

# UNITED STATES BILATERAL INVESTMENT TREATIES WITH RUSSIA AND OTHER C.I.S. REPUBLICS

N. Stephan Kinsella, Paul E. Comeaux *Jackson & Walker, L.L.P. Houston*

**W**hile an investor investing in a foreign state can never be entirely free from political risks,<sup>1</sup> these risks may be substantially reduced if a treaty to protect private investment is in place between the foreign state and the investor's home state.

Treaties aimed specifically at protecting private foreign direct investment are called bilateral investment treaties ("BITs"). BITs set forth standards for treatment of foreign investors in areas such as expropriation of property, repatriation of funds, and

settlement of disputes. While investors can and should use other methods to reduce political risks—such as concession agreements<sup>2</sup> and government-sponsored insurance programs<sup>3</sup>—the presence of a treaty provides a strong incentive for a host

state to honor its obligations under international law and its agreements with the investor.

When a host state violates the rights guaranteed to the investor by the treaty, that state has not only violated norms of customary international law

(such as the requirement to expropriate only for a public purpose, in a nondiscriminatory fashion, and upon the payment of prompt, adequate and effective compensation<sup>4</sup>), but has also breached a treaty with the investor's home state.

While European countries have been successfully negotiating BITs since the late 1950s<sup>5</sup>, the United States did not first begin to do so until the early 1980s<sup>6</sup>. In 1982, the United States announced the formulation of a model BIT, which was updated in 1983, 1984, and again in 1987. The model BIT is used as a starting point in all BIT negotiations conducted by the United States.<sup>7</sup>

It is likely that BITs will soon be in place between the United States and several C.I.S. republics. As part of its ongoing program of negotiating BITs with its trading partners, especially less developed countries, the United States has signed BITs with Russia, Armenia, Kazakhstan, and Kyrgyzstan as of the date of this writing. However, none of these treaties are yet in force. The U.S.-Russia BIT has received the advice and consent<sup>8</sup> of the U.S. Senate and is awaiting similar domestic approval from the Russian government before it enters into force. The other treaties are expected to be submitted to the U.S. Senate soon.<sup>9</sup>

This article discusses the major provisions of the U.S.-Russia BIT and the BITs with other C.I.S. republics and how these provisions will affect investors.<sup>10</sup>

### The U.S.-Russia BIT

The BIT between Russia and America (the "U.S.-Russia BIT" or the "Treaty") was signed at Washington on June 17, 1992.<sup>11</sup> This is the first BIT with a C.I.S. Republic to be submitted for Senate consideration;<sup>12</sup> it has since been approved by the United States Senate.<sup>13</sup> Although the Treaty imposes obligations on both Russia and the United States with respect to foreign investment, this article focuses upon the treaty's provisions concerning American investors investing in Russia.

Below are discussed six important issues addressed by the Treaty, and

how they will affect investors: the standard of treatment of U.S. investment by Russia, the legality of and remedies for expropriation of U.S. investments, the transfer of currency into and out of Russia, certain provisions for the settlement of investment disputes, the duration of the U.S.-Russia BIT, and the status of the U.S.-Russia BIT in the event that the Russian Federation splits apart.

### Treatment of investment

Article II concerns the standard of treatment that Russia must provide to U.S. investors and their investments. These standards fall into two broad categories: relative treatment, which means that Russia must treat U.S. investment as well as it treats investment from any other country, and absolute treatment, which states that Russia must treat U.S. investment fairly and equitably, and in accordance with international law, regardless of how it treats non-U.S. investment.

• *Relative Standards.* Paragraph 1 of Article II provides for "relative" standards of treatment, by requiring Russia to treat U.S. investment "on a nondiscriminatory basis" with non-U.S. investment, subject to exceptions in certain sectors of the economy, which are listed in an Annex to the BIT.

These relative standards are sometimes known as "national treatment" and "most-favored-nation" ("MFN") treatment. "National treatment" generally requires the host state to treat the foreign investment no less favorably than the investment of its own nationals; MFN treatment requires the host state to treat the investment no less favorably than it treats the investment of any third country's investors. Paragraph 4(a) of the Protocol to the U.S.-Russia BIT specifically refers to the requirement to accord "national treatment" with respect to the entry of investments.<sup>14</sup>

The exceptions listed in the Annex generally relate to matters such as land, power production, state loans, banking, and mass media. One significant sector in which Russia reserves the right to make exceptions is "ownership of land and use of subsoil and

natural resources."<sup>15</sup>

Attached to the Treaty is a letter between the U.S. and Russia containing an understanding of the BIT shared by both countries. The letter states:

*Based on the Law of the Russian Federation on Subsoil and legislation relating to natural resources, the Russian Federation has reserved the right to make or maintain exceptions to national treatment for the use of subsoil and natural resources. The aforementioned Law on Subsoil in principle accords national treatment to foreign investment concerning the use of subsoil. . . . [T]he Russian Federation intends to continue to accord national treatment to investments of nationals and companies of the United States with respect to the use of subsoil and natural resources.*

Such understanding "constitutes an integral part of the Treaty." Therefore, even though Russia reserves the right to make exceptions to national treatment for the use of the subsoil and natural resources, in this significant clarification it appears to be attempting to promise, to as great an extent possible, as with a "letter of intent," without making an absolutely binding commitment, that it will not deny national treatment to U.S. companies and nationals investing in natural resources in Russia.

The permitted exceptions apply only to the provisions of Paragraph 1 (which concern national treatment); and Russia has promised in the Annex to the Treaty to keep future exceptions at a minimum. Further, "Any future exception by [Russia or the U.S.] shall not apply to investment existing in that sector or matter at the time the exception becomes effective."

• *Absolute Standards.* Paragraph 2 of Article II provides for "absolute" standards of treatment. Russia must provide the investment with fair and equitable treatment, full protection and security, and treatment not inconsistent with the norms and principles of international law.<sup>16</sup> Russia may not impair by arbitrary or discriminatory measures the management, operation or other use of investments.

Finally, Russia must observe any concessions it enters into with U.S.

nationals or companies.<sup>17</sup> Because the BIT is not yet in force and could terminate in the future even after it does come into force (discussed below), and because of Russia's power to make exceptions with respect to natural resources, an investor would be wise to consider the use of a concession to protect its investment, as discussed in a previous article by the authors.<sup>18</sup>

• *Other protections.* Other provisions of Article II guarantee the right of U.S. investors to bring U.S. nationals to Russia to establish and operate the investment (Paragraph 3) and to hire top managerial personnel of their choice, regardless of nationality (Paragraph 4). Russia is barred from imposing on the investor requirements to export goods produced, or to purchase goods and services locally, or other similar requirements (Paragraph 5).

Russia is to provide effective means of asserting claims and enforcing rights related to investments and investment agreements (i.e. concessions) (Paragraph 6) and must publish all laws or regulations affecting investments (Paragraph 7).

### Expropriation

Provisions protecting an investor from the consequences of an expropriation or nationalization of its investment are of particular importance to an investor—especially in an unstable regime such as Russia, which also has history of hostility towards private property rights.

Article III of the Treaty limits Russia's right to expropriate U.S. investments in Russia and provides for compensation when expropriation does occur. The Article provides that investments shall not be expropriated, directly or indirectly, unless: (1) for a public purpose; (2) performed in a nondiscriminatory manner; (3) upon payment of prompt, adequate and effective compensation; and (4) in accordance with due process of law and the "absolute" standards of treatment discussed above.

Realistically, although Russia would be technically in breach of a treaty obligation, as well as customary international law, if it were to take proper-

ty in a discriminatory manner or not for a public purpose, merely deeming Russia to have violated international law will be of little economic benefit to an expropriated investor, who may well be out of millions or even billions of dollars' worth of assets and other rights.

Therefore, one of the most important guarantees an investor can have is a guarantee that it will be compensated if there is an expropriation. Practically speaking, it is impossible to prevent a nation from expropriating assets it is determined to confiscate, since other states would not be willing to prevent the expropriation by force. This is especially true in the context of the modern movement towards "permanent sovereignty over natural resources," in which many states (typically, third-world, developing economies) have declared that a state always retains the right to expropriate certain assets, such as natural resources, if the "public interest" demands it—even if the state has promised not to do so, e.g. in a concession agreement or in a BIT.<sup>19</sup>

It is, however, more acceptable under current international law and practice for a state to bind itself to pay compensation in the event that it does nationalize or expropriate an investor's property. The courts of other nations are in certain circumstances willing to enforce a damages award, based upon an obligation to compensate, against the assets of the offending state located within the court's jurisdiction.<sup>20</sup> It is seen as less of an infringement on the sovereignty of the confiscating state to simply enforce a commitment to pay compensation, than to declare that the confiscating state may not perform expropriating acts within its own sovereign territory.<sup>21</sup>

Thus the provision of Article III requiring "payment of prompt, adequate and effective compensation" is one of the most potentially useful to an investor. Such a requirement is likely to be one of the most effective in terms of protecting the value of the investment, because other nations are more willing to enforce a damages award based on this obligation, and because Russia would be less willing

to expropriate in the first place if it would have to pay for the property it confiscates.

Of further benefit to the investor is the adoption of the "prompt, adequate and effective compensation" standard and the further requirement that compensation should be the "fair market value of the expropriated investment immediately before the expropriatory action was taken or became known . . . ." This compensation standard is the "Hull Formula," which is promoted by the United States, but is not universally accepted as customary international law. This standard better protects the investor by insisting that the aggressor nation pay the true economic value of the investment taken, rather than "appropriate" compensation, an inadequate standard, which is often favored by less developed countries.<sup>22</sup>

This provision also requires that compensation be paid without delay, include interest from the date of the expropriation, be fully realizable, and be freely transferable at a market rate of exchange.<sup>23</sup>

Additionally, the Article prohibits indirect, as well as direct, expropriation. This helps to ensure that Russia may not avoid the prohibition against expropriation by indirectly or gradually imposing regulations<sup>24</sup> that have the same economic effect as a direct expropriation.

Other provisions in Article III concern the right of an investor complaining of an expropriation to review of the complaint by the appropriate judicial or administrative authorities in Russia and the right of an investor to be accorded nondiscriminatory treatment by Russia as regards restitution, compensation or other measures following losses due to war or revolution in Russia.

### Currency transfers

Although highly burdensome exchange control regulations may constitute an expropriation, exchange control regulations that do not rise to this level can still be very costly to investors.<sup>25</sup> Article IV of the Treaty addresses this concern by providing for free transfer of currency into and out of the Host State. The Treaty

states that each country shall allow "all transfers related to an investment to be made freely and without delay into and out of its territory." Investors are allowed to convert currency "into the freely convertible currency of their choice."

The Treaty gives examples of what is meant by "transfers related to an investment." Such transfers fall into two broad categories. First, a transfer may occur in the normal course of the investor's business. Examples given are returns and proceeds from the sale or liquidation of all or part of an investment. Second, a transfer may occur as a payment from Russia to the investor as compensation for a transgression. If Russia compensates the investor for a violation of an agreement between them, Russia may not pay the money and then refuse to allow the money to be expatriated.

Article IV does, however, list several qualifications. Russia is allowed to require reports of currency transfers by the investor and is also allowed to impose withholding taxes on currency that is expatriated. Finally, Russia is allowed to pass laws protecting the rights of creditors, which may interfere with an investor's right to freely transfer currency.

### Arbitration and settlement of investment disputes

Article VI of the Treaty concerns the settlement of disputes between the investor and the Host State.<sup>26</sup> This Article covers "investment disputes," which are defined as disputes arising over either (a) an investment agreement between the investor and the host state, (b) the authority given to the investor by the host state, or (c) a breach of the Treaty itself.

If any such dispute arises, the Treaty mandates that the parties first attempt to negotiate the dispute between themselves, with or without the help of third-party, non-binding mediation. This rule overrides contractual provisions between the investor and the Host State to the contrary. Thus, even if the investor and the Host State are parties to a concession that provides that upon violation of the concession, either party may immediately invoke binding arbitration,

the Treaty mandates that the parties must nevertheless first attempt to settle their differences by negotiation. An investor who negotiates to resolve an investment dispute in accordance with this provision of the Treaty should keep records of such negotiations to prevent later claims by the Host State that no such negotiations were undertaken.

If the investment dispute cannot be resolved by negotiation between the parties, the parties are then allowed to settle their dispute "in accordance with previously agreed, applicable dispute-settlement procedures." This provision contemplates and allows dispute settlement provisions, such as international arbitration provisions, in agreements between a Host State and an investor.<sup>27</sup> The Treaty states that these dispute-settlement procedures are enforceable in accordance with "the terms of the agreement, relevant provisions of domestic law, and applicable international agreements regarding enforcement of arbitral awards."<sup>28</sup>

Finally, Article VI provides a mechanism by which the investor may insist upon arbitration of an investment dispute before an international arbitral body, even if the parties did not provide for this type of dispute resolution in their contract or concession. This provision allows arbitration of an investment dispute before one of the following arbitral bodies: the International Center for Investment Disputes ("ICSID"),<sup>29</sup> if the Russian Federation has become a party to the treaty which authorized ICSID; the Additional Facility of ICSID (the "Additional Facility");<sup>30</sup> the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"); or any other institutional arbitration facility agreed upon by the parties to the dispute.

In the Treaty itself, Russia gives its consent to arbitration before ICSID, the Additional Facility, or under the UNCITRAL Rules. The investor has the option to consent at any time after six months from the date that the investment dispute arose. Once the investor consents, then either Russia or the investor may bring an action before the particular arbitration body to which the investor has given its

consent.

This provision is relevant in situations either where the dispute settlement provisions in a contract between Russia and an investor do not cover a particular investment dispute, or where there are no investment dispute provisions between Russia and the investor. The investor may nevertheless invoke international arbitration by consenting to it under this provision. It is nevertheless prudent for an investor to insist upon settlement dispute mechanisms in its agreements with Russia rather than relying upon this provision. Settlement dispute provisions negotiated by an investor can be tailored to the particular needs of the investor and can include such safeguards as a stabilization clause.<sup>31</sup>

### Termination of the U.S.-Russia BIT

Article XIII provides that the BIT enters into force thirty days after it has been ratified by both the U.S. and Russia and remains in force for at least ten years. Of particular importance to investors with already-existing investments in Russia, this Article also provides that the BIT "shall apply to investments existing at the time of entry into force as well as to investments made thereafter." This provision helps to reduce any incentive an investor might have to wait until the BIT is in force before investing, and also, as a bonus, protects current investments on an equal footing with post-BIT investments.

After the initial ten-year period, either Russia or the U.S. may, by giving at least one year's written notice, terminate the BIT.

Thereafter, any prospective investor would be aware that the BIT was no longer in force and could decide not to invest in Russia if the increased risk was felt to be too high. However, investors who had already invested in Russia may have no such option. The Article provides that, for such investments, the provisions of the BIT continue to be effective for a period of ten years from the date of termination.

Therefore, any investor relying upon the protections afforded by the Treaty should be aware that Russia

could, at any time after the initial ten-year period, announce termination of the BIT, giving the investor benefits under the BIT for only eleven more years (one year's notice to terminate plus ten years after termination).

To the extent investors require protection lasting longer than this, other options, such as investment insurance programs, or concession agreements negotiated directly with the government that contain a longer term than that of the BIT, should be considered.

### Dissolution of the Russian Republic

Given recent unrest and instability in Russia, there may understandably be some concern by investors that republics or parts of Russia could separate from Russia to form one or more independent states. For example, three of the most restless of the republics are Chechnya, Tatarstan, and the oil-rich Bashkortostan; it is not inconceivable that these republics could break away from Russia entirely.<sup>32</sup>

If this were to occur, the provisions of the Treaty would, under international law, probably still bind the successor states.<sup>33</sup> This prediction is reinforced by Article XII of the Treaty, which provides that "This Treaty shall apply to the political subdivisions of the Parties."

### BITs with Kazakhstan, Armenia, Kyrgyzstan and other republics

BITs have also been signed between the U.S. and three other C.I.S. Republics: Kazakhstan (signed May 19, 1992), Armenia (signed September 23, 1992), and Kyrgyzstan (signed January 19, 1993).<sup>34</sup>

These BITs are very similar to the U.S.-Russia BIT discussed above. The main differences are in the Annexes to these BITs, which contain any exceptions to the national treatment requirements provided in Article II, Paragraph 1, of each BIT.

Armenia reserves the right to make or maintain limited exceptions to national treatment in certain listed sectors of the economy, including extraction of natural resources and mining on the public domain. Kazakhstan reserves the right to maintain exceptions

in certain matters, including "ownership" of land, its subsoil, and other natural resources. However, the "use" of such land with its subsoil and natural resources is not subject to an exception.

Kyrgyzstan, however, has decided not to reserve such rights, perhaps in order to demonstrate the Republic's interest in attracting foreign investment. The Annex to the U.S.-Kyrgyzstan BIT provides that "The Republic of Kyrgyzstan does not reserve the right to make or maintain exceptions from the national treatment or most favored nation treatment obligations in Article II, paragraph 1."

It is expected that the U.S. will continue to negotiate and enter into BITs with other C.I.S. Republics.<sup>35</sup> Additionally, "There is a broad expectation that the [U.S.-Russia BIT and the BIT between the U.K. and Russia] will serve as models for comparable treaties with other major commercial countries."<sup>36</sup>

### Conclusion

Western investors seek to benefit themselves and the populace of Russia and other C.I.S. Republics by providing them with needed capital to finance production and economic growth. But unless political risks are minimized, investors will not be willing to invest precious time and capital. The resulting lack of investment would be detrimental to both the investors and the Republics.

Fortunately, as the world begins to gain a greater appreciation for the importance of property rights, methods are becoming available to lower political risks to allow investment to proceed. Concessions, directly negotiated between the investor and the Host State, containing stabilization and international arbitration clauses, are one method of reducing political risks; purchasing government-sponsored or even private insurance is still another.

The protections won by BITs also serve to reduce the political risks inherent in foreign investment. BITs create a regime anchored in international law that is favorable, not hostile, to investment—a regime that attempts to

prevent expropriation, direct or indirect, and to provide for full compensation when expropriation does occur. Hopefully, for the sake of both investors and the Republics, the trend towards greater protection of the property rights of investors will continue in this direction.

### References

1. Political risk is the risk of government intervention faced by a foreign investor. Examples are the risk that the government will raise import or export duties, increase taxes, impose currency restrictions or further regulations, or nationalize or expropriate the assets of the investor. Political risks do not include typical business risks such as changes in consumer demand or increases in the cost of production.
2. See generally Paul E. Comeaux & N. Stephan Kinsella, *Reducing The Political Risk of Investing in Russia and Other C.I.S. Republics: International Arbitration and Stabilization Clauses*, Russian Oil & Gas Guide, April 1993, p. 21, and articles cited therein.
3. See generally Paul E. Comeaux & N. Stephan Kinsella, *Insuring Investments in Russia and Other C.I.S. Republics: MIGA and OPIC*, to be published in the next issue of *The Russian Oil & Gas Guide*. See also Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 *Harvard Int'l L.J.* 103 (1992); Berger, *The New Multilateral Investment Guarantee Agency Globalizing the Investment Insurance Approach Towards Development*, 15 *Syr. J. Int'l L. & Com.* 13 (1988); Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 *Int'l Lawyer* 671 (1987); Akinsanya, *International Protection of Direct Foreign Investment in the Third World*, 36 *Int'l & Comp. L.Q.* 58 (1987); Chatterjee, *The Convention Establishing the Multilateral Guarantee Agency*, 36 *Int'l & Comp. L.Q.* 76 (1987); Zakariye, *Insurance Against Political Risks in Oil Development*, 4 *J. Energy Nat. Resources & Env'tl. L.* 217 (1986); and Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, *ICSID Rev.* (1986).
4. See M.N. Shaw, *International Law* (1991), pp. 516-21.
5. "West Germany and Pakistan signed the first BIT in 1959." Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *Int'l Lawyer* 655, 655 (1990).
6. Previously, issues of private foreign investment were addressed collaterally in treaties known as Friendship, Commerce, and Navigation Treaties ("FCNs"). Although the first FCN was negotiated with France by Benjamin Franklin, Arthur Lee, and Silas Deane shortly after the signing of the Declaration of Independence, BITs were the first treaties focused solely on these issues. Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 *Cornell Int'l L.J.* 201, 203 (1988). For further discussion of FCNs, see *id.* at 204. See also Valerie H. Ruttenberg, comment, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 *U. Pa. J. Int'l Bus. L.* 121

- (1987).
7. Vandevelde, supra note 6, at 211.
  8. The treaty power is granted to the President by and with the advice and consent of the Senate, providing two-thirds of the Senators present concur. U.S. Const. art. II, §2, cl. 2.
  9. This information concerning the current status of BITs negotiated with C.I.S. republics is based on a telephone conversation between Paul Comeaux and the Office of Treaty Information, U.S. Department of State, on April 5, 1993.
  10. For further discussion of BITs, see generally Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* (1992). See also Salacuse, supra note 5; Vandevelde, supra note 6; Reading, note, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 *Duke L.J.* 679 (1992); Denza & Brooks, *International Protection of Investment Treaties*, 36 *Int'l & Comp. L.Q.* 909 (1987); Ocran, *Bilateral Investment Protection Treaties: A Comparative Study*, 8 *N.Y.L. Sch. J. Int'l & Comp. L.* 401 (1987); Ruttenberg, supra note 6; and Gallins, *Bilateral Investment Protection Treaties*, 2 *J. Energy Nat. Resources & Env'tl. L.* 77 (1984).
  11. *Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment*, with Annex, Protocol, and related exchanges of letters, in *Senate Treaty Document No. 102-33 102d Cong., 2d Sess.* (1992), reprinted in 31 *I.L.M.* 794 (1992).
  12. Letter of Submittal, dated July 21, 1992, from Secretary of State Lawrence S. Eagleburger to President George Bush, included with the Treaty.
  13. See supra note 9.
  14. Vandevelde, supra note 6, at 202.
  15. "It is noteworthy that in the U.S.-Russian treaty the United States has accepted, for a period of five years, the requirement of a special investment permission by the Russian Government for 'large-scale investments that exceed the threshold amount set forth in the Russian Federation Law on Foreign Investments of July 4, 1991.' It should be recalled that Article 16 of the Law requires that 'enterprises into which foreign investors contributed in excess of the total of 100 million Rubles' be subject to an approval process by the Russian Government [31 *I.L.M.* 414 (1992)]." Heribert Golsong, *Introductory Note to the U.S.-Russian BIT*, 31 *I.L.M.* 794 (1992).
  16. Certain requirements in the Treaty are redundant with already-existing requirements of international law. Although the Treaty binds Russia to the requirements of international law, by its nature international law binds Russia even when there is no BIT in place. See Comeaux & Kinsella, supra note 2.
  17. Paragraph 2(c) refers to "obligations [Russia] may have entered into with regard to investments . . ." This type of agreement is known as a concession. Although it is useful to have this obligation embodied in a treaty, this provision is somewhat redundant, since Russia need not be a party to a treaty to be obligated under a concession agreement. See generally Comeaux & Kinsella, supra note 2. See also Paragraph 1(f) of Article I of the U.S.-Russia BIT, defining "investment agreement" as "an agreement between a Party (or its agencies or instrumentalities) and a national or company of the other Party concerning an investment.
  18. Comeaux & Kinsella, supra note 2.
  19. For further discussion of the concept of "permanent sovereignty over natural resources," see Haight, *The New International Legal Order and the Charter of Rights and Duties of States*, 9 *Int'l Lawyer* 591 (1975); Rozenthal, *The Charter of Economic Rights and Duties of States and the New International Legal Order*, 16 *Va. J. Int'l L.* 306 (1976); Brewer and Tepe, *The Charter of Economic Rights and Duties of States*, 9 *Int'l Lawyer* 295 (1975); Garcia Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 *Lawyer of the Americas* 1 (1980); and Shaw, supra note 4, at 521-23.
  20. For information concerning enforcement of arbitral awards, see Ian F. G. Baxter, *International Business Disputes*, 39 *Int'l & Comp. L.Q.* 288 (1990); Leo J. Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, 8 *J. Int'l Arb.* 81, 111 et passim (1991); Peter M. McGowan, *Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution under the Foreign Sovereign Immunities Act of 1976*, 5 *N.Y.L. Sch. J. Int'l & Comp. L.* 409, 417-19 (1984); Note, *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 *Va. J. Int'l L.* 75 (1982); Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 *Am. J. Int'l L.* 784 (1981); and J. Stewart McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 *Nw. J. Int'l L. & Bus.* 58 (1982).
  21. It is not realistic to expect an award of specific performance, or of restitution, to either be awarded or enforced against a sovereign state. Although the tribunal in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits of January 19, 1977, 53 *I.L.R.* 389 (1979), 17 *I.L.M.* 1 (1978) ("Texaco"), awarded restitution, such an award will not, in practice, be enforceable against the offending state, nor will an award of damages be enforceable against property within the territory of the state. "The problems . . . of enforcing such restitution awards against a recalcitrant state may be imagined." Shaw, supra note 4, 521-24. See also A. Z. El Chiaty, *Protection of Investment in the Context of Petroleum Agreements*, 4 *Recueil des cours de l'Académie de Droit International* (Collected Courses of the Hague Academy of International Law), 9, 158 et seq. (1987). "The futility of claiming a *restitutio in integrum* has become so apparent that some litigants do not even bother to claim it." *Id.* at 161.
  22. The international law principle of requiring "appropriate compensation" in such cases was codified in U.N. General Assembly Resolution no. 1803 (XVII) of 14 December, 1962, on *Permanent Sovereignty over Natural Resources*, Article 4. *Government of Kuwait v. American Independent Oil Company (Amin-oil)*, 21 *I.L.M.* 976, 1032 (1982), 66 *I.L.R.* 518 (1984). See also *Texaco*, supra note 21, 53 *I.L.R.* at 403-04. *Texaco*, 53 *I.L.R.* at 489, also cites the standard "appropriate compensation" with approval as a rule of customary law.
  23. "Since at the time of signature of the BIT there was no single market rate of exchange in Russia, the U.S.-Russian Treaty carries with it a side letter stating that in the absence of a unified rate of exchange in the Russian Federation at the time of ratification, the provision in question has to be renegotiated at the request of the United States. The same applies to a market rate for all other transfers, referred to in Article IV (2) of the Russian BIT." Golsong, supra note 14, at 795.
  24. Gradually increasing regulations which amount to a taking are sometimes known as "creeping expropriation".
  25. Vandevelde, supra note 6, at 244.
  26. Such disputes are differentiated from disputes between the U.S. and Russia themselves, which are governed by Articles V and VII.
  27. See generally Comeaux & Kinsella, supra note 2.
  28. This may be interpreted to mean that dispute settlement provisions can be invalidated by domestic law. This interpretation would allow the Host State to invalidate an international arbitration provision that it had previously agreed to in a concession by legislating against it. The investor can best protect itself from this contingency by including a stabilization clause in any contract negotiated with a state. For further discussion of stabilization clauses, see Comeaux & Kinsella, supra note 2.
  29. ICSID is an international arbitral institution with both a standing secretariat and rules for arbitration between States and nationals of other States. It was formed by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which was signed in Washington D.C. in March of 1965. Currently, over 100 countries are parties to the ICSID Convention. As of this writing, Russia has signed but not ratified the convention. See generally *The Convention on the Settlement of Investment Disputes*, 136 *Recueil des cours de l'Académie de Droit International* (Collected Courses of the Hague Academy of International Law) 330 (1972).
  30. The ICSID Additional Facility is a part of ICSID, and is designed to handle arbitration between States which are not a part of the ICSID convention and nationals of other States.
  31. See generally Comeaux & Kinsella, supra note 2 for a discussion of stabilization clauses.
  32. See "Russia in Turmoil: A country of countries," p. 19 at 21, *The Economist*, March 27, 1993.
  33. See Shaw, supra note 4, at 606-11, discussing standards of international law, as manifested in the 1978 Vienna Convention on the Succession of States in Respect of Treaties.
  34. The text of these BITs were obtained from the U.S. Department of State. The U.S. has also signed BITs with Bangladesh, Cameroon, Egypt, Grenada, Morocco, Panama, Senegal, Turkey, Zaire, Argentina, the Czech and Slovak Federal Republic, the Congo, Haiti, Romania, Sri Lanka, and Tunisia. Golsong, supra note 14, at 796.
  35. "BIT negotiations are underway with several of the other newly independent states of the former Soviet Union." Letter of Submittal of U.S.-Russian BIT to the President of the United States, July 21, 1992, by Lawrence S. Eagleburger, included with the Treaty. "It is expected that the number of BITs will increase significantly in the near future in view of ongoing negotiations." Golsong, supra note 14, at 796. See also the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, Public Law 102-511 [S. 2532], October 24, 1992 reprinted in *The Implications of Economic and Legal Reforms on Doing a Deal in Russia and Ukraine* (Practising Law Institute, Richard N. Dean, Chairman), 389 at Sec. 101(6), (1993), in which the Congress finds that "the success of the United States assistance for the independent states of the former

## BILATERAL INVESTMENT TREATIES

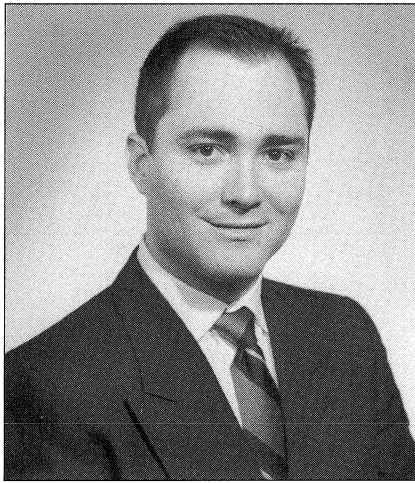
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Soviet Union depends on . . . reciprocal commitments by the governments of the independent states to work toward the creation of democratic institutions and an environment hospitable to foreign investment based upon the rule of law, including negotiation of

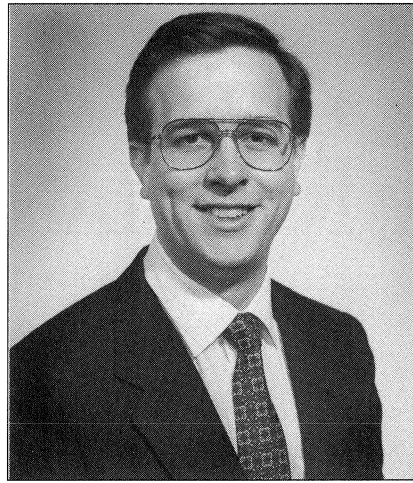
bilateral and multilateral agreements on open trade and investment'".

36. Pollack, Bernstein & Minakova, Foreign Investment in Russia: The Perspective of the Russian Government and Problems Faced by Western Investors, in *The Implications of*

*Economic and Legal Reforms on Doing a Deal in Russia and Ukraine* (Practising Law Institute, Richard N. Dean, Chairman), 507 at 516 (1993).



Kinsella



Comeaux

### ***The authors . . .***

*N. Stephan Kinsella is an associate in the energy section and in the international law practice group of the law firm Jackson & Walker. He received his B.S. (1987) and M.S. (1990) degrees in Electrical Engineering from Louisiana State University, his J.D. degree (1991) from the Paul M. Hebert Law Center, Louisiana State University, and his LL.M. degree (1992) in International Business Law from King's College London, University of London. He is licensed to practice in the States of Texas and Louisiana.*

*Mr. Kinsella may be contacted at Jackson & Walker, 1100 Louisiana, Suite 4200, Houston, TX 77210-4771. Phone: (713) 752-4360. Fax: (713) 752-4221.*

*Paul E. Comeaux is an associate in the finance and real estate sections and in the international law practice group of the law firm Jackson & Walker. He received his B.A. degree (1988) in English Literature from Louisiana State University, his J.D. degree (1991) from the Paul M. Hebert Law Center, Louisiana State University, and his LL.M. degree (1992) in International Business Law from King's College London, University of London. He is licensed to practice in the States of Texas and Louisiana.*

*Mr. Comeaux may be contacted at Jackson & Walker, 1100 Louisiana, Suite 4200, Houston, TX 77210-4771. Phone: (713) 752-4386. Fax: (713) 752-4221.*

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Well in Kazakhstan's big Tengiz field is equipped to handle high-pressure sour wellstream. Photo by John L. Kennedy

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