

7-1-2004

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J. Steven Jarreau

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## Recommended Citation

J. Steven Jarreau, *Anatomy of a BIT: The United States - Honduras Bilateral Investment Treaty*, 35 U. Miami Inter-Am. L. Rev. 429 (2014)  
Available at: <http://repository.law.miami.edu/umialr/vol35/iss3/2>

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## ARTICLES

### ANATOMY OF A BIT: THE UNITED STATES - HONDURAS BILATERAL INVESTMENT TREATY

J. STEVEN JARREAU\*

#### INTRODUCTION

Foreign direct investment<sup>1</sup> influences the world economy by promoting the transfer of capital, technology and managerial skills, improving economic efficiency through greater competition and enhancing market access.<sup>2</sup> The United States and Honduras, appreciating the benefits of foreign direct investment (FDI) while mindful of the shortcomings of customary international law<sup>3</sup> and

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\* B.A. Loyola University, 1980; J.D. Louisiana State University Law School, 1986; LL.M. International and Comparative Law, The George Washington University Law School, 1999. Mr. Jarreau is an attorney with U.S. Customs and Border Protection (formerly the U.S. Customs Service), the Office of Regulations and Rulings, where he is responsible for international trade issues. He is licensed in New York, Washington, D.C. and Louisiana. He was a trial attorney for eight years with the law firm of Borrello, Huber & Dubuclet in New Orleans, LA. and was a law clerk to the Hon. Jerome E. Domengeaux, Chief Judge, Third Circuit Court of Appeals, State of Louisiana. Mr. Jarreau would like to dedicate this article to the men and women of U.S. Customs and Border Protection who embody the mission of Vigilance - Integrity - Service. Mr. Jarreau would like to extend special thanks to Mr. Cornelis D. Heesters, a friend and colleague, for his critical insight, thoughtful analysis and comprehensive review. Thanks are also extended to Mr. Herb Somers, Foreign and International Law Librarian, The George Washington University Law School and the law library staff of the Library of Congress for the professional assistance they provided in the preparation of this article.

The opinions expressed in this article do not necessarily represent the views of U.S. Customs and Border Protection or the United States government.

1. See U.N. Ctr. On Transnational Corporations & Int'l Chamber Of Commerce, *Bilateral Investment Treaties 1959-1991*, 1992, at preface iii, U.N. Doc. ST/CTC/136, U.N. Sales No. E.92 II.A.16, I.C.C. Sales No. 508 [hereinafter *Bilateral Investment Treaties 1959-1991*].

2. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 41 n.37 (1994).

3. See generally CLIVE PARRY ET AL., *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 82 (1987); *RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 (2) (1986) [hereinafter *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW*] (providing that customary international law requires "a concordant practice of a number of States acquiesced in by others and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)").

the absence of a multilateral accord on FDI,<sup>4</sup> entered into negotiations to promote and protect foreign investment in their respective countries. Subsequent to the conclusion of those negotiations, the Honduran Congress and the United States Senate ratified the *Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment*.<sup>5</sup>

The agreement achieved by Honduras<sup>6</sup> and the United States<sup>7</sup> is a bilateral investment treaty (BIT).<sup>8</sup> Bilateral investment treaties, the origins of which extend from a 1959 agreement between the Federal Republic of Germany and Pakistan,<sup>9</sup> are international covenants intended to foster foreign direct investment by extending protection from noncommercial, political risks.<sup>10</sup> The intense worldwide treaty activity of recent years attests to the importance of FDI from the perspective of both capital exporting, as well as capital importing countries.<sup>11</sup> It is also recognition by

4. See *The Sinking of the MAI*, ECONOMIST, Mar. 14, 1998, at 81; *UK Admits Failure After French Talks Withdrawal*, FIN. TIMES (London), Nov. 18, 1998, at 14.

5. See *Treaty Concerning The Encouragement And Reciprocal Protection Of Investments*, July 1, 1995, U.S.-Hond., Treaty Doc. 106-27 [hereinafter *United States - Honduras Investment Treaty*]; See also Gary G. Yerkey, *Senate Ratifies Bilateral Treaties on Investment With 10 Countries*, 17 INT'L TRADE REP. (BNA) 1630 (Oct. 26, 2000) (discussing U.S. Trade Representative Charlene Barshefsky's statement on the senate ratification of ten investment treaties, including the treaty with Honduras).

6. See generally UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS at 157; U.S. COMMERCIAL SERVICE, U.S. DEPT OF COMMERCE, 2002 COUNTRY COMMERCIAL GUIDE FOR HONDURAS, available at <http://www.usatrade.gov/Website/CCG.nsf/ShowCCG?OpenForm&Country=HONDURAS> (addressing investment conditions in Honduras). (This internet cite no longer exists in the listed location)

7. See generally Barbara Hagenbaugh, *China Draws More Foreign Money Than USA*, USA TODAY, Sept. 5, 2003, at 3B (stating that worldwide foreign direct investment in 2002 was U.S. \$651.2 billion and that foreign direct investment in the United States fell to U.S. \$30 billion in 2002 from a high of U.S. \$314 billion in 2000); Michael Youssef, *Direct Investment Positions in 2001*, INT'L ECON. REV. 17 (U.S. Int'l Trade Comm'n ed. USCIT Publication 3612) (discussing the flow of direct investment into and out of the United States in 2001).

8. See BUREAU OF ECON. AND BUS. AFFAIRS, U.S. DEPT OF STATE, U.S. BILATERAL INVESTMENT TREATY PROGRAM, (July 1, 2003) [hereinafter U.S. BIT PROGRAM] (addressing the objectives of the United States in negotiating investment treaties).

9. See Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries* 24 INT'L LAW 665 (1990).

10. See LOUIS HENKIN, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS, 764, 1446 (3rd ed. 1993); see also Brian M. McKell, *Protecting the Balance Sheet Against Political Risk*, 32 INT'L L. NEWS 1 (Summer 2003) (discussing methods of protecting foreign investment against non-economic, political risks).

11. See SORNARAJAH, *supra* note 2, at 225; See also Teresa McGhie, *Bilateral and*

the United States that the American Treaties of Friendship, Commerce and Navigation (FCN),<sup>12</sup> the predecessors to bilateral investment treaties, inadequately protect the overseas investments of Americans.<sup>13</sup>

Treaties of Friendship, Commerce and Navigation originated<sup>14</sup> in an era where international commercial activity principally involved merchants trading goods.<sup>15</sup> Contemporary international commercial activity involves the physical establishment of operations beyond the borders of the investor's home state. The increasing flow of international direct investment, the increasing complexity of international economic relations between states and investors, and the expansion of BIT's to encompass dispute settlement between host states and investors<sup>16</sup> resulted in investment treaties being drafted with greater detail, the interpretation of BIT's from a more legalistic perspective and the resolution of investment disputes in a more judicial rather than diplomatic manner.

The treaty between Honduras and the United States, the fourth BIT between the United States and a Central or South American country,<sup>17</sup> represents a BIT crafted with greater emphasis on dispute resolution.<sup>18</sup> Expropriation, of foremost concern of past treaty negotiators,<sup>19</sup> is now relegated to a lesser role as inves-

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*Multilateral Investment Treaties*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 107 (Daniel D. Bradlow & Alfred Escher eds., 1999); U.N. ECONOMIC COMMISSION ON LATIN AMERICA AND THE CARIBBEAN, FOREIGN INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN 1998 REPORT, U.N. Doc.LC/G.2042-P, U.N. Sales No. E.98.II.G.14 (1998).

12. See generally Fritz Munich, *Treaties of Friendship, Commerce and Navigation*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 484, (Rudolf Bernhardt ed., 1984) (discussing the Treaties of Friendship, Commerce and Navigation).

13. See SORNARAJAH, *supra* note 2, at 229.

14. See PAUL E. COMEAUX & N. STEPHEN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 104 (1997) (The first treaty of Friendship, Commerce and Navigation entered into by the United States with France was negotiated by Benjamin Franklin, Arthur Lee and Silas Deane shortly after the signing of the Declaration of Independence.); See also Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 624-25 (1993).

15. See SORNARAJAH, *supra* note 2, at 229.

16. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11.

17. See President's Message to the Senate Transmitting the Honduras - United States Bilateral Investment Treaty With Documentation, 36 WEEKLY COMP. PRES. DOC. 1199 (May 23, 2000) [hereinafter President's Message to the Senate].

18. See United States - Honduras Investment Treaty, *supra* note 5, arts. IX-X; *infra* Consultation and Dispute Resolution.

19. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11.

tor-state dispute resolution rises appreciably in importance.<sup>20</sup> The significance placed on dispute resolution provisions in contemporary BITs and the increasing recourse by investors to international arbitration<sup>21</sup> enables investors to direct and control investor-state disagreements. The resolution of investor-state investment differences will, however, continue to remain difficult. While recent BIT negotiations, including those between the United States and Honduras, have committed greater resources to the dispute settlement features of investment treaties, numerous other aspects of the treaties remain vague and ambiguous.

The intended or unintended ambiguities in the United States - Honduras bilateral investment treaty are the focus of this article. The treaty will be analyzed from the perspective of an investor or a state either contemplating or engaged in dispute resolution. The purpose of highlighting ambiguities in the agreement is to provide investors and states engaged in dispute negotiations or formal dispute resolution with a thorough understanding of their positions. A secondary aim is to enable the negotiators of future investment agreements to draft treaties in more precise terms.

## THE TREATY

### *Overview*

The United States - Honduras investment treaty closely parallels the 1994 United States prototype investment treaty.<sup>22</sup> It consists of a title, a preamble,<sup>23</sup> sixteen articles, an annex and a protocol. The title and the preamble provide an understanding of the goals and objectives of the treaty, but are not, by the express

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20. See International Centre for the Settlement of Investment Disputes Deputy Secretary-General Antonio Parra, Presentation to the International Dispute Resolution Committee, Section of International Law and Practice, American Bar Association (June 24, 2002) (stating that the Centre receives one to two new cases each month and that "not very long ago this was the annual rate").

21. See *id.*

22. See generally 1994 Prototype Treaty, Treaty Between the Government of the United States of America and the Government of the [Country] Concerning the Encouragement and Reciprocal Protection of Investment, revised Apr. 1998 (available from the Office of the U.S. Trade Representative, Office of Services, Investments and Intellectual Property Rights); TRADE UNIT, ORGANIZATION OF AMERICAN STATES, *Investment Agreements in the Western Hemisphere: A Compendium* (Oct. 1999), available at <http://www.sice.oas/bites/asp> (providing a study prepared for the Free Trade Areas of the Americas, Working Group on Investments, undertaken by the Trade Unit of the Organization of American States).

23. See *infra* Preamble.

indication of the Parties, part of the treaty.<sup>24</sup> The substantive law of the agreement is found in the articles<sup>25</sup> and the Annex. The Protocol clarifies the intentions of the Parties with respect to specific aspects of the treaty.<sup>26</sup>

Article I provides definitions for technical words and phrases employed in the other articles,<sup>27</sup> including an extensive definition of "investment."<sup>28</sup> Articles II<sup>29</sup> and XI<sup>30</sup> set the standards of treatment to be accorded investors and investments from the earliest stage of establishing an investment through its ultimate disposition. Article II also provides for a treaty Annex through which Honduras and the United States may make exceptions to their Article II treatment obligations.<sup>31</sup>

Articles III and IV address expropriation<sup>32</sup> and the obligations of the host state for investment losses caused by war or other civil disturbances.<sup>33</sup> Article V concerns financial transfers relating to investments, including the repatriation of profits.<sup>34</sup> Article VI prohibits the Parties from mandating or enforcing specific conditions, such as export requirements, as prerequisites for undertaking or operating an investment.<sup>35</sup> The entitlement of investors or their representatives to enter and remain in the territories of Honduras and the United States is set forth in Article VII.<sup>36</sup>

The resolution of treaty differences between the United States and Honduras, as well as the methodology for resolving investment disputes between an investor and a host state, are provided for in Articles VIII through X.<sup>37</sup> These articles address the obligation of the states to engage in state-to-state consultation<sup>38</sup> and, if necessary, binding arbitration.<sup>39</sup>

Article XII reserves to Honduras and the United States the

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24. See United States - Honduras Investment Treaty, *supra* note 5, Preamble.

25. See *infra* Scope of Application.

26. MADELINE ALBRIGHT, DEP'T OF STATE, LETTER OF SUBMITTAL, May 1, 2000, S. Treaty Doc. 106-27, at v (2000) [hereinafter Albright].

27. See United States - Honduras Investment Treaty, *supra* note 5, art. I.

28. See *id.* art. I(d).

29. See *id.* art. II.

30. See *id.* art. XI.

31. See *id.* art. II(2)(a) and Annex.

32. See *id.* art. III.

33. See *id.* art. IV.

34. See *id.* art. V.

35. See *id.* art. VI.

36. See *id.* art. VII.

37. See *id.* arts. VIII - X.

38. See *id.* art. VIII.

39. See *id.* arts. IX and X.

right to withhold the benefits of the treaty from certain investors when nationals of a third country own or control the investment.<sup>40</sup> In Article XIII, the treaty establishes that it does not apply to matters of taxation, with limited exceptions.<sup>41</sup> Article XIV entitles Honduras and the United States to take action necessary to comply with their international obligations concerning peace and security, as well as those actions essential to maintain their national security.<sup>42</sup> Additionally, this article permits the Parties to prescribe formalities in connection with covered investments, provided the formalities do not impair any right granted in the treaty.<sup>43</sup>

Article XV addresses the extension of treaty obligations to the political subdivisions of the Parties<sup>44</sup> and to state enterprises.<sup>45</sup> The duration of the agreement and its application to investments in existence at the time the treaty became effective and those subsequently established or acquired is set forth in Article XVI.<sup>46</sup>

The Annex and the Protocol are "integral" parts of the treaty, but are not found within the articles in the main body of the BIT.<sup>47</sup> The Annex sets forth those sectors of the economies and activities of the United States and Honduras that the Parties have agreed that they may exempt from the Article II obligation of extending national treatment, and national and most favored nation treatment.<sup>48</sup> The Protocol confirms the mutual understanding of the Parties regarding specific aspects of the treaty.<sup>49</sup>

### *Preamble*

The Preamble to the United States – Honduras treaty follows

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40. *See id.* art. XII.

41. *See id.* art. XIII.

42. *See id.* art. XIV(1) and Protocol paras. (3) and (4) (confirming the understanding of the Parties with respect to the meaning of Article XIV(1)).

43. *See id.* art. XIV(2).

44. *See id.* art. XV(1)(a) and (b).

45. *See id.* art. XV(2).

46. *See id.* art. XVI.

47. *Id.* art. XVI(4).

48. *See id.* Annex.

49. *See id.* Protocol; Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L. J. 255, 258 (1994); *See generally* VIENNA CONVENTION ON THE LAW OF INTERNATIONAL TREATIES, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31 (4) [hereinafter Vienna Convention] (stating that special meaning shall be given to terms when the parties to treaties so intended); *See also* EDMUND JAN OSMANCIK, *THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS* 999 (2nd ed. 1990) (a more readily available version of the Convention).

the title and precedes the articles.<sup>50</sup> It consists of five statements that outline the object and purpose of the Parties.<sup>51</sup> The treaty does not expressly state the purpose of the Preamble. The concluding phrase of the Preamble that the Parties "Have agreed as follows:" immediately precedes the articles of the treaty, confirming that it is not part of the substantive body of legal principles that constitute the treaty.<sup>52</sup> This determination is supported by a reading of the Annex and the Protocol that are stated to "form. . . integral part[s]" of the treaty.<sup>53</sup> A statement in the treaty concerning the intent of the Parties for including the Preamble and the purposes of the statements in the Preamble would have eliminated uncertainty concerning its significance.

Although the Preamble is not part of the substantive aspect of the agreement, its inclusion and placement in the final document establishes that the Parties considered it relevant to achieving the goals sought in the BIT. The articles, Annex and Protocol should be understood and interpreted with reference to the prefatory statements in the Preamble.<sup>54</sup>

The Preamble commences with the statement that the United States and Honduras enter into the treaty "[d]esiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party."<sup>55</sup> It concludes by stating that the Parties, "[h]aving resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment;. . . [h]ave agreed as follows:. . ."<sup>56</sup> Since the precise purpose of the Preamble is left to interpretation, an arbitral panel could conclude that the capital exporting state has an affirmative duty to "promote economic cooperation" by "encouraging" foreign investment.<sup>57</sup> A reasonable

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50. See *id.* United States - Honduras Investment Treaty, *supra* note 5, Preamble; See generally U. N. CTR. ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 at 14-15, (1988) [hereinafter U.N. Ctr. on Transnational Corporations, Bilateral Investment Treaties].

51. See generally Albright, *supra* note 26; SORNARAJAH, *supra* note 2, at 237; Bilateral Investment Treaties 1959-1991, *supra* note 1, at 8; Vienna Convention, *supra* note 49, art. 31.

52. See United States - Honduras Investment Treaty, *supra* note 5, Preamble.

53. *Id.* art. XVI(4).

54. See SORNARAJAH, *supra* note 2, at 237; Siqueiros, *supra* note 49, at 258-59; See generally IIMAR TAMMELO, TREATY INTERPRETATION AND PRACTICAL REASON—TOWARDS A GENERAL THEORY OF LEGAL INTERPRETATION 11, 12 (1967) (stating that treaty interpretation requires "consideration of the whole context of the treaty").

55. United States - Honduras Investment Treaty, *supra* note 5, Preamble.

56. *Id.*

57. *Id.*



interpretation suggests that neither the United States nor Honduras should impede the flow of investment into or out of their respective countries.<sup>58</sup> During times of discord between the Parties arguments alleging a breach of the treaty will likely rely on the language of the Preamble.<sup>59</sup>

The second goal announced in the Preamble recognizes "that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties."<sup>60</sup> This goal reflects the view that private foreign investment is a component of economic development<sup>61</sup> and that intergovernmental agreements establishing standards of treatment and protection for foreign investment encourage the flow of direct investment.<sup>62</sup> Investment protections extended by international agreement provide more security to an investor than the Parties' domestic laws, which are subject to judicial interpretation and unilateral modification.<sup>63</sup>

The third aim recognized in the preamble is that "a stable framework for investment will maximize effective utilization of economic resources and improve living standards."<sup>64</sup> This pronouncement fosters the belief that the treaty will prove mutually beneficial to the economic development of both Honduras and the United States.<sup>65</sup> It presupposes that the private sector, as opposed to government-directed decision-making results in the more efficient use of limited resources.

The fourth objective announced in the Preamble is the recognition that "the development of economic and business ties can promote respect for internationally recognized worker rights."<sup>66</sup> The goal is not the direct promotion of American or Honduran labor rights, but rather the indication of a belief that economic development "can promote respect" for "internationally recognized

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58. See SORNARAJAH, *supra* note 2, at 239.

59. See *id.* at 238-39.

60. United States - Honduras Investment Treaty, *supra* note 5, Preamble.

61. See Remarks at the Welcoming Ceremony at the Central American Summit in San Jose, Costa Rica, 33 WKLY. COMP. PRES. DOC. 673, 684 (May 8, 1997); Alejandro A. Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 ICSID REVIEW- FOREIGN INV. L. J. 86, 87 (1996).

62. Cf. SORNARAJAH, *supra* note 2, at 236 (stating that developing countries believe that investor confidence in the legal structure will attract foreign direct investment, but the ability to attract FDI depends more on the political and economic climate).

63. See Bilateral Investment Treaties 1959-1991, *supra* note 1, preface iii.

64. United States - Honduras Investment Treaty, *supra* note 5, Preamble.

65. See SORNARAJAH, *supra* note 2, at 239.

66. United States - Honduras Investment Treaty, *supra* note 5, Preamble.

worker rights.”<sup>67</sup>

The final purpose of the Preamble expresses the conviction of the Parties that the preceding “objectives can be achieved without relaxing health, safety and environmental measures of general application.”<sup>68</sup> This element of the Preamble differs from the recognition of worker rights in a significant regard. The focus on worker rights is from the international perspective. The attention directed to health, safety and environmental measures only concerns those of “general application,” a phrase that is not defined.<sup>69</sup> The dual purposes of this objective is to dissuade the Parties from reducing health, safety and environmental standards to obtain investment, while at the same time recognizing the sovereignty of the United States and Honduras in matters of public health, safety and the environment.

### *Scope of Application*

#### Scope of Application: Investment

The United States – Honduras investment agreement applies to “investment[s]” as defined in Article I (d) of the treaty.<sup>70</sup> One of the initial ambiguities in the treaty is that Article I (d) defines “investment” to mean “every kind of investment.”<sup>71</sup> The meaning of “investment” in the phrase “every kind of investment” is not, however, defined.<sup>72</sup> The objects, that is the “investment,” to which the United States and Honduras afford specific rights and protections can only be determined by interpreting Article I (d).

An examination of Article I (d) results in the conclusion that

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67. *Id.* See generally Kimberly Ann Elliott, *International Labor Standards and Trade: What Should be Done?*, in LAUNCHING NEW GLOBAL TRADE TALKS, AN ACTION AGENDA, at 165, 167 (Inst. Int'l Econ., Jeffery J. Schott ed. 1998) (The International Labor Organization core standards are: freedom of association; collective bargaining; freedom from forced labor; equal remuneration; nondiscrimination in employment; and a minimum age for work. These principles are also endorsed by Organization for Economic Co-operation and Development Trade Union Advisory Committee and the International Confederation of Free Trade Unions.).

68. United States – Honduras Investment Treaty, *supra* note 5, Preamble.

69. *Id.*

70. *Id.* art. I(d); See generally McGhie, *supra* note 11, at 110 (discussing treaty definitions of “investment” and “investor”); MARYSE ROBERT, ORGANIZATION OF AMERICAN STATES, MULTILATERAL AND REGIONAL INVESTMENT RULES: WHAT COMES NEXT? 3-5 (2001) (analyzing the scope of investment agreements in the Western Hemisphere).

71. United States – Honduras Investment Treaty, *supra* note 5, art. I(d); see generally U.N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 16-18.

72. See United States – Honduras Investment Treaty, *supra* note 5, art. I(d).

the term "investment" should be broadly construed.<sup>73</sup> The definition states that "investment" includes "every kind of investment"<sup>74</sup> and that "every kind of investment. . . includes investment consisting or taking the form of" any or all of six categories of juridical entities, legal rights and assets.<sup>75</sup> The definition was drafted in terms that would encompass new, yet undeveloped forms of investment.<sup>76</sup>

The types of juridical entities, legal rights and assets that may constitute an investment are broad and illustrative.<sup>77</sup> The first is a "company."<sup>78</sup> A "company", comprehensively defined in Article I (a), includes "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled."<sup>79</sup> The term "company" is not limited to incorporated juridical entities, but "includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or other organization."<sup>80</sup> "Shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company" form the second type of investments.<sup>81</sup>

Contractual rights, tangible and intangible property, and rights acquired pursuant to law comprise the third, fourth and sixth types of investments.<sup>82</sup> Contractual rights are expansively defined to include rights "such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts."<sup>83</sup> Tangible and intangible property includes "real property" and "rights, such as leases, mortgages, liens and pledges."<sup>84</sup> "Rights conferred pursuant to law," the sixth form of investment, embraces rights "such as licenses and permits."<sup>85</sup>

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73. See ROBERT, *supra* note 70, at 4; Bilateral Investment Treaties 1959-1991, *supra* note 1, at 8; See also COMEAUX, *supra* note 14, at 105 (stating that the United States prototype treaty language is broad).

74. United States - Honduras Investment Treaty, *supra* note 5, art. I(d).

75. *Id.*

76. See SORNARAJAH, *supra* note 2, at 241; Bilateral Investment Treaties 1959-1991, *supra* note 1, at 8.

77. See United States - Honduras Investment Treaty, *supra* note 5, art. I(d).

78. *Id.* art. I(d)(i).

79. *Id.* art. I(a).

80. *Id.*

81. *Id.* art. I(d)(ii).

82. See *id.* art. I(d)(iii), (iv) and (vi).

83. See *id.* art. I(d)(iii).

84. *Id.* art. I(d)(iv).

85. *Id.* art. I(d)(vi).

The fifth and one of the most important forms of investment protected by the United States – Honduras BIT is “intellectual property.”<sup>86</sup> The BIT lacks a specific definition of intellectual property, but provides a list of those rights that the Parties deemed to be intellectual property rights. Intellectual property includes “copyrights and related rights, patents, rights in plant varieties, industrial designs, rights in semiconductor layout designs, trade secrets, including know-how and confidential business information, trade and service marks, and trade names.”<sup>87</sup>

### Scope of Application: Parameters on Investment

Although “investment” is broadly defined in Article I (d), the treaty includes specific limitations on investments and restrictions on to whom those benefits may flow.<sup>88</sup> The principal restrictions focus on the nationality of natural-person investors, the place of organization of a juridical person investment, territoriality constraints and the preclusion of treaty benefits under specifically delineated, policy-based circumstances. The restrictions mandate that the investment be one of a “national or company” of either the United States or Honduras and that it be “owned or controlled directly or indirectly by that national or company.”<sup>89</sup> The investment must be in the territory of the other Party<sup>90</sup> and the extension of treaty benefits may not inure to a third country with whom a Party does not maintain normal economic relations or to a juridical entity essentially conducting business in the territory of one of the Parties in name only.<sup>91</sup>

### Nationals

A “national” of a Party is a “natural person” according to the “applicable law” of the respective Party.<sup>92</sup> The term “applicable law” is not defined nor is there customary international law that addresses this issue.<sup>93</sup> “Applicable law” should be understood to

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86. *Id.* art. I(d)(v).

87. *Id.*

88. See generally McGhie, *supra* note 11, at 111 (discussing limitations on the term “investment”).

89. United States – Honduras Investment Treaty, *supra* note 5, art. I(d).

90. See *id.* art. I(e).

91. See *id.* art. XII(a) and (b).

92. *Id.* art. I(c); see generally U. N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 22-23.

93. See RUDOLF DOLZER & MARGRETE STEVENS, INT’L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, *BILATERAL INVESTMENT TREATIES* 35 (1995)

mean the respective domestic laws of Honduras and the United States.<sup>94</sup>

The treaty does not address two issues concerning who should be considered a "national." Those issues include the impact of a change of nationality by an individual subsequent to the establishment or acquisition of an investment<sup>95</sup> and by a natural person of one Party who is a long-term resident of the other Party in whose territory the investment exists.<sup>96</sup>

These issues may be resolved by resorting to the Preamble. The Preamble provides that one of the purposes of the treaty is the promotion of greater economic integration with respect to investment "by nationals. . . of one Party in the territory of the other Party."<sup>97</sup> Considering this purpose, permitting a natural person to change nationality with the intent of altering entitlement to treaty benefits would defeat the purpose of fostering economic cooperation through investment in the territory of the other Party. Extending the privileges of the BIT to a person who is a long-term resident of the host state, but a national of the other Party, would also have this effect. The treaty does, however, state that the "applicable law" of the Parties resolves questions of nationality, indicating that the intent of natural-person investors in asserting a particular nationality is significant.<sup>98</sup>

### *Juridical Entities*

A "company," as previously stated, includes a broad array of juridical entities constituted or organized "under applicable law."<sup>99</sup> The term includes "any entity. . . whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization."<sup>100</sup> The treaty definition, by referencing "any entity" and concluding with the phrase "or other organization," encompasses a multitude of legal persons currently known or that may be developed in the future.

The United States - Honduras BIT employs a place of incorporation test and defines a "company of a Party" as a juridical

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94. See Escobar, *supra* note 61, at 88.

95. See DOLZER & STEVENS, *supra* note 93, at 36.

96. See Escobar, *supra* note 61, at 88.

97. United States - Honduras Investment Treaty, *supra* note 5, Preamble.

98. *Id.* art. I(c).

99. *Id.* art. I(a).

100. *Id.*

entity "constituted or organized under the laws of that Party."<sup>101</sup> Ambiguity in the BIT exists because juridical entities in the United States are constituted or organized under the laws of sub-federal authorities, rather than federal law. However, sub-federal authorities are not "Parties" to the treaty.

The definition of "company of a Party"<sup>102</sup> should be interpreted to include those juridical entities constituted or organized under the laws of the sub-federal authorities of the United States or Honduras. A "company," in accordance with the definition in Article I (a), is any entity constituted or organized under "applicable law."<sup>103</sup> Applicable law in Honduras and the United States should mean the laws of the jurisdictions providing for the establishment and governance of juridical entities. A restrictive interpretation of Article I (b) would essentially render the agreement void.<sup>104</sup>

### *Territoriality Requirement*

The territoriality requirement of an investment is set forth in Article I (e). Article I (e) defines an investment to which the benefits of the treaty may flow as a "covered investment."<sup>105</sup> A "covered investment" is further defined as "an investment of a national or company of a Party in the territory of the other Party."<sup>106</sup> The treaty does not, however, delineate the "territory" of either the United States or Honduras. The territories of both countries should be those areas over which the Parties exercised sovereign authority on July 1, 1995, the date of the signing of the treaty. Providing investments in subsequently acquired territory with the benefits of the treaty should not be assumed. Territorial additions by either Party could result in circumstances not contemplated during the negotiations.<sup>107</sup>

### *Denial of Treaty Benefits*

Investments that meet the nationality, juridical entity and territoriality requirements may still be denied the benefits of the

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101. *Id.* art. I(b); See ROBERT, *supra* note 70, at 4.

102. United States – Honduras Investment Treaty, *supra* note 5, art. I(b).

103. *Id.* art. I(a).

104. See generally Vienna Convention, *supra* note 49, art. 31(1) (treaties should be interpreted in good faith and in light of their object and purpose).

105. United States – Honduras Investment Treaty, *supra* note 5, art. I(e).

106. *Id.*; see U.N. Ctr. on Transnational Corporations, Bilateral Investment Treaties, *supra* note 50, at 26.

107. See generally Vienna Convention, *supra* note 49, art. 62 (addressing unforeseen, fundamental changes in circumstances).

treaty under circumstances set forth in Article XII.<sup>108</sup> Article XII “reserves” to the United States and Honduras the right to deny “a company of the other Party the benefits of this treaty if nationals of a third country own or control the company” and one of two other circumstances exist.<sup>109</sup> The initial situation involves the denial of treaty benefits to an investment owned or controlled by nationals of a country that the United States or Honduras, whichever state is denying the benefits, “does not maintain normal economic relations.”<sup>110</sup> Article XII (a) respects the rights of the Parties to choose those third states with which they will engage economically. The United States, in accordance with this provision, may not be compelled to extend treaty benefits to an entity that meets the definition of a “company of a Party,” but is owned or controlled, for instance, by nationals of North Korea, Burma (Myanmar) or Cuba.<sup>111</sup> Honduras, likewise, retains the right, based on the policy considerations enunciated in Article XII (a), to limit those juridical entities that may enjoy the privileges of the treaty.

The second circumstance ensures the Parties the right to withhold treaty benefits from any entity that “has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.”<sup>112</sup> This reservation, set forth in Article XII (b), is drafted to preserve the flow of treaty benefits to the Parties. Whether the business activity in issue is “substantial” is a matter resolved on a case-by-case basis. Business activity should be considered “substantial” if it supports the economic development of the host Party<sup>113</sup> and promotes the underlying purpose of precluding name-only entities with few ties to the state of organization from enjoying the benefits of the treaty. The recourse of an entity denied treaty benefits, because it lacks substantial business activity in the state under whose laws it is con-

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108. See DOLZER & STEVENS, *supra* note 93, at 42.

109. United States – Honduras Investment Treaty, *supra* note 5, art. XII; see U. N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 25.

110. United States – Honduras Investment Treaty, *supra* note 5, art. XII(a); See ROBERT, *supra* note 70, at 5.

111. See generally OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, SANCTIONS PROGRAM AND COUNTRY SUMMARIES, at [www.treas.gov/offices/enforcement/ofac/sanctions/index.html](http://www.treas.gov/offices/enforcement/ofac/sanctions/index.html).

112. United States – Honduras Investment Treaty, *supra* note 5, art. XII(b); See ROBERT, *supra* note 70, at 5.

113. See United States – Honduras Investment Treaty, *supra* note 5, Preamble para. 2.

stituted, is to seek the benefits of a BIT negotiated with the state where it undertakes substantial business activity, if a BIT with that state exists.

### Scope of Application: Time

The temporal application of the United States – Honduras BIT is addressed in Article XVI. Article XVI addresses when the agreement becomes effective, establishes a minimum duration, the method of its termination, and the effect of treaty terms and conditions subsequent to termination of the agreement.

### *Entry into Force and Duration*

The treaty entered into force pursuant to Article XVI (1) on July 11, 2001, thirty days after the Parties exchanged instruments of ratification.<sup>114</sup> It remains in force for a minimum of ten years and could conceivably continue to be *lex specialis* between the two countries indefinitely.<sup>115</sup> The treaty may be terminated in accordance with Article XVI (2) only after its initial ten-year period and then only after the Party electing to end the agreement provides the other with written notice. If neither Party chooses to conclude the agreement at the end of the initial ten-year period, it may be terminated at any subsequent time provided the terminating Party gives the other Party “one year’s written notice.”<sup>116</sup>

An issue of concern for investors is the effect of premature termination of the agreement.<sup>117</sup> A subsequent government of a Party that does not share the same political ideology or economic policy of the ratifying government might assert that it is not bound by the treaty. The only possible assertion in this situation, which would likely prove unsuccessful in the context of the United States – Honduras BIT, would be an unforeseen, fundamental change of circumstances pursuant to Article 62 of the Vienna Convention on the Law of International Treaties (Vienna Convention).<sup>118</sup> Circumstances sufficient to justify termination of the agreement contrary to Article XVI would entail a “change that radically transforms the obligation under the treaty.”<sup>119</sup> A change

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114. See *id.* at art. XVI(1); See generally DOLZER & STEVENS, *supra* note 93, at 44 (discussing the entry into force and duration of BITs).

115. See United States – Honduras Investment Treaty, *supra* note 5, art. XVI(1); See generally COMEAUX, *supra* note 14, at 109.

116. United States – Honduras Investment Treaty, *supra* note 5, art. XVI(2).

117. See SORNARAJAH, *supra* note 2, at 274.

118. See Vienna Convention, *supra* note 49, art. 62.

119. *Id.*



of government or economic policy, even if through revolution, does not constitute the fundamental change contemplated by the Vienna Convention.<sup>120</sup> This argument would be more persuasive if the governments of Honduras and the United States were not representative governments.<sup>121</sup>

### *Application of the Treaty to Existing and Subsequent Investments*

Article XVI (1) provides that the treaty applies to "covered investments. . .existing at the time of entry into force," as well as, those that are established or acquired after the inception of the agreement.<sup>122</sup> This provision, representative of a practice in many Latin American BIT's,<sup>123</sup> extends the protections of the agreement to those investments that predate the treaty, as well as, those initiated or acquired after its effective date.<sup>124</sup> Absent the provision expressly providing coverage for prior investments, the only protection available for those investments would be the limited protections afforded under customary international law.

### *Effect of the Treaty After Termination*

Although the BIT has specific provisions addressing its termination, some obligations survive termination. Article XVI (3) provides that all of the terms and conditions of the agreement, except those pertaining to the establishment or acquisition of an investment, continue in force for ten years after the conclusion of the treaty.<sup>125</sup>

Ambiguity in Article XVI (3) and (4) establishes a basis for maintaining a right to eleven years of treaty protection. Article XVI (3) provides that the treaty protections continue for ten years after its termination.<sup>126</sup> Article XVI (2) states that the agreement

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120. See SORNARAJAH, *supra* note 2, at 274-275.

121. See *id.*

122. United States - Honduras Investment Treaty, *supra* note 5, art. XVI (1); See generally COMEAUX, *supra* note 14, at 109; ROBERT, *supra* note 70, at 5 (stating that most investment agreements in the Western Hemisphere afford protection for investments made before and after the entry into force of the particular treaty).

123. See ESCOBAR, *supra* note 61, at 88.

124. See ROBERT, *supra* note 70, at 50; Siqueiros, *supra* note 49, at 267; see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, *supra* note 50, at 21-22.

125. See United States - Honduras Investment Treaty, *supra* note 5, art. XVI(3); see generally U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, *supra* note 50, at 28.

126. See United States - Honduras Investment Treaty, *supra* note 5, art. XVI(3).

terminates at the end of the initial ten year period or anytime thereafter on giving one year's written notice.<sup>127</sup> If the treaty does not terminate until one of the Parties gives one year's written notice and the benefits continue for ten years subsequent to its termination, an investor may claim entitlement to eleven years of protection. Article XVI should be interpreted as terminating the treaty on the date of written notification, thereafter extending only ten years of protection. This interpretation is not in explicit accord with the language of the agreement but it is in concurrence with the presumed intent of the Parties.

### *Admission*

#### Establishment and Acquisition

Customary international law, as reflected in the Guidelines on the Treatment of Foreign Direct Investment developed by the World Bank Group ("World Bank Guidelines")<sup>128</sup> and the United Nations Charter of Economic Rights and Duties of States,<sup>129</sup> is well-settled concerning the obligation of states to permit foreign investment in their territories.<sup>130</sup> The decision to admit foreign investment is a matter of governmental policy and the discretion to exercise that policy rests exclusively with the state concerned.<sup>131</sup> The execution of an investment treaty is an assertion of sovereign discretion whereby a state relinquishes its absolute right to control the entry of foreign investment.<sup>132</sup>

In many investment treaties, admission clauses provide that the entry of foreign investment "shall" be permitted.<sup>133</sup> The entitlement to enter the territory of the host state for the purpose of establishing or acquiring foreign direct investment is, however,

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127. See *id.* at art. XVI(2).

128. See THE WORLD BANK GROUP, *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REV. - FOREIGN INV. L. J., 297, 299 (1992) [hereinafter *World Bank Guidelines*].

129. See CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES G.A. Res. 3281, U.N. GAOR, 29th Sess., U.N. doc. A/RES/3281 (XXIX) (1975) [hereinafter *U.N. Charter of Economic Rights*].

130. See Ibrahim F.I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 9 ICSID Review- Foreign Inv. L. J. 47, 59 (1994); A.A.Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 10 ICSID REV.-FOREIGN INV. L.J. 181 (1995).

131. See Shihata, *supra* note 130, at 47; Adeoye Akinsanya, *International Protection of Direct Foreign Investment in the Third World*, INT'L & COMP L. Q. 58, 59 (1987); McGhie, *supra* note 11, at 112.

132. See *Bilateral Investment Treaties 1959-1991*, *supra* note 1, at 9.

133. See Shihata, *supra* note 130, at 55.

generally qualified by language that only authorizes admission in accordance with the host state's domestic laws and regulations.<sup>134</sup> Treaty provisions that provide for the admission of foreign investment subject to the host state's laws and regulations, which are subject to domestic interpretation and amendment, in practice significantly restrict the ability of a foreign investor to establish or acquire investment.<sup>135</sup>

The practice of the United States, continued in the United States - Honduras investment treaty, is considerably different.<sup>136</sup> The United States - Honduras BIT does not have a separate article or clause addressing the admission of foreign investment.<sup>137</sup> The approach taken by the United States, designed to reduce the actions of foreign governments that impede or distort the flow of investment, is a system based on national treatment and most favored nation principles.<sup>138</sup> The aim of United States BIT practice is to enable investment decisions to respond to market forces.<sup>139</sup>

Article II (1) of the United States - Honduras treaty establishes a liberal policy favoring the admission of investments of nationals and juridical entities of the other Party. The United States and Honduras agree to accord the establishment and acquisition of covered investments national treatment, most favored nation treat or the more favorable of national treatment and most favorable nation treatment.<sup>140</sup> National treatment is the treatment of foreign investment "no less favorable than [the Party] accords, in like situations, to investments in its territory of its own nationals or companies."<sup>141</sup> Most favored nation treatment involves a comparison of the treatment accorded investments made by nationals and juridical entities of the other Party with the treatment accorded by the host Party to investments in its territory by nationals and juridical entities of third countries.<sup>142</sup> The unavoidable ambiguity in the definition of national treatment and

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134. See *id.*; see also *Bilateral Investment Treaties 1959-1991*, *supra* note 1, at 8.

135. See Shihata, *supra* note 130, at 55; *Bilateral Investment Treaties 1959-1991*, *supra* note 1, at 8.

136. See DOLZER & STEVENS, *supra* note 93, at 50.

137. See *id.* at 56; Fatouros, *supra* note 130, at 195.

138. See McGhie, *supra* note 11, at 113.

139. See Shihata, *supra* note 130, at 55; Statement by the President, International Investment Policy, 19 WKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983) [hereinafter *Presidential Investment Policy Statement*].

140. See *United States - Honduras Investment Treaty*, *supra* note 5, art. II(1).

141. *Id.*

142. See *id.*

most favored nation treatment is the comparison of "like situations."<sup>143</sup>

The dictates of Article II(2)(a) and the Annex curtail the liberal admission policy set forth in Article II(1). Article II (2)(a) provides that Honduras and the United States may "adopt or maintain" exceptions to their national treatment, most favored nation treatment or their national and most favored nation treatment obligations "in the sectors or with respect to the matters specified in the Annex."<sup>144</sup> Article II (2)(a) afforded both Parties, at the time the treaty was negotiated, the right to make specific reservations that they determined to be in their national security interest or that were consistent with their economic goals.<sup>145</sup>

The system utilized in the United States – Honduras agreement is that of a "negative list" intended to foster transparency.<sup>146</sup> The Parties were obligated to stipulate in the Annex those sectors or matters for which they may withhold the agreement's open admission policy.<sup>147</sup> Accepting the premise that the treaty's policy is one of open admission, exceptions should not be implied and those declared in the Annex should be narrowly construed, in accord with the intent and purpose of the exception privilege of Article II.<sup>148</sup>

### Performance Requirements

Performance requirements are obligations imposed by host states on investors, frequently in conjunction with an incentive, that mandate the investing national or entity operate the investment in a particular manner.<sup>149</sup> These requirements may be a prerequisite to establishing or acquiring an investment or an obligation imposed to continue its operation. Performance requirements can be used to discriminate against foreign investors if, for example, they compel a minimum amount of production be exported or that the investor purchase a minimum amount of

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143. *Id.*

144. *Id.* art. II(2)(a); see *infra* Sector and Subject Specific Exceptions to National Treatment and Most Favored Nation Treatment Obligations.

145. See Shihata, *supra* note 130, at 68.

146. See *id.* at 58; FOREIGN INV. ADVISORY SERV., INT'L FIN. CORP., FOREIGN DIRECT INVESTMENT, LESSONS OF EXPERIENCE NUMBER 5, at 30 (1997) [hereinafter FOREIGN INVESTMENT ADVISORY SERVICE].

147. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 8.

148. See Vienna Convention, *supra* note 49, art. 31(1).

149. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 10; see generally ROBERT, *supra* note 70, at 7-8 (addressing performance requirements in BIT's and trade agreements in countries of the Western Hemisphere).

locally produced goods or services.<sup>150</sup>

United States BIT practice, contrary to most investment treaty practice, expressly addresses performance requirements.<sup>151</sup> Article VI of the United States – Honduras treaty provides that neither country “shall mandate or enforce” performance requirements as a prerequisite for the “establishment, acquisition, expansion, management, conduct or operation of a covered investment.”<sup>152</sup> Neither Party, pursuant to Article VI, may compel an investor to utilize host country products or services, limit imports, export a specific measure of products or services, limit sales within the host Party’s territory, transfer technology, production processes or other propriety knowledge or engage in research and development.<sup>153</sup> The prohibition against performance requirements extends to “any commitment or undertaking in connection with the receipt of a governmental permission or authorization,” however “conditions for the receipt or continued receipt of an advantage” are specifically authorized.<sup>154</sup> Arbitral tribunals relying on Article VI and the national treatment standard of Article II, should question conditions imposed subsequent to the entry of an investment.<sup>155</sup> The enactment of legislation that is facially neutral, but impacts domestic and foreign investment in different degrees is the concern of the foreign investor.

### *General Standards of Treatment*

Treatment standards in bilateral investment treaties enable the Parties to eliminate or reduce the uncertainty that exists in customary international law concerning the rights and privileges accorded to foreign investment within the territories of their respective BIT partners.<sup>156</sup> Treatment standards may be categorized into absolute standards and relative standards.<sup>157</sup> Absolute standards include fair and equitable treatment, full protection and security, and treatment according to the minimum standards

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150. See *Bilateral Investment Treaties 1959-1991*, *supra* note 1, at 10; see generally ROBERT, *supra* note 70, at 7-8.; DOLZER & STEVENS, *supra* note 93, at 79.

151. See Presidential Investment Policy Statement, *supra* note 139, at 1216; DOLZER & STEVENS, *supra* note 93, at 80.

152. United States – Honduras Investment Treaty, *supra* note 5, art. VI; see Patricia McKinstry Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 949 (1984).

153. See United States – Honduras Investment Treaty, *supra* note 5, art. VI(a) – (f).

154. *Id.* art. VI; See Shihata, *supra* note 130, at 59.

155. See SORNARAJAH, *supra* note 2, at 251.

156. See *id.* at 250.

157. See COMEAUX, *supra* note 14, at 105-06.

of international law.<sup>158</sup> The relative standards of treatment include national treatment and most favored nation treatment.<sup>159</sup>

The lack of an international consensus concerning the treatment that must be accorded foreign investment is reflected in the manner the treatment standards are set forth in BIT's.<sup>160</sup> Treatment standards are not uniform and the format of the standards in BIT's reflects the unique views of the contracting parties regarding the relationship between the different standards.<sup>161</sup>

The United States – Honduras BIT addresses the Parties' treatment obligations in a single article. Article II mandates that each Party accord covered investments national treatment, most favorable nation treatment, or national and most favored nation treatment "[w]ith respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments."<sup>162</sup> National treatment, as previously discussed, is the treatment of foreign investment no less favorable than a Party accords to investment in its territory by its own nationals or juridical entities.<sup>163</sup> Most favored nation treatment, also addressed earlier, is the treatment of covered foreign investments in a manner no less favorable than a Party accords to investments in its territory by nationals and entities of third countries.<sup>164</sup> National and most favored nation treatment extends to covered investments the more favorable of either national treatment or most favored nation treatment.<sup>165</sup>

Fair and equitable treatment, full protection and security, and treatment no less favorable than that required by international law are additional treatment standards set forth in the United States – Honduras agreement.<sup>166</sup> These principles, like national treatment, most favored nation treatment and the better of national and most favored nation treatment, while provided for

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158. *See id.*

159. *See id.*

160. *See* Escobar, *supra* note 61, at 89.

161. *See id.*

162. *See* United States – Honduras Investment Treaty, *supra* note 5, art. II(1).

163. *See id.*; *See generally* ROBERT, *supra* note 70, at 5 (discussing the concept of national treatment in countries of the Western Hemisphere).

164. *See* United States – Honduras Investment Treaty, *supra* note 5, art. II(1); *See generally* ROBERT, *supra* note 70, at 6-7 (discussing the concept of most favored nation treatment in countries of the Western Hemisphere).

165. *See* United States – Honduras Investment Treaty, *supra* note 5, art. II(1).

166. *See id.* art. II(3); *See generally* ROBERT, *supra* note 70, at (discussing treatment standards in countries of the Western Hemisphere).

in Article II, are set forth in a subsequent separate clause.<sup>167</sup> Unlike the obligations of national treatment, most favored nation treatment, and national and most favored nation treatment to which Honduras and the United States can adopt and maintain exceptions,<sup>168</sup> the Parties bound themselves "at all times" to accord fair and equitable treatment, full protection and security, and treatment no less favorable than customary international law mandates.<sup>169</sup> The relationship between the treatment standards in Article II (1) and those in paragraph (3) is not set forth in the language of the treaty. Using the interpretative rules set forth in the Vienna Convention suggests reading both paragraphs together and understanding the text in a manner that affords each meaning,<sup>170</sup> with the more favorable interpretation to the advantage of the investor.

The manner in which the United States – Honduras treaty was drafted indicates that the obligations of national treatment, most favored nation treatment, and national and most favored nation treatment apply to a specific, limited schedule of activities, namely "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments."<sup>171</sup> The obligation to accord fair and equitable treatment, full protection and security, and treatment no less favorable than mandated by international law are not limited by any treaty language and apply to all investment-related relationships between an investor and the host state.

### Fair and Equitable Treatment

The United States – Honduras BIT provides that the Parties shall at all times accord "fair and equitable treatment" to covered investments, but does not define the meaning of "fair and equitable treatment."<sup>172</sup> The phrase is both vague and subject to interpretation.<sup>173</sup> Although there is no international consensus of "fair and equitable" treatment, the purpose of the clause is to "provide a basic and general standard" that is detached from the host

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167. See United States – Honduras Investment Treaty, *supra* note 5, art. II(3).

168. See *id.* art. II(2).

169. See *id.*

170. See Vienna Convention *supra* note 49, art. 31.

171. United States – Honduras Investment Treaty, *supra* note 5, art. II(1).

172. See generally DOLZER & STEVENS, *supra* note 93, at 60; U. N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 30.

173. See SORNARAJAH, *supra* note 2, at 250-251; *Bilateral Investment Treaties 1959-1991*, *supra* note 1, at 9.

state's domestic laws.<sup>174</sup> Assessing what parties with different perspectives consider to be "fair and equitable" will be difficult, but this standard affords the treaty the flexibility to apply in a multitude of circumstances.

"Fair and equitable" treatment, as set forth in the treaty, is an independent standard of treatment.<sup>175</sup> The phrase "fair and equitable treatment" is separated from the phrase "full protection and security" by a conjunctive,<sup>176</sup> as is the third phrase of Article II (3)(a) that concludes "and shall in no case accord treatment less favorable than that required by international law."<sup>177</sup> The drafting of Article II (3)(a) indicates three different standards: fair and equitable treatment, full protection and security, and treatment not below that mandated by customary international law. This position is persuasive considering that the Parties agreed that they "shall in no case accord treatment" below the standard required by international law.<sup>178</sup> If the minimum standard is set in accordance with international law, any additional investment protection must grant covered investments greater sanctuary from adverse host state measures.<sup>179</sup>

The language of Article II (3)(a) may, conversely, be understood as only affording that treatment accorded by international law. The phrase "fair and equitable treatment and full protection and security", under this interpretation is merely an articulation of the minimum standard of treatment pursuant to international law. Some Latin American treaties provide that "fair and equitable treatment" shall be "in accordance with or in conformity with the rules and principles of international law",<sup>180</sup> indicating a belief that international law mandates fair and equitable treatment for foreign investments.

Fair and equitable treatment, as well as full protection and security, in the North American Free Trade Agreement (NAFTA),<sup>181</sup> is explicitly subsumed under the minimum standard

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174. DOLZER & STEVENS, *supra* note 93, at 58; see ROBERT, *supra* note 70, at 4.

175. See generally Shihata, *supra* note 130, at 56; Cf. ROBERT, *supra* note 70, at 4-5.

176. United States - Honduras Investment Treaty, *supra* note 5, art. II(3)(a).

177. *Id.*

178. *Id.*

179. See generally DOLZER & STEVENS, *supra* note 93, at 60; see also F.A. Mann, *British Treaties for the Protection and Promotion of Investment*, 1981 BRIT. Y.B. INT'L L. 244 (stating that "fair and equitable treatment" goes beyond the minimum standard of international law and should be understood and applied autonomously).

180. See Escobar, *supra* note 61, at 89.

181. See North American Free Trade Agreement, Dec. 8, 1993, Can.-Mex.-U.S., 107 Stat. 2057, reprinted in 32 I.L.M. 289 [hereinafter NAFTA].



of customary international law.<sup>182</sup> Article 1105(1) of the NAFTA provides that "[e] party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security."<sup>183</sup> The language in Chapter 11 of the NAFTA is, however, significantly different from the phraseology employed in the United States – Honduras BIT. More host state obligations emerge from a plain reading of the United States – Honduras agreement than from the NAFTA.

Whether Article II (3)(a) of the treaty is merely an elaboration of the minimum standards of treatment required by international law or affords greater investment protections is significant because of the rigors encountered to confirm the existence of a customary international legal standard.<sup>184</sup> Validating the existence of an international legal precept is arduous.<sup>185</sup> This exercise is avoided if it is concluded that the Parties to the treaty intended that protections greater than those available under international law were undertaken with the execution of the agreement.

### Full Protection and Security

The United States and Honduras agreed in Article II to accord, at all times, "full protection and security."<sup>186</sup> This obligation, similar to the obligation of fair and equitable treatment, lacks definition and exactitude.<sup>187</sup> Whether the obligation to accord "full protection and security" is an independent duty of the host state or simply part of the minimum standard of treatment subsumed by customary international law also remains unsettled.<sup>188</sup>

The duty of providing "full protection and security" extends from the Treaties of Friendship, Commerce and Navigation, treaties for which the focus was not foreign direct investment.<sup>189</sup> The FCN obligation of "full protection and security" is a general duty on the part of the host state to exercise "due diligence" in the pro-

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182. See Free Trade Commission Clarifications Related to NAFTA Chapter 11, July 31, 2001, at B.

183. NAFTA, *supra* note 181, art. 1105(1).

184. See generally PARRY, *supra* note 3, at 81-82.

185. See *id.*

186. United States – Honduras Investment Treaty, *supra* note 5, at art. II(3)(a); see ROBERT, *supra* note 70, at 6.

187. See DOLZER & STEVENS, *supra* note 93, at 60-61.

188. Cf. BARCELONA TRACTION 1970 ICJ 32 (full protection and security held to be a "self-contained" standard of treatment).

189. See DOLZER & STEVENS, *supra* note 93, at 60-61.

tection of foreigners.<sup>190</sup> The obligation does not establish a strict liability standard that would render host states responsible for any detrimental change in investment circumstances or destruction of an investment.<sup>191</sup> Early twentieth century scholars advocated state responsibility for injuries caused to the person of an alien, for the destruction of property by forces of the state or that resulted from the negligence of the host state in protecting the alien or his property.<sup>192</sup> Support for this position was not, however, universal.<sup>193</sup>

The World Bank Guidelines offer an understanding of what the United States and Honduras may have intended by "full protection and security."<sup>194</sup> The Guidelines suggest that fulfillment of this commitment entails extending protection and security to the persons of investors, as well as to property rights, including the granting of permits, import and export licenses, employment authorizations, entry and stay visas, and other legal matters relevant to the treatment of foreign investors.<sup>195</sup> The Guidelines recognize that as foreign investment becomes more complex, so too must the protections afforded investment.

## International Law

The United States and Honduras, pursuant to Article II (3)(a), "shall in no case accord [foreign investment] treatment less favorable than that required by international law."<sup>196</sup> This clause reiterates the principle of customary international law that once the privilege of engaging in the economic activity of a foreign country is extended by a state, investors are entitled to a certain minimum standard of treatment.<sup>197</sup> The minimum standard of

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190. *Id.* at 61.

191. *See id.*

192. *See* SORNARAJAH, *supra* note 2, at 124-25.

193. *See id.*

194. *See* World Bank Guidelines, *supra* note 128, at 300; *See* generally Ibrahim F. I. Shihata, *Introductory Remarks, Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment*, WORLD BANK GROUP, LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES," (1993) [hereinafter Shihata, *Introductory Remarks* WORLD BANK GUIDELINES]. Mr. Shihata was Vice President and General Counsel of the World Bank and the Secretary-General of the International Centre for Settlement of Investment Disputes.

195. *See* World Bank Guidelines, *supra* note 128, at 300.

196. United States - Honduras Investment Treaty, *supra* note 5, art. II(3)(a); *see* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating the "[i]nternational law is part of our [U.S.] law").

197. *See* SORNARAJAH, *supra* note 2, at 128-29 n.137 (quoting A. Roth, *The Minimum Standard of International Law Applied to Aliens* 185-86 (1949)).

treatment in the United States – Honduras agreement is customary international law, those international rules of state conduct the existence of which is confirmed by the “general and consistent practice of States.”<sup>198</sup> Customary international law is followed out of a “sense of legal obligation,” as opposed to economic or political compulsion.<sup>199</sup>

The minimum standard of treatment, while a “floor” below which the treatment of foreign investment should not fall,<sup>200</sup> is a nebulous standard. A “credible case” may be made for minimum standards protecting “life, liberty, and property” from state violence or state-sanctioned mob violence and the arbitrary dispossession by a dictator for private gain.<sup>201</sup> These are, however, old benchmarks. The issues, among others, that will challenge future arbitral panels is whether international law protects investors against “unjust” domestic court judgments,<sup>202</sup> the “arbitrary” failure of states to take affirmative actions,<sup>203</sup> and “unfair” international competition.<sup>204</sup>

### *National Treatment, Most Favored Nation Treatment and National and Most Favored Nation Treatment*

The United States – Honduras BIT accords covered investments, “in like situations,” national treatment, most favored nation treatment or the “most favorable” of national and most favored nation treatment.<sup>205</sup> The national treatment standard gives rise to international responsibility if the host state discriminates between its own investors and foreign investors.<sup>206</sup> The presence of the national treatment obligation, in addition to Arti-

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198. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 3, at § 102 (2).

199. *Id.*; see MALCOLM N. SHAW, INTERNATIONAL LAW 51 (1997).

200. In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, S.D. Myers, Inc. (Claimant) and Government of Canada (Respondent) Partial Award, para. 263 (Nov. 13, 2002).

201. SORNARAJAH, *supra* note 2, at 129.

202. See *Mondev International Ltd. v. The United States of America*, Notice of Arbitration, para. 135 et seq., ICSID Case No. ARB(AF)/ (Sept. 1, 1999).

203. See GAMI Investments, Inc. v. The Government of the United Mexican States, Demand for Arbitration, (April 9, 2002).

204. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Customary International Law Does Not Protect Anticompetitive Behavior* 97 AM. J. INT'L L. 441 (2003).

205. United States – Honduras Investment Treaty, *supra* note 5, art. II(1); See generally McGhie, *supra* note 11, at 113-15 (discussing the national treatment and most favored nation treatment standards).

206. See SORNARAJAH, *supra* note 2, at 251; ROBERT, *supra* note 70, at 6; U. N. Ctr. On Transnational Corporations, Bilateral Investment Treaties, *supra* note 50, at 33.

cle VI, impedes the host state from imposing burdens such as export quotas or local purchase requirements on the foreign investor after the investment agreement has been executed.<sup>207</sup> This is significant, subsequent to the commitment of resources by the investor, when the bargaining position of the host state will be dominant.<sup>208</sup>

The most favored nation standard of treatment extends to American or Honduran investors the most favorable treatment that the Parties accord to third country investors.<sup>209</sup> A Honduran investor in the United States, for example, is entitled to be treated either in accordance with the standards of the United States – Honduras BIT or in accordance with a more favorable measure if such treatment is extended by the United States to an investor from a third country with direct investment in the United States.<sup>210</sup> The treaty does not address whether the higher standard accorded a third country investor must be in accordance with an investment treaty, leading to the conclusion that the only issue of significance is the standard of treatment.

The United States – Honduras treaty, extending “national treatment and most favored nation treatment,” further obligates the Parties to accord foreign investment the standard of treatment that is the more favorable of the two.<sup>211</sup> Although the foreign investor should be entitled to the better standard of treatment, even absent the express language of the treaty extending the “most favorable,” Article II (1) of the treaty eliminates any doubt.<sup>212</sup>

The principle burden facing an investor asserting that a Party failed to accord national treatment, most favored nation treatment or the most favorable of either national and most favored nation treatment is the establishment of “like situations.”<sup>213</sup> The

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207. See SORNARAJAH, *supra* note 2, at 251.

208. See *id.*

209. See *id.*; ROBERT, *supra* note 70, at 6; U. N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 34-35.

210. See DOLZER & STEVENS, *supra* note 93, at 65-66.

211. See *Bilateral Investment Treaties 1959-1991* *supra* note 1, at 9; SORNARAJAH, *supra* note 2, at 251.

212. See *United States – Honduras Investment Treaty*, *supra* note 5, art. II(1).

213. *Id.* art. II(1); see generally Don Wallace, Jr. & David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment With Increasingly Few Exceptions*, 31 CORNELL INT'L L. J. 615, 620-21 (1998) (suggesting that the term “like circumstances” employed in the proposed Multilateral Agreement on Investments is a “modest norm” with its determination subject to different application).

investor must prove that the factual circumstances surrounding the investment are "like" the situation involving an investment of a national or juridical entity of the host state, in the case of national treatment, or the situation involving the investment of a third party investor, in the case of most favorable nation treatment.<sup>214</sup> Examining the totality of the circumstances, the inquiry will scrutinize whether local investments or investments from a third country, "in like situations," have been granted any special privileges or benefits by the host state not available to the investment of an investor from the other Party.<sup>215</sup> The inquiry should seek to ascertain whether the foreign investment was placed at a competitive disadvantage in relation to the situation of the domestic or third country investments.<sup>216</sup>

*Sector and Subject Specific Exceptions to National Treatment and Most Favored Nation Treatment Obligations*

The United States and Honduras set forth exceptions to their Article II (1) national treatment and most favored nation treatment obligations in the treaty Annex.<sup>217</sup> These exceptions are in those sectors and matters in which the Parties domestic regimes do not confer the investments of nationals or juridical entities of the other Party national treatment or most favored nation treatment.<sup>218</sup> The United States and Honduras must, even as regards the excepted sectors and matters, afford covered investments all of the other rights conferred in the agreement.<sup>219</sup>

The Annex specifies in paragraphs (1) and (4) the sectors and matters for which the United States and Honduras may adopt or maintain exceptions to their national treatment obligations.<sup>220</sup> Although the Parties have exempted themselves from the obligation of according national treatment in the listed sectors and subjects, the agreement specifically mandates that they continue to extend most favored nation treatment.<sup>221</sup> The United States in

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214. See Wallace & Bailey, *supra* note 213, at 619-20.

215. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 9.

216. See DOLZER & STEVENS, *supra* note 93, at 66.

217. See Albright, *supra* note 26, at XIV; ROBERT, *supra* note 70, at 7.

218. See Albright, *supra* note 26, at XIV; Kenneth J. Vandeveld, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 518 (1998).

219. See United States - Honduras Investment Treaty, *supra* note 5, art. XVI.

220. See *id.* Annex paras. (1) and (4).

221. See *id.* art. II(3)(a).

paragraph (1) of the Annex exercised the right to adopt or maintain exceptions to its national treatment obligation in matters of:

atomic energy; customhouse brokers; licenses for broadcast, common carriers, or aeronautical radio stations; COMCAST; subsidies or grants, including government-supported loans, guarantees and insurance; state and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables.<sup>222</sup>

Honduras in paragraph (4) exercised the right to adopt or maintain exceptions to its national treatment obligation in:

properties on cays, reefs, rocks, shoals or sandbanks or on islands or on any property located within 40 km of the coastline or land borders of Honduras; small scale industry and commerce with total invested capital of no more than US \$40,000 or its equivalent in national currency; ownership, operation and editorial control of broadcast radio and television; ownership, operation and editorial control of general interest periodicals and newspapers published in Honduras.<sup>223</sup>

Although Honduras exercised its right to make exceptions to its national treatment obligation, Protocol paragraph (2) confirms the understanding that Honduras will neither reject nor delay decisions on applications to possess or acquire real estate within "urban zones" or in the areas enumerated in Annex paragraph (4) "on grounds of nationality."<sup>224</sup> Protocol paragraph (2) appears in conflict with the language and intent of Annex paragraph (4).

The United States in paragraph (2) of the Annex reserved the right to adopt or maintain exceptions to its obligation to accord both national treatment and most favored nation treatment. The United States reserved rights in "fisheries; air and marine transport, and related activities."<sup>225</sup> Honduras, however, reserved no exceptions to its Article II (1) obligation to extend national treatment and most favored nation treatment.

The United States advised Honduras during the treaty negotiations that "if Honduras undertook acceptable commitments with respect to all or certain financial services, the United States would consider limiting its exceptions with respect to its national

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222. *Id.* Annex, para. (1).

223. *Id.* Annex, para. (4).

224. *Id.* Protocol, para. (2).

225. *Id.* Annex para. (2).

and MFN [most favored nation] treatment obligations in financial services."<sup>226</sup> Honduras responded by taking no exceptions relating to banking, insurance, securities or other financial services.<sup>227</sup> The United States, in Annex paragraph (3), further reserved in "banking, insurance, securities, and other financial services,"<sup>228</sup> the right to adopt or maintain exceptions to national treatment and most favored nation treatment, but agreed to extend to Honduran investments treatment no less favorable than that accorded to Canada and Mexico in the NAFTA.<sup>229</sup>

Article II (2)(a) states that exceptions to the obligations of Article II (1) may be "adopted or maintained" in the sectors or with respect to the matters "specified" in the Annex.<sup>230</sup> While the Parties may adopted or continue to maintain exceptions to the treaty's Article II (1) obligations, neither the United States nor Honduras may enlarge the enumeration of sectors or matters excepted in the Annex. Those sectors and matters excepted from the commitments to extend national treatment or most favored nation treatment must have been set forth in the Annex at the time the treaty was signed.<sup>231</sup> Expansion of the Annex to encompass sectors or matters not provided for would be contrary to the language of the treaty and violative of its transparency. Changes to the Annex may only be by an amendment to the treaty ratified by both Parties.

Article II (2)(a) of the treaty prohibits the application of an exception that would require divestiture, in whole or in part, of a covered investment that existed at the time the exception became effective.<sup>232</sup> Protection of pre-establishment or pre-acquisition activities is not afforded to investors as Article II (2)(a) only addresses "covered investments existing at the time the exception becomes effective."<sup>233</sup>

Annex paragraph (5), unlike the preceding paragraphs, sets forth a positive duty. Honduras and the United States in Annex paragraph (5) agree to accord national treatment to covered investments in the "leasing of minerals or pipeline rights-of-way

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226. Albright, *supra* note 26, at XV.

227. *See id.*

228. United States - Honduras Investment Treaty, *supra* note 5, para. (3).

229. *See* Albright, *supra* note 26, at XV.

230. United States - Honduras Investment Treaty, *supra* note 5, art. II(2)(a).

231. *See* Shihata, *supra* note 130, at 57.

232. *See* Albright, *supra* note 26, at XVI; McGhie, *supra* note 11, at 113.

233. *See* United States - Honduras Investment Treaty, *supra* note 5, art. II (2)(a).

on government lands.”<sup>234</sup> The United States sought the inclusion of paragraph (5) because the Mineral Lands Leasing Act<sup>235</sup> and federal law pertaining to Naval Petroleum and Oil Shale Reserves<sup>236</sup> dictate that foreign investors must be denied mineral leases, and oil and gas pipeline rights-of-way on government lands in the United States if American foreign direct investors are denied those right in a foreign country.<sup>237</sup>

### Discriminatory Measures

The treatment obligations of Article II (3)(a), to accord fair and equitable treatment, full protection and security, and treatment not less than required by international law, are accompanied by an additional obligation in Article II (3)(b). Article II (3)(b) mandates that neither the United States nor Honduras “shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or disposition of covered investments.”<sup>238</sup> The obligation of nondiscriminatory treatment applies to governmental “measures.”<sup>239</sup> The treaty does not indicate whether the measures must involve direct governmental action or more broadly encompass action only tacitly sanctioned by a Party. The obligation of nondiscriminatory measures, by express exclusion, does not extend to the establishment, acquisition or expansion activities of an investor. This is a significant difference from the activities of an investor protected by the national treatment and most favored nation treatment standards of Article II (1). The Parties to the treaty impliedly retain the right to treat investors differently with regards to the establishment, acquisition and expansion of investment.

The prohibition in Article II (3)(b) focuses on the impairment of an investment by “unreasonable and discriminatory” measures.<sup>240</sup> Measures that “impair” should be broadly interpreted because the Parties modified impair with the phrase “in any way.”<sup>241</sup> The reach of the duty imposed by subparagraph (3)(b) is,

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234. *Id.* Annex para. (5).

235. *See* 30 U.S.C. § 181 (2000).

236. *See* 10 U.S.C. § 7435 (2000).

237. *See* Albright, *supra* note 26, at XV.

238. United States – Honduras Investment Treaty, *supra* note 5, art. II(3)(b); *see generally* U. N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 30-31.

239. *See* United States – Honduras Investment Treaty, *supra* note 5, art. II(3)(b).

240. *Id.*

241. *Id.*; *See* DOLZER & STEVENS, *supra* note 93, at 62.



however, limited to only those measures that are both unreasonable and discriminatory.<sup>242</sup> Whether a measure is unreasonable and results in discriminatory impairment of the management, conduct, operation or disposition of an investment may only be determined on a case-by-case basis. Customary international law, which may be a source for guidance, prohibits discriminatory treatment in which governmental measures result in actual injury to an alien and the governmental measure is undertaken with the intent to harm the alien.<sup>243</sup>

### Political Subdivisions and State Enterprises

The obligations accepted by the United States and Honduras when they entered into the treaty apply to the political subdivisions of the Parties,<sup>244</sup> as well as to state enterprises.<sup>245</sup> The federal governments, irrespective of whether they have the domestic right to control sub-federal authorities, are responsible for the actions of their political subdivisions.<sup>246</sup> Accordingly, it will not be a defense in the resolution of a dispute between an investor and a state that the measure at issue was the action of a political subdivision.<sup>247</sup>

The United States – Honduras treaty obligations assumed by the Parties also apply to state enterprises “in the exercise of any regulatory, administrative or other governmental authority delegated to it” by a Party.<sup>248</sup> The United States and Honduras specifically agreed that state enterprises, in the sale or other distribution of their goods and services, would accord covered investments “national and most favored nation treatment.”<sup>249</sup>

### Transfers

Government foreign exchange measures impact foreign investors’ ability to efficiently administer their investment opera-

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242. See United States – Honduras Investment Treaty, *supra* note 5, art. III(3)(b).

243. See DOLZER & STEVENS, *supra* note 93, at 62.

244. See United States-Honduras Investment Treaty *supra* note 5, art. XV (1)(a); McGhie, *supra* note 11, at 112; Vandeveld, *supra* note 14, at 649.

245. See United States – Honduras Investment Treaty, *supra* note 5, art. XV(2).

246. See Dana H. Freyer et al., *Bilateral Investment Treaties and Arbitration*, 52-MAY Disp. Res. J. 74, 76 (1998).

247. Cf. Vienna Convention, *supra* note 49, art. 27 (internal domestic law is not a justification for the failure to perform a treaty obligation).

248. See United States – Honduras Investment Treaty, *supra* note 5, art. XV(2).

249. *Id.* art. II(1).

tions.<sup>250</sup> Article V of the BIT responds to these issues by establishing the types of transfers that may be made into and out of the host country, and the limitations that the Parties may impose on those transfers.<sup>251</sup> In Article VI, the United States and Honduras balanced the competing interests of the host state's "monetary sovereignty,"<sup>252</sup> and the right to regulate their currency, with the interest of the investor and the investor's home state in unrestricted transferability.<sup>253</sup>

### Types of Transfers

Article V (1) provides that "[e]ach Party shall permit all transfers relating to a covered investment to be made freely and without delay."<sup>254</sup> Transfers that are considered "relating to" a covered investment are set forth in Article V (1)(a) through (e).<sup>255</sup> According to the treaty, "[s]uch transfers include:

- (a) contributions to capital;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments under a contract, including a loan agreement; and
- (e) compensation pursuant to Articles III and IV, and payments arising out of an investment dispute."<sup>256</sup>

The language of Article V (1) indicates that the Parties intended the types of transfers encompassed within the agreement to be broadly interpreted.<sup>257</sup> The transfers include "all transfers" relat-

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250. See FOREIGN INVESTMENT ADVISORY SERVICE, *supra* note 146, at 35; see generally SORNARAJAH, *supra* note 2, at 252 (addressing repatriation of profits).

251. See United States - Honduras Investment Treaty, *supra* note 5, art. V; See generally World Bank Guidelines, *supra* note 128, at 301-02; ROBERT, *supra* note 70, at 9.

252. DOLZER & STEVENS, *supra* note 93, at 85 n. 234.

253. See *id.* at 85.

254. United States - Honduras Investment Treaty, *supra* note 5, art. V(1).

255. See *id.* art. V(1) (a)-(e); see generally COMEAUX, *supra* note 14, at 107-08.

256. See United States - Honduras Investment Treaty, *supra* note 5, art. V(1); U. N. Ctr. on Transnational Corporations, Bilateral Investment Treaties, *supra* note 50, at 42.

257. See generally DOLZER & STEVENS, *supra* note 93, at 90 (stating that such provisions are not necessarily exhaustive); HENKIN, *supra* note 10, at 767 (defining "returns" broadly); Bilateral Investment Treaties 1959-1991, *supra* note 1, at 10 (stating that most treaties encompass the principle of free transferability of investment-related payments).

ing to covered investments with the agreement illustratively listing specific types.<sup>258</sup>

"Contributions to capital" is the first transfer that is specified in the United States – Honduras treaty.<sup>259</sup> Although some BIT's specifically guarantee investors the right to transfer additional capital into the host state,<sup>260</sup> the United States – Honduras BIT simply provides for "contributions to capital."<sup>261</sup> However, investors, relying on the broad language of Article V, should be entitled to make initial, as well as additional capital contributions provided that those contributions have a nexus with the covered investment.

Returns on the investment are provided for in Article V (1)(b), as are the proceeds from the sale or liquidation of an investment.<sup>262</sup> Article V (1)(b) addresses the transfer of "profits, dividends and capital gains," as well as the proceeds from the sale of all or part of the investment, or from the total or partial liquidation of the investment.<sup>263</sup> The transfer rights accorded in Article V (1)(b) complement the treatment obligations of Article II (1), as they relate to the "sale or other disposition" of an investment.<sup>264</sup>

Article V (1)(c) relates to the transfer of "interest, royalty payments, management fees, and technical assistance and other fees."<sup>265</sup> With regard to the transfers discussed in Article V (1)(c), the United States – Honduras treaty is neutral as to whether the investment has the status of a debtor or creditor.<sup>266</sup>

Transfers of payments that are made pursuant to contracts are provided for in Article V (1)(d). The United States – Honduras treaty does not restrict nor does it offer any indication of the types of contracts that may call for payments from an investment, except that they include payments made pursuant to loan agreements.<sup>267</sup> The transfer of funds to repay indebtedness is limited to transfers that are "related to" the covered investment.<sup>268</sup> This

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258. See United States – Honduras Investment Treaty, *supra* note 5, art. V(1).

259. *Id.* art. V(1)(a).

260. See Escobar, *supra* note 61, at 90.

261. See United States – Honduras Investment Treaty, *supra* note 5, art. V(1)(a).

262. See *id.* art. V(1)(b).

263. *Id.*

264. DOLZER & STEVENS, *supra* note 93, at 93.

265. United States – Honduras Investment Treaty, *supra* note 5, art. V(1)(c).

266. See generally SORNARAJAH, *supra* note 2, at 253 (stating that repatriation clauses include profits and other payments that are made to a foreign investor); DOLZER & STEVENS, *supra* note 93, at 93.

267. See United States – Honduras Investment Treaty, *supra* note 5, art. V(1)(d).

268. *Id.* art. V(1).

requirement, similar to that of other investment treaties, restricts the transfer of funds for loan repayment to those funds that were borrowed for the purpose of investing in the territory of either the United States or Honduras.<sup>269</sup>

The final category of transfers includes compensation received as the result of expropriation,<sup>270</sup> for losses suffered due to civil disturbance,<sup>271</sup> and for payments that arise out of an investment dispute.<sup>272</sup> Article V (1)(e) expressly provides for the transfer of "compensation" for expropriation or losses from civil disturbance, while Article IV, which addresses the Parties' obligations for losses owing to civil disturbance, provides for either restitution or compensation.<sup>273</sup> "Restitution" is not a treaty-defined term. A strict interpretation of Article V (1)(e) and a Party's assertion that it provided "restitution," not compensation, will set the stage for resolution of the meaning of "restitution," and whether the United States – Honduras treaty also mandates that the Parties permit the transfer of "restitution."

The reference to payments that arise from investment disputes is unique to United States BIT practice.<sup>274</sup> This is an acknowledgement of the increasingly significant role dispute resolution plays in foreign direct investment and the interest of the Parties in facilitating non-diplomatic, expeditious dispute resolution. The United States – Honduras treaty states that such payments must "arise out of" an investment dispute.<sup>275</sup> Transfers "arising out of" investment disputes include arbitral recoveries beyond simply the award of damages and may include costs, interest and other awards unique to a particular investor-host state undertaking.

The payment of remuneration by an investor in the host country to employees or independent contractors that are not nationals of the host country is a transfer of significant importance. American and Honduran negotiators either chose not address or could not agree whether foreign nationals who are paid in the host country should be permitted to transfer all or part of their salaries to

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269. See DOLZER & STEVENS, *supra* note 93, at 92.

270. See United States – Honduras Investment Treaty, *supra* note 5, art. III; see generally SORNARAJAH, *supra* note 2, at 253 (stating that repatriation of compensation is generally in a separate clause).

271. See United States – Honduras Investment Treaty, *supra* note 5, art. IV.

272. See *id.* art. IX (1).

273. See *id.* art. IV(2).

274. See generally DOLZER & STEVENS, *supra* note 93, at 94.

275. United States – Honduras Investment Treaty, *supra* note 5, art. V(1)(e).

their home country or a third country.<sup>276</sup> Relying on Article VII, which addresses the entry and sojourn of aliens, as well as on Article V (1)(d), which addresses transfers that relate to payments made under contract, a position may be advanced that remuneration transfers, if not specifically provided for in the treaty, are within the spirit of the agreement.<sup>277</sup> Precluding employees from transferring their salaries would create an impediment to the effective exercise by the investment of the rights extended under Article VII to employ foreign nationals.<sup>278</sup> Furthermore, investors are less likely to be able to employ the most capable individuals if those persons have concerns about the ability to repatriate their salaries. Since investors are authorized to transfer payments made under a contract, and compensation is paid pursuant to contracts of employment, whether directly to employees or indirectly to independent contractors, investors should consider making a percentage of their compensation payments in the host country and a percentage in their home or a third country.<sup>279</sup>

### Limitations on Transfers

The obligation of the Parties to permit transfers relating to covered investments is not without qualification.<sup>280</sup> Honduras and the United States in Article V (4), agreed that they may prevent transfers through the "equitable, non-discriminatory and good faith application" of four areas of their domestic laws.<sup>281</sup> Those laws are as follows: "(a) bankruptcy, insolvency or the protection of rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offenses; or (d) ensuring compliance with orders or judgments in adjudicatory proceedings."<sup>282</sup>

The laws listed in Article V (4)(a) through (d) present issues of interpretation. Bankruptcy laws and those designed for the protection of creditors require an initial determination of debtor and creditor status.<sup>283</sup> Although issuing and trading securities may be

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276. See generally DOLZER & STEVENS, *supra* note 93, at 93-94 (addressing the issue of transferring personal remuneration).

277. See Vienna Convention, *supra* note 49, art. 31(1).

278. See United States - Honduras Investment Treaty, *supra* note 5, art. VII.

279. See *id.* art. V(1)(d).

280. See *id.* art. V; see generally COMEAUX, *supra* note 14, at 108 (addressing currency reporting laws); U.N. Ctr. on Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 44-45.

281. United States - Honduras Investment Treaty, *supra* note 5, art. V(4).

282. *Id.*

283. See *id.* Protocol para. (1) (confirming the understanding that Article V(4)(a) includes the application of Honduran labor laws relating to the protection of

understood, "dealing" in securities is less specific.<sup>284</sup> Offenses set forth in a Party's criminal code should fall within Article V (4)(c), but administrative action is neither precisely civil nor criminal. The enforcement of orders or judgments in "adjudicatory proceedings" encompasses actions of the courts, yet it is unresolved whether orders or decisions of administrative bodies also fall within the parameters of Article V (4)(c).<sup>285</sup>

Disputes concerning the denial of transfers based on a Party's assertion of its rights under Article V (4) will also involve whether the law and proceedings are equitable, non-discriminatory and applied in good faith. Equitable application mandates that the proceedings conform to the imprecise standard of "principles of justice and right."<sup>286</sup>

Recourse to the treatment standards of Article II assists in providing substance to the Article V (4) obligation of non-discrimination.<sup>287</sup> One of the basic tenets of the treaty is that investors be treated no less favorable than an investor of a Party or an investor of a third-country.<sup>288</sup> The meaning underlying the non-discriminatory application of the host country's laws and regulations may also be found in Article III which mandates that expropriation be undertaken in a "non-discriminatory" manner.<sup>289</sup>

An international understanding of a Party's "good faith" application of its bankruptcy, securities, or criminal laws, and proceedings to ensure compliance with adjudicatory orders or judgments may be obtained from an application of the Vienna Convention (the "Convention"). Article 26 of the Convention requires that the Parties of a treaty perform their obligations in "good faith."<sup>290</sup> A body of international jurisprudence applying this standard in different factual situations offers substance to the meaning of "good faith."

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preferential creditor's rights); see generally COMEAUX, *supra* note 14, at 108 (providing that a host state may pass laws protecting creditors rights which laws may interfere with an investor's right to freely transfer currency).

284. United States – Honduras Investment Treaty, *supra* note 5, art. V(4)(b).

285. *Id.* art. V(4)(c).

286. BLACK'S LAW DICTIONARY 482 (5th ed. 1979).

287. See United States – Honduras Investment Treaty, *supra* note 5, art. II(1).

288. See *id.* art. II(1).

289. *Id.* art. III(1).

290. Vienna Convention, *supra* note 49, art. 26 (setting forth the principle of *pacta sunt servanda*).

## Convertibility and Exchange Rates

The United States – Honduras treaty provides that the Parties are to permit transfers in and out of their countries “freely and without delay.”<sup>291</sup> The BIT, unlike other investment treaties, does not provide either Party with the right to institute currency or exchange controls during times of “exceptional economic or financial circumstances.”<sup>292</sup> Although the BIT is void of any provision addressing periods of exchange shortfalls, times of financial stringency may give rise to the doctrine of *rebus sic stantibus*, making an absolute right of repatriation indefensible.<sup>293</sup>

Additionally, the United States – Honduras treaty mandates that transfers shall be made “without delay.”<sup>294</sup> This provision is consistent with Article III on expropriation which also calls for the payment of compensation to be made “without delay.”<sup>295</sup> In contrast, the BIT practices of other states, frequently only require that transfers be made “without undue delay,” thus indicating that some delay is acceptable.<sup>296</sup>

Article V(2) provides investors with the entitlement to make transfers in “freely usable currency at the market rate of exchange prevailing on the date of transfer.”<sup>297</sup> The phrase “freely usable currency” is also employed in Article III on expropriation, but in neither article is it defined. The International Monetary Fund,<sup>298</sup>

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291. United States – Honduras Investment Treaty, *supra* note 5, art. V(1); see Siqueiros, *supra* note 49, at 263.

292. See generally SORNARAJAH, *supra* note 2, at 252 (quoting language in a Singapore – United Kingdom treaty permitting the implementation of exchange controls); Bilateral Investment Treaties 1959-1991, *supra* note 1, at 10 (stating that balance of payment concerns result in the inclusion of currency transfer limitations).

293. See SORNARAJAH, *supra* note 2, at 252; See generally *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983) *rev'd* 757 F. 2d 516 (2d Cir. 1985) (interpreting the Foreign Sovereign Immunity Act and the Act of State doctrine in litigation before U.S. courts addressing the decision of a foreign sovereign to enact foreign exchange controls).

294. United States – Honduras Investment Treaty, *supra* note 5, art. V(1).

295. *Id.* art. III(2).

296. See DOLZER & STEVENS, *supra* note 93, at 95 (noting that German treaties define “undue delay” to mean a transfer “effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.”).

297. United States – Honduras Investment Treaty, *supra* note 5, art. V(2).

298. The International Monetary Fund is an organization composed of 184 member-countries with the purpose of fostering “international monetary cooperation, exchange stability, and orderly exchange arrangements. . . .” The IMF plays an important role in the resolution of member-country exchange short-falls. Available at <http://www.imf.org>.

the source of the phrase, employs it to currently reference the United States Dollar, the Japanese Yen, the German Mark, the French Franc and the British Pound Sterling.<sup>299</sup> While some BIT's stipulate the currency of transfer and others call for transfers in the currency of the original investment,<sup>300</sup> the United States – Honduras treaty affords the Parties latitude as to the currency of the transfer.

The United States – Honduras treaty imposes on the host country, the risk that an investor may make transfers of a freely usable currency into the territory of a Party which currency may subsequently experience a monetary crisis. Since the issue of free usability is relevant on the date of the transfer, it is possible that an investor may desire to transfer currency out of the country at a time when the currency that was transferred into the host country is no longer "freely usable."<sup>301</sup> The tenor of Article V is that the Parties should not manipulate the transfer of currency to the detriment of the investor. Utilizing the "market rate of exchange prevailing on the date of transfer,"<sup>302</sup> essentially the "spot rate,"<sup>303</sup> confirms this view. The question that remains is what "market" the Parties anticipate will be used, such as Tegucigalpa, New York, London or Paris, if the rates of exchange vary from market to market.

### *Entry and Sojourn*

The opportunity for investors and their representatives to travel to and within the host country is essential to successful foreign direct investing. Article VII of the treaty addresses this necessity.<sup>304</sup> Subject to the laws of Honduras and the United States "relating to the entry and sojourn of aliens,"<sup>305</sup> that is the immigration laws of each country,<sup>306</sup> investors of one Party are entitled to travel to and within the territory of the other Party.<sup>307</sup> Honduran investors, pursuant to Article VII, are eligible to obtain "treaty-investor visas," with American investors being accorded

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299. See Albright, *supra* note 26, at IX.

300. See DOLZER & STEVENS, *supra* note 93, at 94.

301. United States – Honduras Investment Treaty, *supra* note 5, art. V(2).

302. *Id.*

303. DOLZER & STEVENS, *supra* note 93, at 94.

304. See United States – Honduras Investment Treaty, *supra* note 5, art. VII; ROBERT, *supra* note 70, at 8.

305. United States – Honduras Investment Treaty, *supra* note 5, art. VII (1)(a).

306. See Albright, *supra* note 26, at X.

307. See Vandevelde, *supra* note 218, at 512.



similar treatment by the Honduran government.<sup>308</sup>

Article VII of the BIT sets forth the minimum obligations of the United States and Honduras with regard to the entry and sojourn of foreign investors. The Parties "shall permit . . . nationals of the other Party" to "enter and remain" in their respective territories to engage in specifically delineated investment-related activities.<sup>309</sup> Those activities include "establishing, developing, administering or advising on the operations of an investment."<sup>310</sup> Arising out of each investment are these factual issues: (1) "What is the activity of the investor or the investor's representative?" and (2) "What is the relationship between the activity and establishing, developing, administering or advising on the operation of the investment?" Although the United States - Honduras treaty does not establish a specific time limit for travel within a Party's territory, the presence of an investor or an investor's representative must bear a minimal relationship to the establishment or operation of the investment.<sup>311</sup>

The "nationals of the other Party" to whom the United States - Honduras treaty confers entry and sojourn privileges, are individual investors and employees of juridical entities.<sup>312</sup> The BIT uses the word "employs" in the phrase "a company of the other Party that employs them," but does not define employment status.<sup>313</sup> The question that arises is whether the representative of an investing company who travels to the host state must be a direct employee of the juridical entity or whether consultants and other independent contractors retained or "employed" by the investment will be accorded BIT entry and sojourn rights. Lawyers, accountants, geologists, economists and others with unique skills will frequently not be on the payroll of an investment, yet they are essential to its successful establishment and operation. Provided that the consultants are nationals of the state of the investor or investing entity, a broad interpretation of the term "employ" is in accord with the object and purpose of the United States - Honduras treaty.<sup>314</sup>

The investor, to obtain the entry and sojourn privileges of the agreement, must "have committed" or be in the "process of com-

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308. Albright, *supra* note 26, at X.

309. United States - Honduras Investment Treaty, *supra* note 5, art. VII(1)(a).

310. *Id.*

311. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 10.

312. United States - Honduras Investment Treaty, *supra* note 5, art. VII(1)(a).

313. *Id.*

314. See Vienna Convention, *supra* note 49, art. 31(1).

mitting" a "substantial amount of capital or other resources."<sup>315</sup> The commitment and amount of capital or other resources raises issues that are not resolved by the United States – Honduras treaty. The act of "having committed"<sup>316</sup> capital or other resources for the purpose of creating or acquiring an investment indicates a degree of permanency in the decision to invest. The investor may not be precluded from rescinding the actions concerning the investment, but any decision to alter the investor's course would come at a cost. The state of being in the "process of committing"<sup>317</sup> assets to an investment is an earlier period of time. It is a time in the investment process that represents action on the part of the investor that is more than mere inquiry, but before the time in which the investor has actually dedicated funds or resources.

The amount of capital or resources that the Parties consider to be "substantial" is not defined in the United States – Honduras treaty.<sup>318</sup> The difficulty in determining an amount that will be considered "substantial" for any given investor, any particular investment, at any given time and under any unique economic circumstances, probably resulted in the decision to leave clarification of the term "substantial" to subsequent consultation or dispute resolution. Notwithstanding this, the definition of "company" in Article I may offer guidance in the interpretation of the term "substantial."<sup>319</sup> Considering that an investor may be a single individual or involve business entities ranging from sole proprietorships to large corporations, the amount of capital or resources that must be devoted to an investment before it will be considered "substantial" may bear relationship to the type of investor.<sup>320</sup>

The United States – Honduras treaty further provides that the United States and Honduras "shall permit covered investments to engage top managerial personnel of their choice, regardless of nationality."<sup>321</sup> This situation involves, for instance, a juridical entity organized under Honduran law that has invested

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315. United States – Honduras Investment Treaty, *supra* note 5, art. VII(1)(a).

316. *Id.*

317. *Id.*

318. See Albright, *supra* note 26, at X.

319. United States – Honduras Investment Treaty, *supra* note 5, art. I(a).

320. Cf. *id.* Annex (4) (reserving onto Honduras the right to withhold national treatment in "small scale industry and commerce with a total invested capital of no more than US \$40,000").

321. United States – Honduras Investment Treaty, *supra* note 5, art. VII(2); see *contra* Albright, *supra* note 26, at X (stating that "top managerial personnel" are not automatically entitled to entry and that they must "independently qualify for an appropriate visa").

or is contemplating operations in the United States and has in its employ a Nicaraguan national. Although the United States – Honduras treaty places no restrictions on the nationality of an investment's senior management, if those individuals are not Honduran or American they must "independently qualify for the appropriate visa."<sup>322</sup> Since the United States – Honduras treaty does not define "top managerial" positions, the discretion of immigration officers in resolving this factual issue will be significant.

### *Expropriation*

Customary international law sanctions state action that expropriates or nationalizes the investments of foreigners within the territory of the state.<sup>323</sup> The United States – Honduras BIT, in response to customary international law and the state takings experienced in the 1950's through the 1970's,<sup>324</sup> includes a detailed article addressing expropriation and nationalization.<sup>325</sup> Reflecting the historical significance of expropriation and nationalization, state takings are preceded in the United States – Honduras treaty only by Article I, its definitions, and Article II, the standards of treatment. Article III is a comprehensive article that sets forth the basic premise on takings, the circumstances under which a taking is permissible and the compensation due to the foreign investor as a result of an expropriation or nationalization.<sup>326</sup>

### Measures That Constitute Expropriation

Article III commences with the proposition that expropriation and nationalization are permitted, but immediately focuses on those measures that constitute a taking and the restrictions with which the host state must comply in order for the taking to be considered in compliance with the United States – Honduras treaty.<sup>327</sup> The United States – Honduras treaty addresses the expropriation and nationalization of covered investments that are undertaken "directly" by the host state, or "indirectly through

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322. Albright, *supra* note 26, at X.

323. See DOLZER & STEVENS, *supra* note 93, at 97; SORNARAJAH, *supra* note 2, at 253; Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11; ROBERT, *supra* note 70, at 9 – 10.

324. See generally Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11; COMEAUX, *supra* note 14, at 101; SORNARAJAH, *supra* note 2, at 253.

325. See United States – Honduras Investment Treaty, *supra* note 5, art. III.

326. See *id.*; see generally World Bank Guidelines, *supra* note 128, at 303 (addressing expropriation and "unilateral alterations and termination of contracts").

327. See United States – Honduras Investment Treaty, *supra* note 5, art. III.

measures tantamount to expropriation or nationalization.”<sup>328</sup> The United States – Honduras BIT, similar to many investment treaties, does not define “expropriation,” “nationalization,” or those measures deemed “tantamount to expropriation or nationalization.”<sup>329</sup> The multitude of measures that a host state might undertake, although not constituting *de jure* takings, preclude precise definition.<sup>330</sup>

The characterization of state measures as either an expropriation, nationalization, direct or indirect takings is not, however, significant. Rather, it is the effect on the investor’s rights and interests which serves as the focal point.<sup>331</sup> The examination of these effects assists in determining those indirect measures that are deemed to be “tantamount to expropriation or nationalization.”<sup>332</sup> If the effect of the Party’s action is similar to that which would have resulted from a direct taking,<sup>333</sup> the provisions of Article III should operate to protect the national or juridical entity involved.

Indirect taking or “creeping expropriation” is the incremental erosion of a foreign investor’s ownership interest.<sup>334</sup> The Organization of Economic Co-operation and Development (OECD),<sup>335</sup> an organization of predominately developed countries, offered the following examples of indirect takings in its draft convention: (1) excessive or arbitrary taxation; (2) prohibition of dividend distribution coupled with compulsory loans; (3) imposition of administrators; (4) prohibition on employee termination; (5) refusal of access to raw materials; and (6) refusal to grant essential export or import authorization.<sup>336</sup> An international arbitral tribunal

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328. *Id.* at art. III(1); see generally SORNARAJAH, *supra* note 2, at 254 (providing that some United States treaties state “any measure or series of measures”); ROBERT, *supra* note 70, at 9.

329. United States – Honduras Investment Treaty, *supra* note 5, art. III(1); see DOLZER & STEVENS, *supra* note 93, at 98.

330. See DOLZER & STEVENS, *supra* note 93, at 99.

331. See *id.* at 100.

332. United States – Honduras Investment Treaty, *supra* note 5, art. III(1).

333. See DOLZER & STEVENS, *supra* note 93, at 100.

334. See generally SORNARAJAH, *supra* note 2, at 254 (explaining “creeping expropriation”); see also Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW-FOREIGN INV. L.J. 41 (1986); DOLZER & STEVENS, *supra* note 93, at 99 n.268; Albright, *supra* note 26, at IX.

335. The Organization for Economic Co-operation and Development (OECD) is the successor to the Organization of European Economic Co-operation. It has twenty-nine members and provides a platform for the exchange of information and ideas on economic and social policy. Available at <http://www.oecd.org>.

336. See Draft Convention on the Protection of Foreign Property and Resolution of the Council of the Organization for Economic Cooperation and Development on the

called on to address indirect taking in *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, concluded that although Iran, the host state, did not issue any law or decree expressly taking the foreign investor's property, its measures interfered with the foreign investor's property interests to the extent that it "must be deemed to have been expropriated. . . even though the legal title to the property formally remains with the original owner."<sup>337</sup>

Early United States treaties provided lists of measures which the Parties to those treaties deemed to constitute indirect takings.<sup>338</sup> The measures included: (1) confiscatory taxes; (2) compulsory sale; (3) impairment of management or control; and (4) impairment of economic value.<sup>339</sup> The United States - Honduras BIT does not include such a list, presumably because of the restrictive effect it would have on the interpretation of measures the Parties intended to constitute expropriation.

Similarly, the United States - Honduras treaty does not address which Party bears the burden of proving that a taking has occurred. The host state should bear the burden of establishing that its taking meets the requirements of the treaty. Since takings, although permissible, are subject to intense inquiry and since the host state is likely to be in possession of the documentation and information necessary to confirm observance of the treaty terms, the host state should assume the initial burden of demonstrating respect for its treaty obligations. The investor should then have the opportunity to rebut the evidence proffered by the host state.

### Conditions Precedent

The United States - Honduras BIT, while recognizing the authority of the Parties to expropriate or nationalize covered investments, sets forth five requirements for considering a taking as being in compliance with the treaty.<sup>340</sup> The requirements are as follows: (1) the taking must have a public purpose; (2) it must be done in a non-discriminatory manner; (3) the investor must receive prompt, adequate and effective compensation; (4) the pro-

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Draft Convention, OECD Publication No. 23081 (1967), *reprinted in* 7 I.L.M. 117 (1968).

337. *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Rep., 23 I.L.M. 1090 (1983).

338. See SORNARAJAH, *supra* note 2, at 254.

339. See *id.*

340. See United States - Honduras Investment Treaty, *supra* note 5, art. III(1).

cedures must accord due process of law; and (5) the taking must be in harmony with the treatment obligations of Article II (3), which are fair and equitable treatment, full protection and security, and treatment not less than the minimum dictated by customary international law.<sup>341</sup>

### *Public Purpose*

The public purpose requirement of Article III reiterates the well-established principle of customary international law.<sup>342</sup> The United States – Honduras treaty, in accord with international law as to principle, is equally comparable in its lack of definition.<sup>343</sup> The absence of a treaty definition or an internationally accepted understanding of “public purpose” coupled with the likelihood that an arbitral tribunal will extend considerable weight to the host state’s subjective view of the taking<sup>344</sup> warrants the establishment of parameters.

The intention of the public purpose requirement in investment treaties is to safeguard investors from executive and legislative abuse and to deter host states from enacting measures that have private, as opposed to public impetus.<sup>345</sup> The parameters of takings extend from those measures designed to promote a public good, to those with personal or foreign policy retaliatory motives.<sup>346</sup> Variations employed in other treaties with purposes similar to those of the United States – Honduras treaty include expropriation or nationalization for the public benefit, a national purpose, the public use, the public interest, in the interest of national defense or security and takings with an internal public or social basis.<sup>347</sup>

### *Non-discriminatory*

The obligation of Article III (1), that takings be carried out in a non-discriminatory manner, is a similarly well-established principle of customary international law.<sup>348</sup> While discriminatory tak-

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341. See *id.*; Albright, *supra* note 26, at IX; see generally U.N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 53.

342. See SORNARAJAH, *supra* note 2, at 253.

343. See DOLZER & STEVENS, *supra* note 93, at 104.

344. SORNARAJAH, *supra* note 2, at 253.

345. See DOLZER & STEVENS, *supra* note 93, at 105.

346. See *id.* at 104-05.

347. See *id.* at 105; U.N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 53-54.

348. See SORNARAJAH, *supra* note 2, at 253.

ings may be contrary to the United States – Honduras treaty and international law, the treaty does not define or offer examples of takings done in a discriminatory manner. Discriminatory nationalization may be particularly difficult to substantiate when the state is in a position to maintain that economics was the motivating factor.<sup>349</sup>

The obligation that takings be non-discriminatory is strengthened by the obligations Honduras and the United States accepted pursuant to Article II (1). Article II (1) mandates with respect to specific activities, particularly the “sale or other disposition” of covered investments, that investors be accorded national treatment, most favored nation treatment and the better of national treatment and most favored nation treatment. (Emphasis added).<sup>350</sup> If expropriation and nationalization are included within the meaning of “other disposition,” the host state must not only engage in a non-discriminatory taking, but must also extend the treatment standards of Article II to the taking of an investment.<sup>351</sup>

### *Compensation*

Should the United States or Honduras expropriate or nationalize the investment of a national or juridical entity of the other Party, the taking state is obligated pursuant to Article III (1) to pay the investor “prompt, adequate and effective compensation.”<sup>352</sup> The United States – Honduras treaty, in Article III (2), (3) and (4), elaborates on the meaning of “prompt, adequate and effective” compensation.<sup>353</sup> The compensation standard set forth in the United States – Honduras BIT is known as the “Hull Formula,”<sup>354</sup> named after former U.S. Secretary of State Cordell Hull who initially used the phrase.<sup>355</sup> It is the standard strenuously advocated by the United States,<sup>356</sup> as well as other capital exporting countries.<sup>357</sup> This standard is in contrast to that of the more flexible

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349. *See id.* at 253-54.

350. United States – Honduras Investment Treaty, *supra* note 5, art. II(1).

351. DOLZER & STEVENS, *supra* note 93, at 106. *But cf.* Albright, *supra* note 26, at IX (offering no suggestion that the principles of Article II are applicable to expropriation or nationalization).

352. United States – Honduras Investment Treaty, *supra* note 5, art. III(1).

353. *Id.* art. III(2), (3) and (4); *see also* Albright, *supra* note 26, at IX; U.N. Ctr. On Transnational Corporations, *Bilateral Investment Treaties*, *supra* note 50, at 55.

354. DOLZER & STEVENS, *supra* note 93, at 108; ROBERT, *supra* note 70, at 10.

355. *See* ALAN C. SWAN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMICS* 774 (1991).

356. *See* SORNARAJAH, *supra* note 2, at 256.

357. *See id.* at 254.

compensation standard of "appropriate compensation," generally supported by capital importing countries.<sup>358</sup> Bargaining positions and competition for foreign investment all factor into the decision of capital-importing countries whether or not to agree to the Hull Formula.<sup>359</sup>

### Amount of Compensation

Adequate compensation, pursuant to Article III (2), is "equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of the expropriation")."<sup>360</sup> The United States - Honduras treaty does not define "fair market value," but it does provide that it "shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation."<sup>361</sup> The taking state may not benefit from the impact that public knowledge of an impending expropriation or nationalization may have on the value of an investment.<sup>362</sup> Establishing the date of the expropriatory action in an indirect taking will be contentious. Doubt as to the precise date should be resolved in favor of the investor, as the host state, once again, is more likely to be in possession of relevant documentation and information.

The lack of factors for determining "fair market value" was probably not an oversight, but rather a reflection that the Parties could not agree on a specific set of criteria applicable to each unique situation. A side letter to the 1982 investment treaty between the United States and Panama<sup>363</sup> provides that "both Parties understand that the estimate of full value of expropriated investment can be made using several methods of calculation depending on the circumstances thereof."<sup>364</sup> The United States - Haiti investment treaty, a treaty signed but not yet ratified due to political circumstances, stipulates that "compensation will be equivalent to the fair market value of the investment, as deter-

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358. *Id.* at 254; see also U.N. CHARTER, *supra* note 129, art. 2(2)(c) (providing for the payment of "appropriate compensation").

359. See SORNARAJAH, *supra* note 2, at 258.

360. United States - Honduras Investment Treaty, *supra* note 5, art. III(2).

361. *Id.*

362. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11; Escobar, *supra* note 61, at 90.

363. See Treaty Between The Government of the United States of America and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments, S. Treaty Doc. 99-14 (1986), reprinted in 21 I.L.M. 1227 (1982).

364. DOLZER & STEVENS, *supra* note 93, at 110 (quoting the side-letter between the United States and Panama).



mined according to different methods of calculation as appropriate in each specific case."<sup>365</sup>

The absence of treaty standards for determining "fair market value," the imprecise nature of the measure and the particular interests of the taking Party result in a host of considerations being brought forward to determine the value of an investment.<sup>366</sup> The World Bank *Guidelines* (the "*Guidelines*"), include the value a willing buyer would pay a willing seller, taking into consideration the nature of the investment, its future potential, the length of time the investment has been in operation, the percentage of tangible assets to intangible assets, and "other relevant factors pertinent to the special circumstances of each case."<sup>367</sup> The *Guidelines*, without suggesting a single, definitive measure of fairness by which compensation may be judged, consider profitability or the lack thereof as an important consideration.<sup>368</sup> Criteria in the NAFTA for determining the fair market value of an expropriated investment include "going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate."<sup>369</sup> A 1991 treaty between Israel and Romania provides for the inclusion of "equitable principles taking into account, *inter alia*, the capital invested, its appreciation or depreciation, current returns, replacement value and other relevant factors."<sup>370</sup>

### Time and Manner of Payment

Investors whose investments have been expropriated or nationalized are entitled to compensation "paid without delay" and that is "fully realizable and freely transferable."<sup>371</sup> Although neither the term "prompt"<sup>372</sup> in Article III (1), nor the phrase "without delay"<sup>373</sup> in Article III (2) are defined, the United States – Honduras treaty should not be interpreted to mean that compen-

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365. *Id.* at 110-11 (quoting Article III of the United States – Haiti investment treaty).

366. Bilateral Investment Treaties 1959-1991, *supra* note 1, at 11 (providing that "market value" is generally used to determine the value of expropriated investments); Escobar, *supra* note 61, at 90.

367. World Bank *Guidelines*, *supra* note 128, at 304; *see also* DOLZER & STEVENS, *supra* note 93, at 111.

368. *See generally* World Bank *Guidelines*, *supra* note 128, at 304; *see also* DOLZER & STEVENS, *supra* note 93, at 111.

369. NAFTA, *supra* note 181, art. 1110(2).

370. DOLZER & STEVENS, *supra* note 93, at 111.

371. United States – Honduras Investment Treaty, *supra* note 5, art. III(2).

372. *Id.*

373. *Id.*

sation must be paid immediately following the taking. The BIT permits the allowance of delay, but only as it relates to the formalities necessary to transfer funds. Balance of payment circumstances may impede a Party's ability to transfer a large sum of currency, particularly foreign currency, out of the host country.<sup>374</sup> Nevertheless, these circumstances are not a treaty-acceptable basis to delay the payment of compensation.<sup>375</sup> The United States – Honduras treaty, unlike British investment treaties, does not provide for the payment of compensation in installments.<sup>376</sup>

The Protocol of the United States – Egypt investment treaty<sup>377</sup> offers insight, from the American perspective, into what is considered a permissible delay.<sup>378</sup> The investment agreement that the United States negotiated with Egypt specifies that “the term ‘prompt’ does not necessarily mean instantaneous. ‘The intent is that the Party diligently and expeditiously carry out necessary formalities.’”<sup>379</sup>

German investment treaty practice incorporates the identical phrase employed in the United States – Honduras BIT, “without delay,” and declares that the taking state will be in compliance with its treaty obligation if payment is “effected within such period as is normally required for the completion of transfer formalities.”<sup>380</sup> German investment treaties further provide that the applicable period “shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.”<sup>381</sup>

Compensation, in order to be “effective,” must be “fully realizable and freely transferable.”<sup>382</sup> Whether a particular currency on a particular date is “fully realizable and freely transferable,” given that the United States – Honduras treaty offers no understanding

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374. See DOLZER & STEVENS, *supra* note 93, at 113.

375. See United States – Honduras Investment Treaty, *supra* note 5, art. III.

376. See generally DOLZER & STEVENS, *supra* note 93, at 113 (providing that British treaties address the periodic payment of compensation).

377. See Treaty Between the Government of the United States of America and the Government of the Republic of Egypt Concerning the Encouragement and Reciprocal Protection of Investment, S. Treaty Doc. 99-24, Protocol (1986) [hereinafter United States – Egypt Investment Treaty].

378. See *id.*

379. DOLZER & STEVENS, *supra* note 93, at 112; United States – Egypt Investment Treaty, *supra* note 377, Protocol.

380. DOLZER & STEVENS, *supra* note 93, at 112 (quoting the language of German investment treaties).

381. *Id.*

382. United States – Honduras Investment Treaty, *supra* note 5, art. III(2); see DOLZER & STEVENS, *supra* note 93, at 112.

of the phrase, can only be determined on a case-by-case basis taking into account all of the circumstances.

The United States – Honduras treaty in Article III (3) and (4) expressly addresses situations in which the fair market value of an expropriated investment is denominated in “freely usable currency” and “currency that is not freely usable.”<sup>383</sup> The substance of Article III (3) and (4) is that investors are to be fully and completely compensated for the fair market value of their investment, with interest accruing from the date of the expropriatory action until the investor receives total payment.<sup>384</sup> If the fair market value of the investment is denominated in a freely usable currency, the investor is to receive, in addition to the value of the investment, “interest at a commercially reasonable rate for that currency” through the date of payment.<sup>385</sup> If the fair market value of the investment is not denominated in a currency that is freely usable, the compensation paid must initially be “converted into the currency of payment at the market rate of exchange prevailing on the date of the payment.”<sup>386</sup> The taking state is then required to pay the fair market value of the investment on the date of expropriation “converted into a freely usable currency at the market rate of exchange prevailing on that date.”<sup>387</sup> The taking state must additionally pay interest accruing from the date of the taking through the date of payment.<sup>388</sup> Interest accrues at “a commercially reasonable rate. . .”<sup>389</sup>

The Parties to the United States – El Salvador BIT set forth their understanding of the phrase “commercially reasonable rate” in the treaty Protocol.<sup>390</sup> A “commercially reasonable rate” for “a freely usable currency may include a commercially reasonable bank rate for that freely usable currency and a commercially reasonably bond rate for government bonds for that freely usable currency.”<sup>391</sup> The United States – El Salvador BIT’s use of the word

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383. United States – Honduras Investment Treaty, *supra* note 5, art. III(3) and (4).

384. See DOLZER & STEVENS, *supra* note 93, at 113.

385. United States – Honduras Investment Treaty, *supra* note 5, art. III(3).

386. *Id.* art. III(4).

387. *Id.* art. III(4)(a).

388. *See id.* art. III(4)(a).

389. *Id.* art. III(4)(b).

390. See Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Encouragement and Reciprocal Protection of Investment, Mar. 10, 1999, Protocol (1) [hereinafter United States – El Salvador Investment Treaty]. The treaty has been signed, but has not yet been ratified. It is available through the U.S. Dep’t of State.

391. *Id.* Protocol para. (1).

“may” indicates that other commercially reasonable rates will fulfill the purpose of confirming that investors do not suffer loss while awaiting the receipt of payment.

### *Due Process*

The obligation that the United States and Honduras shall only expropriate or nationalize covered investments “in accordance with due process of law”<sup>392</sup> references the procedures utilized by the host state in taking an investment.<sup>393</sup> Due process of law, in the international context, is not entirely synonymous with due process in the domestic setting.<sup>394</sup> The United States – Honduras treaty, and investment treaties in general, do not reference domestic law addressing expropriation or nationalization, thereby confirming the principle that international standards are intended to judge the legitimacy of a taking.<sup>395</sup>

Due process of law on the international plane wants for substance, although certain basic features exist. In order to effectuate due process, the Parties should afford advance notification of a taking, a just hearing conducted by an unbiased official, and a decision on the legitimacy of the taking within a reasonable period of time.<sup>396</sup> The availability of review by the host state’s courts has also been asserted as an international due process standard.<sup>397</sup> Many investment treaties expressly provide for domestic judicial review of state takings, which is in accordance with international legal standards.<sup>398</sup> The United States – Honduras BIT does not have such a provision.

Resorting to the domestic judicial system of the host country by a Honduran or American investor to redress expropriation or nationalization may result in the forfeiture of the right to compel

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392. United States – Honduras Investment Treaty, *supra* note 5, art. III(1).

393. See DOLZER & STEVENS, *supra* note 93, at 106.

394. See *id.* at 107.

395. See *id.* at 106.

396. See *id.*

397. See *id.*; see United States – Honduras Investment Treaty, *supra* note 5, art. II (4) (addressing the obligation of the Parties to provide “effective means of asserting claims and enforcing rights with respect to covered investments.”)

398. See generally DOLZER & STEVENS, *supra* note 93, at 107 (quoting the investment treaty between the United States and Tunisia as providing for “prompt review by the appropriate judicial or administrative authorities,” but further mandating that the review confirm that the taking complied with the principles of international law).

arbitration.<sup>399</sup> The United States – Honduras BIT, while conferring investor access to the domestic courts and administrative tribunals to resolve investment disputes, expressly precludes recourse to investor-state arbitration once the domestic route has been exercised.<sup>400</sup>

### *Losses Due to Armed Conflict and Civil Disturbance*

A feature commonly found in bilateral investment treaties is a provision relating to the treatment accorded foreign investment for losses suffered by an investor due to armed conflict or internal disorder.<sup>401</sup> The United States – Honduras investment treaty addresses this issue in Article IV.<sup>402</sup> The United States – Honduras BIT has two provisions in Article IV that address investment losses suffered in the territory of the host state “owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events.”<sup>403</sup> Article IV (1) provides that “[e]ach Party shall accord national treatment and most favored nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory” as the result of war or civil disturbance.<sup>404</sup> Article IV (2) sets forth the obligation of the host state to make restitution or pay compensation for the requisitioning or destruction of an investment by the host Party’s military forces or other authorities.<sup>405</sup>

The investment loss rights that are provided by Article IV, relate to losses sustained by investments in the host state<sup>406</sup> that result from “war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events.”<sup>407</sup> The situations that trigger Article IV range from war

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399. See KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 125 (1992).

400. See United States – Honduras Investment Treaty, *supra* note 5, art. IX(2) and (3).

401. See Bilateral Investment Treaties 1959-1991, *supra* note 1, at 10; McGhie, *supra* note 11, at 117.

402. See United States – Honduras Investment Treaty, *supra* note 5, art. IV.

403. *Id.* art. IV(1) and (2).

404. *Id.* art. IV(1); see ROBERT, *supra* note 70, at 9; Siqueiros, *supra* note 49, at 262.

405. See United States – Honduras Investment Treaty, *supra* note 5, art. IV(2)(a) and (b).

406. See *id.* art. IV(1) (referencing “losses that investments suffer in its territory”); see *id.* art. IV(2) (specifying “that covered investments suffer losses in its territory”); see *id.* art. I (e) (defining “covered investment”).

407. *Id.* art. IV(1) and (2); see DOLZER & STEVENS, *supra* note 93, at 83.

against foreign countries to entirely internal civil disorder.<sup>408</sup> Considering that the description of events includes an array of situations of differing degrees of conflict that illustratively provide for “war or other armed conflict” at one extreme and “civil disturbance, or similar events” at the other, Article IV should be broadly interpreted to the advantage of the investor.<sup>409</sup>

The obligations of Honduras and the United States pursuant to Article IV, unlike the list of triggering events, have been narrowly drawn. Article IV (1) obligates the Parties to accord covered investments “national treatment and most favored nation treatment” as regards any measure relating to investment losses in their respective territories.<sup>410</sup> The Parties must treat the investment losses of an investor of the other Party in the same manner as they would treat the investment losses of one of their own nationals or juridical entities. The United States and Honduras must also afford such investment losses the same treatment that the host Party extends to losses suffered by an investor from a third state. If neither the Party nor any of its political subdivisions<sup>411</sup> affords the losses of investors of the host country or of any third country special treatment, investment losses incurred by nationals or juridical entities of the other Party owing to armed conflict or civil disturbance are not entitled to any special recovery privilege.

The total or partial loss of a covered investment that meets the criteria set forth in Article IV (2)(a) and (b) obligates the host Party to make restitution or pay compensation.<sup>412</sup> Restitution or compensation is only due an investor if the loss incurred results from the “requisitioning of all or part of such investments by the Party’s forces or authorities” or the “destruction of all or part of such investments by the Party’s forces or authorities that was not required by the necessity of the situation.”<sup>413</sup> The BIT does not offer guidance concerning the circumstances that must exist for the destruction of an investment to be considered as having been “required by the necessity of the situation.”<sup>414</sup>

The “combat exception” to treaty liability, although involving

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408. See HENKIN, *supra* note 10, at 766; see generally SORNARAJAH, *supra* note 2, at 263 (addressing “ordinary mob violence” that the host state failed to control).

409. United States – Honduras Investment Treaty, *supra* note 5, art. IV(1) and (2).

410. *Id.* art. IV(1).

411. See *id.* art. XV(1).

412. See *id.* art. IV(2).

413. *Id.* art. IV(2) (a) and (b).

414. *Id.* art. IV(2) (b).

action by a Party in preservation of its national security or internal civil order, should not be considered self-judging absent express language to this effect.<sup>415</sup> Deference from arbitral bodies should be accorded to decisions of the Parties regarding these matters, however a Party's actions should ultimately be assessed from an international perspective.<sup>416</sup> If the United States and Honduras had intended for this exception to financial liability to be self-judging, they could have utilized language that would have ensured that result. The American and Salvadorian negotiators in Article XIV of the United States – El Salvador investment agreement, for example, drafted the treaty so that each country, in the fulfillment of its international obligations to maintain peace or in the protection of its national security, could apply any measure "it considered necessary."<sup>417</sup> The standard in Article XIV of the United States – El Salvador BIT, unlike Article IV of the United States – Honduras BIT, is self-judging.<sup>418</sup>

The issue of the "necessity of the situation" was addressed in the British decision in the matter of *Burmah Oil Co. v. Lord Advocate*.<sup>419</sup> The property in question was destroyed during World War II to prevent it from falling into the hands of the advancing enemy army. The House of Lords, interpreting the British Crown Suits Act of 1857, concluded that because the property was destroyed in advance of possibly being obtained by the enemy, it was not destroyed in combat.<sup>420</sup> The United States – Honduras treaty, unlike the British Crown Suits Act, does not mandate that the property be destroyed in combat, only that the situation necessitated its destruction. The standard in the United States – Honduras treaty provides the Parties with greater latitude and limits those circumstances in which an investor may obtain recovery for the loss of an investment.

The "combat action" exception also arose in arbitral proceedings before the International Centre for the Settlement of Investment Disputes (ICSID) involving the interpretation of an investment agreement between Sri Lanka and the United Kingdom.<sup>421</sup> The property in *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka* was a shrimp culture farm that was

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415. See Shihata, *supra* note 130, at 57-58.

416. See *id.*

417. United States - El Salvador Investment Treaty, *supra* note 390, at art. XIV(1).

418. See *id.*; cf. Vandevelde, *supra* note 14, at 703.

419. See *Burmah Oil Co. v. Lord Advocate*, [1965] App. Cas. 75, (H.L. 1964).

420. See *id.*

421. See *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, Award of

destroyed by the Sri Lankan military based on information that it was being used by separatist elements.<sup>422</sup> The arbitral panel, which consisted of an Egyptian, French and Ghanaian national, concluded that the actions of the Sri Lankan forces qualified as "combat action."<sup>423</sup> The tribunal also concluded, however, that the agreement at issue afforded protection pursuant to customary international law, and that this protection included an affirmative duty on the part of the host state to safeguard investments.<sup>424</sup> The failure of Sri Lanka to protect the shrimp farm, according to the arbitral panel, resulted in liability pursuant to customary international law that took precedent over the combat exception to liability.<sup>425</sup> The dissent in *Asian Agricultural Products* maintained that the treaty provisions excluding liability were special provisions that derogated from the general principles of customary international law and should have primacy.<sup>426</sup>

### *Access to Judicial and Administrative Process*

The United States and Honduras in Article II of the investment treaty provide investors with the right to utilize the judicial and administrative systems of the respective countries to resolve conflicts that arise between private parties in business matters. Each Party, pursuant to Article II (4), is obligated to "provide effective means of asserting claims and enforcing rights with respect to covered investments."<sup>427</sup> Two primary issues arise in the interpretation of this aspect of Article II. The initial issue concerns what constitutes "asserting claims" or "enforcing rights."<sup>428</sup> The second issue involves the "means" by which the Parties are to make their judicial and administrative systems available.<sup>429</sup>

The only express limitation in Article II (4) involves the types of claims and rights that an investor may seek to secure through

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June 27, 1990 of ICSID in Case No. ARB/87/3, Yearbook Comm. Arb'n. XVII 106 (1992); see also McGhie, *supra* note 11, at 114.

422. See *Asian Agricultural Products Ltd.*, No. ARB/87/3.

423. *Id.*; see SORNARAJAH, *supra* note 2, at 260-63.

424. See *id.*

425. See *id.*

426. See *id.* at 263.

427. United States - Honduras Investment Treaty, *supra* note 5, art. II (4); see generally Committee on International Investment and Multinational Enterprise, Organization For Economic Cooperation and Development, Workshop on "Foreign Direct Investment Policy and Promotion In Latin America" Report (1999) (stressing the importance of a transparent judicial and regulatory system).

428. United States - Honduras Investment Treaty, *supra* note 5, art. II(4).

429. *Id.*



access to the judicial or administrative structures. The claims or rights that an investor may assert are limited to only those "with respect to covered investments."<sup>430</sup> A better understanding of Article II (4) may be obtained from a reading of the article as a whole, particularly Article II (1), which addresses the activities that are entitled to specific treatment by each Party.<sup>431</sup> Article II (1) focuses on the establishment, acquisition, expansion, management, conduct, operation and the sale or other disposition of a covered investment. Reading Article II paragraphs (1) and (4) together, an investor's right of access to a Party's judicial or administrative system is available to address all issues, from the initial establishment of an investment through its ultimate disposition.

Explicit from a reading of the entire agreement is that Article II (4) does not permit recourse to the domestic judicial or administrative system for the resolution of disputes between an investor and a host-Party. Article IX, which addresses investment disputes, provides for the resolution of these differences.<sup>432</sup> An "investment dispute" is defined in the treaty as a "dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized" by the treaty with respect to a covered investment.<sup>433</sup> Although Article II (4) is broadly written to encompass a multitude of actions, Article IX specifically addresses "investment disputes."<sup>434</sup> Access to the host state's judicial or administrative tribunals is not conferred by Article II (4) for the resolution of a matter considered to be an "investment dispute."<sup>435</sup>

Article II (4) states that the "means" of asserting a claim or enforcing a right must be "effective."<sup>436</sup> No definition is provided for determining when a Party should be deemed to have provided "effective means," mere access to the judicial and administrative process, without more, does not meet the standard. There must be a fair and impartial system through which a timely and reasoned determination may be rendered in order for the assertion of a claim to be effective. The means must also be available, once a

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430. *Id.*

431. See Vienna Convention, *supra* note 49, art. 31(1).

432. See United States - Honduras Investment Treaty, *supra* note 5, art. IX.

433. *Id.* art. IX(1).

434. *Id.* art. IX.

435. *Id.* art. IX(2)(a).

436. *Id.* art. II(4).

claim or right has been successfully asserted, for the investor to utilize the system to enforce all judicially or administratively confirmed rights.

Article II (5) complements Article II (4) by providing that “[e]ach Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions that pertain to or affect covered investments are promptly published or otherwise made publicly available.”<sup>437</sup> One of the goals of Article II (5) is the effective assertion of claims and enforcement of rights through transparent legal, judicial and administrative systems.

### *Consultation and Dispute Resolution*

The resolution of disputes relating to the United States – Honduras treaty and direct investment is provided for in Articles IX, X and XI.<sup>438</sup> The United States – Honduras treaty includes the customary provisions addressing consultation and dispute resolution between the Parties involving state-to-state matters, but additionally provides the means for investors to pursue investment-related issues directly with the host country.<sup>439</sup> It is the presence of the investor-state arbitration provision, creating international obligations on the part of the United States and Honduras, which is most significant.<sup>440</sup> The direct means for foreign investors to protect their investments in a neutral forum “depoliticizes” the process and imparts investor confidence.<sup>441</sup> Investors no longer need to exclusively rely on their home states to espouse their positions through diplomatic channels, and can avoid the risks associated with litigating before possibly impartial local tribunals.<sup>442</sup>

### Consultation

The representatives of Honduras and the United States in Article VIII of the treaty committed their countries to promptly engage in consultation in advance of instituting arbitration to

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437. *Id.* art. II(5).

438. *See id.* art. IX, X and XI; *see World Bank Guidelines*, *supra* note 128, at 306 (addressing dispute settlement).

439. *See DOLZER & STEVENS*, *supra* note 93, at 119.

440. *See ROBERT*, *supra* note 70, at 11.

441. SORNARAJAH, *supra* note 2, at 266.

442. *See* Carlyn Kolker, *When Nations Go Bust*, *THE AMERICAN LAWYER*, Nov. 2003, at 92.

resolve issues that arise between the Parties.<sup>443</sup> The obligation to consult is the initial method set forth in the treaty for resolving Party-to-Party disagreement.<sup>444</sup> Consultation offers the Parties the possibility of prompt resolution of a matter that is only available when parties with conflicting positions meet face-to-face.<sup>445</sup> Consultations may be sought to "resolve any disputes in connection with the [t]reaty," or to "discuss any matter relating to the interpretation or application. . . or the realization of the objectives of the treaty."<sup>446</sup> The Parties should resort to the Preamble for an understanding of the United States – Honduras treaty objectives.

Article VIII only mandates consultation for the resolution of state-to-state issues. When read in conjunction with Article IX, addressing investor-state investment disputes, and Article X providing for government-to-government arbitration, Article VIII precludes the Parties from compelling consultations on matters that directly involve investors. Nothing in the United States – Honduras treaty prevents the United States and Honduras from engaging in diplomatic discussions concerning matters that are principally investor-state issues, but compelling such discussions would re-inject politics into the process and is prohibited.

Although consultations are to be undertaken "promptly," the United States – Honduras treaty does not set a time period within which exchanges should be initiated or completed,<sup>447</sup> nor does it address the level of diplomatic personnel that must participate. The obligation to consult and to do so promptly should be carried out in good faith,<sup>448</sup> with the understanding that dilatory tactics should not frustrate a Party's entitlement to pursue Article XI arbitration. The requirement to consult should be satisfied when the Ambassador of one Party addresses the issue at hand with the relevant ministry of the other, although consultations between other officials may suffice.<sup>449</sup>

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443. See United States – Honduras Investment Treaty, *supra* note 5, art. VIII.

444. See DOLZER & STEVENS, *supra* note 93, at 121; McGhie, *supra* note 11, at 119.

445. See DOLZER & STEVENS, *supra* note 93, at 121.

446. United States – Honduras Investment Treaty, *supra* note 5, art. VIII; see Siqueiros, *supra* note 49, at 264.

447. See McGhie, *supra* note 11, at 119.

448. See Vienna Convention, *supra* note 49, art. 31 (stating that treaties should be interpreted in good faith).

449. See DOLZER & STEVENS, *supra* note 93, at 123.

## Dispute Resolution Between the Governments of Honduras and The United States

### *Intergovernmental Arbitral Tribunal Jurisdiction*

Differences between Honduras and the United States concerning the interpretation or application of the United States – Honduras treaty that the Parties cannot resolve through Article VIII consultations “or other diplomatic channels” may be submitted to arbitration for binding resolution.<sup>450</sup> Arbitration pursuant to Article X, although limited to matters concerning the “interpretation and application” of the United States – Honduras treaty, could bring purportedly internal, political matters within the jurisdiction of an arbitral tribunal if broadly construed.<sup>451</sup>

This situation arose in the interpretation of the United States - Nicaragua Treaty of Friendship, Commerce and Navigation.<sup>452</sup> Nicaragua, as a result of the action of the United States involving the “Contras,” instituted proceedings before the International Court of Justice (ICJ), the judicial arm of the United Nations, alleging that the United States violated its sovereignty.<sup>453</sup> The United States attempted to preclude the ICJ from hearing the matter on the grounds that the issues were beyond the Court’s jurisdiction. The United States maintained that the issues raised by Nicaragua involved its essential security interests.<sup>454</sup> The Court declined the position of the United States stating that the matter concerned a dispute relating to the “interpretation or application” of the FCN treaty and was properly before the ICJ.<sup>455</sup>

State-to-state arbitration clauses may also create an expansive basis for arbitral tribunal jurisdiction if a state’s activity with regard to the promotion of conditions favorable to the inward or outward flow of investment is subject to review.<sup>456</sup> The United

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450. United States – Honduras Investment Treaty, *supra* note 5, art. VIII and X; Siqueiros, *supra* note 49, at 264.

451. SORNARAJAH, *supra* note 2, at 272.

452. See Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.-Nicar., 9 U.S.T. 449.

453. See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U. S.*), 1984 I.C.J. 392 (Jurisdiction and Admissibility) [hereinafter *Nicar. v. U. S.*].

454. See Shihata, *supra* note 130, at 58 n.49.

455. *Nicar. v. U. S.*, 1984 I.C.J. at 442, para 113.; see generally *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, Award of June 27, 1990 of ICSID in Case No. ARB/87/3 Yearbook Comm’n. Arb’n. XVII 106 (1992) (a case in which the conduct of a civil war was subject to inquiry by a tribunal established to address investment disputes).

456. See SORNARAJAH, *supra* note 2, at 273.

States – Honduras BIT precludes this inquiry.<sup>457</sup> Article VIII consultations only mandate that the Parties “discuss any matter relating. . . to the realization of the objectives of the [t]reaty.”<sup>458</sup> Arbitration pursuant to Article X does not, however, impose an obligation to arbitrate issues that concern the realization of the treaty objectives.<sup>459</sup> The reluctance of the United States and Honduras to extend arbitral review to matters beyond the interpretation or application of the agreement reduces the Parties’ concerns that their internal policies will be subject to international scrutiny, but it also limits the protection available to their respective foreign direct investors.<sup>460</sup>

### *Law Applicable to Disputes Between The Parties*

Arbitral decisions resolving disputes between Honduras and the United States are to be made “in accordance with the applicable rules of international law.”<sup>461</sup> Article X (1) reinforces the presumption that international agreements are not governed by domestic state law, but rather, by international law.<sup>462</sup> Since the treaty references “[t]he applicable rules of international law,”<sup>463</sup> without limitation, the international law applicable to the resolution of state-party disputes is customary international law.<sup>464</sup> Customary international law, as previously discussed, consists of those rules of international governance “where the existence of the rule is established by general and consistent practice of States followed by them from a sense of legal obligation.”<sup>465</sup> Absent a “concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)” a rule should not be accepted and applied by an arbitral tribunal as international

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457. See United States – Honduras Investment Treaty, *supra* note 5, art. X.

458. *Id.* art. VIII.

459. See *id.* art. X.

460. See SORNARAJAH, *supra* note 2, at 273; see Escobar, *supra* note 61, at 92.

461. United States – Honduras Investment Treaty, *supra* note 5, art. X(1).

462. See DOLZER & STEVENS, *supra* note 93, at 129.

463. United States – Honduras Investment Treaty, *supra* note 5, art. X(1).

464. See generally DOLZER & STEVENS, *supra* note 93, at 129 (stating that treaties of the Peoples Republic of China state that the international law applicable to the resolution of disputes is only that international law recognized by both parties to the treaty).

465. Loewen Group, Inc. v. United States, NAFTA arbitration, ICSID Case No. ARB (AF)/98/3, Response of the United States of America to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128 (Dec. 7, 2001) (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102(2)).

law.<sup>466</sup>

*Constitution, Procedural Rules and Expenses of the Intergovernmental Arbitral Tribunal*

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules<sup>467</sup> are specified in the United States – Honduras treaty as governing the United States – Honduras state-to-state arbitral process.<sup>468</sup> The United States – Honduras treaty allows the Parties to employ other arbitral rules or to modify the UNCITRAL Arbitration Rules, provided that they both agree.<sup>469</sup> The arbitrators may also propose modifications to the UNCITRAL Arbitration Rules, but the objection of either Party compels strict adherence to the UNCITRAL rules.<sup>470</sup>

United States – Honduras intergovernmental arbitral tribunals will consist of three-member panels.<sup>471</sup> The Parties must each appoint an arbitrator of their choice within two months of receipt of a request for arbitration.<sup>472</sup> The Party-appointed arbitrators then select the third, presumably neutral, arbitrator who will chair the panel.<sup>473</sup> The arbitral chair must be a national of a third state.<sup>474</sup> The UNCITRAL Arbitration Rules relating to the appointment of three-member arbitral panels apply, “*mutatis mutandis*,”<sup>475</sup> to the appointment of Party-to-Party arbitral panels.<sup>476</sup>

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466. PARRY, *supra* note 3, at 82.

467. See Report of the United Nations Commission on International Trade Law, Arbitration Rules of the United Nations Commission on International Trade Law, U.N. Comm’n on Int’l Trade Law, U.N. GAOR 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976).

468. See United States – Honduras Investment Treaty, *supra* note 5, art. X(1); McGhie, *supra* note 11, at 120; DOLZER & STEVENS, *supra* note 93, at 125.

469. See United States – Honduras Investment Treaty, *supra* note 5, art. X(1); see generally Permanent Court of Arbitration: Optional Rules for Arbitrating Disputes Between Two States, effective Oct. 20, 1992, reprinted in 32 I.L.M. 572 (1993) (based on the UNCITRAL rules, the Optional Rules “reflect the public international law character of disputes between states, and diplomatic practice appropriate to such disputes.”); DOLZER & STEVENS, *supra* note 93, at 128.

470. See United States – Honduras Investment Treaty, *supra* note 5, at art. X(1).

471. See *id.* at art. X(2); McGhie, *supra* note 11, at 119; see generally DOLZER & STEVENS, *supra* note 93, at 124 (discussing the establishment of arbitral panels).

472. See United States – Honduras Investment Treaty, *supra* note 5, art. X(2); McGhie, *supra* note 11, at 119.

473. See United States – Honduras Investment Treaty, *supra* note 5, art. X(2).

474. See *id.*

475. BLACK’S LAW DICTIONARY, *supra* note 286, at 919 (“Lat. With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like”).

476. See United States – Honduras Investment Treaty, *supra* note 5, art. X(2); see DOLZER & STEVENS, *supra* note 93, at 124.

The only exception is that the Secretary General of ICSID, rather than the Secretary General of the United Nations, is delegated the authority to resolve appointments that are not administered by the Parties or the Party-appointed arbitrators.<sup>477</sup>

The United States – Honduras BIT is unique from other investment treaties in its reference to specific arbitral rules, rather than obligating the tribunal to determine its own procedure.<sup>478</sup> The agreement is also distinctive in its aim of conducting the arbitration and achieving an arbitral decision in a relatively short time period.<sup>479</sup> Unless the Parties agree to the contrary, all submissions must be made and all hearings completed within six months of the selection of the third arbitrator.<sup>480</sup> The arbitral panel must then complete its deliberations and render a decision no later than two months after receipt of the final submission or the close of the hearing, whichever is later.<sup>481</sup> Although arbitral tribunals generally have the authority to extend time constraints, only the Parties, not the tribunal, may lengthen the periods set in the United States – Honduras BIT.<sup>482</sup>

The expenses incurred by the Chair and the other arbitrators, as well as other costs of the proceedings are presumptively borne equally by the Parties.<sup>483</sup> The United States – Honduras treaty does extend discretion to the arbitral panel to “direct that a higher proportion of the costs be paid by one of the Parties.”<sup>484</sup>

### Dispute Resolution Between an Investor and a Party

Article IX of the United States – Honduras treaty is the article of foremost consequence for most foreign direct investors.<sup>485</sup> Article IX confers on the investor the right to initiate and control dispute resolution with the host state and expressly sets forth the rights investors may assert.<sup>486</sup> The investor's entitlement to

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477. See United States – Honduras Investment Treaty, *supra* note 5, art. X(2).

478. See DOLZER & STEVENS, *supra* note 93, at 126; McGhie, *supra* note 11, at 120.

479. See DOLZER & STEVENS, *supra* note 93, at 126.

480. See United States – Honduras Investment Treaty, *supra* note 5, art. X(3).

481. See *id.*

482. See DOLZER & STEVENS, *supra* note 93, at 127.

483. See United States – Honduras Investment Treaty, *supra* note 5, art. X(4); see generally DOLZER & STEVENS, *supra* note 93, at 124 (suggesting that sharing arbitral costs or having the tribunal assess costs facilitates the independence of the arbitrators).

484. United States – Honduras Investment Treaty, *supra* note 5, art. X(4).

485. See McGhie, *supra* note 11, at 119.

486. See United States – Honduras Investment Treaty, *supra* note 5, art. IX; see DOLZER & STEVENS, *supra* note 93, at 145.

engage the host state on the international plane flows solely and directly from the authority conferred in Article IX.<sup>487</sup> The United States – Honduras BIT not only empowers investors to participate in dispute resolution with the host state, particularly through international arbitration, but further authorizes the assertion of claims by investors to be based on substantive provisions of the United States – Honduras treaty.<sup>488</sup>

Investment disputes subject to the control of an investor are “dispute[s] between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized” by the treaty with respect to covered investments.<sup>489</sup> The treaty does not, however, offer guidance regarding those disputes that should be regarded as “arising out of or relating to” investment authorizations, investment agreements or the rights conferred, created or recognized by the treaty,<sup>490</sup> but such disputes should be coterminous with the broad definition of “investment” in Article I (d).<sup>491</sup> The phraseology of Article IX (1), “arising out of or relating to,” particularly the use of the coordinating conjunction “or” suggests an expansive interpretation.<sup>492</sup> The language of Article IX (1), when read with the expansive definition of “investment,”<sup>493</sup> supports the conclusion that the Parties intended the phrase “investment dispute” to be liberally construed.<sup>494</sup>

Balanced against an expansive interpretation of “investment dispute” is the issue of state sovereignty and the extent to which it may be accepted that the Parties intended to yield that sovereignty to an arbitral tribunal. Disputes that involve business issues are appropriate for settlement through investor-state dispute resolution. The more fundamentally political an issue, such as the characterization of a war<sup>495</sup> or the legality of the use of

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487. See SORNARAJAH, *supra* note 2, at 262.

488. See DOLZER & STEVENS, *supra* note 93, at 146.

489. United States – Honduras Investment Treaty, *supra* note 5, art. IX(1); see McGhie, *supra* note 11, at 120; COMEAUX, *supra* note 14, at 108 (examining Article IX of the United States prototype investment treaty).

490. United States – Honduras Investment Treaty, *supra* note 5, art. IX(1).

491. *Id.* art. I(d).

492. *Id.* art. IX(1).

493. *Id.* art. I(d).

494. See generally SORNARAJAH, *supra* note 2, at 267 (stating that the type of disputes that may be arbitrated should be identified in “wide terms”).

495. See *id.* at 262 n.95 (stating that wars involving self-determination are



force,<sup>496</sup> the less likely it is that the Parties intended to extend to an investor the right to have that matter addressed in a domestic court or through the arbitral process.

### *Investor – State Dispute Resolution Methodology*

The United States – Honduras BIT provides investors with three options to resolve investment disputes with the host state. Investors may proceed before the domestic courts or administrative bodies of the host state, conclude their differences in accordance with any previously agreed on settlement procedures applicable to the issues or compel the host state to submit to binding international arbitration.<sup>497</sup> The most important alternative, that of arbitration in an international forum, is an aspect of investment treaty practice on which American negotiators have consistently refused to compromise and is only available through the treaty.<sup>498</sup> Binding arbitration may be before the International Centre for the Settlement of Investment Disputes, if ICSID's jurisdictional requirements are satisfied, the Additional Facility of ICSID, if ICSID jurisdiction cannot be established, pursuant to the UNCITRAL Arbitration Rules or in accordance with any other arbitral institution or arbitration rules, if agreed to by both the investor and the host state.<sup>499</sup>

Investors may only compel arbitration if they have not previously instituted action in the host state's domestic legal system or pursuant to a previously agreed upon method, and "three months" have passed since the dispute arose.<sup>500</sup> If the investor has "previously submitted the dispute for resolution"<sup>501</sup> under one of the initial two options of Article IX (2), that of the local courts or a previously agreed on dispute-settlement procedure, investor recourse to arbitration is precluded.<sup>502</sup> The "three month" delay in

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"inherently unsuitable for settlement by tribunals constituted to settle investment disputes").

496. *See id.* at 263.

497. *See* United States – Honduras Investment Treaty, *supra* note 5, art. IX(2).

498. *See* COMEAUX, *supra* note 14, at 108-09.

499. *See* United States – Honduras Investment Treaty, *supra* note 5, art. IX(3)(b)(i),(ii),(iii) and (iv); McGhie, *supra* note 11, at 121; Georges R. Delaume, *Consent to ICSID Arbitration, in THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY* 155, 168 (Joseph J. Norton et al. eds., 1998).

500. United States – Honduras Investment Treaty, *supra* note 5, art. IX(3)(a); *cf.* United States – El Salvador Investment Treaty, *supra* note 390, art. IX(3)(a) (which states "ninety days").

501. United States – Honduras Investment Treaty, *supra* note 5, art. IX(3)(a).

502. *See* ROBERT, *supra* note 70, at 11; McGhie, *supra* note 11, at 121; Escobar,

instituting arbitration commences to run on “the date on which the dispute arose.”<sup>503</sup> The United States – Honduras treaty does not state how it should be decided when a dispute is considered to have arisen. The date should not be later than the date on which the investor’s rights in the domestic system would commence to run. Although investors are prevented from commencing arbitration pursuant to Article IX (3)(a) prior to the elapse of the three-month period, they are entitled to seek interim injunctive relief during this period to preserve their rights and interests.<sup>504</sup>

### *Injunctive Relief*

Investors, pursuant to Article IX (3)(b), may seek interim injunctive relief through the domestic judicial or administrative system of the host country.<sup>505</sup> Maintenance of the status quo between the investor and the host state must underlie the interim request for relief. Referencing the language of the United States – Honduras treaty, an investor’s recourse to injunctive relief must be solely for the “preservation of its rights and interests.”<sup>506</sup> Injunctive relief intended to preserve an investor’s rights and interests is relief that does not involve the payment of damages.<sup>507</sup> The United States – Honduras treaty does not define the term “damages.”

Article IX (3)(b) makes it clear that resort to strictly injunctive relief will not negatively impact an investor’s option of engaging in binding arbitration. Sub-paragraph (3)(b) provides that a national or juridical entity may seek interim injunctive relief “notwithstanding that it may have submitted a dispute to binding arbitration.”<sup>508</sup> The United States – Honduras treaty further states that such relief may be sought “prior to the institution of the arbitral process or during the proceedings.”<sup>509</sup> Despite having the right to do so, investors required by their particular circumstances to seek injunctive relief against a Party should carefully limit the request. An expansive prayer for injunctive relief may be interpreted as seeking the payment of damages, rather than

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*supra* note 61, at 91 (referencing this provision of U.S. BIT practice as the “fork-in-the-road”).

503. United States – Honduras Investment Treaty, *supra* note 5, art. IX(3)(a).

504. *See id.* art. IX(3)(b).

505. *See id.*

506. *Id.*

507. *See id.*

508. *Id.*

509. *Id.*

merely the preservation of rights and interests, and consequently be deemed an exercise of the investor's right to dispute resolution in the domestic legal system.<sup>510</sup>

### *Consent to Binding Investor – State Arbitration*

ICSID Convention Article 25 (1)<sup>511</sup> and the Additional Facility Rules<sup>512</sup> only extend the jurisdiction of ICSID to “legal dispute[s] arising directly out of an investment” for which there has been “consent in writing” to submit the dispute to ICSID.<sup>513</sup> ICSID will not entertain arbitration against a sovereign state absent unconditional consent set forth in a written instrument.<sup>514</sup> The United States – Honduras BIT expressly provides the requisite written consent in Article IX (4).<sup>515</sup>

Article IX (4) of the agreement provides that “[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration” in accordance with the election of the investor.<sup>516</sup> The Parties, through Article IX(4), confirm their intention that the consent agreed to in the United States – Honduras treaty satisfies the requirements of the ICSID Convention and the Additional Facility Rules.<sup>517</sup> The language drawn on by Honduras and the United States does not, as in some treaties, suggest a willingness to consider arbitration. Rather, it expressly recognizes the Parties’ obligations to participate in binding arbitration before ICSID or pursuant to the Additional Facility Rules.<sup>518</sup> Since neither Article 25 (1) of the ICSID Convention nor the Addi-

510. *See id.* art. IX(2)(a).

511. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27, 1965, art. 25(1), 17 U.S.T. 1270, 1280, 575 U.N.T.S. 159, 174 [hereinafter ICSID Convention]; *see generally* Antonio R. Parra, *The Role of ICSID in the Settlement of Investment Disputes*, ICSID News, Winter 1999 at 5, available at <http://www.worldbank.org/icsid/news/n-16-1-5.htm>.

512. *See* Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes, ICSID Doc. 11, art. 4(2) (1979).

513. ICSID Convention, *supra* note 511, art. 25(1).

514. *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524, 527 (stating that consent is the “cornerstone” of the Convention); *see also* Delaume, *supra* note 499, at 166.

515. *See* McGhie, *supra* note 11, at 122.

516. United States – Honduras Investment Treaty, *supra* note 5, art. IX(4); *see* Delaume, *supra* note 499, at 168.

517. *See* United States – Honduras Investment Treaty, *supra* note 5, art. IX(4)(a); Delaume, *supra* note 499, at 168.

518. *See* DOLZER & STEVENS, *supra* note 93, at 132; Delaume, *supra* note 499, at 165-66.

tional Facility Rules require that a state's consent be in a particular instrument or even conferred in the same instrument, investors whose investment agreements with a host state do not expressly address consent remain entitled through Article IX (4) of the United States – Honduras BIT to submit their disputes for arbitration before ICSID or the Additional Facility.<sup>519</sup>

### *Finality and Enforcement of Investor – State Arbitral Awards*

The United States and Honduras expressly sought through Article IX (6) to eliminate protracted litigation or arbitration and to facilitate satisfaction of arbitral awards. The Parties provided that any arbitral award rendered pursuant to Article IX would be “final and binding on the parties to the dispute.”<sup>520</sup> “The parties,” as expressed in Article IX (6), refers to both investors and the host Party, not just the “Parties” to the United States – Honduras treaty.<sup>521</sup> The United States – Honduras treaty further provides that Honduras and the United States are to “carry out without delay” the provisions of any arbitral award and to provide in their territories for the enforcement of any arbitral award.<sup>522</sup> The failure of the Parties to enforce an award rendered pursuant to the conditions set forth in the United States – Honduras treaty could constitute a breach of the Treaty and possibly render the Party directly liable.<sup>523</sup>

Buttressing the obligation of the Parties to carry out the terms of any arbitral award are the requirements of Article IX (5). Article IX (5) mandates that arbitration be held in a country that is a Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Con-

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519. See DOLZER & STEVENS, *supra* note 93, at 131; Delaume, *supra* note 499, at 156.

520. United States – Honduras Investment Treaty, *supra* note 5, art. IX (6).

521. *Id.*

522. *Id.*

523. See Islamic Republic of Iran and United States, Award No. 586-A27-FT (June 5, 1998), available at <http://www.iusct.org/awards/award-586-a27-ft-eng.pdf>; see generally Anuj Desai, *Arbitral & Judicial Decision: Case No. A27: The Iran-United States Claims Tribunal's First Award of Damages for Breach of the Algiers Declaration*, 10 AM. REV. INT'L ARB. 229 (1999) (questioning the decision of the Iran-United States Claims Tribunal rendering an award in favor of Iran and against the United States for violating the Algiers Declaration. The arbitral award stemmed from decisions of a U.S. District Court and Court of Appeals declining to recognize and enforce a previous award of the Claims Tribunal in favor of Iran against a U.S. national.); McGhie, *supra* note 11, at 122 (suggesting diplomatic espousal to enforce an arbitral award).

vention")<sup>524</sup> in order to ensure, to the extent possible against any sovereign, that the Parties comply with arbitral awards rendered against them.<sup>525</sup> The New York Convention enables investors in whose favor an arbitral award has been rendered, to seek recognition and enforcement of the award against the assets of the host Party in any state that is a Party to the New York Convention. The Parties affirm through Article IX (4) that the treaty constitutes an "agreement in writing"<sup>526</sup> as mandated by the New York Convention.<sup>527</sup> Recognition and enforcement of an award against Honduras may, however, be complicated by the fact that only the United States is a Party to the New York Convention.<sup>528</sup> Issues of jurisdiction and sovereign immunity may also hinder the ability of an investor to obtain ultimate satisfaction of an award.<sup>529</sup>

### *Exhaustion of Local Remedies*

The local remedies rule, a fundamental principle of customary international law, calls for the exhaustion of all remedies provided for by the laws of the host state in advance of recourse to international arbitration.<sup>530</sup> The rule is recognition of state sovereignty over matters within its territory and is implied in investment treaties that are silent on the issue.<sup>531</sup> The Court of International Justice in *Elettronica Sicula S.p.A. (ELSI)* addressed the obligation to exhaust local remedies when asserting privileges based on a Treaty of Friendship, Commerce and Navigation.<sup>532</sup> The ICJ held that "it was unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."<sup>533</sup>

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524. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *reprinted in* 7 I.L.M. 1042 (1968) [hereinafter New York Convention].

525. See Delaume, *supra* note 499, at 168.

526. United States - Honduras Investment Treaty, *supra* note 5, art. IX(4)(b); Delaume, *supra* note 499, at 168.

527. See New York Convention, *supra* note 524, art. II.

528. A review of the World Wide Web site of the United Nations is available at <http://www.unece.org/trade/tips/comarbit/listpart.htm>, and it indicates that the United States is a signatory to the New York Convention, but does not list Honduras.

529. See SORNARAJAH, *supra* note 2, at 269; McGhie, *supra* note 11, at 121; Delaume, *supra* note 499, at 168. See also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 -1611(2000).

530. See SORNARAJAH, *supra* note 2, at 270; Shihata, *supra* note 194, at 214.

531. See SORNARAJAH, *supra* note 2, at 271-72.

532. See *Elettronica Sicula S.p.A. (ELSI)* (*United States v. Italy*) 1989 I.C.J. 15.

533. *Id.* at 42.

The United States – Honduras investment treaty, although not expressly obviating the local remedies rule, does provide investors with dispute resolution options that contradict incorporation of the rule in the treaty. Article IX (2) states that “a party to an investment dispute may submit the dispute for resolution” in accordance with the terms set forth in the United States – Honduras treaty.<sup>534</sup> The options available to an investor through the BIT include recourse to the domestic legal system of the host Party, dispute settlement procedures agreed on in advance and binding arbitration.<sup>535</sup> Since the obligation to exhaust local remedies is not expressly dispensed with in the United States – Honduras treaty, there is the presumption that it should be implied. Article IX (2) should, however, be interpreted as rebutting this presumption. Providing an investor with dispute resolution options directly conflicts with the proposition of the rule.<sup>536</sup> The intent of Honduras and the United States, as expressed in Article IX (2), was to eliminate the investor’s obligation to exhaust local remedies prior to electing its course of dispute resolution with the host state.

### CONCLUSION

The development of international commerce from trade between merchants to direct investment beyond the traditional borders of the investor’s home country has brought with it a rapidly evolving legal landscape.<sup>537</sup> International dispute resolution, once the provenance of diplomats and state espousal of claims, is now the arena of the “transnational adjudicator.”<sup>538</sup> Providing investors with the means of advancing their disputed claims with the host state and recognition of that privilege by investors has resulted in a proliferation of arbitral claims.<sup>539</sup>

Appreciating the nuances and ambiguities of bilateral investment treaties is essential to contemporary foreign direct invest-

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534. United States – Honduras Investment Treaty, *supra* note 5, art. IX(2).

535. See *id.* art. IX(2)(a)-(c).

536. Cf. SORNARAJAH, *supra* note 2, at 270 (providing that the presence of an arbitration clause in an investment contract does not, by itself, negate the rule).

537. See Kolker, *supra* note 442, at 90; see generally Robert L. Pritchard, *The Lawyer’s Role in Foreign Direct Investment and the Global Economy*, 18 INT’L BUS. L. 358 (1990).

538. Jacques Werner, *International Commercial Arbitration: From Merchants to Academic to Skilled Professional*, DISP. RESOL. MAG. Spring 1998, at 22, 24.

539. See Malcolm Richard Wilkey, *Introduction to Dispute Settlement in International Trade and Foreign Direct Investment*, 26 LAW & POL’Y INT’L BUS. 613 (1995).

ing. Treaty provisions drafted by skilled diplomats are being subjected to the scrutiny of talented arbitrators. The strengths and weaknesses of negotiating positions, and concurrent arbitral awards, rest on the interpretation of treaty terms that are more frequently being construed in a legalistic manner. As investor – state dispute resolution, the recourse of final resort, becomes more prevalent, knowledge of treaty ambiguities becomes more indispensable and the need for treaties crafted with greater certainty more evident.