29, 30.

economic power between the two states.[178] According to this analysis, these "bourgeois imperialist" foreign states also manipulated principles such as the protection of nationals abroad to force less powerful states to give foreign citizens special treatment above that given to their own citizens.[179] Similarly, the United Nations was seen in its early years as a tool of the "bourgeois imperialist" states to carry out their own purposes. The U.N. position on the Korean conflict was taken as a classic illustration of this.[180]

Since 1979, as the study of international law in China has been rejuvenated, class analysis in international law has largely dropped from the literature in favor of a more pragmatic approach.[181] Of course, some Chinese writers still characterize the international goals of western countries ideologically as "hegemonic" or under the control of multinational corporations who search for "superprofits."[182] On the whole, however, it appears that international law itself is now being treated by Chinese commentators as a separate body of law governing the relations among states.[183]

Largely unchanged from the 1950s, however, is the preoccupation of Chinese scholars and political leaders with the overriding importance of the principle of national sovereignty.[184] The first and the most important of China's so-called Five Principles of Peaceful Coexistence, the principles upon which the PRC has publicly based its foreign relations since the late 1950s, is the principle of mutual respect for sovereignty and national territory.[185] The sovereign state is the primary building block of the international system and cannot be interfered with or violated in any way.[186] Although these notions are by no means novel, of course, their application by PRC legal scholars and policy-makers to international investment in China is a recent development.

178. Qian Si, *A Criticism of the Views of Bourgeois International Law on the Question of Population*, 5 GUOJI WENTI YANJIU 47-48 (1960), *reprinted in* COHEN & CHIU, *supra* note 125, at 683, 684.

179. *Id.* at 684-85.

180. Jung, Pi Wu, *The Tenth Anniversary of the United Nations*, PC, no. 14:6-8 (1955), *reprinted in* COHEN & CHIU, *supra* note 125, at 129.

181. Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117, 125 (1987).

182. *See, e.g.*, Yao Meizhen, *Legal Protection of International Investment*, in SELECTED ARTICLES FROM CHINESE YEARBOOK OF INTERNATIONAL LAW 147 (1983).

183. Kim, *supra* note 181, at 125, *citing* GUOJIFA (International Law) 1 (Wang Tieya ed. 1981).

184. *Compare, e.g.*, Ying Tao, *A Criticism of Bourgeois International Law Concerning the Question of State Sovereignty*, 3 GUOJI WENTI YANJIU 50-52 (1960), *reprinted in* COHEN & CHIU, *supra* note 125, at 106, and GUOJIFA, *supra* note 183, at 84.

185. *See* Kim, *supra* note 181, at 148; GUOJIFA, *supra* note 183, at 69.

186. *See* Kim, *supra* note 181, at 148; GUOJIFA, *supra* note 183, at 84.

Three relevant illustrations of the application of the Chinese position on sovereignty are worth mentioning. First, the Chinese believe that the principle of national sovereignty prevents the recognition of any international rule that binds a sovereign state to treat aliens on its soil any better than it treats its own citizens.[187] Second, absent unfair or discriminatory treatment, any dispute arising from the treatment of a foreign individual or company on Chinese territory is inherently within the exclusive jurisdiction of Chinese courts, unless otherwise agreed upon by the Chinese government. Third, there is the belief that third party adjudication of any dispute between a sovereign government and a foreign individual would place the individual on an equal plane with states, which contradicts the fundamentals of the international system and insults that state's sovereignty.

These positions gain even greater importance when viewed in conjunction with domestic Chinese law relating to the effect of treaties and international custom. Unlike U.S. treaties which can be preempted for domestic law purposes by subsequent legislation, according to the General Principles of Civil Law, PRC treaties always take precedence over domestic civil law in "foreign civil relationships."[188] When treaties or domestic PRC law do not contain a provision relevant to a situation, then "international practice" (*guanli*) may be applied.[189] Given the poverty of domestic law provisions regarding matters of concern to foreign investors such as takings of investments,[190] the definition and effect of "international custom" becomes more important.

III. U.S.-PRC BIT NEGOTIATIONS

It is within the context of on-going trade and investment relations but persistent and intransigent differences on fundamental principles that BIT negotiations between the U.S. and the PRC have continued since mid-1983, with the last informal meeting in November 1987. Negotiations had also been stalled by the failure of the Executive Branch to gain Senate passage of any of the previously signed U.S. BITs until October 1988. In the meantime, however, the Huguang Railroad Bonds case, a continuing irritant in investment relations, has been resolved. China's legal and economic reforms have

187. COHEN & CHIU, *supra* note 125, at 683, 684.

188. Civil Law Principles, *supra* note 160, art. 142. The Foreign Economic Contract Law, which applies to contracts made in the PRC between Chinese and foreign parties, contains a similar provision. Foreign Economic Contract Law, *supra* note 156, art. 6.

189. Civil Law Principles, *supra* note 160. However, international custom is not applied if there would be a violation of the "public interest" of the PRC. *Id.* art. 150.

190. *See infra* discussion accompanying notes 263-273.

also continued apace, though not without detours. And now Japan has concluded a BIT with the PRC, containing a number of possible breakthroughs.

But, after six rounds of formal talks on the proposed BIT, there appears to be no sense of overwhelming urgency on the part of either the U.S. or PRC. Thus the resolution of the outstanding disagreements will more likely come from a change in the overall circumstances — economic, diplomatic, and political — rather than as a result of sudden concessions, although the effect of the ratification of the other U.S. BITs and the signing of the PRC-Japan BIT has yet to be felt. On the other hand, both government parties and private investors who will potentially be affected by conclusion of a U.S.-PRC BIT may gain much from a more objective appraisal of just where the differences lie and how extensive they really are.

The following analysis seeks to appraise how the U.S Model BIT has been transformed through actual negotiations with various BIT partners; how the PRC BITs with third countries deal with these same issues; and whether, based on these separate experiences, the U.S. and the PRC have any basis for reaching an agreement. As mentioned above, the three most important areas of disagreement in the ongoing negotiations, which parallel important components of the U.S. Model BIT, are: 1) treatment of foreign investments, 2) expropriation processes and compensation, and 3) dispute settlement. These areas will be discussed sequentially below.

A. Investment Treatment

American businessmen have long clamored that they have been treated inequitably vis-à-vis domestic Chinese firms in areas such as access to and pricing of locally-sourced raw materials, transportation, services, utilities, buildings, and labor.[191] Performance requirements, especially ceilings on domestic sales, have also frustrated investors hungry for a piece of the billion consumer Chinese market. The article of the Model BIT on treatment of investments,[192] if signed intact,

191. Frisbie, *supra* note 10. *See generally* Cohen & Valentine, *Foreign Direct Investment in the People's Republic of China: Progress Problems and Proposals*, 1 J. CHINESE L. 161 (1987).

192. *See supra* text accompanying notes 69-79. The OECD also supports national treatment. *See* Declaration on International Investment and Multinational Enterprises (1976) [hereinafter OECD Declaration], art. II., in D.C. Campbell and R.L. Rowan, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES 243, 244 (1983). For an attempt by African and Asian countries to construct a model BIT of their own, see Asian-African Legal Consultative Committee: Model Bilateral Agreements on Promotion and Protection of Investments [hereinafter AALCC] BITs, *reprinted in* 23 I.L.M. 237 (1984).

would answer U.S. investors' most optimistic dreams. For reasons to be discussed below, this result seems unlikely.

Indeed, U.S. negotiators concede that there is no universal consensus that states have an obligation to accord national treatment to foreign investments, despite a growing recognition among developed countries of the importance of this principle.[193] Thus the clauses on national treatment represent an ambitious attempt to attain a higher level of bilateral economic relations with BIT partners. The Chinese economy, with its high degree of state ownership and planned production and the accompanying dual systems of domestic and foreign economic laws, presents a particularly imposing challenge for U.S. negotiators. But despite basic structural and linguistic similarities between the treatment provisions of most of the ten U.S. BITs signed thus far and those of the Model BIT, the U.S. has compromised considerably in negotiations with a number of BIT partners.

To begin with, six of the ten BITs concluded by the U.S. thus far do not explicitly stipulate that national treatment (or MFN treatment, whichever is more favorable)[194] shall be accorded to the establishment and acquisition of investments.[195] In addition, the Panama, Turkey, Morocco, and Egypt BITs contain qualifying language that seriously undercuts any granting of national treatment to established investments. Both the Morocco and Turkey BITs only provide for national treatment "within the framework of . . . existing laws and regulations."[196] The Egypt BIT inserts the phrase "in applying its laws, regulations, administrative practices and procedures."[197] The Panama BIT creates the biggest loophole by allowing exceptions to national and MFN treatment, resulting from preexisting laws which establish preferences for domestic investments.[198]

Because investment can take many forms and comprises a large

193. Eiss Interview, *supra* note 11.

194. National treatment and MFN treatment are coupled in the Model BIT. This discussion shall refer predominantly to national treatment, since until the PRC-Japan BIT, discussed below, only MFN treatment but no form of national treatment had been granted.

195. *See* U.S.-Panama BIT, art. II; U.S.-Grenada BIT, *supra* note 64, art. II; U.S-Bangladesh BIT, *supra* note 64, art. II; U.S.-Turkey BIT, *supra* note 64, art. II; U.S.-Morocco BIT, *supra* note 64, art. II; U.S.-Zaire BIT, *supra* note 64, art. II. Article II of the U.S.-Zaire BIT uses the word "established" but not the word "acquired." *Id.*

196. U.S.-Turkey BIT, *supra* note 64, art. II, para. 1; U.S.-Morocco BIT, *supra* note 64, art. II, para. 1.

197. U.S.-Egypt BIT, *supra* note 63, art. II, para. 1. Gann argues that this language does not undercut the obligation. Gann, *supra* note 58, at 384 n. 51.

198. U.S.-Panama BIT, *supra* note 64, art. II., para. 1. The "Agreed Minutes" to the treaty illustrates one of these "rules and regulations": "Panama has incentive laws granting benefits to duly constituted [domestic] companies which sign contracts with the government in which they agree to meet the requirements established therein." *Id.* Agreed Minutes, art. II.

variety of commercial and financial activities, the Model BIT and all BITs signed thus far accord the same treatment to activities "associated" with investment as to the investment itself. However, while the Model BIT carefully defines seven categories of "associated activities," three BITs do not elaborate on the meaning of this term at all.[199] Perhaps more significant are the exceptions to the standard of treatment listed by several U.S. BIT partners. The U.S. exceptions have stayed constant,[200] but a majority of its treaty partners have specified exceptions covering a broader range of sectors. The exceptions specified by Haiti, Panama, and Egypt are so broad as to make the treatment obligation almost meaningless.[201]

Every BIT signed thus far, except the Egypt BIT, duplicates the Model BIT clause providing for, aside from national and MFN treatment, fair and equitable treatment of all investments, making some reference to the minimum requirement of international law.[202] But the clause of the Model BIT prohibiting a party from allowing a state-owned or controlled enterprise to compete unfairly against private investments has been dropped from or qualified in four of the BITs signed thus far.[203] Although President Reagan has singled out the elimination of performance requirements as conditions for the establishment and continuation of investment,[204] six U.S. BITs contain only precatory provisions serving this purpose.[205]

199. *See* U.S.-Morocco BIT, *supra* note 64; U.S.-Turkey BIT, *supra* note 64; U.S.-Haiti BIT, *supra* note 64. The elaboration of "associated activities" appears in the formal text of some of the BITs and in the attached protocol or minutes of others.

200. *See supra* note 74.

201. The U.S.-Haiti BIT excepts, *inter alia*, activities associated with certain areas: banking and insurance, the production and distribution of basic commodities, the professions, the agro-industrial sector, and the chemical industry. U.S.-Haiti BIT, *supra* note 64, Annex. The U.S.-Panama BIT excepts, *inter alia*, retail trade, insurance, the practice of liberal professions, and banking. U.S.-Panama BIT, *supra* note 64, Annex. The U.S.-Egypt BIT excepts, *inter alia*, air and sea transportation, banking and insurance, commercial activity such as distribution, wholesaling, retailing, import and export activities, commercial agency and broker activities, and issuance of newspapers and magazines. U.S.-Egypt BIT, *supra* note 63, Annex.

The U.S.-Morocco BIT excepts no "associated activities" in Morocco, but it should be noted that the treatment clause in this BIT is qualified by the phrase "within the framework . . . of existing laws and regulations." U.S.-Morocco BIT, *supra* note 64, art. II.

202. *See, e.g.*, U.S.-Turkey BIT, *supra* note 64, art. II, para. 3: "Investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security, in a manner consistent with international law." *Id.*

203. *See, e.g.*, U.S.-Cameroon BIT, *supra* note 64; U.S.-Grenada BIT, *supra* note 64; and U.S.-Morocco BIT, *supra* note 64. The U.S.-Egypt BIT prefaces this obligation with the phrase, "[i]n the context of national economic policies." U.S.-Egypt BIT, *supra* note 63, art. II, para. 6.

204. United States Government Policy on International Investment, *supra* note 7, at 1215. *See also* Model BIT, *supra* note 62, art. II, para. 7.

205. U.S.-Egypt BIT, *supra* note 63, art. II, para. 7; U.S.-Haiti BIT, *supra* note 64, art. II, para. 7; U.S.-Morocco BIT, *supra* note 64, art. II, para. 5; U.S.-Turkey BIT, *supra* note 64,

It is clear from this review of the treatment provisions of the BITs signed by the U.S. to date that U.S. negotiators have failed in the majority of instances to obtain the desired level of protection as set out in the Model BIT.

In contrast to the U.S., the PRC has never sought more than MFN treatment.[206] Generally speaking, as noted above, Chinese BITs contain significantly less specific and comprehensive language than the U.S. model. The treatment provisions typically do not exceed three short paragraphs, whereas the U.S. Model BIT treatment provisions comprise ten lengthy and detailed paragraphs. Article 2 of both the PRC-Great Britain BIT and PRC-West Germany BIT, for example, provides for "equitable and reasonable treatment" (*gongping, heli*) at all times,[207] echoing the "fair and equitable" standard of U.S. BITs. In both these BITs, investors are accorded general MFN treatment, regardless of the existence of other treaties. But in the case of the PRC-West German BIT, the most favored position is measured only as against treatment granted any third state that has concluded a similar agreement.[208] The PRC-Singapore BIT even goes to the extent of limiting MFN treatment only to investments that have been individually approved by and registered with the receiving state for treaty coverage.[209] The PRC-West Germany BIT and the PRC-Great Britain BIT, signed three years later, specify that the "management, use, enjoyment or disposal" of investments are all

art. II, para. 7; U.S.-Zaire BIT, *supra* note 64, art. II, para. 7; U.S.-Bangladesh BIT, *supra* note 64, art. II, para. 6. *See also* Gann, *supra* note 58, at 396. Apparently, the Office of the USTR believes that the most effective forum for forwarding the administration's goals on performance requirements might be GATT negotiations. Eiss Interview, *supra* note 11; Serwer Interview, *supra* note 67.

206. *See, e.g.*, Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Oct. 7, 1983, China-Germany (Federal Republic), arts. 2, 3, *reprinted in* CHINA ECON. NEWS, Apr. 14, 1986, at supp. no. 3 (Chinese text on file at the *Journal of Chinese Law*) [hereinafter PRC-West Germany BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments, May 15, 1986, China-Great Britain, art. 3 (English and Chinese texts on file at the *Journal of Chinese Law*) [hereinafter PRC-Great Britain BIT]; PRC-Japan BIT, *supra* note 162, arts. 2, 3.

207. PRC-West Germany BIT, *supra* note 206, art. 2; PRC-Great Britain BIT, *supra* note 206, art. 2, para. 2. In each case, however, even this treatment is accorded only in "accordance with" or "without prejudice to its (the host country's) laws and regulations." *Id.* The Protocol to the PRC-West Germany BIT defines discriminatory treatment as measures directed specifically against the foreign investments and allows measures for "reason of priority in the arrangement" of a state party's national economy. PRC-West Germany BIT, *supra* note 206, Protocol, para. 3(b). A standard exception for measures necessary for "reasons of public security and order, public health or morality" also appears. *Id.* para. 3(c).

208. PRC-West Germany BIT, *supra* note 206, art. 3.

209. Agreement on the Promotion and Protection of Investments, Nov. 21, 1985, China-Singapore, arts. 2, 4 [hereinafter PRC-Singapore BIT] (English text on file at the *Journal of Chinese Law*).

associated activities covered by the MFN provision.[210]

Significantly, Great Britain and China have pledged to seek national treatment, though this aspiration is highly qualified by the caveat "to the extent possible" and "in accordance with the stipulations of (the host country's) laws and regulations."[211] The PRC-Japan BIT, signed only in August 1988, goes even further towards a credible statement of national treatment. To begin with, the treatment articles of the PRC-Japan BIT offer considerably more specificity. The treatment of the acquisition and establishment of investment is distinguished from treatment of established investment.[212] The former is accorded MFN treatment, while the latter is accorded both MFN and — for the first time — national treatment.[213] In addition, "returns and business activities in connection with the investment" are also accorded both MFN and national treatment. Moreover, this BIT even lists and defines four types of "business activities" covered by the provision.[214] By virtue of MFN clauses in the other PRC BITs, it should be remembered, this level of treatment will now be extended to investments of all the other PRC BIT partners.

However, the force of these provisions is undercut by the sweeping latitude given the signatories by exceptions in the Protocol attached to the agreement. Paragraph 3 of the Protocol accompanying the PRC-Japan BIT stipulates:

> it shall not be deemed "treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for reason of public order, national security, or sound development of national economy.[215]

Furthermore, the Japan BIT contains no provision limiting performance requirements and no provision providing for competitive equality with state-controlled and operated industries, although the latter is arguably implied in the granting of national treatment to established investments.

It is yet to be seen how broad the scope of discriminatory measures necessary for the "sound development of the national economy"

210. PRC-Great Britain BIT, *supra* note 206, art. 3, para. 2; PRC-West Germany BIT, *supra* note 206, Protocol, para. 3(a).

211. *Id.* para. 3.

212. PRC-Japan BIT, *supra* note 162, art. 2.

213. *Id.* art. 3, paras. 1. 2.

214. *Id.* para. 3.

215. PRC-Japan BIT, *supra* note 162, Protocol, para. 3.

is. Judging from the still highly centralized and planned nature of the Chinese economy as well as from the strong belief of Chinese leaders in China's sovereign right to control all aspects of that economy regardless of foreign interests, it seems likely that this clause will be interpreted very broadly. On the other hand, it should be noted that, except for the economic development exception, this language roughly parallels the escape clause in article X of the U.S. Model BIT. Even if U.S. statutes put a detailed and restrictive gloss on the U.S. provision while the PRC provision lacks statutory explication, it is difficult and perhaps unfair to prejudge determinations by either government of their own nation's essential police and national security interests.

The principle of national treatment, however qualified, appears to have been accepted. Since the Chinese have traditionally laid more emphasis on the negotiation of broad principles than on the intricate qualifications and explications of those principles in contracts and bilateral treaties, this clause of the PRC-Japan BIT might therefore prove to be a much more significant achievement.

Even considering the advances of the PRC-Japan BIT, U.S. negotiators express doubt that the Chinese position has changed appreciably.[216] The PRC has rejected all past U.S. proposals for broad national treatment.[217] The primary reason given is the "difficulty" and "complication" of implementing such a standard in light of China's planned economic system and varying degrees of state ownership.[218] It is argued, moreover, that foreign investment already enjoys a number of preferences over domestic enterprises.[219] Chinese

216. Telephone interview with Angus Simmons, Director for Chinese Affairs, Office of the U.S. Trade Representative (Oct. 21, 1988) [hereinafter Simmons Interview]. One commentator believes it is doubtful that the "fuzzy language" of the PRC-Japan BIT offers any substantially new protection to foreign investments. Sullivan, *Do We Really Need a BIT?*, CHINA BUS. REV., Nov.-Dec., 1988, at 9. Mr. Sullivan is the president of the US-China Business Council.

217. Some PRC leaders seem to confuse national treatment with equal treatment. Gu Ming, then Deputy Secretary-General of the State Council, has commented that "It would not do if the agreements were to include the clause that Chinese-foreign enterprises enjoy the same national treatment as that enjoyed by Chinese enterprises." Gu Ming, *supra* note 9, at 18. From this confusion arise arguments that point out the favorable tax treatment of foreign investments compared with that of State enterprises, and imply that a national treatment provision would require the raising of these taxes to domestic levels. *Id.*

218. Liu Yimin, Waiguo Touzi de Youxiao Falu Baohu, (The Effective Legal Protection of Foreign Investment), ZHONGGUO DUIWAI MAOYI 8 (Apr. 1985), *reprinted in* FALU (Chinese People's University Reprinted Materials) 53 (Apr. 1985), *trans. in* CHINA'S FOREIGN TRADE 8 (Apr. 1985). Liu Yimin was then vice-director of the Bureau of Treaties and Law in the Ministry of Foreign Economic Relations and Trade.

219. *Id.* One example is favorable income tax treatment. *See, e.g.*, 22 Articles, *supra* note 157, arts. 7-10; Caizhengbu Guanche Guowuyuan "Guanyu Guli Waishang Touzi de

officials also accurately note that other nations, including industrialized countries, exclude foreign investment activities from certain industrial sectors.[220] If foreign investors want to enjoy the benefits of investing in China, then they must also take on responsibilities.[221] This means that if foreign enterprises want preferences equal to those of state enterprises, they must expect to pay a similar level in taxes.

The PRC government has made it plain in public statements and in laws governing foreign investments that such investments are welcome under specific conditions consistent with China's "open policy" and general development goals.[222] The "open policy" stands on two legs: investments should be either based on production for exports or should introduce advanced technology into China. Approval of investment projects, therefore, is implicitly, if not explicitly,[223] based on their desirability as measured against these two legs. It is unlikely that the PRC will give up these standards in the short run.

Despite this national development policy, there seems to be some recognition by China that national treatment is feasible "in certain areas."[224] Some provisions of several laws and regulations already stipulate that foreign investors are to be given treatment comparable to that given state-run industries.[225] But caps on pricing of products sold on the domestic market,[226] inconsistent and sometimes discriminatory land-use fees, and inflated labor fees continue to frustrate some foreign investors.[227] These areas conceivably remain the focus of negotiating efforts by the U.S. side.

What formulation could break this seeming impasse? First of all,

---

Guiding" zhong Shuishou Youhui Tiaokuan de Shishi Banfa (Measures of the Ministry of Finance for the Implementation of the Preferential Tax Treatment Provisions of the State Council Regulations Concerning Encouragement of Foreign Investment) (issued Jan. 31, 1987), *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 32-650.

220. Liu Yimin, *supra* note 218, at 8.

221. *See infra* text accompanying notes 171-190.

222. *See, e.g.*, 22 Articles, *supra* note 157.

223. *See id.* Only the Wholly Foreign Owned Venture Law makes advanced technology or a high percentage of exports a prerequisite for government approval of the JV plan. Wholly Foreign Owned Venture Law, *supra* note 155, art. 3. The Equity JV Law and implementing regulations and the Cooperative JV Law give preference to but do not require advanced technology and exports. Equity JV Law, *supra* note 150, art. 9; Equity JV Regulations, *supra* note 154, art. 4; Cooperative JV Law, *supra* note 158, art. 4.

224. Gu Ming, *supra* note 9, at 18.

225. *See, e.g.*, 22 Articles, *supra* note 157, art. 5, which give priority to export and technologically advanced enterprises in obtaining water, electricity, and transportation services and provides that fees shall be computed and charged "in accordance with the standards for local state enterprises"; Equity JV Regulations, *supra* note 154, art. 65, which give similar preferences.

226. *See, e.g.*, Equity JV Regulations, *supra* note 154, art. 66.

227. *See generally* Cohen & Valentine, *supra* note 191, at 194-198.

the U.S. should recognize that it has achieved only meager success with other BIT partners in this area, none of which have the pervasive state-ownership and planned economy that China does. The U.S. has acquiesced to limit national treatment of established investments "subject to existing laws" in the Panama BIT and to similar formulations in the Morocco, Egypt and Turkey BITs. The Model BIT provision on competitive equality with state-owned and state-operated enterprises has been dropped or qualified in four BITs thus far. Likewise, the limitation on performance requirements has been qualified in a majority of these BITS. Some of the U.S. BIT partners, moreover, have excepted an extremely broad spectrum of their economies from application of MFN and national treatment. There is clearly considerable room for compromise from the U.S. Model BIT position.

China, for its part, must fully recognize that foreign investors, who may not share China's goals, will not invest if they believe that they will be treated unfairly or that such treatment is so inconsistent or unfavorable as to eliminate profitability. Although an investment treaty is not necessarily the proper mechanism to impose reforms on the domestic economy, the introduction of foreign-invested enterprises not only functions to attract advanced technology and raise export earnings but can also stimulate more efficient and higher-quality production by state-run enterprises. But this result is only possible if domestic industries are forced to compete on an equal basis.

In addition, Chinese policy-makers may fear that China's body of domestic economic laws presently lacks the comprehensiveness and detail to limit effectively the pervasiveness of a national treatment clause.[228] Legal relationships between the government and enterprises, both domestic and foreign-invested, are only now being adequately defined. Reforms in concepts of ownership, financing, price-setting, and supervision of domestic enterprises, moreover, are continuing apace. If the PRC government accepts treaty obligations to provide a certain level of treatment to foreign investments in this context, then the possibility of disputes arising is high. But if PRC policy-makers recognize that the elementary stage of legal development is, indeed, an obstacle, then they must also recognize that such a legal environment is not conducive to foreign investment — unless special protection and guarantees are provided.

Thus, both sides must face negotiations with a more realistic atti-

228. Though PRC officials insist that Chinese laws provide full and adequate protection for foreign investments, they also point out that China's legal system is in the process of early development. *See, e.g.*, Bennett, *U.S., China Face Problems Over Legal Agreements*, ASIAN WALL ST. J. (weekly), Apr. 9, 1984, at 8, in which then Premier Zhao Ziyang was quoted as saying, "China honors contracts and keeps promises."

tude. Based on BITs signed by both the U.S. and the PRC thus far, a compromise on the issue of treatment of investment is clearly possible. A draft acceptable to both sides might include the principle of national treatment only for established investments, like the PRC-Japan BIT and a number of U.S. BITs. In the alternative, the principle of national treatment for the acquisition and establishment of investments could be adopted but only as applied to enumerated sectors and industries. Instead of the PRC providing a lengthy list of broad exceptions to national treatment, as some U.S. BIT partners have done, the treatment provision might positively state the sectors and industries to which national treatment would apply, excluding all others. In this way, while the principle would be established, the scope of application could be limited at first, only to be expanded when the PRC government gives its approval. A provision on maintaining competitive equality with state-owned and state-run industries could similarly be limited by enumeration of applicable industries. This compromise would clarify and delimit the effects of national treatment and allow the domestic legal system to catch up. Moreover, it might also mitigate the multiplier effect[229] of MFN treatment clauses in BIT treaties with other countries, an apparent worry of PRC negotiators.[230]

The Chinese could also boost investor confidence by agreeing to the U.S. list of "associated activities" covered by the treatment provisions. Performance requirements, however, are a pivotal element of current PRC development policy, so it would seem futile for the U.S. to hold out for a restrictive provision on this issue.

B. Expropriation and Compensation

Both the U.S. and the PRC have considerable political capital invested in their respective interpretations of what the proper processes surrounding expropriation and nationalization are and, especially, what the proper standard for measuring compensation is. Each side, moreover, believes that its own interpretation is harmonious with international law. In practice, however, neither has consistently negotiated its own self-conceived ideal, though U.S. BITs, on the whole, tend to be more uniform.

Virtually every U.S. BIT signed to date follows the Model BIT in providing that expropriation, or measures tantamount to expropria-

229. The multiplier effect of MFN clauses comes into play whenever a state grants a more favored level of treatment to another state. This new level of treatment then becomes the standard for each of the other states with which the first state already shares similar agreements and for states which will sign such treaties with the first state in the future.

230. Liu Yimin, *supra* note 218.

tion, is legal only if it "is done for a public purpose," "is accomplished under due process of law," "is not discriminatory," and "is accompanied by prompt, adequate, and effective compensation.[231] However, there have been exceptions: the U.S.-Egypt BIT stipulates that "freely realizable" instead of "effective" compensation is to be paid,[232] and the U.S.-Morocco BIT provides for prompt payment of "just and effective compensation."[233] Four of the ten, moreover, do not include a provision recognizing the binding effect of stabilization clauses in contracts.[234]

"Prompt" compensation in most of the U.S. BITs, as in the Model BIT, is defined as compensation paid "without delay." Several BITs, however, redundantly use the word "promptly" to define "prompt,"[235] and the U.S.-Senegal and U.S.-Egypt BITs stipulate that time must be allowed to carry out so-called "necessary formalities."[236] Normally, even in the best of circumstances, compensation is not paid immediately, therefore, to maintain its full value, interest on the compensation from the date of expropriation must be paid. The U.S. Model BIT provision calls for the addition of interest at a rate "equivalent to current international rates." That provision was substituted with the phrase "commercially reasonable rate"[237] in four BITs and dropped completely from three BITs with Arab nations.[238] These variations raise the issue of how long "necessary formalities" can continue and whether "commercially reasonable" interest rates are equivalent to international rates.

In addition, while the definition of "adequate" compensation is "fair market value" in seven of the ten BITs, language in both the

231. U.S.-Haiti BIT, *supra* note 64, art. III, para. 1; U.S.-Panama BIT, *supra* note 64, art. IV, para. 1; U.S.-Senegal BIT, *supra* note 64, art. III, para. 1; U.S.-Turkey BIT, *supra* note 64, art. III, para. 1; U.S.-Zaire BIT, *supra* note 64, art. III, para. 1; U.S.-Grenada BIT, *supra* note 64, art. III. para. 1; U.S.-Bangladesh BIT, *supra* note 64, art. III, para. 1.

232. U.S.-Egypt BIT, *supra* note 63, art. III, para. 1.

233. U.S.-Morocco BIT, *supra* note 64, art. III, para. 2.

234. U.S. BITs with Turkey, Morocco, Panama, and Grenada do not contain this provision.

235. U.S.-Haiti BIT, *supra* note 64, art. III, para. 1.

236. U.S.-Senegal BIT, *supra* note 64, Protocol, para. 4; U.S.-Egypt BIT, *supra* note 63, Protocol, para. 5.

237. U.S.-Panama BIT, *supra* note 64, art. IV, para. 1; U.S.-Senegal BIT, *supra* note 64, art. III, para. 1; U.S.-Zaire BIT, *supra* note 64, art. III, para. 1; U.S.-Grenada BIT, *supra* note 64, art. III, para. 1.

238. For Islamic religious reasons, presumably, BITs with Egypt, Morocco, and Turkey do not mention the word "interest." However, each makes some allowance payment that amounts to interest. For instance, the U.S.-Egypt BIT provides that compensation includes "payments for delay as may be considered appropriate under international law." U.S.-Egypt BIT, *supra* note 63, art. III, para. 1; *See also* U.S.-Morocco BIT, *supra* note 63, Protocol, para. 4; U.S.-Turkey BIT, *supra* note 64, art. III, para. 2.

U.S.-Haiti and U.S.-Panama BITs seriously loosens this standard. The U.S.-Haiti BIT stipulates that "fair market value" will be set "according to different methods of calculation as appropriate in each specific case."[239] In the "Agreed Minutes" of the U.S.-Panama BIT the "full value" of the expropriated investment can be made using "several methods of calculation depending on the circumstances thereof."[240] Each of the other U.S. BITs contains substantially similar language recognizing that "fair market value" shall not reflect any reduction in the value of the investment due to prior public notice, announcement of the expropriation, or the occurrence of events that brought about the expropriatory action.[241]

The Model BIT definition of "effective" compensation as compensation that is "freely transferable at the prevailing market rate of exchange on the date of expropriation" has been almost universally incorporated into the U.S. BITs signed thus far. Only the U.S.-Egypt and the U.S.-Morocco BITs use slightly different language.[242] The U.S.-Egypt BIT speaks of the exchange rate for "current transactions." The U.S.-Morocco BIT speaks of the exchange rate used for "commercial purposes."

PRC formulations to date, taken as a whole, do not seem to present significantly different threshold tests for legitimate expropriation.[243] Like U.S. BITs, PRC BITs not only apply to direct expropriation but also to other measures that have an effect equivalent to expropriation.[244] The differences lie, primarily, in varying definitions of certain terms and a lack of consistency among the Chinese BITS, each of which seems to be missing one clause or another. The PRC-Singapore BIT, for instance, allows for expropriation measures "for any purpose authorized by law,"[245] and the PRC-West Germany BIT allows for action in a country's "public interests,"[246] but the

239. U.S.-Haiti BIT, *supra* note 64, art. III, para. 1.

240. U.S.-Panama BIT, *supra* note 64, Agreed Minutes, para. 4, referring to art. IV, para. 1.

241. However, the U.S.-Panama and U.S.-Turkey BITs abbreviate the Model BIT language somewhat.

242. The U.S.-Egypt BIT speaks of the exchange rate for "current transactions." U.S.-Egypt BIT, *supra* note 63, art. III, para. 1. The U.S.-Morocco BIT speaks of the exchange rate used for "commercial purposes." U.S.-Morocco BIT, *supra* note 64, Protocol, para. 4.

243. The PRC BITs uniformly provide that the term "expropriation" as used in the agreements is to include measures having effect equivalent or similar to expropriation. *See, e.g.*, PRC-Great Britain BIT, *supra* note 206, art. 5, para. 1; PRC-Japan BIT, *supra* note 162, Agreed Minutes, para. 3; PRC-West Germany BIT, *supra* note 206, Protocol, ad. art. 4, para. a.

244. *See, e.g.*, PRC-West Germany BIT, *supra* note 206, Protocol, para. 4(a).

245. PRC-Singapore BIT, *supra* note 209, art. 6, para. 1.

246. PRC-West Germany BIT, *supra* note 206, art. 4, para. 1.

PRC-Great Britain BIT refers more completely to expropriation made for a "public purpose related to the internal needs of that (party)."[247] The PRC-Japan BIT, the most recent Chinese BIT signed, also stipulates that a "public purpose" is necessary.[248]

The requirement of legal process is absent from the PRC BITs with Britain and Singapore, but does appear in the BITs with West Germany and Japan. The PRC-West Germany BIT stipulates that expropriation be "undertaken according to the legal procedure,"[249] and the PRC-Japan BIT stipulates that expropriation be undertaken "in accordance with laws and regulations."[250] No mention of the non-discriminatory nature of any expropriation appears in the PRC BITs with Britain and West Germany, while both the PRC-Japan and PRC-Singapore BITs do contain such a term. Significantly, no PRC BIT available to the author contains a provision enforcing stabilization clauses in private contracts.

Where the PRC BITs consistently differ from U.S. BITs relates to the question of the proper form of compensation. The PRC refuses to use the U.S. slogan "prompt, adequate, and effective," to modify "compensation." At least one PRC official rejects the U.S. formula as extortionate.[251] Several PRC BITs, including the PRC-Japan BIT, omit any adjectives modifying "compensation."[252] However, several others contain what appears to be the sole preferred adjective, "appropriate (*shidang de*),"[253] or the adjective "reasonable (*heli de*)"[254] before "compensation."

But what ultimately matters more than whether the U.S. lan-

247. PRC-Great Britain BIT, *supra* note 206, art. 5, para. 1. The PRC-GB BIT neither mentions due process or related terms nor non-discrimination.

248. PRC-Japan BIT, *supra* note 162, art. 5, para. 2.

249. PRC-West Germany BIT, *supra* note 206, art. 4, para. 1.

250. PRC-Japan BIT, *supra* note 162, art. 5, para. 2.

251. "The terms 'full, timely and effective' have long been used in capitalist countries for extorting compensations for liquidated assets." Gu Ming, *supra* note 9. In fact, however, the expropriations over which Secretary Hull proclaimed this standard in 1938 led to a compensation payment of $40 million over several years on an estimated value of expropriated holdings of $350 million. Other expropriations of oil properties valued at $260 million were compensated for with payment of $24 million. HENKIN, *supra* note 107, at 1046 n. 1. *See supra* note 107 and accompanying text, for a discussion of the Hull formula.

252. *See, e.g.*, PRC-Singapore BIT, *supra* note 209, art. 6, para. 1; PRC-West Germany BIT, *supra* note 206, art. 4, para. 1; PRC-Japan BIT, *supra* note 162, art. 5, para. 2.

253. *See, e.g.*, Agreement Concerning the Reciprocal Encouragement and Protection of Investments, May 30, 1984, China-France [hereinafter PRC-France BIT], art. 4, para. 2, *reprinted in* 23 I.L.M. 550 (1984) (Chinese text on file at the *Journal of Chinese Law*). *See also* Liu Yimin, *supra* note 218.

254. Agreement Concerning the Promotion and Reciprocal Protection of Investments, June 4, 1984, China-Luxembourg & Belgium [hereinafter PRC-Luxembourg & Belgium BIT], art. 5, para. 1, *reprinted in* 24 I.L.M. 538 (1985); PRC-Great Britain BIT, *supra* note 206, art. 5, para. 1.

guage is adopted word for word is whether and how the term "compensation" is expressly defined in accompanying language in the PRC BITs. Three recent PRC BITs with Britain, West Germany, and Japan contain considerable elaboration defining the word "compensation." The PRC-West Germany and PRC-Great Britain BITs provide that compensation be made without "undue delay," while the PRC-Japan BIT provides only that compensation be made "without delay," dropping the word "undue."[255] Each of the three also provides that the compensation be "effectively realisable [sic]" or "in convertible currency" (West Germany), and all three state that compensation be "freely transferable." All three of these BITs sets the time of valuation of the expropriated investment,[256] but only the PRC-Great Britain BIT states that this value must be the "real value" of the investment.[257] Of the PRC BITs available to the author, only the PRC-Japan BIT provides that interest be paid on the unpaid compensation amount starting from the date of expropriation. It goes without saying that valuation of investments in a largely non-market economy is problematic. What "Market Value" would mean in this context remains supposition.[258]

The U.S. contends that even without using its formulation for compensation, international law recognizes the standard enunciated by the Model BIT,[259] and that, by seeking to change the language,

255. PRC-Japan BIT, *supra* note 162, art. 5, para. 3. However, the Agreed Minutes allow for "a reasonable period of time necessary for deciding amount, way of payment, and so on." *Id.* Agreed Minutes, para. 4.

256. PRC-West Germany BIT contains the following provision: "[compensation] shall be equivalent to the value of the investment expropriated immediately before the expropriation was announced. PRC-West Germany BIT, *supra* note 206, Protocol, ad. art. 4, para. c. The PRC-Japan contains the following provision: compensation is "equivalent to the value [of the investment] . . . at the time when the [expropriations] . . . are publicly announced or when such measure [sic] are taken, whichever is earlier." PRC-Japan BIT, *supra* note 162, Agreed Minutes, para. 3. The PRC-Great Britain contains the following provision: "[compensation] shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge." PRC-Great Britain BIT, *supra* note 206, art. 5, para. 1.

257. PRC-Great Britain BIT, *supra* note 206, art. 5, para. 1.

258. PRC-Japan BIT, *supra* note 162, Agreed Minutes, para. 3. The compensation "shall carry an appropriate interest taking into account the length of time until the time of payment." *Id.*

259. *See* Memorandum, Application of the Treaty of Amity to Expropriation in Iran, *reprinted in* 129 Cong. Rec. S. 16055, S. 16056-57. *See generally* Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 517 (1976); Schachter, *Compensation for Expropriation*, *supra* note 119. The Restatement (Revised), uses somewhat softer language: "[compensation must] be equivalent to the value of the property taken and must be paid at the time of taking or with interest from the date and in an economically usable form." RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712.

China is rejecting this internationally accepted formulation.[260] However, although the words "prompt, adequate, and effective" appear in each of the U.S. BITs negotiated to date, it is clear from the preceding analysis that the U.S. has failed to achieve complete incorporation of its expropriation and compensation principles in every case. Nevertheless, there seem to be fewer crippling exceptions in U.S. BITs regarding this issue than can be found regarding the treatment issue. Furthermore, China, judging from the PRC-Japan BIT, seems to be moving gradually closer to the U.S. position, notwithstanding strong criticism of that position by Chinese officials.

However, there is one expropriation-related area over which the U.S. and the PRC sharply disagree: where the jurisdiction for cases of alleged expropriation lies. This topic relates to issues of dispute settlement, which will be dealt with below. The U.S. clings to the notion that the preconditions for expropriation and the requirement of "prompt, adequate, and effective" compensation are based on international law, citing the 1962 U.N. resolution. Therefore, these disputes, by definition, can be the subject of international adjudicatory bodies. The PRC believes that based on the principle of national sovereignty all questions relating to expropriation lie exclusively within domestic jurisdiction,[261] citing the Charter of Economic Rights and Duties of States for support.[262] It appears that the only concession the Chinese are willing to make is to allow international arbitration over the amount of compensation.

Considering these differences, it is worth asking what protection the Chinese law actually provides against discriminatory and uncompensated expropriation. As a preliminary matter, observers should recall that the PRC has created a parallel body of "foreign economic law" to apply to foreigners, whether individuals or companies. It is still sometimes unclear which law applies in a given situation involving foreign investment, especially if the foreign economic law contains no provision on point. In addition, the legal certainty of these laws is reduced by the added complication of conflict between older more general and newer more comprehensive replacements.[263] Generally, foreign investors either look to the body of laws designed specially for

260. Eiss Interview, *supra* note 11.

261. Liu Yimin, *supra* note 218. *See supra* notes 175-190 and accompanying text.

262. "In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought. . . ." G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 131) at 50 (1974), U.N. Doc. A/9631, ch. II, art. 2, para. 2(c).

263. Recent economic and legal reforms have come piecemeal. Because of this evolving process, it has been necessary to allow the continued application of certain existing laws to

them or to distinct provisions within domestic laws addressed to foreigners.

A survey of PRC statutes and regulations demonstrates that domestic law related to expropriation of foreign investment, especially indirect expropriation, is cursory. The primary provision of the PRC Constitution regarding land ownership, for example, is article 10. It provides that the state may expropriate (*zhengyong*) land in accordance with the law if necessary for the public interest. But there is no mention of compensation.[264] Although a special provision of the PRC Constitution is directed specifically at foreign investment, it only makes the vague statement that the "lawful rights and interests [of foreign investors] are protected" by PRC law.[265] The General Principles of Civil Law contains a similar general provision stating that all Chinese legal persons, which can include foreign invested companies, are "protected by law."[266] The sections on ownership and property rights cover the rights of collective, state, and citizens but not the rights of foreigners.[267] Only one article addresses "co-ownership" between two or more citizens and legal persons, but it only specifies the division of rights and duties of the "co-owners" with respect to that property, not of their rights vis-à-vis the state.[268]

Regarding substantive statutes and regulations that apply to foreign investments, expropriation is only mentioned explicitly in the Wholly Foreign-Owned Venture Law. Expropriation or nationalization of foreign-owned enterprises is allowed under "special circumstances" for "social and public interests" if accomplished according to legal procedures and if "corresponding" (*xiangying de*) compensation

---

preexisting legal relationships, while the new laws are applied only prospectively to newly established relationships. The laws relating to ownership rights exemplify this phenomenon.

264. PRC Constitution, *supra* note 153, art. 10. This article also provides that land must be used "reasonably" (*heli de*). *Id.* The 1988 amendment of the Constitution amended article 10 to allow for the sale of land use rights but did not affect the clauses cited herein.

265. *Id.* art. 18. The entire article reads as follows:

> The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China.
>
> All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investments located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.

Id. The "lawful rights and interest" of foreigners in general are protected under article 32. *Id.* art. 32.

266. Civil Law Principles, *supra* note 160, art. 5.

267. *Id.* arts. 71, *et seq.*

268. *Id.* art. 78.

is paid.[269] The Equity Joint Venture Law and its implementing regulations, the Foreign Economic Contract Law, and the new Cooperative Joint Venture Law contain only general stipulations that might be applicable in the case of expropriation. For example, article 2 of the Equity Joint Venture Law reads, "The Chinese Government protects, by the legislation in force, the resources invested by a foreign participant in a joint venture . . . as well as his other lawful rights and interests."[270] The most important national legislation regarding the transfer and requisition of land rights, the Chinese equivalent of eminent domain, explicitly exempts foreign-invested enterprises from its coverage.[271] Elsewhere, local regulations may provide some protection against unfair and uncompensated takings of foreign investments.

In Shanghai, for instance, recent regulations concerning the transfer of land-use rights parallel the Wholly Foreign-Owned Venture Law provisions. They provide that the premature "recovery" (*shouhui*) of land use rights can be undertaken by the Municipal Land Bureau, but only under "special circumstances," if necessary for the "social public interest," within six months prior notice, and for "reasonable compensation" (*heli de buchang*).[272] The amount of compen-

269. Wholly Foreign Owned Venture Law, *supra* note 155, art. 5. *See* Torbert, *Wholly Foreign-Owned Ventures Come of Age*, CHINA BUS. REV., July-Aug. 1986, at 50, 52.

270. Article 2 of the Equity JV Law reads as follows, "The Chinese Government protects, by the legislation in force, the resources invested by a foreign participant in a joint venture . . . as well as his other lawful rights and interests." Equity JV Law, *supra* note 150, art. 2.

271. Zhonghua Renmin Gongheguo Tudi Guanli Fa (Law of the People's Republic of China Concerning Land Management) (adopted June 25, 1986, into effect Jan. 1, 1987) art. 55, *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 14-715. This article provides that the State Council will promulgate special regulations for the management of the use of land by foreign invested enterprises. *Id.* The State Council has not yet acted.

Elsewhere in this law, which applies primarily to expropriation of state and collectively-owned rural land for "state construction," two different methods are used to calculate compensation. 1) Compensation fees for cultivated land is calculated as between three and six times the value of the average annual output of the land over the prior three years. 2) The standard for compensation for other areas of land is left to the local administrative unit to make with reference to the calculation of compensation for cultivated land. In addition, compensation for planted land and for land with fixtures is also left up to the administrative unit. *Id.* art. 27. If agricultural land is expropriated for State construction, resettlement subsidies (*anzhi buzhufei*) for those living on the land are calculated in a similar manner with the level set at between two and three times the value of the average output per *mu* (0.0667 hectares). *Id.* art. 28. *See* Guojia Jianshe Zhengyong Tudi Tiaoli (Regulations Regarding the Requisition of Land for National Construction) (approved May 4, 1982, promulgated May 14, 1982) art. 2, *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 14-590.

272. Shanghai Shi Tudi Shiyongquan Youchang Zhuanrang Banfa (Measures of Shanghai Municipality on the Compensatory Transfer of Land Use Rights) (promulgated Nov. 29, 1987), *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 91-034, art. 42. *See also* Shanghai Shi Zhongwai Hezi Qiye Tudi Guanli Banfa (Measures Concerning Land Use Administration for Sino-foreign Joint Equity Enterprises in Shanghai Municipality (issued Oct. 30, 1986), *trans. in id.* at ¶ 91-033, where no mention of compensation for expropriation is made.

sation is determined through "consultation" between the land bureau and the land-use owner "in accordance with" the remaining period of the land-use contract, the nature of the land-use, the value of the buildings and other attachments, and the original land-use fee. Disputes over the amount can be taken to the People's Court.[273] This formulation clearly leaves plenty of room open for interpretation and, in particular, does not guarantee that improved property will be fairly compensated. Moreover, Shanghai and Shenzhen appear to be the only localities that have passed regulations that even address the takings issue.

It seems that the U.S. government is seeking to negotiate its "prompt, adequate, and effective" standard into its BITs precisely because there is disagreement between capital exporting and capital importing countries over what exactly the international law and jurisdiction are in this area. Logically speaking, investors will not risk their money without sufficient contractual, legal, and economic guarantees against losses through expropriation. Therefore, as Professor Schachter observes, countries that wish to attract investment will generally give such guarantees when the foreign investment is perceived as beneficial and the interests of both sides are mutual.[274] Parties to all the U.S. BITs thus far have accepted this Model BIT language without major alterations.[275] Two of three drafts devised by the Asian-African Legal Consultative Committee as model BITs for developing countries also state that compensation should be "prompt, adequate, and effective."[276]

273. Shanghai Land Use Measures, *supra* note 272, art. 43. Other related Shanghai regulations, in particular the Shanghai regulations on the management of the dismantling and removal of non-residential buildings stipulate, *inter alia*, that compensation for certain losses incurred by units forced to relocate because of city infrastructure construction must be paid. This compensation is based on the following four considerations: 1) compensation for current replacement cost will be made based on the total land area, the size of existing structures, and their current condition, providing the original structures were built according to legal procedures and with legal approval; 2) compensation for land use fees will be made for land that is presently subject to legitimate land use rights; 3) compensation will be paid for the expenses incurred in dismantling, moving, and reinstalling equipment; 4) in the case of collectively owned and leased enterprises, compensation equal to one year of the salaries of workers who are put out of work because of the removal or discontinuation of the business will be paid. Shanghai Shi Caiqian Fangwu Guanli Ruogan Wenti de Guiding (Regulations of the Shanghai Municipality on a Number of Issues Regarding the Administration of the Dismantling and Removal of Buildings) (promulgated March 21, 1988) 5 XIN FAGUI 45 (1988). Significantly, lost profits are not compensated. *Id.* It should be noted that while these measures on their face apply only to Chinese units, they probably apply by analogy to foreign-invested property if no relevant foreign economic measures exist.

274. Schachter, *Conpensation for Expropriation*, *supra* note 119, at 130.

275. *See* Gann, *supra* note 58, 401-403.

276. AALCC, *supra* note 192.

Just as the Reagan administration's free trade policy is part of a larger political philosophy, the PRC government's broad political agenda is not entirely in sync with its own stated goal of attracting foreign investment. Claims that foreign investments are already sufficiently protected by domestic law still ring hollow, as do patronizing claims that contracts are never broken.[277] Regardless of the content or origins of international law on expropriation and compensation, nothing in international law prevents a country from assuming greater obligations by treaty without derogating from its sovereign rights.[278] Participation in OPIC and MIGA undoubtedly helps assuage some of investors' fears, but insurance is a palliative and not a cure. A recent experience of the China Tianjin Otis Elevator joint venture illustrates, on a practical level, the very real uncertainties that exist.

The Otis Case[279]

The China Tianjin Otis Elevator Company (Otis Tianjin), established in 1984, is one of the largest Sino-foreign joint ventures (JVs) to date in the PRC. It ran into trouble when it applied in the spring of 1985 for a building permit in order to begin a factory expansion program planned since the inception of the JV. Although the JV's expansion plans had been approved as part of the original JV proposal and feasibility study, which specified allocation of land adjoining the now operating factory for construction of a new paint line, the subsequent building permit application was rejected by the Tianjin Transportation Department.[280]

When officials at the JV inquired into the rejection, they were told that the land had been earmarked for an off-ramp to the new Tianjin ring road that was to be constructed as part of the Tianjin-Beijing highway. Furthermore, when Otis Tianjin officials suggested that they would accept compensation for the taking of the land-use rights, the authorities not only told them that no compensation was

277. *See* (Zhao Ziyang quoted in) Asian Wall St. J., *supra* note 171. Other inconsistencies must also be clarified. For instance, only the Joint Venture Law provides that businesses with foreign investment are to be limited liability companies. Equity JV Law, *supra* note 150, art. 5.

278. *See* SCHACHTER, THEORY & PRACTICE, *supra* note 85, at 299.

279. This account was related to the author by Jon Christianson and confirmed by Jay Chen, both of whom worked at China Tianjin Otis Elevator Company during the beginning phase of the joint venture [hereinafter Christianson & Chen].

280. *See* Tianjin Jingji Jishu Kaifa Qu Tudi Guanli Guiding (Regulations for Land Management of the Tianjin Economic and Technological Development Zone) (adopted July 20, 1985), *trans. in* CHINA L. FOR. BUS., *supra* note 150, ¶ 92-012.

owed but that the JV would have to pay to tear down the existing buildings to prepare the land for the highway construction.

The JV officials protested to the Transportation Department that their own building plan and the land allocation had already been approved at the start of the JV. The response said that internal plans for the highway had existed even earlier in the transportation department, therefore, the JV contract approval did not govern on this point.[281] A petition to the Tianjin mayor for special review of the dispute failed. In the end, rather than resort to litigation, the JV accepted the fait accompli by yielding in "mutually beneficial discussions" over the matter. The JV will loose a section of its factory yard and have to build several new buildings to replace the ones to be torn down. No compensation was or will be paid.[282]

Indirect takings through administrative action like this one, rather than direct expropriation or nationalization, are the most likely hazards currently confronting foreign investors in China. Under the U.S. Model BIT and most BITs negotiated by both the U.S. and the PRC to date, measures like this one which "[have an] effect equivalent to expropriation or nationalization," must be compensated.[283] Clearly, one problem is that local implementation and enforcement of national policies and laws pertaining to foreign investment still lack consistency. Time, education, and experience are necessary before a more widespread knowledge and consistent interpretation of foreign economic laws can be expected. Meanwhile, rather than claiming that domestic legal remedies are sufficient, Beijing should boost investor confidence by adopting standards more acceptable to prospective investors. If signing a BIT with the U.S. terms intact is too unappealing, then at least, domestic legal protection must be strengthened significantly.

281. Tianjin land-use regulations adopted after this dispute arose place an obligation on land-users to ensure that construction or building "of an infrastructure nature" conform with municipal plans. Obviously, however, an enterprise must have access to city or state plans if it is reasonably expected to conform with this regulation. By implication, although the JV had no prior notice of the highway plans, the authorities did have notice of Otis Tianjin's plans. *Id.* art. 12.

282. Jay Chen observes that Otis Tianjin might have failed to force the Tianjin officials to change their highway plans because to do so would have caused a similar dispute with a proposed Sino-British JV which was negotiating rights to the adjacent land. Since the Otis Tianjin JV was already underway, and the Sino-British JV still under negotiation, the latter could wield more leverage for concessions from the Tianjin authorities. Christianson & Chen, *supra* note 279.

283. PRC-Great Britain BIT, *supra* note 206, art. V, para. 1.

C. *Dispute Settlement*

From the point of view of foreign investors, the lack of fair dispute settlement mechanisms would render the discussion of compensation for expropriation almost meaningless.[284] Of the two types of disputes covered by the U.S. Model BIT, those between an investor and a state party to the BIT and those between and investor and another private party, negotiations between the U.S. and the PRC are at an impasse only over the proper settlement of the former type of dispute.[285] Future PRC accession to ICSID may portend a change of faith in this regard, however, considering the strong Chinese belief that sovereignty prevents a state from being the subject of private suits, a rapid change seems unlikely.

Although the positions of the two countries remain considerably far apart, occasional modification in the language of BITs negotiated to date indicates some flexibility on both sides. All U.S. BITs follow the dispute settlement provisions of the Model BIT closely,[286] except in the case of two key provisions.[287] The first of these two provisions deals with the definition of the term "investment dispute." Both the U.S.-Egypt and U.S.-Morocco BITs omit disputes over "the interpretation or application of any investment authorization granted by a party's investment authority,"[288] the second category of the Model BIT definition. For countries, like the PRC, whose governments are extensively involved in investment project applications, authorization, and supervision, the deletion of this clause creates considerably more operating room in which the relevant host investment authority can maneuver.

A second and less significant variation involves the ultimate choice between the two possible mechanisms for resolving disputes, conciliation or arbitration. Again, the U.S.-Egypt and U.S.-Morocco BITs, joined now by the U.S.-Panama BIT, differ from the other U.S. BITs, which follow the Model BIT in giving investors the deciding role in choosing. Instead, these three BITs make no mention of how

284. *See* Cohen, *Negotiating Complex Contracts with China*, in BUSINESS TRANSACTIONS WITH CHINA, JAPAN, AND SOUTH KOREA sec. 2 (Saney & Smit, eds., 1984).

285. Frisbie, *supra* note 10.

286. *See supra* notes 87-99 and accompanying text.

287. Because neither Haiti nor Panama were contracting states to the ICSID Convention at the time their BITs with the U.S. were signed, the investor-State dispute resolutions provisions of each necessarily use alternative settlement mechanisms. The U.S.-Haiti BIT provides for arbitration under the International Chamber of Commerce. U.S.-Haiti BIT, *supra* note 64, art. VII, para. 3. The U.S.-Panama BIT provides for conciliation or arbitration proceedings of the Additional Facility of the Centre. U.S.-Panama BIT, *supra* note 64, art. VII, para. 3(c).

288. *See* U.S.-Egypt BIT, *supra* note 63, art. VII, para. 1; U.S.-Morocco BIT, *supra* note 64, art. VI, para. 1.

disagreement over whether to use conciliation or arbitration will be resolved. Although hardly a major variation and possibly an oversight, these omissions could lead to a needless procedural deadlock should a dispute reach this point in the dispute resolution process.

China's BITs, on the other hand, provide for international arbitration of investor-state party disputes only over the issue of compensation amount.[289] These BITs typically begin by urging that any disputes between a national or company of one party and the other party shall, as far as possible, be settled amicably through negotiations or consultations between the parties to the dispute.[290] If a dispute over the amount of compensation for an expropriatory action cannot be resolved within six months, then binding international dispute resolution can be resorted to. In the PRC-Japan BIT, which contains the most comprehensive dispute resolution provisions, submission of a dispute over compensation amount and the choice of format, conciliation or arbitration, are made contingent on the request of the investor. The conciliation or arbitration board shall be established "with reference to" the ICSID Convention.[291] But unlike the PRC BITs with France, West Germany, and Britain, where special provision is made in side letters, the PRC-Japan BIT does not require an additional protocol should the PRC become a signatory of the ICSID Convention.

Within the scope of this author's research, there is no provision in any PRC BIT making mandatory arbitration of any other type of investor-state party disputes. The PRC-Japan BIT creates no obligation, but does offer the option, "upon mutual agreement," of submitting any dispute concerning "other matters" to international dispute resolution.[292] Thus, unless the host government agrees, it seems that all other investor-state party disputes should be settled by resort to local courts.[293] Alternatively, the government of the complaining investor can take up the dispute on a government to government level. PRC BITs generally provide for arbitration by an ad hoc tribunal of disputes between the two governments over "interpretation and application" of the BIT.[294]

289. *See, e.g.*, PRC-Great Britain BIT, *supra* note 206, art. 7; PRC-Singapore BIT, *supra* note 209, art. 13; PRC-Japan BIT, *supra* note 162, art. 11. The PRC-West Germany BIT contains no provision covering investor-state disputes. *See* PRC-West Germany BIT, *supra* note 206. *See also supra* text accompanying notes 184-187.

290. PRC-Great Britain BIT, *supra* note 206, art. 7, para. 1; PRC-Singapore BIT, *supra* note 209, art. 13, para. 1; PRC-Japan BIT, *supra* note 162, art. 11, para. 1.

291. PRC-Japan BIT, *supra* note 162, art. 11, para. 2.

292. *Id.*

293. *See* Liu Yimin, *supra* note 218 at 55.

294. *See, e.g.*, PRC-West Germany BIT, *supra* note 206, art. 10; PRC-Great Britain

The PRC position against international arbitration of all investor-state disputes, except the issue of compensation amount, stems in part from the belief that all domestic measures by a government lie within the jurisdiction of domestic law and that any variation from this principle would violate PRC sovereignty. Although the PRC government has established a domestic arbitration facility under the auspices of the China Council for the Promotion of International Trade (CCPIT),[295] this facility primarily arbitrates disputes between private contracting parties, not between a party to a private contract and the host government.[296] The dispute resolution provisions of both OPIC and MIGA, on the other hand, by their nature elevate claims of private investors against host governments to the state level. This subrogation may conform more closely to Chinese notions of state sovereignty, but in highly politically sensitive cases, the potential for diplomatic friction may actually increase. Without this mechanism, a private claimant could be more easily ignored by its own government.

A further interesting innovation of the PRC-Japan BIT involves the establishment of a joint committee of representatives of the two governments to review the implementation of the BIT and to consult on the development of domestic laws and policies in each country relevant to foreign investment. The committee will meet at the request of either government, alternately in Tokyo and Beijing. While this consultation committee concept may lack substantive appeal on paper, it is possible that a mechanism such as this, which formalizes government-to-government consultation outside the context of actual investment disputes, may help channel government concerns about internal reforms that affect foreign investment in a more effective manner.[297]

As the Otis Tianjin episode described above illustrates, government approvals and the actions of supervisory authorities can have considerable prejudicial effect on established investments. U.S. BIT negotiators are seeking a clause that provides for international arbitration over the very issue of when and if an expropriation has

BIT, *supra* note 206, art. 8; PRC-Singapore BIT, *supra* note 209, art. 14; PRC-Japan BIT, *supra* note 162, art. 13.

295. The facility, called Foreign Economic & Trade Arbitration Commission, is located in Beijing. *See* Cohen, *The Role of Arbitration in Economic Co-operation with China* in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA (Moser ed., 1984).

296. *See id.*

297. USTR is skeptical about the relative benefit of a consultative committee. Simmons Interview, *supra* note 216.

occurred.[298] The U.S., however, itself excepts from application of the relevant article of the Model BIT disputes within the jurisdiction of regulatory agencies, including disputes solely concerning interpretation or application of securities and antitrust laws.[299]

Furthermore, while the U.S. government usually does not enter into investment agreements or authorizations with foreign investors,[300] PRC laws stipulate extensive government involvement in the investment approval process.[301] The centralization of foreign investment approvals and even the adoption of each specific investment project by a relevant responsible ministry or department create endless opportunities for friction and dispute. It seems difficult to imagine that the PRC government would allow disruption by an outside arbitrator of this whole system.

CONCLUSION

Recent retrenchment in China's economic policy has elicited renewed warnings that some foreign economic contracts will be cancelled, joint ventures terminated.[302] PRC leaders have hastened to deny the rumors and have pledged that all contracts already signed and joint ventures already in operation will continue to be enforced and protected.[303] Foreign investors with experience in China may recognize and understand the recurrent necessity for economic readjustments and ignore the cacophony of publicity that national policy detours elicit. But new and prospective investors, on hearing this news, cannot but be forced to reassess the risks of investing in China. A bilateral investment treaty between the U.S. and the PRC would both give added protection to existing and future investments in China as well as encourage these new investors to commit their resources.

Currently, there are at least two schools of thought on what course U.S. BIT negotiators ought to take in negotiations with the PRC. One holds that the respective positions of each government are too far apart and that, in any case, a bilateral treaty of this sort can never offer any real protection.[304] Even the strongest bilateral invest-

298. Frisbie, *supra* note 10.

299. Gann, *supra* note 58, at 415.

300. *Id.* at 415 n. 179.

301. *See, e.g.*, Equity JV Law, *supra* note 150.

302. *See, e.g.*, Gargan, *China Explains Policy Shift Retightening Economic Grip*, N.Y. Times, Oct. 28, 1988, at A14, col. 3.

303. *See, e.g., Wo Jiang Baohu Shewai Jingji Xiangmu*, Renmin Ribao (Haiwai Ban), Oct. 27, 1988, at 1.

304. *See* Sullivan, *supra* note 216, at 9. *See also Council Recommendations to the Bush Administration*, CHINA BUS. REV. Jan.-Feb. 1989, at 6, 7.

ment treaty with broad arbitration provisions would be toothless in the face of host country action perceived to be in the national interest. Therefore, rather than prolong abortive negotiations, the U.S. should merely work for a treaty that clarifies in simple terms the current level of protection the PRC is willing and able to offer and acts as a symbol of present and future cooperation.

The other school of thought holds that U.S. negotiators should continue their struggle for BIT provisions that approach or match the investment protection of the Model BIT. The Office of the U.S. Trade Representative refuses to sign a treaty that does not "have real tangible value" and does not include binding commitments.[305] Negotiators apparently believe that unless some of the positions elucidated in the Model BIT are made into hard treaty law, U.S. investors will be better served without a treaty than they would with an aspirational or declaratory one. Whether this is merely a hard-line negotiating stance is difficult to say right now.

This note has shown that both these positions may be based on inaccurate observation and assumptions. Although significant differences of opinion still exist, the past treaty records of both governments indicate that they both may be willing to compromise on nearly every disputed provision. Negotiations should not be as stymied as they are made to appear in public. Five years of negotiations and the passage of time appear to have yielded some important advances. Moreover, each side has recently passed a significant landmark in its BIT program development: in September 1988, the PRC concluded a promising BIT with Japan after hard negotiations; and in October 1988, the U.S. Senate finally ratified eight of the U.S. BITs, some of which had been awaiting action since 1982.

Thus, both sides should grasp this opportunity to renew formal negotiations, but not without taking a strong dose of realism before sitting down at the negotiating table. The PRC must recognize that solid confidence cannot be built in the minds of foreign investors by lofty claims of legality and promises of security unbacked by legislation or other legal protection. Demands from foreign investors for fairness, nondiscrimination, and consistency as prerequisites to intensified foreign investment are not unreasonable. As long as the often accurate perception remains that laws and the actions of administrative and judicial bodies do not adequately enforce these standards and protect investment, then foreign investors will continue to press for treaty provisions, like the Model BIT investor-state dispute provision, that impose external standards or processes on the host state.

305. Eiss Interview, *supra* note 11.

The U.S., for its part, must recognize that China is not going to change over night. In a few short years, a skeletal framework of a commercial legal system has been created, but considerable fleshing out is needed. It will take still more time to iron out the inconsistencies, fill in the gaps, and develop a body of consistent interpretation. BITs can have some role in this development, but they arguably should not be expected to be miracle cures. Considering the advances in treatment achieved by the PRC-Japanese BIT, U.S. negotiators must accept that the lack of a U.S.-PRC BIT may now result in increased discrimination against U.S. investment, since without a BIT the U.S. does not have the benefit of an MFN clause covering bilateral investment.

The issues of national treatment of foreign investors, expropriation and compensation, and investor-government arbitration are difficult ones because they strike at the heart of some of the basic differences between capitalist and socialist economic outlooks and because they elicit strong and principled protective responses on the Chinese side and equally principled legal posturing on the U.S. side. BIT negotiations between the U.S. and the PRC should be used as a forum for honest communication and compromise. They are not the proper forum to beat out an unrealistic or over-idealistic vision of international investment law.

Timothy A. Steinert *

* J.D. 1989, Columbia University.