NOTES

THE BILATERAL INVESTMENT TREATY IN ASEAN: A COMPARATIVE ANALYSIS

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INTRODUCTION

The Association of South East Asian Nations (ASEAN)[1] is currently one of the most lucrative investment and trade regions in the world. ASEAN is the United States' fifth largest trading partner, with trade totalling $46 billion in 1990.[2] U.S. direct investment in ASEAN amounted to approximately $14 billion in 1990.[3] Exports from the United States to ASEAN increased by

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1. ASEAN was created in August of 1967 with the signing of the Bangkok Declaration by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. *See* 1 ACADEMY OF ASEAN LAW AND JURISPRUDENCE, ASEAN REGIONAL LAW SERIES: VITAL ASEAN DOCUMENTS 1967–1984, at 25 (1985). In February 1976, at the first ASEAN summit, the member states signed a "Treaty of Amity and Co-operation in South-east Asia" which obligated each state to further "perpetual peace, everlasting amity and co-operation." *Id.* at 143. Brunei Darussalam became a member of ASEAN in January of 1984. *Id.* at 50.

2. Peter Bohan, *Bush Visit to Singapore to Have ASEAN Flavour*, REUTERS, Dec. 29, 1991.

3. Foreign direct investment (FDI) in the region is as follows:

TABLE 1

FOREIGN DIRECT INVESTMENT (IN MILLIONS OF U.S. DOLLARS)

	Indonesia (through 1990)	Malaysia (through 1990)	Philippines (through 1990)	Singapore (through 1989)	Thailand (through 1990)
Total FDI	36,066	21,614	3,303	10,600	2,773
U.S. FDI	2,151	1,291	1,771	7,600	339
Japan FDI	8,734	5,187	502	n/a	1,148
U.S. share of FDI	6.0%	6.0%	53.6%	70.0%	12.2%
Japan share of FDI	24.2%	24.0%	15.2%	n/a	41.4%

See Commercial Section of the American Embassy in Jakarta, INDONESIA—COUNTRY MARKETING PLAN (Sept. 1991), § I(D), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter INDONESIA—COUNTRY MARKETING PLAN]; Commercial Section of the American Embassy in Kuala Lumpur, MALAYSIA—COUNTRY MARKETING PLAN (Sept.

14%, from $19 billion to $21.6 billion in 1991.[4] Nevertheless, there is a sentiment in the region that the United States is neglecting Southeast Asia as it concerns itself with solving problems elsewhere.[5] The criticism derives largely from the fact that Japan is now the largest investor in ASEAN.[6] U.S. investors simply appear to be shying away from the investment opportunities in ASEAN, despite the potential financial gains.[7]

Ostensibly, the cornerstone of the United States' efforts to promote and protect American investment in Lesser Developed Countries (LDCs) is the United States Bilateral Investment Treaty Program. The Bilateral Investment Treaty (BIT) establishes legally binding standards of treatment that each signatory must afford to the other signatory's investors and investments. Breach of these standards by one signatory gives rise to a legal cause of action by the other signatory. If properly constructed and coordinated with

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1991), § I(D), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter MALAYSIA—COUNTRY MARKETING PLAN]; Commercial Section of the American Embassy in Manila, PHILIPPINES—COUNTRY MARKETING PLAN (Sept. 1991), § I(D), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter PHILIPPINES—COUNTRY MARKETING PLAN]; Commercial Section of the American Embassy in Singapore, SINGAPORE—COUNTRY MARKETING PLAN (Sept. 1991), § I(D), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter SINGAPORE—COUNTRY MARKETING PLAN]; Commercial Section of the American Embassy in Bangkok, THAILAND—COUNTRY MARKETING PLAN (Oct. 1991), § I(D), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter THAILAND—COUNTRY MARKETING PLAN].

4. *See* Bohan, *supra* note 2.

5. Siti R. Dollah, *Bush Visit to Singapore Signals New Relations with Asia*, KYODO NEWS SERV., Dec. 25, 1991. In an effort to respond to this deficiency, the Bush Administration created a joint commercial commission with Thailand in 1990 and signed Trade and Investment Framework Agreements (TIFAs) with Singapore and the Philippines. Minerva A. Lau, *U.S., Singapore Sign Trade Pact*, NIKKEI WEEKLY, Oct. 19, 1991, at 24. The TIFAs established a council of senior-level trade officials from both countries, which meets to discuss "bilateral trade issues such as anti-dumping regulations, market access, services and intellectual property rights." *Id.* The United States has signed TIFAs with 29 other states, mostly Latin American and Caribbean states, since the stalling of the Uruguay Round talks. *See* Reuters Business Report, *U.S. Trade Representative in Singapore for Trade Pact*, REUTERS, Oct. 10, 1991.

6. *See supra* note 3; *see also* Siti R. Dollah, *Bush Hears Fear of Japan Domination*, KYODO NEWS SERV., Jan. 5, 1992. In fact, Japan has been the world's top investor since 1990. *See id.*

7. *See* Table 1, *supra* note 3. In general, developing countries present an exceptionally lucrative investment climate for U.S. investors. The average annual rate of return in developing countries has been approximately 17% while in developed countries it has been only 11.7%. IBRAHIM F.I. SHIHATA, MULTILATERAL INVESTMENT GUARANTEE AGENCY AND FOREIGN INVESTMENT 24 n.13 (1988) (citing U.S. Dep't of Commerce figures for period 1980–1985).

other legal instruments, the BIT can be effective in creating a positive investment climate in LDCs by reducing non-economic risk.[8] However, instead of utilizing the BIT to reduce non-economic risk and to coordinate other legal instruments, the United States has utilized the BIT primarily to fortify its position on various international legal principles.[9] Accordingly, the United States has attempted to sign the same BIT with as few modifications as possible.[10] This philosophy has led the United States to refuse to compromise regarding its BIT requirement that the partner state treat U.S. investors and their investments equal to local investors and their investments.[11] This inflexibility has been the main reason why ASEAN states have rejected the United States BIT.[12] In order to obtain acceptance of the BIT in ASEAN, the United States should make the primary goals of the BIT Program the reduction of non-economic risk and the coordination of other legal instruments. Additionally, the United States should take advantage of the flexibility inherent in the BIT by adjusting the Model BIT[13] according to the level of economic, political, and

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8. The term "non-economic risk" refers to risk caused by the political and social environment of the host state: a corrupt bureaucracy, poor intellectual property protection, political instability, etc.

9. *See infra* Part II.

10. Note the relatively small variance among the provisions contained in the United States' BITs with Bangladesh, Cameroon, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investments, [hereinafter TCREPI] Mar. 12, 1986, U.S.-Bangl., S. TREATY DOC. No. 23, 99th Cong., 2d Sess. (1986); TCREPI, Feb. 26, 1985, U.S.-Cameroon, S. TREATY DOC. No. 22, 99th Cong., 2d Sess. (1986); TCREPI, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. No. 24, 99th Cong., 2d Sess. (1986); TCREPI, May 2, 1986, U.S.-Gren., S. TREATY DOC. No. 25, 99th Cong., 2d Sess. (1986); TCREPI, Dec. 11, 1983, U.S.-Haiti, S. TREATY DOC. No. 16, 99th Cong., 2d Sess. (1986); TCREPI, July 22, 1985, U.S.-Morocco, S. TREATY DOC. No. 18, 99th Cong., 2d Sess. (1986); TCREPI, Oct. 27, 1982, U.S.-Pan., S. TREATY DOC. No. 14, 99th Cong., 2d Sess. (1986); TCREPI, Dec. 6, 1983, U.S.-Sen., S. TREATY DOC. No. 15, 99th Cong., 2d Sess. (1986); TCREPI, Dec. 3, 1985, U.S.-Turk., S. TREATY DOC. No. 19, 99th Cong., 2d Sess. (1986); TCREPI, Aug. 3, 1984, U.S-Zaire, S. TREATY DOC. No. 17, 99th Cong., 2d Sess. (1986).

11. This requirement is called "national treatment." For a discussion on the problems with the national treatment standard in the United States Model BIT, see *infra* notes 92–104 and accompanying text.

12. *See infra* Part III.

13. The U.S. BITs are all based on a model treaty that was created in 1982 and revised in 1983 and 1984. *See* Treaty Between the United States of America and [_____] Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 24, 1984 [hereinafter U.S. Model BIT], *reprinted in* 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 655 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter BASIC DOCUMENTS]. The latest draft was revised based upon the experiences of earlier BIT

social stability of each potential partner, instead of treating all LDCs alike.

Part I of this Note examines the extent, purposes, and value of BITs in general. Part II analyzes the purposes and intentions of the current United States BIT Program. Then, Part III compares the major provisions of the United States Model BIT to parallel provisions contained in BITs signed between ASEAN and European states in an effort to discern what treaty provisions are appropriate for the United States BIT. This Note concludes that the United States must reform its approach to the BIT Program soon, or the opportunity will be lost for the BIT to operate to its full potential in ASEAN.

I. THE BILATERAL INVESTMENT TREATY

The BIT has become the bilateral agreement of choice for codifying investment agreements between countries in the world today. As of March 1991, 302 BITs had been signed,[14] mostly between developed and developing countries.[15] Section A examines why bilateral agreements in general are attractive mechanisms for establishing standards for foreign direct investment. Section B discusses the purposes and strengths of the BIT in particular.

A. *The Advantages of Bilateral Agreements*

Bilateral agreements are particularly appropriate for settling international investment issues between developed states and LDCs, primarily because they provide flexibility for both partners.

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negotiations. A comparison of the drafts is useful to see how policy has altered only slightly from the inception of the BIT Program. *See* Treaty Between the United States and [_____] Concerning the Reciprocal Encouragement and Protection of Investment, 1982 (on file with the Office of the United States Trade Representative, Executive Office of the President, Washington, D.C. 20506); Treaty Between the United States and [_____] Concerning the Reciprocal Encouragement and Protection of Investment, Jan. 21, 1983 [hereinafter 1983 Model BIT], *reprinted in Appendix to* Kathleen Kunzer, *Developing a Model Bilateral Investment Treaty*, 15 LAW & POL'Y INT'L BUS. 273 (1983).

14. *See* INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT LAWS OF THE WORLD (Mar. 1991) [hereinafter ICSID].

15. *See id.* As of mid-1987, "[o]ver 70 developing countries have signed—though not necessarily ratified—one or more treaties . . . ." UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 7 (1988) [hereinafter UNCTNC]. The majority of these 70 developing countries are in Africa and Southeast Asia. *See id.* Twelve BITs have been signed between developing countries. *See id.*; ICSID, *supra* note 14.

Bilateral treaties enable partners to make concessions without compromising their positions on unsettled customary international legal principles. Although treaties in general are said to affect customary international law,[16] it is generally accepted that most bilateral treaties have very little influence on international customary law, due both to their lack of *opinion juris* and to their individual natures.[17] Therefore, a signatory to a bilateral treaty can agree to terms contrary to positions it has taken regarding customary international law and still not concede that position as to customary international law if it states that the treaty is merely a contractual arrangement with the other signatory and not a representation of international legal obligation. This factor is especially important for an LDC because the fact that the international principle is not yet settled gives it a valuable bargaining tool in the negotiating process. The LDC may have already resigned itself to the inclusion in a bilateral agreement of a principle espoused by the capital-exporting state but it can still hold out the principle as something which needs to be "purchased" with some concession by the capital-exporting state.[18]

Although the effect of bilateral agreements on specific customary international law is limited, bilateral agreements serve three positive functions in relation to international commercial relations. First, bilateral agreements can provide the foundation upon which a future multilateral agreement may be built.[19] Once an extensive framework of bilateral agreements has been established, a multilateral agreement may be possible in the future. Multilateral agreements are ultimately more desirable than bilateral arrangements because they simplify the international economic

16. *See* Statute of the International Court of Justice, art. 38(1)(a), 59 Stat. 1055, 1060 (1945); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE U.S. 3D § 102 (1987) [hereinafter RESTATEMENT].

17. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 78 (2d ed. 1987) ("Rules found in treaties can never be conclusive evidence of customary international law."); *id.* at 70 ("[T]reaties are no more a source of law than an ordinary private law contract that creates rights and obligations . . . . In itself, the treaty and 'the law' it contains only applies to the parties to it."); SHIHATA, *supra* note 7, at 239 (*opinion juris* is necessary if principles in BITs are to become international law); M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD TRADE L. 79, 82 (1986) ("Each treaty is nothing but *lex specilis* between parties designed to create a mutual regime of investment protection.").

18. Of course, for this strategy to be successful, the capital-exporting state must be willing to negotiate and compromise on some other issue.

19. *See* RESTATEMENT, *supra* note 16, § 102 cmt. i (1987).

system and provide for stronger norms. However, bilateral agreements are preferable as a first step in resolving highly contentious issues, such as those involved in foreign direct investment, simply because bilateral treaty negotiations involve only two parties with conflicting interests.[20] Second, bilateral agreements can strengthen the international legal and economic order. The signing of each treaty indicates that treaties are valuable legal documents which guide and restrict state behavior. Additionally, as more treaties are signed, more disputes over treaty interpretation will arise. As a result, international judicial bodies, such as the International Court of Justice or tribunals formed under the International Convention for the Settlement of Investment Disputes (ICSID), will be called upon to resolve these disputes, thereby strengthening the role and legitimacy of these bodies in international economic affairs. Furthermore, domestic courts will inevitably be called upon to interpret these treaties, again providing legitimacy to international legal obligations. Third, bilateral treaty negotiations simply can provide the parties with a forum to sit down and discuss their perspectives on trade and investment, a function that is crucial to successful trade and investment relations.

B. *Purposes of the Bilateral Investment Treaty*

The primary purpose of the BIT should be to reduce non-economic risk and thereby open up otherwise neglected investment opportunities. BITs can reduce non-economic risk primarily by establishing legally enforceable standards of treatment for foreign investment. The BIT should not, and cannot, promote and protect investment without the assistance of other mechanisms. Whether the BIT can actually "promote" or "encourage" foreign direct investment *standing alone* is doubtful:

> The existence of a bilateral treaty is only one factor among many which may affect a potential investor's decision to invest in a particular developing country . . . . Other factors taken into consideration by the prospective investors are the political stability of the host country; the economic, industrial and administrative

20. Investment issues have historically proven to be highly controversial, especially between developed and developing countries. *See* ROBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 21 (1960) (discussing the difficulties caused by the inclusion of investment-related clauses in Treaties of Friendship, Commerce, and Navigation).

> framework; the economic profitability of an initial investment or an increase in current investments . . . ; [and] the incentives package or the selection of new investment arrangements . . . . In practical terms, unless the host country can offer a secure profit-making venture to the foreign investor, the existence of a bilateral treaty will not in itself attract investors.[21]

Therefore, the BIT will be more effective when utilized in conjunction with other mechanisms which also work to reduce non-economic risk.[22] BITs can provide the anchor for other legal institutions and agreements, such as taxation treaties,[23] political risk insurance,[24] Investment Guarantee Agreements (IGAs),[25] domestic laws of the host and exporting state, investment contracts between a foreign investor and the host state, and intellectual property protection agreements.[26]

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21. UNCTNC, *supra* note 15, at 1–2. Statistics indicate that the flow of investment does not correspond with the signing of BITs. *Id.* at 10–11; *see also* KLAUS W. GREWLICH, TRANSNATIONAL ENTERPRISES IN A NEW INTERNATIONAL SYSTEM 56 (1980) (arguing that BITs appear to have no effect on investment flow).

22. This Note concentrates on the BIT; therefore, other forms of legal protection and encouragement of foreign investment are discussed only as they relate to the BIT.

23. Taxation treaties are useful for creating a tax environment that encourages, or at least does not discourage, investment abroad. *See, e.g.*, THAILAND—COUNTRY MARKETING PLAN, *supra* note 3, § V(B) ("Benefits . . . would include exemption from Thai corporate income taxes on sales transactions, reduced dividend withholding tax, lower royalty withholding tax, . . . [and] removal of capital gains taxes on sale of shares . . . ."). The capital-importing states use the tax structure as a way to channel investment into certain forms of ventures (e.g., equity joint ventures, stock joint ventures, concession agreements, etc.) or certain sectors or types of investment (e.g., pioneer technology, capital-intense ventures, labor-intense ventures, or publicly useful ventures like power generation). *See* Seiji Naya & Eric D. Ramstetter, *Policy Interactions and Direct Foreign Investment in East and Southeast Asia*, 22 J. WORLD TRADE 57, 65 (No. 2 1988) ("Most governments [in developing countries achieve industrial targeting] with a variety of policy measures (e.g., tax policy, subsidies, tariff and quota exemptions, and foreign exchange restriction exemptions)."); *see also* SINGAPORE INT'L CHAMBER OF COMMERCE, INVESTOR'S GUIDE TO THE ECONOMIC CLIMATE IN SINGAPORE 30 (1991) (stating that Singapore provides special tax incentives for projects that introduce "technology, know-how or skills into an industry which is substantially more advanced than that of the average level prevailing in that industry").

24. For a discussion on the U.S. political risk insurance scheme, see *infra* notes 27–38 and accompanying text. Although national insurance schemes have been quite popular among developed states, they have not been adequate. *See* UNCTNC, *supra* note 15, at 4 ("As of 1986, about 20 countries, 16 of which are members of [OECD], offer their investors political risk insurance."); SHIHATA, *supra* note 7, at 18 (arguing that national insurance schemes cover a small percentage of investments). As a result, the World Bank decided to establish a multilateral organization to reduce, or hopefully remove, political risk barriers to investment in developing countries. *See id.* at 17–18.

25. *See infra* notes 34–36 and accompanying text.

26. Intellectual and industrial property protection is vital to creating an attractive in-

The most important of these legal instruments is non-economic risk insurance. Foreign investors conduct a risk-return analysis, and if the risk outweighs the potential return, they will not make an investment.[27] Part of the determination of whether the risk is acceptable or not is the possibility of obtaining insurance against such a risk.

> The alleviation of non-commercial investment risks through guarantees is of particular benefit to the developing world. It facilitates investments that may not have otherwise been made without the coverage . . . . The purpose of such guarantees is not to make an inherently bad project good. Rather, it is to reduce, if not neutralize, the uncertainty factor by providing protection against unanticipated risks . . . . By taking coverage, the investor is given the confidence to make an investment decision based on business considerations, instead of foregoing profitable opportunities due to perceptions of political risk.[28]

Insurance companies, like investors, also conduct a risk analysis to determine whether to insure a particular investment, and if so, what to charge—the lower the risk, the higher the chance of obtaining insurance and the lower the cost of that insurance. "Unless the insurer is satisfied that the legal protection of an investment is sufficiently guaranteed under the domestic law of the host State or in some other way, the existence of a treaty may be the condition *sine qua non* for political risk insurance."[29]

U.S. investors often look to the Overseas Private Investment Corporation (OPIC)[30] for insurance against non-economic risk encountered when investing in LDCs. OPIC provides insurance

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vestment environment in developing countries because many developing countries are interested in attracting pioneer technologies, but often lack effective legal protection for intellectual and industrial property. *See, e.g.*, Commercial Section of the American Embassy in Kuala Lumpur, *Foreign Economic Trends and Their Implications for the United States: Malaysia* (June 11, 1991), *available in* LEXIS, ASIAPC Library, ALLASI File.

27. *See* SHIHATA, *supra* note 7, at 15. Of course the acceptable risk-to-return ratio depends upon whether the investor is risk-averse, -neutral, or -preferring. *See id.* Even if the investor chooses to brave the risks, he will most likely utilize various risk management techniques to limit the loss (e.g., minimal or no reinvestment of profits or restricted use and access of high-tech know-how). *See id.* at 18 (arguing that such techniques often elicit adverse reactions from host states, leading to a heightened danger of political loss).

28. *Id.* at 19.

29. UNCTNC, *supra* note 15, at 4.

30. OPIC is a U.S. government-owned corporation, backed by the "full faith and credit" of the United States. OPIC's authorization is codified at 22 U.S.C. §§ 2191–2200a (1988).

and reinsurance against losses due to currency inconvertibility; expropriation; war, revolution, insurrection, and civil strife; and business interruption resulting therefrom.[31] Insurance is generally not obtainable by U.S. investors unless there is some form of bilateral agreement between the United States and the host state.[32] Historically, this requirement of the existence of a bilateral agreement has been filled by Investment Guaranty Agreements (IGAs),[33] normally created by an exchange of letters between the executive and the host state.[34] IGAs subrogate the insurer's rights to the investors' rights whenever the insurers pay out compensation to the insured investors.[35] However, IGAs themselves do not create substantive legal rights.[36] BITs, like the Treaties of Friendship, Commerce, and Navigation (FCNs) that preceded them, provide substantive legal rights which can be enforced in a domestic or international judicial forum.[37] The United States Model BIT

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31. *Id.* § 2194(a)(1).

32. *See id.* § 2197(a) (requiring a bilateral agreement for all-risk financial guarantees of loans and other investments issued pursuant to § 2194(b) and political risk insurance and reinsurance issued pursuant to § 2194(a)). "As a matter of policy, OPIC generally does not offer any of its programs in countries with which there is no active bilateral agreement." ROBERT C. O'SULLIVAN, INTRODUCTION TO REGULATION OF FOREIGN INVESTMENT: MODEL OPIC INVESTMENT INCENTIVE AGREEMENT, *reprinted in* 1 BASIC DOCUMENTS, *supra* note 13, at 665. In fact, in many states "[t]he existence of a bilateral investment treaty is often the condition for national insurance against political investment risks . . . ." UNCTNC, *supra* note 15, at IX.

33. IGAs created between the United States and its trading partners have traditionally been referred to as "Agreements on Investment Guaranties." *See* O'SULLIVAN, *supra* note 32, at 665.

34. *See id.* The U.S. has signed IGAs with all ASEAN members except Brunei. *See* UNCTNC, *supra* note 15, at 4–5. The U.S. has concluded 116 IGAs as of 1986 and appears to be committed to continuing the trend. *See id* at 6. Some other countries often will place a subrogation clause into the BIT and thereby conflate the IGA and BIT into one document. *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Singapore for the Promotion and Protection of Investments, July 22, 1975, art. 10, 1975 U.K.T.S. No. 151 (Cmnd. 6300).

35. *See* Model OPIC Investment Incentive Agreement, United States - [_____], art. 3 [hereinafter U.S. Model IGA], *reprinted in* 1 BASIC DOCUMENTS, *supra* note 13, at 669.

36. *See generally* U.S. Model IGA, *supra* note 35; *see also* Robert O'Sullivan, *Regulation of Foreign Investment: Model Bilateral Investment Treaty (BIT) and Sample Provision from Negotiated BITs*, 1 BASIC DOCUMENTS, *supra* note 13, at 649.

37. *See* O'Sullivan, *supra* note 36, at 649; Joseph Norton, *The Renegotiability of United States Bilateral Commercial Treaties with the Member States of the European Economic Community*, 8 TEX. INT'L L.J. 299, 311 (1973) (stating that many of the obligations created by FCNs are legally enforceable in domestic courts).

provides specific rights to each contracting party in relation to all of the losses insurable with OPIC.[38] Furthermore, the United States Model BIT attempts to assist U.S. IGAs by requiring that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements . . . ."[39] This clause is designed to require each contracting state to recognize IGAs as legally binding under its domestic laws, thereby providing legal redress in the host state. Thus BITs can provide substance to IGAs and to the insurance schemes which rely on IGAs.

Another source of rights and obligations which the insurers can claim by subrogation are contracts between the investors and the host state, or perhaps between the investors and a local corporation. However, these contracts, especially those with a local business entity, are less reliable because they are concluded on an ad hoc basis and vary depending upon the relative strengths of the bargaining parties. These contracts may give rise to a multitude of legal issues and therefore may only result in lengthy and fruitless litigation. Or, if they contain no provisions for arbitration, these contracts may be completely worthless. In any event, the United States Model BIT provides that any obligation existing between the investor and the host state shall not be hindered by provisions in the BIT if there are provisions more favorable contained in the investment contract.[40] As a result, OPIC may assert the rights of the investor established in the investment contract with the host state as well as the rights established in the BIT.

Therefore, direct protection from non-economic risk (risk reduction) and coordination of other instruments that reduce risk should be considered the main purposes of the BIT; investment promotion is only the byproduct of these goals.

II. THE PRESENT UNITED STATES BILATERAL INVESTMENT TREATY PROGRAM

When the United States embarked on its BIT Program in the early 1980s, legal scholars predicted that the Model BIT would be

38. *See* U.S. Model BIT, *supra* note 13, art. III, § 1 (expropriation); art. III, § 3 (losses due to war, insurrection, civil strife, revolution); art. IV (free transfer of assets in convertible currency).

39. *Id.*, art. II, § 6.

40. *Id.*, art. II, § 1.

unsuccessful in protecting and promoting U.S. direct investment in LDCs.[41] This prediction was essentially correct: The United States has signed only ten BITs,[42] none of which are with ASEAN states. The United States has signed FCNs with Brunei and Thailand.[43] The FCNs contain clauses that form the basis for sections of the United States Model BIT;[44] but as they were not designed specifically to deal with questions of international investment, they are of only marginal value for the U.S. foreign direct investor.[45] The only other materially relevant agreements between the United States and ASEAN states are the IGAs with Indonesia, Malaysia, the Philippines, and Singapore[46] and the TIFAs with the Philippines and Singapore.[47]

The United States BIT Program is directed mainly at developing countries.[48] All ten of the treaties signed by the United States

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41. *See, e.g.*, Patricia M. Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 934 (1984).

42. The United States has signed BITs with Bangladesh, Cameroon, Egypt, Grenada, Haiti, Morocco, Panama, Senegal, Turkey, and Zaire. *See supra* note 10.

43. Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thai., 19 U.S.T. 5843; Treaty of Peace Friendship, Commerce, and Navigation, June 23, 1850, U.S.-Brunei, 10 Stat. 909. Note that "FCN" is the term used to describe this whole class of commercial treaties, even though some of them are actually entitled "Treaty of Amity and Economic Relations." *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203 n.19 (1988).

44. *See* Vandevelde, *supra* note 43, at 207–10.

45. *See* Robin, *supra* note 41, at 940–41 (commenting that "these treaties fail to meet American investors' needs"). *See generally* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 107–09 (1986); Wayne Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 INT'L TAX & BUS. LAW. 192, 195–98 (1984).

46. Agreement Relating to Investment Guaranties, Jan. 7, 1967, U.S.-Indon., 18 U.S.T. 1850 (entered into force August 22, 1967 and still in force as of April 1992); Agreement Relating to Investment Guaranties, Mar. 25, 1966, U.S.-Sing., 17 U.S.T. 534 (entered into force March 25, 1966 and still in force as of April 1992); Agreement Relating to the Guaranties Authorized Under Section 413(b)(4) of the Mutual Security Act of 1954, Apr. 21, 1959, U.S.-Malay., 10 U.S.T. 776 (entered into force April 21, 1959 and still in force as of April 1992) (amended June 24, 1965, 16 U.S.T. 1086); Agreement Relating to the Guaranties Authorized by Section 111(b)(3) of the Economic Cooperation Act of 1948, Feb. 18–19, 1952, U.S.-Phil., 3 U.S.T. 3878 (entered into force February 19, 1952 and still in force as of April 1992) (amended Feb. 25, 1965 and Aug. 15, 1966, 17 U.S.T. 1557).

47. *See supra* note 5.

48. *See* Office of the U.S. Trade Representative, Press Release No. 82/01, Jan. 13, 1982, at 2 ("With the increased importance of the developing countries in the world economy, we need new bilateral treaties in the investment area."); Robin, *supra* note 41, at 933 n.13 ("Investment relations among industrialized countries are sufficiently stable to allow market forces to allocate investment resources, thereby obviating the need for trea-

under the BIT Program have been with developing countries.[49] According to the executive branch, the purpose of the BIT Program, and of United States trade and investment policy in general, is to reduce barriers to American investment abroad, to increase U.S. investment in LDCs so that they may develop more quickly, and to keep the United States open to foreign investment.[50] Yet although the State Department and the U.S. Trade Representative (USTR) state otherwise, it appears that the BIT Program is not in fact aimed at "forc[ing] open the door for investment" in LDCs.[51] Instead, it seems that the BIT Program was designed with two other goals in mind: to protect existing investments[52] and to fortify the United States' position on various unsettled principles of customary international law.[53] The United States argues that if the same, or substantially similar, provisions are agreed to in bilateral agreements again and again, they will take on the character of "customary state practice" and carry more weight in the dispute over customary legal norms.[54] Therefore, the United States be-

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ty guaranties."); Sachs, *supra* note 45, at 194, 198 n.48; Vandevelde, *supra* note 43, at 209.

49. *See supra* note 42.

50. *See U.S. Policy Toward International Investment: Hearings Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess., 180, 184 (1981) (statement of Harvey E. Bale, Jr., Ass't U.S. Trade Representative for Investment Policy, Office of the U.S. Trade Representative); Office of the U.S. Trade Representative, Press Release No. 82/16, Sept. 29, 1982; Office of the U.S. Trade Representative, Press Release No. 82/19, Oct. 27, 1982; *Gist: International Investment*, DEP'T ST. DISPATCH, July 29, 1991, at 552; *see also* Sachs, *supra* note 45, at 194 (1984). For a discourse on the guiding principles of U.S. trade and investment policy in general, see Statement on International Investment Policy, 1983 PUB. PAPERS 1243 (Sept. 12, 1983). As of July 1991 "U.S. policy continues to be guided by [this statement]." DEP'T ST. DISPATCH, July 29, 1991, at 552.

51. Eric V. Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy*, 2 J. INT'L L. & ECON. 72, 84 (1967) (quoting an unclassified memorandum from Sester, Commercial Treaties Division, Dep't of State, to Blankenheimer, Dep't of Commerce (Mar. 29, 1961)).

52. See *id.*

53. *See* UNCTNC, *supra* note 15, at 7 (stating that "negotiation of [BITs] developed into a deliberate policy . . . to counteract what some capital-exporting countries considered a continuous erosion of principles of customary international law through United Nations resolutions, such as the Charter of Economic Rights and Duties of States."); Gudgeon, *supra* note 45, at 111 (stating that "BITs were proposed as a means of strengthening principles of customary international law and practice as observed and advocated by the United States and its developed-country partners in the [OECD]"); Sachs, *supra* note 45, at 195 (noting that "[a]n important function of the BIT program is to lend weight . . . to the United States' position on various points of international law and practice").

54. *See, e.g.*, WILSON, *supra* note 20, at 17 (arguing that "[a] single state that secures

lieves that any compromise on its position on unsettled customary international principles in a bilateral agreement will be detrimental to its position on the appropriate customary international law.[55]

The attempt to utilize BITs to fortify the United States' position on customary international law should be abandoned for several reasons. First, this use of BITs is counterproductive because it eliminates the flexibility that makes the bilateral agreement so advantageous in this area of international relations. The ability to negotiate and compromise over sensitive and contentious issues is essential to completing successful international agreements. Second, this use of the BITs is inconsistent with the United States' position on compensation for expropriated property. The United States maintains that compensation for property expropriated from a foreign investor must be for the full value of the property, whereas most foreign investors actually accept less than full compensation for expropriated property.[56] Applying the logic inherent in the United States' position on the effect of BITs, the fact that most states actually provide less than full value for expropriated property should mean that the actual "customary practice" of states is to provide less than full compensation to foreign investors—contrary to the United States' position in the BIT Program.

Third and more important, the objective of fortifying the United States position on customary international law is not an appropriate basis for concluding treaties with states with the level of development of Indonesia, Malaysia, the Philippines, or Thailand.[57] Due to the underlying goals of the present United States BIT Program, the United States Model BIT has not been sufficiently altered to fit the needs of ASEAN. As treaty negotiations with Singapore in the 1970s, and with Indonesia and Malaysia in the 1980s have shown, the ASEAN states are sophisticated and independent enough to resist a U.S. dictation of terms, but have not reached a level of economic security that would allow them to adopt more open investment policies.[58] But these states are pre-

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acceptance by many other states of viable clauses in bilateral agreements may well influence progress toward a generally applied rule").

55. *See supra* note 53.

56. For a discussion on the United States' position on compensation for expropriated property, see *infra* notes 110–18 and accompanying text.

57. Singapore and Brunei are not listed here because it appears that they have achieved a level of economic, political, and social stability high enough to make a BIT of little value. *See infra* notes 59–61 and accompanying text.

58. Indonesia and Malaysia both declined to sign the U.S. BIT mainly because of

cisely at a stage of economic, political, and social development in which treaty protection is most useful.[59] Treaty protection for non-economic risk is most appropriate for nations that have attained a relatively high degree of economic prosperity and stability but still lag in political and social stability. Concluding a treaty to protect U.S. investors from non-economic risk with a state that is already politically and socially stable is of marginal value, because there is little or no non-economic risk that needs to be guarded against. Singapore provides an excellent example of a situation in which the ideal time to conclude a BIT has already passed. In January 1992, the State Department announced that the United States will sign a BIT with Singapore sometime in the near future.[60] However, Singapore has already reached an extremely high degree of economic, political, and social stability; the ideal time to sign a BIT with Singapore would have been in the late 1970s or

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objections to the national treatment requirements. *See* Commercial Section of the American Embassy in Jakarta, INDONESIA—COUNTRY MARKETING PLAN FY '91 (Mar. 1991) § V(9)(B)(c), *available in* LEXIS, ASIAPC Library, ALLASI File [hereinafter INDONESIA—COUNTRY MARKETING PLAN FY '91]; Commercial Section of the American Embassy in Kuala Lumpur, MALAYSIA—COUNTRY REPORT (Mar. 1991), *available in* LEXIS, ASIAPC Library, ALLASI [hereinafter MALAYSIA—COUNTRY REPORT]. For a discussion of why Singapore refused to sign the U.S. BIT, see Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1, 10 n.47 (1983); *see also* Naya & Ramstetter, *supra* note 23, at 65.

59. The International Country Risk Guide, published by International Business Communications, Ltd., London, annually ranks the relative risks (political, financial, and economic) of countries. The maximum score (least risky) is 100 for political risk and 50 for financial and economic risk. The following chart is taken from the 1991 International Country Risk Guide. Non-ASEAN states are included as points of reference.

	Political	Financial	Economic
Brunei	81.0	48.0	41.5
Singapore	79.0	48.0	39.5
U.S.	78.0	49.0	39.5
Malaysia	71.0	45.0	38.5
Indonesia	57.0	44.0	35.5
Thailand	57.0	42.0	37.0
Egypt	54.0	30.0	29.0
Panama	47.0	28.0	34.0
Philippines	41.0	22.0	29.5

Monua Janah, *Rating Risk in the Hot Countries: How Two Firms Gauge Investment Safety*, WALL ST. J., Sept. 20, 1991, at R4. Malaysia, Indonesia, and Thailand received high scores for financial and economic risk, but moderately low scores for political risk. The Philippines was ranked substantially lower in all three categories. Brunei and Singapore were rated politically less risky than the United States.

60. *See Senator Urges Bush to Seek Solid Trade Action from Japan*, KYODO NEWS SERV., Jan. 4, 1992, *available in* LEXIS, ASIAPC Library, ALLASI File.

early 1980s.[61] Similarly, concluding a treaty with a state that has such a low level of economic development that foreign investment will not be profitable is also of marginal value, because the reduction of non-economic risk is worthless in a situation in which there is little potential for economic gain.[62]

The United States should change its approach to treaty negotiations: Instead of treating all LDCs alike, the United States should negotiate its treaties according to the level of economic, political, and social stability of each potential partner. It should not treat as similar a state with a low level of economic, political, and social stability, like Haiti, and a state with moderate economic, political, and social stability, like Malaysia.

III. THE BILATERAL INVESTMENT TREATY AND ASEAN

Of all of the ASEAN states, only Brunei has not signed a BIT.[63] However, the United States has not concluded any BITs

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61. The International Country Risk Guide rated Singapore above the United States in the political risk category. *See supra* note 59; *see also* SINGAPORE—COUNTRY MARKETING PLAN, *supra* note 3, § III(A) ("Singapore is a parliamentary democracy that prides itself on political stability and the predictability this offers to foreign investors and traders."). In fact, some people have advocated that Singapore be invited to join the Organization of Economic Cooperation and Development. *See* Peter Hazelhurst, STRAITS TIMES, Nov. 4, 1988, at 4. Brunei, although for entirely different reasons, was also rated above the United States in the political risk category, *see supra* note 59, and therefore the ideal time for conclusion of a BIT may have already passed.

62. *See supra* note 21 and accompanying text. Note that this makes the conclusion of a treaty with the Philippines arguably somewhat premature due to its high economic risk. *See supra* note 59. Also, it should not be assumed that this Note argues against the conclusion of investment protection treaties with *any* state. Treaties with states with stable economies, political systems, and social institutions are valuable in their own right because they create more certainty for investors and help to fortify international legal institutions. *See supra* Section I(B). Additionally, treaties with states that have very low economic development may become extremely valuable if the state eventually develops economically such that foreign investment becomes profitable. The position of this Note is simply that these situations deserve different approaches and that investment promotion and protection agreements are most useful in situations where a state is relatively prosperous economically but has underdeveloped political or social institutions.

63. There are 21 BITs currently signed between ASEAN states and European states. Agreement for the Promotion and Protection of Investments, Apr. 12, 1985, Aus.-Malay. [hereinafter Aus.-Malay. BIT]; Agreement for the Promotion and Protection of Investments, Feb. 27, 1985, Neth.-Phil. [hereinafter Neth.-Phil. BIT]; Agreement Concerning the Mutual Protection of Investments, Nov. 6, 1984, Nor.-Malay. [hereinafter Nor.-Malay. BIT]; Agreement for the Promotion and Protection of Investments, May 21, 1981, U.K.-Malay. [hereinafter U.K.-Malay. BIT]; Agreement for the Promotion and Protection of Investments, Dec. 3, 1980, U.K.-Phil. [hereinafter U.K.-Phil. BIT]; Agreement Concerning the Mutual Protection of Investments, Mar. 3, 1979, Swed.-Malay. [hereinafter Swed.-Ma-

with ASEAN members. Treaty negotiations with Singapore collapsed in 1973 and have only just begun again in 1991 with the negotiation of the Singapore TIFA.[64] Three rounds of treaty negotiations with Malaysia ended in failure.[65] There have been no negotiations with Brunei, Indonesia, the Philippines, or Thailand.[66] The reason for the United States' failure is quite simple: The United States Model BIT contains several clauses that are objectionable to most of the ASEAN states, and unfortunately, the United States has not appeared willing to negotiate and compromise on these provisions.

A comparison of key provisions of the United States Model BIT with similar provisions from BITs signed between European states and ASEAN states is useful in determining what clauses in the United States Model BIT should, and what clauses should not, be changed. These provisions—pertaining to the scope of application, treatment standards, currency transfer, and expropriation—are the heart of the BIT's legal guarantees and are the most important to prospective investors. The scope of application and treatment standards are the most problematic provisions; this Note proposes

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lay. BIT]; Agreement for the Promotion and Protection of Investments, Nov. 28, 1978, U.K.-Thai. [hereinafter U.K.-Thai BIT]; Agreement for the Promotion and Protection of Investments, Nov. 17, 1978, Sing.-Belg.-Lux. [hereinafter Sing.-Belg.-Lux. BIT]; Agreement for the Promotion and Protection of Investments, Apr. 27, 1976, U.K.-Indon. [hereinafter U.K.-Indon. BIT]; Agreement for the Promotion and Protection of Investments, Sept. 8, 1975, Sing.-Fr. [hereinafter Sing.-Fr. BIT]; Agreement for the Promotion and Protection of Investments, July 22, 1975, U.K.-Sing. [hereinafter U.K.-Sing. BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Oct. 3, 1973, F.R.G.-Sing. [hereinafter F.R.G.-Sing. BIT]; Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 6, 1973, Sing.-Switz. [hereinafter Sing.-Switz. BIT]; Agreement on Economic Cooperation, June 6, 1972, Neth.-Thai. [hereinafter Neth.-Thai. BIT]; Agreement on Economic Cooperation, May 16, 1972, Neth.-Sing. [hereinafter Neth.-Sing. BIT]; Agreement on Economic Co-operation, June 15, 1971, Neth.-Malay. [hereinafter Neth.-Malay. BIT]; Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Nov. 24, 1969, Indon.-Nor. [hereinafter Indon.-Nor. BIT]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Nov. 8, 1968, F.R.G.-Indon. [hereinafter F.R.G.-Indon. BIT]; Agreement on Economic Cooperation, July 7, 1968, Neth.-Indon. [hereinafter Neth.-Indon. BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments, Mar. 3, 1964, F.R.G.-Phil. [hereinafter F.R.G.-Phil. BIT]; Agreement Concerning the Promotion and Reciprocal Protection of Investments, Dec. 22, 1960, F.R.G.-Malay. [hereinafter F.R.G.-Malay. BIT].

64. *See Senator Urges Bush to Seek Solid Trade Action from Japan*, *supra* note 60.

65. *See* MALAYSIA—COUNTRY REPORT, *supra* note 58, § V.

66. The State Department has explicitly stated that negotiations with Indonesia were not begun due to the understanding that there was no possibility of obtaining national treatment. *See* INDONESIA—COUNTRY MARKETING PLAN, *supra* note 3, § V(B)(c).

possible adjustments to these clauses. The currency transfer and expropriation provisions, although extremely important to investors, are not as controversial.

A. *Scope of Application*

The definitional section of the BIT heavily impacts the effectiveness of the treaty. The definitions of "investments," "activities associated therewith," "nationals," and "companies" are the most important, and the most problematic.

1. *Types of Investment Protected.* The United States Model BIT brings under its protection "every kind of investment."[67] Included specifically in a non-exclusive list are direct and equity investments, contractual rights, and intellectual and industrial property rights.[68] The United States Model BIT also provides that "[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment."[69] Activities that are "associated" with investments are also protected.[70]

Comparison with the ASEAN treaties indicates that the U.S. provisions are basically acceptable to the ASEAN states. The ASEAN treaties' definition of the term "investment" uses the phrase "every kind of asset," followed by a non-exclusive list of

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67. U.S. Model BIT, *supra* note 13, art. I, para. 1(b).

68. "Investment" is defined to mean:

> every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including rights . . . ;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual and industrial property rights . . . ; and
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law . . . .

Id., art. I, para. 1(b)(i)–(v); *cf.* Foreign Assistance Act of 1961, 22 U.S.C. § 2198(a) (1988) (" 'investment' includes any contribution or commitment of funds, commodities, services, patent, process, or techniques, in the form of (1) loan or loans to an approved project, (2) the purchase of a share of ownership in any such project, (3) participation in royalties, earnings or profits of any such project, and (4) the furnishing of commodities or services pursuant to a lease or other contract.").

69. U.S. Model BIT, *supra* note 13, art. I, para. 3 (the "alteration clause").

70. *See id.*, art. II, para. 1 (establishing standards of treatment for "investments and associated activities").

examples similar to those in the United States Model BIT.[71] Additionally, like the United States Model BIT, the ASEAN treaties protect "associated activities," using either a different but effectively similar term[72] or through a less detailed definition of associated activities.[73]

However, the unqualified right to alter the form of the investment is problematic for two reasons. First, this unqualified right to alter the form of the investment after admission and establishment creates the risk of disrupting the policies served by admission requirements imposed by the host state.[74] All of the ASEAN treaties that provide for a right to alter the form of the investment include the requirement that the alteration not violate any restrictions placed upon the investor or the investment as a term for admission.[75] The United States Model BIT has no such provision because it prohibits the use of admission requirements.[76] Second, when coupled with the definition of associated activities, the alterations clause establishes a right to acquire and liquidate or dissolve local companies, which is an unfavorable situation for LDCs.

> Although [the United States Model BIT] provisions permit profitable foreign investment in enterprises capable of increasing employment and promoting development in the host State, these provisions also equally allow the acquisition and liquidation of productive local companies. Thus, protected investors might purchase and liquidate local competitors to engage in anticompetitive practices . . . or they might simply acquire and liquidate undervalued companies and expatriate the profits.[77]

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71. *See, e.g.*, Swed.-Malay. BIT, *supra* note 63, art. 1(1). In fact, there is only one treaty which does not include a similar non-exclusive list defining the term "investment." *See* Indon.-Nor. BIT, *supra* note 63 ("investment" left undefined).

72. *See, e.g.*, U.K.-Indon. BIT, *supra* note 63, art. 4(2) ("[Each] Contracting Party shall . . . subject . . . [protected investors] as regards their management, use, enjoyment or disposal of their investments[,] to [MFN] treatment . . . .").

73. *See, e.g.*, F.R.G.-Malay. BIT, *supra* note 63, art. 3 (protecting "activities in connection with investments").

74. *See* UNCTNC, *supra* note 15, at 22. For a full discussion on admission requirements, see *infra* notes 88–93 and accompanying text.

75. *See, e.g.*, Swed.-Malay. BIT, *supra* note 63, art. 1(1)(e)(ii); F.R.G.-Indon. BIT, *supra* note 63, art. 1(1); F.R.G.-Phil. BIT, *supra* note 63, art. 8(1).

76. U.S. Model BIT, *supra* note 13, art. II; *see infra* notes 93–98 and accompanying text (discussing problems caused by prohibiting use of admission requirements).

77. Sachs, *supra* note 45, at 207.

The old definition of "associated activities" provided for the explicit right to acquire and liquidate or dissolve all corporations or assets acquired by the investor.[78] Although the new definition has eliminated the explicit right to engage in such activities, an implicit right to do so still exists. Protected associated activities still include "the organization, control, operation, maintenance and *disposition of companies* . . . ; the acquisition, use, protection and *disposition of property of all kinds* . . . ; [and] the purchase and issuance of equity shares."[79] It can be argued that this new definition does not permit the straightforward acquisition and subsequent dissolution of a local corporation;[80] regardless of this fact, the definition appears to allow the liquidation of all or substantially all of an acquired corporation's assets, such that the local corporation will essentially become a shell. Because the new definition of associated activities is ambiguous and still appears to allow the acquisition and dissolution of local companies, it should be qualified, perhaps by a protocol to the BIT, so as to make clear that the BIT does not create such a right.[81]

2. *Types of Investors Protected.* The United States Model BIT protects the investment of the "nationals"[82] and "companies"[83] of the contracting parties.[84] The definition of "company" considers the jurisdiction where legal personality is created as

78. *See* 1983 U.S. Model BIT, *supra* note 13, art. II, para. 2.

79. U.S. Model BIT, *supra* note 13, art. I, para. 1(e) (emphasis added).

80. The definitional problems now turn on the interpretation of "disposition of." The term "disposition" is defined under U.S. law as "transferring to the care or possession of another." BLACK'S LAW DICTIONARY 471 (6th ed. 1990). However, the definition of "dispose of" is considered to include the exercise "in any manner, one's power of control over [property]." *Id.* Considering the ambiguity in the terms used in the new definition and the elimination of an explicit right to acquire and dissolve a local corporation, it can be argued that such a right is not created under the new definition.

81. Of course, this recommendation assumes that the language was in fact altered to eliminate the right to acquire and dissolve local companies. It is possible that the language was changed not to eliminate the right, but instead, to disguise the right so that other parties might overlook it; but this is merely speculation.

82. " 'National' of a Party means a natural person who is a national of a Party under its applicable law." U.S. Model BIT, *supra* note 13, art. I, para. 1(c).

83. " 'Company of a Party' means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned." *Id.*, art. I, para. 1(a).

84. *See id.*, art. I, para. 1(b).

determinative of nationality.[85] However, either party (as host party) may deny protection to investments made by companies legally organized under the laws of the other party that either are controlled by nationals of a third country with which the host party does not have "normal economic relations" or do not have "substantial business activities in the territory of the other party."[86] Unfortunately, there is no further elaboration as to what "substantial business activities" or "control" entail.[87] Additionally, there is no indication as to which party's law should be used to determine these questions. Therefore, to cure the ambiguity, an agreement should be reached between the United States and its treaty partners as to the definitions of "substantial business activities" and "control." Such clarification should be made by means of a protocol or an exchange of letters. Other than these minor difficulties, there does not appear to be any need to alter these provisions. While the parallel provisions contained in the ASEAN treaties contain a variety of tests for determining what investors are protected,[88] several contain a formulation similar to the U.S. standard.[89]

B. *Treatment Standards*

Article II of the United States Model BIT establishes Most Favored Nation (MFN) treatment and national treatment, which-

85. The 1983 United States BIT used the "substantial control" test instead of the jurisdiction where legal personality was created. 1983 United States BIT, *supra* note 13, art. I, para. (b). The substantial control test inquires into the nationality of the controlling shareholders. *Id.*; *see also* Case Concerning Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. 3 (describing the "substantial control" test and holding that it is not customary international law).

86. U.S. Model BIT, *supra* note 13, art. I, para. 2.

87. For examples of possible U.S. provisions that might apply, see the ownership requirement for OPIC insurance, 22 U.S.C. § 2198(c) (1988) (requiring 95% U.S. ownership), and the requirement for protection under the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(1)(A) (1988) (requiring 50% U.S. ownership).

88. *See, e.g.*, U.K.-Phil. BIT, *supra* note 63, art. I(4) (employing "place of effective management" test); Neth.-Malay. BIT, *supra* note 63, art. I(2) (protecting Dutch companies either "lawfully constituted" in the Netherlands or "controlled directly or indirectly by a national . . . or by a legal person constituted in accordance with the Netherlands law").

89. *See, e.g.*, F.R.G.-Phil. BIT, *supra* note 63, art. 8(4) (company deemed national of state in which "seat" is located); F.R.G-Malay. BIT, *supra* note 63, art. 1(4), Protocol (1) (protecting companies with their "seat" in Germany and companies "lawfully constituted" in Malaysia, but not protecting subsidiaries incorporated in a third state).

ever is better, for investment and its associated activities.[90] Running parallel to the national treatment standards is the provision in the United States Model BIT that specifically prohibits either party from imposing performance requirements (e.g., local inputs quotas or export quotas) as a condition of establishment or operation of an investment.[91] The United States Model BIT also provides that investments will be accorded "fair and equitable treatment," and in any case, no less than that "required by international law."[92]

Obtaining from all the ASEAN states MFN treatment, fair and equitable treatment, and treatment no less favorable than that "required by international law" should not pose any difficulty, because these provisions are contained in virtually all the ASEAN treaties.[93] A major problem arises, however, with the standard of national treatment and the prohibition of performance requirements as a term for entry. National treatment contains two different concepts: "pre-admission" national treatment and "post-admission" national treatment. "Pre-admission" national treatment refers to any requirements placed upon the incoming investment or investor as a prerequisite for admission into the host state. Some examples of these types of regulations include restrictions or prohibitions on investing in certain sectors of the economy, local inputs requirements, export requirements, use of local labor, or local ownership requirements. "Post-admission" national treatment refers to any regulations, including taxation, licensing, and health and safety laws, imposed on the investment (or its associated activities) after it has already been established. The treaties themselves do not use the terminology "pre-admission" national treatment and "post-admission" national treatment; in some instances they confuse the two concepts. The United States Model BIT makes a

90. *See* U.S. Model BIT, *supra* note 13, art. II, para. 1. ("Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies [national treatment], or of nationals or companies of any third country [MFN], whichever is the most favorable . . . .").

91. *See id.*, art. II, para. 5.

92. *Id.*, art. II, para. 2.

93. All ASEAN states have accepted the provisions in one form or another in at least one treaty (except, of course, Brunei, which has signed no treaties). *See, e.g.*, Neth.-Phil. BIT, *supra* note 63, arts. 3(2), 4(1); Nor.-Malay. BIT, *supra* note 63, arts. 3(2), 4(1); U.K.-Thai. BIT, *supra* note 63, art. 5(1); U.K.-Indon. BIT, *supra* note 63, arts. 3(2), 4(1)–(2); U.K.-Sing. BIT, *supra* note 63, art. 3.

distinction between the two, and requires them both.[94] Several of the ASEAN treaties grant national treatment in one form or another, but none grant it in both forms unconditionally.[95] At this time no ASEAN state, except perhaps Singapore, is willing to grant national treatment in relation to "pre-admission" standards.[96] Disagreement over the national treatment standards was directly responsible for cessation of treaty negotiations with Malaysia and was partially responsible for the failure to conclude a treaty with Singapore.[97] Negotiations with Indonesia were never begun, due to the understanding that Indonesia would not agree to national treatment standards.[98]

A solution to the problem of national treatment is simple. The United States should qualify its requirement of pre-admission national treatment: It should focus instead on ensuring MFN treatment for pre-admission treatment and national treatment for post-admission treatment. If pre-admission restrictions are applied on an MFN basis, U.S. companies are no worse off than their real competition—other foreign investors. In fact, pre-admission requirements can actually be helpful to U.S. interests, because they

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94. The distinction can be seen in the use of the words "permit and treat" in Article II: "Each Party shall *permit and treat* investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies . . . ." U.S. Model BIT, *supra* note 13, art. II, para. 1 (emphasis added).

95. Nearly all of the treaties exclude pre-admission national treatment, and the treaties that include post-admission national treatment provide for exceptions. *See* U.K.-Thai. BIT, *supra* note 63, arts. 3, 5 (providing for post-admission national treatment but not pre-admission); U.K.-Sing. BIT, *supra* note 63, art. 3 (providing for pre-admission national treatment and post-admission national treatment, but authorizing exceptions to "particular matters" on an MFN basis); Neth.-Malay. BIT, *supra* note 63, arts. 1(i), 6 (providing no pre-admission national treatment and post-admission national treatment for industrial property rights); Indon.-Nor. BIT, *supra* note 63, arts. II(a), III, Protocol (providing post-admission national treatment but not pre-admission national treatment but Protocol allows Indonesia to derogate from post-admission national treatment standard); F.R.G.-Malay. BIT, *supra* note 63, arts. 1(ii), 2(2), 3 (providing no pre-admission national treatment, MFN, and post-admission national treatment "[u]nless specific stipulations made in the document of admission provide otherwise").

96. The State Department has stated that a "new" BIT may be signed with Singapore which "will assure the United States that U.S. firms will be treated equally with local firms when it comes to basic investment issues." *See Senator Urges Bush to Seek Solid Trade Action from Japan*, *supra* note 60.

97. *See* MALAYSIA—COUNTRY MARKETING PLAN, *supra* note 3 (After "three rounds of bilateral investment treaty negotiations [with Malaysia] no agreement was reached on the key U.S. request for national treatment . . . ."); Bergman, *supra* note 58, at 10 n.47 (among other things, Singapore was unwilling to protect unapproved investments).

98. *See* INDONESIA—COUNTRY MARKETING PLAN, *supra* note 3.

provide a mechanism by which an LDC can regulate potentially harmful effects on its economy and society.[99] As a result, they can be very useful in reducing the fear of many LDCs that large multinational corporations will exploit the local labor force and natural resources and then repatriate all the profits.

There are two possibilities for qualifying pre-admission national treatment. The first possibility is an expanded version of the present United States Model BIT's Article II. The United States Model BIT already provides for the "maintenance of limited exceptions" to national treatment.[100] However, this provision must be adjusted to allow more than "limited" exceptions if it is to be satisfactory to Thailand, Indonesia, and Malaysia. This change would require a concerted effort to discern what areas of the LDC's economy are most important to U.S. investors and which areas are most important to the LDC (as host state)—with exceptions being limited to sectors specifically agreed upon, or with national treatment being contained to sectors specifically agreed upon.

The second possibility is replacement of the present provision with a clause similar to that found in the Germany-Malaysia BIT.[101] Such a clause would establish pre-admission national treatment as a general principle, but would allow the parties to avoid the duty by making "specific stipulations in the document of admission."[102] Potential U.S. investors would then negotiate for

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99. *See* M. Sornarajah, *The New International Economic Order, Investment Treaties and Foreign Investment Laws in ASEAN*, 27 MALAYA L. REV. 440, 454 (1985).

100. *See* U.S. Model BIT, *supra* note 13, art. II, para. 1 (providing for exceptions to both pre-admission national treatment and post-admission national treatment by "sector" and to mining operations on public lands); *see, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Oct. 27, 1982, U.S.-Pan., S. TREATY DOC. No. 14, 99th Cong., 2d Sess. (1986) (permitting Panama to "maintain limited exceptions" in, *inter alia*, "communications; representation of foreign firms; distribution and sale of imported products; retail trade; insurance; state companies; private utility companies; energy production; practice of liberal professions; customs house brokers; banking; [and] rights to the exploitation of natural resources . . . ."); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. No. 24, 99th Cong., 2d Sess. (1986) (modified by Supplementary Protocol, Mar. 11, 1986) (allowing Egypt to "maintain limited exceptions" in, *inter alia*, "[a]ir and sea transportation; . . . mail, telecommunication, telegraph services and other public services which are state monopolies; banking and insurance; . . . ownership of real estate; [and] use of land . . . .").

101. F.R.G.-Malay. BIT, *supra* note 63, arts. 2, 3.

102. *Id.*

the conditions themselves. If the host state demands conditions that are too onerous, investors will decide not to invest in that state. The United States would still be able to maintain continuing political pressure on the host state to eliminate progressively admission practices that violate the national treatment principle. Theoretically, as the host state's economy develops, U.S. investors would be subjected to less onerous requirements. However, the choice would always be in the hands of the host state, providing it with a sense of security. This option is more likely to succeed than the first because it has already been accepted in Malaysia[103] and Indonesia,[104] and also because it is more flexible, leaving the complex and arduous process of negotiating over each sector of the economy to more appropriate parties—the host state and interested investors.

C. *Currency Transfer*

The United States Model BIT provides that "all transfers related to an investment" shall be freely transferable "without delay into and out of [the host state's] territory."[105] Such transfers must be allowed in a "freely convertible currency at the prevailing market rate of exchange on the date of the transfer."[106] Similarly, all of the ASEAN treaties include a provision allowing the free transfer of capital and returns from capital.[107] The only difficulty

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103. *Id.*

104. F.R.G.-Indon. BIT, *supra* note 63, art. 9.

105. U.S. Model BIT, *supra* note 13, art. IV, para. 1. Transfers include:

> (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

Id.

106. *Id.*, art. IV, para. 2. This requirement is in line with the requirements of Article VIII of the International Monetary Fund. *See* Articles of Agreement of the International Monetary Fund, art. VIII, para. 2(a) ("[N]o member shall . . . impose restrictions on the making of payments and transfers for current international transactions.").

107. *See, e.g.*, U.K.-Malay. BIT, *supra* note 63, art. 5 ("free transfer of . . . capital and of the returns from it"; subject to "the right to restrict in exceptional circumstances . . . consistent with [the Party's] rights and obligations as a member of the [IMF]"); U.K.-Thai. BIT, *supra* note 63, art. 7 (similar to art. 5 of U.K.-Malay. BIT); F.R.G.-Phil. BIT, *supra* note 63, art. 4 (guaranteeing the "transfer of the capital, of the returns from it and, in the event of liquidation, of the net proceeds from such liquidation"); F.R.G.-Indon. BIT, *supra* note 63, art. 4 (similar to art. 4 of F.R.G.-Phil. BIT).

is that because the treaties only apply to "approved" investments, any investments that are not approved are subject to local laws restricting international transfers of capital. Indonesia, Malaysia, and Thailand all have laws restricting the transfer of capital by investors or investments which are not "approved."[108]

D. *Compensation for Expropriation*

The most developed customary international legal principles relating to international investment concern expropriation. Unfortunately, the international legal principles are far from being settled. This ambiguity has important ramifications because of the United States' position that bilateral agreements affect customary international law.[109] The debate over the principles has emerged as a developed-versus-developing world dispute. The developed states support a pro-investor doctrine known as the "Hull Formula,"[110] whereas many developing states support a more pro-state sovereignty doctrine known as the "Calvo Doctrine."[111] The developed states argue that because over 200 bilateral agreements contain it, the Hull Formula must be international law.[112] The developing states, however, point out that more states reject the Hull Formula than support it, and that over 150 bilateral agreements and compensation agreements among states have resulted in compensation involving less than the full value of the property taken.[113]

Not surprisingly, the United States Model BIT incorporates the Hull Formula. Expropriation must be "for a public purpose; in

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108. *See* INGRID D. DE LUPIS, FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES 18 (2d ed. 1987). Singapore, in contrast, has removed all such restrictions. *See* SINGAPORE INT'L CHAMBER OF COMMERCE, *supra* note 23, at 5.

109. *See supra* text accompanying note 53–55.

110. The Hull Formula requires that in the event of nationalization compensation must be "prompt, adequate, and effective." The doctrine was first enunciated by Secretary of State Cordell Hull in his letters to the Mexican Minister of Foreign Affairs following the expropriation of many U.S.-owned farms and agrarian properties. *See* 19 DEP'T OF STATE: PRESS RELEASES 50–53, 140, 143–44 (1938).

111. The Calvo Doctrine provides that customary international law merely requires the host state to afford foreigners essentially the same rights as it does nationals. *See* HENKIN, *supra* note 17, at 1049. This doctrine is primarily supported by Latin American States, but also was endorsed by the Asian-African Legal Consultative Committee in a set of Principles Concerning Admission and Treatment of Aliens adopted in 1961. *Id.* at 1046.

112. *See* SHIHATA, *supra* note 7, at 238–39.

113. *See id.*

a non-discriminatory manner; upon payment of prompt, adequate and effective compensation."[114] Furthermore, a clause has been added to clarify the procedure for assessing the amount of just compensation and to specify that the compensation itself is protected by the treaty.[115] Additionally, the United States Model BIT specifically addresses the situation in which an investment is not taken outright by the state but is taken by more subtle means ("creeping expropriation").[116]

Although the ASEAN states voted in favor of the Charter of Economic Rights and Duties of States,[117] which contains an affirmative acceptance of the Calvo Doctrine, the Hull Formula is consistently supported within the ASEAN treaties.[118] Therefore, even though the dispute over the customary international legal requirements as to compensation for expropriation continues, the ASEAN states have been consistently willing to sign treaties containing the Hull Formula.

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114. U.S. Model BIT, *supra* note 13, art. III, para. 1.

115. This clause reads as follows:

> Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

Id.

116. "Investments shall not be expropriated or nationalized either directly or *indirectly through measures tantamount to expropriation or nationalization* . . . ." *Id.* (emphasis added). This language is in line with the position taken in comment g to section 712(1) of The Restatement of Foreign Relations Law: "Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also [where government actions] have the effect of 'taking' the property, in whole or in large part, outright or in stages." RESTATEMENT, *supra* note 16; *see also* First Hickenlooper Amendment, 22 U.S.C. § 2370(e)(1)(C) (1988) ("actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership"). "Creeping expropriation" includes, for example, restrictions on foreign residence and labor permits; discriminatory application of tax, health, and safety laws; or dehabilitating price hikes or supply failures by state-owned monopolies supplying vital supplies or services. *See* Richard C. Pugh, *Legal Protection of International Transactions Against Non-Commercial Risks*, *in* A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 301–06 (Walter S. Surrey & Crawford Shaw eds., 1963); Louis B. Sohn & R.R. Baxter, *[Draft Convention] Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553–55 (1961).

117. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974) (endorsing the Calvo Doctrine in Article 2(2)(c)).

118. *See, e.g.*, Neth.-Phil. BIT, *supra* note 63, art. 5; U.K.-Thai. BIT, *supra* note 63, art. 6; U.K.-Indon. BIT, *supra* note 63, art. 5, IV I.C.S.I.D. at 352.xi, 1:4I–3.4 352.xv; F.R.G.-Malay. BIT, *supra* note 63, art. 4(1), Protocol (5), (6).

IV. CONCLUSION

The current United States BIT Program is unsuitable for the economic, political, and social conditions now existing in ASEAN. Most of the ASEAN states, specifically Indonesia, Thailand, and Malaysia, have achieved a level of economic development that makes them very attractive for investment, but retain a level of political and social development that introduces a degree of uncertainty chilling to foreign direct investment. Although BITs cannot promote investment in and of themselves, they *can* help to create a favorable legal environment that reduces the level of real and perceived risks caused by underdeveloped social and political institutions. The emphasis of the United States Model BIT should be on risk reduction and on coordination of other mechanisms that do the same. The BIT Program should focus on flexibility and negotiation, not reaffirmation of U.S. opinion on customary international legal principles. Bilateral agreements are not the appropriate means—in fact they are probably the *worst* possible means—by which to pursue the goal of reaffirmation of U.S. opinion on customary international legal principles. Bilateral agreements provide the opportunity for both parties to negotiate and compromise on contentious issues. The present U.S. position eliminates that very strength. The United States should therefore reassess its present BIT Program and adjust the Model BIT, as well as the Program's fundamental purpose, so that it may take full advantage of the inherent flexibility that could, and should, exist in the BIT. The opportunity has already been missed in Singapore, and probably in Brunei as well; hopefully, change will be made before it is too late for the BIT to perform to its fullest potential in any ASEAN state.